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IMPACT FEES IN MARYLAND

Paul A. Tiburzi†

I. INTRODUCTION

Sprawling residential development in Maryland has forced local officials to seek new revenue sources to pay for the infrastructure necessary to support that development. Water and sewer facilities, stormwater drains, roads, sidewalks, parks, schools, firehouses, and police stations all must be built and financed. Traditionally, capital improvements of this nature have been financed with the proceeds of municipal bonds and with federal grant money. Usage fees,¹ benefit assessments² and property taxes³ provided the funds for paying the debt service on the bonds. But rapid and unrestrained suburban growth, coupled with the decline in federal grant programs, has placed inordinate demands on municipal finances.⁴ Many localities — approaching their limits on bonded indebtedness and fearful of incurring taxpayers' ire — have realized that they cannot meet the needs of new development and still maintain existing facilities without an additional source of funds. For a growing number of Maryland counties and municipal corporations, impact fees have provided that source.

Impact fees have two essential features: (1) they shift the cost of capital improvements from all users or taxpayers in the jurisdiction to the new residents who create the need for them, and (2) they are col-

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1. A "usage fee" is a charge based on the property owner's consumption of a given public service. See 2 C. ANTIEAU, MUNICIPAL CORPORATION LAW § 19D.04, at 19D-8 to -9 (1988); see, e.g., MD. ANN. CODE art. 29, § 4-110(d) (1986) (sewer usage charge). This fee can encompass not only the cost of the service used, but also the costs of expanding and improving the service. See, e.g., *White Rock Sewage Corp. v. Township of Monroe*, 77 Pa. Commw. 119, 465 A.2d 102 (1983) (sewage rate ordinance that included expenses relating to repair and depreciation was permissible).
2. A "benefit assessment" is a charge imposed by a local government upon property owners to pay for municipal improvements which benefit the property. See 2 C. ANTIEAU, *supra* note 1, § 14.00, at 14-5; 14 E. MCQUILLIN, MUNICIPAL CORPORATIONS § 38.01, at 12 (3d ed. rev. 1987). This assessment may be apportioned among the owners of property according to the value of the property, the frontage of the property benefited by the public improvement, or the value of the benefits received by each property owner. See generally 14 E. MCQUILLIN, *supra*, §§ 38.121 to .133, at 345-86.
3. A "property tax" has been defined by the Maryland Court of Appeals as "a charge on the owner of property by reason of his ownership alone without regard to any use that might be made of it." *Weaver v. Prince George's County*, 281 Md. 349, 357, 379 A.2d 399, 403 (1977).
4. See generally 1987 ZONING AND PLANNING LAW HANDBOOK § 15.01, at 276-77 (N. Gordon ed. 1987).

lected before the improvements are constructed rather than after they are in service.⁵ Impact fees are imposed on every new house, condominium, apartment, or other dwelling unit in proportion to the impact the unit will make on the public infrastructure.⁶ An impact fee, at least in theory, represents the proportionate share of the capital costs of providing a municipal service to an individual dwelling unit or other consuming unit which begins using that service for the first time.⁷

Imposition of impact fees may be contrasted to the traditional capital financing method under which necessary funds are borrowed and the debt service costs are passed on to all customers or taxpayers through higher usage charges or taxes. Unlike these assessments, an impact fee is an up-front, one-time charge.⁸ In financing water supply or sewage collection and treatment facilities, for example, the impact fee (or "special connection charge," as it is usually called in this context) would be due and payable when the builder or developer applies for service. The impact fee is separate from, and imposed in addition to, the usual connection charges which are designed to recoup only the cost of making individual connections from a water or sewer main in the street to the property line of an abutting lot. After the unit is connected to the system it is also subject to taxes or usage charges.

Builders and developers are the hardest hit by impact fees because in most cases they must pay the charges up front without any assurance that they will be able to recoup their costs later through higher house or lot prices. Builders and developers in areas subject to impact fees may be at a competitive disadvantage if the price of their homes includes a substantial cost that does not appear in homes sold in other areas.⁹ For this reason, builders and developers historically have been opposed to

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5. For an excellent overview of impact fees, see Eveleth, *The Cost of Growth: Impact Fees*, MD. B.J., Mar.-Apr. 1988, at 16; see also Morgan, Duncan, McClendon & Standerfer, *Drafting Impact Fee Ordinances: Legal Foundation for Exactions*, 9 ZONING & PLAN. L. REP., July-Aug. 1986, at 49; Juergensmeyer & Blake, *Impact Fees: An Answer to Local Governments' Capital Funding Dilemma*, 9 FLA. ST. U.L. REV. 415 (1981).
 6. See Eveleth, *supra* note 5, at 17; Samuel, *Impact Fees a Step Closer in Arundel*, The Daily Record, Sept. 9, 1986, at 1, col. 4 (reporting Anne Arundel County's proposed impact fees).
 7. See Eveleth, *supra* note 5, at 17. Impact fees may also be assessed to an existing development which is expanding its use of municipal services. See, e.g., ANNE ARUNDEL COUNTY CODE art. 24, § 7-103(B) (1988).
 8. See Eveleth, *supra* note 5, at 17.
 9. Dr. James Nicholas, an associate director of growth management studies at the University of Florida's Holland School of Law (and a national authority on impact fees), has argued that "[i]mpact fees do not lead to higher prices for new home buyers" because, "in general, developers have absorbed the cost of impact fees by taking a lower profit, and have not passed them along to the home buyer." Samuel, *Impact Fees a Step Closer In Arundel*, The Daily Record, Sept. 9, 1986, at 1, col. 4 (reporting Dr. Nicholas' remarks to a conference of the Maryland chapter of the American Planning Association).

impact fees.¹⁰

The purpose of this article is to examine the principal legal issues associated with impact fees in Maryland. Because builders, developers or new residents may file suit to prevent the imposition of impact fees, government officials and their counsel should consider and resolve the arguments that may be raised in such a challenge before implementing an impact fee program. Each issue must be analyzed within the legal framework established by the general and local laws applicable to whatever county, municipal corporation, or other governmental body seeks to use the impact fee financing method; what is true for one county or municipal corporation may not be true for another.

This article will attempt to identify and analyze the most significant issues that have been addressed in Maryland and other jurisdictions regarding impact fees. The important areas of analysis are: (1) the statutory authority to impose impact fees, (2) the reasonableness of impact fees, (3) restrictions on the use of impact fees, (4) fifth amendment "takings" challenges to impact fees, and (5) fourteenth amendment equal protection challenges to impact fees.

II. STATUTORY AUTHORITY FOR IMPACT FEES

Because counties, municipal corporations, and other local governmental bodies are creatures of the state, they can exercise only those powers delegated to them by the Maryland General Assembly.¹¹ They cannot charge impact fees, therefore, unless they have been authorized to do so by statute. Maryland courts have been strict in construing the extent of local governmental bodies' powers to raise revenues. For example, in *Washington Suburban Sanitary Commission v. C.I. Mitchell & Best Co.*,¹² one of two Maryland appellate decisions involving impact fees, the Court of Appeals of Maryland held that the Washington Suburban Sanitary Commission ("WSSC") lacked the statutory authority to impose a special connection charge known as the System Expansion Offset Charge ("Offset Charge").¹³ WSSC had been collecting the Offset Charge from developers to finance a substantial portion of the long-term debt service costs resulting from WSSC's expansion of its water and

10. See, e.g., Wheeler, *Lines Forming In Arundel To Blast "Impact Fee" Plan*, Baltimore Evening Sun, Apr. 16, 1987, at C6, col. 4.

