



PLANNING BOARD REPORT PORTLAND, MAINE

Proposed Text Amendments to the Land Use Code
Impact Fee Ordinance & Division 30
City of Portland, Applicant

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I. INTRODUCTION

Portland's Plan, the City's comprehensive plan, lays a strong foundation for future growth in the city over the next ten years. The plan speaks to where and how growth should be managed and suggests mechanisms for funding improvements associated with growth. Among these recommendations, *Portland's Plan* proposes impact fees – one time fees charged to development to pay for the infrastructure necessary to accommodate that development. Perceived through this lens, impact fees are fundamentally about planning for smart and sustainable growth in the city – a way to help ensure that there is adequate park, recreation facility, and trail capacity; multi-modal transportation capacity; and wastewater capacity to allow the city to grow as envisioned in *Portland's Plan*.

The City's Planning Division, with the assistance of the Department of Public Works and the Department of Parks, Recreation, and Facilities, began the process of exploring a city-wide system of impact fees for parks and recreation, transportation, and wastewater in the late winter of this year. In the time since, the *Impact Fee Study* has produced both draft fees and a draft ordinance, which have been shared and revised over multiple iterations. Altogether, the *Impact Fee Study* has been reviewed at two meetings of an informal stakeholder group convened for the study (see list of members in *Attachment 1*), three workshops of the Economic Development Committee, two workshops of the Planning Board, and one workshop of the City Council. The intent of this hearing is to provide an opportunity for the Planning Board to review the final draft impact fee ordinance, including a proposed fee schedule, and vote on a recommendation to forward this ordinance to the City Council.

2. FEE SCHEDULE

On September 20, the Planning Division, with its consultant, TischlerBise, presented a draft set of parks and recreation, transportation, and wastewater fee calculations to the Planning Board. These fee calculations were based on an analysis of projected growth, infrastructure demand associated with growth, and the cost of improvements necessary to accommodate that demand. As of October 3, TischlerBise has documented the methodology and assumptions for all fee calculations in a final draft report for the *Impact Fee Study (Attachment 2)*.

It should be noted that these fees represent the second formal draft of the impact fee calculations, as the initial fee calculations, prepared in July, were revised based on feedback from the study's stakeholder group. It should also be noted that, in addition to gathering feedback on the second draft fee calculations from the Planning Board, Economic Development Committee, and City Council in late September, staff has shared the calculations with the stakeholder group and offered to meet with members of the group to review and discuss. No comments on the revised fees were received from the stakeholder group.

WHAT ARE IMPACT FEES?

What are impact fees?

Impact fees are charges paid by new development to fund the cost of providing municipal facilities to serve that development. This idea is premised on the concept that when development occurs, it can bring many benefits, but it also affects the existing infrastructure around it by adding more cars, bikes, and pedestrians to the streets, increasing sewer and stormwater flows into City systems, and infusing additional visitors into the City’s parks and open spaces. In turn, these facilities require additional capital investment to provide sufficient capacity to accommodate new growth. As a result of this thinking, impact fees are widely used throughout the United States. Impact fees have been used in some communities in the United States for the past 50+ years.

Where are impact fees?

Although impact fees are particularly common in U.S. states that have experienced rapid population growth in the west and south, they are found in the majority of states nationwide. Concord and Manchester, NH have impact fees, as does Burlington, VT. In Maine, the legislature laid the foundation for impact fees with the Comprehensive Planning and Land Use Regulation Act of 1987. In the time since, communities across the state, mostly in southern Maine, have developed and implemented impact fee ordinances.

How may impact fees be used?

The uses of impact fees vary widely, depending on state enabling legislation, but in all cases impact fees **may only be used on capital projects to construct, expand, or replace infrastructure required to serve new development.** In Maine, impact fees may be used for transportation projects, public safety facilities, sewer and water systems, parks and open space, and school improvements. **Impact fees may not be used to pay for operations or maintenance, and may not be used to address existing deficiencies in these systems.**

How are impact fees generally derived?

