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The Ohio Supreme Court's Perverse Stance on Development Impact Fees and What To Do About It

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THE OHIO SUPREME COURT'S PERVERSE STANCE ON DEVELOPMENT IMPACT FEES AND WHAT TO DO ABOUT IT

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ABSTRACT

Ohio is among the twenty-two states that have no enabling legislation for development impact fees. But in a 2000 ruling, *Homebuilders Association of Dayton and the Miami Valley v. City of Beavercreek*, a divided Ohio Supreme Court ruled that municipalities could lawfully enact impact fees under their police and "home rule" powers, provided that the fees could pass constitutional muster under a "dual rational nexus test." On May 31, 2012, however, the court ruled in *Drees Company v. Hamilton Township*, that a development impact fee enacted by an Ohio township with "limited home rule" powers was an unconstitutional tax. The court's unanimous opinion in *Hamilton Township* was authored by Justice Paul Pfeiffer, who, twelve years before, had authored the main dissenting opinion in the *Beavercreek* case. This Article faults the court's opinion invalidating the impact fees in *Hamilton Township*, arguing that the court, rather than engaging in a fair-handed analysis, chose instead to rely on very limited authority to support a conclusion that appears to have been pre-determined. In particular, the Article demonstrates that the court failed even to acknowledge, let alone distinguish: (1) its earlier ruling upholding impact fees in *Beavercreek*; and (2) the state supreme court decisions that had rejected the reasoning of the Iowa and Mississippi courts upon which the court relied in part. The Article notes that the court's ruling leaves Ohio with a bifurcated approach to impact fees that is perverse because it makes impact fees most defensible in municipalities, in many of which there is little new development, and thus the need for impact fees is less, and effectively prohibits their use in rapidly-developing townships where they are needed most. The Article concludes that the time is long-past for the legislature to examine the policy debate on impact fees and make a decision about adopting enabling legislation for impact fees, and that the decision should be to join the majority of states that have enacted such legislation.

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I. INTRODUCTION

Ohio was a pioneer in zoning and land-use regulation,[1] but the consensus view among scholars is that the state has lagged behind in recent decades.[2] Since the 1950s, many states have comprehensively updated their zoning enabling legislation,[3] enacted environmental impact assessment legislation,[4] or recognized the need to

[1] The leading role that Ohio played in the early development of land use regulation in the United States can be seen from the fact that Village of Euclid, Ohio v. Ambler Realty Co., 272 U.S. 365 (1926), the landmark decision of the United States Supreme Court establishing the constitutionality of zoning, was an Ohio case. *See generally* MICHAEL ALLAN WOLF, THE ZONING OF AMERICA: *EUCLID V. AMBLER* (Peter C. Huffer & N. E. H. Hull eds., 2008).

[2] *See, e.g.*, STUART MECK & KENNETH PEARLMAN, OHIO PLANNING & ZONING LAW 62 (2011), noting that the only major effort to reassess Ohio zoning and planning laws since their inception, the Ohio Land Use Review Committee, created by the General Assembly in 1975, failed to produce comprehensive legislative changes. More recently, recommendations for comprehensive changes to update the Ohio system of land use regulation, including enabling legislation for development impact fees, died in committee. *Report of the Subcomm. on Growth & Land Use*, 125th Gen. Assembly (2004) (Rep. Larry Wolpert, Chairman Ohio House of Representatives, County & Township Government Committee), *available at* http://www.hamiltoncountyohio.gov/hcrpc/fsc/documents/reference/Wolpert%20Report.pd.

[3] *See generally* FRED BOSSELMAN & DAVID CALLIES, THE QUIET REVOLUTION IN LAND USE CONTROL (1972) (describing and analyzing these changes).

[4] In New York State, for example, most projects or activities proposed by a state agency or unit of local government, and all discretionary approvals (permits) from a state agency or unit of local government, require an environmental impact assessment as prescribed by N.Y. COMP. CODES R. & REGS. tit. 6, § 617 (2012) for the State Environmental Quality Review (SEQR). *See* N.Y. ENVTL. CONSER. LAW §§ 3-0301(b), 3-0301(2)(m), 8-0113 (McKinney 2012). Similarly, California imposed requirements for assessing the environmental impact of projects date in 1970 with the enactment of the California Environmental Quality Act (codified at CAL. PUB. CONT. § 21000(a), 21000(g) (West 2012)), which requires that state and

create effective mechanisms for land-use regulation beyond the boundaries of a single jurisdiction.[5] Ohio, in contrast, has rejected such efforts[6] and the Ohio Revised Code retains essentially the zoning laws that were first enacted in 1920.[7]

Ohio is also among the twenty-two states that have no enabling legislation for development impact fees,[8] a mechanism for insuring that new developments pay their fair share of the costs for the new infrastructure they will require.[9] But in a 2000 ruling, *Homebuilders Association of Dayton and the Miami Valley v. City of Beavercreek*,[10] a divided Ohio Supreme Court approved the use of development impact fees by municipalities,[11] with the four justice majority[12] ruling that

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local agencies consider the environmental impact of their decisions when approving a public or private project.

[5] *See, e.g*., Janice Griffith, *Smart Governance for Smart Growth: The Need for Regional Governments*, 17 GA. ST. U. L. REV. 1019 (2001); Katherine J. Jackson, *The Need for Regional Management of Growth*, 37 URB. LAW 299 (2005).

[6] MECK & PEARLMAN, *supra* note 2.

[7] H.B. 697, 83rd Gen. Assembly (1920); *see* MECK & PEARLMAN, *supra* note 2, at 61, stating, in regards to Ohio's zoning enabling legislation: "Today their structure remains fundamentally unchanged from their original versions."

[8] As of January 2012, twenty-eight states had enacted development impact fee enablinglegislation. Arizona: ARIZ. REV. STAT. ANN. §§ 9-463.05 (cities), 11-1102 (counties) (1998); Arkansas: ARK. CODE ANN. § 14-56-103 (West 2003) (cities only); California: CAL. GOV'T CODE §§ 66000.5 (mitigation fee act), 66477 (Quimby Act park dedication/fee-in-lieu), 17620 (school fees) (repealed) (West 1989); Colorado: COLO. REV. STAT. §§ 29-20-104.5, 29-1-801-804 (earmarking requirements), 22-54-102 (school fee prohibition) (2001); Florida: FLA. STAT. § 163.31801 (2006); Georgia: GA. CODE. ANN §§ 36-71-1 (1990); Hawaii: HAW. REV. STAT. §§ 46-141, 264-121, 320 (schools) (1992); Idaho: IDAHO CODE ANN. § 67-8201 (1992); Illinois: 605 ILL. COMP. STAT. ANN. § 5/5-901 (West 1987); Indiana: IND. CODE ANN. §§ 36-7-4-1300-1399 (West 1991); Maine: ME. REV. STAT. ANN. tit.30-A, § 4354 (1988); Maryland: MD. CODE ANN, Art. 25B, § 13D (West 1992) (code home rule counties only); Montana: MONT. CODE ANN. § 7-6-1601 (2005); Nevada: NEV. REV. STAT., § 278B (1989); New Hampshire: N.H. REV. STAT. ANN. § 674:21 (1991); New Jersey: N.J. STAT. ANN. §§ 27:1C-1, 40:55D-42 (West 1989); New Mexico: N.M. STAT. ANN. § 5-8-1 (1993) (Conway Green); Oregon: OR. REV. STAT. § 223.297 (1991); Pennsylvania: 53 PA. CONS. STAT. § 10503-A (1990); Rhode Island: R.I. GEN. LAWS §45-22.4 (2000); South Carolina: S.C. CODE ANN. § 6-1-910 (1999); Texas: TEX. LOC. GOV'T ANN. § 395.001 (West 1987); Utah: UTAH CODE ANN. § 11-36-101 (West 1995) (repealed 2011); Vermont: VT. STAT. ANN., tit. 24, § 5200 (West 1998); Virginia: VA. CODE ANN., § 15.2-2317 (1990); Washington: WASH. REV. CODE § 82.02.050 (1991); West Virginia: W. VA. CODE, § 7-20-1 (1990) (counties); and Wisconsin: WIS. STATS. § 66.0617 (1993).

[9] *See generally* 1 JAMES A. KUSHNER, SUBDIVISION LAW AND GROWTH MANAGEMENT § 6:31 (2nd ed. 2012); JAMES C. NICHOLAS, ARTHUR C. NELSON & JULIAN C. JUERGENSMEYER, A PRACTITIONER'S GUIDE TO DEVELOPMENT IMPACT FEES (1991).

[10] Homebuilders Ass'n of Dayton & the Miami Valley v. City of Beavercreek, 729 N.E.2d 349 (Ohio 2000).

[11] Local governments in Ohio are classified as either municipal corporations (municipalities)—which includes villages (population of less than 5,000) and cities (population of 5,000 or more), see OHIO CONST. art. 18, § 1—or unincorporated townships, which range in population from a few hundred to more than 60,000. *See* OHIO DEP'T OF DEV., POLICY RESEARCH & STRATEGIC PLANNING OFFICE, 2010 POPULATION CENSUS COUNT BY

municipalities could lawfully enact impact fees under their police and "home rule" powers,[13] provided that the fees could pass constitutional muster under a "dual rational nexus test."[14] On May 31, 2012, however, the court ruled in *Drees Company v. Hamilton Township*,[15] that a development impact fee enacted by an Ohio township with "limited home rule"[16] powers was an unconstitutional tax. The court's unanimous opinion in *Hamilton Township* was authored by Justice Paul Pfeiffer, who, twelve years before, had authored the main dissenting opinion in the *Beavercreek* case.

