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IMPACT FEES: AN ALTERNATIVE WAY TO FINANCE PUBLIC FACILITIES IN MISSISSIPPI

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I. INTRODUCTION

Local governments have traditionally financed public facilities and services through the use of tax revenues or the issuance of general obligation bonds or revenue bonds.[1] General obligation bonds are repaid by future property tax collections, while revenue bonds are repaid through the net revenues of the utility to be constructed, acquired, or improved.[2] Financing public facilities through such "debt instruments" has historically been viewed as a favorable investment option since they are usually welcomed on the open market.[3] This is because bonds are generally backed by the full faith and credit of the issuing community.[4] These traditional methods of financing the construction of public facilities required by new development are alive and well in Mississippi today.[5]

However, local governments throughout Mississippi are quickly learning what local governments in other states have known for years – traditional financing mechanisms have limits. [6] They present a number of challenges which can make it difficult for all but the most popular projects to secure financing.[7] For example, Mississippi requires three-fifths voter approval in favor of the issuance of bonds before they can be used by the local governing authority. [8] In addition, a number of statutorily required

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1. Gus Bauman & William H. Ethier, *Development Exactions and Impact Fees: A Survey of American Practices*, 50 LAW & CONTEMP. PROBS. 51, 51–52 (1987);

2. MISS. CODE ANN. § 21-33-87 (2008) (granting municipalities the power to levy and collect taxes on all taxable property for the purpose of paying off municipal bonds); MISS. CODE ANN. § 21-27-23 (2008) (authorizing the issuance of revenue bonds for the purpose of acquiring, improving, and maintaining a municipally owned utility).

3. "The U.S. Municipal Bond rating Scale: Mapping to the Global rating Scale and assigning Global Scale ratings to Municipal obligations," Moody's, March 2007 (finding the 10-year cumulative default rate for all Moody's-rated municipal bond issuers to stand at 0.1032%, while the default rate for all corporate bonds during the same period was at 9.6999% rate), *available at* http://v2.moodys.com/cust/default.asp (last visited January 3, 2009).

4. MISS. CODE ANN. § 21-33-305 (2008) (pledging revenue of the utility to be constructed with proceeds thereof in addition to the pledge of full faith and credit of the municipality).

5. *See generally* MISS. CODE ANN. § 27-65-75 (2008) (providing for a share of state sales taxes collected within each municipality to be paid to that municipality); *and* MISS. CODE ANN. § 21-33-53 (2008) (requiring municipalities to assess and collect ad valorem taxes in the same way as counties).

6. *See* Bauman, *supra* note 1, at 51–52 (citing state mandated limitations on bond indebtedness and competitive bond markets as complications of using traditional financing mechanisms).

7. *See* James C. Nicholas, *Impact Exactions: Economic Theory, Practice, and Incidence*, 50 LAW & CONTEMP. PROBS. 85, 86 (1987) (discussing the limits of taxes and bond revenues as a funding source for public infrastructure improvements).

8. MISS. CODE ANN. § 21-33-311.

procedures must be followed prior to the issuance of bonds and certain limitations apply,[9] specifically with respect to the amount of interest that may be charged [10] and the maximum time for bonds to mature.[11] Couple these requirements with the fact that such financing mechanisms may require property tax increases, utility rate increases, or reductions in existing services, and these approaches tend to be politically unpopular.

Because of the problems associated with traditional financing mechanisms, local governments have increasingly sought alternative financing sources for construction of public facilities and provision of services.[12] Arguably the most popular alternative to taxes or bonds is the "impact fee." This Article explores the evolution of impact fee jurisprudence in Mississippi, and suggests that, given the Mississippi Supreme Court's recent decision in *Mayor and Board of Aldermen, City of Ocean Springs v. Homebuilders Ass'n of Miss., Inc.*,[13] enabling legislation is both appropriate and necessary.

Part II provides a brief discussion on what impact fees are and how they developed. Part III discusses potential challenges to impact fees and the analysis commonly employed by courts to determine the validity of impact fees enacted by local governments. Part IV discusses the Mississippi Supreme Court decision in *Ocean Springs* and its effect on the validity of impact fees in Mississippi. Part V concludes by advocating that the Mississippi legislature adopt impact fee enabling legislation in response to the *Ocean Springs* opinion, and provides some suggestions the legislature should consider when drafting enabling legislation to ensure that future impact fee ordinances are not invalidated by Mississippi courts.

II. EVOLUTION OF IMPACT FEES

Shifting the cost of funding new public facilities from the community at large to new development is not a new idea. The concept has its origins in the early 1900's when planning and economic development professionals across the country began voicing concern about urban sprawl and the increased cost of providing public facilities to support the booming outlying

9. MISS. CODE ANN. § 21-33-307.

10. MISS. CODE ANN. § 75-17-101 (setting the maximum interest rate of all such bonds issued by the State, county, municipality or political subdivision thereof); and MISS. CODE ANN. § 21-27-45 and MISS. CODE ANN. § 75-17-103 (limiting the maximum interest rate to maturity for revenue bonds to 13% per annum).

11. MISS. CODE ANN. § 21-33-315 (governing the maturity and interest of municipal bonds); MISS. CODE ANN. § 21-27-45 (limiting revenue bonds to a maximum maturity equal to the estimated life of the contemplated system or improvement—in no event longer than thirty years).

12. Nicholas, *supra* note 7, at 88. Professor Nicholas states:

> Increasingly, local governments have been turning to impact exactions or payments in lieu (impact fees) as a means of financing the growing need for capital improvements. Such approaches shift the incidence of the cost of such improvements from the public to the developer. In turn, this shift can impose the ultimate burden upon the developer, the purchaser, or the property owner. *Id.* (citing James Nicholas, State Regulation /Housing Prices, 27-42 (1982)).

13. Mayor and Board of Aldermen, City of Ocean Springs v. Homebuilders Ass'n of Miss., Inc., 932 So. 2d 44 (Miss. 2006).

residential areas.[14] In response to their concerns, and as a result of mounting court challenges, the United States Department of Commerce drafted the Standard City Planning and Zoning Enabling Acts in the 1920s.[15] The Acts were designed in large measure to provide guidance to state legislatures that sought to authorize local governments, through the adoption of state subdivision regulations, to require developers to provide on-site facilities.[16] Local governments continued to use general revenue from local taxes to fund off-site public facilities.[17]

As communities continued to expand however, local governments began to realize that a new development's impact was not limited to the development itself—it also placed heavy burdens on off-site facilities.[18] By the 1940s, local governments in high growth areas were simply unable to meet the increased demands for off-site facilities with revenues produced by the traditional financing mechanisms.[19] To meet the increasing demands, local governments began to require developers to dedicate land for public use or make cash payments in-lieu of land dedication, which the local government would then use to build/upgrade public facilities to meet the new demand. [20] While public dedications and in-lieu fees proved to be a short term success, they could not generate sufficient funding in the long term to keep pace with the demands created by increased growth.[21] Eventually, as consumer demand for a broader range of public facilities and services increased and local revenue sources declined, local governments began adopting the policy that new development was only acceptable if it could "pay its own way."[22]

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14. James C. Nicholas, *State and Regional Land Use Planning: The Evolving Role of the State*, 73 ST. JOHN'S L. REV. 1069, 1071 (1999) (discussing how land development and use regulations became acceptable methods for resolving conflicts as individual states became more urbanized); *See also* Arthur C. Nelson, *Preface to Development Impact Fees*, 54 J. AM. PLANNING ASS'N 3, 3–4 (1988).

15. Department of Commerce, *Standard State Zoning Act* (1926), *available at* http://myapa.planning.org/growingsmart/pdf/SZEnablingAct1928.pdf (authorizing local governments to require developers to build streets, water mains, and sewer lines within the boundaries of their developments).

16. *Id.*; Patricia Burgess, Planning for the Private Interest: Land Use Controls and Residential Patterns in Columbus, Ohio, 1900-1970 66–67 (1947) *available at* http://ohiostatepress.org/Books/Complete%20PDFs/Burgess%20Planning/06.pdf

17. Edward J. Sullivan & Isa Lester, *The Role of the Comprehensive Plan in Infrastructure Financing*, 37 URB. LAW. 53, 57 (2005) (the first exactions were limited to on-site improvements, while off-site improvements such as parks, treatment plants, and arterial roads continued to be financed out of the general revenue through local taxes).

18. *Id.* at 57–58.

19. *Id.* at 57.

20. *Id.* at 58.

