Impact Fees and Tapping Fees

Background Analysis and a Summary
of
Act 209 of 1990
House Bill 1361, Printer's No. 4295
and
Act 203 of 1990
House Bill 444, Printer's No. 3941

Local Government Commission
General Assembly of the Commonwealth of Pennsylvania
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The purpose of this briefing paper is to apprise Members of the General Assembly of the issues surrounding the imposition of impact fees and to provide a simple, objective analysis of House Bill 1361 (Act 209 of 1990). Also included is a brief summary of House Bill 444 (Act 203 of 1990), which creates a formal methodology in determining tapping fees for new water and sewer customers. As such, this document is in no way to be considered a legal opinion or an opinion of the Local Government Commission, its Members, or its staff. Rather, this summary has been prepared with the objective of providing Members with needed information on these important local government topics.

I. IMPACT FEES

Act 209 provides specific statutory authority for municipalities to impose impact fees. Only those impact fees authorized by the Act are permitted. Arguably, the bill may curtail the current, unofficial method of negotiation between developers and municipal governments concerning fees for off-site improvements.

During the first half of February, 1990, the House Subcommittee on Counties, chaired by Representative Anthony M. DeLuca, conducted two extensive meetings in order to elicit testimony surrounding the matter of impact fees from all parties with special interests and concerns. The information derived resulted in substantive amendments to House Bill 1361, Printer's Number 1582, which was reported as amended from the House Local Government Committee on May 30, 1990 (PN 3620). House Bill 1361 was further amended on the House floor on June 30, 1990 (PN 3942), and subsequently passed by the House on October 2, 1990 (PN 4204). House Bill 1361 was referred to the Senate Local Government Committee on October 9, 1990, and was subsequently amended and reported out of committee on November 14, 1990 (PN 4295). House Bill 1361 was approved by the Senate on November 20, 1990, and returned to the House for concurrence in Senate amendments. The House voted to concur with the Senate amendments on November 21, 1990. Governor Casey signed House Bill 1361 on December 19 as Act 209 of 1990.

HISTORICAL BACKGROUND AND DEVELOPMENT OF ACT 170 OF 1988 - WHY IMPACT FEES WERE NOT INCLUDED IN THE REENACTMENT OF THE PENNSYLVANIA MUNICIPALITIES PLANNING CODE IN 1988.

The Local Government Commission organized a Task Force in 1981 to comprehensively study the Pennsylvania Municipalities Planning Code (MPC). The Task Force undertook a section-by-section review of the MPC in an attempt to remove inconsistencies, clarify ambiguities, and standardize procedures. The primary objective of the Task Force was to revise the MPC, not necessarily to revolutionize planning. Several new provisions were added, such as "transferable development rights" for more creative land use planning and a "mediation option" to resolve certain land use disputes. The Task Force made a conscious and deliberate effort to analyze relevant judicial decisions concerning the MPC and to avoid cavalierly overturning existing land use case law.

On March 10, 1987, Senate Bill 535, PN 588, was introduced by Members of the Local Government Commission to effectuate the changes contemplated by the Task Force. Prior versions of Senate Bill 535 had been introduced in three earlier sessions of the General Assembly.

Subsequent to Senate action, the bill was referred to the House Local Government Committee. A special subcommittee was appointed to study the Senate version, elicit testimony, and consider proposed amendments, including the exaction of impact fees through the creation of a formal methodology to impose such fees. Following numerous meetings, the subcommittee's report and recommendations were examined by the full House Committee on September 27-28, 1988. The final product, embodied within SB 535, PN 2428, was reported to the floor of the House on October 4, 1988.

However, extensive lobbying efforts intensified over the following weeks, primarily featuring opposing factions seeking favorable final language with respect to the "impact fee" provisions of proposed Section 509(i). Several important debates occurred on the floor of the House on November 16, 1988, as many amendments were considered. After several substantive changes were made, often following extremely narrow margins, final passage was achieved by a vote of 159-31. The subsequent version of SB 535, PN 2514, was referred to the Senate on November 22, 1988, for concurrence in House amendments.

