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

Alan C Weinstein, Cleveland State University

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ABSTRACT

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

* Associate Professor & Director, Law & Public Policy Program, Cleveland-Marshall College of Law and Levin College of Urban Affairs, Cleveland State University. Support for this article was provided by the Cleveland-Marshall Fund and Cleveland State University. Thank you to Dennis Keating for his critique of the article and to Amy Burchfield for her library research assistance.
Introduction

Ohio was a pioneer in zoning and land-use regulation,1 but the consensus view among scholars is that the state has lagged behind in recent decades.2 Since the 1950’s, many states have comprehensively updated their zoning enabling legislation,3 enacted environmental impact assessment legislation,4 or recognized the need to create effective mechanisms for land-use regulation beyond the boundaries of a single jurisdiction.5 Ohio, in contrast, has rejected such efforts6 and

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1 The leading role that Ohio played in the early development of land use regulation in the United States can be seen from the fact that Village of Euclid, Ohio v. Ambler Realty Co., 272 U.S. 365 (1926), the landmark decision of the United States Supreme Court establishing the constitutionality of zoning, was an Ohio case. See generally, Michael Allan Wolf, THE ZONING OF AMERICA: EUCLID V. AMBLER (2008).


3 See generally, Fred Bosselman and David Callies, THE QUIET REVOLUTION IN LAND USE CONTROL (1972)(describing and analyzing these changes).

4 In New York State, for example, most projects or activities proposed by a state agency or unit of local government, and all discretionary approvals (permits) from a state agency or unit of local government, require an environmental impact assessment as prescribed by 6 NYCRR Part 617 State Environmental Quality Review (SEQR). See, Environmental Conservation Law Sections 3-0301(1)(b), 3-0301(2)(m) and 8-0113. Similarly, California imposed requirements for assessing the environmental impact of projects date in 1970 with the enactment of the California Environmental Quality Act (codified at California Public Resources Code Sec. 21000 et. seq.), which requires that state and local agencies consider the environmental impact of their decisions when approving a public or private project.


6 Meck & Pearlman, n. 2, supra.
the Ohio Revised Code retains essentially the zoning laws that were first enacted in 1920.\(^7\)

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

\(^7\) 108 v Part II 1175 (H.B. 697, eff. 5-13-20). See, Meck & Pearlman, n. 2, *supra*, at 61, stating, in regards to Ohio’s zoning enabling legislation: “Today their structure remains fundamentally unchanged from their original versions.”


\(^10\) Homebuilders Association of Dayton and the Miami Valley, et. al. v. City of Beavercreek, 89 Ohio St.3d 121,729 N.E.2d 349 (2000).

\(^11\) Local governments in Ohio are classified as either municipal corporations (municipalities) -- which includes villages (population of less than 5,000) and cities (population of 5,000 or more) see Ohio
that municipalities could lawfully enact impact fees under their police and “home rule” powers, provided that the fees could pass constitutional muster under a “dual rational nexus test.” On May 31, 2012, however, the Court ruled in Drees Company, et. al. v. Hamilton Township, that a development impact fee enacted by an Ohio township with “limited home rule” powers was an unconstitutional tax. The Court’s unanimous opinion in Hamilton Township was authored by Justice Paul Pfeiffer, who, twelve years before, had authored the main dissenting opinion in the Beaver Creek case.


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

13 Section 18.03 of the Ohio Constitution grants all municipalities “authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws.” Section 18.04 grants any municipality the authority to “frame and adopt or amend a charter for its government and may, subject to the provisions of section 3 of this article, exercise thereunder all powers of local self-government.” Municipalities that do not adopt a charter still have “home rule” authority “to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws,” but must follow the procedural provisions in the ORC as regards the exercise of their powers of local self-government. See generally, George D. Vaubel, MUNICIPAL HOME RULE IN OHIO (1978) and George D. Vaubel, Municipal Home Rule in Ohio: 1976-1995, 22 Ohio N.U. L. Rev. 143 (1995).

14 See text at ns. 45-51 infra.


16 Ohio Revised Code (ORC) Chapter 504 governs the establishment of and powers granted to townships which adopt a limited home rule form of government. Limited home rule enables townships to enact legislation over a broad range of areas in which they could not have legislated as a statutory township having only those powers granted expressly by the ORC. As with home rule municipalities, limited home rule townships may not enact legislation specifically prohibited by the ORC or in conflict with the general laws of the state.
This article faults the Court’s opinioninvalidating the impact fees in *Hamilton Township*, arguing that the Court, rather than engaging in a fair-handed analysis, chose instead to rely on very limited authority to support a conclusion that appears to have been pre-determined. In particular, the article demonstrates that the Court failed even to acknowledge, let alone distinguish: (1) its earlier rulingupholding impact fees in *Beavercreek* and (2) the state supreme court decisions that had rejected the reasoning of the Iowa and Mississippi courts upon which the Court relied in part. The article notes that the Court’s ruling leaves Ohio with a bifurcated approach to impact fees that is perverse because it makes impact fees most defensible in municipalities, in many of which there is little new development, and thus the need for impact fees is less, and effectively prohibits their use in rapidly-developing townships where they are needed most. The article concludes that the time is long-past for the legislature to examine the policy debate on impact fees and make a decision about adopting enabling legislation for impact fees, and that the decision should be to join the majority of states that have enacted such legislation.
**Background: Origin and Expansion of Development Impact Fees**

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

Development impact fees [hereafter “impact fees”] were a natural outgrowth of these fee-in-lieu of dedication requirements. In the 1970’s, local governments began to levy impact fees on new development to generate revenue for capital facilities, the need for which was created by the new development. The rationale


\(^{19}\) See Nicholas, Nelson & Juergensmeyer, n. 9, *supra* at 11, which notes: “Payment in lieu is employed when actual dedication or provision of land or improvements is not practical or feasible. For example, under a requirement to set aside 5 per cent of a development’s land area as open space, a five-acre subdivision would reserve one-quarter of an acre. Such a site might prove to be totally impractical for both the subdivision and the community. The alternatives were either to exempt smaller subdivisions from such requirements or to allow a payment to be made in lieu of dedication. This resulted in local governments requiring money in lieu of land dedication. The money exacted was to equal the value of the land that would have been dedicated.” See also, Julian Conrad Juergensmeyer & Robert Blake, *Impact Fees: An Answer To Local Government’s Capital Funding Dilemma*, 9 Fla. St. U.L. Rev. 415, 418 (1981).
behind impact fees is straightforward: new development should be required to pay its fair share of the costs of providing public services and facilities to meet the demand for those services and facilities created by those who would be living in the new development. With the decline of federal and state grants to local governments and the anti-tax revolution in the late 1970s, the use of impact fees expanded in the 1980’s to include an array of municipal facilities/services, such as fire, police and libraries.

