

# impact fees

## PAYING FOR PROGRESS

By James P. Gaines and Judon Fambrough

Texas grew by more than 2.6 million residents between 2000 and 2006 and is expected to add another 2.4 million by 2010. Growth of this magnitude exerts a substantial strain on local political jurisdictions to provide basic public services.

Public infrastructure investment decisions made by local governments often control the timing, location, intensity and quality of community growth. If growth occurs at a relatively slow, even pace, most communities can absorb the new demand through increased property and sales tax revenues and service fees generated by new development.

But if growth surges, communities may be hard-pressed to provide services and pay for new or expanded high-cost capital improvements. In such cases, local governments require developers to pay for capital infrastructure supporting their new developments. One way this is done is through impact fees.

Debate over whether new development pays for itself has continued for decades. Expecting developers to pay for expansion of existing facilities or construction of new facilities, especially in areas of substantial and rapid growth, appears justifiable and equitable if properly implemented. Developers

in high-growth areas not only expect but may actually encourage and promote impact fees to finance capital improvements to ensure that their developments are built.

Texas law permits impact fees, and more and more communities are using them to finance local infrastructure enhancements. Impact fees may only be imposed for and spent on capital improvement costs “necessitated by and attributable to” projected new development within a defined area and specifically identified in the local capital improvements plan. Builders, developers and other real estate industry participants need to understand these procedures and play an active role in the implementation process.

### State Enabling Legislation

Although charging development fees for public services dates back decades in fast-growing areas like California and Florida, Texas was the first state to enact legislation specifically authorizing local governments to levy impact fees on new development (1987). Impact fees are governed by Chapter 395 of the Texas Local Government Code, which authorizes impact fees to fund required capital costs for locally provided roadways and water and wastewater facilities as well as storm water, flood control and drainage facilities. All other fees, costs or exactions levied by a local jurisdiction on new developments technically are not impact fees.

The code contains definitions, requirements, processes, procedures and required computations an eligible local jurisdiction must adhere to when enacting or updating a local impact

fee ordinance. The ordinance establishes the administrative procedures and financial details by which the impact fee program will be implemented. It also mandates when fees are assessed, when they are paid, what they are imposed for, how they will be spent, the actual fee to be assessed for each land-use type, the process for appeals and other administrative details.

