IMPACT FEES AND YOU: PERFECT TOGETHER ?

I. Introduction

The 1980's represented a decade of strong economic growth for New Jersey. Low unemployment, controlled inflation and the housing boom allowed New Jersey citizens to prosper. This prosperity has taken its toll on our municipalities.[1] The State's unprecedented growth was accompanied by increased demands on an already crumbling infrastructure.[2] With huge decreases in federal and state funding, coupled with citizen revolts against general revenue raising techniques,[3] municipalities have been struggling to maintain the more basic municipal services for existing residents.[4] To fund these services, new and creative financing techniques, through which the attendant costs of new development could be imposed on the private sector, were needed. The most popular and controversial technique has been the expansion of development exactions to include impact fees.[5]

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[1] *See* Grogan, *Needed: Comprehensive Development Fee Legislation*, 7 PUBLIC AFFAIRS FOCUS 1 (April 1989) (outlining municipal infrastructure crisis in New Jersey and promoting impact fee legislation as the solution).

[2] *See* DEPARTMENT OF LABOR, DIV. OF PLANNING, STATE OF NEW JERSEY: THE NEXT TEN YEARS 13-18 (1984) (outlining population and economic changes and the condition of New Jersey's state and local infrastructures as well as predicting future municipal infrastructure needs); Bauman & Ethier, *Development Exactions and Impact Fees: A Survey of American Practices*, 50 LAW & CONTEMP. PROBS. 51 (1987) (discussing cause of infrastructure crisis and municipal solutions); Prior, *Developer Impact Fees: Legal Extortion or Town Right?*, N.J. BUS., July 1987, at 24-26 (outlining New Jersey municipal funding crisis and predictions for future needs and solutions).

[3] Property and income taxes are the most common municipal funding devices. In light of New Jersey's skyrocketing property and income taxes this is particularly relevant to the funding dilemma. The word "taxes" in New Jersey today may well sound the death knell for a politician. Additionally, the second most popular municipal revenue raising device, municipal bonds, are viewed as inadequate due to the poor bond market. *See* Bauman & Ethier, *supra* note 2, at 51-52.

[4] *See generally* Grogan, *supra* note 1.

[5] *See* Blaesser & Kentopp, *Impact Fees: The "Second Generation,"* 38 WASH. U.J. URB. & CONTEMP. L. 55 (1990) (develops the history of impact fees and their rise in popularity). Other financing techniques used by municipalities to defray increasing infrastructure costs have been user connection charges, special assessment districts and negotiated developer contributions. Morgan, Dunean & McClendon, *Drafting Impact Fee Ordinances: Legal Foundation for Exactions* (pt. 1), 9 ZONING AND PLANNING LAW REPORT 49, 50 (1986).

The dilemma outlined above is not unique to New Jersey. Municipalities throughout the country are facing the same fate.[6] In response, most municipalities have utilized impact fees to finance their services.[7]

Generally speaking, impact fees are charges imposed on developers to fund off-tract[8] capital facility improvements,[9] which are necessary in order to accommodate new growth.[10] Although other methods are available, they have proven troublesome.[11]

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6 *See* Juergensmeyer & Blake, *Impact Fees: An Answer to Local Governments' Capital Funding Dilemma*, 9 FLA. ST. U.L. REV. 415-18 (addressing unprecedented suburban growth and the problems it has created).

7 Although only a handful of states have enacted specific impact fee legislation, a majority of local governments do have a formalized policy for imposing impact fees. National Association of Home Builders, *What Has the Home Building Industry's Experience Been With Impact Fees?*, IMPACT FEE MANUAL (Rev. 1990) (survey results showed twelve states with enabling acts although a majority of municipalites were utilizing impact fees for various purposes through local ordinances). These formalized policies help protect the municipality from extortion claims although enabling legislation is clearly their strongest justification.

8 The term off-tract is defined in The Municipal Land Use Law, N.J. STAT. ANN. § 40:55 D-5 (West Supp. 1990) as "not located on the property which is the subject of a development application nor on a contiguous portion of a street or right-of-way." In New Jersey, it is important to distinguish the term "off-tract" with the term "off-site." Under this statute "off-site" means "located outside the lot lines in question but within the property (of which the lot is a part) which is the subject of a development application or contiguous portion of a street or right of way." *Id.* Thus, in New Jersey, "off-tract" has a broader context than "off-site". Many states deem "off-site" to include "off-tract" improvements. For purposes of this note the term off-site will include off-tract improvements.

9 For purposes of this note, the term "capital facility improvements" encompasses schools, libraries, parks, police and fire equipment, and other public services as well as streets, water mains and sewerage facilities which are located outside of the development's boundaries.

10 *See also* Juergensmeyer & Blake, *supra* note 6, at 417. Professor Juergensmeyer defines impact fees as "charges levied by local governments against new development in order to generate revenue for capital funding necessitated by the new development." *Id.* Stated another way, "[i]mpact fees are those charges or fees levied by a governmental unit against new development for the purpose of acquiring or recovering some or all of the cost of providing the public infrastructure facilities needed to support the new growth or development paying the fees." Taylor, *How to Develop and Use Impact Fees Successfully*, 1988 INST. ON PLAN., ZONING & EMINENT DOMAIN § 11.02, at 11-2. *See also* Blaesser & Kentopp, *supra* note 5, at 64 (developing a uniform definition of impact fees). Impact fees have also been referred to as capital recovery fees, capital contributions, development share charges, municipal utilities system charges and access fees. Taylor, § 11.02.

11 The most troublesome method utilized by many planning boards to defray municipal costs associated with growth is ad hoc negotiating with the developer. In reality, this "negotiating" is a form of legal extortion. The developer knows that if

The theory underlying impact fees is that it is fair and equitable to make new development pay its own way.[12]

This note traces the origins of impact fees, outlines the various legal challenges to their imposition, and concludes with an analysis of the proposed New Jersey impact fee enabling act. In Part II, this note examines the birth and growth of development exactions. Part III examines the judicial response to subdivision exactions by analyzing the authority to impose impact fees, followed by a close look at the constitutional opposition to such fees. Lastly, in Part IV, the Municipal Development Impact Fee Authorization Act proposed by the New Jersey's Legislature is examined for its effect on future beneficiaries of impact fees.

II. The History of Development Exactions

Zoning and planning[13] regulations have deep roots in land

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he does not accede to the planning board demands he will face recalcitrant board members who will likely deny his application. Alternatively, if he decides to take the board to court his project will be tied up for years. Planning Boards, as well as the courts, are not unaware of the untenable position of developers. *See, e.g.*, West Park Ave, Inc. v. Ocean Tp., 48 N.J. 122, 127-28, 224 A.2d (1966) (in striking down per unit fees intended to finance school system the court stated that "[w]e have no doubt the municipality was conscious of the illegality of what it did and for that reason refrained from adopting an ordinance, seeking instead to achieve its ends through the guise of 'voluntary' contributions with spurious 'agreements' to make them stick."); Nunziato v. Edgewater Planning Bd., 225 N.J. Super. 124, 134, 541 A.2d 1105, 1110 (App. Div. 1988) (bargaining between board and developer, resulting in "voluntary" $203,000 contribution for affordable housing, "irremediably tainted" the proceedings). *See generally* Prior, *supra* note 2, at 24-26.

[12] N.J. SENATE LAND USE MANAGEMENT AND REGIONAL AFFAIRS COMMITTEE, TESTIMONY BY N.J. STATE BAR ASSOC., (1990) Opponents of impact fee legislation do not dispute that new development should pay for burdens it places on a municipality. The dispute centers on what the fee may be imposed for and how to arrive at what amount they should be required to pay. *See id.* (disputing the broad array of facilities the bill permits impact fees to be imposed for); Letter from K. Hovnanian calling for limit to purposes and calling for a maximum cap on the fees; NEW JERSEY BUILDERS ASSOCIATION, COMMENT ON S-2037 IMPACT FEE LEGISLATION, (Feb. 1990) (contesting broad use of fees and manner of cost allocation). *See also* Heyman & Gillrod, *The Constitutionality of Imposing Increased Community Costs on New Subdivision Residents Through Subdivision Exactions*, 73 YALE L.J. 1119 (1964) (advocating cost-accounting as an appropriate method to determine what fees new development should be charged by calculating them in proportion to the needs generated by the new development).

[13] These terms, although frequently used interchangeably, have different connotations. Zoning encompasses the separation of a city into districts which are required to comply with the use and design limitations established for that district. *See* Mansfield & Sweet, Inc. v. West Orange, 120 N.J.L. 145, 149, 198 A. 225, 228-

use jurisprudence. Under the police power rubric, their validity has been firmly established.[14] Through enabling legislation most states have delegated their zoning and planning powers to local government.[15] Thus, within this framework, municipalities possess the power to control and guide their own growth in a manner consistent with their communities' idiosyncracies and needs.[16] One way in which this power has been implemented is through the imposition of development exactions.[17]

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29 (1938). Zoning is often referred to as a method of implementing the planning objectives of a municipality. *See* Lake Intervale Homes v. Parsippany-Troy Hills, 28 N.J. 423, 438, 147 A.2d 28, 37 (1958). An example of zoning would be a single family residential district in which only detached homes or lot sizes of a specified minimum area would be permitted. The term planning, however, has a broader significance. *Mansfield & Sweet*, 120 N.J.L. at 149, 198 A. at 228-29. It connotes a comprehensive scheme to guide the physical development of a municipality. *Id.* Its focus is on the location and character of streets, sewers, schools and other public necessities as well as population density rather than on the particular use or design which is permitted on an individual parcel of property. *Id.* An example of a planning "regulation" would be the municipality's master plan. *See id.* at 148-49, 198 A. at 228-29 (1938) (upholding state power to regulate zoning and planning and discussing the distinction between the terms).

[14] The police power of the states refers to "[t]he power of the State to place restraints on the personal freedom and property rights of persons for the protection of the public safety, health, and morals or the promotion of the public convenience and general prosperity." BLACK'S LAW DICTIONARY 1041 (5th ed. 1979). Pursuant to this power the United States Supreme Court has repeatedly reaffirmed the validity of zoning regulations which promote the health, safety, morals or general welfare of the public. *See, e.g.*, Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) (zoning restriction on who may live in a single family home upheld because it was reasonably related to a valid government purpose); Nectow v. City of Cambridge, 277 U.S. 183 (1928) (zoning regulations must bear substantial relation to public welfare to be upheld); Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (landmark case validating state power to zone). For a complete discussion of the use of the police power to support zoning regulations *see* Heyman & Gillrod, *supra* note 12, at 1122-30.

