

Journal of Environmental and Sustainability Law

Missouri Environmental Law and Policy Review
Volume 3
Issue 2 1995

Article 4

1995

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Recommended Citation

Jill A. Morris, *Development Impact Fees: Guidelines for Missouri Enabling Legislation*, 3 Mo. Envtl. L. & Pol'y Rev. 87 (1995)

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Development Impact Fees: Guidelines for Missouri Enabling Legislation

by Jill A. Morris

I. INTRODUCTION

Local purse strings tighten as urban growth places a demand on municipalities and counties for additional public services and facilities.¹ This growth, combined with a shortage of matching federal funds,² leaves local governments in need of revenue to build facilities such as roads, sidewalks, parks, schools, solid waste facilities, water treatment facilities and sewers.³

Impact fees have emerged as a creative means for local entities to finance these facilities.⁴ An impact fee constitutes a charge made by a local government on a developmental entity to raise capital for infrastructure necessitated by that entity's new development.⁵ The local government assesses the impact fee,

usually a flat monetary amount, at the time the plat is approved or the building or occupancy permit is issued.⁶ Local governments utilize the revenue from impact fees to finance public facilities, which are usually off-site of the new development.⁷

A local government must levy a fee against new development in a manner consistent with the statutory authority granted by the state.⁸ The local government may assert its authority under implied police power⁹ or under express enabling legislation.¹⁰ Additionally, the fee must pass constitutional muster to avoid violating substantive due process rights, the equal protection clause and the principle of illegal takings.¹¹

Many states have enacted enabling

legislation, providing counties and municipalities the authority to levy impact fees on new development in order to regulate community growth and to assure adequate financing for infrastructure improvements.¹² Other states, such as Washington, have instituted state-wide growth management plans, which include the authorization to assess impact fees to meet the state's objectives for managing growth.¹³

The Missouri legislature soon will consider legislation that would enable local governments to enact ordinances to levy impact fees.¹⁴ By analyzing the approaches taken by several states that have authorized impact fees, this comment will provide insight as to the provisions that create sound enabling legislation. In addition, this comment will establish a framework to assist the legislature in enacting impact fee legislation.

II. BACKGROUND

A. History of Exactions¹⁵

The first form of exactions involves the dedication of land as a condition for approval of subdivision plats.¹⁶ The municipality uses the subdivision exactions for on-site improvements, namely for sewer and water systems, walkways, streets and easements.¹⁷ Land

¹ Susan M. Denbo, *Development Exactions: A New Way to Fund State and Local Government Infrastructure Improvements and Affordable Housing?*, 23 REAL EST. L.J. 7, 1 (1994).

² Steven B. Schwanke, *Local Governments and Impact Fees: Public Need, Property Rights, and Judicial Standards*, 4 J. LAND USE & ENVT. L. 215, 218 (1988).

³ *Id.*

⁴ Theodore C. Taub, *Development Exactions and Impact Fees*, CB72 AII-ABA 269, 272 (1993).

⁵ *Id.* at 272.

⁶ Denbo, *supra* note 1.

⁷ *Id.*

⁸ *Id.* at 2.

⁹ Police power describes the inherent power of a state to regulate for its people's health, safety and welfare. Robert C. Widner, *Supporting Municipal Impact Fee Ordinances: A Kansas Perspective*, 37 KAN. L. REV. 621, 625 (1989).

¹⁰ Enabling legislation describes a statute promulgated by the legislature, which grants power to local governments to adopt ordinances.

¹¹ Denbo, *supra* note 1.

¹² Taub, *supra* note 4, at 305. These states include Arizona, Delaware, Georgia, Idaho, Illinois, Indiana, Maine, Nevada, New Hampshire, Oregon, Pennsylvania, Texas, Vermont, Virginia, Washington, West Virginia and New Mexico. *Id.*

¹³ Oregon, Florida, Georgia and Massachusetts comprise the other states with state-wide land use legislation. Jeffrey M. Eustis, *Between Scylla and Charybdis: Growth Management Act Implementation that Avoids Takings and Substantive Due Process Limitations*, 16 U. PUGET SOUND L. REV. 1181, n.2 (1993). See also Richard L. Settle and Charles G. Gavigan, *The Growth Management Revolution in Washington: Past, Present, and Future*, 16 U. PUGET SOUND L. REV. 867 (1993).

¹⁴ Telephone Interview with Ken Midkiff, lobbyist for the Sierra Club (Feb. 1995).

¹⁵ Exactions constitute fees levied on developers as a prerequisite to continuing a project. Denbo, *supra* note 1.

¹⁶ Taub, *supra* note 4, at 271. Approval for sites, plats and rezoning all occur at the development stage. *Id.*

¹⁷ *Id.* The Department of Commerce promulgated the 1928 Standard Planning Enabling Act, which contained provisions for conditioned plat approval. *Id.*

dedication eventually encompassed the development of schools and parks.¹⁸ Local governments still utilize on-site land dedication as a means of shifting the costs of infrastructure to developers and newcomers whose presence necessitates additional improvements.¹⁹ Courts generally uphold subdivision exactions, finding this dedication requirement within the municipality's police powers.²⁰

In-lieu fees evolved as the second type of exaction used by municipalities.²¹ This fee comprises a payment "in-lieu" of land dedication to fund off-site improvements.²² Some courts have invalidated in-lieu fees, because they resemble taxes, in that the subdivision pays a fee for off-site improvements, which will presumably be shared with others.²³ Thus, the amount assessed is disproportionate to the benefit received, since other developments will benefit from the improvements without contributing to the cost. Specifically, it is the municipality's lack of proper taxing authority that has caused the courts to invalidate these fees.

The third type of exaction, impact fees,²⁴ encompasses a broader purpose than land dedication or in-lieu fees.²⁵

Impact fees are not limited to subdivision plat approval.²⁶ Since impact fees are paid upon the issuance of building or occupancy permits, they are supposed to better correlate to the need created by new development.²⁷ Impact fees also generate revenue for many more services and facilities.²⁸ For example, some impact fee legislation authorizes the use of funds for the construction of schools, libraries, solid waste disposal facilities and public safety facilities.²⁹ Impact fees have evolved as an alternative financing mechanism for local governments that would otherwise be forced to impose additional property taxes, utilize debt financing or eliminate services altogether.³⁰

The most recent and most controversial form of exactions include "linkage fees" and "fair share" regulations.³¹ Linkage fees are assessed against commercial developers to build reasonably priced homes for low-income families.³² Fair share regulations utilize zoning inclusions that provide incentives for developers to construct affordable homes along with their principal projects.³³ These exactions are meant to increase the availability of economical living

accommodations.³⁴ The argument is that the construction of a new office building brings in people who demand housing, which in turn increases the price of housing in the area.³⁵ Thus, linkage fees and fair share regulations alleviate the harshness of higher housing costs on low-income populations.³⁶

B. Legal Issues

States and their municipalities have broad authority to act for the public welfare under their general police powers.³⁷ Police powers, however, provide insufficient support for the assessment of impact fees. Home rule authority,³⁸ delegated by the state, comprises one option to legitimize a municipality's assessment of impact fees.³⁹ However, express enabling legislation serves as the most secure foundation for the creation of impact fee ordinances and the subsequent levying of fees.

