Marquette Law Review

Volume 79
Issue 3 *Spring 1996: Wisconsin Issue*

Article 6

Impact Fees for a Developing Wisconsin

Charles C. Mulcahy

Michelle J. Zimet

IMPACT FEES FOR A DEVELOPING WISCONSIN

CHARLES C. MULCAHY* AND MICHELLE J. ZIMET**

I. INTRODUCTION

Local governments in Wisconsin and nationwide are searching for funding to build or expand public facilities to accommodate new development. The gap between available funds and the cost of new development is dramatic. Estimates indicate that the infrastructure deficiencies in the United States are now equal in size to the national budget deficit.[1] The shortfall of funding for the construction of public facilities needed to accommodate new and expanded development is

---

* Charles C. Mulcahy has played an active role concerning local government issues in Wisconsin for over thirty years. He is a graduate of Marquette University Law School and has been admitted to the Bar in Wisconsin and Florida. Mr. Mulcahy served as an adjunct Professor of Law at Marquette University Law School from 1975-1990. Mr. Mulcahy is a past president of the Public Policy Forum, which is a local government think tank functioning in southeast Wisconsin. He also served for twelve years as an elected member of the Milwaukee County Board of Supervisors. He is legal counsel to the Wisconsin Local Government Innovation Center at Marquette University in Milwaukee and is a partner in the law firm of Whyte Hirschboeck Dudek, S.C. Mr. Mulcahy has been a frequent contributor to the Marquette Law Review over the past thirty years.

** Michelle J. Zimet is a partner in the Chicago office of Siemon, Larsen & Marsh, a law firm that specializes in planning and land use law for public and private sectors on a national basis. Ms. Zimet has a master's degree in urban planning, is a member of the American Institute of Certified Planners, and has been admitted to the bar in Illinois, California, and Florida. Ms. Zimet has substantial experience in drafting impact fee ordinances for local governments nationwide. In addition, she appeared with her firm as special counsel to St. Johns County, Florida in the successful defense of its educational facilities impact fee before the Florida Supreme Court. She has co-taught land use law at Northwestern University for the past four years and is an active participant in the legislative and open spaces committees of the Northeastern Illinois Planning Commission.

Mr. Mulcahy and Ms. Zimet have worked as co-counsel in the development of the Waukesha County Transportation Impact Fee Project. The authors express their thanks to Attorney Jerry Edgar for his review of this Article, to Attorneys Charles L. Siemon and Wendy U. Larsen of Siemon, Larsen & Marsh, and John Scripp of Whyte Hirschboeck Dudek, S.C. for their assistance with portions of the text, and to Karyn Johnson of Whyte Hirschboeck Dudek, S.C. for her support, encouragement, editing, and finalization of the Article.

1. EXACTIONS, IMPACT FEES AND DEDICATIONS: SHAPING LAND-USE DEVELOPMENT AND FUNDING INFRASTRUCTURE IN THE DOLAN ERA xxxiv (Robert H. Freilich & David W. Bushek eds., 1995) [hereinafter EXACTIONS]. For example, Barton-Aschman Associates, Inc., (a transportation, engineering, and planning firm) estimates a $95,000,000 infrastructure deficiency from 1995 to 2010 for Waukesha County, Wisconsin.

primarily the result of three factors:

A. Substantially curtailed subsidies of local government public facilities by federal and state governments;
B. Federal and state mandates that have increased construction costs of public facilities; and
C. The combined effect of stagnated incomes and a property tax revolt.[2]

Unless alternative funding sources are developed to accommodate new development, the funding gap and revenue shortfall will result in a deteriorating infrastructure quality and a further congestion of existing public facilities.

Rather than revisit the arguments, pro and con,[3] and the myths and realities of impact fees,[4] this Article will focus on the following:

A. The historic deployment of exactions;
B. Legal constraints on the imposition of impact fee exactions;
C. Constitutional constraints on impact fees;
D. The application of constitutional principles; and
E. Recommended provisions and requirements of Wisconsin law for impact fee ordinances.

Local governments in the United States are generally empowered to regulate land use and to provide adequate public facilities to serve new growth. To meet the substantial costs of providing new roads, schools, and other public facilities to serve new development, local governments have been forced to utilize innovative new methods of capital facilities financing. Local governments have increasingly required developers to contribute public facilities or pay a proportionate cost of those facilities to offset the impact of proposed development on capital facilities. Exactions take the form of:

A. Mandatory dedications of land for roads, schools, or parks as a condition of plat or building permit approval;
B. Fees in lieu of mandatory dedication;
C. Water or sewer connection fees;
D. Special assessments; and
E. Impact fees.

The underlying principle of exactions is that those who benefit from

---

2. Arthur C. Nelson, *Development Impact Fees: The Next Generation, in* EXACTIONS, *supra* note 1, at 87-88.

3. *See* WISCONSIN LEGISLATIVE COUNCIL STAFF, NEW LAW RELATING TO THE IMPOSITION OF IMPACT FEES ON DEVELOPERS OF LAND, (1993 Wisconsin Act 305), Information Memorandum 94-5 (1994).

4. Nelson, *supra* note 2, at 92-96.

capital improvements should pay the costs of constructing those facilities. The concept is not new.[5] Indeed, for many years, local governments have tried to shift the cost of providing services to new growth and development to the developer and the new residents who create the costs. The rationale behind exactions is that since taxpayers have already paid for existing infrastructure, it is fair that additional development should not be permitted unless developers contribute for new or expanded facilities that must be made available to service new growth. Exactions, therefore, are not only an equitable means of financing public facilities, but they also guarantee the timely installation of the facilities.

Although Wisconsin courts have historically approved various types of exactions that address the cost of public facilities required by development, case law provides no clear and uniform standards to assist in the validation of these exactions. Local government officials, real estate developers, and other interested parties turned to the state legislature to provide statutory standards for determining the validity of an impact fee.

A. Description of Statute and Legislative History

In 1993, responding to the pressure placed on local governments to satisfy the escalating demand for public facilities and the concomitant reduction in the sources of revenue to fund such facilities, the Assembly Committee on Ways and Means of the Wisconsin Legislature appointed a Subcommittee on Impact Fees. In May 1993, the Subcommittee informally approved goals for drafting a Wisconsin impact fee law. Those goals were to draft laws to provide:

1. Clear statutory authority for the imposition of impact fees by local governments (Previously, authority for impact fees was generally derived from the home rule or police powers, or both, of local government units.);
2. Statutory standards for determining the validity of an impact fee (Previously, court decisions were vague concerning the general standards for determining the validity of an impact fee in Wisconsin. The Subcommittee on Impact Fees sought to eliminate the uncertainty involved in imposing impact fees and to minimize potential litigation by land developers challenging the validity of impact fee ordinances.);
3. Clear authorization of which local government units may

5. *See* Jordan v. Village of Menomonee Falls, 28 Wis. 2d 608, 137 N.W.2d 442 (1965), *appeal dismissed*, 385 U.S. 4 (1966).

impose impact fees and what types of impact fees may be imposed;
4. Statutory notice and public hearing requirements before an impact fee ordinance may be enacted; and
5. Authority for local government units to exempt low-cost housing from impact fees or to impose reduced impact fees on low-cost housing.[6]

As a result of the Subcommittee's work, the Wisconsin legislature adopted the Wisconsin Impact Fee Act in 1994 as an innovative mechanism that enables Wisconsin political subdivisions to shift the costs of providing public facilities to those who create the need for them. Codified as Wisconsin Statutes section 66.55, the law provides that local governments may enact ordinances, which permit them to impose impact fees on developers, to cover some or all of the capital costs necessary to accommodate new development. In addition to setting forth the authority of Wisconsin local governments to enact impact fee ordinances, section 66.55 also provides the minimum standards that must be met in any ordinance enacted pursuant to that authority.

B. Standards for a Valid Impact Fee

Impact fees imposed under an ordinance adopted by a local government pursuant to the Impact Fee Law:

(a) Shall bear a rational relationship to the need for new, expanded or improved public facilities that are required to serve land development.
(b) May not exceed the proportionate share of the capital costs that are required to serve land development, as compared to existing uses of land within the political subdivision.
(c) Shall be based upon actual capital costs or reasonable estimates of capital costs for new, expanded or improved public facilities.
(d) Shall be reduced to compensate for other capital costs imposed by the political subdivision with respect to land development to provide or pay for public facilities . . . .[7]
(e) Shall be reduced to compensate for moneys received from the federal or state government specifically to provide or pay for the public facilities for which the impact fees are imposed.

---

6. *See* WISCONSIN LEGISLATIVE COUNCIL STAFF, *supra* note 3, at 7-8.

7. In that regard, impact fees may not be imposed in an amount that recovers more than the net cost to the local government unit of providing the public facilities where there may also be special assessments, special charges, or other impositions.

(f) May not include amounts necessary to address existing deficiencies in public facilities. [The impact fees must be based upon new developments only.]
(g) Shall be payable by the developer to the political subdivision, either in full or in instalment payments . . . before a building permit may be issued or other required approval may be given by the political subdivision.[8]

Under the new law, impact fees are authorized through ordinances that must comply with the above described provisions. The ordinances can impose different impact fees on separate types of development or impose different impact fees in various areas of the local government unit, if such differences are justified under the standards listed above. The impact fee law also authorizes local governments to exempt or provide a reduction in the amount of impact fees on land development related to low-cost housing. The cost of such reduction or elimination of impact fees for low-cost housing, however, may not be covered by increasing impact fees on other developments. [9]

C. Approved Costs Funded With Impact Fees

Impact fees may be imposed to pay for some or all of the capital cost to construct, expand, or improve public facilities. "Public facilities" are defined in the statute to mean highways and other transportation facilities; traffic control devices; facilities for collecting and treating sewage; facilities for collecting and treating storm and surface water; facilities for pumping, storing, and distributing water; parks, playgrounds, and other recreational facilities; solid waste and recycling facilities; fire protection facilities; law enforcement facilities; emergency medical facilities; and libraries. (The law specifically excludes facilities owned by a school district.) The law also authorizes certain noncapital costs to be funded with impact fees. The statute provides that legal, engineering, and design costs not exceed ten percent of "capital costs" unless the political subdivision can demonstrate that these costs directly relating to public improvements involve more than ten percent of the capital costs.[10]

8. WIS. STAT. § 66.55(6) (1993-94).
9. *Id.* § 66.55(7).
10. *Id.* § 66.55(1).

D. Separation of Impact Fee Revenues

Under the law, impact fees must be placed in a segregated interest bearing account and must be accounted for separately from the other funds of the local government unit. The impact fees and interest earned on them may only be expended for capital costs for which the impact fees are imposed. The local government unit must use the impact fee within a reasonable period of time or it will be required to refund the unused amounts to the current owner of the property. Impact fee ordinances are required to identify the type of public facility and the reasonable time periods within which impact fees must be expended or refunded.[11]

E. Appeal of Procedure

An impact fee ordinance adopted pursuant to the Wisconsin Impact Fee Law must specify an appeals procedure "under which a developer . . . has the right to contest the amount, collection or use of the impact fee" imposed by the local government unit.[12]

F. Approval Procedure for Impact Ordinances - Needs Assessment

The Impact Fee Law requires that the adopting local government prepare a "needs assessment" for the public facilities for which it is anticipated the impact fees may be imposed. The needs assessment must identify the new public facilities, improvements, or expansions of existing public facilities that will be required because of land development. This identification must be based upon explicitly identified service standards for the public facilities. The needs assessment must identify existing deficiencies in the quantity and quality of public facilities because impact fees may not be imposed on new development to pay for existing deficiencies in either the quantity or quality of public facilities.[13] A local government must hold a public hearing on the proposed ordinance before enactment and publish notice specifying where a copy of the public facility needs assessment and the proposed ordinance may be obtained.[14]

---

11. *Id.* § 66.55(9).
12. *Id.* § 66.55(10).
13. *Id.* § 66.55(4).
14. *Id.* § 66.55(3).

II. HISTORICAL DEVELOPMENT OF EXACTIONS

Subdivision exactions were the earliest form of exaction accepted by courts as a means for making a new development responsible for serving itself. Early examples of subdivision exactions include mandatory dedication of subdivision roads, utility easements, and parks, which were levied as conditions of development approval. What was originally and principally a method of guaranteeing the timely installation of physical improvements needed on-site to meet the demands created by new development has evolved into systems for accumulating municipal funds with which to construct capital facilities in the future. The dedication of facilities as a condition of development approval is now a fine art, as developers routinely negotiate with local governments by offering a gamut of amenities and improvements.

Historically, exactions were limited to on-site requirements, and dedications or public improvements were targeted for the actual parcel proposed for development. As growth pressures and inadequate capital facilities funding gradually intensified public concern over the impacts of new growth and development, local governments began to exact contributions towards off-site infrastructure as conditions for development approval. Requirements for off-site improvements are now firmly entrenched in contemporary land development regulations. Developers now contribute to improvements, such as road intersections, lift stations, and oversized sewer and water mains, that serve their development, but which may be located some distance away.

A. Types of Exactions

Many local governments have adopted various forms of developer exactions as a means of financing and guaranteeing the timely installation of public facilities. Funding sources that are exacted as a condition of development approval now include impact fees,[15] special assessments,[16] development agreements,[17] user fees and tolls,[18] and connec-

15. Impact fees refer to charges imposed by a local government on new development as a condition for development approval, to fund a proportionate share of the cost of public facilities needed to serve new development.

16. Special assessments tax properties, which benefit from capital improvements, a pro rata share of the facilities' costs. The premise behind special assessments is that newly constructed public facilities bestow a special benefit, above that incurring to the general public, to the owners of property adjacent to newly constructed public facilities.

17. Development agreements are agreements by which development rights are guaranteed for a set term of years in return for advance funding, which is used to construct

tion fees.[19] No matter what form they assume, however, development exactions are conditions of development approval imposed by local governments to mitigate the otherwise negative impacts of development, and all allocate the cost of capital improvements to the developers and their customers who need and benefit from the facilities.

