Infrastructure Financing Study

Financial Alternatives Memorandum

submitted by

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OVERVIEW

One of the challenges facing the City of Lincoln is how to fund the infrastructure and capital facilities required to serve development without reducing the levels of service provided to existing residents. In the face of local voter opposition to general tax increases, cities and counties across the country have turned to alternative financing techniques, such as impact fees, utility connection fees, development taxes and special districts. Despite their differences, these funding techniques have a common theme: they shift the costs of new infrastructure from the general public to the new development that creates the need.

This Financial Alternative Memorandum is designed to provide the City of Lincoln with a comprehensive evaluation of how growth-related infrastructure costs are financed. The evaluation includes a review of current financing mechanisms, local policy objectives and alternative financing mechanisms.

Purpose of Study

This Financial Alternatives Memorandum is the first report of the Infrastructure Financing Study. The purposes of the larger study are to:

1) determine the capital costs of serving areas expected to accommodate new growth and development within the City or areas to be annexed thereto,

2) examine the types and amounts of capital recovery fees and/or exactions the City might use to offset some or all of these costs,

3) estimate the impact of new development on the City's operating costs and revenues,

4) estimate the needs for continued repair and maintenance of the City's existing infrastructure on its capital budget, and

5) draft State or local legislation that may be required to implement or authorize certain types of capital recover fees or exactions.

The study will focus on the major types of services provided by the City, including its public works and utility operations (roads, storm drainage, water and wastewater), the Lincoln Electric System, parks and recreation department, fire department, city libraries and police department. Additionally, the study will look at costs to the City for reimbursing certain extra-territorial agencies for acquisitions related to new annexations, including rural water and fire districts and the Norris Public Power District.

This *Financial Alternatives Memorandum* evaluates alternative techniques that are currently used or could potentially be used to finance the capital costs of new development in Lincoln. The techniques evaluated include impact fees, development taxes, utility fees, special districts, revenue and general obligation bonds and land dedication/fee-in-lieu requirements. The evaluation considers factors such as legal authority, data availability, administrative simplicity, revenue potential and equity. This Memorandum also reviews state statutes to determine the status of existing legal authority for alternative financing techniques, and suggests potential changes to state law that could create, clarify or strengthen Lincoln's authority to pursue such techniques. In sum, this Memorandum describes the alternative financing techniques, outlines the advantages and disadvantages of each approach, discusses their current or potential application in Lincoln, and evaluates their feasibility and desirability for the City.

It should be emphasized that the focus of this memorandum is capital costs. The issue of the additional operating costs required to serve new development is also important, and will be addressed later during the course of this project.

Existing Development Exactions

Development exactions may be defined generally as required developer capital contributions. The early forms of exactions addressed the provision of on-site facilities, such as local streets, sidewalks and water mains within a subdivision. Increasingly, developers are being asked to pay for more generalized off-site or system-wide improvements required to serve their developments.

In Lincoln, standardized developer exactions for off-site facilities (or on-site facilities with community-wide benefit) are typically limited to requiring developers to pay for a share of water or wastewater line extensions and a local street equivalent of arterial streets adjacent or internal to the subdivision. The City does not have a park land dedication requirement, nor does it charge water or wastewater connection fees that contain capital cost components.

In addition to standardized exactions, developers may also be asked to make other improvements as a condition of development approval based on an individualized analysis of the impacts of the development. Arterial street improvements are the primary subject for negotiated exaction requirements during the development review process. Large-scale developers may be required to install traffic signals, construct intersection improvements, or widen arterials. The City negotiates few improvements for other types of facilities, although the City did have a fire station site dedicated by a developer.

In the event that the City decides that it should place more of the burden for paying for the costs of new infrastructure on the new development that creates the need for the capital facilities, the City has a choice between several alternative mechanisms to accomplish this goal: impact fees, development

taxes, utility fees, special districts, revenue and general obligation bonds and land dedication/fee-in-lieu requirements. The following sections describe these alternatives.

Summary of Legal Analysis

Our review of state statues and state and national case law relating to alternative financing techniques is presented in the last section of this report. Based on that analysis, it appears that the City of Lincoln has authority to impose wastewater connection fees designed to pay for system capital costs (often called "capital recovery fees'), as well as storm sewer utility fees that could be assessed on all development based on impact on the drainage system and used to pay for capital or operating costs. The City also probably has implied authority for water connection or capital recovery fees as well.

In general, Lincoln has all authority not denied to it by state law or the city charter. That is much broader authority than the authority of local governments in many states in which impact fees have evolved without enabling legislation. Consequently, we see minimal risk to the City in proceeding with development of impact fees for any of the general fund facilities, such as roads, parks, libraries and public safety facilities.

There is express authority to impose an "occupation tax" on some industries and not others. There is little question that the city could impose such a tax on the business of land development and building construction. The City may be able to impose such a tax based on the amount of construction (e.g., a tax per square foot of new construction). This type of tax in other states where it is authorized is generally referred to as a development tax or facilities tax.

The City can use water, sewer and street paving districts to finance the expansion of services within the city. It is advantageous to the city to use the water, sewer and street paving districts rather than the general "public utility districts," because the public utility districts require that assessments be based on frontage, whereas the other districts simply require that the assessments be proportionate to benefits.

The City appears to have adequate legal authority to develop several alternative financing strategies without recourse to requests for legislative action.

Summary of Recommendations

We have organized our recommendations into a hierarchy of three tiers. The first priority would be for the City to develop connection fees and greater use of revenue bonds for water and wastewater facilities. Second, the City should consider development of an impact fee for arterial street improvements. Third tier priorities include development of a stormwater utility and appropriate user fees, as well as park land dedication requirements in combination with park impact fees.

Table 1
RECOMMENDED FUNDING MECHANISMS

Facility	Existing Developer Charges for Off-Site Impacts	First Priority	Second Priority	Third Priority
Roads	arterial exactions		impact fee	
Drainage	none			stormwater utility & fee
Water	none	bonds/connection fee		
Wastewater	none	bonds/connection fee		
Electrical	none			
Parks	none			dedication/impact fee
Libraries	none			
Fire/EMS	none			
Police	none			

Water and Wastewater Connection Fees and Revenue Bonds

The City should give consideration to mechanisms that shift some of the burden of growth-related water and wastewater capital costs from rate payers to future customers who benefit from the improvements. These mechanisms include a greater use of revenue bonds and up-front connection fees. The City is funding the majority of its growth-related capital improvements today from current rate revenues. Greater use of revenue bonds could be used for system-wide improvements to central facilities, while connection fees could be charged in growth areas to recoup the cost of lines needed to serve these areas. Use of these mechanisms would help the City fund growth-related improvements while relieving pressure on utility rates for current customers.

Of particular concern to some local developers is the lack of any mechanism for reimbursing the initial developer who pays the cost for a major improvement to serve an area, such as a water booster pump or major sewer trunk line. While the City could consider formalizing a policy of pro rata contributions, forming an assessment district for every major improvement would likely be overly cumbersome. We think the best approach is water and wastewater connection fees with appropriate policies to provide credit against those fees for developer contributions to major system facilities. Typically, the connection fees are calculated on the basis of the utility providing all major system facilities, including pipes over a certain size. If a developer is required to extend or install a major facility to or through his development, he would be eligible for credit against the connection fees. There may still be an intermediate range of pipe sizes between the minimum required for a subdivision and the minimum included in the connection fees that would be addressed through negotiations with developers and potentially with pro rata agreements to reimburse the initial developer who pays for the improvements.

The City might also consider making greater use of revenue bonds to spread more of the cost of growth-related facilities to future customers. The City is currently funding most of its water and

wastewater capital improvements out of current revenues. The additional revenue bonds could be repaid with connection fee revenues or rate revenues. Regardless of the funding source, the effect would be to reduce capital funding out of current rate revenues, which should allow the City to lower rates or at least avoid future rate increases.

Road Impact Fees

The City currently has development exactions to address system-wide infrastructure costs only for arterial streets. Not only do the standard requirements that developers widen or construct internal or adjacent arterials effect developers differently depending upon the location of the project, arterial street improvements are the primary subject of negotiated exactions with developers. While arterial road exactions are the primary means by which developers contribute to system-wide infrastructure needs, an arterial street impact fee system that provides credit to developers who are required to make arterial improvements as a condition of development approval would have several advantages over the current system: it would "level the playing field" among developers, streamline the development review process, strengthen the legal defensibility of the City's road exaction policy, and provide a major additional source of funding for growth-related road improvements. It would not necessarily end negotiations with developers to mitigate their road impacts, but it would provide City officials with an incentive to ask only for road improvements that are high priorities for the City. It would be a policy decision whether to include all right-of-way (ROW) costs, only the portion of ROW costs in excess of local street dedication requirements, or no ROW costs at all, with corresponding credits for ROW dedication ranging from full credit to none at all.

Stormwater Utility Fees

After road impact fees, the City should consider establishing a stormwater utility. In most communities, drainage improvements tend to be underfunded without a dedicated source of funding. As noted in the Comprehensive Plan, however, a significant increase in funding is going to be required to comply with the mandates of the new federal Clean Water Act. A stormwater utility fee would provide a dedicated source of funding for both capital improvements and maintenance of the City's stormwater system.

Park Dedication Requirements and Impact Fees

Finally, the City should consider creating a system of park dedication requirements and impact fees. The City does not have a park land dedication requirement, although it does encourage voluntary donations of park sites. An even bigger problem than land acquisition is finding the funds to develop the parks. A subdivision requirement for park land dedication that could be waived by the City if an appropriate site is not available could be coupled with park impact fees payable at building permit that would fund both park land and improvements. Developers who were required to or who voluntarily donate park land would get credit for the value of the land against their park impact fees. Such a system would help ensure that the City is able to maintain its existing park level of service in the face of growth.

Other Facilities

No alternative financing mechanisms are recommended at this time for electrical facilities, libraries and public safety facilities. Impact fees or other alternative financing techniques are rarely used for electrical facilities, and the City has among the lowest electric rates in the country. While the City could consider impact fees or other techniques for libraries and public safety facilities at some point in the future, they would not generate large amounts of revenue and should not be a high priority at this time.

ALTERNATIVE FINANCING STRATEGIES

This section evaluates alternative financing strategies according to defined criteria. The purpose of the evaluation is to identify those financing techniques that best meet the unique needs of the City and that best respond to established community goals and objectives. The types of alternative financing techniques evaluated in this section include:

- utility fees,
- revenue and general obligation bonds,
- special districts,
- impact fees, and
- development taxes.

These alternative techniques are compared to the City's current financing mechanisms, which primarily consist of general obligation and revenue bonds and developer exactions (primarily for roads).

Evaluation Criteria

Alternative financing strategies were assessed according to a defined set of evaluation criteria. Some of the criteria used in the evaluation were distilled from the *Lincoln City-Lancaster County Comprehensive Plan*. Others were identified by City staff and the consultant team. The evaluation criteria include:

- legal basis,
- proportionality,
- geographic equity,
- infill/redevelopment,
- housing affordability,
- annexation costs,
- technical ease, and
- public acceptability.

Although all of the criteria are examined as if they were of equal importance, in reality some are more critical than others. For example, it is essential that financing strategies adopted by the City have a sound legal basis. Thus, any technique that is not legal in Nebraska will not be feasible, unless and until state law can be amended. The evaluation criteria are described as follows:

> **Legal Basis.** A critical criterion is whether a particular financing technique has a sound legal basis.

Proportionality. The first test applied to all legal financing techniques is whether it will ensure that those who impose capital costs on the City will pay their proportionate share of those costs. Often, communities choose to require developer contributions because the public perception is that existing residents—many of whom have been there for years—are unfairly paying the costs of new growth. In the case of impact fees, State law and constitutional law require that impact fees be based on at least "rough proportionality."

Revenue Potential. Another important characteristic of financing techniques is their ability to raise sufficient revenues to cover a major portion of growth-related costs.

Geographic Equity. Different geographic areas may have varying service costs due to differences in topography, soils, distance to central facilities and other features. Older established areas, for example, may already be served with facilities that have excess capacity. Although many communities choose to look at growth-related capital costs on a system-wide basis, it may be desirable to establish area-specific rates and fees if cost differences are substantial.

Infill/Redevelopment. One of the goals of the *Comprehensive Plan* is to encourage infill and contiguous development as a means of providing for orderly growth throughout the county. Different financing strategies may work to support or undermine this objective.

Housing Affordability. There are two aspects to housing affordability: purchase price and operating costs (monthly payments). Generally, financing techniques that work to decrease purchase price tend to increase operating costs and vice versa. While economic theory holds that in the long run in competitive housing markets development fees will be absorbed in lower land costs, it can be argued that financing techniques that attribute all costs of certain facilities to residential uses (e.g., impact fees for parks, cultural facilities and libraries) may impact housing costs more than other techniques (e.g., development taxes) that can be assessed on all new development.

Annexation Costs. When substandard subdivisions or areas with substandard utility service (septic tanks on small lots, private water service without fire flow) are annexed the City may be faced with the cost of upgrading water and wastewater lines, roads, street lighting and drainage in those areas. Normally, the developer of a new subdivision contributes City-standard internal facilities to the City as a part of the development process. For areas that are already developed, this cost will fall either on individual property owners in the annexed area or on the City (and its rate payers). Some financing strategies tend to reduce the City's cost of upgrading utilities, shifting costs to benefitting property owners. In addition, state law requires the City to reimburse other electric service providers when it annexes outside its service area.

Administrative Ease. Each of the alternative financing strategies requires some technical expertise and administrative effort. They may require, for example, that the City's billing system accommodate necessary adjustments or that accounting changes be made. Some require technical coordination with other governmental or private entities. Some financing strategies require little or no change in current City practices, while others may require additional staffing or ongoing consultant assistance.

Public Acceptability. There are many elements of a community with various points of view. This criterion reflects how the majority of existing residents/ratepayers are expected to accept each financing strategy. There are other members of the community, such as developers and new home buyers, who may not share the majority viewpoint.

Utility Fees

Municipalities in Nebraska have the power to create utilities in order to build public facilities and provide public services. In essence, a utility is simply an organization charged to build necessary public facilities and services, and to cover the cost of doing so through rates and charges from those who use the facilities and services. Utilities can be incorporated and can have a legal status independent of their host city, or they can simply be a department within the city. When a self-financing facility or service is operated by a charter city without the creation of any formal organization or corporation, it is often referred to as an enterprise fund. Enterprise funds are essentially accounting tools used by city governments to ensure that certain facilities and services within the city really do pay for themselves through user-charges and rates.

Nebraska cities also have significant powers to raise revenues in connection with their operation of municipal utilities such as water and wastewater services. As in most states, the rates and fees charged by municipally-owned utilities are not regulated to the same degree as those of independent utility companies. As a result, a municipal utility can impose charges for connection to the system that largely or completely offset the costs of extending utility lines to the area. While there is no explicit restriction in the law that revenues from utility fees be used only for that utility, utility revenue bond covenants do restrict the use of utility funds. The City of Lincoln does not take any funds from its water, wastewater and electric utilities other than a payment in lieu of taxes.

While the utilities have traditionally been used to provide facilities and services for water, wastewater, electricity and natural gas, the list does not need to end there. There appears to be no legislation prohibiting a municipality from creating a utility to provide other services and facilities, such as storm drainage or public streets, throughout the city or in newly developing areas.

The utility mechanism is best suited to those types of facilities and services from which non-payers can be excluded. The fact that Lincoln has utilities to which all new development must connect provides the mechanism to exclude those who do not pay from the benefits of public streets or storm

drainage systems. For example, a monthly storm drainage utility fee could be added to monthly water and wastewater bills, and non-payers could be disconnected from these essential utilities.

The major advantage of a utility over impact fees is that a significantly lower level of data and analysis is required to develop the fee. It shares many of the advantages of a development tax in terms of flexibility in expenditures (e.g., funding existing deficiencies or maintenance costs). It also has some advantages over a development tax, including avoiding the unpopular tax label and clearly earmarking fees for specific types of facility improvements.

The major disadvantage of utility fees compared to impact fees or development taxes is that they are assessed on all existing development and consequently do not require new development to pay for growth-induced costs. For this reason, the utility mechanism may be most suitable, in Lincoln, to drainage facilities, where, at least at present, data constraints make it difficult to assign growth-related costs. The City's legislative authority to operate and assess charges for wastewater also includes stormwater facilities ("sewerage and drainage"). Monthly drainage utility fees could be used to fund capital improvements to solve existing problems and on-going operating and maintenance costs, as well as growth-related improvements. While other types of utility fees that primarily address operating costs could be considered (e.g., street maintenance, street lighting operating costs), the focus of this inquiry is on growth-related capital costs.

Revenue and General Obligation Bonds

Most cities finance utility expansions with revenue bonds that are retired solely through rate revenues of active customers over the life of the bonds. The use of revenue bonds generally ensures that only the beneficiaries of utility service (customers) pay for improvements. Moreover, payments are made by customers in amounts that are roughly proportional to the cost each imposes on the system.

General obligation (GO) bonds are also used to fund utility improvements in some communities, although they have not been used for this purpose in Lincoln. GO bonds are tax-backed bonds. Cities may or may not transfer revenues from utility funds to retire utility-related general obligation bonds, but ultimately property owners assume the risk and often the cost of such bonds. If general obligation bonds are retired from property tax revenues, costs to individual property owners will be proportional to property value rather than utility use. Moreover, property owners who do not benefit from service will pay for utility improvements through property taxes.

Revenue bonds are an appropriate mechanism for funding enterprise fund facilities, such as utility expansions. Moreover, they recover the cost of expansion over a long period of time and thereby spread costs over current and future customers who benefit from the improvements. The City of Lincoln has been very conservative in recent years in its use of utility revenue bonds. The most recent water and wastewater revenue bonds were issued in 1992 and 1993.