The legal status of impact fees was initially at issue, but a series of court cases from California, Florida, and Utah validated their usage in the 1970s and

20 See generally, Kushner, n. 9, supra., Connors & High, n. 18, supra and Juergensmeyer & Blake, n. 19, supra.


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


80s and, by 1986, three states had enacted impact fee enabling legislation. Over the next 25 years, more than half the states adopted such acts and, even in states without enabling legislation, impact fees frequently exist in one form or another, having been enacted on the basis of local home rule powers or jurisdiction-specific enabling legislation.

The Current Status of Impact Fees in Ohio

The Road to Beavercreek

As noted in the Introduction, while Ohio is among the minority of states that has not enacted enabling legislation for impact fees, in Beavercreek, the Ohio Supreme Court approved the use of impact fees by municipalities, provided certain conditions were met. Prior to Beavercreek, which approved an impact fee for road improvements, the Ohio courts had considered only a handful of “impact fee-like” cases, all of which involved fees charged to new development for either utility taps or recreational facilities. These cases focused on three main issues: (1) whether


26 Call v. City of West Jordan, 606 P.2d 217 (Utah 1979), on reh’g, 614 P.2d 1257 (Utah 1980).


28 See state legislation listed at n. 8, supra.


30 City of Beavercreek, 89 Ohio St.3d 121,729 N.E.2d 349 (2000).

31 See text at ns.43 to 51, infra.
the charges should be considered a fee or a tax; (2) under what authority was the fee (or tax) enacted; and (3) the reasonableness of the amount of the fee (or tax).

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

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\(^{32}\) Article XVIII, Section 4, captioned “Acquisition of public utility; contract for service; condemnation” states: “Any municipality may acquire, construct, own, lease and operate within or without its corporate limits, any public utility the product or service of which is or is to be supplied to the municipality or its inhabitants, and may contract with others for any such product or service. The acquisition of any such public utility may be by condemnation or otherwise, and a municipality may acquire thereby the use of, or full title to, the property and franchise of any company or person supplying to the municipality or its inhabitants the service or product of any such utility.” This Article was adopted as part of a referendum held on September 3, 1912 to consider a number of amendments proposed by the Constitutional Convention of 1912. See generally, Steven H. Steinglass and Gino J. Scarselli. *The Ohio State Constitution: A Reference Guide* (2004).

\(^{33}\) Englewood Hills, Inc. v. Village of Englewood, 14 Ohio App. 2d 195, 198, 237 N.E.2d 621, 624 (2d Dist. 1967). See also Amherst Builders Assn. v. City of Amherst, 61 Ohio St.2d 345, 402 N.E.2d 1181 (1980) (upholding sewer connection fees on new users that were segregated into a special fund to pay for servicing those users).

\(^{34}\) State ex rel. Waterbury Development Co. v. Witten, 58 Ohio App.2d 17, 387 N.E.2d 1380 (6th Dist. 1977); judgment aff’d, 54 Ohio St.2d 412, 377 N.E.2d 505 (1978) (striking down an “equity value” charge on new connections calculated to recoup expenditures previously made to construct the existing water system and for the costs of future expansion).

Beavercreek in the Lower Courts

The Beavercreek litigation arose from efforts by a fast-growing Dayton suburb to deal with “intense development pressure in the northern part of the city due to a combination of factors, including the completion of Interstate 675, and the proximity of Interstate 70 and major traffic generators like Wright Patterson Air Force Base and Wright State University” plus plans for a regional mall in the same general area.37 The city manager decided that an impact fee ordinance should be enacted to help finance road construction and formed a team of city employees and outside consultants to formulate an impact fee ordinance which was enacted in November 1993.38 The Homebuilders Association and owners of properties affected by the ordinance sued. The trial court partially granted the city’s motion for summary judgment, ruling that the city could lawfully enact an impact fee ordinance based on its police powers and home rule authority and that the ordinance was not an invalid tax, but denied summary judgment for both sides on equal protection and due process claims. At trial, the court rejected all challenges

501 (8th Dist. 1995), dismissed, appeal not allowed, 74 Ohio St.3d 1417, 655 N.E.2d 738 (1995), reconsideration denied, 74 Ohio St.3d 1465, 656 N.E.2d 1300 (1995), the appeals court invalidated a recreation facility impact fee on new development. The court characterized the “fee” as a tax and ruled it was unlawful because the funds generated from taxing new development could be used to maintain and operate existing recreation facilities and there was no matching funds requirement as had been the case in Towne Properties.

36 Westlake, n. 35, supra.


38 Id. The “team” comprised the City Attorney, City Planning Director, City Engineer, City Finance Director, Assistant City Manager, and outside consultants in planning/engineering and economic forecasting. The ordinance language itself was based on a model impact fee ordinance promulgated by the American Planning Association. Id. at *2.
to the ordinance, including a claim that the ordinance was an unconstitutional
Taking without compensation, and entered judgment for the city.

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

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39 City of Beavercreek, 89 Ohio St.3d at 123, 729 N.E.2d at 352.

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

41 Id. at *6. The District Court, applying factors for differentiating between a fee and a tax developed
in State ex rel. Petroleum Underground Storage Tank Release Comp. Bd. v. Withrow, 62 Ohio St.3d 111, 579 N.E.2d 705 (1991), cited the following to support its finding: (1) funds collected under the
ordinance were placed in the city’s general revenue fund and then used to pay for litigation expenses
in defending the ordinance; (2) interest earned on the funds collected under the ordinance were
placed in the city’s general revenue fund; (3) a small group is paying the fees while the benefits paid
for by the fees are available to the public generally; and (4) the primary purpose of the fee was to
raise revenue rather than to regulate. Id. at *7-*11.


43 Building Industry Assn. of Cleveland & Suburban Counties v. Westlake, 103 Ohio App. 3d 546, 660
N.E.2d 501 (8th Dist. 1995), dismissed, appeal not allowed, 74 Ohio St.3d 1417, 655 N.E.2d 738
Beavercreek at the Supreme Court

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

“Proportionality” would seem to be a workable test for the legality of an impact fee, and, in fact, is part of the Nollan/Dolan “dual rational nexus/proportionality” test announced by the U.S. Supreme Court as appropriate to determine the constitutionality of development exactions.46 The Beavercreek

44 City of Beavercreek, 89 Ohio St.3d at 125, 729 N.E.2d at 353.

45 City of Beavercreek, 89 Ohio St.3d at 126, 729 N.E.2d at 354. The majority spoke too broadly on this point. While road construction costs may appropriately be included in calculating an impact fee, future road maintenance costs would generally be considered inappropriate. See, e.g., Ronald H. Rosenberg, The Changing Culture of American Land Use Regulation: Paying for Growth with Impact Fees, 59 SMU L. Rev. 77, n. 101 (2006), where the author writes: “It has been uniformly stated by analysts, courts, and legislatures that on-going operation and maintenance expenses are not to be paid for by impact fees and that the fees are only to provide funding for capital improvement costs necessitated by development. This view apparently stems from the view that the funding of operation and maintenance should come from generally-derived tax revenues as a general operating cost of government. Implicit in this outlook us the idea that such a general community expense should not be charged to a limited segment of the locality’s population through a focused impact fee on new development,” citing Julian Conrad Juergensmeyer & Thomas E. Roberts, LAND USE PLANNING AND DEVELOPMENT REGULATION LAW, 328-32 (2003).