As many local governments throughout the United States have come to recognize, continued growth and prosperity depends upon the ability of the community to provide, in a timely manner, those public facilities needed to serve new growth and development. They have come to realize that quality of life can be eroded by traffic congestion, air and water pollution, or other manifestations of inadequate public facilities, which in turn ultimately diminish the attractiveness of an area to both residents and developers.

B. Other Sources of Revenue

The key to successful funding of public facilities for new development is a predictable planning process that determines facilities' needs in advance of demand, identifies the cost of needed facilities, and equitably allocates that cost among those who are benefitted. General revenues (*e.g.*, sales taxes, property taxes, and real estate transfer taxes) and special revenues (*e.g.*, special assessments and user fees) are funding vehicles by which existing residents can also equitably share in the cost of upgrading public facilities that are of general benefit.

C. Impact Fees

Impact fees are an increasingly popular means by which exactions for new development are imposed, and their mechanics are now well understood.[20] For example, the methodology and underpinnings of transportation impact fees are fairly predictable. Road impact fees are

---

public infrastructure, by the developer. The agreement generally contains provisions concerning vested rights, limits on future exactions, cooperation in bond financing, and future assignment. The agreements guarantee a landowner's right to develop in accordance with law that exists at the time and state the dollar amount of the landowner's obligation for infrastructure costs.

18. User fees and tolls are linked to actual use and are charges incident to receiving a service. The fees and tolls are used to repay the capital cost of building and operating the facility.

19. Connection fees are charges that a new customer of a utility pays for a share of the capital cost of the utility's facilities.

20. In Florida, for example, impact fees have been used to finance the provision of a variety of capital facilities, including potable water, sewers, schools, solid waste disposal, libraries, law enforcement, and cemeteries.

charged to new development 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 roadway capacity to accommodate those trips. Impact fees to finance transportation facilities have been particularly popular because they are so quantifiable.

New growth and development generates a known quantity of traffic (x number of trips generated per unit of development traveling a particular distance per average trip). This demand for trafficways is quantifiable in terms of the number of trips of a particular length and is easily translated into the number of additional roads that is required in order to provide safe and efficient vehicular movement at the level of service selected by the community. By calculating the cost per unit of additional roads, the cost of a particular development's impact on roads can be identified with a fair degree of precision, and a charge can be collected to pay for the required improvements. The fees are usually published in tables that show the fee per dwelling unit for residential developments and the fee per square foot for commercial and industrial developments.

III. LEGAL CONSTRAINTS ON THE IMPOSITION OF IMPACT FEE EXACTIONS

Impact fees have principally evolved in California, Florida, and other high growth areas where staggering increases in development have pressured the capacity of local governments to provide adequate public facilities. As a result, these are the states that have the most extensive practical and legal experience with the concept of impact fees, and these are the states to which other governments look in evaluating the legal and practical implications of a program of exactions by impact. However, even states with less extreme growth experience have funding shortfalls and have accepted impact fees as a viable alternative to increasing property taxes. Their courts have expressly confirmed the legality of the concept.

Two issues control the legality of the impact fee or exaction. First, the local government must possess the authority to impose the fee as a condition of development approval. Second, the fee must be constitutional. While any regulation is generally subject to the constraints of the Wisconsin and United States Constitutions, the substantive and procedural due process and the equal protection clauses are the principle applicable constraints.

A. Legal Authority

One of the major forces shaping modern impact fee ordinances is new state legislation. To date, at least twenty states have enacted impact fee legislation (*i.e.*, Arizona, California, Georgia, Idaho, Illinois, Indiana, Maine, Maryland, Nevada, New Hampshire, New Jersey, New Mexico, Oregon, Pennsylvania, Texas, Vermont, Virginia, Washington, West Virginia, and Wisconsin).[21] Within those states, the legislation is usually either limited in its application to certain specified jurisdictions or to specific types of public improvements.

1. Home Rule Authority

The authority of local government to regulate the use of land is derived from the police power of the states to regulate the public health, safety, morals, and welfare. This power was traditionally delegated to local governments through specific enabling acts. Currently, most states have granted "home rule" powers to local governments in recognition of the sophistication of local government and the complexity of the issues they face.

Home rule authority is usually sufficient to provide those local governments with the authority to adopt an exaction program. Non-home rule units may have to rely on other statutory authority or police power case law to support an exaction-type ordinance. Nationwide, the pattern has been the adoption of exaction programs without specific statutory authority. For example, many communities have implemented exactions through subdivision or annexation control.

Financing of public roads and other related public improvements has historically been authorized through local subdivision regulation and dedication requirements, or through special assessments. Broad authority exists for the provision of public facilities under subdivision dedication statutes and special assessment statutes.[22]

However, absent specific statutory authority, the powers of local governments in Wisconsin have been broadly interpreted to provide for the health, safety, and welfare of the public.[23] Ordinances adopted by local governments pursuant to their home rule authority and police powers will be upheld unless they conflict directly with a state law on the

---

21. Nelson, *supra* note 2, at 101. See also the chart analyzing legislation on a state by state basis shown in Appendix 1.

22. WIS. STAT. chs. 66, 236 (1993-94).

23. Johnston v. City of Sheboygan, 30 Wis. 2d 179, 185-86, 140 N.W.2d 247, 251 (1966).

same subject or are found to be unreasonable or arbitrary.[24] Municipalities may enact ordinances in the same field or on the same subject covered by state legislation where such ordinances complement the state legislation.[25]

In Wisconsin, there are now explicit statutory provisions that grant local governments the authority to impose non-subdivision related exactions as a means of mitigating the fiscal impact of growth. Wisconsin Statutes section 66.55 grants this authority but also contains mandatory procedural and substantive requirements.

2. Dillon's Rule

In a Dillon's Rule state, such as Arkansas, Kentucky, Utah, Vermont, and Virginia, local governments must look towards either police powers or home rule powers as sources for exaction authority. Dillon's Rule states:

> It is a general and undisputed proposition of law that a *municipal corporation possesses and can exercise the following powers, and no others*: First, those granted in *express words*; second, those *necessarily or fairly implied in* or *incident* to the powers expressly granted; third, those *essential* to the accomplishment of the declared objects and purposes of the corporation, — not simply convenient, but indispensable.[26]

Under this scheme, when statutes do not expressly authorize local governments to adopt exactions, the analysis must focus on whether any authority is implied. The power to adopt and implement an exactions program in those states must therefore be found either in the express language of the state zoning and planning enabling legislation or must be necessarily implied or incident to the powers expressly granted to the local government so that the zoning and planning powers may be effectuated.

3. Case Law and Statutes Providing Legal Authority for Impact Fees

Although the imposition of impact fees has now been specifically codified in Wisconsin Statutes section 66.55, the authority for imposition of similar exactions had already existed in Wisconsin law. The increasing influx of people to suburban communities in the 1950s and 1960s, and

---

24. City of Milwaukee v. Piscuine, 18 Wis. 2d 599, 602-03, 119 N.W.2d 442, 444 (1963).
25. City of Milwaukee v. Childs Co., 195 Wis. 148, 151, 217 N.W. 703, 704-05 (1928).
26. 1 JOHN F. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS § 237 (5th ed. 1911).

the rapid growth of those communities, resulted in provision by the legislature of a means for managing the growth and providing for the increased necessary services through the enactment of local ordinances. In *Jordan v. Village of Menomonee Falls*,[27] the Wisconsin Supreme Court held that an ordinance enacted pursuant to Wisconsin Statutes section 236.45, which required the dedication of land by a subdivider for open spaces or schools, was a constitutional exercise of the police power. Likewise, the court determined that requiring a payment in lieu of actual dedication was constitutional. Dedication fees are equally legitimate when imposed pursuant to zoning ordinances that are enacted for the purpose of "'facilitat[ing] the adequate provision of transportation, water, sewerage, schools, parks and other public requirements.'"[28]

Wisconsin has maintained an expansive attitude toward the application of police power by local municipalities.[29] That expansive treatment of municipal police power translates into a significant amount of authority to impose fees or assessments for the purpose of funding a variety of public improvements. The validity of special assessments, which are imposed directly on a property owner, is dependent upon the degree to which the funded improvement specifically benefitted that particular property.

The legislature has established guidelines for the amount of special assessments that may be imposed under circumstances where the municipality justifies the assessments through police power and nonpolice power authority. Wisconsin Statutes section 66.60(1)(a) and (b) provides that any municipality may levy and collect special assessments for "special benefits" conferred from municipal work or improvements. The assessment shall not exceed the value of the benefits conferred when taxing power authority is used as the basis for the assessment. When police power is used, however, the assessment shall be upon a "reasonable basis." According to the court in *CIT Group/Equipment Financing, Inc. v. Village of Germantown*,[30] such reasonableness requires that an assessment made under the police power "fairly apportion the cost [of an improvement and] not arbitrarily or capriciously burden any group of

27. 28 Wis. 2d 608, 137 N.W.2d 442 (1965), *appeal dismissed*, 385 U.S. 4 (1966).

28. Black v. City of Waukesha, 125 Wis. 2d 254, 256, 371 N.W.2d 389, 391 (Ct. App. 1985) (quoting WIS. STAT. § 62.23(7)(c)) (expanding ruling in *Jordan*).

29. Peterson v. City of New Berlin, 154 Wis. 2d 365, 370, 453 N.W.2d 177, 180 (Ct. App. 1990) (a municipality's police power is broad, and courts may intercede only if the exercise of that power is clearly unreasonable).

30. 163 Wis. 2d 426, 471 N.W.2d 610 (Ct. App. 1991), *cert. denied*, 502 U.S. 1099 (1992).

property owners."[31] When police power is used, the municipality need not show that the property is benefitted in an amount equal to the dollar amount assessed.[32] There are limitations on the imposition of assessments under the police power, however, as the courts have cautioned that the adopted plan of assessment must be "'fair and equitable and such that it will bring about an assessment in proportion to the benefits accruing.'"[33]

IV. CONSTITUTIONAL CONSTRAINTS ON IMPACT FEES

The most common constitutional challenges to impact fees are the arguments that they are unfair, arbitrary, unreasonable, or without any rational basis, in violation of developers' due process rights, or that they are discriminatory in violation of the equal protection clauses of the state and federal constitutions.

A. Equal Protection

The thrust of an equal protection challenge to a land use regulation is that a government regulation effectuates invidious discrimination against a class of individuals.[34] A municipal regulation will be constitutional under the equal protection clause only so long as it is supported by a rational basis.[35] The courts will apply a stricter standard of judicial review if a suspect class or a fundamental interest is affected. To date, courts have not found property rights to be fundamental interests and, therefore, a rational basis level of scrutiny is applied to most zoning ordinances.[36] Developers have often argued unsuccessfully that mandatory impact fees illegally discriminate against new development.[37] Equal protection claims have usually been rejected in the past because an impact fee program requires that new development only pay its fair

31. *Id.* at 437, 471 N.W.2d at 614 (citing Village of Egg Harbor v. Mariner Group, Inc., 156 Wis. 2d 568, 573, 457 N.W.2d 519, 521-22 (Ct. App. 1990)).

32. Sippel v. City of St. Francis, 164 Wis. 2d 527, 540, 476 N.W.2d 579, 585 (Ct. App. 1991) (citing Gelhaus & Brost, Inc. v. City of Medford, 144 Wis. 2d 48, 50, 423 N.W.2d 180, 182 (Ct. App. 1988)).

33. *Id.* (quoting *In re* Installation of Storm Sewers v. City of Glendale, 79 Wis. 2d 279, 287, 253 N.W.2d 521, 525 (1977)).

34. *See, e.g.*, Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977).

35. *See, e.g.*, City of New Orleans v. Dukes, 427 U.S. 297 (1976).

36. *See, e.g.*, Madison Landfills, Inc. v. Dane County, 183 Wis. 2d 282, 515 N.W.2d 322 (Ct. App. 1994).

37. *See, e.g.*, Krughoff v. City of Naperville, 369 N.E.2d 892 (Ill. 1977).

share of the cost of capital improvements and because all new development is treated equally under a formula or schedule of fees.

A potential problem for the future, however, is that as fees are used to finance an increasing number of facilities and improvements, cumulating to thousands of dollars per residential unit, an increasing number of hardship exceptions will likely be negotiated. Impact fee ordinances that are implemented on an ad hoc basis will be susceptible to equal protection challenges, especially if the effect of a substantial surcharge on all new developments discriminates against low and moderate income potential home buyers.[38]

The Equal Protection Clause of the Wisconsin Constitution prohibits the state from treating similarly situated individuals dissimilarly. As in federal law, absent the existence of a fundamental interest or a suspect classification, satisfying equal protection depends on whether a rational basis for the legislation is present.[39] The test for evaluating equal protection is not merely to determine whether inequality results from a classification, but whether there is any rational and reasonable justification for the classification.[40]

More specifically, Wisconsin courts employ a five point test to determine whether a governmental enactment satisfies equal protection:

> (1) All classifications must be based upon substantial distinctions which make one class really different from another. (2) The classification adopted must be germane to the purpose of the law. (3) The classification must not be based upon existing circumstances only.
> (4) To whatever class a law may apply, it must apply equally to each member thereof. . . .
> (5) That the characteristics of each class should be so far different from those of other classes as to reasonably suggest at least the propriety, having regard to the public good, of substantially different legislation.[41]

---

38. *See* discussion *infra* of exemption of affordable housing at part VI.L.1.

39. *In re* Guardianship of Nelson v. Department of Health and Social Servs., 98 Wis. 2d 261, 296 N.W.2d 736 (1980); Rubin v. City of Wauwatosa, 116 Wis. 2d 305, 342 N.W.2d 451 (Ct. App. 1983).

40. Kallas Millwork Corp. v. Square D Co., 66 Wis. 2d 382, 225 N.W.2d 454 (1975); Village of Oregon v. Waldofsky, 177 Wis. 2d 412, 501 N.W.2d 912 (Ct. App. 1993).