21. Charles C. Mulcahy & Michelle J. Zimet, *Impact Fees for a Developing Wisconsin*, 79 MARQ. L. REV. 759, 765 (1996).

22. Bauman, *supra* note 1, at 52; *See also* James C. Nicholas & Julian Conrad Juergensmeyer, *Market Based Approaches to Environmental Preservation: To Environmental Mitigation Fees and Beyond*, 43 NAT. RESOURCES J. 837, 839–40 (2003) (discussing the factors that led to change in attitudes about new growth). According to Nicholas and Juergensmeyer:

> The first of these events was the sharp rise in inflation in the 1970s and the decimation of fixed based taxes such as the motor fuels tax. The next was the federal government's fiscal retrenchment that began in 1982 and has continued since then, thus reducing the funds made available to local jurisdictions. The third factor leading to the breakdown of the traditional approach was the general hostility to the taxation of real property, thus forcing local jurisdictions to look

Today the most common alternative used by local governments to fund public facilities that arise as a result of new development is the "impact fee."[23] Impact fees are a form of "monetary exaction" that are defined as one-time charges applied by local government to new development for the purpose of raising revenue to fund the construction or expansion of the capital facilities required as a result of the new development.[24] Impact fees are commonly assessed to provide for the additional roads, schools, libraries, water and sewer systems, or parks and recreation facilities made necessary by the presence of new residential developments.[25] Impact fees are not charged for or used to fund ongoing operations or maintenance of these facilities.[26] Rather, they are charged for the limited purpose of enabling the construction of new public facilities or the expansion of existing public facilities that are required as a result of the new development.[27]

Impact fees serve a number of very important functions. First, impact fees allow local governments to accommodate new development without increasing taxes on existing residents or decreasing public services.[28] Impact fees accomplish this by shifting the costs of financing public facilities from the taxpayers at large to the beneficiaries of the new facilities. [29] Second, impact fees allow local governments to conserve their resources by reserving the use of traditional funding mechanisms for ongoing operation and maintenance of public facilities.[30] Finally, impact fees force developers

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elsewhere to fund the ever increasing demands of constituents. Because these factors were occurring at a time when the pace of urban development was increasing, both the demand for and the cost of investment in public infrastructure began to climb at a time when the available resources were falling. As a result, there arose an increasing need for investment concurrent with declining means. *Id.*

23. James C. Nicholas & Julian Conrad Juergensmeyer, *Market Based Approaches to Environmental Preservation: To Environmental Mitigation Fees and Beyond*, 43 NAT. RESOURCES J. 837, 843 (2003). *See e.g.*, ARTHUR C. NELSON, ET AL., A GUIDE TO IMPACT FEES AND HOUSING AFFORDABILITY 19 (2008) (finding that the role of impact fees as supplemental, but is now primary), *and* Ronald H. Rosenberg, *The Changing Culture of American Land Use Regulation: Paying for Growth with Impact Fees*, 59 SMU L. REV. 177, 262 (2006) ("All evidence points to the rapid spread of land development impact fees throughout the nation making it a prevalent means of funding new growth.").

24. ARTHUR C. NELSON, ET AL., A GUIDE TO IMPACT FEES AND HOUSING AFFORDABILITY 3 (2008) [hereinafter, Nelson].

25. *Id.* at 2.

26. Ronald H. Rosenberg, *The Changing Culture of American Land Use Regulation: Paying for Growth with Impact Fees*, 59 SMU L. REV. 177, 205–206 (noting that operational or maintenance expenses are regarded as the proper subject of tax or user fee support); *See also* AMERICAN PLANNING ASSOCIATION, GROWING SMART LEGISLATIVE GUIDEBOOK: MODEL STATUTES FOR PLANNING AND THE MANAGEMENT OF CHANGE (Stuart Meck ed., American Planning Association 2002), *available at* http://planning.org/growingsmart/guidebook/eight04.htm#commdif. Impact fees are not intended to pay for the maintenance of existing public facilities or to cover operating expenses. *Id.* at 8-141 Commentary.

27. *Id.*; *See also* ALAN A. ALTSHULER, ET AL., REGULATION FOR REVENUE: THE POLITICAL ECONOMY OF LAND USE EXACTIONS 51 (1993) (the purpose of impact fees "must be to finance service capacity for future occupants or to alleviate negative project impacts on the wider community.").

28. Sullivan, *supra* note 17, at 61 ("Impact fees allow local governments to accommodate new development without increasing taxes on existing residents or decreasing public services.").

29. Ronald H. Rosenberg, *The Changing Culture of American Land Use Regulation: Paying for Growth with Impact Fees*, 59 SMU L. REV. 177, 210 (2006).

30. *Id.* at 209 (the use of impact fees reduces the need to access the capital markets in order to borrow funds for capital construction, which in turn conserves local government's "limited borrowing

to internalize the cost of expanding or improving overburdened public facilities, the destruction of wetlands or endangered species' habitats, and various forms of pollution. [31]

III. Determining the Validity of Impact Fees

Although it is believed that impact fees are used in one form or another in nearly all fifty states, their validity has been challenged on several grounds.[32] When determining whether to adopt impact fees as an alternative to the traditional financing mechanisms, state and local governments would be well-advised to consider the various legal challenges that impact fees are likely to face.

Challenges to impact fees generally fall into two categories.[33] The first, and most basic challenge, involves the *authority* of a local government to enact an impact fee ordinance.[34] Such a challenge often hinges on whether there is express or implied authority to impose the fee and whether the impact fee is actually a "fee" at all (or instead an invalid "tax").[35] The second challenge involves the constitutionality of impact fees under the due process and equal protection requirements of the Fourteenth Amendment and whether the fee constitutes a regulatory taking under the Fifth Amendment.[36]

A. Test for Authority

1. Express Authority

The threshold inquiry to any newly adopted impact fee ordinance involves the *authority* of local governments to assess, collect and spend impact fees for a particular public facility. To avoid such a challenge, many states have enacted legislation that expressly authorizes local governments

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authority and reduc[es] the future budgetary strain of debt service that would have been incurred to finance the improvements").

31. Thomas W. Ledman, *Local Government Environmental Mitigation Fees: Development Exactions, the Next Generation*, 45 Fla. L. Rev. 835, 836 (December 1993) (arguing that Development exactions are one method which local governments can use to force developers to internalize some of the negative externalities, which developers pass on to society, including the cost of expanding or improving overburdened public facilities, destruction of wetlands, destruction of endangered species' habitats, and various forms of environmental pollution); *See also* Vicki Been, *Impact Fees and Housing Affordability*, Cityscape, 2005, No. 1, at 139, 143 (arguing that impact fees may encourage efficiency by making the developer and its customers internalize the full costs of the harms that the development causes).

32. Nelson, *supra* note 24, at 49.

33. Thomas W. Ledman, *Local Government Environmental Mitigation Fees: Development Exactions, the Next Generation*, 45 Fla. L. Rev. 835, 842 (1993).

34. *Id.*; *See also* Bauman, *supra* note 1, at 54 ("An impact fee imposed by a local agency and not authorized by law will be struck down.").

35. Bauman, *supra* note 1, at 54 ("If a fee amount is not reasonably equivalent to the cost of the regulated activity, or if the monies collected are deposited into the general treasury rather than a special fund, the fee may be deemed a tax and therefore illegally adopted.").

36. *Id.*

to impose impact fees. Indeed, some 27 states have enacted enabling legislation authorizing the imposition of impact fees to varying degrees.[37] Impact fees imposed pursuant to this *express authority* are generally deemed valid, as long as they are consistent with the enabling statute and satisfy constitutional requirements.[38]

2. Implied Authority

Although state enabling legislation is certainly preferable, the absence of enabling legislation does not doom local impact fee ordinances, but does make their validity less certain. [39] Courts may imply the authority to enact the fees from more general grants of authority.[40] Jurisdictions adopting this approach have held that, in the absence of enabling legislation, local governments have the *implied authority* to impose impact fees based on local government's general "police power" to protect the public health, safety, and welfare pursuant to broad home rule authority.[41]

In order to determine whether a local government has *implied authority* to impose impact fees, it is necessary to determine the extent of the local government's police power.[42] Local governments derive their powers, not from the United States Constitution, but from state constitutions and state statutes.[43] Therefore, the extent to which local governments may use their police powers to impose impact fees depends largely on whether the state affords their local governments "Home Rule" authority or whether the state continues to adhere to the strictures of "Dillon's Rule."[44]

Where the State grants local governments home rule authority, the local government is generally granted the full power of self-government not

37. Nelson, *supra* note 24, at 49.

38. Arthur C. Nelson, *Development Impact Fees: The Next Generation*, 26 URB. LAW. 541, 544 (authority is satisfied by explicit enabling legislation).

39. Theodore C. Taub, *Exactions, Linkages, and Regulatory Takings: The Developer's Perspective*, 20 URB. LAW. 515, 526 (1988) (stating the "lack of express legislative authorization is not enough to invalidate an ordinance imposing an exaction on a developer since such authorization is implied from the state's statutory or constitutional home-rule provision"); *See also* Brian W. Blaesser & Christine M. Kentopp, *Impact Fees: The "Second Generation"*, 38 WASH. U. J. URB. & CONTEMP. L. 55, 85-89 (1990).