Impact fee legislation must fit within the constitutional limitations expressed in the Fifth Amendment takings provision, the Equal Protection Clause and the Due Process Clause. First, if impact fees regulate beyond a municipality's police power, the fees may violate the Fifth

¹⁸ Taub, *supra* note 4, at 271. Taub credits the population growth after World War II as the catalyst for expanding the use of dedicated land for schools and parks. *Id.*

¹⁹ Denbo, *supra* note 1, at 1-2. Some developers must also construct the facilities on the dedicated land. *Id.*

²⁰ *Id.*

²¹ Denbo, *supra* note 1, at 2; Taub, *supra* note 4, at 271, 272. Taub cites smaller subdivisions as an impetus for in-lieu fees because of the limitation of available land for dedication. Taub, *supra* note 4, at 271.

²² Taub, *supra* note 4, at 271, 272.

²³ Denbo, *supra* note 1, at 2. Denbo notes that other courts consider in-lieu fees to be within the police power of the state and, therefore, valid. *Id.*

²⁴ See generally James A. Kushner, *Property and Mysticism: The Legality of Exactions As A Condition for Public Development Approval in the Time of the Rehnquist Court*, 8 J. LAND USE & ENVT. L. 53, 131-41 (1992) for an excellent collection of commentary and cases regarding impact fee exactions.

²⁵ Taub, *supra* note 4, at 272.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* at 272, 305.

³⁰ Fiona M. Powell, *Challenging Authority for Municipal Subdivision Exactions: The Ultra Vires Attack*, 39 DEPAUL L. REV. 635, 635 (1990).

³¹ William W. Merrill III & Robert K. Lincoln, *Linkage Fees and Fair Share Regulations: Law and Method*, 25 URB. LAW. 223, 223 (1993).

³² *Id.*

³³ *Id.*

³⁴ Charles J. Delaney and Marc T. Smith, *Development Exactions: Winners and Losers*, 17 REAL EST. L.J. 195, 195 (1989).

³⁵ *Id.*

³⁶ *Id.*

³⁷ James C. Nicholas, *Impact Exactions: Economic Theory, Practice, and Incidence*, 50 L. & CONTEMP. PROBS. 85, 86 (1987).

³⁸ Home rule authority is the means by which a state can extend its governing power to its local governments. Once a county or municipality receives home rule power, it has broader authority to manage its own local affairs, freeing the state to deal with state-wide issues. Widner, *supra* note 9, at 628 n.48.

³⁹ Brian W. Blaesser & Christline M. Kentopp, *Impact Fees: The "Second Generation"*, 38 J. OF URB. & CONTEMP. L. 55, 62 (1990). For information on Missouri's home rule authority, see Rex V. Gump, *Local Government-County Home Rule and the 1970 Missouri Constitutional Amendment*, 41 Mo. L. Rev. 49 (1976).

Amendment, which prohibits the taking of private land without just compensation.⁴⁰ Second, the Equal Protection Clause requires that impact fees be applied in a non-discriminatory manner.⁴¹ An ordinance would violate the Equal Protection Clause if only new development paid impact fees for a facility that older development also used.⁴² Lastly, Due Process protects people from "arbitrary, capricious or unreasonable" exactions.⁴³ The courts will look at the relationship between the fees assessed and the benefits received, as well as how the money is handled and spent, and then determine whether the exaction is reasonable.⁴⁴

Impact fees should be calculated and assessed in an objective manner. For example, fees should be calculated based on bedrooms, square feet or a flat rate.⁴⁵ In addition, local governments should assess fees on all types of development: commercial, residential, and industrial.⁴⁶ The Missouri Supreme Court, in *Home Builders Ass'n v. City of Kansas City*,⁴⁷ held that once a local government has revealed the foundation for calculating its exactions, a challenger bears the burden of proving that the exaction violates the Constitution.

The standard for evaluating the legality of impact fee exactions remains unclear, as courts have espoused several different tests. First, there is the rational nexus or reasonableness test, which requires that fees reasonably relate to the need created by the development.⁴⁸ Second, there is the more stringent uniquely attributable test, which requires that "the exaction must be uniquely attributable to the needs generated by the development, and that the subdivision approved must enjoy the benefit of the exaction."⁴⁹ Most recently, the U.S. Supreme Court has handed down the *Dolan v. City of Tigard*⁵⁰ decision, which more clearly defines the essential nexus between the state's interest and the conditions required for local government approval.⁵¹ *Dolan* requires the nexus between the state interest and the condition for issuance of approval be roughly proportionate.⁵² It is yet to be determined which of these tests will apply specifically to impact fees.⁵³

III. IMPACT FEE LEGISLATION IN OTHER STATES.⁵⁴

Generally, impact fee legislation contains a purpose and definition section, outlining the rationale of the fees and

defining the terms incorporated in the act. Legislation distinguishes itself by the category of items or capital improvements that are subject to exactions. Some legislation expressly denotes items for which fees may be assessed, while other pieces prohibit fees to be levied for certain facilities. The most common infrastructures approved for impact fees include roads, streets, bridges, right-of-ways, traffic signals, and landscaping. The biggest disparity between state legislation, however, centers around fees for open spaces,⁵⁵ libraries, schools, and solid waste facilities.

The legislation imposes requirements or restrictions on the use of fees. For example, most municipalities must spend collected fees within a specified amount of time, as well as keep fees in interest-bearing accounts. Some legislation even specifies the time at which fees are to be collected. In addition, most acts forbid use of the fees for the cost of maintenance, repairs and operation. Furthermore, many enabling statutes include substantive provisions concerning the issuance of waivers, credits⁵⁶ and refunds.

While most enabling legislation

⁴⁰ Kushner, *supra* note 24, at 152.

⁴¹ *Id.* at 153.

⁴² Gus Bauman & William H. Ethier, *Development Exactions and Impact Fees: A Survey of American Practices*, 50 LAW & CONTEMP. PROBS. 51, 54 (1987).

Another example of discriminatory application is where a fee is levied against residential development, while commercial development escapes the fee. *Id.*

⁴³ John J. Delaney, *Exactions: From Early Subdivision Dedications to User Impact Fees and Linkage in the Post-Nollan Era*, 73 CALIF. L. REV. 859, 867 (1992).

⁴⁴ Bauman & Ethier, *supra* note 42, at 55.

⁴⁵ *Id.* at 56.

⁴⁶ *Id.*

⁴⁷ 555 S.W.2d 832 (Mo. 1977).

⁴⁸ Kushner, *supra* note 24, at 157.

⁴⁹ *Id.* at 159.

⁵⁰ 114 S. Ct. 2309 (1994).

⁵¹ Jesse S. Ishikawa, *Rough Proportionality & Wisconsin New Impact Fee Act*, 68 MAR. WIS. LAW. 19 (1995). See Daniel S. Hultenus, *Dolan Meets Nollan: Towards A Workable Takings Test for Development Exactions Cases*, 4 N.Y.U. ENVTL. L. REV. 30 (1995); Julian R. Kossow, *Dolan v. City of Tigard, Takings Law and the Supreme Court: Throwing the Baby Out with the Floodwater*, 14 STAN. ENVTL. L.J. 215 (1995); Robyn L. Sadler, Note, *Dolan v. City of Tigard: Takings Doctrine Remains Vague Under the Rough Proportionality Standard*, 31 WILLAMETTE L. REV. 147 (1995); Kristen P. Sosnosky, Note, *Dolan v. City of Tigard: A Sequel to Nollan's Essential Nexus Test for Regulatory Takings*, 73 N.C. L. REV. 1677 (1995).

⁵² Kossow, *supra* note 51.

