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I. Introduction

The 1987-88 session of Pennsylvania's General Assembly produced unique, comprehensive, and creative approaches to some of local government's most intractable problems. In the summer of 1987, Governor Robert P. Casey signed the Financially Distressed Municipalities Act[1] in Clairton, Pennsylvania. This bill deals forthrightly with the financial crises confronting some of the Commonwealth's nearly bankrupt local governments. Subsequently, in the final hours of the two-year legislative session, lawmakers considered an equally momentous proposal. A historic local tax reform package was enacted, promising to free local government decision makers from the outmoded, inflexible, and archaic tax structure, which relied too heavily on various nuisance taxes and the real property tax.[2]

During the final sixty minutes prior to sine die adjournment, when much of the drama concerning tax reform unfolded in the Senate,[3] the House of Representatives approved and forwarded to Governor Casey significant revisions to Pennsylvania's Municipalities Planning Code (MPC).[4] This comprehensive revision of the statute

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1. 53 PA. CONS. STAT. ANN. §§ 11701.101-.501 (Purdon Supp. 1989).

2. The constitutional amendment (Special Session House Bill 14, amending Article VIII, sec. 2(b) of the Constitution of Pennsylvania) needed to trigger the tax reform statute was overwhelmingly defeated in the May 16, 1989 primary. The demise of tax reform may drive local governments more quickly to exactions and impact fees. The California experience following the adoption of Proposition 13 is instructive. *See* Smith, *From Subdivision Improvement Requirement to Community Benefit Assessments and Linkage Payments: A Brief History of Land Development Exactions*, 50 LAW & CONTEMP. PROBS. 5, 19-24 (1987).

3. *See* Singel, *As the Clock Ticked Away on Tax Reform*, Pittsburgh Post Gazette, Dec. 5, 1988, at 7, col. 1-4.

4. Act of July 31, 1968, P.L. 805, No. 247, *reenacted and amended by* Act of Dec. 21,

authorizes the regulation of land use by local government agencies, including governing bodies, zoning hearing boards, and planning commissions, and represents the culmination of work begun in 1981 by a blue-ribbon Task Force organized by the Local Government Commission (Commission).[5] The Commission, a bicameral and bipartisan research agency of the Legislature, has substantial jurisdiction over local government legislation and provides advice to the General Assembly on municipal governmental affairs. The Commission comprises five members of the Pennsylvania House of Representatives and five members of the Senate of Pennsylvania. A small professional staff executes the policy decisions promulgated by the Commission. One of the co-authors of this Article served as a member of the Commission from 1983 to 1988, and the other co-author currently serves as the Commission's legal counsel.[6]

Although the proposed revision of the MPC did not attract widespread statewide media attention, considerable controversy and attendant debate preceded the proposal's eventual enactment. The bill's seven year gestation period and difficult, painful birth reflect the complexity of the topic and its day-to-day significance. Land use control is a major function of Pennsylvania local governments, and affects millions of the state's residents. The final version of the MPC mirrors the varied pressures and desires for growth and development in Pennsylvania, as well as the confusing intricacies of the legislative process.

Perhaps even more than the power to tax, the power to regulate the use of an individual's private property to further the public interest generates one of the most profound tensions in our democracy.[7]

1988, P.L. 1329, No. 170; Municipalities Planning Code, 53 PA. CONS. STAT. ANN. §§ 10101-11202 (Purdon Supp. 1989) [hereinafter MPC].

5. In addition to the Commission's Task Force on the Municipalities Planning Code (MPC), the Commission organized similar task forces to study and propose legislative solutions. These efforts resulted in the Distressed Municipalities Act, 53 PA. CONS. STAT. ANN. §§ 11701.101-.501 (Purdon Supp. 1989). Additionally, the tax reform legislation incorporated, in part, the Real Estate Assessment Task Force's final product.

6. This Article borrows extensively from the Commission's final report on the MPC. LOCAL GOVERNMENT COMMISSION, 172d Leg., 2d Sess., ANALYSIS OF REVISIONS TO THE PENNSYLVANIA MUNICIPALITIES PLANNING CODE: HISTORICAL DEVELOPMENT, LEGISLATIVE INTENT, AND COMMENTARY ON AMENDMENTS ENACTED DURING 1987-88 LEGISLATIVE SESSION (Comm. Print Jan. 1989) (copy on file at Dickinson Law Review office).

7. Justice Frankfurter predicted that:

> Yesterday, the active area in this field was concerned with "property." Today it is "civil liberties." Tomorrow it may again be "property." Who can say that in a society with a mixed economy like ours, these two areas are sharply separated, and that certain freedoms in relation to property may not again be deemed, as they were in the past, aspects of individual freedom.

F. FRANKFURTER, OF LAW AND MEN 19 (1956).

To paraphrase Chief Justice John Marshall's words in the landmark opinion of *McCulloch v. Maryland*,[8] the power to regulate can constitute the power to destroy or seriously impair private property rights.[9] Skilled advocates cleverly and vigorously presented the arguments for the respective rights in conflict. At every step along the way, the advocates strongly and convincingly argued that a phrase, or a seemingly technical amendment, could fundamentally tip the fulcrum upon which the rights of private property and the pursuit of the public interest are precariously balanced.[10]

This Article reviews the legislative history and process that resulted in Act 170 of 1988, the revised Pennsylvania's Municipalities Planning Code.[11] The major changes in Pennsylvania land use law, including the adoption of new concepts, the codification of appellate court decisions, and the key points for immediate attention by practitioners are underscored. Also highlighted are the occasional instances in which the General Assembly made a policy decision that reversed an appellate court precedent. Finally, this Article explores the unresolved issue of local governments' right to impose fees upon real estate developers for the impact that new housing places upon a municipality.

One major reason for amending Act 247 of 1968 was to simplify and streamline the MPC. Since 1968, the MPC has produced a veritable flood of litigation over a host of both substantive and procedural issues.[12] To answer what might seem to be the simplest question regarding a procedural aspect of land use practice, a lawyer must review numerous pages of annotations. Act 170 directly sets forth the key definitions, rules of construction, appropriate procedures, deadlines, and criteria for decision-making.

As noted, the General Assembly's prodigious efforts did not resolve the single most contentious issue placed before it—the so-called impact fee. Various proposals authorizing the assessment of impact fees on new development were proposed. However, on the final day of the legislative session, it became abundantly clear that this bitterly contested dispute could not be settled. Therefore, the final version, which was passed in the last tumultuous hour of the session, contains no authorization for imposition of impact fees. This Article

8. 17 U.S. (4 Wheat.) 316 (1819).
9. *Id.* at 431.
10. *Id.* at 322.
11. 53 PA. CONS. STAT. ANN. §§ 10101-11202 (Purdon Supp. 1989).
12. *See* annotations collected at 53 PA. CONS. STAT. ANN. § 10101-11202 (Purdon 1972 & Supp. 1989).

contains a review of the current state of the law in Pennsylvania, analysis of prospects for legal challenge to the fees currently charged by some municipalities, and prognosis for future judicial and legislative action.

II. The Roots of the Commonwealth of Pennsylvania's Land Use Regulation Law

On July 13, 1968, Governor Raymond P. Shafer signed Act 247 of 1968, the statewide enabling legislation for regulation of local land use, zoning, and planning activities by municipal governing bodies.[13] That landmark legislation provided local governments with the essential tools for crafting subdivision and land development ordinances, enacting zoning and planning legislation, and making appointments to planning commissions and zoning hearing boards. As noted by former Pennsylvania Supreme Court Justice Samuel J. Roberts:

> The Municipalities Planning Code is the Legislature's mandate for the unified regulation of land use and development. The Code also sets forth procedures by which landowners and others may challenge municipal decision-making in this area. These procedures are, in the Legislature's judgment, the best means of balancing the interests of municipalities with those of land owners and others. Commentators view the Municipalities Planning Code's procedures for challenging local land regulations as a significant advance over prior methods.[14]

Despite several amendments adopted in 1972, 1978, and 1982, the MPC remained substantially similar to its original format for twenty years.

III. Historical Development of the New MPC

In 1981, the Local Government Commission organized a Task Force to comprehensively study the MPC.[15] The Task Force under-

13. *See supra* note 4; 53 PA. CONS. STAT. ANN. §§ 10101-11202 (Purdon 1972), *amended by* 53 PA. CONS. STAT. ANN. §§ 10101-11202 (Purdon Supp. 1989).

14. Gary D. Reihart, Inc. v. Carroll Township, 487 Pa. 461, 466, 409 A.2d 1167, 1170 (1979) (citing Krasnowiecki, *Zoning Litigation and the New Pennsylvania Procedures*, 120 U. PA. L. REV. 1029, 1093 (1972); Wolffe, *Procedures Under the Pennsylvania Municipalities Planning Code*, 14 DUQ. L. REV. 1, 5-7 (1975)).

15. The Members of the Commission's Task Force included:
Senator Tim Shaffer (Chairman of the Task Force)*; Senator J. Doyle Corman (ex officio, Chairman of the Commission); Representative Joseph Levi II*; Representative David W. Sweet*; William Adams (Pennsylvania Farmer's Association); Ronald Agulnick, Esq. (Chester and Delaware County Home Builders);

took a section-by-section analysis of the MPC to remove inconsistencies, clarify ambiguities, and standardize procedures. The Task Force made a conscious and deliberate effort to analyze relevant judicial decisions concerning the MPC, and to avoid cavalierly overturning existing land use case law. However, new provisions were proposed, including transferable development rights for more creative land use planning, and a mediation option to resolve certain land use disputes.

The report of the Task Force was originally embodied in Senate Bill 1168, Printer's No. 1546. The bill was introduced in the Pennsylvania Senate on November 30, 1983 and was widely distributed for comment. Many technical and editorial amendments were made by the Senate Local Government Committee, but the basic substance of the bill was not altered.

Senate Bill 1168, Printer's No. 2311, expired with the sine die adjournment of the legislature on November 30, 1984. The bill was redrafted with additional technical amendments and reintroduced in the Senate in the 1985-86 legislative session.[16] Further refinements were proposed by the Commission staff and accepted by the Task Force.

However, Senate Bill 876 also expired upon sine die adjournment of the legislature on November 26, 1986. The bill was reintroduced in the following session as Senate Bill 535.[17] The Senate Local Government Committee further amended the bill at its meeting on February 2, 1988.[18] The following month, on March 21, 1988, the Senate adopted several other amendments on the bill's third consideration on the floor of the Senate. The following day, by a vote of 45-2, the Senate passed the bill, as amended.[19]

Following Senate approval, the bill was referred to the House Local Government Committee, which appointed a special subcommittee to study the Senate version, consider testimony, and review

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Richard G. Bickel (AICP, American Planning Association); Frederick C. Brown (Pennsylvania Association of Realtors); Loudon L. Campbell, Esq. (Pennsylvania Builder's Association); Dallas A. Dollase (Department of Community Affairs); Thomas W. Graney (Lawrence County Planning Commission); Elam Herr (Pennsylvania State Association of Township Supervisors); John P. Knox, Esq. (Pennsylvania Bar Association); James R. Moore (Pennsylvania Manufactured Housing Association); Ronald J. Mull (Pennsylvania State Association of Township Commissioners); and Leslie E. Spaulding (Pennsylvania Planning Association).

*No longer Members of the Local Government Commission.

