Together, the six papers provide both a broad overview of history and legal context in the use of impact fees and useful insights into the kinds of issues which emerge in their local applications. They do not provide a "cookbook" for establishing an impact fee, but they provide answers to a number of questions. However, applying impact fees, in most cases, is particular to the circumstances of the individual situation. It is hoped that this group of papers will raise the questions and issues that state and local jurisdictions must resolve in applying impact fees to land development.

IMPACT FEES

by
Michael A. Stegman
University of North Carolina

In September, 1983, the Department of City and Regional Planning at the University of North Carolina was awarded a contract by U.S. Department of Housing and Urban Development to examine alternative revenue sources local governments have found to finance new off-site public facilities to serve urban growth.* Our national study was to describe how these methods work and for what situations they are appropriate and to analyze these methods in terms of equity, economic efficiency, and impacts on housing costs.

This paper will address three issues:

1. The evolution of impact fees.

2. Legal considerations in financing off-site public facilities, including roads; and

3. Some of the complexities involved in the creation of an impact fee system at the local level, with specific reference to work in Raleigh in designing a road impact fee ordinance.

Over the years, government has regulated private development in a variety of ways. Current efforts to make development responsible for more of the infrastructure that serves it, signal a significant expansion in developer responsibility and usher in a new generation of development regulation.

The first significant control over private development came with the widespread adoption of zoning and subdivision regulations during the early part of the 20th century. Under those regulations, cities

*Thomas P. Snyder and Michael A. Stegman, Paying for Growth: Using Development Fees to Finance Infrastructure, Washington, The Urban Land Institute, October, 1986.

could limit the type of development that occurred in particular locations, in order to make it compatible with surrounding land uses, and could impose standards of design that were necessary to protect the health, safety, and welfare of the community. These regulations were justified under the legal doctrine of nuisance which permitted cities to use their police powers to eliminate the negative side effects that new development had on others in the community. Land use controls--zoning and subdivision regulations--adopted under the nuisance doctrine constituted the first generation of development regulations.

With the first generation of development regulations, there was a fine line that separated infrastructrue that developers could be required to provide from that which had to be provided by the city. Cities could require developers to provide infrastructure that was needed to prevent their development from being a nuisance to other development in the community and infrastructure that exclusively benefited the residents of their projects. Cities could not, however, require infrastructure that served and benefited the community at large.

In the early 1970s, many cities determined there was a limit to the amount of infrastructure that they could afford to provide to new development. Rapid growth was leading to excessive burdens on established residents in the form of higher taxes and utility rates which were needed to finance infrastructure for new development. These problems led cities to adopt what we refer to as a second generation of development regulations--growth control and growth management programs. Under these programs, a city could limit the amount of development if costs of new infrastructure required to serve it were too high, and they could direct development to particular areas of the city where necessary public facilities already existed or could be built more cheaply. Importantly, no effort was made under these programs to shift the responsibility for financing off-site infrastructure, which had always been considered a public responsibility, to the developer.

Typical of this new generation of land use regulations was the town of Ramapo. New York's famous phased growth program, in 1972, was upheld by the courts in the precedent setting case Golden v. Planning Board of the Town of Ramapo. The Ramapo program established a schedule for constructing new infrastructure in various sections of town, and development could not occur in an area until the scheduled facilities were built by the community. In establishing its timetable, the town relied primarily on its ability to provide new capital facilities to serve growth without having to raise taxes.

In the late 1970s and early 1980s, rapid growth in many areas has combined with increases in construction costs and interest rates, and reductions in federal and state aid, to increase the cost to local governments of providing new infrastructure. Coupled with the fiscal decline of many cities, tax and expenditure limitations, and voter

rejections of bond issues, the cost increases have forced many cities to reconsider the way they pay for new capital facilities.

Orlando, Colorado Springs, Orange County California, Raleigh, NC, and hundreds of other rapidly growing communities across the country have already adopted or are in the process of adopting various forms of private financing--including exactions and impact fees--to construct at least some portion of new off-site infrastructure, and by so doing are attempting to shift more of the capital costs of growth to developers and residents of new development.

The systems of fees, special assessments and facility dedications communities have created to accomplish this shift to private financing is what we refer to as the third generation of development regulations.

Nationally, the use of impact fees is most prevalent in California and Colorado. All cities in these states use impact fees, and most cities use them to finance a broad range of facilities.

