Impact Fees and Michigan - Social and Legal Issues

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1. Introduction

In order for a modern city to function, it requires infrastructure and some level of government services. Basic infrastructure for a residential dwelling unit includes running water, sewage treatment, electricity, gas, telephone, cable television service, stormwater drainage, and roads. Public facilities and government services include police and fire services, schools, libraries, museums, parks and recreation facilities, hospitals, Emergency Medical Services, and public transportation. Most households use infrastructure such as roads, water treatment systems, sewer treatment services, electricity, gas, cable television services, and telephone services on a daily basis. Other services such as fire and police protection, hospitals, and parks are available to the general public as the need arises.

Most people enjoy the availability of these services, but their provision can become quite expensive. A water and sewer system requires an extensive system of pipes and plants to not only pump the water but to ensure that sewer water does not contaminate the clean water. Roads require engineering, construction, and long-term maintenance. Policemen and firemen require specialized vehicles and equipment to do their jobs effectively. None of this is without cost, and these services require some method of financing. Impact fees are a relatively new method for financing capital improvements and providing government services. This paper explores the evolution of impact fees, the socioeconomic issues related to impact fees, and the legal issues that have been addressed by various state courts; and it will examine Michigan's proposed traffic impact fee enabling legislation.

2. Evolution of Impact Fees

Impact fees are an outgrowth of the power of a local government to regulate the use of land and the subdividing of land for development. Prior to

1928, the purpose of subdividing land was to create a uniform method of legally describing the perimeters of each parcel. The land was subdivided into blocks and numbered lots. This method significantly shortened the legal description of each lot, making it easier to sell the land and collect taxes on it. It was considered a privilege for a developer to record a subdivision plat. In exchange for this privilege, the developer would dedicate its own land for roads and other improvements. Dedications were only made in exchange for the privilege of development.

When the Standard City Planning Enabling Act was published by the Department of Commerce in 1928, the model legislation included provisions which allowed municipalities to impose exactions on developers for on-site improvements. Local governments and courts began to recognize that conditions could be imposed on developers through subdivision regulations under the general police powers. Dedications were then made not so much for the privilege of recording a subdivision plat, but because the dedications were now mandatory (Callies, Freilich, and Roberts 1994).

The Court of Appeals of New York upheld the right of municipalities to require on-site improvements in the case of *Brous v. Smith* (1952). In this particular case, the developer wanted to build six single-family homes. He asked the Building and Zoning Inspector for the necessary building permits, but the inspector would not grant the permits unless the developer constructed access roads to the proposed structures or posted a performance bond that would guarantee that such roads would be built. The local ordinance required the access roads to be built as a condition for receiving the building permits. It was argued that this law was a violation of Section 7, Article I of the New York State Constitution (the eminent domain clause in the NY Constitution) because it required the developer to build public roads on his own land without just

compensation from the Town. The court ruled that such laws did not "deprive an owner unreasonably of his property if the statue is properly administered in accordance with its terms." The court also stated that the any public improvements that were required of a developer need to be specifically listed in the ordinance (Callies, Freilich, and Roberts 1994).

In the case of *Blevens v. City of Manchester* (1961), the court stated, "Since the subdivider of land creates the need for local improvements which are of special benefit to the subdivision, it is considered reasonable the he should bear the cost rather than the municipality and the general taxpayer." This was an early case examining the legitimacy of requiring developers to pay for on-site infrastructure (Mandelker 1993).

Currently, it is rather common for municipalities to have subdivision ordinances that require developers to complete the basic infrastructure and other on-site improvements. For example, the East Lansing Subdivision Ordinance details what public improvements need to be made and how they will be paid for. The basic public improvements that are required in East Lansing are:

1. Public Water System - includes supply lines, valves, and fire hydrants
2. Sanitary Sewer System - the size and grade is determined by the City Engineering Department
3. Storm Sewer Drainage System - includes storm sewers, drain inlets, manholes, and culverts
4. Roads - includes curbs and gutters, street islands, street trees and street lights. Minimum width of the road is determined by the type of road and expected volume of traffic.
5. Sidewalks and Walkways

Other utilities such as electric lines and telephone lines often need to be placed underground. It is the responsibility of the developer to ensure that these

services are provided. The East Lansing Subdivision Ordinance has four different methods of making sure developers will pay for the infrastructure requirements. The four methods are: Completion Bond, Escrow Fund, Irrevocable Bank Letter of Credit, or Contractual Arrangements. A Completion bond (or surety bond) is deposited with the City Treasurer for the cost of the required improvements based on the City Engineer's calculations. Along with this bond is a timetable which dictates when the improvements will be made. A surety bond is purchased by the developer from a commercial bonding company. It is similar to a bail bond where the bonding company takes a risk by issuing the bond to a developer. The ordinance does have a provision that reduces the amount of the bond as the infrastructure is completed.

An escrow fund is basically a cash deposit or certified check rather than a completion bond. This method is rarely used. If it is used, it is for very small developments, or it may be used in conjunction with several other types of payments.

An irrevocable bank letter of credit is issued by a financial institution and deposited with the City Treasurer. The value is also based on the cost of the required improvements.

In the last method mentioned in the ordinance, the developer and City can make a contractual agreement on when and how infrastructure will be completed and paid for. If the developer does not complete the required public infrastructure, then the City will complete the infrastructure by withdrawing funds from the various deposits that were made with the City Treasurer. All funds deposited are specifically earmarked and do not go into the general fund. Also, depending on the type of subdivision development, the City of East Lansing can impose more conditions to ensure that the subdivision receives an appropriate amount of services (East Lansing Subdivision Regulations 1995).

Most state courts have upheld the right of municipalities to require developers to provide on-site improvements in a subdivision, based on the legitimate exercise of the police powers to promote the health and safety of the municipality. However, what is different about impact fees is that they require developers to finance off-site infrastructure improvements.

During the 1950's, long-term general obligation bonds and state and federal grants financed about half of the capital improvement funds for most municipalities with the other half paid for by taxes and special assessments. State and federal funding was eventually reduced, but communities continued to grow. During the 1960s, taxpayer revolts became more common, as many people did not want tax money to fund public facilities for new development. All the while communities were still growing and needed a means to finance public services for new developments. Impact fees almost became a political necessity to offset the costs of new improvements (Frank 1988).

In order to finance new developments, municipalities may require some form of exaction. Exactions come in four basic forms: Mandatory dedications, fees-in-lieu of land dedications, water or sewer connection fees, and finally impact fees. Impact fees are a one-time assessment to a new development to recover the cost of capital improvements and government services required to service that development. An impact fee is further defined as a type of exaction which is:

1. a predetermined money payment based on a formula that is applied to all new developments;
2. it is assessed as a condition to a building permit, occupancy permit, or plat approval;
3. it is a means of regulating new growth and providing facilities for the new growth;

4. it is levied to fund large-scale, off-site public facilities and government services necessary to serve the new development; and

5. it is an amount that is collected that is proportionate to the demand for the public facilities generated by the new development;

Impact fees are different from taxes. Taxes are used to raise revenue for running and operating a government, and the authority to tax is found in the state constitution. The ability to levy any type of fee comes from the community police power to regulate the community for the public's health, safety, and general welfare. An impact fee can legally be charged to compensate for services rendered, but a fee bearing no relation to the services which merely enhances the general fund is not legal.

Impact fees are different from special assessments because the latter are fees levied against existing developments while the former are levied only against new developments. If a neighborhood that has existed for twenty years without water or sewer services (utilizing water wells and septic tanks), and the city finally extends water and sewer services to the community, a special assessment can be levied against the existing homes. However, the two are similar in that both forms collect fees for capital improvements from those who directly benefit.