[15] New Jersey's statutes are typical. *See* N.J. STAT. ANN. §§ 40:55D-23 to -27, :55D-62 to -68.3 (West Supp. 1990). These statutes respectively provide for the formation of planning and zoning boards by municipalities to regulate land use within their borders pursuant to the standards and guidelines set forth.

[16] The locale, size, demography and terrain of a municipality may dictate different zoning and planning needs. Through its derivative police power, the municipality can ensure its individual needs are met, subject, of course, to state and federal constitutional limitations on the power to zone. *See, e.g.*, *Nollan*, 483 U.S. 825 (1987); Katobinea Realty Co. v. Webster, 20 N.J. 11, 118 A.2d 824 (1985) (zoning regulations must be reasonable exercise of the police power to withstand Constitutional challenge); *Nectow*, 272 U.S. 183 (1928).

[17] Development exactions comprise various conditions which have been placed on the right to develop property. *See* Blaesser & Kentopp, *supra* note 5, at 63-69. In

The dedication of land to serve intradevelopment needs was the earliest form of development exaction.[18] Although this dedication arose primarily to provide for streets and sidewalks within subdivisions,[19] it was soon expanded to provide land for school and recreational facilities.[20] The impracticality of forcing small developers to dedicate land for schools and parks led to the creation of the in-lieu fee.[21] The in-lieu fee quickly emerged as a popular method for municipalities to shift the cost of capital improvements necessitated by growth to new development.[22] Impact fees, the focus of this note, are a relatively recent outgrowth of these earlier forms of exactions.[23]

The impact fee was a natural expansion of the in-lieu theme.[24] An increasing reluctance to dip into municipal coffers to accommodate new development, along with rising citizen expectations with regard to public services, caused the impact fee

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one form or another, development exactions have been in existence since the 1700's. *See* Ferguson & Rasnic, *Judicial Limitations on Mandatory Subdivision Dedications*, 13 REAL EST. L.J. 250, 252 (1984).

18 Connors & High, *The Expanding Circle of Exactions: From Dedication to Linkage*, 50 LAW & CONTEMP. PROBS. 69, 70 (1987). The authors described land dedication as a process through which an interest in the land is conveyed to the municipality for a public purpose. *Id.*

19 *Id.*

20 *Id.* Dedication exactions were typically upheld by the courts on the privilege theory. D. HAGMAN & J. JUERGENSMEYER, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW § 7.8, at 204 n.7 (2d ed. 1986) (citing early cases upholding required dedications). This theory held that subdivision dedications were a proper exaction on developers in return for the right to develop their land. *Id.* When this theory was replaced by the theory that property owners have a "right" to develop their land, courts began to withdraw their prior support for dedication exactions. *Id.* at 205.

21 Connors & High, *supra* note 18, at 71. This new form of development exaction required developers to pay a fee in lieu of dedication when their land was too small or the dedication of land would be impractical. *Id.* The in-lieu fees were required so the municipality could provide for additional schools and recreational areas elsewhere. *Id.*

22 *Id.* at 71-72.

23 *See* D. HAGMAN & J. JUERGENSMEYER, *supra* note 20 for a brief overview of various exactions.

24 *See generally* Juergensmeyer & Blake, *supra* note 6, at 418. The in-lieu fee was applicable only when a required dedication would have been proper. *Id.* The impact fee, by definition, broadens the use of in-lieu fees to cover off-site improvements. *Id.*

A further expansion of exactions resulted in linkage fees. Linkage fees are levies against commercial development to defray the cost of affordable housing. Connors & High, *supra* note 18, at 72.

to spread like wildfire through municipalities nationwide.[25] A dream came true: a financing tool was found whereby existing residents could reap all the benefits of new growth without paying the costs.[26] This dream, however, soon turned into a nightmare.

The ever-increasing expansion and use of impact fees spurred previously complacent developers, a politically powerful and resourceful group, into the courtroom. Their attacks on impact fees ran the gamut from claiming the fees were impermissible taxes to fifth and fourteenth amendment challenges.[27] The social policies underlying impact fees, as well as the constitutional questions they raise, have catapulted the impact fee battle into the center of the land use arena, where it has remained unresolved for several years.

III. Judicial Response to Subdivision Exactions

Impact fees are generally subject to a two-tiered test when their validity is challenged. First, statutory or constitutional authority to impose the fee must be established.[28] Second, the fee must constitute a reasonable exercise of the state's police power in order to comply with fifth and fourteenth amendment requirements.[29] This section outlines the mixed results of these tests

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25 *See* MANUAL, *supra* note 7 for statistics on impact fee use.

26 Much of the literature and case law favoring impact fees fails to note the benefits new growth provide for the community. Increased sales and property tax revenues, new jobs and more disposable income are several benefits of new growth which should offset the costs. *See* Bauman & Ethier, *supra* note 2, at 52-54. Furthermore, the effect these new fees are likely to have on the cost of housing is often ignored. These fees are incorporated by developers into the cost of the housing they sell. Thus, the argument that the new consumer is the innocent victim of impact fees because he is being charged a fee to move into the community, as well as pay his property taxes, is a potent one. *See* Delaney & Smith, *Development Exactions: Winners and Losers*, 17 REAL ESTATE L. J., 195, 201-09 (1989) (analyzes the effect of impact fees on the housing market); Letter from Peter S. Reinhart of K. Hovananian Enterprises, Inc. to Senator Paul Contillo (Feb. 19, 1990) (emphasizing the potential for increased housing costs if bill is passed and citing $15,000 as potential increase in single family home costs if impact fees are allowed).

27 *See generally* D. HAGMAN & J. JUERGENSMEYER, *supra* note 20, at 207-11 for a brief discussion on various challenges to impact fees. A more detailed discussion of these challenges appears in Professor Juergensmeyer's law review article. *See* Juergensmeyer & Blake, *supra* note 6, at 421-38.

28 *See* Juergensmeyer & Blake, *supra* note 6; Heyman & Gillrod, *supra* note 12.

29 The most comprehensive and contemporary articles discussing both prerequisites are: Delaney, Gordon & Hess, *The Needs-Nexus Analysis: A Unified test for Vali-*

and their effect on the validity of impact fees.

A. *Authority to Impose Impact Fees*

Enabling legislation that specifically permits municipal imposition of impact fees is the strongest source of authority for local impact fees.[30] Nevertheless, few states have enacted such legislation.[31] Most municipalities were constrained to rely on limited grants of regulatory power or their home rule authority in order to justify imposition of impact fees.[32]

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dating Subdivision Exactions, User Impact Fees and Linkage, 50 LAW & CONTEMP. PROBS. 139 (1987); *see also* Blaesser & Kentopp, *supra* note 5.

An additional problem impact fees face is the tax label. This issue can arise under both prongs of the test. If labelled as a tax from the outset the fee will be invalidated unless specifically permitted under the limited taxing power of the municipality. If authority to impose the fee is upheld the court may still find it to constitute a tax and not a proper exercise of the police power if it is found to be unreasonable. *See* Juergensmeyer, *supra* note 20; Daniels v. Pt. Pleasant, 23 N.J. 357, 129 A.2d 265 (1957) (fees imposed on developer were invalid taxes because they were being collected to fund education which is traditionally funded by general tax revenues).

30 Jurisdictions which have such enabling legislation have enjoyed the greatest success with impact fees. *See, e.g.*, Candid Enterprises, Inc. v. Grossmont Union High School District, 39 Cal.3d 878, 705 P.2d 876 (1985) (school impact fees permissible pursuant to broad authority in California to impose such fees); Home Builders v. Bd. of Palm Beach Cty. Commissioners, 446 So.2d 140 (Fla. App. 1983) (county road impact fee ordinance validated).

The New Jersey courts have frequently called for a legislative response to impact fees. *See e.g.* N.J. Builders Ass'n v. Bernards Township, 108 N.J. 223, 235-36, 528 A.2d 555, 561-62 (1987) (New Jersey Supreme Court concluded that "as yet the Legislature has not delegated to municipalities the far reaching power to depart from traditionally authorized methods of financing public facilities so as to allocate the cost of substantial public projects among new developments on the basis of their anticipated impact").

31 *See* MANUAL, *supra* note 7 for statistics on states with enabling legislation either in place or pending.

32 As indicated earlier, most states have delegated their power to regulate land use to municipalities. *See supra* note 15 and accompanying text. These grants, however, are generally very specific as to what an implementing ordinance may contain. Morgan, *The Effect of State Legislation on the Law of Impact Fees, With Special Emphasis on Texas Legislation*, 1988 INSTIT. ON PLANNING, ZONING & EMINENT DOMAIN § 7.03[2]. This has created an interpretation problem as to the scope of enabling legislation. Through strict interpretations of the zoning and planning powers courts have generally held that only the enumerated exactions may be imposed. *Id.*

Reliance on home rule powers present different problems. Most states, including New Jersey, have conferred home rule powers on municipalities through their constitutions. *Id.* at § 7.03[3]. Home rule provisions grant municipalities the power of self-government, constrained only by limiting acts of the legislature. *Id.* At first blush they appear to be conducive to the adoption of impact fee ordinances.

In New Jersey, municipalities have had the legislative authority to adopt zoning and planning ordinances since the enactment of the Municipal Planning Act of 1953 (hereinafter the Planning Act).[33] Pursuant to the Planning Act, municipalities were armed with the authority to enact subdivision regulations.[34] Today, this power is contained in the Municipal Land Use Law of 1976 (MLUL)[35] whereby permissible exactions are specifically enumerated in Section 42.[36] Consequently, exaction cases in New Jersey

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Nonetheless, the exercise of home rule powers to adopt impact fee ordinances leads to non-uniformity and thus invites limiting legislation from the states. *Id.* For a more extensive review of home rule authority *see* Blaesser & Kentopp, *supra* note 5, at 86-89.