46 In Nollan v. California Coastal Comm’n, 493 U.S. 925 (1987), the Court ruled that an exaction required as a condition for development approval could only be justified constitutionally if there was an “essential nexus” between the condition imposed and the governmental interest claimed as the
majority, however, engaged in an extensive discussion of what test they should adopt, analyzing how the District Court, and the trial court before it, had addressed the plaintiffs’ assertion that the impact fee ordinance was an illegal taking of property without just compensation in violation of both the United States and Ohio constitutions.\textsuperscript{47} The majority ultimately agreed with the trial court that the Nollan/Dolan standard was the most appropriate.\textsuperscript{48}

The majority’s standard required first, that the city “demonstrate that there is a reasonable relationship between the city’s interests in constructing new

\textsuperscript{47} City of Beavercreek, 89 Ohio St.3d at 126-128, 729 N.E.2d at 354-56. The trial court had applied the Nollan/Dolan test in upholding the impact fee. The District Court, after an exhaustive analysis of the appropriate standard, ultimately concluded that: “although the words used to describe the various tests may be different, the tests all actually focus in legal terms, and in application, on the existence of a connection between the dedication or fee and the needs generated by the development. Whether one wants to call this ‘reasonable relationship,’ ‘rational nexus,’ ‘rough proportionality,’ or ‘specifically and uniquely attributable,’ the important issue is whether the dedication or fee is reasonably connected to the needs created by the development.” City of Beavercreek, 1998 WL 735931 at *18.

\textsuperscript{48} City of Beavercreek, 89 Ohio St.3d at 125, 729 N.E.2d at 353. The majority, however, failed to address the concern that had been raised by some courts about extending the Nollan/Dolan approach to uniform legislatively enacted impact fees. See, e.g., Ehrlich v. City of Culver City, 12 Cal.4th 854, 911 P.2d 429, 50 Cal.Rptr.2d 242 (1996). Further, while acknowledging that the “dual rational nexus/rough proportionality test” arose in the context of land-use exactions that required landowners seeking a permit to dedicate land to public use, the majority did not acknowledge that the U.S. Supreme Court had suggested that Dolan’s rough proportionality test should not be extended beyond “the special context of exactions – land-use decisions conditioning approval of development on the dedication of property to public use.” City of Monterey v. Del Monte Dunes, Ltd., 526 U.S. 687, 702 (1999). See generally, Charles Thompson Switzer, Note: Escaping the Takings Maze: Impact Fees and the Limits of the Takings Clause, 62 Vand. L. Rev. 1315, 1328-1340 (2009)(discussing four approaches to the issue of applying Nollan/Dolan to impact fees and concluding they should not be applied); see also, Juergensmeyer & Roberts, n. 29 supra. at 527-34; Steven A. Haskins, Closing the Dolan Deal – Bridging the Legislative/Adjudicative Divide, 38 Urb. Law. 487 (2006).
roadways and the increase in traffic generated by new development.” If that reasonable relationship is demonstrated, the city must then demonstrate “that there is a reasonable relationship between the impact fee imposed by Beavercreek and the benefits accruing to the developer from the construction of new roadways.”

The majority noted that this portion of the test “addresses whether the developer and the city are paying their proportionate shares of the costs necessary to construct new roadways.” The majority then explained that while a matching fund provision was one way to measure whether a city’s contribution met its obligation to pay a proportionate share of project costs, it was not the only permissible way the city could meet its proportionate share obligation, noting various “credits” that the city would apply towards a developer’s obligation under the ordinance. Applying the standard it had just announced, the majority concluded that the city had met its burden.

Three of the seven Justices dissented. Justice Pfeiffer, joined by Justice Resnick, rejected the majority’s argument that “classification as an impact fee or a tax is not determinative” and would have struck down the impact fee ordinance as an unconstitutional tax. In the alternative, he argued that if a particular impact fee ordinance was not found to be an invalid tax, then he would favor judging the

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49 *City of Beavercreek*, 89 Ohio St.3d at 128, 729 N.E.2d at 356.

50 *Id.*

51 *City of Beavercreek*, 89 Ohio St.3d at 130, 729 N.E.2d at 357.

52 *City of Beavercreek*, 89 Ohio St.3d at 130, 729 N.E.2d at 357-58.

53 *City of Beavercreek*, 89 Ohio St.3d at 131-32, 729 N.E.2d at 358-59.
constitutionality of the fee under the “specifically and uniquely attributable to the needs of the development” standard, a “strict test than that put forth by the majority.” 54 Finally, he claimed that the impact fee at issue did not meet the second part of the majority’s dual rational nexus test because the city was not obligated to provide any of the credits potentially available. 55 Justice Cook dissented separately, stating that he would have affirmed the District Court based on that court’s reasoning that the impact fee was actually an invalid tax because the ordinance did not contain a mandatory matching funds provision. 56

**Limits of the Beaver Creek Ruling**

Given the lack of state impact fee enabling legislation in Ohio, the Beaver Creek ruling at least clarified that municipalities could enact impact fees based on their police and home rule powers 57 and provided a workable standard for judging such fees. 58 But Beaver Creek provided far less guidance than would well-drafted state impact fee enabling legislation. Stuart Meck and Ken Pearlman

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54 *City of Beaver Creek*, 89 Ohio St. 3d at 132, 729 N.E. 2d at 359. Justice Pfeiffer failed, however, to acknowledge that the majority’s dual rational nexus standard was the view espoused by most state courts. See, Juergensmeyer & Roberts, n. 29 supra at 420.

55 *Id.*

56 *Id.*

57 Juergensmeyer & Roberts, n. 29 supra at 519, note that, in the absence of enabling legislation, a major attack on the legality of impact fees has been the claim that “they were not authorized by state statute or constitutional provision and therefore were void as ultra vires acts of the governmental entities which had enacted them.”