Impact fees are different from fees-in-lieu of land dedications. Fees-in-lieu of land dedications are collected by a municipality when the land dedications may not be sufficient to meet the needs of the community. Fees-in-lieu, for example, can be pooled from various developments to pay for a school that all new developments would use. Each new development dedicating land for the new school in a slightly different area would not work. The land dedications or fees-in-lieu are also based on the overall size of the development. Impact fees are collected based on a preset formula on a per unit basis.

Impact fees also differ from user fees because user fees can be collected more than once, often on a monthly or yearly basis. An impact fee is only collected at one point in time (Blaesser and Kentopp 1990).

However, impact fees, user fees, land dedications, fees-in-lieu of land dedications, and special assessments are used somewhat interchangeably as the courts view all of them the same way. In order for a municipality to use any of these, it must show that the property or fee being collected is related to the proposed improvements. Whether a municipality requires a developer to pay an impact fee or dedicate land, the requirement must meet a rational nexus test that the impact fee or dedication will directly alleviate the extent and type of burden created for the existing community (Stroud 1988).

3. Socioeconomic Issues Related to Impact Fees

Aside from the many legal issues surrounding impact fees (which are addressed in the next section), there are several socioeconomic and political issues related to impact fees. These issues include determining who actually pays the impact fees, the effect of impact fees on the cost of affordable housing, and the political consequences of raising property taxes instead of using impact fees.

When a community assesses impact fees on new developments, there are three potential groups that will actually pay the fee: the original landowner, the developer, or the consumer. It is generally assumed that the developer will pass impact fees "forward" to the consumer by charging the customer more for a house. The consumer pays through higher prices, lower house quality, or both. Impact fees are sometimes passed "backwards" to the landowner. In this case, the developer knows that they have to pay impact fees, and so the developer will want to pay a lower price for the undeveloped land to compensate for the impact

fees. It is also possible that the developer will pay for the impact fees by collecting a smaller profit from the development project.

Market conditions determine who pays. In theory, developers will not absorb the costs of impact fees. A consumer will not (according to economic theory) pay more money for a house if a close substitute can be found nearby for less money. This may happen when one community is charging impact fees and a nearby community is not. The homes in the community without the impact fees will be building either similar houses for lower prices or better quality houses for the same price. In this type of market, the developer will either have to absorb the impact fees in terms of lower profit or pass the costs backwards to the landowner or develop in the other community (White 1990).

In communities that impose an impact fee ordinance, developers will first try to purchase undeveloped land for a lower price. If high fees cause housing prices to become prohibitively expensive, and landowners do not wish to sell at lower prices, however, then new development will not occur. The demand for housing in a nearby no-fee community will increase, forcing prices of homes there to rise to the point where the close substitute housing costs as much as the new housing (Huffman, et al. 1988).

In certain markets where impact fees are high, developers will only cater to development for higher income groups of people that are more insensitive to changes in the market price of a home. Developers can pass the costs along to the consumer where the demand is high enough. In situations where the demand is not high enough for the developer to pass the impact fees along to the consumer, then the developer must either bear the cost of the impact fee or postpone development until demand is high enough for them to pass the impact fees along to the consumer. This means that impact fees create two problems for affordable housing development. The impact fee itself can add $2,000-

10,000 onto the cost of a home. Impact fees in California in the early 1980s ranged from $4,400-6,100, and by the mid-1980s costs went up to $7,000-10,000. These fees are not correlated to the size of the house or lot since each house requires about the same amount of infrastructure and services regardless of the house or lot size. The first problem is that impact fees make affordable housing less affordable. Furthermore, impact fees can create economic incentives for developers to only cater to higher income groups of people that are relatively insensitive to the change in market price. The secondary effect of impact fees is that the developers may respond to high impact fees by constructing housing types for which the impact fee is a smaller percentage of the total price of the house.

Some people argue that impact fees are exclusionary in nature. Some have gone so far as to say that planners who use impact fees are building "the City Selfish" (Connerly 1988). Some have argued that impact fees can be used the same way large lot zoning can be used to exclude certain economic groups from a community. The impact fees reflect the cost of providing services to a home. The impact fees do not in any way reflect the value of the home as the property tax does. If the costs of new homes continue to rise because of impact fees, then the price of existing homes that are close substitutes will also rise. This gives existing home owners a potential windfall while placing a heavy financial burden on those seeking affordable housing (Nelson, ed. 1988).

Impact fees force lower-income households to pay a higher percentage of their income for impact fees especially when mortgages are involved. Each $1,000 of impact fees added onto the cost of a house with a 30-year mortgage at a 10% interest rate would add about $105 to the yearly mortgage bill. So a $5,000 impact fee added onto the cost of a house with a 30-year mortgage at a 10% interest rate would add about $525 to the yearly mortgage bill. In

comparison, a $1,000 increase in the value of a home with a property tax rate of 20 mils would only add on $20 to the yearly property tax bill, and an increase in value of $5,000 would add $100 to the property tax bill.

The average size of a city in Michigan is approximately 20,000 people. Assuming a 5% annual growth rate and an average household size of four people, an average community would need to construct 250 new housing units for the next year [(20,000*.05)/4]. If each new housing unit costs the local government $5,000, the city would need to raise $1.25 million for this new development (250*5000). The existing 5,000 households would need to pay out $250 per household to finance the new development. If all 5,000 households lived in homes worth $100,000, the property tax rate would need to be increased by 2.5 mils to finance the new development

With impact fees, each new household would have to pay the $5,000. As mentioned earlier, based on a 30-year mortgage at 10% interest rate, this extra $5,000 would add $525 to the yearly mortgage bill. In an average community in Michigan either current residents would experience an increase of 2.5 mils and pay an additional $250 per household (this would occur every year if the growth rate remains at 5%), or new residents would pay nearly twice that amount in mortgage bills for the next thirty years in addition to the yearly property tax bill. The house would be more valuable, but the yearly costs for financing a home with impact may increase to the point where the homes become less affordable.

An exemption for affordable housing either in the local impact fee ordinance or the enabling legislation could alleviate some of these problems caused by impact fees for affordable housing. Vermont is the only state with enabling legislation that expressly allows municipalities to exempt affordable housing from impact fees. The Vermont impact fee enabling legislation (1989) states:

> A municipality may exempt certain types of development from any part or all of the impact fee assessed, provided that the exemption achieves other policies or objectives clearly stated in the municipal plan. The policies or objectives may include, but are not limited to, the provision of affordable housing and the retention of existing employment or the generation of new employment. (Vt. Stat. Ann. 24:5200-5205 Supp. 1989)

This exemption is not exclusively for affordable housing because exemptions can also be made to promote economic development or other objectives that are listed in the comprehensive plan (White 1990).

Once exemptions are made, funds to address the revenue shortfalls from the exemptions for the impact fees need to be found elsewhere. Funding could come from the local general fund, but this is rare in cities trying to tighten up budgets. In some communities increasing the property taxes slightly to pay for these foregone impact fees is politically possible, but in other communities it is not (Connerly 1988). In rapidly growing communities, the taxes would need to be raised to such an extent that it would not be politically possible and impact fees may be the only alternative to raise the necessary revenue.

Another alternative is to tell developers that there can be no new development until the city has the money to pay for the infrastructure. While this may induce development to bear some of the cost, the high cost of infrastructure will deter developers from going forward in most cases.

Another alternative is for developers to go case by case, negotiating dedications or fees-in-lieu of land dedications. One reason developers do not oppose impact fees more vehemently is because impact fees allow the developers and city governments to side-step a potential political land mine of being perceived to increase taxes on everyone else in a community. If the proposed development is large, and this would require considerable tax dollars,

people may become hostile toward allowing this developer to doing business in their community. Furthermore, developers may themselves prefer a pre-set formula of impact fees so that they can calculate how much their development will have to pay in impact fees before they even propose the development. Impact fees can be reasonable and predictable. The developer can figure it out while the development is still on their drawing board rather than proposing the development to the municipality and haggling over fees and land dedications. When impact fees are used, developers would want the money to quickly and efficiently benefit their projects for their buyers. It may be possible to sell the idea of impact fees to developers based on their predictability. This way each development can pay their fair share of costs associated with their development without being burdened by inefficiencies of the current system and being asked to make up for those in a negotiation (Porter 1988).