40. Ledman, *supra* note 31, at 842–43 ("local governments must derive their authority directly from specific enabling legislation, other general land use enabling legislation, state taxing power, home rule powers, or the broad police powers.").

41. Brian W. Blaesser, *Impact Fees: The "Second Generation"*, 38 WASH. U. J. URB. & CONTEMP. L. 55, 85–89 (1990) (discussing other sources of authority for the adoption of impact fees) [hereinafter, Blaesser].

42. *Id.* at 86.

43. U.S. CONST. amend. X (providing that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."); *See also* BLACK'S LAW DICTIONARY (8th ed. 2004) (police power is "[t]he inherent and plenary power of a sovereign to make all laws necessary and proper to preserve the public security, order, health, morality, and justice.").

44. *See* Blaesser, *supra* note 41, at 86–89 (concluding that general planning and zoning enabling statutes are inadequate to justify the adoption of impact fees in most non-home rule states, while the authority to adopt impact fees in home rule states under the same statutes are generally authorized provided "it can be established that the financing of a particular type of facility or service is a matter of local concern and not the exclusive jurisdiction of the state").

inconsistent with the constitution or laws of the state.[45] As such, local governments could use their police power to impose impact fees on the basis that the fees would protect the public from the negative effects of new development, such as congestion and a lack of proper services or facilities.[46] While a local government's police power may be very broad, it is not boundless.[47] A local government may only impose a regulation pursuant to its home rule police powers if the State has not expressly preempted the regulation and if the regulation is a wholly local matter.[48] If the State adheres to Dillon's Rule, the local government only has "those powers expressly granted by law, powers incidental to those provided by law, and powers which are considered indispensable to the accomplishment of the purposes of a municipal corporation."[49]

3. Tax

A corollary to the issue of *authority* is whether the impact fee is "regulatory" in nature or actually an unauthorized tax.[50] Since state constitutions or statutes generally restrict the authority of local governments to impose taxes, the characterization of an impact fee as a "tax" generally renders an impact fee invalid. [51] The confusion over whether impact fees constitute a fee or tax arises because "fees" share two very important characteristics with taxes.[52] First, impact fees are generally levied by local governments on developers as a monetary charge.[53] Second, impact fees are assessed on a proportional basis.[54]

"Fees," however, also have a number of traits which distinguish them from taxes.[55] First, they are generally charged for a particular governmental service which benefits the party paying the fee in a manner "not shared by other members of society."[56] Next, "the party paying the fee has the option of not utilizing the governmental service and thereby avoiding the charge."[57] Finally, "the charges are collected not to raise revenues, but to

45. 1 McQuillin Municipal Corporations § 3.21.10 (Thompson West, 3d ed. 2008).

46. *See* Nicholas, *supra* note 22, at 840 (citing James C. Nelson, et al., A PRACTITIONER'S GUIDE TO DEVELOPMENT IMPACT FEES 13 (1991).

47. 56 AM. JUR. 2D *Municipal Corporations, Counties, and Other Political Subdivisions* § 391 (2008).

48. *Id.*

49. *Id.* at § 401.

50. Nick Rosenberg, Comment, *Development Impact Fees: Is Limited Cost Internalization Actually Smart Growth?,* 30 B.C. ENVTL. AFF. L. REV. 641, 651 (2003) (finding one of the primary challenges that local governments face when imposing impact fees is that the charges are not fees, but instead taxes).

51. *See* MISS. CODE ANN. § 21-17-05.

52. *Id.*

53. *Id.*

54. *Id.*

55. Emerson Coll. v. City of Boston, 462 N.E.2d 1098, 1105 (Mass. 1984) (categorizing fees as "user fees", based on the rights of the entity as proprietor of the instrumentalities used, or "regulatory fees", founded on the police power to regulate particular businesses or activities).

56. *Id.* (quoting Nat'l Cable Television Ass'n v. U.S., 415 U.S. 336, 341 (1974)).

57. *Id.* (quoting Vanceburg v. Fed. Energy Regulatory Comm'n, 571 F.2d 630 (D.C.Cir. 1977), *cert. denied*, 439 U.S. 818 (1978)).

compensate the governmental entity providing the services for its expenses."[58] Unfortunately, courts have not developed a uniform framework for making the regulatory tax/fee determination.[59] As such, it is important for local governments to ensure that their impact fees are characterized as regulatory "fees" rather than revenue raising devices in order to avoid the implication of taxation.[60]

B. Test for Constitutionality

Even where authority exists for the imposition of impact fees, the ability of local governments to use impact fees to finance public facilities (or regulate growth) is not absolute.[61] Once the authority of the local government has been established, the focus shifts to the constitutionality of the impact fee ordinance.[62] In order to justify an impact fee, local governments must be able to demonstrate something more than just a generalized connection between the development and impact fee.[63] Local government must be able to demonstrate that the impact fee: (i) is reasonable—meaning it directly addresses the problem created by the development project and is therefore reasonable,[64] (ii) does not violate equal protection—meaning that it is applied to all parties on the same basis,[65] and (iii) is not a "taking" under the Fifth Amendment (requiring just compensation).[66] Each of these requirements will be discussed in turn.

1. Reasonableness

The requirement of "reasonableness" under due process of law has emerged as the primary standard for determining what types of public facilities can be financed with impact fees. [67] Over the years, state courts have developed three distinct tests of whether impact fees meet the standard of reasonableness.[68] The first test, known as the "reasonable relationship test," originated in 1949 and simply requires that the local government link the impact fee charged to the need created by the new development.[69] This

58. *Id.*

59. TAKING SIDES ON TAKINGS ISSUES: PUBLIC AND PRIVATE PERSPECTIVES 366 (Thomas E. Roberts ed., 2002) (discussing two identical school impact fees - the "fee" prepared for St. Johns County, Florida was found to be a permissible exercise of police power, while the same "fee" prepared for Franklin, Massachusetts was found to be an unauthorized tax).

60. Nelson, *supra* note 38, at 544.

61. Nelson, *supra* note 38, at 545.

62. Nelson, *supra* note 38, at 544–45.

63. Hollywood, Inc. v. Broward County, 431 So. 2d 606 (Fla. Dis. Ct. App. 1983).

64. *See* Nelson, *supra* note 38, at 546–548.

65. *Id.*

66. Dolan v. City of Tigard, 512 U.S. 374, 391 (1994); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 837 (1987). Where the Nollan/Dolan analysis is applied, the test requires a nexus between the impact and the fee demanded, and a rough proportionality between the fee and the impact.

67. Rosenberg, *supra* note 23, at 221.

68. *Id.*

69. Ayres v. City of L.A., 207 P.2d 1 (Cal. 1949) (finding that a municipality may require the developer to provide the streets which are required by the activity within the subdivision but cannot require him to provide a major thoroughfare, the need for which stems from the total activity of the community).

test is considered too permissive because it favors local government.[70] The second and much more stringent test, the "specifically and uniquely attributable test," originated in 1961 and requires that the impact fee be tied uniquely and specifically to the incremental need for facilities, that the exact users of the new facilities be documented, and that the fee paid be related to the need generated by each development.[71] This test is considered too restrictive because it favors developers.[72] The more flexible intermediate standard, known as the "dual rational nexus" test, does not inherently favor either the developer or the municipality. [73] The dual rational nexus test balances the needs of both parties by providing local governments the flexibility of preparing for future expansion, while not merely acting as a rubber stamp of approval for the ordinance.[74]

Although the dual rational nexus test was first articulated in 1965 by the Wisconsin Supreme Court in *Jordan v. Village of Menomonee Falls*,[75] its general legal principal is best summarized by Florida's Fourth District Court of Appeals in *Hollywood, Inc. v. Broward County*.[76] In *Hollywood*, a developer seeking a permit to subdivide property for residential development challenged a county ordinance imposing an impact fee to expand the county's park system to serve the new subdivision.[77] The court determined the ordinance "was within the provisions of the county [home rule] charter" and held that reasonable impact fee requirements are permissible so long as they offset needs "sufficiently attributable" to the subdivision and the funds collected are "sufficiently earmarked" for the substantial benefit of the subdivision residents.[78] In order to satisfy this dual rational nexus test, the court held that:

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70. Rosenberg, *supra* note 23, at 223 (noting that the reasonable relationship test is extremely deferential to local government exaction policy and has been associated with state court decisions approving of exactions with little direct cause and effect nexus shown).

71. Pioneer Trust and Sav. Bank v. Vill. of Mt. Prospect, 176 N.E.2d 799 (Ill. 1961) (finding that an exaction would be permissible if authorized and if the "burden cast upon the subdivider is specifically and uniquely attributable to his activity").