As in the House, pressures were exerted in the Senate by those factions unable to reach agreement upon the precise final language of Section 509(i) relating to impact fees. Following discussion within the caucuses of the Senate, during which the fate of this legislation was about to be determined, a compromise proposal was offered which would eliminate all reference to impact fees. Although no one appeared fully satisfied by this more moderate posture, at least the important aspects of the other remaining large percentage of the MPC could be salvaged. Following excision of the proposed Section 509(i), the Senate concurred in all other House amendments on November 29, 1988, by a vote of 46-3.

House concurrence in the total deletion of all impact fee language was therefore left to the final day of session prior to sine die adjournment. One last effort to alter this legislation was made on the House floor late in the evening of November 30, 1988. A motion to revert to the prior printer's number, including impact fee provisions, failed by a narrow thirty-vote margin; then, the final concurrence vote of 133-58 insured that SB 535, PN 2556, would, upon signature of the Governor, provide the Commonwealth with a codified, reenacted, and substantively amended MPC to set forth land use

guidelines for local government units in Pennsylvania. Governor Casey signed Act 170 into law on December 21, 1988, and it became effective 60 days thereafter.

ATTEMPTS AT DEVELOPING LEGISLATIVE LANGUAGE ON IMPACT FEES

From an historical perspective, Section 509(i) of Senate Bill 535 of 1988 began with Task Force language of a brief, rather innocuous nature. Essentially, the Task Force provision simply granted local officials authority to require a developer to pay a "pro rata share" of the costs for "reasonable and necessary" off-site street, water, sewage, and other infrastructure improvements "necessitated or created and required by construction or improvements" on the site of such a development. The developer was naturally expected to bear the costs of all on-site improvements; however, the extent of liability for related off-site improvement expenditures frequently became a source of conflict between land developers and municipal officials.

The perspectives involved in this dispute are reviewed in Pennsylvania Zoning Law and Practice, §3.3.17 and §11.2.13, authored by noted Commonwealth land use expert Robert S. Ryan. As noted by Mr. Ryan, these issues were the precise questions posed to the General Assembly in seeking to achieve a compromise on the final version of impact fee language in Act 170 of 1988. In the Senate, the relatively simplistic original Task Force language on this issue was removed from Senate Bill 535. When referred to the House Local Government Committee, the Members tried to work upon a more detailed legislative methodology by which all parties could be fairly treated in the resolution of this critical area of concern.

The House Local Government Committee responded to this challenge with two separate versions of Section 509(i) relating to impact fees. Proponents on both sides of the controversy advocated a position in favor of one or the other text of the language. Indeed, in two separate printer's numbers, each side had achieved the goal of having its favorite rendition of impact fees included in Senate Bill 535. However, in the final days of the 1987-88 Legislative Session, the House sent to the Senate a version of the bill including Section 509(i) language which generally granted municipalities more liberal powers to impose impact fees. This version was opposed by proponents of less restrictive controls upon land development.

In the Senate, there existed some sentiment to simply let Senate Bill 535 die due to the inability to reach a compromise on this issue. Indeed, it appeared that Senate Bill 535 would expire with the sine die adjournment scheduled for midnight, November 30, 1988. With all other avenues to the resolution of this matter apparently blocked, the only possible way to save the bill was to remove all reference to impact fees and hope that, somehow, the House would concur in that amendment. Little more than one hour before midnight, the House was in a position to consider Senate amendments which had removed all mention of impact fees.

A last effort to derail the entire bill was launched on the floor of the House as the clock ticked inexorably toward the adjournment hour. A motion to revert to the prior printer's number which included impact fee language, if successful, would have insured the demise of this legislation due to the

entrenched postures of both groups on either side of the impact fee issue. Moreover, due to the lateness of the hour, it would have prevented the return of the bill to the Senate; and appointment of a conference committee and a meeting of its conferees, even if the impact fee situation could be resolved, were virtual impossibilities. Defeat of the motion to revert to the prior printer's number, by a thirty-vote margin, insured that the House would be able to finally consider the Senate amendments which deleted Section 509(i) impact fee language. With less than an hour remaining in the session, the final House vote of 133-58 gave the Governor an opportunity to sign and thereby enact long-awaited amendments to the MPC.