4. Legal Issues

As mentioned earlier, municipalities can require developers to provide on-site improvements for their projects. As municipalities began to levy impact fees on developers, two basic legal challenges arose. First, developers may argue that the municipality does not have the legal authority to collect impact fees. Second, developers may argue that the impact fee is not really a fee but an invalid tax (Vollman 1988).

Once a municipality has the authority to assess impact fees, the courts examine a number of issues to determine if the fee is reasonable. If the fee is not reasonable, improperly used, or excessive, then the courts will rule that the fee is an invalid tax. Reasonableness depends on whether a need exists for new facilities and services, the amount collected, the benefits the new development will receive from the improvements, the time between when the fee was collected and when the facilities are built, the spatial distance between the

new development and the improvements being made, and finally whether the impact fees were earmarked for the specific type of improvement for which they were collected (Leitner and Schoettle 1993).

The more closely the fees are tied to the provision of the service, the better chance it will be accepted by the courts. The amount collected should be roughly equal to or less than the cost of the new facilities, and the new development needs to be the primary beneficiary of the improvements. The fees need to be spent within a reasonable time frame (generally 5 years). If the improvements are made too far away from the new development, then it is difficult to justify the improvements in terms of the benefit to the new development. Finally, the impact fees need to be earmarked for the specific improvements for which they were collected. A water impact fee, for instance, cannot be used to improve the sewer system; water impact fees need to be spent on the water system. There must be a nexus between the burden created by the new development and the how the impact fees will directly alleviate that burden (Nicholas and Nelson 1988).

4.1 Federal Case Law

In the case of *Nollan v. California Coastal Commission,* 1988, the United States Supreme Court created and defined the "rational nexus" test that must be met for land dedications.

The Nollans owned a small bungalow they wanted to demolish to create room to build a two-story house. They applied for a building permit, but the California Coastal Commission claimed the new home would obstruct the view of the beach from the road. In an attempt to extract compensation for this visual obstruction, the commission required the Nollans to dedicate a lateral stretch of land along the beach on the other side of the house from the road. The

proposed dedication would not improve the view of the beach from the road as the lateral easement would only benefit people already on the beach.

The Supreme Court analyzed the relationship between the proposed dedication and the reasoning behind it. The Supreme Court ruled in favor of the Nollans because the land dedication did not alleviate the problem of decreased visual access to the beach. With this decision, the Supreme Court set a precedent that a land dedication or exaction needs to directly alleviate problems a new development will cause (Nelson, ed. 1988).

This rational nexus test was further expanded upon by the Supreme Court in the case of *Dolan v. City of Tigard* (1994). Florence Dolan wanted to demolish her 9,700-sq. ft. electric and plumbing store and construct a new 17,600-sq. ft. store. In order to receive the building permit, Ms. Dolan had to dedicate a 15 foot easement strip within the 100 year floodplain to increase drainage, and an 8 foot easement for a pedestrian/bike path to provide alternative means of transportation to Ms. Dolan's business. The Supreme Court ruled that both requirements advanced legitimate public purposes and met the rational nexus test that was created in the Nollan case. However, the Court then stated that the City of Tigard had to meet the "rough proportionality" test. If the nexus test is met, then the next step is to examine the degree of connection between the required dedication and the impact of the proposed development. The burden was placed on the City to demonstrate that the exactions would alleviate the extent and types of problems caused by the expansion of Ms. Dolan's business. The Supreme Court ruled that this rough proportionality test was not met by the City of Tigard.

Both cases only dealt with the issue of land exactions. If interpreted and applied narrowly to only land dedication or exaction cases, then it is possible that neither Nollan nor Dolan would be applicable to impact fees. Furthermore, in

both cases, neither the Nollans nor Ms. Dolan were offered the option of paying a fee. With most impact fee ordinances, the fee is the preferred method of payment; however, most ordinances do allow the developer to dedicate land instead of paying some or all of the impact fee.

If both cases are applied more broadly, then impact fees and land dedications cannot simply be collected because a burden is being created. Once it is determined that a new development will create a burden on the community, the impact fees and land dedications cannot be used to merely compensate the community for the burden. Impact fees, once collected, need to be used to directly alleviate both the extent and specific types of problems that the new development has created in the community (Freilich and Bushek 1995).

The concepts that underlie the rational nexus test and the rough proportionality test are not new. Before *Nollan* or *Dolan*, state courts were applying these concepts to land exaction cases. When communities in Florida began to use impact fees as an alternative means of financing infrastructure, the Florida courts applied the concepts of the rational nexus test and the rough proportionality test to impact fees to determine if the impact fees were excessive (Freilich and Bushek).

4.2 Utilization of Impact Fees in Florida

Communities in the State of Florida pioneered the use of impact fees in the late 1970s and early 1980s, and the Florida courts have determined how impact fees themselves can be used to alleviate problems created by new developments. The population of Florida nearly doubled between 1970 and 1990. In 1970, Florida had approximately 6.8 million people, but by 1990, this had grown to 12.9 million. This rapid growth over the last two decades has compelled Florida to take action to ensure new residents could be provided with the necessary services (Austin 1992). In 1985, the Florida State Legislature

enacted the Growth Management Act. The most fundamental element of this legislation is the state's "concurrency requirement." The legislation states, "It is the intent of the Legislature that the public facilities and services needed to support development shall be available concurrent with the impacts of development" (Austin 1992). The concurrency requirement stipulates that a private development project cannot be approved unless the infrastructure is in place by the time the project is completed. No plan or development will be approved unless the infrastructure and facilities will be provided simultaneously with the impacts of development (Cloutier 1992).

Since costs of new development are passed along in a large part to the new residents, they have demanded greater information about what they were purchasing. "Concurrency will force us [the engineers] to have a much better grasp of the development process...it also requires an engineer to be less of a technocrat and to be more proactive in educating people about the technical sciences," says Timothy Jackson, Orlando transportation engineer (Austin 1992).

Florida's Growth Management Act of 1985 (GMA) does not give municipalities the express authority to implement impact fees. The GMA requires that the development and necessary infrastructure be built at the same time, but it does not state how this concurrency requirement is to be met. However, the courts in Florida upheld the use of impact fees prior to the adoption of the GMA. This means that the impact fees can be used to meet the concurrency requirement of the GMA.

In the case of *Contractors and Builders Association of Pinellas County v. City of Dunedin* (1976), the plaintiff, Contractors and Builders Association of Pinellas County, argued that the defendant, the City of Dunedin, had imposed an illegal tax by requiring the payment of water and sewer connection fees. The Florida Supreme Court stated that an impact fee that shifted the burden of the

costs of new infrastructure from current residents to the new residents is not a tax. An appropriate nexus was created between the fee charged and the costs of the new capital facilities that were necessary to serve the new development. If a private company were to charge the same rates, then the Builders Association could not claim that the private companies were trying to collect a tax: "The cost of new facilities should be borne by new users to the extent new use requires new facilities, but only to that extent."

The court invalidated Dunedin's ordinance because the city did not properly earmark the funds raised by its fees; however, the court stated the city could adopt another sewer connection charge ordinance as long as there were appropriate restrictions on how and when the money was to be spent. Impact fees by themselves were ruled to be valid, so long as the funds collected were properly designated (Nelson, ed. 1988).

In the case of *Hollywood, Inc. v. Broward County* (1983), the plaintiff, Hollywood, Inc., was seeking a refund of a fee that it paid to Broward County for parks and recreation space. The plaintiff had been given the choice of dedicating land or paying a fee, so the plaintiff chose to pay the fee. The land dedication or fee was required as a condition of plat approval. The court recognized that counties derived their powers from the state, and the Florida State Constitution says that counties have "vested broad home rule powers in charter counties such as Broward County." Based on this, the court found that counties were empowered to collect such fees; furthermore, the court did not find anything in the Broward County Charter that would prohibit the county from requiring such dedications or fees.