72. Wald Corp. v. Metropolitan Dade County, 338 So.2d 863, 866 (Fla. Dis. Ct. App. 1976), *cert. denied*, 348 So.2d 955 (Fla. 1977) (finding that heightened standard undermined the ability of local governments to plan for future expansion, in contrast to the previous "presumption of validity" accorded most police power regulations).

73. *Wald*, 338 So. 2d at 866 (finding that the "rational nexus" approach provides a more feasible basis for testing subdivision dedication requirements than the two methods of review discussed earlier).

74. *Id.*

75. Jordan v. Vill. of Menomonee Falls, 137 N.W.2d 442 (1965) (fee in lieu of dedication of land upheld as condition of subdivision approval, when state statute authorized municipal subdivision regulations to facilitate provision for, *inter alia*, schools and parks).

76. *Hollywood*, 431 So. 2d at 61. To meet the requirements of the dual rational nexus test, "the local government must demonstrate a reasonable connection, or rational nexus between the need for additional capital facilities and the growth of the population generated by the subdivision. In addition, the government must show a reasonable connection, or rational nexus, between the expenditures of the funds collected and the benefits accruing to the subdivision." *Id.*

77. *Id.* at 607. The ordinance gave the developer the option of paying the fee, dedicating land in lieu of the fee, or paying a fee equal in value to such dedicated land. *See* BROWARD COUNTY, FLA., CODE § 5-198(h).

78. *Id.* at 611. *Citing* City of Dunedin v. Contractors & Builders Ass'n of Pinellas County, 358 So. 2d 846 (Fla. Dis. Ct. App. 1978), *cert. denied*, 370 So. 2d 458 (Fla. 1979), *cert. denied*, 444 U.S. 867 (1979); Wald Corp. v. Metro. Dade County, 338 So. 2d 863 (Fla. Dis. Ct. App. 1976), cert. denied, 348

> [T]he local government must demonstrate a reasonable connection, or *rational nexus*, between the need for additional capital facilities and the growth in population generated by the subdivision. In addition, the government must show a reasonable connection, or *rational nexus*, between the expenditures of the funds collected and the benefits accruing to the subdivision. In order to satisfy this latter requirement, the ordinance must specifically earmark the funds collected for use in acquiring capital facilities to benefit the new residents.[79]

In short, the first prong of the rational nexus test is satisfied so long as the local government can show that the developer has created a need for the additional public facilities and the impact fee imposed bears some proportional relationship.[80] If the collected fees are used to offset the impact of new development, the second prong is satisfied.[81] Whether the community at large may derive an incidental benefit from the impact fee is of no consequence, and will not invalidate the fee.[82]

So. 2d 955 (Fla. 1977); and Admiral Dev. Corp. v. City of Maitland, 267 So. 2d 860 (Fla. Dis. Ct. App. 1972).

79. *Hollywood*, 431 So. 2d at 611–12. With the articulation of a two-pronged standard in Dunedin, the Florida appellate court rejected the more flexible "reasonable relationship" approach taken in California concluding that it could no longer be used in Florida (emphasis added). *Id.*

80. Although state courts have expressed the link between cause and effect in different terms, the consistent goal appears to be that of fashioning a test of proportionality that would limit development exactions to amounts necessary to offset the burdens that the building would impose on the community. *See generally* St. Johns County v. N.E. Fla. Builders Ass'n, Inc., 583 So. 2d 635, 637 (Fla. 1991) (is there a "reasonable connection"); Batch v. Town of Chapel Hill, 376 S.E.2d 22, 32 (N.C. 1989) ("prorated portion"); Banberry Dev. Corp. v. S. Jordan, 631 P.2d 899, 903 (Utah 1981) ("their equitable share of the capital costs"); Simpson v. City of N. Platte, 292 N.W.2d 297, 301 (Neb. 1980) (rational nexus means "substantial" nexus); Home Builders Ass'n v. City of Kansas City, 555 S.W.2d 832, 835 (Mo. 1977) (exactions "to the extent" they create need); Land/Vest Props., Inc. v. Town of Plainfield, 379 A.2d 200, 204–05 (N.H. 1977) ("proportionality test"); and Collis v. City of Bloomington, 246 N.W.2d 19, 24–26 (Minn. 1976) ("reasonable portion").

81. S. Mark White, *Development Fees and Exemptions for Affordable Housing: Tailoring Regulations to Achieve Multiple Public Objectives*, 6 J. LAND USE & ENVTL. L. 25, 31–32 n.26 (1990) "The benefit requirement requires earmarking of the funds and is generally satisfied in three ways: (1) dividing the jurisdiction into geographic zones and limiting expenditures to those zones, (2) placing a time limit on the expenditure of the funds, and (3) placing the funds into a separate trust fund to guard against commingling impact fee revenues with general revenues." *Id.*

82. Home Builders and Contractors Ass'n of Palm Beach County, Inc. v. Bd. of County Comm'rs of Palm Beach County, 446 So. 2d 140, 143 (Fla. Dis. Ct. App. 1983):

> If by that argument it is Home Builders' position that the benefits accruing from roads constructed with the impact fees collected must be used exclusively or overwhelmingly for the subdivision residents in question, we would have to differ. It is difficult to envision any capital improvement for parks, sewers, drainage, roads, or whatever, which would not in some measure benefit members of the community who do not reside in or utilize the new development. For example, landowners abutting a subdivision may well derive substantial benefit from intrasubdivision drainage facilities. Parks within subdivisions are not restricted to subdivision residents only. Furthermore, intrasubdivision streets and roads may be extensively used by persons not residents thereof. *Id.*

2. Equal Protection

Impact fees may also be challenged on the ground that they violate the constitutional guarantees of equal protection. [83] Such a challenge is generally premised on the fact that impact fees are only levied on new development and therefore deny developers equal protection under the United States Constitution.[84] To survive an equal protection challenge, a facially neutral impact fee ordinance must (i) not be applied arbitrarily, and (ii) must be rationally related to a legitimate government purpose.[85]

This challenge was addressed in *Ivy Steel and Wire Co. v. City of Jacksonville*.[86] In *Ivy Steel*, the City of Jacksonville sought to raise money for general improvements to its sewer system to comply with federal water pollution control standards.[87] The improvements benefited all users of the system and would have been needed whether or not any new users connected to the system.[88] Nevertheless, the city decided to fund the needed improvements by imposing a water pollution control charge on every property owner whose property first received sewer services from the city's sewer system after August 24, 1971, the effective date of the ordinance.[89] Persons who had connected to the sewer system prior to that date were not required to pay the charge.[90] A class action was brought seeking a declaration that the ordinance denied equal protection by imposing the cost of upgrading the system only on persons connecting to the sewer system after a certain date.[91] The court rejected plaintiffs' argument that the ordinance unfairly required one group of persons, specifically new users of the system, to pay for improvements that benefited all users of the system, recognizing "[n]o scheme of taxation, whether the tax is imposed on property, income, or purchases of goods and services, has yet been devised which is free of all discriminatory impact."[92] Challenges to impact fees on equal protection grounds often fall victim to this same rationale. Thus, while equal protection challenges are often made, they are seldom successful.[93]

83. Robert Lincoln & William Merrill III, *Linkage Fees and Fair Share Regulations: Law and Method*, 25 URB. LAW. 223, 253 (1993).

84. *Id.*

85. *See* Nelson, *supra* note 61, at 545.

86. Ivy Steel & Wire Co. v. City of Jacksonville, 401 F. Supp. 701 (M.D. Fla. 1975) (holding that imposition of sewer charge did not violate equal protection even when earlier customers would benefit from the charge).

87. *Id.*

88. *Id.*

89. *Id.* at 702.

90. *Id.*

91. *Id.*

92. *Steel*, 401 F. Supp. at 705.

93. *See also Hollywood*, 431 So. 2d at 611; Wald Corp. v. Metro. Dade County, 338 So. 2d 863 (Fla. Dist. Ct. App. 1976); *and* Admiral Dev. Corp. v. City of Maitland, 267 So. 2d 860 (Fla. Dist. Ct. App. 1972); each contained equal protection challenges which were rejected.