16. S. 876, Printer's No. 1018, 169th Leg., 2d Sess. (1985).
17. S. 535, Printer's No. 588, 171st Leg., 1st Sess. (1987).
18. S. 535, Printer's No. 1758, 172d Leg., 1st Sess. (1988).
19. S. 535, Printer's No. 1880, 172d Leg., 1st Sess. (1988).

proposed amendments. Following numerous meetings, and a public hearing in Bucks County, the subcommittee's report and recommendations were considered by the full House Local Government Committee on September 27-28, 1988. The final product was reported to the floor of the House on October 4, 1988.[20]

Lobbying efforts intensified during the two weeks following the introduction of the bill to the House, primarily focusing upon the proposed impact fee provisions. Extensive debates on many key amendments occurred on the floor of the House on November 16, 1988.[21] After the House passed several significant amendments by extremely narrow margins, the bill achieved final passage by a vote of 159-31. This version of the MPC[22] was returned to the Senate for concurrence in the House amendments.

As in the House, intense lobbying pressures were exerted in the Senate by the same forces that continued to disagree about the precise final language of section 509(i) related to impact fees. Following discussion among the Senate caucuses and key House members, a compromise proposal emerged that would eliminate all reference to impact fees. Although no one appeared fully satisfied by this decision, at least the important aspects of the remaining MPC revisions could be salvaged. Following excision of proposed section 509(i), the Senate concurred in all other House amendments on November 29, 1988, by a vote of 46-3.[23]

House concurrence in the total deletion of all impact fee language was, therefore, left to the final day of session prior to sine die adjournment. One last effort to kill this legislation was made on the House floor late in the evening of November 30, 1988. A motion to revert to the prior printer's number, which included the House-passed impact fee provisions, failed by a thirty-vote margin.[24] The

20. S. 535, Printer's No. 2428, 172d Leg., 2d Sess. (1988).

21. 64 LEGISLATIVE JOURNAL 1831-1856, 172d Leg., 1988 Sess. (Nov. 16, 1988).

22. S. 535, Printer's No. 2514, 172d Leg., 2d Sess. (1988).

23. Senate amendment to House amendments is unusual, but not entirely unheard of, particularly near the end of legislative sessions. However, recent shortcuts instituted in the name of legislative craftsmanship, including unusual manipulation of the rules and violation of constitutionally mandated procedures, have been struck down by the courts. *See* Pennsylvania Ass'n of Retail Dealers v. Commonwealth, ___ Pa. Commw. ___, 554 A.2d 998 (1989); Parker v. Commonwealth, 115 Pa. Commw. 93, 540 A.2d 313 (1988); Ritter v. Commonwealth, 120 Pa. Commw. 374, 548 A.2d 1317 (1988). These recent cases considered alleged violations of the Pennsylvania Constitution, article III, sections 2 and 4, and the adjudication of the issues of germaneness and nonjusticiability of co-equal branches of the government.

24. This motion to suspend the House rules and revert to previous printer's number 2514 was immensely significant since it would have dealt a death knell to the MPC because the Senate was embroiled in an eleventh hour debate on local tax reform, and would not have been able to vote on this late House action.

final concurrence vote was 133-58.[25] Governor Robert P. Casey signed Act 170 on December 21, 1988, and the Act became effective on February 21, 1989.

IV. New Concepts Embodied in the MPC

A. Transferable Development Rights

One of the several innovative concepts adopted by the General Assembly in the new MPC is transferable development rights, or TDRs. A TDR is a planning concept that permits a municipality, in its zoning ordinance, to recognize development rights that are severable and separately conveyable as another estate in land.[26] This provision allows a municipality to encourage local development in a manner more reasonably related to the best interests of the community.[27]

Although TDRs were initially developed twenty years ago, the concept has caught on rather slowly. TDRs were employed successfully to preserve historic landmarks in New York City[28] and to protect coastal wetlands in Collier County, Florida.[29] In addition, TDRs have been used to protect woodlands, streams, and farmland in the Pine Barrens of New Jersey.[30] The implementation of the new MPC may result in greater nationwide acceptance of TDRs. However, there are many potentially serious criticisms made of TDRs' usage:

> Aside from the possible equal protection problems surrounding the artificial creation and distribution of wealth in the form of development rights, it is suggested that many municipalities may be reluctant to play "Robin Hood" and may shy away from implementation of a full-scale TDR plan. It is not hard to imagine the potential administrative headaches involved in a full-scale TDR plan. Simply determining the number of rights to be created and allocated assumes that a municipality can accurately predict future growth pressures, a highly speculative prospect. Furthermore, unless all municipalities in a region cooperate in a regional TDR scheme, the price of a development

25. S. 535, Printer's No. 2556, 172d Leg., 2d Sess. (1988).

26. Pennsylvania Municipalities Planning Code, 53 PA. CONS. STAT. ANN. §§ 10107, 10619.1 (Purdon Supp. 1989).

27. Appeal of Buckingham Developers, Inc., 61 Pa. Commw. 408, 433 A.2d 931 (1981) (noted use of TDRs, but did not reach the merits of the issue in the final adjudication).

28. *See* Penn Cent. Transp. Co. v. New York, 438 U.S. 104 (1978), *reh'g denied*, 439 U.S. 883 (1978).

29. Office of Environmental Management, City of Virginia Beach, Virginia, Public Information Brochure (Dec. 1988) (copy on file at Dickinson Law Review office).

30. *Id.*

> right may be unrealistically low, since a developer may have the option to build in a neighboring township where rights need not be purchased at all, or where, due to an over-issue of development rights, the price is depressed. In short, the highly artificial market and potential inequities connected with initiation of a full-scale TDR program might lead to a virtual Pandora's Box of undesirable and unforeseen side effects. For that reason, the effectiveness of TDR as a method for preserving farmland is highly questionable.[31]

We predict that Pennsylvania's local governing bodies will be slow to adopt TDRs.

B. Civil Enforcement Remedies

The Task Force's belief that the prior MPC inappropriately imposed criminal sanctions for violations of a subdivision or zoning ordinance prompted the amendments and changes to articles V, VI, and VII of the MPC.[32] For example, a zoning violation involving a default of the prescribed monetary fine resulted in imprisonment of not more than 60 days under the old MPC.[33]

The Task Force, the Senate, and the House all contributed to a substantial rewording of these provisions. In the revised MPC, references to fines and contempt citations are deleted and replaced by civil judgments, imposition of costs and attorney fees, and enforcement of defaults through applicable rules of civil procedure. District justices have initial jurisdiction for all proceedings brought under these provisions.[34]

A municipality may also institute actions at law or in equity to restrain, correct, or abate violations and to prevent unlawful construction or occupancy, as well as recover damages.[35] In addition, local officials may refuse to issue any permit or grant any approval to develop land that has been developed or subdivided in violation of an ordinance adopted pursuant to the MPC.[36] This authority is appropriate whether the applicant is an owner, vendee, or lessee at the time of the violation or subsequent to the time of the violation, and is

31. Chestek, *Farmland Preservation Techniques: Some Food for Thought*, 40 U. PITT. L. REV. 258, 278-79 (1979).

32. *See* 53 PA. CONS. STAT. ANN. §§ 10501-10515.3, 10601-10619.1, 10701-10713 (Purdon Supp. 1989).

33. 53 PA. CONS. STAT. ANN. § 10616 (Purdon 1972), *repealed by* 53 PA. CONS. STAT. ANN. § 10616 (Purdon Supp. 1989).

34. 53 PA. CONS. STAT. ANN. §§ 10515.2, 10617.1, 10712.1 (Purdon Supp. 1989).

35. *See, e.g., id.* at § 10515.1(a).

36. *Id.* at § 10515.1(b).

applicable whether the applicant had either actual or constructive notice of the violation.[37]

The major change in the enforcement remedies sections eliminates the criminal penalty for subdivision and land development ordinance violations and substitutes a civil judgment procedure. Liability for a violation results in a civil judgment of not more than $500 plus costs and attorney fees incurred by the municipality.[38] No violation, however, is deemed to have occurred, nor any judgment commenced, imposed, or payable until a final determination is made by the district justice.[39] In case the defendant "neither pays nor timely appeals the judgment, the municipality may enforce the judgment pursuant to the applicable rules of civil procedure."[40]

Essentially, this provision reclassifies subdivision violations from a misdemeanor to a civil penalty, which avoids the cumbersome, expensive, and unworkable process necessarily associated with the use of criminal proceedings to enforce subdivision or zoning regulations. The authority to institute such proceedings is limited to the municipality and does not extend to private citizens.[41]

C. Mediation Option

A new section of the MPC provides a mediation option as a supplement to proceedings initiated under MPC articles IX, Zoning Hearing Board and Other Administrative Proceedings, and X-A, Appeals to Court.[42] Mediation is not mandatory; the municipality may choose to offer mediation, and any party may refuse to participate.[43] This new process is not a substitute for the proceedings required by articles IX and X-A of the MPC.[44] Current legal process for the resolution of land use disputes continues to exist as a matter of right. Mediation is not intended to subvert the letter of the law but only to facilitate settlement. The MPC specifically prohibits the zoning hearing board from initiating or participating as a party in mediation.[45]

In order to encourage use of the mediation process, the MPC prohibits the evidentiary use of any offers or statements made during

37. *Id.*
38. *Id.* at § 10515.3(a).
39. 53 PA. CONS. STAT. ANN. § 10515.3(a) (Purdon Supp. 1989).
40. *Id.*
41. *Id.* at § 10515.3(c).
42. *Id.* at § 10908.1.
43. *Id.* at § 10908.1(b).
44. *See* 53 PA. CONS. STAT. ANN. § 10908.1(a) (Purdon Supp. 1989).
45. *Id.* at § 10908.1(a).

mediation in any subsequent judicial or administrative proceeding.[46] Anticipated benefits of offering mediation include: (1) assistance in relieving an overburdened court system; (2) support for a public policy in Pennsylvania that encourages out-of-court settlements; (3) providing a potentially less costly, more effective mechanism for resolving land use disputes; and (4) providing a less polarized process than that which an adversarial administrative hearing and legal proceedings tend to create.

D. Regional Municipal Relationships

The amendments to the MPC clarify provisions that require consideration of the relationship of the municipality's development to surrounding units of local government and areas. The new language of the Act establishes the interrelationship between existing and proposed development of a municipality and (1) existing and proposed development of contiguous municipalities; (2) county development objectives and plans; and (3) regional trends, whether sociological, economic, demographic, ecological, or otherwise. Since municipal land use planning more and more frequently adversely affects development objectives of adjacent municipalities and the surrounding region, this provision is intended to encourage consideration of adjacent community, county, and regional planning objectives along with informal cooperation on land use planning matters.

The Task Force concerns for insuring coordination of the planning function between and among adjacent municipalities were adopted by the MPC.[47] The Commonwealth Court of Pennsylvania judicially recognized and confirmed these desires for cooperation when the court overruled previous opinions and held that aggrieved nonresidents of a municipality could appeal or intervene in zoning decisions made within the boundary of an adjacent unit of local government.[48]

V. Legislative Codification or Reversal of Caselaw

One of the important goals of the drafters of the new MPC was to legislatively codify appropriate common pleas and appellate decisions. Also, in some instances, the drafters decided to reverse or modify a judicial decree, and occasionally, addressed and resolved a

46. *Id.* at § 10908.1(c).
47. *See, e.g., id.* at §§ 10301(a)(5), 10503(7).
48. Miller v. Upper Allen Township Zoning Hearing Bd., 112 Pa. Commw. 274, 535 A.2d 1195 (1987).

problem highlighted by a court case. Key members and staff in both chambers of the legislature analyzed important judicial opinions, and crafted language to accurately reflect these legal tenets.