⁵³ *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), lies at the heart of the confusion, because it is unclear whether the decision extends to both possessory and regulatory takings. Delaney, *supra* note 43, at 873 (1992).

⁵⁴ For a dated, yet helpful bibliography, see Mary Ann Nelson, *Land Exaction: A Selective Bibliography*, 50 L. & CONTEMP. PROBS. 177-194 (1987) (listing enabling acts in the 50 states).

⁵⁵ Parks and recreational areas generally are not included in this category. Taub, *supra* note 4, at 305.

⁵⁶ Credits are extended for contributions or land dedications previously accepted by a municipality for the category of improvements for which a fee is assessed. Taub, *supra* note 4, at 289.

contains substantive provisions similar to those previously expressed, many statutes include highly detailed procedural provisions. These provisions provide specific procedures for the creation and administration of municipal impact fee ordinances. For example, many pieces of enabling legislation require a capital improvement plan,⁵⁷ although few statutes require level of service standards.⁵⁸ Additionally, in some states, municipalities are required to enlist an advisory committee to assist the local government in its adoption of a fee ordinance or to aid in reviewing capital improvement plans and assessments. Representatives from the development, building and real estate communities comprise a certain percentage of seats on many such committees.

A. Georgia Legislation

Georgia's Development Impact Fee Act contains some of the nation's most expansive provisions. The Act authorizes fees to be levied for a wide variety of infrastructures and requires many procedural steps for implementing an impact fee ordinance.⁵⁹ The Georgia legislature intended the Act to "promote and accommodate orderly growth and development," and to protect the "public health, safety, and general welfare of

the citizens."⁶⁰ The Act's broadpurpose supports the authorization of fees for a wide range of public facility capital improvements.⁶¹ According to the Act, public facilities encompass:

water supply production, treatment, and distribution facilities; waste-water collection, treatment, and disposal facilities; roads, streets, and bridges, including rights of way, traffic signals, landscaping, and any local components of state or federal highways; storm-water collection, retention, detention, treatment, and disposal facilities, flood control facilities, and bank and shore protection and enhancement improvements; parks, open space, and recreation areas and related facilities; public safety facilities, including police, fire, emergency medical, and rescue facilities.⁶²

It is important to note that the Georgia Act does not authorize the assessment of fees for schools,⁶³ solid waste facilities, maintenance, repairs or operating costs. Another important aspect of the Act is that it requires that the associated fee reflect only the proportional cost of the facility attributable to new growth and development.⁶⁴

The procedures espoused in Georgia's Act are highly detailed. The Act goes so far as to specifically instruct local governments on how to enact an ordinance and how to impose an impact fee. Before implementing an impact fee ordinance, municipalities in Georgia first must adopt a comprehensive capital improvement plan.⁶⁵ Based on the municipality's comprehensive plan, the Act provides a method for calculating fees upon the service areas contained therein.⁶⁶ Local government must also create an Advisory Committee to "assist and advise" the municipality in its adoption of an impact fee ordinance.⁶⁷ According to the Act, the committee seats five to ten members, with forty percent of the members representing the real estate, building or development communities.⁶⁸ In addition, before adopting a development impact fee ordinance, the municipality must hold two public hearings.⁶⁹

The statute also contains clauses requiring municipalities to provide exemptions,⁷⁰ credits⁷¹ and refunds.⁷² Municipalities must provide credit to the developers for system improvements.⁷³ Like many other statutes, the Georgia Act requires impact fees to be held in interest-bearing accounts.⁷⁴ Collected funds can only be applied toward

⁵⁷ A capital improvement plan generally identifies capital improvements for which a local government may assess fees. See *infra* note 187.

⁵⁸ Level of service defines the relationship between the demand for public facilities and the capacity of the public facilities. Taub, *supra* note 4, at 284. See Wis. STAT. ANN. § 66.55(1)(h) [West Supp. 1994].

⁵⁹ GA. CODE ANN. §§ 36-71-1 through 36-71-13 (1990).

⁶⁰ GA. CODE ANN. § 36-71-1.

⁶¹ GA. CODE ANN. § 36-71-3.

⁶² GA. CODE ANN. § 36-71-2(16).

⁶³ However, a separate statute excuses school boards from impact fee assessments. GA. CODE ANN. § 20-3-261 (1992).

⁶⁴ GA. CODE ANN. § 36-71-1.

⁶⁵ GA. CODE ANN. § 36-71-3.

⁶⁶ GA. CODE ANN. § 36-71-4. Service areas constitute a defined geographic space within which public facilities service development. GA. CODE ANN. § 36-71-2(17).

⁶⁷ GA. CODE ANN. § 36-71-5. The governing body may adopt an ordinance without action by the Advisory Committee. GA. CODE ANN. § 36-71-5(c).

⁶⁸ GA. CODE ANN. § 36-71-5(b).

⁶⁹ GA. CODE ANN. § 36-71-6.

⁷⁰ S. Mark White, *Development Fees and Exemptions for Affordable Housing: Tailoring Regulations to Achieve Multiple Public Objectives*, 6 J. LAND USE & ENVTL. L. 25 (1990). See GA. CODE ANN. § 36-71-4(l) [authorizing ordinances to exempt some development projects from impact fees if they "create extraordinary economic development and employment growth or affordable housing," or the comprehensive plan contains a public policy supporting exemption, or if the development has funded its share of improvements through an alternative means].

⁷¹ GA. CODE ANN. § 36-71-7.

⁷² GA. CODE ANN. § 36-71-9.

⁷³ GA. CODE ANN. § 36-71-7.

⁷⁴ GA. CODE ANN. § 36-71-8(a).

system improvements as authorized in the capital improvement section of the comprehensive plan.⁷⁵ Additionally, the local government must prepare an annual report for auditing purposes, which details fees collected and encumbered by the local government.⁷⁶ Furthermore, the Act provides that all fees be refunded if they are not encumbered within six years of collection.⁷⁷ The statute also contains some important miscellaneous provisions that allow developers to appeal impact fee assessments and municipalities to form intergovernmental agreements.⁷⁸

As compared to other states, Georgia's legislation contains some very strong points. Its emphasis on representation of the development, building and real estate communities and its highly detailed procedural provisions make it one of the best.

B. Nevada's Legislation

Nevada promulgated an act entitled "Impact Fees for New Development."⁷⁹ As compared to the Georgia statute, Nevada's legislation calls for a more interactive approach between the public and the local government for each decision ultimately affecting the impact fee assessed on new development. For

example, the municipality must establish a capital improvements advisory committee that is charged with numerous duties,⁸⁰ including the evaluation of the capital improvement plan and land use assumptions. This differs from the Georgia Advisory Committee, which primarily advises the government only on the adoption of the initial ordinance.⁸¹ In addition, Nevada's Act requires only one representative from the building, real estate or development community,⁸² while Georgia's Act seems to favor these sectors by requiring at least a forty percent representation.⁸³ Nonetheless, the Nevada Act grants more hearing procedures for specific assessments, which would seem to afford consistent checks on the reasonableness of charges assessed against developers and builders. For example, local governments must hold public hearings for land use assumptions⁸⁴ before imposing an impact fee.⁸⁵ If the local government's governing body accepts the land use assumptions, the capital improvement plan must be completed.⁸⁶ The governing body then must hold public hearings regarding the plan and the impact fee.⁸⁷ The Act also clearly outlines procedures for notice and complaints, and it specifies the maximum number of days for each step

in the process.

