# Impact Fees and Other Methods of Funding Local Public Improvements

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## I. Introduction

In 1994, Wisconsin became one of a growing number of states to pass specific statutory enabling legislation for impact fees. Impact fees are one response to the growing gap in infrastructure dollars between revenues and needs which have arisen in part because of decreased federal aid for such purposes. Impact fees are one form of exactions. Exactions are various techniques used by local governments, as a condition of development approval, to shift a portion of the capital cost burden of new development to developers, thereby making development responsible for serving itself.

The concept that new development should pay its own way is not new to Wisconsin. Local governments in Wisconsin have long had the authority to require that new development contribute a larger share of the costs of public improvements which are made necessary by the new development. What is new is that the enabling legislation (1) clarifies the authority of local governments in Wisconsin to legitimately use impact fees to finance a broad array of capital facilities and (2) the legislation establishes a formal process which local governments must follow if they wish to use impact fees. The legislation provides an incentive for communities to engage in comprehensive planning. In order to use impact fees, local government will need to engage in capital facilities planning and other planning.

## II. Infrastructure Financing in Wisconsin -- An Historical Context

Prior to World War II, developers paid for a very limited amount of infrastructure costs. The funding of public services was left to the local government to pay through property taxes or through the special assessment process. The Great Depression in the 1930s, however, caused widespread delinquencies in the payment of special assessments levied to construct public facilities in platted subdivisions. The incentive to pay such assessments existed only when the assessed lot had been improved by the construction of a residence. As special assessments were foreclosed, only a fraction of the assessments due was realized upon foreclosure because of the general depreciation in land values. Unable to collect, local governments defaulted on special assessment bonds. Because of the high default rates, cities had difficulty arranging the financing of infrastructure through special assessment bonds.

With the rapid suburban growth following World War II, cities started to require developers to provide infrastructure that had previously been considered a public responsibility. By 1958, the mandatory construction of subdivision improvements as a condition of subdivision plat approval had become the dominant method of securing such improvements. It was during this period of rapid growth that the concept of "exactions" began to be widely used by communities.

*A. Exactions*

Exactions are various techniques used by local governments to shift a portion of the capital cost burden of new development to developers, thereby making development responsible for serving itself. The concept that new development should pay its own way is not new to Wisconsin. Local governments in Wisconsin have long had the authority to require that new development contribute a larger share of the costs of public improvements which are made necessary by the new development. As early as 1961, land use attorney Richard Cutler identified the following four methods of shifting the cost of development commonly used in Wisconsin as part of the subdivision process:[1]

1. Dedication of land. Dedication is appropriate where the subdivision actually contains suitable land for the public facility needed, such as a park or a school site. Dedication is least desirable for off-site facilities. Mandatory dedication of certain capital improvements as part of the subdivision process is generally recognized as the earliest form of exaction.

2. Payment of fees in lieu of dedication. The fee in-lieu concept developed as a refinement of mandatory dedication by substituting monetary payment for the dedication of capital improvements when dedication was not feasible because the subdivision is too small and there is insufficient land to dedicate for the facility needed; where the land available is not well suited for the facility because of location or topography; or where the local government's plans indicate a need for the facility at a different location outside the boundaries of the particular subdivision. **[NOTE: As a result of 2005 Wisconsin Act 477, this method is no longer available to local governments in Wisconsin.]**

3. Requiring that the developer install on site public improvements such as streets, curb and gutter, water mains, sanitary sewers, storm water facilities. Wisconsin law expressly provides:

    a. As a condition of approving a map of a subdivision the governing body of a town, city or village "may require that the subdivider make and install any public improvements reasonably necessary or that the subdivider execute a surety bond or provide other security to ensure that he or she will make those improvement within a reasonable time." Wis. Stat. § 236.13(2)(a).

    b. A city or village "may require as a condition for accepting the dedication of public streets, alleys or other ways, or for permitting private streets, alleys or other public ways to be placed on the official map, that designated facilities shall have been previously provided without cost to the municipality . . . such as . . . sewerage, water mains and laterals, grading and improvement of streets, alleys, sidewalks and other public ways, street lighting or other facilities designated by the governing body, or that a specified portion of such costs shall be paid in advance. . . ." Wis. Stat. § 236.13(2)(b).

    c. A county, town, city, or village may require that the subdivider pay "the cost of any necessary alterations of any existing utilities which, by virtue of the platting or certified survey may, fall within the public right-of-way." Wis. Stat. § 236.13(2)(c). A county, town, city, or village may also "require the dedication of easements by the subdivider

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1 Richard W. Cutler, Legal and Illegal Methods for Controlling Community Growth on the Urban Fringe, 1961 Wisconsin Law Review, pp. 370 - 402.

for the purpose of assuring the unobstructed flow of solar energy across adjacent lots in the subdivision." Wis. Stat. § 236.13(2)(d).

