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ATTORNEYS AND COLLECTORS AT LAW

## SCHOOL FINANCE: IMPACT FEES and a COUPLE OF OTHER THINGS

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## First Things

- What Are We Talking About?
  - How to pay for governmental facilities and other large capital expenditures.
  - “Capital Expenditures” distinguished from “Expenses.”
  - What’s useful life got to do with it?

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## How Do We Pay?

- How Do We Pay?
  - Each “type” of government has differing tools available to pay for capital items.
  - Federal government finances everything via tax collection and through the issuance of US Treasury Bonds—debt. Federal agencies have, in some cases, authority to issue other classes of federal indebtedness.

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## How Do We Pay?

- How Do We Pay?
  - The State of South Carolina pays for some capital items out of annual appropriations, and, occasionally, issues bonds to pay for capital items.
  - The Department of Transportation issues bonds repaid from gasoline taxes.
  - Universities typically issue bonds repaid from (a) student fees, or (b) athletic department revenues. Classroom buildings are financed through a special revenue stream referred to as "tuition." Tuition is only part of what a student pays to attend the university, however.

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## How Do We Pay?

- How Do We Pay?
  - Municipalities and counties have an array of tools to pay for capital items:
    - General obligation bonds;
    - Revenue bonds for revenue-producing projects (e.g. water, sewer, stormwater, solid waste, etc.);
    - Capital Project Sales Tax;
    - Municipal/County improvement and assessment districts;
    - Installment purchase (not legal for schools for past 10 years);
    - Special tax district (debt-limit exempt) bonds for localized facilities and services;
    - Impact fees;
    - Hospitality and Accommodations Taxes ("Tourism-Related").

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## How Do We Pay?

- How Do We Pay?
  - School districts, on the other hand, have:
    - General obligation bonds...and...

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## How Do We Pay?

- How Do We Pay?
  - From 1987 through 1995, school districts used “lease-purchase” transactions to build a number of school buildings across the State.
    - 1995 legislation made this technique impracticable.
  - From 2001 through 2006, school districts used “installment-purchase” to build more school buildings across the State.
    - Act 388, likewise, made this technique impracticable.
  - From 1997 through 2014, some school districts used a local sales tax authorized by local legislation to finance school buildings
    - Despite approving the sales tax technique in a unanimous opinion in 1996, the Supreme Court in 2014 cast doubt on the use of local laws.

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## A “New” Tool: Impact Fees

- What are Impact Fees?
  - Impact Fees are charges imposed against new development intended to capture a proportionate share of new public facilities which are required as a consequence of the new development.
  - Depending on the jurisdiction, impact fees can be collected against many types of new development (industrial, warehouse facilities, commercial, multi-family, single family residential).
  - And applied to the cost of various types of public facilities: water, sewer, natural gas, street lighting, recreational facilities, roads, stormwater, police and fire stations.
  - Paid at time of issuance of building or development permit.

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## Pros and Cons

- Pro:
  - Impact fees are imposed with a reasonable degree of precision on the direct users of a facility. Compare that precise imposition with property taxes, which apply to all property owners, regardless of a given taxpayer’s use or derivation of benefit from a particular facility.
- Con:
  - Impact fees are charged up-front on a one-time basis, but are applied to the cost of a facility which may be in use for 30 years or longer. How much of the cost of a facility should be borne by one who, by design, will only use the facility for a fraction of the life of the facility?

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## Impact Fees in SC: History

- Prior to 1999, there was no general statute--applicable to all local governments--addressing impact fees.
- Water and sewer districts, in some cases, had statutory authority to impose impact fees as a means to recapture a proportionate share of the cost of major facilities, e.g. water and sewer treatment plants.
- During the brief window of unfettered Home Rule in 1996, York County imposed residential impact fees on behalf of Fort Mill School District.
- Continuing litigation over a statute authorizing residential impact fees in Dorchester Co. School District No. 2.

