

An Analysis of Development Impact Fees in Georgia

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Introduction

As the population of Georgia continues to increase, as it has for the past several decades, there arises a need for tools to control the byproducts of this population growth. Georgia's population boom has created many problems. Not only is greenspace being consumed at a staggering rate as sprawl from urban areas spreads into the countryside, but also the costs of accommodating the influx of people are often falling on existing residents. As development spreads into formerly rural areas, there is an increased demand for public services such as water and sewer connections, public safety, and transportation improvements. As studies have shown, the tax revenues collected from residential development often do not cover the costs of providing public services to residential development.¹ Invariably, some of the cost of providing these services falls on existing residents in the form of higher taxes. If funds are not immediately available for the local government to accommodate these increases in demand, shortages of public services occur.

In 1990, the Georgia General Assembly enacted the Georgia Development Impact Fee Act, which gave local governments a tool to help alleviate problems associated with growth into undeveloped areas.² A development impact fee is defined as "payment of money imposed upon development as a condition to development approval to pay for a proportionate share of the cost of system improvements needed to serve growth and development."³ System improvements are capital improvements which increase the capacity of facilities designed to serve the public at

¹ See Jeffrey Dorfman, Dawn L. Black, David H. Newman, Coleman W. Dangerfield, Jr., & Warren A. Flick, The Economic Costs of Development for Local Governments, University of Georgia (January 2002), available at <http://www.forestry.uga.edu/warnell/pdf/cfb/EcCost.pdf>.

² O.C.G.A. § 36-71-1 *et seq.*

³ *Id.* at § 36-71-2(8).

large.⁴ Development impact fees are a relatively new idea in Georgia, but have been used in other jurisdictions for years.

Development impact fees help alleviate some of the problems associated with rapid growth by requiring those responsible for the growth, developers and occupiers of newly developed property, to pay their proportionate share of the cost of upgrading existing or creating new public services necessary to serve new growth. This is accomplished by conditioning building permit approval on developers paying a fee for each building project that will cause an increase in the demand for public services. Through impact fees, the funding to provide system improvements to service new development is collected concurrently with the growth, so local governments have the funds in hand when they are needed as opposed to having to wait for tax revenues to make up the difference. Also, the availability of impact fee funds allows local governments to meet service demands without burdening other residents with increased taxes.

The Development Impact Fee Act was not enacted just to benefit local governments, however. Prior to the enactment of this legislation, there was concern among developers that local governments had been demanding dedications, donations of land or easements over land that are accepted for use by the public, as conditions to building permit approval that were excessive in relation to the impact of the development.⁵ The General Assembly stepped in to regulate this practice. Thus the Act also benefited developers by providing certainty about exactions and limits to what could be demanded from them as a condition to receiving a permit.

⁴ See *id.* at § 36-71-2(19). The public facilities which may have systems improvements funded by impact fees are limited to water supply production, treatment, and distribution facilities; waste-water collection, treatment, and disposal facilities; roads, streets, and bridges, including landscaping, rights-of-way, and signals, and any local components of state or federal highways; storm water collection, retention, detention, treatment, and disposal facilities; flood control facilities; bank and shore protection and enhancement improvements; parks, open space, and recreation areas and related facilities; public safety facilities; library and related facilities. *Id.* at § 36-71-2(16).

⁵ Janice C. Griffith, *The Preservation of Community Greenspace: Is Georgia Ready to Combat Sprawl with Smart Growth?*, 35 Wake Forest L. Rev. 563, 589 (2000) (citing Carly Brinson Sumner & Ed Sumner, *Impact Fees Under Georgia's New Statute*, 1, No. 2 Information Series, Georgia Municipal Association 2 (1990)).

How the Development Impact Fee Act works in Georgia.