11. See *Nevenschwander v. Washington Suburban Sanitary Comm'n*, 187 Md. 67, 74, 48 A.2d 593, 597 (1946) (municipal corporations are creatures of the State and are subject to the absolute control of the legislature); *Baltimore v. State*, 15 Md. 376, 462 (1860) (counties are created by and subject to the control of the legislature).

12. 303 Md. 544, 495 A.2d 30 (1985). For a discussion of another aspect of the case, see *infra* text accompanying notes 86-87.

13. *C.I. Mitchell & Best Co.*, 303 Md. at 563-71, 495 A.2d at 39-44. The Washington Suburban Sanitation Commission ("WSSC") was created by the legislature to provide for construction, operation and maintenance of sewer and water service in the Washington Suburban Sanitary District, comprising most of Prince George's and Montgomery Counties. See generally MD. ANN. CODE art. 29, §§ 1-102, 3-101 to -301 (1986 & Supp. 1988).

sewer systems to accommodate new development.¹⁴ The court held that because WSSC is a public corporation created by an Act of the General Assembly¹⁵ it must have specific statutory authority for its rates and charges.¹⁶ WSSC's enabling statute identifies only three possible revenue sources for payment of WSSC's debt service — ad valorem taxes,¹⁷ front-foot benefit charges,¹⁸ and usage charges.¹⁹ The court concluded that the Offset Charge was not one of those authorized sources and was therefore invalid.²⁰

In *Northampton Corp. v. Washington Suburban Sanitary Commission*,²¹ on the other hand, the Maryland Court of Appeals found authority for WSSC's Interim Sewer Service Charge ("Interim Charge"), a one-time charge imposed on new sewer connections to fund the construction of three "interim" sewage treatment plants.²² Because existing treatment facilities were overburdened, the state health department had imposed a moratorium on new sewer connections and had directed WSSC to expand its sewage treatment facilities.²³ WSSC designed the interim plants as a temporary solution until permanent facilities could be built. The court held that WSSC had statutory authority to impose the Interim Charge because it was designed to satisfy an "extraordinary expense."²⁴

The distinction between the two cases is that the Interim Charge funds were used directly to finance the construction of interim facilities which were required to cure an extraordinary problem, but the Offset Charge proceeds were used to pay debt service on municipal bonds issued for routine financing of the construction of permanent facilities.

Although impact fees were not involved in *Baltimore County v. Security Mortgage Corp.*,²⁵ the decision of the court of appeals strongly suggests that a county has no power to impose impact fees without specific authorization from the General Assembly. The court held that Baltimore County could not force a developer to contribute to the cost of a

14. *C.I. Mitchell & Best Co.*, 303 Md. at 569-70, 495 A.2d at 43.

15. Act of April 10, 1918, ch. 122, 1918 Md. Laws 248 (codified as amended at MD. ANN. CODE art. 29 (1986 & Supp. 1988)).

16. *C.I. Mitchell & Best Co.*, 303 Md. at 564, 495 A.2d at 39-40.

17. MD. ANN. CODE art. 29, § 4-105(a) (1986).

18. *Id.* §§ 4-107, 5-101 to -109 (1986 & Supp. 1988).

19. *Id.* §§ 4-106, 4-110(d).

20. *C.I. Mitchell & Best Co.*, 303 Md. at 569, 495 A.2d at 42. Nevertheless, the court held that WSSC need not refund any amounts collected under the Offset Charge because the plaintiffs had paid the charge "voluntarily," within the meaning of Maryland's stringent voluntary payment rule, rather than seeking an injunction prohibiting its imposition while the litigation was pending. *Id.* at 571-78, 495 A.2d at 44-47.

21. 278 Md. 677, 366 A.2d 377 (1976). For a discussion of another aspect of the case, see *infra* text accompanying notes 106-07.

22. *Northampton Corp.*, 278 Md. at 680-82, 366 A.2d at 379-80.

23. *Id.* at 680, 366 A.2d at 379.

24. *Id.* at 683, 366 A.2d at 380-81 (quoting section 6-1(b) of the Washington Suburban Sanitary District Code, MD. ANN. CODE art. 29, § 6-101(b) (1986 & Supp. 1988)).

25. 227 Md. 234, 175 A.2d 755 (1961).

bridge that had to be built to handle the increased traffic his development would generate but which would be located outside of the development. The court explained:

A [county] in the absence of an enforceable contract or statutory authority cannot, as a prerequisite to approval of a subdivision plat, require a developer or owner to defray the cost and expense of land improvements which lie beyond the owner or developer's property and are located on land owned by others.²⁶

If a particular impact fee is designed to force developers to pay for off-site improvements required to serve their developments, the reasoning of this decision would apply with equal force to the imposition of such an impact fee.²⁷

A. *Counties' Authority to Impose Impact Fees*

Maryland is divided into twenty-three counties which fall into three categories: county commissioner counties,²⁸ code counties,²⁹ and charter counties.³⁰ Counties comprising the latter two categories have certain home-rule powers, with charter counties being more autonomous. Article 25 of the Maryland Annotated Code sets forth the general³¹ and enumerated³² powers of county commissioner counties. Because article 25 does not confer general authority to impose impact fees, county commissioner counties must seek specific authorization from the General Assembly. The General Assembly has authorized five commissioner counties to impose impact fees: St. Mary's,³³ Charles,³⁴ Carroll,³⁵ Calvert,³⁶ and

26. *Id.* at 239, 175 A.2d at 757.

27. It may be argued, however, that *Security Mortgage* is of limited importance because the court did not discuss Baltimore County's home-rule powers. A proper county ordinance might have led to a different result in the case.

28. There are eleven county commissioner counties: Calvert, Carroll, Cecil, Charles, Dorchester, Frederick, Garrett, Queen Anne's, St. Mary's, Somerset, and Washington.

29. There are four code counties: Allegany, Caroline, Kent, and Worcester.

30. There are eight charter counties: Anne Arundel, Baltimore, Harford, Howard, Montgomery, Prince George's, Talbot, and Wicomico. Baltimore City also has a charter form of government. For a more detailed discussion of the differing forms of county government, see Moser, *County Home Rule - Sharing the State's Legislative Power with Maryland Counties*, 28 MD. L. REV. 327 (1968).

31. MD. ANN. CODE art. 25, § 1 (1987)

32. *Id.* § 3 (1987 & Supp. 1988).

33. St. Mary's County has statutory authority to impose what may be the functional equivalent of impact fees. See Act of May 31, 1974, ch. 814, 1974 Md. Laws 2729 (codified as amended at MD. ANN. CODE art. 25, § 10D-1 (1987)) (authorizing collection of "building permit fees" to defray the cost of "additional educational, water, sewage, road, sanitation, or similar facilities").

34. Act of May 21, 1973, ch. 642, 1973 Md. Laws 1291 (codified as amended at MD. ANN. CODE art. 66B, § 5.08 (1988)) (authorizing collection of a fee to "compensate the county for the burden the development will impose in terms of the additional public facilities which will have to be provided . . .").

Queen Anne's.³⁷

Code counties have been given limited home rule powers. Under article XI-F of the Maryland Constitution they may enact, amend, or repeal their own "public local laws."³⁸ Article 25B of the Maryland Code sets forth the powers of code counties,³⁹ and within those areas the General Assembly may not legislate for the county, except by general enactments applicable to all code counties.⁴⁰ Under the Maryland Constitution, however, a code county may not levy any type of new tax or fee without the express authorization of the General Assembly in the form of a general law for all code counties.⁴¹ The General Assembly has not authorized code counties to impose impact fees.

Charter counties have the greatest degree of local autonomy. Article XI-A of the Maryland Constitution directs the General Assembly to provide a grant of express powers to charter counties.⁴² The Express Powers Act⁴³ delegates more than thirty different areas of power to the charter counties.