This Article faults the court's opinion invalidating the impact fees in *Hamilton Township*, arguing that the court, rather than engaging in a fair-handed analysis, chose instead to rely on very limited authority to support a conclusion that appears to have been pre-determined. In particular, the Article demonstrates that the court failed even to acknowledge, let alone distinguish: (1) its earlier ruling upholding impact fees in *Beavercreek*; and (2) the state supreme court decisions that had rejected the reasoning of the Iowa and Mississippi courts upon which the court relied in part. The Article notes that the court's ruling leaves Ohio with a bifurcated approach to impact fees that is perverse because it makes impact fees most defensible in municipalities, in many of which there is little new development, and thus the need for impact fees is less, and effectively prohibits their use in rapidly-developing townships where they are needed most. The Article concludes that the time is long-past for the legislature to examine the policy debate on impact fees and

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COUNTY, CITY, VILLAGE AND TOWNSHIP (Mar. 2011), *available at* http://www.development.ohio.gov/research/documents/ALLSUB COUNTY2010.pdf.

[12] Chief Justice Moyer wrote the majority opinion, joined by Justices Douglas, Lundberg Stratton, and Sweeney, Sr.; Justice Pfeiffer wrote a dissent, with which Justice Resnick concurred, and Justice Cook dissented separately.

[13] OHIO CONST. art. 18, § 3 grants all municipalities the "authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws." Section 4 grants any municipality the authority to "frame and adopt or amend a charter for its government and may, subject to the provisions of section 3 of this article, exercise thereunder all powers of local self-government." Municipalities that do not adopt a charter still have "home rule" authority "to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws," but must follow the procedural provisions in the Revised Code as regards the exercise of their powers of local self-government. *See generally* GEORGE D. VAUBEL, MUNICIPAL HOME RULE IN OHIO (1st ed. 1978); George D. Vaubel, *Municipal Home Rule in Ohio: 1976-1995*, 22 OHIO N.U. L. REV. 143 (1995).

[14] *See infra* text accompanying notes 45-51.

[15] Drees Co. v. Hamilton Twp., 970 N.E.2d 916 (Ohio 2012).

[16] OHIO REV. CODE ANN. 504 (West 2011) (ORC) governs the establishment of and powers granted to townships which adopt a limited home rule form of government. Limited home rule enables townships to enact legislation over a broad range of areas in which that they could not have legislated as a statutory township having only those powers granted expressly by the ORC. As with home rule municipalities, limited home rule townships may not enact legislation specifically prohibited by the ORC or in conflict with the general laws of the state.

make a decision about adopting enabling legislation for impact fees, and that the decision should be to join the majority of states that have enacted such legislation.

II. BACKGROUND: ORIGIN AND EXPANSION OF DEVELOPMENT IMPACT FEES

Local governments have long imposed so-called "dedication" requirements as a condition for subdivision approvals, requiring that developers dedicate land within the subdivision for roads, school, and parks.[17] In the case of smaller subdivisions, however, land dedication was often problematic because the dedication required in a small subdivision was too fragmentary to host a functional school or park and/or was not in a suitable location.[18] To address this problem, local governments began to require that the developer pay a fee in lieu of dedication as a condition for subdivision approval of his project, then used those funds to finance schools, parks, and other off-site improvements.[19]

Development impact fees (hereafter "impact fees") were a natural outgrowth of these fee-in-lieu of dedication requirements. In the 1970s, local governments began to levy impact fees on new development to generate revenue for capital facilities, the need for which was created by the new development. The rationale behind impact fees is straight-forward: new development should be required to pay its fair-share of the costs of providing public services and facilities to meet the demand for those services and facilities created by those who would be living in the new development.[20] With the decline of federal and state grants to local governments[21]

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[17] *See* Theodore C. Taub, *Exactions, Linkages and Regulatory Takings: The Developer's Perspective*, 20 URB. LAW. 515, 520-21 (1988). *See generally* KUSHNER, *supra* note 9, at § 6.

[18] Taub, *supra* note 17 (citing Donald L. Connors & Michael E. High, *The Expanding Circle of Exactions: From Dedication To Linkage*, 50 LAW & CONTEMP. PROBS. 69 (1987)).

[19] *See* NICHOLAS, NELSON & JUERGENSMEYER, *supra* note 9, at 11, which notes:

> Payment in lieu is employed when actual dedication or provision of land or improvements is not practical or feasible. For example, under a requirement to set aside 5 percent of a development's land area as open space, a five-acre subdivision would reserve one-quarter of an acre. Such a site might prove to be totally impractical for both the subdivision and the community. The alternatives were either to exempt smaller subdivisions from such requirements or to allow a payment to be made in lieu of dedication. This resulted in local governments requiring money in lieu of land dedication. The money exacted was to equal the value of the land that would have been dedicated.

See also Julian Conrad Juergensmeyer & Robert Blake, *Impact Fees: An Answer To Local Government's Capital Funding Dilemma*, 9 FLA. ST. U.L. REV. 415, 418 (1981).

[20] *See generally* KUSHNER, *supra* note 9; Connors & High, *supra* note 18; Juergensmeyer & Blake, *supra* note 19.

[21] Professor Nelson notes: "From 1955 through 1978, federal aid to local governments and states expanded from 0.8% of the gross national product (GNP) to 3.6%. But between 1978 and 1991, federal aid shrunk to 2.8%." Arthur C. Nelson, *Development Impact Fees: The Next Generation*, 26 URB. LAW. 541, 542 n.4 (1994) (citing 2 ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, SIGNIFICANT FEATURES OF FISCAL FEDERALISM 50, Table 24 (1991)); *see also* ALAN A. ALTSHULER & JOSE A. GOMEZ-IBANEZ, REGULATION FOR REVENUE: THE POLITICAL ECONOMY OF LAND USE EXACTIONS 25-26 (1993) (discussing cutbacks in federal aid); James C. Nicholas, *Impact Exactions: Economic Theory, Practice and Incidence*, 50 LAW & CONTEMP. PROBS. 85, 85-86 (1987) discussing the diminished role of federal and

and the anti-tax revolution in the late 1970s,[22] the use of impact fees expanded in the 1980s to include an array of municipal facilities/services, such as fire, police, and libraries.[23]

The legal status of impact fees was initially at issue, but a series of court cases from California,[24] Florida,[25] and Utah[26] validated their usage in the 1970s and 80s and, by 1986, three states had enacted impact fee enabling legislation.[27] Over the next twenty-five years, more than half the states adopted such acts[28] and, even in states without enabling legislation, impact fees frequently exist in one form or another, having been enacted on the basis of local home rule powers or jurisdiction-specific enabling legislation.[29]

III. THE CURRENT STATUS OF IMPACT FEES IN OHIO

A. The Road to Beavercreek

As noted in the Introduction, while Ohio is among the minority of states that has not enacted enabling legislation for impact fees, in *Beavercreek,*[30] the Ohio Supreme Court approved the use of impact fees by municipalities, provided certain conditions were met.[31] Prior to *Beavercreek*, which approved an impact fee for road improvements, the Ohio courts had considered only a handful of "impact fee-like" cases, all of which involved fees charged to new development for either utility tap-

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state governments in financing infrastructure and the resulting shift to user fees as a financing mechanism); Taub, *supra* note 17, at 519 (noting cutbacks in federal aid).

[22] The 1978 adoption by Initiative of Proposition 13 in California, amending the California Constitution to impose strict limits on the rate of increase for real property tax assessments, is the prime example of such tax-payer "revolts" against increasing property taxes. *See* ALTSHULER, note 21, at 23; *see also* Julie K. Koyoma, *Financing Local Government in the Post-Proposition 13 Era: The Use and Effectiveness of Nontaxing Revenue Sources*, 22 PAC. L.J. 1333, 1336-37 (1991).

[23] Taub, *supra* note 17, at 520 n.25 (citing John J. Delaney, Larry A. Gordon & Kathryn J. Hess, *The Needs-Nexus Analysis: A Unified Test for Validating Subdivision Exactions, User Impact Fees and Linkage*, 50 LAW & CONTEMP. PROBS. 139, 143 (1987)).

[24] Associated Home Builders of Greater East Bay, Inc. v. City of Walnut Creek, 484 P.2d 606 (Cal. 1971); J.W. Jones Cos. v. San Diego, 203 Cal. Rptr. 580 (Ct. App. 1984).

[25] Contractors & Builders Ass'n of Pinellas Cnty. v. Dunedin, 329 So. 2d 314 (Fla. 1976); Hollywood, Inc. v. Broward Cnty., 431 So. 2d 606 (Fla. Dist. Ct. App. 1983); Home Builders & Contractors Ass'n of Palm Beach Cnty. V. Bd. Of Cnty. Comm'rs of Palm Beach Cnty., 446 So. 2d 140 (Fla. Dist. Ct. App. 1983).

[26] Call v. City of West Jordan, 606 P.2d 217 (Utah 1979).

[27] Martin L. Leitner & Susan P. Schoettle, *A Survey of State Impact Fee Enabling Legislation*, 25 URB. LAW. 491, 516 (1993) (listing Arizona, California, and New Jersey).

[28] *See* state legislation cited *supra* note 8.

[29] JULIAN CONRAD JUERGENSMEYER & THOMAS E. ROBERTS, LAND USE PLANNING AND DEVELOPMENT REGULATION LAW 508 (2d ed. 2007).

[30] Homebuilders Ass'n of Dayton & the Miami Valley v. City of Beavercreek, 729 N.E.2d 349 (Ohio 2000).

[31] *See infra* text accompanying notes 43-51.

ins or recreational facilities. These cases focused on three main issues: (1) whether the charges should be considered a fee or a tax; (2) under what authority was the fee (or tax) enacted; and (3) the reasonableness of the amount of the fee (or tax).