Cities in Colorado have the longest history of using impact fees, and their fees are more sophisticated and refined than they are in other parts of the country. The use of impact fees in Colorado dates from the first half of the century, when they were first used to finance the purchase of water rights. Since then, cities in Colorado have extended the use of impact fees to the financing of much of the infrastructure needed to serve new development. Our survey of fees for six cities and one county in Colorado for a typical single-family house constructed in 1984 indicates that total fees average $5,265, ranging from a low or $2,589 in unincorporated Boulder County to more than $7,000 in nearby Lafayette.

In California, the widespread use of impact fees is a relatively recent phenomenon and is largely attributable to the passage of Proposition 13 in 1978. Many of the fees there differ substantially from impact fees in other parts of the nation, in that they are enacted as taxes by "charter cities" under their home-rule powers.

In Orange County California, impact fees average more than $4,400, ranging from $2,182 in Buena Park to almost $9,100 in San Clemente. In the San Francisco Bay area, fees averaged $6,107 and ranged from $1,321 in San Mateo to $8,568 in Tiberon. Most of the variation comes from school and park fees. In 1983,road and school fees--which did not even exist in 1975--were the largest fees of all. Between 1975 and 1983, total impact fees in the Bay area increased 511 percent in real terms, while planning and engineering fees grew by 72 percent and 30 percent respectively.

In recent years, Florida cities and counties have also been very active in adopting impact fees. According to a March 1986 survey by ACIR, more than 50 cities and counties in Florida have adopted water and sewer impact fees while 8 cities and 12 counties have imposed

road impact fees. The latter average around $400 for a typical single family house in cities, and a higher $705 in the counties. With respect to their revenue potential, it is anticipated that Orange County Florida can raise a total of $42 million over the next 5 years from road impact fees. This represents about 28% of the cost of its priority road network for the 1985-1990 period.

The movement toward private financing of infrastructure has not occurred wihtout controversy. While many rapidly growing cities have found impact fees to be the most expedient solution to immediate budgetary problems, they have imposed them with little understanding of their long-term consequences. Fees were an uneasy compromise between current political realities, a pressing need for new infrastructure, and a need to reform the way capital facilities had been financed in the past.

Critics of private financing believe that fees are unfair because residents of new developments pay the same taxes as everyone else and thus should have access to the same facilities as established residents without having to bear additional costs. Many critics also believe local governments should provide infrastructure using general revenue sources. They see the provision of public facilities as a basic responsibility of local government for which everyone should pay.

The critics believe that impact fees sound the death-knell of long range land use planning. According to land use attorney Charles Siemon, for example, the idea of a fair share "pay as you go" exaction system "creates the illusion that the character, location and magnitude of land use is simply a matter of a developer's willingness to pay for the cost of new services required by new growth".

Indeed, "the intangible values--community character and quality of life--are vulnerable to incompatible or undersirable land uses whether or not a developer is willing to pay for water, sewer, or roads." In other words, quality of life involves far more than fiscal efficiency and it is imperative that land use controls be capable of conserving community values even if a developer is willing to pay for the cost of needed improvements.

Another potentially serious problem with impact fees is that what starts out as an incremental response to budget difficulties can easily end up as a whole new financing system. Laws designed to protect individuals who pay special fees and charges require that the resulting revenue be spent only for the specific purpose for which they were collected. Such earmarking protects these funds from being unsurped by city government for other purposes. But under a system that isolates these earmarked funds from the normal budgetary process, cities stand to lose much of the flexibility they need to meet many community-wide objectives, since fee revenues cannot be readily shifted to where they might be needed most.

In Raleigh, North Carolina, the City's impact fee enabling law prohibits the use of fees to help pay the costs of administering the impact fee program. Impact fee laws in other states routinely consider administration a legitimate program cost. Palm Beach County Florida, for example, permits up to 2% of collected revenues to be used for administrative purposes, in addition to interest earned on collected funds.

Another issue of concern to Raleigh is prohibition against using impact fees to retire bonded indebtedness. This prohibition will severely limit Raleigh's ability to plan for the future and to acquire parkland and build roads economically and efficiently. Roads generally require substantial investments and are built with excess capacity to serve anticipated growth in order to take advantage of economies of scale in construction. Instead of being able to build such roads with bond proceeds which will be repaid with impact fees collected from future residents who the roads are intended to serve, the city will have to either postpone construction until new development occurs and impact fee revenues become available, or finance the projects from bonds that will then have to be repaid with general fund revenues.

