MBA

v88 n3

Previous Story | Next Story

Massachusetts Law Review

Municipal Impact Fees in Massachusetts

By Lawrence Friedman and Eric W. Wodlinger

As new residential development strains available municipal resources, Massachusetts communities have turned to impact fees to address the costs associated with this development. Impact fees are municipal assessments, typically imposed upon developers or builders at the time a town issues a building permit, to finance the capital improvements and expansion of capital facilities necessitated by new development, such as roads and water and sewer plants. 1 In Massachusetts, cities and towns may assess fees in connection with the provision of municipal services pursuant to their Home Rule authority under the state constitution, 2 and by state statute. 3 Impact fees related to improvements such as expanded water or sewer connections have been held constitutionally valid. 4

Lawrence Friedman is a visiting assistant professor of law at Boston College Law School.

Eric W. Wodlinger is a partner in Choate, Hall & Stewart's Real Estate Department/Land Use & Environmental Group.

More recently, Massachusetts courts have struck down certain municipal impact fees as unconstitutional. In *Greater Franklin Developers Association v. Town of Franklin*, 5 the Appeals Court declared unconstitutional an impact fee ordinance enacted to fund additional educational infrastructure, and in *Dacey v. Town of Barnstable*, 6 the Superior Court invalidated an impact fee related to the need for additional affordable housing. These cases reveal the inherent deficiencies in the analysis currently employed by Massachusetts courts to distinguish between taxes and valid municipal impact fees. The Supreme Judicial Court adopted this analysis in *Emerson College v. City of Boston*, 7 borrowing liberally from a test articulated in a United States Supreme Court decision, *National Cable Television Association v. United States*, 8 which addressed fees in a specific regulatory context. As discussed below, the continued application of this analysis in cases like *Greater Franklin* and *Dacey* undermines the ability of Massachusetts municipalities to address the effects of residential development, denying communities the ability to allocate to builders the cost of new capital facilities required by new development. 9

This article explores the evolution of impact fee jurisprudence in the Massachusetts courts, and suggests that municipal impact fees should be analyzed differently under the state constitution. Part I discusses *Emerson College v. City of Boston* and its progeny, including the two recent decisions in which Massachusetts courts struck down impact fees, *Greater Franklin Developers Association v. Town of Franklin* and *Dacey v. Town of Barnstable*. In Part II, the article examines the origins of the impact fee analysis in *National Cable Television*, and how *Emerson College* fails to account for the contextual basis of the *National Cable Television* decision. Part II also discusses the impact fee analysis employed by many other state courts to determine the constitutional validity of municipal impact fees. Finally, Part III argues that the Supreme Judicial Court should adopt an impact fee analysis that better reflects the reality of economic benefits and choices in the context of residential development.

I. Impact Fees in Massachusetts: Emerson College and its Progeny

The Supreme Judicial Court first addressed the issue of impact fees in 1984, in *Emerson College v. City of Boston*. In the nearly 20 years since, the courts have utilized the formula set forth in *Emerson College* in numerous cases, including two relatively recent cases, *Greater Franklin Developers Association v. Town of Franklin* and *Dacey v. Town of Barnstable*, in which the Appeals Court and the Superior Court struck down municipal impact fees relating to school construction and affordable housing, respectively.

A. Emerson College v. City of Boston

In *Emerson College*, the Supreme Judicial Court faced the question whether the city of Boston could validly charge a fee for augmented fire service availability. The legislature had conferred upon the city the authority to impose a fee for "augmented" fire protection services. 10 Boston subsequently enacted an ordinance establishing the fee, and the city fire department inspected facilities owned by the plaintiff, a tax-exempt educational institution, to ascertain whether its facilities should be assessed the fire services fee. The plaintiff responded with an action for declaratory judgment and injunctive relief, alleging that: (1) the charge was, in effect, a tax on real property from which the plaintiff was exempt; (2) the charge violated the constitutional requirement that property taxes be "proportional and reasonable"; and (3) the calculation of the charge by the fire commissioner amounted to an unconstitutional delegation of the taxing authority to an administrative official. 11 The trial court ruled that the charge was an invalid tax. 12