The amount of the impact fee is determined by dividing capital improvement costs⁸⁸ by the estimated number of service units.⁸⁹ The Act provides a formula for the maximum fee per service unit and prohibits additional charges to be assessed for the same service unit at a later time.⁹⁰ The local government collects the fee upon issuing a building permit or certificate of occupancy.⁹¹ The fees must be kept in an interest-bearing account.⁹² The Act contains a refund provision if the capital improvement is not started within five years of collection or if the fee is not spent on its initial purpose within ten years of collection.⁹³ After the development is completed, the local government must recalculate the impact fee using the actual costs and is then required to refund any difference between the recalculated cost and the collected fee.⁹⁴

The Act specifically prohibits the use of fees for six items, including the repair or maintenance of new capital improvements, the upgrade of existing improvements for existing development and the compliance with stricter environmental standards.⁹⁵ In addition, a municipality must review its capital improvement plan every three years and hold a public

⁷⁵ GA. CODE ANN. §§ 36-71-8, 36-71-2(2) (stating that the comprehensive plan outlines the capital improvements needed to meet anticipated development).

⁷⁶ GA. CODE ANN. § 36-71-8(c).

⁷⁷ GA. CODE ANN. § 36-71-9(l). The statute also requires that collected fees be refunded if capacity for a particular facility exists but service is denied. GA. CODE ANN. § 36-71-9(l).

⁷⁸ GA. CODE ANN. §§ 36-71-10, 36-71-11.

⁷⁹ NEV. REV. STAT. § 278B (1993).

⁸⁰ NEV. REV. STAT. § 278B.150.

⁸¹ NEV. REV. STAT. § 278B.150.3.; GA. CODE ANN. § 36-71-5.

⁸² NEV. REV. STAT. § 278B.150.2(a).

⁸³ GA. CODE ANN. § 36-71-5(b).

⁸⁴ A land use assumption is a schedule of expected changes with respect to land use, populations, etc., for a specific area over at least a ten year period. NEV. REV. STAT. § 278B.060.

⁸⁵ NEV. REV. STAT. § 278B.180.1.

⁸⁶ NEV. REV. STAT. § 278B.190.2.

⁸⁷ NEV. REV. STAT. § 278B.190.3.

⁸⁸ These costs are based on the new development as measured by the approved land use assumptions. NEV. REV. STAT. § 278B.170.

⁸⁹ NEV. REV. STAT. § 278B.230. The statute defines a service unit as a standardized measure of consumption, use, generation or individual unit of development calculated for a particular category of capital improvements or facility expansions. NEV. REV. STAT. § 278B.110.

⁹⁰ NEV. REV. STAT. §§ 278B.230, 278B.270.

⁹¹ NEV. REV. STAT. § 278B.230.3.

⁹² NEV. REV. STAT. § 278B.210.

⁹³ NEV. REV. STAT. § 278B.260.2.

⁹⁴ NEV. REV. STAT. § 278B.260.2-3.

⁹⁵ NEV. REV. STAT. § 278B.280. Impact fees are also not assessable for: non-capital improvements, improvements of existing facilities for development already

hearing before the plan is revised.⁹⁶ Payment of the impact fee entitles new development to permanently use the facilities for which the fee was assessed and to immediately use any existing facility if capacity can accommodate the new service units.⁹⁷ Most notably, the Nevada Act contains a provision that requires an action for judicial review of any decision to begin within twenty-five days of filing notice with the clerk or secretary of the governing body.⁹⁸ The Act's extensive procedures provide a check on local government to ensure the fairness of the capital improvement plan, land use assumptions, and individual impact fee assessments. These extensive procedures comprise the strongest elements of Nevada's legislation.

C. Hawaii's Legislation

Hawaii's statute grants authority to assess impact fees only when a public capital improvements facility is identified by a comprehensive county plan⁹⁹ or a facility needs study.¹⁰⁰ The statute ensures that new development only pays its proportionate share by taking into

account credits and off-sets when assessing impact fees.¹⁰¹ Hawaii provides the clearest framework for calculating impact fees by delineating seven factors.¹⁰² These factors include the consideration of: a needs assessment study;¹⁰³ other sources of funding;¹⁰⁴ the cost and means of financing for existing capital improvements; impact fees paid within the last five years for which the development received no benefit; impact fees expected to be assessed against the developer in the next twenty years for existing improvements;¹⁰⁵ and any offsets owed to developers for contributions to non-site related improvements.¹⁰⁶ Additionally, the calculation of fees must "substantially" relate to the needs of the new development.¹⁰⁷

Hawaii also details five specific requirements to ensure that the collection and expenditure of fees "reasonably" relates to the benefits derived from the new development.¹⁰⁸ These requirements include maintaining fees in an interest-bearing account, establishing benefit zones, and spending or encumbering funds within six years of

collection.¹⁰⁹ Developers may request a refund of any previously assessed fee if the municipality does not use the money within six years.¹¹⁰ In addition, if the collection of impact fees is halted all together, the county must give notice and refund any unused fees.¹¹¹ Hawaii is somewhat unique in that it does not require the collection of impact fees prior to permit issuance. The Act specifically allows local governments to issue building or grading permits contingent upon the payment of the fee.¹¹² It is specificity such as this that makes Hawaii's Act noteworthy.

D. New Mexico's Legislation

New Mexico's legislation, entitled "Development Fees Act," bases its impact fees on service units,¹¹³ which measure the usage attributable to a single unit of new development.¹¹⁴ The Act requires a capital improvement plan, which includes a projection of land use changes and growth changes as related to a system of service areas.¹¹⁵ New Mexico ensures quality by using professionals to develop the county or

present, local government costs, and to some extent, the payment on debts. NEV. REV. STAT. § 278B.280.

⁹⁶ NEV. REV. STAT. § 278B.290.

⁹⁷ NEV. REV. STAT. § 278B.310.

⁹⁸ NEV. REV. STAT. § 278B.330.

⁹⁹ This plan identifies facilities based on projected needs. The plan must include principles for development and avenues to control development. HAW. REV. STAT. § 46-141 (1992).

¹⁰⁰ HAW. REV. STAT. § 46-142. The ordinance requires a study to ascertain the cost, need and service standards for a public facility. The study also determines the future need for capital improvements. *Id.*

¹⁰¹ HAW. REV. STAT. § 46-141(d).

¹⁰² HAW. REV. STAT. § 46-143.

¹⁰³ A needs assessment study, prepared by a professional, outlines levels of service standards, identifies expected capital improvement needs, and distinguishes present from future needs. *Id.*

¹⁰⁴ Funding sources could include taxes, bonds, user charges and intergovernmental transfers. *Id.*

¹⁰⁵ These contributions could be in the form of user fees or debt service payments. *Id.*

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

¹⁰⁸ HAW. REV. STAT. § 46-144.

¹⁰⁹ *Id.* Benefit zones comprise a geographic area demarcated by a county. The purpose of benefit zones is to ensure that collected and expended fees are used locally, such that the benefit derived from the public facility is greater for those in the development than for the general public. *Id.* See also HAW. REV. STAT. § 46-141 for definition of "reasonable benefit."

¹¹⁰ HAW. REV. STAT. § 46-145.

¹¹¹ *Id.*

¹¹² HAW. REV. STAT. § 46-146.