41. Dane County v. McManus, 55 Wis. 2d 413, 423, 198 N.W.2d 667, 672-73 (1972) (*quoted in* Dog Fed'n of Wis., Inc. v. City of S. Milwaukee, 178 Wis. 2d 353, 366, 504 N.W.2d 375, 380 (Ct. App. 1993)) (alteration in original); *see also* Omernik v. State, 64 Wis. 2d 6, 19, 218 N.W.2d 734, 742 (1974).

In view of these criteria, Wisconsin courts generally view any reasonable basis for a classification as legitimating the given legislation.[42]

B. Substantive Due Process

Substantive due process requires that governmental powers affecting private rights and interests be exercised in a fundamentally fair fashion. In order for an ordinance to meet the standards of substantive due process, it must bear a "substantial relationship" to the public purpose (*i.e.*, the public health, safety, and welfare sought to be achieved).[43] The Supreme Court discussed the substantive nature of due process of law in relation to restrictions on land use in *Nectow v. City of Cambridge*[44] as follows:

> The governmental power to interfere by zoning regulations with the general rights of the land owner by restricting the character of his use, is not unlimited, and other questions aside, such restriction cannot be imposed if it does not bear a substantial relation to the public health, safety, morals, or general welfare.[45]

Substantive due process is a standard that has provided the backbone of land use controls for over fifty years and ensures that the police power is sufficiently broad to protect the public welfare from more than just offensive and noxious activities.

In Wisconsin, the right to substantive due process "requires that a law not be 'unreasonable, arbitrary or capricious, and that the means selected shall have a real and substantial relation to the object sought to be obtained.'"[46] For state action to comply with due process it must pass the reasonable or rational relationship test. The test is whether the means chosen have a reasonable and rational relationship to the purpose or object of the enactment.[47] This remains the standard consistently used by the Wisconsin courts in evaluating the validity of a governmental unit's exercise of its police power.[48]

---

42. *See* State *ex rel* Niederer v. Cady, 72 Wis. 2d 311, 240 N.W.2d 626 (1976).

43. *See* Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (upholding the constitutional validity of zoning as an appropriate exercise of the police power, provided that the zoning was substantially related to the public health, safety, and welfare).

44. 277 U.S. 183 (1928).

45. *Id.* at 188.

46. Yotvat v. Roth, 95 Wis. 2d 357, 372, 290 N.W.2d 524, 532 (Ct. App. 1980) (quoting Nebbia v. New York, 291 U.S. 502 (1934)).

47. State v. Jackman, 60 Wis. 2d 700, 211 N.W.2d 480 (1973).

48. State v. McManus, 152 Wis. 2d 113, 447 N.W.2d 654 (1989); State v. Hermann, 164 Wis. 2d 269, 474 N.W.2d 906 (Ct. App. 1991); State v. Tarantino, 157 Wis. 2d 199, 458 N.W.2d 582 (Ct. App. 1990); Oliver v. Travelers Ins. Co., 103 Wis. 2d 644, 309 N.W.2d 383 (Ct. App.

From a substantive due process of law perspective, the issue is whether an exaction by impact is "reasonable," and whether the local government has demonstrated a linkage between the imposition of the fee and the burden imposed by new development. Put another way, the government must ensure that new developments are not paying more than their fair share of the costs of such improvements.

C. *Procedural Due Process*

Procedural due process is a constitutional concept that embodies the basic notion of fairness. Accordingly, procedural due process requires that governmental power affecting private rights and interests be exercised in a fundamentally just fashion. The government regulation must treat people fairly so they know their concerns will be given due consideration. At a minimum, fundamental due process requires reasonable notice and an opportunity to be heard and provides that governmental decisions should be made on the basis of merit, using defined standards.

To satisfy the standard of procedural due process, an ordinance must be fair; it must provide procedures and standards in terms that are clear, concise, and intelligible to persons of common intelligence. A police power regulation will therefore violate the due process clause if it "either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application."[49] Therefore, an impact fee ordinance must be carefully drawn and must contain clear definitions and definitive procedures.

V. APPLICATION OF CONSTITUTIONAL PRINCIPLES

Application of the constitutional principles of due process have taken on a particular twist in the context of impact fees. The standards generally applied by states ensure that to varying degrees, a "substantial relationship" exists between the regulatory requirements and the public purposes for which they were imposed. As subdivision and development regulations and other exactions by impact proliferated, the courts developed three standards to ensure that this substantial relationship exists. The three standards that state courts have employed in determining the constitutionality of exactions examine whether the fee: (1) is

---

1981).

49. Connally v. General Constr. Co., 269 U.S. 385, 391 (1926).

specifically and uniquely attributable, (2) bears a reasonable relationship, or (3) has a rational nexus with the impact of the new development. Under each standard, new development must create a demand for a new capital facility, and a linkage must exist between this new development and the need for the new facilities. There must also be some assurance that sufficient benefit accrues to the particular developer that pays the fee.

A. "Specifically and Uniquely Attributable" Standard

The first standard is the toughest to meet and requires the local government to prove that the need for the capital improvement is specifically and uniquely attributable to the activity of a particular developer. In order for a mandatory dedication to be a valid exercise of police power in some states (most notably Illinois), local governments have faced the difficult burden of proving that the need for the capital improvement was "specifically and uniquely attributable" to the development of a particular subdivision.[50] Interestingly, although the 30-year old specifically and uniquely attributable test was explicitly rejected as the standard under the Federal Constitution by the United States Supreme Court in *Dolan v. City of Tigard*,[51] it has recently been reaffirmed by the Illinois Supreme Court under its state constitution.[52]

---

50. *See, e.g.*, Pioneer Trust & Sav. Bank v. Village of Mount Prospect, 176 N.E.2d 799 (Ill. 1961). In *Pioneer Trust*, a developer challenged the validity of an ordinance requiring the dedication of public grounds as a condition of plat approval. The Illinois Supreme Court held that while a municipality may require a developer to provide streets that a subdivision requires, it cannot require a developer to provide a major thoroughfare, the need for which stems from an entire community's activities. The court therefore held that the mandatory dedication of land for educational purposes was unrelated to the developer's subdivision plat and that an exaction may only be constitutional when it is within a municipality's statutory grant of power and is specifically and uniquely attributable to a developer's activity. The court stated:

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

Id. at 802.

51. 114 S. Ct. 2309 (1994) ("We do not think the Federal Constitution requires such exacting scrutiny, given the nature of the interests involved." *Id.* at 2319.)

52. *See* Northern Ill. Home Builders Ass'n, Inc. v. County of DuPage, 649 N.E.2d 384 (Ill. 1995).

B. *"Reasonable Relationship" Standard*

Courts in other states, including California, New York, Kentucky, Nebraska, and Texas, have traditionally applied the more liberal due process "reasonableness" requirement for exercises of police power when construing exactions.[53] Under the "reasonable relationship" test, every reasonable presumption is indulged in favor of the constitutionality of the exaction, and if the ordinance bears any reasonable relation to the public welfare and morals, the courts may not declare it to be invalid.[54] According to the reasonable relationship test, if the constitutionality of an ordinance is "fairly debatable," a court cannot substitute its judgment for that of the legislative authority. Nonetheless, in light of the Supreme Court's holdings in *Nollan v. California Coastal Commission*[55] and *Dolan v. City of Tigard*,[56] (discussed below), a more heightened level of judicial scrutiny may be applied for development exactions.[57]

C. *"Rational Nexus" Standard*

The "rational nexus" constitutional standard of reasonableness for fees in lieu of dedication for off-site improvements was introduced in the Wisconsin and New York courts in 1966. The Wisconsin Supreme Court in *Jordan v. Village of Menomonee Falls*[58] held that fees in lieu of dedication for off-site educational and recreational purposes were a valid exercise of the police power if there was a reasonable connection

---

53. *See, e.g.*, Associated Home Builders of the Greater East Bay, Inc. v. City of Walnut Creek, 484 P.2d 606 (Cal.), *appeal dismissed*, 404 U.S. 878 (1971). In *Walnut Creek*, a subdivider was required to dedicate land or pay fees in lieu of dedication for park or recreational purposes. The landowner claimed that because the contribution would be used to pay for public facilities that would be enjoyed by all citizens of the city, the taxpayers should share the burden of the cost. The California Supreme Court disagreed and held that the recreational facilities would be used for salutary purposes and were sufficiently related to the health and welfare of the subdivision residents to justify the dedication requirement. Moreover, the court reasoned that there was a reasonable relationship between the need for the additional facilities and the growth generated by the subdivision because people in high density areas will use the recreational facilities more than people with big private backyards.

54. *See, e.g.*, Russ Bldg. Partnership v. San Francisco, 234 Cal. Rptr. 1 (Ct. App. 1987) (fee for mass transportation), *aff'd and rev'd in part*, 750 P.2d 324 (Cal. 1988); Ayres v. City Council of L.A., 207 P.2d 1 (Cal. 1949); Lampton v. Pinaire, 610 S.W.2d 915 (Ky. Ct. App. 1980); Jenad, Inc. v. Village of Scarsdale, 218 N.E.2d 673 (N.Y. 1966).

55. 485 U.S. 825 (1987).

56. 114 S. Ct. 2309 (1994).

57. *But see* Commercial Builders of N. Cal. v. City of Sacramento, 941 F.2d 872 (9th Cir. 1991), *cert. denied*, 504 U.S. 931 (1992) (in which the court rejected the notion that stricter scrutiny might apply to a linkage fee under *Nollan*).

58. 28 Wis. 2d 608, 137 N.W.2d 442 (1965), *appeal dismissed*, 385 U.S. 4 (1966).

between the need for additional facilities and the growth generated by the subdivision.[59] Funds earmarked for certain capital improvements were also required to "substantially benefit" the development that paid the fee. Whether the general public would incidentally benefit from the planned capital facilities was not a factor that would affect the reasonableness of the fee requirement.

The principles that were set forth in *Jordan* are now applied in many states and have been broken down into a two part standard: (1) there must be a reasonable connection between the need for additional capital facilities and the growth resulting from new development, and (2) there must be a reasonable connection between the expenditure of the fees collected and the facilities capacity provided thereby.[60] To meet the first prong of the dual rational nexus test, an exaction ordinance should indicate that the local government must expand its public facilities in order to maintain current levels, or set new levels of service if new growth and development are to be accommodated without decreasing those levels of service. The local government should also be able to demonstrate that the need for an increase in the public facilities is linked to new growth and development. An exaction ordinance will satisfy the second prong of the rational nexus test if the ordinance assures that the feepayers will enjoy a benefit from the exaction expenditures. While the benefit of public capital facilities, such as roadways, cannot always be attributed to individual developments, the general community should nonetheless benefit from the adequate provision of roadways. Once these rational nexi are established, a payment requirement authorized by the local government has the same presumption of validity under the police power as other zoning and land use regulations, and the developer has the burden of disproving its reasonableness.[61]

More recently, in *St. Johns County v. Northeast Florida Builders Ass'n*,[62] the Florida Supreme Court upheld the rational nexus test in a case that involved the validity of educational facilities impact fees. Taking each prong of the rational nexus test individually, the supreme court first held that St. Johns County adequately demonstrated that there is a reasonable connection or nexus between the need for additional

---

59. *Id.* at 618, 137 N.W.2d at 447.

60. *See, e.g.*, Home Builders Ass'n of Greater Kan. City v. Kansas City, 555 S.W.2d 832 (Mo. 1977); Call v. City of West Jordan, 606 P.2d 217 (Utah 1979).

61. *See, e.g.*, Contractors & Builders Ass'n of Pinellas County v. City of Dunedin, 329 So. 2d 314 (Fla. 1976) (upholding sewage impact fees).

62. 583 So. 2d 635 (Fla. 1991). *See* Charles L. Siemon & Michelle J. Zimet, *Who Should Pay for Free Public Schools in an Expensive Society?*, 20 STETSON L. REV. 3 (Summer 1991).

schools and the growth in population in the county that will accompany new development and that the ordinance, therefore, met the first prong of the rational nexus test. The court made this decision based upon language in the ordinance that states that the County "must expand its educational facilities in order to maintain current levels of service if new development is to be accommodated without decreasing current levels of service."[63] Further, the Court relied upon the calculations of the County's expert who indicated that the fee was appropriately designed to provide capacity to serve the educational needs of all the new dwelling units in the County, regardless of when or whether that capacity would be needed. The Court then stated that it believed that an impact fee ordinance that operated county-wide (*i.e.*, all municipalities participating) could meet the second prong of the rational nexus test. Any municipality that does not wish to participate must specifically opt out of the impact fee ordinance by adopting a conflicting municipal ordinance and must show a valid municipal purpose in its action.

D. Nollan and Dolan

The United States Supreme Court's decision in *Nollan v. California Coastal Commission*[64] may have resulted in a blending of the distinctions between the several different standards that courts apply to an impact fee ordinance. In *Nollan*, the Court suggested that a heightened standard of review should apply to land use regulations that involve the actual conveyance of property and that go further than merely restricting specific uses.[65] The Court stated:

> As indicated earlier, our cases describe the condition for abridgment of property rights through the police power as a "*substantial* advanc[ing]" of a legitimate state interest. We are inclined to be particularly careful about the adjective where the actual conveyance of property is made a condition to the lifting of a land-use restriction, since in that context there is heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police-power objective.[66]

In *Nollan*, the Supreme Court considered the constitutionality of development exactions in a case where the California Coastal Commission conditioned the issuance of a building permit for a single family

63. 583 So. 2d at 638.
64. 483 U.S. 825 (1987).
65. *Id.* at 834-35.
66. *Id.* at 841.

home on the dedication of an easement of access to and from on the dry sand in front of an oceanfront lot. The California Coastal Commission alleged that the purposes of the condition were to reduce any obstacles to viewing the beach created by the new house, to lower any psychological barriers to using the beach, and to remedy congestion along the beach.[67] The property owner argued that the exaction was unconstitutional in violation of the takings clause of the Fifth Amendment. While the Court believed that the Commission's reasons for requiring dedication of the easement were a "legitimate state interest," it nonetheless held that the condition itself did not sufficiently advance those purposes. The Court responded:

> The Commission argues that a permit condition that serves the same legitimate police-power purpose as a refusal to issue the permit should not be found to be a taking if the refusal to issue the permit would not constitute a taking. *We agree.* Thus, if the Commission attached to the permit some condition that would have protected the public's ability to see the beach notwithstanding construction of the new house — for example, a height limitation, a width restriction, or a ban on fences — *so long as the Commission could have exercised its police power (as we have assumed it could) to forbid construction of the house altogether, imposition of the condition would also be constitutional.*[68]

Although the Supreme Court in *Nollan* did not openly endorse the rational nexus standard, its analysis is nonetheless consistent with the use of this standard in subdivision dedication cases in state courts.[69] The Supreme Court determined that there must be some "fit" between the beach access condition imposed on the Nollans and the burden that their new house creates or to which it contributes. However, the Court did not find it necessary to discuss how close a fit is required because the Justices found "that this case does not meet even the most untailored standards."[70] The practical lesson of *Nollan* is that local governments must be particularly careful when they impose land use regulations that require the actual conveyance of private property for public use without just compensation.

