

# **Financing Growth in Shelby County: Who should pay?**

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## Summary

*Shelby County is a rapid growth community whose increase in population is stressing the existing infrastructure and exceeds our ability to fund new construction through existing tax levels. There is mindset that schools must be financed through sales tax or property tax. More imaginative methods are for some reason never considered. One such method is the impact fee. Impact fees have been brought up to our elected representatives on the commission, the board of education and the state legislature but have always been summarily dismissed without much discussion. More delay means the further loss of millions of dollars that would serve to fund the capital improvements needed by the county. Now is the time to seriously consider impact fees.*

*Impact fees have been shown to work in other communities. They assure a source of funds dedicated to installation of new infrastructure to meet the demands of new growth without unfairly burdening the existing residents.*

*Impact fees are an additional source of funding to finance a portion of future capital improvements needs. Impact fees present a means for assuring that community facilities will be coordinated with new development and promote economic development by encouraging business and employees to locate here who value such services such as the schools we have here. At the same time it assures existing business and residents that taxes will remain relatively stable. Impact fees represent a more equitable form of sharing the burden of financing future improvements.*

*Development of impact fees should draw on the experiences of communities who have undergone the process and have much to offer in success and failures. The process should be transparent and open to the public. It should involve developers, citizens, business, special interest groups, and governmental officials. Developers should be assured that they will not be forced to shoulder the entire burden of funding capital improvements but they should participate in offsetting the costs imposed on the local populace.*

## **Introduction**

In 2003, The Shelby County Board of Education asked for a 9-mil increase in the property tax in order to finance school construction with the county's residential development. The school board has estimated that growth in the Shelby County school system adds the equivalent of one school per year. The Board has correctly identified the cause of stress on the system but its proposed solution incorrectly identified the source of financing by placing the burden on the current citizens of Shelby County and absolving the developer of all responsibility. Voters recognized that with annual reappraisals, school taxes would be increased 5% each year and soundly defeated the proposal at the polls.

Until now, infrastructure was funded almost entirely by government. Today, opposition to higher taxes have diminished public dollars available to infrastructure development.<sup>1</sup> We are now faced with new challenges in financing public works in the face of a reluctant populace.

A more creative and growing form of financing is the impact fee. An impact fee is broadly defined as a contribution of land, improvement or money imposed as a condition of development approval to mitigate the impacts of the development project.<sup>2</sup>

## **What are Impact Fees?**

Impact fees have been used since the 1920's and were first used to manage growth and urban sprawl. Impact fees have also been used for many years in utilities and enterprise funds in the form of connection fees, system development charges, or buy-in fees.<sup>3</sup> Impact fees are direct contributions by developer and may include dedication of land, construction of facilities, or payment of fees in lieu of these facilities. They can be levied through written provisions in ordinances or, as in many cities, through negotiations.<sup>1</sup>

## **Advantage of Impact Fees**

Welch outlines the advantages of impact fees:

*First, impact fees represent an additional source of revenue from which to finance a portion of future capital improvements' needs. Political subdivisions which are responsible for supplying water, sanitary sewer, roads and drainage facilities increasingly are subject to fiscal constraints for funding such improvements to serve new growth. With the disappearance of many federal and state grants, and tax-payer sensitivity to increased taxes and utility rates, local governments must transfer a portion of the costs of capital improvements which serve new development to the ultimate beneficiaries. The more the local government relies upon debt financing to serve its capital improvement needs, the more likely it becomes that service levels in the community will be reduced. By supplementing tax and utility revenues with impact fee revenues, existing revenue sources may be devoted to maintaining service levels and funding capital improvements to correct existing deficiencies or replace existing facilities.*

*Because impact fees present a means for assuring that community-related facilities will be coordinated with new development, their use promotes economic development by encouraging the location of new employers in the community who value such services. At the same time, the use of impact fees provides assurance to existing businesses that local taxes and utility rates will remain relatively stable. If the local government must rely upon these sources to finance capital improvements to serve both new and existing development, the community faces steady increases in tax and utility rates attributable to debt financing.*