¹¹³ N.M. STAT. ANN. § 5-8-2 (Michie 1993). New Mexico statute defines a service unit as a "standardized measure of consumption, use, generation or discharge attributable to an individual unit of development calculated in accordance with generally accepted engineering or planning standards for a particular category of capital improvements or facility expansions." N.M. STAT. ANN. § 5-8-2.

¹¹⁴ N.M. STAT. ANN. § 5-8-2. Impact fees are limited to the "proportionate share" of improvements as determined by the service units. N.M. STAT. ANN. § 5-8-7.

¹¹⁵ N.M. STAT. ANN. § 5-8-2. A service area describes the location within a city or a municipality that is to be served by improvements contained in the capital improvements plan. *Id.*

municipality capital improvement plan and total calculate the impact fee.¹¹⁶ Under the Act, the capital improvement plan must address seven factors, including an analysis of existing capital improvements, tables depicting service units in relation to land uses, projections of new development and needed improvements, and other sources of funding.¹¹⁷

Impact fees may be levied for capital improvements, which are defined in terms of a ten-year life expectancy and include water facilities, roadway facilities, emergency equipment¹¹⁸ and recreational space.¹¹⁹ The Act denotes only the specific items that are payable by the impact fee, which include capital improvements, surveying work by engineers related to capital improvement construction, and fees for the capital improvement plan.¹²⁰ New Mexico's Act also places a three percent cap on administrative costs incurred by the local government for the employment of qualified professionals.¹²¹ In addition, the Act defines seven items for which impact fees may not be assessed: "libraries, community centers, schools, projects for economic development and employment growth, affordable housing or apparatus and equipment of any kind . . ." ¹²²

New Mexico's Development Fees Act is very thorough and well thought out.

The Act clearly delineates which items or factors are to be considered for each step in levying a fee. In addition, by assessing fees early and collecting them late in the process, New Mexico's Act provides a level of fairness for developers.¹²³ Furthermore, the Act authorizes local governments to establish a payment schedule for impact fees, thereby lessening the heavy financial burden on developers.¹²⁴ Several safeguards have been incorporated into the Act. For example, a fee can only be collected if the construction of the capital improvement will be completed within seven years.¹²⁵ The Act also guarantees that the developer paying the impact fee is entitled to permanently use the services for which the fee was collected and to use existing facilities if capacity can accommodate the new service units.¹²⁶ In addition, the act extends significant authority to the local government by allowing the municipality to enter into agreements with developers to reduce impact fees on the basis of contributions.¹²⁷ Furthermore, the act authorizes the issuance of credits for the dedication of recreational land, open spaces for trails, streets, sidewalks, easements, drainage facilities, and payments in lieu of land dedication.¹²⁸ The Act does not, however, exempt governmental entities from paying impact fees.¹²⁹ Like other state statutes, New

Mexico's Act requires collected fees to be maintained in interest-bearing accounts¹³⁰ and refunds to be made if the improvement is not completed within seven years after collection or if the fees were miscalculated.¹³¹

E. New Hampshire's Legislation

New Hampshire's enabling legislation authorizes fee assessments for the broadest range of capital improvements.¹³² The statute specifically delineates libraries, schools, water treatment facilities, solid waste facilities and recreational facilities¹³³ as entities for which fees can be charged.¹³⁴ Although New Hampshire authorizes the collection of fees for a wide variety of infrastructures, the legislation lacks specificity as to the restrictions and uses of the fees once they are collected. The statute grants authority for ordinances to include both waiver and refund provisions.¹³⁵ In addition, the Act provides that fees must be paid upon issuance of the certificate of occupancy.¹³⁶ Most notably, the Act does not require an advisory committee to oversee any part of the ordinance process. New Hampshire does allow local governments to regulate the timing of development, if its planning board has adopted a master plan and capital improvement program.¹³⁷ When managing growth, the development needs of

¹¹⁶ N.M. STAT. ANN. § 5-8-6.

¹¹⁷ *Id.*

¹¹⁸ N.M. STAT. ANN. § 5-8-2. The emergency buildings and equipment must endure for at least ten years and cost \$10,000 in order to be classified as capital improvements. *Id.*

¹¹⁹ N.M. STAT. ANN. § 5-8-2.

¹²⁰ N.M. STAT. ANN. § 5-8-4.

¹²¹ *Id.*

¹²² N.M. STAT. ANN. § 5-8-5.

¹²³ N.M. STAT. ANN. § 5-8-8.

¹²⁴ N.M. STAT. ANN. § 5-8-10.

¹²⁵ N.M. STAT. ANN. § 5-8-11.

¹²⁶ N.M. STAT. ANN. § 5-8-12.

¹²⁷ N.M. STAT. ANN. § 5-8-13.

¹²⁸ N.M. STAT. ANN. § 5-8-15.

¹²⁹ N.M. STAT. ANN. § 5-8-14.

¹³⁰ N.M. STAT. ANN. § 5-8-16.

¹³¹ N.M. STAT. ANN. § 5-8-17.

¹³² N.H. REV. STAT. ANN. § 674:21 (1986 & Supp. 1994).

¹³³ Although the act includes recreational facilities, this category excludes public open space. N.H. REV. STAT. ANN. § 674:21V.

¹³⁴ N.H. REV. STAT. ANN. § 674:21V.

¹³⁵ *Id.*

¹³⁶ *Id.*

the community and the region must be taken into consideration.¹³⁸ New Hampshire's Act merits attention due to its brevity, although its lack of specific guidelines leaves room for disparity between various municipal ordinances within the state.

F. Maine's Legislation

Maine enacted a very brief statute for land use planning and regulation. The Act lists six items for which impact fees may be assessed, while leaving the category open-ended for the addition of other infrastructures.¹³⁹ Most notable is the inclusion of facilities for fire protection and for recreational space.¹⁴⁰ The Act requires that the impact fee reasonably relate to the cost of capital improvements created by development.¹⁴¹ Furthermore, a municipality can assess a fee against developers for their usage share of infrastructure improvements where the municipality paid for the improvement before the developer began the new development.¹⁴² The local ordinance must also contain a provision requiring any unused portion of the fee to be refunded.¹⁴³

Maine's legislation contains fewer procedures than New Hampshire's Act and therefore also inadequately addresses the logistics of administering an impact fee ordinance. Its lack of

safeguards such as interest-bearing accounts or advisory committees would seem to create troublesome ambiguities for local governments and for the courts.

G. Vermont's Legislation

Vermont's impact fee legislation contains some meritorious provisions. The Act begins with an excellent statement of purpose, which enables "municipalities to require the beneficiaries of new development to pay their proportionate share of the cost of municipal and school capital projects which benefit them and to require them to pay for or mitigate the negative effects of construction."¹⁴⁴ It is worth noting that under Vermont's Act, new development bears responsibility for the positive and negative effects of capital projects.¹⁴⁵ Additionally noteworthy is the fact that Vermont authorizes the use of fees for schools.¹⁴⁶ On the negative side, the statute vaguely defines "capital project" as "any physical betterment or improvement."¹⁴⁷ Like the Maine statute, Vermont municipalities may recoup expenses for beneficial capital projects which were paid prior to the development.¹⁴⁸

Vermont encourages permanent environmental preservation by granting municipalities the option to accept offsite mitigation instead of an impact fee.¹⁴⁹ The act requires municipalities to include

a reasonable formula in their ordinances for the assessment of fees. The formula must be based on service standards and assessment means, such as bedrooms or square footage.¹⁵⁰ Such specificity adds to the strength of Vermont's statute because it helps standardize and justify fee assessments. Municipalities may place a heavy demand on developers by collecting a fee for the entire amount of a capital improvement if the project will exclusively, although only initially, benefit that development.¹⁵¹ The Act does, however, offer an equitable solution in this situation in that future development must pay a reimbursement fee of sorts to the development owners.¹⁵² Municipalities also are authorized to accept fee payments on an installment basis, which may alleviate some of the burden on builders and developers.¹⁵³ It is notable that Vermont's exemption clause recognizes contributions toward affordable housing, preservation of employment and creation of new jobs as acceptable public policies for which municipalities may grant exemptions.¹⁵⁴ The legislation also includes provisions for offsets, refunds, expenditures and appeals.¹⁵⁵

Vermont's enabling statute does not place cumbersome administrative demands upon its municipalities. It does not require advisory committees or

¹³⁷ N.H. REV. STAT. ANN. § 674:22 (1991).