3. Takings

The final significant challenge that an impact fee ordinance is likely to face, is that it results in a "regulatory taking." The Takings Clause of the Fifth Amendment limits the power of local government to impose regulations that condition the use of private property on a monetary payment or dedication of land. [94] Although the United States Supreme Court has not addressed the issue of monetary exactions directly, the Court has set out the federal constitutional standards that must be met by physical exactions, such as required land dedications.[95] A number of state courts have applied the same standards to impact fees.[96]

In *Nollan v. California Coastal Commission*[97] and *Dolan v. City of Tigard*,[98] the Court's holdings limited what a local government engaged in land use control can exact from a property owner as a condition for development. Specifically, the Court's holding in *Nollan* restricts the government to those exactions which have an "essential nexus" to the anticipated harm from the proposed development.[99] In addition, the Court's holding in *Dolan* requires that the burden placed on the property owner be in "rough proportionality" to the development's impact (harm) on existing infrastructure.[100] To meet the proportionality requirement, the Court essentially adopted the dual rational nexus test employed by the majority of state courts. [101] However, unlike those same state courts, Chief Justice Rehnquist writing for the majority concluded that "[n]o precise mathematical calculation is required."[102] Instead, only some sort of individualized determination that the dedication is related in nature and extent to the impact of the proposed development is required.[103] Although the extent to which *Nollan's* "essential nexus" and *Dolan's* "rough proportionality" test apply to impact fees continues to be debated,[104] local governments should

94. U.S. CONST. amend. V; *See also* Nelson, *supra* note 38, at 545. The Takings Clause of the Fifth Amendment has been incorporated through the Fourteenth Amendment to apply to the States. *See generally* Chi. B. & Q.R. Co. v. City of Chi., 166 U.S. 226 (1897).

95. *See* Dolan v. City of Tigard, 512 U.S. 374 (1994); Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987).

96. *See generally* Richard Duane Faus, *Exactions, Impact Fees, and Dedications—Local Government Responses to Nollan/Dolan Takings Law Issues*, 29 STETSON L. REV. 675 (2000).

97. Nollan v. Cal. Coastal Comm'n, 483 U.S. 825 (1987).

98. Dolan v. City of Tigard, 512 U.S. 374 (1994).

99. *Nollan*, 483 U.S. at 837.

100. *Dolan*, 512 U.S. at 391.

101. *Id.* Instead of calling the "acceptable test" the "dual rational nexus test," the Court came up with a new label:

> We think the [dual rational nexus] test adopted by a majority of the state courts is closer to the federal constitutional norm than either [reasonable relationship test or specifically and uniquely attributable test]. But we do not adopt it as such partly because the term [dual rational nexus] seems confusingly similar to the term "rational basis" which describes the minimal level of scrutiny under the Equal Protection Clause of the Fourteenth Amendment. We think a term such as "rough proportionality" best encapsulates what we hold to be the requirement of the Fifth Amendment. *Id.*

102. *Id.*

103. *Id.*

104. Nelson, *supra* note 24, Chapter 3:

ensure that their impact fee ordinances satisfy these requirements to avoid the possibility that its impact fee ordinance is found to constitute a taking—requiring the local government to provide "just compensation" to the landowner.[105]

IV. MAYOR & BD. OF ALDERMEN, CITY OF OCEAN SPRINGS V. HOMEBUILDERS ASS'N OF MISS., INC.

A. Background of the Litigation

In 2006, the Mississippi Supreme Court addressed the extent to which municipalities have the authority to impose impact fees on new development in the absence of express enabling legislation in *Mayor & Bd. of Aldermen of Ocean Springs v. Homebuilders Ass'n of Miss., Inc.*[106] The Mayor and Board of Aldermen of the City of Ocean Springs (the "City") adopted a Comprehensive Plan in 2001 authorizing the assessment, collection and expenditure of impact fees (the "Plan").[107] The Plan set forth a number of policies addressing the coordination of public facilities with growth, including the need to develop impact fees to fund the pro rata share of public improvements. [108] The Plan projected that at present development densities, the City has approximately seventeen years before it was built out and required the City "[p]lan for and equitably fund the efficient provision of public facilities and services." [109]

1. The Ordinances

In furtherance of the Plan, the City subsequently adopted several ordinances (the "Ordinances") requiring that new development, as an individualized condition of development approval, mitigate the need for public facilities and infrastructure created by the development through the payment of a reasonable and proportional impact fee. [110] The Ordinances authorized the assessment and imposition of fees upon six separate categories

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[I]mpact fees should not . . . be subject to the *Nollan/Dolan* test because, in virtually all states, they are subject to the dual rational nexus test, which is more stringent than *Nollan/Dolan*. It guarantees that exactions, which meet the dual rational nexus test, could not be takings. If an impact fee is valid (i.e., if it satisfies the dual rational nexus test), then it cannot destroy property rights. If an impact fee violates the nexus test, it is invalid. Therefore, no takings analysis is appropriate or necessary. *Id.*

105. Rosenberg, *supra* note 23, at 262 (concluding that as states develop jurisprudence that focuses on their own state law and policy the impact of the *Nollan/Dolan* case line will diminish, because those cases appear to have been confined to an extremely narrow set of circumstances—adjudicated or individually-negotiated impact fees—which do not commonly occur); *But cf.* Ehrlich v. City of Culver City, 911 P.2d 429 (Cal. 1996) (holding that whether the heightened scrutiny under *Nollan* and *Dolan* applies to an impact fee depends upon whether the fee is an ad hoc or a legislative determination). The court reaffirmed this rule in San Remo Hotel L.P. v. City and County of S.F., 41 P.3d 87 (Cal. 2002).

106. *Ocean Springs*, 932 So. 2d 44 (Miss. 2006).

107. The City of Ocean Springs, Mississippi - Comprehensive Plan - Designing for the Future - Adopted: June 19, 2001 (hereinafter "Comprehensive Plan"), *available at* http://www.oceansprings.org/comp_plan.htm (last visited on Jan. 3, 2009).

108. Comprehensive Plan, *supra* note 107, Policy 57, 59, 61, and 62.

109. Comprehensive Plan, *supra* note 107.

110. Homebuilders Ass'n of Miss., Inc. v. City of Ocean Springs, No. 2003-00, 093(3) (Miss. Cir. Ct. 19th Dist. May 24, 2004), *aff'd.*, Mayor and Bd. of Aldermen, City of Ocean Springs v.

of zoning classifications: single family, multi-family, office/general, commercial/retail, light industrial and heavy industrial/manufacturing.[111] The municipal services for which appropriations were authorized, and for which separate impact fees were assessed included: general municipal services, fire facilities, park and recreation facilities, police facilities, major roadways, and water facilities.[112]

Whenever a builder or developer sought a permit to develop a parcel of land within the City that fell into any one of the zoning classifications, the Ordinances mandated that the developer pay six (6) separate impact fees for the municipal services described in the Ordinances.[113] Once collected, the fees were deposited into an earmarked account separate from the City's general municipal fund.[114] The Ordinances required that the earmarked revenues be spent on public facilities "necessitated by new development," not on maintenance, operation, repair or personnel expenses.[115] The Ordinances also required that the collected fees be used to fund only new capacity for the particular facility for which the fee was collected and spent only within the service area from which it was collected.[116]

2. Authority to Adopt

The City adopted the Ordinances pursuant to its police power, authorized under the home rule authority provided by statute and by the state's planning and zoning laws.[117] The home rule statute states that "governing authorities of every municipality of this state shall have the care, management and control of the municipal affairs and its property and finances."[118] The statute also provides that the powers granted to governing authorities are complete without the existence of or reference to any specific authority granted in any other statute or law of the State of Mississippi.[119] Similarly, Miss. Code Ann. Section 17-1-11(1)(a) provides, that "[t]he governing authority of each municipality and county may provide for the preparation, adoption, amendment, extension and carrying out of a comprehensive plan

Homebuilders Ass'n of Miss., Inc., 932 So. 2d 44 (Miss. 2006). The City identified its purpose as desiring "to fix, impose and provide for the collection of . . . fees to finance, in whole or in part, the capital costs of additional or expanded [services] required to accommodate new construction or development." *Id.* at 3.

111. *Id.* at 3.

112. *Id.*

113. *Id.*

114. *Id.* at 9.

115. Although the Court goes to great length to cite persuasive authority to support its conclusion, it fails to adequately discuss the actual requirements of the Ordinances at issue. *See* Mayor and Bd. of Aldermen, City of Ocean Springs, Miss., Appellants, v. Homebuilders Ass'n of Miss., Inc., et al, Appellees, 2005 WL 4171137, 37 (2005) (providing a summary of how the Ordinances are to be administered and what the Ordinances require).

116. *Id.*

117. *Ocean Springs*, 932 So. 2d at 50.

118. In 1985, the Mississippi Legislature did away with the general legal principle that a specific grant of power was necessary for a municipality to take action by granting municipalities home rule authority. MISS. CODE ANN. §21-17-5 (2008).

119. *Id.*

for the purpose of bringing about coordinated physical development in accordance with present and future needs . . . ."[120]

3. Procedural History

Ten days after the Ordinances were adopted, the Home Builder's Association of Mississippi, Inc., together with a number of other homebuilder and realtor associations, filed a Bill of Exceptions in the Jackson County Circuit Court, setting out a facial challenge to the adoption of the Ordinances, arguing that the impact fees constituted, *inter alia*, a per se illegal tax which the City had no authority to enact.[121] No evidence was presented challenging the reasonableness of the ordinances, including whether the Ordinances were designed to address the problems created by new developments.[122] Nor was an "as applied" challenge raised as to the application of the Ordinances to any particular development.[123] The issue focused solely on the City's authority, and the circuit court declared the impact fee Ordinances to be a void taxing measure. [124] The City appealed the holding to the Mississippi Supreme Court.