OVERVIEW OF JUDICIAL STANDARDS

Impact fees are fees or charges imposed by a municipality against new development in order to generate revenue for the funding of capital improvements necessitated by and attributable to new development. In order to comprehend the impact fee issue, it is imperative to understand the three judicial standards normally employed by courts across the nation in adjudicating whether impact fees or similar exactions are constitutionally valid. These three "legal tests" and a brief explanation of each follow:

1.) The Reasonable Relationship Test is generally considered the one most favorable to municipalities because it merely requires some tangential, a/k/a "reasonable," relationship between the exaction imposed and the needs created by new development; it is frequently referred to as the "California Rule" since that state has frequently employed its tenets to decide in favor of local governments and against builders and developers; it has also been called the "anything goes" test because it gives municipalities "almost unlimited discretion" in imposing exactions.

2.) The Specifically and Uniquely Attributable Test has been deemed the antithesis of the above stated rule because it places a heavy burden of proof upon municipalities to demonstrate that off-site infrastructure improvements are solely and specifically created by new development; this standard is one that clearly favors the builder/developer community.

3.) The Rational Nexus Test is the "test of judicial scrutiny now employed in the majority of jurisdictions to determine an exaction's constitutionality." Under this standard, a court can consider the demands imposed upon municipal public facilities by new development and find that a proportionate share of these expenses should be borne by the developer because of a causal connection between population influx and the need for infrastructure improvement; new development need not be the sole reason for these improvements, nor would the improved facilities need to benefit only the new development but could also accrue to the general public; essentially this standard is considered a "middle ground" between the two tests previously mentioned.

Therefore, of these three standards, the one generally deemed by many to constitute the most equitable position would be the rational nexus test; however, that standard may defy an appropriate definition which could be expressed in statutory language.

ANALYSIS OF PENNSYLVANIA JUDICIAL DECISIONS

Prior to the enactment of Act 209 of 1990, two pertinent common pleas court decisions were rendered on the legality of local exaction enactments.[1] In both the Cranberry Township and Manheim Township cases, the traditional arguments of the Pennsylvania Builders Association (PBA) won clear and convincing victories when two common pleas courts totally invalidated impact fee ordinances enacted by the townships as ultra vires (meaning "beyond the scope of lawful power") actions for which no legal authorization existed. Because no appellate decisions have been issued, these two cases apply only in Butler and Lancaster Counties, respectively. However, absent some legislative response, if the builders' argument had been upheld on appeal to Commonwealth Court, that position could have had the effect of statewide applicability, which would mean that no municipality in Pennsylvania would have the requisite authority from the General Assembly to levy local impact fees. Were that to occur, local governments would have been placed in an extremely difficult situation: If impact fee provisions are invalid, can developers then recover all or part of funds previously paid under these unlawful enactments?

It is entirely possible that Act 209 may render the above decisions, for the most part, moot. Nevertheless, an examination of the lower court pronouncements in each of these cases may be instructive.

A. Cranberry Township - decided January 23, 1990.

In Builders Association of Metropolitan Pittsburgh et al. v. Cranberry Township, 8 Butler L.J. 1 (1990), the Butler County court order granted plaintiffs' motion for summary judgment (i.e., a legal decree that the local builders who sued the township were totally correct in their legal arguments and that the township had no substance in its offered defense). The court ruled that the local ordinance requiring the payment of impact fees was "illegal, invalid, and unenforceable." In addition, the township was ordered to refund all monies collected under the ordinance. Other excerpts from the opinion of Judge Martin J. O'Brien include the following:

1.) "This Court concurs . . . that Article VI of the MPC, which contains § 10603, cited as a grant of authority by . . . [the township], does not expressly or by fair implication authorize the impact fee. Nor do the other various sections of the MPC [specifically MPC 105, 301, 501, 503, 603, 604, 701, and 702] cited by . . . [the township] necessarily or fairly imply the power to enact these impact fees."

2.) Referencing a recent Dickinson Law Review article on the MPC ("Pennsylvania's New Municipalities Planning Code: Policy, Politics, and Impact Fees," Vol. 94, No. 1, Fall 1989), "Specifically noting the impact fee authorization was expressly granted, deleted, reinstated and at final passage, excluded. The Court believes it is, therefore, reasonable to

[1] In a recent ruling in Bucks County, the Court of Common Pleas dismissed a challenge by a builders' association on the imposition of impact fees by several Bucks County municipalities. The petition was dismissed on the basis of standing; thus, the legality of the imposition of such fees was not decided.

consider and weigh this legislative history in concluding that the specific authority for municipalities to impose impact fees was withheld by the Legislature."