A. Subdivision and Land Development

1. Section 107.—The definition of subdivision has been amended to include any "petition by the court for distribution to heirs or devisees,"[49] overruling a Lehigh County Common Pleas decision that held that such partitions and distributions did *not* constitute a "subdivision."[50]

2. Section 503(4.1).—This provision was added to enable those municipalities that have not enacted a zoning ordinance to provide for uniform setback lines and minimum lot sizes, and provides that an ordinance may include: "Provisions which apply uniformly throughout the municipality regulating minimum setback lines and minimum lot sizes which are based upon the availability of water and sewage, in the event the municipality has not enacted a zoning ordinance."[51] The Commonwealth Court previously ruled that these regulations were invalid without enactment of a zoning ordinance.[52] Now, a municipality without a zoning ordinance may still provide for setbacks and minimum lot sizes.

3. Section 503(9).—This new clause states that a municipality may impose conditions for the approval of plats, whether preliminary or final.[53] The provision also requires that the municipality establish a procedure for an applicant's acceptance or rejection of conditions.[54] This provision delineates the authority of a municipality to impose prerequisites for subdivision and land development approvals, but equitably gives a developer the opportunity to notify the municipality of either the rejection or acceptance of the conditions. A developer's rejection of the conditions will be deemed a disapproval of the application for which the municipality must render a written decision pursuant to section 508(1) and section 508(2).[55]

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49. 53 PA. CONS. STAT. ANN. § 10107 (Purdon Supp. 1989).

50. *In re* Estate of Tettemer, 26 D. & C.3d 745 (1981), *aff'd*, 311 Pa. Super. 635, 458 A.2d 287 (1983).

51. 53 PA. CONS. STAT. ANN. § 10503(4.1) (Purdon Supp. 1989).

52. Board of Supervisors of Franklin Township v. Meals, 57 Pa. Commw. 129, 426 A.2d 1200 (1981).

53. 53 PA. CONS. STAT. ANN. § 10503(9) (Purdon Supp. 1989).

54. *Id.*

55. *Id.* at §§ 10508(1)-(2); *see* Board of Comm'rs of Annville Township v. Livengood, 44 Pa. Commw. 336, 403 A.2d 1055 (1979).

B. *Zoning*

1. Section 603(a).—This provision provides that: "Zoning ordinances should reflect the policy goals of the statement of community development objectives required in section 606, and give consideration to the character of the municipality, the needs of the citizens and the suitabilities and special nature of particular parts of the municipality."[56] The House Local Government Committee inserted this language, which states that zoning ordinances "should" reflect the policy goals enunciated in the statement of community development objectives. This new subsection may serve to modify court decisions holding that a municipality's statement of community development objectives should never serve as a basis to challenge the validity or effect of its zoning ordinance.[57]

2. Section 603(d).—This new subsection allows zoning ordinances to include provisions regulating siting, density, and design of developments to assure reliable, safe, and adequate water supplies to support the intended use of the land.[58] For more than twenty years, Pennsylvania appellate courts have been confronted with the adjudication of legal issues created by large-lot zoning techniques of local governments seeking to protect the watershed against pollution. The courts have traditionally held, however, that municipalities may not utilize large minimum lot sizes to effectuate exclusionary motives of land use regulation.[59]

3. Section 603.1.—This new section is added to provide a statement of intent to assist in the interpretation of zoning provisions when the meaning of local statutory language adopted by a governing body is questioned. This provision restates current law as clearly and unequivocally enunciated by the appellate courts of the Commonwealth in numerous decisions.[60] Municipal officials should be cognizant that the provision provides that when doubt exists as to the intention of the governing body, the language of the local zoning

56. 53 PA. CONS. STAT. ANN. § 10603(a) (Purdon Supp. 1989).

57. *See* McClimans v. Board of Supervisors of Shenango Township, 107 Pa. Commw. 542, 529 A.2d 562 (1987); Appeal of deBotton, 81 Pa. Commw. 513, 474 A.2d 706 (1984).

58. 53 PA. CONS. STAT. ANN. § 10603(d) (Purdon Supp. 1989).

59. *See* Concord Township Appeal, 439 Pa. 466, 268 A.2d 765 (1970); National Land & Inv. Co. v. Easttown Township Bd. of Adjustment, 419 Pa. 504, 215 A.2d 597 (1965); Martin v. Millcreek Township, 50 Pa. Commw. 249, 413 A.2d 764 (1980). These cases referred generally to the issue of whether local zoning strategies based upon an announced need to protect available water supplies constitute an extraordinary justification to public interest so as to require large minimum lot sizes for on-site sewage.

60. *See* Appeal of Haff, 68 Pa. Commw. 112, 448 A.2d 120 (1982); Gilbert v. Montgomery Township Zoning Hearing Bd., 58 Pa. Commw. 296, 427 A.2d 776 (1981); Cook v. Marple Township Zoning Hearing Bd., 55 Pa. Commw. 535, 423 A.2d 1105 (1980).

ordinance shall be interpreted in favor of the property owner and against any implied extension of the restriction.[61] The judicial concept of rule of strict construction is, therefore, applicable.[62]

4. Section 604(4).—This clause is added to emphasize the importance of providing for varied types of housing through zoning. The clause states that zoning ordinances shall be designed to provide for single- and multi-family dwellings, and provides that no zoning ordinance shall be declared invalid for not listing other classifications of dwellings.[63] Once again, the legislative intent appears to be consonant with judicial standards established by Pennsylvania appellate courts.[64]

There was considerable dispute over this provision, with the Pennsylvania State Association of Township Supervisors (PSATS) strongly objecting to a shopping list approach to zoning. The PSATS' criticism was directed toward an earlier draft of the Task Force proposal that required more specific dwelling types including: single-family detached; single-family semi-detached; two-family detached; townhouses and similar single-family dwellings; multi-family dwellings in various arrangements; and, mobile homes and mobile home parks. Because the Pennsylvania Supreme Court, in several decisions, backed away from mandating different dwelling types to this degree of specificity,[65] the House Local Government Committee amended the proposal to require: "residential housing of various dwelling types encompassing all *basic forms of housing*, including single-family and two-family dwellings, and a reasonable range of multifamily dwellings in various arrangements, mobile homes, and

61. 53 PA. CONS. STAT. ANN. § 10603.1 (Purdon Supp. 1989).

62. The legislative intent was not to engender a companion rule that an ordinance granting rights with respect to a nonconforming use should be strictly construed against the landowner. The restatement of the strict construction rule was intended to reiterate, and not to modify, the judicial rules concerning nonconformances.

63. 53 PA. CONS. STAT. ANN. § 10604(4).

64. In Fernley v. Board of Supervisors of Schuylkill Township, 509 Pa. 413, 502 A.2d 585 (1985), the Pennsylvania Supreme Court struck down an ordinance that totally excluded apartments within the community. Eight years earlier, in Surrick v. Zoning Hearing Bd. of Upper Providence Township, 476 Pa. 182, 189, 382 A.2d 105, 108 (1977), the court "adopted the 'fair share' principle, which requires local political units to plan for and provide land use regulations which meet the legitimate needs of all categories of people who may desire to live within its boundaries." Among the factors involved in the "fair share" analysis are the percentage of land available for a requested use, current population growth and pressures within the municipality and surrounding region, and the amount of undeveloped land in a community. *Id.*

65. *See* Appeal of Elocin, Inc., 501 Pa. 348, 461 A.2d 771 (1983); Appeal of M.A. Kravitz Co., Inc., 501 Pa. 200, 460 A.2d 1075 (1983) (plurality opinion). These cases are thoughtfully analyzed in 1 R. RYAN, PENNSYLVANIA ZONING LAW AND PRACTICE §§ 3.5.2-.9 (Supp. 1986).

mobile home parks . . . ."[66] The legislative goal was to codify inclusionary zoning principles without requiring more than the court had determined was constitutionally necessary.[67]

5. Section 609.1.—This section was amended with respect to the effect to be given a situation in which a landowner seeks to challenge the validity of a zoning ordinance by suggesting an amendment designed to cure an alleged defect. If the curative amendment is rejected by a local governing body, but subsequently deemed meritorious by the court, only the ordinance provisions relating to the landowner's challenge, and *not the entire ordinance*, shall be invalid.[68] This amendment effectively codifies an entire line of Pennsylvania appellate court decisions related to this issue.[69]

This new provision of section 609.1 ensures that an entire zoning ordinance will not be invalidated and, therefore, will not leave a municipality wholly without zoning protection. Likewise, the provision offers a legal safeguard against the absurd results present when a challenger seeks to take advantage of a vulnerable unit of local government.

> The entire exclusionary zoning doctrine is an unusual one, for it permits an owner to use his land in a manner prohibited by the zoning ordinance *not because the ordinance is unduly restrictive as to his land, but because the ordinance is exclusionary.* In this respect it is a little like the rule which permits a publisher of hardcore pornography to attack an anti-pornography statute on vagueness grounds even though his particular publication clearly could have been prohibited. *The reason for rules which*

66. 53 PA. CONS. STAT. ANN. § 10604(4) (Purdon Supp. 1989) (emphasis added). Section 604(4) is consistent with R. RYAN, *supra* note 65, at § 3.5.2, which states: "It is now clear that a municipality must make provision for all 'basic forms' of housing, whether or not the municipality is in the path of development . . . . [thus] . . . [a] total exclusion of a basic form of housing cannot be justified."

67. The court in Fernley v. Board of Supervisors of Schuylkill Township, 509 Pa. 413, 419, 502 A.2d 585, 588 (1985), essentially identified this listing as basic forms of housing and indicated that when a zoning ordinance "totally excludes a basic form of housing such as apartments," one need not even consider analysis of the fair share principles espoused in Surrick v. Zoning Hearing Bd. of Upper Providence Township, 476 Pa. 182, 382 A.2d 105 (1977), but rather can determine that such a total exclusion is unconstitutional. Therefore, it would appear that the most recent decisions cited in *Fernley* that cited *Surrick* stand for the proposition that the language of § 604(4) sets forth constitutionally appropriate and valid statutory provisions for basic forms of housing that should be available in all municipalities throughout the Commonwealth.

68. 53 PA. CONS. STAT. ANN. § 10609.1 (Purdon Supp. 1989).

69. *See* Cracas v. Board of Supervisors of West Pikeland Township, 89 Pa. Commw. 424, 492 A.2d 798 (1985); Appeal of Kasorex, 70 Pa. Commw. 193, 452 A.2d 921 (1982); Greenwood Township v. Kefo, Inc., 52 Pa. Commw. 367, 416 A.2d 583 (1980); Davis v. Board of Supervisors of Easttown Township, 32 Pa. Commw. 343, 379 A.2d 645 (1977).