On appeal, the Supreme Judicial Court turned first to the enabling legislation. The statute stated as its purpose, "to assure the city's continued ability to provide the availability of firefighting services in excess of the degree of such services provided to the general public by imposing the cost of making available such extra services on those to whom such extra services are made available." 13 Thus, the statute distinguished between two classes of building owners: those deemed members of the "general public," who would receive fire protection services without any additional charge, and those building owners who would pay the fire services charge. 14 Building owners would fall into the latter category if the "total fire-fighting capacity . . . necessary to extinguish a fully involved fire [exceeded 3,500] gallons per minute." 15 The statute established a formula to estimate the "total fire flow" of a particular building, from which computation the fire commissioner would determine whether the building would require more than 3,500 gallons per minute to combat a three-alarm fire. 16 The excess gallons per minute were converted to "units," a calculation that became the basis for the dollar amount of the fire services assessment against building owners. 17

The court next addressed the city's argument that the charge was not an invalid tax. Relying upon federal cases, the court stated that fees share three "common traits." First, "they are charged in exchange for a particular governmental service which benefits the party paying the fee in a manner 'not shared by other members of society.'" 18 Second, fees "are paid by choice, in that the party paying the fee has the option of not utilizing the governmental service and thereby avoiding the charge." 19 Finally, the charges must be collected "not to raise revenues but to compensate the governmental entity providing the services for its expenses." 20

The court concluded that the fire services fee possessed none of these traits; the benefits of the fee were not so sufficiently particularized as to justify distribution of the costs among the owners of certain buildings, as opposed to the general public:

The benefits of "augmented" fire protection are not limited to the owners of [particular] buildings. The capacity to extinguish a fire in any particular building safeguards not only the private property interests of the owner, but also the safety of the building's occupants as well as that of surrounding buildings and their occupants. 21

In addition, the court noted that the fire services fee was not voluntary, and that, pursuant to the statute, the assessments were not targeted for the maintenance of existing fire services, but for "general" police and fire services. 22 "The statutory earmarking of proceeds for [non-fire] services," the court continued, was "more consistent with a revenue raising purpose than with an intent to recover [fire services]-related expenditures." 23

B. Post-Emerson College *Cases*

Since *Emerson College*, Massachusetts courts have applied the tripartite definition of "fees" in numerous cases. In *Town of Winthrop v. Housing Authority*, 24 for instance, the Appeals Court addressed the validity of an annual fee charged for the use of a town's common sewer system to property owners who connected to the sewer. 25 The court concluded that the charge was a valid fee. First, only those individuals who connected their particular (private) sewers to the common sewer system received the benefit of the common sewer, making the benefit "sufficiently particularized" to pass muster under *Emerson College*. 26 Second, the town assessed the charge only against those individuals who chose to use the service. 27 Finally, the town imposed the charge only to compensate "for its costs of operation and maintenance of the common sewer system." 28 The court noted that there appeared to be no dispute as to the "reasonable relationship" between the charges and the cost of operating and maintaining the system. 29

In *Bertone v. Department of Public Utilities*, 30 the Supreme Judicial Court reviewed an electric service hook-up charge imposed by the town of Hull upon new customers. 31 The plaintiffs - developers - argued that the hook-up charge was an invalid tax, which the Hull Municipal Lighting Plant lacked the authority to assess. 32 Employing the *Emerson College* analysis, the court concluded that the charge to new customers was sufficiently particularized because the benefits of electrical service - which included both the service itself and the new additional infrastructure that made it possible - were conferred only upon them: the electrical service received by the existing customers would remain unchanged. 33 The charge also satisfied the other *Emerson College* factors, as no customers were compelled to use the lighting plant's electrical service, and the developers could elect not to pursue the development in question. 34 As the court remarked, "[f]ees are not taxes even though they must be paid in order that a right may be enjoyed." 35 Finally, the court noted that the revenues received from the assessment were "reasonably calculated to meet expenses incurred in providing electrical service to new customers," 36 thereby satisfying the third *Emerson College* requirement.

