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Act 44: Compromise Legislation on Impact Fees and Other Development-Related Topics

By Curt Witynski, Assistant Director

2007 Wisconsin Act 44 is new compromise legislation addressing impact fees, the practice of passing through professional service fees to developers, dedication of storm water facilities and fees in lieu of park land dedication. The Act took effect January 19, 2008. This article describes the important changes affecting municipalities made by the Act. It is based in part on a memo prepared by Don Dyke, Chief of Legal Services, Wisconsin Legislative Council.

A copy of Don's memo can be viewed at the following Web link: <http://www.legis.state.wi.us/lc/publications/act/2007/act044-ab341.pdf>. Act 44 is available at the following link <http://www.legis.state.wi.us/2007/data/acts/07Act44.pdf>.

History and Background

Act 44 was introduced as AB 341 by Rep. Mark Gottlieb (R-Port Washington). Rep. Gottlieb was interested in lessening some of the limitations placed on municipal impact fee and subdivision approval powers in the previous legislative session by 2005 Wisconsin Acts 203 and 477. In particular, Rep. Gottlieb wanted to restore a municipality's ability to require a developer to pay a fee in lieu of park land dedication as a condition of subdivision approval, which was taken away by Act 477.

AB 341 evolved out of discussions facilitated by Rep. Gottlieb between the Wisconsin Builders Association and Wisconsin Realtors Association on one side and the League and the Towns Association on the other. The resulting legislation contains some items that are good for municipalities and a few others that were sought by the development community and are not helpful to municipalities. The League supported the legislation because we thought the good outweighed the bad.

Impact Fees

Recreational Facilities. 2005 Wisconsin Act 477 deleted "other recreational facilities," from the definition of "public facilities" eligible to be funded by impact fees. Some communities, however, were relying on the previous law to fund new recreational facilities through impact fees. At the request of the Village of Waunakee, Act 44 grandfathers recreational facilities that were substantially completed before the change made by Act 477. Act 44 provides that impact fees first imposed to fund "recreational facilities" before 2005 Act 477 took effect on June 14, 2006, may continue to be collected for up to ten more years.

Needs Assessment. Act 44 adds a new requirement to the affordable housing element of the public facilities needs assessment that a municipality must prepare before imposing impact fees. Under the Act, the estimate of the capital costs of providing new public facilities must include an estimate of the "cumulative" effect of "all proposed and existing" impact fees on the availability of affordable housing within the municipality.

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Time at which Impact Fees are Payable. Prior to the changes made in the 2005-2006 legislative session, municipalities could determine that impact fees were payable at the time a building permit or other required approval, such as a subdivision approval, was obtained. Under 2005 Wisconsin Act 477, impact fees were payable within 14 days of the issuance of a building permit or within 14 days of the issuance of an occupancy permit. Act 44 makes impact fees payable to the municipality in full upon issuance of a building permit.

Time by which Impact Fees Must be Used or Refunded. Prior to the changes made in the 2005-2006 session, municipalities had "a reasonable period of time" to use or refund any impact fees that were imposed and collected by the municipality. 2005 Wisconsin Act 203 specified that impact fees must be used to pay the capital costs for which they were imposed within seven years after they were collected. A municipality could retain impact fees for an additional three years if the governing body passed a resolution indicating such an extension was necessary due to extenuating circumstances or hardship in meeting the seven-year deadline.

Act 44 establishes a series of deadlines, each of which may apply depending on when the impact fees were collected. Under the Act:

- Impact fees collected before January 1, 2003 must be used not later than December 31, 2012.
- Impact fees collected after December 31, 2002 and before April 11, 2006, must be used not later than the first day of the 120th month beginning after the date on which the fee was collected.
- Impact fees collected after April 10, 2006 and collected within seven years of the effective date of the ordinance imposing the fee must be used within 10 years after the effective date of the ordinance. The 10-year limit may be extended for three years if the municipality passes a resolution that includes detailed written findings specifying the extenuating circumstances or hardship supporting the need for the extension.
- Impact fees collected after April 10, 2006 and collected more than seven years after the effective date of the ordinance imposing the fees must be used within a reasonable period of time after collected.

This is a complicated series of deadlines for using impact fee revenue. However, the "use it or lose it" deadline for any impact fee first imposed and collected from this time forward is simple. A community that passes an impact fee ordinance anytime after the effective date of Act 44 (January 19, 2008) must use impact fees collected during the first seven years the ordinance is in effect within 10 (or 13 for extenuating circumstances or hardship) years after the effective date of the ordinance. Impact fees collected more than seven years after the effective date of the ordinance must be used within a reasonable period of time after collected.

Concerns have been raised about how the deadlines in Act 44 apply to impact fees collected by communities pursuant to ordinances that were enacted in 2001 or 2002. The concern arises because the 7/10 rule under the third bullet point above is calculated from the time the impact fee ordinance was enacted, not the time at which the impact fee was collected.