In decisions spanning almost three decades that formed the backdrop for the *Beavercreek* decision, Ohio courts ruled that: (1) municipalities had authority under Article XVIII, Section 4 of the Ohio Constitution[32] to adopt ordinances for water and sewer tap-in fees, so long as the fees are "fair and reasonable and bear a substantial relationship to the cost involved in providing the service;"[33] (2) it is unlawful to impose fees that exceed the costs of the services provided;[34] (3) taxing new development to fund the building, maintenance, and operation of new recreation facilities is lawful, provided the revenue derived from the tax is "matched" each year by an appropriation from general revenues;[35] and (4) courts could re-characterize as a tax what a municipality had labeled as an impact fee.[36]

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[32] Article XVIII, Section 4, captioned, "Acquisition of public utility; contract for service; condemnation" states:

> Any municipality may acquire, construct, own, lease and operate within or without its corporate limits, any public utility the product or service of which is or is to be supplied to the municipality or its inhabitants, and may contract with others for any such product or service. The acquisition of any such public utility may be by condemnation or otherwise, and a municipality may acquire thereby the use of, or full title to, the property and franchise of any company or person supplying to the municipality or its inhabitants the service or product of any such utility.

OHIO CONST. art. XVIII, § 4. This Article was adopted as part of a referendum held on September 3, 1912 to consider a number of amendments proposed by the Constitutional Convention of 1912. *See generally* STEVEN H. STEINGLASS & GINO J. SCARSELLI, THE OHIO STATE CONSTITUTION: A REFERENCE GUIDE (2004).

[33] Englewood Hills, Inc. v. Village of Englewood, 237 N.E.2d 621, 624 (Ohio Ct. App. 1967); *see also* Amherst Builders Ass'n v. City of Amherst, 402 N.E.2d 1181 (Ohio 1980) (upholding sewer connection fees on new users that were segregated into a special fund to pay for servicing those users).

[34] State *ex rel.* Waterbury Dev. Co. v. Witten, 387 N.E.2d 1380 (Ohio Ct. App. 1977), *aff'd*, 377 N.E.2d 505 (1978) (striking down an "equity value" charge on new connections calculated to recoup expenditures previously made to construct the existing water system and for the costs of future expansion).

[35] Towne Props., Inc. v. City of Fairfield, 364 N.E.2d 289 (Ohio 1977). In *Bldg. Indus. Ass'n of Cleveland & Suburban Cntys. v. City of Westlake*, 660 N.E.2d 501 (Ohio Ct. App. 1995), *appeal dismissed as not allowed*, 655 N.E.2d 738 (Ohio 1995), *reconsideration denied*, 656 N.E.2d 1300 (Ohio 1995), the appeals court invalidated a recreation facility impact fee on new development. The court characterized the "fee" as a tax and ruled it was unlawful because the funds generated from taxing new development could be used to maintain and operate *existing* recreation facilities and there was no matching funds requirement as had been the case in *Towne Properties*.

[36] Bldg. Indus. Ass'n of Cleveland & Suburban Cntys. v. City of Westlake, 660 N.E.2d 501 (Ohio Ct. App. 1995), *appeal dismissed as not allowed*, 655 N.E.2d 738 (Ohio 1995), *reconsideration denied*, 656 N.E.2d 1300 (Ohio 1995).

B. Beavercreek *in the Lower Courts*

The *Beavercreek* litigation arose from efforts by a fast-growing Dayton suburb to deal with "intense development pressure in the northern part of the city due to a combination of factors, including the completion of Interstate 675, and the proximity of Interstate 70 and major traffic generators like Wright Patterson Air Force Base and Wright State University" plus plans for a regional mall in the same general area.[37] The city manager decided that an impact fee ordinance should be enacted to help finance road construction and formed a team of city employees and outside consultants to formulate an impact fee ordinance which was enacted in November 1993.[38] The Homebuilders Association and owners of properties affected by the ordinance sued.

The trial court partially granted the city's motion for summary judgment, ruling that the city could lawfully enact an impact fee ordinance based on its police powers and home rule authority and that the ordinance was not an invalid tax, but denied summary judgment for both sides on equal protection and due process claims. At trial, the court rejected all challenges to the ordinance, including a claim that the ordinance was an unconstitutional taking without compensation,[39] and entered judgment for the city.[40]

The District Court of Appeals reversed and remanded, but was then itself reversed by the Supreme Court. The critical point on which the District Court and the Supreme Court differed was whether the amounts charged under Beavercreek's impact fee ordinance constituted an invalid tax. The District Court had characterized the charges as a tax. While it acknowledged that "some features weigh in favor of the impact charge being considered a fee, the more significant criteria point to the fact that the fee is, in reality, a tax."[41] Having found the charges to be a tax, the District Court, citing *Towne Properties*[42] and *Westlake*[43] as controlling, ruled the tax invalid because the city had not provided for a matching fund.

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[37] Homebuilders Ass'n of Dayton & the Miami Valley v. City of Beavercreek, Nos. 97-CA-113, 97-CA-115, 1998 WL 735931, at *1 (Ohio Ct. App. Oct. 23, 1998), *rev'd*, 729 N.E.2d 349 (Ohio 2000).

[38] *Id.* The "team" comprised the City Attorney, City Planning Director, City Engineer, City Finance Director, Assistant City Manager, and outside consultants in planning/engineering and economic forecasting. The ordinance language itself was based on a model impact fee ordinance promulgated by the American Planning Association. *Id.* at *2.

[39] Homebuilders Ass'n of Dayton & the Miami Valley v. City of Beavercreek, 729 N.E.2d 349 (Ohio 2000).

[40] *City of Beavercreek*, 1998 WL 735931, at *3.

[41] *Id.* at *6. The District Court, applying factors for differentiating between a fee and a tax developed in *State* ex rel. *Petroleum Underground Storage Tank Release Comp. Bd. v. Withrow*, 579 N.E.2d 705 (Ohio 1991), cited the following to support its finding: (1) funds collected under the ordinance were placed in the city's general revenue fund and then used to pay for litigation expenses in defending the ordinance; (2) interest earned on the funds collected under the ordinance were placed in the city's general revenue fund; (3) a small group is paying the fees while the benefits paid for by the fees are available to the public generally; and (4) the primary purpose of the fee was to raise revenue rather than to regulate. *Id.* at *6-11.

[42] Towne Prop., Inc. v. City of Fairfield, 364 N.E. 2d 289 (Ohio 1977).

C. Beavercreek *at the Supreme Court*

The Supreme Court majority rejected the District Court's tax vs. fee dichotomy, arguing that "the important factor in determining the constitutionality of an ordinance is whether the ordinance is unduly burdensome in application and not its label as a tax or an impact fee."[44] The majority then argued that while a matching fund provision was a factor that courts might consider to determine the constitutionality of an impact fee, the lack of a matching fund was not fatal constitutionally. Rather, "[t]he appropriate test is one that examines whether the fee is in proportion to the developer's share of the city's costs to construct and maintain roadways that will be used by the general public."[45]

"Proportionality" would seem to be a workable test for the legality of an impact fee, and, in fact, is part of the *Nollan/Dolan* "dual rational nexus/proportionality" test announced by the U.S. Supreme Court as appropriate to determine the constitutionality of development exactions.[46] The *Beavercreek* majority, however, engaged in an extensive discussion of what test they should adopt, analyzing how the District Court, and the trial court before it, had addressed the plaintiffs' assertion that the impact fee ordinance was an illegal taking of property without just compensation

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[43] Bldg. Indus. Ass'n of Cleveland & Suburban Cntys. v. City of Westlake, 660 N.E.2d 501 (Ohio Ct. App. 1995), *appeal dismissed as not allowed*, 655 N.E.2d 738 (Ohio 1995), *reconsideration denied*, 656 N.E.2d 1300 (Ohio 1995).

[44] *City of Beavercreek*, 729 N.E.2d at 353.

[45] *Id.* at 354. The majority spoke too broadly on this point. While road *construction* costs may appropriately be included in calculating an impact fee, future road maintenance costs would generally be considered inappropriate. *See, e.g.*, Ronald H. Rosenberg, *The Changing Culture of American Land Use Regulation: Paying for Growth with Impact Fees*, 59 SMU L. REV. 177, 205 n.101 (2006), where the author writes:

> It has been uniformly stated by analysts, courts, and legislatures that on-going operation and maintenance expenses are not to be paid for by impact fees and that the fees are only to provide funding for capital improvement costs necessitated by development. This view apparently stems from the view that the funding of operation and maintenance should come from generally-derived tax revenues as a general operating cost of government. Implicit in this outlook is the idea that such a general community expense should not be charged to a limited segment of the locality's population through a focused impact fee on new development.

(citing JULIAN CONRAD JUERGENSMEYER & THOMAS E. ROBERTS, LAND USE PLANNING AND DEVELOPMENT REGULATION LAW 328-32 (2003)).