The court then had to rule on whether or not the required dedication was a taking without just compensation and whether or not the ordinance was

exacting an illegal tax. The court ruled that dedication requirements and fees are valid under the general police power. The court reasoned that

> the subdivider realizes a profit from governmental approval of a subdivision since his land is rendered more valuable by the fact of subdivision, and in return for this benefit the city may require him to dedicate a portion of his land for park purposes whenever the influx of new residents will increase the need for park and recreational facilities. Such exactions have been compared to admittedly valid zoning regulations such as minimum lot size and setback requirements.

The court then cited the precedent of *Contractors and Builders Association of Pinellas County v. City of Dunedin* in which fees exacted from developers for improvements to water and sewage systems were ruled not to be illegal taxes. The court stated that dedications and impact fees are valid as long as

> they offset needs sufficiently attributable to the subdivision and so long as the funds collected are sufficiently earmarked for the substantial benefit of the subdivision residents. In order to satisfy these requirements, the local government must demonstrate a reasonable connection, or rational nexus, between the need for additional capital facilities and the growth in population generated by the subdivision. In addition, the government must show a reasonable connection, or rational nexus, between the expenditures of the funds collected and the benefits accruing to the subdivision.

Broward County was judged to have demonstrated a need for more park space as a result of the new development. Broward County was also able to demonstrate that the funds collected were spent in such a way so that the

subdivision was the primary beneficiary, and that its ordinance adequately earmarked the funds.

Finally, the court felt it necessary to rule that parks and recreation space were vital to the health and general welfare of the community. In the case of *Berg Development Co. v. City of Missoun* (1980), the lower court ruled that dedications and fees could be collected for water and sewer improvements under the police powers, but park and recreation space could not because they were not important to the public safety and health of a community. In *Hollywood, Inc.,* the Florida court stated that open spaces, green parks, and recreation areas were

> vital to a community's mental and physical well-being. As such, the ability to regulate subdivision development in order to ensure the adequate provision of parks and recreational facilities is a matter that falls squarely within the state's police powers to provide for the health, safety, and welfare of the community. (Nelson, ed. 1988)

As a result of the many cases regarding impact fees, the law on impact fees in Florida is fairly well developed. Developers in Florida generally do not want enabling legislation for impact fees because they fear that the legislation will add even more requirements. Municipalities also do not want impact fee enabling legislation because it could undo some of the case law and give developers more technical legal points to argue.

Local governments in Utah were also adopting impact fee ordinances in the early 1980s. Utah also did not have enabling legislation for impact fees, and the courts in Utah had to decide to what degree and extent the impact fee ordinances were reasonable. Utah's Banberry case listed several detailed factors to help local municipalities in Utah meet standards that the Utah Supreme

Court ruled to be reasonable. The standards in Utah's Banberry case are a good example of what most state courts will rule to be reasonable.

4.3 Utah's Banberry Test

There have been several other issues regarding impact fees decided in other Florida cases; however, Utah's *Banberry* case dealt with many of these issues in one case. The Supreme Court of Utah, in reviewing impact fees for water connections and park improvements, set up very stringent accounting guidelines for the use of impact fees in the case of *Banberry Development Corporation v. South Jordan City* (1981). This decision covered almost everything the two Florida cases covered, along with the additional issues of double-charging and the depreciation of public facilities. The guidelines from the Banberry case required the following factors to be considered when using impact fees:

1. The cost of existing capital facilities.
2. The manner of financing existing capital facilities (such as user charges, special assessments, bonded indebtedness, general taxes, or federal grants)
3. The relative extent to which the newly developed properties and the other properties in the municipality have already contributed to the cost of existing capital facilities (by such means as user charges, special assessments, or payment from the proceeds of general taxes)
4. The relative extent to which the newly developed properties and the other properties in the municipality will contribute to the cost of existing capital properties and the other properties in the municipality will contribute to the cost of existing capital facilities in the future
5. The extent to which the newly developed properties are entitled to a credit because the municipality is requiring their developers or owners (by

contractual arrangement or otherwise) to provide common facilities (inside or outside the proposed development) that have been provided by the municipality and financed through general taxation or other means (apart from user charges) in other parts of the municipality

6. Extraordinary costs, if any, in servicing the newly developed properties

7. The time-price differential inherent in fair comparisons of amounts paid at different times.

The Utah Supreme Court also pointed out that the charge to a new development cannot be mathematically computed down to the last penny; however, if the fees collected are much greater than the cost of the new facilities, the fee would then be a revenue generating fee and would be found invalid. The court also stated it would not be fair to expect new residents to pay for capital improvements through impact fees and then pay for the same improvements again through property taxes. The court wanted municipalities to calculate how much the new residents would pay for the new facilities through property taxes and how much they would pay for the new facilities through impact fees.

The issue of the depreciation in value of the capital improvements is important to developers. If a new development is built that taps into the same water and sewer improvements that were made because of a prior but recent development, the court said that the newest development does need to pay for its fair share; however, the depreciation in value of the capital improvements should be taken into consideration when considering how much a new development should be charged (Callies, Freilich, and Roberts 1994).

The situation in Utah was similar to Florida's because neither state had enabling legislation for municipalities to adopt an impact fee ordinance. In both states, enabling legislation was not necessary because the courts had clearly defined how impact fees can or cannot be used. In other states, enabling

legislation has been passed to define if and how impact fees can be used (see Appendix A for a listing of states that have impact fee enabling legislation).

4.4 Illinois' Traffic Impact Fee Legislation

As a result of much litigation in many courts over impact fees, many states have chosen to adopt enabling legislation for impact fees. Illinois authorizes the use of impact fees only for road improvements (605 Ill. Comp. Stat. Ann. § 5-901 *et. seq.).* Currently, it is the only state with an enabling law that limits the use of impact fees to road improvements. Michigan's proposed enabling legislation would also limit the use of impact fees to road improvements. In 1987, the Illinois State Legislature passed the transportation impact fee legislation, and it was amended in 1989. This legislation as amended specifically authorized local governments within counties that have a population greater than 400,000 people to adopt impact fees for road improvements. There are four counties in Illinois with a population over 400,000 people. Listed below are the growth rates for these four counties (all of which border Cook County) between 1990 and 1996:

Cook: -1%
DuPage: 9.9%
Lake: 12.9%
Will: 19.7%

Will County passed the 400,000 population limit during this time period. Kane County, which also borders Cook County, had a 1990 population of 317,471 and a 1996 population of 370,361 - a growth rate of 19.7% (US Bureau of the Census 1997). Based on this growth rate for Kane County, it will soon pass the 400,000 population mark. The population growth rates in the counties with a population over 400,000 people were high enough to justify the use of impact fees.

Furthermore, the legislation does not expressly prohibit local governments with a population of 25,000 or more people from adopting a traffic impact fee

ordinance. Under Illinois law, such local governments would be able to adopt a road impact fee ordinance, because they were not prohibited from adopting them in the enabling legislation. This would allow local governments in places such as McHenry County, which also borders Cook County, to adopt an impact fee ordinance. During the early 1990s, McHenry County had the highest population growth rate in the Chicago area -- 25.8%. Its 1990 population was 183,241 and it increased to 230,555 in 1996.

As will be shown in the next section, the Michigan counties with a population over 400,000 people do not have high growth rates as high as these Illinois counties. Another major difference is that the relatively smaller counties in Illinois (population less than 400,000 but greater than 100,000) with high growth rates can still adopt an impact fee ordinance under Illinois law. In contrast, Michigan counties within the same population range could benefit the most from an impact fee ordinance, but the proposed impact fee legislation would not allow them to adopt one.