### Enacting the Ordinance

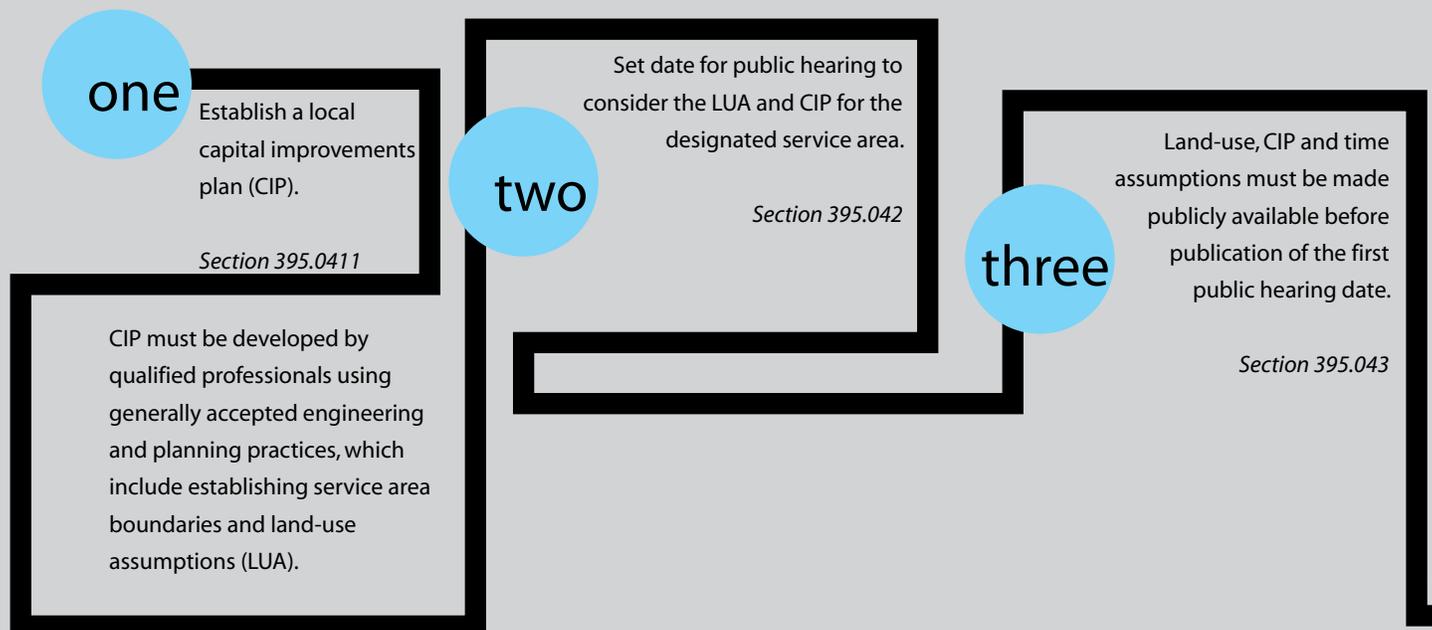
State-authorized political subdivisions must follow the procedures and requirements specified in *Subchapter C. Procedures for Adoption of Impact Fee*, Chapter 395 of the Texas Local Government Code, to enact impact fee ordinances (see figure). The first phase of this process requires public hearings to secure approval of the land-use assumptions (LUA) and comprehensive capital improvements plan (CIP).

The second phase requires approval of the specific impact fee ordinance. Most communities perform these functions as part of a comprehensive planning process to forecast future service and capital facility needs whether they enact an impact fee or not.

### Advisory Committee Role

On or before the date of the first public hearing on the CIP for an impact fee ordinance, the political subdivision must appoint an advisory committee made up of at least five members. At least 40 percent of these must represent the real estate, development or building industries and must not be affiliated with the jurisdiction. If the service area includes all or part of the political subdivision’s extraterritorial jurisdiction, at least

# Creating a Local Impact Fee Ordinance



one member of the committee must represent that area. If the local planning and zoning commission acts as the advisory committee, only one member is required to represent the real estate, development or building industries.

The committee's charge is to review the proposed CIP and "advise and assist the political subdivision" in adopting the LUA. Although the committee is required to submit a written report reviewing the LUA, CIP and the proposed impact fee ordinance, it has no authority to approve, disapprove or to take any other direct action with regard to the data, conclusions or recommendations. It has the ongoing responsibility to monitor and evaluate the implementation of the CIP. Despite its lack of direct authority, the advisory committee can be influential in implementing a local fee through its role as technical advisor to the decision-making body of the local jurisdiction.

### Updating LUA and CIP

Any jurisdiction imposing an impact fee must update the LUA, capital improvements plan and impact fee ordinance every five years (Section 395.052). If no update is necessary, the jurisdiction must meet specific

notification requirements to inform the public of that fact (Section 395.0575).