*Impact fees also represent a means of attaining certain police power objectives, which are not easily attained through the use of traditional development exactions. Thus, local governments may adjust impact fee rates to meet particular economic development or other police power objectives. Impact fees may be varied among service areas or by type of land use, as long as such differences are reasonably related to a proper police power objective. Through the use of impact fees, the community may encourage the establishment of certain kinds of developments, such as major employers or affordable housing projects.*

*Finally, impact fees represent a more equitable form of distributing the burdens for financing future capital improvements among various types of development. Traditional development exactions practices, which require the on-site dedication or construction of capital improvements, are based on the location of the property in relation to existing or planned public improvements. As a consequence, developments which equally contribute to the need for additional capital improvements may be assessed widely differing costs under such practices. Generally speaking, the owner of the property which is located on or abutting the site for a future public improvement is required to contribute more than the owner of property which is not so located. This unequal distribution of responsibilities for providing for future capital improvements is avoided through an impact fee program, in which the contribution of a particular development project is in proportion to the demand it creates for additional capital improvements.<sup>2</sup>*

### **Disadvantage of Impact Fees**

Kolo & Decker note the disadvantages of impact fees:

*In spite of the advantages discussed above, impact fees are not without some problems, many of which can be deduced from the contentions expressed by developers. The most vocal objection ensues from the fear that impact fees have adverse effects on the housing market and/or on profit margins. This fear also has a social dimension in that low- and some middle-income earners may be priced out of the housing market should developers build the cost of impact fees into the net cost of housing. For commercial property, developers assert that consumers of office buildings and commercial space would need to increase their expected rate of return on their rent profits and capital gains as a result of paying an impact fee. In an elastic market, commercial renters may relocate some or all of their operations to cheaper locations. Rents can be raised to cover impact fees, but developers must first determine rates at which higher rents would result in vacancies.*

*Another problem is the inequity that may result from the difficulty and complexity of adopting uniformly enforceable impact fee formulas and structures. In most cases, the fees are negotiable; therefore, even when municipalities do not intend any inequity in the adopted fee structures, the negotiation abilities and political currencies of developers and their attorneys could result in major differences or inequities in the implementation of the fees. Part of this inequity is that, depending on specific circumstances, developers rarely pay the full cost of the fees levied directly on them. The cost is often either pushed back to the land owner by lowering the price paid for land, or pushed forward to the consumer. Finally, the cost or part of it can be absorbed by government through some form of public contribution.*

*If impact fees do not accrue in the amount expected, then the ability of a municipality to finance infrastructure adequately is limited. This is true particularly where development is slow due to recession, excessive interest rates, conservative lenders, refusal by developers to build and/or willingness to build elsewhere, and an impact fee system that generates little or no revenue because of the ease with which developers can abuse it or secure exemptions from it. Another issue on which there is hardly any consensus is that of double billing residents who relocate from one part of a city to another and are billed in both places for putting additional pressure on infrastructure. While the argument can be made that these movers had, in their former residences, contributed their fair share to the city infrastructure funding in the city, a counterargument can be made that the move adds demand on infrastructure in the new location, justifying the levying of new fees. This issue has had no legal test, so cities are able to justify double billing on the basis of the demand placed on infrastructure by newcomers.*

*Another problem with impact fees is that they are often adopted and implemented with little or no participation from developers. Developers also argue that there is little or no factual information on the impacts which different types of development have on the development and surrounding areas. Furthermore, developers charge that there is no standardization of impact fees; hence, developers must operate under the different rules and regulations of various communities. Other developers charge that some funds that accrue from impact fees may be spent on projects that benefit the entire community rather than the specific development paying the fees. Finally, some developers view impact fees as a way by which municipalities shirk their public responsibility to fund growth-induced infrastructure.<sup>1</sup>*

## **Current Impact Fees in Shelby County**

There exists a loose assortment of impact fees in Shelby County now. Connection fees are charged for Shelby County Water and Sewer. Development projects are met with certain restrictions and requirements for buffers, landscaping, storm water control, and density of construction. In effect, these are met with exactions of land or facility construction. The Lake Purdy watershed controlled by the Birmingham Water Works and Sewer Board required developers to construct drainage channels and a stilling basin. Residents are assessed fees to pay for the maintenance of the stilling basin though dues to homeowners associations or directly

