

MEMORANDUM

DATE: January 19, 2007

TO: Tom Arnold, Director Engineering Services
Transportation Impact Fee External Work Group

FROM: James Richman, Assistant City Attorney

SUBJECT: GMA, Concurrency, and Impact Fees

1. **Growth Management Act, Chapter 36.70A RCW.**

Theme: One of GMA's principal themes is the recognition that sprawl results in inefficient use of public money and infrastructure. RCW 36.70A.020.

Response: Limit sprawl by prohibiting new growth and development where there is inadequate transportation facilities to serve new growth and development. RCW 36.70A.070(6)(b).

2. **Transportation Concurrency.**

GMA enforces the foregoing prohibition as follows:

[L]ocal jurisdictions must adopt and enforce ordinances which prohibit development approval if the development causes the level of service on a locally owned transportation facility to decline below the standards adopted in the transportation element of the comprehensive plan, unless transportation improvements or strategies to accommodate the impacts of development are made concurrent with the development. . . . For the purposes of this subsection (6) "concurrent with the development" shall mean that improvements or strategies are in place at the time of development, or that a financial commitment is in place to complete the improvements or strategies within six years.

RCW 36.70A.070(6)(b).

3. **Cities Lack Resources to Finance Planned Growth.**

Cities have a variety of options available for requiring new growth and development to mitigate transportation impacts as follows:

Subdivision Exactions – cities are generally prohibited from granting subdivision approval unless the subdivision makes adequate provision for various public infrastructure necessary to serve the development, including streets. Chapter 58.17 RCW.

State Environmental Policy Act – authorizes cities to impose conditions on a proposed development “to mitigate specific adverse environmental impacts.” RCW 43.21C.060.

Voluntary Agreements – RCW 82.02.020 authorizes voluntary impact fees where cities can demonstrate the fees are reasonably necessary as a direct result of a proposed development.

Local Transportation Act – authorizes fees in an amount reasonably necessary as a direct result of a proposed development. RCW 39.92.030(4).

These tools generally require a direct nexus between fees that are imposed and the development activity that is being assessed and do not give cities an adequate tool for requiring new growth and development to pay a proportionate share of planned system improvements that indirectly benefit the new growth and development.

4. **GMA Response; Impact Fees; Funded Activities Are Not Required to Directly or Specifically Benefit Development Activity That is Being Assessed.**

GMA recognized that existing legislation did not provide cities with adequate tools to pay for infrastructure necessary to accommodate planned growth.

In 1990, the legislature enacted RCW 82.02.050-.090 as part of the GMA, authorizing local governments to condition the approval of development proposals on the payment of “impact fees” to defray a portion of the costs arising from “new growth and development.” RCW 82.02.050(1)(a). . . . [B]y enacting the impact fee statutes, the legislature intended to enable towns, cities, and counties to plan for “new growth and development” and to recoup from developers a predictable share of the infrastructure costs attributable to the *planned growth*. . . . (Emphasis supplied.)

City of Olympia v. Drebick, 156 Wn.2d 289, 126 P.3d 802 (2006).

Notably, in the GMA impact fee statutes, the legislature did not require that the funded facilities be directly or specifically related and beneficial to the development seeking approval. Whereas the starting point in the calculation of SEPA or LTA fees is the individual development and its direct impact, the local government's calculation of a proposed development's GMA impact fee begins, in contrast, with the anticipation of the area-wide improvements needed to serve new growth and development in the aggregate. (Emphasis in original.)

City of Olympia v. Drebick, 156 Wn.2d 289, 126 P.3d 802 (2006).

5. Payment of Impact Fees Does Not Guarantee Finding of Concurrency; it May Help Establish Necessary “Financial Commitments” to Complete Required Improvements Within Six Years of Development Approval.

Payment of impact fees will not automatically guarantee a project's compliance with the concurrency requirement. This is reflected in some impact fee ordinances as follows:

Neither compliance with this chapter or the payment of any fee hereunder shall constitute a determination of concurrency under Chapter 17.03 BMC.

Bothell Municipal Code - 17.045.040 Relationship to concurrency.

The payment of impact fees may, however, help to establish the necessary “financial commitments” to complete necessary transportation improvements within six years of development approval. This concept is reflected in Olympia's impact fee ordinance, as follows:

Prior to approving proposed subdivisions, dedications, short plats, short subdivisions, planned residential developments, or binding site plans, the Council or administrative personnel shall make written findings that the public facilities which will be needed as a result of the new development, such as parks, recreation, open space, schools, and school grounds, will be provided concurrent with development. The concurrency requirement is satisfied if the improvements are in place at the time the impacts of development occur, or that the necessary financial commitments are in place, which shall include the impact fees anticipated to be generated by the development, to

complete the improvements required to meet the specified standards of service defined in the Parks Study, the Fire Protection Study, and the Schools Study within six (6) years of the time that the impacts of development occur.

Olympia Municipal Code, Section 15.04.030A. Olympia's ordinance goes on to describe a number of circumstances that may constitute "necessary financial commitments", including (1) voter approval and/or bonding authority for a project, (2) approval of federal, state or other funds for a particular project, (3) a secured commitment from a fee payer to construct the necessary improvements, and/or (4) the city has other assured funding, including but not limited to impact fees that have already been paid.

As Olympia's ordinance recognizes, the payment of money alone does not satisfy concurrency. There must be some showing that the payments, combined with other financial commitments, are adequate to finance construction of transportation improvements necessary to preserve the requisite levels of service established in the comprehensive plan.

Support for this conclusion is found in *Irondale Community Action Neighbors and Nancy Dorgan v. Jefferson County*, Compliance Order, WWGMHB 04-2-0022 (5/30/06):

Additionally, alternative 2 is a flawed means of achieving concurrency. Impact fees may be used by GMA planning counties and cities pursuant to RCW 82.02.050(2) to help pay for certain capital facilities including roads. However, while requiring payment of an impact fee that is a proportionate share of improvements related to the impact is a legitimate way to provide funds for needed improvements, it does not guarantee concurrency. For this alternative to be part of a compliant concurrency regulation, it would need to show that payment of an impact fee is a proportionate share of improvements or to a system of improvements related to the impacts on the LOS that will be in place to guarantee the maintenance of the LOS within the timeframe required by RCW 36.70A.070(6)(b).

Id., at 19.

6. Impact Fees Don't Eliminate Potential Mitigation Under SEPA.

The imposition of impact fees under GMA does not impair a city's ability to require transportation mitigation under Chapter 43.21C RCW (SEPA). Indeed, impact fee ordinances uniformly include provisions reserving a

city's authority under SEPA to require developers to mitigate the direct impacts of proposed development activity. Both SEPA and GMA prohibit double-dipping, however, by providing that persons required to finance construction of transportation system improvements pursuant to SEPA shall be excused from paying GMA impact fees for the same improvements. RCW 82.02.100.