NATIONAL COOPERATIVE HIGHWAY RESEARCH PROGRAM
REPORT 307

PUBLIC AND PRIVATE PARTNERSHIPS FOR FINANCING HIGHWAY IMPROVEMENTS

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NATIONAL COOPERATIVE HIGHWAY RESEARCH PROGRAM

Systematic, well-designed research provides the most effective approach to the solution of many problems facing highway administrators and engineers. Often, highway problems are of local interest and can best be studied by highway departments individually or in cooperation with their state universities and others. However, the accelerating growth of highway transportation develops increasingly complex problems of wide interest to highway authorities. These problems are best studied through a coordinated program of cooperative research.

In recognition of these needs, the highway administrators of the American Association of State Highway and Transportation Officials initiated in 1962 an objective national highway research program employing modern scientific techniques. This program is supported on a continuing basis by funds from participating member states of the Association and it receives the full cooperation and support of the Federal Highway Administration, United States Department of Transportation.

The Transportation Research Board of the National Research Council was requested by the Association to administer the research program because of the Board's recognized objectivity and understanding of modern research practices. The Board is uniquely suited for this purpose as: it maintains an extensive committee structure from which authorities on any highway transportation subject may be drawn; it possesses avenues of communications and cooperation with federal, state, and local governmental agencies, universities, and industry; its relationship to the National Research Council is an insurance of objectivity; it maintains a full-time research correlation staff of specialists in highway transportation matters to bring the findings of research directly to those who are in a position to use them.

The program is developed on the basis of research needs identified by chief administrators of the highway and transportation departments and by committees of AASHTO. Each year, specific areas of research needs to be included in the program are proposed to the National Research Council and the Board by the American Association of State Highway and Transportation Officials. Research projects to fulfill these needs are defined by the Board, and qualified research agencies are selected from those that have submitted proposals. Administration and surveillance of research contracts are the responsibilities of the National Research Council and the Transportation Research Board.

The needs for highway research are many, and the National Cooperative Highway Research Program can make significant contributions to the solution of highway transportation problems of mutual concern to many responsible groups. The program, however, is intended to complement rather than to substitute for or duplicate other highway research programs.

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The members of the technical committee selected to monitor this project and to review this report were chosen for recognized scholarly competence and with due consideration for the balance of disciplines appropriate to the project. The opinions and conclusions expressed or implied are those of the research agency that performed the research, and, while they have been accepted as appropriate by the technical committee, they are not necessarily those of the Transportation Research Board, the National Research Council, the American Association of State Highway and Transportation officials, or the Federal Highway Administration, U.S. Department of Transportation.

Each report is reviewed and accepted for publication by the technical committee according to procedures established and monitored by the Transportation Research Board Executive Committee and the Governing Board of the National Research Council.

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FOREWORD

By Staff
Transportation
Research Board

This report will be of interest to highway administrators, financial managers, elected officials, and private developers who are concerned with financing needed highway improvements. In response to the growing shortfall between highway needs and revenues, recently there has been a proliferation of the literature describing mechanisms for partnerships between public agencies and private interests to finance highway improvements. This report is an important contribution to the literature as it contains practical information and ready-to-use guidelines for establishing and implementing partnerships between public and private agencies to finance highway improvements.

NCHRP Project 2-14, "Public/Private Partnerships for Financing Highway Improvements," was initiated to provide guidance to state and local highway officials and private developers on existing and potential public and private financing mechanisms, including present state and local statutes and ordinances related to private participation in financing highway improvements. The objectives of the project have been achieved through a review of the various funding mechanisms available and documentation of the barriers and constraints to their implementation. Five case studies of successful mechanisms were used to develop implementation guidelines and specific examples of legislation. The guidelines consist of a well-defined, step-by-step process which can be used at the State or local level to implement legislation to facilitate public and private financing partnerships. Specific examples of legislation include recommended language for both statutes and ordinances for three of the most promising mechanisms, namely, special assessment districts, impact fees, and development agreements. A benefit-cost analysis technique was also developed for analyzing benefits to the public and private sectors of a potential funding arrangement.

In addition to this report, NCHRP Research Results Digest 161, "Public and Private Partnerships for Financing Highway Improvements," May 1987, addresses in more depth the legal issues raised by the various funding mechanisms. It presents a legal framework that is understandable to nonlawyers, while providing supporting citations in extensive footnotes for those interested in more detail.

Also, for those interested in more detail, Appendix A to *NCHRP Report 307* documents the five case studies and is available for loan or purchase at the cost of reproduction upon written request to the NCHRP.

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Laurence J. Meisner, Associate, Kimley-Horn and Associates, Inc., was the principal investigator. Judith W. Wegner, Associate Professor, University of North Carolina School of Law, directed the legal research that formed the basis of Chapter Three and provided background for the annotated legislation in Appendix B. Marge Ciardella, Linda Hamel, Cathy Hagewood, and James Worthey provided legal research assistance to Professor Wegner. Thomas P. Snyder, Assistant Professor, School of Public and Environmental Affairs, Indiana University (formerly of the Department of City and Regional Planning at the University of North Carolina at Chapel Hill) contributed to Chapters Two and Three and participated in the conduct and documentation of the case studies. William W. Merrill, III, Icard, Merrill, Cullis, Timm, & Furen, P.A. (formerly of Siemon, Larsen, Mattlin and Purdy) was the principal author of Chapter Four. Mr. Merrill and Susan Connelly, Sonnenschein, Carlin, Naith and Rosenthal (formerly of Siemon, Larsen, Mattlin, and Purdy) prepared Chapter Three, based largely on Professor Wegner's work, and provided valuable commentary on the case study material.

PUBLIC AND PRIVATE PARTNERSHIPS FOR FINANCING HIGHWAY IMPROVEMENTS

SUMMARY

This study includes a review of the various funding mechanisms currently in use for public and private highway financing, as well as other mechanisms that could be used. Five case studies involving successful implementation of public and private financing were investigated and analyzed. Characteristics of those examples were used to develop implementation guidelines and specific examples of legislation to facilitate private sector participation in highway funding.

Private funding for highways has evolved from on-site and minor off-site improvements to the increasingly common use of private funds to help finance major highway improvements serving new developments. Public and private funding agreements range from impact fees where each developer pays a "fair share" to multi-million dollar improvements funded totally by the private sector. The major types of private funding that have recently evolved or come into increased use include development agreements, traffic impact fees, special assessment districts, joint ventures, toll financing, and tax increment financing. Development agreements usually involve the negotiated dedication of land for right-of-way and the construction or funding of specific highway improvements. Traffic impact fees are uniform charges imposed on all new development to pay for a portion of those highway improvements needed to serve it. Special assessment districts assess property within a specific area on an annual basis to pay for highway improvements that benefit those properties. Joint ventures include various types of funding involving both public and private funds, usually under a contract among two or more private parties and public agencies. Toll financing, the purest form of user funding, is being used in new projects undertaken by both public agencies and private consortiums. Tax increment financing uses a portion of tax revenues from new growth to finance the highway infrastructure needed to serve the new development.

Of the financing mechanisms mentioned previously, the first three (development agreements, traffic impact fees, and special assessment districts) were classified and evaluated, as summarized in the following table.

	Development Agreement	Traffic Impact Fee	Special Assessment District
Legal Basis	Depends on state	Depends on state	Depends on state
Equity	Least equitable	Very good	Good, depending on boundaries
Economic	Good, if developed objectively	Good, if fees by zone vary	Fair, inequity between district and rest of area
Administrative	Varies—can be considerable for complex agreements	High initial cost, moderate cost for tracking funds	Relatively low cost
Political	Unpopular with developers	Generally acceptable	Generally good, but questions on maintenance may arise
Financial	Requires high front end costs	Unstable revenue source	Tax advantage through bonding

Barriers and constraints to the various types of highway funding mechanisms were also investigated. These include legal, financial, administrative, and political constraints. Legal constraints occur primarily at the state level, although Federal constitutional issues also must be considered. Financial constraints relate to the revenue potential and stability of private funding sources, budgetary limitations on public funds, and tax implications. Administrative constraints include the organization and staffing necessary to implement public and private funding, while political constraints revolve primarily around acceptability by various factions in the community.

Five case studies were conducted to obtain practical advice based on the experience of successfully implementing public and private funding mechanisms. These case studies were located in Orange County, California; Palm Beach County, Florida; Chester County, Pennsylvania; San Antonio, Texas; and Travis County, Texas. The funding mechanisms used included traffic impact fees, special assessment districts, and joint venture funding. The issues identified in the case studies were used in developing implementation guidelines and legislation for each type of funding mechanism.

Extensive research was conducted on the legal background of, and limitations on, the various public and private funding mechanisms. Each of the three major mechanisms (special assessments, exactions and impact fees, and contingent zoning and development agreements) was investigated in terms of theoretical and legal foundation, recent trends, and issues.

Special assessments, unlike taxes, are not required to be uniform but are based on the benefit received by a property from a public improvement. The legal issues currently being examined include the relationship among special assessments, taxes, and the police power; the relationship between cost and benefit as regards the setting of assessments; the definition of special benefit from areawide improvements; and the allocation of costs among benefited properties.

There are currently three tests regarding the legal limits on subdivision exactions: whether the needs are specifically attributable to a development (the most strict), whether a rational relationship exists between the exactions and the development (the most liberal), or whether a "rational nexus" exists (the middle ground). Concerns related to exactions include the limiting of the government's ability to initiate improvements, the difficulty in linking needs and improvements, and the ability of developers to fund needed improvements.

Impact fees, although relatively new, have existed long enough to have been tested by the courts to a large degree. Several legal issues that have surfaced include linking the fees with the need for facilities, the ability to use fees to pay for excess capacity on existing facilities, the segregation of fee revenues to pay for projects benefiting development, the need to set fees conservatively, and the linkage to a capital improvements plan.

Contingent zoning, although it has been used extensively throughout the United States, has often been viewed as being on the fringe of legality. Issues that have evolved include the reserved powers doctrine, which prohibits the bargaining away of regulatory powers; the public interest versus the private interest; conformance with land use policy; the use of conditions in zoning to address public need; and equal protection issues.

The issues concerning development agreements are similar to those concerning contingent zoning, but also include contract law issues because development agreements are contracts between public agencies and private developers.

Based on the analysis of legal issues, examples of state enabling legislation and local ordinances were developed for special assessments, impact fees, and development agreements. These are intended to guide state and local governments in preparing

their own versions of such legislation. The legislation is annotated with examples and limitations for specific states.

The final major project of this study was the development of guidelines for state and local officials implementing public and private funding arrangements. The success of implementation is related to the existing conditions in the community and to the procedures used for implementation.

Successful public and private partnerships depend on environmental conditions (or existing conditions in the local area) and on project-specific characteristics. Some of these critical areas include the following:

1. *Environmental:* existing traffic congestion, rapid growth, strong economy, business community, and previous experience.
2. *Project Specific:* size of project, type of project, traffic impact, and access needs.

A benefit-cost analysis technique was developed for analyzing the benefits to the public and private sectors of a potential funding arrangement. This technique provides formulas for calculation of net benefits for both the public and private sectors.

The recommended implementation guidelines consist of the following steps: (1) form task force; (2) develop goals and objectives; (3) conduct initial studies; (4) draft legislation; (5) provide information and obtain support; (6) enact legislation; (7) implement program; and (8) continue planning and review process.

CHAPTER ONE

INTRODUCTION AND RESEARCH APPROACH

PROBLEM

The problem statement initiating the research conducted under NCHRP Project 2-14 reads as follows:

> In recent years, needs for highway construction and maintenance have risen much faster than available revenues. It is estimated that highways and streets on the Federal-aid highway systems require more than $20 billion a year for improvements. Although the Surface Transportation Assistance Act of 1982 makes available about $12 billion a year through Fiscal Year 1986, state and local financing responsibilities constitute a significant and indispensable component. However, many state and local governments lack sufficient funds to make improvements needed in state and local highway systems. This shortfall and the future needs for new construction require consideration of different approaches in financing highway improvements.
>
> Greater private participation in financing highway and road improvements is being explored today, in both public and private sectors of the economy, as a supplement to public funding. . . . However, there are few systematic and organized ways to facilitate public/private partnerships. Research is needed to define the possible nature of such partnerships, the overlying decision processes, and the necessary legislation and model ordinances.
>
> The objective of this research is to provide guidance to state and local highway officials and private developers on existing and potential public/private partnership mechanisms, including present state and local statutes and ordinances related to private (e.g., developer) participation in financing highway improvements. The project will identify constraints on private participation in financing highway and road improvements, will identify potential opportunities and appropriate processes to implement public/private partnerships, and will document examples of state and local legislation enabling and encouraging such partnerships. Guidelines will be developed for application at the state and local levels to facilitate this form of highway financing.

RESEARCH APPROACH

Accordingly, the project objectives were pursued through the performance of the following project tasks, as identified in the NCHRP project statement.

> *Task 1.* Examine existing and potential public/private partnership mechanisms. This examination will include mechanisms such as bargaining/negotiation, exactions, and voluntary contributions. Special consideration will be given to mechanisms that are not currently in practice but have the potential to facilitate public/private partnerships in financing highway improvements.
>
> *Task 2.* Examine the characteristics of successful public/private partnerships as well as the barriers or constraints that inhibit successful implementation.
>
> *Task 3.* Review state and local legislation and relevant court decisions. It is expected that state and local legislation significantly affects the opportunities for public/private partnerships. This task will include review of legislation and court decisions that facilitate or constrain public/private partnerships in highway financing and related areas.
>
> *Task 4.* Prepare an overview of potential case studies. This

overview will include a brief description of a sufficient number of case studies to illustrate the implementation of public/private partnerships in different situations and for different mechanisms.

Task 5. Prepare an interim report. The interim report will document the results of Tasks 1 through 4. Of particular interest are analysis of evolving patterns and the reasons for recommending the case studies. On the basis of this report, approximately five case studies for in-depth analysis will be selected.

Task 6. Conduct in-depth case studies. The case studies will include an analysis of the institutional and legal factors that contributed (or could contribute) to successful public/private partnerships.

Task 7. Develop and annotate examples of legislation. This task will include a section-by-section analysis and case citations.

Task 8. Develop guidelines to facilitate the successful implementation of public/private partnerships in highway financing through the measures identified in previous tasks.

The remainder of this report describes the foregoing efforts. Chapter Two summarizes the results pertaining to the potential funding mechanisms, their advantages and disadvantages,and examples of their use. Chapter Three summarizes the results of the case study investigation conducted in California, Florida, Pennsylvania, and Texas. A discussion of the legal issues involved in public–private financing is given in Chapter Four. And Chapter Five covers the implementation guidelines.

The appendixes present detailed reports: Appendix A deals with the five case studies (two of which were conducted in Texas). Appendix B highlights specific examples of legislation as particularly promising in facilitating the use of public and private highway funding partnerships. And Appendix C is a review of the literature of particular value in public and private financing mechanisms for funding highway improvements.

CHAPTER TWO

FINDINGS—MECHANISMS FOR PRIVATE SECTOR PARTICIPATION IN HIGHWAY FUNDING

THE EVOLUTION OF PRIVATE FUNDING

Private funding of some highway facilities has long been a part of the total transportation financing package in the United States. In recent years, as needs have increased and existing revenues have declined, there has been a move toward increased private participation in funding of highway improvements. The following sections describe the evolution of private funding from its initial use on small-scale improvements, to its present use on large-scale projects funded by the private sector or as joint ventures, to the latest concepts in which the private sector provides a major share of funding for highways serving new development.

Traditional Private Financing

Traditional private highway financing, as it has existed for many years, has included local assessment districts and subdivision exactions. While these traditionally have been applied at a relatively small scale, they form the basis for the recent major private sector funding contributions. Local assessment districts were formed in many states to fund the construction of both urban and rural roads without burdening the general tax base. They also have been used extensively throughout the country to fund sidewalks, curb and gutter, and minor widening where these were to be performed after adjacent property had already developed; i.e., when they could no longer be funded by a single developer. The theory behind special assessments is that local improvements are funded by those who benefit rather than by the general public. With such improvements as those listed above, the local nature of use and benefits of the new or improved facilities is clear.

While local assessment districts have been used for improvements in developed areas or in rural areas, exactions have been the most common method of obtaining private funding for facilities that directly serve new development. Exactions are dedications and improvements required by local government as part of the subdivision approval process. Like the improvements traditionally funded by special assessment districts, those included under traditional exactions are clearly local in nature, including such items as subdivision streets, sidewalks, and street lights. Site-related improvements, such as widening adjacent streets, are common in most jurisdictions; while access improvements, such as turn lanes into a subdivision or traffic signals, are less common but still generally accepted as being within the bounds of traditional subdivision exactions.

Extensions of Traditional Financing

In the last 10 years, the traditional financing concept of exactions has been extended to include highway improvements that are less local and more regional in nature. This extension has come about in part because of the funding shortages in traditional public financing sources and in part as a growth management method. In addition, the limited meaning of exactions as related to the subdivision of land has expanded to encompass various types of negotiated agreements and development agreements, which may be associated with zoning, site plan approvals, or other processes during which local government approval is required for development to occur.

An example of this extension of the scope of traditional private financing is the improvement of intersections and road sections that are not within or adjacent to a development, but that will serve a significant amount of the development's traffic. In Palm

Beach County, Florida, four developers were required to fund the widening of Glades Road from two to four lanes for a distance of 1.3 miles, including the widening of an underpass and two bridges over canals. This widening was required based on traffic performance standards. The cost was shared by the developers, because all were seeking approval at the same time. In another example, a developer north of Seattle, Washington, was required to widen to four lanes and realign 0.6 miles of a two-lane road serving his residential development, based on a county ordinance requiring developer-funded improvements to maintain an acceptable level of service on county roads. Off-site intersection improvements have become common in many areas of the country, but perhaps the most extreme example is the requirement of the improvement of 14 intersections by several developers in Newport Beach, California, based on a city ordinance requiring improvements to maintain an adequate level of service.

In some cases, interchange improvements or even construction has been required as a condition of approval. The developer of a project in Fairfax County, Virginia, is being required to reconstruct an existing interchange on I-495 and provide an interchange on US 50 to accommodate traffic and provide access, with a total cost estimated at $18 million. While a substantial portion of that cost is related to providing direct access to the site, the improvement of an existing interchange is well beyond what would have been considered reasonable only a short time ago, or even now in many states and regions.

The concept of exactions as a condition of subdivision approval has expanded both in terms of application to other types of development permits and in the scope of improvements required. In many urban areas, such expanded exactions have become the norm rather than the exception.

Innovative and Evolving Concepts in Private Financing

In recent years, private financing of highways has evolved beyond even the extensions of the exaction principle discussed above. Some of the more recent and innovative concepts involve large-scale financing districts, impact fees or development fees for road improvements, and roads and bridges that are initiated, financed, and perhaps even owned by the private sector or by a public and private joint venture.

Special assessment districts have been formed to construct regional transportation facilities in developing areas, extending the use of assessments well beyond the original intention of local improvements. Perhaps, the best example of these comprehensive financing districts are the metropolitan districts in Colorado. Several of these districts have been formed by developers along the I-25 corridor southeast of Denver, and have been used to finance both highway improvements and other infrastructure needed to serve development. A group of these special districts have joined together as the Joint Southeast Public Improvement Association to fund regional improvements, such as upgrading and constructing interchanges on I-25 to serve their traffic needs. The original program called for $18 million in improvements to be funded in cooperation with the Colorado Department of Highways. Special assessment districts also have been used extensively in Texas and California to fund major highway improvements, and their use is spreading to states such as Pennsylvania, where such districts have not traditionally been used.

Impact fees have evolved from the concepts of exactions and negotiated development agreements to a cost-sharing arrangement by developers. Improvements required to be made by developers have been replaced by fees in lieu of construction on a case-by-case basis where improvements could not be made at the time or where the cost was to be shared by several developers. In other cases, developers have voluntarily shared the cost of constructing improvements to reduce their individual costs. Some local governments, seeing those examples and the inequities that often result from requiring specific improvements of individual developers, have adopted impact fee ordinances to spread the burden more equitably among the various developments generating traffic. In fact, the traffic impact fee system in Palm Beach County, one of the first to be successfully implemented, uses the term "fair share fee" throughout the ordinance. The rationale behind traffic impact fees is that each developer should contribute toward solving traffic problems caused by new development, rather than attributing specific improvements to each developer.

An innovative concept that departs totally from others discussed here involves the construction of new facilities initiated, funded, and perhaps even owned by the private sector. The proposed 200-mile Pueblo-Fort Collins Freeway in Colorado would be funded through a combination of tolls and value capture from development on adjacent property. On a somewhat more modest scale, a proposed 10-mile extension of the Dulles Airport Toll Road in Loudoun County, Virginia, may be financed in a similar manner, with developers contributing much of the right-of-way. In another arena, some innovative entrepreneurs have promoted the construction, maintenance, and ownership of bridges by the private sector, with long-term leases to local governments.

CLASSIFICATION OF PRIVATE FUNDING MECHANISMS

Definition

Prior to describing and classifying the various mechanisms used to facilitate private funding of highways, it is important to distinguish between public and private funding and between private funding and private provision of facilities or services. Private, as opposed to public, financing of a facility occurs when the costs of providing the facility are paid by those who will benefit the most from it, as opposed to the costs being shared by the general public through taxes. Thus, special assessment districts are considered a form of private rather than public funding, because costs are paid only by those who benefit rather than the general public (even though the district may be administered as a public entity). Similarly, impact fees are considered to be private funding, even though they are paid to a government agency. Conversely, gasoline tax is not considered to be private funding, because the revenues are collected and spent on a system-wide basis.

Private financing is also different from "privatization," the private provision of public goods or services. An example of privatization is the contracting of transit system operation to a private management firm. Most states already contract the construction of highways to private contractors; however, because the construction is financed through traditional public funding sources, it is not considered to be an example of private funding.

Even the provision of roads and bridges by the private sector to be sold or leased to the public sector is more a matter of private provision than private funding, since the public sector ultimately pays for the facility.

Examples of Major Types of Innovative and Evolving Private Funding Mechanisms

Six major types of private funding mechanisms have evolved or have come into increased use recently: (1) development agreements, (2) traffic impact fees, (3) special assessment districts, (4) joint ventures, (5) toll financing, and (6) tax increment financing. These are described and discussed briefly below.

Development Agreements

Development agreements usually involve the negotiated dedication of land and facilities by developers, with a formal agreement or contract. Exactions, from which development agreements have evolved, are authorized under state land use and subdivision control regulations and have been traditional sources of financing on-site public facilities such as local roads, sidewalks, streetlights, and local water and sewer lines. In recent years, cities in many states have extended the use of exactions to the financing of off-site facilities through development agreements. In most cases, such agreements are negotiated and imposed only on large-scale developments. They are usually required as part of the development or annexation approval process, and include such improvements as deceleration lanes, left-turn lanes, road widening, signalization, and, in a few cases, freeway overpasses and interchanges. Off-site improvements are most common in fast growing states such as California, Florida, and Colorado, but also occur in rapidly growing regions of other states, such as Pennsylvania and New Jersey. Florida has one of the most formal development agreement processes in the state-mandated review of Developments of Regional Impact (DRIs), with traffic considerations comprising a major portion of the technical analysis and review considerations.

The types of roads that can be financed with negotiated agreements are limited, and in many areas the required improvements have met with strong resistance from developers. The use of development agreements is generally limited to the financing of facilities whose need is clearly identified with the new development making the contribution. Therefore, such agreements cannot be readily used to finance many portions of the overall road networks that are needed to serve new development. Furthermore, developers often complain about development agreements, because their liability is negotiated at the time of development approval and is not known in advance, and because only large-scale developments are required to make contributions. In many regions, cities also concede that off-site improvements often go beyond what they can legally require, despite the fact that the developer agrees to make them "voluntarily," but often under coercion.

Traffic Impact Fees

Many areas that have relied heavily on exactions and negotiated agreements have institutionalized them over the years and evolved into a more formal system of development or traffic impact fees. Development or impact fees are charges imposed on new development to pay for the portion of public facilities needed to serve it. Traffic impact fees can be used for large-scale, centralized facilities, such as arterial roads and sewage treatment plants, as well as for small-scale facilities. Under fee systems, each development contributes to the financing of public facilities that serve it, and liabilities are known in advance. In all states except California, traffic impact fees and other development fees are imposed as regulations under police powers. In most non-Dillon's Rule states, the grant of police power contained in land use enabling legislation is adequate to impose development fees. In California, development fees are imposed under revenue powers and, consequently, cities have more freedom in setting fee levels and spending fee revenues.

Special Assessment Districts

The dependent financing district or special assessment district is a traditional method of privately financing local improvements. The use of special assessment districts reached its peak in the early part of the twentieth century. Since the Depression, when there were numerous defaults on special assessment-backed bonds, the use of independent special districts for highways has declined significantly. Recently, however, there has been a resurgence in the use of dependent special assessment districts for funding highway improvements. Special assessments are authorized in all 50 states either under explicit enabling legislation or state constitutional provisions. The major limitation on special assessments is that they can be used only to finance facilities that provide local benefits. They cannot be used to finance facilities that provide general, community-wide benefits. In recent years, there has been some liberalization of this policy, but, in most areas, it has not been significant enough to make special assessments a viable alternative to finance major components of the highway system.

In many states, legislatures have passed new enabling legislation that allows special districts to be used to finance a broader range of facilities than in the past. These districts often go by such names as improvements districts, road districts, metropolitan districts, and building authorities. In most cases, the districts serve the same general purpose as the traditional special assessment district, but they often are not limited to the use of assessments on property, such as front footage charges or acreage fees.

In many areas, the main use of such districts has been by developers to access tax-exempt funds to finance facilities that are required under development and annexation agreements. The most successful use of special districts in this context has been by developers in Colorado. The use of special assessment independent of the exaction process is quite rare today. The most widespread use of special financial districts independent of exactions is in Texas, where Municipal Utility Districts (MUDs) are used widely in several rapidly growing cities to finance water and sewer facilities. In 1985, in an effort to broaden the use of a very successful form of private financing, the Texas legislature authorized the use of MUDs to finance roads as well as water and sewer facilities. In general, the greatest problem in using special districts to finance roads is that, because the highway system is an open system, it is difficult to establish a district which includes all those who benefit from a road, while

excluding those who do not benefit—except for small-scale local roads. As such problems do not exist with closed systems, like water and sewer systems, special districts are most successful in financing such facilities.

Joint Ventures

The joint venture is another form of public–private financing of transportation facilities. Such ventures often are negotiated under the provisions of contract law and are limited primarily to projects that have direct private benefit and where the private party wants to retain some control over design or operation of the facilities. The most common joint equity ventures are for parking facilities in high-density developments and other specialized facilities. However, some recent joint venture projects have been concerned with constructing highways that will serve a public need but will also benefit private property. Examples of joint public and private ventures include the proposed E-470 beltway in Denver, which will use both public and private financing; the State Highway 151 Westside Expressway in San Antonio, for which developers are providing right-of-way and part of the construction cost; and the Southern Durham Parkway in North Carolina, which is being built as a state project with 50 percent private funding and donated right-of-way. The key characteristics of the joint venture agreement, as defined here, are sharing of costs between the public and private sectors and a true voluntary approach to the project.

Toll Financing

Tolls are the purest form of user financing for roads. Because of the costs of collecting tolls and of limiting access to toll-financed facilities, tolls are appropriate for only a small class of road—limited-access highways and bridges. Because of the reduced availability of state and federal funds for new limited-access highways in recent years, toll roads are seeing a comeback. Examples include the new Hardy Street Toll Road in Houston, portions of E-470 in Colorado, the Sawgrass Expressway in Florida, and the proposed Cross Island Expressway on Hilton Head Island, South Carolina.

Tax Increment Financing

Tax increment financing (TIF) involves the dedication of a portion of tax revenues from new growth to pay for the infrastructure to support the growth. While TIF is often justified on the grounds of being a "value capture" technique that makes those who benefit from a public facility pay for that facility, it actually is not such a technique. TIF does not change the tax liability of those benefiting from a TIF project; all it does is earmark a portion of the property tax revenues that the developer would have paid without TIF for transportation or other purposes. Thus, TIF is a budgetary technique for allocating public revenues rather than a private financing technique.

EVALUATION OF FUNDING MECHANISMS

Legal Basis

Mechanisms considered for private funding of highway improvements vary in their legal basis, ranging from explicit state enabling legislation to local administrative policy based on implied local powers. Many states hold that all powers of local government must be specifically authorized by state statute. These "Dillon's Rule" states require specific state authorization for use of any private funding mechanism by local government. Other states hold that local governments may have broad powers under their police powers (generally, powers to uphold the public "health, safety, and welfare"), while others allow for home rule in some cities and counties under the state constitution, permitting those jurisdictions to impose legislation not prohibited or preempted by the state.

Any of the funding mechanisms described earlier may be authorized under various types of state or local power, depending on the legal status of the state and locality. For example, traffic impact fees under study by two cities in North Carolina were preceded by specific state enabling legislation allowing those two cities to impose facility fees and limiting the use of those fees; while at least one township in Pennsylvania has imposed traffic impact fees based solely on local police powers.

Equity Considerations

Equity issues are of considerable importance to developers, who act in a highly competitive environment. Under "horizontal equity," developers in similar situations should be treated the same. All of the major mechanisms examined here strive for such equity, but their effects may be very different.

Negotiated agreements are usually regarded as the least equitable arrangement because they usually are assessed only on large developments, and the standards used may vary from case to case. From a planner's viewpoint, however, such an agreement is equitable if it is based on site-specific improvements needed to accommodate a development.

Traffic impact fees based on traffic generation were first developed in an attempt to overcome the inequities inherent in case-by-case negotiated agreements. If calculated and administered in a competent manner, such fees are considered more equitable than case-by-case exactions. There remains an intergenerational equity problem that occurs between projects that are approved and built prior to the fee, and projects that are approved after the fee is enacted. Other inequities may occur if exactions or negotiated improvements are required in addition to the traffic impact fee; however, this issue is not directly related to impact fees.

Assessment districts must provide a certain degree of equity, in that benefits received must at least equal the amount paid. However, two major equity issues arise: whether the assessed valuation of a parcel is a good measure of the benefit to be received; and the geographic inequity that arises at the district boundaries, where some property within the district may not receive much more benefit than property outside the district.

Economic Efficiency

Economic efficiency occurs when resources are allocated so as to maximize the welfare of society. The economic efficiency criterion used here relates to the provision and use of roadway facilities, such that the cost to the consumer is equal to the marginal cost of providing the facilities and that facilities are provided when benefits exceed costs. Three such considerations

are addressed here: (1) the impacts of the various private funding mechanisms on the location of development, (2) the type and cost of housing, and (3) the use and provision of roads.

Traffic impact fees affect the location of development only if the fees are differentiated by area or if fees exist in some areas and not in others within the same market. Negotiated agreements may influence locational decisions if developers know in advance that development in certain locations will require major off-site improvements as a condition of project approval. Special assessment districts may also affect location decisions, based on the developer's perception of the costs versus benefits of locating within the district. However, the effect on location of development will only increase economic efficiency if the fees are set to reflect the true costs of development.

With regard to the second consideration, all three types of private funding mechanisms may impact the cost and thus the availability of housing, depending on whether the cost of improvements is passed forward to the consumers of housing or backward to the land owners. Some types of impact fees that may be based on the size or type of housing unit may encourage production of a different mix of housing types than would otherwise be produced under market conditions without such fees. For example, fees that increase sharply for houses of greater than, say, 1,500 sq ft may cause more 1,499-sq ft houses to be built versus 1,600-sq ft houses.

The third consideration, the economic efficiency of the provision and the use of roads, varies depending upon the mechanism. With a negotiated agreement, efficient provision of road improvements will be encouraged if the negotiated agreements are applied equitably and are based on the true incremental costs (demands) imposed on roadways by developers. A special assessment district will tend to allocate roads efficiently within the district because of requirements of voter or landowner approval. Traffic impact fees do not encourage efficient provision of transportation facilities and may, in fact, contribute to inefficiencies. The latter may occur when fees must be spent in certain zones within a specific period, when efficiency considerations would dictate allocation of resources in other areas. None of the funding mechanisms except tolls have a direct effect on the efficient use of roads, because they are open to the general public.

Administrative Requirements

The various funding mechanisms all involve some administrative costs, but these vary considerably by type of mechanism.

Development agreements involve the least administrative cost: staff time to draft and negotiate the agreements, perhaps some legal counsel or city attorney time to review the agreement, and additional staff time to follow up with the implementation of agreements. The latter is particularly important and may be considerable if many development agreements with complex requirements must be monitored.

Special assessment districts usually require legal services to set up the district, including formation of organization, bylaws, elections, and other provisions required by law. Many special assessment districts concerned with road construction have minimum staff, rely on consultants for provision of design and construction services, and use existing public tax collect agencies to collect assessments. Thus, the costs of administering a special assessment district are usually fairly low and are provided for by the revenues collected.

Traffic impact fees are probably the most expensive funding mechanism to administer. First, a detailed transportation study is needed to determine future needs, existing deficiencies, and the costs of accommodating traffic generated by new development. (The cost of this study could be minimized if it is coordinated with state or regional transportation planning efforts.) Further study is then needed to allocate estimated future costs to development on a per-unit basis. Broward County, Florida, uses a complex computer model to compute the impact fee for each development through a traffic assignment and marginal cost pricing scheme, in which each trip on each roadway link is assigned a cost. Most other jurisdictions assign a cost per generated trip and publish a table of costs per dwelling unit, square foot, or other readily accessible unit for various types of land use.

Traffic impact fees also require legal counsel for preparation of an ordinance that will withstand challenges as well as the cost of defending possible challenges. (Palm Beach County, Florida, spent more than $300,000 in legal fees defending its ordinance.) Administering the fee system on a continuing basis is also costly because fees must go into a separate fund, to be used within specified periods for certain types of projects in specific locations. In addition, if credits for improvements in lieu of fees are allowed, a system of allocating and tracking credits is needed.

Political Acceptability

The use of private funding mechanisms for transportation improvements first arose because of the political unacceptability of increasing taxes to pay for road improvements needed to serve increased traffic generated by new development. Development fees, development agreements, and special assessment districts all were seen as ways of transferring the costs incurred by new growth to the new residents or businesses. Thus, when applied to new development only, all of these mechanisms are acceptable to existing residents. (Special assessment districts for major road improvements may include existing development, but usually only if that development desires to participate in the district.) Traffic impact fees are more acceptable to most developers than are development agreements, because the fees are predictable and are assessed against all development, not only large projects. In some areas, developers have even backed impact fees as an alternative to extensive off-site exactions and development agreements. Special assessment districts also are favored by developers, but concern has been raised by some citizens who are involved with the future maintenance of district-funded roads.

Financial Considerations

Financial considerations related to the various private funding mechanisms involve Federal tax deductions for payments and the ability to issue bonds to finance construction. Under traditional tax financing of road improvements, most state and local taxes may be deducted from Federal income tax. This deduction is not allowed for impact fees or special assessments, and is probably not allowed for exactions or development agreement costs, although the latter might be interpreted as a deductible business expense.

Bonds offer a significant advantage in financing major road improvements, particularly when tax-exempt bonds can be used. While the tax-exempt bond interest rates no longer differ as greatly from commercial borrowing rates as they did before the 1986 tax act, they still offer a significant advantage. Because bonds require a dedicated, predictable revenue stream for financing, impact fees are unlikely to be used as the primary source of bond funding because of the variability of the development market. Impact fees can, in many instances, be used to retire a bond backed by more stable sources, such as gas tax or property tax.

Development agreements also are unlikely to be used for bonds, unless the negotiated improvements are part of a publicly funded bond program to be reimbursed by the developer. Special assessments can be and have been used to fund tax-exempt bonds, because they rely on assessment of existing property at a determined rate over a specific number of years. The interest rate for the bonds depends on the perceived risk of the project, including the extent of existing development, the initial millage rate, the amount of development required for a "reasonable" millage rate, and the perceived state of the development and bond markets at the time.

BARRIERS AND CONSTRAINTS TO PUBLIC AND PRIVATE PARTNERSHIPS

Private financing of highway improvements has not been used extensively to date largely because of a series of barriers and constraints, both real and perceived. These constraints include legal issues, financial problems, and practical impediments. They occur at the federal, state, and local levels, and they affect both the public and private sectors. While many of the constraints are real and must be overcome through legislation or other positive actions, others can be reduced or eliminated by education or other indirect means. The major barriers and constraints that have been identified are briefly described below.

General Legal Constraints

Some of the major general legal constraints on all types of public and private funding of highways are briefly summarized in the following.

Enabling Legislation.—Most local governments require authority from the state to enact ordinances. This authority may not exist for certain types of private financing. For example, state legislation may set caps on millage rates and require special assessments to be considered as part of the tax base, thereby limiting the use of special assessment districts. Enabling legislation also may be needed for imposing traffic impact fees or forming some types of special assessment districts.

In Dillon's Rule states, a unit of local government is deemed to have only those powers explicitly granted to it by the state. In such states, local governments are wary of enacting traffic impact fee ordinances under the general "health, safety, and welfare" clause, and instead seek legislation specifically authorizing them to impose impact fees. In some states with both a Dillon's Rule interpretation and a conservative judiciary, this perception is probably correct.

Constitutional Issues.—Local ordinances must comply with provisions of the Federal Constitution and state constitutions. Some of the issues arising from both the Federal Constitution and the state constitutions relate to due process, equal protection, and uniformity of taxation. State constitutions also may affect the powers of municipalities to use private financing under chartered cities or home-rule powers.

Administrative Regulations.—These regulations relate primarily to the Federal-Aid Highway Program, and include such issues as eligibility of private funds for matching federal funds, right-of-way acquisition regulations, environmental requirements, and prohibitions on tolls. Administrative procedures required to implement and manage impact fees, development orders and special assessment districts can be complex and expensive to both the public and private sectors.

Case Law.—Case law, which is determined based on previous court decisions and opinions, provides distinctions not always found in written statutes. Similar provisions in state laws and constitutions have been interpreted in very different manners by different courts. Without specific laws providing for the ability of local government to use specific impact assessment techniques, case law may limit the use of various finance mechanisms.

Interjurisdictional Agreements.—Because transportation problems frequently extend across jurisdictional boundaries, the ability to form interjurisdictional agreements is important in solving these problems with public and private partnership.

Constraints on Special Assessments

If a special assessment is imposed to provide for a specific public facility and not for the general purposes described above, it must be demonstrated that the assessed property benefits in a substantial and appreciable way. This requirement makes the implementation of special assessments for specific purposes much more complex, as well as more legally difficult to institute than general-purpose taxes.

Direct Benefit Principle.—A legal principle applying to special assessment districts is that the assessment must not exceed the direct benefit accruing to the property. While the benefit to the property is somewhat subjectively determined, the existence of the principle is sufficient to require conservative structuring of special assessment districts.

Voting Requirements.—Virtually all special assessment districts require some type of landowner or voter approval of inclusion in the districts. The procedure varies among states and among types of district, but may include petition for formation of a district, election to form a district, election to issue bonds, protest petitions, or other procedures involving residents or property owners. Which group (residents or property owners) has voting rights with respect to special assessment districts varies among states and may determine the success in forming a district for financing road improvements.

Tax-Exempt Bonds.—Several types of public and private financing mechanisms involve bonding against future revenues. Recent tax legislation has narrowed the requirements for tax-exempt bonds. Because of the benefits of using tax-exempt-bond financing, it is important that public and private partnership projects meet the requirements established by the Internal Revenue Service, especially those requirements related to public purpose.

Limits on Taxes or Assessments.—Limits on property taxes are one of the factors that have led some states to look to public and private partnerships for funding highway improvements.

However, some of these limits may also apply to some types of fees or special assessments, especially if they are imposed based on property value.

Reimbursement Agreements.—The use of bond proceeds to pay developers for preliminary planning and engineering expenses has been viewed as inappropriate by some observers. Travis County, Texas, has set forth guidelines governing the use of bond proceeds for such front-end expenses, and calls for a determination of the expenses that should be paid by the developer rather than the district.

