

Developers Face Growing Impact Fees

By Tom Larson

As development pressures continue to increase, more Wisconsin communities are requiring developers to bear the costs of expanding and improving public facilities to service the new development projects. Although the contribution may take the form of donating land for a road or park, increasingly the local governments require a cash payment known as an impact fee.

Accordingly, the ability of a government entity to exact money from a developer in return for approval of a project remains one of the most hotly debated areas of real estate development law.

Wisconsin's impact fee law

Wisconsin's impact fee law, codified as Wis. Stat. § 66.55, was adopted in 1994. Although Wisconsin case law had previously recognized the validity of impact fees, there was no statutory authority and no clear standards for determining an appropriate fee. The impact fee law provides local governments with statutory authority and provides guidelines for local ordinances.

Wis. Stat. § 66.55(2) states: "A political subdivision may enact an ordinance under this section that imposes impact fees on developers to pay for the capital costs that are necessary to accommodate land development." "Capital cost" is defined to include the cost to construct, expand or improve public facilities. "Public facilities" include highways, sewers, drainage facilities, parks, playgrounds, solid waste and recycling facilities, fire protection, law enforcement, emergency medical facilities and libraries. "Public facilities" specifically excludes any property that will be owned by a school district.

In addition to providing statutory authority, the impact fee law sets out certain standards that must be met by the local ordinance. Most significantly, any impact fee imposed by a local ordinance must bear a "rational relationship" to the need for new facilities to serve the development. This means that a political subdivision must be prepared to show how the new developer is only responsible for the increased need created by the new development. A developer will not be penalized because existing facilities are inadequate to serve existing development.

Before the United States Supreme Court changed the rules that apply to impact fees, various state courts had adopted a variety of tests to decide whether a subdivision control exaction is a taking of property.

These tests required a showing that the exaction is reasonably related to a need created by the subdivision, that there is a rational nexus between the exaction and that need, or that the exaction is specifically and uniquely attributable to the subdivision.

In *Nollan v. California Coastal Commission*, 43 U.S. 625 (1987), the first Supreme Court exaction case, the court held a Coastal California Permit Condition that required an easement to cross the beach of a beachfront home was a taking. The court held the "essential nexus" between the permit condition and the justification for the condition was lacking. It also held that it would closely examine a government regulation to determine whether it "substantially" advanced a legitimate governmental interest as required by the takings clause.

The *Nollan* nexus requirement for exactions has not been difficult to meet in most cases, especially when the exaction was imposed comprehensively as part of a regulatory scheme. The *Nollan* test will invalidate an exaction when a nexus between the exaction and the regulatory purpose it is intended to implement is clearly lacking.

The U.S. Supreme Court elaborated on the *Nollan* standards for exactions in *Dolan v. City of Tigard*, 512

U.S. 374 (1994). The court invalidated a condition to a building permit to expand the plaintiff's building that required the dedication of land within a flood plain to improve a storm drainage system and provide a pedestrian bicycle path. The court adopted a "rough proportionality" test for exactions, which indicated it was strictly the nexus test adopted by most state courts. Some courts have held, however, that the difference between the *Dolan* test and the reasonable relationship is only a matter of degree. *Dolan* also placed the burden to prove the constitutionality of exactions on government agencies and indicated that the decision to impose the dedication on the building permit was adjudicated. Similar standards were set forth 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).

Procedure

Under Wisconsin's impact fee law, a political subdivision must prepare a needs assessment subdivision before enacting an impact fee ordinance. The needs assessment consists of an inventory of existing facilities and identification of new facilities that would be made necessary by new development. A detailed estimate of the cost of providing the new facilities is then arrived at to ensure that the impact fee is a reasonable estimate of the cost of new facilities to serve the development.

An ordinance may impose different impact fees in different geographic zones so long as a justification is provided for the differing fees. The impact fee law also allows an ordinance to create an exemption or reduction of the fee for the development of low-cost housing.

Revenue from impact fees must be kept separate from all other funds and be used only for the capital costs for which the impact fees were imposed. If the funds are not used within a reasonable time, they must be returned.

Before enacting an impact fee ordinance, a political subdivision must hold a public hearing on the proposed ordinance. As part of the ordinance, the political subdivision must establish a procedure whereby a developer has the right to contest the amount, collection or use of an impact fee to the governing body of the political subdivision.