3.) "Therefore, the Court finds and holds that Ordinance No. 189, the Cranberry Township Transportation Improvement Program Amendment, was adopted without authority, express or implied, pursuant to the MPC or the Second Class Township Code. Further, this Court must conclude that the magnitude of the impact fees imposed herewith demonstrates that this Ordinance adopted under the guise of a zoning amendment or license is in reality an unauthorized, and therefore, invalid tax."

B. Manheim Township - decided February 12, 1990.

In Reserve Company of Pennsylvania v. Board of Commissioners of Manheim Township, 72 Lanc. L. Rev. 61 (1990), the Lancaster County court order, likewise, granted the plaintiff land developer's motion for summary judgment ruling against defendant, the Board of Commissioners of Manheim Township. The Manheim Township Ordinance No. 1989-1 imposing a transportation impact fee was declared invalid and unenforceable. The opinion in this case, written by Judge Louis J. Farina, would appear to go even further than the Cranberry decision in overwhelmingly concluding that impact fees are an illegitimate tool for municipal exactions. Some excerpts from that opinion follow:

1.) On the question of authorization for the enactment of impact fee ordinances under the General Assembly's delegation of power pursuant to the MPC, "the Court had an ample basis for its conclusions . . . that the PaMPC neither expressly nor impliedly authorizes the impact fee ordinance."[2]

2.) "Thus, absent proper enabling legislation from which the power to act is either expressly or by necessary implication conferred, a municipality is not free to legislate no matter how wise the enactment or compelling the need for it. . . . [The township's] . . . argument that its transportation impact fee is a legitimate fee is unpersuasive . . . . [The] . . . shared characteristics that identify a charge as a fee are missing from the Manheim Township transportation impact fee, thus rendering it apparent that no matter what it may be called, it is not a fee under Pennsylvania law."

3.) "A tax is a revenue producing measure which is characterized by the production of large income and a high proportion of income relative to the costs of collection and supervision [citations omitted]. That is exactly what . . . [the township's] impact fee ordinance does."

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[2]In an earlier opinion and order issued in this same case, reported in 71 Lanc. L. Rev. 555 (1989), the court dismissed the defendant's preliminary objections and found that the ordinance was not authorized by, and could not be enacted as or deemed a "land use ordinance" under, the MPC. The court did not rule at that time on whether the township's authority to enact the ordinance was contained in its general police power.

4.) "The township's impact fee being a tax . . . [its] attempt to support it as a proper exercise of its police power is fatally flawed. The police power may not be used to tax."

5.) "Manheim Township's transportation impact fee, having all the hallmarks of a general revenue raising tax measure, must be justified by much more than the Township's general power [pursuant to the First Class Township Code] to promote the health, safety and welfare of its citizens; what the law requires is specific authorization from the legislature to tax . . . . Such authorization cannot be found. There exists no statutory enabling authority for an impact fee/tax on residential development."

6.) ". . . [T]he Supreme Court clearly and unequivocally declared that municipalities may not deny residential opportunities to any class of individual by means of restrictive zoning policies that had the result of zoning out higher density and lower cost housing. . . . Through the imposition of impact fees the cost of housing could conceivably be driven to levels beyond the affordable low cost housing . . . [that the Supreme Court] insures that municipalities by zoning cannot make unavailable within their borders. More importantly, however, [the township's argument] . . . is legally unsupportable, being merely an ineffective attempt to circumvent the settled Pennsylvania law by which . . . [the township's] impact fee must be judged."

Many believe that the legal arguments of the development community are founded upon a firm legal basis. This conclusion is supported by the common pleas court decisions rendered to date. Further, although it is often an exercise in folly to attempt to predict the outcome of a court's decision, it is possible that, in the absence of a legislative response, these arguments may have prevailed in the Commonwealth Court.