Legal Constraints on Impact Fees

Impact fees are not considered taxes and thus have separate but parallel legal constraints.

In general, impact fees have been found to constitute a valid regulatory purpose if their imposition demonstrates that: (1) the new development will require additional capacity of the public facility; (2) the new development pays only its pro-rata share of the anticipated costs of the expanded facility, and the fees are used only for expansion of the facility; and (3) the revenues are specifically delineated to ensure a reasonable connection between the expenditure of funds and the benefits accruing to the development.

These stipulations place specific legal constraints on the collection and use of impact fees.

Sufficient Benefit Principle.—In contrast to special assessments, impact fees require only that the benefit be reasonably related to the property for which the fee is paid. A more generalized area may be charged an impact fee rather than a special assessment.

Fees vs. Taxes.—A major issue that has been argued regarding impact fees is whether they are fees or taxes. Fees may be within the power of a local government to impose without specific enabling legislation, whereas taxes usually are not. The *Dunedin* case, discussed in the Palm Beach County case study writeup, provides guidelines for determining this distinction.

Priority of State Projects.—Although not strictly a legal issue, the effect of private funding on the prioritization of state projects has often been discussed as a policy issue. There has been concern that some projects may be placed ahead of equally deserving, or perhaps even more deserving, projects because the favored projects include private funding. The response of states to this issue has varied considerably. Texas and Pennsylvania support giving priority to projects with local funding, while North Carolina recently prohibited the acceleration of projects based on local funding.

Participation of Municipalities.—The participation of cities in county-imposed impact fee districts was an issue in two cases studied, Palm Beach County, Florida, and Orange County, California. City participation in those partnerships was voluntary, although Palm Beach County, as a chartered county, may now include municipalities in such impact fee ordinances.

Double-Payment Issue and Credits.—A fee on new development for road improvements can be viewed as a double payment, because new residents will pay gas tax, property tax, and other taxes used to improve and maintain the highway system as well as the fees on new development. In several areas, impact fee calculations have taken into account this issue and provided for credits, either within the fee structure or external to it.

Legal Constraints on Exactions and Development Agreements

Exactions are usually authorized under state law, local subdivision control, and development review regulations, and they are usually negotiated when site-specific zoning is granted. This zoning may be defined in terms such as Community Unit (CU) or Planned Unit Development (PUD). In some states, specific laws are written requiring larger projects to be reviewed fully to determine the projected impact and appropriate mitigation through formal development agreements.

Improvements required through exactions and development agreement usually are limited in two basic ways. First, the improvement should be associated with clearly identifiable impacts and the need for their mitigation. Specific improvements are limited to mitigation of impacts associated with the site access or immediately adjacent to the site. For larger projects, the area of impact expands in relation to the size of the project and its area of influence. Second, exactions and development agreements usually involve a one-time payment with no recourse regarding future impact when conditions external to the site change.

With these two basic limitations, recent efforts have attempted to extend the boundaries of the area of impact (regional impact). Many development orders will phase the project approval to allow review of latter phases as they actually occur. This enables a more accurate determination of impact and of appropriate assessment in future years.

Financial Constraints

Revenue Potential.—Revenues from alternative funding mechanisms can be constrained both in total revenues and revenue stream flow.

Constraints on total revenue potential can be dictated by the economics of a project, its political acceptability, and the state or local legislation. The character of individual projects many times determines the availability of total revenues. Local conditions and goals relating to growth determine the political restraints on revenue potential, in that limited growth will limit the revenue available from land development. (Of course, limited growth also reduces the need for highway improvements.) State legislation, such as caps on ad valorem tax for local government, often limits the potential of revenues from special assessments.

Constraints on revenue stream flow are important in that total facilities are designed and constructed, while only portions of the facilities may be initially required by individual development or developments. For this reason, exactions usually lag immediate needs, thus creating a deficiency in available funds. In some circumstances, constraints on the availability of upfront revenues can be more difficult to deal with than total revenue constraints. Special assessment districts can provide a solution through revenue bond financing using the constant stream of assessment revenues.

Revenue Stability and Bonding.—Alternative funding mechanisms are usually associated with future needs and revenues based on projected growth. Growth rates fluctuate with time, and therefore growth-dependent revenues may become volatile or unstable over time. The use of growth revenues is constrained for two reasons. First, communities themselves should be careful not to become overly dependent on growth revenues, and, second, financial institutions may not bond growth revenues or

may require such large coverage of revenue (ratio of projected revenues to bond payments) that bonding is not practical.

Because of the stability issue, communities often find it necessary to back bonds with general revenues and to retire those bonds with revenues coming from growth. A common example of this type of bond financing is the use of projected parking revenues in municipal parking programs. General obligation bonds are retired with revenues derived from parking fees, meter revenues, and fines, as well as general tax revenues, if required.

Federal and State Tax Considerations.—The ability to receive tax deductions can affect the willingness of the private sector to make contributions such as dedication of land for highway right-of-way.

Tax-exempt status for private sector financial contributions for public benefit can assist in motivating the private sector to participate in such projects. Conversely, the lack of such tax-exempt status can restrain the private sector's willingness to be involved.

Governmental agencies often can borrow funds at rates lower than the private sector through issuing bonds. Total available revenues may be increased through the issuance of bonds and reinvestment of the bond money at higher rates. In many cases, governmental agencies will refinance bond programs to take advantage of this leverage. However, arbitrage laws constrain the use of this technique by requiring funds raised through bond financing to be expended for a public purpose within a specified period. Financial penalties are levied against the governmental body if these requirements are not met.

Administrative Constraints

Private sector financing is often new to governmental agencies and their personnel. Lack of expertise and experience become major issues in the initiation and administration of such financial programs. The legal and administrative process required to implement public and private sector funding programs may be perceived as so complex that the public sector's initiative to implement such programs may be thwarted.

Even after this initial constraint is overcome, developing the administrative procedure to operate and effectively use specialized funding programs may become a constraint in itself. Issues such as requirements to track revenues, expenditures reporting, unique land uses requiring unique assessments, appeal procedures and other complexities tend to constrain the implementation of new financing techniques.

Inter-organization conflicts and competition for use of special financing techniques may occur within governmental bodies. For example, disputes over responsibility for collecting and monitoring revenues may occur between departments. Such conflicts may be strong enough to stop the initiative of new programs.

Jurisdictional responsibilities and authority are an issue in that highways and funding needs for highways may cross several jurisdictional boundaries. Issues such as revenue collection and project selection and prioritization become very prominent among municipal, county, and state agencies. In many cases, interjurisdictional agreements may be required to deal with the implementation and operation of the proposed finance program.

These legal requirements and jurisdictional coordination efforts may increase the administrative cost such that it constitutes a significant proportion of revenues.

Along with the public sector costs, the private sector bears the cost of being educated in the new procedures and requirements of the process. Even after the actual education in the procedures, the time to process permits and development approvals will increase because of the additional administrative procedures. This additional time is a significant cost to the development and building community.

Coordination with Federal-Aid Highway Program.—Using multiple funding mechanisms to finance highway needs can become a constraint when dealing with federal restrictions related to the administration of highway programs and coordination and use of federal-aid funds.

Restrictions and guidelines relating to right-of-way acquisition, matching federal aid with state and local funds, and the timing (priority) of programmed projects can all constrain the use of alternative financing. These issues slow the implementation of projects that would require priority, if revenues are to be obtained from development that creates the need for the projects. Without a reasonable guarantee of the timely implementation of growth-related projects, private sector funding will not become available.

Political Constraints

Procedural Issues.—General interest in private sector participation may lose momentum because of the difficulty of understanding the procedural issues that must be resolved before the funding can be implemented. The legal and administrative procedures for implementing the various mechanisms for private sector participation in highway funding can be complex and frustrating both to the general public and to the elected officials who are exposed to these procedures for the first time.

Community Acceptance.—Community acceptance of private sector participation can vary among individual groups. These individual groups include the general population, individual neighborhood groups, developers, builders, business community, elected officials, public staff, and other special interest groups.

The general public and neighborhood groups may perceive the new alternative financing as a way of imposing a new tax burden on the community, or as a way of shifting costs from existing residents to new residents or developers. The acceleration of growth rates due to new funding sources and the construction of additional highway facilities may also be concerns of the general population and the neighborhood groups.

Developers and builders are concerned both with total cost and up-front costs required in financing new development. Therefore, acceptance from developers and builders will be contingent not only on perceived total costs but also on the timing of the financing as it relates to their development buildout schedules.

Acceptance of new financing mechanisms with the general business community is contingent on existing and new businesses paying balanced, reasonable shares of the cost of growth. The perceived cost of growth to the business community is weighed against the benefit of growth to the existing business community.

Elected officials and public staff are influenced by all the community constituencies discussed above. Current conditions, along with community goals and elected officials' perceptions of the "mandate of the public," are all factors that influence the acceptance of these officials.

The evaluation of current conditions, projected growth, and its impact on community goals leads to the question of the compatibility of growth and community goals. Many private sector funding mechanisms act to facilitate growth, and, in fact,

growth is required to generate funding. Therefore, the perceived lack of compatibility of growth with community goals can become a significant political constraint in private sector financing of highways.

Overcoming Barriers and Operating Within Constraints

Many of the barriers and constraints to public and private partnerships are real, while others are more perception than reality. Through recognition, classification, and proper understanding of these potential barriers and constraints, most can be overcome. To resolve these issues, however, eduction of both the public and private sectors is critical. The timing of this education process is most important in solid "public/private partnership" as the key to successful program implementation and long-term administration.

CHAPTER THREE

FINDINGS—CASE STUDY RESEARCH

This chapter summarizes the conclusions of the case study investigation conducted as part of this research and provides the framework for the development of legislation and implementation guidelines. It is based on an analysis of five case studies in four states: California, Florida, Pennsylvania, and Texas (two case studies). These case studies are described in detail in Appendix A.

CASE STUDY SUMMARIES

Orange County Transportation Corridor Fee

- Location: Orange County, California.
- Type of Mechanism: Transportation corridor fees, joint power authority.
- Enabling Legislation: California Map Act.
- Type of Project: Construct 60 mi of new transportation corridors (freeways with additional right-of-way for transit or HOV).
- Project Cost: $850 million (48.5 percent through fees, remainder undetermined).
- Project Status: Joint Powers Authorities have been formed, more than $20 million in fees have been collected, and design and environmental studies are underway.

Orange County and 12 participating cities have established two transportation corridor districts to fund three major freeway corridors (San Joaquin Hills, Eastern, and Foothill) with a combined length of 60 mi and a total estimated cost of over $850 million. The development fees are projected to cover almost 50 percent of the corridor cost. Sources for the remainder of the cost have not yet been identified. The transportation corridor districts, which are formed under joint powers agreements allowed under California law, have a combined area of 313 sq mi. Fees vary between the corridor fee areas and within each area, ranging from $920 to $1,305 per single family unit, from $535 to $760 per multi-family unit, and from $1.30 to $1.80 per sq ft of nonresidential use.

Palm Beach County Traffic Impact Fees

- Location: Palm Beach County, Florida.
- Type of Mechanism: "Fair share" traffic impact fees.
- Enabling Legislation: None (police powers; upheld in court).
- Type of Project: Construct thoroughfare plan improvements county-wide.
- Project Cost: Varies, as fees are not based on cost of specific improvements, but on cost of providing road capacity to serve new trips generated by development.
- Project Status: Impact fee ordinance was recently revised, raising fees an average of approximately 275 percent for residential development and 100 percent for commercial development since original adoption in 1979. More than $12 million in fees have been collected to date, not including improvements made for fee credit.

Palm Beach County adopted a traffic impact fee ordinance in 1979. This ordinance was based on requiring new development to pay its fair share of roadway costs. After a lengthy litigation, the ordinance was upheld by the Florida Supreme Court in 1984. The impact fee ordinance was modified in 1985, raising fees and requiring new development to pay for a greater proportion of its costs. The County also has adopted traffic performance standards, which are used to determine the off-site improvements to be required to be made by the developer for major developments. These off-site improvements are usually credited against traffic impact fees.

Route 29/US 202 Interchange and Corridor Improvement

- Location: Chester County, Pennsylvania.
- Type of Mechanism: Transportation development district.
- Enabling Legislation: Transportation Partnership Act.
- Type of Project: Reconstruct interchange and widen 1.5 mi of roadway.
- Project Cost: $20 million (50 percent PennDOT, 25 percent Transportation Authority, 25 percent developer).
- Project Status: District formed, bonds sold, and project under construction.
- Other: Comparison with traffic impact fee system in nearby Upper Merion Township, Montgomery County, where fees on new development are imposed under township police power.

This case study involves the funding of interchange reconstruction, road widening, and access improvements through the use of special assessments, developer contributions, and state contributions. The project site is in East Whiteland and Tredyffrin Townships in Chester County, Pennsylvania, at the interchange of Pennsylvania Route 29, a two-lane suburban arterial, with US 202, a four-lane freeway. Of the $17 million cost of the project, the Pennsylvania Department of Transportation will provide $9.5 million; the Rouse Company, a major developer, will provide $3.5 million; and the local transportation authority will provide $4.0 million. In addition, right-of-way provided for the project is valued at $3.0 million, for a total project cost of $20 million. The transportation authority formed by two townships is funded through a special assessment district pursuant to Pennsylvania's Transportation Partnership Act. At this time, bonds have been sold, an agreement among the parties has been executed, construction of some ramps has begun, and right-of-way for other improvements is being acquired.

San Antonio Westside Freeway

- Location: San Antonio, Texas.
- Type of Mechanism: Joint venture (public/private).
- Enabling Legislation: None.
- Type of Project: Construct frontage roads and ultimately expressway in 10-mi corridor.
- Project Cost: $93 million (80 percent state, 5 percent local, 15 percent private).
- Project Status: Frontage roads under construction.

Several major developers and landowners, along with the City of San Antonio, have dedicated 461 acres of right-of-way in a 10.1-mi corridor for a new freeway linking northwest San Antonio with the westside area and downtown, and have also provided one-half of the cost of required frontage roads. The estimated value of the right-of-way is $13.2 million, with $5.9 million contributed toward construction of the frontage roads. The State Department of Highways and Public Transportation (SDHPT) has agreed to pay for the other half of the access roads ($6 million) and the cost of the main lanes and interchanges ($68.2 million), with the main lanes to be added when traffic warrants.

Travis County Road District

- Location: Travis County, Texas.
- Type of Mechanism: County road district (CRD), transportation corporation, road utility district (RUD).
- Enabling Legislation: County Road and Bridge Act, Transportation Corporation Act, Road Utility District Act.
- Type of Project: Construct roads for developing areas.
- Project Cost: Varies; CRDs and RUDs are funded by special assessments on property, while transportation corporations may be funded by a combination of private, local, and state funds.
- Project Status: Twelve county road districts and three transportation corporations have been formed in Travis County; some CRDs have issued bonds and have started construction; only one RUD has been formed in Texas.

Texas has recently passed new and revised legislation aimed at increasing the extent of public and private financing of highway infrastructure. This legislation included the Road Utility District Act, the revised County Road and Bridge Act, and the Texas Transportation Corporation Act. Of these mechanisms, the County Road and Bridge Act has been the most used to date, particularly in Travis County, where 11 County Road Districts have been formed. The County Road District, which has progressed furthest to date, has issued $20 million in bonds to fund the construction of 6.8 mi of six-lane divided arterial road, including grade separations and bridges. In addition, at least three Transportation Corporations have been formed in the Travis County area to promote and provide some funding for new thoroughfares. One Road Utility District (RUD) has been formed in Texas, but none in Travis County. This case study investigates the use of these three mechanisms for highway finance, and concentrates on the County Road Districts.

FUNDING MECHANISMS STUDIED

Traffic Impact Fee

The Pennsylvania (Upper Merion Township), California, and Florida case studies all include some elements of traffic impact fees, in that all rely on fees imposed on new development to fund off-site areawide improvements. From the findings of these cases, some observations can be made regarding impact fees.

Authority.—In both Upper Merion Township and Palm Beach County, the fees were imposed under local police powers, without specific enabling legislation, although the Florida ordinance was carefully drafted to meet the tests imposed in a previous Florida court case. (See *Dunedin* in case study.) The Orange County transportation corridor fees were implemented after revising the Map Act to grant specific authority to impose the fees. Other California municipalities, however, have enacted development fees for transportation under police powers, without enabling legislation. The use of enabling legislation has varied from state to state, and to some extent within states, based not only on whether states follow Dillon's Rule, but also on such factors as grants of power under city or county charters, previous case law, the general judicial philosophy of state courts (liberal or conservative), and the judgment of city or county attorneys.

Basis of Fees.—All three of the jurisdictions' fees are based on daily trip generation rates for various land uses. Orange

County and Upper Merion Township fees are based on paying for a portion of a specific program of transportation improvements, based upon a projected level of development, while Palm Beach County's fees are based on the cost of providing road capacity for the new trips generated by the development. Both Palm Beach County and Orange County have incorporated a mechanism for reducing the fees that otherwise would be charged to retail uses based upon strict application of trip generation rates.

Zones.—Palm Beach County uses 40 zones for the purpose of matching collection and expenditures. Orange County has two benefit areas, one for the San Joaquin Hills Corridor and one for the Eastern and Foothill Corridors. Each benefit area, with fees controlled by a Joint Powers Authority (JPA), is divided into two areas of benefit; therefore, four fee structures are computed. Fees collected in each JPA area are spent for designated freeways in that area. Upper Merion Township has no zone system, as it is much smaller than the two counties that use zones. In general, counties that charge impact fees usually have a zone system, whereas smaller cities operate on a city-wide basis or use few zones.

Recent Innovations.—A relatively recent approach has been to require expenditure of funds "for the benefit" of the zones in which they were collected, as opposed to requiring improvements within each zone. While allowing more flexibility to the agency responsible for implementing the road improvements, this approach could raise questions regarding the degree of benefit provided by an out-of-zone improvement.

Another recent approach has been the separate calculation of fees for various zones. While adding to the theoretical soundness of impact fees, this approach could affect development patterns as well as complicate the process for both local government and developers without providing tangible benefits.

Timing of Collection.—All three jurisdictions provide for collection of fees at building permit issuance. Although this offers a good mechanism for collection and does not unduly burden the developer, it does pose two problems: credits and timing of construction. In many cases, the original developer of a property is required to provide off-site road improvements as a result of negotiations during rezoning, subdivision approval, or site plan approval. If he then receives credit towards the traffic impact fees and subsequently sells all or part of the property to one or more builders, a procedure must be established to transfer the credits to those who will be applying for the building permit and thus will be liable for the fees. This process can be quite complex in the case of a developer of a large tract who may sell to others who may, in turn, resell the property before construction is started. Regarding the timing issue, if the fees are not collected until the building permit is issued, the improvements from the fees are not likely to be made until the development has impacted existing streets, assuming that the improvements are made on a pay-as-you-go basis.

Credits.—The impact fees studied here also vary in the degree of credit granted for off-site improvements made by a developer. While all three jurisdictions provide credit for at least the amount of fees imposed, only Orange County recognizes credits for construction in excess of the impact fee amount. Orange County also credits dedication of right-of-way in excess of that required for a major thoroughfare, but it is also the only one of the three jurisdictions using the fees for freeway construction.

Time of Restrictions.—In Palm Beach County, not only must the fees be spent for improvements within the zones collected, but they must be spent (encumbered) within a 6-year period from the date collected. If they have not been spent, a property owner may petition the county for a refund, including 6 percent annual interest. Neither Orange County nor Upper Merion Township has any time restrictions on spending the funds.

Disadvantages.—A major disadvantage of impact fees is their dependence on the development market and their consequent variability over time. These properties make it difficult to program impact fees for long-range planning and even more difficult to use impact fees for revenue bonds. They have been used as a source of revenue for general obligation bonds or for revenue bonds based on other funding sources, such as a gas tax, but their variability makes impact fees doubtful as a primary revenue source for funding bonded indebtedness.

Another principal disadvantage regards the legal requirements for traffic impact fees. The basic authority as well as the legal guidelines for assessing, collecting, and spending traffic impact fees at the local government level vary among states. Most jurisdictions establishing fees have used well-documented studies to show the need for the fees and the basis of the fee rates. Courts have tended to look favorably on such well-documented, conservative impact fee ordinances.

Special Assessment District

Two case studies involved special assessment districts or similar mechanisms: Travis County, Texas, and East Whiteland and Tredyffrin Townships, Pennsylvania. Both of these jurisdictions have used assessments based on property valuation to finance bond issues for transportation improvements.

Authority.—Both cases had specific state enabling legislation for forming the special assessment districts. The Pennsylvania Partnership Act authorizes the formation of transportation development districts. These districts may finance transportation projects through assessments on business property (as provided under the Business Improvement District Act of 1967), assessments on all benefited properties based on actual or projected use of the transportation facilities, or by imposing any tax otherwise permitted (in cases in which the transportation development district is coterminous with municipal boundaries). In Travis County, the County Road and Bridge Act authorizes the formation of County Road Districts, which may finance road construction through assessments on real property within the districts.

The Pennsylvania transportation development district studied is governed by a municipal authority as provided under Pennsylvania's Municipal Authorities Act. The five-member authority board was appointed by the township boards of both townships. Only the municipalities have the authority to impose assessments, although the authority board may issue bonds. A county road district in Texas has no independent board, but is controlled directly by the County Commissioners Court, with the commissioner in whose district the road district is located designated as the ex officio road superintendent.

Formation.—A major distinction between the two types of special assessment districts is that in Pennsylvania, the district may be formed directly by the local government(s). Once formed, property owners have 45 days to protest the formation. The district enabling ordinance can be overturned by a protest of the owners of property comprising more than 50 percent of the assessed valuation in the district. In Texas, a county road

district is created by the commissioners court. For an election to be held authorizing an assessment to support a bond issuance, a majority of the voters in the district must petition for such an election, which requires a two-thirds favorable vote in order to issue the bonds. Landowners as such do not have a formal voice in the assessment of their property, although Travis County consults with them prior to the formation of a county road district.

Existing Development.—Another difference in the two cases examined here, although not necessarily in all Pennsylvania and Texas districts, is that the Pennsylvania district had considerable existing development, while the Texas district was undeveloped land. The prospectus for the East Whiteland-Tredyffrin Joint Transportation Authority bonds showed a 10-year financial pro forma based on no new development, with a 19.75-mill assessment. The prospectus for Southwest Travis County Road District No. 1 showed an initial 51-mill levy, projected to decrease as new development escalated property values by a factor of ten during the first 10 years. The real difference between the initial assessments is even more dramatic, as the Chester County, Pennsylvania, property assessment is estimated to be only about 10 percent of actual market value.

Limits on Indebtedness.—An issue that arose in Travis County involves limitation on total bond indebtedness. Under the Texas Constitution, bonded debt of a district cannot exceed 25 percent of the assessed valuation of real property within a district. Some road districts in Texas have approached that 25 percent cap. The assumption is that development within the district will quickly raise the assessed valuation; however, that assumption is dependent upon market conditions that can change, as was recently learned in Austin. In the Pennsylvania case, the special assessment was very small compared with existing property taxes, which were well below the mileage limit.

Advantages and Disadvantages.—Special assessment districts, although used extensively in such western states as Texas and Colorado, are relatively rare in most eastern states, particularly when used for transportation improvements. They provide the advantages of taxing both existing and new development, collecting revenues over a period of years, and having the capability of funding bonds for major improvements. However, like impact fees, they are subject to reliance on continued development. Their other major disadvantages include the difficulty in determining district boundaries and the need for state enabling legislation as authority to form districts.

Joint Ventures

Two case studies involved joint ventures in which the public and private sectors cooperated in funding a project through mutual agreement: the San Antonio Westside Expressway and the Route 29/US 202 improvements in Pennsylvania (also an example of a special assessment district). Other public and private joint ventures that were not included as case studies are the E-470 project in Denver, the proposed Pueblo to Fort Collins Expressway, several transportation corporation projects in Texas, and the Southern Durham Parkway in North Carolina. These projects usually involve a small number of developers who participate with the public sector (usually the state) in funding a major transportation facility.

The San Antonio case involved a developer who found he could enhance access to his property (and hence its value) while providing right-of-way for a needed highway. Through early coordination with other landowners, the state, and the city, right-of-way was obtained, funds were assembled for initial construction of the frontage roads, and a state highway was designated in the corridor. Right-of-way was provided by large land owners and the City of San Antonio, with the City purchasing property from owners of small tracts who could not afford to dedicate a 350-ft-wide right-of-way. Funds for construction of the frontage roads were provided in a similar manner, except that the state provided one-half of the total construction funding. The expressway through-lanes and interchanges are to be funded by the state when traffic warrants their construction. The success of this project was attributable jointly to the major developer and his planners, who initially saw the opportunity to implement the facility and acted quickly to build consensus with other landowners; the City-elected officials and staff, who were able to work out details of assembling right-of-way and build support within the community; and the State, which gave early concept approval and committed state funds to the project.

The Pennsylvania joint venture was different in a number of ways, yet showed some similarities. The Pennsylvania project was more concerned with funding than right-of-way acquisition, as it involved improvement of existing facilities. It also involved more property owners than did the San Antonio project, and used a special assessment district for funding much of the local share of improvements with revenue bonds. However, in both cases, there existed a member of the private sector who was willing to take the lead in expediting the project development. There was also a spirit of cooperation among the principal actors; a "win-win" conclusion was strived for and to a large degree attained in both cases.

Both projects involved state funding and a state policy choice of accelerating a project that included private and local financial participation. In the Texas case, the state's share was funded with discretionary funds that had not previously been committed to other projects. In Pennsylvania, however, current state policy includes acceleration of projects with local funding and support over projects without that degree of local commitment.

These kinds of public and private joint ventures are to some degree "special cases" in which public and private interests coincide, or at least overlap. As shown by the previous examples, potential exists for a large number of such instances, particularly when they are encouraged by state policy, as is the case in Pennsylvania and Texas.

SUGGESTIONS FROM CASE STUDIES

In each of the case studies, the individuals interviewed were asked for comments or suggestions regarding the mechanisms used or the techniques used in implementation. It will be noted that some of the suggestions are case specific, while others are more general and were considered for inclusion in the proposed legislation and implementation guidelines in Chapter Five. The individuals participating in the case studies were very candid with their responses and their comments, and thus provided significant guidance for developing study recommendations. The suggestions received for each case study are summarized below.

Orange County (Cal.) Transportation Corridor Fees

1. Provision should be made for funding administrative costs with fees.

2. Funding for total completion of the corridors will need to be obtained.
3. Localities should not be able to block programs of regional interest.
4. Provision should be made for transfers of credit from developers to builders and from one local jurisdiction to another.

Palm Beach County (Fla.) Traffic Impact Fees

1. The number of zones (40) is cumbersome and should be reduced.
2. The existing mechanism for transferring credits from developers to builders is cumbersome to administer.
3. A mechanism for tracking developer commitments and construction in lieu of fees should be implemented.
4. All cities within the county should participate in the program.
5. Some have suggested providing credits for right-of-way contribution.
6. Greater state-county cooperation is needed.

Route 29/US 202 (Penn.) Interchange and Corridor Improvements

1. A statewide discretionary fund should be established for partnership projects.
2. The partnership approach should be weighed against improvements that can be obtained through exactions.
3. All involved property owners should be involved in discussions as early as possible.
4. The private sector should be the primary motivator and initiator of such projects.
5. The formation of a broadly based task force was an important factor in the success of this partnership.

San Antonio (Tex.) Westside Freeway

1. Earlier contact should be made with COPS (Communities Organized for Public Service), the local community group.

Travis County (Tex.) Road Districts

1. Allow elections at times other than the four uniform election dates.
2. Provide for district annexation and deannexation.
3. Allow for construction of improvements outside district.
4. Allow noncontiguous districts.
5. Limit bond funding to arterial streets.
6. Streamline RUD (Road Utility District) procedures.
7. Restrict use of bond funds for front-end costs.

PROPOSED RECOMMENDATIONS

Based on an analysis of the case studies described above, the following funding mechanisms have been included in the examples of state and local legislation and implementation guidelines:

1. *Impact Fees.* This mechanism allows the cost of areawide transportation improvements to be equitably shared among the new developments that create a need for such improvements.
2. *Special Assessment Districts.* These offer the advantage of being able to assess both existing *and* future development for road improvements from which they will benefit directly. An added advantage is a steady, predictable source of revenue that can be used to finance bonds.
3. *Joint Ventures.* Although these occur on a case-by-case basis, some very general state enabling legislation and guidelines would facilitate these desirable arrangements.
4. *Development Agreements.* Although these negotiated forms of partnership were not specifically addressed in the case studies, they still may have application in many instances.

CHAPTER FOUR

SUMMARY OF LEGAL ISSUES

(**Note:** A more detailed treatment of the material presented in this chapter is given in *NCHRP Research Results Digest 161* ("Public and Private Partnerships for Financing Highway Improvements," May 1987).

AUTHORITY AND LIMITATIONS

Use of public–private highway financing mechanisms can occur only when necessary legal authority exists and governing legal principles are observed. Local governments are creatures of the state in which they are located and do not generally possess inherent powers. Instead, they must look to state constitutions and statutes and municipal and county charters as sources of power to take desired action.

State constitutions provide the basic parameters within which local governments may act, while state statutes usually afford additional guidance concerning the authority available and limitations applicable to such governments. A number of state courts follow "Dillon's Rule" and interpret such authority nar-

rowly. "Dillon's Rule" is the rule that a local government can possess and exercise only those powers granted in express words, those powers necessarily and fairly implied in or incident to the powers expressly granted, and those powers essential to the accomplishment of the declared objects and purposes. Under this rule, local governments may be denied desired authority in cases of doubt. State statutes usually are the vehicle through which local governments receive their specific authority, although some states provide for broad "home rule" powers by constitutional or statutory provisions. Such general home rule provisions may serve as an alternative basis for adopting innovative road financing techniques. A particular state's law regarding conflict and preemption must be evaluated to determine the usefulness of both home rule and express powers as bases for undertaking public and private road financing partnerships.

Charters also play an important role in establishing the authority available to local governments. Municipal and county charters are generally adopted at the time of incorporation, either by state legislation or by referendum. They may be amended at a later date, consistent with a given state's requirements.

Even when local governments possess adequate authority to implement a financing mechanism, they may do so only if consistent with basic federal and state constitutional requirements. The requirements of particular concern here include substantive and procedural due process and equal protection. State constitutions contain provisions paralleling those in the United States Constitution, as well as additional requirements that are uniquely part of state law, such as uniformity of taxation.

The complex interweaving of these principles as they relate to special assessments, subdivision exactions, impact fees, contingent zoning, and development agreements is explored in the following pages.

SPECIAL ASSESSMENTS

Description

A special assessment is a charge upon lands deriving a special benefit from some capital improvement, to defray the cost of the improvement. The charge generally cannot be for more than the benefit received nor for more than the cost of the improvement. Special assessments typically allocate costs of improvements among private property owners on the basis of front footage, total area, or property value.

The special assessment is often characterized as a special use of the government's taxing or revenue-raising power. At the same time, it is regarded as sufficiently different from other forms of taxation to be free from constitutional requirements for uniformity of taxation; that is, because the improvements do not benefit all citizens, the assessment need not be made against all citizens, but only against those benefited.

Special assessments have been seen as a means of shifting costs to a small group of property owners in return for special benefits that accrue to their properties as a result of nearby, publicly constructed, physical improvements. In essence, a special assessment is imposed as a quid pro quo, with benefits in the form of increased service or facilities and, therefore, increased property values.

Special assessments often entail financing arrangements in which a local government initially issues bonds to raise funds for an improvement and is later reimbursed by periodic payments from property owners, secured by liens against the property. This mechanism may, therefore, provide a way of covering improvement costs at a lower interest rate than would apply if a developer were required to perform necessary work as part of the development process. It also may provide a useful method for making improvements with excess capacity in preparation for subsequent development, while stretching out repayment over a period of time in which that development is likely to take place.

Theoretical and Legal Foundations

The theoretical foundation of special assessments has a variety of implications. It provides both a fundamental rationale and a delineation of how far a government may go in imposing costs of public infrastructure development on private citizens. Such assessments may shift costs only to the extent of benefit received and, then, only to the extent that the property owner's benefit is special, as opposed to general. Special assessments also provide important flexibility for local governments, opening the way for funding of many types of improvements in areas that need not correspond with the jurisdiction's territorial boundaries, but only with the zone of benefit. Special assessments are used in a variety of contexts, whether affected property is undeveloped, developing, or already developed, at the initiative of either property owners or the government itself, so long as demonstrable special benefit can be shown.

The availability of express authorizing legislation for special assessments has both advantages and disadvantages. It removes any doubt that local governments are permitted to rely on this device as a funding mechanism, but it often provides relatively restrictive guidelines for use of the technique.

Special assessments may only be used in furtherance of a public purpose which justifies government participation. Use for purely private benefit, such as to cover costs of driveway aprons, may be prohibited. Courts have tended to focus on this private or special benefit side of the question, examining both the type of improvement imposed and the degree of benefits accruing to affected property owners. Such decisions are extremely fact-dependent; the results, therefore, are difficult to predict. Consequently, the legality of a proposed special assessment may at times be in doubt, except in cases where planned improvements clearly are very local in character or when courts and legislatures have adopted a relatively expansive interpretation of this concept. Local governments may be obliged (or may find it advisable) to contribute some proportion of project costs to ensure that costs of anticipated or general benefits are not improperly allocated to assessed property owners.

Concerns and Issues

The theoretical underpinnings of special assessment law have been undergoing reexamination on several fronts in recent years. California courts have been particularly active in probing the relationship between special assessments and the taxing power in the wake of a state constitutional amendment sharply limiting the use of property tax and special taxes as sources of general revenue, and in the face of California municipalities' embracement of special assessments as a less constraining revenue-raising alternative.

Another area of current interest is the relationship between special assessments and the police power. Public and private partnerships based on exercise of the police power are not subject to the same exacting scrutiny as is traditionally applied to special assessments, insofar as the special benefit requirement is concerned. This is so because courts give great deference to legislative action under the guise of the police power, while they more carefully scrutinize special assessment authority which is based on the taxing and revenue-raising powers of government. It is increasingly common for local governments to develop hybrid assessment mechanisms that combine the most attractive features of levies based on the police power (such as subdivision exactions and impact fees) with the most attractive features of special assessments.

A final area of interest is the ambiguous relationship between cost and benefit as those factors determine the charge to be assessed. Assuming that benefit in the form of increased property values exceeds the cost of the improvement, an issue arises as to whether property owners may be assessed up to the amount of the benefit received, or whether cost serves as a cap on the amount assessed. Although this special assessment issue has not yet been the focus of substantial litigation, analogous case law regarding subdivision exactions and impact fees suggests that an effort to recoup this incremental increase in property value in this way is likely to be seen as an unauthorized tax in the absence of enabling legislation on this point.

Change is underway in the definition of special benefit, as it is used to differentiate between private and public obligations. In assessing the obligations of property owners to pay for multifaceted improvement projects, courts and legislatures in a few states have begun to focus on aggregate system benefits, rather than individual segment benefits. Thus, for example, property owners in an assessment district will be adjudged to have benefited by increased property values resulting from a package of several interrelated improvements, rather than improvement of a single nearby street that is but one aspect of such a project. This departure from earlier practice reflects a more flexible and realistic attitude toward areawide road improvements, perhaps stimulated by increased experience with other types of areawide projects or emerging patterns of development on an areawide basis.

Methods of allocating costs among benefited property owners are becoming increasingly sophisticated. Established standards such as allocation based on increased property value have been applied with greater sensitivity. A number of courts have recently approved assessments against relatively undeveloped properties based upon their highest and best developed use, in effect recognizing that introduction of an improvement can result in especially great incremental increase in value under these circumstances.

New alternative methods for allocating costs also have been employed through statutes authorizing the allocation of costs based on the anticipated increase in vehicular traffic generated by the particular property. Such a use-based standard appears to be one step away from traditional methods that focus on land value and accrued benefit. In addition, the use-based standard is a step closer to a hybrid assessment that resembles impact fees based on the police power. Arguably, such a standard is a more precise measure of benefit accrued than many of the traditional methods. Finally, a few jurisdictions have moved to a multi-factor system of allocating costs using highly flexible local legislation to develop ordinances that allocate costs on the basis of several factors such as front footage, per lot or per dwelling unit, a land area's impact zones, and zoning use of the property.

EXACTIONS AND IMPACT FEES

Traditional Exactions

Description

While special assessments historically have provided a mechanism for funding small-scale local improvements on an ad hoc basis, a separate legal mechanism gradually evolved to provide basic highway infrastructure routinely needed by new residential subdivisions. Such traditional subdivision exactions originally entailed on-site exactions and dedications and were eventually extended in some states to off-site needs as well. The concept evolved to include limited fee in lieu of dedication requirements.

Traditional subdivision exactions are rooted in the police power of local governments rather than in the taxing power. They are designed to ensure that necessary improvements will be made in public facilities likely to be overburdened by new development and that developers, not just local governments, are obliged to cover appropriate portions of the costs to serve that new development. This rationale may be framed in alternative terms, which emphasize a local government's ability to control its financial expenditures: developers should not dictate to local governments where or when monies should be expended to provide needed infrastructure, but must instead wait a reasonable time for facilities to be provided, or provide desired improvements themselves.

Theoretical and Legal Foundations

As with special assessments, many jurisdictions provide statutory authority for traditional subdivision exactions. While the same question of distinguishing the obligations of private and public sectors is posed with regard to subdivision exactions as was the case with special assessments, the courts have offered a subtly different answer in this context. Three major tests have developed as a way of ensuring that substantive due process concerns are met. Each examines the relationship between the exaction required and the purported basis for that exaction; yet, the tests vary as to how close that relationship may be.

The most stringent test requires that exactions be imposed only to satisfy needs that are "specifically attributable" to a particular subdivision, much as special assessments may only be imposed when unique special benefits accrue. This test has been applied in only a few jurisdictions such as Illinois, primarily where park and school land are involved, but also in a handful of situations involving roads.

The most liberal test, articulated by the California courts, allows exactions to be imposed whenever they are rationally related to subdivision-generated burdens or needs. In fact, this "rational relationship" test allows local government to require private participation whenever private development activity contributes to or precipitates certain infrastructure needs.

A third, the dual "rational nexus," test has come to command much broader general acceptance. Under this test, courts require a "reasonable" basis for concluding that the need for the exaction resulted from the activity of the subdivider, and that the amount of the exaction bears some relationship to the share of the overall

need that is contributed by the subdivision. Some courts add an additional requirement that the exaction be reasonably related to benefits that the subdivision will receive. In many instances, however, the strictness of the test adopted will be less evident from the court's characterizing language than from its approach to the test's application. For instance, courts carefully scrutinize subdivision exactions for roads that are a far distance from the subdivision, whereas they are more lenient in their approach when the subdivision exaction relates to internal subdivision roads or nearby roads.

Concerns and Issues

Because subdivision exactions generally are imposed on a given developer at the time subdivision approval is sought, the issue of subsequent allocation of infrastructure costs is removed from the local government's control. Moreover, the use of exactions limits local governments' ability to initiate infrastructure improvements; only when a developer approaches the local government with a request for subdivision approval does a development-related need arise, thus triggering the government's authority to impose such requirements. Moreover, although the linkage between development-related needs and facility improvements is rational in theory, it raises a number of problems when put into practice. In addition, needs are not always readily translated into functioning improvements. Needs associated with an individual subdivision may justify dedication of a narrow, short road segment, but not road construction to a size and length that allows the road to contribute in a meaningful way to an areawide transportation system.

The procedures for imposing subdivision exaction obligations differ from those applicable to special assessments. The subdivision review process is defined, to a large extent, by local ordinances within the general framework set by state subdivision statutes. As a general rule, a standing local board, such as a local governing body or planning commission, will review developer proposals and reach a decision after the developer has been provided a hearing. The problem of raising funds to cover costs of required improvements is left to the developer. A variety of means, including bonding requirements and letters of credit, are available to local governments to ensure that mandated improvements are completed once subdivision approval has been granted.