---

67. *Id.* at 835.

68. *Id.* at 836 (emphasis added).

69. *See, e.g.*, Town of Longboat Key v. Lands End, Ltd., 433 So. 2d 574 (Fla. Dist. Ct. App. 1983); Pioneer Trust and Sav. Bank v. Village of Mount Prospect, 176 N.E.2d 799 (Ill. 1961); Jenad, Inc. v. Scarsdale, 218 N.E.2d 673 (N.Y. 1966); Jordan v. Village of Menomonee Falls, 28 Wis. 2d 608, 137 N.W.2d 442 (1965).

70. *Nollan*, 483 U.S. at 838.

The Supreme Court did elaborate on how strong the nexus between the development condition and the public purpose must be to sustain an exaction by impact in *Dolan v. City of Tigard*.[71] In *Dolan*, the Court enunciated a new two-part test for determining when an unconstitutional exaction has occurred. First, an "essential nexus" must exist between a legitimate government interest and the permit condition imposed by the local government. Second, there must be a "rough proportionality" between the exaction and the impact of the proposed development. Applying this new test, the Supreme Court found that the City of Tigard, Oregon had not justified its requirement that a store owner give up a portion of her development site for a public bicycle path and drainage improvements to an adjacent creek as a condition of a permit to double the size of her hardware store.

In evaluating whether Tigard's planning commission's findings were constitutionally sufficient to justify the conditions imposed on the Dolans' building permit, the Supreme Court reviewed the standards by which several different state courts have treated development exactions. The Court observed that a wide spectrum exists in the manner in which states have handled the issue of what is the necessary connection between the required dedication and the proposed development. The Court wrote that while a "very generalized statement" is too lax a standard, the highly restrictive "specifically and uniquely attributable test" is likewise unwarranted.[72]

The Court determined that the reasonable relationship test, which had been adopted by a majority of the state courts, was the closest to the constitutional norm. Under this standard, a local government must show a reasonable relationship between the required dedication and the impact of the proposed development. However, the Court refused to adopt the test as such, in part because the term "reasonable relationship" is too easily confused with the term "rational basis" (the minimum level of scrutiny under the Equal Protection Clause). Rather, the Court held:

> We think a term such as "rough proportionality" best encapsulates what we hold to be the requirement of the Fifth Amendment. No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.[73]

---

71. 114 S. Ct. 2309 (1994).
72. *Id.* at 2319.
73. *Id.* at 2319-20.

Of paramount importance to local governments, landowners, and developers—and the issue that caused the rift between the majority and dissenting justices—in elucidating what is now the standard for evaluating development exactions, the Court shifted the burden so that governments now have the responsibility of proving the constitutionality of an exaction. Until this time, the burden of proving that the exaction would take all (or substantially all) of the economically viable or beneficial use of the property fell on the landowner challenging the land use regulation. Now, a court must examine whether the government has justified its exaction by making what the Court called an "individualized determination" that the condition satisfies the proportionality requirement.

The practical effect of *Dolan* is that local governments must make some evaluation of the proposed development in relation to the exaction to support the fact that the exaction is roughly proportional to the future impacts of the proposed development. The question of precisely how much planning is needed to satisfy the Court's standard will be debated across the country, in every state and at every level of local government in the upcoming years. What is certain, however, is that by shifting the burden of proof from the property owner to the government, the Supreme Court has established stricter limits on the ability of governments to place conditions on their approval of building permits. In general, observations of *Dolan* can be categorized as follows:

A. While no precise mathematical calculation will be required to justify land use restrictions, a government should attempt to quantify its findings and should make an individual determination of the relationship between the impact of the development and the requirement imposed on the developer.

B. A government may rely on studies performed by other communities in justifying its exactions, and developers may be asked to supply additional information and prepare further studies to assist the government in its planning efforts.

C. A government may not attach arbitrary conditions to a building permit or to a variance even when it can rightfully deny the application outright.

Again, however, development exactions and dedications no longer have a presumption of constitutional validity and courts will use a heightened level of scrutiny in their evaluation. Therefore, the local government unit will have to show that the development condition substantially advances a legitimate public purpose. And, the local government unit will have to precisely document the costs to the public that are generated by the development and the manner in which an impact fee would alleviate those costs.

In general, and as a form of summation of the constitutional standards, state and federal case law have established four principles for a constitutionally valid exaction. The fee must:

A. be reasonable, or substantially advance a legitimate public interest and not exceed a proportionate share of the cost of infrastructure improvements attributable to the feepayer's development;
B. not be charged to remedy existing deficiencies, but be charged only to provide public facilities for new development;
C. not duplicate other taxes or charges paid for the same public facility, but subtract these other payments as a credit against the exaction that would otherwise be due; and
D. be deposited in interest-bearing accounts, kept separate from general revenues, and expended only for the types of improvements specified in the exaction ordinance.

VI. RECOMMENDED PROVISIONS AND REQUIREMENTS OF WISCONSIN LAW FOR IMPACT FEE ORDINANCES

Regardless of the judicial standard used to evaluate an exaction by impact fees, Wisconsin local governments that decide to implement an exaction program will have to consider a number of administrative issues to ensure that their fees will be legally defensible if challenged in court. While impact fees may be new to them, they can fortunately take advantage of both the wisdom and mistakes of local governments elsewhere that have survived such challenges.

As expressed earlier, the backbone of an exaction is not simply the population or statistical data used to compute the fee schedule. Rather, a defensible ordinance must accommodate due process, equal protection, and other equity limitations, and most ordinances contain many administrative procedures. The typical impact fee ordinance contains explicit definitions; establishes the timing of assessments; includes a fee schedule; and allows for fee agreements, individual assessment of impact, refunds, credits, and exemptions to ensure that no developer is assessed more than his or her fair share of the cost of capital facilities, which will be paid for by the funds collected. Before an effective and enforceable impact fee can be developed, several issues and policies should be considered and resolved.

A. Land Development

One of the first issues that a local government will have to consider in drafting an impact fee ordinance is the proposition of what actually constitutes "land development." An impact fee is typically applied to all

new development (with the exception of specified exemptions discussed below). The statute defines "land development" as "the construction or modification of improvements to real property that creates additional residential dwelling units within a political subdivision or that results in nonresidential uses that create a need for new, expanded or improved public facilities within a political subdivision."[74] However, this statutory definition is so broad that it does not address, for example, whether additional accessory buildings that are constructed are an example of development, and are therefore responsible for their fair share.[75]

The definition should cover the need to assess a fee when significant changes in use occur. The local government is free to include any activities that can be shown to generate new development impacts, and a careful definition in the regulations themselves will ease the administration of the fee.

B. Public Facilities Needs Assessment

Before enacting an impact fee ordinance, the Wisconsin statute requires the local government to conduct a "Public Facilities Needs Assessment" of the capital facilities for which the impact fee is to be levied. The Public Facilities Needs Assessment must include, but is not limited to, the following:

> 1. An inventory of existing public facilities, including an identification of any existing deficiencies in the quantity or quality of those public facilities, for which it is anticipated that an impact fee may be imposed.
> 2. An identification of the new public facilities, or improvements or expansions of existing public facilities, that will be required because of land development for which it is anticipated that impact fees may be imposed. This identification shall be based on explicitly identified service areas and service standards.
> 3. A detailed estimate of the capital costs of providing the new public facilities or the improvements or expansions in existing public facilities identified in subd. 2., including an estimate of the effect of recovering these capital costs through impact fees on the availability of affordable housing within the political subdivision.[76]

---

74. WIS. STAT. § 66.55(1)(d) (1993-94).

75. Typically, a definition of development would exclude accessory buildings and the replacement of existing structures as long as there is no change in size or use from payment of a fee.

76. WIS. STAT. § 66.55(4)(a) (1993-94).

The amount of the impact fee will be based upon actual capital costs or reasonable estimates of capital costs for the expansion of public facilities that will be incurred by the local government unit as a result of anticipated new development.

C. *Impact Fee Zone(s)*

Wisconsin Statutes section 66.55 (5) authorizes local government units to impose different impact fees on different types of land development. The local government units may delineate geographically defined zones and impose impact fees that differ from zone to zone based upon the Public Facilities Needs Assessment. The Needs Assessment explicitly identifies the differences between the zones and justifies the amount of impact fees imposed. Whether the local government unit in its entirety could be considered a single impact fee zone, or whether the ordinance would delineate geographically defined zones, must be determined. The impact fee law does not state which factors warrant "special consideration" in determining impact fees.

The Wisconsin impact fee law also does not identify the criteria the local government unit should use in determining the boundaries of a zone. Section 66.55 (5) (b) merely states: "the public facilities needs assessment . . . shall explicitly identify the differences, such as land development or the need for those public facilities, which justify the differences between zones in the amount of impact fees imposed."[77] Whatever zone or zones the local government unit chooses to create, the new development within that zone must be appropriately linked to the impact fee charged.

Impact fee zones should be logically delineated on the basis of like characteristics. Geographic features (*i.e.*, natural boundaries) are often key delineators. Market trade areas and travel patterns can also be used to construct zones. Zones are occasionally related to urban-rural boundaries. Input to the process of delineating zones includes existing and potential municipal boundaries, development opportunity sites, land cost characteristics, and land-use inventories.

D. *Timing of Collection*

After the effective date of an impact fee ordinance, any person or governmental body who commences any impact-generating land development activity identified in the ordinance will be obligated to pay

77. *Id.* § 66.55(5)(b).

an impact fee. One of the issues that local governments must resolve is when the fee should be collected. The statute contains very flexible guidelines and provides that the fee shall be payable either in full or in installment payments "before a building permit may be issued or other required approval may be given by the political subdivision."[78] The impact fee will therefore be determined and paid at the time required in the ordinance: it can be at the time of issuance of a building permit for the development, at the time of plat approval, at the issuance of an occupancy permit if properly guaranteed, or at another point in the permitting process.

If the permit is for less than the entire development, the fee should be computed separately for the amount of development covered by the permit. The ordinance should provide that the obligation to pay the impact fee runs to subsequent owners of the land. In addition, the ordinance should contain an exception to the timing of the payment if the local government obtains security ensuring the later payment of the fee. 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.

There are several benefits to collecting the impact fee at the time of issuance of the building permit (versus the certificate of occupancy). First, collection of the fee is generally easier to administer. Second, it provides the local government additional lead time to collect monies for construction or land acquisition. Third, collecting fees at the time the certificate of occupancy is issued may cause problems for commercial properties that are built and occupied in stages. The issue of phased development, however, could pose similar problems when fees are collected at the building permit stage. For example, when a large development initially has a substantial vacancy rate, the developer might find that paying fees at such an early time is overly burdensome.

E. Collection of Impact Fees: Inter-Local Agreements

County impact fees should involve municipal input and participation, not only in the context of developing the impact fee ordinance, but also in establishing specific procedures whereby the county and its municipalities agree to cooperate in the collection of the impact fees. An inter-local agreement (adopted under Wisconsin Statutes section 66.30) should be developed between counties and their municipalities to provide a

78. *Id.* § 66.55(6)(g).

cooperative, uniform, and cost effective procedure to collect impact fees at the county level.

An inter-local agreement would set out the responsibilities of the municipalities and the counties in implementing an impact fee program. The terms of inter-local agreements that have been established in other states generally require the municipality to establish an interest-bearing account into which the impact fee funds are deposited. The municipalities then remit the amount of the fees to the county, plus any interest earnings collected, less administrative costs, usually on a monthly basis. All the funds that are remitted to the county by the municipalities must be used for the projects within the zone from which the funds were collected.

F. Fee Agreement

Fee agreements have been used in many communities to assist in defining the time of payment as well as in pro-rating credits in large scale developments. In these situations, at any time prior to issuance of a building permit, the owner of property may enter into a fee agreement with the local government providing for payment of the impact fee under specified terms and conditions.

Any developer who agreed prior to the effective date of the impact fee ordinance to pay impact fees, as a condition of development approval, will be responsible for the payment of the fees under the terms of the agreement. The payment of such fees by the developer will be offset against any impact fees otherwise due at later stages of the development activity for which the fee was paid. Any portion of the impact fees agreed to be paid pursuant to a prior agreement that is greater than the fees established in the impact fee ordinance will be refunded. Any land or facilities agreed to be dedicated to the local government unit as a condition of development approval will be dedicated by either easement or deed, at the discretion of the local government, no later than the time at which impact fees are required to be paid under the ordinance.

G. Establishment of Fee Schedule and Periodic Review

Impact fee ordinances usually have a schedule of land use categories with a fee attached to each category. In addition, such ordinances typically provide a process whereby proposed land uses not identified in the schedule may be interpreted, usually by the Planning Department, so that the appropriate fee can be assigned. Frequently, such interpretations are appealable to the legislative body.

The primary function of the fee schedule is to provide an easily administered mechanism that ensures that the fees are consistent with constitutional standards. The fee schedule is also developed so that individual determinations do not have to be made for each new development. Because the courts have accepted the use of average costing methodologies to determine proportionate share, most impact fee ordinances set forth a formula that applies various factors to compute the fee. For example, a transportation impact fee formula would take into account factors that include trip generation rates, trip length, capture and diversion factors, and road and right-of-way costs.