SUMMARY OF ACT 209 OF 1990 (HOUSE BILL 1361, PRINTER'S NUMBER 4295)

SUMMARY AND SCOPE:

Act 209 amends the Pennsylvania Municipalities Planning Code (MPC) by adding a new Article V-A, relating to "Municipal Capital Improvement." This article authorizes the imposition of impact fees, in accordance with stated conditions, standards, and procedures, to cover the cost of off-site road improvements necessitated by, and attributable and directly related to, new development. This authority is given to every municipality as defined in the MPC, other than a county, if the municipality has adopted: (1) either a municipal or county comprehensive plan; (2) a subdivision and land development ordinance; and (3) a zoning ordinance.

PREREQUISITES TO ADOPTION OF AN IMPACT FEE ORDINANCE:

1. Advisory Committee.

A municipality (within the scope of Act 209's Article V-A to the MPC) which intends to adopt an impact fee ordinance would proceed by adopting a

resolution establishing an impact fee advisory committee, which is to consist of 7 to 15 members, all appointed by the municipality's governing body, and at least 40 percent of whom shall be representatives of the real estate, commercial, and residential development and building industries. If one exists, a municipal planning commission may be designated as the advisory committee, provided that additional members be appointed, if needed, to meet the aforementioned "40 percent" requirement. The resolution also shall describe the geographical area or areas for which the advisory committee is to develop land use assumptions and conduct roadway sufficiency analysis studies.

2. Notice of Intent.

Notice of a municipality's intention to adopt an impact fee ordinance may be given by publishing a statement of its intention. The first publication shall not appear before the adoption of the advisory committee resolution and the second not less than one nor more than three weeks thereafter.

The impact fee ordinance can have retroactive effect on tentative applications for land development, subdivision, or Planned Residential Development (PRD) if such applications are filed with the municipality on or after the first publication of its notice to adopt the ordinance, provided that no more than 18 months elapse between the adoption of the advisory committee resolution and the adoption of the ordinance.

3. Land Use Assumptions.

Once appointed, the advisory committee shall develop land use assumptions, describing existing land uses in the designated area and projecting growth and development which may affect traffic levels over a period of at least five years.

The written report on the advisory committee's land use assumptions which is to be presented to the municipality shall include the findings from a public hearing conducted by the advisory committee for consideration of its proposed assumptions. Thirty days prior to the public hearing, the advisory committee shall send its assumptions to, and elicit comments from, the county planning agency, if any, all contigious municipalities, and the local school district.

4. Roadway Sufficiency Analysis.

After a municipality's governing body adopts, by resolution, the advisory committee's land use assumptions or a modified version thereof, the advisory committee must prepare, with the help of a traffic or transportation engineer or planner, for presentation to the municipality, a roadway sufficiency analysis of the designated area. This analysis must:

(i) detail existing traffic volume and levels of service;
(ii) identify a preferred level of service;
(iii) identify existing deficiencies which need to be remedied to accommodate existing traffic levels at the preferred level of service;

(iv) specify the improvements needed to correct the deficiencies identified in item (iii);
(v) provide a projection, for at least the next five years, of anticipated traffic volumes, with a separate determination for pass-through trips (a trip beginning and ending outside the designated area);
(vi) identify the deficiencies created by pass-through trips.

5. Transportation Capital Improvement Plan.

After a municipality's governing body adopts, by resolution, the advisory committee's recommended roadway sufficiency analysis or a modified version of it, the advisory committee shall utilize the information in the adopted land use assumptions and roadway sufficiency analysis to develop and recommend to the municipality a transportation capital improvement plan which must include:

(i) road improvements required to meet preferred level of service and safety and regulatory standards not attributable to new development;
(ii) road improvements attributable to forecasted pass-through traffic;
(iii) road improvements attributable only to projected future development;
(iv) projected costs for the improvements in items (i), (ii), and (iii);
(v) timetable and proposed budget for each road improvement;
(vi) proposed source of funding for each improvement.

6. Consideration of the plan; public hearing.

After completing the transportation capital improvement plan which is to be recommended to the municipality, the advisory committee is required to hold at least one public hearing on the plan and make it available for public comment. The advisory committee must present the plan to the municipality at a public meeting, and the governing body subsequently may make changes to the plan as recommended, pursuant to its review of the public comments received.