¹³⁸ *Id.*

¹³⁹ ME. REV. STAT. ANN. tit. 30-A, § 4354.1 (West 1988 & Supp. 1994).

¹⁴⁰ ME. REV. STAT. ANN. tit. 30-A, § 4354.1 A.(4), (6).

¹⁴¹ ME. REV. STAT. ANN. tit. 30-A, § 4354.2.A.

¹⁴² *Id.*

¹⁴³ ME. REV. STAT. ANN. tit. 30-A, § 4354.2.D.

¹⁴⁴ VT. STAT. ANN. tit. 24, § 5200 (1992).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ VT. STAT. ANN. tit. 24, § 5201(2)(A) (1992).

¹⁴⁸ VT. STAT. ANN. tit. 24, § 5201(3).

¹⁴⁹ VT. STAT. ANN. tit. 24, §§ 5201(4), 5202(b) (1992). The act defines offsite mitigation as permanent preservation of land compensating for the developmental impact. VT. STAT. ANN. tit. 24, § 5201(4). Instead of an impact fee, the local government may acknowledge offsite mitigation as compensation when the development damages important land for wildlife or agriculture. VT. STAT. ANN. tit. 24, § 5202(b).

¹⁵⁰ VT. STAT. ANN. tit. 24, § 5203 (1992).

¹⁵¹ VT. STAT. ANN. tit. 24, § 5203(b).

¹⁵² *Id.*

¹⁵³ VT. STAT. ANN. tit. 24, § 5204(c) (1992).

¹⁵⁴ VT. STAT. ANN. tit. 24, § 5205 (1992).

¹⁵⁵ VT. STAT. ANN. tit. 24, § 5203.

hearings. However, the absence of such procedural provisions may, to some extent, promote litigation and inconsistencies within impact fee ordinances throughout the state.¹⁵⁶

H. Wisconsin's legislation

Wisconsin has enacted one of the newest pieces of impact fee enabling legislation with an effective date of May 1, 1995. Wisconsin's legislation, more so than any other state, merits attention. The Act clearly and concisely addresses most all of the important elements involved in enacting an ordinance and assessing fees. The Act begins by defining the terms used in the legislation. Wisconsin's definition of public facilities, or the items for which fees may be assessed, is quite expansive in that it includes recycling facilities, parks, playgrounds, libraries and facilities for fire protection, emergency medical care, law enforcement, and solid waste.¹⁵⁷ The Act includes general explanatory provisions, which provide that a political subdivision¹⁵⁸ may implement an impact fee ordinance and subsequently levy fees on developers to cover the capital costs¹⁵⁹ required to accommodate development.¹⁶⁰ The Act explains that service areas refer to the geographic location that will contain public facilities, and that a service standard is the ratio between the public facility and a certain number

of persons.¹⁶¹ Service areas and the service standard serve as the foundation for identifying new public facilities for which fees may be assessed.¹⁶² The legislation requires that each political subdivision prepare a public facilities needs assessment before enacting an impact fee ordinance.¹⁶³ The needs assessment must include: 1) an inventory of public facilities already in existence; 2) an identification of new facilities that will be needed as a result of land development; and 3) an estimate of capital costs needed to construct the new facilities.¹⁶⁴ This needs assessment must be posted and available for the public to inspect twenty days before the political subdivision holds a public hearing on its proposed impact fee ordinance.¹⁶⁵

It should be noted that Wisconsin does not require an advisory committee *per se* in order to oversee or assist the local government in enacting an ordinance; however, the aforementioned provisions safeguard the same purposes as would an advisory group. In fact, Wisconsin's approach may decrease the bureaucracy imposed by other statutes at the local level. The only possible negative aspect of Wisconsin's exclusion of an advisory or review committee is that the building, real estate and development industries are not guaranteed any type of representation.

Wisconsin provides seven standards

for impact fees.¹⁶⁶ These standards help ensure that impact fees will meet the Supreme Court's requirements for a constitutional fee assessment.¹⁶⁷ Wisconsin's impact fees must: 1) be rationally related to the need for new facilities to serve new development, 2) not exceed the proportionate share of capital costs, 3) be based on actual or estimated capital costs, 4) be reduced to compensate for other capital costs that the political subdivision has imposed, 5) be reduced to compensate for other state or federal funds received to pay for facilities for which the fees are assessed, 6) not cover costs to improve deficiencies in public facilities, and 7) be paid in full or by installment by the developer before the issuance of a building permit.¹⁶⁸

The Act mandates certain standard requirements similar to those found in other legislation. For instance, collected fees must be kept separate from other funds in interest-bearing accounts, and expenditure of the money and interest is limited to the capital projects for which the fees were collected.¹⁶⁹ The distinguishing element of Wisconsin's Act, however, is the flexibility that it extends to local governments. Although ordinances enacted pursuant to this Act must contain provisions for refunds and appeals, discretion rests with the local government to determine the specifics.¹⁷⁰ Another unique element of the Act is the

¹⁵⁶ VT. STAT. ANN. tit. 24, §§ 5200-5205.

¹⁵⁷ WIS. STAT. ANN. § 66.55(1)(f). In addition, the Act defines public facilities as highways, transportation facilities, traffic control devices, sewage facilities, storm and surface water facilities, and storage, distribution and water pumping facilities. *Id.*

¹⁵⁸ WIS. STAT. ANN. § 66.55(1)(e). A city, village, town or county constitute a political subdivision as referenced in the Act. *Id.*

¹⁵⁹ WIS. STAT. ANN. § 66.55(1)(a). The costs associated with constructing, expanding or improving public facilities comprise the capital costs. The provision places a ten percent limit on capital costs expended for design, engineering and legal expenses. *Id.*

¹⁶⁰ WIS. STAT. ANN. § 66.55(2).

¹⁶¹ WIS. STAT. ANN. § 66.55(1)(g)(h). Service standard is defined as a "certain quantity or quality of public facilities relative to a certain number of persons, parcels of land or other appropriate measure, as specified by the political subdivision." *Id.*

¹⁶² WIS. STAT. ANN. § 66.55(4)2.

¹⁶³ WIS. STAT. ANN. § 66.55(4).

¹⁶⁴ WIS. STAT. ANN. § 66.55(4)1-3.

¹⁶⁵ WIS. STAT. ANN. §§ 66.55(3), 66.55(4)(b). These procedures are required both before a political subdivision enacts an ordinance and when a political subdivision amends its ordinance. *Id.*

¹⁶⁶ WIS. STAT. ANN. §§ 66.55(6).

¹⁶⁷ Ishikawa, *supra* note 51, at *3-4.