Most impact fee ordinances also provide that the legislative body would determine, usually on a bi-annual basis, whether any modifications should be made to the fee schedule to reflect changes in the conditions. The purpose of this periodic review is to analyze the effects of inflation and other factors on the actual costs of facilities and to insure that the fee charged will not exceed the pro rata share for the reasonably anticipated expansion costs of facilities necessitated by the new development.

In addition, once the capital improvements are completed, the periodic review allows the local government to recalculate the fee using the actual costs of the capital improvements or facility expansion. If the impact fee calculated based on actual cost is less than the impact fee paid, the impact fee ordinance may provide that the local government shall refund the difference if the difference exceeds the impact fee paid by more than a certain percentage (*e.g.* 10%).

H. Individual Assessment

Many impact fee ordinances also provide that a developer may challenge the impact fee schedule by providing an individual impact assessment. Individual assessments are usually used to determine whether a fair share of the capital expansion costs, which the proposed development necessitates, should be less than the fee established in the ordinance's schedule. Many impact fee ordinances provide that the impact fee may be computed by the use of an individual assessment of impact if:

1. the type of development being commenced is not one of the types listed on the fee schedule; or
2. the developer chooses to have the amount of the impact fee determined by the use of an individual assessment of fiscal impact; or
3. the local government's analysis of the proposed development

concludes that the nature, timing, or location of the proposed development makes it likely to generate impacts costing substantially more than the amount of the impact fee that would be generated by the use of the fee schedule.

The developer is usually responsible for the preparation of the individual assessment if he or she chooses to conduct the analysis. The local government unit would be responsible for the preparation of the individual assessment if the type of land development being proposed is interpreted by the Planning Department staff not to be one of those types listed in the fee schedule or if analysis of the proposed land development concludes that the nature, timing, or location of the proposed development make it likely to generate impacts costing substantially more than the amount of the fee generated by the use of the fee schedule. The regulations should require that the person who conducts the individual assessment be a qualified professional in the preparation of such analyses.

The ordinance should also require that the person who conducts the individual assessment of fiscal impact should be a qualified professional in the preparation of fiscal impact analyses. If the designated individual within the local government unit is responsible for the preparation of the assessment, he or she may request that the developer prepare the individual assessment and credit the cost of such preparation against the impact fee.

The individual assessment option is included in most impact fee ordinances that utilize average cost fee schedules to ensure that the ordinance will withstand a substantive due process challenge. Individual assessments offer the developer the opportunity to prove that his or her new development will have less impact on the public facilities system than is determined in the fee schedule. If the local government determines that the data, information, and assumptions used by the applicant to calculate the assessment satisfy the requirements set out in the ordinance for assessments, the fee determined will be due and owing for the proposed land development activity. Such an adjustment in the fee would usually be set forth in a fee agreement.

The individual fee calculations are based on data, information, or assumptions contained in the impact fee ordinance, or the ordinance may provide that independent sources may be used. However, the independent source must either be an accepted standard source of engineering or planning data or information, or a local study carried out by a qualified planner or engineer pursuant to an accepted methodology of planning or engineering. To ensure fairness in the process, the same

formula used in developing the fee schedule must also be used in the independent analysis, and a consistent and reasonable set of review procedures should be established. Any person should be able to appeal the decision on the individual assessment by filing a petition with the legislative body. In reviewing the decision, the legislative body should make written findings and conclusions of law and use the appropriate constitutional standards for reasonableness described earlier in this Article.

I. Credits

The local government unit must provide credits for new development against impact fees in instances where there have been contributions of public facilities or money for public facilities that will be used to accommodate new development.[79] Impact fees must also be reduced to compensate for federal and state monies received "to provide or pay for the public facilities for which the impact fees are imposed."[80] Any person who initiates any impact generating land development activity may apply for a credit against the impact fee for any contribution, payment, construction, or dedication of land that the local government accepts and receives for the targeted capital facilities improvements. The determination of credits usually occurs at the time of the calculation of the amount of the impact fee.

The rationale for granting credits is based on the proportionate share principles discussed above in the impact fee case law. 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 that is subject to impact fees is also generating tax revenues that are being used to construct public facilities or pay debt service on outstanding bonds for capital facilities, the new development will be contributing twice for the same public facility without a credit.

In order to avoid legal challenges for such a double payment situation, the local government unit should deduct the present value of other revenues generated by the new development from the impact fees

79. WIS. STAT. § 66.55(2)(b), (6)(d) (1993-94).
80. *Id.* § 66.55(6)(e).

on the new development when the two sources of revenues are used to meet the same local need. The types of credits that should be considered depend on the local government's taxing scheme and on the type of fee which is charged. For instance, a local government with a transportation 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.

J. Earmarking of Funds

Any fees collected pursuant to an impact fee ordinance must be expressly designated for the accommodation of impacts reasonably attributable to the proposed development. Separate accounts or trust funds should be established to insure that the fees collected pursuant to an ordinance are designated for the accommodation of impacts reasonably attributable to the proposed development. Proceeds collected and all interest accrued on such funds should be used exclusively for capital expansion of the facilities in the impact fee zone from which they were collected.[81]

Any proceeds in the trust fund account on deposit that are not immediately necessary for expenditure must be invested in interest bearing accounts. All income derived from these investments should be retained in a segregated account.[82] Each year when the annual budget is reviewed, the local government unit should propose appropriations to be spent from the segregated account to the legislative body. After review of the recommendations, the legislative body should then either approve, modify, or deny the recommended expenditures of the segregated account monies. Any amounts not appropriated from the segregated account, together with any interest earnings, should be carried over in the specific segregated account to the following fiscal period.

As discussed earlier, 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 each of the reasonableness tests, the impact fee must be adequately related to the needs for additional facilities generated by new development, and the money collected must be used to benefit the new development.[83] The ordinance must, therefore, provide that the fees collected be earmarked to pay for facilities that will benefit the feepayers. These fees may not exceed the

81. *Id.* § 66.55(8).
82. *Id.*
83. *Id.* § 66.55(6)(c).

proportionate share of the capital costs that are required to serve land development, as compared to existing uses of land within the political subdivision.[84] The time limit on the use of the funds should be specifically identified in the ordinance to ensure that the funds are spent within a reasonable length of time. 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 designated for accommodation of impacts reasonably attributable to the development upon which the fee was levied.

K. Refund of Impact Fees

As an additional assurance that the developer pay only his or her fair share of the cost of capital facilities construction or expansion, most ordinances allow for the refund of the monies collected if the fees have not been spent on targeted capital improvements within a specified time frame or if the approved development is canceled before construction has commenced. The ordinance must specify that impact fees that are imposed and collected by the local government units, but not used within a reasonable period of time after they are collected, will be refunded to the current owner of the property. The ordinance must also specify reasonable time periods within which impact fees must be spent or refunded. The local government units must consider what are appropriate planning and financing periods in determining the length of time periods.[85] The refund provisions should also provide that the refund includes simple interest.

In certain situations, it may be desirable to also provide for an extension of the date that fees must be refunded. Such an extension should be limited to those situations where a finding is made that within such an extended period, specified transportation capital improvements are planned and evidenced by the adoption and incorporation of the plans into the Needs Assessment, that these transportation capital improvements will be constructed within such extended period, that these improvements are reasonably attributable to the feepayer's development, and that the fees with an extended time of refund will be spent for these transportation capital improvements. Fees are usually deemed spent on the basis that the first fee collected is the first spent.

---

84. *Id.* § 66.55(6)(b).
85. *Id.* § 66.55(9).

L. Exemptions

Some ordinances also exempt certain types of new development from payment of their fair share of the impact fee. Early impact fees usually applied to all new development, or to a broad category of new development, such as new residential or office or commercial development. For equitable reasons, many modern impact fee ordinances now exempt a narrow class of land uses in order to avoid the harsh impact of development fees on less-profitable, socially beneficial land uses. These exempted developments often include government buildings and affordable housing, thus encouraging certain housing development that ensures both the long-term integrity of an area and accommodates regional growth influences.[86]

Exemptions generally imply a willingness by the local government to decrease the amount of funds collected on behalf of the capital facility in order to provide adequate public facilities for the targeted group. The impact of exemption policies must be clearly articulated so that the purpose of the compromise is clearly understood. Also, it is important to calculate exemptions with caution to ensure that the deficit the exemptions create will not be absorbed by other developers who remain subject to the fee. Wisconsin Statutes section 66.55 (7) provides that:

> An ordinance enacted under this section may provide for an exemption from, or a reduction in the amount of, impact fees on land development that provides low-cost housing, except that no amount of an impact fee for which an exemption or reduction is provided under this subsection may be shifted to any other development in the land development in which the low-cost housing is located or to any other land development in the political subdivision.[87]

The legal issues that would likely be raised in a lawsuit challenging impact fee exemptions are whether the local government has the authority to exempt some land users from the impact fees and whether the exemption violates the state's and the federal equal protection clauses.

---

86. For example, in Monroe County, Florida, developers are exempt from paying impact fees if they construct affordable housing units, and public governmental buildings are also exempt. *See* Monroe County, Fla. *Comprehensive Plan Land Development Regulations*, vol. III, ch. 12, § 101-05 (1986). Other exemptions have been provided for single family dwelling units in the Pinelands, New Jersey, when municipal ordinances would otherwise have interfered with a community's development objectives. *See* N.J. ADMIN. CODE tit. 7.50, § 5.22 (1982).

87. WIS. STAT. § 66.55 (7) (1993-94).

1. Affordable Low Cost Housing Exemptions

Because impact fees may increase the cost of new housing, some jurisdictions have exempted affordable housing from the payment of impact fees. Wisconsin and Vermont, for example, are states that expressly authorize the exemption of affordable low cost housing in their impact fee enabling legislation.[88] In other jurisdictions that do not expressly authorize impact fee exemptions, the exemption of affordable housing development would have to be based upon the local government's overall objective of planning comprehensively for the orderly growth and development of the community, including the encouragement of a variety of housing types. In Wisconsin, the new impact fee statute expressly states that an ordinance may offer an exemption from, or a reduction in the amount of, impact fees for land development that provides low-cost housing.[89]

Exempting affordable housing from impact fee regulations is an intuitive technique to encourage the construction of affordable housing development. Exemptions imply that a community is willing to aggressively promote the construction of adequate housing for its lower income residents. However, exemption policies should clearly be articulated in the local government's plans so that the purpose and rationale of the approach are clearly understood.

Recognition should be given to the fact that the affected agency will need to fund the exempt development's share of the system improvements through a revenue source other than impact fees. Exemptions should be carefully calculated to ensure that the deficit created by the exemptions will not be absorbed by other types of development that remain subject to the fee. Moreover, as described above, if exemptions are determined to be appropriate, the agency must determine whether exemptions should be applied generally, by individual district, or based on the needs of individual developers or developments.

An affordable low cost housing exemption would likely withstand a constitutional equal protection challenge as long as the local government can demonstrate that exemption of that particular class of development is rationally related to some legitimate government purpose, such as planning objectives, rather than for the sole purpose of creating a financial subsidy for the exempt land use. The United States Supreme

88. *See* VT. STAT. ANN. tit. 24, § 5205 (1994).
89. WIS. STAT. § 66.55 (7).

Court has emphasized that where no "suspect class" (*e.g.*, race, nationality, or alienage) or fundamental right is at stake, a government need only show that its classification is rationally related to a legitimate government interest.[90] To date, neither the federal nor any state courts have held affordable housing to be a fundamental right. Thus, a court would apply the same constitutional analysis that would be applied to determine the validity of many other types of police power or economic regulations. The only role of the courts would be to determine whether the governing body enacting the impact fee ordinance could rationally have decided that the exemption of affordable housing developments would achieve a legitimate public purpose.

2. Exemptions for Public Buildings and Private Non-Profit Organizations

Public schools, other public buildings, and non-profit organizations have sometimes also been exempted from impact fees. There is no difference in the legal requirements for the exemption of not-for-profit organizations and other types of exemptions. Unless a statute infringes on a fundamental right or discriminates against a suspect class, differential treatment of a regulated class will be judged under the less stringent rational basis equal protection standard.

The exemption of public buildings and private non-profit organizations will be constitutionally valid if it is reasonably related to comprehensive land use planning objectives. Further, as in the case of affordable housing, a local government must be able to demonstrate that non-exempt land uses are not subsidizing the exempted land uses. It is important to note, however, that many not-for-profit institutions have at least as great an impact on road systems and other public facilities as other land uses, and it may therefore be difficult to provide the necessary reasonable relationship that would be required to justify the exemption. Furthermore, because the United States Constitution mandates the separation of church and state, the exemption of religious institutions only, without any similar exemption for other institutions, from the payment of impact fees is likely to be strictly scrutinized by the courts. However, if some non-religious institutions were exempt as well, the claim of government favoritism of churches would be weakened.

---

90. *See, e.g.*, Pennell v. City of San Jose, 485 U.S. 1 (1988); Vance v. Bradley, 440 U.S. 93 (1979); City of New Orleans v. Dukes, 427 U.S. 297 (1976).

M. Retroactive Application

Whenever laws affecting development are modified, some developers will inevitably be caught with projects in the "pipeline," — that is, the developers will have received some government approval (*e.g.*, site plan, rezoning), but they still will require additional authorization (*e.g.*, a building permit or certificate of occupancy). An impact fee ordinance should therefore clearly indicate when a developer will not be subject to the impact fee because the project is at such an advanced stage of development that his or her right to develop without paying fees will be considered vested. The local government unit must decide whether it wants to charge impact fees to developers whose projects are close to completion (or have just recently been finished), or whether fees will only be imposed on developers whose developments are still on the drawing board.