This Illinois legislation addresses the additional issues of deficiencies in the existing infrastructure, vested rights, and the initial formation of an impact fee ordinance. Municipalities cannot use impact fees to compensate for deficiencies that existed prior to a new development. The new development should pay for its fair share of the new infrastructure for that particular development, but deficiencies in the current capital facilities and governmental services need to be improved through other means such as the property tax.

The Illinois legislation also addresses the issue of vested rights. Any development that has received site specific approval eighteen months before the notification of a public hearing for an impact fee ordinance is exempt from the impact fees. This means that once developers are notified about a public hearing for an impact fee ordinance, they cannot rush out and push to get their

plans approved. Once a developer is notified that a community wants to adopt an impact fee, their first instinct would be to get as many projects approved as possible, hoping that those projects would escape the impact fees.

However, the legislation also requires that any municipality that wants to adopt an impact fee ordinance will have to create a local Advisory Committee that would be made up of representatives from the real estate industry, developers, building and labor industries, and the local government. This allows developers to participate in the formation of the local impact fee ordinance.

5. Michigan's Experience with Impact Fees

Illinois' enabling legislation was written in response to various court decisions in the State of Illinois that placed too many restrictions on the use of impact fees (Larsen and Zimet 1988). The Illinois enabling legislation clarified how impact fee ordinances could be adopted and used. The courts in Florida and Utah were able to clearly define how impact fees could be used, making enabling legislation unnecessary.

As will be demonstrated in the next section, Michigan courts also have not supported the use of impact fees to finance the infrastructure costs of new developments, and have created a need for impact fee enabling legislation. In Michigan, however, the enabling legislation is necessary if municipalities in Michigan ever desire to adopt an impact fee ordinance (Vollman 1988).

5.1 Michigan's Case Law

In the case of *Merrelli v. St. Clair Shores* (1959), the plaintiff is Merrelli, a development corporation, and the defendant is the City of St. Clair Shores. In 1950, the population of St. Clair shores was 19,000. By 1955, the population had nearly tripled to 50,000 to 60,000 people. St. Clair Shores, in order to accommodate this rapid growth, increased the price of its building permits. The building permits included charges for electrical and plumbing inspections and

other work associated with the construction of new homes. These permits would not be issued until the fees were paid, but it was also recognized that the City did have the authority to collect fees for issuing building permits. However, the City of St. Clair Shores went beyond this limited statutory authority to include the costs of providing police services, fire services, and street maintenance. The total amount of the fee to cover these additional services were "guestimated."

The Supreme Court of Michigan ruled that it was permissible for the City to increase the costs of the building permits to recover the increased costs of administering the building permits. If the demand for building permits went up so much that the City had to hire more staff to issue the permits, then it was acceptable for the city to increase the costs of the permits to pay for the increase in administrative costs. The increase in the need for more permit and administration was a direct result of the new construction of the new buildings.

The court then said that the need for more government services was a result of the increase in population. The court pointed out that the Charter of St. Clair Shores authorized the City to increase and collect all the necessary taxes from all the citizens to run the City. Therefore it was inappropriate to use impact fees as an alternative means of financing infrastructure improvements. To summarize and reinforce its decision, the court cited a case from the New Jersey Supreme Court, *Daniels v. Borough of Point Pleasant*, which said, "The philosophy of this ordinance is that the tax rate of the borough should remain the same and the new people coming into the municipality should bear the burden of the increased costs of their presence. This is so totally contrary to tax philosophy as to require it to be stricken down."

The very purpose of impact fees is that new developments should pay for their share of the increased costs of their presence. It was not until the 1980s that growth impacted states were forced to break away from "traditional" tax

philosophy to find other methods of financing for new development. The City of St. Clair Shores was essentially collecting an impact fee to deal with rapid growth rates. Unfortunately the impact fees for the government services were added to the building permit fees rather than collected as separate fees. It was acceptable for the City to recover the increase in administrative costs for the issuance of the building permit fees, but as soon as other impact fees for additional costs of government were added, the building permit fee greatly outweighed any administrative costs. Even in modern impact fee cases, if the fee exceeds the actual costs of the project, then the fee becomes a tax (Vollman 1988).

However, even if the impact fees had been separated from the building permit fee, it is unlikely that the court would have upheld the use of the impact fees. In the 1950s, the term impact fee did not even exist, and the idea that new people in the city had to pay for their own infrastructure and their own services was a radical idea for the time and an extreme deviation from the status quo. There were no precedents at the time for the court to rely on to uphold the use of the impact fees. In the New Jersey case cited by the Michigan court, the New Jersey Supreme Court struck down the use of impact fees.

In the case of *Eyde Construction Company v. Charter Township of Meridian* (1986) the plaintiff, Eyde Construction Company, wanted to develop a subdivision (known as Shoals II) in Meridian Township. The Meridian Township Ordinance required three acres of recreation space to be dedicated for every one hundred dwelling units. Shoals II consisted of 95 single-family homes, so the plaintiff was required to dedicate 2.8 acres of land for a public park. The land was originally dedicated on-site in the southwest corner of the subdivision, but the on-site location was later deemed to be unsuitable. A suitable off-site location was found at the corner of Hatch and Cornell Roads, and the plaintiff

agreed to this but later asked the Township to reconsider. The Township did not reconsider, and the plaintiff filed suit in trial court on the basis that the required dedication was a taking of property without just compensation. The trial court ordered the Township to remove the disputed land dedication requirement.

When the Township appealed, the Eyde Construction Company argued that first, the Township did not have statutory authority to require these dedications, and second, the requirement was a taking without due compensation.

The Michigan Court of Appeals ruled that the requirement had to be removed because the township did not have express or implied powers to condition plat approval on land dedication. The court stated that the township is a "creature" of the Michigan State Legislature. Previous Michigan court decisions ruled that the Plat Act of 1929 did not give townships the express or implied powers to condition plat approvals. When the Michigan Legislature changed the laws governing the platting and subdividing of land under the Subdivision Control Act of 1967, the legislature did not give townships the express or implied powers to condition plat approvals even though the legislature was aware of previous court rulings regarding this issue. The court also stated that because the Township did not have the statutory authority to condition the plat approval, it was not necessary to determine if a taking without just compensation had occurred.

In the case of *Arrowhead Development Company v. Livingston County Road Commission* (1982), the plaintiff, Arrowhead Development Company, wanted to develop 140 acres of property in Livingston County for a subdivision. As a condition for the subdivision approval, the County Road Commission required that a hill on Chilson Road be regraded. The hill needed to be regraded because the hill was obstructing the view of oncoming traffic for people exiting

the subdivision. The plaintiff posted a performance bond for the removal of the hill. When the plaintiff did not regrade the hill, the County Road Commission was going to use the money from the performance bond to pay for the regrading of the hill. The Trial Court upheld the validity of the requirement that the hill be regraded, and the Court of Appeals affirmed the decision.

The plaintiff appealed to Michigan's Supreme Court, asking it to rule on two issues. First, can the County Road Commission require a developer to make improvements on a county road that is outside of the platted area; and second, are such requirements a taking of property without just compensation?

In its defense, the County Road Commission cited Article 7, Section 34 of the Michigan Constitution which states that "the provisions of this constitution and law concerning Counties, Cities, and Villages shall be liberally construed to their favor. Powers granted to Counties and Townships by this constitution and by law shall include those fairly implied and not prohibited by this constitution." The Michigan Supreme Court stated that this provision in the Michigan Constitution said nothing about powers being granted to County Road Commissions, and it ruled that the Livingston County Road Commission did not have the statutory authority to make the requirement that Arrowhead regrade the hill.

