Policy Guide on Impact Fees

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Findings

Impact fees are payments required by local governments of new development for the purpose of providing new or expanded public capital facilities required to serve that development. The fees typically require cash payments in advance of the completion of development, are based on a methodology and calculation derived from the cost of the facility and the nature and size of the development, and are used to finance improvements offsite of, but to the benefit of the development.

Local governments throughout the country are increasingly using impact fees to shift more of the costs of financing public facilities from the general taxpayer to the beneficiaries of those new facilities. As a general matter, impact fees are capitalized into land values, and thus represent an exaction on the incremental value of the land attributable to the higher and better use made possible by the new public facilities. Some commentators have argued that, under certain circumstances, others may instead bear the incidence of the fee (these may include the original landowner, the developer, or the consumer). There has been little to demonstrate that the imposition of a fee system has stifled development. The fees supplement local government resources that otherwise have decreased because of diminished state and federal transfers of funds. Local governments have also used impact fees to delay or as a substitute for general property tax increases.

Impact fees, when based on a comprehensive plan and used in conjunction with a sound capital improvement plan, can be an effective tool for ensuring adequate infrastructure to accommodate growth where and when it is anticipated. It is important that communities rely on zoning and other land use regulations, consistent with a comprehensive plan, to influence patterns of growth and to more accurately predict new infrastructure needs. However, in areas facing development moratoria because of the lack of adequate public facilities, impact fees may be viewed not as growth stopping measures, but rather as growth facilitators. Impact fees should not be considered a panacea for the funding of general capital improvements, nor should they be used to "stop growth." They can do neither.

Local government experimentation with impact fees has been paralleled by increasing state court involvement in the review of these fees. A general trend in the state courts has been to require a "rational nexus" between the fee and the needs created by development and the benefits incurred by the development. This analysis is a moderate position between a standard that requires that the fee be "specifically and uniquely attributable" to the needs created by new development, and the relaxed standard that the fee be "reasonably related" to the needs created by development.

Impact fees have been criticized as being an inequitable means to finance public facilities. By requiring new development to pay for new facilities without benefiting from existing facility capacity, local governments may be bypassing the traditional practice of intergenerational contribution toward public facilities. Some commentators have argued that, when set at high levels, impact fees may also tend to be regressive. Certain public facilities may be considered "public goods" that should be financed by the entire community, such as general government, police, or schools. To the extent that impact fees are paid by those who are most likely to benefit from the public facilities provided therefrom, however, impact fees are equitable.

Many local communities have expanded the use of impact fees to finance a wide variety of public facilities. The most widespread use of these fees is for sewer and water facilities, parks, and roads. Impact fees are also being used for schools, libraries and public facilities. In recent years, rulings at the state court level have defined how impact fees may be applied and utilized. Thus, there are numerous standards and guidelines available to assist local and regional governmental agencies on the planning processes that must be undertaken to develop a legally defensible impact fee program. Approximately half the states have enacted enabling legislation for impact fees, some of which have specifically included language that governs how these programs are to be implemented. To be most effective and legally valid, impact fees must be carefully designed and documented.

Policy Guide

POLICY 1. APA National and Chapters support state enabling legislation that establishes clear and concise standards for the adoption and use of impact fees consistent with this policy.

Reasons to Support #1
Since there is substantial case law on impact fees around the country, the courts have been specific in developing the criteria for an equitable and legally defensible impact fee system. By encouraging enabling legislation that delineates these standards, state, regional and local government will be required to follow the planning process needed to develop the proper methodology for calculating fees that are valid and well documented. While following these standards will not eliminate costly litigation challenging the fees, it places a greater burden of proof on the party challenging the imposition of the fee. Further elaboration on specific issues can be found in the following policies and a list of applicable standards are appended to this Policy Guide.

POLICY 2. APA National and Chapters encourage consideration of the use of impact fees as a means to provide additional resources for an adequate public infrastructure and services only as they relate to the needs of new development.

Reasons to Support #2
Given the diminishing level of support for infrastructure improvements from state and local governments, coupled with the significant costs involved, regional and local governments are limited in where they can turn to secure funding for new infrastructure projects to accommodate new growth. Moreover, since impact fees cannot be used to cover the staggering costs of maintaining and repairing the existing infrastructure, they can augment resources available for new infrastructure necessary to accommodate new growth, for which general revenue funding must be made available.