Special Districts

Special districts are a form of infrastructure finance that attempts to directly correlate the payments made by landowners with the benefits received by those landowners. Payments made by landowners within taxing districts are neither "taxes" nor "fees," but "special assessments." Because of the need to correlate the amounts of individual special assessments with the benefits received by the those who pay the assessments, special taxing districts are generally less flexible and more heavily regulated than the tools described earlier.

As noted in the legal analysis, a number of special districts are authorized by state law. These include public utility districts (which can be used to extend water, sanitary sewer, storm sewer, natural gas or "other public utility" services), sewer districts, water districts, street improvement and paving districts (which can be used to improve alleys, sidewalks, and curb and gutter, as well as streets and paving), and special improvement districts.

Another type of special district authorized by state law is called a Sanitary Improvement District (SID). However, SIDs may be created only by property owners, not by the City, and they may only be created outside the city limits. If the City annexes an SID, the SID must disband and the City assumes its debt.

Special districts are particularly useful when a variety of different types of improvements need to be constructed in a well-defined area, and when the direct benefits of the new facilities to the property owners in that area can be demonstrated. Other advantages of special districts are that those who pay special assessments know that their assessment is proportionate to the direct benefits they will receive, and proposals for special districts generally do not create strong opposition from those outside the boundaries of the district.

On the other hand, special districts are relatively inflexible compared to other financing techniques, and are suitable primarily for financing localized facilities that serve only a small geographic area. In addition, special districts often require detailed studies to document the direct benefits to each member of the district who will pay an assessment, and to document a fairly concrete connection between the payment of the assessment and the receipt of a benefit.

For the City of Lincoln, special districts might be most appropriate for upgrading substandard facilities in developed areas. Substandard facilities could include roads, sidewalks, street lights, drainage facilities and water and wastewater lines. Use of special districts to fund these facilities from assessments on the benefitting property owners would relieve existing City residents and utility customers from the burden of paying for them. They might also be used to recover costs to the City for reimbursing the Norris Public Power District and rural water and fire districts for acquisitions related to new annexations.

Impact Fees

Impact fees are one of the most direct ways for local government to require new development to pay a larger portion of the costs they impose on the community. Impact fees are charges that are assessed on new development based on a standard formula such as the amount of square footage or the number of bedrooms per dwelling unit. Fees are one-time, up-front charges, with the payment usually made at the time of development approval, although some jurisdictions allow extended payments over a period of years. Essentially, impact fees require that each developer of a new residential or commercial project pay its pro-rata share of the cost of new infrastructure facilities required to serve that development.

Impact fees have been used to help finance a broad variety of public services. A recent survey of city and county impact fees in Florida reported fees for water, wastewater, roads, parks, fire protection, law enforcement, beach acquisition, correctional facilities, electric power facilities, general capital fund, general government/public buildings, land acquisition, libraries, off-site parking, tree replacement, rights-of-way, schools, solid waste, street lights and stormwater drainage (Florida Advisory Council, 1989: 11).

To date, 22 states have adopted impact fee enabling legislation. These acts have tended to embody the constitutional standards that have been developed by the courts. However, some states where impact fees are popular, such as Florida, still do not have impact fee enabling legislation. One of the reasons that Florida does not have an impact fee enabling act is that local governments felt that they had more freedom under Florida and national case law than they would under an explicit enabling statute. Indeed, one of the provisions in most state enabling acts is a limitation on the types of facilities for which impact fees can be assessed. The types of facilities that are eligible for impact fees are listed in Table 2.

Figure 1
Impact Fee Enabling Acts

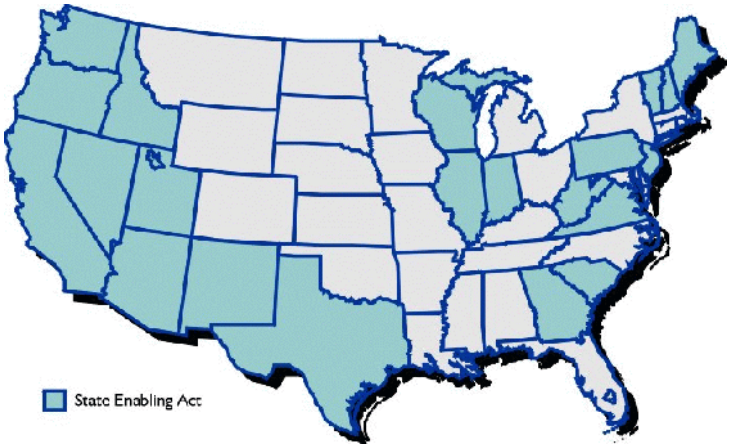


Table 2
FACILITIES ELIGIBLE FOR IMPACT FEES

State	Roads	Water	Sewer	Storm Water	Parks	Fire	Police	Library	Solid Waste	School
Arizona (cities)	■	■	■	■	■	■	■	■	■	
Arizona (counties)	■	■	■	■	■					
California	■	■	■	■	■	■	■	■	■	■
Georgia	■	■	■	■	■	■	■	■		
Hawaii	■	■	■	■	■	■	■	■	■	■
Idaho	■	■	■	■	■	■	■			
Illinois	■									
Indiana	■	■	■	■	■					
Maine	■	■	■		■	■			■	
Nevada	■	■	■	■						
New Hampshire	■	■	■	■	■	■	■	■	■	■
New Jersey	■	■	■	■						
New Mexico	■	■	■	■	■	■	■			
Oregon	■	■	■	■	■					
Pennsylvania	■									
South Carolina	■	■	■	■	■	■	■			
Texas	■	■	■	■						
Utah	■	■	■	■	■	■	■			
Vermont	■	■	■	■	■	■	■	■	■	■
Virginia	■									
Washington	■				■	■				■
West Virginia	■	■	■	■	■	■	■			■
Wisconsin (cities)	■	■	■	■	■	■	■	■	■	
Wisconsin (counties)		■	■	■	■	■	■	■	■	

Source: Ariz. Rev. Stat. Ann., § 9-463.05 (cities), § 9-11-1101 et seq. (counties); Cal. Gov't Code, § 66000 et seq.; Colo. Rev. Stat., § 29-1-801 et seq.*; Ga. Code Ann., § 36-71-1 et seq.; Haw. Rev. Stat., § 46-141 et seq.; Idaho Code, § 67-8201 et seq.; 605 Ill. Comp. Stat. Ann., § 5-901 et seq.; Ind. Code Ann., § 36-7-4-1300 et seq.; Me. Rev. State. Ann., Title 30-A, § 4354; Nev. Rev. Stat., § 278B; N.H. Rev. Stat. Ann., § 674:21; N.J. Perm. Stat., § 27:1C-1 et seq.; § 40:55D-42; New Mexico Stat. Ann., § 5-8-1 et seq.; Or. Rev. State, § 223.297 et seq.; Pa. Stat. Ann., Title 53, § 10501-A et seq.; Code of Laws of S.C., § 6-1-910 et seq.; Tex. Local Gov't Code Ann., Title 12, § 395.001 et seq.; Utah Code, § 11-36-101 et. seq.; Vt. Stat. Ann., Title 24, § 5200 et seq.; Va. Code Ann., § 15.1-498.1 et seq.; Wash. Rev. Code Ann., § 82.02.050 et seq.; W. Va. Code, § 7-20-1 et seq.; Wis. Stats., § 66.55

Since only 22 states have thus far enacted specific enabling legislation authorizing impact fees, such fees have generally been legally defended as an exercise of local government's broad "police power" to protect the health, safety and welfare of the community. The courts have gradually developed guidelines for constitutionally valid impact fees, as described in the legal analysis that concludes this study.

Nebraska does not have a state impact fee enabling act. Nevertheless, based on the legal analysis presented in the final section of this report, the City of Lincoln appears to have implied authority to impose impact fees.

A 1998 impact fee survey of over one hundred jurisdictions across the country provides a representative sample of typical impact fees by type of facility and type of land use. As shown in Table

3, the highest fees, as well as the most commonly charged, are for water and wastewater facilities. Road and park impact fees are also fairly substantial, while fees for public safety facilities are generally modest, reflecting the more labor-intensive nature of public safety services.

Table 3
NATIONAL AVERAGE IMPACT FEES

Facility	Single-Family (per unit)	Multi-Family (per unit)	Retail (per 1,000 sq. ft.)	Office (per 1,000 sq. ft.)	Industrial (per 1,000 sq. ft.)
Water & Wastewater	$5,063	$4,113	Varies	Varies	Varies
Road	$1,288	$825	$2,423	$1,594	$727
Park	$966	$797	$0	$0	$0
Fire/EMS	$145	$121	$239	$128	$87
Police	$61	$51	$205	$71	$52

Source: James C. Nicholas, Holland Law Center, University of Florida at Gainesville, Nov. 1998.

There are a number of ways that impact fees can be designed to mitigate their negative effect on desired types of development. For example, to reduce the negative effect on affordable housing, park impact fees could be based on the size of the dwelling unit, and the portion of the water and wastewater fees that address the cost of lines can be charged on a per acre basis, lowering the fee per unit for higher-density development. Similarly, to encourage infill and redevelopment, a developed area already served with adequate infrastructure could be designated as a separate service area, where no impact fees are charged. Another alternative that can be used to encourage redevelopment is to extend the time allowed for replacement or expansion of existing buildings or activities. Most impact fee ordinances allow an existing building to be replaced by an identical structure within a certain period of time without paying an impact fee. Similarly, an expansion of an existing use is only charged for the net increase in demand for the particular type of facility caused by the expansion. The most generous form of these provisions would give credit against the impact fees for any development or use that could be documented to have ever existed on the site. Such a provision could effectively reduce or eliminate impact fees in older areas were redevelopment is desired. In addition to designing the fees to mitigate the negative effects on certain types of development, the City could also set up a special fund to pay the impact fees for such development.

Unlike developer exactions that typically address only on-site or nearby facilities, impact fees can be used to cover the broad range of capital facilities required to serve new development. Impact fees are more predictable and equitable than informal systems of negotiated exactions and are likely to generate considerably more revenue. Impact fees can also be used to fund a wider variety of services and types of facilities than is possible with exactions or special districts. Impact fees can also be structured to require new development to "buy into" service delivery systems with existing excess capacity, thus recouping prior public investments made in anticipation of growth demands. Recoupment of prior investments is generally not possible with other types of exactions.

An advantage of impact fees over development taxes is that impact fees avoid the unpopular tax label and tend to be more politically acceptable because of the requirement that revenues be spent so as to benefit the fee-paying development. On the other hand, the revenues from impact fees may not be used to pay for operating costs, or for pre-existing deficiencies not attributable to new development. Such limitations do not apply to revenues from special district assessments or development taxes, which may be more suitable to certain types of improvements.

The requirement that impact fees be spent to benefit the fee-paying development is typically met by earmarking revenues for expenditure in the zone in which they are collected. If impact fees cannot be used to finance bonds, enough fees must accumulate before construction on a project can begin. The requirement that fee revenues be spent within a reasonable period of time following fee payment imposes an additional constraint. However, proper design of benefit zones, provisions for pooling revenues from adjacent zones and supplementing impact fee revenues with funds from other sources can overcome obstacles to successful fee implementation.

Rational nexus requirements impose a set of earmarking and accounting practices that limit the use of impact fee revenues, a feature characteristic of all development fees but not applicable to development taxes. Studies required to develop and justify an impact fee are not required of other types of development fees and taxes, although such analysis can build support for impact fee adoption.

The primary strengths of impact fees include applicability to a wide range of public facilities, ability to recover the full net costs of growth-related infrastructure, proportionality to impacts, predictability for both the public and private sectors and acceptability due to a clear linkage with the needs of new development. Their limitations include the necessity for detailed studies and accounting procedures, inability to fund operating or deficiency costs, dependence on growth cycles and lack of bonding capability.

The City's development exactions for roads result in developers constructing most collector road improvements, but are less efficient and equitable in securing developer participation in the cost of arterial street widening. An impact fee for arterial streets would spread the costs among new developments more equitably, since it is based on traffic generation rather than arterial street frontage. And it could generate considerably more revenue that could be more efficiently utilized to make improvement where most needed.

During a recent similar study for the City of Mesa, Arizona, developers in the Phoenix area voiced a strong preference for impact fees over development taxes. Even when residential developers were presented with an option of a lower development tax that would spread the cost of park, library and cultural facilities over both residential and nonresidential development, they preferred the higher impact fee.

Development Taxes

Development taxes are local taxes imposed on the business or occupation of real estate development in general (or a part of that business) in order to raise monies to pay for the added costs that development imposes on the city. Development taxes differ from development impact fees in several important ways. First, they are primarily a tool for raising revenue, as opposed to a land use regulation designed to finance facilities for specific developments. Second, they do not have to be earmarked or segregated or accounted for separately from the city's general revenues. Third, they can be used to pay for operations and maintenance of facilities, as well as for their construction. Fourth, they generally do not need to be based on either general or specific studies to document a reasonable relationship of burdens and benefits. For all of these reasons, the occupation tax mechanism offers municipalities substantially more flexibility in raising revenues to cover the costs of development.

At the same time, occupation taxes differ from ad valorem property taxes. They are not taxes on property at all, but taxes on the exercise of an occupation. They are therefore also generally not subject to constitutional and statutory requirements of uniform real property taxation. They are seldom based directly on the value of a property; they are usually calculated based on some measure of the amount of construction itself. When occupation taxes are directly based on the value of real property, they have sometimes been held to be unconstitutional ad valorem taxes, and have been overturned. Finally, unpaid ad valorem property taxes are generally secured by a lien on the property, while payment of the occupation tax is not secured by a lien. Instead, it is usually collected at the time of building permit issuance.

Perhaps most importantly, occupation taxes are adopted pursuant to municipal taxation powers, and not police powers. As a result, they are generally not subject to the body of law dealing with the limits of police power regulations and exactions. Court-defined standards for “nexus,” "reasonable relationships," and "rough proportionality" generally do not apply. While occupation taxes must be rationally related to a corporate purpose, that is generally easy to show, since revenues are generally needed from somewhere to fund public facilities made necessary by the new development activity subject to the tax.

A number of states, including Missouri, Kansas, Colorado and Arizona, authorize municipalities to impose development taxes. Nebraska appears to be among them. State law authorizes cities of the primary class, which includes Lincoln, to levy an occupation tax. Consequently, it appears that the City could levy a tax on the occupation of real estate development and construction based on the amount of building constructed. Such a development tax could be collected at the time the building permit is issued and would function in a manner similar to an impact fee.

Development taxes are not without disadvantages. In spite of the fact that occupation taxes are not subject to the strict nexus/rational relationship test, studies may still need to be compiled. Generally, it is good practice to calibrate development taxes carefully, based on the types of expenses that they are intended to cover. In addition, the adoption of new taxes is generally more unpopular than the

adoption of new development fees or special assessments, even though the practical results and burdens of the different tools may be the same. Finally, a development tax would have to be uniform throughout the city, whereas an impact fee could apply only to selected growth areas and could vary between different areas to reflect geographic differences in the cost to serve development.

One reason for choosing development taxes over impact fees for certain facilities might be to promote housing affordability. Impact fees for parks, libraries and cultural facilities (and schools) must generally be assessed only on residential development. The cost of these facilities could be addressed with a much lower development tax that applied to nonresidential as well as residential development. Another situation favoring a development tax would be a facility like stormwater drainage for which there is inadequate data to support defensible impact fee calculations.

Summary

An overall evaluation of the four alternative financing techniques (impact fee, development tax, special district and utility fee) and the two existing financing techniques (bonds and exactions) is illustrated in *Table 4*. All of the techniques have a sound legal basis, although traditional developer exactions other than impact fees may not meet evolving constitutional standards. Only impact fees score high on relating the fee to the impact on facilities, while utility fees score low on proportionality because they do not charge growth-related costs to new development. Exactions and special districts rate poorly in terms of revenue potential because they can only address localized facilities. Special districts, however, do rate highly in promoting geographic equity, as do impact fees, which are often assessed by service area. Utility fees and bonds score high on promoting infill/redevelopment and affordable housing, because, at least in the short run, they spread growth-related cost among all development and reduce the cost to new development. Special districts are the only tool applicable to recovering the costs of upgrading substandard facilities in recently annexed areas. Development taxes and utility fees rate high on technical ease, while impact fees and special districts rank low because of the legal requirements for studies and accounting. Finally, impact fees, development taxes and exactions are likely to have the highest public acceptability because they place the costs of growth on new development, while bonds and to a less extent utility fees should tend to be less acceptable because they will result in higher taxes and utility fees for the general public.

Table 4
ALTERNATIVE FINANCING TECHNIQUE EVALUATION

Evaluation Criteria	Impact Fee	Dev't Tax	Special District	Utility Fee	Bonds	Exactions
Legal Basis	U	U	U	U	U	—
Proportionality	U	—	—	Y	—	—
Revenue Potential	U	U	Y	U	U	Y
Geographic Equity	U	—	U	—	—	—
Infill/Redevelopment	—	—	—	U	U	—
Housing Affordability	—	—	—	U	U	—
Annexation Costs	—	—	U	—	—	—
Technical Ease	Y	U	Y	U	—	—
Public Acceptability	U	U	U	—	Y	U

U good — fair Y poor

While the general evaluations presented above highlight the strengths and weaknesses of alternative financing techniques, no obvious choices present themselves. The various policy choices must be evaluated for individual types of facilities. Not all financing techniques are appropriate to all types of capital improvements, and the evaluation criteria are not all equally applicable to all financing techniques. Ultimately, the competing advantages of the various techniques must be weighted by community values.