After *Bertone*, the Massachusetts appellate courts addressed the *Emerson College* tax/fee distinction in several other contexts. In *Nuclear Metals v. Radioactive Waste Management*, 37 for example, the Supreme Judicial Court affirmed the validity of an assessment imposed by the Low-Level Radioactive Waste Management Board in connection with the disposal of radioactive waste. 38 As a participant in a heavily regulated industry, the plaintiff could not engage in its business absent some reliance upon services provided by the board. 39 Further, the plaintiff derived a benefit not shared by other members of the public - namely, "access to disposal facilities for low-level waste meeting Federal and State standards." 40 As the court remarked with respect to the first *Emerson College* factor, "[i]t is appropriate that the entities which will generate low-level radioactive waste (and not the taxpayers of the Commonwealth) should shoulder costs associated with protecting the general public from the hazards posed by the waste." 41 Further, the court held that the fee was voluntary, because the plaintiff could choose whether to engage in manufacturing activities that resulted in the production of low-level radioactive waste. 42 Finally, the revenues raised through the assessment were used to fund particularized services by the board. 43

The Appeals Court relied upon *Nuclear Metals* in *Baker v. Department of Environmental Protection*, 44 upholding a filing fee to be paid to the department by wetland developers. 45 As to the existence of a particularized benefit, the court concluded that those members of the public who elect to undertake wetland development do so with the expectation of an economic benefit: "Protection of wetland is a public benefit, but the developers are the persons who require a permit to develop wetland in compliance with [state law]. In return for financial benefit, a landowner shoulders the financial burdens of the government associated with protecting wetland from adverse development." 46 Following the reasoning of *Nuclear Metals*, the court concluded that the charge was not compulsory, because the landowners must pay only if they decide to develop wetland: "landowners are no more compelled to pay the fee than they are compelled to develop their land." 47 Finally, the court determined that, because the fee merely served to offset agency expenses, it was not a tax. 48

More recently, in *Greater Franklin Developers Association v. Town of Franklin*, 49 the Appeals Court addressed a challenge to the validity of a "school impact fee" charged to residential developers. The town sought to relate the need for additional classroom space to projected municipal growth. 50 The court held that the charge failed the *Emerson College* test, because the "benefit of expanded school facilities is not particularized to the fee payers," but enhances "the entire community." 51 The court recognized that the charge was voluntary, because the plaintiffs did not have to build residences in the town. 52 Nonetheless, the court determined that voluntariness was not dispositive, as the provision of school facilities, like the provision of fire services in *Emerson College*, was an obligation on the town, and the fee "did nothing in particular for the properties that paid it." 53

Finally, the Superior Court struck down an affordable housing impact fee in *Dacey v. Town of Barnstable*. 54 In that case, the town sought to meet the state mandate for inclusionary housing by charging subdivision and building permit applicants an assessment that would be devoted to an affordable housing account. 55 The court rejected the town's characterization of the charge as a fee, finding that the charge conferred no private benefit on the payers, but served instead to fulfill the town's inclusionary housing obligation. 56

In short, in applying *Emerson College*, Massachusetts courts have tended to uphold impact fees imposed by regulatory bodies, like the Department of Environmental Protection, that appear to benefit fee payers via the expectation of economic reward, but to strike down municipal impact fees in instances in which the particularized benefit is not so readily identifiable.

II. The Limits of *National Cable Television* and Alternatives to *Emerson College*

Massachusetts courts have employed the *Emerson College* analysis to review any monetary assessment that resembles an impact fee, as opposed to reviewing such charges under the standards generally governing municipal regulation of land development. *Emerson College*, however, takes its animating principles from a United States Supreme Court decision, *National Cable Television Association v. United States*, 57 which, as subsequent federal cases have demonstrated, and as discussed below, is not necessarily applicable outside its specific factual context.

