Impact Fees in Georgia: The Basics
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Introduction

On April 4, 1990, the Georgia Development Impact Fee Act [hereinafter referred to as the "Act"] was signed into law. The legislation was the result of negotiations between representatives of local government and the building/development industry. The Georgia Development Impact Fee Act is set forth at Chapter 71, Volume 36 of the Official Code of Georgia Annotated.

The Georgia Development Impact Fee Act establishes the process by which municipalities and counties may adopt ordinances pursuant to which development impact fees may be imposed upon new development as a condition of development approval. In theory, impact fees are imposed on new development to pay for a proportionate share of the cost of system improvements needed to serve new growth and development. That is, the Act permits a municipality or county to charge development for the cost of infrastructure required to support that development.

The Georgia Development Impact Fee Act provides that "development exactions for other than project improvements shall be imposed by municipalities and counties only by way of development impact fees imposed pursuant to and in accordance with the provisions of [the Act]." The Act draws a distinction between "system improvements," for which a development impact fee may be charged, and "project improvements," which are not the proper subject of a development impact fee. The Act defines system improvements as "capital improvements that are public facilities and are designed to provide service to the community at large . . . ." In contrast, project improvements are defined as "site improvements and facilities that are planned and designed to provide service for a particular development project and that are necessary for use and convenience of the occupants or users of the project that are not system improvements." As set forth in the Act, however, "[i]f an improvement or facility provides or will provide more than incidental service or facilities capacity to persons other than users or occupants of a particular project, the improvement or facility is a system improvement and shall not be considered a project improvement."

As noted above, a development impact fee may only be imposed upon new development to pay for a proportionate share of the cost of system improvements.

"System improvement costs" include:

> Costs incurred to provide additional public facility capacity needed to serve new growth and development for planning, design and construction, land acquisition, land improvement, design and engineering related thereto, including the cost of constructing or reconstructing system improvements or facility expansions, including but not limited to the construction contract, price, survey and engineering fees, related land acquisition, cost (including land purchases, court awards and costs, attorneys fees, and expert witness fees), and expenses incurred for qualified staff or any qualified engineer, planner, architect, landscape architect, or financial consultant for preparing or updating the capital improvement element, and administrative cost, provided that such administrative cost shall not exceed 3 percent of the total amount of the cost.

As defined by the Act, public facilities "include water supply production, treatment and distribution facilities; waste water collection, treatment and disposal facilities, roads, streets and bridges; storm water collection, retention, detention, treatment and disposal facilities, flood control facilities; parks and recreation areas; public safety facilities; and libraries and related facilities."

Note, however, that the Act does not apply to a water authority created by an act of the General Assembly, as long as the water authority is not established as a political subdivision of the State of Georgia but instead acts subject to the approval of the county governing authority. Moreover, the Act does not limit a municipality, county, or other governmental entity which provides water or sewer service from collecting a proportionate share of the capital cost of water or sewage facilities by way of hook-up or connection fees as a condition of water or sewer service to new or existing users, provided that the development impact fee ordinance of a municipality, county or other governmental entity that collects impact fees pursuant to the Act shall include a provision for credit for such hook-ups or connection fees collected by the municipality or county to the extent that a hook-up or connection fee is collected to pay for system improvements.

A. How do I know if my local ordinance complies with the Georgia Development Impact Fee Act?

i. <u>Procedural requirements prior to adoption of development impact fee ordinance</u>.

Before a municipality or county may enact a development impact fee ordinance, the county or municipality must first adopt a comprehensive plan containing a capital improvements element. As defined by the Act, a "capital improvement

element" means a component of a comprehensive plan adopted pursuant to Chapter 70 of Volume 36 of the Official Code of Georgia Annotated "which sets out projected needs for system improvements during a planning horizon established in the comprehensive plan, a schedule of capital improvements that will meet the anticipated need for system improvements, and a description of anticipated funding for each required improvement."