33 N.J. STAT ANN. §§ 40:55-1.1 to -67 (West 1967) (repealed 1976). Land use planning in New Jersey dates back to the Old Map Act, N.J. REV. STAT. §§ 46:23-1 to -11 (1937) (repealed 1954). The Act's main purpose was to provide a filing system for maps used to transfer land. Lake Intervale Homes, Inc. v. Parsippany-Troy Hills, 28 N.J. 423, 433, 197 A.2d 28, 33 (1958) (provides general discussion of planning methods prior to 1953). However, it also served as a planning tool with regard to new street locations and widths. *Id.* The Old Map Act was upheld as a constitutional exercise of the police power in Mansfield & Sweet, Inc. v. West Orange, 120 N.J.L. 145, 198 A. 225 (1938). The *Mansfield* court, in a somewhat prophetic statement, declared:

> We are surrounded with the problems of planless growth. The baneful consequences of haphazard development are everywhere apparent. There are evils affecting the health, safety and prosperity of our citizens that are well-nigh insurmountable because of the prohibitive cost. To challenge the power to give proper direction to community growth and development in the particulars mentioned is to deny the vitality of a principle that has brought men together in organized society for their mutual advantage.

Id. at 150-51, 198 A. at 230.

34 N.J. STAT. ANN. §§ 40:55-1.14 to -1.29 (West 1967) (repealed 1976). The current version of subdivision regulation authority is contained in N.J. STAT. ANN. §§ 40:55D-37 to -59 (West Supp. 1990). A subdivision is "[t]he division of a lot, tract or parcel of land into two or more lots, tracts, parcels or other divisions of land for sale or development." N.J. STAT. ANN. § 40:55D-7 (West Supp. 1990).

35 *Id.* §§ 40:55D-1 to -129.

36 Section 42 provides in part:

> The governing body may by ordinance adopt regulations requiring a developer, as a condition for approval of a subdivision or site plan, to pay his pro-rata share of the cost of providing only reasonable and necessary street improvements and water, sewerage and drainage facilities, and easements therefor, located outside the property limits of the subdivision or development but necessitated or required by construction or improvements within such subdivision or development. Such regulations shall be based on circulation and comprehensive utility service plans . . . and shall establish fair and reasonable standards to determine the proportionate or pro-rata amount of the cost of such facilities that

focus not on the bare authority to impose conditions upon subdivision approvals, but rather on the scope of that authority. Additionally, compliance with the enabling legislation's requirements is often at issue.

In *Lake Intervale Homes, Inc. v. Parsippany-Troy Hills, Inc.*,[37] the New Jersey Supreme Court upheld a municipality's authority over land regulation under the old Planning Act as a constitutional exercise of the police power.[38] Interestingly, the court left unanswered the authority of the municipality, pursuant to the Planning Act, to require a developer to bear the expense of installing water mains which would serve his property.[39] Instead, the court invalidated the requirement because the implementing municipal ordinance lacked the requisite standards to govern the imposition of the condition.[40] Whether a municipality had the power to impose such a fee had become irrelevant because even if such power existed it was improperly implemented.[41]

The unanswered question in *Lake Intervale Homes* was later

> shall be borne by each developer or owner within a related and common area, which standards shall not be altered subsequent to preliminary approval. . . .

Id. § 40:55 D-42 (West Supp. 1990). The MLUL represented a major overhaul of the Planning Act of 1953. With respect to exactions, § 1.21 of the old Act provided in part:

> Before final approval of plats the governing body may require, in accordance with the standards adopted by ordinance, the installation, or the furnishing of a performance guarantee in lieu thereof, of any or all of the following improvements it may deem to be necessary or appropriate: street grading, pavement, gutters, curbs, sidewalks, street lighting, shade trees, surveyor's monuments, water mains, culverts, storm sewers, sanitary sewers or other means of sewage disposal, drainage structures, and such other subdivision improvements as the municipal governing body may find necessary in the public interest.

N.J. STAT. ANN. § 40:55-1.21 (West 1967).

37 28 N.J. 423, 147 A.2d 28 (1958).

38 *Id.* at 436-37, 147 A.2d at 36. The court found that the Act was a reasonable and therefore constitutional, exercise of the police power because its purpose was to alleviate "public health, safety and welfare problems created by improperly planned or improved developments." *Id.*

39 *Id.* at 441, 147 A.2d at 38-39.

40 *Id.* The court focused on the language of section 1.21, which provided that municipalities could require certain improvements to the property "in accordance with the *standards* adopted by ordinance. . . ." *Id.* (emphasis in original). For relevant text of section 1.21 see *supra* note 36.

41 *Lake Intervale Homes*, 28 N.J. at 441, 147 A.2d at 38-39.

addressed in *Deerfield Estates, Inc. v. Township of East Brunswick*.[42] In *Deerfield Estates*, the court had no difficulty in sustaining the municipality's authority to require a developer to carry the expenses of servicing his property.[43] The court stated "[i]t is now settled as a general proposition that the expense of installing most required improvements may be imposed upon the developer."[44] However, the dispositive factor in the court's analysis was the lack of appropriate standards to determine when such exactions could be required and how much could be charged. Thus, absent these standards, the fees were struck down.[45] Strict compliance with enabling legislation had become a steadfast rule. Without appropriate quidelines to impose the fee no authority to require the fee existed.[46] Failure to satisfy ordinance requirements, however, was not the court's only way of striking down exactions. As the following case illustrates, a strict interpretation of the language of the Planning Act also served this goal.

The imposition of per unit fees upon a developer to fund educational facilities was invalidated in *West Park Ave., Inc. v. Ocean Township*.[47] By limiting the Planning Act to its explicit language, the court found that statutory authority for educational fees was lacking.[48] The court pronounced that "[i]t is not our purpose to prejudge the constitutional power of the Legislature to authorize municipalities to impose charges such as the one

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42 60 N.J. 115, 286 A.2d 448 (1972).

43 *Id.* at 122, 286 A.2d at 501-02.

44 *Id.* at 124, 286 A.2d at 502-03.

45 *Id.* at 132, 286 A.2d at 510-11. The court offered a variety of standards which the town could utilize: it could pay for watermains with municipal funds, install them as local improvements and assess the cost to benefitted property owners, require developers to pay the full amount or require developers to pay but allow them to recoup expenses which benefitted others through a set formula. *Id.* The court was not concerned with which alternative was chosen, only with ensuring an equitable result which treated all consumers equally. *Id.*

46 *Id.*

47 48 N.J. 122, 127, 224 A.2d 1, 4 (1966).

48 *Id.* at 127, 224 A.2d at 4. The court first noted that improvements for educational purposes were not included in section 1.21 of the Planning Act. *Id.* at 125, 224 A.2d at 1. Second, the language of section 1.20 which permitted the reservation for one year of parts of a subdivision for educational purposes was found controlling. *Id.* at 126, 224 A.2d at 3. Because section 1.20 related to educational improvements and provided that the reserved land must be bought or condemned within a year the court reasoned that section 1.21 did not intend to encompass improvements for educational purposes. *Id.* The court further observed that education was traditionally supported by general taxation. *Id.*

here involved. Rather our point is that the Legislature has not committed that authority to local government."[49] As a result, the door was left open for the state legislature to permit fees for education and other programs generally supported by tax revenues. The decision to broaden the permissible scope of exactions was thus left to the legislature.

It was not until 1975, in *Divan Builders v. Planning Board of Township of Wayne*,[50] that the authority to impose off-site improvements pursuant to the old Planning Act was first sustained by the court.[51] In *Divan*, a fee imposed to construct a new off-site drainage facility was struck down because the ordinance adopted by the town failed to provide for the apportionment of the cost between the developer and other property owners who would benefit from the improvement.[52] The court had dispensed with the authority issue and moved on to the reasonableness test.[53] From *Divan*, the rule emerged that to implement properly the now recognized authority to impose an off-site exaction on a developer, the cost must be apportioned among all who will benefit from the improvement.[54] Costs which are not apportioned would be found an unreasonable exercise of the municipalities authority.[55] *Divan's* new rule was subsequently incorporated into the MLUL, which replaced the Planning Act of 1953.[56]

Two recent cases addressing the scope of a municipality's authority under the MLUL to adopt impact fee ordinances highlight the need for explicit impact fee enabling legislation in New Jersey. In *New Jersey Builders Association v. Bernards Township*,[57] impact fees relating to road improvement costs were invalidated[58] and in *Holmdel Builders v. Holmdel Township*[59] fees to provide for affordable housing were labelled as impermissible taxes by the

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49 *Id.* at 127, 224 A.2d at 4 (citations omitted).

50 66 N.J. 582, 334 A.2d 30 (1975).

51 *Id.* at 598, 334 A.2d at 38.

52 *Id.* at 598-601, 334 A.2d at 38-39.

53 *Id.*

54 *Id.*

55 *Id.*

56 N.J. STAT. ANN. §§ 40:55D-1 to -129 (West Supp. 1990).

57 108 N.J. 223, 528 A.2d 555 (1987).

58 *Id.* at 237, 528 A.2d at 562. For a more detailed discussion of this case see *infra* notes 110-15 and accompanying text.

59 232 N.J. Super. 182, 556 A.2d 1236 (App. Div. 1989), *rev'd*, 121 N.J. 50, 583 A.2d 277 (1990).

appellate court.[60] In both cases, the requisite authority to impose such fees was rejected because they were not directly linked to needs caused by the new development.[61] The language of section 42 was held to authorize the imposition of off-site exactions only when the improvements were directly necessitated by the new development.[62] The recent approval of affordable housing fees by the New Jersey Supreme Court in *Holmdel* does not appear to effect the Court's view of the scope of exaction authority under the MLUL.

In *Holmdel*, authority to impose fees for affordable housing was premised mainly on the Fair Housing Act.[63] The court did find, however, that affordable housing needs are often directly linked to new development.[64] The court's stretch here to validate affordable housing fees is more likely a reflection of their commitment to affordable housing rather than an indication of a more lenient approach to other exactions imposed pursuant to the MLUL.

In sum, the New Jersey Legislature has provided municipalities with limited authority to impose impact fees.[65] To implement this power properly any impact fee ordinance adopted pursuant to the MLUL must contain appropriate standards governing when such impact fees will be levied and a proper method for cost allocation.[66] From the trend of recent judicial opinions it is apparent that specific enabling legislation, such as the proposed bill discussed in section IV of this note, is required if impact fees are to be assessed for any purposes other than affordable housing or those currently enumerated in section 42 of the MLUL.

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60 *Id.* at 193, 556 A.2d at 1241.

61 *Bernards Tp.*, 108 N.J. at 237, 555 A.2d at 562; *Holmdel Builders*, 232 N.J. Super. at 194-95, 556 A.2d at 1242-43.