Impact Fees

Description

Impact fees, or development fees, are charges levied by local government against new development to generate revenue to fund capital facilities necessitated by the new development. Impact fees take the concept of traditional subdivision exactions a step further: rather than requiring road construction, land dedication or fees in lieu of a specific construction project, local governments may require money payments to cover the cost of providing development-related needs. These fees also differ from traditional exactions in that they have been imposed in various states for a wider variety of purposes. Impact fees have been imposed in various states for water and road improvements, for sewer system expansion, or for school facility improvements. Impact fees may encompass a broader range of development activities. Local governments also may require that private contributions be made at a different stage in the development process, typically when building permits are issued.

Theoretical and Legal Foundations

As with traditional subdivision exactions, the police power rationale has been used to justify the imposition of impact fees. While excessive dedication requirements often are condemned as "takings" that fail to comply with constitutional constraints on the power of eminent domain, flawed impact fee ordinances, on the other hand, generally are characterized as improper exercises of the taxing power.

Local governments interested in adopting a system of impact fees must carefully assess their legal authority to do so, because few jurisdictions have explicit enabling legislation at this time. Nonetheless, Florida's recent recognition of impact fees is noteworthy. Florida's 1985 growth management legislation sanctions the use of impact fees, although several local governments imposed impact fees prior to this legislation, based largely on police power authority. Florida's Local Government Comprehensive Planning and Land Development Regulation Act requires, among other things, that cities and counties adopt local comprehensive plans that identify appropriate levels of municipal services, specify capital facilities needs, and ensure that development permits will be denied unless adopted level-of-service standards are maintained. Local governments are encouraged to use "innovative land development techniques"—including impact fees—to achieve the specified land use objectives.

The Florida Legislature in 1985 also amended requirements applicable to developments of regional impact (DRIs), those developments that, because of their "character, magnitude, or location would have a substantial effect upon the health, safety and welfare of citizens of more than one county." Local governments now must decline approval of proposed DRIs unless the developer makes "adequate provision for public facilities needed to accommodate the impact of proposed development" or unless the local government itself agrees to provide such facilities. The DRI statute specifically contemplates use of impact fees as a financing device in this context, but limits their use by requiring that certain conditions be met: fees may only be used when the need for fee-funded facilities is reasonably attributable to the proposed development; contributions are related to expected facility costs; funds are earmarked for use to benefit the affected development; local fee ordinances require that other developers contribute a proportionate share of funds necessary to accommodate development-related impacts; and, if additional fees are imposed, developers are given credit for impact fees already levied to meet the same development-related needs. Several other states, including California, Colorado, Illinois, Maryland, New Hampshire, North Carolina, Oregon, Pennsylvania, Utah, and Washington, have experimented with impact fees as well. New Jersey and Texas appear to be the only states with express state-wide enabling legislation for impact fees.

A more difficult threshold problem exists in those states or jurisdictions in which explicit legislative authority is lacking. In such situations, local governments have relied on a number of options, such as seeking special legislation, relying on home rule authority, and asserting power under zoning or subdivision legislation.

The problem of allocating responsibility between the private and public sectors is both easier and more difficult with regard to impact fees than with regard to traditional subdivision exactions. It is easier in that obligations defined in monetary terms may be allocated and shared with greater flexibility than are obligations to dedicate land or make improvements. It is more difficult because that very flexibility opens the door to much more complex allocation calculations and creates some risk of abuse. Courts faced with the problem of defining the respective roles of the private and public sectors have drawn upon precedent applicable to more traditional subdivision exactions, while adding a number of new analytical twists.

A threshold legal issue that runs throughout the case law is whether the impact fee ordinance represents a legitimate exercise of the police power, properly imposing obligations upon certain members of the private sector to offset public burdens resulting from private activities or whether, conversely, the ordinance constitutes an illegal tax imposed on the few for the benefit of the many. The rational nexus test continues to be the principal tool for resolving this dilemma. Courts have articulated a three-part test which embellishes the traditional need-benefit rational nexus analysis: impact fees may be imposed where (1) new development requires that the present system of public facilities be expanded, (2) the fees imposed are no more than what the local government unit would incur in accommodating the new users of a facility system, and (3) the fees are expressly earmarked for the capital projects for which they were charged.

Requirements, Concerns, and Issues

The first step in defining the respective roles of the public and private sectors in the use of impact fees is to identify a basic level-of-service standard for each facility or service. Only capital improvement expansion needs, such as new construction, widening of roads, and fundamental upgrading of facilities attributable to new private sector development, may then be financed by impact fees.

The second step is to calculate the capital improvement need that is properly attributable to the development in question. Criteria clearly and directly linking need, such as anticipated vehicle trips per residential unit in a given geographical area, are necessary in this regard. Less certain approximations of need, such as intensity of land use, measured by comparing residential lots or floor area, without demonstrating the relationship between intensity and traffic generation in a given area, are more likely to be rejected. Experimentation continues with the development of more complex need formulas and measurement strategies and computer simulations of anticipated traffic-generating characteristics. Whatever formula is used, local governments should be prepared to demonstrate the basis for their need calculations, and to allow developers to submit their own studies or similar evidence that may refute government calculations in a given case.

One complication likely to arise in this needs-driven process occurs in instances in which facilities having excess capacity (that is, capacity to handle more than the present demand) already have been built. Developers may be required to contribute toward preexisting facilities with excess capacity so that a government entity that has advanced funds for such facilities may recoup its investment. In other instances, impact fees reflecting a particular development's needs, together with appropriate government contributions, may be sufficient to fund only a small-scale road, or only part of a needed road system, at the time of initial development despite the fact that anticipated future development will require, and can be expected to pay for, a larger or more complete system. Developers may not require local governments to provide more extensive improvements simply to facilitate their own developments, but may be required to scale back a proposed project until adequate facilities are available. Conversely, the developer may assume the obligation of providing excess capacity facilities needed for the start up of a given project, subject to possible later reimbursement.

Impact fees must be ear-marked to benefit the development charged. Fees may not be used interchangeably with general revenues, but must be reserved for use for the purpose levied and, in some jurisdictions, retained in a separate fund. Fees also must be expended pursuant to a specific plan, within a reasonable period of time, for improvements designed to benefit the areas assessed.

Impact fees usually are set on a per unit basis and on a level significantly below the cost of anticipated improvements. This strategy, although not required, allows local governments to take into account the need by the public at large for the proposed facilities, as well as equity concerns such as balancing taxes to be paid against fees to be imposed on new residents and giving credit for dedications or other exactions.

Impact fees generally are implemented by adoption of a general ordinance establishing a fee schedule and requiring developers to tender fees at the time a building permit is issued. Linkage to an adopted capital improvements program is desirable and is, in fact, mandated in some states. Although there has been little litigation to date on procedural and remedial issues, it is advisable to provide developers with an opportunity to submit independent evidence concerning the burdens attributable to their proposed projects, and to establish clear ground rules concerning the disposition of fees in the event that a proposed development or planned public improvement is not completed.

CONTINGENT ZONING AND DEVELOPMENT AGREEMENTS

Contingent Zoning

Description

Contract and conditional zoning are terms generally used to describe exceptional requirements or obligations undertaken by or imposed on a landowner in connection with a proposed revision of a zoning ordinance or zoning map amendment. In this section, the two approaches will be called, collectively, "contingent zoning." Such requirements or obligations can take numerous forms, such as limitations on the types of uses allowed on a particular property, landscaping or buffering requirements; and dedication, construction, or monetary contribution requirements for road improvements or other purposes. They may also appear in other guises, often in separate agreements or recorded covenants, or in conditions incorporated into rezoning ordinances passed by local legislative bodies.

Use of the two terms "contract zoning" and "conditional zoning" has resulted from scholars' and courts' attempts to distinguish between technically different types of arrangements, the first of which is likely to be struck down, and the second of which may be upheld as legal.

Theoretical and Legal Foundations

Local governments interested in experimenting with contingent zoning may look to state zoning legislation as their source of authority. They should be aware, however, that while some courts find implicit authority for their undertaking, others have found that current zoning legislation does not contemplate nonuniform regulation of this type.

Local governments interested in contingent zoning as an additional mechanism for financing road improvements will find that this method has considerable potential, but that care must be taken to avoid possible pitfalls. Contingent zoning may be viewed as a legitimate exercise of the police power, but seen also to possess contract characteristics. Although courts may uphold such arrangements under the police power, they carefully consider whether there has been a violation of the "reserved powers doctrine" which prohibits bargaining away of future regulatory power and legislative discretion for the benefit of favored individuals.

Where contingent zoning is concerned, it is possible to reduce the risk of invalidation under the reserved powers doctrine: by observing generally applicable procedural requirements; by requiring unilateral "proffers" from landowners rather than bilateral promises in which the local government also agrees to take action; by clearly articulating standards for approval of conditions; by otherwise preserving an independent legislative stance in determining the conditions that should apply; and by ensuring that such decisions are reasonably and adequately justified by the needs and concerns created by the development. When an agreement is contemplated between the local government and the landowner, a stronger legal posture will exist if negotiation of that agreement has been clearly separated from the handling of the zoning request or other promise of the local government. This procedure, however, may not make sense from a practical perspective because the landowner would have no guarantee of return for his effort.

A number of state legislatures recently have taken steps to remove any uncertainty on the issue of contingent zoning by adopting narrow, but specific, authorizing legislation.

Concerns and Issues

While the courts remain sensitive to protecting property owners from overreaching by local governments who might be tempted to condition rezoning on successive contributions to the public treasury, more play has been given to the question of whether contingent zoning too readily favors private parties at the expense of the public good. Ironically, the concern for the "public interest" most often is raised by neighboring landowners who object to contingent zoning because it permits a compromise arrangement designed to harmonize land uses rather than to preserve the "status quo" and a personal preference about area zoning.

In jurisdictions that have not condemned contingent zoning as invalid per se, a two-step process may be required to determine whether a rezoning arrangement allocates opportunities and obligations in the interest of both the public and the affected landowner. In lawsuits brought by neighboring property owners, the courts generally have reviewed the local government's decision to rezone by using the same standards employed in other types of rezoning litigation, including litigation that challenges rezoning of individual parcels. At a minimum, local governments interested in experimenting with contingent zoning should carefully evaluate and document whether the proposed rezoning does, in fact, make good sense in terms of land use policy.

In decisions to date, courts have indicated that such conditions or obligations may be imposed only as a means of addressing public needs resulting from development proposed *in conjunction with* the requested rezoning, implying that a rational relationship test is employed. Need may be measured in terms of adverse land use effects that require litigation or by demands for public services that must be addressed. Benefit to the affected landowner will not suffice as an alternative justification.

Where the question has been posed in constitutional equal protection terms, in most instances, such challenges have proved unsuccessful in view of the very limited scrutiny applied by the courts. Spot zoning challenges have enjoyed a greater measure of success by arguing that individual requirements contravene the uniformity requirements contained in zoning enabling legislation.

Development Agreements

Description

Development agreements are agreements between local governments and developers, usually sanctioned by state statute, that set out various use limitations and infrastructure/public facility exactions sought by the former, and the freezing of land use controls for fixed periods together with service guarantees for the latter.

Theoretical and Legal Foundations

There is uncertainty in many states as to whether adequate authority exists to sustain development agreements of various sorts. A few states recognize local authority to enter into annexation agreements under specific enabling legislation, by implication under more general annexation statutes, or under home rule provisions. Development agreements that seek to modify court-made vested rights requirements generally have been undertaken only pursuant to express authorizing legislation.

Development agreements are particularly likely to raise questions regarding reserved powers (that is, power reserved to the state) when they include a provision for a "regulatory freeze" designed to allow completion of a particular development project under requirements in effect at the time of negotiation. Steps may be taken to reduce the risk of invalidation of such development agreements by including provisions requiring a periodic review by the local government and by allowing for subsequent imposition of certain types of health and safety regulations.

In light of legal questions regarding enforceability of development agreements, an increasing number of states have adopted enabling legislation for development agreements. California's development agreement statute provides guidance for other states interested in this area. It includes an extensive statement of purpose and cites a variety of justifications for enactment, including a desire to increase certainty in the development process, to spur investment, to keep housing costs low, to improve planning, and to facilitate financing of public facilities. Cities and counties must enter into agreements and establish proce-

dures for considering agreements if requested by an applicant. Government participants must review the status of agreements every 12 months; developers must demonstrate compliance or the agreements may be modified or terminated. Agreements must specify their duration and permitted uses of property, including density or intensity, maximum building height and size, and reservation or dedication requirements. They may only be approved consistent with applicable plans that may contain conditions or terms concerning subsequent discretionary government action, commencement or completion dates, and terms and conditions relating to applicants' financing of necessary public facilities and subsequent reimbursement at the time.

Other key provisions specify that development agreements shall be enforced notwithstanding subsequent changes in applicable plans, zoning, subdivision or building regulations, subject to the prerogative of participating governments to apply nonconflicting rules, regulations or policies, or to provide to the contrary in the agreement itself. Subsequent state and federal legislation is specifically said to apply, however, and development on lands subject to coastal controls must be approved by appropriate authorities.

After some years of consideration, Hawaii also passed a development agreement statute that differs in certain respects from the California model. It creates a significant exception, not expressly included in the California statute, which permits subsequent laws to be applied if there is a need to alleviate situations "perilous" to residents' health or safety. Also unlike California, Hawaii's development agreements are described as "administrative acts," apparently to reduce the risk of being overturned by referendum. Florida has likewise passed a distinctive development agreement statute in recent months.

Assuming that no reserved powers problem is posed and adequate statutory authority exists, a local government that enters into a development agreement must be prepared to comply carefully with the terms of that agreement. A number of scholars have suggested that noncompliance by local governments may at times constitute an impairment of contract in violation of the Federal Constitution. While noncompliance may be upheld if backed by "reasonable and necessary" justifications, this standard may be a difficult one to satisfy.

Local governments in states that lack such comprehensive enabling statutes may be able to rely on police power or implicit authority under annexation statutes to support development agreements undertaken in that context. Without clear authority, however, local governments and developers both run considerable risk of costly reliance on an agreement that may be subject to judicial invalidation. Moreover, because of the relative absence of case law on development agreements, there is little definitive guidance on the allocation of obligations between private and public sectors so far as that issue is raised by development agreements. Contingent zoning precedent would suggest that private parties not be required to contribute to the community more than is warranted in light of needs reasonably arising from their proposed development. Because of the bargaining context in which development agreements are made and in which a developer has agreed to certain exactions, however, the question remains as to whether a needs-based test still applies or if some other standard would apply.

Concerns and Issues

With development agreements, more questions are likely to arise with regard to promises by local governments to provide infrastructure or to freeze regulatory controls.

From the viewpoint of major developers, perhaps the most important element of typical development agreements is a promise by the local government to freeze regulatory controls as they exist at the time the agreement is negotiated. An opportunity to remove the costly uncertainty associated with possible regulatory change and judicial application of vested rights rules may serve as a major incentive for developers to enter into development agreements.

Although a contract to freeze land use regulations raises reserved powers questions, these issues may be addressed in the development agreement itself. A development agreement should (1) specify applicable land use controls (for example restrictions on type of use and height of buildings); (2) be of limited duration; (3) provide for ongoing monitoring or compliance, and modification of the agreement in appropriate circumstances; (4) recognize that changing state and federal law will continue to apply, as well as local regulations of certain types (for example taxation and environmental requirements) and under certain circumstances (if significant health and safety concerns develop); and (5) state that other permits or approvals required in the course of development would be processed under generally applicable procedures. It has also been suggested that because such agreements operate as contracts, local governments may be able to exact more concessions (such as construction of off-site roads) from developers than would be the case under a more traditional police power exaction, when market principles and the concept of quid pro quo do not apply.

Local governments should make opportunities for contingent zoning and development agreements available to all interested parties to avoid the charge that they have been afforded on a discriminatory basis. The adoption of uniform procedures setting a framework within which such development agreements might be reached has several benefits, including ensuring fair and even-handed treatment that can avoid equal protection problems, strengthening the government's position that agreements are reached with sufficient integrity to undercut reserved powers concerns, and addressing procedural due process problems that might otherwise arise.

Careful thought should be given to those who should be made parties to development agreements. Both property owners with legal titles and developers who hold options or equitable interests may need to be included. On the other hand, developers may wish to involve specialized or state-level governmental entities along with local governments as parties to development agreements in order to avoid possible disagreements and changing regulatory postures at a later date.

Finally, because of the risk of invalidation or breach, both local governments and developers should give careful attention to identifying available remedies at the time they enter into contingent zoning arrangements or development agreements.

CONCLUSION

Several techniques or approaches are available to permit private participation in what traditionally have been public-funded highway improvements. Each state will differ, dramatically or subtly, in its constitutional, statutory, and case-law framework for such efforts, but authority for one or more of these cooperative techniques probably is available in most jurisdictions. Table 1 summarizes the major characteristics of the financing

Table 1. Summary of selected highway financing mechanisms.

mechanisms previously described, particularly as related to legal issues and as they are applied in various states.

	SPECIAL ASSESSMENT	TRANSPORTATION IMPACT FEE	DEVELOPMENT AGREEMENT
SOURCE OF POWER	Taxing power, although some states (e.g., Florida, Texas, Colorado) also have implemented hybrid mechanisms using both taxing powers and police powers. All 50 states have express special assessment enabling legislation.	Police power, usually derived from zoninng and subdivision enabling legislation or home rule power. A few states have express impact fee enabling legislation (e.g., Texas, New Jersey) and others are considering the same (e.g., Florida, Illinois).	Policy power, usually derived from zoning and subdivision enabling legislation or home rule power. A few states have express development agreement enabling legislation (e.g., California, Florida, Hawaii, Nevada, New Jersey).
REQUIRED ENABLING LEGISLATION	Requires express enabling legislation in all states.	Requires enabling legislation in Dillon's Rule states. Enabling legislation desirable, but not required in non-Dillon's Rule states; may rely on police powers or home rule authority.	Formal development agreement requires ennabling legislation; however, contingent zoning allowed under certain circumstances without enabling legislation.
LEGAL DEF-ENSIBILITY	Traditionally upheld in courts throughout nation.	Upheld in courts in several states.	Not fully tested, but contingent zoning upheld in certain circumstances.
WHERE USED	All 50 states have special assessment legislation, but only a few, such as Colorado, Florida, Texas and Washington, use it for highway financing.	California, Colorado, Florida, Illinois, Maryland, New Hampshire, New Jersey, North Carolina, Oregon, Pennsylvania, Texas, Utah, and Washington.	Formal development agreements are used primarily in California, Florida, Hawaii, Nevada & new Jersey, but most states use some form of contingent zoning and development exactions (e.g., Virginia "proffers" system).
HOW USED	Used to finance public facilities which specially benefit the property assessed.	Used to finance new development's fair share of public facilities which benefit the entire community.	Used to finance public facilitaties which may benefit the development and/or the entire community.
LEGAL STANDARD	Special benefit	Rational nexus	Contract
WHO ASSESSED	New and existing landowners within district.	New development only.	Developer entering into agreement.
LAND OR DEVELOPMENT ASSESSED	All land specially benefited (limited to district) is assessed.	All impact generating development is assessed.	Development subject to agreement is assessed.
TYPE OF PROPERTY OR DEVELOPMENT ASSESSED	Any type within district.	Any type (residential, commercial &in-dustrial) generating impact.	Any type, but primarily large scale development.
TYPE OF PUBLIC FACILITY FINANCED	Any type of public facility allowed by statute, but usually not including areawide road system.	Any type of public facility, including areawide road system.	Any type of public facility including road system.
ON-SITE OR OFF-SITE PUBLIC FACILITY FINANCED	Primarily on-site, but trend toward off-site as well.	Off-site.	On-site and off-site.

Table 1. Continued

	SPECIAL ASSESSMENT	TRANSPORTATION IMPACT FEE	DEVELOPMENT AGREEMENT
AMOUNT ASSESSED	A landowner's proportionate share of the benefit of public facilities.	New development's proportionate share ("fair share") of public facilities needed by the development.	Amount varies with each agreement, but should be reasonable.
ADMINISTRATIVE COSTS	Low administrative costs to establish, but may be higher for bond issues or annual adjustments.	Higher administrative costs to implement, but less for annual adjustments.	Least administrative costs, but may vary with agreement.
PREDICTABILITY OF REVENUE	Steady, predictable source of revenue.	Revenue fluctuates with rate of development.	Revenue determined at time of agreement and may vary with each agreement.
TIME OF PAYMENT	After commitment to improvement and after time of assessment. May be on installatment basis.	Generally at issuance of building permit, but may be at plat approval or issuance of certificate of occupancy.	At time of execution of agreement or as specified in agreement.
BONDING	Often used to secure or apy for bond issues to finance public facilities.	Rarely used to secure bonds and then only when restricted to those aspects of bond attributable to expansion of public facility system necessitated by new development. Rarely, if ever, used to pay bonds.	Not used.
EQUITY	Equitable to extent of type of method of apportionment employed.	Most equitable if appropriate credits are given.	Less equitable to developer and may vary with agreement.
POLITICAL ACCEPTABILITY	Generally acceptable to land owners within district.	Most acceptable to existing residents and development, and less acceptable to newcomers and developers.	Depends on terms of agreement.

CHAPTER FIVE

IMPLEMENTATION GUIDELINES

The legislation described in Appendix B will greatly facilitate the use of public and private highway funding partnerships throughout the United States. In addition to this legislation, however, practical guidelines are needed for implementing partnerships. This chapter focuses on the implementation of partnerships by local and state transportation officials. A summary of current practice is provided as a brief guide to the use of the various mechanisms and their advantages and disadvantages. The conditions desirable for successful implementation of public and private partnerships are discussed, as are the benefits and costs to the public and private sectors from partnership funding. The chapter then covers the step-by-step implementation guidelines.

CURRENT PRACTICE

The three most widely accepted methods of public and private highway financing are traffic impact fees, special assessment districts, and development agreements. This section defines the

mechanisms, provides examples of their use, discusses practical financial and legal issues associated with each, as well as their strengths and weaknesses.

Overview of Mechanisms

Traffic impact fees are charged to new development by local governments to pay for the cost of improving roads to serve the additional traffic generated by the new development. These one-time fees are based on traffic studies that determine future needs. The fee rates are calculated based on the number of trips generated by various land uses and the cost of constructing highway capacity to accommodate those trips. The fees are usually published in tables showing the fee per dwelling unit for residential developments, fee per square foot for commercial developments, and other easily computed figures.

Special assessment districts are designated areas in which property is assessed for the cost of public improvements that benefit the property. The assessments are usually imposed on an ad valorem basis, although acreage fees and front footage assessments also have been used. At least one special assessment district has based assessments on traffic generation. A special assessment district must assess property for specific improvements benefiting that property; unlike taxes that are shared with other revenue sources, the assessments must be used for specific items.

Development agreements and related mechanisms such as negotiated agreements, exactions, or conditional zoning are a common method of obtaining private funds for highway improvements. These agreements are negotiated during the approval of a development project and are applied as conditions of approval. These conditions are usually applied during zoning or subdivision approval, when local government has broad discretion in approving a project. However, they may also come into play during site plan approval, as part of an adequate facility requirement.

Examples of Use

Traffic impact fees originated in such rapidly growing areas as Florida and California, and they have recently spread to other states, including Colorado, Illinois, Maryland, New Hampshire, New Jersey, North Carolina, Oregon, Pennsylvania, Texas, Utah, and Washington.

Special assessment districts exist in all states, but are currently used for highway funding in only a few states, including Colorado, Florida, Texas, Virginia, and Washington State. Townships in Pennsylvania have recently used special assessment districts through the Transportation Partnership Act. Special assessment districts often are formed in developing areas by land owners as a financing mechanism for road improvements to allow development of the property. The land owners in effect assess themselves and future owners for those road improvements.

Development agreements or related mechanisms are used throughout the country. They range from informal agreements by developers to improve streets or intersections in order to obtain staff approval to the very detailed and formal development agreements used in California and Florida.

Table 2 summarizes some examples of the use of each of these mechanisms.

Issues and Comparison of Mechanisms

The advantages and disadvantages of each of the various funding mechanisms are discussed below, based on practical, financial, and legal issues.

Traffic impact fees are politically acceptable because the fees are perceived as being imposed on new residents and businesses. Voters and elected officials favor them rather than increasing the taxes of existing residents. This political fact is particularly important in areas that have experienced rapid growth and where residents perceive the growth as adversely impacting them.

Traffic impact fees have also been largely accepted on both technical and legal grounds. A fee system based on a technically sound transportation planning study is likely to be found legally valid as well. Several cases have upheld the legality of impact fees that were based on transportation studies and were to fund only those facilities requiring new development.

The third advantage of impact fees is that they are equitable for all types and sizes of development and so are favored by most developers over negotiated agreements or controls on growth. The fees usually do not significantly affect the cost of the development. They are also known in advance and, thus, can be included in the financial feasibility studies for development projects.

Impact fees also have some drawbacks. They are assessed only on new development and not on existing development. They therefore cannot be used to correct existing deficiencies. While the fees are (or should be) structured so that they cover only the cost of improvements needed to serve new development, the new development must also pay taxes for portions of the road system not covered under impact fees. (Few impact fees systems include a credit mechanism to compensate for such double payment.)

Impact fee revenues are collected gradually over time as development occurs, are usually required to be spent within the zones in which they were collected, and within a designated time period. These restrictions may result in a piecemeal pattern of improvements that are made as funds become available. Because the impact fees are based on uncertain development activity occurring over time, they are not reliable as a source of bonding revenue, and so are limited in funding major improvements.

The cost of administering impact fees may be significant. In addition to the cost of the initial traffic study (and regular updates), the administering agency must account for collections and disbursements of fees for each zone, as well as tracking the time limits on spending the fees. Credits for construction in lieu of fees, which is usually permitted by the ordinance and preferred by the developer, must also be tracked. Credits accrued by the developer must often be transferred to one or more subsequent purchasers of property and to the ultimate builders. This administrative task may be burdensome to small cities and counties.

Special assessment districts enable the cost of improvements to be shared by all properties that will benefit significantly from the improvements by including existing developments as well new construction. Assuming ad valorem assessment and a constant total annual debt service, a developed property's annual assessment will decline as other property develops and begins paying a larger share of the total.

Special assessments have a long history and are regarded as

Table 2. Examples of public and private highway funding.

Funding Mechanism	Location	Comments
Special Assessment District	Chester County, Pennsylvania	Funding of $20 million in road widening and interchange reconstruction through PennDOT, special assessment districts, and major developer. Special assessment district formed under Pennsylvania Transportation Partnership Act includes 2,000 acres under multiple ownership, with 9,000 employees, and projected 75% increases in assessed value by year 2015.
	Troy, Michigan	Funding of $11 million in road improvements by a 400-acre special assessment district, plus 2.7 million in city funds. District has 1.5 million square feet of office/research space existing or under construction with 5.7 million square feet total planned. Assessment based on acreage.
	Arapahoe County, Colorado	Several Metropolitan districts have formed an association to fund $20 million in improvements along I-25 corridor southeast of Denver.
	Colorado Springs, Colorado	METEX Metropolitan district, established in 1985, assesses 7,500 acres of undeveloped land to upgrade two-lane arterial to six-lane expressway. A 9,100-acre development is using a Building Authority to assess property and fund $65 million in road improvements.
	Travis County, Texas	County Road Districts have been used throughout Travis County and in other parts of Texas to finance road infrastructure for large new developments. These districts are formed by the County but rely exclusively on revenue bond financing for new roads and improvements.
Traffic Impact Fee	Raleigh, NC	Adopted in 1987, authorized by 1985 enabling legislation (local bill). Fees set conservatively: $292/single family unit, $318-$517/KSF office, $905-$1,188/KSF retail. Fees cannot be used for more than 50% of any project, cannot be used for bond payments.
Traffic Impact Fee	Palm Beach County FL	Adopted in 1979, revised in 1985. Contested by homebuilders association, upheld by Court of Appeal in 1983. Fees are $800-$1,050/single-family unit, $490/KSF office, $1,000-$2,700/KSF retail. Performance standards significantly outweigh fees for large projects.
	Orange County, CA	Corridor fees similar to traffic impact fees, need to fund one-half the cost of 60 miles of freeway in Southern Orange County. Fees are based on traffic and benefit from freeways, range from $920-$1,305/single-family unit, $1,300-$1,800/KSF non-residential.
	San Bernardino Co., CA	Adopted in 1987, including countywide enabling ordinance and specific ordinance for the Yucaipa area. Fees are $1,500/acre for commercial, $950/single family unit, $750/multi-family unit, and $425/mobile home.
	Broward County, FL	Fees set based on computer model which includes marginal cost of increasing capacity on each road facility impacted by development.
	Upper Merion Township, PA	Adopted in 1985. Fees are based on peak-hour trip generation $930/single family unit, $2,000-$2,600/KSF office, $2,300-$13,400/KSF retail.
	Orange County, Florida	Adopted in 1985, based on $300 fee per trip generated (approximately $3,000/single family unit, $4,500/KSF office, $15,000/KSF retail).
	San Diego, California	Adopted in 1981, upheld in court in 1984. Fees vary by area of City, range from $125 to $9,000 per single family unit, averaging $1,200 to $3,000. (Total fees include non-transportation items.)
	Loveland, Colorado	Adopted in 1983 for transportation and other infrastructure improvements. Detailed methodology was used to set fees, which range up to $6,600 per dwelling unit.

Table 2. Continued

Funding Mechanism	Location	Comments
	Hudson, New Hampshire	Adopted in 1985, fees apply to one corridor in which development has created congestion, based on PM peak hour trips. System includes joint funding plan.
Development Agreements and Contingent Zoning	Fairfax County, Virginia	Proffer zoning, a type of conditional zoning, has been authorized since 1975 for specific cities and counties in Virginia. Transportation proffers, while "voluntary" on the part of developer, undergo considerable analysis at both local and state levels, as well as lengthy negotiations.
	Florida (Statewide)	Florida law requires a detailed review of all "developments of regional impact" (DRIs). The review process was established in 1981 and modified in 1985. The transportation element is normally the most complex and controversial aspect, and results in negotiated development agreements between the developer and local government.
	Palm Beach County, Florida	Traffic performance standards were adopted in 1981 and are the basis for developer contributions related to rezoning approval. Such contributions are credited against impact fees.
	Newport Beach, California	The 1979 traffic phasing ordinant uses traffic impact anlysis to determine the intersection improvements required for development approval, before issuance of a building or grading permit.

a tried and proven funding mechanism. Virtually all states have provisions for various types of special assessment districts. These may require only minor modifications (or possibly creative interpretation) for application to large-scale highway improvements.

An ad valorem assessment produces a known income stream over time and thus can be used for funding long-term revenue bonds for major improvements. Because the improvements are for public benefit, tax-exempt bonds are used, which reduce the interest rate and the overall financing cost of the improvements. With this type of financing, the maximum assessment is known in advance and the cost can be financed over time as development proceeds, rather than paid in advance or with short-term notes.

The primary difficulty with a special assessment district is defining the district boundaries. Unlike water and sewer systems, the highway network is an open system with no clearly defined boundaries for the area served by any roads beyond local streets. It thus becomes extremely difficult to define a fair and rational benefit area for a major highway improvement. In practice, special assessment districts are usually proposed and defined by land owners who have agreed on an appropriate benefit area for the proposed project. This negotiation process depends on a cooperative group of land owners (or voters, or both landowners and voters, depending on the state legislation).

A disadvantage in some states may be the difficulty in drafting and passing the required legislation. Another drawback is the amount of "soft cost," or the cost of financing inherent in bonding. These soft costs may add up to a substantial portion of the total bond issue.

Finally, the use of ad valorem assessment may not accurately represent the benefit derived by various properties or especially the proportion of the cost attributable to them. For example, industrial property may be assessed at a higher value; yet, it may generate less traffic and may derive a much smaller benefit from road improvements than a shopping center.

A major advantage of *development agreements* for local governments is that significant private-sector financed highway improvements can be negotiated during the approval process for large developments. Because the local government has approval authority, a significant incentive exists for developers to make such improvements.

Site-specific negotiated agreements can be developed to address the roadway needs caused by a specific development, both in terms of type of improvement and, especially, timing. Unlike traditional funding mechanisms, where improvements usually lag behind need, development agreements usually require improvements to be in place prior to occupancy of the development. The improvements required under a development agreement to serve both site-generated and existing (or future) traffic can be determined by traffic impact analysis. Some local governments and developers favor development agreements because of their versatility. Such agreements can be made to serve the specific needs of the local government and the developer, as well as the traffic needs of the site development.

The primary disadvantage of development agreements is equity among developers. Large developments often must make large-scale improvements, while small developments make few if any improvements. The level of improvements required may be determined as much by negotiating ability and political factors as by technical issues. Even if the improvements required were determined objectively, it would still be difficult to treat all developers equally because of differences in sites, street configurations, and other location factors.

Development agreements also may create problems in enforcement and administration. Some negotiated agreements are not legal, and the local government thus may have difficulty in enforcing the agreement if the developer reneges. Even when such agreements are legal, enforcement still may prove to be difficult, partly, because of the difficulty in coordinating among various departments (e.g., transportation and building inspection or permit issuing) for follow-up on a large number of agreements. This process is made more complex when phased

improvements are required with a phased development, or when traffic monitoring is required as part of a project.

Finally, negotiated agreements often result in piecemeal improvements, with widened sections of roadway alternating with narrow sections, and with different design approaches applied to street sections built by different developers. Publicly funded improvements often are required to link the various privately funded improvements and provide system-wide continuity.

SUMMARY OF DESIRABLE CONDITIONS

It has been determined from the research conducted for this and other studies that almost all instances of successful public and private partnerships have several common characteristics. These characteristics relate to the economic and political conditions in the project area, the type of development planned, the highway and traffic characteristics, and even to the specific individuals and their roles in forming the partnerships. The desirable conditions for forming successful partnerships are defined and discussed in the paragraphs below.

Successful public-private partnerships depend on environmental conditions (or existing conditions in the local area) and project-specific characteristics. These critical areas are classified as follows:

1. *Environmental:* existing traffic congestion, rapid growth, strong economy, citizen groups, business community, and previous experience.
2. *Project Specific:* size of project, type of project, traffic impact, and access needs.

Existing Traffic Congestion

The degree of actual or perceived traffic congestion in an area is an important influence on public and private partnerships for several reasons. First, a high degree of perceived traffic congestion heightens public awareness of the traffic impacts of new development and may lead to a requirement for private sector participation in improvements. In addition, a perception of traffic congestion on the developer's part will make him more receptive to providing or participating in road improvements, and may even motivate developers or owners of existing developments to initiate large-scale improvements.

Rapid Growth

A recent history of rapid growth in an area increases public awareness not only of traffic problems, but also of the degree to which traffic is increased by rapid growth. Rapid growth also tends to polarize a community into pro-growth and anti-growth factions. A tendency arises to segregate the public costs incurred by growth so as not to subsidize new development with general tax revenues paid by existing residents and businesses. This tendency often is translated into a policy that new developments must pay for the additional infrastructure required to serve them.

Strong Economy

While related to the issue of rapid growth, the need for a strong economy is based on the perception that development will continue to occur regardless of fees, exactions, or other requirements to provide highway improvements. Many jurisdictions that have experienced rapid growth and traffic congestion do not obtain private sector contributions for road improvements because of a perception that such participation will slow down development or scare away potential developers. Also, if the economy is perceived as strong, new development may not be as strongly sought after by the community and is more likely to be required to "pay its dues."

Citizen Groups

Citizen groups have played roles in virtually all of the successful public and private partnerships studied. Their influence is felt in two ways: (1) in shaping legislation and policies that apply to all development, and (2) in requiring improvements by specific developers. Citizen organizations usually represent existing residents concerned with (and usually opposed to) future development. In addition, these groups often have considerable political influence, particularly when they are well organized. These groups are often the motivating factor behind the provision of road construction as a mitigation measure for new development, although they may in some cases oppose the road construction as much as or more than the development itself. Most of the large public–private road improvements have involved considerable influence and participation on the part of citizen groups.

Business Community

The attitude of the local business community, as well as the developer involved in a specific project, is important in determining the success of public and private partnerships. While developers tend to be extremely independent and one developer may proceed counter to the wishes of the rest of the business community in order to get a project approved, a widespread and long-term partnership agreement, such as a traffic impact fee ordinance or special assessment district, can be successfully formed only with the support of the business community at large. This support is necessary to have legislation that will be accepted by developers and other businesses.

Previous Experience

If the private developer or the local planning or engineering staff has had previous experience with public and private partnership funding, the likelihood of success is increased by the increased level of experience and confidence afforded by such experience. If this experience includes representatives from both the public and private sectors, the degree of cooperation will increase even more, bringing an increased probability of success.

Size of Project

Large projects are much more likely to be involved in public and private partnerships than small ones, for two independent reasons. First, large projects have a greater traffic impact on the road system, require more road capacity and access capability, and are usually more controversial than small projects.

Table 3. Desirable conditions in case studies.

	CASE STUDY				
	Orange County Corridor Fees	Palm Beach County Fair Share Fees	Chester County Transportation Development District	San Antonio Westside Expressway	Travis County Road Districts
Environmental Conditions					
Existing Congestion	Yes	Yes	Yes	Yes (in area)	Somewhat
Rapid Growth	Yes	Yes	Yes	Yes	Yes
Strong Economy	Yes	Yes	Yes	Yes	Yes (at time of implementation)
Citizen Groups	Yes	Yes	Yes	Yes	Yes
Business Community	Support, after Meetings	Support	Support	Support	Support
Experience	Yes	Yes	No	Yes	Yes
Project Specific					
Size of Project	Large land-holdings	N/A	Large (new development)	Very large	Mostly large
Type of Project	Mostly Residential some mixed-use	All Types	Office, Industrial	Office, mixed-use	Residential and Commercial
Traffic Impact	N/A	N/A	Major Impact	Major Impact	Some Impact
Access Needs	Project needed for	N/A	Improve Access	Improve Access	Improve Access

Secondly, large projects are better able to fund major improvements because of a larger financial base and an increased ability to pass on costs to secondary developers, property owners, or tenants. Only in an impact fee case is the size of the project irrelevant. Even a special assessment district, in which costs are shared by a number of property owners, is more effectively implemented if one or more large property owners or developers take the lead in forming the district.

Type of Project

The type of project relates the success of public and private partnerships in many of the same ways as the project's size. Those projects most likely to participate in improvements are those that are relatively high density, high cost or "upscale," and that generate significant traffic volumes. Such projects also include those for which location and accessibility are important. Office centers and business parks appear to have the greatest frequency of participation in highway improvements, with shopping centers also participating to a large extent. Some residential developments make major contributions, but these are relatively infrequent and apply only to very large developments. Industrial and manufacturing developments seldom participate in highway improvements, partly, because their location criteria are different and, also, because they are viewed favorably by local communities as increasing employment and the tax base.

Traffic Impact

Projects with significant traffic impact are most likely to participate in improvements for essentially the same reasons as large projects. These two categories are sometimes synonymous, although the degree of traffic impact in this context refers as much to the conditions on the existing road network serving the project as to the trip generation characteristics of the project. A project located in an area with inadequate roads or with existing congestion will have more of an impact than the same project at a location that can more readily accommodate the project's traffic.

Access Needs

Developers have made major highway improvements to improve their access to the highway network, as opposed to improvements that would increase capacity of nearby streets. This direct accessibility is particularly important for shopping centers and, to a somewhat lesser degree, office centers. While direct access improvements, such as turn lanes and signals, are usually considered to be on-site improvements, other types of access improvements may involve more off-site work that would benefit other property and the non-site related traffic.

Case Study Analysis

The five case studies included in this project (Table 3) illustrate the desirable conditions existing for each project.

As shown in the table, almost all of the desirability criteria were satisfied by the case study projects. The major exception is Palm Beach County's traffic impact fee, which applies to all development, regardless of size, location, or individual project impact. However, Palm Beach County also has in place traffic

performance standards, which apply primarily to larger projects with significant impact on the roadway system.