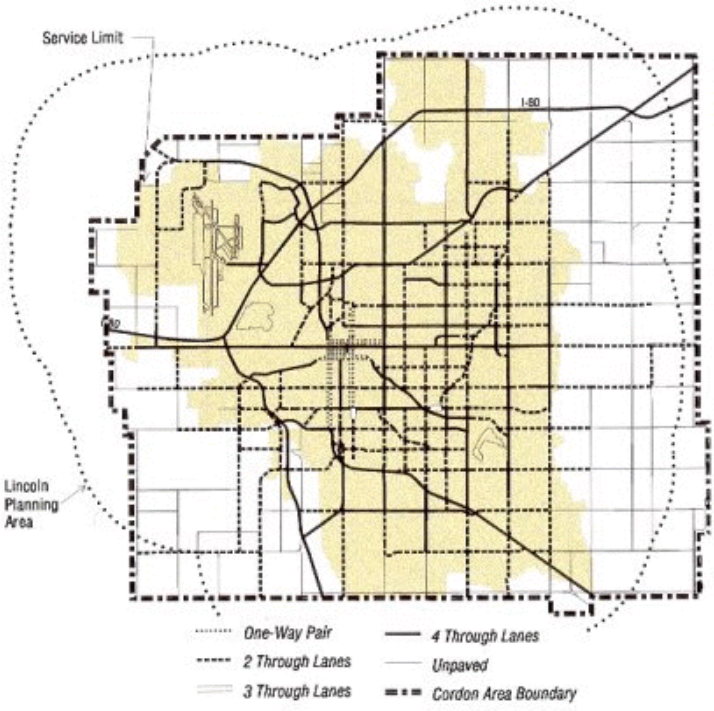
TYPES OF FACILITIES

In this section, the various types of facilities provided by the City are briefly described, along with their suitability for the various alternative financing mechanisms.

Roads

The City maintains 650 miles of residential streets and 251 miles of arterial streets. The City's local street standard is a 27-foot cross-section (26 feet curb-to-curb) in a 60-foot right-of-way (ROW). Developers are required to dedicate the full width of ROW for the ultimate cross-section required by the Thoroughfare Plan. The City reimburses developers for the cost of oversized width or pavement depth beyond what would be required for a local street. Funds are set aside in the Capital Improvements Plan (CIP) to reimburse developers for street oversizing. There is generally sufficient funding to reimburse developers for oversizing collectors, but often not for the much more considerable cost of arterial street oversizing. In the event of insufficient funding, there is no standard approach to allocating the available reimbursement funds among qualifying developers.

Figure 2
Existing Major Road Network



The road improvements that are required of developers as a condition of development approval are negotiated on a case-by-case basis. This process of negotiated developer contributions is commonplace, but is often criticized for being unpredictable, time-consuming and unfair. The fairness arguments are that the process penalizes larger developers, developers with frontage on streets needing improvement, and late-comers whose traffic triggers the need to widen a street or install turn lanes at an intersection.

The City's desired level-of-service (LOS) standard is LOS "C." According to the Highway Capacity Manual, for urban and suburban arterials:

> LOS C represents stable operations; however, ability to maneuver and change lanes in midblock locations may be more restricted than at LOS B, and longer queues, adverse signal coordination, or both may contribute to lower average travel speeds of

about 50 percent of the average free-flow speed for the arterial classification. Motorists will experience appreciable tension while driving.[1]

The City will identify existing capacity deficiencies as well as capacity improvements needed to maintain acceptable levels of service in the upcoming update of its *Long Range Transportation Plan*. The City has invested $24 million in signalization (replacement cost), which is often the most cost-effective type of capacity improvement. However, some road widening will be required in the future, and staff estimates that it costs an average of $2.8 to $3.1 million per mile to widen an existing road from two to four lanes.

The major sources of funding for the City's streets and highways program are the Highway User Fund derived from gasoline and other motor fuel taxes (52%), the wheel tax (30%) and Federal TEA21 highway funding (18%). Of the typical $39 wheel tax, which is included in the annual vehicle registration fee paid by motorists, $16, or 41 percent, is reserved for new road projects that serve growth-related needs, while the remainder is used for street operations, rehabilitation and maintenance.

Short of funding such improvements from general revenues, the major alternative to negotiated developer contributions is road impact fees. Actually, road impact fees generally supplement rather than supplant negotiated contributions, and traffic impact studies are generally still required of major development projects in communities that have adopted road impact fees. The differences are that impact fees are assessed on all new developments, regardless of size or location, and those developers who are required to make contributions to the major road system funded by impact fees (e.g., arterials) get credit for the value of such contributions against the impact fees they would otherwise owe. Thus, road impact fees tend to "level the playing field" between developers. They also generate funds that are not tied to the location of a particular development and can be spent on projects that are highest on the City's priority list.

Alternatively, the City could adopt a development tax to help fund road improvements. The development tax approach would have several advantages, including not requiring detailed studies to establish and update fees, flexibility to use funds to remedy existing deficiencies, and relief from the obligation to provide developers with credits for major road improvements they are required to make as a condition of development approval. However, such a system would not be as fair and predictable as a road impact fee system. In addition, a development tax would probably need to be assessed uniformly throughout the city, and unlike impact fees could not be targeted to specific growth areas where the need for capital improvements to serve growth is primarily being created.

Another issue to be addressed is how road impact fees would affect existing development exaction practices (e.g., standard right-of-way dedication and improvements to adjacent arterials). Our

[1]National Research Council, Transportation Research Board, Highway Capacity Manual, 3rd Edition, 1994, p. 11-4.

recommendation would be that the City develop a demand-driven road impact fee system that would charge new development based on the anticipated travel demand on the roadway system (e.g., number of daily trips generated times average trip length) and the average cost to add a lane-mile of capacity to the arterial system.

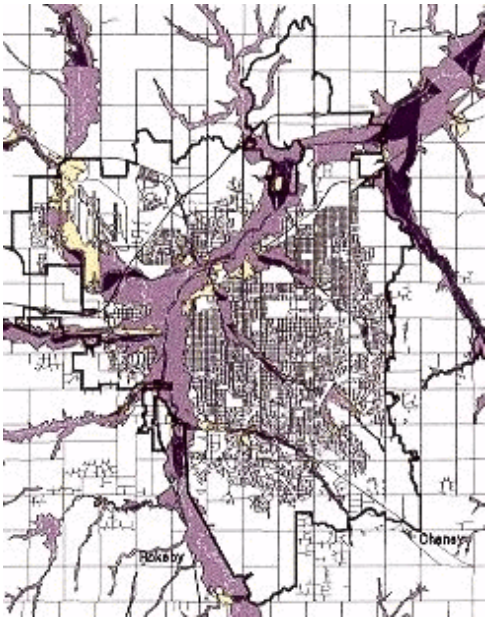
An arterial street impact fee could be limited to construction costs, or it could also include right-of-way costs. If ROW costs are excluded, the City could continue to require dedication of ROW without providing credits against the impact fee. Some communities include only the costs of ROW in excess of the standard dedication requirement for a local street, and only provide credit for the excess ROW dedication. A final option is to include all ROW costs in the fee calculations, so that any required developer contribution to the arterial system would be eligible for credits against the road impact fee.

Probably the majority of communities with road impact fees provide credit to developer improvements to the major road system, regardless of timing or inclusion in planning documents. However, some communities have been more restrictive, out of concern that premature development in fringe areas would essentially control the local governments road building program indirectly through road impact fee credits. To address this concern, credit in some impact fee systems is not allowed to exceed the amount of the impact fees, or will only be provided for improvements that are included in the 5- to 6-year CIP, or in the 20-year long range transportation plan.

Drainage

Responsibility for storm drainage improvements and maintenance in Lincoln is divided among the private sector (developers and land owners), the Lower Platte South Natural Resources District (NRD), and the City. About five years ago the City began requiring developers to install on-site detention so that stormwater runoff after development does not exceed pre-development conditions. In many cases, drainage channels and detention facilities are not dedicated to the City, and the maintenance of these facilities is the responsibility of the property owner or a homeowners association. City has an inventory of drainage facilities, but staff acknowledges that it is not completely accurate or up-to-date. A drainageway often will go from public to private to public to private, with little clarity on who is responsible for maintenance.

Figure 3
Major Drainageways



The Lower Platte South NRD is one of 23 such entities in the state. Its jurisdiction covers 1 million acres, including part of six counties. The NRD has responsibility for the main storm drainage channels, including all named creeks.

The NRD does NPDES reviews/inspections for nonpoint pollution, purchases open space and constructs trails, such as the current project in Stevens Creek.

The City has responsibility for the street drainage system, including curb and gutter and storm sewers, and bridges and culverts over major and minor drainageways. It also has responsibility for tributaries to the main drainage channels maintained by the NRD. The City has only a few regional detention facilities. The Street Maintenance division of the Public Works Department does storm drainage as well as street maintenance, including storm sewer repair and replacement, mowing and curb and gutter repair and replacement. The City has issued some general obligation bonds for storm sewer improvements.

The new Federal Clean Water Act requires local governments to identify sources of pollution in the stormwater system and to develop measure to reduce that pollution. The funding sources the City has historically relied upon, primarily general fund revenues and the NRD, will not be sufficient to address the cost of complying with the stringent new requirements. The *Lincoln City—Lancaster County Comprehensive Plan* calls for the preparation of a Stormwater Management Master Plan, and also calls for the development of additional funding sources:

> It is expected that the implementation of the regulations will place a financial burden upon the City in the magnitude of five or six times that which has been previously provided. Some methods to be considered include ad valorem taxes, user fees, bonds, and utility bills.

Even though Lincoln appears to have the legal authority to impose drainage impact fees, such fees are relatively rare, primarily because drainage systems are very complex and few communities have the data required to support the impact fee calculations. Much more common are stormwater utility fees.

A stormwater utility fee is a user fee similar to a water or wastewater fee, which is typically included on the monthly city utility bill. Unlike an impact fee, a utility fee is charged to all existing development, and can be used for either capital or operating expenses. A city-wide stormwater utility fee could help fund remedies to existing drainage problems as well as on-going maintenance costs. The studies required to develop a stormwater utility fee would be much simpler and less expensive than those required to support a stormwater drainage impact fee. The main requirement for a utility is that the user fees should be related to the demand for service and that the fees should reasonably reflect actual costs to provide the service.

Several Midwestern cities, including Topeka and Wichita, Kansas; Kansas City and Columbia, Missouri; and Des Moines and Sioux City, Iowa, have adopted stormwater utility fees. The fee appears on the monthly utility bill and is earmarked for drainage purposes. Fort Collins, Colorado assesses a stormwater utility fee that is designed to fund both capital and maintenance costs. The monthly bill for a typical residence is $2.01 for maintenance and $3.58 for capital improvements. At

these rates, a stormwater utility fee in Lincoln would generate well over $6 million annually from existing residential development alone.

It is recommended that Lincoln consider establishing a stormwater utility and user fee to help fund drainage maintenance and capital improvement costs. The monthly utility fee could be based on land use and lot size, impervious cover or some other characteristic of the parcel that is related to the generation of stormwater runoff.

Water

Most of the City's water supply comes from a 1,600-acre well field along the Platte River near Ashland, Nebraska. The water enters the city from the northeast through a supply line capable of transmitting 110 million gallons per day (mgd). Because the primary source of water is so far away, the City has more storage capacity than most communities, equal to approximately one peak day's demand.

In the 1980s, the City tripled water rates to fund an $86 million project to expand supply and treatment facilities in Ashland. Most of those bonds have been paid off, and the remaining debt service is about $5 million per year. In addition, the City is funding about $10 million annually in capital improvements and replacements out of current revenues.

A major current capital improvement is a $19.5 million project to build a new line and a new 30 million gallon (mg) storage tank on a ridge to serve new development in the southeast. Because of their location, these facilities could also serve a portion of the Stevens Creek basin. The City is spending about $1 million per year rehabilitating old mains, painting reservoirs regularly, and performing other maintenance on existing facilities.

Figure 4
Rural Water Districts

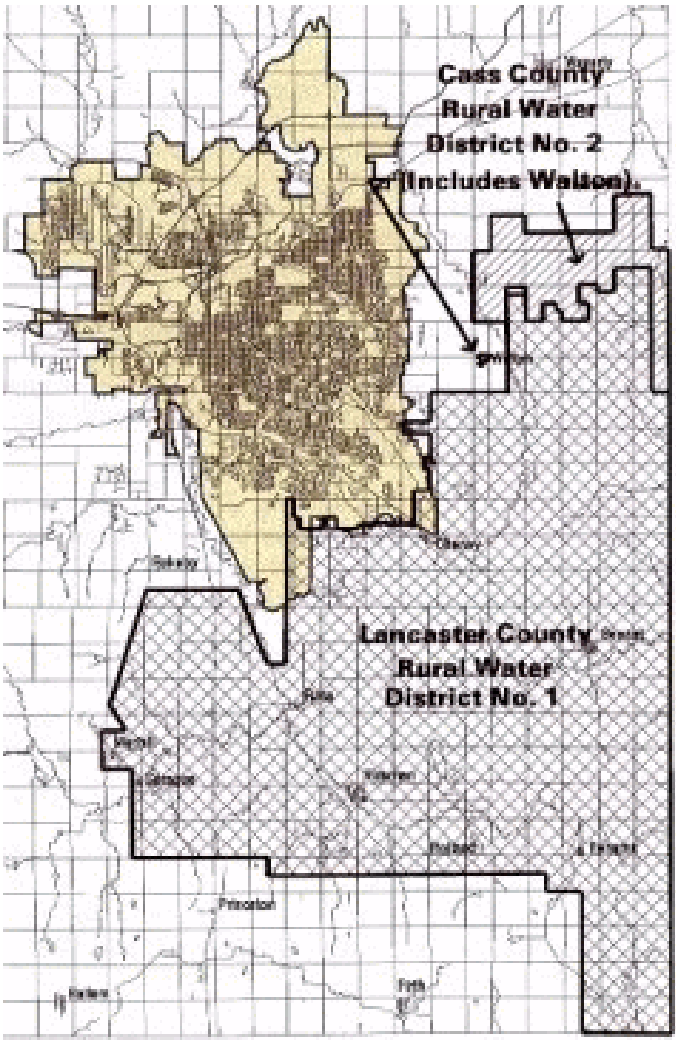
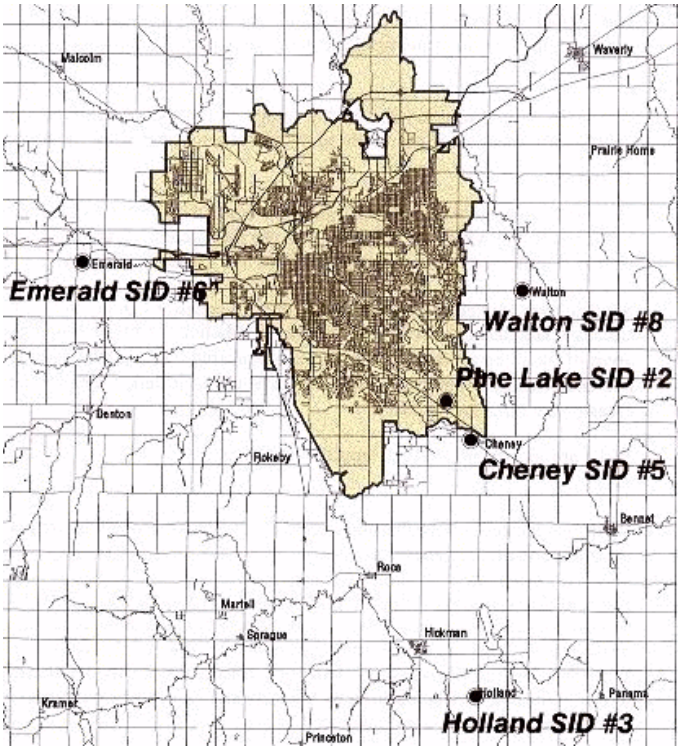


Figure 5
Sanitary Improvement Districts



Development outside the city limits is served by on-site wells or other private systems, rural water districts or Sanitary and Improvement Districts (SIDs). Two rural water districts, Lancaster County Rural Water District No. 1 and Cass County Rural Water District No. 2, supply water to rural areas of Lancaster County (see Figure 4). SIDs are formed by property owners to fund infrastructure improvements and have taxing authority. Currently, there are five SIDs that provide water service to residential developments in the unincorporated county (see Figure 5). Four of the five SIDs were established to serve the unincorporated villages of Emerald, Walton, Cheney and Holland. Lancaster County S.I.D. #7, also known as the Highlands SID, was unable to meet its financial obligations and was ultimately annexed by the City.

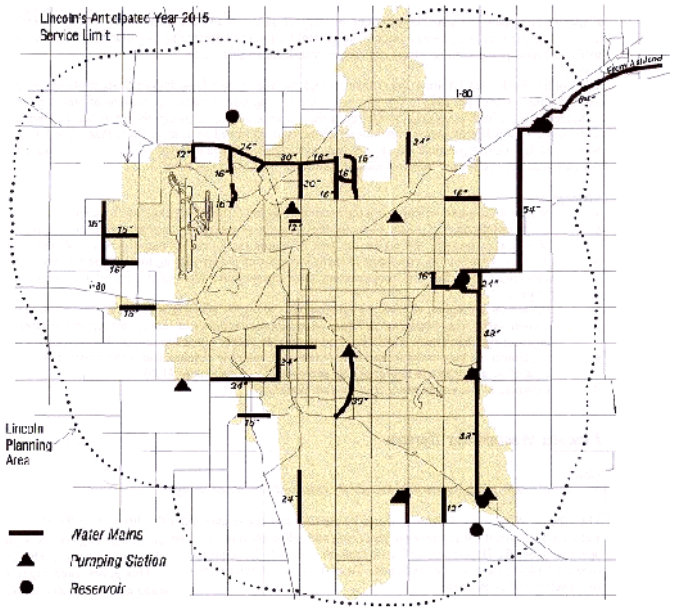
State law specifically authorizes municipalities that operate water and wastewater utilities to collect fees to defray the cost of such services, and this can reasonably be interpreted to include the authority to charge connection fees that recoup some of the capital costs associated with serving new utility customers. However, the City does not currently charge such connection fees.