Still another issue in the impact fee area concerns the transition from exactions to impact fees. It may make sense, for example, to require the developer of a modest-sized subdivision to build and dedicate a left-turn lane on an arterial road to provide access to his project, but it is infeasible to require him to construct a portion of a major freeway interchange or sewage treatment plant from which his development would benefit. For those reasons, many cities are abandoning exactions in favor of impact fees and special districts, which can be used to generate the capital needed to finance all types of off-site capital facilities.

The discrete nature of most large-scale, off-site infrastructure has led to developers of large projects being forced to pay disproportionately large shares of off-site facility costs. That has happened because it is the large-scale projects that cities incorrectly assume create the need for new highways, sewage treatment plants and other similar facilities. Since for off-site infrastructure that serves more than one project it is not possible for each developer who creates an incremental need for it to build an incremental portion of it, communities traditionally have limited off-site exactions to large developers. Indeed, in our national survey, we found developers of large projects to be more unhappy because smaller-scale projects and smaller developers were exempted from having to pay exactions or fees-in-lieu than they were with the cities' decision to shift part of the off-site infrastructure cost from the public to the private sector.

In Raleigh's case, the transition from exactions to road impact fees could also cost the city some much needed revenue in the short run. This is because, under the city's exaction system, developers

are reimbursed only for the added construction costs they incur in building oversized roads to meet citywide needs. They receive no reimbursement for their development or needs for the additional right-of-way they must dedicate to the city. Under the impact fee system for roads, Raleigh's enabling law specifies that developers must either receive credits against their fee liabilities or be reimbursed for the total value (land and improvement) of the additional roadway they build beyond that needed to serve the local needs of their projects. This means that, in making the transition from exactions to impact fees, Raleigh will incur higher local outlays for roads.

In formal terms, the trend toward private financing of new infrastructure is a move to apply the benefit principle to the financing of off-site infrastructure. In many cases, however, cities are actually applying what we see as a double standard of benefit financing for new infrastructure and ability-to-pay or general revenue for replacement infrastructure. While this double standard may be politically popular at first, we wonder whether those who have to pay for their own new infrastructure through impact fees are going to support a double standard of infrastructure financing once they become a larger fraction of the population. An example of the problem that could occur can be most clearly illustrated in the case of education, where new schools would be financed with exactions or school impact fees while school replacements or renovations would be financed with general taxes. As new residents who had to pay for their own schools become a larger part of the city's population, they may not continue to support the use of their tax dollars to finance school replacements and thus may vote against urgently needed bond authorization.

More extensive use of impact fees also raises other important issues, such as their effects on housing costs. In many communites, impact fees exceed $5,000 per housing unit. Fees that high may well put housing out of reach for many people if developers are able to pass those charges on to buyers of new homes.

Not surprisingly, we have found that local developers are among the strongest supporters of impact fees, but for defensive reasons. They fear moritoriums might be placed on development and that insufficient public facilities might be built to accommodate their subdivisions. In addition, as the "fees are antiplanning" school of thought correctly argues, many developers think impact fees will give them the necessary leverage to demand the public facilities they need in order to develop their land in a timely and orderly manner.

Our national study confirmed the proposition that legal considerations have been the most important factors in shaping private financing of new infrastructure. Although economic, political, and social factors have been the dominant forces in creating discontent with traditional forms of public financing, legal considerations have largely determined the type of private financing

that a city uses, the type of infrastructure that is financed with private sources, and the extent to which private financing is relied upon.

Legal challenges to the financing of new infrastructure usually center on two questions: Does the city or jurisdiction have the legal power to use the revenue source it is using? If it does, is it using the source within the legal restrictions placed on that power?

Local governments that have the power to regulate land use and development also have the power to require exactions. Since the power to require exactions is a grant of police power, the protection of public health, safety, and general welfare must be weighed against the constitutional protections of due process and equal protection in deciding what are acceptable exactions. Courts in all the states consistently have upheld exactions for such infrastructure as streets, sidewalks, street lights, sewers, water lines, and drainage facilities that are either on site or directly adjacent to the development. They have been far less consistent in upholding exactions for parks, schools, libraries, and other public buildings and for various off-site facilities. The emerging trend has been the use of the "rational nexus" criterion, in which exactions are legally acceptable under due process and equal protection as long as there is a reasonable relationship between the exaction and the public needs generated by the new development. Under this doctrine, exactions are generally acceptable as long as the developer is held responsible for only the proportion of those facilities for which his development creates a need be they on or off-site.

