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## Wisconsin's New Impact Fee Law

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Cities, villages, towns and counties in Wisconsin have a new tool to assist them in addressing the impacts of new development on the fiscal health of the community. With the passage of 1993 Wisconsin Act 305 in 1994, Wisconsin became one of a growing number of states to pass enabling legislation for impact fees. Beginning on May 1, 1995, a local government seeking to use impact fees must comply with the requirements of the new law which is codified at section 66.55 of the Wisconsin Statutes. Impact fees are financial obligations imposed on a developer by a local government as a condition of development approval.

The concept that new development should pay its own way is not new to Wisconsin. Local governments in Wisconsin have traditionally used such techniques as dedication of land for parks and streets or fees in lieu of dedication under the subdivision process to require that new development contribute a larger share of the costs of public improvements which are made necessary by the new development. However, impact fees are a much more flexible and sophisticated approach to private funding of public infrastructure than previously available methods. For example, unlike dedication and fees in lieu which apply only to residential subdivisions, impact fees can be applied to all types of new development. Also, impact fees can finance *off-site* improvements, whereas dedications, fees in lieu, and special assessments are typically limited to funding on-site improvements.

The new law is noteworthy for several reasons. First, the new law clarifies the authority of local governments to use impact fees to finance highways and other transportation facilities, sewage treatment facilities, storm and surface water handling facilities, water facilities, parks and other recreational facilities, solid waste and recycling facilities, fire and police facilities, emergency medical facilities, and libraries.

Historically, local governments in Wisconsin have been reluctant to use impact fees for such a comprehensive list of public facilities. In addition, the law provides that a portion of the impact fees may cover related legal, engineering, and design costs. On the other hand, the new law forbids the use of impact fees to finance facilities owned by a school district.

Second, the new law allows *counties* to have a more direct role in the development process, regardless of where new development occurs in a county. Counties can use the new law to require that new development which is occurring within a city, village, or town, pays for the impacts that it has on the need for new county facilities, such as parks and roads. Counties have not had an effective mechanism for recovering these costs directly from new development in the past. Unlike cities, villages, and towns, counties do not have authority to impose special assessments and have limited ability to use dedications and fees in lieu under the subdivision process. Now, counties can establish an impact fee program. Indeed, it is easy to envision circumstances when it might make most sense to enact impact fees at the county level rather than at the local level. Often public facilities within one community need to be expanded because of new development occurring in another community. The ability of counties to enact impact fees to pay for new county facilities required by new growth makes it possible, for the first time, to take account of growth impacts on communities beyond the boundaries of the community where development is occurring -- and in so doing to take a more regional approach to growth management.

To be in a position to enact an impact fee ordinance, a local government must first prepare a needs assessment for public facilities the local government anticipates financing with impact fees. The critical importance of preparing a needs assessment is highlighted by recent

decisions of the United States Supreme Court. In *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S.Ct. 3141 (1987), the Court ruled that the "type" of condition imposed must address the same "type" of impact caused by the new development. Moreover, in *Dolan v. City of Tigard*, 114 S.Ct. 2309 (1994), the Court ruled that any condition imposed by a local government, such as a fee, must bear a "rough proportionality" to the impact created by the new development. In other words, the fee cannot unreasonably exceed the burden or impact created by the new development. Similar standards were articulated by the Wisconsin Supreme Court many years ago in *Jordan v. Village of Menomonee Falls*, 28 Wis.2d 608, 127 N.W.2d 442 (1966).

As these court rulings indicate, local governments bear the burden of proving that the need for additional facilities (that they propose to meet with impact fees) results from new development, and not from deficiencies related to existing development. It is therefore essential, prior to adopting an impact fee ordinance, to prepare a *needs assessment*, which inventories existing public facilities and identifies existing deficiencies in the quantity or quality of those public facilities. (Since impact fees cannot be used to address existing deficiencies in public facilities, other means of financing, such as special assessments, will need to be used to correct such deficiencies.) The needs assessment must identify the level of service for public facilities within the local government. Examining service levels in light of growth projections will enable a local government to identify additional public facilities which will be required because of new development. Finally, the assessment must include a detailed estimate of the capital costs of providing the additional public facilities. This figure provides the basis for establishing the actual fee, and ensures that the fee does not exceed the proportionate share of the capital costs required to serve new development.

An important aspect of the new impact fee law is that it allows a local government to impose different impact fees on different types of land development and on different geographically defined zones within the political subdivision. This enables local governments to use impact fees in a coordinated fashion, consistent with other public

policy objectives. For example, the law expressly allows a community to provide for an exemption from, or a reduction in, the amount of impact fees on land development that provides low-cost housing. Similarly, a community could decide that preservation of its central business district was a critical priority. With the proper justification in the needs assessment, the community could decide not to charge impact fees in the central business district, while charging them in other areas.

Wisconsin's new impact fee law contains additional requirements that local governments need to be aware of when adopting an impact fee ordinance. For example, impact fee ordinances must specify reasonable time periods within which impact fees will be spent. If the impact fees are not expended within this time frame, they must be refunded to the current owner of the property. The ordinance must also specify a procedure for a developer to contest the amount, collection or use of the impact fee charged by the governing body. Finally, the law requires that local governments provide credits for money received from other sources to ensure that double funding of facilities does not occur. Impact fees must be reduced by the amount of any federal or state money a local government receives for the public facilities for which the impact fees are imposed. Impact fees must also be reduced by the amount of any special assessments, special charges, required land dedications or fees in lieu that a developer is required to pay. However, the law does not prevent local government from financing public facilities by any other means authorized by law.

Communities that hope to have the legality of their impact fees upheld in court have a strong incentive to plan, and to prepare a sound assessment of the need for capital improvements related to anticipated future development. The better the planning, and the greater the adherence to established capital improvements plans and services standards, the easier it will be for an impact fee program to withstand a legal challenge.

(Edited by G.B.)

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