Water lines within a development are installed at the developer's expense. When line extensions are needed to serve new development, or when larger lines are needed within a development in order to serve other developments, the City will pay for the cost of oversizing pipes beyond six inches in diameter.

The City had a long-range plan for its water distribution system prepared in 1995. The *Water Distribution System Master Plan Report*, prepared by Black & Veatch, identified improvements and costs needed to accommodate projected growth through the year 2010.

As part of this project, City staff will determine the water system improvements that would be needed to accommodate the build-out of six growth areas on the

Figure 6
Future Water Improvements



city's fringe, which in turn will be used to determine the capital cost per equivalent dwelling unit to serve new customers in each of the six growth areas. The results of this analysis will indicate the direction of growth that would be the most cost-effective to serve with water facilities. The analysis could also be used to support development of a connection fee or other financing mechanism that would defray the capital cost associated with serving new customers.

The capital costs associated with growth could be financed in a number of ways. The current practice is to finance new distribution facilities primarily through rate revenues, with some developer participation in the cost of line extensions and booster stations needed to serve new areas. One alternative would be to make greater use of revenue bonds, which would spread the cost over time so that future customers, who are benefitting from the improvements, would pay more of the costs. Still, existing customers would continue to pay the majority of the costs of the growth-related facilities.

Another approach would be to create a special district that would issue bonds to fund the facilities needed to serve a geographic subarea and impose assessments on property within the district to retire the bonds. The assessments could be made on a per-acre basis as an annual charge on all property within the district, billed along with property tax notices, or on some other basis related to benefit received from the improvements. However, because the improvements would ultimately serve a large area, it would be necessary to include in such a district land that may not be located in the City or realistically able to connect to the City system for many years. This would likely create both political and legal problems for such an approach.

A water connection fee that recovered the capital costs of serving new customers based on meter size or some other measure of potential water demand would appear to be the most promising alternative approach. The connection fee approach is widely used by local governments and private utilities in the United States, and it goes by a variety of names, including impact fee, capital recovery fee, utility expansion fee and system development charge. As discussed earlier, it appears that the City already has the authority to impose such a fee as a condition for connection to the municipal water system. The calculation of the fee would be designed to reduce the fee to account for the fact that new customers would be paying a portion of their share of capital costs through rate payments that retire outstanding debt. The regulation imposing the fee would also provide for a reduction of the fee to account for any developer contributions of major system improvements.

An alternative that is similar in many ways to a connection fee is the development tax. As noted earlier, the City probably has the authority to impose a development tax, which is essentially an occupation tax on the occupation of real estate development or construction. A development tax for water facilities might differ slightly from a connection fee in that it would typically be collected at the time of building permit issuance, rather than water meter purchase, although in practice the two often occur at the same time. More significantly, a development tax could be consciously structured to be more socially progressive than a connection fee. For example, a connection fee needs to reflect potential water demand, and so is most often the same for all single-family units, regardless of size, that use a standard residential meter. In contrast, a water development tax could be assessed on a

per square foot basis, so that the end result is a fee that corresponds much more closely with the value of the house and to the income of the residents. Of course, water connection fees can sometimes also be designed to accomplish such proposes, but only to the extent that they can be shown to reflect differences in demand on the system. On the other hand, development taxes generally do not provide credits for developer contributions, since their primary purpose is to raise revenue, and not necessarily to reflect proportionate impacts. Another important distinction is that a development tax would probably need to be uniform throughout the city, whereas connection fees could be charged only in the growth areas and could also vary between areas.

Of particular concern to some local developers is the lack of any mechanism for reimbursing the initial developer who pays the cost for a major improvement to serve an area, such as a water booster pump or major distribution main. While credit policies differ among communities with connection fee systems, a developer would generally be able to claim connection fee credits if required to make major system improvements as a condition of development approval. Some communities allow connection fee credits only for improvements included in their CIP or long-range plan, and others do not allow for any reimbursement in excess of the amount of connection fees that would otherwise be due from the development.

Another way to deal with this problem are pro rata agreements, whereby the City would agree to require other developers who connect to the system and benefit from the improvement to pay a pro rata share reimbursement to the original developer. Under this approach the initial developer carries the financial risk, and the City has some administrative costs of enforcing the pro rata scheme. The City may also need to satisfy itself that it has the legal authority to require subsequent developers to reimburse the original developer.

A final alternative to requiring the initial developer to footing much of the infrastructure bill would be to create a special district to finance the improvement. This approach would involve the highest cost in terms of legal, technical and administrative requirements, and would also subject the City to greater financial risk in case of district default or bankruptcy.

Based on these considerations, we would recommend the connection fee approach to calculating a water connection fee to recover capital costs to serve growth areas of the city. Typically, a connection fees are calculated on the basis of the utility providing all major system facilities, including pipes over a certain size. If a developer is required to extend or install a major facility to or through his development, he would be eligible for credit against the connection fees. There may still be an intermediate range of pipe sizes between the minimum required for a subdivision and the minimum included in the connection fees that would be addressed through negotiations with developers and potentially with pro rata agreements to reimburse the initial developer who pays for the improvements.

The City might also consider making greater use of revenue bonds to spread more of the cost of growth-related facilities to future customers. The additional revenue bonds could be repaid with connection fee revenues or rate revenues. Regardless of the funding source, the effect would be to

reduce capital funding out of current rate revenues, which should allow the City to lower rates or at least avoid future rate increases.

Wastewater

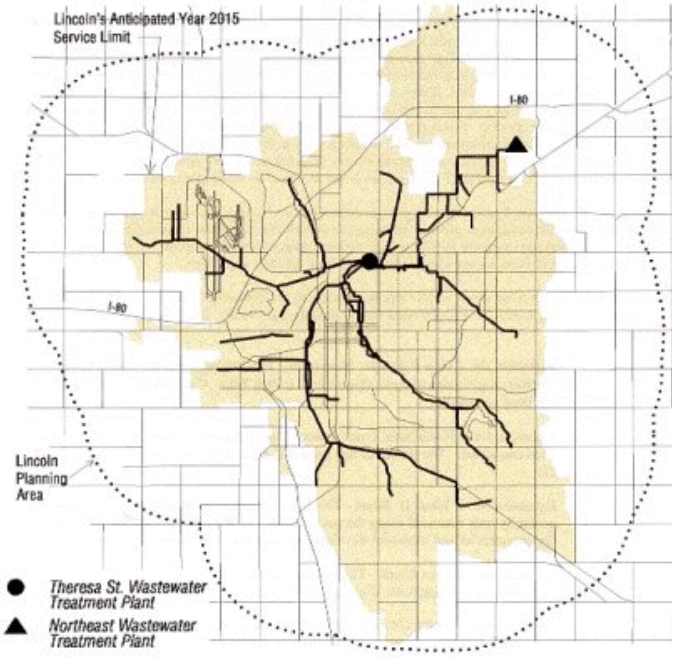
Wastewater generated in Lincoln is currently treated at the City's two wastewater treatment plants. The Theresa Street Wastewater Treatment Plant is centrally located and is currently rated for a design oxidative capacity of 28 mgd. The Northeast Wastewater Treatment Plant is located at the northeastern edge of the city, and is currently rated for a design oxidative capacity of 8 mgd, at maximum month loading conditions.

The Theresa Street plant is currently treating an average annual flow of 20 mgd. During wet periods with high intensity rainfall events, peak hydraulic flows have reached as high as 85 mgd. The Northeast plant is currently treating an average annual flow of 6 mgd, with peak wet weather flows approaching 26 mgd.

The Theresa Street facility occasionally exceeds its permitted discharge limits for organic waste strength due to period of high volume, high strength organic wastes discharged from several large industries. Improvements are currently underway to provide additional oxidative capacity for treatment of such high strength wastes. Improvements to both plants to meet new NPDES permit limits for ammonia are currently estimated at $20 to $25 million.

The two treatment plant have adequate site area for expansion to serve the needs of the City for up to 50 years. Both plants can be expanded in increments to meet growth needs at a cost of about $3 per gallon per day. If future growth of the city dictates the need for an additional treatment facility, the approximate unit cost for construction is $4 per gallon per day, not including the costs of land acquisition.

Figure 7
Existing Wastewater Facilities



The City is increasing the wastewater interceptor system by about 15 to 20 miles per year. A major improvement to the collection system currently underway is the Salt Creek relief sewer trunk. This project, which will ultimately cost about $24 million, is about one-third done, and will take another 8 to 10 years to complete. It is intended to serve additional growth in the City's existing service area to the south. When completed, the trunk sewer will

have the capacity to serve a total of 22,500 acres, of which approximately 11,500 acres are currently developed. The additional areas to be served could be a combination of growth in the south and southwest, but the trunk sewer system will not have sufficient capacity to serve the build-out of these areas. In order to provide sewer capacity to serve build-out, additional relief sewers will be needed to transport peak flows to the Theresa Street Plant, or a flow equalization facility or an additional treatment facility will be needed on the west/southwest side of the city.

As with the water system, the City has been relatively conservative in its use of revenue bonds, preferring to fund the majority of capital expenditures out of current rate revenues. The City's most recent bond issues was in 1992, and it was used to refund some 1980 bonds. Annual debt service payments are only about $1.3 million, while capital improvement and replacement expenditures total about $8 to $10 million annually.

State law specifically authorizes municipalities that operate water and wastewater utilities to collect fees to defray the cost of such services, and this can reasonably be interpreted to include the authority to charge connection fees that recoup some of the capital costs associated with serving new utility customers. However, the City does not currently charge such connection fees.

Wastewater lines within a development are installed at the developer's expense. When line extensions are needed to serve new development, or when larger lines are needed within a development in order to serve other developments, the City will pay for the cost of oversizing pipes beyond eight inches in diameter.

The City's wastewater master plan was developed in tandem with the 1994 *Lincoln-Lancaster County Comprehensive Plan* and covers the 20-year period from 1995-2015. The *Lincoln Wastewater Facility Plan* was completed in January 1995 by Brown and Caldwell and HWS Consulting Group, Inc. in cooperation with City wastewater staff and the city-county planning department.

As part of this project, City staff will determine the wastewater system improvements that would be needed to accommodate the build-out of six growth areas on the city's fringe, which in turn will be used to determine the capital cost per equivalent dwelling unit to serve new customers in each of the six growth areas. The results of this analysis will indicate the direction of growth that would be the most cost-effective to serve with wastewater facilities. The analysis could also be used to support development of a connection fee or other financing mechanism that would defray the capital cost associated with serving new wastewater customers.

In general, lines smaller than 18 inches in diameter are considered tappable mains, and the City's *Directional Growth Analysis* study performed in 1996 excluded the cost of such lines from consideration, since at least a portion of the cost of such lines would be paid for by developers. The City's existing system contains about 79 miles of wastewater lines 18 inches and greater, and the cost of installing this amount of pipe in undeveloped areas at today's costs would total about $54 million.

The capital costs associated with growth could be financed in a number of ways. The current practice is to finance new distribution facilities primarily through rate revenues, with some developer participation in the cost of line extensions needed to serve new areas. The alternatives include making greater use of revenue bonds, creating a special district to fund the improvements through assessments, levying a citywide development tax or imposing a connection fee within individual growth areas.

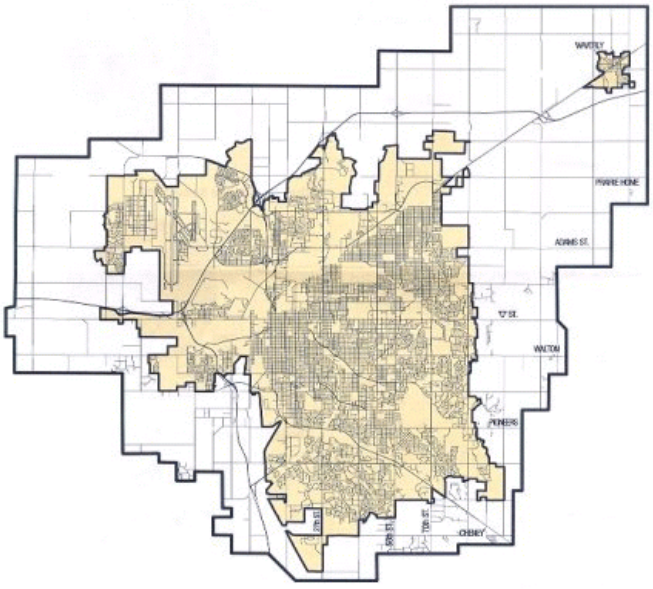
The arguments in favor of connection fees using an impact fee methodology over the other alternatives are analogous to those for water facilities discussed in the previous section. Consequently, we would recommend the connection fee approach to calculating a wastewater connection fee to recover capital costs to serve growth areas of the city. The City might also consider making greater use of revenue bonds to spread more of the cost of growth-related facilities to future customers.

Electrical Facilities

The Lincoln Electric System (LES) is owned by the City of Lincoln and is operated by an administrative board appointed by the Mayor and City Council. The electric system is revenue-producing, and no tax funds are used to support its operation. LES makes annual payments in lieu of taxes to the City, Lancaster County and the Lincoln School District. The in lieu payments represent five percent of electric revenue collected the previous year and are distributed among the local governments based on a proportionate share of the tax mill levy.

LES provides electric service to the City of Lincoln and most of the surrounding area within Lincoln's three-mile planning zone, include the City of Waverly and the unincorporated villages of Cheney, Walton, Prairie Home and Emerald. The rest of Lancaster County is served by the Norris Public Power District (see Figure 8). LES has about 110,000 customers within its current 190 square mile service area, and gains about 2,200 to 2,500 new customers each year.

Figure 8
Lincoln Electric Service Area



The City's electric service area boundary used to extend out to the three-mile extraterritorial jurisdiction boundary, but that was changed by state law. Now, the only way to extend the service boundary is to annex an area outside the current service boundary. While this has not yet happened, the buffer outside the city has been reduced to as little as one-half mile in some areas to the south and southeast.

Annexing land in the Norris Public Power District service area can be expensive, as LES must compensate the District for 2.5 times annual revenue from lost customers, the cost of existing facilities (reproduction less depreciation) and the reintegration of their system. LES estimates acquiring existing Norris Power customers in the Stevens Creek area would cost $10,000 per customer, compared to a cost of about $5,000 per customer for new distribution facility costs. Out of Norris Public Power District's total customer base of about 13,000 in five counties, approximately 1,000 are within three miles of Lincoln's city limits.

According to the March 2000 *Lincoln Electric System Report to Rating Agencies*:

> In early 2000, LES began a non-binding mediation process with Norris Public Power District to find a mutually agreeable solution to allow LES to expand its service area to include a buffer area surrounding Lincoln that will allow LES to efficiently and economically install electrical infrastructure in advance of significant growth and development. This process holds off the introduction of service area-related legislation. The mediation is expected to be completed by the end of the third quarter of this year. Should the mediation fail to produce a mutually agreeable solution, LES will again seek legislative changes to service area statutes in 2001.

LES installs all facilities in new subdivisions, although it does get easements for its lines in new plats. It charges $150 to make a residential connection on a lot up to 150 feet wide. Most of its distribution lines are underground. Up to five times the estimated annual revenue from potential new customers will be spent to extend service without asking for developer participation.

LES owns approximately 800 megawatts (MW) of capacity, most of which is in jointly-owned facilities, as shown in Table 5. This does not include the 150 MW and 90 MW units currently under construction. The new 150 MW Salt Valley generation station will cost about $90 million. LES only buys generating capacity to serve peak loads, not for resale. It does, however, sell some excess power on the spot market.

Table 5
GENERATING CAPACITY, 1999

Facility	Type	LES Share	LES Capacity
Laramie River Station	Coal	11.09%	179 MW
Cooper Nuclear Station	Nuclear	12.50%	95 MW
Sheldon Station	Coal	30.00%	68 MW
Gerald Gentleman Station	Coal	8.00%	109 MW
Western Area Power Administration	Hydroelectric	na	56 MW
Rokeby Generation Station	Oil or Gas	100.00%	150 MW
8th & J	Oil or Gas	100.00%	31 MW
Wind Turbine Generators	Wind	100.00%	66 MW
Nebraska Distributed Wind Generation Project	Wind	na	45 MW
Total			799 MW

Source: Lincoln Electric System, *Financial Report '99*, p. 3.