62 *Bernards Tp.*, 108 N.J. at 237, 555 A.2d at 562.

63 *Holmdel*, 121 N.J. 550, 583 A.2d 288 (1990).

64 *Id.* at 571-72, 583 A.2d at 288. *See infra* notes 116-135 and accompanying text for detailed discussion of court's holding.

65 N.J. STAT. ANN. §§ 40:55D-42 (West Supp. 1990). For the text of this section *see supra* note 36.

66 *See generally* Divan Builders v. Planning Board of Tp. of Wayne, 66 N.J. 582, 598, 334 A.2d 30, 38 (1975).

B. *The Constitutionality of Impact Fees*

From the foregoing cases we can discern that a lack of municipal authority is a potent challenge to impact fees in New Jersey. This is only the initial hurdle. Once authority is established, courts must determine whether the impact fee satisfies fifth and fourteenth amendment concerns. This section will discuss fifth amendment taking challenges to put matters into perspective, but will deal primarily with fourteenth amendment concerns.[67] This approach is taken because most of the suits brought in New Jersey have contested the reasonableness of the fee, thereby prompting fourteenth amendment analysis. Due to the court's intermingling of the authority and reasonableness requirements, much of the New Jersey case law dealt with in this section was mentioned in the prior section.

1. Fifth Amendment Taking Challenges

Fifth amendment challenges to exactions have been rare in New Jersey. This appears to be a result of the two-tiered test employed in analyzing impact fees. During a court's analysis, exactions are first tested for authority.[68] If no authority exists to impose an exaction, it will be invalidated on this ground. As discussed earlier, many New Jersey impact fee ordinances have been rejected at this initial stage.[69] Once rejected, a court need not reach fifth and fourteenth amendment considerations.[70] Furthermore, in cases which have passed the authority test, the issue has been the reasonableness of the fee imposed rather than whether

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67 For an in-depth analysis of fifth amendment challenges to exactions *see* Morgan, Dunean & McClendon, *supra* note 5; Delaney, *supra* note 29.

68 *See supra* notes 30-66 and accompanying text.

69 *Id.*

70 *See* Holmdel Builders v. Holmdel Tp., 232 N.J. Super. 182, 195, n.3 550 A.2d 1236, 1242 where the court explained "[i]n view of our determination that mandatory development fee ordinances have no statutory authorization, we need not address plaintiffs' arguments that the ordinances represent an unconstitutional taking and violate the equal protection and due process clauses under the state and federal constitution." *See also* Brazer v. Borough of Mountainside, 55 N.J. 456, 262 A.2d 875 (1970) (required reservation of a right-of-way would be taking of private property without just compensation if it was required simply because the master plan depicts the proposed street); Midtown Properties, Inc. v. Madison Tp., 68 N.J. Super. 197 (Law Div. 1961) (fees for educaional purposes not provided for in Act and thus consituted a taking without due process of law).

the fee could be imposed at all.[71]

Assuming the New Jersey courts were to address squarely a takings claim with respect to impact fees, an important recent United States Supreme Court case has set forth the test for courts to follow. In *Nollan v. California Coastal Commission*,[72] the Court held that the requirement that a property owner grant an easement over his property to ensure public beach access before a development permit would be approved, violated the fifth amendment's proscription against the taking of private property without just compensation.[73] The test set forth by the Court to measure the constitutionality of development exactions employed a nexus analysis.[74] To be upheld, the condition attached to development approval must "substantially advance" an asserted governmental interest in imposing the condition.[75] Furthermore, an "essential nexus" must be shown between the condition imposed and the "legitimate state interest."[76]

In *Nollan*, the required beach front easement failed to satisfy the Court's essential nexus test. The Court found that the presumed legitimate state interest in preserving the public view of the beach was not advanced by allowing persons already on the beach to cross over the plaintiff's property.[77] Hence, the nexus between the imposed condition and the state interest claimed to justify it was lacking.[78] In fact, the Court labelled the easement requirement "an out-an-out plan of extortion."[79]

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71 *See supra* notes 30-66 and accompanying text.

72 483 U.S. 825 (1987).

73 *Id.* at 841-42.

74 *Id.* at 836-37.

75 *Id.* at 834. Additionally, the regulation may not deny an owner the "economically viable use of his land." *Id.* (quoting Agins v. Tiburin, 447 U.S. 255, 260 (1980)).

76 *Nollan*, 485 U.S. at 839. For a comprehensive discussion of *Nollan* and its requirements *see* Best, *Nollan Sets News Tests and Standards for Exactions*, 1988 Zoning & Planning Law §§ 9.01-.08; Curtin, *Status of Exactions After First Lutheran Church and Nollan Cases*, 1989 Zoning & Planning Law §§ 11.01-.05.

77 *Nollan*, 483 U.S. at 838. The construction of the new home may well have blocked views of the beach but the easement did not alleviate this problem. Consequently, the court found that the state's exercise of its land use power was improper because such exercise was not for the purpose of correcting the problem which compelled them to exercise it. *Id.*

78 *Id.* In *Nollan*, the condition did not "substantially advance" a legitimate state interest.

79 *Id.* at 837.

From *Nollan*, a stricter nexus requirement between the fee charged and the burden it imposes upon development emerges. This new test is of great consequence to land use law. The message from the land's highest court is that private property rights are of the utmost importance; let the municipality or state imposing conditions on those rights beware.[80]

Exactions in New Jersey which are properly imposed pursuant to the MLUL would pass the *Nollan* test. If authority to impose the fee exists, it is pursuant to the MLUL. The power to adopt planning regulations similar to the MLUL has already been upheld by courts as serving a legitimate state interest in controlling the growth and development of the state.[81] Moreover, the exactions permitted under the MLUL are for the express purpose of obtaining this objective and already incorporate a nexus test which is arguably stricter than the *Nollan* test.[82] Therefore, the enumerated exactions "substantially advance" the state's legitimate interest in planned growth and, if applied pursuant to the requirements set forth in the MLUL, will be utilized to satisfy their expressed purpose, thereby establishing the required nexus between the condition and the state interest.

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[80] It is argued that the effect of Nollan on exactions may be minimal for three reasons. Morgan, *supra* note 32, at § 7.03 First, the *Nollan* decision does not address excessive exactions. *Id.* Thus, the more lenient reasonableness test will be used when the condition is contested as a taking because it is too high. *Id.* Second, *Nollan* could justifiably be limited to cases where exactions result in the physical occupation of the property itself. *Nollan* does not specifically address the strength of its nexus test as a general rule to be applied to all cases. As a result, critics argue that the test will be the strictest when property interests are actually required to be transferred. *Id.* A less stringent nexus may be required when only limited conditions are imposed on the property. *Id.* As distinguished from more typical exactions, the *Nollan* exaction at issue was an easement so that other people could pass over the owners property. *Id.* Third, the court itself recognized that the approach it adopted was consistent with the approach most state courts had already adopted. *Id. See Nollan*, 483 U.S. at 839.

[81] *Mansfield & Sweet*, 120 N.J.L. 145, 198 A. 225 (1938). In fact, *Nollan* cites residential zoning as falling within the range of governmental purposes and regulations which would satisfy their requirement. *Nollan*, 483 U.S. at 834-35.

[82] *See* N.J. STAT. ANN. § 40:55D-2 for expressed purposes of the Municipal Land Use Law. Section 42, which permits off-site exactions, incorporates a nexus test which requires the imposed conditions to be "necessitated" by the development. Case law has interpreted this as requiring funding needs to be a "direct consequence" of the project in order to collect fees for it. New Jersey Builders Assoc. v. Bernards Tp. 108 N.J. 223, 528 A.2d 555 (1987). *See supra* note 36 for text of section 42.

2. Fourteenth Amendment Challenges

To survive a fourteenth amendment challenge an impact fee ordinance must constitute a reasonable exercise of the state's police power.[83] State courts utilize various tests to determine the reasonableness of exactions.[84] The most common are the reasonable relationship test,[85] the rational nexus test,[86] and the specifically and uniquely attributable test.[87] The rational nexus test is the most moderate of the three and is used by a majority of states, including New Jersey.

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83 *See* Heyman & Gillrod, *supra* note 12, at 1122-23; Blaesser & Kentopp, *supra* note 5, at 96-97.

84 Blaesser & Kentopp, *supra* note 5, at 97 (noting the numerous tests employed by different courts as a result of inbreeding from various jurisdictions).

85 The reasonable relationship test, generally applied to zoning regulations, is used in a few states. *Id. See, e.g.*, Ceyres v. City Council of City of Los Angeles, 34 Cal. 2d 31, 207 P.2d 1 (1949) (upheld condition requiring the dedication of improvements to road adjacent to owners property); City of College Station v. Turtle Rock Corp., 680 S.W.2d 802, 806 (Tex. 1984) (exactions for recreational needs are permissible if there is a "reasonable connection" between the city's park needs and the new development). The test simply requires that a reasonable relationship exist between the exaction and the needs created by new development. Blaesser & Kentopp, *supra* note 5, at 99. It is the most liberal of the three tests.

86 This test has emerged as the most popular. Blaesser & Kentopp, *supra* note 5, at 100. It requires that the fee amount be in proportion to the needs generated by the new development and the benefit the improvement will provide to the development. *Id.* at 101. *See generally* Jordan v. Village of Menomenee Falls, 28 Wis. 2d 608, 137 N.W. 2d 442 (1965) (in-lieu fees for off-site educational and recreational improvements were permissible exercise of police power because there was a "reasonable connection" between the need for the improvements and the growth attributable to the subdivision); Hollywood, Inc. v. Broward County, 431 So. 2d 606, 611 (Fla. Dist. Ct. App. 1983) (coined phrase "rational nexus"); Home Builders & Contractors Association of Palm Beach County, Inc. v. Board of County Commissioners of Palm Beach County, 446 So. 2d 140, 143-44 (Fla. Dist. Ct. App. 1983) (in upholding road impact fees court refined the "rational nexus" test to include a need-benefit analysis); Frisella v. Town of Farmington, 550 A. 2d 102 (N.H. 1988) (off-site road contribution requirement exhibited no rational nexus between the improvements and the needs created by new subdivision and no special benefit to subdivision shown); Banberry Development Corp. v. South Jordan City, 631 P. 2d 899 (Utah 1981) (implicitly adopts rational relationship test in analyzing water connection and park fees). For New Jersey cases adopting and applying the rational nexus test *see infra* notes 88-115 and accompanying text.