After a county or municipality has adopted a comprehensive plan containing a capital improvements element, the county or municipality must then establish a development impact fee advisory committee. The committee must be established prior to the adoption of the development impact fee ordinance. The Act provides that the committee "shall be composed of not less than 5 and no more than 10 members appointed by the governing authority of the municipality or county and at least 50% of the membership shall be representatives from the development, building, or real estate industry." Pursuant to the Act, the committee shall serve only in an advisory capacity to assist and advise the governing body of the municipality or county with respect to the adoption of a development impact fee ordinance. As set forth in the statute, "no action of the committee shall be considered a necessary prerequisite for municipal or county action in regard to adoption of an ordinance."

Finally, prior to the adoption of the development impact fee ordinance, the governing body of the municipality or county is required to hold two duly noticed public hearings with respect to the proposed ordinance. The Act specifically provides that the second hearing shall be held at least two weeks after the first hearing.

Once a municipality or county has (1) adopted a comprehensive plan containing a capital improvements element, (2) established the development impact fee advisory committee, and (3) held two hearings on the proposed fee ordinance, the county or municipality may adopt a development impact fee ordinance.

ii. Mandatory elements of a development impact fee ordinance.

The Georgia Development Impact Fee Act requires that a development impact fee ordinance adopted by a municipality or county must contain the following elements:

1. The ordinance shall provide that fees are to be collected not earlier in the development process than issuance of the building permit authorizing construction of a building or structure;

2. The ordinance shall include a schedule of fees specifying the fee for various land usage per unit development on a service-area by service-area basis;

3. The ordinance shall provide that the developer shall have the right to pay a project's proportionate share of system improvement costs by payment of fees according to the fee schedule as full and complete payment of the development project's proportionate share of the system improvement costs;

4. The ordinance shall include a provision permitting individual assessments of fees at the option of applicants for development approval under the guidelines established in the ordinance;

5. The ordinance shall provide a process by which a developer may receive a certification of the fee schedule or individual assessment for a particular project, that shall establish the fee for a period of 180 days from the date of certification;

6. The ordinance shall include a provision for credit in accordance with the requirements of the Act;

7. The ordinance shall include a provision prohibiting the expenditure of fees except for the category of system improvements and in the service area to which the development impact fees were imposed as shown by the capital improvement element and as authorized by the Act. Fees shall not be used to pay for any purpose that does not involve system improvements that create additional services available to serve new growth and development;

8. The ordinance shall provide that, in the event a building permit is abandoned, credit shall be given for the present value of the fee against future fees for that same parcel of land;

9. The ordinance shall provide for a refund of development fees in accordance with O.C.G.A. § 36-71-9;

10. The ordinance shall provide for appeals from administrative determinations regarding development impact fees; and

11. The ordinance shall provide that all development impact fee funds shall be maintained in one or more interest bearing accounts. Accounting records shall be maintained for each category of system improvements and the service area in which the fees are collected. Interest earned on development impact fees shall be considered funds of the account on which it is earned and shall be subject to all restrictions placed on the use of development impact fees under the provisions of the Act.

iii. Optional elements of a development impact fee ordinance.

The Act provides that a development impact fee ordinance adopted by a municipality or county **may** contain the following elements:

1. The ordinance may provide for the imposition of a fee for system improvement costs previously incurred by a municipality or a county to the extent new growth and development will be served by the previously constructed system improvement; and

2. The ordinance may exempt all or part of a particular development project from fees if:

   a. The project is determined to create extraordinary economic development and employment growth or affordable housing;

   b. Public policy which supports the exemption is contained in the municipality's or county's comprehensive plan; and

   c. The exempt development's proportionate share of the system improvement is funded through a revenue source other than development impact fees.

iv. Calculation of impact fees.