BENEFIT AND COST ANALYSIS TECHNIQUE

The implementation of public and private partnerships can be facilitated by an analysis that evaluates the benefits and costs of implementing such a partnership. These benefits and costs should be allocated to the public sector or private sector so that all participants in cost-sharing arrangements can determine their own benefits and costs. The methodology discussed here can be applied in specific cases to identify costs and benefits of using various financing mechanisms to potential participants. The following sections discuss the various benefits and costs to the public and private sectors, after which benefit and cost analysis formulas are introduced and explained. It should be noted that some of these benefits and costs are not easily quantifiable.

Public Sector Benefits

The benefits accruing to the public sector from public and private partnerships may include right-of-way for highway improvements, cost of the improvements themselves (construction and design), increased tax base, and increased mobility.

The contribution of right-of-way for future highway construction provides a savings in several areas. First is the right-of-way, which can be considerable in developed or commercially zoned areas. The cost of acquiring buildings or other improvements is also saved, since the right-of-way is dedicated before the property is developed. The time involved in negotiating with property owners or condemning properties is saved, as are the legal fees and other administrative expenses involved in acquiring right-of-way. This early acquisition of right-of-way may provide additional benefit to local governments in that state-funded projects may be accelerated if right-of-way is available; conversely, some states will not participate in construction unless right-of-way has been provided locally.

If the highway improvements themselves are designed and constructed by the private sector, significant costs are saved by the public sector. However, the entire construction cost should not be considered as a benefit, as some road construction is necessary to provide access to development and to provide additional capacity to serve the new development. Determination of true net benefit to the public sector will involve judgment regarding the compatibility of the development served by the road improvements with the community's growth and planning objectives.

If the development is considered to be excessive or premature and is allowed only because road capacity is increased to serve the development, the value of the increased capacity should not be considered to be a benefit to the public sector, except for the benefit it provides to "other" nondevelopment-related traffic. If the development does conform to planning objectives, the full cost of the road should be considered as a benefit. The status of the new or improved road on the local transportation plan or thoroughfare plan should also be considered. Again, if the improvement project conforms with the transportation plan, it should be considered as a full benefit; if not, the benefit should be reduced.

A further benefit to the public is the increased tax base resulting from new development served by the increased highway capacity. This increase should be prorated based on the amount of intensity of development that would have occurred without the improvements. (The cost of serving the new development is discussed under "Costs" later in this chapter.)

The increase in mobility by the general public is another benefit attributed to the public sector by the use of public and private financing of highway improvements. This benefit can be defined in terms of reduced travel time, reduced vehicle-hours of delay, and shortened trip lengths.

The final benefit to the public sector is the accelerated construction of improvements made possible through public and private partnerships. The commitment of private funds usually involves a development project with critical timing, thus motivating developers to make the improvements as quickly as possible in order to develop the project on schedule. Even though the improvement is to serve development traffic as well as other traffic, building it well in advance of the need provides a significant benefit over traditionally funded projects in which construction almost always lags behind the need for highway facilities.

Private Sector Benefits

The benefits to the private sector from public and private partnerships include increased accessibility, increased areawide mobility, reduced construction time, benefit to private design firms, possible tax deductions, reduced construction cost, and other benefits resulting from specific types of funding mechanisms.

The most important benefit to the private sector is the increase in property value due to the road improvement. This increase in value should not be attributed exclusively to increased accessibility and traffic capacity, because it is usually a result of rezoning, density increases, or other development approvals that are granted, at least in part, as a result of the proposed highway construction. The most direct example of such an increase is the Westover Hills property in San Antonio, Texas. This 4,000-acre tract was originally planned to be developed as a low-density residential area. After the Westside Expressway (SH 151) was designated, the land use plan for the development was revised to provide for significant commercial land use, with up to a tenfold increase in property values in those areas. Increases in property value can result from smaller scale road construction; in fact, most of the benefits discussed in this section to some extent result in higher property values.

The second major benefit to the private sector is increased accessibility. Although this is, to a large extent, capitalized as higher property value, it also provides a benefit to businesses and residents serviced by the improvements. These benefits may include more customers (in the case of retail centers); shorter travel time for employees, higher occupancy, and possibly higher lease rates (in the case of offices); more timely deliveries and lower transportation costs (in the case of manufacturing or industrial centers); and higher occupancies and rental rates (in the case of apartments). These accessibility-related factors, while reflected in property values, also provide benefits to the property owners and occupants prior to sale of the property.

A benefit related to accessibility but on a more general level is increased areawide mobility. As used here, this factor does not include the direct benefits to a property owner, but rather the indirect benefits from an overall better quality of life as it relates to mobility in the urban area or in the subarea served

by the improvements. A private contributor to a highway improvement program could receive additional individual benefits from public recognition of his sponsorship of the program. Several public and private partnership projects included the placement of signs during construction describing the improvements and their sponsors.

Private design firms generally benefit from public and private funding for several reasons. First, the project is either a completely new project or one that has been moved from a low priority, and thus adds to the total highway design market for that period. Second, the fact that the project must be designed and built quickly makes it likely that it will be designed by a private firm rather than by a public agency. The accelerated schedule and the access considerations involved in the road design also tend to increase the design fee above the typical fee for a public sector project.

If construction is controlled by the private sector, the construction cost of the project is likely to be lower than for a public project, due in part to the private sector's ability to negotiate with contractors rather than operating on a bid system. The cost may be reduced further if the project does not have to comply with state and federal environmental restrictions and other requirements that increase both the planning and design time and construction cost of highway projects. (These latter benefits may not apply in states such as California and Pennsylvania, which have strict state environmental regulations.)

An additional benefit to the private sector may be the ability to deduct portions of contributions to some public and private projects from federal and possibly state taxes. The extent of the deductibility is governed by federal and state tax laws and is, of course, affected by the method of donation as well as the extent to which the contribution enhances the property of the contributor. At least one public and private partnership mechanism, the Texas Transportation Corporation Act, has been successfully used as a way of donating funds or right-of-way to a nonprofit organization. The use of tax-exempt bond financing through special assessment districts provides an indirect tax benefit.

Other private sector benefits depend to a large extent on the type of partnership mechanism used. Traffic impact fees generally produce increased areawide mobility, a reduced level of negotiated development agreements (a benefit to larger developers), and lower taxes to the extent that improvements not funded by impact fees would be tax-financed. Special assessment districts would offer the same benefits, plus the advantage of each property owner's paying for improvements over time rather than in one payment. The low interest rates available through bond financing also provide a benefit. Those projects that involve both public and private sector funding provide a benefit to the private sector as compared with a project totally funded by the private sector.

Public Sector Costs

Costs to the public sector for public and private partnership highway improvements may include the actual cost of public sector funding for the project, costs of review and inspection, possible lower design standards and criteria, changes in highway funding priorities, additional maintenance costs, nonhighway costs of serving new development, and the impact of new development traffic on other portions of the local highway network.

Public sector funding for the project may include direct cash payments for right-of-way, construction, or design as well as in-kind services such as plan review, in-house design, or field inspection. These payments and services should all be included in public sector costs, because they are resources that could be directed to other needs if not used for a particular project.

A public cost that may be difficult to quantify involves the fact that projects with private funding tend to be designed and constructed differently from purely public projects. These differences occur because, when the private sector contributes to the funding of a project, it expects to have greater impact in the design of the project. The private sector input may be in terms of access, such as the developer-funded exit ramps on the Route 29/US 202 interchange in Chester County, Pennsylvania, which provide direct access to an office park. Such a design, while providing safe, acceptable service, is quite different from that which Penn DOT would have recommended. Because of the private sector's greater sensitivity to cost, privately funded improvements may use innovative approaches or use "minimum" rather than "desirable" standards in order to reduce capital costs. Although these approaches may not involve direct cost to the public sector, such indirect costs as less direct routing, reduced levels of service, and possible increased maintenance should be considered.

The issue of changing funding priorities is one that has caused considerable debate. Pennsylvania and Texas have adopted policies that projects with considerable local (public or private) funding should be moved up on the statewide priority program. (Pennsylvania controls the changing priorities by requiring that all transportation partnership projects be incorporated into municipal, county, regional, and statewide transportation improvement programs before federal or state funds can be spent on such projects.) In contrast, North Carolina recently enacted legislation prohibiting the Board of Transportation from accelerating projects due solely to local funding, and prohibiting local governments from contributing substantial amounts to state projects. Regardless of an individual state's policy, it should be recognized that the shifting of statewide or local priorities based on the extent of private funding means that other needed projects will be postponed and that the state may have to contend with bidding for projects, at the expense of those areas without local funds to compete for highway improvements. This cost may be difficult (or impossible) to quantify, but should nevertheless be considered as a policy implication.

The additional costs of maintaining new highway construction, even when constructed by the private sector, almost always are borne by the public sector. While such costs are seen as minor in the short term for relatively small improvements, such projects will eventually require resurfacing, reconstruction, and other maintenance, and will compete with other roads in the jurisdiction for scarce maintenance resources.

The costs of serving new development permitted by constructing the improvements or stimulated by the improvements should also be considered by public agencies. If the improvement is constructed to allow a higher intensity of development than would otherwise be feasible or permitted, that development will incur public costs other than those related to traffic served by the improvements. Traffic from the development will impact other roadways off-site. Other nontraffic costs incurred by the high-density development would include the costs of providing utilities, fire, and police protection, schools (for residential de-

Table 4. Costs and benefits to public and private sectors.

Public Sector	Private Sector
Benefits	
Right-of-way donation	Increased property value
Construction and design by private Sector	Increased accessibility
Increased tax base	Reduced construction time
Increased mobility	Design firms benefit
Accelerated construction	Tax deductions
	Reduced cost
	Reduced taxes (marginal)
	Reduced negotiated agreements (with impact fees or special assessment district)
	Bond financing (special assessment district)
Costs	
Direct cost	Direct cost
Review and inspection	
Access/design standards	
Change in priorities	
Maintenance cost	
Service new development (include other traffic impact)	

velopment), parks, drainage and flood control facilities, and general community facilities.

Private Sector Costs

Unlike the costs to the public sector, private sector costs generally are direct and quantifiable. They include the actual cost to the private participants of providing the new facility. In the case of total private funding, this cost includes the value of land dedicated plus the design and construction cost of the improvements. This cost should include all off-site improvements plus on-site improvements only to the extent they are upgraded to serve the general public, as well as site traffic, as in the case of a collector or arterial street through a development. Where the costs are shared or where there is provision for developer payment other than direct construction, these costs may be in the form of a lump sum payment, a traffic impact fee, or an annual assessment based on property value.

The various costs and benefits to the public and private sectors are described in Table 4.

Analysis Technique

The benefit and cost analysis technique calculates the net benefit to the public sector and to the private sector; that is, total benefit less total cost. Ideally, a proposed project would have positive net benefit for both the public and private sectors. If the net benefit for the public sector is negative, the public officials reviewing the project should determine whether changes can be made that would increase the benefits or decrease the costs to the public sector. The private sector typically does its own analysis and proceeds only if there is a high net benefit, taking risk factors into consideration. Clearly, several of the factors to be included in this analysis are subjective and estimates may vary with the analyst's opinions and techniques. Items outside the specific benefit/cost analysis technique such as nonquantifiable benefits and costs, minimum acceptable rate of return, and allocation of scarce resources also should be evaluated. A positive benefit and cost ratio may not necessarily imply an acceptable rate of return and, in most cases, limited budgets will not allow the construction of all projects with positive benefit and cost ratios. This technique may be supplemented with other analyses, such as factor analysis and rate of return analysis.

This technique also may be used to evaluate a process that will be applied to many developments, such as an impact fee ordinance, as well as a specific road improvement partnership proposal.

The basic formulas to be used follow:

$$NB = B - C$$

$$NB_{PUB} = ROW + CON + TB + MOB + ACCEL - DC - IC - DES - PRTY - MAINT - DEVEL$$

$$NB_{PVT} = PV + ACC + CT + DE + TX + LOCST + NEGO + BOND - COST$$

where NB = net benefit; B = benefits; C = costs; ROW = value of right-of-way; CON = value of construction and design; TB = increase in tax revenue at current rates (present value) due to new development; MOB = increase in mobility to general public (present value of annual savings in dollars, based on reduced travel time); ACCEL = benefit from accelerating project (present value of sum of annual benefits); DC = direct cost to public agency (present value); IC = indirect cost (in-kind services); DES = cost of change in design standards that cause reduced level of service (present value of annual increased delay or accident costs); PRTY = cost of changing priority of other project; MAINT = cost of future additional maintenance; DEVEL = cost of serving additional development made possible by road improvement; PV = increase in property value; ACC = dollar value of increase in accessibility, other than reflected in property value; CT = savings due to accelerated construction time; DE = increased fees to design firms; TX = tax benefits; LOCST = savings due to construction by private sector; NEGO = reduced negotiated developer agreement costs; BOND = savings due to bond financing; and COST = total cost to developer (construction plus right-of-way plus design plus financing).

The foregoing costs and benefits should all be stated as present values, so as to recognize the time value of money at a given interest rate.

Although the formulas show the addition of all public sector benefits and costs and all private sector benefits and costs, it is evident that these costs and benefits will accrue to different entities. For example, a typical development-related public and private partnership may primarily benefit the local jurisdiction; yet, the public sector costs may be borne by the state. It may, therefore, be desirable to perform separate benefit and cost analyses for various levels of government. While the benefits to the private sector accrue primarily to the developer or land owner, the design fees would clearly not be seen as a benefit to the developer who pays them.

Example

As an example of the application of this technique, a partnership scenario was developed and a simplified benefit and cost analysis was performed. It should be noted that several of the dollar values stated as benefits or costs would require considerable analysis to determine for an actual case. In addition, nonqualifiable benefits and costs should also be considered.

The owner of a 100-acre tract desires rezoning from single family residential to office and commercial zoning, which will enable him to build a 400,000-sq ft shopping center and 1,200,000 sq ft of office development. He offers to provide right-of-way and pay one-half the cost of a $5 million arterial connector and interchange that will provide direct access to the property from an interstate highway. The arterial and interchange have long been on the local thoroughfare plan but at a low priority. What are the costs and benefits?

Public Sector Benefits and Costs

ROW = value of right-of-way
2,000-ft roadway × 100 ft wide = 4.6 acres
interchange area = 8 acres
12.6 acres × $10,000/acre = $126,000

CON = value of construction and design = $1.5 million

TB = increase in tax revenue
current revenue = 100 acres × $10,000/acre × 0.01 tax rate = $10,000/year
future revenue = 0.01 (100 acrea × $100,000/acre + 1,200,000 SF × $100/SF) = $1.3 million/year
present value of 10 years additional revenue = $9,494,000 (at 6 percent)

MOB = increase in mobility to general public
12,000 ADT × 365 × 1.5 minutes saved × $10/hr = $1.1 million/year
present value = $8,059,000

ACCEL = benefit from accelerating project (determined above)

DC = $2,500,000

IC = $250,000

DES = cost of change in design = 0.5 minutes delay for 5,000 vehicles at proposed signal = 5,000 × 0.5 × 365 × $10/hr = $152,000/year
present value = $1,119,000

PRTY = cost of change in priority = $2 million per year benefit for other project, delayed 3 years = $5,346,000

MAINT = cost of additional maintenance = $50,000/year = $368,000

DEVEL = other costs of serving new development = $400,000/year = $2,944,000

NB_{PUB} = $126,000 + $1,500,000 + $9,494,000 + $8,059,000 − ($2,500,000 + $250,000 + $1,119,000 + $5,346,000 + $368,000 + $2,944,000)
= + $6,652,000

Private Sector Benefits and Costs

PV = increase in property value = 100 acres × $90,000/acre = $9,000,000

ACC = increase in accessibility = $2,000,000

CT = savings due to accelerated construction time
$215 million × 10% = $250,000

DES = increased fees to design firms = $5 million × 10% = $500,000

TX = tax benefits = $126,000 in ROW × 50% = $63,000

LOCST = savings due to private sector construction = $250,000

NEGO = reduced negotiated developer agreement costs = 0 in this case

BOND = savings due to bond financing = 0 in this case

COST = total cost to developer = $2,500,000

NB_{PVT} = $9,000,000 + $2,000,000 + $250,000 + $500,000 + $63,000 + $250,000 − $2,500,000 = $9,563,000

This analysis shows significant positive net benefits for the proposed public and private partnership, for both the public and private sectors. Thus, this project would be recommended for implementation provided that adequate funds were available, that alternative projects did not provide greater benefits, and that the project conformed with other policy goals and objectives.

Although the foregoing example has been simplified, it illustrates the kinds of factors that should be considered in evaluating a potential public and private partnership for financing highway improvements.

STEP-BY-STEP IMPLEMENTATION GUIDELINES

This section provides step-by-step guidelines to be used at the local or state level to implement legislation to facilitate public and private partnerships for financing highway improvements. These guidelines have been developed from an analysis of the case studies described in this report, plus a study of, and direct involvement with, numerous other examples of public and private highway financing. The guidelines consist of the following major steps and actions:

1. Form task force.
2. Develop goals and objectives.
3. Conduct initial studies.
4. Draft legislation.
5. Provide information and obtain support.
6. Enact legislation.
7. Implement program.
8. Continue planning and review process.

Each of these steps is discussed below in further detail.

Form Task Force

The first step is the most critical in the entire implementation process. The persons involved initially should be those who strongly desire to see the legislation implemented, who will be directly affected by the legislation, who are in a position to help implement the legislation, and, if possible, those who might be expected to oppose such legislation. A typical list of members

of such a task force could include: major developer(s) promoting partnership/legislation; developers/business group (Chamber of Commerce, developers association, building industry association); other landowners affected; neighborhood groups; environmental groups; local (city/county/township) staff (managers, engineers, planners); local elected officials; state DOT staff; state elected officials (state senators, representatives); and attorneys and consultants.

Most successful partnership task forces are initiated by a single private sector developer who needs the legislation or partnership for a large project. The presence of such a highly motivated individual is usually the key factor in the success of the public and private partnership, although the cooperation of key public sector figures also is essential for a successful partnership. In addition, it is important to neutralize potential opposition or, at least, to reach an acceptable compromise fairly early in the process, keeping potential opponents involved and informed is an excellent way of keeping communication channels open.

Develop Goals and Objectives

Once the task force has been formed, its first task should be to develop goals and objectives. These goals and objectives, of course, will vary, depending on the local situation, but similar issues should be addressed in all cases. These issues will relate to the type of cost-sharing proposed, the types of roadway involved, the types of development involved, boundary issues, administrative procedures, and legal issues.

The types of cost-sharing could include impact fees, special assessment districts, negotiated development agreements, joint ventures, or a combination of two or more funding mechanisms. Analysis of this issue should include examining the advantages and disadvantages of the various funding mechanisms, as discussed earlier in this report, and their applicability to the desired goals in the specific area. Other than the specific advantages and disadvantages of the mechanisms, items to be considered should include: funding for one specific project or a permanent funding source; inclusion of existing and new development or only new development; jurisdiction-wide (city or county) or limited area level of funding desired; and degree of public and private cost sharing.

The type of facility to be funded would affect the choice of funding, and could range from an interchange or corridor improvement, as in the US 202/Route 29 case study, to areawide improvements as in Palm Beach County or major regional corridors such as in Orange County, California. This item should be decided on early in the process, because it will affect the other goals and objectives. It also will affect the nature and degree of cost-sharing arrangements, inasmuch as the facilities are local, state, interstate, or other federal-aid highways. The extent to which the roads included serve specific developments as opposed to regional traffic will affect funding options as well.

The type of development to be included in the funding program is also important, particularly whether the partnership arrangement is directed toward a specific development or area or toward development in general. As discussed earlier, a major issue involves whether existing and new development will contribute toward funding improvements or whether only new development is to be included. The type of development will influence the relative amount of fee or assessment to be paid and possibly the method and timing of payment. For example, a residential development would probably be assessed on a per-unit basis, while commercial assessments could be based on traffic generation, square footage, or acreage.

Boundary issues are important for both traffic impact fee and special assessment district funding. Traffic impact fees may be assessed in a specific area or throughout the jurisdiction. If a limited area is selected, its boundaries must be defined carefully; if jurisdiction-wide fees are implemented, zones should be defined in order to ensure that funds are spent for the benefit of those paying fees. (A recent New Jersey case invalidated a township traffic impact fee that did not segregate funds by geographic area.) Although these boundaries are usually not defined precisely until after the task force has completed much of its work, the task force should be able to address the boundary issues and reach consensus on at least the general location of boundaries pending technical studies.

Many of the issues to be addressed will involve the actual administration of the funding mechanism. Some of these administrative details should be included in the legislation, while others should be left to the discretion of local administrative staff, such as the city or county manager, planning director, and traffic engineer. Examples of such issues are listed below; those followed by (L) should be addressed specifically in state or local legislation, while those designated (A) should be left to the discretion of staff. Those items designated (L, A) should be addressed in the legislation with authority delegated to administrative staff.

- construction in lieu of fee (L, A)
- timing of payments (L)
- calculation of payments (L)
- administration of funds (L, A)
- appeal process (L)
- flexibility allowed (A)
- staff requirements (A)
- expenditure of funds, by project (A)
- timing and geographic restrictions on expenditure of funds (A)

Conduct Initial Studies

Once the goals, objectives, and general parameters for the funding partnership mechanism have been established, a preliminary traffic study should be conducted. The form of the study could range from a traffic impact analysis for one large development or a limited area, to a corridor or subarea study, to a major regional transportation needs study for a county-wide impact fee system or other funding method. The study could be funded by the public sector, the private sector, or a combination of the two. While traffic engineering will comprise a major portion of the studies, they may also include preliminary engineering and environmental studies, as well as an analysis of funding alternatives and recommendations.

It is extremely important that these initial studies be performed in a professional, technically proficient manner and that the study findings be used in setting the fees or assessments in the event that the funding mechanism is later challenged in court. Experience has shown that most courts will support an impact fee ordinance or other public and private funding mechanism if it follows the *Dunedin* principles (new developer requires the expansion of public facilities, fees cover only the costs

incurred by new development, and fees are earmarked for projects to serve new developments) and takes a reasonable, conservative approach towards setting fees or assessments. It must be clear that local government is not using the fees for transportation improvements in lieu of general tax revenues.

Draft Legislation

An outline or working draft of the proposed legislation (enabling legislation and local ordinance) should be developed in coordination with the initial traffic studies. Even though the details of the local ordinance, such as the setting of fees or assessments, would have to be developed after the traffic studies are complete, much of the legislation can be drafted once the major issues have been addressed, and goals and objectives have been agreed upon by the task force.

The examples of legislation included in this document should provide guidance in drafting specific legislation; however, an attorney familiar with land use legislation in the particular state should have major involvement in drafting the legislation. At the state level, the involvement of elected officials and state DOT or Highway Department officials would be extremely helpful and desirable. Similarly, drafting of local ordinances should include local attorneys, elected officials, and key transportation and planning staff.

Provide Information and Obtain Support

A key element in enacting legislation and in successfully implementing a public and private highway funding program is obtaining broad-based public support. As discussed earlier, a certain level of political maturity is a desirable condition for the implementation of public and private funding, in which citizens recognize that growth produces significant impacts on traffic and that it is desirable for new growth to mitigate those impacts through fees, special assessments, or development agreements. However, even where this condition exists, support for a specific funding proposal must be obtained and maintained. Experience has shown that this support can best be obtained through an open, public process.

East Whiteland and Tredyffrin Townships, Pennsylvania, used an open task force approach, with a broad level of representation and good publicity, along with a parallel effort at the state level. In Orange County, California, the lengthy technical study process was accompanied by a regular series of meetings between private sector staff, technical staff, and elected officials from cities and Orange County to reach consensus and agree on implementation strategy. Even with this open process, the corridor fees were almost undermined by a small group of citizens opposed to the corridor highways and fees. In San Antonio, Texas, the initial formulation of the Westside Expressway funding was almost stalled, because a citizens group that had not been consulted early in the process raised questions and concerns. Only by including this group in the development of the highway implementation plan was the project able to continue.

Thus, it is extremely important to include public officials, business, and citizen groups throughout the planning and implementation of a project. This goal is often difficult to achieve, because the private sector is accustomed to working rapidly and with little or no public involvement. In many cases, successful implementation of a highway funding process requires meeting a fast-track schedule in order to comply with a developer's requirements. However, if all interested groups are not included early in the process, there is a significant risk of either political or legal action that could jeopardize the process at a later, more costly time, after commitments have already been made. Thus, even though schedule considerations are important, it is equally important to involve interest groups—including neighborhoods, business interests, and political factions—early in the process, both in negotiations and working meetings if possible, but at least at public information meetings, with one-to-one contact with group leaders. Otherwise, as was the case with COPS in San Antonio, a group may feel that it has been bypassed and may attempt to block the project or legislation. In setting up public and private funding mechanisms, especially where legislation is involved, it is almost always better to deal early and openly with potential opponents than to try to bypass them.

Securing news coverage of a proposed funding partnership is an important way to provide public information and build support. The news media reach a broad cross section of the public. The press should be informed of all meetings and given factual, up-to-date information. News coverage is not without potential hazards, however, and needs to be handled carefully. For example, if a news release is issued before elected officials or interest groups have been contacted, those groups may believe they are being bypassed and may commit themselves to positions before they are aware of the facts of the case or before they have heard the proponents' side of the issues. Inaccurate news coverage can also be damaging, as wrong first impressions may do lasting damage to the proposed agreement or legislation. Therefore, the initial contacts with key individuals and groups must be made before the story is carried by the news media, and the news media should be given a well-prepared summary of the proposed agreement or legislation, with regular updates as needed.

Publicity can be of tremendous value in building a consensus for a funding partnership, and every opportunity should be used to present the positive factors of such a partnership. Public opinion polls have not been used extensively, if at all, in support of public and private highway funding partnerships. In the cases investigated, the support of key elected officials, public sector staff, key private sector management, and citizen groups was obtained relatively early in the process, and opinion polls were not necessary to prove the existence of public support. It appears that opinion polls are unnecessary and possibly counterproductive. If opinion polls have a place in this process, it would be in the very preliminary stage of discussion, when the public staff is determining the political feasibility of proposed partnership legislation, or attempting to build a case supporting a particular type of partnership legislation.

Enact Legislation

This crucial activity actually consists of two very different processes: (1) enacting state enabling legislation, and (2) enacting a local ordinance or code change.

At the state level, the first step is to determine whether or not adequate state enabling legislation exists and, if not, if it is required. If legislation is needed, it can be drafted either as a revision to existing statutes or as a new section.

In the case studies reviewed here, state legislation was required for the US 202/Route 29 improvements in Pennsylvania (but not for the traffic impact fees in adjoining Upper Merion Town-

ship), the Travis County, Texas Road Districts, and the Orange County, California Corridor Fees. Each of these cases was somewhat "borderline" regarding the need for new state legislation. In the Pennsylvania case, the need for the new legislation (for this particular partnership) was not clear, but the attorneys decided to use it as "insurance." In Travis County, the county road legislation that had been in existence for many years was modified only slightly. In Orange County, it was felt that the existing map act required modification because it "pre-empted the field" by requiring certain improvements in order to file a plat but not specifically including road and bridge fees.

Based on these examples, considerable legal judgment will be needed to determine whether state enabling legislation is required.

A secondary consideration in some states is whether statewide legislation or a local bill should be introduced. While statewide legislation such as Pennsylvania's Partnership Act is desirable from an overall policy viewpoint, in some cases it might be advantageous to pursue local bills. These are approved by the state legislature but apply only to specific jurisdictions.

An example of local legislation is North Carolina's facility fee act, which authorizes facility fees (including road fees) only in the City of Raleigh and the Town of Carrboro. Even though a local bill does not require the same statewide campaign and lobbying effort as a regular bill, it does need the strong support of the local delegation. North Carolina requires unanimous support of the legislative delegation (House and Senate) from the affected area. To obtain this level of support, several compromises in the original draft of the bill were made, primarily to overcome objections of development-oriented legislators. In California, the State Subdivision Map Act was revised to permit the imposition of fees for bridges and major thoroughfares. This legislation was supported by the State Building Industries Association (BIA), led by the Orange County BIA. In this case, then, state legislation was enacted even though its use was intended for one county in the immediate future. Thus, there is a tradeoff between the statewide effort needed to pass a general bill and the compromise necessary to gain support for a local bill.

Pennsylvania was another state in which statewide legislation was passed with the strong support of a local area. However, the Pennsylvania Transportation Partnership Act also had the backing of the Pennsylvania Department of Transportation, and was always intended as a statewide package rather than as assistance for one particular funding partnership. Only one year after this act passed, it was in jeopardy of being repealed because of misuse by one county. Only quick action by the Act's supporters to amend it prevented its repeal. This action shows the importance of continued legislative support even after passage of state enabling legislation.

Once state enabling legislation has been enacted, a local ordinance will be needed to facilitate the funding partnership. The ordinance should be prepared as either a new code section or as a revision of the existing code, using the example legislation in this document as a guide. If more than one municipality is involved, intergovernmental agreements also may be required. The task force should work with local staff and elected officials prior to and during the drafting of the legislation. It is at this stage in the implementation process that the early contacts and coordination will prove valuable in reducing controversy and providing a base of support for the proposed legislation. The inclusion of one or more local elected officials in the task force will provide a well-informed proponent who can sponsor the local legislation and become a spokesperson in favor of it. This official, because of his or her knowledge of the issues involved and the reasons for the legislation, will be in an excellent position to propose compromise where needed to obtain support without defeating the purpose of the legislation.

Implement Program

Once the legal framework is in place, implementation of the funding mechanism can begin. While the details of this implementation process will depend on the actual legislation and funding mechanism selected, general procedures for each of the major partnership types are discussed here.

Development agreements will be negotiated and executed on a case-by-case basis. These will generally be applied to large developments (100 acres or more), although there may be cases in which they will be desirable for smaller developments. In negotiating a development agreement (including agreements relating to conditional zoning, PUD approval, or similar agreements), the local government should carefully review the traffic analyses prepared by the developer, perhaps using an outside consultant if qualified local staff are not available.

It is especially important to define the ultimate roadway improvements needed during the project build-out period, the responsibilities of the developer for some or all of those improvements, and the phasing of the improvements with respect to development phasing. Consistent standards should be applied in negotiating agreements for different developments regarding such items as level-of-service criteria, distance from project to be analyzed for traffic impact (possibly based on size and type of project), developer responsibility for non-project traffic, and phasing considerations.

Implementation procedures for special assessment districts will depend to a great extent on procedures specified in state legislation. Some states require a petition and election by landowners, while others require an election by voters living within the proposed special assessment district. Regardless of the procedures (which must be followed precisely), informal meetings of property owners in the proposed special assessment area should take place prior to any formal action. The major land owners will have been included in task force discussions and should have a good understanding of the scope and purposes of the proposed district, but the smaller land owners also should be included in the discussion. Although some districts may be formed by only a few land owners or even by one owner, it is more likely that some small land owners will be involved. These individuals would tend to perceive less benefit from being in a special assessment benefit district and thus are most likely to object. Depending on the state, objection from even a small proportion of property owners could delay or prevent formation of a special assessment district. Therefore, it is important that district boundaries be defined to include willing participants as well as be based on technical studies of need and benefit.

Formation of a special assessment district also should include early discussion with bond underwriters and bond counsel to determine promising financing plans and likely finance costs. The extent to which planning and engineering costs are included in the bond financing should be defined by the responsible public agency prior to the formation of special assessment districts to ensure equitable treatment for developers, land owners, and the public.

A traffic impact fee system is the most complex mechanism to implement administratively. A table of fees by land use must be developed based on a detailed traffic study, appeals should be provided for, and accounting procedures must be developed to account for fee revenues and expenditures. Court decisions have held that impact fee revenues must be segregated from general revenues and that they must be spent only for projects required by new development.

Most local impact fee ordinances also specify that the fees be spent in the zone in which they were collected, and be spent within a specified time of collection. Many localities also allow construction in lieu of fees or credits for construction performed as a requirement for development approval. These factors all require a rather complex accounting system and additional personnel to administer the system. This staff could range from an additional clerical person to an entire section, including computer operators, depending on the size and capabilities of existing staff and the complexity of the fee system. A traffic engineer will also be needed at times for interpretation of the fees and analysis of appeals. Several jurisdictions have proposed earmarking a portion of traffic impact fees (1 to 2 percent) for these administrative expenses.

Continue Planning and Review Process

Regardless of which mechanism is selected, the process as well as the fees themselves should be evaluated on a regular basis. Five-year reviews and updates should be appropriate for major review and evaluation of the funding mechanism itself, although a newly implemented system should be reviewed annually or, as is the case with Orange County, California, automatically revised based on a standard construction cost index. In the case of a special assessment district, assessments as a percentage of property value should be adjusted annually to take into account new construction. In addition, any funding mechanism should be reviewed pending any court decision related to a similar funding mechanism, particularly if the decision is in the same state.

APPENDIX A

CASE STUDY REPORTS

Appendix A, which contains a detailed account of the case studies (Orange County, California: Development Fees for Transportation Corridors; Palm Beach County, Florida: Traffic Impact Fees; Chester County, Pennsylvania: Public/Private Interchange Reconstruction and Road Widening; San Antonio, Texas: Public/Private Expressway Financing; Travis County, Texas: Road District Financing) is not published herewith but is contained under separate binding, as submitted by the research agency to the program sponsors. A limited number of copies are available on loan, or for purchase at the cost of reproduction, upon written request to the NCHRP.

APPENDIX B

LEGISLATION TO FACILITATE PRIVATE SECTOR PARTICIPATION IN HIGHWAY FUNDING

INTRODUCTION

Legal considerations have been the most important factors in shaping private financing of public transportation facilities and services. Although economic, political, and social considerations have been dominant forces in creating dissatisfaction with traditional forms of transportation financing mechanisms, they have not been the guiding forces in the search for alternatives. Legal considerations have largely determined the type of private financing mechanism that a local government uses, the type or types of public facilities that are financed, the extent to which such facilities are financed, the rate at which they are financed, and the persons who must pay the costs of the public facilities. In many cases, the legal constraints placed on private financing of public transportation facilities are based on distinctions and definitions comprising the institutional framework and the precedents for judicial analysis and review. Often those distinctions and definitions bear little relationship to the realities of a transportation financing situation, especially with regard to the economic and political climate and the needs of developers, landowners, and existing and future resident.

Use of private financing mechanisms for transportation facilities can occur only when the necessary legal authority exists and governing legal principles and restrictions are observed. In other words, local government not only must have the legal power through constitutional or statutory enabling provisions to finance transportation facilities, but also must use this power within the legal restraints established by legislatures and courts. The methods of granting power and the limitations on that power vary widely among local governments. The three forms of private financing of transportation facilities presented in this analysis are special assessments, impact fees, and development agreements. The first, special assessments, is a traditional means of financing public facilities and, in one form or another, has been constitutionally or statutorily authorized and implemented in each of the 50 states.

Impact fees, the second transportation financing mechanism to be considered, is a relative newcomer to the public facilities financing field, and trace their beginnings through the evolution of exactions and in lieu of development fees. A few states have enacted impact fee legislation, and several others are considering legislation authorizing impact fees at this time.

The third method of transportation facilities financing mechanisms considered in this report is the development agreement. Although contingent zoning has been viewed as a legitimate exercise of a local government's authority in certain circumstances, express legislation allowing for development agreements, a form of contingent zoning, has gained acceptance only recently in a handful of states.

SPECIAL ASSESSMENTS

Introductory Commentary

The legal foundations for special assessments were firmly established at the beginning of this century and have changed little since then. As an exercise of taxing powers, special assessments must be specifically authorized by a state either through enabling legislation or through constitutional provision. Without such authorization, they, like most other taxes, are routinely rejected by the courts as an illegal exercise of power that has not been granted to the local government attempting the special assessment.

Local governments in all 50 states can raise revenues through special assessments. In most states special assessments are explicitly authorized through state statutes, but in a few states they are explicitly authorized through constitutional provisions. Some states allow local governments to impose special assessments under their home rule powers.

Although the special assessment is often characterized as a special use of the government's taxing or revenue-raising power, it is regarded as sufficiently different from other forms of taxation to be free from constitutional requirements for uniformity of taxation. Because special assessments are not uniformly applied, two restrictions distinguish them from other taxes and make them legally acceptable. First, public facilities and services for which special assessments are levied and collected must peculiarly or specially benefit the property upon which the special assessments are imposed; that is, the special assessments charged to only a few landowners cannot be used to finance general government services or facilities that benefit the whole community. Second, special assessments must not exceed a proportionate share of the benefits received by the property upon which the special assessments are imposed. The proportionate share of the benefits received by the property upon which a special assessment is imposed is typically allocated by using various equitable means of apportionment. These equitable means of apportionment are often based on front footage, square footage, increased value, number of dwelling units, distance from the public facility, or combinations of these factors.

These judicially mandated restraints on the use of special assessments to finance only those public facilities that provide special benefits are the principal limitations on their use. In recent years there has been some liberalization in the definition of special benefits, but still this restriction keeps special assessments from being used widely as a private financing mechanism for transportation facilities.

The availability of express authorizing legislation for special assessments has both advantages and disadvantages. It removes any doubt that local governments are permitted to rely on this device as a funding mechanism for transportation facilities, but it often provides relatively restrictive guidelines for use of the technique.

Restrictions resulting from conditions in typical enabling legislation limit the economic, political, and practical application of special assessments in today's public facilities financing environment. First, most enabling legislation limits special assessments to the financing of particular types of infrastructure. Regrettably, transportation facilities often are not the beneficiaries of special assessment enabling legislation, except to the extent that construction of sidewalks, gutters, street lights, and maintenance and repair work for roads are sometimes addressed.

Another difficulty that local governments are likely to encounter in special assessment enabling legislation is that such legislation often grants special assessment powers to particular levels of government while excluding others.

Moreover, by prescribing specific methods of allocating costs to different types of property located within a special assessment district, enabling legislation may unduly restrict the availability of equitable methods of apportionment of the special assessments to the properties peculiarly benefited. For instance, much of the special assessment enabling legislation requires the cost of public facilities to be allocated through special assessments based on front footage. They often do not allow for other methods of allocation (square footage, increased value, number of dwelling units, distance from the public facility, traffic generation) or a combination of equitable methods. In this age of cost sharing between local government and the private sector, more flexibility is needed and should be granted as long as it is within the bounds of equitable and legal principles.

Another problem exists to the extent that enabling legislation often restricts a local government's ability to borrow against the revenues raised by a special assessment.

Special assessments often entail financing arrangements in which a local government initially issues bonds to raise funds for an improvement and is later reimbursed by periodic payments from property owners, secured by liens against the affected property. By incurring the indebtedness in order to build the needed transportation facilities, the local government requires flexibility to "front-end" the costs for such facilities in reliance upon reimbursement through the levy and collection of special assessments from those who benefit.

The theoretical underpinnings of special assessments have been subject to reexamination in recent years. Some courts have

allowed a great deal of discretion in the allocation of costs among benefited parties, requiring only that the special assessment formula approximate being proportional to benefits received. The relationship does not have to be exact. More important, these same courts are exploring the relationship between special assessments and the police power. The emerging trend has been for courts not to restrict special assessments to a one time charge imposed at the time of construction, which is typical of most special assessments. Instead, courts have upheld ad valorem assessments (based on either the value of all real property or only the value of land), connection charges, user charges, and development fees. Such hybrid assessment mechanisms that combine the most attractive features of levies based on the police power (such as subdivision exactions and impact fees) with the most attractive features of special assessments are increasingly common for local governments to develop. Such hybrid programs have been implemented successfully in states, such as Florida, Texas, and Colorado, where more flexible special assessment legislation has been enacted. Moreover, courts and legislatures in several states have begun to focus on aggregate system benefits, rather than individual segment benefits, pursuant to special assessment financing. For example, Sarasota County, Florida, has implemented a statutorily authorized "Municipal Service Taxing Unit" (MSTU) system of special assessments that provides financing for road improvements and right-of-way acquisition, as well as design, engineering and administration charges for most of the county. While the MSTU Ordinance derives its authority from express taxing powers, it operates much like an impact fee. Likewise, "Municipal Utility Districts" (MUDS) are hybrid systems used in Texas to finance areawide road networks. This departure from earlier practice reflects a more flexible and realistic attitude toward areawide road improvements, perhaps stimulated by increased experience with other types of areawide projects or emerging patterns of development on an areawide basis.