One of the issues that arises in adopting an impact fee ordinance is whether the "vested rights" concepts that have been applied to changes in zoning laws will apply to the adoption of impact fees. Under the most common type of vested rights case, a court would be asked to determine the point in time, if any, at which a developer's right to proceed under an old zoning ordinance, which is superseded by new zoning regulations, becomes vested.[91] The rule in most states is that a developer does not acquire any vested rights to proceed under the rules in effect at the time the development was approved unless a building permit was issued and the developer made "substantial expenditures" in reliance on the permit. In *Lake Bluff*, however, after considering an unusual level of pre-zoning change, planning activity, and expense, the court concluded that rights can be vested in a zoning designation even absent the issuance of a building permit. The court articulated the following principles:

> (1) a property owner can have vested rights in a *planned* building before actual construction begins; (2) 'retrospective effect' of an ordinance is 'not favored, and this is especially true where vested rights are affected;' and (3) conceptually, vested rights can be separated from zoning compliance. That is, a court can conclude that a property owner has a vested right to build, *contingent on compliance* with previously existing restrictions.[92]

---

91. *See, e.g.*, Lake Bluff Hous. Partners v. City of S. Milwaukee, 188 Wis. 2d 230, 525 N.W.2d 59 (Ct. App. 1994), *rev'd*, 540 N.W.2d 189 (1996).

92. *Id.* at 250, 525 N.W.2d at 67. *See also* State *ex rel* Humble Oil & Ref. Co. v. Wahner, 25 Wis. 2d 1, 130 N.W.2d 304 (1964); Rosenberg v. Village of Whitefish Bay, 199 Wis. 214, 225

In general, local government units should face few legal obstacles to imposing impact fees on developments "in the pipeline." There is no automatic right to have the exaction regulations in effect at the time of project commencement applied at its conclusion. In fact, the law is relatively clear that all property is subject to an exercise of the police power, regardless of a developer's expectations.[93] In the absence of a statutory provision that protects a developer's right to complete a previously planned and approved development without change in the rules, the developer's only real recourse is to seek a judicial declaration that his or her development rights are vested.

The concept of vested rights has been developed by the courts in response to the inevitable changeability of local land use regulations.[94] Generally, the vested rights concept stops a land use regulatory authority from applying new or changed regulations to a previously approved development where a landowner has, in good faith, relied to his or her substantial detriment on the approval. The landowner must show that it would be highly inequitable to deny him or her the right to complete the project as originally approved. The difficulty is that what is "substantial," what is "good faith," and what is "highly inequitable" are subjective issues that to date have only been resolved on an ad hoc basis.[95]

In general, in vested rights or estoppel cases, the courts try to balance the developer's economic injury against the public interest served by the regulation. The local government unit should take advantage of the opportunity to exercise some foresight when addressing this important issue of development expectations. Developers should be alerted to these potential conflicts concerning vested rights before an impact fee ordinance takes effect. By working together, the local government unit

---

N.W. 838 (1929); Building Height Cases, 181 Wis. 519, 195 N.W. 544 (1923).

93. Jordan v. Village of Menomonee Falls, 28 Wis. 2d 608, 137 N.W.2d 442 (1965), *appeal dismissed*, 385 U.S. 4 (1966).

94. For a comprehensive discussion of vested rights principles and cases, see CHARLES L. SIEMON ET AL., VESTED RIGHTS: BALANCING PUBLIC AND PRIVATE DEVELOPMENT EXPECTATIONS (1982).

95. Although it has never been established that traditional vesting rules apply to impact fees, a Florida case, Key West, Fla. v. R.L.J.S. Corp., 536 So. 2d 641 (Fla. Dist. Ct. App. 1989), upheld the city's right to require a developer to pay development fees pursuant to an ordinance adopted after a building permit had been issued and a substantial number of units had been constructed. This case illustrates the developers' potential liability for impact fees even after their developments have been approved. *See also* Russ Bldg. Partnership v. San Francisco, 750 P.2d 324 (Cal. 1988) (new mass transportation fees held not violative of vested rights because terms of permits issued contemplated that developers would pay the fee).

and its developers should be able to stave off this type of costly and risky litigation.

N. Appeals Procedure

To ensure fairness in the process, the same formula used in developing the fee schedule should also be used in the independent analysis, and a consistent and reasonable set of review procedures should be established. Under Wisconsin Statutes section 66.55 (10), the ordinance must specify a procedure under which a developer on whom an impact fee is imposed has the right to contest the amount, collection, or use of the impact fee.[96] The procedure should provide for commencement of the review of individual assessments by filing a petition for review with the local government unit. Throughout the review and appeals procedure, local government officials should prepare written findings of fact and conclusions of law and use the appropriate constitutional standards to establish reasonableness.

VII. CONCLUSION

State and local governments are responding to infrastructure funding problems and the implications of inadequate public facilities on the quality of life in their communities. Many governments have begun to explore alternative funding sources, such as impact fees, as a means of ensuring sufficient funding to finance capital facilities needed to support their new growth and development. Development impact fees are a popular, useful, and necessary mechanism for financing public facilities.

The Wisconsin Impact Fee Law follows the national trend and provides the basic authority and requirements for local government units to enact impact fee ordinances. The validity of such ordinances will be based upon compliance with the statutory and constitutional requirements set forth in this Article. Impact fee ordinances that are properly drafted in compliance with the necessary statutory and case law requirements will be enforceable. Impact fees have been challenged and sustained nationwide and are now prevalent in Wisconsin.[97]

With few or no revenues to expand facilities commensurate with new development, local governments face unpleasant dilemmas. Without growth, they face economic and fiscal stagnation. Without new facilities,

---

96. WIS. STAT. § 66.55(10) (1993-94).

97. For example, as the chart in Appendix II demonstrates, within Waukesha County, Wisconsin alone, over thirty local governments have already enacted various types of impact fees or exactions. *See infra* Appendix II.

they can have no growth. If growth occurs in the absence of new or expanded facilities, local taxpayers correctly perceive that new development is associated with lower quality of life. However, despite their significant need for new revenues, local government officials should not only comply with the statutory and case law requirements, but should also carefully evaluate the effect of an impact fee ordinance on economic development and affordable, low cost housing. The process of enacting development impact fees should therefore involve a genuine balancing of interests.

Appendix I: Analysis of State Impact Fee Legislation*

State/Citation	Facilities Authorized	Citizen Committee Required	Time for Imposition & Collection	Accounting Requirements	Time Limit for Expenditures	Capital Improvements Plan Required	Service/ Benefit Area(s) Required	Identification of Deficiencies Required
Arizona Cities ARIZ. REV. STAT. ANN. § 9-463.05 (Supp. 1993).	Necessary public services. § 9-463.05(A).	No.	At time of building permit issuance for residential development. § 9-463.05(B)(3).	Separate funds by facility type. § 9-463.05(B)(2).	Not specified.	No.	No.	No.
Arizona Counties ARIZ. REV. STAT. ANN. §11-1101 *et seq.* (Supp. 1993).	Roads, sewer, water, neighborhood parks, flood control. § 11-1101(14).	No.	Imposed at building permit issuance, collected at issuance of either building permit of certificate of occupancy. § 11-1108(A).	Separate funds by facility type. § 11-1105(A)(3).	Must encumber within 5 years of date of collection or refund due to property owner upon filing of claim to refund (1 year claim period). § 11-1105(A).	Yes , must cover current fiscal year plus 4 years § 11-1101(8).	Yes. § 11-1105(A).	Yes, as part of facilities needs assessment and CIP. § 11-1106.
California CAL. GOV'T CODE §66000 *et. seq.* (West. Supp. 1993).	Unrestricted.	No.	Collected from residential development at final inspection or issuance of certificate of occupancy, whichever occurs first; collection may occur earlier if fees charged for facilities in CIP or fees are for reimbursement. (Conditions imposed pursuant to Subdivision Map Act must be imposed at earliest possible time. CAL. GOV'T CODE § 65961.) § 66007.	Separate funds by facility type to avoid commingling of fees with other revenues and funds; and annual report required. § 66006.	Must encumber or expend within five years of date of deposit or refund current property owners unless local agency makes findings to identify the purpose to which the fee is to be but and to demonstrate a reasonable relationship between the fee and purpose for which it was charged. § 66001(d) &(e).	No, however permitted and may allow collection of fees prior to issuance of certificate of occupancy. § 66002 & § 6007(a).	No.	No.

* Martin L. Leitner & Susan P. Schoette, *A Survey of State Impact Fee Enabling Legislation, in* EXACTIONS, IMPACT FEES AND DEDICATIONS: SHAPING LAND-USE DEVELOPMENT AND FUNDING INFRASTRUCTURE IN THE DOLAN ERA, Robert H. Freilich & David W. Bushek, eds., 60, 63-69 (1995).

Appendix I (cont.)

State/Citation	Facilities Authorized	Citizen Committee Required	Time for Imposition & Collection	Accounting Requirements	Time Limit for Expenditures	Capital Improvements Plan Required	Service/ Benefit Area(s) Required	Identification of Deficiencies Required
Colorado COLO. REV. STAT. § 29-1-801 *et. seq.* (Supp. 1992).	Unrestricted.	No.	Not specified.	Separate fund or account by facility type or by aggregate or individual land development at discretion of local government. § 29-1-803.	Not specified.	No.	No.	No.
Georgia GA. CODE ANN. § 36-71-2-(16) (Supp. 1992).	Roads, sewer, water, parks, stormwater, flood control, public safety, libraries. § 36-71-2(16).	Yes, advisory capacity only. § 36-71-5.	Collected no earlier than building permit issuance except for stormwater/ flood control facilities (grading permit). § 36-71-4(d).	Separate funds by facility type and service area § 36-71-8(a).	Must refund upon application of property owner if not encumbered within 6 years and service not provided. § 36-71-9(1).	Yes, as part of adopted Comprehensive Plan. § 36-71-3(a).	Yes. § 36-71-4(b).	No.
Hawaii HAW. REV. STAT. § 46141 *et. seq.* (Supp. 1992).	Limited to facility types identified in a county comprehensive plan or a facility needs assessment study. § 46-142(b).	No.	Imposed prior to issuance of grading or building permit, collection prior to or at building permit issuance. § 46-146.	Separate funds by benefit area (portion of fees that recoup cost may be transferred to any appropriate fund). § 46-144(1).	Must encumber or expend within 6 years of date of collection or refund upon application of developer or successor in interest. § 46-144(5).	Yes, unless fee is recouping previous government investment. § 46-144(3).	Yes, may be county-wide if reasonable. § 46-144(2).	Yes, as part of facilities needs assessment study. § 46-143(d)(1).

Idaho IDAHO CODE § 67-8201 *et seq.* (Supp. 1992).	Roads, sewer, water, parks, stormwater, flood control, public safety. § 67-8203(24).	Yes, advisory capacity only. § 67-8205.	Collection no earlier than commencement of construction, issuance of building permit, or issuance of manufactured home installation permit, or as agreed to by developer. § 67-8204(3).	Separate accounts, within the capital projects fund, by facility type and service area. § 67-8201(1).	Must be expended within 10 years of date of collection (20 years for sewer and drainage fees), local government. § 67-8210(4) & § 67-8211.	Yes, must be based on projections of land uses and population over at least a 20-year period. § 67-8206.	Yes. § 67-8203(26).	Yes, as part of the CIP. § 67-8208.
Illinois 605 ILL. COMP. STAT. ANN. § 5-901 *et seq.* (Smith-Hurd 1993).	Roads directly affected by traffic demands generated by the new development charged ("specifically and uniquely attributable"). § 5-904.	Yes, advisory capacity. § 5-905(b) & § 5-907 to 909.	Imposed at final plan approval or building permit issuance if no plant approval necessary, collection at building permit issuance for one single-family unit construction, at certificate of occupancy issuance for all other development, 10-year installment payment plan authorized. § 5-912.	Separate accounts by service area. § 5-913.	Must be encumbered within 5 years of date of collection or refund to fee payer, or successor in interest, upon submittal or petition. § 5-916.	Yes, comprehensive road improvement plan based on land use assumptions projected over 10-year period. § 5-905(h) & § 5-910.	Yes, may be jurisdictionwide if reasonable. § 5-903.	Yes, as part of comprehensive road improvement plan. § 5-910(1).

Appendix I (cont.)

State/Citation	Facilities Authorized	Citizen Committee Required	Time for Imposition & Collection	Accounting Requirements	Time Limit for Expenditures	Capital Improvements Plan Required	Service/ Benefit Area(s) Required	Identification of Deficiencies Required
Indiana IND. CODE ANN. § 36-7-4-1300 *et seq.* (Burns Supp. 1992).	Roads, sewer, water, parks, drainage, flood control. § 36-7-4-1308.	Yes, advisory only. § 36-7-4-1312(b).	Imposed no later than 30 days after issuance of location permit or after submittal of development plan, whichever is earlier; collection upon issuance of building permit if fees total less than $5,000, ordinance must provide for installment payment plan. § 36-7-4-1322 & § 36-7-4-1324.	Separate accounts by facility type and impact zone. § 36-7-4-1329(d).	Refund upon application of fee payer required if facilities for which fee is imposed not completed within 2 years after date indicated in zone plan, if fee payer is unreasonably denied use of benefit of facilities, or if local government has failed to make reasonable progress on construction by the date specified in the zone plan or within 6 years of issuance of building permit, which-ever is earlier. § 36-7-4-1332.	Yes, zone improvement plan based on projected development over 10-year period. § 36-7-4-1318(b).	Yes, "impact zones." § 36-7-4-1315.	Yes, as part of zone improvements plan. Deficiencies must be corrected within 10 years. § 36-7-4-1318.
Maine ME. REV. STAT. ANN. tit. 30-A, § 4354 (West Supp. 1992).	Roads, sewer, water, parks, fire protection, solid waste. § 4354(1)(A).	No.	Not specified.	Must be segregated from general revenues. § 4354(2)(B).	Must expend fund according to reasonable schedule established in comprehensive plan or refund fees. § 4354(2)D).	Yes, as part of comprehensive plan. § 4354(2)(C).	No.	No.

