

Transportation Utility Fees

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In June 1992, Port Orange, Florida, became the 10th U.S. city (and the first east of the Mississippi River) to adopt a transportation utility fee (TUF). Initially, TUF funds will replace a 0.287-mil subsidy from the city's general fund and eliminate a shortfall in the city's road maintenance budget. Eventually, funds will be used to pave dirt roads, construct bike paths, and reconstruct and widen deficient city streets. In a TUF ordinance, roads are treated as a public utility, and developed properties are charged a fee for service in much the same way they are charged for water, sewer, trash collection, and, increasingly, storm water utility services. Like other utility fees, TUFs are imposed on a jurisdictionwide basis and continue in perpetuity, financing ongoing operations. A nationwide search uncovered nine localities outside Florida with TUF ordinances as of late 1991. From a review of their experiences and an analysis of legal cases relating to TUFs and other user fees, a TUF ordinance was drafted and a fee structure was developed for Port Orange. The rationale for Port Orange's fee structure, focusing on legal considerations, is outlined.

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IT BEATS A PROPERTY TAX

A TUF is not a user fee in the classic sense. By the textbook definition, user fees are "payments for voluntarily purchased, publicly provided services that benefit specific individuals" (1). A TUF is not comparable with fees for, say, the use of public swimming pools. It is not voluntarily paid and does not fund a service that benefits "specific individuals" to the ex-

clusion of nonfeepayers. In this sense it is more akin to a tax than a fee.

Popular wisdom would say that roads are not suitable for funding with user fees. "User charges can function only when activities financed meet two necessary conditions: benefits separability and chargeability. These are features absent from pure public goods. . . . The farther a good or service departs from publicness and the closer it approximates a private good, the more feasible are user charges" (2, p.360). Although roads are not a pure public good, they certainly fall near the public end of the public-private spectrum. Provision of such goods historically has been funded with taxes rather than user fees.

Then why contemplate a fee for road use? User fees are the fastest-growing source of revenue for local governments. They are popular for three reasons.

New Revenue

Historically, cities and counties paid for roads with taxes and special assessments. Since the mid-1980s, localities in certain states have also imposed transportation impact fees. But even tapping all these sources, many localities find their road needs outpacing their revenues. Port Orange, for example, is facing a \$245,000 shortfall in its road maintenance program.

Property tax hikes are death politically, even where (as in Port Orange) a locality has the ability to raise them under state law. Transportation impact fees are inherently volatile and can be used only to meet the needs of new development (under applicable case law). Local governments must come up with the funds to operate and maintain the new roads built with impact fees and to eliminate congested conditions on existing roads. These are precisely the uses of funds for which TUFs are intended (Table 2).

Equity

With a property tax, a significant percentage of trip generators pay nothing because of their tax-exempt status. In contrast, with a TUF, every local trip generator pays to support the local road system.

Of course, some inequity creeps into a transportation utility fee schedule because road use is estimated rather than measured, and because estimates are based on averages for entire classes of property. Still, this shortcoming may be less problematic than the exemption of entire classes of developed property from any payment of property taxes. This is clearly the case in Port Orange, where the amount of tax-exempt property is a sore point with local officials.

TABLE 1 National Experience with Transportation Utility Fees

Fee Characteristics	Fort Collins Colorado	La Grande Oregon	Pocatello Idaho	Ashland Oregon	Tualatin Oregon
Name	Transportation Utility Fee	Street User Fee	Street Restoration and Maintenance Fee	Transportation Utility Fee	Road Utility Fee
Status	Implemented 1984 Discontinued 1987	Implemented 1985	Implemented 1986 Discontinued 1987	Implemented 1986	Implemented 1990
Fee Basis	Front footage Trip generation	Flat fee	Trip generation	Flat fee for residential uses Required parking spaces for non-residential uses	Trip generation
Use of Funds	Road maintenance	Road construction Road maintenance	Road maintenance	Road maintenance Bikeways Pedestrian improvements	Road maintenance Street lighting
Land-Use Categories	Single-family Multifamily 1 Non-residential category	1 Land use category	Single-family Multifamily Mobile homes Retirement homes 79 Non-residential categories	Single-family Multifamily 10 Non-residential categories	Single-family Multifamily 7 Non-residential categories
Exemptions	Undeveloped land	Properties without water service	Undeveloped land Unoccupied structures (must be unoccupied at least 90 days)	Undeveloped land Churches Nursing homes	Undeveloped land Unoccupied structures without water service (after 30 day vacancy) Park-and-ride lots Public park land without parking Railroad right-of-way
Fee per Single Family Unit	\$.75 - \$1.50 per month (\$1.00 target)	\$2.50 per month	\$2.65 per month	\$1.20 per month (20 cents for bikeways)	\$1.42 per month
Billing Mechanism	Monthly utility bill	Monthly utility bill	Monthly utility bill	Monthly utility bill	Monthly utility bill
Individual Billed	Owner or occupant (owner is liable)	Owner or occupant (owner is liable)	Owner or occupant (jointly liable)	Owner or occupant	Owner or occupant (owner is liable)
Enforcement Mechanism	Discontinuance of utilities Creation of lien	Creation of lien Legal action	Discontinuance of utilities Creation of lien	Discontinuance of utilities Legal action	Discontinuance of utilities Creation of lien
Discounts (upon application)	Low-income elderly	Low-income elderly	Low-income elderly	Low-income elderly	Vacant structures with water service