[46] In *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987), the Court ruled that an exaction required as a condition for development approval could only be justified constitutionally if there was an "essential nexus" between the condition imposed and the governmental interest claimed as the justification for the condition. Because the government could not meet this test in *Nollan*, the Court did not reach the question of how exact a measurement of the "essential nexus" was required to pass constitutional muster. That question was answered in *Dolan v. City of Tigard*, 512 U.S. 374 (1994), with the Court ruling that the appropriate test was "rough proportionality." *See generally* BRIAN W. BLAESSER & ALAN C. WEINSTEIN, FEDERAL LAND USE LAW & LITIGATION 263-70 (2011).

in violation of both the United States and Ohio constitutions.[47] The majority ultimately agreed with the trial court that the *Nollan/Dolan* standard was the most appropriate.[48]

The majority's standard required first that the city "demonstrate that there is a reasonable relationship between the city's interests in constructing new roadways and the increase in traffic generated by new development."[49] If that reasonable relationship is demonstrated, the city must then demonstrate "that there is a reasonable relationship between the impact fee imposed by Beavercreek and the benefits accruing to the developer from the construction of new roadways."[50] The majority noted that this portion of the test "addresses whether the developer and the city are paying their proportionate shares of the costs necessary to construct new roadways."[51] The majority then explained that while a matching fund provision was one way to measure whether a city's contribution met its obligation to pay a proportionate share of project costs, it was not the only permissible way the city could meet its proportionate share obligation, noting various "credits" that the city would apply towards a developer's obligation under the ordinance.[52] Applying the

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[47] *City of Beavercreek*, 729 N.E.2d at 354-56. The trial court had applied the *Nollan/Dolan* test in upholding the impact fee. The District Court, after an exhaustive analysis of the appropriate standard, ultimately concluded that

> although the words used to describe the various tests may be different, the tests all actually focus in legal terms, and in application, on the existence of a connection between the dedication or fee and the needs generated by the development. Whether one wants to call this "reasonable relationship," "rational nexus," "rough proportionality," or "specifically and uniquely attributable," the important issue is whether the dedication or fee is reasonably connected to the needs created by the development.

Homebuilders Ass'n of Dayton & the Miami Valley v. City of Beavercreek, Nos. 97-CA-113, 97-CA-115, 1998 WL 735931, at *18 (Ohio Ct. App. Oct. 23, 1998), *rev'd*, 729 N.E.2d 349 (Ohio 2000).

[48] *City of Beavercreek*, 729 N.E.2d at 353. The majority, however, failed to address the concern that had been raised by some courts about extending the *Nollan/Dolan* approach to uniform legislatively enacted impact fees. *See, e.g.*, Ehrlich v. City of Culver City, 911 P.2d 429 (Cal. 1996). Further, while acknowledging that the "dual rational nexus/rough proportionality test" arose in the context of land-use exactions that required landowners seeking a permit to dedicate land to public use, the majority did not acknowledge that the U.S. Supreme Court had suggested that *Dolan*'s rough proportionality test should not be extended beyond "the special context of exactions—land-use decisions conditioning approval of development on the dedication of property to public use." City of Monterey v. Del Monte Dunes, Ltd., 526 U.S. 687, 702 (1999); *see also* JUERGENSMEYER & ROBERTS, *supra* note 29, at 527-34; Steven A. Haskins, *Closing the* Dolan *Deal – Bridging the Legislative/Adjudicative Divide*, 38 URB. LAW. 487 (2006). *See generally* Charles Thompson Switzer, Note, *Escaping the Takings Maze: Impact Fees and the Limits of the Takings Clause*, 62 VAND. L. REV. 1315, 1328-40 (2009) (discussing four approaches to the issue of applying *Nollan/Dolan* to impact fees and concluding they should not be applied).

[49] *City of Beavercreek*, 729 N.E.2d at 356.

[50] *Id.*

[51] *Id*. at 357.

[52] *Id*. at 357-58.

standard it had just announced, the majority concluded that the city had met its burden.

Three of the seven justices dissented. Justice Pfeiffer, joined by Justice Resnick, rejected the majority's argument that "classification as an impact fee or a tax is not determinative" and would have struck down the impact fee ordinance as an unconstitutional tax.[53] In the alternative, he argued that if a particular impact fee ordinance was not found to be an invalid tax, then he would favor judging the constitutionality of the fee under the "specifically and uniquely attributable to the needs of the development" standard, a "stricter test than that put forth by the majority."[54] Finally, he claimed that the impact fee at issue did not meet the second part of the majority's dual rational nexus test because the city was not obligated to provide any of the credits potentially available.[55] Justice Cook dissented separately, stating that he would have affirmed the District Court's decision based on that court's reasoning that the impact fee was actually an invalid tax because the ordinance did not contain a mandatory matching funds provision.[56]

D. Limits of the Beavercreek *Ruling*

Given the lack of state impact fee enabling legislation in Ohio, the *Beavercreek* ruling at least clarified that municipalities could enact impact fees based on their police and home rule powers[57] and provided a workable standard for judging such fees.[58] But *Beavercreek* provided far less guidance than would well-drafted state impact fee enabling legislation. Stuart Meck and Ken Pearlman provide an extensive, but not exhaustive, list of questions that remained after *Beavercreek*, which state legislation could address:

> [T]here are still many policy issues that state legislation could resolve. For example, what happens to impact fees from an individual development that a municipality has not expended within a certain period of time (say, five years), something the appeals court noted the Beavercreek ordinance failed to provide for? If they are to be rebated, should that be with interest? What level of service may a local unit of government impose and what kind of studies should be necessary to impose it? Should all governmental facilities that create an impact on traffic be exempted from payment of impact fees, as the Beavercreek ordinance provided for? Is there any obligation to first correct existing

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[53] *Id.* at 358-59.

[54] *Id.* at 359; Justice Pfeiffer failed, however, to acknowledge that the majority's dual rational nexus standard was the view espoused by most state courts. *See* JUERGENSMEYER & ROBERTS, *supra* note 29, at 420.

[55] *City of Beavercreek*, 729 NE.2d at 359.

[56] *Id.*

[57] JUERGENSMEYER & ROBERTS, *supra* note 29, at 519. Note that, in the absence of enabling legislation, a major attack on the legality of impact fees has been the claim that "they were not authorized by state statute or constitutional provision and therefore were void as *ultra vires* acts of the governmental entities which had enacted them." *Id.*

[58] *See id.* at 523-27 (discussion of various standards); *City of Beavercreek*, 729 N.E.2d at 354-56.

> conditions that do not satisfy adopted level of service standards before addressing future conditions? What kind of requirements should be placed on municipalities to plan future land use on which the full build-out of the impact fee district may be calculated and to prepare, adopt, and execute capital improvement programs? Until the Ohio General Assembly acts, these questions and many, many others will be litigated, no doubt expensively, on a case-by-case basis.[59]

The above list is far from exhaustive. There are many other questions that *Beavercreek* failed to address, several of which are quite fundamental. A basic question that state enabling legislation could address is the type of infrastructure, facilities, or services that can be funded through impact fees. *Beavercreek* involved road improvements, and the majority opinion makes no mention of other types of facilities, but impact fees have been used to fund far more than roads. Authorizations for infrastructure improvements among the twenty-eight states that currently have enabling acts include: water (twenty-four states), sewer (twenty-four states), storm water (twenty-three states), and parks (twenty-three states).[60] Authorizations for services and facilities include: fire (twenty-two states), police (twenty states), library (thirteen states), solid waste (eleven states), and schools (twelve states).[61]

Julian Juergensmeyer and Tom Roberts list several other important questions that enabling legislation could address:[62] (1) the credits issue, dealing with the extent to which a developer's proportionate share of project costs should be reduced to reflect such items as the developer's previous or future monetary or in-kind contributions (e.g., land dedication or construction of infrastructure) and monetary payments for the infrastructure or services at issue provided by the enacting jurisdiction and/or other levels of government;[63] (2) the capital versus non-capital expenditures problem, dealing with whether monies collected through an impact fee system may ever be used for the maintenance of infrastructure;[64] (3) exemptions from the fee requirements for certain types of development, dealing with the issue of whether the potential exclusionary effect of an impact fee should be mitigated by exempting low and moderate income housing, or other developments deemed to be socially

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[59] MECK & PEARLMAN, *supra* note 2, at 668.

[60] CLANCY MULLEN, DUNCAN ASSOCS., NATIONAL IMPACT FEE SURVEY: 2011 3 (Nov. 20, 2011), *available at* http://www.impactfees.com/publications%20pdf/2011_survey.pdf. Duncan Associates is a nationally-known consulting firm that specializes in plan implementation services, including impact fee studies and ordinances, for local and state governments. Prior surveys prepared by Duncan Associates have been used in other publications. *See, e.g.*, JUERGENSMEYER & ROBERTS, *supra* note 29, at 534-35.

[61] Mullen, *supra* note 60.

[62] JUERGENSMEYER & ROBERTS, *supra* note 29, at 536-40.

[63] *Id*. at 536; *see also* Charles C. Mulcahy & Michelle J. Zimet, *Impact Fees for a Developing Wisconsin*, 79 MARQ. L. REV. 759, 789-90 (1996) (describing credits provision in Wisconsin enabling legislation).

[64] JUERGENSMEYER & ROBERTS, *supra* note 29, at 536.

desirable, from the obligation to pay the impact fees either in full or in part;[65] and (4) what land uses can be charged what impact fees, dealing with the issue, for example, of whether non-residential development may lawfully be charged fees for facilities—such as parks, libraries, and schools—the demand for which is only tenuously connected to non-residential development.[66]

There are also numerous "design" issues that can be addressed through an enabling statute. To list just a few: (1) will there be a requirement that the imposition of an impact fee be based on a capital facilities plan and/or future land-use plan?;[67] (2) when should an impact fee be assessed (or the amount calculated) and when should it be collected?;[68] (3) how frequently must an impact fee be re-calculated?;[69] and (4) what percentage, if any, of the impact fees may be spent on administration of the impact fee system?[70]

Critically, the *Beavercreek* ruling was also lacking in comparison to state enabling legislation in terms of its reach: because the court's ruling addressed impact fees only in the context of municipal home rule authority, it provided no guidance on the issue of whether Ohio townships could lawfully enact impact fees. This was not, *per se,* a failure of the court, of course. The issue of township impact fees was not before the court and the majority could easily have been criticized had they discussed that issue *sua sponte*. But the issue called out to be addressed.