58 See, discussion of various standards, id. at 523-27 and *City of Beaver Creek*, 89 Ohio St. 3d at 126-128, 729 N.E. 2d at 354-56.
provide an extensive, but not exhaustive, list of questions that remained after

*Beavercreek* which state legislation could address:

... there are still many policy issues that state legislation could resolve. For example, what happens to impact fees from an individual development that a municipality has not expended within a certain period of time (say, five years), something the appeals court noted the Beavercreek ordinance failed to provide for? If they are to be rebated, should that be with interest? What level of service may a local unit of government impose and what kind of studies should be necessary to impose it? Should all governmental facilities that create an impact on traffic be exempted from payment of impact fees, as the Beavercreek ordinance provided for? Is there any obligation to first correct existing conditions that do not satisfy adopted level of service standards before addressing future conditions? What kind of requirements should be placed on municipalities to plan future land use on which the full build-out of the impact fee district may be calculated and to prepare, adopt, and execute capital improvement programs? Until the Ohio General Assembly acts, these questions and many, many others will be litigated, no doubt expensively, on a case-by-case basis.\(^{59}\)

The above list is far from exhaustive. There are many other questions that

*Beavercreek* failed to address, several of which are quite fundamental. A basic question that state enabling legislation could address is the types of infrastructure, facilities or services that can be funded through impact fees. *Beavercreek* involved road improvements, and the majority opinion makes no mention of other types of facilities, but impact fees have been used to fund far more than roads. Authorizations for infrastructure improvements among the twenty-eight states that currently have enabling acts include: water (24 states), sewer (24 states), storm

water (23 states), and parks (23 states).\textsuperscript{60} Authorizations for services and facilities include: fire (22 states), police (20 states), library (13 states), solid waste (11 states), and schools (12 states).\textsuperscript{61}

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

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\textsuperscript{60} Clancy Mullen, Duncan Associates, “National Impact Fee Survey, 2011,” Figure 1: FACILITIES ELIGIBLE FOR IMPACT FEES BY STATE. On file with author and available online at http://www.impactfees.com/publications%20pdf/2011_survey.pdf. Duncan Associates is a nationally-known consulting firm that specializes in plan implementation services, including impact fee studies and ordinances, for local and state governments. Prior surveys prepared by Duncan Associates have been used in other publications; see, \textit{e.g.}, Juergensmeyer & Roberts, n. 29 \textit{supra} at 534-35.

\textsuperscript{61} \textit{Id}.

\textsuperscript{62} Juergensmeyer & Roberts, n. 29 \textit{supra} at 536-40.


\textsuperscript{64} \textit{Id}.
\end{footnotesize}
developments deemed to be socially desirable, from the obligation to pay the impact fees either in full or in part;\(^{65}\) and (4) what land uses can be charged what impact fees, dealing with the issue, for example, of whether non-residential development may lawfully be charged fees for facilities such as parks, libraries and schools – the demand for which is only tenuously connected to non-residential development.\(^{66}\)

There are also numerous “design” issues that can be addressed through an enabling statute. To list just a few: (1) will there be a requirement that the imposition of an impact fee be based on a capital facilities plan and/or future land-use plan?\(^ {67}\) (2) when should an impact fee be assessed (or the amount calculated) and when should it be collected?\(^ {68}\) (3) how frequently must an impact fee be re-

\(^{65}\) Id. at 537-38. See also, S. Mark White, Development Fees and Exemptions for Affordable Housing: Tailoring Regulations to Achieve Multiple Public Objectives, 6 J. Land Use & Envtl. L. 25 (1990-1991).

\(^{66}\) Id. at 538-40. See also, Volusia County v. Aberdeen at Ormond Beach, 760 So.2d 126 (Fla. 2000)(exempting age-restricted mobile home park that did not permit children as residents from payment of impact fee for schools).

\(^{67}\) These would be formal documents developed separately from whatever planning was required to justify the imposition of the impact fee. For example, the former Utah impact fee enabling statute, Utah Code. Ann. 11-36-201, repealed by Laws 2011, c. 47, § 41, eff. May 11, 2011, required a capital facilities plan as a condition for enacting an impact fee.

\(^{68}\) Developers normally favor having impact fees calculated as soon as possible in the permit approval process, so they know what the amounts will be early-on and can build that into their financial projections, with collection of the fees postponed to the latest possible date in the permit approval process so as to minimize the developer’s carrying costs. Government normally favors calculation as late as possible, to avoid the need for recalculation or possible refunds if the project size changes, and collection as soon as possible, again for obvious reasons.
calculated?; and (4) what percentage, if any, of the impact fees may be spent on administration of the impact fee system?

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

The majority of vacant land undergoing development lay in townships, not municipalities; thus, townships were facing the greatest demand for new infrastructure to serve the new development. Further, since 1991, Ohio townships had been able to adopt a “limited home rule” form of government and so it was certainly conceivable that the *Beavercreek* ruling that impact fees could be enacted based on municipal “home rule” authority might, in an appropriate case, be

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69 Every two years? Every five? Ten?

70 The use of impact fee revenue to pay for defending the lawsuit against the City of Beavercreek had been one of the factors cited by the District Court in declaring that the impact fee was actually a tax. *City of Beavercreek*, 1998 WL 735931 at *6 - *9.

71 Data from the “2010 Population Census Count by County, City, Village and Township,” n. 11, *supra*, illustrates this point. For example, in Geauga County and Medina County, largely rural counties neighboring Cleveland and its Cuyahoga County suburbs, population growth in townships has far exceeded the population growth in municipalities for the past two decades. In Geauga County, where the overall population growth for 1990-2010 was 12,260, 84% of that increase occurred in townships. In Medina County, where the overall population growth for 1990-2010 was 49,984, 60% of that increase occurred in townships. Similar growth patterns occurred elsewhere in Ohio. For example, in Delaware County, neighboring Columbus and its Franklin County suburbs, townships accounted for 61.2% of the population growth from 1990-2010.
extended to a township that had adopted the “limited home rule” form of
government. It would, however, be a dozen years before the issue came before the
Court.

The Hamilton Township Case

On May 31, 2012, the Court ruled in Drees Company, et. al. v. Hamilton
Township, that a development impact fee enacted by an Ohio township with
“limited home rule” powers was an unconstitutional tax. The unanimous opinion
was authored by Justice Paul Pfeiffer, who, twelve years before, had authored one of
the two dissenting opinions in Beaver Creek.

Hamilton Township is approximately 25 miles from downtown Cincinnati,
ten miles from I-275, the Interstate that encircles greater Cincinnati, and five
miles from I-71, which links Cincinnati to Ohio’s two other major cities: Columbus
and Cleveland. These locational advantages, combined with ample land available

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

74 Evelyn Lundberg Stratton, the only other remaining member of the Beaver Creek Court, had joined
the four Justice majority in that case.