(Declaration of Protective Covenants, July 11, 1988 between NCNB National Bank of North Carolina as trustee for the Public Employee Retirement system of Ohio and The Water Works and Sewer Board of the City of Birmingham). Impact fees have been discussed before for Shelby County. In 2001, a fee schedule was offered by the Shelby County Planning Department and was met with vehement opposition by Representative Mike Hill\* of Shelby County and by Bill Crawford, Executive Director of the Greater Birmingham Association of Homebuilders.<sup>4</sup> The methodology for determining this fee schedule was not discussed in the article

## **Development of Impact Fees**

The premise on which impact fees are based is that development should pay for the cost of providing the facilities necessary to accommodate growth. The costs of projects needed to support growth are financed with impact fees based on some measurement of development's impact on future needs. Impact fees should not be intended to be used for operational expenses to pay for capital improvements to correct an existing deficiency or shortfall.<sup>3</sup> Practically speaking, had we not delayed impact fees the schools needed to accommodate Shelby County's growth would already be funded.

## **Rights of Developers**

Developers should not be expected to fully fund all capital improvement but should participate in offsetting the costs imposed on the populace by development. The developers and the end users have certain rights regarding the development of impact fees.

- Developers have the right to know what they are paying for. Impact fees can be a significant portion of the cost of developing both residential and commercial properties.
- Developers have the right to equal treatment.
- Developers have a right to know that the projects for which they have paid impact fees will be built. Local agencies should be required to maintain suitable fund accounting to assure the impact fees are used for the uses intended.
- Developers have the right to support impact fees. Linda Presez, impact fee coordinator for Palm Beach County, Florida says "Some of the largest developers in Palm Beach County are strong supporters of the impact fee because they recognize that it is a way to maintain the quality of life, and as such enhance the value of their property investment".
- Developers have the right to pay for improvements that will benefit their development.
- Developers have the right to expect that their payments will not be diverted to finance improvement not related to growth.<sup>3</sup>

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\* Representative Mike Hill is listed as Vice President, Marketing for Cahaba Title, Inc., 1900 Indian Lake Drive, Birmingham, AL 36244

## **Information Needed to Calculate Impact Fees**

Ross and Thorpe delineates a method to calculate the fee:

*Before beginning the impact-fee calculation process, there are information sources that must exist or be generated. The essential data consists of reliable information on what the community will look like in the future (20 or more years) or at theoretical build-out.*

*The list of projects to be financed with impact fees should be derived from the following information sources:*

*General plans or comprehensive plans, including updates.*

*Zoning maps.*

*Master plans.*

*Master facilities plans.*

*Capital improvement plans.*

*Planning statistics on the future population, ultimate land use, undeveloped parcels, and sizes of parcels will be used to determine the amount of growth to be anticipated. Existing land-use and zoning data will provide a basis for evaluating the current situation.*

*Master facilities plans that address the methods of providing service to future residents will provide the foundation for constructing a capital improvement plan (CIP). The master facility plan should ideally extend to the ultimate build-out condition of the community.*

*Each project included in the CIP should be clearly identified by a descriptive title or supplemental description. The projects should contain a cost estimate, schedule, and location. An allocation of the relative benefit between existing users and future users should also be prepared for each project.<sup>3</sup>*

The Shelby County Comprehensive Plan, “Pathways to the Future” may provide the perfect first step for development of impact fees.

## **Implementation of the impact fee system**

Ross and Thorpe also offer their view on the implementation of the system.

*The path to adoption of impact fees is often labyrinthine and strewn with the corpses of well-intentioned public servants. The following discussion is the result of the writers' composite experience in calculation and implementation of impact fees in more than 20 agencies. The following considerations may not be significant factors in successful implementation of impact fees in every community. They are offered in the hope that they will be beneficial to others who travel the impact-fee path.*

***The realization phase.*** *The calculation and adoption of impact fees begins with the acknowledgment of the local agency (either the elected officials or the management staff)*

*that providing public facilities necessary to support development cannot be financed through existing sources of revenue (traditional sources of revenue include property taxes, sales and use taxes, income taxes, business licenses, user charges [usually for utilities], and state or federal grants). Unfortunately in areas of rapid growth, this realization may come too late, but as they say, better late than never.*