The following draft "model" special assessment district statute and ordinance combine many of the features found and used successfully in other states.

SPECIAL ASSESSMENT DISTRICT ACT

Section 1. Purpose

It is the intent and purpose of this Act to:

(1) Authorize local government to finance public facilities through the levying and collection of special assessments;

(2) Provide a mechanism for local government to levy and collect special assessments from property to recover the cost of providing public facilities that peculiarly benefit the property upon which they are imposed;

(3) Define the procedural and substantive requirements for special assessments and special assessment districts for capital costs and service charges of public facilities covered in a comprehensive [or master] plan element of a local government;

(4) Shift the financing of public facilities from all taxpayers to those who specifically benefit from such public facilities; and

(5) Authorize local government to establish special assessment districts and levy special assessments for the purpose of providing public facilities to benefit property owners in such designated special assessment districts.

Section 2. Definitions

As used in this Act, the term:

(1) "Comprehensive [or master] plan" means a plan adopted pursuant to the [insert statutory authority for comprehensive or master plan].

(2) "Development" means any construction or expansion of a building or structure, any change in the use of a building or structure, or any land use change that affects a local government's need for public facilities.

(3) "Governing body" means the legislative body of the local government, however designated.

(4) "Local government" means any county or municipality or any special district or governmental entity established pursuant to law which is authorized to prepare, adopt, and implement comprehensive [or master] plans pursuant to [insert statutory authority for comprehensive [or master] planning].

(5) "Proportionate share of the benefits" means that share, or portion, of the value of the total public facilities and service which specially and peculiarly benefits the property upon which they are imposed, and in no event shall such share or portion be in excess of the benefits such property receives by reason of such improvement.

(6) "Public facilities" means capital improvements, including, but not limited to, transportation, sanitary sewer, solid waste, drainage, potable water, educational, parks and recreational, and health systems and facilities that have a life expectancy of three (3) or more years.

(7) "Public services" means the performance by employees, consultants, or agents of functions, operations, design, engineering, planning and maintenance, and repair activities in order to provide public facilities.

(8) "Special assessment" means a charge imposed upon property located within a designated special assessment district by [insert local government] to pay for public facilities and services which peculiarly and specially benefit the property upon which they are imposed.

(9) "Special assessment district" means the district in which public facilities and services are to be provided and in which special assessments and charges may be levied and collected pursuant to this act to pay for those public facilities and services.

Section 3. Authority

Consistent with the provisions of this Act, any local government may adopt provisions authorizing that government to establish, and subsequently merge or abolish those created hereunder, special assessment districts for any part or all of the area of such local government, within which may be provided public facilities and services from funds derived from service charges, special assessments, or other charges within such special assessment district.

(1) For the purpose of providing public facilities and services within any special assessment district, the local government may levy and collect service charges, special assessments, or other charges within such special assessment district, and borrow and expend money, issue bonds, revenue certificates, and other obligations of indebtedness, which powers shall be exercised in such manner, and subject to such limitations, as may be provided by general law, in furtherance of the provision of the public facilities and services authorized by this Act.

(2) The provisions of this Act shall not affect or limit any other provisions of law authorizing or providing for the furnishing of public facilities and services or the raising of revenue for these purposes. A local government may use the provisions of this Act instead of, or in conjunction with, any other method of financing part or all of the cost of providing the public facilities and services authorized under this Act.

Section 4. Requirements for Special Assessment Districts

A special assessment district must meet the following requirements:

(1) Public facilities and services for which special assessments are levied and collected must peculiarly and specially benefit the property upon which the special assessments are imposed.

(2) Special assessments levied and collected pursuant to a designated special assessment district must not exceed a proportionate share of the benefits received by the property upon which the special assessments are imposed.

(3) The proportionate share of the benefits received by the property upon which a special assessment is imposed shall be calculated and apportioned by using any equitable means of assessment and apportionment which the governing body of a local government may prescribe including, but not limited to, square footage, front-footage, increased value, number of dwelling units, distance from the public facility, traffic generation or other impact generation factors, or any combination thereof.

Section 5. Procedures for Special Assessment Districts

(1) *Initiation of Proceeding.* Proceedings for the establishment of a special assessment district may be instituted by the governing body of a local government on its own initiative and shall be instituted by the governing body when either of the following occurs:

(a) A written request therefor is filed with the governing body, signed by two members of the governing body, describing the boundaries of the territory which is proposed for inclusion in the special assessment district and specifying the type or types of public facilities and services to be provided within the special assessment district.

(b) A petition requesting the institutions of such proceeding and signed by the number of registered voters required by Sec. 5(2)(d) hereof is filed with the clerk of the governing body. The petition may consist of any number of separate instruments, each of which shall comply with all the requirements of the petition, except as to the number of signatures.

(2) *Contents of Petition.* A petition requesting institution of proceedings for the establishment of a special assessment district shall:

(a) Request the governing body of a local government to institute proceedings to establish a special assessment district pursuant to this Act.
(b) Describe the boundaries of the territory which is proposed for inclusion in the special assessment district.
(c) State the type or types of public facilities and services to be provided within the special assessment district.
(d) Be signed by not less than ____% of the registered voters residing within the territory proposed to be included within the special assessment district. If the governing body finds that the petition is signed by the requisite number of registered voters residing within the territory proposed to be included within the special assessment district, that finding shall be final and conclusive.

(3) *Ordinance Establishing Special Assessment District.* Within ____ days after either a written request by two members of the governing body of a local government or a petition requesting the institution of proceedings for the establishment of a special assessment district is filed with it, the governing body of a local government shall adopt an ordinance establishing a special assessment district in the form hereinafter specified.

(4) *Contents of Ordinance.* Proceedings for the establishment of a special assessment district shall be instituted by the adoption of an ordinance establishing the special assessment district which shall:
(a) State that a special assessment district is established under the terms of this Act and describe the boundaries of the territory proposed for inclusion in the special assessment district.
(b) State the name proposed for the special assessment district in substantially the following form: "____ Special Assessment District."
(c) State the type or types of public facilities and services proposed to be provided within the special assessment district pursuant to this Act.
(d) State that, except to the extent that funds are otherwise available and committed, a special assessment sufficient to pay for all such public facilities and services will be annually levied and collected within such special assessment district. The ordinance shall specify the rate and method of apportionment of the special assessment in sufficient detail to allow each landowner or resident within the special assessment district to estimate the annual amount that he or she will have to pay.

(5) *Public Hearing and Notice.*
(a) A public hearing shall be held by the governing body at least ten (10) days prior to the adoption, amendment, merger, or abolition of a special assessment district.
(b) Notice shall be provided in accordance with the provisions of ____ at least fifteen (15) days but no more than thirty (30) days prior to the public hearing. Notice shall:
1. Contain the text of the ordinance.
2. State the time and place of the hearing.
3. State that at the hearing testimony will be heard of all interested persons or taxpayers for or against the establishment of the special assessment district, the extent of the district, or the furnishing of specified types of public facilities or services.

(6) *Protests.*
(a) At the public hearing, protests against the establishment of the special assessment district, the extent of the district, or the furnishing of specified types of public facilities or services within the special assessment district may be made orally or in writing by any interested person or taxpayer. Any protests pertaining to the regularity or sufficiency of the proceeding shall be in writing and shall clearly set forth the irregularities and defects to which objection is made. All written protests shall be filed with the clerk of the governing body on or before the time fixed for the hearing. The governing body may waive any irregularities in the form or content of any written protest and at the hearing may correct minor defects in the proceedings. Written protests may be withdrawn in writing at any time before the conclusion of the hearing.
(b) If 50% or more of the registered voters residing within the territory proposed to be included in the special assessment district, or the owners of ½ or more of the area of the land in the territory proposed to be included in the special assessment district, file written protests against the establishment of the special

assessment district, the governing body shall abandon the proposed establishment of the special assessment district.

(c) If such majority protests of the registered voters or of the landowners are only against the furnishing of a specified type or types of public facilities or services within the special assessment district, or against levying a specified rate or special assessment, those types of public facilities or services or the specified rate or special assessment shall be eliminated from the ordinance finally establishing the special assessment district.

(7) *Boundaries of District.* In establishing the boundaries of a special assessment district, the governing body may alter the exterior boundaries of a special assessment district to include less territory than that described in the notice of the public hearing, but it may not include any territory not described in the notice of the public hearing.

(8) *Types of Public Facilities and Services Provided.* In designating the types of public facilities to be provided in a special assessment district, the governing body may eliminate one or more of the types of public facilities and services specified in the ordinance establishing the special assessment district, but it may not include any types of public facilities and services not specified in the ordinance.

Section 6. Collection of Special Assessments and Service Charges

The special assessment may be collected in the same manner as ordinary ad valorem property taxes are collected and may be subject to the same penalties and the same procedure and sale in case of delinquency as provided for ad valorem property taxes, or another procedure may be adopted if the governing body of a local government prefers. The tax collector or the appropriate local government official responsible for collecting the special assessments may deduct a service charge for the reasonable administrative costs incurred in collecting the special assessment.

Section 7. Use of Proceeds

Any special assessments collected pursuant to this Act may only be used, in whole or in part, for public facilities and services authorized by this Act or for the payment of the principal and interest of bonds, revenue certificates, and other obligations of indebtedness for such public facilities and services.

Section 8. Issuance of Bonds and Other Indebtedness

After the public hearing establishing a special assessment district and approving the levying and collection of the special assessments for public facilities and services as provided by this Act, and as soon as a contract for the public facilities and services has been finally let, the governing body may, by resolution or ordinance, authorize the issuance of bonds, revenue certificates, or other indebtedness in an amount not in excess of the aggregate amount of the liens levied for such public facilities and services. [Insert appropriate state requirements and provisions for issuance of bonds, revenue certificates or other indebtedness].

Section 9. Priority of Lien

A special assessment shall be payable at the time and in the manner indicated in the ordinance providing for the special assessment; shall remain a lien, co-equal with the lien of all state, county, district, and municipal taxes, superior in dignity to all other liens, titles, and claims until paid; shall bear interest, at a rate not to exceed ____% per year, or, if bonds are issued pursuant to this Act, at a rate not to exceed ____% above the rate of interest at which the improvement bonds authorized pursuant to this Act and used for the improvement are sold, from the date of the acceptance of the improvement; and may, by the ordinance aforesaid and only for public facilities, be made payable in equal installments over a period not to exceed twenty (20) years to which, if not paid when due, there shall be added a penalty at the rate of ____% per month, until paid. However, the special assessments may be paid without interest at any time within 30 days after the public facility is completed and a resolution accepting the same has been adopted by the governing body.

EXPLANATORY NOTES ON SPECIAL ASSESSMENT DISTRICT ACT

Section 1.

This section specifies the purposes of the act. Those purposes include providing the authority for local governments to levy and collect special assessments and to establish special assessment districts for the purpose of providing public facilities to benefit property owners in those districts. Special assessments have typically been levied to provide for streets and sidewalks, sewers, drains, and water and gas main improvements. ALA. CODE § 11-48-4 (1975) (construction, reconstruction of sewers, water and gas mains, opening, widening, and extending of streets, highways); ALASKA STAT. § 29.46.010 (Supp. 1985) (any capital improvements); ARK. STAT. ANN. § 20-1501 (1968) (street improvements, including grading, paving, curbing, guttering, and drainage and storm sewers); COLO. REV. STAT. ANN. § 31-25-503(1) (1977) (grading, paving, curbing, constructing, extending guttering or otherwise improving all or part of any street, sidewalk, water mains, and sewers); CONN. GEN. STAT. ANN. § 7-194 (West 1964) (layout, construct, reconstruct, alter, maintain, repair, control or operate streets, alleys, boulevards, bridges, underpasses, sidewalks, curbs, gutters, public walks, cemeteries, parks, swimming areas, hospitals, parking lots and business or plane terminals); FLA. STAT. ANN. § 170.01 (1978) (construction, reconstruction, repair, paving, repaving, lengthening and widening streets, roads, boulevards, sidewalks, sewers and drainage systems, parking); GA. CODE ANN. § 36-39-1 (1981) (construction, reconstruction, altering, grading, paving, repaving, macadamizing of streets, alleys, sidewalks, curbing, gutters, storm sewers, water, gas, and sanitary sewers); HAWAII REV. STAT. § 67-1(3) (1976) (construction, repair, establishment, opening, widening, grading, paving, curbing or otherwise improving any street, alley, sidewalk, storm drain, sewer, lighting or water system); IDAHO CODE § 50-1703 (1980) (construct, repair, improve, grade, pave, extend and maintain streets, alleys, sidewalks, parking, curbs, gutters, sewers, landscaping, culverts, drains, lighting systems, canals, reservoirs, and irrigation systems); ILL. ANN. STAT. § 9-2-1 (1971) (any local improvement); IND. CODE ANN. §§ 36-9-18-2, 36-9-1-2(3)(5)(2)(4) and (7) (Burns 1981) (construction, improvement, extension, remodeling and betterment of sidewalks, curbs, streets, and alleys); IOWA CODE ANN. § 384.38 (1976) (construction and repair of streets, sewers, drains, lighting, gas, water, sidewalks or waterworks); KAN. STAT. § 12-601 (1982) (grade, regrade, pave, curb, gutter or otherwise improve streets or avenues), § 12 6a02 (1982) (open, widen, improve, construct, reconstruct, maintain, restore, replace, renew, repair or otherwise enhance streets, alleys, gutters, curbs, sidewalks, storm drains, sewers, waterworks, parks, dikes, tunnels, parking or retaining walls); KY. REV. STAT. ANN. § 91A-210(1) (Bobbs-Merrill 1982) (any facility for public use or any addition thereto, which is of special benefit to specified properties), § 107.020(4) (construction or reconstruction of public ways, sewers, fire hydrants and water mains); LA. REV. STAT. ANN. § 33:771 (West 1951) (construction, reconstruction, repair, and maintenance of all things in the nature of local improvements (streets, sidewalks, water, sewer)); ME. REV. STAT. ANN. § 3601 (1980) (lay out, widen, alter or discontinue any new street or public way); MD. ANN. STAT. § 92 (1981) (construction, installation, paving of public ways, sidewalks, curbs, gutters, sewers, and water mains); MASS. ANN. LAWS § 1 (Michie/Law. Co-op 1978) (any public improvement where an area receives special benefit); MICH. STAT. ANN. § 5.1807 (Callaghan 1978) (lay out, open, widen, extend, straighten, alter, close, vacate, abolish any highway, street, or alley), § 5.1810 (establish, change or alter the grade of any street, alley or public highway), § 5.2770(52) (construction, improvement, maintenance of public highways, water mains, sewers, parks, garbage collection, bike paths, dikes, and elevated structures for foot travel over highways); MISS. CODE ANN. § 21-413 (1972) (construction, reconstruction, opening, reopening, widening, grading, paving and surfacing of roads, streets, alleys, squares, sidewalks, sewers and drainage systems); MO. ANN. STAT. § 88-812 (1971) (grading, paving, excavating, macadamizing, curbing and guttering of streets, alleys, highways or parts thereof, sidewalks, sewers or other improvements); NEB. REV. STAT. § 14-385 (1983) (pave, repave, surface, widen, improve, regutter, landscape streets, alleys, boulevards, public grounds and parts thereof), § 701.01 (to grade partially or to an established grade, curb, recurb, gutter, construct sidewalks or otherwise improve or repair streets, alleys, public grounds, ways or parts thereof), § 701.02 (to grade, change a grade, pave, repave, macadamize, curb, recurb, gravel, regravel, open and widen streets, roads, public ways or parts thereof), § 16-609 (open, control, name, rename, extend, widen, narrow, vacate, grade, curb, gutter, park, pave or otherwise improve and repair streets, alleys, public parks and squares), § 17-509 (grade, curb, recurb, gutter, regutter, pave, gravel, macadamize, remacadamize, widen, narrow, resurface, relay or otherwise improve any street, alley, public ways or parts thereof; to construct or reconstruct pedestrian walks, plazas, malls, landscaping, fountains, lighting systems or sidewalks); NEV. REV. STAT. § 271.121 *et seq.* (1979) (extension, widening, lengthening, bettering, altering, repair or other improvement on a facility, property, project or interest including parks, sewers, parking, security walls, streets, avenues, alleys or water projects); N. H. REV. STAT. § 231.28 (1982) (construction, reconstruction of streets, highways, and roads); N. J. STAT. ANN. § 40:56-1 (1967) (construction, reconstruction, maintenance, repair, grading or alterations of streets, alleys, curbs, gutters, bridges, beachfront, public works, sewers, water, gas, heat or lighting systems, waterways, bulkheads, and parking); N. M. STAT. ANN. § 3-33-3 (1978) (construct, improve, repair streets, sidewalks, sewer projects, flood control improvements); N. C. GEN. STAT. § 160A-216 (1982) (construction, reconstruction, paving, extending or otherwise building and improving streets, water systems, curbs, gutters, sewage systems, drainage systems); N. D. CENT. CODE § 40-22-01 (1983) (construction, improvement of water supply or sewage systems, municipal streets and road systems, landscaping, flood protection and parking); OHIO REV. CODE tit. 7, § 727.01 (Page 1976) (construct, reconstruct, grade, lay, light and repair streets, sidewalks, docks, sewers, reservoirs, retaining walls, and water treatment plants); ORE. REV. STAT. § 223.387 (1985) (construction, reconstruction, grading, paving, laying out or extending any street, sidewalk, street lights, sewers, water main, parking dams, parks or any local improvement where special benefits are conferred); PA. STAT. ANN. tit. 53, §§ 1721, 1081 (Purdon 1974) (construct, reconstruct, pave, grade, alter or renew streets, alleys, footwalks, parking, landscaping, bridges, sewers, drains and piers), § 37930 (grade, pave, macadamize or otherwise improve or lengthen streets and highways or parts thereof); R. I. GEN. LAWS § 24-3-1 (1979) (lay out, enlarge, improve or alter any street, highway or part therein); S. C. CODE ANN. § 5-27-310 (Law. Co-op 1977)

(permanent improvements of streets and sidewalks); SOUTH DAKOTA L. § 9-43-5 (1981) (all public buildings, public works and improvements or repairs on the foregoing); TENN. CODE ANN. § 7-32-101 (1985) (construction, improvement, or reconstruction of streets, alleys, avenues, highways, or public places); UTAH CODE ANN. § 10-16-4 (1985 Supp.) (establish, improve, repair, construct streets, alleys, bridges, sewers, lighting facilities, landscaping, covering canals and ditches, parking and recreational facilities); VT. STAT. ANN. tit. 24, § 3252 (1975) (purchase, construction, repair or extension of a water or sewage system or any other improvement of benefit to a limited area); VA. CODE § 15.1-239 (1981) (construction, improvement, repair of alleys, sewers, lighting, retaining walls, streets); WASH. REV. CODE ANN. § 35.43.040 (1965) (includes but not limited to construction, reconstruction, repair, cultivation, maintenance or landscaping of streets, alleys, water systems, recreational facilities, bridges, retaining walls, dikes, sewers, escalators, parks, sidewalks, street lights, water mains and fences); W. VA. CODE § 8172 (1984) (grading, regrading, repairing, building and renewing streets, alleys, sewers and sidewalks), § 8-18-1 (construct, improve, provide, renew, grade or pave streets, alleys, public ways and sewers); WIS. STAT. ANN. § 66.60 (1965) (municipal work or improvement, including service charges for current services if they confer special benefit); WYO. STAT. § 15-16-101 (1985) (any type or extent of improvement that the governing body finds to be of special benefit to an area).

Special assessment have also been applied towards fire protection and other means of public safety. ARIZ. REV. STAT. ANN. § 48-572(A) (1985) (improve or reimprove streets, construct, reconstruct tunnels, subways, sidewalks, gutters, curbs, drainage ditches, waterworks, lighting), § 48-575(A) (enhanced municipal services, public safety); CAL. CODE § 5101 (1969) (construction, reconstruction, improvement, grading, lengthening, widening of streets, public ways, squares, sidewalks, sewers, drains, lighting, fire and flood protection, water and gas supplies, fallout and bomb shelters, retaining walls, landscaping and all other necessary or auxiliary work); MICH. STAT. ANN. § 5-2401 (Callaghan 1982) (construction, reconstruction, paving, graveling, macadamizing and otherwise improving streets, bridges, sewers, destroying weeds, street lights, garbage systems, sidewalks, fire protection, breakwaters and chemical beach treatment); MINN. STAT. ANN. § 429.021 (1986) (acquire open, widen, construct, reconstruct, maintain and extend roads, alleys, sidewalks, gutters, parking, sewers, waterworks, parks, lighting systems, dikes, retaining walls, skyways, malls, and fire protection); MONT. CODE ANN. § 7-12-4102 (1985) (construction, reconstruction, repair of streets, alleys, recreational sites, sidewalks, waterworks, sewers, fire protection, tunnels, breakwaters and landscaping); TEX. REV. CIV. STAT. ANN. § 2 (Vernon 1986 Supp.) (improving, widening, narrowing, closing, construction or improvement of streets, sidewalks, landscaping, parks, fountains, parking, similar improvements, supplemental services for improvement and promotion of district, including public safety, health, and sanitation).

Section 2.

This section contains definitions of terms found in the act. "Proportionate share of the benefits" may be determined by a variety of equitable means. The courts have not required mathematical accuracy and have allowed flexibility to local governments in making this legislative decision.

Section 3.

This section grants to local government the powers necessary for the establishment and enforcement of special assessments or charges to finance the cost of public facilities and services. When determining whether a development exaction is valid under state law, a court first characterizes the exaction regulated by the ordinance and then determines whether that type of exaction is authorized by state law. The grant of authority not only expressly states the intention of the state to authorize local government to enact and enforce special assessments, but also sets the parameters of that authority. *See also* Special Assessment District Act, Sec. 4. Thus, the grant of authority assures local governments that if they exercise their authority in accordance with this statutory provision, their actions will be valid under state law.

Section 3(2) allows for supplemental financing of public facilities and services authorized under this act by means of other instruments of indebtedness. Local governments have used a variety of financing methods to reduce the burden of the assessment on individual property owners. The common method followed by local government is to prepare an estimated project budget and issue one or another type of bonds in order to raise construction funds. *See* Misczinski, "Special Assessments" in *Windfalls for Wipeouts* (D. Hagman and D. Misczinski, eds. 1978) at 333–34.

Section 4.

This section reflects judicially developed requirements for special assessment districts. The requirement that public facilities and services for which special assessments are levied must specially benefit the property assessed means that the benefit to the property assessed must be substantially greater than the public benefit. *A.G. Sisters of Saint Mary v. Beaverton,* 478 P.2d 412 (Ore. Ct. App. 1970). The requirement that special assessments not exceed a proportionate share of the benefits received by the assessed property adheres to the United States Supreme Court pronouncement that special assessments be "substantially proportionate" to the benefit received. *Norwood v. Baker,* 172 U.S. 269 (1898).

Professor Mandelker has summarized the use of special assessments in the following way:

> All such assessments have one common element: they are for construction of local improvements that are appurtenant to specific land and bring a benefit substantially more intense than is yielded to the rest of the municipality. The benefit to the land must be actual, physical and material, and not merely speculative or conjectural.

Mandelker, Daniel; Metsch, Dawn Clark; and Salsrich, Peter W., *State and Local Government in a Federal System: Cases and Material,* (2d ed. Charlottesville, Va., Michie Co. 1983), at 251.

This section also contains methods of calculating and apportioning special assessments that local governments have developed. The variety of methods reflects Supreme Court doctrine that local government be allowed flexibility in assuring the required proportionality. The Supreme Court does not require mathematical accuracy. *Norwood v. Baker,* 172 U.S. 269 (1898). Similarly, the Supreme Court views the amount of the assessment as a legislative decision. *Parsons v. District of Columbia,* 170 U.S. 45 (1898); *Williams v. Eggleston,* 170 U.S. 304 (1898). Table B-1 summarizes the various methods used by states.

Table B-1. Methods of apportioning special assessments.

EQUITABLE	BENEFITS ASSESSED	ZONES	INCREASED VALUE	ASSESSED VALUE BEFORE IMPROVEMENTS	FRONTAGE	ACREAGE	OTHER
Alabama				x			
Alaska	x						
Arizona	x						
Arkansas	x						
California	x						
Colorado		x			x		x
Connecticut	x						
Delaware							
Florida					x		x
Georgia					x		x
Hawaii					x	x	x
Idaho	x				x	x	x
Illinois	x						
Indiana				x			
Iowa							x
Kansas				x	x	x	x
Kentucky				x	x	x	x
Louisiana				x	x		x
Maine			x				
Maryland							x
Massachusetts	x						
Michigan	x						
Minnesota	x						
Mississippi					x	x	
Missouri	x				x		
Montana					x	x	
Nebraska	x						
Nevada		x			x	x	x
New Hampshire	x						
New Jersey	x		x				
New Mexico			x				
New York							
North Carolina			x	x	x	x	
North Dakota	x	x				x	
Ohio				x	x		
Oklahoma					x		
Oregon							x
Pennsylvania	x		x				
Rhode Island	x						
South Carolina	x				x	x	
South Dakota					x	x	
Tennessee					x		
Texas			x	x	x	x	
Utah				x	x	x	
Vermont			x	x	x		x
Virginia	x						
Washington		x				x	
West Virginia					x		
Wisconsin	x						
Wyoming		x			x	x	x

Section 5.

The procedures described in this section reflect procedures developed by state legislatures for the establishment of a special assessment district.

This section specifies that proceedings for establishment of a special assessment district may be instituted by the governing body on its own initiative or on petition of a percentage of the registered voters residing within the assessment district. A majority of the states contain this dual method of initiating proceedings which grants the power to initiate the establishment of special assessment districts to both the governing body and the property owners affected. ALASKA STAT. § 29.46.010 (Supp. 1985) (governing body or owners of half of the valuation of the benefited property); ARIZ. REV. STAT. ANN. §§ 48-572(A), 48-575(C) (1984) (governing body or all property owners); GA. CODE ANN. § 36-39-3 (1981) (governing body or owners of majority of lineal feet of frontage of land liable for assessment); HAWAII REV. STAT. §§ 67-2, 67-14 (1976) (County Board of Supervisors or owners of 60 percent of frontage or area desig-

nated as district); IDAHO CODE § 50-1706 (1980) (governing body or 60 percent of resident owners of property subject to assessment); ILL. ANN. STAT. §§ 9-2-40, 9-2-9, 9-2-11, 9-2-43 (Smith-Hurd 1962) (governing body or owners of half of property abutting improvement); IOWA CODE ANN. § 384.41 (1976) (City council or all owners of record of property affected); KAN. STAT. § 12-602 (1982) (governing body or majority of resident owners of real property liable for assessment), KAN. STAT. §§ 6a04(1), 6a04(2) (f) (1982) (governing body or majority of resident owners liable for assessment, resident owners of more than half of the area liable for assessment, and owners of more than half of the area liable for assessment); ME. REV. STAT. ANN. §§ 3601, 3606 (1980) (city government or a majority of the abutters in amount of property and value); MINN. STAT. ANN. § 429.031 (1986) (4/5 vote of council required when no petition; or all owners of real property who agree to pay total cost or 35 percent of owners abutting the improvement and majority votes of the Council required); NEB. REV. STAT. §§ 14-387, 14-388, 14-390 (1983) (City Council or record owners of a majority of frontage of property abutting on improvement), NEB. REV. STAT. §§ 16-617, 16-624 (1983) (1st Class Cities) (Mayor/City Council or owners of property representing 75 percent of front footage abutting or adjacent to improvement), NEB. REV. STAT. §§ 17-509, 17-510 (1983) (2nd Class Cities) (governing body or owners of more than 60 percent of front footage abutting or adjacent to street or alleys specially benefited by improvement); NEV. REV. STAT. §§ 271.280, 271.285 (1979) (governing body or owners of land to be assessed for not less than 90 percent of the entire cost of the improvement constituting 66-⅔ percent of frontage; N. J. STAT. ANN. §§ 40:56-1, 40:56-3 (1967) (governing body or petitioners who agree to pay all of the cost); N. M. STAT. ANN. §§ 3-33-1, 3-33-14 (1978) (governing body or owners of 66-⅔ percent of front footage of land); N. D. CENT. CODE §§ 40-22-08, 40-22-09 (1983) (governing body or ¾ of owners of the area to be added to the district); OHIO REV. STAT. §§ 727.01, 727.06 (Page 1976) (legislative authority or 60 percent of property owners where assessment is based on front footage, otherwise, owners of 75 percent of area to be assessed); OKLA. STAT. ANN. §§ 11-39-103, 11-39-106, 11-39-110 (West 1978) (governing body or majority of resident owners of record of property subject to assessment, or resident owners of record of more than half of the area liable for assessment, or owners of record of more than half of the area liable to be assessed); PA. STAT. ANN. tit. 53, §§ 1725, 1722 (Purdon 1974) (Municipal Corporations) (City Council and Mayor/City Recorder or majority of property owners in interest and number abutting the proposed improvement), 53 PA. STAT. ANN. §§ 37935, 37934 (Purdon 1974) (3d Class Cities) (City Council or majority in amount or interest of owners of property abutting on the improvement); TENN. CODE ANN. §§ 7-32-101, 7-32-118 (1985) (governing body or owners of at least 75 percent of frontage of property abutting on the improvement); TEX. REV. CIV. STAT. ANN. §§ 1(a), 5(b) (Vernon 1986 Supp.) (governing body or owners of more than 50 percent of taxable land area representing more than 50 percent of appraised value of taxable real property within affected area/ more than 50 percent of property owners of affected area); WASH. REV. CODE ANN. §§ 35.43.060, 35.43.070, 35.43.120 (1965) (city council or owners of property aggregating a majority of the lineal frontage upon the improvement of the area within the proposed district); W. VA. CODE § 8-18-2 (1984) (governing body or property owners of greater amount of frontage abutting on improvement).

Regarding notice and hearing requirements currently applied, *see e.g.*, HAWAII REV. STAT. §§ 67-10, 67-16 (1976) (describing requirements of investigation and report of preliminary data, adoption of preliminary resolution, notice, hearing, and determination by governing body). *Cf. Utey v. St. Petersburg,* 292 U.S. 106, 109 (1934) (property owner has no right to be heard in opposition to launching of project that may end in assessment, but only to hearing upon amount to be paid); *St. Louis Land Co. v. Kansas City,* 241 U.S. 419, 430 (1916) (property owner is entitled to be heard as to the amount of his assessments and upon all questions properly entering into their determination); *Detroit v. Parker,* 181 U.S. 399 (1901) (failure to provide fast hearing and review of assessments based on front foot rule do not violate due process requirements).

With regard to protests by affected property owners, this section reflects statutory law as it has developed in most states. This section specifies that "[i]f 50% or more of the registered voters residing within the territory proposed to be included in the special assessment district, or the owners of ½ or more of the area of the land in the territory proposed to be included in the special assessment district, file written protests against the establishment of the special assessment district, the governing body shall abandon the proposed establishment of the special assessment district." ARIZ. REV. STAT. ANN. § 48-579 (1984) (owners of a majority of property fronting the improvement or within the improvement district); MISS. CODE ANN. § 21-41-9 (1972) (majority of owners owning more than 50 percent of the property involved); MONT. CODE ANN. § ____ (owners of property in the district which accounts for the assessment of more than 50 percent of the cost of the proposed work or if it is an assessment within an extended district, objections by the owners of more than 50 percent of the area of the property to be assessed within the district); NEB. REV. STAT. § 14-3, 127 (1983) (Metropolitan Class Cities—majority of owners of frontage to be affected); NEB. REV. STAT. § 16-620 (1983) (1st Class Cities—owners of record title representing greater than 50 percent of the front footage of property abutting or adjacent to the improvement); NEB. REV. STAT. § 17-511 (1983) (2nd Class Cities—owners of record title representing greater than 50 percent of the front footage of property abutting or adjacent to the improvement); N. H. REV. STAT. § 231.28 (1982) (regarding a new thoroughfare, a majority of owners served by an existing road); N. D. CENT. CODE §§ 40-23-15, 40-22-18 (1983) (majority of owners of area of property included within the district, then bar to proceeding within that area. If majority of owners within the district, then bar to entire improvement.); OKLA. STAT. ANN. § 39-108 (West 1978) (owners of 50 percent or more in area of property or 50 percent or more of the owners of property object, then district shall not be created); TEX. REV. CIV. STAT. ANN. §§ 8(b), 8(c) (more than 50 percent of property owners or more than 50 percent of taxable land representing more than 50 percent of the appraisal value of the taxable real property); WYO. STAT. § 15-16-203 (1985) (owners of more than half of the area of property which is subject to assessment).

Section 6.

In this section, the act allows for collection of assessments in the same manner as the collection of ad valorem property taxes. The reason for using the ad valorem method is simplicity. All states have ad valorem taxes and, therefore, it simplifies implementation of this system of collection.

This section also reflects the common characterization of the special assessment as a special use of the government's taxing or revenue-raising power. *See* 14 E. McQuillin, *Municipal Corporations* § 38-01 (special assessments are sustained under exercise of power of taxation) (3d ed. 1979); 4 C. Sands and M. Libonati, *Local Government Law* § 4.05 n.1 (citing cases sustaining power to levy special assessment under rubric of taxation from 19 jurisdictions) (1982). Special assessments may be distinguished from taxes in several ways. For example, the special assessment is usually exempt from constitutional provisions requiring uniformity of taxation. *See, e.g., Eaton v. McCuen,* 273 Ark. 154, 617 S.W.2d 341 (1981); *Lake Howell Water & Reclamation Dist. v. State,* 268 So.2d 897 (Fla. 1972); *Martin v. Ben Davis Conservancy Dist.,* 238 Ind. 502, 153 N.E.2d 125 (1958); *McNally v. Township of Teaneck,* 75 N.J. 33, 379 A.2d 446 (1977); *Berglund v. Tacoma,* 70 Wash.2d 475, 423 P.2d 922 (1967). *See also* 2 Antieu, *Municipal Corporation Law* § 14.00; 14 E. McQuillin, *Municipal Corporations,* § 38.161 (3d ed. 1979).

Section 7.

This section reflects the nature of the special assessment as providing a special benefit to those properties assessed. The use of special assessment funds for other than their designated purpose would charge assessed properties for benefits that do not necessarily specially benefit them. Such a use would be invalid. *See Sec. 4* explanatory notes, *supra.*

Section 8.

This section provides for the use of special assessment proceeds to retire indebtedness created by the provision of special facilities or services authorized under this act.

Section 9.

This section reflects common practice that liens be filed against benefited property, and property owners be allowed to repay amounts due immediately or on a staggered basis at relatively moderate rates of interest. *See, e.g.,* ALASKA STAT. § 29-46.080 (1985) ("Assessments are liens on property and are prior and paramount to all liens except municipal tax lien"; governing body to fix times of payment, penalties, and rate of interest; payment in lump sum or by installments permitted).

Special assessments generally do not give rise to personal liability on the part of property owners because a secured interest in the land is seen as a sufficient repayment guarantee. There has also been some doubt whether personal liability could, in fact, be imposed. Many early cases invalidated efforts to impose personal liability on grounds that statutory authority for such a remedy was lacking or that legislation authorizing personal liability was unconstitutional. *See* Annotation, *Personal Liability of Property Owner to Pay Assessments for Local Improvements,* 127 A.L.R. 551 (1940). However, a growing number of cases have approved personal liability of resident owners. *See Werninger v. Stephenson,* 82 W. Va. 367, 95 S.E. 1035 (1918). Personal liability for nonresident owners may also be imposed where express statutory authorization and an adequate jurisdictional basis can be cited. *See* Rubin, *Collection of Delinquent Real Property Taxes by Action in Personam,* 3 LAW & CONTEMP. PROBS. 410, 422 (1936).

TRANSPORTATION FACILITIES SPECIAL ASSESSMENT ORDINANCE

AN ORDINANCE TO BE KNOWN AS THE TRANSPORTATION FACILITIES SPECIAL ASSESSMENT ORDINANCE; PROVIDING A SHORT TITLE AND AUTHORITY; PROVIDING FOR A PURPOSE; PROVIDING DEFINITIONS AND RULES OF CONSTRUCTION; PROVIDING FOR ESTABLISHMENT OF A SPECIAL ASSESSMENT AREA; PROVIDING AUTHORITY TO LEVY AND COLLECT ASSESSMENTS; PROVIDING FOR ADMINISTRATION OF THE ORDINANCE; PROVIDING AUTHORITY TO BOND; PROVIDING FOR A SERVICE CHARGE FOR EXPENSES; PROVIDING FOR ADJUSTMENTS IN THE AMOUNT OF ASSESSMENTS; PROVIDING FOR A TERM OF EXISTENCE; PROVIDING A SEVERABILITY CLAUSE; AND PROVIDING AN EFFECTIVE DATE.

WHEREAS, the [insert statutory authority for special assessment ordinance] authorizes a local government to establish special assessment districts and levy special assessments for the purpose of providing, *inter alia,* transportation facilities to benefit property owners in such a special assessment district; and

WHEREAS, a special assessment district providing for transportation facilities needed to meet increased demands on the [insert local government] as a result of new development or the rehabilitation or maintenance of transportation facilities is desirable and in the best interests of the property owners with the district and the citizens of the [insert local government];

NOW, THEREFORE, [insert prefatory adopting language required by law]:

Section 1. Short Title and Authority

(1) This ordinance shall be known and may be cited as the "Transportation Facilities Special Assessment Ordinance."

(2) The [insert governing body of local government] is authorized to levy a special assessment for the purposes of providing transportation facilities and service charges against all property owners in the special assessment area pursuant to [insert constitutional and statutory provisions for special assessment districts].

Section 2. Purpose

The [insert governing body of local government], hereby, finds and declares that:

(1) This ordinance is intended to implement and be consistent with the comprehensive [or master] plan and to maintain the quality of transportation facilities and services in designated special assessment districts.

(2) The objective of this ordinance is accomplished by establishing a special assessment district in which the [insert local government] may ensure the adequacy of transportation facilities and the corresponding proportional or special benefit to properties.

Section 3. Definitions

(1) "Comprehensive [or master] plan" means a plan adopted pursuant to the [insert statutory authority for comprehensive or master plan].

(2) "Governing body" means the [insert legislative body of local government].

(3) "Local government" means the [insert county or municipality] or any special district or any other governmental entity established pursuant to law which is authorized to prepare, adopt, and implement comprehensive [or master] plans pursuant to [insert statutory authority for comprehensive or master planning].

(4) "Person" means any individual, corporation, business or land trust, estate, trust, partnership, association, two or more persons having a joint or common interest, governmental entity or any other legal entity.

(5) "Proportionate share of the benefits" means that share, or portion, of the value of the total transportation facilities and services which peculiarly and specially benefits the property upon which they are imposed.

(6) "Special assessment" means a charge imposed upon property located within a designated special assessment district by [insert local government] to pay for transportation facilities and services which peculiarly and specially benefit such property.

(7) "Special Assessment District" means the district in which transportation facilities and services are to be provided, and in which special assessments and charges may be levied and collected pursuant to this ordinance to pay for those facilities and services.

(8) "Transportation facilities" means capital improvements for transportation and shall include, but not be limited to, transportation planning and design, right-of-way acquisition and land acquisition, land improvement, engineering, and construction of any project eligible for inclusion as a transportation or road project in a construction plan.

(9) "Transportation services" means the performance by employees and the cost of functions, operations, and maintenance and repair activities in order to provide transportation facilities.