THE IMPACT FEE ORDINANCE

After the municipality's governing body adopts either the transportation capital improvement plan recommended by the advisory committee, or a modified version thereof, the municipality may enact an impact fee ordinance. The ordinance must delineate the boundaries of the transportation service area or areas (none of which shall exceed seven square miles) for which a transportation capital improvement plan has been adopted and within which impact fees may be imposed. Transportation service areas within a municipality may not overlap.

Among other things, the impact fee ordinance shall:

(i) identify conditions and standards for determing and imposing the fees;

(ii) identify what municipal agency, body, or office will administer the ordinance;
(iii) establish the time, method, and procedure for making payments;
(iv) set forth procedures for issuing a credit against or obtaining a reimbursement of the fee;
(v) state whether the municipality elects to provide a total or partial credit for affordable housing for low- and moderate-income persons, and/or chooses to exempt de minimus applications from fees.[3]

CALCULATION OF IMPACT FEES

Act 209 provides the method of calculating the maximum amount of impact fees which may be imposed on a specific development, as follows.

The total cost of transportation capital improvements within a service area (again, no larger than seven miles), established in the capital improvements plan as being attributable to new development, is divided by the total number of peak hour trips estimated to be generated by all forecasted new development within the service area. These calculations are to be based upon specific engineering criteria as delineated in the most recent edition of the Trip Generation Manual published by the Institute of Transportation Engineers. The result is a per trip cost for transportation improvements attributable to all forecasted development within the service area. To arrive at the fee which will actually be charged to a particular development, the aforementioned per trip cost attributable to all new development is multiplied by the estimated number of trips that will be generated by the particular development on which the fee is being imposed.

ADDITIONAL PROVISIONS OF ACT 209

1.) Previous Impact Fee Ordinances. A municipality may have previously imposed an impact fee for transportation improvements similar to those authorized by the Act. If this was done pursuant to an ordinance in effect on or before June 1, 1990, and if the fee so imposed is greater than the recalculated fee due under an ordinance adopted pursuant to the Act 209 amendment to the MPC, then a refund of the difference must be made to the developer who paid the fee. If the recalculated fee is greater than the fee previously imposed, there can be no additional charges. In order to qualify to retain the allowable portion of impact fees previously imposed, the municipality must adopt a new impact fee ordinance pursuant to the MPC Article V-A within one year of the effective date of that Article.

2.) Additional Refund Provisions. Provision is made for the refunding of collected impact fees which have not been spent either after completion or termination of a project, or because of failure to commence

[3] De minimis development means that the construction of a new subdivision will have little or no effect on existing transportation infrastructure.

construction of the transportation improvement project within three years of its scheduled completion date, or because the new development is not commenced prior to expiration of building permits.

3.) Credits. If a developer dedicates land to the municipality or constructs improvements for the municipality, the fair market value of this land or improvements must be credited against the impact fee due from the developer.

4.) Collection of Fees; Time. Persons required to pay an impact fee will not have to pay the fee before the time that building permits are issued for the development on which the fee is being imposed.

5.) Earmarking of Fees. Once collected, impact fees are to be deposited in an interest bearing account, and the transportation service area from which the fee was received should be identified. The fee collected, along with interest earned on the fee, must be expended within the specified service area for transportation improvements which are identified as being funded by impact fees in the capital improvements plan. The use of fees for repair or maintenance of existing infrastructure is prohibited.

6.) Appeals. A person required to pay an impact fee may take an appeal to the court of common pleas in order to contest various matters concerning the fee or the validity of the ordinance. In the event of an appeal, the costs shall be borne separately by the developer and the municipality. It should be noted that an impact fee ordinance may not be invalidated by challenging the make-up of the advisory committee unless the challenge was initiated within 90 days of the committee's first public meeting.

II. TAPPING FEES

Act 209 also provides that the provisions of the Municipality Authorities Act of 1945, as amended, shall apply to and regulate tap-in connection or other similar fees imposed by municipally owned sewer and water systems. In this regard, Act 203 of 1990, discussed below, amends the Municipality Authorities Act of 1945, as it relates to the imposition of tapping fees for sewer and water connections. Thus, municipalities should be aware that the provisions of Act 203 replace municipal code provisions concerning the imposition of tapping fees by municipalities.

SUMMARY OF ACT 203 OF 1990 (HOUSE BILL 444, PRINTER'S NUMBER 3941)

BACKGROUND AND OBJECTIVE.