4. Ruling on the Claims

a. Express Authority

On appeal, the Mississippi Supreme Court turned first to the issue of express authority. The Court noted that the Mississippi legislature has yet to adopt enabling legislation which would authorize the imposition of impact fees.[125] Citing Governor Haley Barbour's State of the State speech on January 6, 2006,[126] as well as a Development Impact Fee Report prepared for the City,[127] the court quickly disposed of the question of express authority. The court stated in no uncertain terms that:

> The State of Mississippi does not have a specific constitutional provision or statute regarding implementation of development impact fees, nor can authority be found in the common law.[128]

Ultimately, the court concluded that "the taxing power of the sovereign is vested solely in the State and its relinquishment is never to be inferred."[129]

120. MISS. CODE ANN. § 17-1-11 (2008).
121. *Ocean Springs*, 932 So. 2d at 47.
122. *Id.*
123. *Id.*
124. *Id.*
125. *Ocean Springs*, 932 So. 2d at 48.
126. *See* Gov. Haley Barbour, State of the State Address (Jan. 9, 2006), *available at* http://www.governorbarbour.com/speeches/sos06.html (last visited on Jan. 3, 2009).
127. *Ocean Springs*, 932 So. 2d at 51 (noting that the report stated that the City's impact fee program would be consistent with the "*proposed*" impact fee enabling legislation).
128. *Id.* at 50.
129. *Id.* at 52 (quoting Adams v. Kuykendall, 35 So. 830, 835 (1904)).

b. Implied Authority

The court next addressed the City's argument that it was authorized to adopt impact fees pursuant to its general police powers under Mississippi's general planning and zoning statutes and home rule statute.[130] The court rejected this argument with very little discussion.[131] The court held that there are no provisions under the planning statutes which grant authority to adopt impact fees or other revenue raising mechanisms to implement a city's comprehensive plan.[132]

Although the court recognized that some states have upheld impact fees in the absence of enabling legislation, the court noted that Mississippi's home rule statute only grants municipalities the right to adopt those ordinances respecting 'municipal affairs' which are not inconsistent with state legislation and/or the Mississippi Constitution.[133] While the court agreed that the State's home rule statute does grant municipalities the authority to impose "fees", provided the imposition is not inconsistent with legislation or the Constitution, the court noted that the authority did not include the authority to impose taxes. [134] Ultimately, the court concluded that the impact fee Ordinances adopted by the City imposed taxes on new development and therefore, there is "no constitutional basis, legislative enactment, or common law doctrine, which empowers cities to adopt and impose development impact fees."[135]

c. Illegal Tax or Regulatory Fee

In Mississippi, local governments cannot levy taxes of any kind or increase the levy of any authorized tax, unless otherwise authorized by statute.[136] Accordingly, the Home Builders argued that the fees generated by the impact fee Ordinances were being utilized for "general municipal purposes" and as a "revenue raising mechanism" and were therefore invalid taxes. [137] The City asserted, however, that the impact fees qualified as "fees" because they were reasonably related to the infrastructure needs created by the new development and were earmarked and deposited into separate accounts.[138] In addition, the City argued that the Ordinances were reasonably related and roughly proportional to the need generated by the development and were a valid exercise of the City's police powers.[139]

130. *Id.* at 52.
131. *Id.* at 53.
132. *Id.*
133. *Ocean Springs*, 932 So. 2d at 53.
134. *Id.*; MISS. CODE ANN. § 21-17-5(2) (2008).
135. *Id.*
136. MISS. CODE ANN. § 21-17-5 (2008) ("Unless such actions are specifically authorized by another statute or law of the State of Mississippi, this section shall not authorize the governing authorities of municipalities to (a) levy taxes of any kind or increase the levy of any authorized tax, (b) issue bonds of any kind . . . .").
137. *Ocean Springs*, 932 So. 2d at 54.
138. *Id.*
139. *Id.*

In determining whether the City's impact fees constituted an illegal tax or regulatory fee, the court noted "[t]he chief distinction is that a tax is an exaction for public purposes while a fee relates to an individual privilege or benefit to the payer." [140] Regulatory fees are charges to cover the cost of the local government's use of its regulatory powers and are limited to the proportionate cost of giving the fee payer that special attention.[141] To qualify as a regulatory fee, the court adopted the position that "impact fees must cover only the administrative expenses of the City in regulating development or be compensation for a specific benefit or service on those paying the impact fees."[142] Because the fees were "not based on the administrative expense the City incurs in issuing the building permit," the court held that the fees did not qualify as "regulatory in nature."[143]

In addition, the court found that in order to be regulatory in nature, there must be a "specific benefit" conferred on the party paying the fee.[144] The City argued that the party paying the fee receives the "benefit" because the fee is earmarked in a separate fund and its use restricted to new infrastructure that will benefit the new development. [145] The court, however, found this justification to be lacking because there is "little, if any, assurance that such funds provide a special benefit to the class upon whom the burden is imposed."[146] The mere act of opening a special account for particular city services or facilities does not ensure that a "special benefit" is conferred upon those utilizing the service or facility.[147]

The court further held that the City is responsible for general municipal services that benefit the City as a whole. [148] Because the public services identified in the Ordinances have traditionally been funded by tax revenues, the court reasoned that "there would cease to be a need for exercising the taxing power of the State" if the City's rationale were adopted. [149]

Citing judicial decisions from states whose laws on the subject are similar[150] to that of Mississippi, the court held that the City's impact fee Ordinances constituted an illegal tax because they were not limited to the "administrative expense" incurred in issuing the permit and did not confer

140. *Id.* at 54 (quoting Miss. Att'y Gen. Op. 1996-0425 (1996)).

141. *Ocean Springs*, 932 So. 2d at 55.

142. *Id.* (citing Amicus Brief of the State of Mississippi).

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.* at 56.

147. *Ocean Springs*, 932 So. 2d at 56.

148. *Id.* at 56.

149. *Id.* (quoting Slip Opinion of the Circuit Ct. of Jackson County).

150. *Ocean Springs*, 932 So. 2d at 58 (finding that the "Iowa and Alabama decisions comport with holdings of our federal courts interpreting Mississippi law"); *See* Home Builders Ass'n of Greater Des Moines v. City of West Des Moines, 644 N.W.2d 339 (Iowa 2002) (holding the impact fee did not qualify as a regulatory fee authorized by the City's police powers); Armstrong v. City of Montgomery, 38 So. 2d 862, 863 (Ala. 1949) (holding that the power to assess private property for benefits received from local municipal improvements to streets and sewers is a taxing power vested in the legislature and to be exercised by a municipality must be expressly conferred by statue and when so conferred include necessary incidental powers).

any "special benefit" on the party paying the fee.[151] The court rejected the City's assertion that earmarking and depositing the fees into a special account provided the necessary "special benefit" to the party paying the fee.[152] While the court did not find impact fees to be per se illegal, the court did rule that the authority to implement the fees rests with the legislature. [153] Accordingly, because the City did not have express authority to enact the Ordinances, the impact fees were deemed invalid.[154]

B. Analysis of Mayor & Board of Aldermen, City of Ocean Springs v. Homebuilders Ass'n of Miss., Inc.

1. Review of the Court's Analysis

Given the number of states that have found impact fees to be a legal means of supporting new development, the Mississippi Supreme Court's decision to invalidate the City's impact fees as an invalid tax invites further discussion. The court based its conclusion on the holdings of three court decisions. The court relied on the ultimate holding of these cases, but failed to adequately address the factual distinctions between the cases and the Ocean Springs Ordinances. As a result, the court's reasoning is flawed, and it misconstrues what constitutes a regulatory fee.

a. Sweet Home Water and Sewer Ass'n v. Lexington Estates, Ltd.