The court went farther and stated that the Commission relied on the fact that the need to remove the hill was a direct result of the new subdivision; therefore, Arrowhead must pay for the removal of the hill. The court stated that if this argument were upheld, then

> the same argument could be made, however, to justify the cost of police, fire, traffic signals, public school facilities, public lighting, road widening and all other services made necessary due to new construction of new developments. These are not costs that are historically imposable

upon the subdivision developer. They are met by taxation and special assessments to benefited individuals and properties. Similarly, the regrading of a county road adjacent to a new subdivision development, in order to safely accomodate traffic generated by the new community, is a public obligation. A legislative intention to impose such a burden upon a nearby private developer would be a notable departure from the historic manner of funding alterations to public property.

The Supreme Court also stated that because the County Road Commission did not have the statutory authority to require the off-site improvement, it was again not necessary to rule on the takings issue.

Here, the Supreme Court states the traditional view that new infrastructure should be paid for by taxation, special assessments, and utility connection charges. These other forms of financing new infrastructure have been essential to growing communities in Michigan in the absence of enabling legislation for impact fees (Williams 1987).

5.2 Michigan's Proposed Traffic Impact Fee Enabling Act

Due to the lack of support for impact fees in the Michigan courts, enabling legislation will be a necessity if communities in Michigan ever want to adopt an impact fee ordinance. On January 28, 1997, Senators Bullard and Steil introduced a traffic impact fee enabling act (a complete copy of this bill is in Appendix B). This bill would authorize municipalities within certain counties to collect impact fees for road improvements. The basic operative sentence of the enabling act is in Section 5(1) which states that "A *governing body*, by ordinance or resolution, may levy and collect an *impact fee* from a developer." There are two basic terms in this sentence, however, that need further definition.

Only the governing bodies within counties that have a population greater than 400,000 people can adopt an impact fee ordinance. A *governing body* is

defined as the legislature of a city, the legislature of a village, the township board of a township, or the county road agency that operates under the authority of the county board of commissioners.

An *impact fee* is defined as "an amount to defray a portion of the cost of an off-site improvement." Off-site improvements are limited to road improvements that are required to accommodate new land development. A new land development for which an impact fee can be collected are those new developments that have a value greater than two million dollars.

Before an impact fee ordinance can be adopted, the governing body must adopt a "traffic improvement plan" in which "traffic improvement zones" are identified. The traffic improvement zones are designated districts in which new development is likely to occur and where the new improvements will need to be made. The traffic improvement zones can cross jurisdictional boundaries because the roads in one jurisdiction may need to be improved because of a new development in a nearby but separate jurisdiction. This part of the legislation addresses the spatial issue of impact fees. Impact fees need to be made for capital improvements within relatively close proximity to the new development, so the new development is the primary beneficiary. However, the legislation does not place a limit on how large the designated traffic improvement zones can be.

In order to assure that the impact fees benefit the new development, the legislation states that "the schedule of impact fees shall bear a reasonable relationship to the increased traffic attributable to the new land development and the cost of the road improvements attributable to the increased traffic generated by that new land development." This section also requires that the new development generate enough traffic to justify the collection of impact fees.

Once the impact fees are collected, the new development needs to be the primary beneficiary.

The impact fees that are collected are to be deposited in an impact fund. Each traffic improvement zone identified in the traffic improvement plan has a separate fund. For every zone that is created, a fund also needs to be created, and this money is to be earmarked and kept separate form the general revenue funds of the municipality or county road agency.

The enabling legislation also requires the impact fees to be spent in a timely manner. If actual construction work has not commenced within a five year period after the impact fees were collected, then the fees are to be returned with interest. The interest is equal to the average rate of return on a 1-year US Treasury Bill for the previous 12 months. This protects developers in that their money will either be used to improve the development, or the fees will be returned with interest.

The purpose of impact fees is for new development to pay for their fair share of the capital improvements that need to be made to support the new development. Impact fees however cannot be used to pay for existing deficiencies in the current infrastructure system. The legislation states that the current deficiencies in the road system need to be identified, and the impact fees cannot be spent until other sources of funding are identified to pay for the pre-existing deficiencies.

The traffic improvement plan also needs to identify all sources of funding. All the sources of funding that will come from the new development need to be identified in order to avoid possible double taxation. Property taxes and impact fees from the same development cannot be used to pay for the same improvements to the new development. Funding for the traffic improvements can come from impact fees, special assessments, other fees, or other sources.

The amount collected from the impact fees cannot exceed the "pro rata share of reasonably anticipated costs of the road improvements necessary to serve the increased traffic generated by the new land development." These sources of funding need to be identified to avoid the double taxing issue.

By law, the impact fee ordinance is to be reviewed annually. The review should "consider trip generation rates, trip lengths, and actual construction and right-of-way acquisition costs for work contracted for off-site improvements by the governing body." It also considers the potential effects of inflation on the costs of projects, as well as revisions to the size, shape, and location of traffic improvement zones. The review is also necessary to determine if new circumstances have changed the pro rata share of the anticipated costs of the off-site development.

Ninety percent or more of the money in the impact fund to be spent for off-site improvements must be used within the traffic improvement zone. This is in keeping with the basic premise of the legislation, but it allows some flexibility so that up to ten percent of the money can be spent on road improvements that provide access to the zones (Michigan Senate Bill No. 96 1997).

5.3 Weaknesses of Michigan's Proposed Impact Fee Enabling Legislation

The Illinois legislation requires developers to assist a local government in forming an impact fee ordinance. It also addresses the issue of vested rights, and it authorizes counties with a population over 400,000 people to adopt an impact fee ordinance. Michigan's proposed enabling legislation does not require local governments to include developers in the process of writing an impact fee ordinance, and it does not address the issue of vested rights; however, it does include the 400,000 population requirement for counties that can adopt an impact fee ordinance. Michigan's proposed legislation would be more beneficial for Michigan if it had required developers to participate in the development of

impact fee ordinances, addressed the issue of vested rights, and dropped the 400,000 population limit.

Both enabling laws specify the procedures which a municipality must go through to adopt an impact fee ordinance. The Illinois legislation requires the developers to be on the advisory committees in charge of forming an impact fee ordinance. The developers under the Michigan legislation would only have input during the required hearings but would not be on the advisory committees. The Illinois legislation allows developers to have direct input in the formation of the impact fee ordinance, an approach which increases the probability that the developers would be willing to comply with the ordinance once it is passed rather than dispute it in the courts.

The enabling legislation in Illinois addresses the issue of vested rights. The Michigan legislation does not address the issue which makes it an issue that will potentially need to be settled in court.

The Michigan enabling legislation also applies only to municipalities that are within counties with a population greater than 400,000 people. This effectively limits the application of this law to only five counties: Genesee, Kent, Macomb, Oakland, and Wayne. One problem with this stipulation is that these counties are not necessarily growing that rapidly and may not have a great need for these powers. The counties in Illinois with a population over 400,000 people had much higher growth rates. Listed below are the growth rates for the five affected counties in Michigan between 1990 and 1996:

Genesee: 1.3%
Kent: 7.1%
Macomb: 2.4%
Oakland: 7.2%
Wayne: -2.4%

While Kent and Oakland counties had modest growth rates of 7%, the other counties are not growing fast enough to justify the use of impact fees. However, Livingston County had a 1990 population of 115,645 and a 1996 population of 137,616 - a growth rate of 19%, but Livingston County is not covered in the legislation to use impact fees even though it could benefit from an impact fee ordinance (US Census Bureau 1997). As mentioned earlier, the *Arrowhead* case involved a dispute between the Livingston County Road Commission and the Arrowhead Development Corporation. As a result of this case, the enabling legislation includes County Road agencies and County Boards of Commissioners as agencies that can adopt an impact fee ordinance; however, Livingston County, the county where the dispute occurred, cannot adopt an impact fee ordinance.