Regardless of where impact fees are used, courts have established that there must be a rational nexus and rough proportionality between the type and scale of development and the fee imposed. Per guidance from the former Maine State Planning Office, “the expansion of the facility and/or service must be necessary and must be caused by the development; the fees charged must be based on the costs of the new facility/service apportioned to the new development; and the fees must benefit those who pay.” Given these standards, in order for impact fees to be charged, a community must conduct an analysis that identifies growth-related infrastructure costs and apportions those costs to projected development, often by development type, on a square foot, unit, or per trip basis.

At the workshops in late September, staff received a number of questions and comments on the proposed second draft fees. These included the following questions:

A. *How do the fees proposed in the ordinance relate to the ‘true’ cost of growth?*

As discussed above, an original set of maximum defensible fee calculations was developed in the early summer of this year, based on estimated replacement costs and Capital Improvement Plan (CIP) requests, with the assistance of Parks, Recreation, and Facilities and DPW staff. The first draft fees were subsequently shared with the *Impact Fee Study* stakeholder group in late July. As a product of feedback from this group, staff, working with the consultant, made several modifications to the calculations’ underlying assumptions. Some of these were necessary given shifting expectations about future facility expansion (e.g. eliminating the Expo from the parks and recreation fee calculations, modifying the wastewater fee credit to include future payments on debt service for existing stormwater projects). Other modifications were a product of a desire to bring the fee to a more tenable level (e.g. elimination of parks vehicles from the fee calculations, changes in assumptions about growth’s share of infrastructure costs, changes in assumptions regarding outside funding for projects). Because these modifications were made, the second draft fees are lower and will not go as far as the original fees in terms of planning for future growth. However, it is expected that the fees will generate more revenue than is currently being collected in mitigation from development review projects.