The City relied on *Sweet Home Water & Sewer Ass'n v. Lexington Estates, Ltd.* as authority to impose impact fees if they are reasonably proportionate to the amount of need created by the developer.[155] In *Sweet Home*, the owner of an apartment complex brought an action against the water and sewer utility district for a charge to connect to the system and an impact fee of $350 per unit.[156] There, the Mississippi Supreme Court acknowledged that the utility district possessed the authority to charge an impact fee.[157] The *Ocean Springs* court, however, simply failed to address the matter.[158] Instead, the court seemed to adopt the circuit court's position that the reasonableness of the Ordinance was irrelevant, and that without express authority, an "impact fee" is by definition a tax simply because

151. *Ocean Springs*, 932 So. 2d at 55.
152. *Id.* at 56.
153. *Id.* at 59.
154. *Id.*
155. Sweet Home Water & Sewer Ass'n v. Lexington Estates, Ltd., 613 So. 2d 864 (Miss. 1993) (striking down an impact fee, charged by a public utility, because there was no showing of reasonableness).
156. *Id.* at 866.
157. Upon considering the position of both the Attorney General's Office (utilities are authorized to assess impact fees pursuant to Miss. Code Ann. §19-5-177(c)) and the Public Service Commission (utilities are authorized to assess impact fees so long as they are reasonable), the Mississippi Supreme Court concluded that a water and sewer district may, under Miss. Code Ann. §19-5-195, assess "rates, fees, tolls, or charges" provided those assessments are reasonably calculated to provide for the system's functioning and growth. *Id.* at 870.
158. *Ocean Springs*, 932 So. 2d at 60.

it raises revenue.[159] Unlike the impact fee ordinances in the Ocean Springs case, however, the fees in *Sweet Home* were assessed only as to the apartment complex owner.[160] In addition, the utility district offered no evidence that it "reasonably" needed to charge the impact fee.[161] Instead, the utility district cited "fear" that the apartment complex would negatively impact the system's operation as a basis for their imposition.[162]

While true the *Sweet Home* court declined to permit the collection of impact fees under the circumstances, the court expressly recognized that utility districts may assess 'rates, fees, tolls, or charges' under §19-5-195.[163] The court did not base its holding on lack of authority. Nor did the court view the matter as a fee versus tax issue. Instead, the court recognized "that the impact fee assessed by the [d]istrict . . . was, at the very least, arbitrary on its face and as applied and, at worst, discriminatory."[164]

By failing to distinguish the viability of impact fees under Miss. Code Ann. §19-5-195, not only did the *Ocean Springs* court too narrowly defined what constitutes a regulatory fee, the court has also called into question the previously recognized authority of water and sewer districts to impose impact fees.[165] Although both the State of Mississippi and the Mississippi Public Service Commission agreed in *Sweet Home* that utility districts are authorized to impose impact fees, the Attorney General's Office, relying on *Ocean Springs*, now opines that Miss. Code Ann. § 19-5-195 does not grant utility districts the authority to charge "impact fees" and that such fees amount to an unauthorized tax.[166]

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159. *Sweet Home*, 613 So. 2d at 870.

160. *Id.*

161. *Id.* (finding that the record revealed that the utility district established the fee: (1) in the absence of a disparate classification of Lexington Estates as a separate class of customer; (2) in the absence of an explanation of the fee's purpose; and (3) in the absence of identification of any increased costs associated with the service it now provides Lexington Estates).

162. *Id.*

163. *Id.*

164. *Id.*

165. *See* Miss. Att'y Gen. Op. No. 2006-00355 (Aug. 11, 2006).

166. Miss. Att'y Gen. Op. No. 2006-00647 (Jan. 19, 2007) ("You have not asked, and this office cannot opine, as to whether the Ocean Springs case does in fact render void any fees imposed by RSUD. The RSUD is a utility district governed by a separate statutory scheme, not a municipal corporation. As such, the district's authority to charge and collect fees is governed by Section 19-5-195 of the Mississippi Code . . . ."); *But cf.* Miss. Att'y Gen. Op. No. 2007-00097 (Mar. 20, 2007)("It is the opinion of this office that, in accordance with the Ocean Springs decision, Section 19-5-195 does not grant to utility districts the authority to charge "impact fees" and that such fees amount to an unauthorized tax."). Notwithstanding the Ocean Springs decision and Attorney General Opinions, it appears that impact fees continue to be assessed by public utilities. *See* 2007 Miss. PUC LEXIS 394 (Miss. PUC 2007) ("Impact fees will be charged to offset the cost of new residential business construction absorbing capacity of the system. All impact fees must be paid for before requesting bids for service extensions. This fee is in addition to contribution in aid-of-construction. The developer must pay in advance of any construction an impact fee of $350.00 per lot for each family dwelling. No refund will be paid of this fee. Impact fees shall only be assessed to the developer."); *See also* 2007 Miss. PUC LEXIS 395 (Miss. PUC 2007); 2007 Miss. PUC LEXIS 92 (Miss. PUC 2007).

b. Home Builders Ass'n of Greater Des Moines v. City of West Des Moines

As with *Sweet Home*, the *Ocean Springs* court failed to fully explore the Iowa Supreme Court's reasoning behind their decision in *Home Builders Ass'n of Greater Des Moines v. City of West Des Moines*.[167] In *West Des Moines*, the City appealed a lower court ruling enjoining the collection of fees under the Mandatory Park Dedication Fee Ordinance as an illegal tax.[168] There, the court determined that a park fee imposed on residential development was an excise tax, rather than a regulatory fee, because the parks to be created with the fee did not provide a special benefit to the developer.[169] Although the City of West Des Moines argued that the monies collected through the park fees were spent solely on the neighborhood parks for the benefit of the developers that generated the need, the court stated that a neighborhood park is available for general public use and benefits the entire community.[170] The court found that the fee was based on need, rather than impact, and concluded that the city imposed the fee to raise revenue, making it a tax.[171] Under Iowa law, cities must be expressly authorized to impose taxes on residential development.[172] Because Iowa law did not provide for such authorization, the court invalidated the fee.[173]

While it is true that both states take a similar position with regard to the fee versus tax analysis, the facts of both cases are sufficiently different to warrant further analysis. First, the *West Des Moines* decision related solely to park fees, while the Ocean Springs Ordinances cover six (6) separate impact fees. Unlike the *Ocean Springs* impact fee, the park fee in *West Des Moines* did "not prohibit the use of fees collected in one district from being spent . . . in another district."[174] Moreover, although *West Des Moines* had collected fees across the city, it had yet to spend the fees in two districts and had no plans to do so in a third.[175] Consequently, the *West Des Moines* park fee more closely resembled a revenue-raising tax than a regulatory fee. [176]

c. Home Builders Ass'n of Miss. v. City of Madison

The court's decision in *Ocean Springs* also did not address the fact that under the federal court's analysis, impact fees could be valid if properly crafted to avoid certain deficiencies.[177] In *Home Builders Ass'n of Miss.*,

167. *Des Moines*, 644 N.W.2d at 348.
168. *Id.* at 344.
169. *Id.* at 349.
170. *Id.*
171. *Id.*
172. *Id.*
173. *Des Moines*, 644 N.W.2d at 350.
174. *Id.* at 344.
175. *Id.* at 345.
176. *Id.* at 348.
177. Home Builders Ass'n of Miss. v. City of Madison, 10 F. Supp. 2d 617 (S.D. Miss. 1997), *aff'd by* Home Builders Ass'n of Miss. v. City of Madison, Miss., 143 F.3d 1006 (5th Cir. 1998) (concerning

Inc. v. City of Madison, an as-applied challenge was filed challenging the validity of the City of Madison's impact fee ordinance, which required developers pay a fee at the filing of a preliminary plat and in order to obtain a building permit. [178] The plaintiffs alleged that although the impact fees were being used for general revenue purposes, the impact fee ordinance was merely a "regulatory fee" and therefore not subject to the Tax Injunction Act.[179] The impact fee ordinance, however, did not, among other things, require that the impact fees be earmarked for any specific purpose, provide a method for determining the amount of the fee, or adequately measure the actual burden a new development would create.[180]

Unlike the *Ocean Springs* court, the *Madison* court reasoned that whether impact fees were taxes or valid regulatory fees "depends on the language of the . . . ordinances and the [local government's] use of the impact fees."[181] After considering distinctions between fees and taxes, the *Madison* court found that the City had not properly earmarked the impact fee revenues, and thus deposited them into an account separate from the general fund. [182] The *Madison* court also found that impact fee revenues were being used for general revenue purposes, rather than being spent on the public facilities required to serve new development.[183] Consequently, the *Madison* court concluded that the City of Madison's impact fee ordinance was a tax imposed to offset the cost of providing public facilities to newly developed residential areas within the City rather than a regulatory fee.[184] Adopting the reasoning of the *Madison* court, the Fifth Circuit upheld the ruling on appeal.[185]

2. An Alternative to the Tax/Fee Distinction

Simply put, the Mississippi Supreme Court's decision in *Ocean Springs* too narrowly defines what constitutes a regulatory fee.[186] The purpose of an impact fee is not to "raise revenue" as the court suggests.[187] Rather,

initial jurisdictional question of whether impact fee ordinance imposes a tax for purposes of the Tax Injunction Act).

178. *City of Madison*, 10 F. Supp. 2d at 619. The plaintiff's complaint challenged the City of Madison's selective imposition of impact fees against developers of single-family and multi-family dwellings only (i.e., an equal protection challenge).