None of those provisions, however, authorizes the imposition of impact fees. Section 5(O) of the Express Powers Act confers tax and assessment powers on charter counties.⁴⁴ Despite the relative breadth of section 5(O), the courts have held that the General Assembly granted to charter counties only "limited taxing power."⁴⁵ In *Montgomery County v. Maryland Soft Drink Association*,⁴⁶ neither the court of appeals nor Montgomery County challenged the Soft Drink Association's contention that section 5(O) granted the power to levy only ordinary taxes, i.e.,

35. Act of April 14, 1987, ch. 108, 1987 Md. Laws 536 (codified at MD. ANN. CODE art. 25, § 9F (Supp. 1988)) (authorizing collection of "development impact fees for financing . . . the capital costs of additional or expanded public works. . .").

36. Act of May 14, 1987, ch. 326, 1987 Md. Laws 1895 (codified at MD. ANN. CODE art. 25, § 9G (Supp. 1988)) (authorizing collection of "development impact fees for financing . . . the capital costs of additional or expanded public works. . .").

37. Act of May 17, 1988, ch. 410, 1988 Md. Laws 3132 (codified at MD. ANN. CODE art. 25, § 9H (Supp. 1988)) (authorizing collection of "development impact fees for financing . . . the capital costs of additional or expanded public works. . ."). Legislation which would have authorized Washington County to impose impact fees was introduced at the 1988 session of the General Assembly as House Bill No. 166 but did not pass.

38. MD. CONST. art XI-F, § 3. A "public local law" is a law "applicable to the incorporation, organization, or government of a code county and contained in the county's code of public local laws." *Id.* § 1.

39. MD. ANN. CODE art. 25B, § 13 (1987).

40. MD. CONST. art. XI-F, § 4.

41. *Id.* § 9.

42. MD. CONST. art. XI-A, § 2.

43. MD. ANN. CODE art. 25A, § 5 (1987 & Supp. 1988).

44. *Id.* § 5(O).

45. *Reinhardt v. Anne Arundel County*, 31 Md. App. 355, 373, 356 A.2d 917, 927 (1976) (emphasis in original) (quoted in *Montgomery County v. Maryland Soft Drink Ass'n*, 281 Md. 116, 130, 377 A.2d 486, 494 (1977)); see also *Montgomery Bd. of Realtors v. Montgomery County*, 287 Md. 101, 107, 411 A.2d 97, 100 (1980) (section 5(O) "appears to grant no general taxing power").

46. 281 Md. 116, 377 A.2d 486 (1977).

property taxes. The Maryland Attorney General has also concluded that the Express Powers Act confers the power to levy only property taxes.⁴⁷ An impact fee may or may not be construed to be a tax. If it is not a tax, it clearly falls outside the scope of section 5(O). But even if the impact fee is considered a tax, it is definitely not a property tax, which the court of appeals has defined as "a charge on the owner of property by reason of his ownership alone without regard to any use that might be made of it."⁴⁸ Therefore, impact fees are not specifically authorized by the Express Powers Act.

An individual charter county's ability to impose impact fees may be further limited by section four of article XI-A of the Maryland Constitution. Section four prohibits the General Assembly from legislating within those "subjects covered by" the Express Powers Act except by general laws that apply to two or more counties.⁴⁹ In *Maryland Soft Drink Association*, the court of appeals found that for purposes of article XI-A, "the entire subject of taxation is not 'covered' by the Express Powers Act."⁵⁰ The *Maryland Soft Drink Association* case involved the constitutionality of chapter 808 of the Maryland Laws of 1963, which authorized Montgomery County to exercise "in addition to any and all taxing powers heretofore granted by the General Assembly, the power to tax to the same extent as the state," with certain enumerated exceptions.⁵¹ As noted above, the court held that the Express Powers Act granted a very limited taxing power.⁵² The broad taxing powers conferred by chapter 808 thus were not restricted by being a "subject covered by" the Express Powers Act. It was therefore appropriate for the General Assembly to enact chapter 808 as a local law applicable only to Montgomery County.

The *Maryland Soft Drink Association* court also cited with approval *Reinhardt v. Anne Arundel County*.⁵³ In *Reinhardt*, the court of special appeals examined the constitutionality of section 411C of article 81 of the Maryland Annotated Code.⁵⁴ Section 411C conferred upon Anne Arundel County the authority to levy sales or use taxes on fuels, utilities, and telephone service.⁵⁵ Noting that in enacting the Express Powers Act, the General Assembly "did not surrender its right to enact local legislation in areas not included within the Express Powers Act's grant of taxing power," the court found that section 411C was a valid local law applica-

47. 61 Op. Att'y Gen. 202 (1976).

48. *Weaver v. Prince George's County*, 281 Md. 349, 357, 379 A.2d 399, 403 (1977).

49. MD. CONST. art. XI-A, § 2.

50. *Maryland Soft Drink Ass'n*, 281 Md. at 130, 377 A.2d at 494.

51. Act of May 6, 1963, ch. 808, 1963 Md. Laws 1703 (codified at MONTGOMERY COUNTY CODE § 52-17 (1984)).

52. See *supra* text accompanying note 50.

53. 31 Md. App. 355, 356 A.2d 917, cert. denied, 278 Md. 731 (1976).

54. MD. ANN. CODE art. 81, § 411C (1980).

55. *Id.*

ble only to Anne Arundel County.⁵⁶ Thus, the court concluded that the subject of use and sales taxes was not "covered by" the Express Powers Act.⁵⁷

If impact fees are not considered to be a tax of any sort, then they are clearly not within a "subject covered by" the Express Powers Act, and the General Assembly can enact a local law applicable to only one charter county empowering the county to impose such a fee. Even if the fee is construed as a special tax, *Maryland Soft Drink Association and Reinhardt* strongly suggest that because it is not an ordinary tax within a "subject covered by" the Express Powers Act, the Act does not limit the General Assembly's authority to enable a specific charter county to impose the fee.

Accordingly, impact fees are not within a "subject covered by" the Express Powers Act, and the Maryland Constitution does not prohibit the General Assembly from authorizing one charter county to impose impact fees under a public local law.⁵⁸ Anne Arundel County received authorization in 1986.⁵⁹ No other charter county has sought such authority.

B. Municipal Corporations' Authority To Impose Impact Fees

Under the Maryland constitution a municipal corporation must have the "express authorization of the General Assembly" before it can impose any type of new tax or fee.⁶⁰ The authorization must be in the form of a general law applicable to every municipal corporation in the state, rather than a special or local law applicable to a particular municipal corporation.⁶¹ The Attorney General of Maryland has concluded that the General Assembly has expressly authorized all municipal corpo-

56. *Reinhardt*, 31 Md. App. at 373, 356 A.2d at 927.

57. *Id.* Further support for the proposition that the Express Powers Act "covers" only a limited "subject" as to taxation comes from a Maryland Attorney General Opinion on House Bill No. 990 which was introduced at the 1976 General Assembly. 61 Op. Att'y Gen. 202 (1976). House Bill No. 990, if enacted, would have applied to Anne Arundel County alone and would have required the county to impose a "differential tax rate" on Annapolis residents. The Attorney General found nothing in the bill "to suggest that it relat[ed] to [anything] other than property taxes." *Id.* at 203. Because House Bill No. 990 related to a subject covered by the Express Powers Act — property taxes — the Bill, if enacted, would have violated the local law prohibition of article XI-A, section 4.