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## Impact Fees in SC: History

- Impact fees originated in areas with high rates of property development, which strained fiscal resources.
- In 1999, the General Assembly adopted the South Carolina Development Impact Fee Act (“DIFA”).
  - DIFA authorized municipalities and counties to impose impact fees. Did not mention school districts or school facilities.
  - DIFA does not apply to special purpose districts, but special purpose districts do retain the authority to impose impact fees where local legislation adopted prior to March 7, 1973 so provides.

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## 2016: Schools Included

- In 2016, the General Assembly amended DIFA by Act No. 229 of 2016 to include in the list of permissible “Public Facilities”:
  - public education facilities for grades K-12 including, but not limited to, schools, offices, classrooms, parking areas, playgrounds, libraries, cafeterias, gymnasiums, health and music rooms, computer and science laboratories, and other facilities considered necessary for the proper public education of the state’s children.

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## Development Impact Fee Act

- Note that DIFA has not been amended to allow school boards to impose an impact fee. Only municipal and county governments can impose an impact fee which would benefit school districts.
- DIFA is a complex statute, both in terms of the prerequisites for imposing an impact fee, as well as the substantive scope and application of the fee.
- DIFA is a product of compromise. Here, between government and development interests—developers and homebuilders.

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## Conditions For Imposing Impact Fees

- DIFA imposes a number of conditions for imposition of impact fees:
  - Council adopts resolution directing Planning Commission to develop a capital improvements plan (“CIP”).
  - The Planning Commission develops the CIP and reports back to Council.
  - The Council is not bound by the recommendations of the Planning Commission.
  - Council adopts, after a public hearing an ordinance approving CIP and imposition of impact fees.

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## Conditions For Imposing Impact Fees

- The Council must, prior to adopting the ordinance:
  - Conduct a public hearing with at least 30 days’ prior notice.
  - Prepare a report which estimates the effect of recovering capital costs through impact fees on the availability of affordable housing within the political jurisdiction of the governmental entity.
    - Affordable to families whose incomes do not exceed eighty percent of the median income within the jurisdiction of the municipality or county.

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## Planning Commission

- Each Council is authorized to appoint a Planning Commission. The Planning Commission's purpose includes drafting a continuing planning program for the physical, social, and economic growth, development, and redevelopment of the area within its jurisdiction.
  - Plans and programs must be designed to promote public health, safety, morals, convenience, prosperity, or the general welfare as well as the efficiency and economy of its area of jurisdiction.
  - Specific planning elements must be based upon careful and comprehensive surveys and studies of existing conditions and probable future development and include recommended means of implementation.

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## Planning Commission

- A Planning Commission is authorized to prepare and recommend to the Council:
  - zoning ordinances;
  - regulations for the subdivision or development of land;
  - a landscaping ordinance setting forth required planting, tree preservation, and other aesthetic considerations for land and structures; and
  - capital improvements program setting forth projects required to implement plans which have been prepared and adopted, including an annual listing of priority projects for consideration by the Council prior to preparation of its capital budget.

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## Capital Improvement Plan

- A CIP includes:
  - a general description of all existing public facilities, and their existing deficiencies, within the service area or areas of the governmental entity, a reasonable estimate of all costs, and a plan to develop the funding resources;
  - an analysis of the total capacity, the level of current usage, and commitments for usage of capacity of existing public facilities, which must be prepared by a qualified professional using generally accepted principles and professional standards;
  - a description of the land use assumptions.

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## Capital Improvement Plan

- A CIP includes:
  - a definitive table establishing the specific **service unit** for each category of system improvements and an equivalency or conversion table establishing the **ratio of a service unit to various types of land uses**, including residential, commercial, agricultural, and industrial, as appropriate;
  - a description of all system improvements and their costs necessitated by and attributable to new development in the service area, **to provide a level of service not to exceed the level of service currently existing in the community or service area**, unless a different or higher level of service is required by law, court order, or safety consideration.