4. Negotiated dedications of land or payments in cash as a condition of plat approval, but not consistent with any requirements which are written into the subdivision ordinance. As the pace of post war development continued in the 1950s and 1960s, the fastest growth in the use of exactions took place outside the limits of what a city could require from developers. Developers therefore "voluntarily" contributed as a condition of development approval because the costs of construction delays and litigation exceeded the costs of providing the additional infrastructure.

*B. Impact Fees*

Impact fees are one type of exaction. They were developed as a much more sophisticated approach to private funding of public infrastructure. Impact fees are designed to use sophisticated economic analysis to apportion the cost of new infrastructure among new development on the basis of their generation of demand for new infrastructure such as roads and parks. Wisconsin's impact fee law is detailed below.

## III. The Wisconsin Impact Fee Enabling Law

Wisconsin' impact fee law was enacted in 1994. 1993 Wisconsin Act 305. The law is currently codified at 66.0617 of the Wisconsin Statutes. Since May 1, 1995, a municipality seeking to impose and collect impact fees has needed to comply with the requirements of this law. Wis. Stats. § 66.0617(2)(c). The law defines impact fees as "cash contributions, contributions of land or interests in land or any other items of value that are imposed on a developer by a municipality under this section." Wis. Stats. § 66.0617(1)(c). Cities, villages, and towns are all authorized to use impact fees. Wis. Stats. § 66.0617(1)(e). While counties originally were authorized under this law to collect impact fees, 2005 Wisconsin Act 477 eliminated that authority.

*A. Types of Facilities For Which Impact Fees May Be Used*

Impact fees may be used to finance the **capital costs** of constructing highways and other transportation facilities, traffic control devices, sewage treatment facilities, storm and surface water handling facilities, water facilities, parks, playgrounds, and land for athletic fields, solid waste and recycling facilities, fire and police facilities, emergency medical facilities, and libraries. The law expressly prohibits the use of impact fees to finance facilities owned by a school district. Wis. Stat. § 66.0617(1)(f). When the law was enacted, it included the general authorization to collect impact fees for parks "and other recreational facilities." 2005 Wisconsin Act 477 replaced the term "other recreational facilities" with the more limited term "playgrounds, and land for athletic fields."

1. The statute defines "capital costs" to mean the capital costs to construct, expand or improve public facilities, including the cost of land. Wis. Stat. § 66.0617(1)(a). Up to ten percent of capital costs can be for related legal, engineering, and design costs unless a political subdivision can demonstrate that legal, engineering and design costs exceed ten percent of capital costs. Id.

2. 2005 Wisconsin Act 477 amended the definition of "capital costs" to clarify that the cost of vehicles is not included. Other noncapital costs and the costs of other equipment to construct, expand or improve public facilities is also excluded from capital costs.

*B. Procedure for Establishing Impact Fees*

The statute outlines a two-part process that must be followed by a municipality wishing to establish an impact fee program under the statute. The process also needs to be followed by a municipality when it amends an existing impact fee ordinance by revising the amount of the fee or altering the public facilities for which the fee may be imposed. Wis. Stat. § 66.0617(4)(a).

1. Needs Assessment

A political subdivision must prepare a needs assessment for the public facilities that the municipality anticipates imposing impact fees. Wis. Stat. § 66.0617(4)(a). The reason for the needs assessment is that communities bear the burden of proving that the need for additional facilities results from new development, not from existing deficiencies. The needs assessment is therefore critical to establishing the rational relationship that the impact fee must bear to the need for new, expanded or improved public facilities that are required to serve land development. Wis. Stat. § 66.0617(6)(a).

The statute specifies certain information that must be included in the needs assessment. This information is outlined below. Some additional information not identified in the statute is also needed to complete the public facilities needs assessment.

a. An inventory of existing public facilities for which the impact fee may be imposed. Wis. Stat. § 66.0617(4)(a)(1).

b. Identify existing deficiencies in the quantity or quality of those public facilities. Wis. Stat. § 66.0617(4)(a)(1). The statute prohibits the use of impact fees to address existing deficiencies in public facilities. Wis. Stat. § 66.0617(6)(f).

c. Explicitly identify service areas and service standards.