Section 4. Rules of Construction

In the construction of this ordinance, the rules set out in this section shall be observed unless such construction is inconsistent with the manifest intent of the [insert governing body of local government]. The rules of construction and definitions set out here shall not be applied to any section of this ordinance which contains any express provision excluding such construction, or where the subject matter or content of such section would be inconsistent with this section.

(1) *Generally.* All provisions, terms, phrases, and expressions contained in this ordinance shall be liberally construed in order that the true intent and meaning of the [insert governing body of local government] may be fully carried out. Terms used in this ordinance, unless otherwise specifically provided, shall have the meanings prescribed by the statutes of this state for the same terms.

(2) *Text.* In case of any difference of meaning or implication between the text of this ordinance and any figure, the text shall control.

(3) *Delegation of Authority.* Whenever a provision appears requiring the head of a department or some other [insert local government] officer or employee to do some act or perform some duty, it is to be construed to authorize the head of the department or

some other [insert local government] officer or employee to designate, delegate, and authorize professional-level subordinates to perform the required act or duty unless the terms of the provision or section specify otherwise.

(4) *Gender.* Words importing the masculine gender shall be construed to include the feminine and neuter.

(5) *Month.* The word "month" shall mean a calendar month.

(6) *Nontechnical and Technical Words.* Words and phrases shall be construed according to the common and approved usage of the language, but technical words and phrases and such others as may have acquired a peculiar and appropriate meaning in law shall be construed and understood according to such meaning.

(7) *Number.* A word importing the singular number, only, may extend and be applied to several persons and things as well as to one person and thing. The use of the plural number shall be deemed to include any single person or thing.

(8) *Shall, Must, May.* The words "shall" and "must" are mandatory; "may" is permissive.

(9) *Tense.* Words used in the past or present tense include the future as well as the past or present.

(10) *Written or In Writing.* The term "written" or "in writing" shall be construed to include any representation of words, letters, or figures whether by printing or otherwise.

(11) *Year.* The word "year" shall mean a calendar year, unless a fiscal year is indicated.

(12) *Boundaries.* Where a road right-of-way is used to define district boundaries, that portion of the road right-of-way demarcating the boundary shall be considered as part of the district it bounds.

Section 5. Establishment of Special Assessment District

(1) *Establishment.* The [insert governing body of local government] hereby establishes a special assessment district to be known as the "_____ Special Assessment District," the boundaries of which are described on the map and legal description attached hereto and incorporated herein by reference as Exhibit A.

(2) *Authority.* The [insert governing body of local government] shall have the duty, right, power and authority to levy and collect special assessments in support of the provision of transportation facilities and services not greater than the proportionate share of the benefits received by the property located within the _____ Special Assessment District. The proportionate share of the benefits received by the property located within the district shall be calculated using any equitable means of assessment including [insert appropriate equitable means of assessment such as square footage, front footage, dwelling units, increased value, or combination thereof]. The assessments shall be made against all properties that benefit from such transportation facilities and services within the _____ Special Assessment District.

(3) *Declaration of Benefit.* The provision of transportation facilities and services is declared to be of special benefit to all properties within the _____ Special Assessment District and the assessment established herein is declared to be reasonable and not to exceed the benefits accruing to such properties.

Section 6. Calculation, Levy and Collection of Assessments and Administration of Ordinance

(1) *Calculation and Collection of Assessment.*

(a) On or before _____ of each year, the [insert governing body of local government] shall provide the Property Appraiser with a list of all parcels of land by Property Appraiser's data processing number that are within the _____ Special Assessment District. The Property Appraiser shall thereupon prepare a tax roll of all such parcels as have been so identified and submit them to the [insert governing body of local government] not later than _____ of each year.

(b) Upon receipt of the tax roll described in subsection (a) above, the [insert governing body of local government] shall utilize said information to prepare a preliminary assessment roll identifying the individual parcels and calculating the amount of their proposed individual assessment.

(c) The [insert governing body of local government] shall notify the property owners of the affected parcels of the availability for examination of the preliminary assessment roll by publishing a notice as a display advertisement in the same manner and at the same time as notices are published for the consideration of the tentative and final [insert local government] budget.

(d) In conjunction with the [insert governing body of local government] budget hearings, the [insert governing body of local government] shall hold a public hearing to consider protests of the proposed assessments from any property owners within the _____ Special Assessment District, which protests shall be filed in writing on or before the date of the hearing. The [insert governing body of local government] may appoint a hearing examiner to hear such protests and to submit findings of fact, conclusions of law, and a recommended order on each protest to the [insert governing body of local government]. All decisions of the [insert governing body of local government] granting or denying the protests shall be in writing, based upon competent, substantial evidence.

(e) Upon completion of said hearings, the [insert governing body of local government] shall adopt a resolution fixing the rates of assessment for individual parcels on the assessment roll within the _____ Special Assessment District and shall return the final assessment roll to the Property Appraiser, having first noted thereon the assessment against each parcel of property described thereon.

(f) The Property Appraiser shall then include in the [insert local government] tax rolls the assessment thus made by the [insert governing body of local government] and the same shall be collected in the manner and form as is provided for the collection of the [insert local government] ad valorem taxes and paid over by the Tax Collector to the [insert governing body of local government].

(g) The Tax Collector and the Property Appraiser shall each receive compensation for their services regarding such special assessments in the amount of _____ percent (_____%) of the special assessments as commissions and fee usually earned for the assessment and collection of taxes. The payment of personnel required to do special work shall be made out of the _____ percent (_____%) herein provided. If general law provides for fees for the Property Appraiser and Tax Collector for such services, they shall receive the fees authorized by general law in lieu of the fees provided herein.

(h) Pursuant to [insert statutory provision authorizing collection of special assessments in the same manner as collection of ad valorem taxes], special assessments due pursuant to this ordinance shall be collected in a manner provided by and subject to all requirements for collection of ad valorem taxes pursuant to [insert statutory provision for collection of ad valorem taxes], including provisions relating to discount for early payment, prepayment by installment methods, penalty for delinquent payment, and issuance of tax certificates and tax deeds for nonpayment, and shall be subject to all notice provisions of [insert statutory provisions for notice of proposed property tax].

(2) *Transfer of Funds to Finance Department.* Upon receipt of assessments, the Tax Collector shall transfer such funds to the Finance Department and direct the Finance Department as to the appropriate account that has been established by the Finance Department pursuant to subsection (3) below, in which the assessments should be placed.

(3) *Establishment and Maintenance of Account.* The Finance Department shall establish a separate account, and maintain records for the account, whereby assessments collected can be segregated for the _____ Special Assessment District.

(4) *Maintenance of Records.* The Finance Department shall maintain and keep adequate financial records for the account which shall show the source and disbursement of all revenues, which shall account for all monies received, and which shall insure that the disbursement of funds from each account shall be used solely and exclusively for the provision of transportation facilities and services within the _____ Special Assessment District.

(5) *Placement of Funds.* The Finance Department shall be responsible for placement of all funds into the separate account as specified herein. All such funds shall be deposited from the account into an interest-bearing account in a bank authorized to receive deposits of [insert local government] funds, which bank shall be designated by a resolution of the [insert governing body of local government]. Interest earned by each account shall be credited to that account and shall be used solely for the purposes specified for the funds of such account.

(6) *Annual Statement of Accounts.* The [insert governing body of local government] shall annually publish in a newspaper of general circulation in the [insert local government] a statement of accounts which shall show revenues and disbursements for the account.

(7) *Disbursement of Funds.* The [insert governing body of local government] shall be solely and exclusively authorized to disburse funds from such accounts for the purposes

portionate share and benefit principles), many states do not have such clarifying case law. Moreover, all states may benefit to the extent that the law is clarified with regard to how impact fees are to be established and used.

Impact fees are used by local governments to impose charges on new development to generate revenues for capital funding to pay for off-site public facilities necessitated by that new development. Their use is promoted as a way for growth to "pay its own way" by charging at the beginning for the public facilities needed by new development. Impact fees provide a way to help ensure that existing development will not bear the cost of new public facilities necessitated by new development. Because existing development has either paid for or committed itself to pay for the present public facilities already in place, the logic of impact fees anticipates that new development will pay its "fair share" of new public facilities needs.

Typically, impact fees have been popular in fast growing areas, such as the coastal areas in Florida and California; the western sunbelt states like Colorado, Utah and Arizona; and in environmentally conscious areas such as Washington and Oregon. They have enjoyed increased popularity in Illinois, Maryland, New Hampshire, North Carolina, and Pennsylvania. New Jersey and Texas are two states that have enacted express impact fee legislation. Generally speaking, impact fees apply to all physical development that places a demand on a specific public facility; however, the exaction must be for no more than what the development's pro rata share for the needed expansion of the public facility requires. Of course, the type of public facility for which the fee is being exacted will affect the type of physical development from which the fee is being imposed. For example, an impact fee ordinance for the capital funding of a new park program, or for open space acquisition, or for school facilities, is imposed on residential development of all kinds, but not commercial or industrial development because it places no new demand on new parks or open space or schools. On the other hand, an impact fee ordinance for roads would exact fees from all types of physical development because residential, commercial, and industrial uses all generate and attract traffic and consequently place a demand on the roadway system.

One of the major threshold questions arising with impact fees is whether they are categorized by the courts as an exercise of either the police power or taxing powers. The type of power underlying impact fees determines the legal limitations and restrictions placed on them. Most impact fees are seen as an exercise of police powers, although few states have adopted explicit enabling legislation for impact fees as an explicit grant of police power. The power to require impact fees is derived from the police power to regulate land use and development authorized under zoning and subdivision enabling legislation. Such police powers traditionally have been viewed as adequate to allow local government to require mandatory dedications of public facilities. It is this power on which the concept of impact fees is based.

On the other hand, taxing powers generally are not the basis for impact fee legislation. Taxing powers must be explicitly authorized by enabling legislation in most states in order to be valid, and such enabling legislation for impact fees does not generally exist. The most notable exception to this is in California, where impact fees are commonly imposed under the taxing power.

Adopting impact fees without explicit authorization raises several important questions, particularly because impact fees may be used to finance off-site public facilities, while dedications and other exactions often may not. The first question is whether existing legislation is adequate or whether explicit enabling legislation is required. Courts in several states routinely have applied Dillon's Rule, which requires explicit enabling legislation for powers granted to local governments. In these states, local governments generally have taken the position that existing grants of police powers were inadequate to allow impact fees without express legislative authority. In states where courts generally have not applied Dillon's Rule, local governments have adopted impact fees without explicit legislation, and the courts regularly have ruled that existing land use enabling legislation was adequate.

The second question that arises when impact fees are adopted concerns what limitations are placed on the fees so that they are not construed as taxes by the courts. The requirement of reasonableness under due process of law has emerged as the primary standard for determining what types of public facilities can be financed with impact fees. Over the years, the courts have developed three distinct tests of whether impact fees meet the standard of reasonableness: Whether the need for the public facilities financed by the fees is *specifically and uniquely attributable* to the new development? Whether there is a *reasonable relationship* between the public need and the fees imposed on the developer? Whether the impact fee would be used to the benefit of residents of the new development (the *rational nexus test*)?

The "specifically and uniquely attributable test" is the most conservative and restrictive of the three tests. The "reasonable relationship test" is at the opposite end of the spectrum from the specifically and uniquely attributable standard and is the most permissive of the three tests. The "rational nexus test" is more restrictive than the reasonable relationship standard because new development is liable only for the costs of the portion of the public facility needed by the development and not for the total cost of public facilities from which it only partially benefits. The rational nexus test is less restrictive than the specifically and uniquely attributable criterion, however, because new development is responsible for a portion of the cost of all public facilities that is needed to serve it, not just for the cost of the public facilities that solely serves it. The rational nexus test has gained fairly widespread acceptance in recent years. Under this test, courts require that local government's imposition of impact fees constitutes a valid regulatory purpose as long as they demonstrate that:

1. The new development requires additional capacity for the public facility.
2. The fees imposed do not exceed a pro rata share of the reasonably anticipated costs of capital expansion and are exacted only to accommodate new development.
3. The funds are specifically earmarked and delineated so that there is a reasonable connection between the expenditure of funds collected and the benefits accruing to the development.

Other limits that courts have placed on impact fees include that they be based on reasonable planning data and studies and that there be adequate provision for those who pay the fee to challenge the criteria upon which the fee is based. As an alternative to a rigid and inflexible formula for calculating the amount of an impact fee to be imposed on a particular development, a variance procedure often is available so that local

government may consider data and studies submitted by the developer to decrease his assessment.

The Florida courts have gone the furthest in enumerating the requirements for a valid impact fee ordinance. The standards enumerated by the Florida judiciary satisfy not only due process and equal protection constitutional guarantees, but also assure that the measure will be characterized as a regulation rather than a tax. Because of the comprehensiveness of the Florida courts' formulation of the rational nexus test, the Florida decisions largely have been used to model the impact fee act and ordinance which follow.

IMPACT FEE ACT

Section 1. Purpose

It is the intent and purpose of this Act to:

(1) Authorize local government to finance public facilities through the imposition of fair share impact fees;

(2) Provide a mechanism for a local government to charge and collect fees from new development to recover the cost of providing public facilities needed to serve the development;

(3) Define the procedural and substantive requirements for impact fees for capital costs of public facilities covered in a comprehensive [or master] plan element of a local government;

(4) Ensure consistent administration of impact fees;

(5) Promote effective comprehensive planning and capital budgeting by authorizing the use of impact fees;

(6) Clarify requirements of impact fees and thereby create a stable and predictable environment in which to fairly administer impact fees.

Section 2. Definitions

As used in this section, the term:

(1) "Comprehensive [or master] plan" means a plan adopted pursuant to [insert statutory authority for comprehensive or master plan].

(2) "Developer" means any person, corporation, organization, or other legal entity undertaking development.

(3) "Development" means any construction or expansion of a building or structure, any change in the use of a building or structure, or any land use change that affects a local government's need for public facilities.

(4) "Discount rate" means the interest rate, expressed in terms of percentage per annum, which is utilized to adjust past or future financial or monetary payments to present value.

(5) "Governing body" means the legislative body of the local government, however designated.

(6) "Impact fee" means a charge imposed upon new development by local government to pay for public facilities required to serve new development.

(7) "Local government" means any county or municipality or any special district or governmental entity established pursuant to law which is authorized to prepare, adopt, and implement comprehensive [or master] plans pursuant to [insert statutory authority for comprehensive [or master] planning].

(8) "Present value" means the current value of past, present, or future payments which are adjusted to a base period by a discount rate.

(9) "Proportionate share" means that share, or portion, of total public facility capital cost which is reasonably attributable to or caused by an individual development.

(10) "Public facilities" means capital improvements, including but not limited to, transportation, sanitary sewer, solid waste, drainage, potable water, educational, parks and recreational, and health systems and facilities that have a life expectancy of three (3) or more years.

(11) "Public facilities capital costs" includes, but is not limited to, capital costs associated with the construction of new or expanded publicly owned facilities and equipment which have a life expectancy of 3 or more years, and the land acquisition, land improvement, design, and engineering related thereto. Such costs do not include routine and periodic maintenance expenditures or personnel, training, or other operating costs.

Section 3. Authority to Impose Impact Fees

(1) Local governments of this state may assess, impose, levy, and collect impact fees for new development within their jurisdictional limits only pursuant to the requirements set forth in this Act.

(2) Impact fees may be imposed only for those types of public facility capital items that are categorically identified in a local government comprehensive [or master] plan element which meets the requirements of [insert statutory authority for comprehensive [or master] planning].

Section 4. Requirements for Impact Fees

(1) An impact fee must meet the following standards in addition to the requirements of Sec. 5:

(a) New public facilities or the expansion of existing public facilities, for which an impact fee may be charged, must be reasonably attributable or reasonably related to the needs created by the development which will be assessed the fee;

(b) The impact fees imposed upon development must not exceed a proportionate share of the costs incurred or to be incurred by the local government in accommodating the development; and

(c) The expenditure of impact fees must be, or must reasonably be, related to the benefits accruing to the development that pays the fee. In order to satisfy this part of the test, the implementing ordinance must specifically contain the following requirements:

1. Upon collection, impact fees must be deposited in a trust fund that clearly identifies the type of capital facility for which the fee was imposed, and impact fees must be invested with all interest accruing to the trust fund.
2. Although local governments are not required to establish benefit districts if a reasonable benefit is delivered to the development that pays the fee, any benefit districts that are established must be appropriate to the nature of the particular public facility and the nature of the local government jurisdiction. A local government must develop a rationale for the establishment of, or lack of establishment of, benefit districts which shall be reduced to writing and disclosed in a public hearing.
3. Except for recoupment provided in Sec. 4(2), impact fees may not be collected from a development until public facilities, which bear a reasonable relationship to the needs created by the development, are included in at least a 5-year local government capital improvements element as required by [insert statutory authority for comprehensive [or master] planning].
4. Impact fees collected must be encumbered for the construction of public facilities within 6 years after the date of collection, except that where the encumbrance of the impact fee is not feasible within this 6-year period, a local government has the option upon notice and public hearing to:
   a. Extend the encumbrance period for an additional 3-year period; or
   b. Enter into a development agreement with the developer pursuant to [insert statutory authority for development agreements] to phase and schedule the development or the expenditure of impact fees beyond the initial 6-year encumbrance period, pursuant to such agreement.
5. In the absence of a development agreement pursuant to [insert statutory authority for development agreements] to the contrary and if the impact fees are not encumbered within six (6) years, or a maximum period of 9 years, if extended, after the date of collection, a local government shall refund the amount of the fee along with accrued interest to the owner of the property on which the fee was paid. For purposes of refunds, the owner of the property on which an impact fee was paid is the owner of record at the time that the refund is paid. The owner of the property on which an impact fee has been paid has standing to sue for a refund under the provisions of this Act; however, such action may only be commenced within one (1) year after the expiration of the encumbrance period or extension period thereof.

(2) A local government may recoup through an impact fee the costs of excess capacity in existing capital facilities to the extent new development is served by existing capital facilities.

Section 5. Methodology and Ordinance Disclosure Requirements

(1) A local government which desires to adopt an impact fee ordinance shall conduct

a needs assessment for the type of public facility or public facilities for which the impact fee is levied. The needs assessment must distinguish between existing deficiencies and new development needs and must contain components which inventory existing facilities, identify level of service standards for which the fee is to be levied, and project community needs. The needs assessment may be a separate document from an ordinance establishing an impact fee. However, local governments are encouraged to use or base the needs assessment upon supporting data used to develop their comprehensive [or master] plan.

(2) The data sources and methodology upon which the assessment of the impact fee is based must be made available to the public upon request.

(3) The amount of an impact fee imposed shall be based upon actual capital costs or reasonable estimates of capital costs for the expansion of public facilities to be incurred by the local government as a result of anticipated new development.

(4) In determining the total amount of funds an impact fee ordinance seeks to raise, the local government shall reasonably provide for credits that reflect the present value of amounts that new development may have contributed to payments for the same capital improvement in the form of: [insert types of credit to be allowed]. The determination of credits shall occur at the time of the calculation of the amount of the impact fee. The method for calculating credits and the calculation of the amount of the impact fee shall be reviewed and updated at least every 2 years. The revised determination of credits and the amount of impact fee may only be applied prospectively.

(5) The impact fee ordinance, an attachment to the ordinance, or the capital improvements program must identify, for the type of facility covered by the fee, any existing deficiencies, based upon adopted level-of-service standards, and must describe how the local government intends to remedy the deficiency.

(6) The amount of the impact fee may not be based upon the cost of existing deficiencies. The cost of correcting existing deficiencies may not be included in calculating the amount of the impact fee. Existing deficiencies must be financed from sources other than impact fees.

(7) The capital improvements element of the comprehensive [or master] plan shall list anticipated impact fee revenues as a projected source of revenue along with the percentages of impact fee dollars to be used for funding public facility capital improvements.

Section 6. Post Adoption; Time of Assessment; Collection of Impact Fee

All impact fees imposed pursuant to this Act shall be assessed in full and collected in full prior to or at the time of issuance of a building permit, except that the local government may authorize in the ordinance the collection in full of an impact fee at the time of issuance of a certificate of occupancy or other final action authorizing the intended use of a structure if the local governing body receives security ensuring such later payment of the fees at the time of the issuance of a building permit. The security may be in the form of a promissory note, cash bond, security bond, an irrevocable letter of credit, or a lien or mortgage on the lands to be covered by the building permit. The local government may select the time of assessment and collection within the guidelines of this section.

Section 7. Compliance

The failure of an impact fee ordinance adopted prior to the effective date of this Act to meet the requirements of a valid impact fee set forth in this Act is not grounds for challenging its validity unless the local government does not conform its impact fee ordinance as follows: [For states not requiring adoption of local comprehensive [or master] plans: within one (1) year after the effective date of this Act. For states requiring adoption of local comprehensive [or master] plan: within 90 days after the adoption of a proposed comprehensive [or master] plan pursuant to the requirements of [insert statutory authority for comprehensive [or master] planning], local governments shall conform all impact fee ordinances existing on the effective date of this Act, to the requirements of this Act]. Impact fee ordinances adopted by local governments after the effective date of this Act must be in conformance with the requirements set forth in this Act.

EXPLANATORY NOTES ON IMPACT FEE ACT

Section 1.

Section 1 outlines the general purpose of the Impact Fee Act, which is to establish the authority for local governments to exact impact fees on new growth and development, and the parameters for the general imposition and administration of a local government's impact fee ordinance.

In states where Dillon's Rule is applied, which requires explicit enabling legislation for powers granted to local governments, enabling legislation is necessary to authorize local government adoption of impact fee ordinances. Generally, however, the trend is away from this limited construction of local government police powers.

In those states that recognize broad local government powers to regulate the use of land either through general state land use enabling legislation or constitutional home rule powers, the Impact Fee Act may not be necessary to provide a local government the power to adopt impact fees. However, even in these instances, the Impact Fee Act might be considered beneficial as it can provide stability and consistency statewide in the imposition and administration of impact fees.

Section 2.

Section 2 provides definitions for terms and phrases used in the Impact Fee Act. Terms that have been defined in Sec. 2 should be defined the same way in the Impact Fee Ordinance.

It should be noted that through the definition of "public facilities" the enabling legislation limits the use of impact fees to transportation, sanitary sewer, solid waste, drainage, potable water, educational, parks and recreation, and health systems facilities. The definition can be either broadened or limited. Through the definition of "public facilities capital costs," the types of capital improvements are limited to those with a life expectancy of 3 or more years, and the land acquisition, land improvement, design, and engineering related thereto. Finally, the definition of "proportionate share" limits the imposition of impact fees on new development to that portion of the total public facility capital cost that is reasonably attributable to or caused by an individual development.

Section 3.

Section 3 expressly provides authority to local governments to impose and collect impact fees only for those public facilities for which there is a comprehensive (or master) plan element. This section provides local governments express authority to impose fees, but only in the context of a comprehensive planning effort. This requirement assures both the public and private sector more certainty about infrastructure demands, needs, and deficiencies.

Section 4.

The purpose of Sec. 4 is to establish standards for the adoption and implementation of a local governments impact fee ordinance. Fundamentally, it outlines three requirements.

First, local government shall only impose impact fees for the expansion or construction of public facilities that are reasonably related to the needs created by new development. This general standard requires a showing that the population in the local government jurisdiction, or a portion thereof, will be increasing, requiring capacity expansion of public facilities. *See, e.g., Jordan v. Village of Menomee Falls* 137 N.W. 2d 442 (Wisc. 1966); *Hollywood, Inc. v. Broward County* (Fla. 4th DCA 1983).

Second, impact fees imposed on new development shall not exceed a proportionate share of the costs to be incurred by the local government in accommodating the development. Again, and as with the first standard, the courts have recognized and allowed an average cost form of analysis to create this linkage. *Jordan v. Village of Menomee Falls, supra; Home Builders and Contractors Association of Palm Beach County v. Palm Beach County,* 446 So. 2d 140 (Fla 4th DCA 1983).

The third requirement is that the feepayers must receive sufficient benefit from the fees. To ensure that this requirement is met, the Act requires that upon collection of the fees, they are to be deposited into an interest bearing trust fund which is identified for use only for the type of capital facility for which the fee is imposed, that if benefit districts are established they be appropriate to the nature of the particular public facility and local government jurisdiction and that the rationale be reduced to writing, and that the fees be encumbered within a certain period of time. If the fees are not encumbered, the fees are required to be refunded to the feepayer pursuant to common administrative procedures.

The purpose of Sec. 4 is to codify the case law that has established the rational nexus test. *See e.g., Jordan v. Village of Menomee Falls,* 137 N.W.2d 442 (Wisc. 1966), *appeal dismissed,* 385 U.S. 4 (1966); *Home Builders Association of Greater K.C. v. City of Kansas,* 555 S.W. 2d 832 (Mo. 1977); *Call v. City of West Jordan,* 606 P. 2d 217 (Utah 1979), *rehearing denied,* 614 P. 2d 1257 (Utah 1980); *Contractors and Builders Association of Pinellas County v. City of Dunedin,* 329 So. 2d 314 (Fla. 1976); *Hollywood, Inc. v. Broward County,* 431 So. 2d 606 (Fla 4th DCA 1983); *Home Builders and Contractors Association of Palm Beach County, Inc. v. Board of County Commissioners of Palm Beach County,* 446 So. 2d 140 (Fla. 4th DCA 1983).

Section 5.

Section 5 incorporates the requirement that local government prepare a report or plan that outlines the data upon which fees are developed that is consistent with the rational nexus standard established in Sec. 4. The report must also determine the new public facilities demanded by new growth and development, and delineate any existing deficiencies.

This section requires that the impact fee schedule that is imposed be based on actual capital costs or reasonable estimates of capital costs for the expansion of the public facilities to be paid for.

It also requires that the local government provide credits for new development in instances where new development has contributed public facilities or money for public facilities that will be used to accommodate new development.

The primary purpose of Sec. 5 is to ensure that the standards outlined in Sec. 4 are met by the local government in the preparation of impact fee legislation, and that the general public is afforded an opportunity to participate in that process.

Section 6.

This section requires that all impact fees be assessed and collected at the time of building permit issuance. One exception exists which allows collection of the fee at the time of issuance of a certificate of occupancy or other final action authorizing the intended use of the structure if the local governing body receives security ensuring such later payment of the fees.

In most impact fee ordinances today, fees are collected at one of the three instances: (1) the time a plat is approved; (2) the time a building permit is issued; or (3) the time a certificate of occupancy is issued.

The benefits of collecting the impact fee at time of issuance of the building permit versus the certificate of occupancy are that it is generally easier to administer and that it provides the local government additional lead time to collect monies for road construction and right-of-way acquisition.

The purpose of this is to encourage collection at this earlier time. However, to afford some flexibility, a local government is permitted to collect the fee at the time a certificate of occupancy is issued if it obtains legal and financial assurance that the fee will be paid at the time a certificate of occupancy is issued, or at another final action authorizing the intended use of the structure.

Section 7.

This section provides a transition period for local governments to bring existing impact fee legislation into compliance with the Act. Because it is recommended that the use of impact fee legislation be done in the context of capital improvement planning, local governments are required to bring their existing ordinances into compliance within 90 days after an update on the completion of the relevant element of the comprehensive plan.

TRANSPORTATION FACILITIES IMPACT FEE ORDINANCE

AN ORDINANCE TO BE KNOWN AS THE IMPACT FEE ORDINANCE FOR TRANSPORTATION FACILITIES; PROVIDING FOR SHORT TITLE AND AUTHORITY; PROVIDING FOR A PURPOSE; PROVIDING DEFINITIONS AND RULES OF CONSTRUCTION; PROVIDING FOR THE IMPOSITION OF THE IMPACT FEE; PROVIDING FOR FEE SCHEDULE; PROVIDING FOR INDEPENDENT ANALYSIS; PROVIDING FOR CREDITS; PROVIDING FOR REVIEW OF THE ORDINANCE AND FEE SCHEDULE; PROVIDING FOR USE OF FUNDS COLLECTED AND TRUST FUNDS; PROVIDING FOR LIBERAL CONSTRUCTION AND SEVERABILITY; PROVIDING FOR PENALTIES; PROVIDING FOR EFFECTIVE DATE.

WHEREAS, the rapid rate of future growth and new development in [insert local government] requires a substantial increase in public transportation and services; and

WHEREAS, the [insert governing body of local government] has determined that future growth and new development should contribute its fair share of the cost of providing such public transportation facilities and services; and

WHEREAS, an impact fee that contributes this fair share would implement and be consistent with the comprehensive [or master] plan;

NOW, THEREFORE, [insert prefatory adopting language required by law]:

Section 1. Short Title and Authority

(1) This ordinance shall be known and may be cited as the "Transportation Facilities Impact Fee Ordinance."

(2) The [insert governing body of local government] has the authority to adopt this ordinance pursuant to [insert constitutional and statutory provisions for impact fees].

Section 2. Purpose

(1) This ordinance is intended to implement and be consistent with the comprehensive [or master] plan.

(2) The objective of this ordinance is accomplished by requiring all new impact-generating land development activity to contribute its proportionate share of the funds, land, or public facilities necessary to accommodate any impacts on public transportation facilities having a rational nexus to the proposed land development and for which the need is reasonably attributable to the proposed development.

Section 3. Definitions

(1) "Access improvements" mean improvements designed to insure safe and adequate ingress and egress.

(2) "Arterial road" means a road which is a main traffic artery carrying relatively high traffic volumes for relatively long distances. Generally an arterial road is greater than two (2) lanes in width, and longer than two (2) miles in distance.

(3) "Building permit" means that development permit issued by the Building Department before any building or construction activity can be initiated.

(4) "Collector road" means a road which carries traffic from local roads to arterial roads. Collector roads have more continuity, carry higher traffic volumes, and may provide less access than local roads. Generally, collector roads are two-lane facilities and generally operate at lower capacity and operating speeds than do arterial roads.

(5) "Commencement of land development activity" occurs upon the issuance of any permit to authorize building, construction or development of any kind on the property.

(6) "Developer" means any person, corporation, organization, or other legal entity, undertaking any development.

(7) "Development" means any construction or expansion of a building or structure, any change in the use of a building or structure, or any land use change that affects a local government's need for public facilities.

(8) "Existing land development activity" means the most intense use of land within the twelve (12) months prior to the time of commencement of land development activity.

(9) "Expansion" of the capacity of a road includes any widening, intersection improvement, signalization, or other capital improvement designed to increase the existing road's capacity.

(10) "Feepayer" means a person commencing impact generating land development activity who is obligated to pay an impact fee in accordance with the terms of this ordinance.

(11) "Generation" of traffic shall include both the production and attraction of traffic.

(12) "Governing body" means the legislative body of the local government, however designated.

(13) "Impact-generating land development activity" means development designed or intended to permit a use of the land which will contain more dwelling units or floor space than the then-existing use of the land in a manner that increases the generation of vehicular traffic as shown in Sec. 5.

(14) "Local government" means the [insert county or municipality] or any special district or any other governmental entity established pursuant to law which is authorized to prepare, adopt, and implement comprehensive [or master] plans pursuant to [insert statutory authority for comprehensive or master planning].

(15) "Major road network system" means all local, state, and federal arterial and collector roads within the [insert local government jurisdiction], including proposed arterial and collector roads necessitated by new development activity generating traffic. All existing arterial and collector roads and all proposed arterial and collector roads made necessary by new development are designated in Exhibit A, which is incorporated herein by reference.

(16) "Noncommencement" means the cancellation of construction activity which is proposed to make a material change in a structure.

(17) "Person" means any individual, corporation, business or land trust, estate, trust, partnership, association, two or more persons having a joint or common interest, governmental entity or any other legal entity.

(18) "Off-site transportation or roadway improvement" means roadway improvements located outside the boundaries of the parcel proposed for development (except on-site arterial and major collector roads), which are required by the [insert local government] in order to serve the development's external trips on its major road network system. Off-site transportation improvements do not include access improvements as defined herein.

(19) "Road capacity" means the maximum number of vehicles that have a reasonable expectation of passing over a given section of a lane or a roadway in one direction for a highway, during a given time period under prevailing traffic conditions. In the absence of a modifier, capacity is based on hourly volumes.

(20) "Transportation or roadway capital facility or improvement" shall include transportation planning and design, right-of-way and land acquisition, land improvement, engineering, and construction of any project eligible for inclusion as a transportation or road project in a construction plan. Transportation or roadway capital facility or improvement

(2) *Calculation of Fee.*

(a) The individual assessment of fiscal impact shall be calculated by the use of the following formula:

$$\text{IMPACT FEE} = \frac{(\text{ADT (X) (TL) (COST)})}{(\text{CAP) (2)}} - \text{CREDIT}$$

ADT = number of average daily trips generated
X = Percent new trips
TL = Trip lengths in miles for each proposed use
CAP = Capacity per mile in vehicles per day (____)
COST = Cost per lane-mile of right-of-way acquisition, if any, plus construction costs
CREDIT = Allowance for taxes paid for construction of major road network system (including right-of-way purchase and improvement).

(b) The fee calculations shall be based on data, information, or assumptions contained in this ordinance or independent sources, provided that:

1. The independent source is an accepted standard source of transportation engineering or planning data or information; or
2. The independent source is a local study carried out by a qualified traffic planner or engineer pursuant to an accepted methodology of transportation planning or engineering.

(c) The diversion and capture factor used in the individual assessment of fiscal impact shall be based on actual surveys conducted in [insert local government jurisdiction], the most recent *ITE Trip Generation* manual, or published sources as approved by the [insert local government administrator]. For the purposes of this analysis, the diversion and capture figure shall be the percentage of average daily trips that a proposed use will generate that constitute new or additional trips added to the [insert local government] major road network system of the [insert local government]. Those trips that do not represent additional trip ends shall not be counted as new or additional trips.

(3) *Procedure for Review of Application of Assessment of Fiscal Impact.*

(a) An individual assessment of fiscal impact shall be undertaken through the submission of an Application of Assessment of Fiscal Impact. A developer may submit such an application at his discretion. The [insert local government] shall submit an application for any proposed land development activity interpreted as not one of those types listed on the fee schedule, and for any proposed land development activity for which it concludes the nature, timing, or location of the proposed development make it likely to generate impacts costing substantially more to remediate than the amount of the fee that would be generated by the use of the fee schedule.

(b) Within twenty (20) days of receipt of an Application of Assessment of Fiscal Impact, the [insert local government administrator] shall determine if the application is complete. If the [insert local government administrator] determines that the application is not complete, he shall send a written statement specifying the deficiencies by mail to the person submitting the application. The [insert local government administrator] shall take no further action on the application until it is deemed complete.

(c) When the [insert local government administrator] determines the application is complete, he shall review it and render a written decision in thirty (30) days on whether the fee should be modified, and if so, what the amount should be.

(d) If the [insert local government administrator] finds that the data, information, and assumptions used by the applicant to calculate the Assessment of Fiscal Impact satisfies the requirements of this section, the fee determined in the Assessment of Fiscal Impact shall be deemed the fee due and owing for the proposed land development activity. This adjustment in the fee shall be set forth in a Fee Agreement which shall be entered into pursuant to Sec. 5 (2).

(4) *Appeal of Decision on Application of Assessment of Fiscal Impact.* Any person may appeal the decision of the [insert local government administrator] on their Application for Assessment of Fiscal Impact, or on an Application for Assessment of Fiscal Impact initiated by the [insert local government administrator] on their proposed development, by filing a petition with the [insert governing body of local government]. In reviewing the

decision, the [insert governing body of local government] shall make written findings of fact and conclusions of law and use the standards established in Sec. 6 (2).

Section 7. Credits

(1) *General.*

(a) Any person who shall initiate any impact generating land development activity may apply for a credit against any fee for transportation impacts proposed to be paid pursuant to the provisions of this ordinance for any contribution, payment, construction, or dedication of land accepted and received by the [insert local government] for transportation capital facilities.

(b) For any credit against any transportation fee proposed to be paid, the contribution, payment, construction, or dedication shall be credited in an amount equal to its full fair market value if it is for an off-site transportation or roadway improvement (including on-site arterial and major collector roads) which expands the capacity of the major road network system of the [insert local government].

(2) *Appeal of Application for Credit Agreement.* Any person may appeal the decision of the [local government administrator] on their proposed Application for Credit Agreement submitted by filing a petition with the [insert governing body of local government] within thirty (30) days of a decision by the [insert local government administrator]. In reviewing the decision, the [insert governing body of local government] shall use the standards established in Sec. 7.

Section 8. Use of Funds

(1) *Intent.* Any fees collected under this ordinance are expressly designated for the accommodation of impacts reasonably attributable to the proposed development as hereinafter provided in this section.

(2) *Establishment of Trust Fund and Trust Accounts.* There is hereby established the Transportation Facilities Impact Fee Ordinance Trust Fund for the purpose of insuring that the fees collected pursuant to this ordinance are designated for the accommodation of impacts reasonably attributable to the proposed development.

(3) *Expenditure of Fees in Trust Accounts.* Proceeds collected and all interest accrued on such funds shall be used solely for the purpose of capital improvements for transportation facilities and roads on the major road network system of [insert local government] within the Road Construction District from which the fees have been collected. The Road Construction Districts are shown in Exhibit B, which is attached hereto and incorporated herein by reference.

(4) *Investment of Fees in Interest Bearing Accounts.* Any proceeds in the Trust Fund account on deposit, not immediately necessary for expenditure, shall be invested in interest bearing assets. All income derived from these investments shall be retained in the Trust Fund account.

(5) *Annual Recommendation for Expenditure of Fees.* Each year, at the time the annual [insert local government] budget is reviewed, the [insert local government administrator] shall propose appropriations to be spent from the Trust Fund account to the [insert governing body of local government]. After review of the recommendations, the [insert governing body of local government] shall either approve, modify, or deny the recommended expenditures of the Trust Fund account monies. Any amounts not appropriated from the Trust Fund account, together with any interest earnings shall be carried over in the specific Trust Fund account to the following fiscal period. Nothing in this subsection (5) is intended to restrict the power and authority of the [insert governing body of local government] to conduct a review, recommend and approve, modify, or deny appropriations or amendments under this ordinance at such other times as may be deemed necessary or desirable.

(6) *Return of Fees if Not Spent for Capital Improvements.*

(a) Any fees collected shall be returned to the feepayer or his successor in interest if the fees have not been spent within six (6) years from the date the building permit for the development was issued, along with simple interest of ____ percent (____%) a year. Provided, however, that the [insert governing body of local government] may by resolution extend for up to three (3) years the date at which fees must be refunded. Such an extension shall be made upon a finding that within such three (3) year period, specified transportation capital improvements are planned and evidenced by the adoption and incorporation into the

comprehensive [or master] plan, that these transportation capital improvements shall be constructed within the next three (3) years, that these improvements are reasonably attributable to the feepayer's development, and that the fees whose time of refund is extended shall be spent for these transportation capital improvements. Fees shall be deemed to be spent on the basis that the first fee collected shall be undertaken through the following process:

1. A Refund Application shall be submitted within one (1) year following the end of the sixth (6th) year from the date on which the building permit was issued on the proposed development. If the time of refund has been extended pursuant to Sec. 8 (6), the Refund Application shall include the following information:
   a. A copy of the dated receipt issued for payment of the fee;
   b. A copy of the building permits;
   c. A copy of the receipt issued by the [insert local government] for payment of the fee; and if applicable
   d. Evidence that the applicant is the successor in interest to the feepayer.

(b) Within twenty (20) days of receipt of the Refund Application, the [insert local government administrator] shall determine if it is complete. If the [insert local government administrator] determines the application is not complete, he shall send a written statement specifying the deficiencies by mail to the person submitting the application. Unless the deficiencies are corrected, the [insert local government administrator] shall take no further action on the Refund Application.

(c) When the [insert local government administrator] determines the Refund Application is complete, he shall review it within twenty (20) days, and shall approve the proposed refund if he determines the feepayer or his successor in interest has paid a fee which the [insert local government] has not spent within the period of time permitted under this section. The refund shall include the fee paid plus simple interest of ____ percent (____%) a year.