58. Section 9 of article XI-F of the Maryland Constitution, which prevents the General Assembly from empowering a single code county to impose fees or taxes, has no counterpart in article XI-A. See *supra* text accompanying note 41; see also 64 Op. Att'y Gen. 296 (1979).

59. Act of May 13, 1986, ch. 350, 1986 Md. Laws 1365 (codified at ANNE ARUNDEL COUNTY CODE art. 24, § 7-113 (1988)) (authorizing the county to impose "development impact fees" to finance "the capital costs of additional or expanded public works, improvements, and facilities required to accommodate new construction or development").

60. MD. CONST. art. XI-E, § 5.

61. *Id.* The Maryland Constitution requires only that the general law apply to all municipal corporations within a particular class, as defined by the General Assembly.

rations to impose impact fees for certain purposes.⁶² That authorization is found in section 2(b)(33)(ii) of article 23A of the Maryland Annotated Code, which empowers municipal corporations "to establish and collect reasonable fees and charges . . . [a]ssociated with the exercise of any governmental or proprietary function authorized by law to be exercised by a municipal corporation."⁶³

The Attorney General's opinion was written in response to a question about an impact fee proposal in Ocean City. The Governor had announced plans for a beach restoration project to counteract the accelerated erosion of the shoreline caused by extensive development in Ocean City.⁶⁴ Legislation was proposed to create an "Ocean Beach Replenishment Fund" with appropriations from the State Treasury.⁶⁵ Ocean City and Worcester County were required to provide at least half of the money needed for any projects other than land acquisition.⁶⁶ Ocean City proposed to impose an impact fee on all new development and requested the Attorney General's opinion on the legality of the proposal.⁶⁷

The Attorney General reviewed the "express authorization" requirement of the Maryland Constitution⁶⁸ and concluded that "Article 23A, [section] 2(b)(33)(ii) does constitute sufficiently express authorization" for the proposed impact fees.⁶⁹ Section 2(b)(33) was enacted by the General Assembly in 1981 as "emergency" legislation⁷⁰ to reverse the effect of a court of appeals decision⁷¹ that "sharply curtailed the power of municipalities to license and impose fees upon various activities."⁷² The General Assembly intended to "restore to municipal corporations the broad authority 'heretofore thought to exist' to levy fees and charges in connection with their lawful powers."⁷³ According to the Attorney Gen-

Id. The General Assembly, however, has determined that all municipal corporations are in the same class. MD. ANN. CODE art. 23A, § 10 (1987).

62. 71 Op. Att'y Gen. 87, 89 (1986).

63. MD. ANN. CODE art. 23A, § 2(b)(33)(ii) (1987 & Supp. 1988).

64. 71 Op. Att'y Gen. at 88.

65. See H.B. 472, § 1 (1986) (proposing new sections 8-1105.2 and 8-1105.3 of the Natural Resources Article); S.B. 272, § 1 (1986) (same).

66. See H.B. 472, § 1 (1986) (proposing new sections 8-1105.2(H)(2), (I)(1) of the Natural Resources Article); S.B. 272, § 1 (1986) (same).

67. 71 Op. Att'y Gen. at 88.

68. MD. CONST. art. XI-E, § 5.

69. 71 Op. Att'y Gen. at 89.

70. Act of May 19, 1981, ch. 565, 1981 Md. Laws 2299.

71. See *Campbell v. City of Annapolis*, 289 Md. 300, 424 A.2d 738 (1981). *Campbell* involved the issue of whether a license fee imposed by the City of Annapolis upon owners of residential rental units was valid in light of the restrictions contained in section five of article XI-E of the Maryland Constitution. *Id.* at 301, 424 A.2d at 739. Finding that the licensing fee was not expressly authorized by the General Assembly, the court concluded that the fee, whether intended for regulatory or revenue-raising purposes, was prohibited by section five of article XI-E. *Id.* at 306-12, 424 A.2d at 742-44.

72. 71 Op. Att'y Gen. at 90.

73. 67 Op. Att'y Gen. 307, 310 (1982) (quoting Bill Review Letter from Stephen H. Sachs, Attorney General, to Harry Hughes, Governor (May 14, 1981)).

eral, the restoration of the beach at Ocean City was an "appropriate governmental function" within the requirement of section 2(b)(33)(ii).⁷⁴ Therefore, the Attorney General concluded that Ocean City had statutory authorization to impose the impact fees.⁷⁵

Ironically, the Express Powers Act⁷⁶ contains no similar provision authorizing charter counties or code counties to impose impact fees. Hence there exists the anomalous situation in which Maryland's smallest municipal corporations may impose impact fees for certain purposes, while some of the largest and most autonomous counties in the state may not.

C. *General Authority to Impose Water & Sewer Impact Fees*

As the previous discussion demonstrates, local governments, whether a county, municipal corporation, or sanitary district, presently possess only limited authority to impose impact fees. The General Assembly, however, has authorized the imposition of specific types of impact fees. For example, section 9-722 of the Environment Article of the Maryland Annotated Code authorizes all counties, sanitary districts, and municipal corporations to impose water and sewer impact fees ("special connection charges") to defray the debt service costs of expanding or improving their water and sewerage systems:

To provide funds for the payment of principal and interest on indebtedness that is incurred to finance any water or sewerage system, a political subdivision [defined to include counties, municipal corporations, commissions, and districts] may: . . . [e]stablish a reasonable charge that is *not less than the actual cost*, payable to the political subdivision, *for connection* with a water or sewerage system⁷⁷

Many counties, including for example, Anne Arundel County⁷⁸ and Howard County⁷⁹ have imposed such charges. These "special connection charges" are imposed in addition to the standard connection charges which cover the cost of connecting individual lots to the water and sewer mains.

Additionally, section 9-656 of the Environment Article of the Maryland Annotated Code separately authorizes sanitary commissions to impose special connection charges like the Offset Charge. It provides as follows:

To pay the principal and interest on bonds issued under this

74. 71 Op. Att'y Gen. at 90.

75. *Id.* at 97.

76. MD. ANN. CODE art. 25A, § 5 (1987 & Supp. 1988).

77. MD. ENV'T CODE ANN. § 9-722(a)(1) (1987) (emphasis supplied).

78. See ANNE ARUNDEL COUNTY CODE art. 6, § 5-208(e) (1988) ("capital facility connection charge").

79. See HOWARD COUNTY CODE § 20.311 (1977) ("in-aid-of construction charge").

subtitle, a sanitary commission may set reasonable benefit assessments *and reasonable connection charges*. . . . [Such charges] shall be equal *at least to the cost of making the connection* between a water system or sewerage system and the property served by that system.⁸⁰

D. Implied Authority Doctrine

If a governmental body lacks specific statutory authority for imposing impact fees, it may argue that it has implied authority to impose them under "Dillon's Rule." That rule provides that municipal corporations have the following powers: "those granted in *express words*; . . . those *necessarily or fairly implied* in, or *incident* to, the powers expressly granted; . . . [and] those *essential* to the declared objects and purposes of the corporation — not simply convenient, but indispensable."⁸¹ Variants of this rule have been applied to counties,⁸² municipal corporations,⁸³ state agencies,⁸⁴ and other governmental entities.⁸⁵

In *Washington Suburban Sanitary Commission v. C.I. Mitchell & Best Co.*,⁸⁶ the court of appeals rejected WSSC's argument that it had the implied power to impose the Offset Charge. *Express* provisions in WSSC's governing statute limited the revenue sources for the payment of debt service to ad valorem taxes, front-foot benefit charges, and sewer and water user charges.⁸⁷ Were there no specific statutory provisions supporting alternative revenue sources, the implied power argument would, of course, be far stronger.