This Act amends the Municipality Authorities Act of 1945, which currently provides for a "tapping fee," the components of which are not defined. Because there had been no clear statutory formula detailing the specific costs which may be imposed as a part of a "tapping fee," the proponents of Act 203 argued the need to reduce the potential for using exhorbitant tapping fees against new water and sewer customers in place of system-wide assessments

against all authority customers. The objective of the Act is to limit tapping and related fees so that new development will pay only its direct, proportionate share of costs for including new residents in a sewer or water system.

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Act 203 delineates and defines the components which may be charged to those connecting to an authority's water or sewer system. The fees, which are to be based upon an adopted fee schedule and which will be payable at the time of application for connection (if no other time is agreed to), may include the following components:

1.) A connection fee may be based on, but may not exceed, the actual cost of the connection from the authority's main to the property line. Alternatively, it may be based on the average cost of previous, similar connections.

2.) A customer facilities fee is chargeable only if the authority installs the facilities from the property line to the structure to be served. If imposed, this fee is to be based on the actual cost of connection from the property line to the structure. Also, in the case of water service, the fee may include the costs of providing or installing a water meter provided or installed by the authority.

3.) A tapping fee may be composed of four parts: capacity, distribution or collection, special purpose, and reimbursement. It may not exceed an amount based upon some or all of these four components, as follows:

(a) The capacity part is a fee based on the cost of facilities such as supply, treatment, pumping, and transmission facilities. These may include facilities providing existing services and those to provide future service. For future capacity related facilities, the cost must be included in an annual budget or a five-year capital improvement plan, and the authority must have taken some action in furtherance thereof.

(b) The distribution or collection part includes fees which may not exceed an amount based on the cost of providing facilities such as mains, hydrants, and pumping stations.

(c) The special purpose part includes fees based on the cost of providing facilities such as booster pump stations, fire service facilities, and industrial wastewater treatment facilities. These facilities would provide service to a particular group of customers or serve a particular purpose and/or serve a specific area.

(d) The reimbursement part is an amount necessary to recapture the allowable portion of facilities to reimburse the property owner at whose expense the required facilities were constructed.

The cost of existing facilities is to be based on their replacement cost or their historical cost trended to current cost, or upon historical costs plus interest paid on bonds which financed such facilities. In the case of

facilities to be constructed, the cost is not to exceed the estimated cost. Furthermore, the individual components of the tapping fee per unit, or capacity required, is not to exceed the cost of the facilities divided by the design capacity of those facilities.

No tapping fee may include the cost of replacing or upgrading facilities which serve existing customers in order to meet stricter standards or provide better service to those customers. Also, the cost used in calculating tapping fees may not include maintenance and operating expenses.

In lieu of the payment of connection, customer facilities, or tapping fees, an authority may require the construction and dedication of those necessary facilities by the property owner requesting such service.

Where a sewer or water system is to be extended at the expense of the owner, the owner has the right to construct the facilities himself, provided the authority may perform the construction if it does so at a lower cost and within the same timetable. Plans and specifications for construction by the property owner must be approved by the authority, and the authority may require the property owner to cover the authority's reasonable expenses in doing this. The authority may also require that the property owner constructing the facilities post the appropriate financial security. Upon completion of the facilities, the property owner is to dedicate them to the authority.

When a property owner constructs an extension of a sewer or water system of an authority, the authority is to reimburse the owner when another property owner not in the immediate development connects to the extension within ten years of the dedication of the extension. The reimbursement is to be equal to the distribution or collection part of each tapping fee collected as a result of subsequent connections. The total reimbursement is not to exceed the cost of constructing and dedicating the extension to the authority, less the fee which would have been paid had the property owner not constructed the extension.

The authority is required to notify the recipient of such a reimbursement upon 30 days of its receipt of the reimbursement payment. In the event a property owner does not claim his reimbursement within 120 days of the mailing of the notice, the funds are to revert to the authority.[4]

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[4]We wish to gratefully acknowledge the assistance of Jeri E. Stumpf, Republican Executive Director of the House Local Government & Urban Affairs Committees, who graciously allowed us to utilize provisions of his analysis of House Bill 444 (Act 203 of 1990).