(d) Any feepayer or his successor in interest may appeal the decision of the [insert local government administrator] on a Refund Application by filing a petition with the [insert governing body of local government] within thirty (30) days of a decision by the [insert local government administrator]. In reviewing the decision, the [insert governing body of local government] shall use the standards established in Sec. 8 (6)(a).

Section 9. Liberal Construction and Severability

(1) The provisions of this ordinance shall be liberally construed to effectively carry out its purposes in the interest of public health, safety, welfare, and convenience.

(2) If any section, subsection, phrase, sentence, clause, or portion of this ordinance is for any reason held invalid or unconstitutional by any court of competent jurisdiction, such portion shall be deemed a separate, distinct, and independent provision, and such holding shall not affect the validity of the remaining portions.

Section 10. Effective Date

This ordinance shall take effect immediately upon its adoption.

[Insert adopting language required by law] on the ____ day of _____, 19__.

[INSERT GOVERNING BODY OF LOCAL GOVERNMENT]

By:_____

[Head of Governing Body]

Attest:

_____

Clerk

EXPLANATORY NOTES ON TRANSPORTATION FACILITIES IMPACT FEE ORDINANCE

Section 1.

Section 1 provides for the short title and authority of the local government to adopt the Transportation Facilities Impact Fee Ordinance.

In states that require express enabling legislation, reference to that statute should be made in Sec. 1(2), as well as any references to general land use enabling statutes or such powers as constitutional home rule authority.

In states that recognize broad local government authority to

impose impact fees based on general land use, or local government enabling legislation, or constitutional home rule powers, references should be likewise made.

Section 2.

Section 2 states the general purpose of the Transportation Facilities Impact Fee Ordinance, which is to ensure that all new impact generating land development activity contributes its proportionate share of the funds, land, or public facilities that is necessary to accommodate any impacts on public transportation facilities having a rational nexus to the proposed land development and for which the need is reasonably attributable to the proposed development.

The purpose of the section is to spell out the general purposes of the ordinance in a way that is consistent with the general police power purposes expressed in the case law.

Section 3.

Section 3 provides definitions for terms and phrases used in the ordinance.

Section 4.

Section 4 provides rules of construction to assist in the general interpretation of the ordinance.

Its purpose is to assist and ease understanding of the ordinance as well as its administration.

Section 5.

Section 5 serves as the core section of the ordinance. Fundamentally, it does three things. First, it imposes an obligation on all new land development activity to have an impact fee determined and then paid at the issuance of a building permit. Secondly, it establishes a fee schedule. And thirdly, it establishes the mechanism by which fee agreements can be entered into between feepayers and the local government.

Today, in most impact fee ordinances, fees are collected at one of three instances: (1) the time of plat approval; (2) the time of building permit issuance; or (3) the time a certificate of occupancy is issued. Because experience has indicated that collection at time of building permit issuance makes the impact fee ordinance easier to administer and provides the local government a longer lead time for expending fees before construction, the Impact Fee Act requires collection at time of building permit issuance, with one exception. The Transportation Facilities Impact Fee Ordinance is consistent with the requirements of the Impact Fee Act.

The primary function of the fee schedule is to provide an easily administered mechanism that ensures the ordinance fees are consistent with the rational nexus standard. *See e.g., Lafferty v. Payson City,* 642 P. 2d 376 (Utah 1982); *Hollywood, Inc. v. Broward County,* 431 So. 2d 606 (Fla. 4th DCA 1983); *Jordan v. Village of Menomee Falls,* 137 N.W. 2d 442 (Wisc. 1966). Because the courts have accepted the use of average costing methodologies to determine proportionate share, most ordinances use this approach by applying the relevant factors (trip generation rate, trip lengths, capture and diversion factors, and road and right-of-way costs). This is the formula used in the Transportation Facilities Impact Fee Ordinance. Its effect is that instead of having to make individual determinations for each new development, the fee schedule can be used.

The actual list of land use types in the fee schedule in the ordinance includes modest detail. In order to ensure that the fee schedule is sensitive to changing economic conditions, a biannual review is required to examine the effects of inflation and other factors on the costs that affect the fees.

The Fee Agreement is a mechanism that has been included in the more recent iterations of impact fee ordinances to assist both the local government and the feepayer in the actual implementation of the ordinance. The primary purpose of the Fee Agreement is to assist in defining the time of payment as well as the prorating of credits in large scale developments.

Section 6.

The Individual Assessment of Fiscal Impact is included in most impact fee ordinances and is essential when an average cost fee schedule is used to ensure that the ordinance will withstand a substantive due process challenge. *See e.g., Hollywood, Inc. v. Broward County,* 431 So. 2d 606 (Fla. 4th DCA 1983); *Homebuilders and Contractors Association of Palm Beach County v. Palm Beach County* 446 So. 2d 140 (Fla. 4th DCA 1983).

The purpose of the Individual Assessment of Fiscal Impact is simple. It is to provide a safety valve or opportunity for the developer to prove his case when he believes his new development will have less impact on the road system than is determined in the fee schedule. If he is correct, the fee will be modified.

The Individual Assessment can also be used by the local government to allow its staff to assess the impact of new development it believes will have a greater impact than that in the fee schedule, and to assess impacts of land use types not in the fee schedule. This is provided for in the Transportation Facilities Impact Fee Ordinance.

To ensure fairness in the process, the same formula used in developing the fee schedule must also be used in the independent analysis. Additionally, a consistent and reasonable set of review procedures must be established.

Finally, to ensure that the process works, an appeal of any Individual Assessment of Fiscal Impact may be made to the legislative body.

Section 7.

The topic of credits, which has been discussed in several court cases, is related to the proportionate share principle. *See e.g., Banberry Development Corp. v. South Jordan City,* 631 P. 2d 899 (Utah 1981); *Lafferty v. Payson City,* 642 P. 2d 376 (Utah 1982); *Hollywood, Inc. v. Broward County,* 431 So. 2d 606 (Fla. 4th DCA 1983); Bosselman & Stroud, *Pariah To Paragon: Developer Exactions in Florida 1975-85,* 14 STETSON L. REV. 527, 546-47 (1985). The use of impact fees requires a fiscal assessment of the cost of public facilities needed to serve new development and the proportionate share of those needs that are attributable to a particular development, less the credits which that development would generate. This net proportionate cost forms the basis for determining the fiscal impact of the development on the community's public facilities. For example, if a

new development, subject to impact fees, is also generating tax revenues that are being used to construct public facilities, acquire right-of-way, or pay debt service on outstanding bonds for capital facilities, the new development may be contributing twice for the same public facility.

If no credit is given, a new development may generate property taxes or gasoline taxes that are used for road improvements or right-of-way acquisition, and nonetheless be charged transportation impact fees for those same improvements and acquisitions. In order to avoid legal challenges for such a "double-payment" situation, the local government should deduct the present value of other revenues generated by the new development from the impact fees on the new development when the two sources of revenue are used to meet the same local need. The types of credits that a local government should consider depend on the local government's taxing scheme and on the type of fee which is charged. Some credits that may be appropriate for one type of impact fee may not be appropriate for another. For instance, a local government that maintains only a park impact fee would probably not be concerned with gas tax credits. Conversely, a local government with a road impact fee would probably be concerned with gas tax credits to the extent that those gas taxes are used for road improvements or right-of-way costs.

Moreover, a local government may have passed a bond issue to finance the construction or other improvement of public facilities. Their impact fees must be based on the determination of the new development's proportionate share and the credit of future payments on the bond that would be included in the ad valorem taxes or other taxes or charges assessed to new development.

This section also provides credit against impact fees when exactions are required and imposed for the same needs covered by the impact fees. On-site facilities required by local regulations, with the exception of on-site arterial and major collector roads, are excluded from this credit scheme.

Section 8.

Case law requires that the impact fees collected must be limited to a pro rata share of reasonably anticipated costs of construction and expansion. Under the "rational nexus test," (1) the impact fee must be reasonably related to the needs for additional public facilities generated by new development; and (2) the money collected must be used reasonably to benefit the new development.

The framework set out by the courts for designing a valid scheme to satisfy the second requirement is fairly settled in states such as Florida. The fees collected must be earmarked to pay for public facilities that will directly benefit the feepayers. The time limit on the use of the funds should be specifically identified to ensure that the funds are spent within a reasonable length of time. Courts will also look favorably upon any geographic relationship that can be established between the feepayer and the location in which the fees will be spent. Most of the court cases have approved the use of a segregated trust fund for the purpose of ensuring that the fees collected pursuant to the impact fee ordinance are designed for accommodation of impacts reasonably attributable to the development upon which the fee was levied. *Hollywood, Inc. v. Broward County,* 431 So. 2d 606 (Fla. 4th DCA 1983), *certiorari denied,* 440 So. 2d 352 (Fla. 1983) (park impact fees upheld and funds properly earmarked; *Homebuilders and Contractors Association v. Palm Beach County,* 446 So. 2d 606 (Fla. 4th DCA 1983) (road and transportation impact fee upheld and funds properly earmarked); *Contractors and Builders Association of Pinellas County v. City of Dunedin,* 329 So. 2d 314 (Fla. 1976) (sewer and water impact fee struck down because fees not earmarked).

Section 9.

This section provides for the liberal construction of the ordinance and for the severability of its sections, subsections, phrases, sentences, clauses, or portions. These provisions help ensure that the ordinance fulfills its purpose. In the absence of such provisions, an ambiguity could nullify the effect of the ordinance.

Section 10.

This section provides an effective date for the ordinance.

DEVELOPMENT AGREEMENTS

Introductory Commentary

One of the more difficult issues facing contemporary growth management is how to encourage large scale, comprehensive development. It has been recognized for many years that there are substantial public benefits to be derived from large scale comprehensively planned developments. However, economic and legal realities make it difficult for a landowner or developer to undertake the risks and obligations of such an effort. As a result, development continues to follow a model of piecemeal sprawl without the coherence of an overall plan. On the basis of the assumption that it is desirable to encourage large scale, comprehensively planned development, it is, then, important that a state create a legal framework that provides a "mold" for large scale projects—a mold that is flexible enough to respond to inevitable changes in the economy, but is nevertheless sufficiently certain to provide legal surety that the project will be able to be built out over an extended period of time.

The difficulty is that the development of large scale, comprehensively planned projects involves both substantial front-end expenses for planning and infrastructure and an extended build out period with an inevitable lag in revenues. For example, where a large scale project is designed to take advantage of an economy of scale in the construction of a roadway system (a road system capable of serving the entire project) during phase 1, a developer invests far more money than is needed to strictly serve the initial phases of the development. If the developer, rather than building a road or roads that could only serve phase 1 of a project, goes ahead and constructs a large, more efficient and effective roadway network and transportation facilities, he will do so on the expectation that he will be able to complete all phases of his project as planned. In simple terms, the current investment in excess road capacity is made in expectation of revenues to be generated by future phases.

Unfortunately the law provides a developer who is interested in the most efficient means of providing road capacity (i.e., the large more efficient and effective roadway network) with little or no security that he will be able to complete the project as

planned. And, in fact, the law is relatively clear that all property is subject to an exercise of the police power, regardless of the investment expectations of the developer. A prudent developer who is considering a large scale project is forced, as a matter of practical reality, to presume that there will be a change in attitude and regulations before his project can be completed. And, indeed, in residential developments the project itself is very likely to be an "instrument of its own destruction." There are legion examples of the situation where the first residents that move into a project are perfectly happy with vacant land as a neighbor and become politically active in opposition to the build out of the entire project as originally planned, even though when they moved to the project, they were fully aware of the developer's expectations for the balance of the project. This phenomenon is particularly common where the later phases of a project involve nonresidential or more intense residential uses. This is not to say that the developer is totally at risk when he undertakes a large scale development but to say that in most states the exposure is significant and very risky.

In the absence of a statutory provision that protects a developer's right to complete a previously planned and approved development, the developer's only real recourse is to seek a judicial declaration that his development rights are "vested." The concept of so-called "vested rights" has been developed by the courts in response to the inevitable changeability of local land use regulations. Generally, the concept is that a land use regulatory authority will be estopped to apply new or changed regulations to a previously approved development. Specifically, this concept would apply where a land-owner has, in good faith, relied on existing regulations to the extent that it would be highly inequitable to deny the landowner the right to complete the project as originally approved. The trouble is that what is substantial, what is good faith, and what is highly inequitable are each open, subjective questions that must be resolved on a case by case basis, at great risk and expense to both the developer and the public. It is unfortunate that such an important subject as the status of a previously approved development when the rules change is relegated to ad hoc litigation, particularly in light of the predictable lack of predictability that results from any ad hoc system. (In *The Zoning Game,* Richard F. Babcock lamented the "mockery of ad hocery" in land use decisions and the inevitable inconsistencies that result from a case by case approach.) After all, it is difficult to deny that ad hoc decision-making depends, more often than not, on who the petitioner is and how ably or effectively he is represented (usually nothing more than a measure of ability of the petitioner to pay) than on the merits of a petition. Decisions made without the coherence of established standards or policies are inevitably maleable in the hands of the participants.

On top of all these problems, the debilitation that results from an ad hoc approach is particularly regrettable because it makes it virtually impossible for a developer to confidently predict whether his development expectations will be sufficiently vested to justify a significant front-end investment in planning and infrastructure such as roads. There are numerous examples from around the country where seemingly identical developments are treated differently in terms of the projects' so-called vested rights including one notable pair of cases in Lee County, Florida, where the same judge handled both cases involving seemingly identically situated, phased developments. Both projects involved substantial site improvements as a part of a first phase of development that were designed to serve the entire tract, and both were caught between phases by a new set of regulations. In the first case the city won; however, in the second case, on what appear to be similar if not identical facts, the developer won. How a rational, prudent developer is to make a multimillion dollar decision to commit to a large scale, comprehensively planned development in a climate of legal uncertainty, is unfortunately answered by the fact that most opt for piecemeal, unplanned development.

"Development agreements" are essentially contracts that have a variety of provisions binding the parties thereto to its terms. Typical of such contracts are provisions that set out and approve the character, rate, and intensity of development of a parcel of land. In addition, such agreements normally contain the terms of the provision and financing of public facilities, such as roads, required for the proposed development. Finally, such agreements typically provide that the rules governing development cannot change so as to frustrate the development of the project in accordance with the terms of the agreement for a period of time.

In the high growth areas of Florida, California, and Hawaii, development agreements have become commonplace and not only for large scale development. California adopted legislation in 1979 (effective in January 1980), and in 1985 it was estimated that 30 percent of all local governments had signed a development agreement or were negotiating one. Hawaii adopted similar legislation in 1985 (Haw. Sess. Laws, ch. 46, part VII (1985)). While Florida only recently adopted an enabling statute in 1986 (F.S. 163.3220 *et seq.* (1986)), the process of approving developments of regional impact has involved agreements for many years (F.S. 380.06 *et seq.* (1986)). The enabling legislation has made explicit the parameters of such agreements and they are in even greater use now throughout the State.

Other states have comparable provisions, although they may not call them "development agreements." Illinois, for example, has had legislation for annexation agreements since 1961—and they have been used successfully to provide assurance to both the municipality and the property owner that the "rules will not change" during the course of development of the property which is the subject of the agreement (ILL. REV. STAT. ch. 24, 11–15.1-1 (1961)). No significant legal challenges have ever been mounted to question the ability of the local government to bind the powers of future legislative bodies.

New Jersey has recently adopted an amendment to their Land Use Law authorizing the use of "municipal development agreements." Such an agreement is authorized for developers of planned developments of more than 100 acres only, and may be approved only if accompanied by a complete general development plan. The agreement must include a timing schedule and may include other terms, such as off-tract contributions to be made by the developer. The agreement may be for a maximum 20-year duration based on specific criteria. Nevada has likewise adopted development agreement legislation.

The following draft "model" development agreement statute and ordinance combine many of the features found and used successfully in the few states that have enacted such legislation.

DEVELOPMENT AGREEMENT ACT

Section 1. Purpose

It is the intent and purpose of this Act to:

(1) Promote comprehensive planning by providing certainty in the process of obtaining development approval;

(2) Ensure the adequacy of public facilities and encourage sound capital improvement planning; and

(3) Reduce the economic costs of development by providing greater regulatory certainty for all development but particularly large-scale development which, because of its character, requires considerable investment.

Section 2. Definitions

(1) "Comprehensive [or master] plan" means a plan adopted pursuant to the [insert statutory authority for comprehensive or master plan].

(2) "Developer" means any person, including a governmental agency, undertaking any development.

(3) "Development" means the carrying out of any building activity or mining operation, the making of any material change in the use or appearance of any structure or land, or the dividing of land into three or more parcels.

(4) "Development agreement" means that agreement authorized under the provisions of this act.

(5) "Development permit" means any building permit, zoning permit, subdivision approval, rezoning, certification, special exception, variance, or any other official action of a municipality having the effect of permitting the development of land.

(6) "Governing body" means the legislative body of the local government, however designated.

(7) "Land development regulations" means ordinances enacted by governing bodies for the regulation of any aspect of development and includes any local government zoning, rezoning, subdivision, building construction, or sign regulations or any other regulations controlling the development of land.

(8) "Local Government" means any county or municipality or any special district or governmental entity established pursuant to law which exercises regulatory authority over, and grants development permits for land development.

(9) "Public facilities" means capital improvements, including but not limited to, transportation, sanitary sewer, solid waste, drainage, potable water, educational, parks and recreational, and health systems and facilities that have a life expectancy of three (3) or more years.

Section 3. Authority

Consistent with the provisions of this act, any local government may adopt provisions authorizing that government to enter into a Development Agreement with the developer of real property located within its jurisdiction. Adoption of such provisions shall be in accordance with [insert cross reference to applicable land use and zoning enabling authority].

Section 4. Requirements for Development Agreements

(1) *Procedures.* Any local government which adopts provisions pursuant to the authority of this Act shall include the following procedures:

(a) *Public Hearing.* A public hearing shall be held by the [insert Plan Commission] at least ten (10) days prior to the adoption, amendment, or revocation of a Development Agreement.

(b) *Notice.* Notice shall be provided in accordance with the provisions of [insert applicable constitutional, statutory, or local provisions for notice] at least fifteen (15) days but no more than thirty (30) days prior to the public hearing. Notice shall specify the location of the land subject to the proposed Development Agreement; the development uses proposed on the property; the proposed population densities; the proposed building intensities and height; and shall specify a place where a copy of the proposed agreement can be obtained.

(c) *Decision.* The governing body of the local government shall authorize the exe-

cution of or reject a proposed Development Agreement, with or without modifications, within thirty (30) days of the close of the public hearing.

(d) *Recording of Agreement.* Within ten (10) days after a Development Agreement has been executed by all parties, the local government shall record the Agreement with the [Recorder of Deeds]. The obligations of the Development Agreement shall be binding upon, and the benefits of the Agreement shall inure to, all successors and interests of the parties to the Agreement.

(e) *Modification of Agreement.* A Development Agreement may be modified or amended only in accordance with the procedures for original approval.

(2) *Contents.* Any local government which adopts provisions pursuant to the authority of this Act shall require that the following provisions be included in any Development Agreement:

(a) A legal description of the parcel of land which is the subject of the agreement;
(b) A description of the ownership of the parcel of land, including identification of its legal and equitable ownership;
(c) Term of the agreement;
(d) A detailed description of the uses, densities and the intensities to be permitted on the parcel of land;
(e) A description of the public facilities necessary to serve the permitted development, including identification of the deficiencies of such facilities and the manner in which such deficiencies are to be remedied;
(f) A description of any reservation or dedication of land for public purposes;
(g) A description of all permits and approvals required for the development;
(h) A description of the timing or phasing of such development;
(i) A description of any conditions, terms, restrictions, or other requirements necessary for the promotion of the purposes of this Act.

(3) No local government which adopts provisions pursuant to the Act shall approve a Development Agreement unless the legislative body finds and determines that:

(a) Such Development Agreement complies with the [Comprehensive or Master] Plan of the local government;
(b) Provision has been made to ensure the adequacy of the public facilities necessary to serve the proposed development;
(c) The term of the Development Agreement is adequate to provide reasonable assurance to the developer that his investment in facilities to serve the development will be protected, but in no event is less than the following: [insert appropriate maximum term allowed for Development Agreements].

Section 5. Effect of Development Agreement

(1) Except as provided in this section, the terms of an executed Development Agreement shall govern the development of the land during the term of the Agreement. No subsequently adopted local government land development regulation shall prevent or frustrate development in accordance with the Agreement.

(2) Notwithstanding the terms of the Agreement, any change in federal law affecting the development that is the subject of the Development Agreement shall be applicable to the development.

(3) Regulations adopted by a local government subsequent to the execution of a Development Agreement shall not be applicable to the proposed development unless the local government, after a public hearing, determines that the new regulation does not prevent or conflict with the development authorized by the Agreement, the new regulation was specifically anticipated in the Agreement, or substantially inaccurate information was provided by the developer prior to execution of the Agreement.

(4) Nothing in this Act nor in a Development Agreement shall be construed to abrogate any rights which may be otherwise vested under the provisions of the common law.

Section 6. Enforcement

The terms of a Development Agreement may be enforced by the parties thereto, their successors and assigns, by filing an action for injunctive relief in the ____ court.

EXPLANATORY NOTES ON DEVELOPMENT AGREEMENT ACT

Section 1.

There are several significant legal issues raised by development agreements. Among the most critical involve the ability, or inability, of a governing body of local government to bind succeeding governing bodies by "freezing" certain land development regulations for several years. The Development Agreement Act enables local government to agree to bind itself contractually not to enforce any changes in land development laws and regulations, or amendments thereto enacted subsequent to execution of a development agreement, insofar as the land subject to the agreement is concerned.

The courts, which condemn such zoning by agreement, caution against (1) the abridgment of powers that protect the general welfare, and (2) the bartering away of legislative discretion for promises and conditions unrelated to the requested zoning. The prohibition against abridging powers and bargaining away the police power finds its source in the so called "reserve powers doctrine." Under this doctrine, bargaining away the police power is the equivalent of a current legislature attempting to exercise legislative power reserved to later legislatures. *Stone v. Mississippi,* 101 U.S. 814 (1880); Kramer, "*Development Agreements: To What Extent are they Enforceable?*", 10 REAL ESTATE L.J. 29 (1981); Kessler, "*The Development Agreement and Its Use in Resolving Large Scale, Multi-Party Development Problems,*" 1 J. LAND USE & INT'L L. 451 (1985).

The first issue, abridgement of powers to protect the general welfare, is addressed in this section by stating strong public purpose language. A comparison among the purpose provisions of the development agreement statutes adopted in Hawaii (H.R.S. § 163.3220), California (Cal. Code § 65864), and Florida (F.S. §163.3220) show a substantial public purpose upon which courts should have little difficulty in supporting development agreements against reserved powers claims.

Section 2.

This section provides definitions for terms and phrases used in the development agreement act. Terms defined in this section should be defined the same way in the development agreement ordinance and in the development agreements themselves.

Section 3.

The existence of adequate enabling legislation may be of critical importance in determining the legality of innovative financing mechanisms. This is especially true in the context of development agreements in light of the legal questions concerning their enforceability as related to the "reserved powers doctrine." Under this section, local governments are authorized, but not required, to negotiate with landowners over specific development projects, and enter into mutually beneficial and binding agreements trading flexibility in existing land development regulations for public facilities and other dedications and fees, and any other related matter not otherwise legally prohibited. Development agreements are designed to provide developers with a greater degree of certainty over the land development regulations applicable to their projects. Local governments and the public should benefit from the commitments for public facilities and fees agreed upon by developers. Development agreements have, in the past, often been successfully implemented, and development projects have been completed according to their terms. However, the absence of statutory authority enabling governing bodies of local government to bind themselves and future governing bodies to existing land development regulations (essentially promising not to amend or modify existing land development regulations applicable to a proposed project), and, at the same time, empowering them to enforce bargained for commitments for public facilities and fees made by developers, made such agreements largely unenforceable. See *Carruth v. City of Madera,* 233 Cal. App. 688, 43 Cal. Rptr. 855 (1965); *Morrison Homes Corp. v. City of Pleasanton,* 58 Cal. App. 3d 724, 130 Cal. Rptr. 196 (1976).

Neither local government nor landowners can know in advance whether the agreed upon conditions for a proposed development project will remain the same for a sufficient length of time to allow such a project to be completed. Entering into a development agreement without statutory and local authority is a risky business for both parties. On the government's side, there is the risk that if a landowner decided to breach his commitment, there would be uncertain legal means to prevent him from doing so. On the landowner's side, there is little assurance that land development regulations in effect at the initiation of a project, according to which the project was legal, will remain unaltered during the life span of the proposed development, thus jeopardizing completion. Callies, "*Development Agreements Handbook*" (Draft, Nov. 1986).

This problem stems from the confusion in the "vested rights" doctrine developed by the courts. The vested rights doctrine deals with the problem of existing developer expectations and changing government regulations, and jurisdictions differ in their approach to this doctrine. For example, California courts adopted a "late, hard" vesting rule prior to the enactment of its development agreement legislation. Under this rule, vested rights are acquired that allow a developer to proceed notwithstanding regulatory change, only when work has been performed and the developer has incurred substantial liabilities in good faith reliance on a permit issued by a local government. *Avco Community Developers, Inc. v. South Coast Regional Commission,* 17 Cal. 3d 785, 553 P. 2d 546, 132 Cal. Rptr. 386 (1976), *certiorari denied,* 429 U.S. 1083 (1977). *See* Siemon, Larsen & Porter, *Vested Rights: Balancing Public and Private Development Expectations* (1982); Callies, *Developer's Agreements and Planning Gain,* 17 URB. L. 599 (1985). Other states have adopted approaches that recognize vested rights at an earlier stage in the process, or have relied on the doctrine of equitable estoppel to reach a similar result. Siemon, Larsen & Porter, *Vested Rights: Balancing Public and Private Development Expectations* (1982).

Section 4.

This section provides for the procedure for the adoption and contents of development agreements. In the absence of statutory requirements, such as the uniformity provision contained in standard zoning enabling legislation, local governments may be tempted to proceed to negotiate development agreements on an ad hoc basis. The wiser course is to adopt uniform procedures setting a general framework within which such agreements might be reached. This approach has several benefits, including ensuring fair and even-handed treatment that can avoid equal

protection problems, strengthening the government's position that agreements are reached with sufficient integrity to undercut reserve powers concerns, and addressing procedural due process problems that might otherwise arise.

By allowing public input through notice and public hearing procedures, the local government is allowing for consideration of the first concern of the reserve powers doctrine, that is, abridgment of power over the general welfare.

The second concern of the reserved powers doctrine that power is bargained away is likewise satiated to the extent that development agreements may only be modified or amended in accordance with procedures for original approval. This section, therefore, assures local government control over future changes in the agreement which may or may not be in the best interests of the public. Furthermore, the public hearing notice and decision-making processes contained in this section provide further assurance that a local government will exercise its authority to provide for development agreements in accordance with its typical exercises of its police power.

Moreover, as to the argument that development agreements barter away legislative discretion for emoluments unrelated to the zoning, uses, densities, and intensities, public facilities and other conditions of the agreement, this section further nullifies that argument by providing a catch all for related "conditions, terms, restrictions, or other requirements necessary for the promotion of the purposes of this act."

The subsection regarding the duration of the agreement may contain a variety of provisions. The duration may be based on a maximum term with an option to renew, such as in Florida (5 years with an option to renew if after a public hearing both the developer and the local government agree) or the authorized term may be linked to the size or intensity of the development or be open-ended as is the case with the Hawaii and California statutes (limited only by a requirement that the developer show on an annual basis "good faith" compliance with the agreement).

Section 5.

This section assures the landowner that any changes in land development regulations made during the period in which the agreement is in effect cannot be enforced on his land. The statute does not allow local governments to agree to amend, bypass, or otherwise suspend any of the land development regulations in existence at the time a development agreement becomes effective. A landowner must still seek and obtain all of the legally required permits and approvals for the development which he would have had to obtain if there were no agreement. *See* explanatory notes on "vested rights" contained in Sec. 3, *supra.*

Section 6.

If the landowner or the local government materially breaches the terms or conditions of a development agreement, the remedy most likely to be available to either party in most states would be an injunction against such breach. The local government breaches by failing to perform an act to which it has committed itself under the agreement. The landowner would be able to obtain a judgment ordering the local government to perform that act. If the landowner breaches the agreement, the local government would be able to obtain a judgment ordering the landowner to perform his duties under the agreement.

DEVELOPMENT AGREEMENT ORDINANCE

AN ORDINANCE TO BE KNOWN AS THE DEVELOPMENT AGREEMENT ORDINANCE; PROVIDING FOR SHORT TITLE AND AUTHORITY; PROVIDING FOR PURPOSE; PROVIDING DEFINITIONS AND RULES OF CONSTRUCTION; PROVIDING FOR PROCEDURES FOR CONSIDERATION, APPROVAL, REVIEW AND AMENDMENT; PROVIDING FOR EFFECT OF APPROVAL; PROVIDING FOR DURATION OF AGREEMENT; PROVIDING FOR ENFORCEMENT, SEVERABILITY AND AN EFFECTIVE DATE.

WHEREAS, the [insert statutory authority for development agreements] authorizes local governments to enter into agreements with developers governing the development of parcels of land within their jurisdiction; and

WHEREAS, the [insert local government] finds and determines that it is in the best interest of its citizens to be able to consider such agreements in the appropriate circumstances;

NOW, THEREFORE, [insert prefatory adopting language required by law]:

Section 1. Short Title and Authority

(1) This ordinance shall be known and may be cited as the "Development Agreement Ordinance."

(2) The [insert governing body of local government] is hereby authorized to consider and enter into agreements governing the development of land within the [insert local government] with any person having a legal or equitable interest in real property located within its jurisdiction pursuant to the authority of the [insert statutory authority for

development agreements] provided that such agreement is consistent with the provisions of the [insert local government] Comprehensive [or Master] Plan and land development regulations.

Section 2. Purpose

(1) This Ordinance is intended to implement and be consistent with the comprehensive [or master] plan.

(2) The objective of this ordinance is accomplished by authorizing development agreements in which a developer and the [insert local government] may ensure the adequacy of public facilities and encourage sound capital improvement planning while providing certainty in the process of obtaining development approval and reducing the economic costs of development by providing greater regulatory certainty.

Section 3. Definitions

The following definitions shall be used in the administration of the provisions of this ordinance:

(1) "Comprehensive [or master] plan" means a plan adopted pursuant to the [insert statutory authority for comprehensive or master plan].

(2) "Developer" means any person, including a governmental agency, undertaking any development.

(3) "Development" means the carrying out of any building activity or mining operation, the making of any material change in the use or appearance of any structure or land, or the dividing of land into three or more parcels.

(a) The following activities or uses shall be taken for the purposes of this ordinance to involve "development":

1. A reconstruction, alteration of the size, or material change in the external appearance of a structure on land.
2. A change in the intensity of use of land, such as an increase in the number of dwelling units in a structure or on land or a material increase in the number of businesses, manufacturing establishments, offices, or dwelling units in a structure or on land.
3. Alteration of a shore or bank of a seacoast, river, stream, lake, pond, or canal, including any "coastal construction" as defined in [insert statutory provision for coastal construction, if any].
4. Commencement of drilling, except to obtain soil samples, mining, or excavation on a parcel of land.
5. Demolition of a structure.
6. Clearing of land as an adjunct of construction.
7. Deposit of refuse, solid or liquid waste, or fill on a parcel of land.

(b) The following operations or uses shall not be taken for the purpose of this act to involve "development":

1. Work by a highway or road agency or railroad company for the maintenance or improvement of a road or railroad track, if the work is carried out on land within the boundaries of the right-of-way.
2. Work by any utility and other persons engaged in the distribution or transmission of gas or water, for the purpose of inspecting, repairing, renewing, or constructing on established rights-of-way any sewers, mains, pipes, cables, utility tunnels, powerlines, towers, poles, tracks, or the like.
3. Work for the maintenance, renewal, improvement, or alteration of any structure, if the work affects only the interior or the color of the structure or the decoration of the exterior of the structure.
4. The use of any structure or land devoted to dwelling uses for any purpose customarily incidental to enjoyment of the dwelling.
5. The use of any land for the purpose of growing plants, crops, trees, and other agricultural or forestry products; raising livestock; or for other agricultural purposes.
6. A change in the use of land or structure from a use within a class specified in an ordinance or rule to another use in the same class.
7. A change in the ownership or form of ownership of any parcel or structure.
8. The creation or termination of rights of access, riparian rights, easements, covenants concerning development of land, or other rights in land.

(c) "Development" as designated in an ordinance, rule, or development permit includes all other development customarily associated with it unless otherwise specified. When appropriate to the context, "development" refers to the act of developing or to the result of development. Reference to any specific operation is not intended to mean that the operation or activity, when part of other operations or activities, is not development. Reference to particular operations is not intended to limit the generality of this subsection.

(4) "Development permit" includes any building permit, zoning permit, subdivision approval, rezoning, certification, special exception, variance, or any other official action of the City having the effect of permitting the development of land.

(5) "Governing body" means the [insert legislative body of local government].

(6) "Land" means the earth, water, and air, above, below, or on the surface, and includes any improvements or structures customarily regarded as land.

(7) "Land development regulations" means ordinances enacted by the [insert governing body of local government] for the regulation of any aspect of development and includes any zoning, rezoning, subdivision, building construction, or sign regulations controlling the development of land.

(8) "Laws" means all ordinances, resolutions, comprehensive plans, land development regulations, and rules adopted by the governing body affecting the development of land.

(9) "Local government" means the [insert county or municipality] or any special district or other entity established pursuant to law which exercises regulatory authority over, and grants development permits for, land development.

(10) "Local planning agency" means the agency designated to prepare a comprehensive [or master] plan pursuant to the [insert statutory authority for comprehensive or master plan].

(11) "Person" means any individual, corporation, business or land trust, estate, trust, partnership, association, two or more persons having a joint or common interest, governmental agency, or any legal entity.

(12) "Public facilities" means capital improvements, including, but not limited to, transportation, sanitary sewer, solid waste, drainage, potable water, educational, parks and recreational, and health systems and facilities that have a life expectancy of three (3) or more years.

(13) "State land planning agency" means the [insert state agency with authority over comprehensive or master planning].

Section 4. Rules of Construction

In the construction of this ordinance, the rules set out in this section shall be observed unless such construction is inconsistent with the manifest intent of the [insert governing body of local government]. The rules of construction and definitions set out here shall not be applied to any section of this ordinance which contains any express provisions excluding such construction, or where the subject matter or content of such section would be inconsistent with this section.

(1) *Generally.* All provisions, terms, phrases, and expressions contained in this ordinance shall be liberally construed in order that the true intent and meaning of the [insert governing body of local government] may be fully carried out. Terms used in this ordinance, unless otherwise specifically provided, shall have the meanings prescribed by the statutes of this state for the same terms.

(2) *Text.* In case of any difference of meaning or implication between the text of this ordinance and any figure, the text shall control.

(3) *Delegation of Authority.* Whenever a provision appears requiring the head of a department or some other [insert local government] officer or employee to do some act or perform some duty, it is to be construed to authorize the head of the department or some other [insert local government] officer or employee to designate, delegate, and authorize professional-level subordinates to perform the required act or duty unless the terms of the provision or section specify otherwise.

(4) *Gender.* Words importing the masculine gender shall be construed to include the feminine and neuter.

(5) *Month.* The word "month" shall mean a calendar month.

(6) *Nontechnical and Technical Words.* Words and phrases shall be construed according to the common and approved usage of the language, but technical words and phrases and such others as may have acquired a peculiar and appropriate meaning in law shall be construed and understood according to such meaning.

(7) *Number.* A word importing the singular number, only, may extend and be applied to several persons and things as well as to one person and thing. The use of the plural number shall be deemed to include any single person or thing.

(8) *Shall, Must, May.* The words "shall" and "must" are mandatory; "may" is permissive.

(9) *Tense.* Words used in the past or present tense include the future as well as the past or present.

(10) *Written or In Writing.* The term "written" or "in writing" shall be construed to include any representation of words, letters, or figures whether by printing or otherwise.

(11) *Year.* The word "year" shall mean a calendar year, unless a fiscal year is indicated.

(12) *Boundaries.* Where a road right-of-way is used to define zone boundaries, that portion of the road right-of-way demarcating the boundary shall be considered as part of the zone it bounds.

Section 5. Procedures for Consideration, Approval, Review and Amendment

(1) *Required Provisions.* All development agreements shall contain at least the following provisions:

(a) A legal description of the land subject to the agreement and the names of its legal and equitable owners;

(b) The duration of the agreement;

(c) The development uses permitted on the land, including population densities, and building intensities and height;

(d) A description of public facilities that will serve the development, including who shall provide such facilities; the date any new facilities, if needed, will be constructed; and a schedule to assure public facilities are available concurrent with the impacts of the development;

(e) A description of any reservation or dedication of land for public purposes;

(f) A description of all local development permits approved or needed to be approved for the development of the land;

(g) A finding that the development permitted or proposed is consistent with the comprehensive [or master] plan and land development regulations of the [insert local government];

(h) A description of any conditions, terms, restrictions, or other requirements determined to be necessary by the local government for the public health, safety, or welfare of its citizens; and

(i) A statement indicating that the failure of the agreement to address a particular permit, condition, term, or restriction shall not relieve the developer of the necessity of complying with the law governing said permitting requirements, conditions, term, or restriction.

(2) *Optional Provisions.* A development agreement may provide that the entire development or any phase thereof be commenced or completed within a specific period of time.

(3) *Public Hearings.*

(a) Before entering into, amending, or revoking a development agreement, at least _____ public hearing(s) shall be conducted by the [insert local government]. One of the public hearings may be held by the local planning agency, and the other shall be held by the [insert governing body of local government].

(b) Notice of intent to consider a development agreement shall be advertised approximately ____ days before each public hearing in a newspaper of general circulation and readership in [insert local government jurisdiction]. Notice of intent to consider a development agreement shall also be mailed to all affected property owners before the first public hearing. The day, time, and place at which the second public hearing will be held shall be announced at the first public hearing.

(c) The notice shall specify the location of the land subject to the development agreement, the development uses proposed on the property, the proposed population densities, and the proposed building intensities and height and shall specify a place where a copy of the proposed agreement can be obtained.

(4) *Recording.* Within 14 days after the [insert governing body of local government] has approved a development agreement, the [insert appropriate government official to governing body] shall record the agreement with the clerk of the [insert appropriate

court] court in [insert appropriate jurisdiction]. A copy of the recorded development agreement shall be submitted to the state land planning agency within 14 days after the agreement is recorded. The burdens of the development agreement shall be binding upon, and the benefits of the agreement shall inure to, all successors in interest to the parties to the agreement.

(5) *Periodic Review.* The [insert local government] shall review land subject to a development agreement at least once every 12 months to determine if there has been demonstrated good faith compliance with the terms of the development agreement. If the [insert local government] finds, on the basis of substantial competent evidence, that there has been a failure to comply with the terms of the development agreement, the agreement may be revoked or modified by the [insert local government] in accordance with the procedures for original adoption.

(6) *Amendment or Cancellation of a Development Agreement.* A development agreement may be amended or revoked by mutual consent of the parties to the agreement or by their successors in interest.

Section 6. Effect of Approval

(1) The laws and policies of the [insert local government] governing the development of the land in effect at the time of the execution of the development agreement shall govern the development of the land for the duration of the development agreement.

(2) The [insert local government] may apply subsequently adopted laws and policies to the development that is subject to a development agreement only if the [insert local government] has held a public hearing and determined:

(a) They are not in conflict with the laws and policies governing the development agreement and do not prevent development of the land uses, intensities, or densities in the development agreement;

(b) They are essential to the public health, safety, or welfare, and expressly state that they shall apply to a development that is subject to a development agreement;

(c) They are specifically anticipated and provided for in the development agreement;

(d) The local government demonstrates that substantial changes have occurred in pertinent conditions existing at the time of approval of the development agreement; or

(e) The development agreement is based on substantially inaccurate information supplied by the developer.