III. THE REASONABLENESS OF IMPACT FEES

A. Reasonableness In Principle

Although the issue has not yet extensively been discussed by the Maryland courts, the implicit reasonableness of impact fees has been up-

80. MD. ENV'T CODE ANN. § 9-656(a)(1), (b)(1) (1987) (emphasis supplied).

81. J. DILLON, MUNICIPAL CORPORATIONS, § 173 (2d ed. 1873), *reprinted in* 1 C. ANTI-ETEAU, MUNICIPAL CORPORATION LAW, § 3.01, at 97 (1968) (emphasis in original).

82. *See, e.g.*, *Howard County v. Matthews*, 146 Md. 553, 561, 121 A.2d 118, 121 (1924) (authority given to county commissioners to contract for the construction of roads necessarily implied the power to complete construction in case of default by contractors).

83. *See, e.g.*, *Montgomery County v. Maryland-Washington Metropolitan Dist.*, 202 Md. 293, 304-06, 96 A.2d 353, 358-59 (1953) (municipal corporation has implied power to convey real estate held in proprietary capacity).

84. *See, e.g.*, *West v. Philadelphia, B. & W. R.R.*, 155 Md. 104, 114, 141 A. 509, 514 (1928) (Public Service Commission has such implied powers as are necessary to enable it to exert its express powers).

85. *See, e.g.*, *Smith v. Edwards*, 292 Md. 60, 72-73, 437 A.2d 221, 227 (1981); *Barlow v. Friendship Heights Comm.*, 276 Md. 89, 94-95, 344 A.2d 415, 418 (1975) (both recognizing implied powers of the Friendship Heights Citizens Committee).

86. 303 Md. 544, 495 A.2d 30 (1985); *see supra* text accompanying notes 12-20.

87. *C.I. Mitchell & Best Co.*, 303 Md. at 571, 495 A.2d at 43-44.

held by many courts in other jurisdictions. In *Contractors & Builders Association v. City of Dunedin*,⁸⁸ for example, the Supreme Court of Florida acknowledged the reasonableness of an impact fee imposed on new users of a water and sewerage system to defray the cost of expanding the facilities.⁸⁹ The court explained:

In principle . . . we see nothing wrong with transferring to the new user of a municipally owned water or sewer system a fair share of the costs new use of the system involves.

* * *

Raising expansion capital by setting connection charges, which do not exceed a *pro rata* share of reasonably anticipated costs of expansion, is permissible where expansion is reasonably required, *if use of the money collected is limited to meeting the costs of expansion*. Users 'who benefit especially, not from the maintenance of the system, but by the extension of the system . . . should bear the cost of that extension.'⁹⁰

The court rejected the argument that capital costs could be satisfied only by borrowing the necessary funds and then recovering the debt service costs through usage rates:

We see no reason to require that a municipality resort to deficit financing, in order to raise capital by means of utility rates and charges. On the contrary, sound public policy militates against any such inflexibility. It may be a simpler technical task to amortize a known outlay, than to predict population trends and the other variables necessary to arrive at an accurate forecast of future capital needs. But raising capital for future use by means of rates and charges may permit a municipality to take advantage of favorable conditions, which would alter before money could be raised through issuance of debt securities. . . .⁹¹

Courts in at least seven other states have approved the legality and propriety of impact fees for water and sewer facilities under the particular statutes and ratemaking methodologies involved.⁹²

88. 329 So. 2d 314 (Fla. 1976).

89. *Id.* at 317-20. The court, however, held that the impact fee ordinance was invalid because it did not properly restrict the use of the proceeds of the impact fees. *Id.* at 321; *see also infra* notes 108-113 and accompanying text.

90. *Contractor's & Builders Ass'n*, 329 So. 2d at 317-18, 320 (emphasis in original) (footnote omitted) (quoting *Hartman v. Aurora Sanitary Dist.*, 117 N.E.2d 214, 218 (Ill. 1961)).

91. *Id.* at 319-20 (footnote omitted).

92. *See, e.g.*, *Longridge Estates v. City of Los Angeles*, 183 Cal. App. 2d 533, 6 Cal. Rptr. 900 (1960) (upholding a sewer charge on new subdivisions to pay their share of the cost of sewer expansion); *Spalding v. Granite City*, 415 Ill. 274, 113 N.E.2d 567 (1953) (upholding a charge on new users to finance extension of a municipal sewerage system by new users); *Heinrich v. City of Moline*, 59 Ill. App. 3d 278, 375 N.E.2d 572 (1978) (upholding tap-in fees for connection to water and sewer lines); *City of Pontiac v. Mason*, 50 Ill. App. 3d 102, 365 N.E.2d 145 (1977) (upholding a

B. *The Reasonableness of an Impact Fee Formula*

The standard which emerges from cases assessing the reasonableness of an impact fee formula is that a governmental body must make an effort to establish parity between current residents and the future residents upon whom the impact fees will be imposed. It may not impose the *entire* cost of new facilities on new residents unless it can show that *only* they will benefit from the facilities. New customers may not be required to make more than a "fair contribution" toward the cost of new facilities which will be shared by others.⁹³

In *Jordon v. Village of Menomonee Falls*,⁹⁴ the Supreme Court of Wisconsin developed a two-part "rational nexus" test for judging the reasonableness of impact fees. The court held that (1) there must be a "reasonable connection" between the need for the additional facilities financed by the impact fees and the growth generated by the new subdivision that will pay them; and (2) the impact fee proceeds must be expended for the "substantial benefit" of the new subdivision.⁹⁵ The second component requires only that the use of the proceeds be "reasonably related" to the needs of the new subdivision and not that the new subdivision be the *only* beneficiary of the new facilities. Applying that test, the court upheld an impact fee ordinance designed to finance new schools and recreational facilities.⁹⁶

In *Howard County v. JJM, Inc.*,⁹⁷ the Court of Appeals of Maryland applied a similar standard in a related context. The court held that a county ordinance requiring a developer to reserve a right-of-way in a subdivision for a proposed state road would create an unconstitutional taking of the developer's property without compensation because there was no "reasonable nexus" between the need for the highway and the

connection charge assessed against new users to recoup the capital costs of expanding a water and sewer system); *Marriott v. Springfield Sanitary Dist.*, 43 Ill. App. 3d 869, 357 N.E.2d 666 (1976) (upholding the assessment of connection charges against new users of a sewer system to finance expansion); *Brandel v. Civil City of Lawrenceburg*, 249 Ind. 47, 230 N.E.2d 778 (1967) (upholding a charge for connection to a new portion of a sewerage system); *Englewood Hills, Inc. v. Village of Englewood*, 14 Ohio App. 2d 195, 237 N.E.2d 621 (1967) (upholding tap-in charges to pay for the cost of future expansion of sewer and water facilities); *Hayes v. City of Albany*, 7 Or. App. 277, 490 P.2d 1018 (1971) (upholding a special connection charge to fund construction and expansion of a sewer system); *Van Voorhis v. Peters Creek Sanitary Auth.*, 60 Pa. Commw. 51, 430 A.2d 1017 (1981) (upholding tapping fees as a proper means of financing a sewer construction project); *Home Builders Ass'n v. Provo City*, 28 Utah 2d 402, 503 P.2d 451 (1972) (upholding as "reasonable and nondiscriminatory" a connection fee for new users to provide funds to improve and enlarge a sewer system).

93. *Airwick Indus., Inc. v. Carlstadt Sewerage Auth.*, 57 N.J. 107, 270 A.2d 18 (1970), *appeal dismissed, cert. denied*, 402 U.S. 967 (1971).

94. 137 N.W.2d 442 (Wis. 1966).

95. *Id.* at 447-48.