Fee Characteristics	Beaumont Texas	Soap Lake Washington	Austin Texas	Medford Oregon
Name	Street Use Service Fee	Street Utility Charge	Transportation User Fee	Street Utility Fee
Status	Implemented 1990	Implemented 1992	Implemented 1992	Implemented 1992
Fee Basis	Flat fee	Flat fee for residential uses Employees for non-residential uses	Trip generation	Trip generation
Use of Funds	Road maintenance	Road construction Road maintenance	Road maintenance	Road maintenance
Land-Use Categories	Single-family Multifamily 1 Non-residential category	1 Residential category 1 Non-residential category	4 Single-family categories 4 Multifamily categories 31 Non-residential categories	Single-family Multifamily Senior housing 16 Non-residential categories
Exemptions	Undeveloped land Disabled persons Occupants of public housing or federally subsidized low-income rental housing	Undeveloped land Tax-exempt properties Low-income elderly Low-income disabled	Undeveloped land Public properties Vacant residences Autoless households Elderly	Undeveloped land Developed land without water service
Fee per Single Family Unit	\$3.00 per month	\$2.00 per month	\$1.70 per month	\$2.00 per month
Billing Mechanism	Monthly utility bill	Monthly utility bill	Monthly utility bill	Monthly utility bill
Individual Billed	Owner or occupant	Owner or occupant	Owner or occupant	Owner or occupant
Enforcement Mechanism		Creation of lien Legal action	Discontinuance of utilities Legal action	Discontinuance of utilities Legal action
Discounts (upon application)	Elderly living in single-family units		Properties which generate less than the assigned traffic level	

TABLE 2 Eligible Uses of Funds

	Capital Improvements	Operation & Maintenance
Needs of New Development	Impact Fees	N/A
Needs of Existing Development	Utility Fees	Utility Fees

Economic Efficiency

If road users could be charged for the marginal costs of their trips, including delay imposed on other road users and environmental damage, then trips valued at less than their social costs would not be made. Economic theory tells us such charges would maximize net benefits to society.

The problem is that variable pricing requires that road use be metered. Absent metering, a TUF must appear as a fixed charge to the individual user. A TUF neither moderates travel demand nor encourages the use of more economically efficient modes of travel. It provides no demand signals that can be used in service planning.

Even so, the political process of fee setting may lead to a more efficient allocation of resources than is likely when roads compete for general tax revenues (as they do with property taxes). And a TUF appears more politically feasible at this point than the theoretically elegant road pricing schemes advocated by economists.

WHAT IS IN A NAME?

The name given a revenue source does not determine whether it is a tax, assessment, or fee. What counts are the characteristics of the source. The object in structuring a TUF is to make it as much like a user fee and as little like a tax or special assessment as possible.

Legal guidance is provided by the Supreme Court of Colorado, which upheld Fort Collins's TUF as a special fee (*Bloom v. City of Fort Collins*, 784 P.2d 304); the Supreme Court of Idaho, which struck down Pocatello's TUF as a disguised tax (*Brewster v. City of Pocatello*, 768 P.2d 765); the Attorney General of Oregon, who opined that Ashland's TUF is a property tax (Oregon Attorney General Opinion OP-6091, June 26, 1987); and the courts and legislatures of other states, which have drawn the line between user fees, taxes, and special assessments through their case law and statutes.