(3) This section does not abrogate any rights that may vest pursuant to common law.

(4) If state or federal laws are enacted after the execution of a development agreement which are applicable to and preclude the parties' compliance with the terms of a development agreement, such agreement shall be modified or revoked as is necessary to comply with the relevant state or federal laws.

Section 7. Duration of a Development Agreement

The duration of a development agreement shall not exceed ____ years. It may be extended by mutual consent of the [insert governing body of local government] and the developer, subject to the procedures set forth in this ordinance required for its original approval.

Section 8. Enforcement

Any party, any aggrieved or adversely affected person as defined in[insert statutory authority defining "adversely affected person," if any], or any state land planning agency may file an action for injunction relief in the [insert appropriate court] court for [insert local jurisdiction] to enforce the terms of a development agreement or to challenge compliance of the agreement with the provisions of [insert statutory authority for development agreements].

Section 9. Liberal Construction and Severability

(1) The provisions of this ordinance shall be liberally construed to effectively carry out its purposes in the interest of public health, safety, welfare, and convenience.

(2) If any section, subsection, phrase, sentence, clause or portion of this ordinance is for any reason held invalid, or unconstitutional by any court of competent jurisdiction, such portion shall be deemed a separate, distinct, and independent provision, and such holding shall not affect the validity of the remaining portions.

Section 10. Effective Date

This ordinance shall take effect immediately upon its adoption.
[Insert adopting language required by law] on the ____ day of _____, 19__.

[INSERT GOVERNING BODY OF LOCAL GOVERNMENT]

By:_____
[Head of Governing Body]

Attest:

_____
Clerk

EXPLANATORY NOTES ON DEVELOPMENT AGREEMENT ORDINANCE

Section 1.

This section sets forth the authority of local government to enter into development agreements with landowners pursuant to the Development Agreement Act. It also requires that the development agreement be consistent with the local government's comprehensive (or master) plan. *See* Development Agreement Act, Sec. 3 explanatory notes, *supra.*

Section 2.

This section states that in addition to ensuring sound public facility planning and financing, as prescribed in the Development Agreement Act, the ordinance is intended to be consistent with the comprehensive (or master) plan and reduce the costs of development by providing greater regulatory certainty to landowners and developers. *See* Development Agreement Act, Sec. 1 explanatory notes, *supra.*

Section 3.

This section provides definitions for terms and phrases used in the Development Agreement Ordinance in accordance with the Development Agreement Act.

Section 4.

This section contains rules of construction that enable local government officials and landowners to understand and adhere to the ordinance.

Section 5.

Subsection (1) establishes the minimum requirements that must be contained in all development agreements under the ordinance. The legal description of the land is required for identification of the property subject to a development agreement and for recording of the agreement in the public records.

The development agreement must state a termination date. It may also specify project commencement and completion dates, either for the project as a whole or for its various phases. *See also,* Development Agreement Ordinance, Sec. 5(2). The agreement should specify that the termination date may be extended by mutual agreement, and that commencement and completion dates may also be extended at the discretion of the local government if requested by the landowner upon good cause shown. A public hearing may be required pursuant to the terms of the Development Agreement Act. Anything to the contrary notwithstanding, the duration of a development agreement must be in accordance with the terms of the Development Agreement Act and Ordinance. *See* Development Agreement Act, Sec. 4 explanatory notes, *supra.*

The parties to the development agreement are free to set limits to permissible uses, densities, and intensities beyond those specified by the applicable zoning and land use classifications. All additional limits and requirements should be clearly stated in the agreement. Moreover, all descriptions, obligations, and restrictions for public financing and construction of facilities should be set forth in detail in the agreement.

The agreement must provide, where appropriate, a statement of all reservations and dedications of land for public purposes as are required pursuant to laws, ordinances, resolutions, rules, or policies in effect at the time of entering into the development agreement. The agreement must also state all reservations and dedications that are permitted under existing laws and upon which the parties have agreed at the time the agreement is entered.

Pursuant to this section, the development agreement should contain a precise statement of all land use regulations to which the development project will be subject. The agreement should specify precisely which regulations will apply to the project regardless of future changes, and those which will be affected by the agreement. The statement should make it clear that regulations not expressly and specifically identified will not be affected by the terms of the development agreement, and will be subject to enforcement and change under the same criteria

that would apply if no development agreement were in effect.

The development agreement also should contain a statement that no applicable land use regulations or plans are currently under review or reconsideration, and that there are no legal challenges to the validity of such regulations or plans pending.

This section also provides that to the extent possible at the time the agreement is written, the parties should specify all discretionary approvals and permits that may be required before the development is allowed to proceed beyond its various stages. Permits and approvals obtained prior to execution of the development agreement should be specified. Any and all conditions precedent to the obtaining of permits and approvals should be listed.

The governing body of the local government must find that the agreement is consistent with the local government's comprehensive (or master) plan and any relevant development regulations in existence at the time of execution of the development agreement, pursuant to this section.

The agreement must contain any requirements determined to be necessary for the public health, safety, or welfare. This helps to ensure that the local government is not abridging its powers over the public welfare. *See* Development Agreement Act, Sec. 4 explanatory notes, *supra.*

Moreover, this section states that the development agreement does not relieve a landowner or developer of compliance with applicable laws for any matters not contained in the development agreement.

The provisions contained in subsection (2) of this section have been discussed above with regard to the term of the development agreement.

Subsection (3) establishes public hearing procedures for adopting, amending or revoking a development agreement. Subsection (4) allows for recording of the agreement in the public records.

Subsection (5) provides that a local government should periodically review development projects subject to development agreements in order to determine compliance with the terms of the agreement. The governing body responsible for performing such reviews should be identified and specific times for such reviews should be stated. Procedures should be developed and specified for dealing with situations in which minor and major noncompliance is discovered.

Subsection (6) provides the statutory conditions under which a development agreement may be amended, cancelled, or otherwise terminated subject to the public hearing requirements.

Section 6.

Section 6 identifies the local government body that will control the development of land subject to the development agreement. It also specifies the types of subsequently adopted laws and policies that may be applied to land which is subject to a development agreement. In so doing, this section reserves certain powers to local government and excludes certain laws and policies from inclusion in the regulatory "freeze." An express statement of this retention of police power may help to protect the Development Agreement Ordinance and the agreements themselves against possible charges that the local government has bargained away its police power under the reserved powers doctrine.

Section 7.

The duration of development agreements under this ordinance is provided for in this section. *See* Sec. 5 explanatory notes, *supra.*

Section 8.

The development agreement should specify that the agreement shall be enforceable, unless lawfully terminated or revoked, by any party to the agreement or any party's successor in interest, notwithstanding any subsequent changes in any applicable law adopted by the local government entering into the agreement which alters or amends the laws, ordinances, resolutions, rules, or policies frozen by the agreement, except as otherwise provided for in the Development Agreement Act, Ordinance, or the agreement itself.

Section 9.

This section provides that the ordinance shall be liberally construed to effectively carry out its purposes. It also provides a clause specifying that the provisions of the ordinance are severable.

Section 10.

This section provides for an effective date for the ordinance.

APPENDIX C

REVIEW OF LITERATURE

ADAM SMITH INSTITUTE, *Roads and the Private Sector.* London, England: ASI (undated). This publication consists of a number of papers addressing public funding sources, private sector funding, and private roadway financing.

ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, "Financing Public Physical Infrastructure." Report A96, U.S. Government Printing Office, Washington, D.C., 1984. ACIR report summarizes current trends in the financing of public infrastructure, including streets and highways.

AMERICAN TRANSPORTATION ADVISORY COUNCIL, *Financing Future Transportation Needs in the Next Decade, 1978–1987; A Private Sector Report.* Washington, D.C.: ATAC, 1977. Based on data from private sector organizations in the transportation industry, this report concentrates on major Federal financing responsibilities and interests. Descriptions are given of unified transportation funding trust funds, user charges, energy tax, and other tax sources.

AMERICAN TRANSPORTATION ADVISORY COUNCIL, *Transportation Financial Needs during the Next Decade (1978–87).* Washington, D.C.: ATAC, 1977. This report, focusing on the areas of major federal responsibilities and interest, includes individual modal reports for airports, highways, pipelines, public transit, railroads, and waterways. Needs estimates and data sources are outlined and indicated.

ARANA, A., "Doing Deals." *Planning,* February 1986, pp. 30–33. This article describes various public and private financing techniques used in Southern California, including tax increment financing, exactions and fees, development agreements, equity participation, and sales tax participation.

BAUMGAERTNER, W. E. AND H. S. CHADDA. "Adequate Public Facilities Ordinances and Traffic Impact Studies: A Discussion of Issues." *ITE J.,* May 1986, pp. 41–45. This article discusses adequate public facility ordinances based on experience in the Washington, D.C., area and several major issues concerning their relationship to traffic impact studies. These issues include the definition of adequacy, the measurement of adequacy, the method of performing the study, the allocation of cost between the public and private sectors, and methods of funding improvements. The methods of funding discussed include "last developer in pays," tax increment financing, and system development changes, or impact fees.

BAY AREA ASSOCIATION OF GOVERNMENTS, "Developer Fees in the San Francisco Area: An Update." Bay Area Association of Governments, Berkeley, Cal., 1982. This document is a study of fees paid by developers in Northern California. Lists fee levels and what the fees are used for in a selected sample of communities.

BEAR, STEARNS & CO., "Route One Corridor Study: Overview and Discussion of Financing Alternatives." April 1985, (Unpublished Report). This report discusses the existing development-related traffic problems in the Route One Corridor between Trenton and New Brunswick, New Jersey, and analyzes several funding mechanisms as potential solutions. Objectives, potential solutions, institutional mechanisms, and legal issues are all discussed.

BEIMBORN, E., H. ROBINOWITZ, AND C. LINDHOLM, "Strategies for Private Sector Participation in the Provision of Public Transportation Facilities." *Innovative Financing for Transportation: Practical Solutions and Experience.* Washington, D.C.: U.S. Government Printing Office, 1985. This paper discusses several strategies for public and private cooperation in providing transportation projects, including developer contributions, land use planning and controls, a selection process based on private contributions, the state acting as a broker for development projects, investment by the state in development projects, formation of a transportation corridor development corporation, and the state acting as a developer. These strategies are evaluated based on their impacts, on legal considerations, and on internal DOT considerations.

BERNSTEIN, C. S., "Private Funds, Public Projects." *Civ. Eng. / ASCE,* September 1985, pp. 50–53. A portion of this article, entitled "Dollars from Developers," discusses Pennsylvania's Transportation Partnership Act. An example cited is the expansion of the interchange between US 202 and Pennsylvania Route 29 west of Philadelphia. The interchange improvement is to be funded jointly by Penn DOT ($8.5 million), the transportation district ($4 million), and the developer of an industrial park ($2.6 million).

BLACK, J. T. AND J. HOBEN, "Effects of Policy Restrictions on Residential Land Prices." *Urban Land,* Vol. 43, No. 2, 1984, p.3. This is a brief nontheoretic discussion of the impact of development restrictions on land prices.

BLANK, B., "Time Control, Sequential Zoning: The Ramapo Case." *Baylor L. Rev.,* Vol. 25, 1973, pp. 318–335. This paper includes a discussion of the legal ramifications of growth control ordinances, including requirements for public facilities, after the Ramapo decision in New York.

BOSSELMAN, F. P. AND N. E. STROUD, "Mandatory Tithes: The Legality of Land Development Linkage." *Nova Law J.,* Vol. 9, 1985, pp. 381–412. A recent law review article summarizes the legal issues involved in having developers provide infrastructure to achieve social objectives and to mitigate the social impacts of development.

BUTLER, K. S. AND D. MYERS, "Boomtime in Austin, Texas: Negotiated Growth Management." *J. Am. Planning Assoc.,* Vol. 50, No. 4, 1984, pp. 447–458. This article discusses the use of Municipal Utility Districts and negotiation for providing infrastructure serving new development, including roads, in Austin, Texas.

CALIFORNIA BUILDING INDUSTRY ASSOCIATION, "Ensuring Adequate Infrastructure for New Development in California." California Building Industry Association, Sacramento, Cal., 1984. This paper describes the various methods of privately financing infrastructure serving new development in California; data on development fee levels and other developer contributions in communities throughout the state are included. The presentation is made primarily from the developer's perspective.

CANIN, B., "What's Happening in Orlando?" *Urban Land* 45, March 1986, pp. 10–15. This article describes recent development trends in the Orlando, Florida, area. Included is a brief discussion of exactions, "fair share" payments, and traffic impact fees. The latter are expected to raise $41 million in revenues over the next 5 years, less than is needed for road improvements.

CHOATE, P. AND S. WALTER, *America in Ruins: The Decaying Infrastructure.* Duke University Press, Durham, N.C., 1983. This is a controversial book on the condition of the nation's infrastructure, including roads. The primary conclusion of the book is that there is a large need for replacing public infrastructure that cannot be financed through traditional sources. (Note: several highly respected researchers have recently come up with conclusions that contradict Choate and Walter's work for roads and transit.)

CITY OF COLORADO SPRINGS, COLORADO, "The City of Colorado Springs' Policies That Govern the Developer's Minimum Financial Responsibilities in Providing Public Improvements in A New Development." City of Colorado

Springs, 1984. This publication is put out by the city of Colorado Springs for developers and describes the contributions they must make towards public facilities. It includes fee levels and exaction requirements.

CONGRESSIONAL BUDGET OFFICE, "The Federal Budget for Public Works Infrastructure." U.S. Government Printing Office, Washington, D.C., 1985. Report discusses recent trends in public works funding.

CONNORS, D. L. AND M. E. HIGH, "The Expanding Circle of Exactions: From Dedication to Linkage." *Law and Contemporary Problems,* Duke University Law School, Durham, N.C. (Forthcoming). This publication is an article presented at Duke Law School as part of a program on exactions organized by Dick Babcock. It describes the legal limitations on what can be required from developers. It is a fairly traditional legal presentation with a heavy emphasis on case law, especially in some of the more conservative legal states.

CURRIER, B. A., "'Impact Fees' Some Fundamental Issues," *Policy Studies J.,* Vol. 12, No. 3, 1984, pp. 521–527. Some of the shortcomings of impact fees are discussed from a political perspective. The article is based on experience in Florida.

"Dealing with the Transportation Impacts of Site Development." *ITE J.,* May 1986, pp. 17–20. This report describes some of the issues and findings from the National Conference on Site Development and Transportation Impacts. Two of the major topics included in the discussion are funding responsibilities and cost-sharing alternatives. ITE is working toward developing more data and standards in these areas, as well as in the general area of traffic impact analysis.

DELAWARE VALLEY REGIONAL PLANNING COMMISSION, *Private Sector Funding of Off-Site Highway Improvements.* Philadelphia: DVRPC, 1985. This report examines various approaches to private funding of off-site highway improvements used by local governments in southeastern Pennsylvania and New Jersey. The report discusses the differences between the approaches and examines policy issues related to them.

DOWALL, D. E., *The Suburban Squeeze: Land Conversion and Regulation in the San Francisco Bay Area.* University of California Press, Berkeley, 1984. This is a book on a broad range of methods used to regulate development in the San Francisco area, including requirements for adequate public facilities. It contains several case studies of the effects of land use and development controls in specific communities.

DOWNING, P. B. AND T. J. DILORENZO, "User Charges and Special Districts." *Management Policies in Local Government Finance,* ed. by J. Richard Aronson and Eli Schwartz, International City Management Association, Washington, D.C., 1984. The publication summarizes user-fee financing of public facilities and services. It contains a discussion of how user charges should be set.

DOWNING, P. B. AND J. E. FRANK, "Recreational Impact Fees: Characteristics and Current Usage." *National Tax J.,* Vol. 36, No. 4, 1983, pp. 477–90. Discussion includes the use of impact fees to finance recreational facilities in Florida. The authors promote fees primarily on the grounds of economic efficiency.

DUNCAN, J. B., T. D. MORGAN, AND N. R. STANDERFER, "Simplifying and Understanding the Art and Practice of Impact Fees." City of Austin, Tex., 1986. A Memo describes the use of impact fees, including administrative, planning, and legal issues. The authors were involved with the establishment of Broward County, Florida, impact fees, even though they do not refer to it directly. In addition, they try to keep the discussions general so that the information they present can be used outside of Florida.

ELLICKSON, R. C., "Suburban Growth Controls: An Economic and Legal Analysis." *Yale L. J.,* Vol. 86, 1977, pp. 385–509. This article gives a comprehensive legal treatment of growth control regulations. While somewhat dated, the article is still the best available for relationship of legal doctrine and public policy.

ELLICKSON, R. C., "The Irony of Inclusionary Zoning." *Resolving the Housing Crisis,* ed. by M. Bruce Johnson, Ballinger, Cambridge, Mass., 1982. This is a critique of inclusionary zoning where developers are required to provide a certain amount of low and moderate income housing.

ELLIOTT, M. "The Impact of Growth Control Regulations on Housing Prices in California." *AREUEA J.,* Vol. 9, No. 2, 1982, pp. 115–133. Article discusses the impact of different types of land use regulations, including the provision of infrastructure by developers, on housing prices.

EVANS, J. H., H. P. HATRY, AND A. P. MILLER, "Capital Investment Priority Setting for Local Government." Urban Institute, Washington, D.C., 1983. A general discussion is given in this publication of capital budgeting procedures of local governments.

"Fees and Utility Taxes Assure Adequate Street Funding." *Roads,* October 1984, pp. 24, 25. This article discusses the use of a transportation utility fee to pay for street repair, maintenance, and other transportation operating costs. The fee is based on street frontage and land use.

FISCHEL, W. A., *The Economics of Zoning Law: A Property Rights Approach to American Land Use Control.* Johns Hopkins Press, Baltimore, Md., 1985. This book includes a recent comprehensive analysis of land use and development regulation in this country. Most of the analysis is presented from a welfare economic perspective. The book includes a fairly good section on the effects of land use and development regulation on different segments of society, and the economic inefficiencies associated with growth controls.

FISCHEL, W. A., "The Economics of Land Use Exactions: A Property Rights Analysis." *Law and Contemporary Problems,* Duke University Law School, Durham, N.C. (Forthcoming). This publication is an article presented at Duke Law School as part of a program organized by Dick Babcock on exactions. Exactions are presented as a method of internalizing public costs and promoting economic efficiency.

FISHER, G. W., *Financing Local Improvements by Special Assessment.* Municipal Finance Officers Association, Chicago, 1974. This is a classic piece on special assessments from the public administration perspective. It includes a description of the proper use and limitations of special assessments.

"Florida Gets Growth-Management Law." *Eng. News-Record,* June 27, 1985: 16. This article briefly reviews Florida's 1985 growth-management legislation, which gives more control to local governments and requires review and impact fees for all developments, large and small.

FRANK, J. E., P. B. DOWNING, AND E. R. LINES, "A National Survey of Sewer Impact Fees," *Journal WPCF,* Vol. 57, No. 11, 1985, pp. 1055–61. The publication describes the results of the Homer Hoyt Center's survey of impact fee used to finance water and sewer systems.

FRIEDEN, B. J., "Allocating the Public Service Costs of New Housing." *Urban Land,* Vol. 39, No. 1, 1980, pp. 12–16. This is an essay on the likely social and policy implications of shifting the financing of infrastructure from public revenue sources to the developer.

GAJ, S., A. POLITANO, AND L. GOLDBERG. "Local Financing Opportunities for Urban Highway Transportation Improvements." *Transportation Research Record 900,* 1983, pp. 39–42. Paper describes U.S. highways as at a turning point because of their condition and maintenance costs. The report addresses the funding dilemma by focusing on the sources and use of local finances, the range of opportunities for additional sources, and the respective merits of such funding. The suitability of specific sources is examined by a number of criteria.

GIBSON, S., "Transportation 1990: Toll Roads? Transit Incentives? Electrified Freeways? Trucks in Diamond Lanes?" *California J.,* November 1980, pp. 417–420. This report examines the possibility of alternative roadway funding, such as toll roads, because of the combined effects of inflation and dwindling revenue sources. Predictions include decreased construction of highways, increased improvement of existing interchanges, bridges, and streets, and an increased emphasis on mass transit. The report suggests that decreased funding will require a larger percentage of highway financing by developers, alternative fuels, and various experimental projects.

GOODMAN, B. M., "Innovative Financing of Transportation Improvements in Texas," 1985 (Unpublished). This paper describes and discusses Texas's new public-private financing mechanisms for highways, including Road Utility Districts (RUDs) and Transportation Development Corporation. The advantages of public-private corporations are discussed, along with several areas of caution.

GOUGELMAN, P. "Impact Fees: National Perspectives to Florida Practice—A Review of Mandatory Land Dedications and Impact Fees That Effect Land Development." *Nova L. J.,* No. 4, 1980, pp. 137–186. Article discusses the evolution of developer financing of infrastructure in Florida from the legal perspective. A good development of case law to 1980. Fairly readable for the layman.

GRAHAM, K. W. AND J. B. SAAG, "Interchange Reconstruction with Developer Assistance." *ITE J.,* May 1985, pp. 50–55. This article describes a program of improving three interchanges along an interstate highway in Kansas City with developer participation in funding. Funding responsibility was placed on developers based on the proportion of total projected traffic growth accounted for by the development. This cost allocation was applied on a segment-by-segment basis, including individual ramps. Construction is being phased with development as much as possible.

HANKE, S. H. AND J. T. WENDERS, "Costing and Pricing for Old and New Customers." *Public Utilities Fortnightly,* Vol. 29, 1982, pp. 423–447. This is an essay on the advantages and disadvantages of differential financing of water services to current and new residents of an area.

HEYMAN, I. M. AND T. K. GIHOOL, "The Constitutionality of Imposing Increased Community Costs on New Suburban Residents Through Subdivision Exactions." *Yale L. J.,* Vol. 73, 1964, pp. 1119–1157. This is the classic law article on the legal issues involved with developer financing of public facilities either through dedications or through fees. While very dated, it lays out many of the policy issues that are often ignored in today's discussions of exactions and impact fees.

HIGHWAY USERS FEDERATION FOR SAFETY AND MOBILITY, *Getting Around Town: Strategies for Urban Mobility.* Washington, D.C.: Highway Users Federation, 1986. This brochure discusses the urban congestion problem and its potential solutions. Traffic impact fees are discussed as potential funding methods. Localities cited as using impact fees include Broward County, Florida; Orange County and San Diego County, California; Montgomery County, Maryland; and Horns County, Texas.

HOWARD, J. A., G. RIVKIN, S. BRECHER, AND L. HEDER, "Strategies to Implement Benefit-Sharing for Fixed-Transit Facilities." NCTRP *Report 12,* Washington, D.C.: Transportation Research Board, 1985. This publication describes strategies that can be used to obtain private funding for transit facilities through benefit-sharing. These strategies include charges for direct connection to transit facilities, use of air rights over transit rights-of-way, and development of adjacent and nearby real estate.

JACOBSEN, F. AND J. A. REDDING, "Impact Taxes: Making Development Pay Its Way." *North Carolina L. Rev.,* Vol. 55, 1977. JACOBSEN, F. AND J. A. REDDING, "Impact Taxes" and "Exactions of Development Permission." In *Windfalls for Wipeouts: Land Value Capture and Compensation,* ed. by Donald Hagman and Dean Misczynski, American Society of Planning Officials, Chicago, 1978. These articles include discussion of exactions and fees as methods of making new development pay its fair share of the cost of public facilities serving it. The articles grew out of work by D. Hagman in the 1970s on land value capture theory, which advocated methods of making those who benefit from public policies affecting development pay some of their gain in taxes or fees for public facilities serving them.

JOHNSON, G. T. AND L. A. HOEL, *An Inventory of Innovative Financing Techniques for Transportation.* Washington, D.C.: U.S. Government Printing Office, 1985. This report concentrates on value capture approaches for transportation financing. Those that most directly involve public and private financing include connector fees and service charges, negotiated fees or investments, special benefit assessment districts, tax increment financing, traffic impact requirements, air rights leasing, donations, and cost sharing.

JUERGENSMEYER, J. C. AND R. M. BLAKE, "Impact Fees: An Answer to Local Governments Capital Funding Dilemma." *Florida State University L. Rev.,* Vol. 9, No. 3, 1981, pp. 415–445. This is a law review article discussing the legal limitations on using impact fees. The article makes some broad generalizations on the benefits of impact fees without any supporting evidence. Juergensmeyer implies that fees that satisfy the legal requirements laid out by the courts are socially beneficial. The article includes a good

discussion of the courts' limitations on impact fees under rational nexus.

JUERGENSMEYER, J. C., "Funding Infrastructure: Paying the Costs of Growth Through Impact Fees and Other Land Regulation Charges." *The Changing Structure of Infrastructure Finance,* ed. by James C. Nicholas, Monograph 85-5, Lincoln Institute of Land Policy, Cambridge, Mass., 1985. This publication is an article presented at Duke University Law School as part of a program on exactions organized by Dick Babcock. It is an essay on the limitations the courts impose on impact fees. It is a more general and less technical discussion of the points raised in the previous Juergensmeyer article.

KEYES, R., "Innovative Financing for Highway Improvements in Real Estate Development." *ITE J.,* March 1986, pp. 23–27. This article describes an areawide improvement project in New Jersey that is being funded by local developers through developer agreements. The costs are allocated based on peak-hour (a.m. and p.m.) traffic volumes generated by each site.

KIRLIN, J. AND A. M. KIRLIN, *Public Choices—Private Resources: Financing Capital Infrastructure.* California Tax Foundation, Sacramento, Cal., 1982. This report discusses the use of negotiations in the development regulations process. It is an excellent discussion of several specific cases in California where negotiations between government and developer led to substantial contributions by the developers while minimizing the impact on their development.

KLEIN, G., "Privatization: What Hope for Rail?" *Mass Transit,* January–February 1986, pp. 10, 11, 60, 62. This article discusses the potential of private funding for rail transit systems. Two examples discussed are the Harbor Island people mover, recently completed in Tampa, and the proposed Dulles Access Rapid Transit (DART) project. The first project was constructed as part of a major development project, while DART is proposed to be financed at least in part by related real estate projects.

KNACK, R., J. FRANK, AND H. STEWART. "How Road Impact Fees Are Working in Broward County." *Planning,* Vol. 50, No. 6, 1984, pp. 24–27. This article contains a very general discussion of the use of road impact fees in Broward County, Florida. It includes a description of the program and the transportation modeling use to assess impacts of new development.

KNIGHT, T., "The Traffic Snarl: A Reason to Smile." *Texas Business,* November 1985, p. 12. This article discusses the private sector funding of an engineering position at the State Department of Highways and Public Transportation to expedite the design and approval of a section of I-10 in San Antonio.

CITY OF LOVELAND, COLORADO. "Service Cost Recovery System: System Documentation." City of Loveland, Colorado, 1983. A detailed description of Loveland's development fees is given, including full documentation of how fees are calculated and how the system is administered.

MARING, G. E., *State of the Practice: Investment and Financial Analysis.* Washington, D.C.: Transportation Research Board, 1983. Asserting transportation financing as the key issue of the 1980's, this report focuses primarily on local-level financing, such as user-pay and nonuser mechanisms, broad-based taxes, borrowing strategies, and joint ventures with the private sector. Problems with existing revenue sources are discussed, and possible solutions appear to combine the efforts of local and state governments in the areas of budgeting, short-range fiscal analyses, and long-term financial planning.

MCKEE, H., "Following Federal Cutbacks—Can the Private Sector Fill the Gap?" *Traffic Safety 83:* 3, May 1983, pp. 20–21. This article asserts that while private industry can provide a percentage of needed funding, government agencies remain responsible for prioritizing vital community programs. The report discusses ways in which the business community, professional volunteers, and voluntary associations can contribute to highway safety programs and general safety needs of the community.

MEISNER, L. J., *Financing Urban Transportation Improvements, Report 2: Use of Private Funds for Highway Improvements.* Washington, D.C.: Federal Highway Administration, 1984. This report examines uses of private funds for highway improvements, assesses alternative mechanisms for obtaining private financing, and provides recommendations for ways the public and private sectors can cooperate in the construction of highway facilities. Case studies provide information on how private funds have been or will be implemented, and the report presents recommendations on ways to increase the use of private funding.

MISCZYNSKI, D., "Special Assessments." In *Windfalls for Wipeouts: Land Value Capture and Compensation,* ed. by Donald G. Hagman and Dean Misczynski, American Society of Planning Officials, Chicago, 1978. Report includes a general discussion of special assessments.

MUSTOW, S. N., "Strategy for the Future." *Municipal Engineer,* 110:9, September 1983, pp. 281–285. This paper discusses the resultant decline and deteriorization of roadways from decreased public spending. Solutions include increased involvement of the private sector, the identification of priorities, effective use of limited funds, early notification of resource levels, and advance approval to allow time for lengthy procedures.

NICHOLAS, J. C., E. G. MONTANARO, AND N. STROUD, "The Role and Scope of Impact Fees." FAU/FIU Joint Center for Environmental and Urban Problems, Boca Raton, Fla., 1981. This report covers a good overview of the use of impact fees in Florida, including their proper legal use.

NICHOLAS, J. C., "Florida's Experience with Impact Fees." In *The Changing Structure of Infrastructure Finance,* ed. by James C. Nicholas, Monograph 85-5, Lincoln Institute of Land Policy, Cambridge, Mass., 1985. This report provides an overview of the use of impact fees in Florida, including a discussion of the legal limits on using fees under rational nexus and the economic objectives of fee systems.

NICHOLAS, J. C., "Impact Exactions: Economic Theory, Practice and Incidence." *Law and Contemporary Problems,* Duke University Law School, Durham, N.C. (Forthcoming). This publication is an article presented at Duke University Law School as part of a program on exaction organized by Dick Babcock. It discusses the incidence of fees in general terms and the likely impact on housing price, as well as the need for fees with recent changes in government finance.

NIEDOWSKI, R. S., "A Procedure for Allocating Road Improvement Costs to Private Developers," 1986 (Unpub-

lished). This paper describes the implementation of a traffic impact fee system in Hudson, New Hampshire. The fee system was based on projected traffic volumes and roadway needs in a specific 4.5-mile corridor.

OFFICE OF PLANNING AND RESEARCH. "Paying the Piper: New Ways to Pay for Public Infrastructure in California." State of California, Sacramento, Cal., 1982. This report focuses on a description of alternative methods of financing public infrastructure in California with particular emphasis on private financing.

ORANGE COUNTY, FLORIDA, "Transportation Impact Fee Study." Final Draft, Orange County Office of Capital Facilities Development, Orlando, Fla., 1985. Report includes detailed documentation of the road impact fee recently enacted in Orange County, Florida.

ORSKI, C. K. "Suburban Mobility: The Coming Transportation Crisis?" *ITE J.*, July 1985, pp. 40–44. This article discusses the major traffic problems caused by dense development in suburban areas and their possible solutions. Various cooperative financing methods are discussed, including benefit assessment districts, development fees, and negotiated improvements. Examples used for illustration include Denver; Montgomery County, Maryland; Washington, D.C.; Orange County, Alameda County, and San Diego County, California; Houston; and Dallas.

PEISER, R. B., "The Economics of Municipal Utility Districts for Land Development." *Land Economics,* Vol. 59, No. 1, 1983, pp. 43–57. Report includes an economic analysis of the use of Municipal Utility Districts to finance water and sewer facilities serving new development in Texas.

PTRC EDUCATION AND RESEARCH SERVICES, *Private Financing of Public Infrastructure.* London, England: Planning and Transportation Research and Computation Co., 1982. This report describes the current decrease of volume capital expenditure on infrastructure. An alternative is proposed, involving a form of hire-purchase or leasing arrangement with private financiers for some public sector capital projects. The costs of conventionally and privately financing motorways are compared and discussed.

POOL, R. W., JR., "Privatizing Transportation Infrastructure." From *Conference on Transportation Partnerships: Improving Urban Mobility through Public-Private Partnerships, Dallas, Texas, March 14–15, 1984.* Washington, D.C.: Transportation Research Board, 1985. This report discusses the privatization of public facilities, such as toll bridges and highways, as a means to raise large revenues for infrastructure rebuilding. Opposing views are included which argue that efficient operation can be achieved with a well-run public enterprise. Inadequate public infrastructure is presented as an imbalance between that which the public receives and that for which the public pays.

PORTER, D. R., "To Fee or Not to Fee?" *Urban Land,* Vol. 43, No. 5, 1984, pp. 34–35. A short essay presents some of the policy issues involved with developer financing of public infrastructure.

PORTER, D. R. AND R. B. PEISER, "Financing Infrastructure to Support Community Growth." Development Component Series, Urban Land Institute, Washington, D.C., 1984. Short descriptions are given of 14 private financing programs across the country, including development fee systems and exactions.

"*Quid Pro Quo* for Zoning Exception Ruled Illegal by Virginia Supreme Court." *Land Use Digest,* September 1984. This article discusses a Virginia Supreme Court decision in which it was ruled that a local government's police power does not have the power to require the dedication of land or the construction of roads for the benefit of the public.

RHODES, R. M., "Impact Fees: The Cost Benefit Dilemma in Florida." *Land Use Law and Zoning Digest,* Vol. 27, No. 10, 1975, pp. 7–14. Article discusses the need for impact fees in Florida.

RICE CENTER, *Financing Urban Transportation Improvements Report 3: A Guide to Alternative Financing Mechanisms for Urban Highways.* Washington, D.C.: Federal Highway Administration, 1984. This report examines four techniques for generating revenues for the construction and maintenance of urban highways: toll financing, local option motor-fuel taxes, private development related measures, and utilization of airspace. Designed as a guide for state and local officials, the report describes and reviews these revenue techniques by a number of criteria.

RICE CENTER, *Alternative Financing for Urban Transportation.* Washington, D.C.: U.S. Department of Transportation, 1983. This report uses a case study approach to present the alternative financing methods. The report discusses funding sources, cost reduction methods, measures to shift costs to the private sector, and debt financing techniques. The private sector techniques include land use controls and private provisions of service.

ROCKINGHAM PLANNING COMMISSION AND THE NASHUA REGIONAL PLANNING COMMISSION, "Private Development Related Measures for Funding Municipal Road Improvements." *Innovative Financing for Transportation: Practical Solutions and Experience,* Washington, D.C.: U.S. Government Printing Office, 1985. This report reviews various types of private financing for highways, including development phasing, benefit assessment districts, road payback fees, and impact fees. Case studies and examples of each method are discussed, including legal issues.

RUDNICK, A. J., *Alternative Financing for Urban Transportation: State-of-the-Art Case Analyses.* Houston, Texas: Rice Center, 1983. Designed as a guide for the state or local official facing a decrease in public funding for transportation, this report's case analyses provide details to help determine the applicability of various funding techniques. The studies include examples of benefit assessment districts, local fuel taxes, leased property rights, private provision of services, and toll financing.

SANDLER, R. D. AND E. T. DENBURN, "Transportation Impact Fees: The Florida Experience," January 1986 (Unpublished). This report, presented to TRB in 1986, discusses traffic impact fees as used in Florida, with emphasis on the Palm Beach County model, which has withstood judicial challenges. Included in the discussion are legal, economic, and growth management issues.

SCHAEVITS, R. C., "Viability of Wide Area Assessment Districts for Financing Street, Highway, and Parking Improvements." *Innovative Financing for Transportation: Practical Solutions and Experience,* Washington, D.C.: U.S. Government Printing Office, 1985. This report describes the use of benefit assessment districts in Albuquerque, New Mexico, and discusses key legal and practical issues involved in the implementation of the districts.

SCHEUERNSTUHL, G. J., *Case Study on Local Financing Techniques: Denver, Colorado.* Washington, D.C.: Transportation Research Board, 1985. This special report examines the efforts of The Denver Regional Council of Governments to secure local and state funding sources for current and future transportation facilities. Included are the principal revenue concepts recommended by a 1984 DRCOG report.

SCHOPPERT, D. W. AND W. S. HERALD, "Private Funds for Highway Improvements." *Transportation Research Record 900,* (1983), pp.42–47. This report examines how transportation improvements are prohibited by fiscal restraint, increases in construction and maintenance costs, and insufficient traditional source funds. The private sector is discussed as a potential source of new or additional funds and a brief description cites examples of private funds for highway improvements. The report discusses the need for further research to determine the increased role of private funding sources.

SHAW, P. L., *Southern California Urban Transportation: Financial Necessity may be the Mother of Invention.* London, England: PTRC Education and Research Services Limited, 1982. This work documents and analyzes the efforts of Southern California urban transportation agencies to solve the problem of shrinking resources and an increasing travel demand. Such efforts include increased non-federal funding sources, the construction of new light-rail systems, and possible toll roads and freeways. The resulting public-private cooperation is seen as an innovative solution.

SHEEN, J., "Development Fees: Standards to Determine Their Reasonableness." *Utah L. Rev.,* Vol. 3, 1982, pp. 549–69. This article is an excellent law review on the limitations the courts have placed on development fees. The article takes a more balanced approach than those which tend to concentrate on regional trends and court decisions such as those in Florida. It is a good discussion of many of the more recent economic issues raised by the courts in Utah and Colorado.

SHOUP, D., "Financing Public Investment by Deferred Special Assessments." *National Tax J.,* Vol. 33, No. 4, 1980, pp. 413–429. Article includes an economic analysis of the use of special assessments to finance public facilities and the advantages of deferring assessment to match the use of the facilities.

SIMPSON & CURTAIN DIVISION, *Township-Wide Highway/Traffic Improvement Study.* Philadelphia: Booz-Allen & Hamilton, Inc. (Undated). This report describes the results of a traffic study performed for Upper Merion Township in Montgomery County, Pennsylvania. The study defines existing and future deficiencies, future needs for improvements, and estimated cost. The cost of improvements is then allocated to future development on a per-trip basis for impact fees.

SOUTHERN CALIFORNIA RAPID TRANSIT DISTRICT (RTD), *Metro Rail Benefit Assessment Districts.* Los Angeles: SCRTD, 1985. This booklet describes SCRTD's program of benefit assessment districts to help finance the proposed 18.6-mile subway line. The benefit assessment districts, authorized by SCRTD, will be based on either parcel square footage or square footage of the improvement, whichever is greater. Only improvements used as offices, commercial sites, retail stores, or hotels would be assessed, with an initial rate of $0.30 per square foot and a maximum rate of $0.42 per square foot. The benefit assessments are expected to raise $130.3 million, or about 11 percent of the construction cost.

STEGMAN, M. A., "Development Fees for Infrastructure." *Urban Land,* May 1986, pp. 2–5. This article describes the background and results of development fees. Included are the reasons for development fees, legal and economic considerations, reactions of builders and developers, and practical considerations.

"System Development Fees for Raleigh—A Concept/Issues Paper." Raleigh Planning Department in Cooperation with the City Attorney's Office, Raleigh, N.C., 1985. Report documents the need for development fees in Raleigh, North Carolina. This paper contains the information presented to the General Assembly when Raleigh sought special enabling legislation authorizing the use of development fees in the City.

TRANSPORTATION RESEARCH BOARD, *State and Local Transportation Finance and Cost Allocation.* Washington, D.C.: TRB, 1983. Included in the discussion of various finance methods and cost allocations is a discussion of private funds for highway improvements.

U.S. DEPARTMENT OF TRANSPORTATION, FHWA, *A Guide to Alternative Financing Mechanisms for Urban Highways.* Washington, D.C.: U.S. Government Printing Office, 1984. This document describes several alternative financing mechanisms, including the use of private funding.

VESEY, T., "Builder's Projects Now Come with Roads, Buses." *Washington Post* pp A1, A6 (Date not available). This article describes private contributions to highway and transportation improvements in the Washington, DC suburbs, including Fairfax County and Prince George's County, Virginia and Montgomery County, Maryland. The improvements include public parking lots, fee or subsidized van service, intersection improvements, road widenings, interchange improvements, and new roadways.

WARREN, R.E., "A New Approach to Funding Streets." *ITE J.,* July 1985, pp. 17–19. This article describes a system of utility-like assessments on property to fund street maintenance. The charges would be based on trip generation rates.