POLICY 3. APA National and Chapters support the use of impact fees as a standardized method for ensuring that new development pays its fair share of the cost of public infrastructure.

Reasons to Support #3
While the development community has yet to rally behind the concept of impact fees, it seeks predictability and consistency in the permitting and approval process. When local governments attempt to obtain off-site improvements that do not relate to the impacts of a specific development, a system of negotiating exactions with developers is created that has no "rational nexus" because it is not based upon a sound planning process. Impact fee programs designed as described in this Policy Guide must be based on a planning process for capital improvements to ensure that the infrastructure needs of new development are met. This lends credibility to the planning process.

POLICY 4. APA National and Chapters encourage the use of impact fees to pay for facilities where a rational nexus can be established.

Reasons to Support #4
Impact fees should only be utilized when a connection can be made between the impact of new development and the need for new infrastructure to accommodate that development. Proper planning and analysis can demonstrate the nexus between future build-out and the capital needs to support that growth.

POLICY 5. APA National and Chapters believe that impact fees should be used in the context of community-wide plans and programs for financing public facilities and services, and ensure the adequacy of public facilities to serve future development.

Reasons to Support #5
New development should not be responsible for financing an inordinate share of the expense of the future facilities and services needed by the municipality. Community-wide capital improvement planning is necessary in order to properly plan for required improvements and long-term maintenance. This type of planning process should be a pre-requisite to the imposition of impact fees to ensure that fees from new development are not used to finance improvements that are legitimately in the purview of the local government and will benefit the community-at-large.

POLICY 6. APA National and Chapters oppose requiring voter approval to establish fees for mitigation of impacts on public facilities and services where such fees are imposed pursuant to a legislatively approved program in compliance with APA standards for the adoption and use of impact fees.

Reasons to Support #6
If an impact fee program has been adopted and implemented in a manner that is consistent with this Policy Guide, and has already been approved as a matter of law, such programs can be subverted by requiring voter approval. In addition to being administratively cumbersome, it raises constitutional issues of fairness and equal protection. This issue has been raised in several states.

POLICY 7. APA National and Chapters support continued dialogue between local planning agencies, the general public, and the development community to discuss the public costs associated with new development, reaching an understanding on the calculation of such costs, and establishing alternative means for financing these costs, including the use of impact fees.

Reasons to Support #7
APA should continue its training and educational efforts on impact fees and capital improvement planning in order to build a better body of knowledge about the planning, economic, and legal implications of the varying methods of financing major infrastructure improvements.

POLICY 8. As a framework for imposing fees, local jurisdictions are encouraged to develop, adopt, and implement capital improvement programs consistent with an adopted comprehensive plan with consideration given to other funding alternatives.

Reasons to Support #8
Only a capital improvement plan can provide a comprehensive summary of the capital requirements of the jurisdiction. Impact fees will only be able to finance a percentage of those needs. The plan is necessary in order to prioritize expenditures and should relate them to the source of funding.

Impact Fee Standards

- The imposition of a fee must be rationally linked (the "rational nexus") to an impact created by a particular development and the demonstrated need for related capital improvements pursuant to a capital improvement plan and program.
- Some benefit must accrue to the development as a result of the payment of a fee.
- The amount of the fee must be a proportionate fair share of the costs of the improvements made necessary by the development and must not exceed the cost of the improvements.

- A fee cannot be imposed to address existing deficiencies except where they are exacerbated by new development.
- Funds received under such a program must be segregated from the general fund and used solely for the purposes for which the fee is established.
- The fees collected must be encumbered or expended within a reasonable timeframe to ensure that needed improvements are implemented.
- The fee assessed cannot exceed the cost of the improvements, and credits must be given for outside funding sources (such as federal and state grants, developer initiated improvements for impacts related to new development, etc.) and local tax payments which fund capital improvements, for example.
- The fee cannot be used to cover normal operation and maintenance or personnel costs, but must be used for capital improvements, or under some linkage programs, affordable housing, job training, child care, etc.
- The fee established for specific capital improvements should be reviewed at least every two years to determine whether an adjustment is required, and similarly the capital improvement plan and budget should be reviewed at least every 5 to 8 years.
- Provisions must be included in the ordinance to permit refunds for projects that are not constructed, since no impact will have manifested.
- Impact fee payments are typically required to be made as a condition of approval of the development, either at the time the building or occupancy permit is issued.