A. The Limits of National Cable Television

In *National Cable Television Association v. United States*, the United States Supreme Court considered whether the Federal Communications Commission could impose fees for licenses for community antenna television systems that transmitted programs via cable. 58 The commission had imposed the fee in question pursuant to the Independent Offices Appropriations Act, which provided that federal agencies could prescribe fees for benefits, licenses "or similar thing[s] of value or utility performed, furnished, provided, [or] granted." 59

The Court observed that taxation is a legislative function and that, in the federal context, only Congress can levy taxes. 60 "A fee," the court continued,

is incident to a voluntary act, *e.g.*, a request that a public agency permit an applicant to practice law or medicine or construct a house or run a broadcast station. The public agency performing those services normally may exact a fee for a grant which, presumably, bestows a benefit on the applicant, not shared by other members of society. 61

Given this understanding, the court concluded that the commission possessed only the authority to impose fees. 62 The court construed the authority conferred on the commission by the Independent Offices Appropriations Act 63 narrowly,

holding that the act's phrase "value to the recipient" should be the "measure of the authorized fee." 64

The tax/fee question often arises in the context of the Tax Injunction Act, which prohibits the federal courts from enjoining state-enacted taxes when an alternative remedy is available in the state courts. 65 Fees are not subject to this jurisdictional restriction and accordingly can be challenged in federal court. 66 In determining whether an assessment is a fee or a tax for purposes of the Tax Injunction Act, the courts have utilized the *National Cable Television* analysis, but not without qualification. In *San Juan Cellular Telephone v. Public Services Commission*, 67 the United States Court of Appeals for the First Circuit noted that the "value to the recipient test" applied in *National Cable Television* was statute-specific:

[T]he *National Cable* case focused upon a particular statute. . . . That statute limited the [commission's] powers to assess fees to those fees that, in the statute's words, provided "value to the recipient." Deciding whether (or to what extent) a particular fee provides such individual value could make sense *in the context of such a statute*. 68

The *San Juan Cellular* court thus concluded that the Supreme Court's language in *National Cable Television* should be "limited to its specific statutory context." 69

In *Emerson College*, the Supreme Judicial Court did not so limit its understanding of *National Cable Television*. Indeed, no Massachusetts court has questioned whether the specific criteria identified in *National Cable Television* for determining the validity of fees imposed by administrative agencies are applicable to the variety of monetary assessments that may exist outside the relatively narrow, statute-specific context of that case. 70 State courts in other jurisdictions, by contrast, have not been similarly constrained when addressing the tax/fee distinction in a variety of situations; rather, courts in other states have embraced alternative analyses under their states' constitutions to distinguish between taxes and fees. 71

B. An Alternative Conception of the Tax/Fee Determination

Many state courts review the constitutionality of municipal impact fees under a "dual rational nexus" analysis, which examines the fit between public policy ends and means under reasonableness standards. Under this analysis, a court reviewing an assessment first determines whether there is a reasonable connection between the need for new, additional or expanded capital facilities and the proposed development. If such a connection exists, the court next determines whether there exists a reasonable connection between the expenditure of funds collected through the imposition of an impact fee, and the benefits that accrue to the proposed development. 72 The second part of the test - the benefit requirement - "requires earmarking of funds," and is generally satisfied by "(1) dividing the jurisdiction into geographic zones and limiting expenditures to those zones, (2) placing a time limit on the expenditure of the funds, and (3) placing the funds into a separate trust fund to guard against commingling impact fee revenues with general revenues." 73

The Supreme Court of Ohio's decision in *Home Builders Association of Dayton and the Miami Valley v. City of Beavercreek* 74 is illustrative. In that case, a homebuilders association challenged the city's impact fee ordinance, which imposed a charge to fund roadway improvements for new development. 75 The court likened impact fees to land use exactions, concluding that impact fee analysis should be guided by jurisprudence developed in the context of such exactions, in which courts have sought to "balance[] the interests of the city and developers of real estate without unduly restricting local government." 76