> *permit one who has not been injured by an ordinance to attack it because of injury to others is to give an incentive to attack invalid ordinances. But that incentive should be extended only to attacks which involve the validity itself.* If an ordinance excludes mobile home parks, then it makes some sense to say that remedies should be fashioned in a way which encourages attacks on that ground. But there is little sense in saying that because a zoning ordinance improperly excludes mobile home parks, a developer should be permitted to erect a slaughter house in a residential zone. Where an ordinance has been held invalid because it excludes multi-family dwellings, then that invalidity can be used by other multi-family developers . . . . *However, there is no general rule that a statute which has an invalid provision is invalid in all respects.*[70]

C. *Planned Residential Development*

The primary change in Planned Residential Development (PRD) legislation is that within five years of the revised MPC's enactment, PRD ordinances are to be implemented only through provisions within a zoning ordinance and not separately.[71] Section 703 of article VII was amended by changing references from "shall" to "may" when describing the relationship between PRD applications and the comprehensive plan.[72] This change enabled the section to comport with a Commonwealth Court ruling that "inconsistencies with the . . . comprehensive plan did not strike a fatal blow to the [PRD developer's] application."[73] These changes also add statutory authority for the consideration of statements of community development objectives and statements of municipal legislative findings.

D. *Joint Municipal Zoning*

Article VIII-A of the new MPC is a new section intended to facilitate regional zoning when desired by participating local governing bodies. The article establishes some basic ground rules for joining and seceding from a regional land use regulatory entity.

Specifically, the provisions of section 808-A require a municipality to remain a member of a regional zoning venture for at least

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70. R. RYAN, *supra* note 65, at § 3.5.15 (emphasis added).
71. 53 PA. CONS. STAT. ANN. §§ 10702, 10713 (Purdon Supp. 1989).
72. *Id.*
73. Michaels Dev. Co., Inc. v. Benzinger Township Bd. of Supervisors, 50 Pa. Commw. 281, 413 A.2d 743 (1980).

three years from the date of initial entry into the organization.[74] These provisions for binding regional zoning reflect judicial concerns expressed as dicta in *Nicholas, Heim, & Kissinger v. Township of Harris*.[75] In *Harris*, although the township was a member of a regional planning commission, no regional zoning ordinance existed.[76] The court suggested "that it might be a very good thing for the General Assembly to empower municipalities to enter into binding regional zoning arrangements" in order to provide for a regional "fair share" of various housing needs over the acreage of several adjacent municipalities.[77] Section 811-A also relates to the *Harris* dicta because this section authorizes courts to review regional zoning not only within individual member municipalities but also within the zoned regions' entire geographic boundaries.[78]

E. Zoning Hearing Board and Other Administrative Proceedings

Section 915.1(d) of the revised MPC offers the opportunity for an adjudication to impose reasonable costs, expenses, and attorney fees upon a party to a zoning appeal who challenges a landowner's requested relief and refuses to post a bond if the appellate court sustains the lower court's order requiring that a bond be posted.[79] This new section, intended to deter frivolous appeals, may have resulted from the Pennsylvania Superior Court's recent decision in *Appeal of Affected & Aggrieved Residents from Adverse Action of Supervisors of Whitpain Township*.[80]

In *Whitpain*, a landowner who sought rezoning of his land from residential to industrial use was continuously challenged by neighboring residents.[81] The residents failed to post a bond, and the landowner sought remuneration for extensive legal fees incurred in the ongoing dispute with the allegedly aggrieved neighbors.[82]

Even though the lower court lacked jurisdiction of the issue, the Pennsylvania Superior Court entertained the landowner's appeal because of the "interests of judicial economy" and "the unique circumstances of [the] case."[83] The court ruled against the landowner, find-

74. 53 PA. CONS. STAT. ANN. § 10808-A(c) (Purdon Supp. 1989).
75. 31 Pa. Commw. 357, 375 A.2d 1383 (1977).
76. *Id.* at 362, 375 A.2d at 1385.
77. *Id.*
78. 53 PA. CONS. STAT. ANN. § 10811-A (Purdon Supp. 1989).
79. *Id.* at § 10915.1(d).
80. 325 Pa. Super. 8, 472 A.2d 619 (1984).
81. *Id.* at 11-12, 472 A.2d at 620-21.
82. *Id.* at 12, 472 A.2d at 621.
83. *Id.* at 15, 472 A.2d at 622.

ing that the "frivolous" appeals did not necessarily entail "arbitrary, vexatious or bad faith" actions on the part of the residents in ongoing challenges to the landowner's rezoning requests.[84] Although the prior MPC did not provide a remedy for an allegedly harassed landowner, section 915.1(d) addresses the landowner's concerns and offers statutory authority for reversal of *Whitpain.*

F. Appeals to Court

The initial Task Force proposal contained language prohibiting a common pleas judge from remanding an appeal to the deciding body for further hearings or other proceedings, thus requiring the common pleas judge to dispose of the matter. Any new findings of fact elicited through evidentiary hearings were to be conducted before the trial court. However, both appellate and trial court judges expressed opposition to this provision, resulting in its deletion from the bill by the House Local Government Committee. Section 1005-A of the MPC allows the trial judge to remand the case "to the body, agency or officer whose decision or order has been brought for review, or may refer the case to a referee to receive additional evidence,"[85] except that appeals regarding validity of ordinances are not remanded.[86] The new MPC continues to agree with judicial findings that there is "a useful purpose to be served by remand."[87]

VI. Key Points for Practitioners

Following are some items that every practitioner of municipal law, and particularly municipal solicitors, should immediately review.[88]

A. Zoning Ordinance Amendments

1. Previously, advertisements of public hearings required prior to the enactment of zoning ordinance amendments had to appear twice during a period fourteen to thirty days prior to the public hearing.[89] Now, an advertisement must be published twice seven to thirty

84. *Id.* at 16-17, 472 A.2d at 623.

85. 53 PA. CONS. STAT. ANN. § 11005-A (Purdon Supp. 1989).

86. *Id.*

87. Bridgeview Apartments, Inc. v. Brady, 31 Pa. Commw. 126, 375 A.2d 854 (1977).

88. This section of the Article borrows extensively from an excellent memorandum by Blaine Allen Lucas, Esq., of the Pittsburgh law firm of Meyer, Darragh, Buckler, Bebeneck, Eck & Hall. Lucas, *The Municipalities Planning Code Revisions: A Solicitor's Checklist*, 29 THE PENNSYLVANIAN 10-11, 20 (May 1989) (prepared for a presentation to the Municipal Law Section of the Allegheny County Bar Association).

89. 53 PA. CONS. STAT. ANN. § 10107(18) (Purdon 1972), *amended by* 53 PA. CONS.

days prior to said hearing.[90]

2. The advertisement of a proposed amendment to an ordinance must appear seven to sixty days prior to passage.[91]

3. If the advertisement of the proposed amendment is to be in summary form instead of full text, the following new requirements apply:

(a) The solicitor must prepare the summary;

(b) A copy of the full ordinance must be supplied to a newspaper of general circulation; and

(c) An attested copy is required to be filed with the county law library.[92]

4. If there are substantial modifications to the proposed amendment after the required public hearing, the new statute requires:

(a) That another public hearing be conducted, advertisement of the hearing appearing twice within a period of seven to thirty days prior to the hearing;[93] and

(b) The modified ordinance must be readvertised by summary at least ten days prior to enactment.[94]

5. Any proposed zoning map change must be posted on the affected property at least one week prior to the public hearing.[95]

6. Within thirty days of the enactment of zoning ordinance amendments, a copy of the amendments must be filed with the county planning agency.[96]

7. The notice requirements listed above for zoning ordinance amendments are similarly changed and required for subdivision and PRD ordinance amendments.

B. Zoning Enforcement Actions

1. Any enforcement action must be preceded by appropriate notice which, *inter alia*, includes specific reference to the right to appeal the enforcement action to the zoning hearing board within the time specified by the local zoning ordinance.[97]

2. Any judgment obtained from a district justice may commence no sooner than determination of the judgment and, therefore,

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STAT. ANN. § 10107 (Purdon Supp. 1989).

90. 53 PA. CONS. STAT. ANN. § 10107 (Purdon Supp. 1989).
91. *Id.* at § 10610(a).
92. *Id.*
93. *See id.* at §§ 10107, 10609(d).
94. *Id.* at § 10610(b).
95. 53 PA. CONS. STAT. ANN. § 10609(b) (Purdon Supp. 1989).
96. *Id.* at § 10609(g).
97. *Id.* at § 10616.1.

has no retroactive effect. Fines are to be imposed on a per diem basis and begin immediately upon judgment for continuing violations. If there is a finding of good faith, the per diem violation is assessed only once until the fifth day following said determination.[98]

3. If the action of the district justice is appealed to the court of common pleas, the common pleas court may, upon petition, order stay of the per diem fines pending final adjudication.[99]

4. Judgments obtained at the district justice level shall include all court costs, including reasonable attorney's fees.[100]

5. Enforcement remedies for subdivision and PRD ordinance violations are generally the same as those for zoning ordinance violations except for the following:

(a) Unlike zoning violations, the new MPC contains no specific provision for third parties bringing equity actions for violation of subdivision or PRD ordinances; and

(b) Municipalities are granted additional authority to withhold permit approvals on sites where development has occurred in violation of a subdivision ordinance.[101]

C. Zoning Administration

The new MPC is abundantly clear that the municipal solicitor, although permitted to represent the planning commission, may not represent the same municipality's zoning hearing board.[102] This provision codifies existing case law.[103]

D. Zoning Hearing Board Proceedings

1. The new MPC permits compensation for the secretary and members of the zoning hearing board, notice and advertising costs, and necessary administrative overhead expenses to be included within the locally approved application fees.[104] Such fees may not include professional expenses, such as legal, engineering, architectural, consultant, and expert witness costs.[105] Thus, although the rea-

98. *Id.* at § 10617.2(a).
99. *Id.* at § 10617.2(b).
100. 53 PA. CONS. STAT. ANN. § 10617.2(a) (Purdon Supp. 1989).
101. *Id.* at § 10515.1(b).
102. *See id.* at § 10617.3(c).
103. *See* Horn v. Township of Hilton, 461 Pa. 745, 337 A.2d 858 (1975); Gardner v. Repasky, 434 Pa. 126, 252 A.2d 704 (1969); Sultanik v. Board of Supervisors of Worcester Township, 88 Pa. Commw. 214, 488 A.2d 1197 (1985).
104. 53 PA. CONS. STAT. ANN. § 10908(1.1) (Purdon Supp. 1989).
105. *Id.*

sonableness standard that existed in prior law is maintained, the specific items for which fees may be charged has been modified.

2. A stenographic record of zoning hearing board proceedings remains required, but the expenses are apportioned as follows:

(a) The stenographer's appearance fee is to be divided equally between the applicant and the zoning hearing board.

(b) The cost of the original transcript shall be borne by the zoning hearing board if ordered by the board or by the party appealing from the board's decision.