Taxes, Assessments, and Fees

In Florida as in most states, localities may levy taxes only if specifically authorized by state law. A TUF would be illegal if judged to be a tax.

Odds are that a TUF would also be illegal if judged to be a special assessment. Special assessments may be levied only on properties that realize some "special benefit" from expenditures. Traditionally, this meant that properties had to physically abut improvements financed with assessments. Such improvements tended to be limited in scale and scope (e.g., subdivision street paving and street lighting).

Increasingly, special assessments are being used to finance services and facilities beneficial to larger areas and a broader public. The courts in Florida are among the most receptive to such applications. Yet even in Florida, a special assessment for citywide road repaving was recently declared invalid because the benefits conferred by the program were not "special" enough (*Hanna v. City of Palm Bay*, 579 So.2d 320).

Only if a TUF is judged to be a user fee will it likely be upheld. "Home rule" states grant localities all powers that are not precluded or preempted by the state constitution or state statutes. As a rule, the power to impose user fees for public purposes is not preempted; quite the opposite, state statutes specifically grant localities such power under the mantle of home rule.

Costs Occasioned

To qualify as user fees, government charges must be reasonably related to use of public facilities or services. From a legal standpoint, the safest basis for TUFs is costs occasioned by the use of roads. By this I mean costs incurred by government in meeting the needs of specific classes of road users.

Cost occasioned is the most common basis for allocating highway costs among vehicle classes and establishing corresponding fuel tax rates. Cost of service, a concept analogous to cost occasioned, is the most common basis for utility rate setting and one generally acknowledged to meet the "fair and reasonable" standard applied to utility rates. Cost occasioned is the basis for transportation impact fees in Florida and other states adopting the rational nexus standard. And cost of service was the basis for a favorable ruling in the only case to date upholding a TUF, the Fort Collins case. Quoting the Colorado Supreme Court:

We are thus satisfied that where, as here, a municipality imposes a special fee upon owners or occupants of developed lots fronting city streets for the purpose of providing revenues for the maintenance of city streets, and where the fee is reasonably designed to defray the cost of the service provided by the municipality, such fee is a valid form of government charge within the legislative authority of the municipality. [*Bloom v. City of Fort Collins*, 784 P.2d 304, 311 (emphasis added)].

"Reasonableness" Standard

The fact that user fees must be reasonably related to the use of facilities or services does not mean that fees must be based on precise estimates of use or costs occasioned by use. One challenging the reasonableness of a fee must overcome a presumption of validity by demonstrating that the fee structure was established arbitrarily.

In the Fort Collins case, the court stated:

The amount of a special fee must be reasonably related to the overall cost of the service. . . . Mathematical exactitude, however, is not required, and the particular mode adopted by a city in assessing the fee is generally a matter of legislative discretion. (*Bloom v. City of Fort Collins*, 784 P.2d 304, 308)

The same standard has been applied by courts in other states. In Florida, for example, a court held that "mathematical exactitude" is not required in setting trash collection fees to exactly reflect the cost of service (*Pinellas Apartment Association, Inc. v. City of Petersburg*, 294 So.2d 676, 678).

WHOM TO CHARGE, AND HOW MUCH

In establishing a fee structure, it is first necessary to decide which roadway costs are occasioned by feepayers, then to decide which classes of feepayers occasion specific costs, and finally to decide how to divide such costs among individual feepayers within the classes occasioning them.

Existing Versus Future Traffic

If a TUF is truly a fee, feepayers may be charged only for the costs they themselves occasion. With only two exceptions (La Grande, Oregon, and Soap Lake, Washington), localities implementing TUFs to date have utilized funds strictly for operation and maintenance of roads. Clearly, such costs are occasioned by existing users because they are recurring costs that cannot be avoided if facilities are open to traffic.

That is not the case with capital improvements. Some capital improvements meet the needs of new rather than existing development; the costs of these improvements could be avoided in the absence of growth.

In setting transportation impact fees under the court-imposed rational nexus standard, new construction costs must be divided into two pots: costs incurred to eliminate any backlog of road needs at current traffic volumes and costs incurred to accommodate new trips caused by anticipated development. Only the latter may be funded with impact fees.