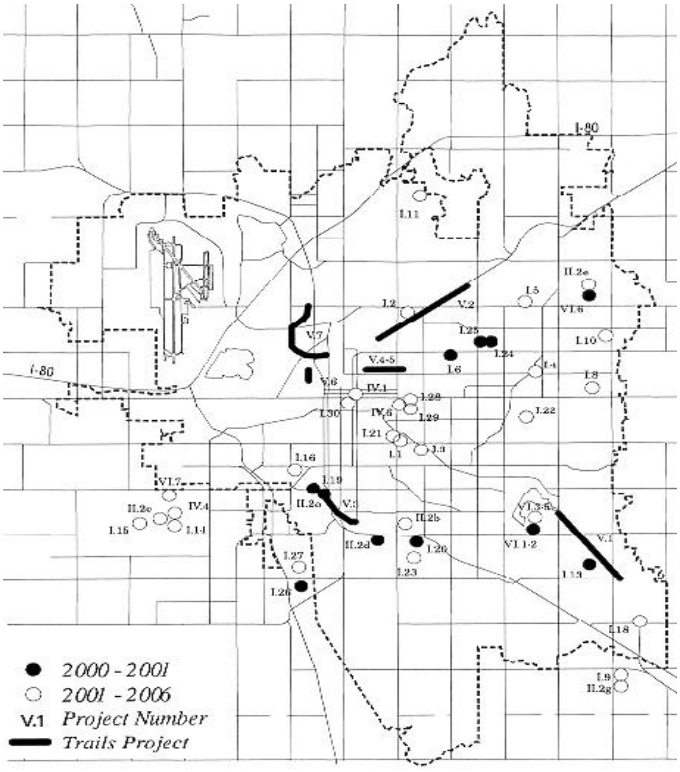
Lincoln's electric rates are less than they were in 1986, while the consumer price index has increased by over 50 percent during the last 14 years. LES has done a good job of avoiding the problems of tight energy supplies and soaring electric rates that have plagued many utilities in recent years. The utility has among the lowest rate structures in the nation (9th lowest out of 106 utilities included in the 1999 KPMG National Electric Rate Survey) and has been far-sighted in planning, purchasing and constructing adequate generating capacity.

For reasons that are not entirely clear, very few municipal electric utilities, or private ones for that matter, charge a connection fee to cover the off-site capital costs attributable to growth. Part of the reason may lie in the complexity of electric facilities, which tend to be part of regionally integrated systems. Another factor may be the nature of the electric utility business, which, compared to water and wastewater utilities, provides more opportunities for buying and selling power and making money from these transactions. In any case, the City's electric rates are already low and no alternative financing appears to be necessary.

Parks

The City of Lincoln provides a wide variety of parks and recreational facilities. The four types of parks: mini-parks, neighborhood, community and regional parks. The City also operates many special purpose facilities, such as Pinewood Bowl, Pioneers Park Nature Center, Hyde Observatory, Woods Tennis Bubbles, Folsom Children's Zoo, Camp A Way and Sherman Field. All told, these parks total about 3,464 acres. In addition, the City provides 75 miles of trails, nine swimming pools, five golf courses and five gyms. The City also operates the County-owned 1,455-acre Wilderness Park.

Figure 9
Park CIP Projects, 2000-2006



The City's desired level of service for parks includes one 8- to 10-acre neighborhood park per square mile of residential development, a community park within 5 miles and a trail within one mile. The City also provides four large regional parks. The City golf courses were built with revenue bonds and are self-supporting enterprises. Lancaster County is not active in the parks arena, and the City manages the one County park. The City participates in joint use of recreational facilities with the Lincoln School District.

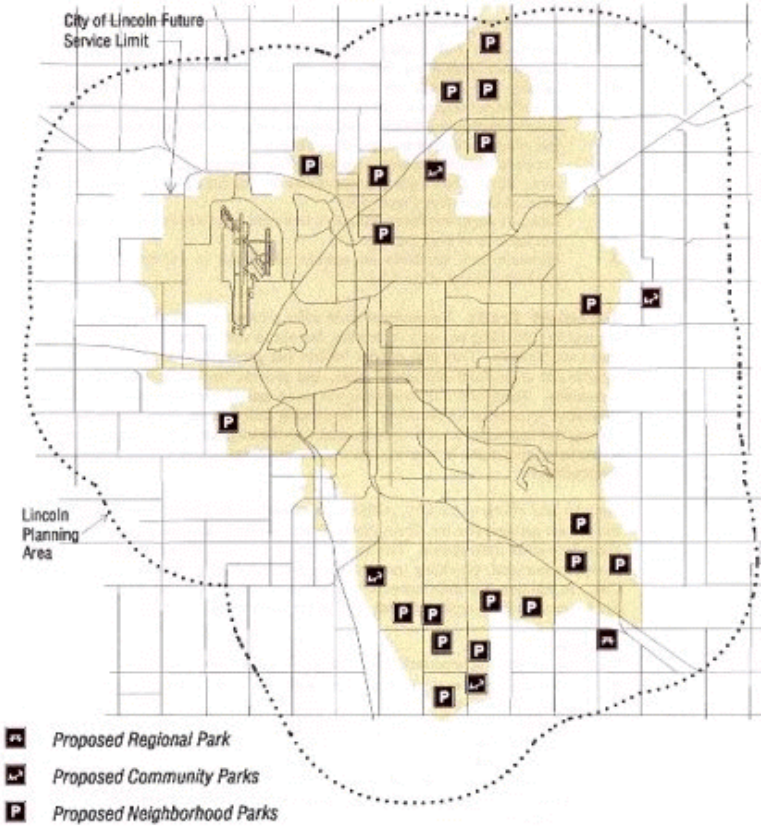
City staff estimates that they are 8 to 9 years behind in developing neighborhood parks. It is estimated

that is costs $8,000 to 10,000 per year to maintain a neighborhood park. The City does make extensive use of park user fees, which cover approximately 30 percent of park operating costs.

A major funding sources for the park system is state Keno funds, a portion of which goes to parks (Keno funds also support libraries and human services). Keno funds amount to about half of the City's park capital improvements financing, or about $800,000 annually. The CIP includes $100,000 annually in general fund revenues for trails, of which $90,000 is used for capital and $10,000 for maintenance. However, this funding is not nearly enough to maintain the City's existing 75 miles of trails. The City has not received any state grants recently for parks, although it has gotten some in the past, particularly Land and Water Conservation grants. There is a new federal program using off-shore drilling money that may provide some park funding to the City in the future. The City has issued three general obligation bonds for park improvements in the last 30 years, including one last year.

The May 2000 draft of the City of Lincoln's *Capital Improvement Program* for fiscal years 2000/01 through 2005/06 programs $19.8 million in park and trail capital improvements over the six-year period. Just under half of that funding, about $9.1 million, could be considered "growth-related" in that it expands the capacity of park facilities and trails, as opposed to rehabilitating or replacing existing facilities. Funding for the growth-related improvements is roughly evenly divided among Keno funds, general funds, and other funding sources. Other funding sources include almost half a million dollars from the Municipal Infrastructure Redevelopment Fund for the F Street Community Center, and just over $900,000 from unspecified sources for trail projects. The programmed CIP projects are scattered throughout the city, as shown in Figure 9.

Figure 10
Future Parks



The *Lincoln City–Lancaster County Comprehensive Plan* states that growth "has strained the community's ability to provide adequate funding for parks, challenging the traditional ways of funding park acquisition… New approaches to land acquisition that equitably spread the costs of providing the new spaces should be examined, such as: joint developments with the private sector; incentives to developers providing park land in the platting process, and; creating assessment districts for park acquisition and development." The map of

proposed park sites included in the *Comprehensive Plan* shows that the City's future park needs are concentrated in the growing areas to the north and south (see Figure 10).

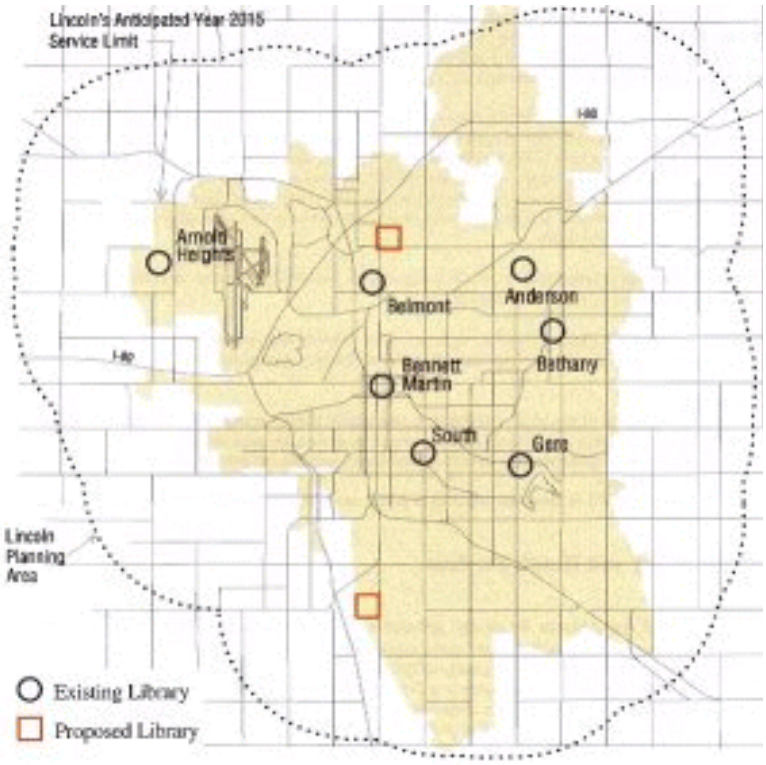
The City does not have a mandatory park land dedication requirement, although it does encourage developers to donate land. Park land dedication requirements are one of the oldest and most common forms of developer exactions, and are generally coupled with a provision that allows the City to accept cash in-lieu of dedication. Today they often play a supplementary role in a park impact fee system, in which the City can require land dedication if there is a suitable park site with a proposed subdivision, but the developer is given credit for the value of any such required dedication against the park impact fees.

We would recommend that the City consider developing a system of park land dedication requirements and park impact fees. If affordable housing is a major concern, park impact fees could be based on the size of the unit. Alternatively, a development tax could be levied on new residential and nonresidential construction on a per square foot basis to be set aside for park acquisition and development.

Libraries

The Lincoln Public Library system operates a main library, six branch libraries and a bookmobile. The system's circulation materials include 641,300 books, more than 39,000 sound recordings and nearly 2,000 periodical subscriptions, as well as a growing collection of video cassettes and compact disks.

Figure 11
Existing and Planned Libraries



The original libraries were built with Carnegie Foundation funds. The downtown library was built in 1962 and expanded in 1968 and 1978, and was funded exclusively with private and federal money. The City's first major investment in its library system was a 1969 bond issue to build two libraries. The library and park bond issue approved by voters in November 1998 authorized $15.2 million to build two new branch libraries. Both will be located in existing parks, and will require no additional expenditure for land acquisition.

Through contractual arrangement, residents

living outside Lincoln, but within Lancaster County, have access to all services of Lincoln Public Libraries. The City receives about $425,000 annually from Lancaster County to help with operating costs, based on the unincorporated area's per capita share of the tax portion of the library budget. The County does not share in library capital costs.

The library system also gets some of its operating revenues from two trust funds. Polley Music Service, which costs the library $120,000 annually to provide, gets about $80,000 annually from a $2 million trust fund. The Library Foundation also provides a small annual grant to help fund the Heritage Room Service.

While the library system's short-term capital funding needs have been addressed with the recent bond issue, alternative funding sources may need to be considered for the long term. These could include additional general obligation bonds, impact fees or a development tax. However, the revenue potential for libraries is much less than for other facilities such as roads, water, wastewater and parks, and no new funding sources are recommended for library facilities at this time.

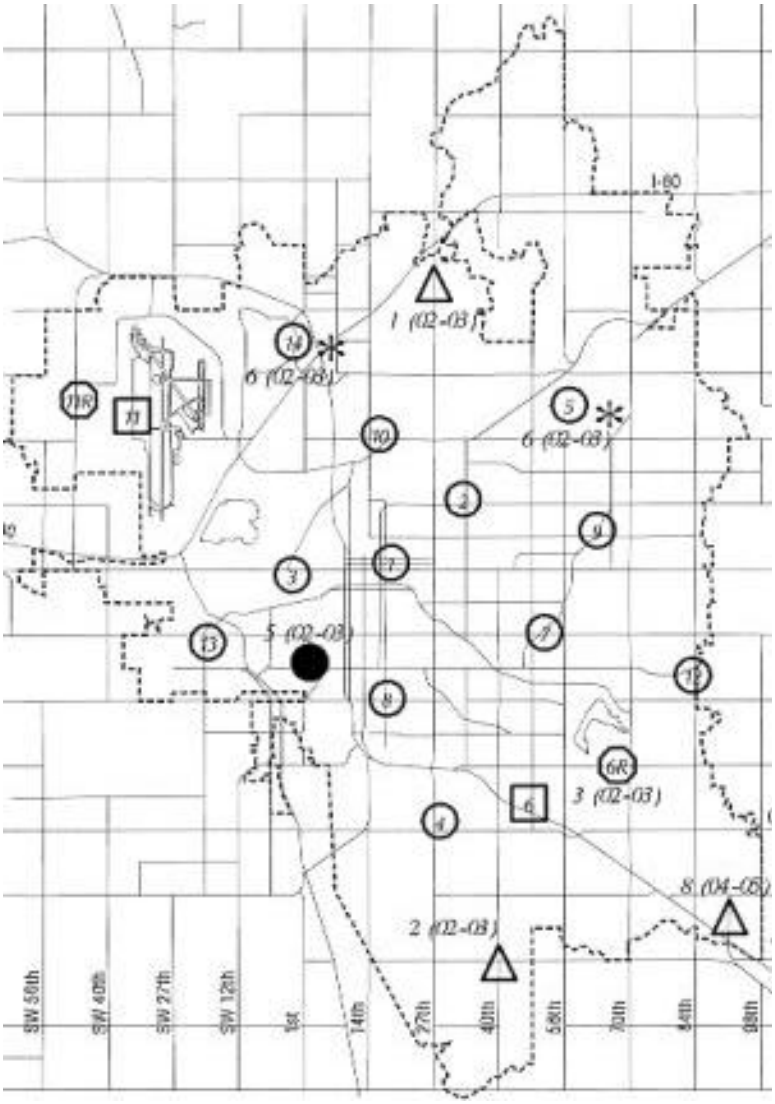
Fire Protection

The Lincoln Fire Department currently operates out of 14 stations located throughout the city. The location of the stations is designed to achieve an average three minute response time. With the exception of the northern and southern extremes of the city, the Department is currently averaging a response time of 3.23 minutes.

Two new stations are planned to improve response times to the north and south. A third new station being planned for the southeast. The Department had previously considered relocating station #6, but that is not currently being planned.

The Fire Department has 243 employees. Ten of the 14 stations are staffed with 12 firefighters (four per shift for three shifts) and

Figure 12
Fire Station Locations



four stations have two companies manned by a total of 24 firefighters. The two new stations would both have two companies and would require hiring about 50 new firefighters, at a personnel cost of about $2.5 million annually.

All of the City's firefighters are paid professionals who are cross-trained as paramedics to offer Advance Life Support. The rest of the county is served by volunteer fire districts. Emergency transport is provided by a private ambulance company, although the City is considering providing that service at some future date. Emergency dispatch is a separate, county-wide function that serves City of Lincoln Fire and Police Departments, the volunteer fire districts and the Lancaster County Sheriff's Office.

The most recently-constructed fire station cost the City about $800,000, including $200,000 in land acquisition costs. Fire-fighting apparatus costs about $400,000 per ladder truck and $235,000 per engine. The City has generally funded fire-related capital improvements out of general revenues, although the City has used general obligation bonds in the past for both station construction and equipment purchase.

The City receives very little in the way of developer contributions toward the capital costs of fire protection. The only contribution in recent memory was one a fire station site donated by a developer.

The City must compensate rural fire districts for losses to their assessment base when an area is annexed into the city. Such costs are not likely to be onerous, and may be most appropriately funded through general revenues.

Fire impact fees or development taxes can be used to ensure that new development pays for the capital facilities required to serve it. However, operating costs are a much bigger consideration than capital costs for fire protection, and fire impact fees (or development taxes) do not tend to generate much revenue. Consequently, no new funding sources are recommended for fire protection facilities at this time.

Police Protection

Lincoln Police Department facilities include the main station in the City/County complex, a new substation, training facilities on land owned by airport authority, and leased space used by the narcotics unit. The existing facilities were supposed to have been enough building space for ten years, but they are already basically full. The Department has plans for the construction of another substation to the east.

The desired level of service (LOS) for police protection is 1.5 officers per 1000, although the LOS only stands at about 1.3 now. Currently, the Department has 296 sworn and 104 non-sworn employees.

The Police Department maintains a fleet of 219 vehicles, including approximately 120 marked police cars, 56 unmarked cars and a number of support vehicles. The Department does not have a vehicle take-home program, and almost all patrol vehicles are assigned to more than one officer.

Police impact fees or development taxes can be used to ensure that new development pays for the capital facilities required to serve it. However, operating costs are a much bigger consideration than capital costs for police protection, and police impact fees or development taxes do not tend to generate much revenue. Consequently, no new funding sources are recommended for police protection facilities at this time.

LEGAL ANALYSIS

A critical component in any analysis of financing alternatives is a review of the types of financing mechanisms authorized by law. That is the purpose of this section.

General Authority of the City

Lincoln is a city of the primary class (see Rev. Stats. Neb. §15-101), giving it a range of specific powers enumerated under Chapter 15 of the Nebraska Code. Among its powers as a primary class city are these:

> To purchase, construct, and otherwise acquire, own, maintain, and operate public service and public utility property and facilities within and without the limits of the city …and to exercise such other and further powers as may be necessary or incident or appropriate to the powers of such city, including powers granted by the Constitution of Nebraska or exercised by or pursuant to a home rule charter adopted pursuant thereto. Rev. Stats. Neb. §15-201(6).