In Georgia, development impact fees may only be imposed by ordinance passed by the local government. The Act sets out several basic requirements that must be met before a local government is allowed to pass an ordinance imposing impact fees. First, the local government must have adopted a comprehensive plan containing a Capital Improvements Element (CIE) that has been approved by the Georgia Department of Community Affairs.⁶ The Capital Improvements Element must contain a projection of the future public service needs of the county for the planning period, a schedule of the capital improvements projects that will provide these services, the projected funding sources for the improvements, a designation of service areas, and the levels of service for public facilities in each service area.⁷ The Act also mandates that the local government must establish a Development Impact Fee Advisory Committee composed of at least 40 percent real estate development community representatives⁸ to advise the local government in matters relating to the adoption of the impact fee ordinance. Last, the local government must hold at least two public hearings on the matter, prior to the adoption of the ordinance.⁹

The ordinance itself must comply with the many substantive requirements of the Act.¹⁰ These substantive requirements include creation of a schedule of impact fees for varying land uses within a service area that imposes fees on a per unit and service area basis.¹¹ Impact fees must be based on the actual, or reasonable estimates of, cost of providing services to the area¹²

⁶ See O.C.G.A. § 36-71-3(a); O.C.G.A. § 50-8-7.1(b).

⁷ GA. COMP. R. & REGS. 110-12-5-.03(a) (2004).

⁸ O.C.G.A. § 36-71-5(a).

⁹ Id. at § 36-71-6.

¹⁰ Id. at § 36-71-4.

¹¹ Id. at § 36-71-4(b), (e).

¹² Id. at § 36-71-4(q).

and must take into account the present value of any future funding sources.¹³ The ordinance must allow parties to request an individual assessment of impact fees for their property.¹⁴ The ordinance must have a system for giving credit to developers or their predecessors in title who have already paid fees or made dedications for a project and a refund policy if these credits exceed the amount of the impact fee.¹⁵ The ordinance must require that impact fee funds be spent on the service and in the service area from which the fees were collected.¹⁶ Finally, the ordinance must contain a mechanism for appealing the imposition of impact fees.¹⁷

In establishing their impact fee programs, local governments have some discretion in deciding the amount of their impact fees and which system improvements will be funded. Also, local governments may charge connection fees for water and sewer services, independent of any impact fees.¹⁸ They may require site specific exactions and dedications from developers on individual development projects.¹⁹ Additionally, local governments are allowed to form private agreements with developers for construction of improvements or dedications of land or services made in lieu of paying impact fees. This provision provides some flexibility for negotiations between the local governments and developers.²⁰

The Act has benefits for local governments beyond simply providing a new source of funding for public services. Implementing an impact fee ordinance requires local governments to forecast their future needs and plan ahead for future development. This allows local

¹³ Id. at § 36-71-4(r).

¹⁴ Id. at § 36-71-4(g).

¹⁵ Id. at § 36-71-4(i).

¹⁶ Id. at § 36-71-4(m); § 36-71-8(b).

¹⁷ Id. at § 36-71-4(p); § 36-71-10. The local government must allow the developer to pay the impact fees under protest and may also include an arbitration provision in their appeals process.

¹⁸ Id. at § 36-71-13(b).

¹⁹ Id. at § 36-71-13(c).

²⁰ Id. at § 36-71-13(b).

governments to react to growth before problems occur rather than waiting for them to arise as a consequence of growth.

Development impact fees may potentially be used to promote Smart Growth ideas. The Act allows impact fees to be charged to fund parks, open spaces, recreation areas, and other related facilities to compensate for any that may be lost due to development.²¹ Also, impact fees charged for extending existing services, such as water and sewer, to new development would make greenfield development more expensive, which may create economic incentives for developers to instead consider infill properties that are connected to existing services.

Problems with the Development Impact Fee Act

Despite the potential benefits of development impact fees, there are several weaknesses to their application that limit the usefulness of impact fees in Georgia. The enabling statute itself is the source of some of these weaknesses. First of all, the requirement of a CIE in the local government's comprehensive plan is a barrier to the use of impact fees. Since impact fees must be based on estimated costs of capital improvements needed to provide service at the levels projected in the CIE, taking into account the present value of future funding sources, a sophisticated level of economic forecasting is required. This forecasting often necessitates the hiring of outside consultants. Studies may also be needed to determine the appropriate boundaries of the service areas and for calculating the appropriate rates for impact fees. These requirements make impact fee ordinances expensive and time consuming to pass, and may make such ordinances impractical to counties with limited funding.²²

Another statutory problem with the Act is that it places limits on what services may be funded with impact fees. While a broad range of system improvements are included on the list

²¹ See *supra* note 4.