The majority of vacant land undergoing development lay in townships, not municipalities;[71] thus, townships were facing the greatest demand for new

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[65] *Id*. at 537-38; *see also* S. Mark White, *Development Fees and Exemptions for Affordable Housing: Tailoring Regulations to Achieve Multiple Public Objectives,* 6 J. LAND USE & ENVTL. L. 25 (1990).

[66] JUERGENSMEYER & ROBERTS, *supra* note 29, at 538-40; *see also* Volusia Cnty. v. Aberdeen at Ormond Beach, L.P., 760 So. 2d 126 (Fla. 2000) (exempting age-restricted mobile home park that did not permit children as residents from payment of impact fee for schools).

[67] These would be formal documents developed separately from whatever planning was required to justify the imposition of the impact fee. For example, the former Utah impact fee enabling statute, UTAH CODE. ANN. § 11-36-201 (West 2012) (repealed 2011), required a capital facilities plan as a condition for enacting an impact fee.

[68] Developers normally favor having impact fees calculated as soon as possible in the permit approval process, so they know what the amounts will be early-on and can build that into their financial projections, with collection of the fees postponed to the latest possible date in the permit approval process so as to minimize the developer's carrying costs. Government normally favors calculation as late as possible, to avoid the need for recalculation or possible refunds if the project size changes, and collection as soon as possible, again for obvious reasons.

[69] Every two years? Every five? Ten?

[70] The use of impact fee revenue to pay for defending the lawsuit against the City of Beavercreek had been one of the factors cited by the District Court in declaring that the impact fee was actually a tax. Homebuilders Ass'n of Dayton & the Miami Valley v. City of Beavercreek, Nos. 97-CA-113, 97-CA-115, 1998 WL 735931, at *6-9 (Ohio Ct. App. Oct. 23, 1998), *rev'd*, 729 N.E.2d 349 (Ohio 2000).

[71] Data from the "2010 Population Census Count by County, City, Village and Township," OHIO DEP'T OF DEV., *supra* note 11, illustrates this point. For example, in Geauga County and Medina County, largely rural counties neighboring Cleveland and its Cuyahoga County

infrastructure to serve the new development. Further, since 1991, Ohio townships had been able to adopt a "limited home rule" form of government and so it was certainly conceivable that the *Beavercreek* ruling that impact fees could be enacted based on municipal "home rule" authority might, in an appropriate case, be extended to a township that had adopted the "limited home rule" form of government. It would, however, be a dozen years before the issue came before the court.

E. The Hamilton Township *Case*

On May 31, 2012, the court ruled in *Drees Company v. Hamilton Township*,[72] that a development impact fee enacted by an Ohio township with "limited home rule"[73] powers was an unconstitutional tax. The unanimous opinion was authored by Justice Paul Pfeiffer, who, twelve years before, had authored one of the two dissenting opinions in *Beavercreek*.[74]

Hamilton Township is approximately twenty-five miles from downtown Cincinnati, ten miles from I-275, the Interstate that encircles greater Cincinnati,[75] and five miles from I-71, which links Cincinnati to Ohio's two other major cities: Columbus and Cleveland. These locational advantages, combined with ample land available for development plus good schools and services, have made the Township a very desirable place to live:[76] the population has *quadrupled* over the past two decades.[77]

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suburbs, population growth in townships has far exceeded the population growth in municipalities for the past two decades. In Geauga County, where the overall population growth for 1990-2010 was 12,260, 84% of that increase occurred in townships. In Medina County, where the overall population growth for 1990-2010 was 49,984, 60% of that increase occurred in townships. Similar growth patterns occurred elsewhere in Ohio. For example, in Delaware County, neighboring Columbus and its Franklin County suburbs, townships accounted for 61.2% of the population growth from 1990-2010.

[72] Drees Co. v. Hamilton Twp., 970 N.E.2d 916 (Ohio 2012).

[73] Ohio Revised Code Chapter 504 governs the establishment of and powers granted to townships which adopt a limited home rule form of government. OHIO. REV. CODE ANN. § 504 (West 2012). Limited home rule enables townships to enact legislation over a broad range of areas in which that they could not have legislated as a statutory township having only those powers granted expressly by the ORC. As with home rule municipalities, limited home rule townships may not enact legislation specifically prohibited by the ORC or in conflict with the general laws of the state.

[74] Evelyn Lundberg Stratton, the only other remaining member of the *Beavercreek* court, had joined the four-justice majority in that case.

[75] Cincinnati borders the Ohio River and thus portions of I-275 are in both Ohio and Kentucky.

[76] The Township website notes: "Cincy Magazine's article 'Rating the Burbs' ranks Hamilton Township 9th out of 43 communities in the tri-state and overall 7th in community safety (2009)." HAMILTON TWP., http://hamilton-township.org/ (last visited July 26, 2011).

[77] In 1990, the Township had 5,854 residents. By 2010, the population had ballooned to 23,556. OHIO DEP'T OF DEV., *supra* note 11. The most recent population estimate of 23,809 shows continued growth in the township despite the lack of new residential development due to overall real estate market conditions. OHIO DEP'T OF DEV., POLICY RESEARCH & STRATEGIC PLANNING OFFICE, 2011 POPULATION ESTIMATES BY COUNTY, CITY, VILLAGE AND TOWNSHIP (July 2012), *available at* http://development.ohio.gov/research/ documents/P5027.pdf.

Such rapid growth, creating significant demand for both infrastructure and government services, is exactly the circumstance that leads local governments to enact an impact fee ordinance, which is what Hamilton Township did on May 2, 2007.[78] The "ordinance"—Ohio Township legislation is termed a Resolution and I will use that term hereafter—was fairly sophisticated by any standard. It included four fee categories: (1) a road impact fee; (2) a fire protection impact fee; (3) a police protection impact fee; and (4) a park impact fee. The amount of each fee would be calculated for several different types of land-uses (e.g., single-family, multi-family, retail/commercial, industrial, etc.) based on the demand for infrastructure/services that had been calculated for each land-use.[79]

The fees were to be kept in separate accounts segregated from the Township's general fund. If the fees were not spent on projects initiated within three years of their collection date, they would be returned, with interest, to the party that paid the fee.[80] The resolution also exempted certain types of development from payment[81] and created a system of credits towards the road impact fee for certain roadway improvements.[82] Finally, the fees would be phased-in over a two-year period, starting at 33% of their full amount ninety days after the effective date of the resolution, increasing to 66% of their full amount one year after that, and reaching 100% after a second year.[83]

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[78] Drees Co. v. Hamilton Twp., No. CA2009-11-150, 2010 WL 2891746, at *1 (Ohio Ct. App. July 26, 2010).

[79] Thus, for example, single-family and multi-family dwellings paid a park impact fee, but non-residential land uses did not. *Id.* Similarly, a retail/commercial land use paid fire and police impact fees totaling $697 per 1,000 sq. ft., while a warehouse land use paid only $157 per 1,000 square feet. *Id*.

[80] *Id.*

[81] The Resolution exempted the following from payment of fees: (1) Alterations of an existing dwelling unit where no additional dwelling units are created. (2) Replacement of a destroyed, partially destroyed or moved residential building or structure with a new building or structure of the same use and with the same number of dwelling units as the original building or structure. This exemption shall not apply in the case of a destroyed, partially destroyed or moved structure which contains an illegal nonconforming use under the zoning regulations of Hamilton Township, Ohio. (3) Replacement of a destroyed, partially destroyed or moved nonresidential building or structure with a new building or structure of the same use and not exceeding the gross floor area of the original building or structure. (4) Any development for which a completed application for a zoning certificate was submitted prior to the effective date of this resolution, provided that the construction proceeds according to the provisions of the building permit for which the zoning certificate was issued and the permit does not expire prior to the completion of the construction. In the event that the zoning certificate does expire before completion of construction, then the provisions of this impact fee shall apply to the development. In such case, the zoning certificate shall not be issued without the payment of the impact fee. HAMILTON TOWNSHIP IMPACT FEE ADMINISTRATIVE RULES 7-8 (2007), *available at* http://zoning.hamilton-township.org/wp-content/uploads/impactFees_11-2008.pdf.

[82] *Id*. at 8-13.

[83] *Id*. at 3. Gradually phasing-in the fees provides developers subject to the fees time to account for the fees in their financial calculations. *See generally* ALTSHULER & GOMEZ-IBANEZ, *supra* note 21, at 97-111 (discussing at length the factors that determine which party or parties in the land development and sales process will bear the cost of the impact fee).

In the fall of 2007, several developers subject to the fees brought suit. The trial court granted summary judgment to the Township.[84] On appeal, the Court of Appeals for the Twelfth District upheld the trial court in a unanimous decision, with Judge Powell focusing on the question of whether the impact fees at issue were a tax versus a fee and ruling that they were a fee rather than a prohibited form of taxation.[85] Writing for a unanimous Supreme Court, Justice Pfeiffer reversed the Twelfth District in an opinion that is perplexing, if not distressing, for its failure to explain why the court here engaged in an analysis of the "tax vs. fee" issue that differed so greatly from that in *Beavercreek*.