The court adopted the dual rational nexus analysis, applying "a middle level of scrutiny that balances the prospective needs of the community against the property rights of the developer." 77 Such an approach affords municipalities the discretion "to reasonably address problems that are not subject to precise measurement without being subject to unduly strict review." 78 Applying this test, the court determined that the city bore the burden of demonstrating, first, a reasonable relationship between its interest in constructing new roadways and the increase in traffic to be generated by new development, and, second, if such a relationship existed, "that there is a reasonable relationship between the impact fee imposed by Beavercreek and the benefits accruing to the developer from the construction of new roadways." 79

The Ohio court concluded that, on the facts presented at trial, the city had sustained its burden. First, the city had demonstrated a legitimate governmental interest in constructing new transportation infrastructure to meet increased traffic needs, based upon evidence in the record that there existed a demonstrable relationship between new development and increased traffic. Second, the city proved that, considering such factors as the actual cost of constructing new roadways, the formula used to determine the fee paid by the developer, the city's contribution, the road improvements made directly by developers, the time lag between payment and new road construction, and the site-specific nature of the roadway projects, the developers would, in fact, pay a proportionate share of the costs necessary to undertake new roadway construction. Thus, the city satisfied the requirement that the funds accrued from the fee be devoted to the new construction. 80

As illustrated by *Home Builders Association of Dayton*, the dual rational nexus analysis allows a reviewing court to balance municipal discretion and private property rights in addressing the constitutionality of an impact fee. The test thus recognizes the importance of permitting municipalities to make public policy determinations regarding the potential impact of new development, as long as those determinations are supported by a demonstrable causal relationship between new development and a detrimental impact on public services, facilities or infrastructure capacity.

III. Revisiting the Massachusetts Municipal Impact Fee Analysis

Why should the Massachusetts courts revisit *Emerson College* and apply the dual rational nexus analysis to municipal impact fees? One reason is that the *Emerson College* approach fails to acknowledge the economic realities of real estate development - realities for which municipalities ultimately must account. The Massachusetts courts have tacitly recognized such economic realities in cases involving statewide regulatory bodies, such as *Nuclear Metals v. Radioactive Waste Management* and *Baker v. Department of Environmental Protection*. In those cases, the courts ackowledged that with new development comes a need for new or expanded infrastructure and capital facilities, and that government has the authority to determine that industry and developers will bear the costs of the external impacts they create, rather than shifting those costs to taxpayers. 81 The effects of new development are felt equally in the municipal context, where it often creates a need for the provision of new roads, services, or facilities. 82

Nonetheless, as *Greater Franklin Developers* and *Dacey* demonstrate, for want of a "particularized benefit" as defined by *Emerson College*, developers in Massachusetts can shift the costs of improvements made necessary by new construction to town residents who neither sought nor require those improvements. The courts have rejected the proposition that the provision of expanded school capacity or affordable housing necessitated by new residential development qualifies as a benefit specifically accruing to developers, unlike the immediate economic rewards that may flow from, say, an environmental permit, as in *Baker*. Thus the *Emerson College* analysis, as derived from *National Cable Television*, effectively prevents municipal flexibility in addressing the impact of new development. 83

The dual rational nexus analysis, by contrast, would allow municipalities to account for the benefits and choices available to developers, by affording them the discretion to determine whether developers should bear the costs created by their projects, as long as the municipalities can demonstrate a sufficient connection, with adequate factual support, between the projects and the costs they will create. That requirement would provide a sufficient basis for distinguishing valid impact fees from invalid taxes in the municipal context.

In *Dacey*, for example, application of the dual rational nexus analysis would have permitted the reviewing court, upon finding that the relationship between new development and increased affordable housing needs was a "mathematical certainty," 84 to assess whether the town asked developers to pay their proportionate share of the affordable housing costs necessary to meet the demands created by their new development, and whether the ordinance properly earmarked revenues generated from the charge for that purpose. Similarly, in *Greater Franklin Developers Association*, application of the dual rational nexus analysis would have warranted a finding that, given the demographic study of the connection between new development and the need for additional classroom capacity, 85 the town had provided sufficient logical and empirical support to show a reasonable connection between the two, such that the court could turn its attention to the issues of proportionate share and earmarking of funds.