87 This test has its roots in the landmark exaction case of Pioneer Trust & Savings Bank v. Village of Mount Prospect, 22 Ill. 2d 375, 176 N.E. 2d 799 (1961) (invalidated impact fees for educational purposes). The test requires that valid exactions must be "specifically and uniquely attributable" to the new development. Blaesser & Kentopp, *supra* note 5, at 103. It is clearly the most difficult test for an exaction to satisfy. *Id.*

The rational nexus test has a complicated history in New Jersey. In an early case, *Lake Intervale Homes, Inc. v. Parsippany-Troy Hills*,[88] the New Jersey Supreme Court struck down an ordinance requiring a developer to install sewer lines as violative of his equal protection rights.[89] Passing on the question of authority to impose such requirements,[90] the court declared the ordinance an unreasonable exercise of the police power because it was devoid of standards governing what exactions may be required of a developer.[91] To impose the entire cost of the sewer line on the developer, without any reference to the resulting benefits to him, was held "clearly arbitrary and discriminatory."[92]

Similarly, in *Longridge Builders, Inc. v. Planning Board of Princeton Township*,[93] a condition requiring a developer to pave an off-site right-of-way was invalidated.[94] The court decided the case on the assumption that off-site improvements were permissible under the Planning Act.[95] Regardless of this requisite authority, the court asserted that without standards and procedures to determine the appropriate amount of the fee, any ordinance adopted pursuant to the planning power must fail.[96] Citing *Lake Intervale* with approval, the court declared that a developer "could be compelled only to bear that portion of the cost which bears a rational nexus to the needs created by, and benefits con-

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88 28 N.J. 423, 147 A. 2d 28 (1958).

89 *Id.* at 442, 147 A.2d at 39.

90 The validity of on-site improvement requirements pursuant to § 1.21 of the Planning Act was later upheld in Levin v. Livingston Tp., 35 N.J. 500, 173 A.2d 39 (1961).

91 *Lake Intervale Homes*, 28 N.J. at 441, 147 A.2d at 38-39.

92 *Id.* It is through this language that the requirement that fees relate to the costs generated by new development begins to emerge. The court apparently believed that the Planning Act requirement of standards within the ordinance correlated into a cost apportionment of the fees. Later courts cited *Lake Intervale* as requiring this. *See* Longridge Builders Inc. v. Planning Bd. of Princeton Tp., 52 N.J. 348, 245 A.2d 336 (1968).

93 52 N.J. 348, 245 A.2d 336 (1968).

94 *Id.* at 352, 245 A.2d at 338.

95 *Id.* at 350, 245 A.2d at 337. Off-site improvements were later held to be valid under the Planning Act in *Divan Builders*, 66 N.J. at 595, 334 A.2d at 36.

96 *Longridge*, 52 N.J. at 350, 245 A.2d at 337. The court pointed out that without standards and procedures "the planning body would be left with an impermissibly broad range of discretion in exacting off-site improvements from subdividers; landowners and developers would have no basis for planning; and reviewing courts would be without a measuring rod to gauge the validity of the imposition." *Id.* at 351, 245 A.2d at 337.

ferred upon, the subdivision."[97] The rational nexus test was now firmly established as the method of determining the constitutionality of impact fees.

The contours of the rational nexus test adopted in *Longridge* were refined in *Brazer v. Borough of Mountainside*[98] and *Divan Builders v. Planning Board of Township of Wayne*.[99] In *Brazer*, the court applied the rational nexus test of *Longridge* to uphold a condition placed on the plaintiffs subdivision approval.[100] The court found that the required right-of-way for a street extension over plaintiff's property was necessary to serve the subdivision and thus beneficial to the subdivided lots.[101] Thus, the exaction did not constitute an unconstitutional taking of private property without just compensation.[102]

In *Divan*, after concluding that off-site improvements were permissible under the Planning Act,[103] the court addressed their constitutionality.[104] The court announced that exactions would be upheld only if the improvements were required because of the development's effect on other property and if appropriate cost-apportionment procedures were adopted to ensure that other property owners who "specially benefitted" from the improvement paid their fair share.[105] In addition, the court directed that standards governing the construction and installation of the required improvements must be outlined in the ordinance.[106] If these requirements are not satisfied "[p]lanning Board impositions, although purportedly authorized by the Planning Act on

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97 *Id.* at 350, 243 A.2d at 337. The court continued by stating that "[i]t would be impermissible to saddle the developer with the full cost where other property owners receive a special benefit from the improvement." *Id.*

98 55 N.J. 456, 262 A.2d 857 (1970).

99 66 N.J. 582, 334 A.2d 30 (1975).

100 *Brazer*, 55 N.J. at 470, 262 A.2d at 861-62.

101 *Id.*

102 *Id.* at 465, 262 A.2d at 861-62. The court noted at the outset that if the required right-of-way was not made necessary by the subdivision a fifth amendment violation would exist.

103 *Divan*, 66 N.J. at 595, 334 A.2d at 36.

104 *Id.* at 600, 334 A.2d at 39. The court's analysis was thus a traditional one: the authority to impose the impact fee was established before constitutional issues were addressed. In prior cases the constitutionally mandated reasonableness test was used to establish a lack of authority, which should be a separate and distinct question.

105 *Id.* at 601-03, 334 A.2d at 40-41.

106 *Id.* at 596, 334 A.2d at 37.

the local ordinance, amount to impermissible exactions."[107] The legislative response to *Divan* is codified in section 42 of the MLUL.[108] A rational nexus test was incorporated in section 42 as a prerequisite to adopting off-site improvement ordinances.[109]

This new language in section 42 was first interpreted by the New Jersey Supreme Court in *New Jersey Builders Association v. Bernards Township*[110] to require the invalidation of road improvement impact fees.[111] The court specifically held that "the plain meaning and obvious legislative intent was to limit municipal authority only to improvements the need for which arose as a direct consequence of the particular subdivision or development under review."[112] This interpretation was premised on language in section 42 stating that only "reasonable and necessary. . .[off-site]. . .improvements. . .necessitated or required by. . .[the development]" may be required.[113] Therefore, the $20 million road improvement plan could not be funded by impact fees because only an "anticipated necessity"[114] due to new growth could be shown.[115]

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107 *Id.* at 600, 334 A.2d at 39 (quoting *Brazer*, 55 N.J. at 466, 262 A.2d at 802).

108 N.J. STAT. ANN. § 40:55D-42 (West Supp. 1990). *See supra* note 36 for the text of section 42.

109 *Id.*

110 108 N.J. 223, 528 A.2d 555 (1987).

111 *Id.* at 233, 528 A.2d at 560.

112 *Id.* at 237, 528 A.2d at 562. The fees were held to be "an invalid exercise of municipal authority" because the sought after improvements were not directly attributable to the development at issue. *Id.* at 238, 528 A.2d at 562.

113 *Id. See supra* note 36 for the text of section 42. Although purporting to give the statute its broadest possible application, the decision is more restrictive than liberal in its interpretation of section 42. Nothing in the language of section 42 requires a "direct" consequence to be proven. In fact, a reasonable interpretation could be that whenever a new development contributes or creates a need for off-site improvements in the community the developer may be required to pay his pro rata share of the cost of such improvements.

114 *Bernards Township*, 108 N.J. at 238, 528 A.2d at 562. The courts statement that "anticipated" growth may not be the subject of impact fees is illogical. All exactions are premised on the anticipated need for the improvement which the new development is expected to cause.

115 *Id.* The court in *Bernards Township* noted that "the variety of governmental devices used to impose public facility costs on new development reflect a policy choice that higher taxes for existing residents are less desirable than higher development costs for builders, and higher acquisition costs for new residents." *Id.* at 233, 528 A.2d at 560.

The hostility one feels the court is directing at impact fees when first reading this opinion is somewhat mitigated by the court's concluding paragraph:

A recent New Jersey decision concerning impact fees is *Holmdel Builders A'ssn.v. Holmdel Township*.[116] In *Holmdel*, several municipalities adopted impact fee ordinances requiring developers to pay certain fees to aid the municipalities in meeting their affordable housing obligations.[117] These mandatory development fee ordinances were vehemently rejected by the Appellate Division as being "nothing more than revenue raising devices which have no legislative authority . . . [they] constitute an illegal tax imposed upon a discrete group of landowners and taxpayers for the single purpose of satisfying a general municipal obligation to provide a realistic opportunity for affordable housing."[118] The court was particularly upset with the mandatory nature of

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> It is indisputable that subdivisions and development applications, in addition to their direct impact on municipal facilities in the surrounding area, have a cumulative and wide-ranging impact on the entire community. We cannot fault the logic or the foresight that induces a municipality such as Bernards Township to consider the long-term impact of permitted development on municipal resources and public facilities.

Id. at 237-38, 528 A.2d at 562.

The legislative response to the *Bernards Township* decision is codified in N.J. STAT. ANN. §§ 27:1C-1 to -18 (West Supp. 1989). This new Transportation Development District Act permits delineated districts to impose road improvement fees on new development to offset the cost of maintaining and constructing roads which serve the district the development is located in.

116 232 N.J. Super. 182, 556 A.2d 1236 (App. Div. 1989), *rev'd*, 121 N.J. 50, 583 A.2d 277 (1990).

117 232 N.J. Super. at 187-90, 556 A.2d at 1238-40.