However, we found that many cities seek from developers exactions that far exceed what the courts would find acceptable, but the industry is generally reluctant to challenge local governments as long as the illegal increment does not exceed the combined costs of litigation and construction delays.

The legality of impact fees is far less certain than the other forms of private financing. One of the major questions arising with impact fees is whether they are taxes or regulations. The answer to this depends in large part on the particular form of the fees as established under local ordinances and the form of the enabling legislation in the state. Few states have adopted enabling legislation for impact fees as an explicit grant of police power, although the North Carolina General Assembly did so exclusively for Raleigh. Most local governments that have adopted impact fees have done so under the police power granted to them to regulate land use and developmemt--the same powers they used to adopt exactions. And, as with exactions, "rational nexus" has emerged as the dominant criterion for determining when impact fees are valid use of police powers. Under the "rational nexus" principle, fees are valid as regulations and are not considered taxes as long as they are used to finance facilities that are needed to serve the new development that pays the fee.

In the latter stages of our HUD project, Raleigh's City Manager asked us to work with the City's planning staff to design an impact fee system for roads and open space. While our work with the city began in November, 1985, at the request of the City Council, Raleigh's planning and legal staffs had been studying the impact fee issue since the preceding summer. Approximately one year after the City's study began, in June, 1985, the North Carolina General Assembly enacted a local bill enabling the City of Raleigh to adopt its own impact fee system. We are now in the late stages of the design process. From where we are in that process right now, I would judge it will probably be mid-fall before all the necessary planning studies, transportation analyses and master plan up-dates will be completed. These are needed to set and justify fee levels and to get a local fee ordinance enacted.

This means that some 30 months will have passed from the time that the City Council first broached the subject of impact fees to the day that the first impact fee dollar is paid into a separate city account that has been specially set up to receive fee revenues.

This is because a defensible impact fee program must be supported by quality plans, and Raleigh had to conduct several planning studies that linked the need for expanding its infrastructure network to new development before its fee system could be implemented. Also, it takes time to establish unambiguous service standards, integrate exaction systems with impact fees, and create project accounting and monitoring systems that a well-administered impact fee program requires.

Raleigh's road impact fee program, will be guided by the following 5 requirements that a valid road impact fee ordinance must satisfy.

1. It will have to be based on a carefully documented estimate of the cost of acquiring and constructing new roads that will be required to serve new development in the Raleigh area over the impact fee planning horizon.

2. Raleigh's impact fee ordinance must be based on a reasonable formula for determining the fair share cost to be imposed on new development that will show the city is not attempting to thrust the entire burden of new road costs on to new development. In Raleigh, that formula will make appropriate adjustments for new road capacity that is required to serve through trips that will neither originate nor terminate in Raleigh area, and thus, cannot properly be charged to new development in Raleigh.

   It will also have to make a downward adjustment for the cost of road improvements that are needed to remedy deficiencies in the existing road system in order to bring that system up to level of service D, the citywide service standard for

roads and the standard being used to design the road impact fee system. The cost of improvements to the existing network are not chargeable to new development, and, therefore, should not be part of the road impact fee base.

Finally, Raleigh's fee formula must also contain credits to be applied against road fees to avoid charging new development twice for the same highway facilities. There are two parts to the double payment credit. First, new development should not have to help pay to retire outstanding bonds on the existing road network serving established residents while bearing the full cost of new roads for which it generates a need. Secondly, new development should not have to pay twice for the same facilities: once through road impact fees and then, over time, through the payment of a motor fuels tax, dedicated sales tax, or as part of state and local tax payments that are used to build roads intended to serve new growth.

3. Raleigh's road impact fee system will have to provide for the separation and earmarking of fee revenues. Fees will not be mingled with general public funds.

4. The expenditure of fees must be localized so that residents of the new development will benefit from the new highway facilities that will be built with fees.

5. Finally, Raleigh's road impact fee system must take steps to ensure there will be a high degree of certainty that fee revenues will actually be expended for the benefit of the residents of the new development that pays them. This is assured by provision in the City's impact fee law that establishes a ten-year time limit within which road fees must be expended under penalty of mandatory refunds.

IMPACT FEES FOR FINANCING TRANSPORTATION INFRASTRUCTURE: THE FLORIDA EXPERIENCE

by
Richard Glaze

In Florida there is no state enabling legislation for impact fees. As a result there is no uniformity. This puts local governments more or less on their own. The fees are usually small in proportion to what the real cost of the impact is on transportation. I've seen numbers ranging from $5000 to $15,000 per single family dwelling, yet impact fees range between $500-$1,000.