The enabling legislation grants municipalities the statutory authority to adopt an impact fee ordinance, but it also allows developers to grant a land dedication instead of paying an impact fee. This leaves open the legal problem of the takings issue. If a developer wishes to dedicate land instead of paying the impact fee, then the developer may attempt to argue in court that this is a taking of land without just compensation. The Michigan courts did not address the takings issue in either the *Arrowhead* case or the *Eyde Construction Company* case. Although Florida courts have ruled that it is not a taking, this issue was never settled in the Michigan courts.

6. Conclusions

In 1987 the Michigan Legislature defeated a similar traffic impact fee enabling act. The major opposition to the 1987 legislation came from the Home Builders Association and the Michigan Association of Realtors. Such organizations would most likely oppose the current proposed legislation and any other legislation that grants municipalities more control over the development

process. Given the past opposition by the courts and development organizations in Michigan, it is unlikely that the current enabling legislation will become law.

However, most communities in Michigan are not growing fast enough to justify the use of an impact fee ordinance. The few communities in Michigan that have high growth rates will have to utilize other means of financing new infrastructure. Currently, Michigan communities can use special assessments and utility connection charges to finance water and sewer services. Special districts and voluntary agreements are also alternatives that growing communities in Michigan will have to explore in order to finance new infrastructure. These alternative forms of financing new infrastructure in growing communities in Michigan were essential in the past due to the lack of enabling legislation for impact fees and will remain essential in the likely event that the current proposed legislation suffers the same fate its counterpart did a decade ago (Williams 1987).

Appendix A -

States with Impact Fee Enabling Legislation

State	Facilities Authorized	Citation
Arizona	Necessary public services.	Ariz. Rev. Stat. Ann. § 9-463.05 (Supp. 1993).
California	Unrestricted.	Cal. Gov. Code § 6600 *et. seq.*
Colorado	Unrestricted.	Colo. Rev. Stat. § 29-1-801 *et. seq.* (Supp. 1992).
Georgia	Roads, sewer, water, parks, stormwater, flood control, public safety, libraries.	Ga. Code Ann. § 36-71-2(16) (Supp. 1992).
Hawaii	Limited to facility types identified in a county comprehensive plan or a facility needs assessment study.	Haw. Rev. Stat. § 46-141 *et. seq.* (Supp. 1992).
Idaho	Roads, sewer, water, parks, stormwater, flood control, public safety.	Idaho Code § 67-8201 *et. seq.* (Supp. 1992).
Illinois	Roads.	605 Ill. Comp. Stat. Ann. § 5-901 *et. seq.*
Indiana	Roads, sewer, water, parks, drainage, flood control.	Ind. Code Ann. § 36-7-4-1300 *et. seq.*
Maine	Roads, sewer, water, parks, fire protection, solid waste.	Me. Rev. Stat. Ann. tit. 30-A § 4354.
Nevada	Roads, sewer, water, stormwater, drainage.	Nev. Rev. Stat. § 278B.010 *et. seq.* (1991).
New Hampshire	Roads, sewer, water, parks, stormwater, drainage, flood control, municipal office facilities, solid waste, public safety, libraries.	N.H. Rev. Stat. Ann. § 674:21 (Supp. 1992).
New Jersey	Roads, sewer, water, drainage.	N.J. Stat. Ann. § 40:55D-42.

State	Facilities Authorized	Citation
New Mexico	Roads, sewer, water, stormwater, drainage, flood control, parks, fire, police, rescue.	1993 New Mexico Laws Ch. 122
Oregon	Roads, sewer, water, drainage, flood control, parks.	Or. Rev. Stat. § 223.297 *et. seq.* (1991).
Texas	Roads, sewer, water, stormwater, drainage, flood control.	Tex. Local Gov. Code Ann. § 395.001 *et. seq.*
Vermont	Unrestricted.	Vt. Stat. Ann. tit. 24, § 5200 *et. seq.* (1992).
Washington	Roads, parks, schools, fire protection.	Wash. Rev. Code Ann. § 82.02.050 *et. seq.*
West Virginia	Roads, sewer, water, parks, stormwater, drainage, flood control, police, fire protection, emergency medical rescue, schools	W. Va. Code § 7-20-1 *et. seq.* (1993).

(Leitner and Schoettle 1993).

Appendix B -

Michigan Senate Bill No. 96

SENATE BILL No. 96

January 28, 1997, Introduced by Senators BULLARD and STEIL and referred to the Committee on Local, Urban and State Affairs.

A bill to authorize governing bodies located within certain counties to levy and collect impact fees on developers to defray the cost of certain improvements required by land development; to provide for certain credits and exemptions; to allow the governing bodies to enter into agreements relating to impact fees; to prescribe powers and duties of the governing bodies; to prescribe the powers and duties of certain state agencies and officers; to create certain funds; and to prescribe remedies.

THE PEOPLE OF THE STATE OF MICHIGAN ENACT:

Sec. 1. This act shall be known and may be cited as the "traffic impact fee enabling act".

Sec. 3. As used in this act:

(a) "County road agency" means a board of county road commissioners or an individual or entity exercising the powers

SENATE BILL No. 96

and duties of a board of county road commissioners pursuant to county charter in a county that does not have a board of county road commissioners.

(b) "Developer" means a person proposing new land development and any successor in interest of that new land development.

(c) "Governing body" means any of the following in a county that has a population of 400,000 or more:

(*i*) The legislative body of a city.

(*ii*) The legislative body of a village.

(*iii*) The township board of a township.

(*iv*) A county road agency that acts only with the concurrence of the county board of commissioners.

(d) "Impact fee" means an amount to defray a portion of the cost of an off-site improvement.

(e) "Impact fund" means a fund created by a governing body under section 15.

(f) "New land development" means the construction, reconstruction, or expansion of a building or a complex of buildings, or the improvement of a recreational area, that will result in the increase of traffic on a highway, street, or road near the building, complex of buildings, or recreational area. However, new land development does not include the construction, reconstruction, or expansion of residential property or a residential development if the property or development has a value of less than $2,000,000.00.

(g) "Off-site improvement" means a road improvement necessitated by that new land development and located off the premises of that new land development.

(h) "Road improvement" means the construction, reconstruction, paving, replacement, extension, or widening of a highway, street, road, or bridge. Road improvement includes, but is not limited to, the cost of design and construction, plan preparation, right-of-way acquisition, turning lanes, drainage facilities, curbs, medians, and shoulders in conjunction with the road improvement, and the purchase and installation of traffic signs and signals. Purchase and installation of traffic signs or signals shall only be considered a road improvement if the signs or signals are permanent and not installed temporarily before or during the construction of a road improvement.

(i) "Traffic improvement plan" means a plan adopted by a governing body as required under section 7.

(j) "Traffic improvement zone" means a designated area with distinct boundaries in which new land development is expected to occur and in which off-site improvements will be required to serve that new land development. A traffic improvement zone may cross jurisdictional boundaries.

Sec. 5. (1) A governing body, by ordinance or resolution, may levy and collect an impact fee from a developer.

(2) Before adopting an impact fee ordinance or resolution, the governing body shall hold a public hearing on the impact fee ordinance or resolution. The governing body shall publish a notice of the public hearing as provided by law or charter for

public hearings on ordinances. A county road agency shall publish notice of the proposed impact fee resolution not less than 2 weeks before the date of the public hearing. A resolution of a county road agency imposing an impact fee shall be concurred in by a majority of the county board of commissioners before the impact fee may be imposed.

(3) A governing body may enter into an agreement with another governing body to levy, collect, and regulate the disposition of impact fees.

(4) Impact fees shall not be expended on a particular road improvement unless the governing body has identified sources of funding for right-of-way acquisition and construction of improvements needed to overcome existing or future service deficiencies for the particular road improvement not attributable to the proposed new land development.

Sec. 7. (1) Before adopting an ordinance or resolution establishing an impact fee, the governing body shall adopt, and may from time to time amend, a traffic improvement plan identifying 1 or more traffic improvement zones.

(2) Before adopting a traffic improvement plan, the governing body shall hold a public hearing on the plan. Notice of the hearing shall be published in the same manner as a notice of a public hearing required by section 5(2).