118 *Id.* at 193, 556 A.2d at 1241. The court further stated that "[t]his shifting of a public responsibility to a limited segment of the community is not only without legislative authority, it also violates the rule of uniform taxation established by our State constitution." *Id.* at 193-94, 556 A.2d at 1241-42. *See also* Daniels v. Pt. Pleasant 23 N.J. 357, 129 A.2d 1265 (1957) (required fees for educational purposes were struck down as invalid taxes). Taxes on property in New Jersey must be assessed by uniform rules. N.J. Const., art. VIII, Sec. 1, par. 1. General enabling legislation for the implementation of municipal police powers is in sharp contrast to the restrictive taxing power of municipalities which is generally limited to raising general revenues. *See* Hagman & Juergensmeyer, *supra* note 20, at 207-08. When enabling legislation does not expressly or impliedly permit the imposition of an impact fee for the activity concerned the court will normally construe the fee as an invalid tax. *Id.* at 208. The intent of the ordinance is of primary importance in determining whether the fee is a tax or a valid exercise of the police power. If the fees are collected primarily to raise general revenues to finance municipal obligations, as contended by the appellate court in *Holmdel*, the fees will be labelled a tax. Also fees deposited in the general treasury invite a tax label. To avoid the tax label, the intent of the fees should be to ensure adequate public facilities exist to serve new development and the fund should be kept in separate accounts. *See* Morgan, *supra* note 32, at § 7.02[2].

the fees.[119] Furthermore, the court emphasized the lack of a nexus between the fees and the needs created by new development.[120] The court maintained that the need for affordable housing is not created by new development, but by a municipality's prior default in the construction of low and moderate income housing.[121]

When confronted with this issue, the New Jersey Supreme Court took a different approach. Reaffirming their commitment to affordable housing,[122] the court recently affirmed the Appellate Division's holding but reversed its reasoning.[123] In an unanimous opinion written by Justice Handler, the court held that reasonable mandatory development fees to finance affordable housing would be permissible if imposed pursuant to validly adopted regulations by the Council on Affordable Housing (COAH).[124] Such fees could be imposed on both residential and commercial development.[125]

The Fair Housing Act (FHA)[126] was held by the New Jersey Supreme Court in *Holmdel Builders* to provide the primary author-

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119 232 N.J. Super. at 194-95, 556 A.2d at 1242. The court observed that "[a] mandatory development fee applied indiscriminately as a price to build within the municipality has no 'real and substantial relationship to the regulation of land', nor does it advance a purpose of zoning 'in a manner permitted by the Legislature.' " *Id.* (quoting State v. C.I.B. International, 83 N.J. 262, 271-72, 416 A.2d 362, 366-67 (1980)).

The court acknowledged that if density bonuses were provided "a *voluntary* provision for an 'in lieu' development fee, paid into a fund for the construction of Mt. Laurel housing is sustainable, provided that the fee charged bears a reasonable relationship to the benefits conferred by the density bonus." *Id.* at 201, 856 A.2d at 1246.

120 *Id.* at 198, 556 A.2d at 1244.

121 *Id.*

122 *See* Southern Burlington County NAACP v. Mount Laurel Township, 67 N.J. 151, 336 A.2d 716 (1975) (Mt. Laurel I) (pursuant to New Jersey Constitution municipalities must provide a realistic opportunity for the development of affordable housing).

123 Holmdel v. Holmdel Tp., 121 N.J. 550, 583 A.2d 277 (1990). The court affirmed the ultimate ruling that the fees at issue were invalid but reversed the lower courts analysis. *Id.*

124 *Id.* at 586, 583 A.2d at 295. The ordinances at issue in Holmdel were struck down because COAH had not yet adopted enabling regulations to authorize and guide the adoption of municipal mandatory development fees for affordable housing. *Id.* at 586, 583 A.2d at 295. It is anticipated that COAH will be quick to implement this judicially approved power.

125 *Id.*

126 N.J. STAT. ANN. §§ 52:27D-301 to 329 (West. Supp. 1990).

ity for affordable housing fees.[127] The court carefully noted, however, that the fees were also consistent with the MLUL and derivative police powers of municipalities.[128] Writing for the court, Justice Handler recognized that the FHA is an enabling act which seeks to ensure that the zoning power encompasses the constitutionally mandated affordable housing needs of a community.[129] Furthermore, the provision of affordable housing was set forth by the court as being within the public welfare ambit of the state's police power, upon which the MLUL is based.[130]

Despite the court's approval of affordable housing fees under the MLUL, the rational nexus test of the MLUL for off-site improvements was rejected as the appropriate test for such fees.[131] Instead, the court determined that a reasonable relationship between the need for the fees and new development was sufficient.[132] This deviation from the "direct consequence" rule of *Bernards Township* is not of great significance to exactions in

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127 *Holmdel*, 121 N.J. at 572-73, 583 A.2d at 287-88.

128 *Id.* at 572, 583 A.2d at 288.

129 *Id.* at 567-68, 583 A.2d at 285-86. Justice Handler asserted that "[a]ffordable housing is a goal that is no longer merely implicit in the notion of general welfare. It has been expressly recognized as a governmental end and codified under the FHA, which is to be construed in *pari materia* with the MLUL." *Id.* at 567, 583 A.2d at 285.

130 *Id.* at 568-69, 583 A.2d at 286. The court declared that "[a] municipality in the exercise of its police power clearly may seek to address housing problems." *Id.* at 569, 583 A.2d at 286.

131 *Id.* at 571, 583 A.2d at 288. Justice Handler noted that the rational nexus test in New Jersey required "a strong, almost but-for, causal nexus between off-site public facilities and private development in order to justify exactions." *Id.* at 570-71, 583 A.2d at 287.

132 *Id.* The court distinguished between affordable housing fees and other exactions under the MLUL by noting that the former reached all land development and sought to encourage affordable housing while the latter focused on particular off-site improvements needed because of a specific development *Id.* at 572, 583 A.2d at 288. The court specifically maintained that:

> Inclusionary zoning through the imposition of development fees is permissible because such fees are conducive to the creation of a realistic opportunity for the development of affordable housing; development fees are the functional equivalent of mandatory set-asides; and it is fair and reasonable to impose such fee requirements on private developers when they possess, enjoy, and consume land, which constitutes the primary resource for housing. Such measures do not offend the zoning laws or the police powers.

Id. (citations omitted).

general.[133] The court in *Holmdel* took pains to reiterate the purposes behind their stringent nexus test and why they were not requiring it to be applied to fees for affordable housing.[134] In addition, the court's validation of these types of fees is premised primarily on implied authority under the FHA, not the MLUL, to impose them.[135]

The court's stringent nexus test for most exactions, together with the limited legislative provisions for impact fees, has resulted in the introduction of proposed fee legislation in New Jersey which will broaden municipal power to impose impact fees.

IV. Proposed Impact Fee Legislation

In response to the infrastructure crisis facing New Jersey municipalities,[136] and the uncertainty surrounding recent judicial exaction decisions,[137] the legislature has proposed enabling legislation to specifically authorize the municipal imposition of im-

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133 *See supra* notes 110-115 and accompanying text for discussion of court's holding in *Bernards Township*.

134 *Holmdel*, 121 N.J. at 571-72, 583 A.2d at 287-88. Justice Handler acknowledged that the court traditionally requires a strong nexus between off-site improvements and private development before an exaction will be upheld. The aims of this stringent test were stated as ensuring that a developer pays only for needs his development generates and he pays only his proportionate share. *Id.* at 571, 583 A.2d at 288. In favoring the requirement of a reasonable rather than stringent nexus between commercial development and affordable housing needs, the court noted the laudable goal of such fees and concluded:

> We find a sound basis to support a legislative judgment that there is a reasonable relationship between unrestrained nonresidential development and the need for affordable residential development. We do not equate such a reasonable relationship with the strict rational-nexus standard that demands a but-for causal connection or direct consequential relationship between the private activity that gives rise to the exaction and the public activity to which it is applied. Rather, the relationship is to be founded on the actual, albeit indirect and general, impact that such nonresidential development has on both the need for lower-income residential development and on the opportunity and capacity of municipalities to meet that need.

Id. at 572, 583 A.2d at 288.

135 *Id.*

136 The plight of New Jersey municipal infrastructures is recognized as the primary purpose of the proposed bill. S. 2037, 204th Leg., 1st Sess., § 3 (1990). *See also supra* notes 1-5 and accompanying text for a discussion on the crisis and its cause.

137 *See supra* notes 110-135 and accompanying text.

pact fees. The proposed legislation, entitled the "Municipal Development Impact Fee Authorization Act,"[138] grants broad powers to municipalities to utilize impact fees to defray rising infrastructure costs.[139] Activities which may be financed by impact fees range from traditional exactions for water and sewer lines to educational and public safety purposes.[140] The bill responds to developer fears of arbitrary and unreasonable fees by mandating strict guidelines on how fees will be calculated and imposed.[141] Overall, the delicate balance struck between providing for municipal needs and fairness to new development appears likely to achieve its dual purpose of providing municipalities with additional funding and making new development pay its fair share.[142]

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138 S. 2037 and A. 2889, 204th Leg., 1st Sess. (1990). The bill is sponsored by Senator Paul Contello (D-38th Dist.) and Assemblymen Impreveduto and Kronick (D's-32nd Dist.). The bill is currently awaiting review by the Senate Land Use Management Committee and Assembly Housing Committee.

Sections 1, 7-9, 11, 13 and 14 of the bill comprise the municipally related portion of the bill. S.2037, 204th Leg., 1st Sess., §§ 1, 7 to 9, 11, 13 (1990). The proposed "County Development Impact Fee Authorization Act" is contained in sections 2 and 18 through 24. *Id.* §§ 2, 18 to 29. For purposes of this note only those sections relating to municipalities are discussed. However, the discussion pertains equally to the proposed county portion of the bill as almost identical language is contained there. The only significant difference is that the county sections limit a county's authority to impose impact fees to drainage facility improvements and improvements to county roads not covered under the Transportation Development District Act. *Id.* § 19(b).

139 *Id.* § 7(b).

140 The bill provides that impact fees may be assessed by a municipality to cover the cost of any of the following improvements that are necessitated by the new development: transportation (applies only when new development is not located in a county covered by a transportation development district pursuant to N.J. STAT. ANN. §§ 27:1C-1 to 18 (West. Supp. 1990)), water treatment and distribution, wastewater treatment and sewerage, flood control and stormwater management, low and moderate income housing, parks and recreational facilities, educational and public safety facilities. *Id.* § 7(b).

141 Specific standards for what fees may be imposed for, the current need for the improvements and the fees which may be charged, as well as other control oriented provisions, are required to be set forth in an implementing ordinance. *See infra* notes 156-58, and accompanying text.

142 Of course, in effect, new development has been paying its own way for years. Municipalities are able to tax vacant land without providing any services to the landowner. Thus, these vacant landowners have been contributing to other development needs all along. Furthermore, most developers have been at the mercy of overreaching planning boarding for decades. *See* West Park Ave, Inc v. Ocean Tp. 48 N.J. 122, 127, 229 A.2d 1, 9 (1966). A common practice of planning boards throughout the state, aptly illustrated in *Nunziato*, is for the board to suggest certain contributions which the developer then "volunteers" to pay. Nunziato v. Planning

In the preamble to the bill, a litany of problems are recited which are held to require the enactment of impact fee legislation.[143] Specifically, the sponsors cited the building boom of the 1980's as having caused a drain on existing municipal facilities,[144] as well as creating the need for increased levels of service,[145] and for increasing the demand for affordable housing.[146] To counteract these negative effects, municipalities will be permitted "to levy impact fees on new development in order to make those improvements in the local infrastructure which are necessary to accommodate the new development and to meet the additional need for affordable housing associated with that development."[147] This broad grant of regulatory authority to impose impact fees is accompanied by strict requirements relating to the valid implementation of an impact fee ordinance.