²² Note however that the costs of financial consultants may be recouped through impact fee funds once the ordinance is in place. *Id.* at § 36-71-2(18).

of allowable expenditures, several important public service items are left off, notably schools, hospitals, and landfills. Many other elements that may be needed to serve growth are not authorized to be funded with impact fees, such as routine maintenance, personnel training, and operating expenses for capital improvements.²³ These items are some of the most expensive for local governments to provide, yet cannot be funded through impact fees. Although the statute does authorize impact fee funds to be used to finance parks, open spaces, and recreational and related areas, it is unclear whether things such as pedestrian walkways, multi-use trails, and bike paths, which might be used to promote alternative transportation methods, are included in this list of permissible uses of impact fee funds.²⁴ Lastly, the Act prevents impact fee funds from being spent to improve existing public services and facilities which are not connected to servicing new development even though insufficiency of existing services may be as large of a problem as providing public services to new development.

Another barrier to the effective use of impact fees is opposition from the development community. It appears that, despite the statutory requirement of developer input on impact fee ordinances, developers still generally oppose the imposition of impact fees and fight local governments to prevent or overturn impact fee ordinances. This opposition can lead to litigation over the impact fee ordinances. The potential for litigation involving the impact fee ordinances may itself be a barrier to the statute's effectiveness. A good example of this occurred in Cherokee County, where pro-developer interest groups resorted to a lawsuit against the local government to stop impact fees.

²³ O.C.G.A. § 36-71-2(18).

²⁴ The City of Atlanta has used impact fee revenues to fund walking paths and sidewalks, thus far without legal challenge to the practice. While arguably the statute does allow these items under the "recreation areas and related facilities" language of the public facilities definition in O.C.G.A. § 36-71-2(16)(F), the lack of specific reference to these items in the statute may deter some local governments from using impact fee funds to provide them.

In 1999, Cherokee County became the first county in the State to adopt a development impact fee ordinance. Shortly after the passage of the ordinance, the Greater Atlanta Homebuilders Association sought, and was granted, an injunction on the fees charged by the county for parks, roads, and libraries. While this injunction was eventually overturned in Cherokee County v. Greater Atlanta Homebuilders Association, 566 S.E.2d 470 (Ga. Ct. App. 2002), the County was prevented from charging impact fees for almost two years during the course of the litigation, during which growth in the county continued.

Greater Atlanta Homebuilders Association also exposed another potential problem for local governments that pass impact fee ordinances: constitutional challenges. The Homebuilders Association argued that the County's practice of charging impact fees only in unincorporated areas and using them to fund projects that benefited both the unincorporated county and the incorporated municipalities violated the due process and equal protection guarantees of the Georgia and federal constitutions.²⁵ Cherokee County imposed impact fees only in the unincorporated areas of the county. It did not have fee sharing agreements with the municipalities within the county.²⁶

The Court of Appeals applied the rational basis test, which, under an equal protection challenge, upholds a legislative classification so long as there is a rational basis for the classification.²⁷ For a due process challenge, under the rational basis test, the legislative body

²⁵ See Greater Atlanta Homebuilders Ass'n, 566 S.E.2d 470, 473 (Ga. Ct. App. 2002). The court in Greater Atlanta Homebuilders Association recognized that the equal protection provisions and due process guarantees of the Georgia and United States constitutions were substantively the same, and thus did not apply separate tests to each claim.

²⁶ O.C.G.A. § 36-71-11 allows, but does not require, local governments to enter into fee sharing agreements with other local governments that may impact and benefit from shared public services.