The cost of new facilities should be borne by new users to the extent new use requires new facilities, but only to that extent. When new facilities must be built in any event, looking only to new users for necessary capital gives old users a windfall at the expense of new users. (*Contractors and Builders Association of Pinellas County v. City of Dunedin*, 329 So.2d 314, 321)

Conversely, only the costs of eliminating existing deficiencies could be funded with a TUF because new users would otherwise benefit from a "windfall" at the expense of old users. If a road user tax were being imposed, the proceeds could be used for any road-related purpose. However, a TUF is a fee and hence subject to a different standard. The connection between who pays and who benefits is stronger for a fee than for a tax.

Local Versus Through Traffic

Being an open system, roads serve not only those who reside or do business in the community but anyone who might wish to travel through the community. Both groups occasion costs through road use. Yet, again, feepayers may be charged only for their fair share of total costs.

The issue of road use by nonfeepayers loomed large in the Pocatello case. In ruling against Pocatello's TUF, the Idaho District Court held:

Accepting the legal definition that a fee is a charge for a direct public service, while a tax is a forced contribution by the public at large to meet public needs, the City cannot charge and collect fees for the restoration and maintenance of public streets . . . fees collected from the owners/occupiers of the individual premises go to support a proprietary service that is *shared by the public at large*. [*Brewster v. City of Pocatello*, District Court, County of Bannock, State of Idaho, Register #39971-A, p. 11 (emphasis added)]

Similar concerns surfaced when impact fees were first used to finance infrastructure available to the general public. In a landmark case, feepayers argued that since anyone could use roads financed with impact fees, there was too wide a gap between those who paid and those who benefited, making the fee, in reality, a tax. The court disagreed, upholding impact fees as long as they do not exceed the costs of improvements required by new developments (*Home Builders v. Board of County Commissioners of Palm Beach County*, 446 So.2d 140).

By analogy, any benefit accruing to the public generally should not invalidate a TUF as long as fees meet the "fair-share" test. The balance of road costs, occasioned by those driving through the community, must be covered by other revenues.

The practical significance of this issue may be nil. It is likely that the great majority of those using city streets have at least one trip end within the city; their trips are generated (produced or attracted) by properties subject to the TUF. Those traveling through the city pay no fee, but in most communities, through traffic is confined to higher-level roads under county or state jurisdiction.

Arterials Versus Local Roads

In jurisdictions with TUFs, high-volume retailers have argued with some success that it would be unfair to make fees a straight function of traffic generation. On the basis of rates in the *ITE Trip Generation* manual, a convenience store or fast food restaurant could pay thousands of dollars annually in fees; a shopping center, tens of thousands. Yet, as these retailers know, the lion's share of local road expenditures only indirectly benefit them since they, by necessity, locate on high-volume county or state roads.

Jurisdictions have responded to such arguments in different ways. Austin, Texas, has capped its "traffic generation factor" at five times the residential rate; food stores and health care facilities pay the same amount per acre of development, although food stores generate almost four times as many trips per acre. Pocatello assigned 79 percent of its costs to resi-

dential users, the balance to other users; residential properties ended up paying 13 times as much per "average weekday vehicle trip end" as did nonresidential properties.

An arbitrary cap or allocation may solve a political problem but also jeopardizes the status of a TUF as a fee reasonably related to use of city streets. There is a better way to deal with this issue.

Arterials, collectors, and local roads perform different functions in the road hierarchy, and thus, occasion costs differently. Because the primary function of local roads is to provide access to land, costs of such roads are occasioned entirely by fronting properties. On the other hand, since the primary function of arterials is to provide mobility, their costs are occasioned by all developed properties, whether they front on a jurisdiction's roads or not. Collectors fall somewhere between the two extremes.

In Port Orange's ordinance, we distinguish among roads in different functional classes and allocate their costs separately, still on the basis of trip generation rates. This approach poses less legal risk than arbitrary caps or allocations, yet it results in moderate fees for nonresidential uses located on arterials or collectors.

Trip Generation Estimates

Two of the nine jurisdictions surveyed, La Grande, Oregon, and Beaumont, Texas, have flat fee schedules independent of road use; their TUFs almost certainly would not meet the legal standard for user fees (if ever challenged). Two other jurisdictions peg fees to surrogates for road use: the number of required off-street parking spaces in Ashland, Oregon, and the number of full-time workers employed by businesses in Soap Lake, Washington. Such fees might or might not pass legal muster.

Most jurisdictions have chosen to base fees on the number of trips generated by developed properties—a measure of road use, albeit a crude one. Fee schedules have typically grouped ITE land use codes into broad categories and then applied average ITE rates to all land uses in a given category. The categories often are those already used to classify rate-payers in the city's utility billing system.