(c) The cost of any additional copies of the transcript shall be borne by the party requesting copies.[106]

3. If a hearing officer is used by the zoning hearing board, the board must render its decision within thirty days after the hearing officer's report has been received by the board.[107] Prior law permitted forty-five days for such review and decision.[108]

E. Stays/Bonds

When a party who has prevailed at the local government level seeks to have a bond imposed by the court on an appellant, the appellee no longer needs to establish to the court's satisfaction that the appeal has been filed "for the purposes of delay."[109]

F. Substantive Validity Challenges

When a substantive validity challenge is before the governing body, the municipal solicitor's role is to represent the governing body. The governing body is permitted to retain independent counsel to defend the challenged ordinance.[110]

G. Jurisdiction Over Appeals

1. All procedural challenges now go initially to the zoning hear-

106. *Id.* at § 10908(7). Section 908(7) of the MPC changed the law with respect to financial responsibility for stenographic fees in zoning hearing board proceedings. The municipality will no longer bear the full cost of the original transcript with the applicant only being charged for the reasonable cost of a copy as upheld by the Commonwealth Court of Pennsylvania in Appeal of Mark-Gardner Assocs., Inc., 50 Pa. Commw. 354, 413 A.2d 1142 (1980); *In re* Appeal of Martin, 33 Pa. Commw. 303, 381 A.2d 1321 (1978). In this particular instance, the General Assembly invoked its fundamental prerogative to change the law.

107. 53 PA. CONS. STAT. ANN. § 10908(9) (Purdon Supp. 1989).

108. 53 PA. CONS. STAT. ANN. § 10908(9) (Purdon 1972), *amended by* 53 PA. CONS. STAT. ANN. § 10908(9) (Purdon Supp. 1989).

109. *See* 53 PA. CONS. STAT. ANN. § 11008(4) (Purdon 1972), *amended by* 53 PA. CONS. STAT. ANN. § 11003-A(d) (Purdon Supp. 1989); annotations compiled in 53 PA. CONS. STAT. ANN. § 11008 (Purdon 1972) (repealed 1988).

110. 53 PA. CONS. STAT. ANN. § 10916.1(a)(4) (Purdon Supp. 1989).

ing board. Such challenges to the procedure by which a zoning ordinance or amendment was enacted must be brought within thirty days of said enactment.[111]

2. All appeals from the governing body's denial of a subdivision request are to be taken to common pleas court.[112] Previously only landowner appeals were heard by the common pleas court; person-aggrieved appeals were first heard by the zoning hearing board.[113]

3. Similarly all appeals from decisions regarding Planned Residential Development ordinances also go to common pleas court.[114]

4. All appeals regarding decisions by the governing body on conditional uses go directly to common pleas court.[115]

5. Appeals arising from a zoning enforcement notice are taken to the zoning hearing board.[116]

6. All administrative determinations regarding flood plain management, storm water management, sediment and erosion control will now be taken to the zoning hearing board.[117] However, if these arise under a subdivision or PRD request, said appeals are taken to common pleas court.

H. Subdivisions

Provisions regarding the payment of expenses incurred by the municipality's professional engineer or consultant in reviewing plans are to be established by ordinance or resolution.[118] An applicant may dispute the amount of the fee by notifying the municipality within ten days of the billing date.[119] An arbitration mechanism is established to resolve those disputes.[120]

I. Completion of Improvement—Municipal Resolution

In order to facilitate developer financing, at the developer's request, a municipality must provide a signed copy of the resolution indicating final plat approval to the developer who can then provide such copy to the lender.[121] Said plat approval may be given contin-

111. *Id.* at § 10909.1(a)(2).
112. *Id.* at § 11002-A.
113. 53 PA. CONS. STAT. ANN. §§ 11004, 11005 (Purdon 1972) (repealed 1988).
114. 53 PA. CONS. STAT. ANN. § 11002-A (Purdon Supp. 1989).
115. *Id.*
116. 53 PA. CONS. STAT. ANN. § 10909.1 (Purdon Supp. 1989).
117. *Id.*
118. 53 PA. CONS. STAT. ANN. § 10503 (Purdon Supp. 1989).
119. *Id.*
120. *See id.* at §§ 10503, 10510(g).
121. *Id.* at § 10509(b).

gent upon receipt of evidence by the developer of satisfactory financial security.[122]

J. Completion Bond

1. A completion bond, still valued at 110 percent as under prior law, is to be calculated based on the estimated cost of completion as of ninety days after the scheduled completion date.[123] The calculation of the financial security is to be based upon estimates submitted by the applicant and prepared by a professional engineer.[124] The municipality may refuse to honor this estimate based upon the municipal engineer's recommendation.[125] An inability to reach agreement on this matter results in resolution of the impasse through an arbitration procedure conducted by a mutually agreeable third engineer.[126]

2. Similarly, by resolution or ordinance, the municipality may prescribe the schedule for inspection fees based on the ordinary and customary fees charged by the municipal engineer.[127] If an applicant disputes the outlined fees, an arbitration mechanism is provided.[128]

VII. Impact Fees and Exactions

The single most controversial issue raised by the comprehensive revisions to the MPC was the so-called impact fee. Since resolution of this issue was ultimately deferred, it is instructive to explore the legal, political, and legislative issues involved in the imposition of such fees.[129] First, it is important to define the terms used since the labels have come to mean different things to different interest groups. For purposes of our analysis, an impact fee is a single payment required to be made by a builder/developer at the time of development approval. The fee is purported to be a proportionate share of the capital cost of off-site infrastructure improvements needed to serve the new development and to cushion the impact of growth on the existing public facilities and services of the municipality.

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122. *Id.*
123. 53 PA. CONS. STAT. ANN. § 10509(f) (Purdon Supp. 1989).
124. *Id.* at § 10509(g).
125. *Id.*
126. *Id.*
127. *Id.* at § 10510(g).
128. 53 PA. CONS. STAT. ANN. § 10510(g) (Purdon Supp. 1989).
129. *See* Taub, *Exactions, Linkages, and Regulatory Takings: The Developer's Perspective*, 20 URB. LAW. 515 (1988), in which impact fees are enumerated as one of several forms of development exactions, including the dedication of land, fees in lieu of dedication, special assessments, and linkages.

An impact fee as analyzed herein should be distinguished from other forms of contributions or exactions demanded of developers for the benefit of local governments such as:

1) A payment for or work actually performed to provide onsite infrastructure improvements, which are routinely imposed as a condition of subdivision approval.

2) A negotiated exaction that is the result of ad hoc bargaining between municipalities and developers. (Such exactions usually deal with specifically delineated improvements directly off-site, such as traffic lights, turning lanes, and sewer line extensions and are not related to the broader scope of larger municipal infrastructure overburden problems.)

3) A linkage fee that tends to be a financial contribution assessed for broader social purposes such as affordable housing, job training, child care, mass transit systems and related matters, in return for municipal governing body approval of new commercial development.[130] (Such linkage fees have been in place in San Francisco[131] and Boston[132] for a number of years, and such a proposal was made in Cleveland[133] earlier this year.)

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130. *Id.* (citing Connors & High, *The Expanding Circle of Exactions: From Dedication to Linkage*, 50 LAW & CONTEMP. PROBS. 69 (1987)):

> The most recent innovation in the exaction game is known as linkage, a concept which has catapulted exactions into unprecedented areas. Linkage is really just another off-site development impact exaction, but it represents a substantial extension of the exaction continuum. Some jurisdictions require downtown office developers to construct housing elsewhere or to contribute monies for the promotion of social programs or policies. For example, a developer may be required to construct low- and moderate-income housing as a condition precedent to development approval. The rationale for imposing such an obligation on office developments is that downtown office development brings new employees to the city. By moving into the city these new employees consequently reduce the supply of housing available to low- and moderate-income residents who traditionally live in the city. Thus, in order to mitigate the resulting theoretical housing shortage, developers are forced to add additional units to the city's housing inventory. The mandatory underwriting of housing and other social programs by developers based on the tenuous "link" between retail development and housing shortages has been the subject of much litigation . . . .

131. The City of San Francisco enacted a Transit Impact Development Fee (TIDF) Ordinance in May, 1981. SAN FRANCISCO CAL., ADMIN. CODE § 38.1-38.5 (1981). The ordinance was the subject of extensive litigation in Russ Bldg. Partnership v. San Francisco, 44 Cal. 3d 839, 750 P.2d 324, 244 Cal. Rptr. 682 (1987), *cert. denied*, 102 S. Ct. 209 (1989), for want of a substantial federal question. The California Supreme Court upheld the validity of the ordinance as a "fair and appropriate mechanism to provide funds for maintaining and augmenting transportation services." *Id.* at 844, 750 P.2d at 326, 244 Cal. Rptr. at 684 (quoting San Francisco Planning Comm'ns Resolution No. 8332 (July 26, 1979)). *See also* San Francisco, Cal., Ordinance 358-85 (Aug. 18, 1985).

132. BOSTON, MASS., ZONING CODE art. 25 (1983), *amended by* BOSTON, MASS., ZONING CODE art. 26a (1986).

133. Zolkos, *Adverse Impact Feared From Cleveland Linkage*, CITY & ST., May 8, 1989, at 10.

None of the proposals made when the MPC was under consideration attempted to go this far. However, some Pennsylvania municipalities have explored whether such fees should be paid to school systems, arguing that new commercial and residential development results in increased school population and higher educational expenditures. Since schools in Pennsylvania are governed by separately elected school boards that do not possess the authority to make land use decisions under the MPC, such fees, if legally imposed, would have to be transmitted to school systems under the Intergovernmental Cooperation Act.[134]

During the recent debates over the MPC, the builder/development community begrudgingly accepted language that would authorize ad hoc exactions for the purpose of supporting a particular project's proportionate share of off-site improvements that were specifically attributable to the demand created by the project.[135] In

134. 53 PA. CONS. STAT. ANN. §§ 481-490 (Purdon 1974).

135. The language adopted by the House Local Government Committee as § 509(i) of S. 535, Printer's No. 2428, 172d Leg., 2d Sess. (1988), was reported to the floor of the House in the following form:

> The governing body may require a developer, subject to the provisions of this subsection, as a condition for final plat approval, to construct and dedicate to the municipality, or municipal authority where appropriate, reasonable and necessary street improvements, water and sewage line extensions, and storm water and drainage facilities necessary to satisfy the requirements of the Act of October 4, 1978 (P.L. 864, No. 167), known as the "Storm Water Management Act," located outside the property limits of the subdivision or land development only if such off-site improvements are necessitated by and specifically attributable to such subdivision or land development or improvements within such subdivision or land development.
>
> (1) Off-site water and sewer line extensions and storm water and drainage facilities which may be required under this subsection shall not exceed the minimum levels of service, capacity or use necessary to provide adequate service in accordance with the subdivision or land development ordinance, within such subdivision or land development, calculated using measurable standards in accordance with generally accepted engineering or planning standards.
>
> (2) The developer and municipality may agree to the payment of fees in lieu of the construction and dedication of off-site water and sewer line extensions, or storm water and drainage facilities, or both, which may be required under this subsection, which agreement may include provisions for the time and manner of payment of such fees and the construction schedule of such improvements.
>
> (3) If off-site street improvements may be utilized in part by traffic specifically attributable to the proposed subdivisions or land development and in part by traffic not specifically attributable to said subdivision or land development, the municipality may not require the applicant to construct such improvements but may, notwithstanding any other provision of this subsection, require the developer to pay a fee which shall not exceed that portion of the cost of such street improvements equal to the percentage that the peak traffic attributable to the subdivision or land development bears to the maximum peak traffic capacity of such street improvement at the design level of service existing prior to the proposed subdivision or land development. The calculation of the portion of total capacity of such street improvements allocable to such subdivision or land devel-

reviewing these provisions that would be acceptable to developers in Pennsylvania, it is important to note whether the proposed language meets the following general legal criteria for valid off-site exaction ordinances:

> (1) that the terms of the ordinance are defined in a relatively unambiguous fashion;
>
> (2) that the funds collected are specifically earmarked for deposit in a separate clearly identifiable account for the express purposes of the new improvements;
>
> (3) that the funds collected shall be expended within a reasonable time or returned to the developer;
>
> (4) that the expenditure of funds shall actually benefit the residents of the new area or development for which contributions are made; and,
>
> (5) that an express methodology or formula is employed to determine proportional need caused by the new development.[136]

However, this proposed off-site exaction language was amended on the floor of the House of Representatives on November 16, 1988,

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opment shall be calculated hereunder consistent with measurable standards in accordance with generally accepted traffic engineering standards.