The bill requires that municipalities desiring to impose impact fees on new development must first adopt a master plan[148]

Bd. of Edgewater, 225 N.J. Super. 124, 134, 541 A.2d 1105, 1110 (developer "volunteered" to pay $203,000 toward affordable housing costs at board's "suggestion"). These fees are generally not contested, unless clearly outrageous, because it is in the developer's best interest to avoid protracted litigation and to avoid falling into disfavor with the Board.

This ad hoc bargaining, clearly illegal, is not condemned by all developers. Some developers would prefer to bargain individually with each town rather than be required by law to pay certain enumerated fees.

143 S. 2037, 204th Leg., 1st Sess., §§ 3(a)-(e)(1990).

144 *Id.* § 3(b).

145 *Id.* § 3(c).

146 *Id.* § 3(d) and (e). Section (d) references the municipal Mt. Laurel obligation to provide low and moderate income housing and declares that the increased need for affordable housing units today is a result of New Jersey's recent housing boom. This link is contested by many and, at least with respect to residential development, is highly debatable. *See infra* notes 168-69. *See also supra* notes 130-32.

That the housing boom exacerbated municipal infrastructure problems is difficult to dispute. However, critics of impact fees assert that the problem was the result of poor planning by municipalities that had allowed their infrastructures to slip yet desired to benefit from new development. *See* Letter from New Jersey Association of Realtors to Senate Land Use Management and Regional Affairs Committee (April 19, 1990) (attacks use of impact fees to correct past problems).

147 S. 2037 § 3(e).

148 *Id.* § 7(a). Master plans are to be adopted pursuant to N.J. STAT. ANN. § 40:55D-28 (West. Supp. 1990). A master plan is a general outline of the major zoning goals of a municipality. It is an omnibus plan touching on most areas of municipal concern and the manner in which the municipality intends to deal with those concerns.

and a capital improvement plan.[149] These plans serve as a guide to both municipalities and developers regarding the present condition of the municipal infrastructure and its future needs associated with the new growth. Specifically, the capital improvements program mandated by the bill requires a complete analysis of current capital facilities,[150] the usage levels associated with each facility,[151] a delineation of the service areas of each facility[152] and the costs of adequately maintaining or replacing each facility.[153] Future needs, based on the anticipated level of development set forth in the master plan, must also be calculated.[154] Finally, for each unit of development, a set measure of use and consumption with respect to the enumerated facility improvements must be es-

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149 S.2037 § 7(a). The contours of the capital improvement plan are laid out in section 11 of the bill. Capital improvement plans are to be adopted pursuant to N.J. STAT. ANN. § 40:55D-30 (West Supp. 1990).

Section 29 of the MLUL governs the voluntary adoption of capital improvement plans today and its language is incorporated into section 11 of the new bill. S.2037 § 11. However, the bill provisions are mandatory and provide more specific guidelines on what the plans must contain. *Id.*

150 *Id.* § 11(a). All existing capital facilities must be listed in the plan.

151 *Id.* § 11(b). Total capacity levels must also be determined. *Id.*

152 *Id.* § 11(a). A "service area" is defined in the bill as "that area to be served by the capital improvement or facility expansion as designated in the capital improvement program. . . ." *Id.* § 6.

153 *Id.* § 11(a). The determination of costs associated with improving or replacing any capital improvement is to be calculated by assessing what will be required to meet current or future demand or stricter safety, environmental or regulatory standards. *Id.*

154 *Id.* § 11(c). The outlining of future needs is of central importance in a capital improvement program which will be relied on to adopt an impact fee ordinance. Subsection (a) references future need analysis by stating that costs for needed improvements can be based on prospective demands. *Id.* § 11(a). Subsection (d) further requires an estimate of the number of service units expected to result from the master plan projections on new development. *Id.* § 11(d). A "service unit" consists of "a standardized measure of consumption, use, generation or discharge attributable to an individual unit of development calculated in accordance with generally accepted engineering or planning standards for a particular category of capital improvements or facility expansions." *Id.* § 6.

In addition to the specifics contained in section 11(a)-(e), most of the general provisions of the MLUL's capital improvement plan section are reiterated. *See* N.J. STAT. ANN. § 40:55D-28 (West Supp. 1990). For example, projects are to be classified in order of importance with a recommended time frame for completion. Additionally, the total estimated cost of each project must be set forth as well as the existing sources of funds or need for additional funds to complete the projects. S. 2037 § 11. Again, the difference is the bill uses the term "shall" rather than "may" (as used in the MLUL) with respect to each provision. *Id.*

tablished.[155] Hence, the capital improvement program serves as a measuring rod to determine the appropriate improvement costs which may be charged to new development.

Only after the above plans are properly in place may an impact fee ordinance be adopted. The proposed ordinance is subject to a variety of requirements. The ordinance must clearly state the purposes for which impact fees may be used[156] and must set forth a fee schedule.[157] These provisions ensure that developers will have at least some advance notice of what may be required of them and can therefore properly assess the economic viability of their projects.[158] Protection of developer expectations is further provided for by the mechanics of the fee calculation. First, the delineated service area in which the development is located will determine what applicable capital improvements a developer may be required to fund.[159] Second, the fee itself, for each individual unit, is arrived at by referencing the applicable service unit set forth in the ordinance.[160]

For developers, the most significant aspect of the bill is its definition of an impact fee. Incorporated into this definition is the "rational nexus" test New Jersey courts have utilized in analyzing the validity of impact fees.[161] The bill defines impact fees as charges against a developer for his proportionate share of rea-

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155 S. 2037, 204th Leg., 1st Sess., § 11(e) (1990).

156 *Id.* § 7(a)(2). It is left to municipal discretion to decide for which of the permitted purposes it will utilize impact fees. *See supra* note 140 for permitted purposes.

157 S. 2037 § 7(a).

158 The greatest danger impact fees pose to both developers and municipalities is that high fees may render development projects, including affordable housing projects, economically infeasible. Accordingly, municipalities must be careful not to set their fees so high that new development will be deterred entirely.

159 The bill requires that the ordinance map out service areas for each capital facility whose improvement is to be funded with impact fees. S. 2037 § 7(a). Based on this information a fee schedule must be arranged for the charge to each service unit. *Id.*

160 *Id.* An example will best illustrate the mechanics of a proper ordinance: once a developer determines from within the ordinance what capital improvements, to be funded by impact fees, are located in his "service area," he can read the ordinance to determine the relevant "service unit" applied to his individual units. By multiplying the number of service units his development will generate by the fee for each service unit, he will arrive at the total cost his project will be charged due to the impact it will have on nearby capital improvements.

161 *See supra* notes 88-115 and accompanying text for the development of the "rational nexus" test in New Jersey.

sonable and necessary off-site public improvement costs which are reasonably related to the development.[162] Most important, however, is that the definition concludes that impact fees are based upon the need for the improvement created by, and the benefits conferred upon, the subdivision or development.[163] This definitional language is reinforced by a later provision in the bill which declares that "[a]n impact fee may be imposed by a municipality under this act to generate revenue for funding or recouping the costs of new capital improvements or facility expansions *necessitated* by new development."[164] These statements should help alleviate developer fears of arbitrary and unreasonable assessments.[165] Furthermore, the bill provides that impact fees may not exceed the reasonable cost of constructing or improving the capital facility the impact fee is intended to fund.[166] As a final form of protection, a developer is permitted, albeit with the municipality's consent, to construct the improvements himself in lieu of paying his assessed impact fee.[167]

The bill's linking of impact fees with affordable housing is particularly controversial. Whether new residential development has created the need for affordable housing is at the heart of this debate.[168] In New Jersey, the recent *Holmdel* decision has ren-

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162 S. 2037, 204th Leg., 1st Sess., § 5 (1990).

163 *Id.* Through this definition the bill ensures that properly imposed impact fees will be upheld as valid regulatory measures. Because impact fees must be related to needs created by the development, and are to be used for purposes conferring a benefit on the development, a tax label is avoided. In sum, by definition impact fees are not for general revenue purposes. *See id.*

164 *Id.* § 7(b) (emphasis added).

165 Clearly, a major goal of this impact fee bill is to set forth exactly what a municipality may charge a new development. By specifically outlining permissible exactions and how they shall be calculated, developers are protected from unfettered municipal discretion. The term "necessitated," however, is somewhat ambiguous and may result in continued litigation.

166 S. 2037 § 8(a). This provision is of limited protection to developers unless only small improvements are sought. For larger improvements, such as building a library, fees are capped at the total cost of the project so it is clear some fees could still reach astronomical levels.

167 *Id.* § 9(c). It is assumed, however, that consent could not be unreasonably withheld.

168 *See* Letter from New Jersey Assoc. of Realtors, *supra* note 146 (objecting to impact fees for affordable housing); Letter from New Jersey Builders Assoc., *supra* note 12 (opposing link of affordable housing needs with residential development). With commercial development it is easier to establish a connection due to new employment opportunities creating a greater need for low income housing for new

dered the debate moot.[169] Provisions in the bill allowing impact fees in the form of cash in-lieu payments for affordable housing needs[170] would most certainly be upheld today.[171] Furthermore, the New Jersey Supreme Court expressly approved of the creation of "affordable housing trust fund" accounts for these payments and their subsequent use in assisting a municipality in providing for its fair share of affordable housing elsewhere.[172] Additionally, it is interesting to note that the only exemption from impact fees provided for in the bill relates to affordable housing. If twenty percent of a development is set-aside for low and moderate income housing, no impact fees will be imposed on the development.[173] In light of the above, it is reasonable to conclude that this bill would be upheld by the court as providing the proper authority and standards for the imposition of impact fees on all new development to fund affordable housing.[174]

Of significant impact to the bill is the rejection of the rational nexus test by the New Jersey Supreme Court with regard to affordable housing fees.[175] The court in *Holmdel* found that a

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employees. Residential development lacks this link. The appellate court in Holmdel decisively found that affordable housing needs were not created by residential development. This was rejected, however, by the New Jersey Supreme Court, which held that the use of limited resources (land) by developers does create a need for more affordable housing. Holmdel Builders Ass'n v. Holmdel Tp. 121 N.J. § 50, 572, 583 A.2d 277, 288 (1990).