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## Capital Improvement Plan

- A CIP includes:
  - the **total number of service units** necessitated by and attributable to new development;
  - the projected demand for improvements required by new service units, projected for up to **twenty years**;
  - identification of all available funding for improvements;
  - a schedule with estimated dates for commencing and completing construction of all improvements identified in the capital improvements plan.

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## Capital Improvement Plan

- It's very likely that no member of the Planning Commission or the municipal/county planning staff will have any experience with school construction and capacity issues. The school district must insert itself into the process.
- Moreover, the Council ultimately controls the CIP, and thus it is incumbent upon school district officials to engage with Council and staff, as well as the Planning Commission, to make sure that planning for school facilities is considered in the planning process.

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## Impact Fee Application

- Under DIFA, impact fees must be expended on public facilities, which include:
  - Water and sewer facilities;
  - Solid waste and recycling facilities;
  - Roads, streets and bridges;
  - Stormwater facilities;
  - Police, fire, EMS facilities;
  - Parks, libraries and recreational facilities;
  - School facilities;
  - Equipment costing in excess of \$100,000 for public safety, emergency preparedness, solid waste and storm water control.

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## Impact Fee Application

- Under DIFA, impact fees cannot be expended on:
  - Facilities not identified in the **capital improvements plan**;
  - Operation, repair and maintenance expenses;
  - Upgrading, expanding or replacing existing facilities to meet stricter standards **or provide better service**;
  - Debt service on bonds other than those issued to finance public facilities included in the capital improvements plan.

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## Impact Fee Application

- The following are exempt from the application of impact fees under DIFA:
  - Rebuilding the same amount of floor space of a structure that was destroyed by fire or other catastrophe;
  - Remodeling, repairing, enlarging or replacing a structure that does not result in an increase in the number of service units;
  - Construction of affordable housing where the proportionate share of system improvements is funded through a revenue source other than development impact fees; and
  - Construction of new schools and construction of new volunteer fire departments.

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## Impact Fee Ordinance

- Upon receipt of the CIP from the Planning Commission, the Council may adopt an ordinance to impose an impact fee. The ordinance must pass by a positive majority. The ordinance must:
  - Establish a procedure for timely processing of applications for determination of the impact fees applicable to all property within the jurisdiction.
  - Establish acceptable levels of service.
  - Establish a basis or time for termination of the impact fee.

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## Calculation of Impact Fees

- Calculating Fees:
  - The impact fee for each service unit may not exceed the amount determined by dividing the costs of the capital improvements by the total number of projected service units that **potentially could use** the capital improvement.
  - But, **“an impact fee that results in benefits to property owners or developers within the service area, other than the fee payor, in an amount which is greater than incidental benefits is prohibited.”** (What does “incidental” mean?)
  - And, an impact fee cannot be applied to upgrading, updating, expanding, or replacing existing capital improvements to provide better service to existing development. Effects existing overcrowding?

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## Calculation of Impact Fees

- Sample :
  - Based on “sound engineering studies”, the cost per person of providing a particular planned improvement is determined.
  - For example, the cost of building a fire station has, in one SC town, recently been calculated to be \$112.97 per person. That same study estimated the cost of new recreation facilities at \$528.81 per person.
  - These per person estimates are derived from estimates of cost and effective capacity of facilities. For example, a fire station can be based upon the estimated per square foot construction costs applied to the estimated square footage required to serve a single person.

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### Calculation of Impact Fees

- The per person cost of a new facility is multiplied by the number of new units in the proposed developments and again multiplied by the estimated number of persons occupying each unit.
- The assumptions based on occupancy can be subject to adjustment to more closely tie the types of development and types of facilities. For example, the use of recreational facilities by residents in a new nursing home would be limited at best. Consideration would be given to excluding such development from an impact fee for recreation facilities. Likewise for schools.

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### Calculation of Impact Fees

- Taking the cost per person for fire service for a 500 single family home development:
  - We assume that each single family home has 3.5 occupants.
  - Multiply  $\$112.97 \times 500 \times 3.5$ .
  - The result is  $\$197,697$ , which applies to the entire development.
  - Assuming equal house sizes, the impact fee amounts to  $\$395.40$  per house.