This can lead to inequities. Tualatin, Oregon, has defined six nonresidential groups (plus a catchall group) and applied the average trip generation rate for an entire group to all uses that fall within a broad rate band. Thus, a strip shopping center of 10,000 to 20,000 ft², falling in Group 4, pays \$11.08/1,000 ft²/month, whereas a center of 5,000 to 10,000 ft², falling in Group 5, pays \$29.51/1,000 ft²/month. The latter generates only 27 percent more trips per 1,000 ft², according to the ITE manual, yet pays almost three times as much per 1,000 ft² of building area.

Inequities of this sort can wreak political havoc. Wholesalers in Medford, Oregon, refused to pay the city's new TUF, contending that they were unfairly lumped into the "retail/commercial" land use category with retailers that generate many more trips. Just weeks after its fee went into effect, Medford was forced to add new land use categories to its fee schedule.

The more precisely trip generation rates can be estimated, preferably with supporting traffic counts, the better fees will fare from a legal standpoint. The Oregon Attorney General declared a TUF proposed by the city of Monmouth to be a tax on property because it was not based on actual use of roads:

The City of Monmouth has labeled its proposed exaction a "street user fee." That fee, however, does not relate to actual automobile trips generated by individual pieces of property. Rather, the city bases its fee categories upon estimates of trips generated by typical properties in each category of use. . . . Because the proposed Monmouth fee is not based on actual use, it is not a user fee. (Oregon Attorney General Opinion, OP-6091, June 29, 1987, p. 3)

In Port Orange, all residential and commercial land uses are classified as precisely the ITE manual permits; each property is assigned to the closest ITE land use category (if ITE has anything close), and the trip generation rate specific to that category is then applied to the property. In addition, traffic counts are performed to establish trip generation rates for properties that do not fall neatly into any ITE land use category and to validate or refine ITE rates for properties that do fall into ITE categories. Eventually, all nonresidential properties will be subject to counts, and fees will be adjusted accordingly. The relatively small number of nonresidential properties makes blanket counts possible.

Refinements

Even in jurisdictions using trip generation as the basis for fee setting, fees to date have not reflected road use or costs occasioned by use to the fullest extent possible. A trip-based fee schedule can be refined as follows:

- Households with varying trip generation rates can be distinguished. The ITE manual provides trip adjustment factors for households by size, automobile ownership, and density. Austin waives its TUF for automobileless households; Port Orange provides a discount corresponding to the ITE adjustment factor. An application process can be used to simplify the administration of a fee waiver or special fee.

- Trip generation estimates can be adjusted for pass-by trips that are attracted to commercial properties as intermediate stops on the way to primary destinations and for internal trips within mixed-use developments that never venture onto the public road system. Adjustments for pass-by and internal trips have become standard procedure in traffic impact studies and transportation impact fee calculations. Of the five jurisdictions surveyed with trip-based fees, only Medford includes an adjustment for pass-by trips. Port Orange adjusts for both pass-by and internal trips, on the basis of studies reported in the ITE manual.

- The volume of truck traffic generated by different land uses can be adjusted for. In terms of wear and tear on pavement, heavily loaded trucks are equivalent to hundreds or even thousands of automobiles. Accordingly, highway cost allocation studies have used equivalent single-axle loads (ESALs) as a basis for allocating pavement rehabilitation and main-

tenance costs. Some adjustment is necessary whenever trucks represent a significant portion of traffic on a jurisdiction's roads. Happily, they do not in Port Orange.

• Trip generation rates can be multiplied by average trip lengths to arrive at vehicle miles of travel (VMT) generated by developed properties. On its face, VMT is a better measure of local road use than is trip ends. However, the practical problems of estimating average trip lengths for a multitude of land uses and breaking out travel on city streets may preclude this refinement. It was judged to do so in Port Orange.

POLICIES AND PROCEDURES

Along with a fee schedule, operating policies and procedures must be established. Many have legal implications.

Table 3 summarizes relevant differences between user fees, taxes, and special assessments. Port Orange is careful to treat its TUF as a user fee in all respects.

Tax-Exempt Properties

All developed properties, whether tax exempt or not, should pay TUFs if they are truly user fees. This includes properties owned by state and federal agencies and school districts, as well as a local government's own properties.

Local governments can expect challenges from other levels of government contending that a TUF is a disguised tax or special assessment from which they are exempt. The Comptroller General has authorized federal agencies to pay charges for use of public utilities but would almost certainly object to roads being treated as a utility.