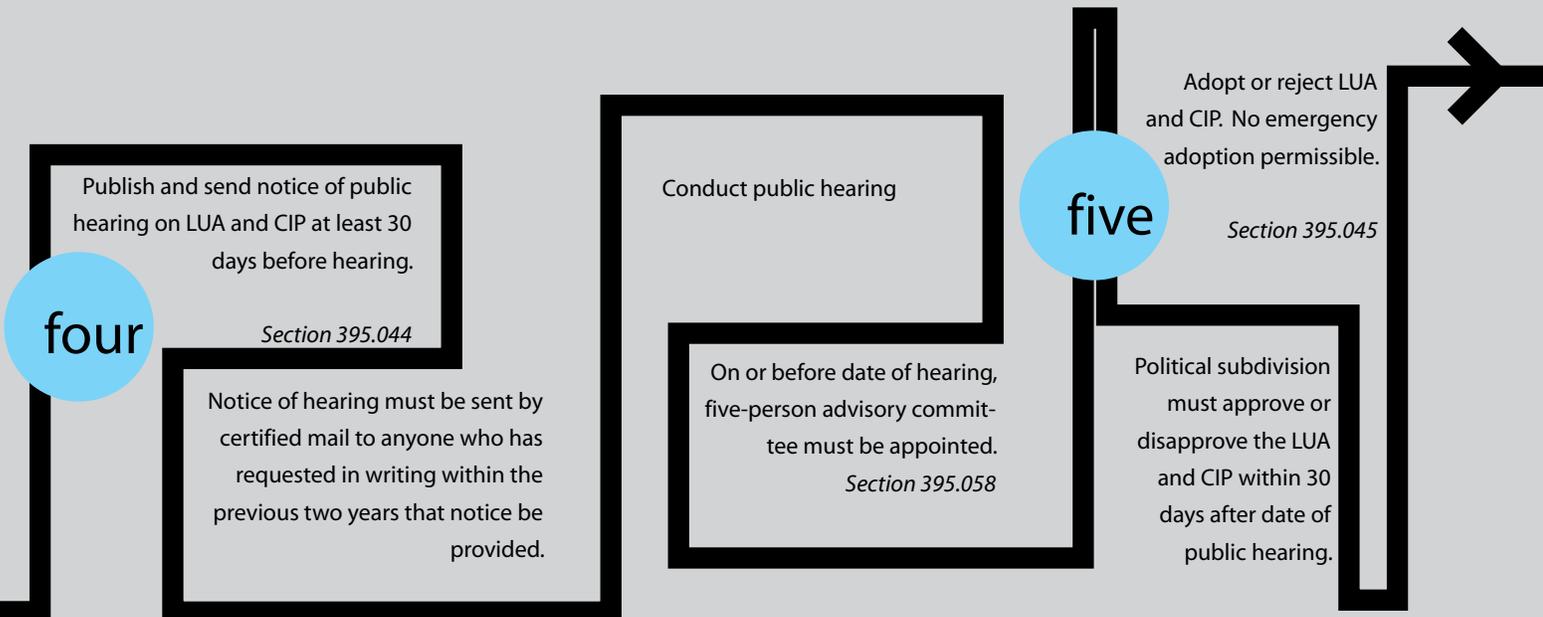
If any citizen files a written request to update the LUA, the CIP or the impact fee ordinance, the jurisdiction must follow the prescribed steps of notice, hearings and adoption detailed in Subchapter C of the Texas Local Government Code. The jurisdiction must follow essentially the same process to update or change the impact fees as was required to enact the impact fee ordinance originally (Section 395.0575[d]).

### Assessing Fees

In general, impact fees may be assessed anytime during the land platting or building approval stages of a project. Once the fees are assessed, additional fees cannot be assessed and fees cannot be increased unless the number of units to be developed on the tract increases (Section 395.017).

The political subdivision may collect impact fees when the subdivision plat or connection to the jurisdiction's water or sewer system is recorded or when the jurisdiction issues the building permit or certificate of occupancy. If new developments are platted

*Impact fees may be assessed anytime during the land platting or building approval stages of a project.*



before the adoption of an impact fee, fees cannot be collected on any building for which a building permit is issued within one year after the impact fee is adopted (Section 395.016[c]).

The code mandates that impact fees may not be collected in areas where services are not available unless:

- the collection is made to pay for a capital improvement or facility expansion identified in the CIP, and the jurisdiction commits to begin construction within two years and have services available in no more than five years;
- the jurisdiction has an agreement with the owner of a new development that the owner may construct or finance capital improvements or facility expansions and that costs incurred will be credited against the impact fees due from the new development; or
- an owner asks the political subdivision to reserve capacity to serve future development, and the jurisdiction and the owner have a written agreement to that effect (Section 395.019).