75 Cincinnati borders the Ohio River and thus portions of I-275 are in both Ohio and Kentucky.
for development plus good schools and services, have made the Township a very desirable place to live: the population has quadrupled over the past two decades. Such rapid growth, creating significant demand for both infrastructure and government services, is exactly the circumstance that leads local government to enact an impact fee ordinance, which is what Hamilton Township did on May 2, 2007. The “ordinance” – Ohio Township legislation is termed a Resolution and I will use that term hereafter -- was fairly sophisticated by any standard. It included four fee categories: a road impact fee, a fire protection impact fee, a police protection impact fee, and a park impact fee. The amount of each fee would be calculated for several different types of land-uses (e.g., single-family, multi-family, retail/commercial, industrial, etc.) based on the demand for infrastructure/services that had been calculated for each land-use.

Each of the fees was to be kept in separate accounts that were segregated from the Township's general fund. If the fees were not spent on projects initiated

76 The Township website http://hamilton-township.org/ notes: “Cincy Magazine’s article ‘Rating the Burbs’ ranks Hamilton Township 9th out of 43 communities in the tri-state and overall 7th in community safety (2009).”


79 Thus, for example, single-family and multi-family dwellings paid a park impact fee, but non-residential land-uses did not. Similarly, a retail/commercial land-use paid fire and police impact fees totaling $697 per 1,000 sq. ft., while a warehouse land-use paid only $157 per 1,000 square feet. Id.
within three years of their collection date, they would be returned, with interest, to the party that paid the fee.\textsuperscript{80} The resolution also exempted certain types of development from payment\textsuperscript{81} and created a system of credits towards the road impact fee for certain roadway improvements.\textsuperscript{82} Finally, the fees would be phased-in over a two-year period, starting at 33\% of their full amount 90-days after the effective date of the resolution, increasing to 66\% of their full amount one-year after that, and reaching 100\% after a second year.\textsuperscript{83}

In the fall of 2007, several developers subject to the fees brought suit. The trial court granted summary judgment to the Township.\textsuperscript{84} On appeal, the Court of Appeals for the Twelfth District upheld the trial court in a unanimous decision,

\begin{flushright}
\textit{Id.}
\end{flushright}

\textsuperscript{80} \textit{Id.}

\textsuperscript{81} The Resolution exempted the following from payment of fees: (1) Alterations of an existing dwelling unit where no additional dwelling units are created. (2) Replacement of a destroyed, partially destroyed or moved residential building or structure with a new building or structure of the same use and with the same number of dwelling units as the original building or structure. This exemption shall not apply in the case of a destroyed, partially destroyed or moved structure which contains an illegal nonconforming use under the zoning regulations of Hamilton Township, Ohio. (3) Replacement of a destroyed, partially destroyed or moved nonresidential building or structure with a new building or structure of the same use and not exceeding the gross floor area of the original building or structure. (4) Any development for which a completed application for a zoning certificate was submitted prior to the effective date of this resolution, provided that the construction proceeds according to the provisions of the building permit for which the zoning certificate was issued and the permit does not expire prior to the completion of the construction. In the event that the zoning certificate does expire before completion of construction, then the provisions of this impact fee shall apply to the development. In such case, the zoning certificate shall not be issued without the payment of the impact fee. "Hamilton Township Impact Fee Administrative Rules 7-8 (August 21, 2007). On file with author and available at http://zoning.hamilton-township.org/wp-content/uploads/impactFees_11-2008.pdf.

\textsuperscript{82} \textit{Id.} at 8-13.

\textsuperscript{83} \textit{Id.} at 3. Gradually phasing-in the fees provides developers subject to the fees time to account for the fees in their financial calculations. See generally, Altshuler & Gomez-Ibanez, n. 21, supra., at 97-111, discussing at length the factors that determine which party or parties in the land development and sales process will bear the cost of the impact fee.

\textsuperscript{84} Drees Company, et. al. v. Hamilton Township, 2010 WL 2891746 at * 2.
with Judge Powell focusing on the question of whether the impact fees at issue were a tax versus a fee and ruling that they were a fee rather than a prohibited form of taxation. Writing for a unanimous Supreme Court, Justice Pfeiffer reversed the Twelfth District in an opinion that is perplexing, if not distressing, for its failure to explain why the Court here engaged in an analysis of the “tax vs. fee” issue that differed so greatly from that in Beaver Creek.

In the first portion of his opinion, Justice Pfeiffer analyzed the challenged impact fee based on standards announced in two cases that came from regulatory contexts far removed from regulation of land development. State ex rel. Petroleum Underground Storage Tank Release Comp. Bd., v. Withrow, a 1991 Ohio Supreme Court case, involved a state statute that imposed fees on the owners and operators of underground storage tanks to create a fund that would be used to address the costs associated with spills and leaks. American Landfill, Inc. v. Stark/Tuscarawas/Wayne Joint Solid Waste Mgt. Dist., a 1999 ruling from the federal Sixth Circuit, examined whether assessments imposed by solid-waste

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


87 166 F.3d 835 (6th Cir. 1999).
management districts on persons disposing of materials at their facilities were fees or taxes for purposes of the federal Tax Injunction Act.88

Justice Pfeiffer first applied what he termed the “Withrow Factors”89 and argued that the impact fee “differs in several important respects from the assessment this court deemed a fee in Withrow.”90 Justice Pfeiffer found that the impact fee: (1) “lacks the regulatory aspect of the fee charged in Withrow,” arguing that it was “a revenue generator with the stated purpose of guaranteeing a consistent level of services to all members of the community” that does not “protect the public from specific threats,” (2) “the revenue generated by the assessment in this case is spent on typical township expenses inuring to the benefit of the entire community,” (3) “assessed parties gen to particular service above that provided to any other taxpayer for the fee that they pay,” and (4) the fee is not “tied to events” but to “the spending whims of government.”91 Characterizing the analysis in Am. Landfill as “similar to that used in Withrow,”92 Justice Pfeiffer applied that analysis to the Township’s impact fee and reached the same conclusion: the impact fee was actually a tax.93

88 June 25, 1948, ch. 646, 62 Stat. 932, codified at. 28 U.S.C. § 1341. “The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State.”

89 The “Withrow Factors,” in Justice Pfeiffer’s view were: (1) is the fee “imposed in furtherance of regulatory measures”?: (2) is the fee “never placed in the general fund” and used only for “narrow and specific” regulatory purposes?: (3) is the fee imposed by government in exchange for a service it provides?: and (4) what happens when the fees collected exceed – or fall short of -- a certain amount? Drees Company, et. al v. Hamilton Township, -- N.E.2d --, 2012 WL 1957881 at * 4.