(1) "Service areas" are defined as "a geographic area delineated by a municipality within which there are public facilities." Wis. Stat. § 66.0617(1)(g).

(2) "Service standards" are 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 municipality." Wis. Stat. § 66.0617(1)(h).

*(3) Examples of setting service standards*

*(a) Use existing standard. This may be an explicit standard that the community has adopted for reviewing development proposals. If an explicit standard does not exist, the needs assessment will need to identify what the standard is through the inventory. For example, the inventory might find that the community has an average of fifteen acres of improved park land per 1000 residents. The community can then use this standard to determine future park land*

*needs and have new development pay for the future needs through the use of impact fees or another appropriate financing mechanism.*

(b) *Set a new standard. If the community decides that the existing standard is not adequate, it can set a different standard that new development in the community must meet. If the standard is higher than the existing standard, there will be a deficiency in the public facilities serving existing development. For example, if the community determines that the standard should be twenty acres of park land per 1000 residents, rather than the fifteen acres existing standard, existing development within the community will have a deficiency of five acres per 1000 residents. Impact fees cannot be used to rectify existing deficiencies. The community, therefore, will need to eliminate the existing deficiency through another financing mechanism.*

d. Based on the identified service areas and service standards, identify new public facilities, or improvements or expansions of existing public facilities that will be required because of land development. Wis. Stat. § 66.0617(4)(a)(2).

*In short:*

*New public facilities = Service Standard x Demand Unit.*

*The demand unit is used to calculate fees in light of demand for public facilities (i.e.--per resident/per household/per bedroom/unit type/etc.) If a residential unit in the community contains 2.5 persons, and the standard for parks is 10 acres per 1000 persons, each new residential unit would generate 0.025 acres of additional parks. (2.5 x (10/1000) = 0.025. While not specified in the statute, the demand unit will often need to be based on demographic information about the municipality. In this case, the needs assessment should identify existing population, dwelling units, employment and business activity and provide projections of future population, dwelling units, employment, and business activity. This information should be tied to the municipality's comprehensive plan.*

*Municipalities should also include a plan for eliminating existing deficiencies and include a schedule for the necessary improvements to meet future needs and existing deficiencies.*

e. Include a detailed estimate of the capital costs of providing the new public facilities or improvements or expansions in existing public facilities. Wis. Stat. § 66.0617(4)(a)(3). Impact fees must be based upon actual capital costs or reasonable estimates of capital costs for new, expanded or improved public facilities. Wis. Stat. § 66.0617(6)(c).

f. The needs assessment should also insure that the impact fees do 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 municipality. Wis. Stat. § 66.0617(6)(b).

*Determining the proportionate share of costs which will be recovered through the use of impact fees can involve some complex calculations. The following are some of the factors that may come into consideration when establishing the proportionate share of capital costs to be borne by new development:*

*(1) The cost of existing capital facilities;*

*(2) The methods by which the existing capital improvements were financed;*

*(3) The extent to which new developments have already contributed to the cost of the existing capital improvements;*

*(4) The extent to which new developments will pay for existing capital improvements in the future through user fees, debt service payments, or other payments toward the cost of existing capital improvements;*

*(5) The extent to which new developments are required to construct and/or dedicate capital improvements as conditions of development or construction approval;*

*(6) Extraordinary costs, if any, in serving the new development; and*

*(7) The time price differentials inherent in fair comparisons of amounts paid at different times. (Banbury Dev. Corp. v. South Jordan City, 631 P.2d 899 (Utah 1981).)*

g. Credits

Impact fees must be reduced to compensate for other capital costs imposed by the municipality with respect to land development to provide or pay for public facilities, such as special assessments, special charges, land dedications or fee in lieu of land dedication or other items of value. Wis. Stat. § 66.0617(6)(d). The law does not prohibit or limit the authority of a municipality to finance public facilities by any other means authorized by law. Wis. Stat. §§ 66.0617(2)(b).

Impact fees must also 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. Wis. Stat. § 66.0617(6)(e).

2. Impact Fee Ordinance

Following completion of the needs assessment, the next step in the impact fee process elaborated in the statute is the enactment of an impact fee ordinance.

a. Procedural Requirements.

(1) Public hearing on the proposed ordinance. Wis. Stat. § 66.0617(3).