In the first portion of his opinion, Justice Pfeiffer analyzed the challenged impact fee based on standards announced in two cases that came from regulatory contexts far removed from the regulation of land development. *State ex rel. Petroleum Underground Storage Tank Release Compensation Board, v. Withrow,*[86] a 1991 Ohio Supreme Court case, involved a state statute that imposed fees on the owners and operators of underground storage tanks to create a fund that would be used to address the costs associated with spills and leaks. *American Landfill*, *Inc. v. Stark/Tuscarawas/Wayne Joint Solid Waste Management District*,[87] a 1999 ruling from the federal Sixth Circuit, examined whether assessments imposed by solid-waste management districts on persons disposing of materials at their facilities were fees or taxes for purposes of the federal Tax Injunction Act.[88]

Justice Pfeiffer first applied what he termed the "*Withrow* Factors"[89] and argued that the impact fee "differs in several important respects from the assessment this court deemed a fee in *Withrow*."[90] Justice Pfeiffer found that the impact fee: (1) "lacks the regulatory aspect of the fee charged in *Withrow*," arguing that it was "a revenue generator with the stated purpose of guaranteeing a consistent level of services to all members of the community" that does not "protect the public from

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[84] Drees Co. v. Hamilton Twp., No. CA2009-11-150, 2010 WL 2891746, at *2 (Ohio Ct. App. July 26, 2010).

[85] *Id*. at *4. Judge Powell also ruled that the Resolution did not conflict with the general laws of the state and did not alter the structure of township government. *Id*. Because the trial court had decided the case below on summary judgment regarding whether the impact fees were or were not a tax, there was no consideration at trial of whether the impact fees met the *Nollan/Dolan* dual rational nexus test or some other test.

[86] State *ex rel.* Petroleum Underground Storage Tank Release Comp. Bd. v. Withrow, 579 N.E.2d 705 (Ohio 1991).

[87] Am. Landfill, Inc. v. Stark/Tuscarawas/Wayne Joint Solid Waste Mgmt. Dist., 166 F.3d 835 (6th Cir. 1999).

[88] "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." 28 U.S.C. § 1341 (2006).

[89] The "*Withrow* Factors," in Justice Pfeiffer's view, were: (1) is the fee "imposed in furtherance of regulatory measures"; (2) is the fee "never placed in the general fund" and used only for "narrow and specific" regulatory purposes; (3) is the fee imposed by government in exchange for a service it provides; and (4) what happens when the fees collected exceed—or fall short of—a certain amount? Drees Co. v. Hamilton Twp., 970 N.E.2d 916, 919-22 (Ohio 2012).

[90] *Id.* at 920.

specific threats,"[91] (2) "the revenue generated by the assessment in this case is spent on typical township expenses inuring to the benefit of the entire community,"[92] (3) "assessed parties get no particular service above that provided to any other taxpayer for the fee that they pay,"[93] and (4) the fee is not "tied to events" but to "the spending whims of government."[94] Characterizing the analysis in *American Landfill* as "similar to that used in *Withrow*,"[95] Justice Pfeiffer applied that analysis to the Township's impact fee and reached the same conclusion: the impact fee was actually a tax.[96]

While Justice Pfeiffer found that these cases supported his conclusion that the impact fee was actually an unauthorized tax, he acknowledged that neither case had "involved the type of assessment at issue in this case"[97] and proceeded to discuss "other state supreme courts facing very similar matters [that] have found that impact fees constituted taxes," noting that a "key factor in those cases was the extent of the public benefit that resulted from the assessment."[98] That discussion included two state supreme court cases—a 2002 Iowa case involving a park impact fee[99] and a 2006 Mississippi case that involved various impact fees[100]—plus a 1998 federal Fifth Circuit case.[101] Justice Pfeiffer argued that these cases buttressed his conclusion that the impact fee at issue was an invalid tax: each found that the benefits that were paid for by the impact fee(s) accrued to the community at large rather than only to those who had paid the fee(s), and, in his view, this was also the case for the Hamilton Township impact fees.[102]

F. Was Hamilton Township *Correctly Decided?*

Justice Pfeiffer's opinion is defensible when viewed on its own terms; that is, if one accepts the premises of the opinion that the impact fee at issue may appropriately be analyzed under *Withrow* and *American Landfill*, and further, that

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[91] *Id.* at 920.

[92] *Id.*

[93] *Id.* at 921.

[94] *Id.*

[95] *Id.*

[96] *Id*. at 922.

[97] *Id.* at 923.

[98] *Id.*

[99] Iowa Home Builders Ass'n of Greater Des Moines v. City of West Des Moines, 644 N.W.2d 339 (Iowa 2002).

[100] Mayor of Ocean Springs v. Homebuilders Ass'n of Miss., Inc., 932 So. 2d 44 (Miss. 2006). The city had six separate impact fees: (1) general municipal facilities; (2) fire facilities; (3) park and recreation facilities; (4) police facilities; (5) major roadways; and (6) water facilities. *Id*. at 48.

[101] Home Builders Ass'n of Miss., Inc. v. City of Madison, 143 F.3d 1006 (5th Cir. 1998) (examining whether impact fee was a fee or tax for purposes of the federal Tax Injunction Act); *see supra* note 88.

[102] *Drees*, 970 N.E.2d at 920-21.

"other state supreme courts facing very similar matters have found that impact fees constituted taxes." But what happens when one subjects each of these premises to closer scrutiny?

As Justice Pfeiffer himself acknowledged, *Withrow* and *American Landfill* dealt with regulatory settings that were quite different from that in the *Hamilton Township* case. In that case, as in *Beavercreek* before it, the setting was the land use regulatory process and, in particular, the issue of what method should be used to fund the provision of infrastructure and the capital costs of services that are necessitated by residential growth and the non-residential development that accompanies it. This issue has been before the courts for more than eighty years.

In the 1930s, courts dealt with challenges to land dedication requirements within a subdivision as a condition of development approval. Succeeding decades saw new challenges each time conditions placed on development approval evolved: from dedication requirements inside a subdivision to outside a subdivision; from dedication requirements to fee-in-lieu of dedication requirements; and most recently, from fee-in lieu of requirements to assessment of impact fees.[103] Because fee-in-lieu requirements and impact fees each involve developers' making cash payments, one of the most common challenges to these methods has been the claim that the fee in question was really a tax.[104]

Numerous courts have grappled with that question, with little consistency in their decisions.[105] Scholars have noted the problem[106] and been critical of the results.[107] They have concluded that impact fees have aspects of both fees and taxes and cannot be characterized definitively as either.[108] This scholarly critique of the fee versus tax

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[103] *See* Rosenberg, *supra* note 45, at 191-204. Professor Rosenberg subtitles his discussion of the evolution of infrastructure funding as "An American Tradition" and argues that the twentieth century saw "a steady growth in the use of land development exactions to impose specific costs on land developers." Further, "This trend has accelerated in the last two decades and has resulted in the widespread use of subdivision land improvement and dedication requirements, impact fees, and linkage programs all having the effect of shifting development-related expenses from the community to the land developer." *Id*. at 192.

[104] *Id*. at 218-20, 249-52 (discussing, respectively, such challenges in the periods before and after the U.S. Supreme Court's *Dolan* ruling); *see also* Michael B. Kent, Jr., *Theoretical Tension and Doctrinal Discord: Analyzing Development Impact Fees as Takings*, 51 WM. & MARY L. REV. 1833, 1866-75 (2010) (discussing various challenges).

[105] *See* Rosenberg, *supra* note 45, at 250 (noting that "the decisions did not indicate any clear pattern in results, with half of the impact fees being classified as regulatory devices while the other half were characterized as 'taxes'").

[106] *Id.* Rosenberg also notes that "making the regulatory fee/tax determination is a difficult task, and courts have not used a uniform framework for making this important decision." *Id.*

[107] "Discerning the differences between invalid taxes and permissible regulatory fees has been difficult for courts to do with any defining principle or consistency. It has been even harder for them to articulate a coherent rationale for the distinctions they have drawn." *Id*. at 219; *see also* TAKING SIDES ON TAKING ISSUES: PUBLIC AND PRIVATE PERSPECTIVES 366 (Thomas E. Roberts ed., 2002) (noting that challenges to two identical school impact fees yielded opposite results, with the fee in St. Johns County, Florida upheld as proper regulatory fee and the same fee in Franklin, Massachusetts struck down as an unauthorized tax).

[108] *See, e.g*., Kent, *supra* note 104, at 1875 (discussing the issue at length and concluding that "impact fees cannot definitively be labeled as either 'fees' or 'taxes'"). This same point

issue calls Justice Pfeiffer's opinion into question on two counts. First, of course, it questions the Justice's effort to characterize the Township's impact fee in those terms in the first place. Second, it questions the Justice's failure to distinguish the many cases where state courts found that impact fees imposed in the absence of state enabling legislation *did not* constitute taxes.[109]

My harshest criticism of the *Hamilton Township* Court, is not limited to Justice Pfeiffer's opinion, however. One is hard-pressed to state a principled reason why none of the justices saw fit to acknowledge that this very court, "facing very similar matters" only twelve years before in *Beavercreek*, had rejected *Hamilton Township*'s tax vs. fee dichotomy, arguing instead that "the important factor in determining the constitutionality of an ordinance is whether the ordinance is unduly burdensome in application and not its label as a tax or an impact fee."[110] We are, regrettably, left with the distressing conclusion that the court's failure to explain why in *Hamilton Township* it revived the tax vs. fee analysis rejected in *Beavercreek*, is most likely outcome driven.