***The education phase.*** *Too many communities launch unsuccessful attempts to implement impact fees. Failure to convey the need for additional revenues to the politicians, residents, developers, and the media is often the reason. Communication is an essential part of the education process, which must include honest, forthright discussions of the financial ability to provide public improvements. It is often not feasible to build capital projects without new sources of revenue.*

***List of all current deficiencies and future needs.*** *It is essential to create an inventory containing the full range of projects needed both now and in the future. Too many agencies become scared when they see the list of all the public improvement projects that must be built to achieve the blueprint envisioned for the community.*

*The complete list is necessary to show to the developers that they are only paying for future needs. By listing the complete litany of needs, the agency can demonstrate that the impact fees will be used exclusively to support growth induced projects.*

*Projects that address only current needs are the responsibility of existing residents and should not be financed with impact fees. Projects that serve both existing and future needs should be financed from impact fees and other sources.*

*Be cautious when attempting to finance facilities that are not currently provided with impact fees. If future needs include facilities that are not provided in the community (e.g., a civic theater where none exists today), it may be difficult to establish a need and corresponding nexus.*

***Special-interest groups.*** *Developers and special-interest groups should be included in the process early. There is nothing worse than having a major special-interest group show up at the public hearing saying that they did not have any notice or input into the development of the impact fees. The surfacing of any group that claims that they did not receive adequate notice will almost certainly result in a continuance of the hearing. Some of the potential special-interest groups include:*

*Individual builders or developers.*

*Builder/developer associations.*

*Realtors.*

*Environmental groups.*

*Anti-growth groups.*

*Chamber of commerce.*

**Planning commission involvement.** *Amazing as it may seem, the planning commission is seldom directly involved in the impact-fee setting process. The writers have no explanation for this phenomenon, nor are they willing to make any judgment about the merits of this practice.*

**Environmental clearances.** *While the setting of fees for services provided by a public agency are usually exempt from environmental regulation, the adoption of impact fees may require environmental clearance. The precursors to impact-fee setting, general or comprehensive plans, and use of the fees for capital projects are subject to environmental regulation. The writers have not found any court cases that would support the notion that the impact-fee setting process requires environmental clearances. In the lack of conclusive evidence, agencies should review the environmental requirements. The agency should make appropriate findings as part of the fee setting process.*

**Formal meetings.** *Public hearings are normally held as part of the adoption of new fees or charges. In California, not only is a public hearing required but the basis for calculation of the fees must also be available for public inspection before the hearing. As a matter of public accountability, it would not be prudent for an agency to try to circumvent the public hearing process.*

**Legislation.** *The format of ordinances or resolutions used to adopt impact fees vary according to the statutory requirements of the state and local agency. The largest variation may occur not due to any statute but as a function of the agency's legal counsel. One agency in the state of California adopted a separate ordinance for each impact fee on the advice of counsel that the invalidation of one fee could affect the others. The key to the ordinance or resolution is to establish the nexus for the fee within the document, or by reference to a specific study or report.*

**Accountability.** *Once the impact fees have been implemented, there is a need to provide accurate accounting or tracking of the fees collected and the use of those fees. California's AB 1600 requires fees to be expended, or committed, within five years of their collection. Since the law is barely two years old, no one can predict how the courts will react to challenges about violation of the five year limit. Even without a statutory requirement to expend the impact fees on growth-related projects, it would be prudent to be able to show developers that their money was spent on growth-related projects.*

## **RECOMMENDATIONS FOR SUCCESS**

*Don't use impact fees as a method of growth control. Use the impact fees to contribute the financing to provide the public facilities necessary to accommodate the growth in the community. The impact fees should merely accommodate the growth envisioned in the community's general or comprehensive plan. If that growth is inappropriate, change the plan.*

*Determine capital improvement needs through build-out. It is essential to have complete information on capital needs. Many communities do not have a practical capital*

*improvement plan that addresses the public facility needs for even the next five years. Impact fees based on incomplete CIPs will not generate sufficient revenues to assure that development pays its own way.*

*Show all capital improvement needs, including those not being financed with impact fees. The identification of projects necessary to overcome existing deficiencies is needed to show the development community that they are not being asked to correct existing problems. A corollary is that the community must demonstrate that they are using impact fees exclusively for growth-related projects. Other sources of revenue must be found for projects benefiting existing residents.*