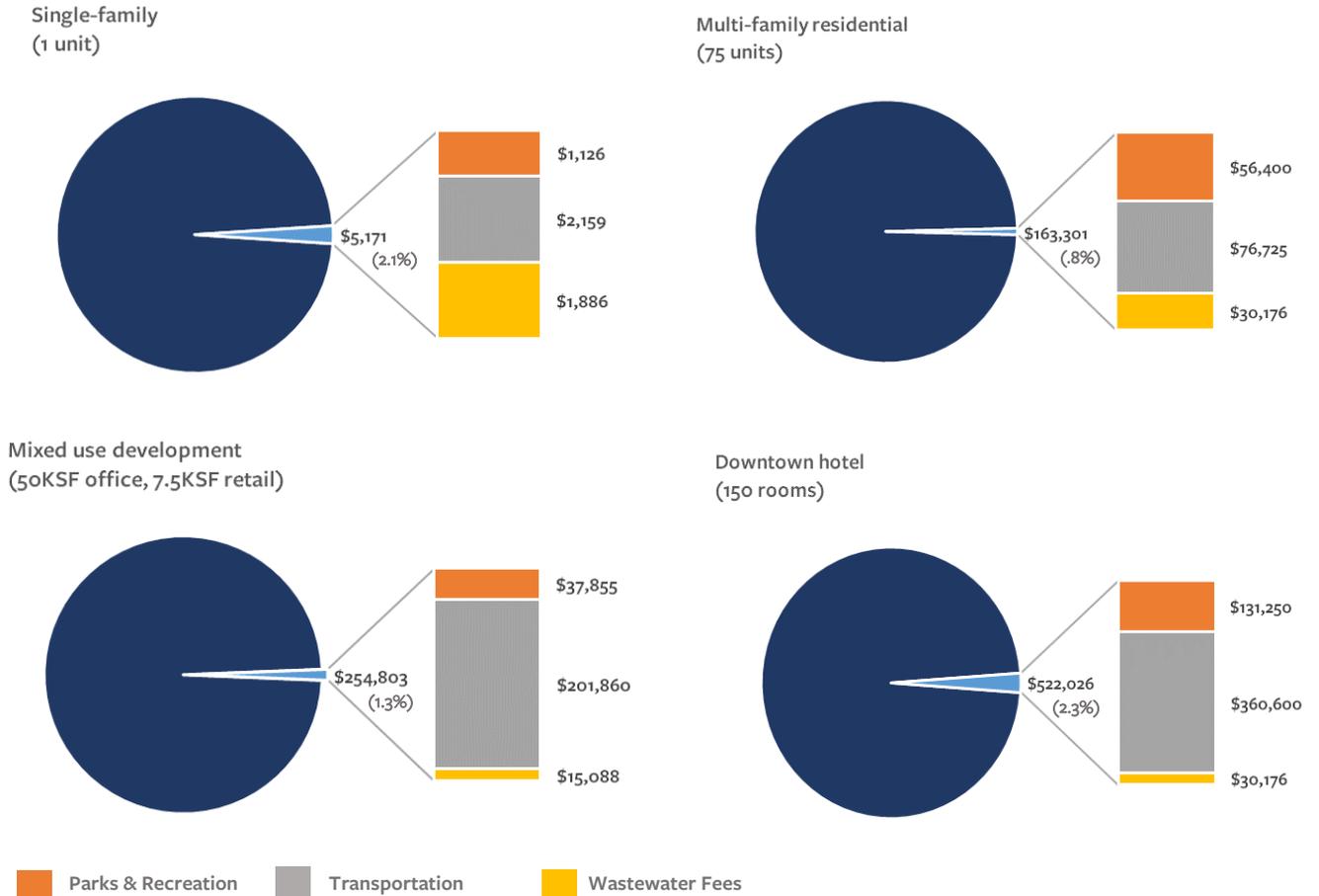


Figure 1: Proposed impact fees as a proportion of total estimated development costs (Note that wastewater fees are based on an estimated meter size.)

B. How will the fees as presented affect development costs? Will the fees have a disproportionate impact on small developments?

Following the development of the second draft fees, staff engaged Colliers International to examine six common development types in the City of Portland and analyze how impact fees as proposed in the ordinance would affect projected returns on investment (Attachment 3). This analysis showed that the effect on returns would generally be fairly minimal across the six development types modeled and that, in all cases studied, the cost of fees represents a nominal percentage of total development costs (less than 2.5%, see Figure 1). As the fee is designed to be proportional, this is generally true of both large and small projects.

C. How do fees compare to what projects pay in mitigation now?

As the Planning Board is aware, the City currently requires mitigation of project impacts through the development review process. As a product of this process, developers often make in-kind physical improvements. In other cases, developers are required to make financial infrastructure contributions proportionate to their impacts. These contributions are held in separate infrastructure accounts until they can be drawn down to pay for the improvement identified through the review process. For reference, an internal staff audit shows that, as mitigation of impacts for site plans approved between May of 2013 and May of 2018, the Planning Board and/or the Planning Authority required infrastructure contributions totaling just over \$1 million. (It should be noted that this figure does not include in-kind work completed by developers, easements or parkland dedications, and some substantial contributions yet to come, including that from the Portland Company redevelopment.) In comparison, TischlerBise’s impact fee revenue projections, assuming

straight line growth, show a ten-year total of \$3.6 million for parks, \$13.3 million for transportation, and \$6.4 million for wastewater.

None of these questions were deemed to necessitate modifications to the second draft fees as proposed. As a result, the parks and recreation, transportation, and wastewater fees presented to the Board in late September have remained unchanged in the final draft ordinance presented here.

3. DRAFT IMPACT FEE ORDINANCE

The proposed impact fee ordinance (*Attachment 4*) was developed based on the state impact fee statute; guidance from the former Maine State Planning Office; review with Corporation Counsel, the Department of Permitting and Inspections, and Finance; as well as examples from comparable communities both in Maine and nationwide. The ordinance addresses not only the technical requirements of the statute but issues critical to the administration of impact fees:

- A. *Applicability.* The draft ordinance is written such that any development on a site that generates an increase in impact would be subject to impact fees. This would include new buildings; additions to existing buildings which result in net new residential units, non-residential square footage, or wastewater meters; and all changes of use which result in a net increase in impact per the impact fee schedule.
- B. *Impact fee schedule and basic guidelines for the calculation of the fee.* The draft ordinance includes impact fee schedules, as well as language designed to clarify methods for calculating fees for mixed-use development, redevelopment, additions, and changes of use. It should be noted that, for typical infill development and changes of use, the ordinance grants credits for existing uses at time of application.
- C. *Provisions for the modification of the fee amount.* The draft ordinance has been written to allow modifications to fee amounts in two instances:
 - a. The ordinance permits the Planning Board or Planning Authority to grant a credit against required impact fees for any infrastructure improvements made by a developer which are either related or equivalent to the projects for which impact fees are being collected. In these cases, the developer or applicant is required to provide cost estimates, prepared by a license professional engineer, and pay for any third party review required. Typical site plan improvements, such as sidewalks along a site frontage, are not considered eligible for credits.
 - b. Likewise, the draft ordinance includes language allowing the Planning Board to grant credits against required impact fees for developers that can provide evidence that a proposed use will have no or significantly-diminished demands on the capital facilities for which impact fees are being collected. As above, the developer is required to provide documentation and pay for any required third party reviews.
- D. *Fee reductions for affordable housing.* The draft ordinance includes a reference to Division 30, which establishes a schedule for fee reductions for affordable housing developments. It should be noted that this reference necessitates a minor amendment to Division 30, designed to extend affordable housing fee reductions to impact fees, which is also proposed here (*Attachment 5*). The concept of this fee reduction is a direct response to concerns regarding the effects of impact fees on the production of affordable housing. Guidance from the former State Planning Office suggests that fee waivers can be justified for affordable housing so long as there is a sound public policy basis and the fee is made whole by the municipality using funds from an alternate source. However, it should also be noted that Corporation Counsel has provided a memo speaking to the question of other use-specific waivers or carve outs, and these are generally not recommended (*Attachment 6*).
- E. *Administration of funds.* The draft ordinance language also addresses the timing of impact fee collection, accounting procedures, and procedure for refunds as necessary. Fees would be assessed at the time of

building permit to provide predictability for developers and paid at the time of certificate of occupancy to more closely link the fee payment with the occurrence of impacts.

In addition to addressing statutory requirements and administrative matters, where necessary, the final draft ordinance also attempts to respond to questions raised by Board members and Councilors in the late September workshops. These included:

A. How do the impact fee land use categories align with the categories in the land use code?

The land use categories represented in the impact fee schedules are purposefully designed to be broad. As part of their contract, TischlerBise will formalize a table categorizing existing uses from the land use code into impact fee categories. However, should a future proposed land use not fit the impact fee structure, the impact fee ordinance provides discretion to the Department of Permitting and Inspections, who will collect the impact fees, to assign the impact fees “applicable to the most nearly comparable type of land use listed in the impact fee schedule.”

B. How would refunds work?

Under the draft ordinance, if a project were not to go forward, refunds would be made to all current holders of properties for which impact fees have been collected, proportionate to that property’s share of the impact fee revenue received for that project. Staff is currently discussing accounting for impact fees, including mechanisms for handling future refunds should they become necessary, with Permitting and Inspections and Finance.

C. Is there a way to exempt small projects?

Communities sometimes have ‘carve outs’ or exemptions built into their impact fee ordinances. However, fundamentally, fees must meet an equal protection test, and every carve out essentially undermines the fundamental premise that projects have impacts on system capacity, and to be equitable, the fee must be charged in a manner proportionate to those impacts, regardless of the project type. A memo from Corporation Counsel has been provided to address this issue (*Attachment 6*).

D. How often should impact fees be revisited?

TischlerBise has recommended a reassessment approximately every five years. The final draft ordinance does not specify a timeline, but explicitly allows for changes in the fee schedule “from time to time as warranted by new information or changed circumstances.”

E. What would the effective date be and how would impact fees be ‘phased in?’

As suggested in the last Planning Board workshop, staff has written the final draft ordinance to apply to all building permit applications submitted following the effective date of the ordinance, with the exception of building permits associated with a site plan approved as of the effective date. The rationale behind this approach is that any project that has received site plan approval as of the ordinance’s passage would have included an assessment of mitigation under the existing site plan review system.

4. DISCUSSION OF THE IMPACT FEE APPROACH

In addition to the technical questions on the fees and ordinance as noted above, the September workshops elicited a number of broader questions about impact fees. These included the following:

A. How do impact fees work in other places?

Generally, impact fees are promoted as an equitable way to address infrastructure demand associated with new growth, as well as a way to add predictability to the development review process. In addition, impact fees are often supported as a means of achieving some measure of economic efficiency; with impact fees, fee payers see direct economic benefit in terms of infrastructure investments that support their development, as

well as indirect benefits in terms of predictability in the permitting process and clarity in municipal capital infrastructure planning. As a result, impact fees have been used in the United States for the past fifty years, and are found in a majority of states nationwide. In Maine, impact fees are used in a number of communities, including York, Berwick, North Berwick, Scarborough, Saco, Windham, Gorham, Freeport, Brunswick, Lewiston, and Pownal. A comparison of fees across Maine is included in *Attachment 7*.