There is additional broad enabling legislation for cities of the primary class:

> A primary city may make all such ordinances, bylaws, rules, and regulations not inconsistent with the general laws of the state as may be necessary or expedient, in addition to the special powers otherwise granted by law, for maintaining the peace, good government, and welfare of the city, its trade, commerce, and manufactories, for preserving order, securing persons or property from violence, danger and destruction, for protecting public and private property, for promoting the public health, safety, convenience, comfort, morals, and general interests and welfare of the inhabitants of the city, and to enforce all ordinances by providing for imprisonment of those convicted of violations thereof at hard labor for a period not to exceed six months and to impose forfeitures, fines, and penalties not exceeding five hundred dollars for any one offense, recoverable with costs, and, in the default of the payment thereof, to provide for confinement in the city prison or county jail, with or without hard labor upon the city streets or elsewhere for the benefit of the city, until the judgment and costs are paid. Rev. Stats. Neb. §15-263.

Article II, Section 1 of the City Charter contains even broader authority:

> The City of Lincoln shall have the right and power to exercise all municipal powers, functions, rights, privileges, and immunities of every name and nature whatsoever that it is possible for it to have at the present and in the future under the constitution of the State of Nebraska, except as prohibited by the state constitution or restricted by

> this charter, and to exercise any powers which may be implied thereby, incidental thereto, or appropriate to the exercise of such powers.

A leading case on the subject confirms that cities in Nebraska have relatively broad authority to address local issues through the adoption of ordinances. *City of Omaha v. Glissman*, 151 Neb. 895, 39 N.W.2d 828 (1949), is a leading case in Nebraska on the authority of local governments. Its well-cited rule on the subject is:

> [A]n ordinance passed in the exercise of such police power properly delegated to a city is presumably valid and the courts will not interfere with its enforcement until the unreasonableness or want of necessity of such measure is made to appear by satisfactory evidence. 39 N.W. 2d at 834-35.

Historical Evolution of Impact Fees

Although a number of states now have legislation authorizing impact fees and providing limits on the collection and use of the funds, the early programs evolved in part in a trial-and-error process through litigation. The important early cases arose in Florida, where the rapid growth of the 1970s led to a good deal of experimentation in paying for public facilities.

The landmark case on impact fees is *Contractors & Builders Assoc of Pinellas County v. City of Dunedin*, 326 So. 2d 314 (Fla 1976). In that case, the Florida court struck down a system development fee, but in doing so it gave guidelines for designing an acceptable fee system; those guidelines are discussed below.

A system in Broward County was struck down by an appellate court because fees from the entire county were collected in one fund and there was no assurance that the fees collected would be used in the vicinity of the development paying the fees. In 1983, a Florida court upheld a fee system in Palm Beach County, finding that it passed the tests set out in the Dunedin and Broward County cases. The Palm Beach County fee was a road fee and was based on a complex formula related to traffic generation and road construction costs. The fee was allocated to a road zone of about six square miles which included the proposed development. The fee was to be used specifically to build roads. *Homebuilders and Contractors Assoc. of Palm Beach County v. Board of County Commissioners*, 446 So. 2d 140 (Fla. Ct. App. 1983).

The Florida cases remain important. Although these cases are not always cited in litigation and articles today, they basically established the impact fee policy that has guided other courts in considering the issue of impact fees and that has guided committees that have developed impact fee legislation in a number of states. Basic principles established by or directly evolving from those cases include the following:

- The fees must be maintained in a separate account (usually simply a fund in the local government's accounting system) containing only funds to be used for the purpose designated for the fees;

- The fees must actually be used for the designated purpose;

- Where the community has been designed into planning zones (which, in a larger community, is probably essential for most types of fees), the fees must be used in the same zone or district that includes the development generating the fee or must otherwise directly benefit the development;

- The fees may not be used to cure deficiencies or improve capacity in the existing system--they must be used only to address growth-related capital facility needs;

- As a corollary of the previous item, the local government must identify other revenue sources to correct deficiencies;

- If the fees are not used for the designated purpose within a reasonable time, they must be refundable.

These rules are discussed here, because they provide the framework within which exactions law has evolved nationally.

Exactions and the U.S. Supreme Court

Two cases decided by the Supreme Court have provided new and relatively clear guidelines for the field of exactions law. In the opinion of this author, they fall squarely in a middle ground between the liberal views of New York and California and the very narrow position adopted by the Illinois court and widely followed elsewhere. *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S. Ct. 3141 (1987), involved an application by the Nollans to tear down a beachfront bungalow and replace it with a larger single-family home. The home sat on an existing lot and the proposal conformed with local zoning. The local government never had any objection to the proposal and actually issued a building permit for it at one point during the litigation, when there was no stay in effect. As a result, the Nollans had built the new house and the case was factually moot by the time it reached the Supreme Court. That is not the critical issue here, however.

The legal issue that arose in the case came when the California Coastal Commission, which played a role in this case because the home was located in the coastal zone, asked that the Nollans dedicate a trail easement across the beach front, providing an important link in a larger trail system that ultimately provided access to a beachfront park. The Court found that the proposed exaction amounted to an unconstitutional taking and in the process established the requirement that there be a "rational nexus" between the impact of a proposed exaction and any exaction imposed upon it.

Here there clearly was no such nexus. Although the state argued that the larger house would impair visibility from the road and thus increase the need for pedestrian access (an argument that the court did not accept; see discussion at 107 S.Ct. 3149), it is clear that the state's need and/or desire for the trail had absolutely nothing to do with the Nollans' desire to build a larger house. The Nollans simply happened to own property along a route on which the state wanted a trail and the state used the development approval process as a lever through which to impose this exaction on them. Although not all land use lawyers accepted this doctrine so readily as this brief analysis might suggest, the facts are clearer than the Supreme Court's own discussion might suggest. Had the Nollans owned a different piece of beachfront property, where no trail was planned, this exaction would not have applied. Had the Nollans proposed a pre-school or an outdoor camp or something likely to generate significant pedestrian traffic, the exaction would apparently have been exactly the same. The exaction was based on the state's needs or desires and the fortuitous (or unfortunate, depending on one's perspective) location of the Nollans' property.

Seven years later, the Court added another piece to the test. In *Dolan v. City of Tigard*, 114 S.Ct. 2309, 129 L.Ed.2d 304 (1994), the Court established a "rough proportionality" test to determine whether a builder exaction exceeds that which is constitutionally permissible. In Dolan, the owner of a plumbing and electric supply store sought a permit to expand her business. Her plans, which called for replacing the existing store, adding an additional structure and parking, and paving thirty-nine existing parking spaces, would nearly double the size of her business. The City Planning Commission granted her application subject to the imposition of two conditions that would further the City's plans for addressing transportation and drainage concerns: first, that she dedicate a portion of the property for improvement of a storm drainage system and, second, that she also dedicate a strip of land for use as a pedestrian/bicycle pathway. Together, the two dedication requirements amounted to approximately 7,000 square feet, nearly ten percent of the property.

Mrs. Dolan appealed to the state Land Use Board of Appeals, which upheld the Commission's findings. The Board's decision was subsequently affirmed by Oregon's Court of Appeals, 113 Ore. App. 162, 832 P.2d 843 (1992), and Supreme Court, 317 Ore. 110, 854 P.2d 437 (1993), both of which rejected Mrs. Dolan's contention that the decision in *Nollan* required a test of the relationship between the dedication requirements and the impacts of the proposed development that was stricter than a "reasonable relationship" test.

The United States Supreme Court reversed. The Court extended its taking analysis beyond the *Nollan* requirement that there be a "rational nexus" between the impacts of a proposed development and any exaction imposed on it. Here, the Court considered "the required degree of connection between the exactions and the projected impact of the proposed development," a question that had not been reached in *Nollan* because the California Coastal Commission's requirement that the property owner dedicate a lateral beach easement had failed the rational nexus test.

Chief Justice Rehnquist discussed three separate approaches to the question of the degree of connection needed between a required dedication or exaction and the impact of proposed

development. He first rejected as too lax the approach of states which require only a very generalized statement of the necessary connection. He then also rejected the approach of states that impose a very exacting degree of correspondence, the "specifically and uniquely attributable test" test, stating that the federal constitution does not demand such exacting scrutiny. The Chief Justice then noted his approval of the intermediate position taken by a number of state courts. It included the Nebraska case of *Simpson v. North Platte,* discussed in the last section of this memo, among its citations.

Applying this new "rough proportionality" standard to the dedication requirements imposed on Mrs. Dolan, the Court found that the City had gone too far by requiring her to dedicate a portion of her property near the floodplain to the City, rather than merely requiring her to leave that portion of her property as open space.

The Court also found that the City had failed to demonstrate that the additional traffic that might be caused by the new development was reasonably related to the requirement that Mrs. Dolan dedicate a second easement for a pedestrian/bicycle pathway. The Court stated that:

> No precise mathematical calculation is required, but the city must make some effort to quantify its findings in support of the dedication for the pedestrian/bicycle pathway beyond the conclusory statement that it could offset some of the traffic generated. 114 S.Ct. at 2322.

Although both of these cases involved land dedication requirements, the California Court of Appeals applied those principles to a requirement for payment of a fee in *Ehrlich v. Culver City*, 911 P.2d 429 (Cal. 1996), a case that is widely cited. It seems likely that other courts will accept this view. Although there is certainly a rational argument on the one hand that there ought to be heightened scrutiny of a requirement that a developer transfer land, viewed from the perspective of the exactions cases, there seems little reason to protect fee exactions; the Supreme Court in *Dolan* made no such distinction. As the Oregon Court of Appeals noted in a decision discussing this issue:

> [T]he fact that *Dolan* itself involved conditions that required a dedication of property interests does not mean that it applies only to conditions of that kind.... For purposes of a takings analysis, we see little difference between a requirement that a developer convey title to the part of the property that is to serve a public purpose and a requirement that the developer himself make improvements on the affected and nearby property and make it available for the same purpose. *Clark v. City of Albany*, 904 P.2d 185, 190 (Or. 1995).

These related tests—that of "rational nexus" and "rough proportionality"—now bracket the law of exactions. Some courts refer to the combined tests as the "dual rational nexus" test. See, for example, *Hollywood, Inc. v. Broward Cty.*,431 So. 2d 606 (Fla.App.1983), and *City of Beavercreek v. Dayton Area Home Builders*, 89 Ohio St. 3d 121, 729 N.E.2d 349 (2000).

Relevant Nebraska Statutes

Implied Authority for Impact Fees

While there is no specific impact fee enabling legislation in Nebraska, the subdivision enabling act is broad and general. See Rev. Stats. Neb. §15-901. It includes this language:

> A city of the primary class shall have authority within the area to prescribe standards for laying out subdivisions in harmony with the comprehensive plan; to require the installation of improvements by the owner, by the creation of public improvement districts, or by requiring a good and sufficient bond guaranteeing installation of such improvements; and to require the dedication of land for public purposes. Rev. Stats. Neb. §15-901.

As noted above, however, impact fees have evolved in a number of states without enabling legislation; the legislation in states where it has been adopted is often as much limiting as it is enabling (usually codifying the Florida rules cited above). Thus, the lack of legislation is not necessarily a barrier to the adoption of fees—particularly in light of the broad enabling language in the statutes, its construction by the courts, and the broad language of Lincoln's charter. This language is particularly important in considering the construction of the language quoted above from the subdivision act, which, in this context, ought not to be read as limiting.

Authority for Water Fees

There is express statutory language on two subjects related to fees for water service. First, the city has the ability to set water charges:

> A primary city shall have power to fix the rate of tax to be paid for the use of water furnished by the city or any person or corporation by means of waterworks, and provide by ordinance that any tax for the use of water furnished by said city shall be a lien upon the property where the same is furnished. Rev. Stats. Neb. §15-223.

It is a little odd that the statute uses the term "rate of tax," because it is certainly the custom and practice of municipal water utilities today to impose charges based on quantity used, meter sizes and other factors that are more closely related to a fee than a tax. It would seem logical that the term "tax" in this context should be read as "charge." Like other municipal water utilities, the City currently charges water rates, based on usage. Thus, clearly everyone involved with the issue has interpreted the "rate of tax" language to apply, at least in a contemporary context, to usage based water fees.

A separate section of the Chapter dealing with cities of the primary class specifically authorizes the City to construct and maintain a waterworks and to "do all acts necessary for the construction, completion, and management and control of the same, not inconsistent with law, including the exercise of the right of eminent domain." Rev. Stats. Neb. §15-501. If this section is interpreted to

authorize the imposition of usage-based fees for water use in Lincoln, it can also be interpreted to support the imposition of fees for connection to the system.

Note that water and sewer connection fees have generally been upheld in other jurisdictions, with many cases predating the evolution of impact fees. A leading case on the subject is the 1976 Florida case *Ass'n v. City of Dunedin*, discussed above under impact fees and cited with approval by the Nebraska Supreme Court in *McGinley v. Wheat Belt Power Dist.*, 214 Neb. 178, at 188, 332 N.W.2d 915 (1983). Other significant cases include: *Loup-Miller Constr. Co. v. City and County of Denver*, 676 P.2d 1170 (Colo. 1984); *Hartman v Aurora Sanitary Dist.*, 23 Ill.2d 109, 177 N.E.2d 214 (1968); *Downey v. Wells Sanitary Dist.*, 561 A.2d 174 (Maine 1989); *Home Builders Ass'n of Greater Salt Lake v. Provo City*, 503 P.2d 451 (Utah 1972)—in a later case, the Utah high court established a relatively flexible "fair share" standard to be applied in determining the reasonableness of water and sewer connection fees, *Banberry Dev't Corp. v. South Jordan City*, 631 P.2d 899 (Utah 1981); *Hillis Homes, Inc. v. Public Utility Dist. No. 1 of Snohomish County*, 714 P.2d 1163 (Wash. 1986); *Coulter v. City of Rawlins*, 62 P.2d 888 (Wyo. 1983); *Home Builders Ass'n of Central Arizona v. City of Scottsdale*, 902 P.2d 1347 (Ariz. 1995). The Oklahoma Supreme Court upheld the constitutionality of a fee charged by a city to reimburse developers who had constructed water and sewer lines and who expected to recover part of the cost from the levy of that fee on other users. *Willow Wind, Inc., v. City of Midwest City*, 790 P.2d 1067 (Okla. 1989). In *Amherst Builders v. City of Amherst* , 402 N.E.2d 1181 (Ohio 1980), the Ohio Supreme Court dealt with the public policy issues in upholding such a fee. "In attempting to equalize the burden of the cost of constructing an adequate sewage system between present users and new users, a municipality … may impose upon new users a tap-in or connection fee which bears a reasonable relationship to the entire cost of providing service to those users." 402 N.E.2d at 1182. The ordinance included a connection fee charged to anyone desiring to connect to the city sewage system. A schedule of fees was based on average sewage flow for various types of structures, as estimated by the Environmental Protection Agency. 402 N.E.2d at 1182.

Authority for Sanitary Sewer Fees

Similarly, a city of the primary class has authority to build and operate a sewer system:

> The city council shall have the power to lay off the city into suitable districts for the purpose of establishing a system of sewerage and drainage; to provide such system and regulate the construction, repairs, and use of sewers and drains, and to provide penalties for any obstruction of, or injury to, any sewers or drains, and for any violation of the rules and regulations with respect thereto that may be prescribed by the city council. The city council shall have power to create sewer districts by ordinance and designate the property to be benefited by the construction of sewers in such districts. The city council shall have power to construct or cause to be constructed such sewer or sewers in such district or districts and assess the cost thereof against the property in such districts, to the extent of the special benefits. Rev. Stat. Neb. §15-717.

The authority also includes these provisions:

> Special taxes may be levied by the city council for the purpose of paying the cost of constructing such sewers and drains within the city. Such taxes shall be levied upon the real estate within the sewerage districts in which such sewer or drain may be, to the extent of benefits to such property by reason of such improvements. The benefits to such property shall be determined by the city council as in other cases of special assessments. All taxes or assessments made for sewerage or drainage purposes shall be levied and collected in the same manner as other special assessments. Rev. Stat. Neb. 15-718

Clearly, this portion of the act is more squarely focused on taxation than on rates or charges. It is important, however, to consider that in its historic context, in which wastewater collection, like stormwater collection, was treated as a general governmental function and generally paid from taxes. A separate section, however, approaches the issue differently. Following Section 18-501 of the Revised Statutes, which provides separate authority for the city to construct and operate sewer and stormwater systems, is Section 18-503 which includes this language:

> The governing body may **establish just and equitable rates or charges** to be paid to it for the use of such disposal plant and sewerage system by each person, firm or corporation whose premises are served thereby. [emphasis added]

Since the adoption of the initial Federal Water Pollution Control Act Amendments of 1972, there has been state and federal funding of sewage treatment plants, all of which was ultimately conditioned on the imposition of user-fees for the use of sewage treatment plants. In that context, municipal sewer departments today commonly charge user fees and it is typically the custom and practice of those managing such systems to include in the fee schedule system connection charges—charges that often include a capital investment element. Particularly when considered in this context of modern custom and practice, this language appears to provide clear statutory authority for sewer connection fees, including a "just and equitable" capital element. See *City of Omaha v. Sanitary Improvement Dist. No. 287*, 214 Neb. 371, 334 N.W.2d 429 (1983), in which the court held that a $195 connection fee charged by the district was a fee and not a tax.

In a case following *Dunedin*, which is discussed above, a Florida appellate court interpreted a water and sewer district's enabling legislation, which read very much like the Nebraska legislation quoted above (the Florida legislation: "fix and collect rates, fees and other charges for the use of the facilities and services provided by any water system or sewer system") to include the authority to charge connection fees. *Englewood Water Dist. v. Halstead*, 432 So. 2d 172 (Fla. Dist. Ct. App. 1983). See, also, the cases cited above under water systems; many involved sewer systems and the principles applied are identical. The two are treated separately here only because of the differences in the respective Nebraska enabling acts.