Texas code prohibits political subdivisions from placing a moratorium on new development while waiting for LUA, a CIP, or an impact fee to be developed, adopted or updated (Section 395.076).

### Refunds and Exemptions

Impact fees not spent are eligible to be refunded if service is denied or construction is not begun on a facility within two years, if service is not available within a reasonable time (not more than five years), or if impact fees are not spent for allowable purposes within ten years.

All refunds bear interest calculated from the date of collection to the date of refund at the statutory rate. Property owners must request refunds and prove that they are owed. Eligibility to request or sue for a refund belongs to the current owner of record, who most often is not the person who paid the fee (Section 395.025).

Rather than expecting future property owners to know that a fee was paid and then trying to initiate separate or even class-action suits for recovery, developers might attach deed restrictions transferring the right to seek impact fee

*Should different fees be assessed in different areas based on existing capacity and projected growth in demand in these areas?*

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May adopt LUA for systemwide water supply, treatment and distribution facilities or wastewater collection and treatment facilities that cover the entire political subdivision.

*Section 395.0455*

May *not* adopt systemwide assumptions for storm water, drainage, flood control or roadway facilities.

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Set date for public hearing for adopting impact fee ordinance.

*Section 395.047*

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Publish and send notice of public hearing on impact fees at least 30 days before hearing.

*Section 395.049*

Notice of hearing must be sent by certified mail to anyone who has requested in writing within the previous two years that notice be provided.

refunds to the local homeowners association. The association could then initiate the refund process if the fees paid were not spent in an appropriate or timely fashion.

The Texas code allows impact fees to be reduced or waived on qualified affordable housing projects for low- and moderate-income households. No other specific land uses or purposes are eligible for exemption.

## Issues to be Decided

Impact fee procedures and administration are complex because impact fees have requirements that traditional local tax revenue sources do not. While Texas legislation spells out procedural requirements to enact impact fees, significant policy and operational issues are being raised around the country and will no doubt come to the forefront in Texas. For example:

- Should different fees be assessed in different areas based on existing capacity and projected growth in demand in these areas?
- Should residential impact fees be indexed by home size, value or some other criteria? Impact fees on residential properties typically are based on the number of lots or multifamily units, projected at the same rate. Consequently, the effective rate is substantially lower for higher-priced properties than for lower-priced properties.
- Should some development projects be exempted from impact fees to boost economic development?

- Should fees be indexed or phased over time? Projected development over a ten-year period probably will not occur at an even pace over the period, so should the fees be phased based on actual development?
- Are fees justified if existing capacity exceeds the projected increase in demand or if the proposed capital improvements create even greater excess capacity over time? For example, if existing excess capacity on a roadway, is 50,000 vehicle-miles and projections indicate 40,000 vehicle-miles of new demand, is a fee justified?
- Should differential impact fees be used to promote some types of development and discourage others?

Information on computing impact fees will be included in the next issue of *Tierra Grande*. 📌

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## THE TAKEAWAY

Many communities, especially those in high-growth areas, are assessing impact fees to finance infrastructure construction. Creating a local ordinance is the first step in the process, which is governed by Texas Local Government Code. Chapter 395 provides specific requirements for enacting a local impact fee.

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Advisory committee must file written comments on proposed impact fee at least five business days prior to public hearing.

*Section 395.050*

An impact fee cannot be held invalid because public notice requirements were not complied with if compliance was substantial and in good faith.

*Section 395.078*

Conduct public hearing

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Adopt or reject the impact fee ordinance. No emergency adoption permissible.

*Section 395.051*

Political subdivision must approve or disapprove the impact fee plan within 30 days after date of public hearing.

Appeal of impact fee ordinance must begin within 90 days.

*Section 395.077*



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