Recall that in *Beavercreek*, Justice Pfeiffer's dissent had rejected the majority's argument that "classification as an impact fee or a tax is not determinative" and would have struck down the impact fee ordinance as an unconstitutional tax.[111] He argued further that if a particular impact fee ordinance was not found to be an invalid tax, then he would favor judging the constitutionality of the fee under the "specifically and uniquely attributable to the needs of the development" standard, a "stricter test than that put forth by the majority."[112]

Avoiding any mention of *Beavercreek* meant that Justice Pfeiffer did not have to overcome what he possibly thought was the substantial hurdle of convincing a majority of the court why that case should not have precedential authority for *Hamilton Township.* There is, however, a somewhat plausible argument for

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was made in an article critiquing *Mayor of Ocean Springs v. Homebuilders Ass'n of Mississippi, Inc.*, 932 So. 2d 44 (Miss. 2006), one of the cases Justice Pfeiffer discusses in support of his finding that the Township impact fee was an invalid tax. *See* Kenneth D. Farmer, *Impact Fees: An Alternative Way to Finance Public Facilities in Mississippi*, 28 MISS. C. L. REV. 287, 293-94 (2009) (noting that impact fees share characteristics with both taxes and regulatory fees and that "courts have not developed a uniform framework for making the regulatory tax/fee determination").

[109] *See, e.g.,* McCarthy v. City of Leawood, 894 P.2d 836 (Kan. 1995) (rejecting claim that transportation impact fee was an illegal tax); Hollywood, Inc. v. Broward Cnty., 431 So. 2d 606 (Fla. Dist. Ct. App. 1983) (finding that park fee was regulatory and not an illegal tax); Call v. City of West Jordan, 606 P.2d 217 (Utah 1979) (rejecting claim that a development fee was an illegal tax because it was revenue-raising). *See generally* Rosenberg, *supra* note 45, at 249-52 (discussing at length the different approaches used and outcomes reached by various courts that have addressed whether an impact fee should be classified as a tax or a fee and finding that "the decisions did not indicate any clear pattern in results, with half of the impact fees being classified as regulatory devices while the other half were characterized as 'taxes'").

[110] Home Builders Ass'n of Dayton & the Miami Valley v. City of Beavercreek, 729 N.E.2d 349, 353 (Ohio 2000).

[111] *Id*. at 358-59.

[112] *Id*. at 359. Justice Pfeiffer also claimed that the impact fee at issue did not meet the second part of the majority's dual rational nexus test because the city was not obligated to provide any of the credits potentially available. *Id*.

distinguishing *Beavercreek*, by focusing on a basic difference in the extent of land use regulatory powers in municipalities as compared with townships.

Beavercreek dealt with an impact fee enacted by a municipality. Like all Ohio municipalities, the City of Beavercreek exercised full regulatory control over the development of land: state enabling legislation authorizes it to enact and administer both zoning and subdivision regulations.[113] In contrast, Hamilton Township, like all Ohio townships, did not exercise full regulatory control over the development of land: state enabling legislation authorizes it to enact and administer only zoning regulations.[114] The enactment and administration of subdivision regulation is left to counties.[115] The fact that Hamilton Township has adopted the limited home rule form of government makes no difference in this regard: Ohio Revised Code Section 504, while granting many home rule powers, explicitly excludes subdivision regularity authority from the powers that may be exercised by a limited home rule township.[116]

Impact fees evolved from fee-in-lieu of land dedication requirements in the subdivision regulatory process[117] and are still primarily imposed in that process as a condition for subdivision plat approval.[118] An Ohio township, although able to exercise some home rule powers, lacks subdivision regulatory authority and thus can only impose an impact fee as a condition for zoning approval, not subdivision plat approval. Given the derivation of impact fees from, and their exercise largely within, the subdivision regulatory process, the lack of such authority could have provided a plausible, if fairly formalistic, argument in favor of a finding that the court's *Beavercreek* ruling was not controlling in *Hamilton Township*. Needless to say, it would also have evidenced a more appropriate degree of respect for precedent.

Even had the above argument been made in *Hamilton Township*, the opinion remains distressing for its failure to acknowledge that the decisions from other states are split on the tax vs. fee characterization debate.[119] To discuss only three rulings,

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[113] *See* OHIO REV. CODE ANN. §§ 711, 713 (West 2012).

[114] *See* OHIO REV. CODE ANN. § 519 (West 2012).

[115] OHIO REV. CODE ANN. § 711.10 (West 2012).

[116] OHIO REV. CODE ANN. § 504.04(B)(3) (West 2012) denies a limited home rule township authority to "establish or revise subdivision regulations."

[117] *See* discussion *supra* notes 17-23.

[118] The operation of the Beavercreek impact fee ordinance is typical. As described by the Second District:

> Under the ordinance, fees for single family developments had to be paid before the City's release and approval of the plat for the development, unless the platting was done in more than one section. In such an event, the fee applicable to a particular section needed to be paid before approval and release of the plat for the section. For all other land development activity, the fee payment was due before the City issued a zoning permit or a certificate of zoning compliance for the development.

Homebuilders Ass'n of Dayton & the Miami Valley v. City of Beavercreek, Nos. 97-CA-113, 97-CA-115, 1998 WL 735931, at *3 (Ohio Ct. App. Oct. 23, 1998), *rev'd*, 729 N.E.2d 349 (Ohio 2000).

[119] *See* discussion *supra* notes 104-108.

all of which favor one side of that debate, is more akin to advocacy than judging; and poor advocacy at that.[120]

IV. WHERE ARE WE AND WHAT, IF ANYTHING, SHOULD WE DO ABOUT IT?

A. Where are We?

As a result of *Hamilton Township*, Ohio now has different tests for judging the legality of a development impact fee depending on whether the challenged fee was enacted by a municipality or a township. If the fee was enacted by a municipality, the court will apply *Beavercreek*'s dual rational nexus test. Any well-drafted impact fee would likely survive judicial scrutiny under that test.[121] On the other hand, if the fee was enacted by a limited home rule township,[122] the court, applying *Hamilton Township*, must first determine whether the "fee" is really a "tax" by applying the "*Withrow* factors." It is highly unlikely that even a well-drafted impact fee resolution would avoid a fatal characterization as a tax.

Even if a township's impact fee avoided characterization as a tax, its survival would not be assured. If the court accorded *Beavercreek* precedential effect on the issue of what standard should be applied to determine the constitutionality of a fee, and applied the dual rational nexus test, then any fee that had avoided characterization as a tax would likely, but not assuredly, survive.[123] But a court might deny *Beavercreek* has precedential effect—perhaps using the reasoning I noted previously[124]—which would leave a court free to adopt a more stringent test than dual rational nexus; most likely the "specifically and uniquely attributable to the needs of the development" approach that Justice Pfeiffer favored in his *Beavercreek* dissent.[125] Survival of an impact fee under that standard is far less likely.[126]

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[120] An appellant's attorney would be foolhardy to file a brief that failed to acknowledge and attempt to distinguish opposing authority. Further, if the opposing authority is from the controlling jurisdiction—as *Beavercreek* almost assuredly was here—then the failure to disclose would violate Rule 3.3(a)(2) of both the Ohio Rules of Professional Conduct and the American Bar Association's Model Rules of Professional Conduct, which state, in identical language: "(a) A lawyer shall not *knowingly* do any of the following: . . . (2) fail to disclose to the *tribunal* legal authority in the controlling jurisdiction *known* to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel" (italics only in Ohio Rules).

[121] Likely, but not assured. Recall that, in *Beavercreek*, Justice Pfeiffer claimed that the impact fee at issue did not meet the second part of the majority's dual rational nexus test because the city was not obligated to provide any of the credits potentially available. Homebuilders Ass'n of Dayton & the Miami Valley v. City of Beavercreek, 729 N.E.2d 349, 359 (Ohio 2000).

[122] An attempt by a statutory township to enact an impact fee resolution would, if challenged, likely be declared *ultra vires.* Such townships lacking both subdivision regulatory authority and limited home rule powers, may exercise only those powers which have been explicitly authorized by the legislature. To date, this does not include the power to enact impact fees.

[123] Taub, *supra* note 17.

[124] *See* discussion *supra* text accompanying notes 116-118.

[125] *City of Beavercreek*, 729 N.E.2d at 359.

From the viewpoint of advocates for the use of impact fees, the practical effect of these differing standards is perverse: impact fees are defensible in municipalities, where the pace of new development, and thus the need for impact fees, is less, but effectively prohibited in townships where rapid development creates the most pressing need for impact fees.[127] Obviously, those opposed to impact fees are likely to see it differently: applauding the court's barring their use precisely where they most likely would have been enacted.

B. What, if Anything, Should We do About it?

The question of whether we should do anything about the current legal status of impact fees in Ohio depends, of course, on whether one believes impact fees are an efficient and equitable method to fund the provision of infrastructure and the capital costs of services that are necessitated by residential growth and the non-residential development that accompanies it. Views on this question are emphatically mixed and the literature provides no definitive answers.[128]

That said, the fact that twenty-eight states have adopted impact fee enabling legislation,[129] including half the states neighboring Ohio,[130] argues strongly that, at the least, it is time for the Ohio General Assembly to consider such legislation seriously.[131] In 2004, the "Wolpert Report" had recommended that Ohio adopt

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[126] *See* JUERGENSMEYER & ROBERTS, *supra* note 29, at 417, describing the "specifically and uniquely attributable to the needs of the development" test as "an almost insurmountable burden on local governments seeking money payments for extra development capital spending from developers whose activities necessitated such expenditures." *See also*, Rosenberg *supra* note 45, at 221-22, describing the "specifically and uniquely attributable to the needs of the development" test as "a highly restrictive view" that demands "a rigorous review of land use exactions and a near-linear cause and effect relationship between growth and public infrastructure."

[127] *See* discussion *supra* text accompanying note 71.