¹⁶⁸ WIS. STAT. ANN. §§ 66.55(6)(a)(g). The Act leaves the political subdivisions with the discretion to decide whether fees will be collected in full or installment and whether the fees should be collected at some point other than before issuing a building permit. *Id.*

¹⁶⁹ WIS. STAT. ANN. § 66.55(8).

¹⁷⁰ WIS. STAT. ANN. §§ 66.55(9), 66.55(10). The political subdivisions bear the responsibility of determining a "reasonable period" in which collected fees must be

exemption provision, which specifically exists for the purpose of encouraging the construction of low-cost housing.¹⁷¹

IV. COMMENT

Impact fees are appropriate for Missouri because they would provide an avenue for the state's local governments to finance the demand for capital infrastructure created by new development.¹⁷² Moreover, impact fees would facilitate planned community development. The goal of planned development makes it imperative that Missouri implement impact fee enabling legislation before extensive overcrowding problems arise throughout the state. Such an act would ensure that infrastructure needs keep pace with population increases.¹⁷³ Absent some type of growth management plan, population growth and related problems, such as environmental damage, could impose long-term burdens on the state.

Although enabling legislation applicable to the entire state presents one option, the legislature may determine that only certain portions of Missouri present the need for impact fees. If this is the case, it will be important for the legislature to base municipal authority for assessing impact fees on specific population numbers. Based on the burdens created by development, Kansas City, St. Louis, Columbia, Springfield, Branson, Odessa, St. Joseph, Cape Girardeau, Jefferson City and Joplin may merit such enabling legislation.

A community's residential population should not, however, be the only determinative factor in implementing impact fee legislation.¹⁷⁴ It has been postulated that even with a declining population, municipalities continue to need improved infrastructure based on an inflow of tourists, shoppers or commuters.¹⁷⁵ This idea seems very applicable to particular areas in Missouri that experience a significant influx of tourists from outlet malls, sporting events, recreational facilities, gaming operations and other attractions.

Enacting enabling legislation is important because of the authority it extends to municipalities or counties to implement impact fee ordinances. Although enabling legislation best substantiates a local government's authority to assess fees, impact fees can also be assessed pursuant to home rule authority.¹⁷⁶ Home rule power extends implied and express powers to certain local governments so that they can address local matters autonomously and more efficiently. Acts under home rule authority are valid so long as the powers do not violate the Constitution or any of the state's statutes. Relying on home rule authority, however, has several disadvantages. First, without a singular act guiding local governments, impact fees will most likely lack uniformity. Second, local governments operating without home rule authority would not have the opportunity to levy impact fees for capital improvements. Finally, assessing

impact fees without enabling legislation provides a greater risk of liability based on unconstitutional takings. Consequently, enabling legislation presents the safest means for the assessment of impact fees.

The strongest argument against impact fees is that levying fees will create funds to build infrastructure that in turn will raise property values and, therefore, make the costs of buying property prohibitive.¹⁷⁷ Although builders and developers seem most affected by impact fee enabling legislation, be assured that they will pass the cost on to the consumers¹⁷⁸ or other land owners¹⁷⁹ instead of suffering a personal loss. Enabling legislation can ameliorate many of the duplicative costs to builders and developers by providing offset, credit or exemption provisions.

Should Missouri pass enabling legislation, it would become part of the second generation of states to authorize impact fees.¹⁸⁰ With a wealth of information available from these states that have previously enacted legislation, Missouri is in a unique position to be able to address a wider spectrum of issues. Specifically, Missouri's legislature should focus on enacting a tightly written statute that would provide enough guidance for impact fee ordinances to be constitutionally administered. Ideally, local governments should retain some discretion in enacting and implementing their ordinances. The primary goal should be to include as many guidelines and

refunded. WIS. STAT. ANN. § 66.55(9). The legislation directs the local entities to consider the time required to plan and finance particular infrastructures. WIS. STAT. ANN. §§ 66.55(9), 66.55(10). The local governments must also design a procedure under which developers may appeal the imposition of impact fees. WIS. STAT. ANN. § 66.55(10).

¹⁷¹ WIS. STAT. ANN. § 66.55(7). This provision, entitled "[l]ow-cost housing," facially appears to only exempt or reduce a developer's impact fee if that developer provides low-cost housing. *Id.*

¹⁷² Schwanke, *supra* note 2, at 220.

¹⁷³ *Id.* at 230-231.

¹⁷⁴ Nicholas, *supra* note 37, at 87.

¹⁷⁵ *Id.*

¹⁷⁶ MO. CONST. art. VI, § 19(a).

¹⁷⁷ Nicholas, *supra* note 37, at 85, 96. Creation of roads, recreational spaces and school facilities are examples of new types of infrastructure which would increase property values. *Id.* at 99.

¹⁷⁸ Bauman & Ethier, *supra* note 42, at 64.

¹⁷⁹ Nicholas, *supra* note 37, at 85, 96. The cost is shifted by paying the landowner a decreased price. *Id.* This article provides a good explanation of who - the property owner, the buyer or the developer - should bear the cost of impact fees based on who receives the benefit. *Id.*

¹⁸⁰ Blaesser & Kentopp, *supra* note 39, at 68-69.

requirements as necessary, while minimizing the bureaucratic burden of these requirements.

The following guidelines should provide a framework for Missouri's enabling legislation.

The legislation should begin with a purpose and definition section. Vermont's Act contains an excellent statement of purpose that identifies the function of impact fees, the parties bearing the fees, the standard for fee assessment, and the responsibility of financing both the benefits and negative effects of new development.¹⁸¹ The definition section should clearly explain all terminology used in the legislation. Lucid definitions in both the enabling legislation and in the local governments' ordinances will provide a clear understanding of the purpose of impact fees and will consequently mitigate a flood of interpretative litigation.¹⁸² The framework chosen for impact fees will determine the detail and complexity required in the definition section. Many of the statutes provide solid definitions, but the value of these acts as examples depends on the substantive framework selected for Missouri's legislation. For example, if Missouri decides to incorporate service units as the basis for assessing fees against development, then the legislature should look to definitions used by New Mexico, Nevada, Wisconsin, and Vermont.¹⁸³

The legislature also will need to

provide sufficient authority and specifications for the municipalities implementing impact fee ordinances so the subsequent exactions are not deemed taxes in disguise.¹⁸⁴ Wisconsin's Act best details standards for impact fees because it most articulately and accurately reflects the guidelines by which a court would evaluate a fee.¹⁸⁵ Hawaii's legislation also provides sound factors for calculating fees because it lists seven factors and the overarching requirement that the fees must "substantially" relate to the needs created by new development.¹⁸⁶ In addition, the legislature should require a capital improvement plan to ensure vision and continuity for municipalities enacting and administering impact fee ordinances. Acts containing some variation of a capital improvement plan include Georgia, Nevada, Hawaii, New Mexico, New Hampshire, and Wisconsin.¹⁸⁷

Several options exist as to when impact fees should be collected: 1) when an area is approved for development, 2) when the building permit is issued, or 3) when the certificate of occupancy is issued.¹⁸⁸ In addressing the timing issue, the legislature should consider the consequences of levying the fee upon the developer in light of economic conditions and the ability of the developer to pass the cost on to the buyer or owner.¹⁸⁹ Most legislation requires impact fees be collected upon issuance of the building permit.¹⁹⁰ This stage seems to be the

best compromise between the developers and the municipalities because it most closely matches the need with the benefit.