96. *Id.* at 448.

97. 301 Md. 256, 482 A.2d 908 (1984).

new subdivision.⁹⁸

In *Banberry Development Corp. v. South Jordan City*,⁹⁹ the Supreme Court of Utah identified seven factors to be considered in evaluating the reasonableness of an impact fee formula: (1) the cost of existing capital facilities; (2) the manner of financing existing capital facilities (such as user charges, special assessments, bonded indebtedness, general taxes, or federal grants); (3) the relative extent to which newly developed properties as well as other properties in the municipality have already contributed to the cost of existing capital facilities (by such means as property taxes and special assessments); (4) the relative extent to which the newly developed properties and other properties in the municipality will contribute to the cost of existing capital facilities in the future (by payment of uniform user charges); (5) the extent to which the newly developed properties are entitled to a credit because the municipality is requiring the developers or owners (by contractual arrangement or otherwise) to provide common facilities (inside or outside the proposed development) that have been provided by the municipality and financed through general taxation or other means in other parts of the municipality; (6) the extraordinary costs, if any, of providing service to the newly developed properties; and (7) the time-price differential inherent in fair comparisons of amounts paid at different times.¹⁰⁰ The *Banberry* approach is a sound analytical model and should be considered when determining the reasonableness of impact fee formulas.

No Maryland appellate court has yet ruled on the reasonableness of an impact fee formula; however, in the unreported decision of the Circuit Court for Montgomery County in the Offset Charge case,¹⁰¹ Judge William C. Miller adopted the "fair contribution" approach of *Banberry* and found that WSSC's Offset Charge was unreasonably calculated. According to Judge Miller, the Offset Charge was based on hypothetical conditions and did not reflect the extent to which existing users had benefited from state and federal grants to finance the construction of WSSC's existing system.¹⁰²

Perhaps the most compelling evidence to support the reasonableness of an impact fee would be a rate study, especially one prepared by an independent expert before the charge is adopted. These rate studies, which are typically prepared by accounting firms, set forth the analytical bases for the charge and quantify the costs to be financed, so as to provide the counties with independent justification for the reasonableness of their particular impact fee.

98. *Id.* at 280-82, 482 A.2d at 920-21. For further discussion of the case, see *infra* text accompanying notes 130-32.

99. 631 P.2d 899 (Utah 1981).

100. *Id.* at 903.

101. See *supra* notes 86-87 and accompanying text.

102. *C.I. Mitchell & Best Co. v. WSSC*, Equity No. 77016, Memorandum Opinion and Order (May 14, 1984), at 57-65, *aff'd in part and rev'd in part*, 303 Md. 544, 495 A.2d 30 (1985). The Court of Appeals of Maryland did not reach this issue.

C. *Standard of Review*

In determining whether an impact fee is reasonably calculated, a court should not substitute its own judgment for the judgment of the governmental body. As the Maryland Court of Appeals explained in upholding the City of Cumberland's water rate structure in *Lewis v. Cumberland*:¹⁰³

The courts are not managers of municipal utilities and have no ratemaking powers. . . . The question before [them] is not whether . . . rate ordinances embody the best possible classification of rates (which is not a judicial question), but whether the ordinance . . . is so unjustly discriminatory and therefore so clearly unreasonable that it is invalid.¹⁰⁴

The issue properly before a reviewing court is not whether it could devise some alternative to the governmental body's ratemaking determinations. Rather, the issue is (1) whether the rates or charges are illegal, arbitrary or capricious in any respect and, if not, (2) whether there is sufficient evidence of the reasonableness of those determinations to show that a reasoning mind could have come to the result reached by the governmental body.¹⁰⁵ The Maryland Court of Appeals implicitly applied this standard of review in *Northampton Corp. v. Washington Suburban Sanitary Commission*.¹⁰⁶ In *Northampton*, the court rejected the argument that the Interim Charge was unreasonably applied by WSSC, explaining that WSSC "must be allowed reasonable latitude" in making subclassifications of property and that its ratemaking decisions "should not be disturbed" in the "absence of a showing of arbitrariness or bad faith" ¹⁰⁷

IV. RESTRICTIONS ON THE USE OF IMPACT FEES

For an impact fee to be validly imposed, courts appear to require that the funds collected under such a program be specifically earmarked for the purpose for which the fee is imposed. For example, in *Contractors & Builders Association v. City of Dunedin*¹⁰⁸ the Supreme Court of Florida struck down an ordinance under which impact fees had been imposed because use of the proceeds was not properly restricted.¹⁰⁹ The court noted that:

103. 189 Md. 58, 54 A.2d 319 (1946).

104. *Id.* at 66, 69, 54 A.2d at 323, 324.

105. *See generally* *City of Annapolis v. Annapolis Waterfront Co.*, 284 Md. 383, 394-99, 396 A.2d 1080, 1087-89 (1979) (discussing the general standard of review for reviewing agency action).

106. 278 Md. 677, 366 A.2d 377 (1976); *see also supra* notes 21-24 and accompanying text.

107. *Northampton Corp.*, 278 Md. at 688, 366 A.2d at 384.

108. 329 So. 2d 314 (Fla. 1976).

109. *Id.* at 320-21.

The failure to include necessary restrictions on the use of the fund is bound to result in confusion, at best. City personnel may come and go before the fund is exhausted, yet there is nothing in writing to guide their use of these moneys, although certain uses, even within the water and sewer systems, would undercut the legal basis for the fund's existence. There is no justification for such casual handling of public moneys, and we therefore hold that the ordinance is defective for failure to spell out necessary restrictions on the use of fees it authorizes to be collected.¹¹⁰

In the circuit court decision in *C.I. Mitchell & Best Co.*, Judge Miller similarly found that WSSC had failed to adopt adequate guidelines restricting the use and handling of moneys collected under the Offset Charge and held the Offset Charge to be invalid for this reason.¹¹¹

Anne Arundel County resolved this concern for proper restriction of impact fees by creating Transportation and School Impact Fee Special Funds in the ordinance establishing its impact fee program.¹¹² Section 7-108 of the ordinance provides that impact fee proceeds "shall be deposited in the appropriate special fund to ensure that the fees and all interest accruing to the special fund are designated for improvements reasonably attributable to new development and are expended to reasonably benefit the new development."¹¹³

V. FIFTH AMENDMENT CONSIDERATIONS RESPECTING IMPACT FEES

The Supreme Court recently held in *Nollan v. California Coastal Commission*¹¹⁴ that certain land use regulations will, if challenged, be held to a strict standard of review to determine whether they cause a taking for which the fifth amendment requires compensation.¹¹⁵ This standard will likely be cited by litigants challenging impact fees as causing an unconstitutional taking. For example, a landowner who cannot obtain a building permit until he pays an impact fee may complain that the requirement unreasonably frustrates the use of his land and therefore constitutes a "taking" without just compensation.

110. *Id.* at 321.

111. *C.I. Mitchell & Best Co. v. WSSC*, Equity No. 77016, Memorandum Opinion and Order (May 14, 1984), at 65-68, *aff'd in part and rev'd in part*, 303 Md. 544, 495 A.2d 30 (1985).

112. See Anne Arundel County Bill No. 50-87, introduced July 20, 1987 and adopted August 5, 1987 (codified at ANNE ARUNDEL COUNTY CODE art. 24, §§ 7-101 to -113 (1988)).

113. ANNE ARUNDEL COUNTY CODE art. 24, § 7-108 (1988).

114. 107 S. Ct. 3141 (1987).

115. The fifth amendment provides in relevant part: "nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. The Supreme Court has held that the fifth amendment applies to the states through the due process clause of the fourteenth amendment. See, e.g., *Chicago, B. & Q. R.R. Co. v. Chicago*, 166 U.S. 226 (1897).