The furnishing by a State or local government of a *quantum* of direct utility type services, such as sewer, water, trash, etc., to the Federal Government, for which payment may be authorized, is to be distinguished from the performance by a State or local government of governmental functions, such as police and fire protection, regulation of traffic and *road construction and maintenance*, generally supported by taxes, for which payment by a Federal agency, absent statutory authority, is not permissible. [51 Comp. Gen., p. 137 (emphasis added)]

Anticipating a challenge from a public agency, a locality would want to base its TUF on an actual traffic count at a public agency's property line. This would ensure that the fee, at least, reflects the actual "quantum" of road use. The first traffic counts in Port Orange were at public schools.

Vacant Land and Unoccupied Structures

Property taxes are levied on vacant land and unoccupied structures. Special assessments are also levied on vacant land and unoccupied structures to the extent that their value is increased by public improvements.

However, as a user fee, a TUF is premised on the use of facilities or services. A TUF must be based on costs occasioned by use, benefits derived from use, or other use-related criteria. Since vacant land and unoccupied structures do not generate trips, it would be inconsistent to impose a TUF on them.

A fee waiver can be granted to owners of unoccupied structures either by means of an application process or on the basis of negligible water use. Tualatin used applications originally but, to simplify administration, switched to automatic waivers based on water use. The Port Orange ordinance provides for a discount, upon application.

TABLE 3 Characteristics of Revenue Sources Under Florida Law

	User Fee	Property Tax	Special Assessment
Basis for Charge	Use	Property value	Special benefits
Who Pays?	Property owners or occupants	Property owners	Property owners
Revenues Necessarily Spent Where Collected?	NO	NO	YES
Public Property Exempt?	NO	YES	YES, unless statutes authorize payments
Nonprofit Property Exempt?	NO	YES, if used for charitable, religious, literary or scientific purposes	NO
Vacant Land/Vacant Structures Exempt?	YES	NO	NO
Billing Mechanism	Utility bill or separate bill	Property tax bill	Property tax bill or separate bill
Enforcement Mechanism	Discontinuance of utility services	Tax deed procedure	Lien foreclosure or tax deed procedure

Characterizations of user fees and special assessments are based upon: Attorney General Opinion (AGO) 076-137; AGO 90-39; AGO 90-47; AGO 91-27; 49 Comp. Gen. 72 (1969); 48 Fla. Jur. 2d *Special Assessments*.

Owners and Occupants

Whenever practical, TUF ordinances should impose fees on occupants of rental property. It is the occupants of property that use the road system. The billing of nonowner occupants was a factor in the court decision upholding Fort Collins's TUF as a special fee rather than a tax.

Still, it was only one of many factors persuading the Colorado Supreme Court to rule as it did. Moreover, the court seemed unperturbed by the fact that property owners were ultimately liable for unpaid fees in Fort Collins. Thus, in the interest of fee collection and enforcement, it may be advantageous to make property owners contingently liable for fees if renters fail to pay them, even at the risk of affecting the status of a TUF. Port Orange and most other localities have done so.

TUF Collection

A TUF ordinarily will be collected as part of a unified municipal utility bill. In Florida and many other states, the property tax bill is limited to assessments and ad valorem taxes. In these states, any locality collecting a TUF via the property tax bill is inadvertently compromising the TUF's status as a user fee.

Orlando's storm water utility fee was judged by the Florida Attorney General to be a special assessment rather than a user fee. His opinion was based, in part, on Orlando's use of the property tax bill to collect the "fee" (Attorney General Opinion 90-47).

Even in states without such restrictions, a locality may create a presumption that the TUF is a fee for service by adding it to the unified utility bill along with water and sewer fees, trash collection fees, and storm water utility fees. Making the TUF part of the monthly utility bill could also help defuse public opposition. In explaining public preferences for the sales tax over the property tax, commentators often note that sales taxes are collected in small amounts with daily purchases whereas the property tax is collected annually in one lump sum. Port Orange's TUF will be added to the city's monthly utility bill (once collection begins).

Enforcement

Payment of fees should be enforced primarily by cutting off other public utility services billed with the TUF. Given a unified utility bill, partial payments may be applied either to the TUF before water and sewer charges or to all utility charges proportionally. In either case, the water payment will come up short, and water service may be discontinued as a method of enforcing payment of other utility fees.