Missouri should assess fees for the number of capital improvements that are constitutional and necessary. The legislature should focus on the impacts of including schools and libraries in the category of capital infrastructure. Some states include these facilities, while others prohibit them. The dichotomy exists mainly due to concerns regarding whether the development of libraries and schools is already being paid for via taxes.¹⁹¹

Additionally, the legislature should contemplate encouraging environmental preservation and protection. If the legislature wants to further environmental preservation,¹⁹² then assessing fees for open space, parks, recreational facilities, water treatment facilities, and solid waste facilities would be advisable. Vermont's Act encourages environmental preservation by authorizing local governments to accept the preservation of land instead of impact fees in those areas where new development might injure land that is either inhabited by wildlife or utilized for agriculture.¹⁹³ Wisconsin's legislation also promotes environmental conservation by naming recycling facilities as infrastructure for which fees may be assessed.¹⁹⁴ Of the acts evaluated, those in Vermont, Wisconsin, Maine, New Hampshire, New Mexico,

¹⁸¹ Vt. STAT. ANN. tit. 24, § 5200.

¹⁸² Taub, *supra* note 4.

¹⁸³ See, e.g., *supra* text accompanying section III. IMPACT FEE LEGISLATION IN OTHER STATES.

¹⁸⁴ *Id.* Police power allows states to regulate for the health, safety and general welfare of its people. Regulations pass constitutional muster if they are connected to the benefit received. Impact fees must be defined as regulations such that the amount assessed is proportionate to the benefit received. In contrast, the United States Constitution requires that taxes are assessed uniformly on real property. Furthermore, taxes generally bear no connection to benefits received, but instead provide a mechanism to raise general revenue. Blaesser & Kentopp, *supra* note 39, at 64-66; Bernard V. Keenan, *Report of the Subcommittee on Exactions and Impact Fees*, 23 URB. LAW. 627 at *2-3 [1991]. In Missouri, the Hancock Rule raises an issue as to taxation.

¹⁸⁵ WIS. STAT. ANN. § 66.55(6).

¹⁸⁶ HAW. REV. STAT. § 46-143; see *supra* text accompanying note 106.

¹⁸⁷ See *supra* text accompanying section III. IMPACT FEE LEGISLATION IN OTHER STATES.

¹⁸⁸ Nicholas, *supra* note 37, at 85, 97.

¹⁸⁹ *Id.* at 97-98.

¹⁹⁰ Taub, *supra* note 4, at 305.

¹⁹¹ See Kushner, *supra* note 24, at 135 n.394. School impact fees also pose a problem in light of the states' requirement to provide free public education.

Blaesser & Kentopp, *supra* note 39, at 90 n.108.

¹⁹² Environmental implications and concerns include consideration of wetlands, air pollution, resource depletion, water pollution, and waste.

¹⁹³ Vt. STAT. ANN. tit. 24, §§ 5201(4), 5202(b).

Nevada, and Georgia provide for some type of environmental facility.¹⁹⁵ One commentator suggests mitigating environmental damage based on a fee for environmental resources used, as opposed to the service-benefits received.¹⁹⁶ This type of fee would prove more difficult to assess, because it would involve the projection of environmental damage due to new growth. Nonetheless, an environmental mitigation fee or the inclusion of environmental facilities as capital improvements for which fees could be assessed would provide incentives for conservation and conscientious growth patterns.

The enabling legislation should also include requirements that provide direction as to the management of fees by local governments. These provisions should require municipalities to: 1) retain collected funds in an interest-bearing account to maximize the earning potential of the money, 2) extend credits, exemptions and refunds to ensure developers are paying only a fair share and that the money is spent on an appropriate purpose, 3) spend the funds within 5-7 years to guarantee that the new development benefits from the capital improvement, and 4) establish a payment plan for the collection of fees¹⁹⁷ in order to alleviate the financial burden on developers. Considering the inequities and burdens associated with paying additional fees, the exemption or credit provision should carefully reflect contributions already made by developers. Developers' contributions could encompass fair share regulations and linkage fees, as provided for in

Vermont's¹⁹⁸ and Wisconsin's¹⁹⁹ Acts. New Mexico's legislation is also noteworthy because it lists items which qualify as credits and gives local governments the flexibility to enter credit agreements with developers.²⁰⁰ The exemption provision could exempt schools or local governments from the payment; however, the legislature should take special precautions that such a provision would not violate the Equal Protection Clause.

In deciding the extent of procedural provisions to include, the legislature should weigh the concern of imposing bureaucratic requirements on municipalities versus the preventive effect such procedures may have on decreasing ambiguity and litigation regarding the enabling legislation and local ordinances. Wisconsin's Act best reflects both of these goals, as it provides excellent guidelines, yet does not require specific committees to assist in developing local ordinances.²⁰¹ This approach seems to allow local entities the freedom to utilize such committees and advisory groups only if deemed necessary. Nonetheless, if statewide continuity is the concern, then some type of oversight or planning committee should be recommended or required. Such a committee could be charged with the responsibility of actually devising an ordinance or with the task of regulating the assessment of fees in accordance with the ordinance. Considering the primary effect impact fees would have on the building, development and real estate industries, any committee should include representation from these sectors. Georgia's Act best

represents the concerns of these industries because it requires that forty percent of the Advisory Committee be represented by the real estate, building and development communities.²⁰²

The legislature also should provide an appellate procedure to govern conflicts resulting from the enabling legislation and its derivative ordinances. Nevada's Act imposes a time limit for judicial review,²⁰³ while Georgia²⁰⁴ and Wisconsin²⁰⁵ require an appeals process under which fees may be contested. Such a procedure would provide developers with a forum to contest the assessment or the amount of a fee, in addition to the appropriateness of how the fee is used.

V. CONCLUSION

The enactment of enabling legislation in Missouri could extend to local governments across the state the opportunity to manage new growth in a planned manner to provide needed facilities in a timely fashion. Furthermore, Missouri might also be able to maintain or even improve the status of its environmental resources, depending on the spectrum of items for which fees may be assessed.

In light of the enabling legislation analyzed in this Comment, Wisconsin's Act provides the clearest and most comprehensive model for Missouri. It is the specificity and flexibility in Wisconsin's legislation that makes it superior to other acts. Legislation in other states, however, should not be discounted. Missouri should also consider the acts adopted by Nevada, Georgia, Hawaii, New Mexico, and Vermont.

¹⁹⁴ Wis. STAT. ANN. § 66.55(1)(f).

¹⁹⁵ See, e.g., *supra* text accompanying section III. IMPACT FEE LEGISLATION IN OTHER STATES.

¹⁹⁶ Thomas W. Ledman, Note, *Local Government Environmental Mitigation Fees: Development Exactions, The Next Generation*, 45 Fla. L. REV. 835 (1993).

¹⁹⁷ New Mexico's Act includes such a payment schedule. N.M. STAT. ANN. § 5-8-10.

¹⁹⁸ Vt. STAT. ANN. III. 24, § 5205.

¹⁹⁹ Wis. STAT. ANN. § 66.55(7).

²⁰⁰ N.M. STAT. ANN. §§ 5-8-13; 5-8-15.

²⁰¹ Wis. STAT. ANN. § 66.55.

²⁰² GA. CODE ANN. § 36-71-5(b).

²⁰³ NEV. REV. STAT. § 278B.330.

²⁰⁴ GA. CODE ANN. § 36-71-10.

²⁰⁵ Wis. STAT. ANN. § 66.55(10).