169 *See* Holmdel v. Holmdel Tp., 121 N.J. 550, 583 A.2d 277 (1990). In *Holmdel*, the court found all new development contributes to the need for affordable housing. *See supra* note 132 and accompanying text.

170 S. 2037, 204th Leg., 1st Sess., § 7(c) (1990).

171 *See Holmdel*, 121 N.J. at 573, 583 A.2d at 288. The court held that mandatory in-lieu payments "are the functional equivalent of mandatory set-asides." *Id.*

172 *Id.* at 579-80, 583 A.2d at 290-91. The proposed bill provides that the Fair Housing Act, N.J. STAT. ANN. § 52:27D-311, will be amended to state that municipalities, in seeking to meet their fair share housing requirements, may place impact fees which are collected for this purpose in affordable housing trust funds. *See* S. 2037 § 17. In *Holmdel* the court found this authority implicit in the Fair Housing Act. *Holmdel*, 121 N.J. at 576, 583, A.2d at 290.

173 S. 2037, 204th Leg., 1st Sess. § 7(d) (1990).

174 The *Holmdel* decision focused on the Fair Housing Act and COAH regulations as providing the requisite authority for affordable housing fees. There is no reason to believe this bill could not act as a substitute authority. If COAH, however, were to implement regulations permitting impact fees, it is reasonable to conclude that such regulations would control the affordable housing area. Thus the bill's exemption for those developments which have dedicated 20% of the development to low and moderate income housing would be ineffective.

175 Within the bill fees for affordable housing are lumped together with other

rational relationship is sufficient.[176] In this respect, an amendment of the bill's affordable housing provisions, to reflect the court's decision, appears appropriate. To accomplish this, a distinction between affordable housing and other municipal services and facilities which may be funded by impact fees is necessary.[177] The amended bill should provide in a separate section that fees for affordable housing may be imposed if the need for affordable housing is reasonably related to the new development.[178] Moreover, to be true to the spirit of *Holmdel*, the bill should provide for a presumption that such a relationship exists.[179] Through this distinction affordable housing fees will be taken out of the impact fee definition and its attendant requirements. Accordingly, their preferred status will be recognized.[180]

The manner in which impact fees are to be collected and handled is strictly regulated by the bill.[181] Impact fee ordinances adopted pursuant to the bill must provide for the assessment of impact fees at the preliminary approval stage.[182] Payments are to

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permissible impact fee purposes. Thus, with the incorporation of affordable housing fees into the impact fee definition, the fees are subject to the rational nexus test contained therein. *Holmdel* rejects the use of the rational nexus test for these fees. *Holmdel*, 121 N.J. at 572, 583 A.2d at 288 (1990).

176 *Id.*

177 An alternative to revising the affordable housing provisions of the bill would be to delete them entirely. Instead, development fees for affordable housing may be provided for pursuant to COAH regulations in lieu of those permitted by *Holmdel*.

178 *Holmdel*, 121 N.J. at 572, 583 A.2d at 288.

179 Justice Handler, writing for a unanimous court in *Holmdel*, carefully articulated the relationship between affordable housing and new development. *Id.* In concluding that mandatory development fees were permissible, he stated "it is fair and reasonable to impose such fee requirements on private developers when they possess, enjoy, and consume land, which constitutes the primary resource for housing." *Id.* By creating a presumption acknowledging the court's express finding of a link between affordable housing and new development, the bill would not only be adhering to the spirit of *Holmdel*, but would also be providing an outlet for developers who could overcome it. The presumption could be rebutted by a showing that the municipality's fair share has already been provided for or is currently being adequately funded.

180 Affordable housing fees are preferred in the respect that they have already been judicially approved of as a valid regulatory measure under both the authority and constitutional test for impact fees. *See Holmdel*, 121 N.J. at 572-73, 583 A.2d at 288.

181 S. 2037, 204th Leg., 1st Sess., §§ 7, 8 (1990).

182 *Id.* § 7(f). However, any charges (interest, etc.) which are incurred by a municipality in constructing an improvement subject to impact fee funding prior to

be collected at intervals in the development process: twenty-five percent prior to final approval, twenty-five percent prior to the issuance of a building permit and the remaining fifty percent prior to applying for an initial certificate of occupancy.[183] The collected fees must then be either immediately applied to their intended purpose or placed in an interest bearing account.[184] Subject to minor exceptions, any impact fees that are not expended within eight years of their receipt must be returned with interest to the party who paid them.[185] An important exception to this retention rule is that impact fees collected for affordable housing need never be returned.[186] Instead, they may be used to fund low and moderate income units elsewhere in the municipality or region.[187]

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receipt of the impact fee may be added on to the amount owing at the final payment stage. *Id.* § 7(e).

183 *Id.* § 7(f). The bill provides for concurrent amendments to N.J. STAT. ANN. §§ 52:27D-130 to -133 to prohibit the issuance of building permits or certificates of occupancy before the impact fees are paid. S. 2037 §§ 15, 16.

184 S.2037 § 8(a). To avoid being labeled a tax the bill should provide specifically that impact fee revenues are to be kept separate from general revenues. *See supra* note 118. However, by providing for their return if not used for their intended purposes within a certain period, the bill arguably calls for segregated funds. *See infra* notes 185-187 and accompanying text for fee retention limitations.

185 S. 2037 §§ 7, 8. Impact fees need not be returned if construction of the improvement begins within eight years. The remaining portion may be retained by the municipality for completion of the project. *Id.* § 8(a). Additionally, as set forth in § 9 of the bill, impact fees may be retained for more than eight years if:

(a) they are being used to fund the municipality's debt service on capital improvement bonds,

(b) an agreement to pro-rate the collection of the fees was reached by the municipality and developer, or

(c) unforeseen delays in completion of the development occur, thereby protracting the time period between the initial and final payments. If this occurs the length of the delay may be added to the eight years to arrive at the permissible retention period.

Id. § 9(a), (b), (c).

It is often argued that the unused fees should be returned to the buyer rather than the developer, who actually transfers the money, because it is the buyer who ultimately pays the fee through increased housing costs. *See* Delaney & Smith, *supra* note 26. The language in the bill, ". . . to the party who made payment. . ." could conceivably be construed as allowing a buyer, if he can prove the fee was passed on to him, to be reimbursed. The difficulties inherent in such a reimbursement scheme must be kept in mind: proof problems would abound and the fees would have to be returned piecemeal.

186 S. 2037 § 8(c).

187 *Id.*

In sum, the authority granted to municipalities to impose impact fees is both broad and narrow. It is broad in that diverse municipal services may be funded with impact fees. It is narrow in that restrictive requirements limit the implementation of that authority. Thus, municipalities are afforded a reliable new financing technique to aid in maintaining their infrastructures while developers are protected from arbitrary fee assessments.

V. Conclusion

Exaction history throughout the country has been arduous. With the public welfare pitted against private property rights, all participants in the land use arena have had to struggle to maintain an equitable balance. Courts throughout the country have tipped the scales in various manners, with divided results.[188] In New Jersey today the scale appears to weigh more heavily in favor of private property rights. A significant exception to this tendency has occurred with affordable housing.[189] This deviation, however, is more likely attributable to the court's deep commitment to affordable housing than to any shift in their general philosophy regarding development exactions.

The proposed impact fee legislation, if enacted, will decidedly re-tip the scale in favor of the public welfare (municipal needs). While the bill incorporates the court's stringent reasonableness test, it will undoubtedly result in a more expansive use of exactions to fund municipal infrastructure need. The traditional two-tiered exaction test will pose no problem for impact fees imposed pursuant to a properly drafted and adopted impact fee or-

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188 *See generally* N.J. Builder's Ass'n v. Bernards Township, 108 N.J. 223, 237, 528 A.2d 555, 562 (1987) (employing stringent nexus test which generally disfavors exactions); City of College Station v. Turtle Rock Corp., 680 S.W. 2d 802 (Tx. 1984) (Texas requires a reasonable connection between fee and development generated needs); Hollywood, Inc. v. Broward County, 431 So. 2d 606, 611 (Fla. Dist. Ct. App. 1983) (Florida seeks a rational nexus showing); Pioneer Trust & Savings Bank v. Village of Mount Prospect, 22 Ill.2d 375, 176 N.E. 2d 799 (1961) ("uniquely and specifically attributable" test displays Illinois' strict scrutiny of exactions).

189 In *Holmdel*, the New Jersey Supreme Court reiterated its favor for affordable housing. Holmdel Builders v. Holmdel Tp., 121 N.J. 550, 562-63, 583 A.2d 277, 283 (1990). The court's rather strict nexus test for most exactions was rejected with respect to low and moderate income housing in favor of an easier reasonable relationship test. *See supra* note 131-32 and accompanying text.

dinance.[190] Consequently, municipalities will be free to impose fees for public necessities such as highways, schools and libraries which previously were of doubtful validity.[191] How great a benefit the municipalities will receive from the legislation is left to them. If the bill is enacted, the safest course for many municipalities may be to enact an impact fee ordinance to solidify their authority, but limit the use of such fees to those enumerated pursuant to section 42 of the MLUL. Otherwise, any expansion beyond that scope may scare off desirable developers. If a municipality carefully balances the need for new growth against the need for additional financing to fund capitol improvements necessitated by the new growth, it will ensure that long term goal are not sacrificed for short term needs.

The municipal need for impact fees as a funding device is clear.[192] Equally clear is that in today's economy such legislation may well drive away the few developers who desire to build now. Thus, the legislature has a difficult task ahead of it in deciding whether to enact the impact fee bill or leave well enough alone.[193] Developers and municipalities are committed to their goals and can be expected to exert their considerable political clout against our politicians. Regardless of the victor, the reverbations of the legislature's decision will be felt by all.

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190 *See supra* notes 57-64 and 88-115 and accompanying text.

191 *See supra* notes 57-64 and 110-115 and accompanying text for case law casting doubt on the validity of impact fees.

192 *See* Grogan, *supra* note 1 (demonstrating the need for impact fee legislation in New Jersey).

193 If the impact fee bill is enacted by the Legislature, it is unclear whether it will replace section 42 of the MULL or simply supplement and expand on the authority contained therein.