(4) Any fee authorized under this subsection shall, upon its receipt by a municipality, be deposited in an interest-bearing account, clearly identifying the specific capital improvements or facilities for which such fee was received. Interest earned on such accounts shall become funds of that account. Funds from such accounts shall be expended for only properly allocable portions of the incurred cost of the construction of the specific improvements or facilities for which the funds were collected.

(5) Upon request of any person who paid any fees under this subsection, the municipality shall refund such fee, plus interest accumulated thereon from the date of payment, if existing facilities are available and service or use is denied; or, after the fee was collected when service or use was not available, the municipality has failed to commence construction or the improvements or facilities for which such fees were paid within three years from the date such fees were paid, or construction has not been completed within five years from the date such fees were paid. Upon completion of the improvements or facilities, if the actual amount expended for such construction is less than 95% of the amount properly allocable to the fee paid hereunder, plus the interest thereon, the municipality shall refund the difference, including interest, to the person or persons who paid fees for such improvements.

(6) No off-site improvements or fees in lieu thereof may be required under this subsection which constitute the expansion, maintenance, repair, replacement or upgrading of existing facilities or improvements in order to meet stricter efficiency, environmental, regulatory or safety standards for, or to provide better service to, or meet the needs of, existing development.

(7) No municipality shall have the power to require the construction or dedication of any improvements of any nature whatsoever or impose any assessment, fee, extraction, or contribution in lieu thereof, except as may be provided specifically by statute.

S. 535, Printer's No. 2428, 172d Leg., 2d Sess. (1988).

136. *See* Taub, *supra* note 129, at 533-34.

and the builder/development community generally opposed the broader language, which allegedly granted local government greater flexibility in the imposition of impact fees.[137] Advocates for the builders and developers subsequently succeeded in convincing a majority of Pennsylvania's senators to excise this broader language from the final version of the MPC; hence, there remains essentially no statutory sanction for municipal exactions in the form of impact fees.

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137. This language adopted on the floor of the House as § 509(i) of S. 535, Printer's No. 2514, 172d Leg., 2d Sess. (1988), embodied the following form:

> The governing body may require a developer, as a condition for approval of a subdivision or land development, to pay the cost of providing only reasonable and necessary transportation improvements, water, sewage and drainage facilities, the rights-of-way and easements therefore, located outside the property limits of the subdivision or land development but necessitated or created and required thereby. Any municipality which levies, or municipalities which jointly levy, facility benefit assessment fees, as provided for above, shall first adopt a facility benefit assessment fee ordinance which shall establish a facility benefit assessment fee schedule; the basis for the calculation of said fees; the method for paying the fees; the time at which the fees are to be paid; and the criteria for credits or refunds of the fees. In addition, the facility benefit assessment fee ordinance shall:
>
> (1) Assure that the fee charged does not exceed the proportional share of the reasonably anticipated costs for the public improvements necessitated to support the new land development activity;
>
> (2) Assure that the fees are based on actual costs;
>
> (3) Provide that any fee schedule developed be based upon empirical data derived from municipal and/or county studies, in addition to national or commonwealth statistics or data relative to daily or peak hour trip generation recreation usage or other similar standards;
>
> (4) Provide that fees must be used to implement a municipal capital improvement plan, recreation plan or provision of an adopted comprehensive plan, which plan shall be updated and kept current;
>
> (5) Provide that all fees collected shall be deposited into a separate municipal escrow or trust fund account and accounted for separately;
>
> (6) Provide that all fees spent to implement a capital improvement plan, recreation plan or other municipal plan shall be expended within a reasonable time not to exceed five years from receipt of said fees at which time any unexpended fees shall be refunded to the developer or developers that contribute them;
>
> (7) Provide that the developer paying such fees shall receive credit against fees due, for the value of any land dedicated to the municipality or for the value of any such improvements constructed or installed by the developer; and
>
> (8) Provide that fees shall be used to construct or provide municipal facilities at a location which directly or indirectly benefits the development against which the facility benefit assessment fees were levied. If the governing body requires a developer to pay costs pursuant to this provision, the governing body shall establish a procedure whereby within five years of completion for the improvements, any other developer who applies for subdivision or land development approval for other lots, tracts or parcels of land benefited by such improvements shall reimburse the original developer for a proportion of such costs as a condition for approval of a subdivision on land development application. The amount of such reimbursement shall be in accordance with the extent of the development thereof.

S. 535, Printer's No. 2514, 172d Leg., 2d Sess. (1988).

Therefore, it is generally acknowledged in Pennsylvania that no *specific* authority exists in the MPC for the imposition of impact fees by local government units.[138] Moreover, since both chambers of the General Assembly considered the grant of express authorization to municipalities for the enactment of impact fee ordinances, but subsequently rescinded that devolution of prerogative, it could reasonably be argued that the legislative intent was clearly *not* to extend this power of exaction to local governments.[139] Proponents of impact fees, however, argue that the general police power, as exemplified by the zoning ordinance of a municipality, provides sufficient legal authority not only for negotiated exactions, but also for impact fees.[140] The power to grant or deny approval of a subdivision is ordinarily the hammer used by municipalities in the negotiations over exactions. Although both zoning and subdivision ordinances are authorized by the MPC, we question whether the authority to grant individual subdivision requests pursuant to the police power necessarily legitimates backroom bargaining over the payment of fees unrelated to the cost of the regulatory process.

There is a dearth of case law in Pennsylvania on the extent to which a local government may impose either exactions or impact fees. The authority generally cited by proponents of impact fees is *Robert Mueller Associates v. Zoning Hearing Board of Buffalo Township*.[141] This case involved the township's tentative, conditional approval of a planned residential development. The trial court ruled that the township should bear the burden of the cost of off-site rights-of-way since imposing the acquisition costs of these off-site

138. A political subdivision has only those powers expressly given to it by the legislature. Guthrie v. Borough of Wilkinsburg, 508 Pa. 590, 499 A.2d 570 (1985). A municipality's authority is limited to those powers that are expressly or by necessary implication conferred by the legislature. Sunny Farms, Ltd. v. North Codurus Township, 81 Pa. Commw. 371, 474 A.2d 56 (1984).

139. Statutory Construction Act, 1 PA. CONS. STAT. ANN. § 1921 (Purdon Supp. 1989). When the words of the statute are not explicit, the intention of the General Assembly may be ascertained by considering the contemporaneous legislative history. The object of all interpretation of laws is to effectuate legislative intent and proper guidance may be obtained by consideration of an act's contemporaneous legislative history. Rossiter v. Whitpain Township, 404 Pa. 201, 202, 170 A.2d 586, 587 (1961). *See also* McKinley v. Commonwealth of Pa., State Bd. of Funeral Directors, 11 Pa. Commw. 241, 246, 313 A.2d 180, 183 (1973) (in interpreting a legislative delegation of authority, the court must "primarily consider the express language of the enabling statute, and, where the statute neither affirms nor negates the exercise of authority, the manifest purpose of the legislation can be culled from circumstances surrounding its enactment and prior legislative history on the same subject.").

140. *See* Collis v. City of Bloomington, 310 Minn. 5, 17, 246 N.W.2d 19, 26 (1976). *See also* Justice Holmes' aphorism about the petty larceny of the police power in 1 *Holmes-Larski Letters* 457 (M. Howe ed. 1953).

141. 30 Pa. Commw. 386, 373 A.2d 1173 (1977).

easements upon the developer would be arbitrary and unreasonable.[142] The township raised this issue on appeal. Although the township lost the appeal in *Mueller*,[143] the case is cited by proponents of impact fees because the court, in what was clearly dicta, stated that: "It is clear that some of the costs of off-site improvements can fairly be charged to a developer whose plans so burden existing facilities as to necessitate their accelerated improvement or construction."[144]

An exaction or impact fee might arguably be shoe-horned into the established concept of a special assessment. In Pennsylvania, however, such specific projects must abut the property assessed and provide a benefit in direct proportion to the amount charged. The assessment is special; it is part of a quid pro quo, a payment for a specific benefit conferred, rather than a tax due for general government services.[145]

Specific language is contained in the new MPC authorizing the dedication of land for recreation or for the imposition of fees in lieu of such dedication.[146] This provision, although initially controversial, and omitted by the Senate, was reinserted in the bill by the House Local Government Committee. Neither the House nor the Senate subjected this section to further amendment during later deliberations. These recreation provisions, as a part of a local subdivision and land development ordinance, would include:

> Provisions requiring the public dedication of land suitable for

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142. *Id.* at 390, 373 A.2d at 1175. The trial court's affirmation of the municipality's imposition of other conditions involving off-site improvements of streets, water lines, and sewage facilities were not appealed by the developer. *Id.* at 388, 373 A.2d at 1174.

143. *Id.* at 390, 373 A.2d at 1175.

144. *Id.* at 389, 373 A.2d at 1175. The *Mueller* decision essentially dealt with limitations placed upon local government in attempting to obtain from a developer virtually *all* off-site development costs. "The rationale for imposing off-site costs is *not* to transfer all costs of development from municipalities to private developers. The *primary responsibility* for providing these services *lies with local governments*." *Id.* (emphasis added).

145.

> [T]he grant of power to impose special assessments is perceived as a modified grant of the taxing power. If the special assessment were narrowly construed to be a tax used to raise revenues for a general public purpose, it would have to comply with constitutional limitations on the taxing power. In most states, this would require that monies raised be spent uniformly throughout the taxing district. Special assessments, however, are not applied uniformly and are legally acceptable for two basic reasons which distinguish them from a tax: (1) they are used exclusively to finance facilities which provide special benefits in the form of increased value to the property being assessed and cannot be used to finance government facilities that benefit the general public; and (2) they must assess the property owner for the cost of the facilities being financed in proportion to the benefits he receives from these facilities.

Taub, *supra* note 129, at 523 (citing Snyder & Stegman, *Paying for Growth, Using Development Fees to Finance Infrastructure*, 45 URB. LAND 35 (1987)).

146. 53 PA. CONS. STAT. ANN. § 10509(k) (Purdon Supp. 1989).

the use intended; and, upon agreement with the applicant or developer, the construction of recreational facilities, the payment of fees in lieu thereof, the private reservation of the land, or a combination, for park or recreation purposes as a condition precedent to final plan approval, provided that:

(i) The provisions of this paragraph shall not apply to any plan application, whether preliminary or final, pending at the time of enactment of such provisions.

(ii) The ordinance includes definite standards for determining the proportion of a development to be dedicated and the amount of any fee to be paid in lieu thereof.

(iii) The land or fees, or combination thereof, are to be used only for the purpose of providing park or recreational facilities accessible to the development.