How are development impact fees calculated? Pursuant to Official Code of Georgia Annotated § 36-71-4, development impact fees are calculated and imposed on the basis of "service areas". The Act describes a "service area" as a geographic area defined by a municipality or county in which a defined set of public facilities provide service to development within the area. Unfortunately, Georgia law does not set forth any guidelines as to how service areas are to be

established or whether more than one service area may be required in a specific instance. This loophole has led many local governments to designate their entire geographic boundary as the "service area." While such a designation may not have much of an effect in a small municipality, such a designation can significantly impact the manner in which impact fees are spent in a county or large municipality. For example, by designating an entire county as a service area, the county could, in theory, spend its impact fees on any impact fee eligible project in the county, regardless of that project's proximity to the project that generated the fee.

Fees are to be calculated on the basis of levels of service for the public facilities that are adopted in the municipality or county comprehensive plan and that are applicable to existing development as well as the new growth and development.

Furthermore, the fees are to be based on actual system improvement costs or reasonable estimates of those costs. Finally, the development impact fees are to be calculated on a basis which is net of credit for the present value of revenues that will be generated by new growth and development based on historical funding patterns that are anticipated to be available to pay for system improvements, including taxes, assessments, user fees, and intergovernmental transfers.

v. Annual Report

The Act provides that as part of the annual audit process of a county or municipality, the county or municipality shall prepare an annual report describing the amount of any development impact fees collected, encumbered, and used during the proceeding year by category of public facility and service area.

B. What issues should a local government consider prior to implementing a development impact fee program?

There are a number of issues that local governments should consider prior to implementing a development impact fee program:

(1) Has the local government carefully considered its growth projections to determine whether impact fees would be appropriate over a significant planning horizon? That is, will there be enough growth to sustain a viable impact fee program?

(2) What effect will the projected impact fees have on growth? On commercial growth? On industrial growth or industrial recruitment?

(3) Is the current inventory of capital facilities sufficient to serve the current population as well as new growth over the same planning horizon, or is additional infrastructure needed? If it is felt that additional infrastructure is necessary, how was that conclusion reached?

(4) Is the local government experiencing a problem with funding capital facilities through traditional methods of generating revenue? If not, why impact fees?

(5) Will the adoption of impact fees hamper efforts in the future to pay for capital facilities through other means such as SPLOST or property taxes? That is, will impact fees be viewed by the public as a substitute for SPLOST, not as a supplemental funding mechanism?

(6) Are there neighboring counties or municipalities that will attempt to "steal" beneficial growth if the jurisdiction adopts impact fees?

(7) Once the new capital facilities are constructed, what are the anticipated costs of operating and maintaining those facilities? Has the local government adopted a plan for the payment of these costs?

(8) How will the local government fund the capital facilities if the projected impact fees are less than anticipated? Will it require an increase in property taxes?

(9) Will there be an exemption for commercial/industrial projects that will create extraordinary economic benefit for the community? If so, how will the exemption be determined? If so, how the will the exempt fees be funded?

The decision to adopt impact fees should proceed in a thoughtful and deliberate manner. Impact fees are not appropriate in all jurisdictions and for all categories of system improvements. A municipality or county that begins the process of considering whether to implement an impact fee program should proceed with an objective analysis of the need for such a program in that particular jurisdiction.

Over the last several years, I have had the opportunity to interview a number of attendees at meetings, seminars and presentations I have given on the topic of impact fees. In those interviews, I routinely ask proponents of impact fees if the perceived need for additional funds for infrastructure improvements is the result (1) exclusively of new growth, (2) the result of new growth and poor planning by

public officials, or (3) exclusively the result of poor planning by public officials. In the vast majority of cases, the answer is number (2). That is, even the most ardent of impact fee proponents will usually admit that the budget crisis which has created the perceived need for impact fees is the result, at least in part, of poor planning and management by current and past public officials. The question, however, is whether the adoption of impact fees will solve this problem. An impact fee program requires proper planning, administration, oversight and management. If these qualities have been lacking in the general operations of the local government, why would that be expected to change with the implementation of an impact fee program?

C. Common misconceptions about impact fees.

There are numerous misconceptions about what impact fees can and cannot be used for in Georgia.

For example, impact fees cannot be used to pay for new school facilities. Nonetheless, I have encountered many members of the public who support impact fees on this very basis.