(2) Notice of the public hearing must be published as a class 1 notice under Wis. Stat. ch. 985. The notice shall specify where a copy of the proposed ordinance and the public facilities needs assessment may be obtained. Id. The needs assessment must be available for public inspection and copying in the office of the clerk of the municipality at least 20 days before the hearing. Wis. Stat. § 66.0617(4)(b).

b. Refund of Impact Fees

The ordinance must specify that impact fees collected by a municipality but are not used within 7 years after they are collected to pay the capital costs for which they were imposed shall be refunded to the current owner of the property along with any accumulated interest. Subject to this 7 year limit, the ordinance must specify, by type of public facility, reasonable time periods within which impact fees must be spent. Wis. Stat. § 66.0617(9)(a). In determining the length of the time periods, the political subdivision must consider what are appropriate planning and financing periods for the particular types of public facilities for which the impact fees are imposed. Id. The 7 year time limit may be extended for 3 years if the municipality adopts a resolution stating that due to extenuating circumstances or hardship in meeting the 7 year limit, it needs an additional 3 years to use the impact fees that were collected. Wis. Stat. § 66.0617(9)(b).

c. Appeal

The ordinance must specify a procedure for a developer upon whom an impact fee is imposed has the right to contest the amount, collection or use of the impact fee to the governing body of the municipality. Wis. Stat. § 66.0617(10).

d. An impact fee ordinance may also include the following:

(1) Impose different impact fees on different types of land development. Wis. Stat. § 66.0617(5)(a).

(2) Delineate geographically defined zones within the municipality and impose impact fees on land development in a zone that differ from impact fees imposed on land development in other zones within the municipality. Wis. Stat. § 66.0617(5)(b). *The statute further specifies that the public facilities needs assessment must 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.* Id.

(3) Provide for an exemption from, or a reduction in the amount of impact fees on land development that provides low-cost housing. Wis. Stat. § 66.0617(7).

No amount of an impact fee which is exempted or reduced for low-cost housing, however, may be shifted to any other land development in the municipality. Id.

d. Administrative Issues

(1) Impact fees shall be payable by the developer or the property owner to the municipality in full within 14 days of issuance of a building permit or within 14 days of the issuance of an occupancy permit by the municipality. Wis. Stat. § 66.0617(6)(g). Under prior law, the impact fee could be collected before the issuance of a building permit or other required approval.

(2) Revenues from each impact fee that is imposed must be placed in a separate segregated, interest bearing account and shall be accounted for separately from the other funds of the municipality. The fees may only be expended for the particular capital cost for which the fee was imposed. Wis. Stat. § 66.0617(8).

## IV. Some General Court Established Standards For Evaluating Impact Fees

### *A. Rational Nexus Test*

The Wisconsin Supreme Court very early approved the use of exactions against constitutional challenge. In Jordan v. Village of Menomonee Falls, 28 Wis.2d 608, 127 N.W.2d 442 (1966), the court articulated the following basis for upholding a compulsory land dedication requirement in a subdivision ordinance:

> The municipality by approval of a proposed subdivision plat enables the subdivider to profit financially by selling the subdivision lots as home building sites and thus realizing a greater price than could have been obtained if he had sold his property as unplatted lands. In return for this benefit the municipality may require him to dedicate part of his platted land to meet a demand to which the municipality would not have been put but for the influx of people into the community to occupy the subdivision lots. Id. at 448.

At issue in Jordan was a $5000 fee paid by the property owners to the City in lieu of dedicating land as required under the City's subdivision ordinance for parks and schools. The court in Jordan applied a "test of reasonableness" to evaluate the ordinance. The Court rejected a strict interpretation of the standard used by other courts that the exaction be "specifically and uniquely attributable to his activity" by defining a standard of proof that recognizes the cumulative impacts of development:

> In most instances it would be impossible for the municipality to prove that the land required to be dedicated for a park or school site was to meet a need solely attributable to the anticipated influx of people into the community to occupy this particular subdivision. On the other hand, the municipality might well be able to establish that a group of subdivisions approved over a period of several years had been responsible for bringing into the community a considerable number or people making it necessary that the land dedications required of the subdividers be utilized for school, park and recreational purposes for the benefit of such influx. In the absence of contravening evidence, this would establish a reasonable basis for finding that the need for the acquisition was occasioned by the activity of the subdivider. Id. at 447.

The Jordan court's "reasonable connection" standard is viewed as an early case in the development of the "reasonable nexus" test that has developed today as the standard for evaluating the constitutionality of exaction programs.