(3) A traffic improvement plan shall identify those segments of the city or village street system, county road system, or state highway system that need improvement, or may need improvement within 5 years after the date of the plan, due to

present or future traffic congestion. The plan shall identify off-site improvements within traffic improvement zones.

(4) The traffic improvement plan shall set forth anticipated methods of financing the road improvements, including but not limited to the following:

(a) The portion of the road improvements expected to be paid for by impact fees, which shall not exceed a pro rata share of reasonably anticipated costs of the road improvements necessary to serve the increased traffic generated by the new land development.

(b) The portion of the road improvements expected to be paid from special assessments or other fees, if any, against property benefited by the road improvements.

(c) The portion of the road improvements expected to be paid from other sources.

(5) A city or village master plan, comprehensive plan, or capital improvements plan may be adopted or amended to meet the requirements of this section instead of adopting a separate traffic improvement plan.

(6) A traffic improvement plan adopted by a county road agency shall be reviewed and agreed to by not less than 2/3 of the governing bodies of the cities and villages within the county, but only with respect to those traffic improvement zones contained in the traffic improvement plan that are located wholly or partially within the particular city or village.

(7) A traffic improvement plan of a county road agency shall be reviewed and approved by resolution of each township board

with regard to those provisions, if any, in the plan that require a portion of the cost of a road improvement to be borne by that township or from impact fees, special assessments, or other charges to be imposed by that township.

(8) A traffic improvement plan of a township shall be reviewed and approved by the county road agency of the county in which the township is located.

(9) A traffic improvement plan of a city, village, or county road agency that identifies road improvements needed on a segment of a state highway and methods of financing those road improvements shall be reviewed and approved by the state transportation commission.

Sec. 9. A governing body may enter into an agreement with another governing body to provide for the creation of 1 or more traffic improvement zones.

Sec. 11. (1) The schedule of impact fees set forth in an impact fee ordinance or resolution shall be uniform within each traffic improvement zone with regard to each type or class of new land development. The schedule of impact fees shall bear a reasonable relationship to the increased traffic attributable to the new land development and the cost of the road improvements attributable to the increased traffic generated by that new land development. The schedule of impact fees may vary with regard to different segments or classes of highways, streets, or roads and with regard to the proportionate impact of new land development on the existing traffic carried by those segments or classes of highways, streets, or roads. An impact fee shall be assessed

only once during the period of the new land development, but may be paid in installments based on a schedule established pursuant to this subsection.

(2) The impact fee ordinance or resolution shall set forth when the impact fee is to be paid and the information required to accompany the impact fee.

(3) The impact fee ordinance or resolution shall provide a procedure for determining an alternative impact fee if the developer believes that the cost of an off-site improvement is less than the impact fee established in the impact fee ordinance or resolution.

(4) The impact fee ordinance or resolution may provide that the governing body and a developer may enter into an impact fee agreement designed to establish a just and equitable impact fee, or its equivalent in the form of contributed right-of-way or other appropriate equivalent, instead of the impact fee set forth in the impact fee ordinance or resolution. The impact fee agreement may provide that the developer shall be reimbursed from impact fees subsequently paid by another developer. The governing body shall approve an impact fee agreement only if the governing body finds that the impact fee agreement will apportion the burden of expenditures for off-site improvements in a just and equitable manner.

(5) The impact fee ordinance or resolution shall provide that a developer is entitled to a credit against an impact fee in an amount equal to the cost of the off-site improvement, or contributions of land, money, or services for the off-site

improvement contributed or previously contributed, paid, or legally committed to by the developer or by his or her predecessor in interest as a condition of any new land development permit issued by the governing body.

Sec. 13. (1) A developer that has received a new land development permit may petition the governing body for an exemption from the impact fees assessed pursuant to an impact fee ordinance or resolution adopted under this act. A petition shall be evaluated by the governing body based on the following criteria:

(a) Whether a legally enforceable act of the governing body authorizes the specific new land development for which a determination is sought.

(b) Whether the petitioner has made or incurred expenditures or obligations in reliance upon the authorizing act described in subdivision (a) that are reasonably equivalent to the impact fee required by the impact fee ordinance or resolution.

(c) Whether it is inequitable to deny the petitioner the opportunity to complete the previously-approved new land development in a manner consistent with the conditions of that previous approval by requiring the developer to comply with the requirements of the impact fee ordinance or resolution. For the purposes of this subdivision, consideration of whether the injury suffered by the petitioner outweighs the public cost of allowing the new land development to proceed without payment of the impact fee shall be considered as a factor in determining whether it

would be inequitable to deny the petitioner the opportunity to complete the previously-approved new land development.

(2) If the previous approval of a new land development contains conditions with respect to off-site improvements, the developer may request a modification of the previous approval in order to bring the previously approved conditions into compliance with the impact fee ordinance or resolution adopted pursuant to this act. A modification of the previous approval of new land development permits is not a substantial change under a city or village planned development ordinance or a substantial deviation under state law.

Sec. 15. (1) A governing body that levies and collects impact fees under this act shall create an impact fund for each traffic improvement zone created under section 7. A governing body shall deposit all impact fees collected pursuant to this act in the impact fund created for that traffic improvement zone. The revenue in an impact fund shall be kept separate from other revenue of the city, village, township, or county road agency.

(2) The governing body shall use revenue collected from impact fees solely for the purpose of off-site improvements determined to be needed to serve traffic generated within the traffic improvement zone.

(3) The governing body shall use 90% or more of the revenue collected from impact fees exclusively for off-site improvements within the traffic improvement zone from which the impact fees were collected.

(4) The governing body may use not more than 10% of the revenue collected from impact fees for road improvements on highways, streets, or roads that provide access to the traffic improvement zone from which the impact fees were collected.

(5) The governing body shall use amounts withdrawn from an impact fund solely in accordance with this section. The disbursement of revenue from an impact fund shall occur only upon the approval of a majority of the members of the governing body.

(6) The governing body shall invest in interest-bearing accounts the money on deposit in the impact fund that is not immediately necessary for expenditure as provided in this act. All income derived from the accounts shall be credited to the impact fund.

Sec. 17. The impact fee ordinance or resolution shall provide that the impact fees collected shall be returned to the present owner of the new land development if actual physical work has not commenced on the off-site improvement by the last day of the calendar quarter that ends immediately following the expiration of 5 years from the date the impact fees were collected by the governing body, in accordance with the following procedure:

(a) The present owner files a petition with the governing body for the refund within 1 year following the last day of the calendar quarter that ends immediately following the expiration of 5 years from the date on which the fee was collected.

(b) The petition contains the following:

(*i*) A notarized sworn statement that the petitioner is the present owner of the property.

(*ii*) A certified copy of the latest recorded deed.

(*iii*) A copy of the most recent ad valorem property tax bill for the property.

(c) Upon approval of the governing body, the money shall be returned to the petitioner with interest paid at the average rate of 1-year United States treasury bills for the 12-month period immediately preceding the month in which the money is returned.

Sec. 19. A governing body shall annually review an impact fee ordinance or resolution adopted by that governing body. The review shall consider trip generation rates, trip lengths, and actual construction and right-of-way acquisition costs for work contracted for off-site improvements by the governing body. The purpose of this review is to analyze the effects of inflation on the actual costs of road improvements and the fees charged to support these improvements; to review and revise, if necessary, the off-site improvements encompassed by the impact fee ordinance or resolution; to review and revise, if necessary, the size, shape, and location of the traffic improvement zones identified in the traffic improvement plan of the governing body; and to ensure that the impact fees charged against new land development do not exceed the new land development's pro rata share of the reasonably anticipated costs of off-site improvements necessitated solely by that new land development.

Sec. 21. A person or a governing body may bring a civil action against any person or governing body that violates an impact fee ordinance or resolution adopted under this act.

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