(iv) The governing body has a formally adopted recreation plan, and the park and recreational facilities are in accordance with definite principles and standards contained in the subdivision and land development ordinance.

(v) The amount and location of land to be dedicated or the fees to be paid shall bear a reasonable relationship to the use of the park and recreational facilities by future inhabitants of the development or subdivision.

(vi) A fee authorized under this subsection shall, upon its receipt by a municipality, be deposited in an interest-bearing account, clearly identifying the specific recreation facilities for which the fee was received. Interest earned on such accounts shall become expended only in properly allocable portions of the cost incurred to construct the specific recreation facilities for which the funds were collected.

(vii) Upon request of any person who paid any fee under this subsection, the municipality shall refund such fee, plus interest accumulated thereon from the date of payment, if the municipality had failed to utilize the fee paid for the purposes set forth in this section within three years from the date such fee was paid.

(viii) No municipality shall have the power to require the construction of recreational facilities or the dedication of land, or fees in lieu thereof, or private reservation except as may be provided by statute.[147]

147. 53 PA. CONS. STAT. ANN. § 10503(11) (Purdon Supp. 1989).

Beyond recreation, transportation projects in Pennsylvania may be financed by special assessments imposed under the authority of the Transportation Partnership Act.[148] This Act, however, requires "that each benefitted property within the district, *existing and newly-developed property*, be assessed a portion of the cost of the transportation project."[149] In *Pennsylvania Builders Association v. East Pennsboro Township*,[150] the Equity Court held that the assessments levied were invalid because the township limited the special assessments to *undeveloped* properties only. Therefore, it is clear from the holding in *East Pennsboro* that the Transportation Partnership Act cannot be the bootstrap from which impact fee advocates can argue the legitimacy of such fees. The legislative findings, purposes, and intent sections of the Transportation Partnership Act, as well as the *East Pennsboro* court's interpretation of that language,[151] logically lead in precisely the opposite direction because *all* properties, *developed* and *undeveloped*, are to be assessed.[152] The legislation extends to transportation improvements the lawful authority under which special assessments may be imposed, but the Transportation Partnership Act should not be read to permit the imposition of exactions or impact fees upon only *new* development.

The continued debate in both the halls of the General Assembly and the courtrooms of the Commonwealth over the propriety and legality of impact fees and exactions reflects the economic and social diversity of Pennsylvania. In areas facing strong development pressures, antigrowth sentiment runs strong.[153] Often impact fee and other ordinances are desired as additional arrows in the quiver of the no-growth advocates. Some municipalities have conducted extensive, sophisticated infrastructure studies in order to justify the rationale behind and defend against challenges to impact fee ordinances. For example, Manheim Township in Lancaster County recently completed a comprehensive traffic, water, and sewer study, and an analysis of park and recreational needs as part of an update and revision of the township's comprehensive plan.[154] In 1988, the township en-

148. 53 PA. CONS. STAT. ANN. §§ 1621-26 (Purdon Supp. 1989).

149. *Id.* at § 1621.1(c).

150. 38 Cumb. L.J. 651 (1988) (emphasis added).

151. *See* 53 PA. CONS. STAT. ANN. §§ 1621-26 (Purdon Supp. 1989); Pennsylvania Builders Ass'n v. East Pennsboro Township, 38 Cumb. L.J. 651 (1988).

152. *See supra* note 149 and accompanying text.

153. Antigrowth sentiments, clearly expressed in such undisguised comments as "we want to keep out ticky-tacky $75,000 townhouses," were forcefully put forth at the House Local Government Committee's public hearing on Senate Bill 535, held at the Bucks County Courthouse in Doylestown, Pennsylvania on August 17, 1988.

154. Underhill, *Enacting an Impact Fee Ordinance*, 469 PA. BAR INST. 326, 329 (1988).

acted an impact fee ordinance in all four of those areas.[155] Additional studies were also made of storm water drainage requirements, police and fire protection requirements, and the burden of development on the public schools.[156]

At the other end of the spectrum, western Pennsylvania, a less vibrant economic environment, generally has more subdued pressures for new development. In those western Pennsylvania communities in which burgeoning economies are evident, however, impact fees are contemplated. For instance, Cranberry Township, located in southwestern Butler County, recently enacted an impact fee ordinance.[157] Moreover, municipalities in the path of the new development expected due to the expansion of the Greater Pittsburgh International Airport in the western part of Allegheny County, and individual municipalities in which major shopping center investments are contemplated, are also reviewing their infrastructure needs and considering both impact fees and Transportation Partnership Act projects.[158]

However, much of Pennsylvania, either because of declining economic conditions or primarily rural nature, has little potential for impact fees. Therefore, these Pennsylvania communities exert little political pressure upon legislators or local public officials to support impact fee or other exaction legislation. Additionally, despite the relatively robust nature of the downtown economies of Pittsburgh and Philadelphia, there is scant evidence of any effort to emulate the San Francisco or Boston experiences[159] with linkage fees or ad hoc exactions. The arguments before the Pennsylvania courts and the General Assembly deal as much with the need for new revenues as with the desire to stymie growth and development. The political question most aptly formulated with respect to impact fees and related exactions is as follows:

> It is easy to understand the genesis for this type of regulation. After all, elected officials would prefer to tax those who do not vote. But it is hard to justify this type of requirement as a matter of law. A decision by a municipal governing body to impose the cost of the new fire house on the new residents, via zoning regulations, is in effect a taxation decision. While zoning necessarily has tax implications and an otherwise proper zoning

155. *Id.*; Manheim Township, Lancaster County, Pa., Ordinance 1 (Feb. 13, 1989).

156. *Id.*

157. Cranberry Township, Butler County, Pa., Ordinance 189 (March 2, 1989).

158. *The Impact of Impact Fees*, Pittsburgh Post Gazette, Feb. 21, 1988, at 8, col. 1-2; *Builders Challenge Cranberry Impact Fee*, Pittsburgh Post Gazette, Apr. 12, 1989, at 1, col. 2.

159. *See supra* notes 131-32 and accompanying text.

> regulation is not valid on that count, the zoning power is not a revenue-raising device, and its use to finance public improvements which are not related in the most direct sense to a proposed land development seems an abuse of that power.[160]

We concur with this analysis. The current Pennsylvania practice of monetary exactions is questionable, both as a matter of law and as a matter of public policy. These ad hoc deals possess tremendous potential for abuse and corruption. Impact fee legislation, which is based upon studies by planners employed by the municipalities that desire to enact the ordinances, threatens to subtly disguise nonuniform taxation. The largess of the federal and state governments, formerly available to local governments, is now greatly diminished. The levy of impact fees, a form of taxation without representation, however, could mitigate the need for certain communities that lie in the path of development to enhance municipal revenues through traditional sources.

Impact fees will continue to be judicially challenged on a number of theories, including:[161]

1) The "Dillon's Rule" argument[162] states that since municipalities are limited to those powers that are expressly or impliedly conferred by the legislature, when doubts exist, the courts must resolve the issue of implied power against local government.[163] Therefore, pursuant to the Dillon's Rule, courts may hold that, absent specific authorization in the MPC, municipalities are not authorized to enact impact fee ordinances and that the ability to assess exactions is ex-

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160. 1 R. RYAN, PENNSYLVANIA ZONING LAW AND PRACTICE § 3.3.17 (1981).

161. For a thorough analysis of exactions, impact fees, and linkage fees, and theories for legal challenge of each, see Delaney, Gordon & Hess, *The Need-Nexus Analysis*, 50 LAW & CONTEMP. PROBS. 139, 140 (Winter 1987). *See also* Lucas, *Challenging Impact Fee Ordinances*, 469 PA. BAR INST. 334 (1988); Andrew & Merriam, *Defensible Linkage*, A.P.A. J., Spring 1988, at 199.

162. The Dillon Rule derived its name from Judge Dillon, an Iowa jurist who stated in City of Clinton v. Cedar Rapids & Mo. River R.R., 24 Iowa 455, 475 (1868): "Municipal corporations owe their origin to, and derive their powers and rights wholly from, the legislature. It breathes into them the breath of life, without which they cannot exist. As it creates, so it may destroy." R. WOODSIDE, PENNSYLVANIA CONSTITUTIONAL LAW 507-08 (1985).

The Dillon Rule was extended to Pennsylvania.

> [The City] is merely an agency instituted by the sovereign for the purpose of carrying out in detail the objects of government — essentially a revocable agency — having no vested right to any of its powers or franchises — the charter or act of erection being in no sense a contract with the state — and therefore fully subject to the control of the legislature, who may enlarge or diminish its territorial extent or its functions, may change or modify its internal arrangements, or destroy its very existence, with the mere breath of arbitrary discretion
>
> . . . .

City of Phila. v. Fox, 64 Pa. 169 (1870) (opinion of Justice Sharswood).

163. City of Clinton v. Cedar Rapids & Mo. River R.R., 24 Iowa 455 (1868).

tremely narrow and limited.[164]

2) Even if the appropriate delegation of authority has been pinpointed, the local ordinance must establish a rational nexus between the fee imposed and the infrastructure burden created.[165] If such a rational nexus can be established through credible studies of infrastructure needs, the imposition of the fee would not be arbitrary and unreasonable.[166] The rational nexus test requires that an imposed fee bear a reasonable relationship to the benefits received by the occupants of the development paying the fee. This test appears to have guided the recent decision of the United States Supreme Court in *Nollan v. California Coastal Commission.*[167] Under *Nollan*, by rational nexus analysis, the municipality must establish that the regulatory act substantially advances a compelling state interest, and, moreover, that the fee is proportionate to the burden created.[168]

In commenting upon *Mueller* and the rational nexus theory, one commentator pointed to the danger of "unwritten" requirements that "open the door to favoritism, and to attempts by municipalities to frustrate proper but unwanted development, by heaping conditions upon it."[169] This appears to argue against the ad hoc exaction or at least requires precise analysis of the proportionality of the fee and its specifically attributable impact upon the new development. The commentator concluded that "simple equity — and predictability — argue strongly in favor of a requirement that the municipality write down — and enact — those conditions which it intends to impose

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164. Statutes like the Transportation Partnership Act and the Business Improvement District Act of 1967 provide no comfort for impact fee advocates because these special assessment enabling acts require that such assessments be levied against benefitted properties, both developed and undeveloped properties. *See* Transportation Partnership Act, 53 PA. CONS. STAT. ANN. §§ 1621-26 (Purdon Supp. 1989); Business Improvement District Act of 1967, 53 PA. CONS. STAT. ANN. §§ 1551-54 (Purdon 1974).

165. Robert Mueller Assocs. v. Zoning Hearing Bd. of Buffalo Township, 30 Pa. Commw. 386, 390 n.1, 373 A.2d 1173, 1175 n.1 (1977). Under the rational nexus test, "a developer can only be forced to 'bear that portion of the cost which bears a rational nexus to the needs created by, and benefits conferred upon, the subdivision.' " *Id.* (quoting 181 Inc. v. Salem County Planning Bd., 133 N.J. Super. 350, 358, 366 A.2d 501, 506 (1975)). The rational nexus test is "[t]he test of judicial scrutiny now employed in the majority of jurisdictions to determine an exaction's constitutionality . . . ." Taub, *supra* note 129, at 530-33.