²⁷ 566 S.E.2d at 474. The rational basis test has been used by courts in other states for determining the constitutionality of imposed dedication and connection fees. See Jordan v. Village of Menomonee Falls, 137 N.W.2d 442 (Wis. 1965); Contractors & Builders Ass'n of Pinellas County v. City of Dunedin, 329 So. 2d 314 (Fla. 1976). But see Ehrlich v. City of Culver City, 911 P.2d 429 (Cal. 1996) (applying rough proportionality test to development exactions).

must show that the classification is not arbitrary and that there is a rational connection between the classification and the legislation's objective. As applied to development impact fee ordinances, to establish a rational basis, the local government generally must establish a connection between new development and the need to fund expanded public services to meet the growth, a connection between the amount of fees charged and the expected cost of providing services, and a rational relationship between the amount charged to new development and the benefits expected to be received by that development.²⁸

The Court of Appeals held that since Cherokee County was only allowed to impose fees in the unincorporated areas of the county, a rational basis existed for imposing fees in only those areas.²⁹ Furthermore, the fact that incorporated sections of the county benefited from the system improvements funded by impact fees collected from the unincorporated areas did not violate equal protection or due process guarantees, because the feepayers were not being denied the services.³⁰ Last, the court ruled that Cherokee County's impact fees did not charge county developers more than their proportionate cost of public services.³¹ The court, however, left open the possibility of equal protection and due process violations in situations where a local government had the authority to impose impact fees on an area that received services and yet did not.³²

The potential for litigation based on violations of equal protection and due process guarantees may also arise due to the statutory limitation of only being able to charge impact fees

²⁸ Arthur C. Nelson, Development Impact Fees: The Next Generation, 26 Urb. Law. 541, 548 (1994).

²⁹ 566 S.E.2d. at 474.

³⁰ Id. at 475.

³¹ Id. at 476. O.C.G.A. § 36-71-4(a) requires that new development not be charged more than its proportionate share of the cost of providing services. Developers argued that the County was charging higher fees to compensate for their inability to collect fees from the incorporated municipalities. However, Cherokee County calculated the impact fees as if the incorporated municipalities were paying the fees, and then made up the difference with other funding sources.

³² Id. at 475.

within the service areas designated in the CIE. Because it is administratively more difficult to calculate and manage separate impact fees for many different service areas and difficult to determine where to draw lines for service areas with certain public services, such as transportation and public safety, local governments may choose to have only one service area for the entire jurisdiction.³³ Impact fees collected from developments in one location could be spent on improvements in another, geographically remote, location within the same service area. This raises potential due process and equal protections problems since a rational relationship is required between the impact fees charged and services being provided. If fees are disproportionately collected in one area but spent in another area, this rational relationship standard may not be met.

While this issue has yet to be fully litigated in Georgia, it may soon be. The Southeastern Legal Foundation, representing the Greater Atlanta Homebuilders Association, recently filed suit against the City of Atlanta, accusing the City of using impact fee funds collected in North Atlanta to fund public service projects in other parts of the city.³⁴ The Foundation alleges that the funds are being spent on projects that do not provide service to the developments from which the fees were collected, and that this practice violates constitutional protections.³⁵ The outcome of this case could potentially have a negative effect on development impact fee ordinances in Georgia. If it is determined that the City of Atlanta's practice violates the Constitution, impact fee programs may be required to designate a larger number of service areas, which will increase both administrative burdens and the cost of creating an impact fee ordinance. This, in turn, may cause local governments to decide against implementing development impact fee ordinances.

³³ The City of Atlanta, for example, has the entire city as its service area for its transportation and public safety impact fees. Telephone Interview with Bronaugh Bridges, City of Atlanta Department of Planning (April 19, 2004).

³⁴ Greater Atlanta Homebuilder's Ass'n, et al. v. City of Atlanta, No. 101-CV-2633 (N.D. Ga. filed Oct. 3, 2001).

³⁵ Janet Frankston, Impact Fee Use Stirs Hot Debate, Atlanta Journal-Constitution, February 25, 2002, at 1B.

The aftermath of litigation in Cherokee County showed yet another possible problem for local governments attempting to impose impact fees: developers influencing local politics to get impact fees repealed or reduced. In Cherokee County, after the lawsuit was finally decided in 2002, the fee ordinances were put back into effect. Developers then heavily financed the campaigns of two pro-developer County Commission candidates.³⁶ The two pro-developer candidates won Commission seats and the Commission promptly reduced the impact fees being charged for road construction and waived impact fees altogether for several large commercial developments.³⁷ Pressure from developers and businesses seeking to avoid impact fees could potentially prevent other local governments from consistently being able to impose development impact fees in their jurisdictions.