Discontinuance of services is the most effective means of enforcing payment of delinquent charges; however, it is not immune to challenge. It has long been accepted that a public utility may not refuse to render service for some collateral matter unrelated to service. Accordingly, courts in Florida and certain other states have adopted an "interlocking" test to decide whether one utility service can be cut off for non-

payment of service charges due another utility (*State v. City of Miami*, 27 So.2d 118).

Water service and road maintenance are not sufficiently interrelated to meet the interlocking test. Even so, it may be possible to tie the two together through a unified utility bill. As local governments in other states have added new service charges to their utility bills, a new legal test has emerged: Does the legislative scheme that permits unified billing and termination of any or all such services for failure to make payment in full bear a reasonable relation to the goal of public health protection? If the answer is yes, unified billing has been upheld (*Perez v. City of San Bruno*, 616 P.2d 1287). Port Orange will discontinue water service for failure to pay the TUF.

Appeals

To ensure that due process requirements are met, a TUF ordinance should provide an avenue for appeal of fee calculations. In Tualatin, road users may appeal the land-use classification or square footage assigned to a property in the fee calculation. In Fort Collins, users were able to appeal in special cases or cases of error in the fee calculation. Port Orange has provided for various appeals.

The calculation of a TUF is analogous to the calculation of a road impact fee. Under applicable case law, property owners are entitled to independently calculate road impact fees on the basis of their own trip generation studies (*Home Builders v. Board of County Commissioners of Palm Beach County*, 446 So.2d 140, 145).

Parenthetically, only users subject to variable (parcel-specific) fees need be given the option of conducting independent fee studies. For users subject to flat fees, appeals may be limited to the issue of appropriate land use classification because the fee is based on average trip-making characteristics for an entire class of users.

Dedication of Funds

TUF funds should be dedicated to road-related purposes, without exception. While upholding Fort Collins's TUF ordinance in the main, the Colorado Supreme Court struck down a severable provision authorizing the city council to transfer excess revenues not required for road maintenance to any other fund of the city. If transferred, the fee would no longer bear a "reasonable relationship" to services rendered by the city, for the nexus between who pays and who benefits would be broken. The fee would become the "functional equivalent of a tax" (*Bloom v. City of Fort Collins*, 784 P.2d 304, 311).

Even granting that TUF funds may be used only for road-related purposes, the courts will likely hold that a portion of a city's general administrative expenses are "road related" and thus eligible for TUF funding. Even as it struck down Fort Collins's "transfer provision," the Colorado Supreme Court made it clear that the ruling applied only to the use of excess revenues for general governmental expenses "unrelated to the maintenance of city streets." The use of funds to defray an equitable share of overhead was left intact. Port

Orange and most other localities provide for recovery of administrative expenses.

CONCLUSION

Under applicable law, a TUF must be reasonably related to the use of roadways or to costs occasioned by such use. A reasonable basis for fee setting is a property's trip generation rate, as reported in the ITE manual. Local traffic counts should be conducted in cases in which the ITE manual has no suitable land use code and as a means of validating or refining ITE rates generally.

Road costs should be allocated separately for arterials, collectors, and local roads, because they perform different functions and occasion costs differently. To more accurately reflect costs occasioned, adjustments may be made for household automobile ownership, pass-by and internal trips, truck traffic, and differential trip lengths.

If they are truly user fees rather than taxes or assessments, TUFs should be imposed on governmental and other tax-exempt traffic generators and on occupants of rental property. By the same token, they should not be imposed on vacant land and unoccupied structures because these land uses are not significant trip generators. Fees should be collected with other utility charges through a unified billing system and should be enforced by discontinuing other utility services for failure to pay the utility bill in full. Funds must be spent for the benefit of fee payers and may not be diverted to nonroad purposes.

These and other elements have been incorporated into a TUF ordinance for Port Orange, Florida. The city adopted the ordinance in May 1992, becoming the nation's 10th locality to do so, and is proceeding to test the legality of the TUF by validating bonds to be repaid with fee proceeds. If a TUF is upheld in Florida, it will bode well for localities in other strong home rule states that might wish to tap this new funding source.

ACKNOWLEDGMENTS

Research for this paper was completed while the author was a visiting faculty member at the Center for Urban Transportation Research, University of South Florida. A national search for localities with TUFs was conducted by Lori Burns, a research assistant at the center. Leagues of Cities in all 48 continental states were contacted.

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Publication of this paper sponsored by Committee on Local Transportation Finance.