Authority for Stormwater Fees

The City of Lincoln has the same authority to impose storm sewer fees that it has to impose sanitary sewer fees. Note that Section 18-501 deals with the authority of a primary class city to construct and operate "a sewerage system, including any storm sewer system or combination storm and sanitary sewer system…." The language quoted above from Section 18-503 clearly depends on Section 18-501 and thus relates to "any storm sewer system." Therefore the right of the City to "establish just and equitable rates or charges" extends to the storm sewer system as well as to the sewer system itself.

Treatment of Exactions by the Nebraska Courts

Impact fees and utility connections fees are forms of developer exactions. Although there are no impact fee cases in Nebraska, the Nebraska courts have examined the validity of exactions. It is important to consider those cases in this context. There are two land-use related exactions cases, one general takings cases and a couple of other cases that provide some guidance in dealing with land-use exactions such as impact fees. *Simpson v. City of North Platte*, 206 Neb. 240, 292 N.W.2d 297 (1980) is the major land-use exactions case in Nebraska, although it pre-dates the U.S. Supreme Court's major decisions in the field. The case challenged a North Platte ordinance that required that any property owner seeking a building permit dedicate any right-of-way necessary to bring the street(s) adjoining the property up to the width planned for that street in the City's master plan. In this case, the City required that Simpson dedicate 40 feet of right-of-way for a planned street expansion; Simpson refused and, apparently, then lost a lease to a fast-food operator. In resolving the case, the Nebraska Supreme Court set out a rule that closely resembles the one that evolved from the U.S. Supreme Court's *Nollan* and *Dolan* decisions:

> The distinction, therefore, which must be made between an appropriate exercise of the police power and an improper exercise of eminent domain is whether the requirement has some reasonable relationship or nexus to the use to which the property is being made or is merely being used as an excuse for taking property simply because at that particular moment the landowner is asking the city for some license or permit. 292 N.W.2d at 301.

In applying that rule to this case, the court held:

> The evidence introduced at the time of trial established that, although the comprehensive plan indicated a proposed extension of Leota Street east of the intersection of existing Leota Street and Jeffers Street, no project was immediately contemplated whereby the street would be constructed nor is there any evidence regarding what the particular project would involve. Furthermore, there is no evidence to indicate that the construction of the project sought by Simpson would create such additional traffic as to require going forward with the proposed street project. As the evidence indicates, no other adjacent property owner would be required to dedicate

> any land for a public street unless a building permit is sought, nor would any other land now be acquired for a public street in the area. 292 N.W.2d at 301.

It is important to note that the type of ordinance struck down in Simpson was based on a regulatory approach that has been widely rejected by state and federal courts during the same period in which wide judicial support for impact fees has evolved. See, Kelly, Gen. Ed., *Zoning and Land Use Controls* (New York: Matthew Bender, 2000), Chapter 46, for a discussion of the use of official maps and the reservation of rights-of-way. In other words, the Nebraska court's rejection of this regulation as unconstitutional is not in any way inconsistent with the use of impact fees. It is also important to note that the focus of the Supreme Court in this decision was on how the City exercised the authority, not on whether it could require a developer to participate in the expansion of the street system.

The other land-use exactions case found in Nebraska has facts that are far less relevant to this analysis than those of *Simpson*. Because of the date of the case, however, the legal analysis is much more important, making it clear that Nebraska will rely heavily on the U.S. Supreme Court's takings decisions in addressing such issues. *Strom v. City of Oakland*, 255 Neb. 210, 583 N.W.2d 311 (1998), is the only exactions/takings case found in Nebraska. The exaction in this case was not a typical urban exaction but a rural one. It arose out of a requirement by the local natural resources district (these have evolved from what were once called soil and water conservation districts) to install terraces and sediment control ponds to deal with erosion and sedimentation problems on Strom's farmland. Strom apparently did not dispute the need for the control measures but argued that the need for them arose because of the construction of a street by the City of Oakland through "the natural drainageway of the land." 583 N.W.2d at 314. The trial court granted summary judgment to the City and to the natural resources district. On appeal, a major issue before the court was whether the requirement by the district that Strom install the drainage improvements was a proper exercise of the police power. After citing *Nollan*, *Dolan* and several other Supreme Court cases, as well as the leading Nebraska decisions in *Whitehead Oil* and *Simpson*, the court set out this rule, again relying heavily on decisions of the U.S. Supreme Court:

> In other words, the distinction between the enforcement of a regulation which gives rise to an inverse condemnation suit and one in which the governmental entity is acting pursuant to its police power is that in the exercise of eminent domain, property or an easement therein is taken from the owner and applied to public use because the use or enjoyment of such property or easement is beneficial to the public. In contrast, in the exercise of police power, the owner is instead denied the unrestricted use or enjoyment of his property, or his property is taken from him, because his use or enjoyment of such property is injurious to the public welfare. See Julius L. Sackman, *Nichols on Eminent Domain*, 1.42[2] (rev. 3d ed. 1998). However, even if a government actor is regulating within proper police powers bounds, there are two discrete categories of regulatory actions that are compensable without a case-specific inquiry into the public interest and concomitant regulatory requirement nexus. One is where the regulation denies a landowner all economically beneficial or productive

> use of his or her land. See *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992). The other is where the landowner suffers a physical invasion of his or her property. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 102 S. Ct. 3164, 73 L. Ed. 2d 868 (1982). 583 N.W.2d at 316.

Applying those tests, the court concluded that, as to the actions of the natural resources district, it was pursuing a legitimate state interest, there was a rational nexus and a rough proportionality between the problem on Strom's property and the burden imposed, and there had been no physical invasion of the property. In short, the actions of the district were valid police power actions that did not deprive Strom of his constitutionally-protected property rights. 583 N.W.2d at 317-18. The court, however, found that the district court should not have granted summary judgment on this issue, because there was no evidence as to the relationship of Strom's share of the costs of the improvements (the district paid 90 percent of the costs) and the value of his property, leaving open the question of whether there had been essentially an economic deprivation of all viable use of the property under Lucas. 583 N.W.2d at 316. The court, however, dismissed Strom's claim against the City, ruling that the regulatory action that gave rise to the claim was pursued only by the district. An interesting note on the case, not completely relevant here, is that there should have been an argument that the City's blocking of the drainageway created a physical invasion of the property by backed-up stormwater. There are three possibilities: that the issue was not proved and/or argued in court, that it was not adequately argued on appeal, or that the high court simply rejected it; because the court's opinion is so thorough in other respects, it seems likely that the issue was not adequately pursued in the litigation.

The Nebraska Supreme Court has relied heavily on the U.S. Supreme Court's takings cases in resolving another long-litigated land-use dispute in Nebraska, this one not involving an exaction. *Whitehead Oil Co. v. City of Lincoln*, 245 Neb. 680, 515 N.W.2d 401 (1994), was the appeal of the district court's damage award to Whitehead Oil—an award of $762.50 per month from the date of denial of the permit to the date of judgment (approximately $44,000) plus attorneys' fees. The district court had relied on the doctrine of inverse condemnation—the procedural framework for a takings action in most state courts—and the City appealed. The state high court then set out a thorough discussion of the regulatory takings cases decided by the U.S. Supreme Court. After discussing *Nollan*, the court concluded:

> Our determination in Whitehead Oil II, that in changing the applicable zoning designation the city acted not in furtherance of a legitimate state interest but arbitrarily and capriciously so as to deny Whitehead Oil a use permit, compels our agreement with the district court's ruling that Whitehead Oil's property has been subjected to a taking under the federal Constitution. 515 N.W.2d at 408.

The court then considered Whitehead Oil's state claims, determining that it had made a claim under the state's "arbitrary and capricious due process" doctrine, 515 N.W. 2d at 409, citing *Eide v. Sarasota County*, 908 F.2d 716 (11th Cir. 1990), cert. denied 498 U.S. 1120, 111 S. Ct. 1073, 112 L. Ed. 2d 1179 (1991) and other cases. The Supreme Court in this case found specifically:

> Without necessarily adopting this arguably higher standard than other federal cases cited in our analysis employ, we apply the standard here and conclude that the city, in delaying its action on Whitehead Oil's use permit application until it could change the zoning designation such as to preclude issuance of the permit, did not act in furtherance of the police power in conformance with its comprehensive planning and zoning plan. Rather, its conduct was arbitrary and capricious such as to constitute an egregious and irrational act which exceeded a mere error of law or inadvertence. 515 N.W.2d at 410.

Evolution of Impact Fees in States without Enabling Acts

As a matter of legal authority, it is also noteworthy that the case law has continued to evolve in support of impact fees, in states without express enabling legislation for them as well as in the states that have adopted such legislation. An interesting example comes from California. There, the state has long used impact taxes, which are a form of excise tax authorized in California. Although there is legislation expressly authorizing the use of such taxes, the California Court of Appeals in 1994 upheld the imposition of impact fees at the building permit stage, although the developer argued that no such fees could be imposed after a subdivision had been approved. *Golden State Homebuilding Associates v. City of Modesto*, 31 Cal. Rptr. 2d 572 (Cal. Ct. App. 1994). The Ohio Supreme Court has upheld the imposition of a new "benefited unit fee" in addition to a sewer tap-in fee that had already been in effect. State ex rel. *Eliza Jennings, Inc., v. Noble*, 551 N.E.2d 128 (Ohio 1990). The new fee, which totaled $1,675 per unit, in addition to the connection fee of $924 per unit, clearly amounted to far more than a plumbing fee and thus fell in the category of what others would call impact fees. More recently, the Ohio Supreme Court has upheld the imposition of road impact fees on new development. *City of Beavercreek v. Dayton Area Home Builders*, 89 Ohio St. 3d 121, 729 N.E.2d 349 (2000), in which it applied the Nollan/Dolan tests, although it found that the tax/fee distinction was not determinative in Ohio.

The Montana Supreme Court similarly upheld the imposition of system development fees to fund future expansion of a sewer and water system. *Lechner v. City of Billings*, 797 P.2d 191 (Mont. 1990). Again, this fee clearly amounted to an impact fee under a different name.

The Supreme Court in Arkansas has also upheld sewer and water connection fees, in part because the ordinance adopting them provided that they would be held in a segregated account and used only for system expansion. In *City of Marion v. Baioni*, 312 Ark. 423, 850 S.W.2d 1 (1993), for example, the City of Marion enacted an ordinance which placed fees on builders and developers of new developments to connect to the City's existing water and sewer lines. Developers challenged the ordinances, arguing that the fees amounted to a general revenue-raising scheme requiring approval by the voters. The Arkansas Supreme Court ruled in favor of the City, holding that the fees were imposed pursuant to the City's exercise of its police powers. The court noted that the difference between a tax and a fee is that a tax is intended for general revenue purposes, but a fee is imposed for

a specific purpose. Thus, to be considered a fee rather than a tax, the fee must bear a reasonable relationship to the benefit conferred on those receiving services. Here, the fees were used directly to benefit new water and sewer users by providing money to fund expansion of the City's water and sewer systems. The Arizona Supreme Court has upheld a "water resources development fee," levied by the City of Scottsdale to be used to acquire water to help it ensure a long-term water supply. *Home Builders Assoc. Of Central Arizona v. City of Scottsdale*, 930 P.2d 993 (Ariz. 1997). The builders' group had challenged the fee on the theory that it was too general and would not directly benefit any particular development (see list of criteria above). The court rejected that argument, finding that the ability to continue to develop in that arid but booming state was a substantial benefit.

In Virginia, a state where the courts have construed the authority of local governments very narrowly under the Dillon Rule, the supreme court upheld the imposition of a "water resource recovery fee" without specific legislative authorization. *Tidewater Association of Homebuilders v. City of Virginia Beach*, 400 S.E.2d 523 (Va. 1991). The court found that the fee was not an impact fee but a "proprietary fee;" under that distinction, there is clearly more support for a fee related to a government enterprise, such as a water or sewer system, than for a more general government purpose. On the other hand, the court reasoned that if the local government had the authority to operate a water system, it also had the authority to develop funding sources for it without having each of the funding sources specifically enabled by statute. That logic applies just as easily to more general government functions, such as the management of roads and stormwater systems. The important policy implication of this case, however, is that if the court in the country that is probably the most conservative in construing the authority of local governments is willing to uphold such a fee even in limited circumstances, there is strong authority for it elsewhere--a proposition illustrated clearly by the cases.

Not all of the impact fee litigation has been resolved favorably to the local government, however. In *Country Joe, Inc., v. City of Eagan*, 548 N.W.2d 281 (Minn. Ct. App. 1996), the court invalidated a "road unit connection fee" as beyond the authority of the City. Similarly, in *Eastern Diversified Properties, Inc. v. Montgomery County, Md.*, 570 A.2d 850 (Md. 1990), the Maryland high court invalidated a road impact fee as an improper tax.

On the law of impact fees in general, see Professor Callies' work in Eric Damian Kelly, ed., *Zoning and Land Use Controls* (New York: Matthew Bender), Ch. 9, esp. §§9.05 through 9.07.

Use of Taxes as a Financing Alternative

A fundamental choice to be made by a local government in determining how to finance public facilities is whether they should be financed through a tax or a fee. For many facilities, a community may use either a tax or fee or some combination thereof. Local governments often prefer to use fees where possible, because the use of fees offers more flexibility in system design and in fee deferral and collection than a community has with taxes.

One of the questions that arises in considering the validity of a particular charge is whether it is indeed a tax or a fee; where a city imposes a charge as a fee, it may be struck down if it is found to be a tax that is in any way inconsistent with the City's taxing authority. The Nebraska Supreme Court has, on one occasion, addressed the tax/fee question. The result is helpful to the establishment of impact and other fees in Nebraska. In *City of Omaha v. Sanitary Improvement Dist. No. 287*, 214 Neb. 371, 334 N.W.2d 429 (1983), the court held that a $195 sewer connection fee was properly considered an obligation of the district and thus collectible as a fee rather than as a special assessment against each lot in the district. Similarly, in a much earlier case, the Nebraska Supreme Court rejected a challenge to a sewer service fee, based on water volume delivered to the user, where the challengers argued that the fee was an illegal special assessment; the court held that it was a lawful fee. *Michelson v. City of Grand Island*, 154 Neb. 654, 48 N.W.2d 769 (1951). The question of whether a charge is a tax or fee is not always determinative of its validity. The Ohio Supreme Court recently upheld a local road impact fee after rejecting an appellate court's application of the tax/fee distinction. *Home Builders Assoc. of Dayton and the Miami Valley v. City of Beavercreek*, 89 Ohio St. 3d 121, 729 N.E.2d 349 (2000). In a much earlier case dealing with a similar issue, the Colorado Supreme Court determined that a road impact fee levied by Cherry Hills Village was actually a tax, but it went on to hold that it was an excise tax that the City was authorized to impose. *Cherry Hills Farms, Inc. v. City of Cherry Hills*, 670 P.2d 779 (Colo. 1983).

Taxation is the most visible (and perhaps least popular) form of financing for government facilities and programs. Lincoln has a variety of tax alternatives available to it in addressing its infrastructure, in addition to its general revenue sources.

Vehicle Tax

There is a general provision, giving a city of the primary class any tax authority granted by other laws. Rev. Stats. Neb. §15-204. The City has express authority to adopt a vehicle tax (Rev. Stats. Neb. §15-207), an authority which it has exercised. The City could clearly adapt the vehicle tax to meet some of its road construction and maintenance needs.

Development Tax

A specific power available to cities of the primary class is to levy an occupation tax:

> A city of the primary class shall have power to raise revenue by levying and collecting a license or occupation tax on any person, partnership, limited liability company, corporation, or business within the limits of the city and regulate the same by ordinance except as otherwise provided in this section and in section 15-212. All such taxes shall be uniform in respect to the class upon which they are imposed. All scientific and literary lectures and entertainments shall be exempt from such taxation as well as concerts and all other musical entertainments given exclusively by the citizens of the city. Rev. Stats. Neb. §15-203.

Although an "occupation tax" might be construed as a wage tax, it can also be construed as an excise tax or sort of a licensing fee imposed on certain occupations. Today, some communities use

development excise taxes, imposed on the construction and/or development industries. The Nebraska statute requires that the taxes must be "uniform in respect to the class upon which they are imposed," but, through the use of an impact fee methodology or other rational basis, it would be relatively easy to establish such uniformity. The Nebraska Supreme Court upheld the action of the City of Lincoln in imposing an occupation tax on the operation of taxicabs, although it did not impose a similar tax on several other occupations. *Richter v. City of Lincoln*, 136 Neb. 289, 285 N.W. 593 (1939). The logic of that case would support the proposed imposition of an occupation tax on the building and/or development industries.

District-Specific Taxes or Assessments

In addition to broader, jurisdiction-wide taxes or fees, the City also has the authority to create several types of special districts that can be used to fund infrastructure costs.

Public Utility Districts

Any Nebraska municipality can create "public utility districts" related to "waterworks system, sanitary sewerage system, storm sewer system, gas plant, or other public utility plant," including a "water-main district, sanitary sewer district, storm water disposal district, or other public utility district. Rev. Stats. Neb. §18-401. Such districts may be created "either within or without the corporate limits of the political subdivision involved," except that they may not be created "outside the corporate limits of a city of the primary class" [meaning Lincoln]. Rev. Stats. Neb. §18-401. Such districts are created by ordinance. Rev. Stats. Neb. 18-402. The costs of system expansion or extension (based either on average construction costs or project-specific costs) are then to be assessed against property in the district. Rev. Stats. Neb. § 18-405. Note that, under this provision, the costs are to be assessed "in proportion to the frontage of the real estate upon the main or utility service." Rev. Stats. Neb. §18-405. The cost of any such extension or enlargement in excess of the actual or average cost of installing the water main or gas main or other utility service, as the case.