Other Issues with Development Impact Fees

Development impact fees may also have harmful economic side effects. Impact fees are generally paid out-of-pocket by developers. It has been hypothesized that developers will negotiate with landowners, whose land is now less valuable to developers subject to impact fees, for lower prices which reflect the value of land minus the impact fees.³⁸ There is some evidence to suggest that developers will, through the terms of their contracts with landowners, place the burden of paying impact fees on landowners.³⁹ If this holds true, then we could expect to see more landowners, as opposed to land developers, attempting to influence local government decisions and get impact fee ordinances overturned. Also, this would defeat the purpose of

³⁶ Christopher Quinn, Cherokee Undergoes a Change of Climate; Developers Warm to New Officials, Atlanta Journal-Constitution, August 11, 2003, at 1E.

³⁷ Id.

³⁸ See Nelson, supra note 28, at 549.

³⁹ Id. at 550. Nelson claims that some Atlanta area developers specified in their contracts that the developer, in the event impact fees were imposed, would be entitled to a refund from the purchase price of the amount of the impact fees paid.

impact fees; the economic burden would fall on landowners instead of the developers and new residents that necessitated the increased expenditures for public services.

There are reasons to doubt that the above hypothesis holds true in practice, however. First of all, if developers were able to pass impact fees on to landowners so easily, then it seems unlikely that developers and developer interest groups would oppose the passage of impact fee ordinances. Generally, it has been development interest groups who have attempted to get impact fee ordinances overturned and have brought litigation opposing them. Secondly, impact fees, at least in the context of residential housing, are unlikely to change the price of an individual home so significantly that they could not be passed on to consumers.⁴⁰

The sequence of events surrounding the passage of the Cherokee County impact fee ordinance paint what is likely a more realistic picture of the effects of imposing impact fees. Between 1999 and 2003, roughly the time period that the county's impact fee ordinance was in place, developers bought almost 5,000 acres surrounding the municipalities in the county, which did not have impact fee ordinances.⁴¹ The developers next petitioned for annexations of the county lands to be included within the municipalities' city limits and these annexations were granted. This represented a 400 percent increase in the acreage annexed over the previous four year period. The municipalities in the city thus experienced a boom in growth as a result of the county imposing impact fees.

This series of events in Cherokee County illustrate yet another potential side effect of imposing impact fees in Georgia. Since the Act does not require local governments to adopt impact fee ordinances, we can predict that developers will tend to move away from areas where impact fees are being charged. This migration could cause many problems. First of all, if

⁴⁰ For example, development impact fees for residential property were \$1,544 per home in North Atlanta, \$1,382 for South or West Atlanta, \$1,141 in Alpharetta, and \$1,832 in Cherokee County. See Frankston, supra note 35.

⁴¹ See Quinn, supra note 36.

development is funneled away from certain areas due to impact fees, we could see irregular or uneven development patterns which could strain existing public services in those areas. The geographical makeup of Georgia could serve to exacerbate this effect. Georgia's counties tend to be smaller in size and have municipalities with independent governmental bodies within them. If a local government decides to impose impact fees in its jurisdiction, developers who do not want to pay the impact fees may not have to look far to find a location that does not. The other locations, since they could anticipate receiving increased tax revenues due to the migration of development into their jurisdictions, would have an economic incentive to continue their practice of not charging impact fees or entering into fee sharing agreements.

Another potential problem that arises when impact fees are not uniformly applied across an area is a sort of "race to the bottom" that may occur as counties and municipalities compete for businesses and tax dollars.⁴² Once again, this can be illustrated through events that took place in Cherokee County. Cherokee County is situated between two counties, Bartow to the north and Cobb to the south, which do not charge impact fees. When a large distributor began considering sites on the Interstate 75 corridor north of Atlanta, they first looked at Cherokee, but began to consider alternative locations in Bartow and Cobb counties after realizing that Cherokee charged impact fees.⁴³ Cherokee was told the fact that the county charged impact fees made it a less desirable location than the other sites.⁴⁴ In response, the County commission waived the impact fees for the proposed development.⁴⁵ Realistically, this means that local governments

⁴² Race to the bottom is a term that describes the tendency of competing jurisdictions to enact the least stringent regulations possible in order to attract business and growth.