*B. U.S. Supreme Court Decisions*

1. Nollan v. California Coastal Comm'n

In Nollan v. California Coastal Comm'n, 483 U.S. 825, 107 S.Ct. 3141 (1987), the United States Supreme Court accepted exactions as a valid means of financing infrastructure. The Court in Nollan developed the "nexus" test for evaluating the constitutionality of exactions. Under Nollan, to withstand constitutional muster, the "type" of condition imposed must address the same "type" of impact caused by the new development.

The Nollans owned a small bungalow on the beachfront that they wanted to replace with a larger house. The California Coastal Commission granted the Nollans a permit to build their new house on the condition that the Nollans grant an easement, by deed, for the public to pass across their beach. The required easement was a lateral one that would pass across a portion of their property bounded by the mean high tide on one side and their seawall on the other.

The Commission's stated rationale for the easement was that the new development would increase blockage of the view of the ocean, thus discouraging access, and burdening the public' right to traverse along the shorefront. The new house would prevent the public "psychologically . . . from realizing a stretch of the coastline exists nearby that they have every right to visit." The United States Supreme Court found that the permit condition was a taking in violation of the Fifth Amendment of the U.S. Constitution because it did not substantially further a legitimate state interest. Under Nollan, the key to the validity of an exaction is the nexus between the exaction and the need created by the development.

The Court in Nollan did not address the degree of relatedness between the condition imposed and the impact created by the new development--in other words, does the condition imposed unreasonably exceed the burden or impact created by the new development. The answer to this issue was provided by the Court in Dolan v. City of Tigard.

2. Dolan v. City of Tigard

In Dolan v. City of Tigard, 114 S.Ct. 2309 (1994), the Court determined that the "required degree of connection between the exactions and the projected impact of the proposed development" must be one of "rough proportionality."

In Dolan, the Court cited with approval the "reasonable relationship" test adopted in Jordan and in other states as being closer to the federal constitutional norm than the exacting standard of the"specific and uniquely attributable" test case or the "lax" standard followed in some states where "very generalized statements as to the necessary connection between the required dedication and the proposed development seem to suffice." Under the "specific and uniquely attributable" test, if the local government cannot demonstrate that an exaction is directly

proportional to the specifically created need, the exaction becomes "a veiled exercise of the power of eminent domain and a confiscation of private property behind the defense of police regulations."

The Court in Dolan views the standard in Jordan as an "intermediate position," which requires the local unit of government show a "reasonable relationship" between the required dedication and the impact of the proposed development. The Court, however, did not adopt the term "reasonable relationship" because the Court feared that the term would be confusingly similar to the term "rational basis" which describes the minimal level of scrutiny test which the Court has developed under the Equal Protection Clause of the Fourteenth Amendment. Rather, the Court adopts the term "rough proportionality" to describe the requirement of the Fifth Amendment. The Court notes that "[n]o 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."

At issue in Dolan was the requirement of the City of Tigard, Oregon, that the property owner dedicate as part of the city's greenway system the portion of her property lying within the 100-year floodplain for improvement of a storm water drainage system along a creek which bordered the property. In addition, the city required that the property owner dedicate an additional 15-foot strip of land adjacent to the floodplain as a pedestrian/bicycle pathway.

The Court in Dolan determined that the floodplain easement satisfied the nexus requirement because the proposed development would increase the amount of impervious surface thereby increasing the quantity and rate of storm water flow from the property. The city has a legitimate interest in flood control. The Court's opinion recognizes that it would be acceptable under the circumstances in the case for the city to prohibit the property owner from developing in the floodplain. In the Court's estimation, however, the City went too far because the city wanted to also impose a permanent recreational easement as part of the City's greenway system. According to the Court, this requirement would "eviscerate" her right to exclude others. "The city has never said why a public greenway, as opposed to a private one, was required in the interest of flood control. . . . It is difficult to see why recreational visitors trampling along petitioner's floodplain easement are sufficiently related to the city's legitimate interest in reducing flooding problems . . . and the city has not attempted to make any individualized determination to support this part of its requirement."

With respect to the pedestrian/bicycle pathway, agreed with the nexus between the finding that the city's permitting a larger retail sales facility would increase traffic. The Court, however, did not find that the city had met its burden of demonstrating that the additional traffic generated by the development reasonably related to the city's requirement for a dedication of the pedestrian/bicycle pathway easement. According to the Court, "[n]o precise mathematical calculation is required, but the city must make some effort to quantify its findings in support of the dedication for the pedestrian/bicycle pathway beyond the conclusory statement that it could offset some of the traffic demand generated."