*Develop long-range financing strategies for projects not financed with impact fees. Projects that are not financed with impact fees will need to have other sources of revenue for construction. The agency should try to identify potential sources of revenue that will be used to build nongrowth projects. The extent that the agency is successful in identifying specific sources of revenue may be an indicator to the reality of achieving the ultimate goals of the community's general or comprehensive plan.*

*Do not attempt to finance operations or current deficiencies with impact fees. Impact fees justified by the need to offset the effects of growth should not be used for operating expenses. To do otherwise would be unethical and could result in a loss of faith by the community.*

*Produce a comprehensive impact-fee report, including rationale and calculations, make the report readily available to the public. Performing an extensive study prepares the agency to answer questions about the way the fees were calculated and the use to which the fees will be put. Complete documentation can be a powerful form of defense against challenges to the agency's ability to impose impact fees.*

*Update the impact fees periodically. Impact-fee calculations should be updated often to ensure that the assumptions are still valid. The projected growth of the community, the facility needs, and the cost for providing those facilities should be verified. Reviewing the impact-fee calculations together with the capital improvement plan or budget would be ideal. At a minimum, the impact fees should be reviewed every two years, or whenever a major change occurs (e.g., major annexation or general plan revision) in the community.<sup>3</sup>*

## **Myths of Impact Fees**

Impact fees are in use in many states and local governments and we now have a wealth of experience from which to draw. Welch had summarized some of the opinions expressed about impact fees into what he calls “Myths About Impact Fees” and provides answers. Many impact fee myths so distort the truth as to ignore that the purpose of impact fees is to actually improve the climate for developers. These myths concern effects on housing and development prices, affordable housing, economic development, border effects, and administration.

### ***Myth 1: Impact Fees Will Be Passed On To Homebuyers***

*Developers usually argue that impact fees will simply be passed on to the homebuyer. This implies that impact fees will raise the price of housing. If this were true, developers would not oppose impact fee policy since it would cost them nothing. Also, if this were true, developers are not now charging as much as the market will bear and are therefore leaving money on the table.*

*In fact, developers have it part right. Depending on market dynamics, the impact fee will actually be paid by the landowner, land developers, builder, or homebuyer. There are two kinds of markets: competitive and noncompetitive. In competitive markets, housing prices are set at the maximum the market will bear across all housing segments. In these markets, it is very difficult to pass impact fees forward to the buyers of new homes. Except for a transitional period, impact fees will be mostly, if not entirely, paid by the seller of the land--whether that is the seller of raw land or the seller of finished lots. This is because, according to classic economic theory, the urban land market will force landowners to absorb the fees in the form of lower sales prices. Indeed, by viewing impact fees as a form of tax, classic economic theory requires that the fees be internalized in land prices. From a public policy perspective, this is a desirable outcome because it leads to more efficient use of land and its resources, thereby maximizing social benefits while maximizing social costs.*

*The situation is different in noncompetitive markets. Rising costs can indeed be passed on to homebuyers, especially in the short term. Such markets may be characterized by the affluent San Francisco Bay Area communities of the 1980s, and smaller, isolated communities where buyers have no locational alternatives, such as the affluent mountain communities of Colorado. However, such a market situation is irrelevant to impact policy consideration. Generally speaking, noncompetitiveness is a product of supply constraints. Ironically, impact fees finance the very facilities that expand the supply of buildable land. In effect, impact fees help make noncompetitive markets less noncompetitive.*

*Builders and developers are becoming quite adept at forcing landowners to pay the fee. One to two years before impact fees were adopted by Atlanta metropolitan area local governments, for example, developers were routinely inserting a new paragraph in their land purchase option agreements requiring landowners to reduce their sales prices by the impact fees charged. Indeed, it is the inefficient or unprofessional builder and developer who do not require the seller to internalize such fees. While impact fees may adversely affect developers and builders who have excess inventory acquired previously at high prices, inventory accumulation usually includes a risk factor that helps account for future uncertainties of both government and markets.*

*Based on economic logic and builder/developer behavior, it is unlikely that all impact fees will be passed forward to homebuyers. Indeed, in competitive markets and after a transition period, impact fees will be passed backward to the owners of vacant land.*