166. *See* Angell & Shorter, *Impact Fees: Private-sector Participation in Infrastructure Financing*, GOV'T FIN. REV., Oct. 1988, at 19; James B. Duncan, Impact Fees (Oct. 26, 1987) (unpublished memorandum presented at the 1987 Annual Conference of the Pennsylvania Planning Association, Monroeville, Pennsylvania) (copy on file at Dickinson Law Review office).

167. 107 S. Ct. 3141 (1987). *See also*, PA. Local Gov't Comm'n, An Analysis, United States Supreme Court Decisions (1987) [hereinafter Analysis] (copy on file at Dickinson Law Review office).

168. Nollan v. California Coastal Comm'n, 107 S. Ct. 3141, 3145-48 (1987).

169. 2 R. RYAN, PENNSYLVANIA ZONING LAW AND PRACTICE § 11.2.13 (1981).

upon subdivision."[170] Therefore, potential challenges must raise the threshold issue. First, the appropriate and precise power must be delegated by the General Assembly. Second, the power must be exercised in a fashion rationally related to the burdens imposed by the new development.

3) Aside from the admittedly brief and oversimplified analysis of the rational nexus challenge to an ordinance's validity, other traditional constitutional attacks, based upon denial of procedural due process or equal protection, will also be advanced.

Since many of the recent United States Supreme Court decisions, which culminated with *Nollan*, arose in California state courts, many commentators have pointed to the relatively unique aspects of California law and the deferential treatment accorded government regulators under California judicial standards.[171] California courts, rather than applying the rational nexus test, broadly interpret constitutional provisions to support local authority for virtually limitless development exactions under the reasonable relationship test.[172] The California rule "sometimes called the 'anything goes' test . . . [constitutes a] loose standard of reasonableness . . . [giving] considerable deference to the local government, thereby presenting an almost insurmountable obstacle for a developer to overcome."[173]

Noting that the *Nollan* legacy will dictate "more disciplined and reasonable regulatory conduct" on the part of municipal officials, Attorney Robert K. Best cautioned that "to suggest that the ramification of the *Nollan* decision will fall only on California . . . [constitutes] a dangerous oversimplification of the holding of the case."[174] Mr. Best's advice to local officials nationwide was based upon his conclusion that "the justification now required for an exaction is different and the nature of judicial review of any exaction has

170. *Id.*

171. *See* Analysis, *supra* note 167, at 2-4.

172. *See* Associated Home Builders, Inc. v. City of Walnut Creek, 4 Cal. 3d 826, 484 P.2d 606, 94 Cal. Rptr. 630 (1971).

173. Taub, *supra* note 129, at 528-29 (citing Debney, Gordon & Hess, *The Needs-Nexus Analysis: A Unified Test for Validating Subdivision Exactions, User Impact Fees and Linkage*, 50 LAW & CONTEMP. PROBS. 139 (Winter 1987)). Taub noted that "a majority of courts have rejected this test . . . [the validity of which] may also be in doubt in light of the United States Supreme Court's recent *Nollan* decision, which held that in order for an exaction to be valid, it must be related to a specific, justifiable public purpose." Taub, *supra* note 129, at 529.

174. Best, *The Supreme Court Becomes Serious About Takings Law: Nollan Sets New Rules for Exactions*, 10 ZONING & PLANNING L. REP. 153, 157-59 (1987). Mr. Best, Chief of Property Rights Litigation for the Pacific Legal Foundation, represented James and Marilyn Nollan in the landmark *Nollan* litigation and argued the case before the United States Supreme Court.

changed."[175] Therefore, Mr. Best suggested that diligence and caution should guide local land use regulators in the preparation of a comprehensive, detailed record supporting the substantive aspects of the rationale underlying the imposition of impact fees and other exactions. Furthermore, the record must be devoid of "factually erroneous conclusions and *subjective, political decisions.*"[176]

In order to properly advise clients, solicitors for Pennsylvania's municipal governing bodies, planning commissions, and zoning hearing boards have been deluged with cautionary messages relating to *Nollan.* At the date of this writing, at least five legal actions challenging local powers of exaction were being pursued. This estimate includes the previously mentioned Cranberry and Manheim Township matters in Butler and Lancaster Counties, respectively. The arguments most likely to be successful in these suits are the delegation of appropriate state authority issue, and the substantive due process challenge implicit in the takings and rational nexus analysis. Solicitors and local officials can defend a rational nexus attack through careful planning, expert studies, and the preparation of a detailed record of the proceedings.[177] Additionally, restraint should be exercised to avoid politically motivated inclinations to employ land use regulatory schemes "to snare convenient prey on which to load whatever costs the unfortunate captive [is] able to bear."[178] These caveats, therefore, should be given careful thought prior to local action that could drain municipal coffers through protracted litigation.

The delegation issue, however, will only be ultimately resolved by an act of the General Assembly that squarely authorizes the power to impose impact fees or exactions. In the 1987-88 legislative session, the builder/developer coalition was successful in excluding all reference to impact fee authorization in the proposed bill. A relatively restrained proposal dealing primarily with exactions for off-site improvements,[179] supported by the House Local Government Committee, was rejected on the House floor and a broader amendment permitting impact fees, offered by Representative A. Carville Foster,

175. *Id.* at 158.
176. *Id.* (emphasis added).
177. *Id.* at 159.
178. *Id.*
179. *See supra* note 137 and accompanying text. More narrowly drafted legislation applying the strict, "specifically and uniquely attributable to" language was introduced in the 1988-89 legislative session at the request of the Pennsylvania Builders Association. *See* S. 923, Printer's No. 1052, 173d Leg., 1st Sess. (1989) (introduced by Sen. J. Doyle Corman); H.R. 1361, Printer's No. 1582, 173d Leg., 1st Sess. (1989) (introduced by Rep. John Wozniak). These bills also amend the tap-in fee provisions of the Municipalities Authorities Act, 53 PA. CONS. STAT. ANN. §§ 301-401 (Purdon 1974).

was adopted, but ultimately deleted from the final version of the revised MPC.[180]

The Foster proposal, reintroduced in the General Assembly's 1989 session,[181] permits the governing body to require a developer, as a condition for approval of a subdivision or land development, to pay "facility benefit assessment fees." The bill prescribes that a facility benefit assessment fee ordinance be enacted and requires significant effort by the municipality to ensure that the fee is rational and proportional to the burdens imposed by the development.[182] For example, the bill requires that the ordinance establish a fee schedule, outline the basis for the calculation of the fee, and mandate a method for payment of the fees.[183] The Foster bill also requires the following: a municipal capital improvement plan, a separate municipal escrow or trust fund account, all fees be spent to implement the plan, developers receive credit against fees due for the value of the land dedicated or improvements constructed, and a procedure whereby within five years of the completion of mandated improvements any other developer whose proposal would benefit from the improvement reimburse the original developer on a proportionate basis.[184]

This impact fee proposal, which was considered late in the 1987-88 session within the context of Senate Bill 535,[185] died in an acrimonious atmosphere created by the heated debate and political machinations emanating from the local tax reform battle. The bill's reintroduction in the 1989-90 legislative session in a more serene legislative and political climate will not, however, insure its passage. Legislators' votes on this issue are dictated more by the extent of growth and development pressures within their home districts than by any concerns relative to partisan or ideological predilections. Land use control is normally not a party issue. Frenetic growth in the suburban Philadelphia counties of the southeastern corner of the Commonwealth influenced the House vote on impact fees last session, and we believe the same resolution may eventuate this session.

Therefore, it is our prediction that competing forces in the General Assembly will continue to neutralize each other because each

180. *See supra* note 137 and accompanying text.

181. H.R. 649, Printer's No. 717, 173d Leg., 1st Sess. (1989) (introduced by Rep. A. Carville Foster, Jr.).

182. *Id.* at § 509(i)(1).

183. *Id.* at § 509(i). Moreover, the bill requires that the ordinance specifically address proportionality, the accuracy of the cost estimated, and the empirical data utilized. *Id.* at § 509(i)(1)-(3).

184. *Id.* at § 509(i)(4)-(8).

185. *See supra* notes 17-25 and accompanying text.

side would rather run the risk and incur the expense of litigation at this stage than make major concessions. Since no appellate court decision of broad precedential value has been handed down to date, neither faction is willing to capitulate on any legislative proposal. Moreover, the builders/developers and the local government associations joined by certain no-growth advocates, are driven by the internal political imperatives that mandate satisfaction of constituencies and are not compelled by any outside force to compromise.

A well-reasoned appellate court decision, however, with broad applicability based on the facts and legal principles at issue, would dramatically change this prognosis. If it appears that the authority to impose impact fees or related exactions through locally enacted ordinances is implied in the general police powers, the builders/developers would want legislation to strictly construe and specifically limit that power. If the police power does not permit such ordinances, then municipalities lying in the path of development will urge some action by the legislature to statutorily authorize exactions designed to force contributions by the development community to local infrastructure improvements.

Given the relatively conservative nature of the Pennsylvania courts on these issues, we believe that challenges to current ordinances may be sustained. In that event, the builder/development forces would have leverage to either prevent the passage of any impact fee bill or to drastically restrict the scope of authorization present in such a bill. Therefore, by excising the limited authority originally granted in Senate Bill 535, and substituting the broader impact fee language espoused by members who represent communities with growing pains, local government/no-growth forces may experience a pyrrhic victory if House Bill 649 is passed. In our opinion, it is unlikely that the General Assembly will grant broader powers than those included in the Local Government Committee version of Senate Bill 535. It is equally unlikely that courts will find the ability to tax new residents implicit in the police power of municipal governments.

VIII. Conclusion

The General Assembly and Governor Robert P. Casey significantly improved, streamlined, and clarified the statute authorizing local government regulation of land use. Pennsylvania has not chosen, as have other states, to move such decision making to the state level. Although the new Act significantly embodies new concepts,

many communities in Pennsylvania have no zoning, and few Pennsylvania communities have a comprehensive plan for local land use development and control. The search for new revenues will lead some localities—those who happen to be in the path of development—toward land use regulation as a tool for revenue generation. The vast majority of municipalities, however, will enter the twenty-first century with only limited new sophistication in the land use regulation area.

For many cities and suburban communities, the new procedures of the Pennsylvania Municipalities Planning Code are welcome. Impact fees, however, are only of marginal relevance. Zoning and other land use regulation will come slowly to rural Pennsylvania, and will be driven by the need for revenues or the desire to keep out undesirables, including classes of people who are disliked[186] and unpleasant landfills. These reasons, revenues and exclusions, are suspect. Skirmishes over the revised MPC, disguised in complicated jargon, will really be about such questions. As the new MPC is implemented, fundamental rights[187] will still be at issue everywhere from the local zoning hearing board, to the General Assembly, and to the Pennsylvania appellate courts.

186. The "insidious by-product of exactions earns it the label as the latest sheepskin for the wool of exclusionary zoning." Siemon, *Who Bears the Cost?*, LAW & CONTEMP. PROBS. 115, 126 (1987).

187. Such fundamental rights include the traditional property and civil rights, and the right to travel within the nation.

> Jobs created in a major metropolitan area in significant numbers draw people into the metroplex. This movement often reflects opportunity for residents of depressed and declining regions to pull up stakes in search of prosperity. I hope we never witness a rebirth of the Grapes of Wrath mentality of walling out neighbors and fellow citizens, of discouraging the great migrations that have been our strength.

Misuraca, *Summation*, 50 LAW & CONTEMP. PROBS. 167, 170 (Winter 1987).