Not every municipal impact fee would survive scrutiny under the dual rational nexus analysis. It seems unlikely that the city of Boston could have satisfied the first part of the test on the facts of *Emerson College*, because the city did not seek to tie the charge to a need for additional services created by new development; rather, the city sought merely to shift the cost of existing services within the universe of service-users. And, even assuming the charge satisfied the first part of the test, it likely would not have satisfied the second, because the revenues from the charge were not targeted exclusively for the maintenance of fire services. Under the dual rational nexus analysis, then, the charge would have been deemed an unconstitutional method of addressing the city's stated concern.

IV. Conclusion

Pursuant to *Emerson College v. City of Boston*, the Massachusetts courts apply an impact fee analysis that limits the ability of municipalities to allocate the public infrastructure costs associated with new residential development. Courts in other jurisdictions apply the dual rational nexus analysis, affording municipalities greater latitude and deferring to a legislative judgment about the reasonable allocation of the external costs of new development. As residential growth increases, Massachusetts courts likely will have the opportunity to revisit the *Emerson College* test in the context of municipal impact fees designed to address a wide array of needs, beyond roads and sewers, and to consider whether the dual rational nexus analysis better comports with the authority reserved to Massachusetts municipalities under Home Rule. Adopting the dual rational nexus analysis would allow cities and towns to decide how best to allocate the costs resulting from the external effects of new development.

1. *See* James A. Kushner, *Property and Mysticism: The Legality of Exactions as a Condition For Public Development Approval in the Time of the Rehnquist Court*, 8 J. Land Use & Envtl. L. 53, 132-33 (1992); Charles J. Delaney & Marc T. Smith, *Development Exactions: Winners and Losers*, 17 Real Est. L.J. 195, 197 (1989). [back]

2. *See* Mass. Const., amend. art. 2, § 6 (authorizing a municipality "to exercise any power or function which the General Court has power to confer upon it, which is not inconsistent with the constitution or laws enacted by the General Court in conformity with powers reserved to the General Court É and which is not denied, either expressly or by implication, to the city or town by its charter"). For a discussion of Home Rule, see David M. Moore, *Home Rule, Potholes and Preemption*, 83 Mass. L. Rev. 137, 140-41 (1999). [back]

3. *See* Mass. Gen. Laws ch. 40, § 22F (stating that "[a]ny municipal board or officer empowered to issue a license, permit, certificate, or to render a service or perform work for a person or class of persons, may, from time to time, fix reasonable

fees for all such licenses, permits, or certificates . . . and may fix reasonable charges to be paid for any services rendered or work performed"). *See also* Greater Franklin Developers Ass'n v. Town of Franklin, 49 Mass. App. Ct. 500, 502 (2000) (noting that "[t]owns . . . may exact fees"). [back]

4. *See* Morton v. Town of Hanover, 43 Mass. App. Ct. 197, 201 (1997) (upholding impact fee for water main connections); Town of Winthrop v. Housing Auth., 27 Mass. App. Ct. 645, 647 (1989) (upholding impact fee for common sewer connections). [back]

5. 49 Mass. App. Ct. 500 (2000). [back]

6. Barnstable Superior Court, No. 00-53 (Oct. 18, 2000). [back]

7. 391 Mass. 415 (1984). [back]

8. 415 U.S. 336 (1974). [back]

9. Although the impact fee analysis discussed herein also applies where fees are charged in connection with non-residential development, it appears that cities and towns most often seek to impose impact fees in relation to residential development. [back]

10. 1982 Mass. Acts, c. 190, § 30. [back]

11. *See Emerson College*, 391 Mass. at 417. [back]

12. *Id.* at 417-18. [back]

13. 1982 Mass. Acts, c. 190, § 30(2). [back]

14. *See Emerson College*, 391 Mass. at 419. [back]

15. 1982 Mass. Acts, c. 190, § 30(3)(i), (ii). [back]

16. *See Emerson College*, 391 Mass. at 419. [back]