Nevada NEV. REV. STAT. § 278B.010 *et seq.* (1991).	Roads, sewer, water, stormwater, drainage. § 278B.020.	Yes, advisory only. § 278B.150.	Not specified.	Not specified.	Refund upon request of property owner required if construction on facilities in CIP not initiated within 5 years or fees not expended within 10 years. § 278B.260.	Yes, including facilities needs for period of 10 years or less based on land use assumptions projected for at least 10 years. § 278B.170.	Yes. § 278B.100.	Yes, as part of CIP. § 278B.170.
New Hampshire N.H. REV. STAT. ANN. § 674:21 (Supp. 1992).	Roads, sewer, water, parks, stormwater, drainage, flood control, municipal office facilities, solid waste, public safety, libraries. § 674:21(V).	No.	Imposed prior to or as condition for issuance of building permit; collection as condition for issuance of certificate of occupancy. § 674:21(V)(d).	Must be segregated from general fund and accounted for by fee. § 674:21(V)(c).	Must expend within 6 years of collection or within reasonable time established by ordinance (not to exceed 6 years) or refunded. § 674:21(V)(e).	Yes. § 674:21(V)(b).	No.	No.
New Jersey N.J. STAT. ANN. § 40:55D-42 (West 1991).	Roads, sewer, water drainage. § 40:55D-42.	No.	Imposed as condition for approval of subdivision or site plan; collection time not specified. § 40:55D-42.	Not specified	Not specified.	Yes, circulation and/or comprehensive utility service plan. § 40:55D-42.	Yes, facilities within a common and related area. § 40:55D-42.	No.
New Mexico 1993 New Mexico Laws Ch. 122.	Roads, sewer, water, stormwater, drainage, flood control, parks, fire, police, rescue. § 2(D).	Yes, advisory only. § 37.	Imposition at earliest possible time; collection at latest possible time but no earlier than issuance of building permit. § 8.	Separate accounts by facility type and service area. § 16.	Refund upon request of property owner required if facility construction not complete within 7 years after collection. § 17.	Yes,. based on system-wide land use assumptions for period of at least five years. § 2.	Yes, may include extraterritorial jurisdiction of municipality. § 20.	Yes. as part of CIP. § 6.

Appendix I (cont.)

State/Citation	Facilities Authorized	Citizen Committee Required	Time for Imposition & Collection	Accounting Requirements	Time Limit for Expenditures	Capital Improvements Plan Required	Service/ Benefit Area(s) Required	Identification of Deficiencies Required
Oregon OR. REV. STAT. § 223.297 *et seq.* (1991).	Roads, sewer, water, drainage, flood control, parks. § 23.299(1)(a).	No.	Not specified.	Separate accounts by facility type. § 223.311.	Not specified.	Yes. § 223.309.	No.	No.
Pennsylvania PA. STAT. ANN. tit. 53 § 10501-A *et seq.* (Supp. 1992).	Roads. § 10501-A.	Yes, advisory only. § 10504-A(b).	Imposition at preliminary or tentative application for development, subdivision or PRD; collection at issuance of building permit. § 10505-A(c) & (e).	Separate accounts by service area. § 10505-A(d).	Refund required if construction or improvements to be commenced within 3 years of date shown in CIP. § 10505-A(g).	Yes, must reflect land use assumptions projected over period of at least five years. § 10504-A(a).	Yes, not to exceed 7 square miles. § 10502-4(a).	Yes, as part of CIP. § 10504-A(d).
Texas TEX. LOCAL GOV'T CODE ANN. § 395.001 *et seq.* (West Supp. 1993).	Roads, sewer, water, stormwater, drainage, flood control. § 395.001(1).	Yes, advisory only. § 395.058.	For fees adopted after legislation enacted, imposition before or at recordation of plant; collection at time of plant recordation, building permit or certification of occupancy issuance, or at time of connection. § 395.016.	Separate accounts by facility type and service area. § 395.024.	Refund to property owner required if facilities available service is denied, or if facilities construction has not commenced within 2 years, or if service is not provided within 5 years, or if fees not expended within 10 years after date of collection. § 395.025	Yes, based on land use assumptions projected over a period of at least 10 years. § 395.046.	Yes, for roads must not exceed distance equal to average trip length but in no case more than 3 miles. § 395.001(a).	Yes, as part of CIP. § 395.014(a).

Vermont VT. STAT. ANN. tit. 24 § 5200 *et seq.* (1992).	Unrestricted.	No.	Imposition as condition of issuance of zoning or subdivision permit; collection may be prior to issuance of zoning or subdivision permit, installment payments authorized. § 5204.	Annual accounting required. § 5203(e).	Expend within 6 years of collection or refund to property owner required. § 5203(e)	Yes. § 5203(a)(1).	No.	No.
Virginia VA. CODE ANN. § 15.1-498.1 *et seq.* (Michie 1989 & Supp. 1992).	Roads. § 15.1-498.2.	Yes. § 15.1-498.2.	Imposition before or at time of site plan or subdivision approval; collection at issuance of certificate of occupancy, installment payment plan authorized. § 15.1-498.6.	Separate accounts by service area. § 15.1-498.9.	*Refund required if* facility construction not completed within 15 years. § 15.1-498.10.	Yes, *adopted as* amendment to comprehensive plan or 6 year plan for County secondary roads. § 15.1-498.4.	Yes. § 15.1-498.3.	Yes, as part of CIP. § 15.1-498.4(1).
Washington WASH. REV. CODE ANN. § 82.02.050 *et seq.* (West Sup. 1993).	Roads, parks, schools, fire protection. § 82.02.090(7).	No.	Imposition as condition of development approval; collection not specified. § 82.02.090(3).	Separate accounts by facility type. § 82.02.070(1).	Encumber or expend within 6 years of date of collection or refund to property owner. § 82.02.070(3).	Yes, as part of comprehensive plan. § 82.02.050(4).	Yes. § 82.02.060(6).	Yes. § 82.02.050(4)(a).

Appendix I (cont.)*

State/Citation	Facilities Authorized	Citizen Committee Required	Time for Imposition & Collection	Accounting Requirements	Time Limit for Expenditures	Capital Improvements Plan Required	Service/ Benefit Area(s) Required	Identification of Deficiencies Required
West Virginia W. VA. CODE § 7-20-1 *et seq* (1993).	Roads, sewer, water, parks, stormwater, drainage, flood control, police, fire protection, emergency medical rescue, schools. § 7-20-3(a).	No.	Levied as a condition of issuance of site plan or sub-division approval, issuance of site plan or sub-division approval, issuance of building permit, approval of certificate of occupancy, or other development or construction approval. § 7-20-3(g).	Separate account by facility type; annual accounting required. § 7-20-8(d).	Expend within 6 years from date of collection or refund upon application of property owner. § 7-20-9(a).	Yes. § 7-20-6(a)(7).	Yes, restricted to areas wherein development projects are located. § 7-20-8(a).	Yes, as part of CIP. § 7-20-7(b).
Wisconsin† Wis. Stats. § 66.55 *et seq.* (1994).	Roads, sewer, water, parks, stormwater, drainage, solid waste, recycling, fore protection, law enforcement, emergency medical services, libraries. § 66.55(1)(f).	No.	Imposed prior to building permit issuance or other required approval. § 66.55(6)(g).	Must be segregated in interest bearing account and accounted for separately from other funds. § 66.55(8)	Expend within reasonable time period of time after collection. § 66.55(9).	No.	Yes.	Yes, as part of Public Facilities Needs Assessment.

* Martin L. Leitner & Susan P. Schoette, *A Survey of State Impact Fee Enabling Legislation, in* EXACTIONS, IMPACT FEES AND DEDICATIONS: SHAPING LAND-USE DEVELOPMENT AND FUNDING INFRASTRUCTURE IN THE DOLAN ERA, Robert H. Freilich & David W. Bushek, eds., 60, 63-69 (1995).

† The Wisconsin section was added by the authors.

Appendix II: Analysis of State Impact Fee Legislation*

Municipality	Type of Impact Fee	Date Enacted	Amount and/or Method for Charging Fee	Reasons for Enacting Fee/Additional Information
Town of Brookfield	No Impact Fee			
Town of Delafield	Public Site, Open Spaces and Capital Improvement Fee	12/13/88	Fee in Lieu of Land Dedication: $400 per residential lot $400 per multi-family residential unit (payment in total or 50% with balance within one year, prior to approval of final plat, CSM or planned development	To locate and preserve adequate open spaces and sites for public uses as the community develops and to ensure the cost of providing said necessary sites to serve new development is equitably apportioned on the basis of additional need created by the individual development.
Town of Eagle	Park Fund Fee	+/- 20 years	$240 per residential lot of 3-6 acres $480 per residential lot of 6+ acres (collected at time of land division)	Fees used for acquisition and development of park and recreation facilities.
	Fire Fund Fee	5-6 years	$250 per residential and non-residential lot of any size (collected at time of land division)	Fees used for fire facility development
Town of Genesee	Public Sites and Open Spaces Fee		Fee in Lieu of Land Dedication: $425 per residential lot or multi-family residential unit (collected at time of final approval of plat, CSM, or planned development preservation and improvement, and $125 for public land acquisition development preservation and improvement.	To locate and preserve adequate open spaces and sites for public uses as the community develops and to ensure the cost of providing said necessary sites to serve new development is equitably apportioned on the basis of additional need created by the individual development. The Town has collected between $175,000 and $200,000.

* This list of Wauskesha County development oriented fees was prepared by Rick Roll and Joy Stieglitz of Vandewalle & Associates, Madison, Wisconsin in Summer, 1995 (on file at Marquette University Law School Law Library).

Appendix II (cont.)

Municipality	Type of Impact Fee	Date Enacted	Amount and/or Method for Charging Fee	Reasons for Enacting Fee/Additional Information
Town of Lisbon	Park Fund Fee	+/- 1969	$100	Fees used for acquisition and development of park and recreation facilities.
	Building Fund Fee	+/- 1969	$400	Fees used for public improvements, such as remodeling of Town Hall.
	School Fee	1993	$500	Fees used for school facility development.
Town of Merton	Park Dedication Fee	25-30	$250 per lot (collected at time of final approval for plat, CSM, or planned development)	Using fees to renovate Town Hall (approximately $75,000), in past for renovation of library. Have approximately $125,000 in segregated fund.
Town of Mukwonago	Dedication Fee		$540 per lot (collected at time of final approval of plat, CSM, or planned development)	Fees used for Town improvements.
Town of Oconomowoc	Park Dedication Fee	8/20/79	Fee In Lieu of Land Dedication: $250 per lot (collected at time of final approval of plat, CSM, or planned development)	To be used for park and recreation site, police and fire protection, capital improvements for Town facilities, excluding school facilities. Have never used any of the collected funds; may use funds for development of park. Currently have approximately $70,000 in segregated fund.
Town of Ottawa	Park Fee	+/- one year	$425 per single-family residential lot	For acquisition and development of park and recreation facilities.
Town of Pewaukee	Park and Parkland Acquisition and Development Fee		Fee In Lieu of Land Dedication: $450 per residential unit (collected at the time of approval of final plat, CSM, or planned development)	For acquisition and development of park and recreation facilities
	Public Site Acquisition, Special Town Capital Improvements or Equipment	2/22/93	$550 - $600 per single-family residential unit depending upon square footage $400 - $500 per two-family residential unit depending upon square footage $300 - $400 for multi-family residential unit depending upon square footage $0.30 -$0.60 per square foot for non-residential depending upon size and location (zoning district) $0.25 per square foot for all additions to existing non-residential buildings less than 50,000 square feet	Paid upon application for a building permit for all new construction within the Town.

Town of Pewaukee (continued)	Reserve Capacity Assessments - Water	4/15/92	$1,295 per residential equivalent connection (Fee varies with size of pipe*). Assessments are paid at time of connection to the system.	*Residential equivalent connection with a lateral of 1 inch is considered as one RCA. Connections of pipes larger than 1 inch increase as follows: 1 1/4"=1.5 RCA; 1 /12"=2.5 RCA; 2"=5.0 RCA; 3"=8.0 RCA; 4"=14.0 RCA; 6"=17.5 RCA; 8"=30.0 RCA; 10"=45.0 RCA
	Reserve Capacity Assessments - Sewer	1995	$1,194 for single-family residential or equivalent, plus $54 increase per year. (Fee varies with size of pipe). Payments for connections are made prior to issuance of building permit.	
	Special Assessment of Street and Related Improvements	9/2/86	Up to $1,500 per parcel or lot for single-family or two-family residential; no maximum for multi-family, commercial, industrial, institutional or governmental property.	All paving, repaving, or reconstruction improvements (does not include utility, storm sewer or curb and gutter improvements) are assessed to owners of the abutting property.
Town of Summit	Park Land Dedication	Revised in 1993	Fee in Lieu of Land Dedication: $400 per residential lot (administered through Subdivision Ordinance, must reserve land for three years)	Fees to be used for public buildings, park and recreations purposes.
Town of Vernon	Park Dedication Fee	+/- 6 years	$300 per residential lot (collected when lots are created)	Fees used for acquisition and development of park and recreation facilities.
	Fire Fund Fee	+/- 6 years	$100 per residential lot $400 per commercial lot	
	Road Impact Fee	1991	$200 per residential lot $200 per commercial lot	Collection of Road Impact Fees began in 1991 due to an increase in construction.

Appendix II (cont.)

Municipality	Type of Impact Fee	Date Enacted	Amount and/or Method for Charging Fee	Reasons for Enacting Fee/Additional Information
Town of Waukesha	Capital Improvement Fee	7/3/89	$500 per lot (collected at time of final approval of plat, CSM, or planned development)	Fees used to remodel Town Hall, reroof fire station, and build storage shed for the recycling facility. Town is currently doing a needs assessment to prepare for a new impact fee ordinance, estimating a $1,000 per maximum which matches their current capital improvement and school fund fees.
	School Fee		$500 per lot (collected at time of final approval of plat, CSM, or planned development)	Collection has ceased since May 1, 1995.
Village of Big Bend	No Impact Fees			
Village of Butler	No Impact Fees			
Village of Chenequa	No Impact Fees			
Village of Dousman	Sewer Utility Fee (Reserve Capacity Assessment)	1981	$2,100 per residential equivalent connection. Commercial and industrial fees calculated by potential use.	$2,100 fee frozen by the Village Board after a number of years of a 10% annual increase.
	Park and Municipal Dedication Fee	6/18/81	Fee In Lieu of Land Dedication: $500 per residential lot (placed in segregated accounts - $250 per residential park and recreation site purchase and development and $250 per residential lot for public facilities site purchase and development	To locate and preserve adequate open spaces and sites for public uses as the community develops and to ensure the cost of providing said necessary sites to serve new development is equitably apportioned on the basis of additional need created by the individual development.