90 Id. at * 5.

91 Id.

92 Id. at * 6.

93 Id. at * 8.
While Justice Pfeiffer found that these cases supported his conclusion that the impact fee was actually an unauthorized tax, he acknowledged that neither case had “involved the type of assessment at issue in this case”\textsuperscript{94} and proceeded to discuss “other state supreme courts facing very similar matters [that] have found that impact fees constituted taxes,” noting that a “key factor in those cases was the extent of the public benefit that resulted from the assessment.”\textsuperscript{95} That discussion included two state supreme court cases -- a 2002 Iowa case involving a park impact fee\textsuperscript{96} and a 2006 Mississippi case that involved various impact fees\textsuperscript{97} -- plus a 1998 federal Fifth Circuit case.\textsuperscript{98} Justice Pfeiffer argued that these cases buttressed his conclusion that the impact fee at issue was an invalid tax: each found that the benefits that were paid for by the impact fee(s) accrued to the community at large rather than only to those who had paid the fee(s), and, in his view, this was also the case for the Hamilton Township impact fees.\textsuperscript{99}

\textsuperscript{94} Id.

\textsuperscript{95} Id.

\textsuperscript{96} Iowa Home Builders Assn. of Greater Des Moines v. City of West Des Moines, 644 N.W.2d 339 (2002).

\textsuperscript{97} Mayor and Board of Aldermen, City of Ocean Springs v. Homebuilders Assn. of Mississippi, Inc., 932 So.2d 44 (2006). The city had six separate impact fees: (1) general municipal facilities, (2) fire facilities, (3) park and recreation facilities, (4) police facilities, (5) major roadways, and (6) water facilities. Id. at 48.

\textsuperscript{98} Home Builders Assn. of Mississippi, Inc. v. Madison, 143 F.3d 1006 (5th Cir. 1998)(examining whether impact fee was a fee or tax for purposes of the federal Tax Injunction Act); see n. 88 supra.

Was *Hamilton Township* Correctly Decided?

Justice Pfeiffer’s opinion is defensible when viewed on its own terms; that is, if one accepts the premises of the opinion that the impact fee at issue may appropriately be analyzed under *Withrow* and *American Landfill*, and further, that “other state supreme courts facing very similar matters have found that impact fees constituted taxes.” But what happens when one subjects each of these premises to closer scrutiny?

As Justice Pfeiffer himself acknowledged, *Withrow* and *American Landfill* dealt with regulatory settings that were quite different from that in the *Hamilton Township* case. In that case, as in *Beavercreek* before it, the setting was the land-use regulatory process and, in particular, the issue of what method should be used to fund the provision of infrastructure and the capital costs of services that are necessitated by residential growth and the non-residential development that accompanies it. This issue has been before the courts for more than 80 years.

In the 1930’s, courts dealt with challenges to land dedication requirements within a subdivision as a condition of development approval. Succeeding decades saw new challenges each time conditions placed on development approval evolved: from dedication requirements inside a subdivision to outside a subdivision; from dedication requirements to fee-in-lieu of dedication requirements, and most recently, from fee-in lieu of requirements to assessment of impact fees.\(^\text{100}\) Because

\(^\text{100}\) See Rosenberg, n. 45 *supra* at 191-204. Professor Rosenberg sub-titles his discussion of the evolution of infrastructure funding as “An American Tradition” and argues that the twentieth century saw “a steady growth in the use of land development exactions to impose specific costs on land developers.” Further, “This trend has accelerated in the last two decades and has resulted in
fee-in-lieu requirements and impact fees each involve developers’ making cash payments, one of the most common challenges to these methods has been the claim that the fee in question was really a tax.101

Numerous courts have grappled with that question, with little consistency in their decisions.102 Scholars have noted the problem103 and been critical of the results.104 They have concluded that impact fees have aspects of both fees and taxes and cannot be characterized definitively as either.105 This scholarly critique of the fee versus tax issue calls Justice Pfeiffer’s opinion into question on two counts.

First, of course, it questions the Justice’s effort to characterize the Township’s

the widespread use of subdivision land improvement and dedication requirements, impact fees, and linkage programs all having the effect of shifting development-related expenses from the community to the land developer.” Id. at 192.

101 Id. at 218-220 and 249-252 (discussing, respectively, such challenges in the periods before and after the U.S. Supreme Court’s Dolan ruling); see also, Michael B. Kent, Jr., Theoretical Tension and Doctrinal Discord: Analyzing Development Impact Fees as Takings, 51 Wm. & Mary L. Rev. 1833, 1866-75 (2010) (discussing various challenges).

102 Id. at 250 (noting that “the decisions did not indicate any clear pattern in results, with half of the impact fees being classified as regulatory devices while the other half were characterized as ‘taxes’.”) Id. Rosenberg also notes that “making the regulatory fee/tax determination is a difficult task, and courts have not used a uniform framework for making this important decision.” Id.

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

104 See, e.g., Kent, n. 101, supra, at 1875 (discussing the issue at length and concluding that “impact fees cannot definitively be labeled as either “fees” or “taxes.”) This same point was made in an article critiquing Mayor and Board of Aldermen, City of Ocean Springs v. Homebuilders Assn. of Mississippi, Inc., 932 So.2d 44 (2006), one of the cases Justice Pfeiffer discusses in support of his finding that the Township impact fee was an invalid tax. See, Kenneth D. Farmer, Impact Fees: An Alternative Way to Finance Public Facilities in Mississippi, 28 Miss. C. L. Rev. 287, 293-94 (2009) (noting that impact fees share characteristics with both taxes and regulatory fees and that “courts have not developed a uniform framework for making the regulatory tax/fee determination.”)

105 See, e.g., Kent, n. 101, supra, at 1875 (discussing the issue at length and concluding that “impact fees cannot definitively be labeled as either “fees” or “taxes.”) This same point was made in an article critiquing Mayor and Board of Aldermen, City of Ocean Springs v. Homebuilders Assn. of Mississippi, Inc., 932 So.2d 44 (2006), one of the cases Justice Pfeiffer discusses in support of his finding that the Township impact fee was an invalid tax. See, Kenneth D. Farmer, Impact Fees: An Alternative Way to Finance Public Facilities in Mississippi, 28 Miss. C. L. Rev. 287, 293-94 (2009) (noting that impact fees share characteristics with both taxes and regulatory fees and that “courts have not developed a uniform framework for making the regulatory tax/fee determination.”)
impact fee in those terms in the first place. Second, it questions the Justice’s failure to distinguish the many cases where state supreme courts found that impact fees did not constitute taxes.\textsuperscript{106}

My harshest criticism of the Hamilton Township Court, is not limited to Justice Pfeiffer’s opinion, however. One is hard-pressed to state a principled reason why none of the Justices saw fit to acknowledge that this very Court, “facing very similar matters” only twelve years before in Beavercreek, had rejected Hamilton Township’s tax vs. fee dichotomy, arguing instead that “the important factor in determining the constitutionality of an ordinance is whether the ordinance is unduly burdensome in application and not its label as a tax or an impact fee.”\textsuperscript{107} We are, regrettably, left with the distressing conclusion that the Court’s failure to explain why in Hamilton Township it revived the tax vs. fee analysis rejected in Beavercreek, is most likely outcome driven.