179. *Id.* Ironically, the City of Madison asserted that the district court lacked subject matter jurisdiction pursuant to Title 28 U.S.C. § 1341, referred to as the "Tax Injunction Act," because "the instant municipal ordinance is not merely an assessment but a tax." In order to maintain its federal case, plaintiffs argued that the Madison impact fees were regulatory fees and not taxes.

180. *City of Madison*, 10 F. Supp. 2d at 625.

181. *Id.* at 625.

182. *Id.* at 620.

183. *Id.* at 625.

184. *Id.* at 626.

185. Home Builders Ass'n of Mississippi v. City of Madison, Miss., 143 F.3d 1006 (5th Cir. 1998).

186. *Ocean Springs*, 932 So. 2d at 55 ("[t]o qualify as a regulatory fee, the impact fees must cover only the administrative expenses of the City in regulating development or be compensation for a special benefit fo service on those paying the impact fees.").

187. *Id.* at 56 ("If the rationale of the City were sufficient to impliedly vest municipalities with revenue-raising authority by implication, there would cease to be a need for exercising the taxing power of the State.").

their purpose is to ensure that the costs associated with the development are properly paid by those who benefit from the public facilities rather than the taxpayers in general.[188] Thus, impact fees help to ensure a more efficient use of resources by forcing developers to "internalize" the costs of their decisions (on whether and how to develop land).[189] The court's decision fails to acknowledge the economic realities of real estate development, realities for which local governments and taxpayers throughout Mississippi must ultimately account.

The *Ocean Springs* decision essentially renders all impact fees void as an invalid tax— regardless of how they are designed, implemented or applied. As a result, the burden of all new developments (that cannot be remedied through land exactions) will be borne by the community at large through higher taxes instead of by those who will actually benefit from the new public facilities (i.e., the developer and those who purchase from the developer).[190] Rather than employ a superficial tax versus fee analysis, the court should, as a number of other state courts have done, review the constitutionality of impact fees under a "dual rational nexus" analysis— examining the fit between public policy ends and means under reasonableness standards.[191]

Under this analysis, the court would first seek to determine whether there is a reasonable connection between the "need" for new, additional or expanded public facilities and the proposed development.[192] Such a review generally requires the court to consider whether the local government's public facilities and services would become overburdened by a specific development project.[193] To satisfy this prong of the test, the burden is on the local government to demonstrate that the methodology used to determine the need for improvements funded by the impact fee is based on generally accepted practices. [194] If a connection exists, the court must then determine whether there is a reasonable connection between the expenditure of funds collected through the imposition of an impact fee and the "benefit" that accrues to the proposed developer. [195] In doing so, the court should consider criterion that bear on the reasonableness of the fee, including among other things, the actual costs of constructing new facilities, the formula used to determine the fee, the fee paid by a particular developer,

188. Guidebook, *supra* note 26, at 8-141.

189. *Id.*

190. *Id.*

191. *See* St. Johns County v. Ne. Fla. Builders Ass'n, Inc., 583 So. 2d 635, 638–39 (Fla. 1991); Hollywood, Inc. v. Broward County, 431 So. 2d 606, 612 (Fla. Dist. Ct. App. 1983); Home Builders Ass'n of Dayton & the Miami Valley v. Beavercreek, 729 N.E.2d 349, 356 (Ohio 2000).

192. *Beavercreek*, 729 N.E.2d at 356.

193. *Id.*

194. *Id.*

195. *Id.*

the local government's contribution, improvements made directly by developers, the length of time between the payment of the fee and new construction projects, or whether the construction projects are site-specific to the new development.[196]

The dual rational nexus analysis allows a reviewing court to balance local government discretion and private property rights in addressing the constitutionality of an impact fee.[197] The test recognizes the importance of allowing local governments to make public policy determinations regarding the potential impact of new development, while at the same time ensuring that their determinations are supported by a demonstrable causal relationship between new development and a detrimental impact on public facilities. [198] In short, the requirements of the dual rational nexus test would provide a sufficient basis for distinguishing valid impact fees from invalid taxes.

V. THE NEED FOR ENABLING LEGISLATION

Although the Mississippi legislature has twice before considered impact fee enabling legislation, both times the bills have died in committee with no public record of the legislature's reasoning.[199] First, Representative Daniel D. Guice, Jr. introduced legislation in 2000 designed to authorize those municipalities that had adopted comprehensive plans to impose impact fees as a condition of development approval on future development.[200] Then, Senator Doug E. Davis introduced legislation in 2005 which, although it expanded upon the proposed authorization to impose impact fees to include counties as well as municipalities, only granted the ability to impose assessments against the property owner or, if a builder or contractor was the property owner, the first purchaser, in an amount not to exceed $1,000.00. [201]

As a result of the Mississippi Supreme Court's recent decision in *Ocean Springs*, the only hope that local governments now have of shifting a pro rata share of public capital improvement costs to the developments that create the need for those improvements is the passage of enabling legislation. Given the continued growth throughout the state, it is important

196. *Id.* at 357.

197. *Id.* at 356.

198. *Beavercreek*, 729 N.E.2d at 356 ("The first prong of the test decides whether the ordinance is an appropriate method to address the city's stated interests, and the second prong assures that the city and developers are paying their proportionate share of the cost of new construction.").

199. H.B. 179, 2000 Leg., Reg. Sess. (Miss. 2000); S.B. 2967, 2005 Leg., Reg. Sess. (Miss. 2005).

200. H.B. 179 is available at http://billstatus.ls.state.ms.us (last visited Dec. 20, 2008).

201. S.B. 2967 is available at http://billstatus.ls.state.ms.us (last visited Dec. 20, 2008). Although S.B. 2967 would have authorized local governments to enact impact fees ordinances, its benefit to local governments as a financing tool would have been severally restricted—given that it would have capped fees at $1,000.00 and protected developers by requiring that the fee be charged essentially to any but developers.

that local governments are equipped with the tools necessary to adequately address the unique needs of their citizenry. [202]

Enabling legislation would empower local government to determine for themselves, whether the traditional financing mechanisms are sufficient or whether alternatives are needed.[203] Properly drafted enabling legislation could also serve to guide the creation of local ordinances that treat all parties to the development process - local government, developers, and residents - in the most equitable manner possible.[204] Furthermore, it would enforce a standard process throughout the state for implementing and administering impact fees, while providing local government with the ability to tailor them to fit their respective needs.[205]

There are a number of steps that the legislature could take to help ensure that impact fee ordinances adopted pursuant to a newly enacted enabling scheme withstand the various legal challenges they may face.[206] First, in order to avoid a Mississippi court declaring an impact fee void as an unauthorized tax or an unallowable exercise of local government power, the enabling legislation should require that the impact fee ordinance conform to the requirements of the "dual rational nexus" test.[207] Next, the enabling legislation should ensure that no local government can charge developments more than a proportionate share of the cost of new facilities.[208] Finally, the enabling legislation should ensure that all impact fee ordinances adequately provide for certain procedural requirements, including fee schedules, individual assessments, appeals, exemptions and waivers, credits for dedications, the collection of fees, accounting, disbursement, enforcement and administrative costs.[209]

Enabling legislation that incorporates such factors would provide much needed guidance to the courts.[210] A court reviewing a case involving impact fees would simply determine if the local government followed the substantive and procedural standards set forth in the enabling legislation.[211]

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202. U.S. Census Bureau, 2000, *available at* http://www.census.gov/population/www/projections/projectionsagesex.html (last visited Jan. 3, 2009). By 2030, Mississippi is projected to be the 33rd most populous State with 3.1 million people.

203. Rosenberg, *supra* note 23, at 207 (discussing the justifications for the modern adoption for impact fees).

204. Guidebook, *supra* note 26, at 8-142 (for impact fees to work properly, they must be at least roughly equal to the public expense it is supposed to cover).

205. *See generally* Guidebook.

206. Guidebook, *supra* note 26, at 8-145 (for a discussion on a model development impact fee act that incorporates best practices, and a comprehensive analysis of current approaches, *see id.* at 8-145–8-166).

207. Nelson, *supra* note 23, at 26 (i.e., require the establishment of "a connection between new development and the new or expanded facilities required to accommodate that development, identification of the cost of those new or expanded facilities needed to accommodate new development, and appropriate apportionment of that cost to new development in relation to benefits it reasonably receives.").

208. Nelson, *supra* note 23, at 30.

209. *Id.* at 39.

210. *See generally* Guidebook, *supra* note 26, at 8-145.

211. *Id.*

VI. CONCLUSION

As a consequence of Oceans Springs, Mississippi courts must now apply an impact fee analysis that severely limits the ability of local governments to allocate the cost of public facilities to new development. Although the impact fees are not per se illegal in Mississippi, they hold little value to local governments in their current state and cannot, in the absence of enabling legislation, be relied upon as means of requiring new development "pay its own way." By adopting enabling legislation, the Mississippi legislature would empower local governments to decide how best to allocate the costs resulting from the external effects of new development.