Here's an example of what the above timelines could mean for some municipalities. Let's say a community adopted an impact fee ordinance in 2001

and still collects fees pursuant to that ordinance. Under Act 44, fees collected in 2005 and early 2006 would have to be used within 10 years of the date of collection (i.e., by 2015 and 2016, respectively). However, fees collected in 2007 and 2008 would have to be used by 2011 (or 2014 if the community can show hardship necessitates extending the time period three years). Fees collected in 2009 would have to be used within a reasonable time.

The concern is with respect to the fees collected in 2007 and 2008 pursuant to an ordinance that was adopted in 2001 or 2002. It doesn't make sense that such fees must be used before the fees collected prior to April 2006, but that is what Act 44 requires. This incongruity in the bill went unnoticed while it worked its way through the legislative process.

One way a community facing this problem might want to proceed is to repeal an impact fee ordinance that was enacted in 2001 or 2002 and re-enact a new impact fee ordinance in 2008. Any impact fees collected between 2008 and 2015 under the new ordinance would not need to be used until 2018 (or 2021 if the community can show hardship necessitates extending the time period three years). However, the adoption of a new impact fee ordinance must be preceded by the completion of a new needs assessment.

Pass Through of Professional Service Fees to Developers

Act 44 provides that if a municipality passes its cost for legal or other professional services relating to a proposed development onto the developer, the rate charged the developer for the professional services may not exceed the rate customarily paid for similar services by the municipality. This provision was added to the legislation at the insistence of the Wisconsin Builders Association, whose support for the bill was necessary in order for it to pass the Assembly. The language is based on similar provisions in Minnesota and Illinois law.

Local officials should be aware that most contract municipal attorneys that I've spoken with about this part of Act 44 intend to notify their municipalities that they will be establishing different rates for different services provided to the municipality. The rate for reviewing and consulting on development, land use, and annexation agreements will likely be higher than the rate charged for ordinary municipal attorney services. The fees for the former services are often passed onto a third party such as a developer.

Storm Water Facilities

Under current law a municipality may require, as a condition of approving a subdivision within the municipality, that the subdivider make and install reasonably necessary public improvements. As a condition for accepting the dedication of public streets, sewer or water laterals and other public improvements, a municipality may require that such facilities be provided without cost to the municipality. Act 44 adds storm water management or treatment facilities to the nonexclusive list of facilities that a municipality may require a developer to construct and dedicate at no cost as a condition of municipal approval of the subdivision.

Also under current law, if areas are designated on a plat as dedicated to the public, such as land to be used for streets, alleys, commons, or other public uses, the approval and recording of the plat constitutes acceptance of those areas for the designated purpose. Act 44 provides that a dedication of lands within a subdivision that includes a facility designed for reducing the quantity or quality impact of storm water runoff from more than one lot is not accepted by the municipality, unless the municipality

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agrees to an earlier date, until at least 80 percent of the lots in the subdivision have been sold and a professional engineer has certified to the municipality that the facility is functioning properly, any required plantings are adequate and well-established, and any necessary maintenance has been properly performed.

Preliminary drafts of the bill that became Act 44 required a municipality to accept from a developer the dedication or transfer of a detention or retention pond to manage storm water runoff. That language, which was sought by the Wisconsin Builders Association, was not included in AB 341. The language was removed in response to local government objections. Act 44 does not require municipalities to accept from a developer the dedication or transfer of an existing storm water detention or retention pond. The Act also leaves it up to the municipality to decide whether to require a developer, as a condition of subdivision approval, to construct and dedicate to the municipality storm water facilities.

Fees in Lieu of Parkland Dedication and Improvement

Authority Restored. In 2006, Act 477 expressly prohibited municipalities from imposing park land or other fees on developers in lieu of requiring land dedication as a condition of subdivision approval. Charging fees in lieu of park land dedication was an option that many municipalities had been using for years. These fees were charged instead of or in addition to impact fees. Act 44 once again allows such fees to be imposed by municipalities as a condition of subdivision approval. It specifically provides that a municipality may impose a fee or other charge to fund the acquisition or initial improvement of land for public parks.

Definition of "improvement of land for public parks." Act 44 defines "improvement of land for public parks" to mean "grading, landscaping, installation of utilities, construction of sidewalks, installation of playground equipment, and construction or installation of restroom facilities on land intended for public park purposes."

Rational Relationship and Proportionality. Under the Act, fees for the acquisition or initial improvement of land for a public park must, like land dedications, easements and public improvements, bear a rational relationship to a need for the fee resulting from the subdivision and must be proportional to the need.

Hence, while fees in lieu of park land dedication may be collected earlier than impact fees and may be imposed without the municipality needing to prepare a facilities needs assessment, the fee must meet the rational relationship and proportionality tests.

Conclusion

Act 44 is compromise legislation that makes important changes to the laws governing impact fees, pass through of professional service fees, dedication of storm water facilities and fees in lieu of park land dedication. The League believes the Act does more good than bad for municipalities because it restores the ability to charge a fee in lieu of park land dedication as a condition of land division approval. The Act took effect January 19, 2008.

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