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### Calculation of Impact Fees

- According to *School Planning and Management* (Feb. 2014), the national median cost of a high school in 2013 was  $\$47,500$  per pupil, based on 174.2 square feet per pupil.
  - Using a 500 home subdivision and an estimate of 0.5 school age children per house:
    - $\$47,500 \times 500 \times 0.5 = \$11,875,000$ .
    - Per house impact fee =  $\$23,750$ .
- This is going to be problematic. It's too high a cost. 2012 national average was only  $\$4,677$  for schools.

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## Politics and Policy

- In a development where the average house price is \$300,000, adding an additional \$23,750 to the cost of the house (not including impact fees for other public improvements) is not practical.
- No developer will undertake to build in that environment.
- The actual level of impact fees charged for a new school, then, will be driven by political negotiation rather than by the actual cost of the new school.

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## Politics and Policy

- Consider adjusting the impact fee to more closely tie the use of the facility by a particular fee-payor to the useful life of the facility.
- A pupil will use a high school, at most (we hope) for four years, which is perhaps one-tenth of the useful life of the facility.
- Is it reasonable for the impact fee to be based on one tenth of the full cost? In our example, \$2,375? Maybe.
- Who pays for the rest, then? Property tax payers.
  - Unless there is another source of funds...

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## Things We Don't Know

- There are a number of unresolved issues involved in imposing an impact fee under DIFA.
  - A new school is built in an unincorporated area. The County has imposed an impact fee, the nearest municipality has not. Pupils from new developments in both areas will attend the school. Is this equitable? Unlike many other governmental facilities, the use of schools in South Carolina is not subject to municipal boundaries.
  - How broad may the "service area" concept in DIFA be interpreted? Co-extensive with geographical boundaries? Even for a county-wide school district? Recall that **an impact fee that results in benefits to property owners or developers within the service area, other than the fee payor, in an amount which is greater than "incidental" benefits is prohibited.**

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### Things We Don't Know

- Put another way,
  - must a planned school actually or potentially serve a new development before an impact fee from that development be expended on that school; or
  - are impact fees in this context more like a "capacity fee", which buys "space" within a system, although not at a specific location?
  - What does "incidental benefit" mean?
- If an impact fee is used to build a new school 10 miles away, thus freeing capacity and creating smaller class sizes in the school used by the new development, is that sufficient? The new school may or may not be an incidental benefit.

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### Things We Don't Know

- Can a county impose an impact fee (or the portion dedicated to schools) only in an area in which a new school is planned? Must it do so? See *St. Johns County v. Northeast Florida Builders Association, Inc.*, 583 So. 2d 635 (Fla. 1991).
  - In *St. Johns County*, the Florida Supreme Court applied a "dual nexus" test, requiring the imposition to be reasonably imposed on users of the facility and that the facility would reasonably serve those paying the fee.
  - The court found the service unit count of 0.44 on residences reasonable, but faulted the use of the fees collected from those residences for unrelated school facilities.

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### Things We Don't Know

- Brevard County, Florida has recently looked at this question:
  - <http://www.floridatoday.com/story/news/local/2015/04/28/brevard-school-impact-fee-flexibility-plan-meets-resistance/26546681/>
- A city government and a county government in Washington State taking differing views on this question:
  - <http://your.kingcounty.gov/annex/erenton/schdistimpactfees.pdf>

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### Maybe Try This

- If the goal of an impact fee is to make development carry its own weight:
  - Both municipalities and counties are empowered to create "assessment districts" and issue bonds to pay for school construction pursuant to the South Carolina Residential Improvement District Act, S.C. Code Ann. Secs 6-35-10 *et seq.*
  - This statute needs several amendments to make it workable, but it allows for the financing of local improvements over time, rather than requiring up-front payment. This feature would allow more of the cost of school construction to be placed on new development requiring new schools.

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### For More Information

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