17. *See id.* at 419-20. The statute required building owners so assessed to pay the charge regardless of whether the fire services were actually required, as the charge was premised upon the future availability of fire protection services. *See id.* [back]

18. *Id.* at 424 (quoting National Cable Television Ass'n v. United States, 415 U.S. 336, 341 (1974)). [back]

19. *Id.* (citing Vanceburg v. Fed. Energy Regulatory Comm'n, 571 F.2d 630, 644 n. 48 (D.C. Cir. 1977), *cert. denied*, 439 U.S. 818 (1978)). [back]

20. *Id.* [back]

21. *Emerson College,* 391 Mass. at 425-26. [back]

22. *See id.* at 427. [back]

23. *Id.* at 427. [back]

24. 27 Mass. App. Ct. 645 (1989). [back]

25. *See id.* at 645. [back]

26. *See id.* at 647. [back]

27. *See id.* [back]

28. *Id.* [back]

29. *See Town of Winthrop,* 27 Mass. App. Ct. at 648. [back]

30. 411 Mass. 536 (1992). [back]

31. *See id.* at 537. [back]

32. *See id.* at 548. [back]

33. *See id.* at 549. [back]

34. *See id.* [back]

35. *Bertone,* 411 Mass. at 549 (quotation omitted). [back]

36. *Id.* at 549-50. [back]

37. 421 Mass. 196 (1995). [back]

38. *See id.* at 202. [back]

39. *See id.* at 203. [back]

40. *Id.* at 204. [back]

41. *Id.* at 205. [back]

42. *See Nuclear Metals,* 421 Mass. at 205. [back]

43. *Id.* at 207. [back]

44. 39 Mass. App. Ct. 444 (1995). [back]

45. *See id.* at 444. [back]

46. *Id.* at 446. [back]

47. *Id.* [back]

48. *Id.* at 446-47. [back]

49. 49 Mass. App. Ct., at 501 (2000). The reader should note that the authors represented the defendant town in *Greater Franklin Developers*. [back]

50. *See id.* [back]

51. *Id.* at 503. [back]

52. *See id.* [back]

53. *Id.* at 504. *See also* Silva v. City of Fall River, 59 Mass. App. Ct. 798, 804 n.8 (2003) (noting that, "whether the plaintiff's use of the service is truly optional, is not necessarily determinative of whether a charge is a fee or a tax. . . . Rather, it is arguably only subsidiary to, and an additional manifestation of, the analytically more comprehensive first factor, particularized private rather than general public benefit." (internal citations omitted)). [back]

54. Barnstable Superior Court, No. 00-53 (Oct. 18, 2000). [back]

55. *See id.* at 4. [back]

56. *See id.* at 8. The court concluded:

[t]he monetary exaction of the ordinance charge [was] not intended to compensate [the town] for the oversight services rendered for the subdivision of land or the construction of new residences, but rather it [was] intended to raise money generally for the purpose of affording [the town] a means of obtaining revenue to purchase or create affordable housing.

Id. at 8-9. *See also* Mass. Gen. Laws ch. 40B, §§ 20-23. [back]

57. 415 U.S. 336 (1974). [back]

58. *Id.* at 340. [back]

59. 31 U.S.C. § 483a. [back]

60. *See National Cable Television*, 415 U.S. at 340. [back]

61. *Id.* at 340-41. [back]

62. *See id.* at 341. [back]

63. 31 U.S.C. § 483a. [back]

64. *National Cable Television*, 415 U.S. at 342-43. [back]

65. *See* 28 U.S.C. § 1341. [back]

66. *See*, *e.g.*, Home Builders of Mississippi v. City of Madison, 10 F. Supp.2d 617, 622 (S.D. Miss. 1997) (initial jurisdictional question is whether impact fee ordinance imposes a tax for purposes of the Tax Injunction Act). [back]

67. 967 F.2d 683 (1st Cir. 1992). [back]

68. *Id.* at 686 (citations omitted) (emphasis added). [back]