### **Myth 2: Impact Fees Are Bad For Low- And Moderate-Income Housing**

*Some will argue that impact fees will be bad for the production of low- and moderate-income housing. This is true if the fees result in reducing land prices to nearly zero. However, impact fees probably do more to facilitate the production of such housing than inhibit such production. Consider that housing prices rise if demand exceeds supply. What causes supply to fall below demand? Inadequate infrastructure. What is the purpose of impact fees? To provide infrastructure commensurate with demand. In effect, impact fees enable local government to increase the supply of buildable land to more closely match demand. If supply meets demand, prices will not rise.*

*There are thus two dynamics at work to keep low- and moderate-income housing prices competitive. First, impact fees will result in lowering land prices to offset the fee. Second, impact fees will increase the supply of buildable land, thereby also dampening price effects. Indeed, careful economic analysis of impact fees applied to competitive housing markets suggests that they will actually improve the opportunities for low- and moderate-income housing. Nevertheless, there can be some problems associated with impact fees on low- and moderate-income housing.*

### **Myth 3: Impact Fees Will Have Border Effects**

*This argument asserts that if a developer is choosing between two parcels of land on which to build, where the first parcel is inside a city that charges impact fees and the second is in another where impact fees are not charged, the developer will choose the second parcel. The trouble is that if the owner of the first parcel does not make a sale. The owner must lower the land price to offset the fee in order to make a sale.*

### **Myth 4: Impact Fees Are Bad For Economic Development**

*Related to Myth 3 is the argument that because impact fees raise the price of doing business, they frustrate economic development. However, just the reverse is true. First, remember that impact fees will be offset by reduced land prices and by enabling the community to more easily expand the supply of buildable land relative to demand. Now, consider what economic development really looks for: skilled labor, access to markets, and land with adequate infrastructure. Competitiveness for economic development will be stimulated by the new or expanded infrastructure paid in part by impact fees.*

### **Myth 5: Impact Fees Are Too High**

*This argument relates that the only good impact fee is no impact fee, and any impact fee is too high. First of all, impact fees merely reflect the real cost to provide the very infrastructure to new development that development needs. Second, impact fees rarely exceed one quarter of the total cost of new facilities needed to accommodate new development; the larger share of that cost is paid from intergovernmental sources and existing tax structures. Third, impact fees (other than utility connection fees) usually run*

*less than 5 percent of the total sales price of a new home, which is less than the customary 6 or 7 percent charged by real estate professionals.*

***Myth 6: Impact Fees Are Difficult And Costly To Administer***

*At 1 to 5 percent of total receipts, impact fees are the most efficient method of exaction. For example, researchers at the Georgia Institute of Technology recently found that government costs associated with case-by-case, negotiated exactions are four times higher than impact fee administration costs. Moreover, considering that developers incur far greater costs associated with case-by-case negotiations than local government, but there are no such costs where impact fees are involved, the developer savings can be considerable.*

***Myth 7: Impact Fees Are Just One More Bureaucracy Developers Have To Contend With***

*Since developers pay fees based on a published fee schedule, gone are many of the time-consuming, unpredictable, usually unfair horse trading between developers and local government for improvements. The result is several important efficiencies that accrue to developers. These include predictability of decision-making processes, certainty of infrastructure provision, streamlined decision processes, and more precise information for financial analysis purposes.<sup>2</sup>*

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<sup>1</sup> Kolo & Dicker, Practical Issues in Adopting Local Impact Fees, , State and Government Review, Vol.25, No. 3 (Fall 1993) pp197-206

<sup>2</sup> Terrance S Welch, An Overview of Impact Fees in Texas, A Short Course on Planning and Zoning for Public Officials and Attorneys, Southwestern Legal Foundation, Municipal Legal Studies center, Brown & Hofmeister, LLP, Dallas, TX, May 28, 1999

<sup>3</sup> Ross & Thorpe, Impact Fees: Practical Guide for Calculation and Implementation, Journal of Urban Planning and Development, Sep, 1992, [http://www.revenuecost.com/imp\\_fees.html](http://www.revenuecost.com/imp_fees.html)

<sup>4</sup> Nancy Wilstach, Proposed new-home fee draws opponents, The Birmingham News, July 18, 2001, p 1SC