B. What happens if the market slows?

With parks impact fees, which are based on an incremental expansion model, the city is obligated to spend only what it collects to maintain levels of service as the community grows. With the transportation and wastewater fees, however, the city is obligated to construct the improvements for which the fee is collected regardless of how much money the city collects in sum total. This means that, should the city underperform when it comes to growth projections, the General Fund/Sewer Fund would need to cover a larger share of those capital projects than anticipated in the fee calculations. If the city overperforms, more capital projects would need to be added to the transportation and wastewater capital project lists (since we would need to create even more capacity in these systems than assumed during the *Impact Fee Study*.) With both the transportation and wastewater projects, the capital lists are based on existing CIP requests, ranked in terms of readiness, so as to avoid overextending the Department of Public Works. (For reference, altogether, the transportation capital projects included in the *Impact Fee Study* represent a total City cost of \$27 million over the next ten years, of which \$15 million is attributable to growth. The remainder would fall to the City's General Fund. In comparison, the city's FY2018 CIP includes \$8.3 million in transportation projects.) It is also important to note that DPW has stated that it has prioritized the implementation of all of the projects on the transportation and wastewater capital lists over the next ten years regardless of the implementation of an impact fee system.

C. How would impact fees affect land values?

Throughout the *Impact Fee Study*, there have been numerous discussions about the interaction between impact fees, property values, and taxes. Brendan O'Connell, the city's Finance Director, has prepared a memo to address broad questions about the increased tax revenue generated by recent development and how this relates to the City's financial picture more broadly (*Attachment 8*). With respect to the incidence of fees, studies have generally shown that, depending on market conditions, the cost of fees is absorbed by the primary land owner, the developer, or the end consumer, and is often distributed across all three. Guidance from the American Planning Association on this point (www.planning.org/policy/guides/adopted/impactfees) reads,

As a general matter, impact fees are capitalized into land values, and thus represent an exaction on the incremental value of the land attributable to the higher and better use made possible by the new public facilities. Some commentators have argued that, under certain circumstances, others may instead bear the incidence of the fee (these may include the original landowner, the developer, or the consumer). There has been little to demonstrate that the imposition of a fee system has stifled development. The fees supplement local government resources that otherwise have decreased because of diminished state and federal transfers of funds. Local governments have also used impact fees to delay or as a substitute for general property tax increases.

D. How would fees apply to parking lots and structured parking?

Because conventional transportation planning does not consider parking facilities to generate their own trips (instead, the land uses associated with parking are considered to generate trips), parking lots and structured parking would not be assessed a transportation impact fee under the proposed impact fee ordinance. In response to concerns about this approach, both staff and TischlerBise attempted to find research that quantifies induced demand associated with parking garages (i.e. the demand that could be attributed to a

garage alone, and not the associated land uses). Finding no quantitative analysis on which to base calculations, it is difficult to develop an impact fee for garages without running the risk of double counting – charging a garage and associated land uses for the same trips. As a result, staff has maintained the original approach with respect to parking garages.

E. *How does the fee structure align with broader multi-modal and Transportation Demand Management objectives?*

Because the capital projects which are the foundation of the transportation fee are all multi-modal - they are designed to create capacity by adding sidewalks, pedestrian lighting, bike lanes and paths, crosswalks and ADA accessibility, transit accommodations, and signal improvements that enhance efficiency - the transportation fee has been designed around the concept of person trips, trips taken by people associated with a land use regardless of mode. This means that some of the incentives built into the site plan process around shifting modes are not an option with the impact fee. It should be noted that this does not mean that those incentives will not continue to exist during the site plan process, when applicants are required to justify their proposed parking arrangement and, in many cases, develop a Transportation Demand Management plan. In addition, and as noted above, the proposed impact fee ordinance would also allow the City to implement multi-modal infrastructure improvements on the part of the City, which are of course critical in terms of supporting a broader range of transportation options.