Another example of a common misconception about impact fees is the effect of impact fees on current citizens. Impact fees are often advocated as an "admission price" that new residents in a community should be required to pay in order to take advantage of the infrastructure paid for by current taxpayers. Local legislators who advocate impact fees will often downplay the impact that such fees have on current residents. That is, there is often very little discussion of the fact that current residents and businesses will also be required to pay impact fees if they build or relocate within the county. Current residents are often left with the mistaken impression that they are somehow exempt from paying impact fees. This is simply not true. Moreover, impact fees do not pay for the costs associated with operating, maintaining and staffing a facility once it is constructed. This is a cost paid by all taxpayers.

In addition, impact fees are often advocated as a means of controlling residential growth. However, many communities that want to control residential growth often desire to retain beneficial commercial growth. However, with certain specific exceptions, both residential and commercial development pay impact fees on a proportional basis. For example, private schools, hospitals, medical clinics, banks, churches and movie theaters are all subject to impact fees by virtue of their significant impact on roads, fire services and police services.

During the process of adopting impact fees, arguments are often made that impact fees will have a detrimental effect on low income families and commercial growth. The Act, however, specifically provides that a county or municipality may exempt development that provides low income housing opportunities or extraordinary economic opportunity. Accordingly, a county or municipality will

often focus on these particular exemptions as a means of addressing the concerns raised by the development community. However, the general public is very rarely informed that when such exemptions are granted by the local government, the revenue lost from such exemptions must be replaced by the local government from sources other than impact fees. Accordingly, the cost of providing for low income housing and extraordinary economic opportunities will ultimately fall back on the taxpayer.

D. Remedies available under the Development Impact Fee Act

i. Administrative Appeal

Section 36-71-10 provides that a development impact fee ordinance shall provide for administrative appeals to the governing body or such other body as designated in the ordinance of a determination of the development impact fees for a particular project. The Act provides that a developer may pay a development impact fee under protest in order to obtain development approval or a building permit. In that case, a developer is not prohibited from exercising the right of appeal nor is the developer prohibited from receiving a refund of any amount deemed to have been illegally collected. Finally, the ordinance may provide for the resolution of disputes over the fee by binding arbitration through the American Arbitration Association or otherwise.

ii. Refunds

Upon the request of an owner of property in which a fee development impact has been paid, a municipality or county is required to refund the fee if capacity is available and services are denied or if the municipality or county, after collecting the fee when service is not available, has failed to encumber the fee or commence construction within six years after the date that the fee was collected. When the right to a refund exists due to a failure to encumber development impact fees, the municipality or county is required to provide written notice of entitlement to a refund to the feepayor who paid the fee at the address shown on the application for development approval or to a successor in interest who has given notice to the municipality or county of a transfer or assignment of the right or entitlement to a refund and who has provided a mailing address. The notice shall also be published within 30 days after the expiration of the 6 year period after the date the development impact fees were collected. An application for a refund shall be made within one year of the time such refund becomes payable under the Act or within one year of publication of the notice of entitlement to a refund under the Act, whichever is later. The refund shall include a refund of a pro rata share of interest actually earned on the unused or excess fee collected. The county or municipality is required to pay the refund to this feepayor within 60 days after it is determined by a municipality or county that a sufficient proof of claim for a refund has been made. The Act provides that a feepayor shall have standing to sue for a refund under the provisions of the Act if there has been a

timely application for a refund and the refund has been denied or has not been made within one year of submission of the application for refund to the collecting municipality or county.

iii. Credits

According to the Act, "[i]n the calculation of development impact fees for a particular project, credit shall be given for the present value of any construction of improvements or contribution or dedication of land or money required or expected by a municipality or county from a developer or its predecessor in title or interest for system improvements of the category for which the development impact fee is being collected." Credit is not available for project improvements. However, in the event that a developer constructs, funds, or contributes system improvements in excess of the development impact fees that would otherwise have been paid for the development of the project, the developer is to be reimbursed for such excess construction, funding, or contribution from development impact fees paid by other development located in the service area which is benefited by the improvement.