Nollan was brought by two California landowners who had been denied a permit to replace a run-down beach bungalow with a larger, three-bedroom house because they refused to grant an easement allowing the public to have lateral access across their beach.¹¹⁶ The California Coastal Commission had refused to issue the permit unless the Nollans would agree to grant the easement, reasoning that the new house would interfere with "visual access" and would create a "psychological barrier" to the public beaches.¹¹⁷ The Commission's objective was to ensure that the public could walk along the beach between a public park located north of the Nollans' property and a public beach south of the property.¹¹⁸ The Commission had imposed similar restrictions on forty-three other new development projects since 1979.¹¹⁹ The Nollans sued the Commission, arguing that the denial of an unconditional permit amounted to an unconstitutional taking of their property without compensation.

In a five-to-four decision written by Justice Scalia, the Supreme Court agreed with the Nollans, holding that a government cannot impose a restriction on a building permit unless the restriction substantially advances a legitimate state interest.¹²⁰ When the state imposes a condition on new development, the Court ruled, there must be a substantial "nexus" between that condition and some injury to the public interest caused by the development.¹²¹ Justice Scalia could not discern a substantial nexus between the alleged harm from development of the Nollans' property (e.g., blocking the public's view of the beach) and the award of additional *lateral* access rights across the beach behind the Nollans' house.¹²² Access to the beach was not substantially furthered by the permit's requirement of an easement *along* the beach. On the other hand, the Court specifically noted that it would have been constitutionally permissible to condition the permit on height restrictions, width restrictions, a ban on fences, or even the requirement that the Nollans provide a viewing spot on their property.¹²³

Four Justices, in three separate opinions, dissented in *Nollan*.¹²⁴ They contended that the majority's substantial nexus requirement improperly changed the traditional standard of measuring public actions, under which merely a "rational relationship" between the regulation and a public end must be identified.¹²⁵

116. *Nollan*, 107 S. Ct. at 3143.

117. *Id.* at 3143-44.

118. *Id.*

119. *Id.* at 3144.

120. *Id.* at 3150.

121. *Id.* at 3147-48.

122. *Id.* at 3149.

123. *Id.* at 3147-48.

124. *Id.* at 3150-62 (Brennan & Marshall, JJ., dissenting), 3162-63 (Blackmun, J., dissenting), 3163-64 (Stevens & Blackmun, JJ., dissenting).

125. *Id.* at 3151-54 (Brennan & Marshall, JJ., dissenting).

Nollan is thus properly viewed as a case turning on the appropriate standard of review to be applied in evaluating a governmental regulation. The majority decision holds that there must be a "close fit" or "substantial nexus" between the regulatory exaction and the condition created by the development. In a footnote, Justice Scalia asserted that the Court's prior decisions established that the standard for evaluating land use actions was not the same as that applied to due process or equal protection challenges to governmental actions.¹²⁶ According to Justice Scalia, the Court has required that a challenged land use regulation "substantially advance" the "legitimate state interest" sought to be achieved,¹²⁷ not that "the State 'could rationally have decided' that the measure adopted might achieve the State's objective,"¹²⁸ as Justice Brennan argued in his dissent.¹²⁹ Whatever the merits of this debate about the Court's prior decisions, *Nollan* makes clear that there will be a different standard of review in future cases.

The importance of *Nollan* to an analysis of impact fees is that it establishes a strict standard of review for challenged land use actions. In the future, this standard may be applied in a variety of contexts, including evaluation of whether an impact fee causes an unconstitutional taking.

Additionally, in *Nollan*, the Supreme Court cited with apparent approval the holding of the Maryland Court of Appeals in *Howard County v. JJM, Inc.*¹³⁰ In *JJM, Inc.*, the court held that the county's requirement that a developer reserve a right-of-way for a road in a subdivision was an unconstitutional taking of property without just compensation because there was no "reasonable nexus" between the exaction and the impact created by the subdivision.¹³¹ The Supreme Court suggested that the Maryland court's "reasonable nexus" standard was "consistent" with the test applied in *Nollan*.¹³² Thus, an advocate could argue that *Nollan* and *JJM, Inc.* together establish that impact fees must satisfy the strict standard of review applied in those cases. Unless impact fees meet this heightened standard, their imposition may violate the fifth amendment's prohibition against takings without just compensation.

VI. EQUAL PROTECTION IMPLICATIONS OF IMPACT FEES

It may be argued that the imposition of impact fees on new development only, and not on existing properties, would deny to new residents the "equal protection of the laws"¹³³ because they alone would pay for

126. *Id.* at 3147 n.3.

127. *Id.* (quoting *Agins v. Tiburon*, 447 U.S. 255, 260 (1980)).

128. *Id.* (quoting *Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 466 (1981)).

129. *Id.* at 3151. (Brennan & Marshall, JJ., dissenting).

130. 301 Md. 256, 280-82, 482 A.2d 908, 920-21 (1984) (cited in *Nollan*, 107 S. Ct. at 3149); see also *supra* text accompanying notes 98-99.

131. *JJM, Inc.*, 301 Md. at 282, 482 A.2d at 920-21.

132. *Nollan*, 107 S. Ct. at 3148-49.

133. U.S. CONST. amend. XIV, § 1.

public facilities which might be used by all residents. In his opinion addressing Ocean City's proposed beach restoration impact fee,¹³⁴ for example, the Attorney General of Maryland noted that the proposal raised equal protection concerns because "the purchasers or lessees of new development would ultimately pay all of Ocean City's share of the beach restoration project costs, even though many others would also benefit from the project."¹³⁵ He concluded, however, that the proposal "would more likely than not be sustained against an Equal Protection Clause challenge" because there was a rational basis supporting the city's impact fee plan.¹³⁶

The real question, according to the Attorney General, was how close a relationship is required between the impact of new development (measured by the increase in demand for community services) and the government expenditures to be financed by the impact fees.¹³⁷ Aware of no cases applying the rational basis test to impact fees, the Attorney General turned to analogous case law on special assessments. To avoid equal protection problems, assessments must be "levied against landowners in proportion to the benefit they receive through the public improvement."¹³⁸ Beyond this basic proportionality requirement, special assessments generally are presumed "valid and constitutional."¹³⁹ Municipalities have broad discretion to classify groups or properties that will be subject to assessments.¹⁴⁰

So broad is the discretion granted to municipal authorities that some special assessments have been upheld even though they were imposed disproportionately on new development.¹⁴¹ In those cases, according to the Attorney General, courts have held that new development may reach a point where certain public improvements become *necessary* instead of merely desirable.¹⁴² The impact on the public infrastructure justifies the disproportionate charges on the new development. "Otherwise put, courts have sometimes viewed new development as the final 'straw that broke the camel's back,' forcing the municipality to undertake public improvements it previously thought of as potentially beneficial but not immediately imperative."¹⁴³ The conclusion from these cases is that while proportionality is required between the benefit received from public im-

134. 71 Op. Att'y Gen. 87 (1986); see *supra* text accompanying notes 62-75.

135. 71 Op. Att'y Gen. at 90.

136. *Id.* at 87, 91.

137. *Id.* at 91.

138. *Id.* at 92.

139. *Id.* at 93.

140. *Id.*

141. *Id.*; see, e.g., *Ivy Steel & Wire Co. v. Jacksonville*, 401 F. Supp. 701, 705 (M.D. Fla. 1975); *Home Builders Ass'n v. Kansas City*, 555 S.W.2d 832, 835 (Mo. 1977); *Deerfield Estates, Inc. v. East Brunswick*, 60 N.J. 115, 286 A.2d 498 (1972); *Call v. West Jordan*, 614 P.2d 1257, 1258-59 (Utah 1980); *Jordan v. Menomonee Falls*, 28 Wis. 608, 137 N.W.2d 442 (1966).