Sewer Districts

There is specific authority for the City to create districts for the expansion of the sewer system and to assess properties within the districts for the costs of the expansion:

> The city council shall have the power to lay off the city into suitable districts for the purpose of establishing a system of sewerage and drainage;… The city council shall have power to create sewer districts by ordinance and designate the property to be benefited by the construction of sewers in such districts. The city council shall have power to construct or cause to be constructed such sewer or sewers in such district or districts and assess the cost thereof against the property in such districts, to the extent of the special benefits. Rev. Stats. Neb. §15-717.

The statute also includes the following provisions. Note the broad language on the determination of assessments for such districts.

> Special taxes may be levied by the city council for the purpose of paying the cost of constructing such sewers and drains within the city. Such taxes shall be levied upon the real estate within the sewerage districts in which such sewer or drain may be, to the extent of benefits to such property by reason of such improvements. The benefits to such property shall be determined by the city council as in other cases of special assessments. All taxes or assessments made for sewerage or drainage purposes shall be levied and collected in the same manner as other special assessments. Rev. Stats. Neb. §15-718.

Water Districts

There is similar authority for the creation of taxing districts for the expansion of the water system:

> The city council shall have power to create water districts for the purpose of supplying water for domestic, industrial, or fire purposes, or for the purpose of enlarging any water mains, now existing or hereafter constructed. All such districts, to be known as water districts, shall be created by ordinance and shall designate the property to be benefited. Upon creation of any water district, the city council shall have power to construct or cause to be constructed, either by contract with the lowest responsible bidder or directly by the city, such water main or mains, or extensions or enlargements, including all necessary appliances for fire protection, within such districts as the council shall determine, and assess the costs thereof against the property in such district, not exceeding the special benefits accruing on account thereof. The city council shall have power and authority to fix the period of time, not to exceed twenty years, in which the special assessments against any property for the payment of the cost of such improvements may be made. The city council shall have power and authority to issue bonds in accordance with the provisions of a home rule charter of the city or of state law. Rev. Stats. Neb. §15-228.

Street Improvement and Paving Districts

A city of the primary class has authority to use assessment districts for the improvement and paving of streets:

> The city council shall have the power to grade partially, or to an established grade, curb, recurb, gutter, construct sidewalks, or otherwise improve or repair any street or streets, alley or alleys, public grounds, public way or ways, or parts thereof, including sidewalk space, at public cost, or by levy of special benefits on the property specially benefited thereby, proportionate to the benefits. When the streets, public ways, or public grounds shall have been brought to an established grade, the council shall have power to bring sidewalks and sidewalk space therein to a grade and to construct sidewalks, and shall have power and authority to levy special assessments against the property specially benefited, not to exceed the cost of the improvement. Ordinary

> repairs, not including repaving or resurfacing or relaying existing pavement or making sidewalk repairs, shall be at public cost. Rev. Stats. Neb. § 15-701.01.

The authority extends to the "power to grade, to change grade, to pave, repave, macadamize, curb, recurb, gravel or regravel, open and widen streets, roadways or public ways, gutter, resurface, or relay existing pavement or otherwise improve any street, streets, alley, alleys, public grounds, public way or ways, or parts thereof, including the sidewalk space, and including improvement by mall or promenade…." Rev. Stats. Neb. §15-701.02. The section includes this language on assessments:

> Cost of so improving the street, streets, alley, alleys, public grounds, public way or ways, including sidewalks, may be in whole or in part assessed, proportionate to benefits, on the property specially benefited. The city council may fix the depth to which property may be charged and assessed for benefits, and to a greater depth than the lots fronting on the street, streets, alley, alleys, public grounds, public way or ways so improved and the determination thereof by the city council shall be conclusive. Rev. Stats. Neb. § 15-701.02.

Article VIII of the City Charter addresses street improvements. Section 3e includes this provision:

> Cost of so improving the street, streets, alley, alleys, public grounds or public ways, including sidewalks, may be in whole or in part assessed, proportionate to benefits, on the property specially benefited….

Special Improvement Districts

There is similar authority for the creation of "public improvement districts," which can include streets and related facilities, as well as parks.:

> The city council shall have power by ordinance to create public improvement districts for opening, widening, or enlarging of any street, alley, boulevard, or public way or the establishing or enlarging of any park or parkway within the city. Such special improvement district having been created, the city may require, by agreement, purchase, condemnation, or otherwise, the necessary lands, lots, or grounds to carry out the purposes of the district. The cost thereof may be, in whole or in part, assessed proportionate to benefits, on the property specially benefited. The city council shall have power and authority to fix the period of time for the payment of the special assessments, and to issue bonds, as authorized by the home rule charter. Rev. Stats. Neb. §§ 15-754.

Similar language can be found in the City Charter, Article VIII, Sec. 4 ½.

Special Assessments in the Nebraska Courts

There are two leading cases in which the Nebraska Supreme Court has dealt with special assessments, helping to bracket the authority of local governments to determine assessment formulas. In *Nebco,*

Inc., v. City of Lincoln, 250 Neb. 81, 547 N.W.2d 499 (1996), upheld a paving assessment imposed by the City of Lincoln on farmland owned by Nebco. From a judicial policy perspective, the court made it clear that the presumptions are on the side of the City:

> Absent evidence to the contrary, it will be presumed that a special assessment was arrived at with reference only to the benefits which accrued to the property affected…. The validity of an assessment is further aided by the presumption of law that all real estate is benefited to some degree from the improvement of a street or alley on which it abuts or from a like improvement made in a district of which the property assessed is a part. [citations omitted] 547 N.W.2d at 503.

The court continued:

> A party challenging a special assessment has the burden of establishing its invalidity. 547 N.W.2d at 503.

From a practical perspective, it provided an even more important holding:

> Reasonable prospective uses of the property may be considered in determining whether the property has benefited. [citations omitted] 547 N.W.2d at 503.

See, also, *Bitter v. City of Lincoln*, 165 Neb. 201, 85 N.W.2d 302 (1957), in which the court also deferred to the City's judgment in making a special assessment. The Nebraska high court many years ago rejected an argument of a property owner that a special assessment that affects property not directly abutting a new sewer line, which was the subject of the assessment, was per se invalid. *Bamrick v. Village of Minatare*, 118 Neb. 644, 225 N.W. 755 (1929). This holding is, of course, entirely consistent with basic rules of statutory construction, which would find meaning in the language differences between the public utility districts (which allow assessments only on property abutting the improvements) and the sewer and water assessment laws (which contain more general "special benefit" language).

Providing the other bookend to the law of special assessments is *Bennett v. City of Lincoln*, 245 Neb. 838, 515 N.W.2d 776 (1994), a case which the City lost. The assessment in the case was for street improvements; it was imposed on lots within 200 feet of the improved street, plus other lots around a street named "Norman Circle." Some or all of the lots around Norman Circle were more than 200 feet from the improved street. The City argued that the lots around Norman Circle received special benefits from the paving, as did the lots along the improved street. The court responded:

> If such special benefits had been conferred on the lots around Norman Circle, then the same four benefits would have also been conferred upon all other property that is the same distance from South 27th Street as are the assessed lots around Norman Circle. Such similarly situated property would include lots to the north and south of

> Norman Circle on the west side of South 27th Street and lots all along the paving district on the east side of South 27th Street. 515 N.W.2d at 780.

The court concluded its analysis of this issue:

> We are mindful of the presumption in favor of an assessment's validity and that the burden is upon the property owner challenging an assessment to establish the assessment's invalidity. However, in this case, the City drew the lines of the paving district to exclude property located the same distance from the improved street and benefited in the same way as property included within the district. The City failed to estimate the benefits to each tract of real estate upon as uniform a plan as it could have in light of available information. We find, as a matter of law, such gerrymandering of paving district lines to be arbitrary, capricious, and unreasonable. 515 N.W.2d at 780.

In short, there was nothing wrong with the logic that the City asserted for the basis of its assessment on the lots around Norman Circle—it was simply inconsistent in applying it. A holding like this is a reminder to a local government to use care in computing benefits and imposing special assessments, but it is not a significant limitation on the special assessment power.

Another important case dealing with special assessments in Nebraska is *Hurd v. Sanitary Sewer Dist. No. 1 of Harvard*, 109 Neb. 384, 191 N.W.438 (1922). In that case, the Nebraska Supreme Court held that:

> The main sewers and disposal plant in question are general improvements conferring general benefits upon all property in the city--the disposal plant because it benefits all property in the city alike; the main sewers, for the same reason, to the extent that they serve the public generally as distinguished from the special service to abutting owners. 191 N.W. 439.

In doing so, the court struck down a "special assessment" levied by the city on an assessment district that incorporated the whole city. This case appears to be good law in Nebraska today and imposes a significant limitation on the use of special assessments to pay for the incremental costs of such major capital facilities as central sewer and water treatment plants.

A Note on Sanitary and Improvement Districts

There is at least one other type of taxing district that can be created under Nebraska law. Specifically, property owners, by petition to the district court, can create a "sanitary and improvement district" for any of the following purposes:

> installing electric service lines and conduits, a sewer system, a water system, an emergency management warning system, a system of sidewalks, public roads, streets,

> and highways, public waterways, docks, or wharfs, and related appurtenances, contracting for water for fire protection and for resale to residents of the district, contracting for police protection and security services, and contracting for gas and for electricity for street lighting for the public streets and highways within such proposed district, constructing and contracting for the construction of dikes and levees for flood protection for the district, and acquiring, improving, and operating public parks, playgrounds, and recreational facilities. Rev. Stats. Neb. § 31-727.

Such districts are relevant to the City for at least two reasons: they offer a possible competing source of services in the urban fringe; and, if the City annexes territory including such a district, it does so with the improvements and subject to the liabilities of the district. See, generally, Rev. Stats. Neb. §31-766. This topic is not treated in depth here, however, because the City cannot control the formation or management of such districts, thus making them an unrealistic and generally undesirable alternative for financing the expansion and/or operation of municipal services.

Parcel-Specific Assessments

The City has the authority to drain any lot or parcel with inadequate storm sewer service and to assess the cost of that work to the lot or parcel. Rev. Stats. Neb. §15-211.

There is specific legislation allowing the City to require property owners to construct and maintain sidewalks adjoining their property. Rev. Stats. Neb. §§15-734, 15-735. See, also, Art. VIII, Secs. 19 and 20, of the City Charter.

A separate provision of the statutes provides:

> The council may order the owner of lots abutting on a street to be paved, to lay sewer, gas, and water service pipes to connect mains; and if he neglects so to do, after five days' notice by publication in a newspaper of general circulation in the city, or in place thereof by personal service of such notice, as the council in its discretion may direct, the council shall have power to cause the same to be laid, along with and as part of the work of the improvement district, and assess the cost thereof on the property of such owner, along with and in the manner as provided, for making the assessment to pay the cost of the pavement or improvements in the improvement district and to be collected and enforced as special taxes. Rev. Stats. Neb. §15-709.

Bonding Authority

Lincoln has relatively broad authority to issue bonds:

> A primary city may borrow money on the credit of the city and pledge the credit, revenue and public property of the city for the payment thereof when authorized in the manner herein provided, and in the manner otherwise provided by law or by the home

> rule charter of the city. It shall have the power to issue general obligation bonds of the city, general obligation notes, and refunding bonds, as provided in its home rule charter or as otherwise provided by law. It shall have the power to issue revenue bonds for the purpose of acquiring, constructing, reconstructing, improving, extending, equipping, or furnishing any revenue-producing facility within or without the city which is for a public purpose; Provided, that unless authorized by a majority of the voters of such city voting upon the question, no revenue bonds shall be issued for entering the public transportation, natural gas distribution or telephone fields or functions, or to acquire before 1972 that part of a retail distribution system of a public power district within the corporate limits of such city as those corporate limits existed on March 3, 1959. Such city shall also have the power to contract for the acquisition of the electric facilities and properties used or useful in connection therewith of a public power district within or without the city, and to pay for all or any part of the same out of the earnings of electric facilities and properties. Rev. Stats. Neb. §15-244.

Secs. 39 and 40 of Article IX of the City Charter spell out the provisions for the issuance of general obligation bonds, which require voter approval.

There is separate, specific authority for the issuance of bonds to fund construction of sewer systems:

> The mayor and council may issue sewer district bonds to cover the cost of the work of constructing sewers in sewer districts, and the special assessment levied on account of such work shall constitute a sinking fund for the payment of such bonds. Rev. Stats. Neb. § 15-720.

In addition, Sec. 44 of Art. IX of the City Charter authorizes the City to issue revenue bonds for "any revenue-producing facility." There are special (and probably redundant, in light of the section just cited) enabling provisions for the issuance of revenue bonds to fund off-street parking facilities. See Rev. Stats. Neb. §§15-273 - 15-276. Similarly, Article IX, Sec. 8 of the City Charter gives the City express authority to issue revenue bonds to finance construction of waterworks.

Summary and Findings

General Findings

- As a city of the primary class, Lincoln has broad statutory authority to pass ordinances that are not inconsistent with the general laws of the state.

- The City's own charter contains even broader language.

- Ordinances adopted by cities in Nebraska enjoy a broad presumption of validity.

Impact Fees and Utility Connection Fees Generally

- Impact fees have evolved over the last 25 years as a form of exactions well-accepted by the courts, both in states with enabling legislation on the subject and in states, like Nebraska, without such legislation;

- The rational nexus/rough proportionality test, sometimes called the "dual rational nexus test," that has evolved out of the *Nollan* and *Dolan* decisions of the U.S. Supreme Court, now establishes the Constitutional parameters within which money and other exactions in the field of development regulation must occur;

- Because most dedication requirements and other ad hoc and negotiated exactions are based on the land needs of the governmental agency rather than on the impacts of the project, it is difficult to show proportionality—and sometimes difficult even to show a basic nexus—for such exactions;

- Because impact fees are exactions computed based on the impact of each development, the concept of proportionality is built into them;

Impact Fees and Utility Connection Fees in Nebraska

- In at least one case, a Nebraska court presented with the issue recognized that a sewer connection charge was a fee and not a tax or special assessment.

- There is authority for the adoption of "reasonable rates and charges" for the operation of a municipal sanitary sewer or storm sewer system. Based on general custom and practice in the operation of municipal utilities, "reasonable rates and charges" should be interpreted to include connection charges for a sewer system, as well as user charges.

- Because the statute has clearly been interpreted administratively to support the imposition of user fees for a sanitary sewer system, it could be interpreted to support reasonable user fees for a storm sewer system.

- The statute authorizing the imposition of charges for the use of water refers to the "rate of tax" to be charged for water use. A separate section, however, includes broad authority for the City to do whatever else is necessary to operate a water system. Clearly the City has administratively construed this language, together with the broad authority in its charter, to allow it to impose usage-based water charges that are not a "tax" in the traditional sense.

- Extending the logic which provides the legal basis for the imposition of usage-based water charges, the City can reasonably be construed to have the authority to impose water connection charges, consistent with the custom and practice in the operation of municipal utility systems.

- Even before *Nollan*, in *Simpson v. North Platte*, the Nebraska Supreme Court adopted a test of exactions very similar to that later adopted by the U.S. Supreme Court—in fact, *Simpson* was cited by the U.S. Supreme Court in its important *Dolan* decision.

- In two decisions, the Nebraska Supreme Court has since made it clear that the "takings" decisions of the U.S. Supreme Court, including *Nollan* and *Dolan*, establish the essential parameters for exactions and other land-use regulations in Nebraska.

- In the *Strom* case, the Nebraska Supreme Court has upheld one regulatory exaction against challenges in principle (leaving open a factual question regarding the effect on the economic value of the property).

- The case in which the Nebraska Supreme Court struck down an exaction as unconstitutional (*Simpson*) is consistent with the pattern of law regarding that type of non-proportional exaction and is in no way inconsistent with the majority position upholding impact fees and similar proportional exactions.

- In general, the Nebraska Supreme Court has closely followed the U.S. Supreme Court in dealing with the takings issue.

- Impact fees represent the best national practice for imposing reasonable exactions on new development while conforming with the "rational nexus" and "rough proportionality" of the Supreme Court's Nollan/Dolan doctrines.

- Impact fees have evolved in a number of states that lack specific enabling legislation.

Special Assessments

- Nebraska law provides a variety of methods through which the City can divide the city into districts and impose special assessments for the installation of specific improvements. These include public utility districts (which can be used to extend water, sanitary sewer, storm sewer, natural gas or "other public utility" services), sewer districts, water districts, street improvement and paving districts (which can be used to improve alleys, sidewalks, and curb and gutter, as well as streets and paving), and special improvement districts.

- For most special assessments, the Nebraska statutes, as construed by the courts, leave the City reasonable discretion to establish an assessment formula that relates the costs imposed on a particular parcel to the benefits received by that parcel. The one exception is for public utility districts, for which the assessment must be based on frontage.

- The City could consider the use of assessment districts to finance utility system expansion, using an impact fee methodology to compute the "special benefits" to each parcel and the related fees.

- The city cannot use special assessments to pay for the incremental costs of more general public improvements, such as central sewer and water treatment plants.

Other Tax Alternatives

- Lincoln has the authority to impose an "occupation tax."

- The City could consider imposition of an occupation tax on the occupation of "land developer" and/or "builder," charging a per-unit tax based on the impacts of the land being developed or the building being constructed.