⁴³ Doug Payne, County Forced to Waive Fees to Attract Business, Atlanta Journal-Constitution, January 15, 2004, at 1JQ.

⁴⁴ Id.

⁴⁵ Waiver of impact fees for certain projects is allowed under the Act, provided that the projects are shown to create extraordinary economic development and employment growth or affordable housing, the public policy for the exemption is contained in the local government's comprehensive plan, and the exempt project's system

imposing impact fees may be forced to waive or repeal them for businesses, or face losing jobs and tax revenues to neighboring jurisdictions that do not impose the fees.

Should Local Governments Charge Impact Fees?

Despite the problems that arise from the use of development impact fees and the limitations to creating a development impact fee ordinance, they should be considered by local governments. Development impact fees can provide additional revenues to local governments without the necessity of raising tax rates or issuing debt. While imposing impact fees may not promote Smart Growth in the sense that development is prevented from growing out into undeveloped land and directed back inward to urban areas, development impact fees perhaps promote a smarter growth in that they help prevent the rate of development from outstripping the availability of funds for public services. This insures against things such as inadequate transportation infrastructure and public services shortages that often plague rapid growth into formerly rural areas. Additionally, the comprehensive planning and capital improvements element necessary for the passage of a development impact fee ordinance help local governments to better plan ahead for the possible impacts of growth to their area.

Suggested Changes

Some legislative changes may be needed to make development impact fees a more effective tool for local governments and to avoid some of the potential consequences of impact fee use. First of all, the list of permissible expenditures for impact fee funds should be expanded to specifically include schools, hospitals, landfills and sanitation related facilities, routine

improvement costs are funded through another revenue source besides development impact fees. O.C.G.A. § 36-71-4(l).

maintenance to capital improvements, and operational expenses for capital improvements.⁴⁶

These are all needed infrastructure items that cannot be funded under the current Act in Georgia. Also, the act should be amended to specifically allow dedications and impact fee funding for bike trails, walking paths, and other related facilities.

Another way that impact fee usage could be improved is by imposing impact fees at the regional level as opposed to the just the county or municipal government level. The Act allows collaboration between cities, counties, authorities, and the State for the purpose of developing impact fee sharing plans.⁴⁷ A regional transportation impact fee is already being considered by the Atlanta Regional Commission as one way to help alleviate Atlanta's traffic problems.⁴⁸ If an agency or regional development authority was created specifically for the purpose developing and promoting impact fee sharing agreements, some of problems that may occur when one isolated local government imposes impact fees, such as annexations, uneven growth, and race to the bottom, might be avoided in the future. Collaborative efforts such as these might also help spread the costs associated with creating an impact fee ordinance among several participants, which could make them financially more feasible for poorer counties. Since the Act already allows local governments to recoup some of the costs of creating an impact fee ordinance with impact fee funds, a system of short term loans or grants from the State to local governments could aid in funding the immediate costs of creating development impact fee ordinances.⁴⁹ Lastly, local governments need to work harder to obtain developer input for impact fee ordinances so that they are not so heavily opposed by development groups.

⁴⁶ The Georgia General Assembly appointed a committee to assess the feasibility of using impact fees to fund schools; this committee is to report its findings back during the next session. H.R. 1475, 147th Gen. Assem., Reg. Sess. (Ga. 2004).

⁴⁷ O.C.G.A. § 36-71-11.

⁴⁸ John McCosh, ARC Looks North for Traffic Solutions, Atlanta Journal-Constitution, March 19, 2001, at 1C.

⁴⁹ See supra note 22.

Conclusion

Impact fee ordinances are an option that local governments facing development pressures, whether imminent or likely to occur in the near future, should consider. The funding benefits of impact fees combined with their potential to help avoid or alleviate an increased tax burden on existing residents make impact fees worth the trouble and expense of developing the CIE. While litigation involving impact fees may be forthcoming, this should serve to better define the permissible boundaries of impact fee ordinances and help local governments avoid legal troubles in the future.