Recall that in Beavercreek Justice Pfeiffer’s dissent had rejected the majority’s argument that “classification as an impact fee or a tax is not determinative” and would have struck down the impact fee ordinance as an unconstitutional tax.\textsuperscript{108} He argued further that if a particular impact fee ordinance was not found to be an invalid tax, then he would favor judging the constitutionality

\textsuperscript{106} See, Rosenberg, n. 45, supra. at 249-252 (discussing at length the different approaches used and outcomes reached by various courts that have addressed whether an impact fee should be classified as a tax or a fee and finding that “the decisions did not indicate any clear pattern in results, with half of the impact fees being classified as regulatory devices while the other half were characterized as ‘taxes.”’ Id. at 250.

\textsuperscript{107} City of Beavercreek, 89 Ohio St.3d at 125, 729 N.E.2d at 353.

\textsuperscript{108} City of Beavercreek, 89 Ohio St.3d at 131-32, 729 N.E.2d at 358-59.
of the fee under the “specifically and uniquely attributable to the needs of the
development” standard, a “stricter test than that put forth by the majority.”

Avoiding any mention of Beavercreek meant that Justice Pfeiffer did not
have to overcome what he possibly thought was the substantial hurdle of convincing
a majority of the Court why that case should not have precedential authority for
Hamilton Township. There is, however, a somewhat plausible argument for
distinguishing Beavercreek, by focusing on a basic difference in the extent of land
use regulatory powers in municipalities as compared with townships.

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

109 City of Beavercreek, 89 Ohio St.3d at 132, 729 N.E.2d at 359. Justice Pfeiffer also claimed that the
impact fee at issue did not meet the second part of the majority’s dual rational nexus test because
the city was not obligated to provide any of the credits potentially available.

110 ORC Chapter 711 – Plats and ORC Chapter 713 – Planning Commissions.

111 ORC Chapter 519 – Township Zoning

112 ORC § 711.10.
regularity authority from the powers that may be exercised by a limited home rule township.\textsuperscript{113}

Impact fees evolved from fee-in-lieu of land dedication requirements in the subdivision regulatory process\textsuperscript{114} and are still primarily imposed in that process as a condition for subdivision plat approval.\textsuperscript{115} An Ohio township, although able to exercise some home-rule powers, lacks subdivision regulatory authority and thus can only impose an impact fee as a condition for zoning approval, not subdivision plat approval. Given the derivation of impact fees from, and their exercise largely within, the subdivision regulatory process, the lack of such authority could have provided a plausible, if fairly formalistic, argument in favor of a finding that the Court’s \textit{Beavercreek} ruling was not controlling in \textit{Hamilton Township}. Needless to say, it would also have evidenced a more appropriate degree of respect for precedent.

Even had the above argument been made in \textit{Hamilton Township}, the opinion remains distressing for its failure to acknowledge that the decisions from other states are split on the tax vs. fee characterization debate.\textsuperscript{116} To discuss only three

\begin{footnotesize}
\textsuperscript{113} ORC § 504(B)(3) denies a limited home rule township authority to “Establish or revise subdivision regulations . . .”

\textsuperscript{114} See discussion in text at ns. 17-23 \textit{supra}.

\textsuperscript{115} The operation of the Beavercreek impact fee ordinance is typical. As described by the Second District: “Under the ordinance, fees for single family developments had to be paid before the City’s release and approval of the plat for the development, unless the platting was done in more than one section. In such an event, the fee applicable to a particular section needed to be paid before approval and release of the plat for the section. For all other land development activity, the fee payment was due before the City issued a zoning permit or a certificate of zoning compliance for the development.” \textit{City of Beavercreek}, 1998 WL 735931 at *3.

\textsuperscript{116} See discussion in text at ns. 101-105, \textit{supra}.
\end{footnotesize}
rulings, all of which favor one side of that debate, is more akin to advocacy than judging; and poor advocacy at that.\textsuperscript{117}

**Where are we and what, if anything, should we do about it?**

Where Are We?

As a result of *Hamilton Township*, Ohio now has different tests for judging the legality of a development impact fee depending on whether the challenged fee was enacted by a municipality or a township. If the fee was enacted by a municipality, the court will apply *Beavercreek*’s dual rational nexus test. Any well-drafted impact fee would likely survive judicial scrutiny under that test.\textsuperscript{118} On the other hand, if the fee was enacted by a limited home-rule township,\textsuperscript{119} the court, applying *Hamilton Township*, must first determine whether the “fee” is really a “tax” by applying the “Withrow factors.” It is highly unlikely that even a well-drafted impact fee resolution would avoid a fatal characterization as a tax.

\textsuperscript{117} An appellant’s attorney would be foolhardy to file a brief that failed to acknowledge and attempt to distinguish opposing authority. Further, if the opposing authority is from the controlling jurisdiction – as *Beavercreek* almost assuredly was here -- then the failure to disclose would violate Rule 3.3 (a)(2) of both the Ohio Rules of Professional Conduct and the American Bar Association’s Model Rules of Professional Conduct, which state, in identical language: “(a) A lawyer shall not *knowingly* do any of the following: . . . (2) fail to disclose to the *tribunal* legal authority in the controlling jurisdiction *known* to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel;” (italics only in Ohio Rules).

\textsuperscript{118} Likely, but not assured. Recall that, in *Beavercreek*, Justice Pfeiffer claimed that the impact fee at issue did not meet the second part of the majority’s dual rational nexus test because the city was not obligated to provide any of the credits potentially available. *City of Beavercreek*, 89 Ohio St.3d at 132, 729 N.E.2d at 359.

\textsuperscript{119} An attempt by a statutory township to enact an impact fee resolution would, if challenged, likely be declared *ultra vires*. Such townships lacking both subdivision regulatory authority and limited home rule powers, may exercise only those powers which have been explicitly authorized by the legislature. To date, this does not include the power to enact impact fees.
Even if a township’s impact fee avoided characterization as a tax, it’s survival would not be assured. If the court accorded *Beavercreek* precedential effect on the issue of what standard should be applied to determine the constitutionality of a fee, and applied the dual rational nexus test, then any fee that had avoided characterization as a tax would likely, but not assuredly, survive. But a court might deny *Beavercreek* has precedential effect – perhaps using the reasoning I noted previously – which would leave a court free to adopt a more stringent test than dual rational nexus; most likely the “specifically and uniquely attributable to the needs of the development” approach that Justice Pfeiffer favored in his *Beavercreek* dissent. Survival of an impact fee under that standard is far less likely.