F. *Will impact fees have unintended consequences with respect to the City's broader policy objectives?*

Impact fees are intended as a fair and equitable system for addressing public infrastructure improvements necessary to accommodate growth. For this reason, guidance from both the former State Planning Office and Corporation Counsel is clear that the idea of structuring or restructuring fees around particular land use policy goals should be approached carefully. Jen Thompson, Associate Corporation Counsel, writes,

The focus in an impact fee ordinance should be on accurately assessing the true impacts of development on capital facilities and assessing fees that are directly tied to that impact. When fees are preferentially imposed on particular kinds of development are exempted from fees based on other policy goals rather than on the impact of those uses on infrastructure, a municipality runs the risk of undermining the "nexus" that is established to justify the fee. Further, and as with all fees imposed by government, where similar uses have similar impacts it's important to take care that fees and regulations are being applied equally. If distinctions in applicability are going to be made, it is important that the reasons for treating one group differently than another are well-articulated and sound.

G. *How would an impact fee system relate to the City's existing site plan ordinance, Traffic Movement Permit process, and system for addressing mitigation?*

A clear advantage of impact fee systems is that they provide predictability, equity, and efficiency to the development review process. By and large, the proposed impact fee system would replace the existing negotiation that occurs around mitigation through the City's site plan ordinance. It is assumed that some analysis required under site plan review would continue to occur (e.g. in projects that trigger a TMP, traffic analysis is still expected, for instance), and that projects might continue to make off-site improvements in cases when those improvements are necessary for a project to proceed. In these cases, credits could be applied against the impact fee category for which such improvements are made. However, in general, the impact fee would generally replace the final step in the development review process whereby mitigation is assessed.

5. CONSISTENCY WITH *PORTLAND'S PLAN*

As noted above, the proposed impact fee ordinance is a direct product of *Portland's Plan*. The plan calls for an investigation into the “potential of a more robust framework for assessing development-related impacts” in the city to “generate additional funding [for facilities and services], while also adding clarity and predictability to existing [review] procedures” (*Portland's Plan*, 67).

Maybe more importantly, however, the proposed impact fee ordinance is also in many ways a means to achieving the vision of *Portland's Plan*. The capital transportation projects associated with the *Impact Fee Study* are about building multi-modal capacity in our nodes and on our corridors so that those targeted areas can continue to support sustainable growth. The expansion of our parks and facility capacity under an impact fee system is about providing access to these facilities as we grow and “connect the chain.” And the building of capacity in our wastewater system to accommodate growth will ensure that we can meet the environmental goals contained in *Portland's Plan*.

6. PUBLIC COMMENT

It should be noted that, in addition to feedback received through the stakeholder group, staff has received four public comments on the proposed impact fee ordinance (*Attachment 9*). These comments raise questions about the treatment of parking garages, how the ordinance would align with the city's smart growth goals, comparable communities with impact fees, the composition of the stakeholder group, and how a fee system would be implemented. Answers to these questions are generally addressed above.

7. RECOMMENDATION

The staff recommends that the Planning Board find that the proposed amendments to the land use code to create an Impact Fee Ordinance and amend Division 30 to include a fee reduction for affordable housing are consistent with *Portland's Plan* and recommends adoption to the City Council.

8. MOTION FOR THE BOARD TO CONSIDER

On the basis of the application, plans, reports and other information submitted by the applicant, findings and recommendations contained in the Planning Board Report for the public hearing on October 9, 2018, and on the basis of the testimony presented at the public hearing, the Planning Board finds that the proposed Impact Fee Ordinance and amendment to Division 30 [are or are not] consistent with *Portland's Plan* and therefore [recommends or does not recommend] adoption of these amendments to the City Council.

9. ATTACHMENTS

1. List of Stakeholder Group members
2. 2018 Impact Fee Study, TischlerBise, 10/3/18
3. Portland Impact Fee Analysis, Colliers International, 9/20/18
4. Proposed Draft Impact Fee Ordinance
5. Proposed Amendments to Division 30, 9/28/18
6. Memo from Jennifer Thompson, Associate Corporation Counsel, 10/4/18
7. Comparable Fee Study, TischlerBise
8. Impact Fee – Questions and Answers from Finance Director & Assessor, 8/12/18
9. Public Comment