Village of Eagle	Water Impact Fee	Updated in the early 1990s	$500 per lot (collected at time of building permit for smaller subdivision and at sale of lot for larger subdivision)	Recently began collection impact fees for two subdivisions, although these fees have been in place since late 1980s and early 1990s. Just set up segregated accounts in April. Currently working on a needs assessment and will be adopting a new impact fee ordinance.
	Park Dedication Fee	Late 1980s	$200 per lot (collected at time of building permit for smaller subdivision)	See above
	Street Impact Fee	Early 1990s	$300 per lot (collected at time of building permit for smaller subdivision and at sale of lot for larger subdivision)	See above
Village of Elm Grove	No Impact Fee			
Village of Hartland	Park Impact Fee	11/90	Fee In Lieu of Land Dedication: $500 per single family residential lot or 3-bdrm multi-family unit $300 per 2-bdrm multi-family unit $100 per 1-bdrm multi-family unit (collected at time of approval of final plat, CSM, planned development)	To locate and preserve adequate open spaces and sites for public uses as the community develops and to ensure the cost of providing said necessary sites to serve new development is equitably apportioned on the basis of additional need created by the individual development. (Currently soliciting proposals for a needs assessment and a new impact fee ordinance.)
	Library Impact Fee	2/93	Fee In Lieu of Land Dedication: $675 per single family residential lot or 3-bdrm multi-family unit $400 per 2-bdrm multi-family unit $225 per 1-bdrm multi-family unit (collected at time of approval of final plat, CSM, or planned development)	To locate and preserve a site for public library.
	School Impact Fee	11/90	Fee In Lieu of Land Dedication: $500 per single family residential lot or 3-bdrm multi-family unit $300 per 2-bdrm multi-family unit $100 per 1-bdrm multi-family unit (collected at time of approval of final plat, CSM, or planned development)	To locate and preserve sites for public schools. Collection has ceased since May 1, 1995.

Appendix II (cont.)

Municipality	Type of Impact Fee	Date Enacted	Amount and/or Method for Charging Fee	Reasons for Enacting Fee/Additional Information
Village of Lac La Belle	No Impact Fee			
Village of Lannon	No Impact Fee			
Village of Menomonee Falls	Sewer Impact Fee	4/18/95	$1,240 per residential equivalent connection (for undeveloped platted land or redevelopment of platted land) $1,540 per residential equivalent (for unplatted land)	Used to regulate the effect of new development on public facilities, and to finance public facilities, the demand for which is generated by new development or any improvements made to existing development in designated development areas.
	Parkland Dedication Fee		$350 per residential lot (collected prior to approval of final plat or CSM)	For future site acquisitions or capital improvements to parks.
Village of Merton	Park Dedication Fee	4/6/77	$200 per residential lot	Used for park and recreation area development. (Five years of collection of dedication fees has amounted to $35,658)
	School Fee	4/6/77	$400 per residential lot	To reduce the Village share of property owners taxes to be collected for the school district or districts in which the development or subdivision lies; however, no school district shall have any claim on this fund. Collection has ceased since May 1, 1995.
Village of Mukwonago	Public Site Fee	9/6/90	Fee In Lieu of Land Dedication: $600 per unit for single family, or condominium $480 per unit for apartment of three to seven units $450 per unit for apartment building of eight or more units	Used for acquisition of site, or capital improvements to parks, playgrounds or recreations facilities. Current segregated fund balance for public sites is $510,569.

Village of Mukwonago (cont.)	Water Facilities Impact Fee	1994	Fees vary with size of pipe: 0.75"=$537; 1.00"=$896; 1.5"=$1,787; 2.0"=$3,579; 3.0"=$8,585; 4.0"=$15,023; 6.0"=$32,907	To finance acquiring, equipping, or capital improvements to public water facilities, or to pay debt service on bonds for said facilities. Current segregated fund balance for water facilities is $13,780.
	Sewer Utility Fee (Reserve Capacity Assessment)	1/1/81	$1,650 per single family dwelling unit (i.e., residential equivalent connection) (increases $50 per year) Residential Equivalent Connections vary based upon type and size of use.	To finance acquiring, equipping, or capital improvements to sewer treatment facilities, or to pay debt service on bonds for said facilities. Current segregated fund balance for sewer facilities is $990,307.
Village of Nashotah	Park Impact Fee (currently revising fee)	+/- 5 years	$400 per residential lot (collected at time of final plat, CSM, or planned development approval)	For park land acquisition and development. However, not collecting any fees at this time.
	School Fee	+/- 5 years	$250 [per residential lot (collected at time of final plat, CSM, or planned development approval)	Not collecting any fees at this time.
Village of North Prairie	Park Dedication Fee	7/18/72	Fee in Lieu of Land Dedication: $300 per residential lot or unit in a multi-family residential development	For acquisition and capital improvement of parks.
Village of Oconomowoc	No Impact Fees			
Village of Pewaukee	Water Connection Fee	5/4/93	Water Fee: $800 per residential equivalent unit* (i.e. single-family residence, apartment unit, or condominium unit)	*Fees vary with number of equivalent units/service size 1"=$800; 1 1/4"=$1,360; 1 1/2"=$2,000; 2"=$2,640; 3"=$4,000; 6"=$12,640; 8"=$25,200; 10"=$40,400
	Sewer User Charge	5/4/93	Sewer Fee: $1,600 per residential equivalent unit. Commercial development fees based upon anticipated water use.	

Appendix II (cont.)

Municipality	Type of Impact Fee	Date Enacted	Amount and/or Method for Charging Fee	Reasons for Enacting Fee/Additional Information
Village of Sussex	Public Site Fee	1977/1982	$200 per dwelling unit or lot (collected at time of first application for final plat approval)	For acquisition and development of public sites as park and recreation facilities to serve the future inhabitants of the proposed subdivision.
	Reserve Capacity for Sewage Treatment Dedication Fee	1977	$1,000 per residential, commercial, or industrial unit. For multi-family units, reserve capacity assessment based at the rate of 75% of the unit assessment.	Dedication fee increases by 8% per year to compensate for additional administrative and handling costs.
	Reserve Capacity for Water Distribution	1978	Reserve capacity assessment is levied against each parcel of land serviceable by such water system according to the meter size of the user.* Existing vacant undivided parcels pay prior to issuance of a building permit. Vacant parcels to be divided pay prior to final plat or CSM approval. Fees increase 8% annually.	*Fees per unit based upon meter size (for low service area, gravity served) are as follows: 5/8"=$150; 3/4"=$225; 1"=$375; 1 1/2"=$750; 2"=$1,200. Fees per unit based upon meter size (for high service area, not gravity served) are as follows: 5/8"=$200; 3/4"=$300; 1"=$500; 1 1/2"=$1,000; 2"=$1,600
	Retained Plant Charge	1959 Revised 1993	Fee based on the assigned residential equivalent connection as defined in Section 13.19 multiplied by the rate established by the Village	Shall recover the net asses value of the existing treatment facility which shall be returned for future use.
	Interceptor Capacity Charge	1959	Same as above	Recover costs for providing excess capacity for future growth in the Sussex Interceptor System.
	Wastewater Treatment Capacity Charge	1959	Same as above	Recover the costs for providing excess capacity in the Sussex Wastewater Treatment Facility.
Village of Wales	Park Dedication Fee		$700 per single-family residential and first two residential units in a multi-family ($100 for additional units in multi-family). 50% of fees collected at time of final plat approval with balance to be paid within one year.	For acquisition and capital improvement to park and recreation facilities.
	Capital Improvement Fund	12/21/92	$750 per single-family residential and first two residential units in a multi-family ($250 for additional units in multi-family). 50% of fees collected at time of final plat approval with balance to be paid within one year.	For acquiring, constructing, maintaining, and operating municipal water supply sources, including water supply source to be used by emergency and fire department vehicles.

City of Brookfield	Parkland Fee	+/- 30 years	$670 per residential dwelling unit n/a for non-residential development	For acquisition and development of park and recreation facilities.
	Wetland Preservation Fee	1990	$65 per residential dwelling unit $6.50 per 1,000 square feet of lot area for non-residential development	For preservation of wetlands.
	Bikeway Fee	1985	$200 per residential dwelling unit $20 per 1,000 square feet of lot area for non-residential development	For acquisition and development of bikeway facilities.
	Street Tree Impact Fee	1977	$400 per residential dwelling unit n/a for non-residential development	Currently not collecting this fee.
City of Delafield	Public Site Fees		$1,000 per single, two-, or multi-family residential dwelling unit. collected at time of first application of final plat approval.	For acquisition and/or improvement of public sites (including parks, recreational land and/or schools), or acquisition, alteration, enlargement or improvement of existing buildings or the construction of new public buildings if deemed necessary to serve the increased population resulting from subdivision development.
City of Muskego	Public Sites and Open Spaces Fee	8/1/94	Fee In Lieu of Land Dedication: $600 per residential lot or unit. Collected at time of final plat approval.	For acquisition and improvement of future schools, parks, playgrounds, drainageways, environmental corridors, and other public purposes.
	Reserve Capacity Assessment for Sewer	7/28/84	$2,850 per residential equivalency connection (increases $135 per year) per developing residential lot $430 per residential equivalency connection (increases $22.50 per year) per previously existing development	For providing the availability of sewer service.
	Reserve Capacity Assessment for Water Services	9/25/86	$1,170 per residential equivalency connection (increases $60 per year) per developing residential lot $702 per residential equivalency connection (increases $36 per year) for existing water hook-up	For providing the availability of water service.

Appendix II (cont.)*

Municipality	Type of Impact Fee	Date Enacted	Amount and/or Method for Charging Fee	Reasons for Enacting Fee/Additional Information
City of New Berlin	Library Fee	1/4/95	Single Family: $112.74 Multi-family: $85.17 Industrial: n/a Retail: n/a	Fees used for physical construction cost (not equipment, personnel, or maintenance) of the library facility. Fees collected at time of building permit.
	Park Fee	1/4/95	Single Family: $140.53 Multi-family: $83.22 Industrial: n/a Retail: n/a	Fees used for physical construction cost (not equipment, personnel, or maintenance) of park facilities. Fees collected at time of building permit
	Police Station Fee	1/4/95	Single Family: $95.20 Multi-family: $70.14 Industrial: $.0139 per sq. ft. Retail: $.2311 per sq. ft.	Fees used for physical construction cost (not equipment, personnel, or maintenance) of police station facilities. Fees collected at time of building permit
	Fire and Rescue Building Fee	1/4/95	Single Family: $152.94 Multi-family: $116.55 Industrial: $.0386 Retail: $.3134 per sq. ft.	Fees used for physical construction cost (not equipment, personnel, or maintenance) of fire and rescue buildings. Fees collected at time of building permit
	Public Works Building Fee	1/4/95	Single Family: $36.14 Multi-family: $0 per sq. ft. Industrial: $0 per sq. ft. Retail: $0 per sq. ft.	Fees used for physical construction cost (not equipment, personnel, or maintenance) of department of public works buildings. Fees collected at time of building permit
	City Hall Fee	1/4/95	Single Family: $263.09 Multi-family: $155.81 Industrial: $.0413 Retail: $.0413	Fees used for physical construction cost (not equipment, personnel, or maintenance) of the city hall facility. Fees collected at time of building permit
	Sewer Impact Fee	1/4/95	Single Family: $2,204* (Multi-family, Industrial, and Retail charges based upon a unit charge per meter size)	*5/8 x 3/4"=$2,204; 3/4"=$3,306; 1"=$5,510; 1 1/4"=$5,510; 1 1/2"=$11,020; 2"=$17,632; 3"=$38,570; 4"=$66,120; 6"=$154,280. Fees collected at time of building permit.

City of New Berlin (cont.)	Water Impact Fee	1/4/95	Single Family: $809* (Multi-family, Industrial, and Retail charges based upon a unit charge per meter size)	*5/8 x 3/4"=$809; 3/4"=$1,215; 1"=$2,022; 1 1/4"=$2,022; 1 1/2"=$4,045; 2"=$6,427; 3"=$14,158; 4"=$24,270; 6"=$56,630. Fees collected at time of building permit.
City of Oconomowoc	Parkland Dedication (in process of revision)		Dedication is 15% of gross area. Fee-in-lieu of land dedication is based on fair market value assessment.	For acquisition and improvement of park facilities.
	Sewer Hook-up (in process of revision, Water Hook-up Fee in revision, as well)	1991	$1,930 for single-family residential lot $1,620 if in the City prior to June 1991	
City of Waukesha	Park Facilities Fee	6/2/95	$479 per single-family residential $352 per two-family residential lot $423 per mobile home $479 per three or more bedroom unit $296 per two bedroom unit $183 per one bedroom unit +$141 per efficiency unit	For acquisition of land and development of public parks, playgrounds, and other recreational facilities. Collected at the time of recording a subdivision plat or CSM. If not collected on vacant land, fees imposed at the time of building permit.
	Sewer Impact Fee	6/9/95	$500 per acre for single-family, multi-family, industrial, commercial, and institutional	For sanitary interceptor sewer, sewage pumping station sewage force mains. Collected at the time of recording a subdivision plat or CSM. If not collected on vacant land, fees imposed at the time of building permit.
	Water Impact Fee	6/9/95	$2,100 per acre for single-family, multi-family, industrial, commercial, and institutional	For storm sewer, drainage, storm water management facility. Collected at the time of recording a subdivision plat or CSM. If not collected on vacant land, fees imposed at the time of building permit.

*This list of Wauskesha County development oriented fees was prepared by Rick Roll and Joy Stieglitz of Vandewalle & Associates, Madison, Wisconsin in Summer, 1995 (on file at Marquette University Law School Law Library).