From the viewpoint of advocates for the use of impact fees, the practical effect of these differing standards is perverse: impact fees are defensible in municipalities, where the pace of new development, and thus the need for impact fees is less, but effectively prohibited in townships where rapid development creates the most

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120 See n 118, supra.

121 See discussion in text at ns. 113-115, supra.

122 *City of Beavercreek*, 89 Ohio St.3d at 132, 729 N.E.2d at 359.

123 See, Juergensmeyer & Roberts, n. 29, supra. at 417, describing the “specifically and uniquely attributable to the needs of the development” test as “an almost insurmountable burden on local governments seeking money payments for extradevelopment capital spending from developers whose activities necessitated such expenditures.” See also, Rosenberg, n. 45, supra, at 221-22, describing the “specifically and uniquely attributable to the needs of the development” test as “a highly restrictive view” that demands “a rigorous review of land use exactions and a near-linear cause and effect relationship between growth and public infrastructure.”
pressing need for impact fees. Obviously, those opposed to impact fees are likely to see it differently: applauding the Court’s barring their use precisely where they most likely would have been enacted.

What, if anything, should we do about it?

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

That said, the fact that twenty-eight states have adopted impact fee enabling legislation, including half the states neighboring Ohio, argues strongly that, at

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124 See discussion in text at n.71, supra.

125 See, e.g., Mark Fenster, Regulating Land Use in a Constitutional Shadow: The Institutional Contexts of Exactions, 58 Hastings L.J. 729, 736-740 (2007)(discussing pros and cons of development exactions); Vicki Been, Impact Fees and Housing Affordability, 8 Cityscape 139 (2005)(extensively reviewing literature and concluding that “the existing literature has not yet established that impact fees raise the net cost of housing – the price after offsetting benefits, such as amenities or savings on alternative financing mechanisms, are accounted for”); Charles J. Delaney & Marc T. Smith, Development Exactions: Winners and Losers, 17 Real Est. L.J. 195 (1989)(discussing economic burden of impact fees and concluding that burden “will be determined based on the pattern of supply and demand in a particular housing market”); Rosenberg, n. 45, supra, at 182 (stating: “Not surprisingly, this emerging impact fee practice has been exceedingly popular with local governments and current residents, and it has dramatically accelerated over the last twenty years. On the other hand, the practice has also been strongly criticized by landowners, developers, and affordable housing advocates as unfairly increasing the cost of new construction, imposing an unfair ‘tax’ and raising housing prices. Some have suggested that such fees actually constitute de facto growth controls with exclusionary implications.” See, generally, Altshuler & Gomez-Ibanez, n. 21, supra. at 6-7.

126 See jurisdictions listed at n. 8, supra.

127 Id. They are: Indiana, Pennsylvania and West Virginia.
the least, it is time for the Ohio General Assembly to consider such legislation seriously. In 2004, the “Wolpert Report” had recommended that Ohio adopt enabling legislation that would grant authority to townships and counties to adopt impact fees and to school districts to adopt impact fees for schools. A bill along those lines, H.B. 299, was introduced in the 126th General Assembly, but died with no further action taken in the Local Government Committee. No other impact fee enabling legislation has subsequently been introduced.

While H.B. 299 at least put the impact fee issue on the legislative agenda, however briefly, its provisions were fairly sparse in comparison to more comprehensive impact fee legislation, adopted elsewhere, which addresses the

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128 Calls for legislative action to authorize impact fees were made in both Iowa and Mississippi after the Supreme Court of each state, as noted by Justice Pfeiffer in *Hamilton Township*, ruled that a challenged impact fee was invalid. See, Kristin B. Flood, Note: *Who Should Pay for the Impact of New Development in Iowa? Developers or the Preexisting Community?* Analysis of Homebuilders Association of Greater Des Moines v. *City of West Des Moines*, 91 Iowa L. Rev. 751 (2006)(analyzing Court's ruling and its effects and concluding that Iowa should adopt an impact fee enabling statute); Farmer, n. 102, supra (analyzing Court’s ruling and its effects and concluding that Mississippi should adopt an impact fee enabling statute). See also, Patric O'Brien, Comment: The Bizarre Journey of Impact Fees in Massachusetts: From the “Foothills of Confusion” Around the “Mountains of Ignorance” and up into the “Castle in the Air” – Will “Rhyme and Reason” Ever be Rescued?, 35 New Eng. L. Rev. 511 (2001)(criticizing Massachusetts Appeals Court for ruling impact fee was invalid);


130 H.B. 299, 126th General Assembly (2005-06).


132 Author’s search for “impact fee” on the Ohio General Assembly’s “Search for Legislative Information” website <http://www.legislature.state.oh.us/search.cfm#bill_keyword> conducted on August 17, 2012.
details of impact fees systems to a much greater extent. Accordingly, reviving H.B. 299, or something similar, would be far less preferable to proposing more comprehensive legislation that answers most, if not all of the questions this article has noted. Moreover, even if there is no support for legislation that would extend authority to enact impact fees to townships -- or to counties and school districts -- there is still need for enabling legislation for municipalities that would fill in the numerous gaps in the Beaver Creek ruling. The time is long past for Ohio to join the majority of states that have adopted enabling legislation for development impact fees.

Conclusion

The Ohio Supreme Court’s recent ruling in Drees Company, et. al. v. Hamilton Township, invalidating the development impact fees adopted by a limited home rule township, is a deeply distressing decision. In Hamilton Township, the Court, rather than engaging in a fair-handed analysis, chose instead to rely on very limited authority to support a conclusion that appears to have been pre-determined. In particular, the Court failed even to acknowledge, let alone

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134 See discussion in text at ns 59-67, supra.

135 Id.

distinguish: (1) its own ruling upholding impact fees twelve years before in Homebuilders Association of Dayton and the Miami Valley, et. al. v. City of Beavercreek,\textsuperscript{137} and (2) the state supreme court decisions that had rejected the reasoning of the Iowa and Mississippi courts upon which the Court relied in part. The Court’s Hamilton Township ruling leaves Ohio with a bifurcated approach to impact fees that is perverse because impact fees are defensible in municipalities, where the pace of new development, and thus the need for impact fees is less, but effectively prohibited in townships where rapid development creates the most pressing need for impact fees. Given the Court’s conflicting rulings, the time is long-past for the legislature to examine the policy debate on impact fees and make a decision about adopting enabling legislation for impact fees. That decision should be to join the majority of states that have enacted such legislation.

\textsuperscript{137} 89 Ohio St.3d 121,729 N.E.2d 349 (2000).