142. 71 Op. Att'y Gen. at 93.

143. *Id.*

provements and the burden imposed on new development, strict equality is not required.¹⁴⁴

In *Northampton Corp. v. Washington Suburban Sanitary Commission*,¹⁴⁵ the Maryland Court of Appeals rejected an equal protection challenge to a special connection charge. Responding to a directive from the state health department, WSSC had planned to build three "interim" sewage treatment plants to expand WSSC's capacity until larger, permanent plants could be built.¹⁴⁶ To finance the construction of the interim facilities, WSSC resolved to impose an Interim Sewer Service Charge ("Interim Charge") on all new connections to the sewer system in the entire sanitary district until the permanent facilities had begun to operate.¹⁴⁷ A group of thirteen property owners filed suit to enjoin WSSC from collecting the Interim Charge. Among their contentions was that WSSC had violated their equal protection rights by making "arbitrary and unreasonable distinctions between members of the same class of property owners."¹⁴⁸ The basis of their argument was that under the Interim Charge plan: (1) current residents of the sanitary district would benefit from the interim facilities but were not required to pay the Interim Charge; (2) current residents converting from a private septic system to the public sewer system were required to pay only one-third of the Interim Charge; (3) trailer lots, churches, schools, and certain public buildings were required to pay only one-half of the normal Interim Charge for comparable business or commercial users; and (4) property owners building a new house on a vacant lot were required to pay the full Interim Charge.¹⁴⁹ The court summarily rejected the plaintiffs' equal protection argument without mentioning any need for proportionality between benefits received and burdens imposed. Instead, the court simply held that "the Commission must be allowed reasonable latitude in making these subclassifications, and that in the absence of bad faith . . . that part of its resolution should not be disturbed."¹⁵⁰

In *C.I. Mitchell & Best Co. v. Washington Suburban Sanitary Commission*,¹⁵¹ the Circuit Court for Montgomery County followed *Northampton* and rejected a similar equal protection challenge to WSSC's

144. *Id.* at 94.

145. 278 Md. 677, 366 A.2d 377 (1976). For a discussion of another aspect of the case, see *supra* text accompanying notes 21-24.

146. *Northampton Corp.*, 278 Md. at 680, 366 A.2d at 379.

147. *Id.*

148. *Id.* at 687, 366 A.2d at 383.

149. *Id.* at 688, 366 A.2d at 383.

150. *Id.* at 688, 366 A.2d at 384. Elsewhere in the opinion, the court implicitly conceded that the Interim Charge was analogous to a special assessment because the plaintiffs were "specially benefited by being permitted to make the sewer connections" which they had been denied previously. The fact that their particular properties would not be served by the interim facilities was inconsequential. *Id.* at 684, 366 A.2d at 381.

151. Equity No. 77016, Memorandum Opinion and Order (May 14, 1984), *aff'd in part, rev'd in part*, 303 Md. 544, 495 A.2d 30 (1985). For a discussion of other aspects of the case, see *supra* text accompanying notes 12-20 & 86-87.

Offset Charge.¹⁵² Under the Offset Charge plan, existing dwelling units converting from a private well and/or septic tank to the public water and/or sewer system were charged a lower fee than new dwelling units connecting to the public system.¹⁵³ The plaintiffs contended that the different classifications were not reasonably related to the Offset Charge's purpose of having new customers bear the cost of expanding the system.¹⁵⁴ WSSC argued that it was reasonable to give credit to residents who had invested in private facilities because their homes previously were not served by the public system.¹⁵⁵ The court cited *Northampton* and held that the Offset Charge rate classifications did not violate the plaintiffs' equal protection rights.¹⁵⁶

Courts in other states also have rejected equal protection challenges to impact fees. In *Ivy Steel & Wire Co. v. City of Jacksonville*,¹⁵⁷ for example, the imposition of a water pollution control charge solely on new development was upheld, even though existing landowners and others would benefit from pollution control as much as new residents. The court reasoned that imposing the fee on new development only was fair and proper because that development created the "immediate need" for the pollution control work.¹⁵⁸

It is quite unlikely that impact fees will be challenged successfully on equal protection grounds. If an impact fee passes the reasonableness test, discussed above, it will also necessarily meet the deferential "rational basis" standard used in evaluating equal protection challenges to economic regulations.¹⁵⁹

VII. PUBLIC UTILITY IMPACT FEE

At least one attempt has been made to apply the impact fee concept outside of the municipal context. In *In re Maryland Marine Utilities, Inc.*,¹⁶⁰ the Public Service Commission of Maryland considered the first impact fee to be proposed by an investor-owned public utility. Maryland Marine Utilities, Inc. provided water and sewer services in the Ocean Pines development in Worcester County.¹⁶¹ It sought authority to impose on all proposed dwelling units in its service territory, for which a

152. *C.I. Mitchell & Best Co.*, Memorandum Opinion and Order at 68-69.

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.* This part of the decision was left undisturbed on appeal.

157. 401 F. Supp. 701 (M.D. Fla. 1975).

158. *Id.* at 705.

159. Unless a classification affects fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion or alienage, the constitutionality of the distinction is presumed, and the challenged classification must only be shown to be "rationally related" to a legitimate state interest. *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976).

160. Order No. 67475, dated September 9, 1986, Case No. 7892, Public Service Commission of Maryland.

161. *Id.* at 2.

building permit had not yet been issued by the county, a one-time "Plant Expansion Charge" in the amount of \$1,340 to finance the expansion of a sewage treatment plant to serve those units.¹⁶² Ocean Pines was subject to a health department building moratorium because its existing sewage treatment plant was operating at capacity. The Commission rejected the charge principally because it represented a departure from the Commission's traditional ratemaking principle under which needed capital is loaned to or invested in a utility and the costs of securing that capital are passed on to all of a utility's ratepayers.¹⁶³ Public Service Commissioner William A. Badger dissented, arguing that the charge would more equitably assign the costs associated with the expansion of the treatment plant to the new residents who caused the need for, and would benefit from, the expansion.¹⁶⁴

VIII. CONCLUSION

Both the federal courts and courts in other states have held that impact fees, if reasonable and if properly applied, are a permissible means of raising funds for capital improvements so long as statutory authority for imposing the fees is present. In Maryland, statutory authority to impose impact fees depends upon the nature of the powers specifically granted to individual counties. At present, the smallest municipal corporations in the state are authorized to impose impact fees while the largest and most populous counties are not.

This anomaly should be corrected. The General Assembly should pass an enabling law giving all counties and municipal corporations the power to impose impact fees. Such a grant of power would not necessarily require every county and municipal corporation to finance capital improvements with impact fees, but the fees could be imposed should local officials determine that they are called for under the conditions prevailing in their jurisdiction.

Impact fees can achieve an appropriate allocation of the costs of providing capital improvements to the new residents who create the need for these improvements. If properly calculated and imposed, they represent a fair method of sharing the cost of public improvements among old and new residents. Uniform statewide authority to impose the fees is necessary if Maryland's local government officials are to have the flexibility they need to deal with the continuing fiscal challenges caused by decreasing federal and state revenue sharing and taxpayer opposition to paying higher local taxes. By giving local governments the means to pay for capital improvements in a fair and appropriate manner, impact fees allow development to go forward.

162. *Id.* at 1.

163. *Id.* at 5-8.

164. *Id.* at 4-9 (Commissioner William A. Badger, dissenting).