69. *Id.* at 687. The First Circuit further observed: "[S]ome courts have read the Court's language [in *National Cable Television*], even in the context of the same statute, as not demanding quite the fine parsing and matching of fee and expenditure for which the [defendant] may now hope." *Id.* (citing Mississippi Power & Light Co. v. United States Nuclear Regulatory Comm'n, 601 F.2d 223, 232 (5th Cir. 1979), *cert. denied*, 444 U.S. 1102 (1980)). [back]

70. *See* Mark Bobrowski, Handbook of Massachusetts Land Use and Planning Law § 12.5 at 488 (1993) (noting that "[t]he judicial review of impact fees in Massachusetts has pursued th[e] fee/tax dichotomy in every instance since *Emerson College*"). [back]

71. *See, e.g.,* Home Builders Ass'n of Dayton and the Miami Valley v. City of Beavercreek, 89 Ohio St. 3d 121, 127-30, 729 N.E.2d 349, 355-57 (2000) (discussing the "most compelling methodologies" for conducting impact fee analyses in various state courts: a "reasonable relationship" test, applied in California, which "allows local governments to act with almost unfettered discretion"; a requirement that fees be "uniquely attributable to the needs of the development," or "directly attributable to the specifically created need," applied in Illinois; and the "dual rational nexus test," adopted in Ohio and discussed at length below) (citing Associated Home Builders of Greater East Bay, Inc. v. City of Walnut Creek, 4 Cal. 3d 633, 484 P.2d 606, 94 Cal. Rptr. 630 (1971) and Pioneer Trust & Savings Bank v. Village of Mt. Prospect, 22 Ill. 2d 375, 176 N.E.2d 799 (1961)). [back]

72. *See* St. Johns County v. Northeast Florida Builders Assoc., Inc., 583 So. 2d 635, 638-39 (Fla. 1991); Hollywood, Inc. v. Broward County, 431 So. 2d 606, 612 (Fla. Dist. Ct. App. 1983). [back]

73. S. Mark White, *Development Fees and Exemptions for Affordable Housing: Tailoring Regulations to Achieve Multiple Public Objectives*, 6 J. Land Use & Envtl. L. 25, 31-32 n.26 (1990). [back]

74. 89 Ohio St. 3d. 121, 729 N.E.2d 349 (2000). [back]

75. *See id.*, 89 Ohio St. 3d at 124, 729 N.E.2d at 353. [back]

76. *Id.*, 89 Ohio St. 3d at 127, 729 N.E.2d at 355; *see generally* Dolan v. City of Tigard, 512 U.S. 374 (1994) and Nollan v. California Coastal Commission, 483 U.S. 825 (1987) (discussing dual rational nexus test in context of land use exactions). [back]

77. *Home Builders Association of Dayton*, 89 Ohio St. 3d at 128, 729 N.E.2d at 356. [back]

78. *Id.* (citing Banberry Dev. Corp. v. South Jordan City, 631 P.2d 899 (Utah 1981)). [back]

79. *Id.* [back]

80. *See id.*, 89 Ohio St. 3d at 128-29, 729 N.E.2d at 356-57. [back]

81. *See Nuclear Metals*, 421 Mass. at 205 (noting that it is appropriate "that the entities which generate low-level radioactive waste (and not the taxpayers of the Commonwealth) should shoulder the costs associated with protecting the general public from the hazards posed by the waste"); *Baker*, 39 Mass. App. Ct. at 446 (reasoning that, "[i]n return for financial benefit, a landowner shoulders the financial burdens of the government associated with protecting wetland from adverse development"). [back]

82. *See* Kushner, *supra* n.1, at 132-33. [back]

83. By contast, the Subdivision Control Law, Massachusetts General Laws chapter 41, sections 81L-81GG, allows cities and towns to require a developer to pay for the internal infrastructure required by a new subdivision, including roads, water mains, sewer pipes, storm drains, etc., as a precondition to the sale of subdivision lots. [back]

84. Barnstable Superior Court, No. 00-53 (Oct. 18, 2000), at 3. [back]

85. *See Greater Franklin Developers Ass'n,* 49 Mass. App. Ct. at 501. [back]