[128] *See, e.g.*, Mark Fenster, *Regulating Land Use in a Constitutional Shadow: The Institutional Contexts of Exactions,* 58 HASTINGS L.J. 729, 736-41 (2007) (discussing pros and cons of development exactions); Vicki Been, *Impact Fees and Housing Affordability*, 8 CITYSCAPE 168 (2005) (extensively reviewing literature and concluding that "the existing literature has not yet established that impact fees raise the net cost of housing—the price after offsetting benefits, such as amenities or savings on alternative financing mechanisms, are accounted for"); Charles J. Delaney & Marc T. Smith, *Development Exactions: Winners and Losers,* 17 REAL EST. L.J. 219 (1989) (discussing economic burden of impact fees and concluding that burden "will be determined based on the pattern of supply and demand in a particular housing market"); Rosenberg, *supra* note 45, at 182 ("Not surprisingly, this emerging impact fee practice has been exceedingly popular with local governments and current residents, and it has dramatically accelerated over the last twenty years. On the other hand, the practice has also been strongly criticized by landowners, developers, and affordable housing advocates as unfairly increasing the cost of new construction, imposing an unfair 'tax' and raising housing prices. Some have suggested that such fees actually constitute de facto growth controls with exclusionary implications."). *See generally* ALTSHULER & GOMEZ-IBANEZ, *supra* note 21, at 6-7.

[129] *See* jurisdictions *supra* note 8.

[130] *See* jurisdictions *supra* note 8. They are: Indiana, Pennsylvania, and West Virginia.

[131] Calls for legislative action to authorize impact fees were made in both Iowa and Mississippi after the Supreme Court of each state, as noted by Justice Pfeiffer in *Hamilton*

enabling legislation that would grant authority to townships and counties to adopt impact fees and to school districts to adopt impact fees for schools.[132] A bill along those lines, H.B. 299, was introduced in the 126th General Assembly,[133] but died with no further action taken in the Local Government Committee.[134] No other impact fee enabling legislation has subsequently been introduced.[135]

While H.B. 299 at least put the impact fee issue on the legislative agenda, however briefly, its provisions were fairly sparse in comparison to more comprehensive impact fee legislation, adopted elsewhere, which addresses the details of impact fees systems to a much greater extent.[136] Accordingly, reviving H.B. 299, or something similar, would be far less preferable to proposing more comprehensive legislation that answers most, if not all of the questions this Article has noted.[137] Moreover, even if there is no support for legislation that would extend authority to enact impact fees to townships—or to counties and school districts—there is still need for enabling legislation for municipalities that would fill in the numerous gaps in the *Beavercreek* ruling.[138] The time is long-past for Ohio to join the majority of states that have adopted enabling legislation for development impact fees.

While any competently-drafted enabling legislation would be a step in the right direction, the legislature should adopt legislation that meets the following minimal

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Township, ruled that a challenged impact fee was invalid. *See* Kristin B. Flood, Note, *Who Should Pay for the Impact of New Development in Iowa: Developers or the Preexisting Community? Analysis of* Homebuilders Ass'n of Greater Des Moines v. City of West Des Moines, 91 IOWA L. REV. 751 (2006) (analyzing court's ruling and its effects and concluding that Iowa should adopt an impact fee enabling statute); Farmer, *supra* note 108 (analyzing court's ruling and its effects and concluding that Mississippi should adopt an impact fee enabling statute); s*ee also* Patric O'Brien, Comment, *The Bizarre Journey of Impact Fees in Massachusetts: From the "Foothills of Confusion" Around the "Mountains of Ignorance" and Up Into the "Castle in the Air"—Will "Rhyme and Reason" Ever be Rescued?*, 35 NEW ENG. L. REV. 511 (2001) (criticizing Massachusetts Appeals Court for ruling impact fee was invalid).

[132] *Report of the Subcommittee on Growth & Land Use*, *supra* note 2, at 10-11.

[133] H.B. 299, 126th Gen. Assembly (2005).

[134] *House Bill 299 Status Report of Legislation, 126th General Assembly*, OHIO LEGISLATIVE SERV. COMM'N (2005-2006), http://lsc.state.oh.us/coderev/hou126.nsf/House+Bill+Number /0299?OpenDocument.

[135] *Find Bills, Resolutions, Analyses, Synopses & Fiscal Notes by Keyword*, 129TH GEN. ASSEMBLY, STATE OF OHIO, http://www.legislature.state.oh.us/search.cfm#bill_keyword (last visited Aug. 17, 2012) (enter "impact fee" into the "Find Bills, Resolutions, Analyses, Synopses & Fiscal Notes by Keyword" box; then press the "Go" button).

[136] *See, e.g.*, Mulcahy & Zimet, *supra* note 63 (discussing provisions of Wisconsin enabling legislation); Leitner & Schoettle, *supra* note 27 (analyzing state impact fee legislation); Brian W. Blaesser & Christine M. Kentopp, *Impact Fees: The "Second Generation,"* 38 J. URB. & CONTEMP. L. 55 (1990) (same); *see also* Floyd B. Olson, Daniel J. Greensweig & Scott J. Riggs, *The Future of Impact Fees in Minnesota*, 24 WM. MITCHELL L. REV. 635 (1998) (proposing impact fee enabling legislation for Minnesota).

[137] *See* discussion *supra* notes 59-67.

[138] *See* discussion *supra* notes 59-67.

criteria. Most critically, impact fee enabling legislation should authorize the imposition of fees by townships as well as municipalities. The reason for this is clear: Since it is likely that a greater proportion of new development will continue to occur in townships rather than municipalities, legislation that fails to include townships simply perpetuates the current "perverse" situation in which impact fees are banned where needed more and authorized where needed less. Further, there is no reason to limit such an authorization to home rule townships, since the enabling legislation itself, rather than a township's home rule or police powers, supports the imposition of the impact fee. In addition, impact fee legislation should authorize fees for at least the most common forms of infrastructure improvements: water, sewer, storm-water, parks, and roads. The legislature should also consider including authorization for fire, police, and library services. While H.B. 299 authorized impact fees for schools, I am not advocating that schools be included in the enabling legislation. Funding for schools has been an extraordinarily contentious issue in Ohio for over two decades, and remains unresolved.[139] Including schools in impact fee enabling legislation would likely serve only to inject a divisive issue into the impact fee debate.

Finally, the legislation should answer many, if not all, of the more technical issues relating to calculation, imposition, collection, and administration in an impact fee system. These include: (1) what future landuse and capital facilities plans should be required before a jurisdiction can enact an impact fee; (2) whether non-residential development may lawfully be charged fees for facilities—such as parks and libraries—the demand for which is only tenuously connected to non-residential development; (3) when should an impact fee be assessed (or the amount calculated) and when should it be collected; (4) how frequently must an impact fee be re-calculated; (5) what percentage, if any, of the impact fees may be spent on administration of the impact fee system; (6) how long may an impact fee paid for an individual development be retained before it must be expended and what are the rebate procedures if it is not expended within that time-frame; (7) to what extent should a developer's proportionate share of project costs be reduced to reflect such items as the developer's previous or future monetary or in-kind contributions (e.g., land dedication or construction of infrastructure) and monetary payments for the infrastructure or services at issue provided by the enacting jurisdiction and/or other levels of government; and (8) should there be exemptions from the fee for low and moderate income housing, or other developments deemed to be socially desirable, and, if so, how will the jurisdiction make-up the shortfall.[140]

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[139] In 1991, a lawsuit was filed that led to a 1997 ruling by the Ohio Supreme Court that the state's system for funding education was unconstitutional, followed by five years of court oversight of legislative efforts to enact a school funding system that could pass constitutional scrutiny, which ultimately failed. *See* DeRolph v. State (DeRolph I), 677 N.E.2d 733 (Ohio 1997), *modified by* DeRolph v. State, 678 N.E.2d 886 (Ohio 1997), DeRolph v. State, 699 N.E.2d 518 (Ohio 1998), *and* DeRolph v. State (DeRolph II), 728 N.E.2d 993 (Ohio 2000), DeRolph v. State, 754 N.E.2d 1184 (Ohio 2001), *vacated by* DeRolph v. State, 780 N.E.2d 529 (Ohio 2002) (affirming *DeRolph I* and *DeRolph II*). *See generally* Larry J. Obhof, DeRolph v. State *and Ohio's Long Road to an Adequate Education*, 2005 B.Y.U. EDUC. & L. J. 83 (2005) (analyzing entire course of the *DeRolph* litigation and legislative responses and concluding that significant progress has been made since the courts first heard the *DeRolph* case, but funding concerns remain).

[140] *See* discussion and sources *supra* notes 59-70.

V. CONCLUSION

The Ohio Supreme Court's recent ruling in *Drees Company v. Hamilton Township*,[141] invalidating the development impact fees adopted by a limited home rule township, is a deeply distressing decision. In *Hamilton Township*, the Court, rather than engaging in a fair-handed analysis, chose instead to rely on very limited authority to support a conclusion that appears to have been pre-determined. In particular, the court failed even to acknowledge, let alone distinguish: (1) its own ruling upholding impact fees twelve years before in *Homebuilders Association of Dayton and the Miami Valley v. City of Beavercreek*,[142] and (2) the state supreme court decisions that had rejected the reasoning of the Iowa and Mississippi courts upon which the Court relied in part. The Court's *Hamilton Township* ruling leaves Ohio with a bifurcated approach to impact fees that is perverse because impact fees are defensible in municipalities, where the pace of new development, and thus the need for impact fees, is less, but effectively prohibited in townships where rapid development creates the most pressing need for impact fees. Given the court's conflicting rulings, the time is long-past for the legislature to examine the policy debate on impact fees and make a decision about adopting enabling legislation for impact fees. That decision should be to join the majority of states that have enacted such legislation.

[141] Drees Co. v. Hamilton Twp., 970 N.E.2d 916 (Ohio 2012).

[142] Homebuilders Ass'n of Dayton & the Miami Valley v. City of Beavercreek, 729 N.E.2d 349 (Ohio 2000).