FINANCING AMERICA'S PUBLIC INFRASTRUCTURE:
ISSUES FOR LOCAL GOVERNMENTS

INTRODUCTION

In recent years, the quality of America’s infrastructure has declined dramatically. Public works expenditures by all levels of government dropped from 20 percent in 1950 to seven percent in 1984. Decreased funding directly resulted in widespread deferred infrastructure maintenance and little new infrastructure expansion. Some studies indicate that a failure to build infrastructure is linked to economic stagnation. Arguably, inadequate infrastructure impedes the nation’s efficiency and productivity. It seems certain that the nation’s deteriorated infrastructure adversely affects Americans’ standard of living.

This comment examines the role state and local government financing has played in America’s infrastructure crisis. This comment also recognizes that

1 See CHICAGO FED LETTER, Rx for Productivity: Build Infrastructure (Sept. 1988); Anderberg, Financial Headaches: This year’s survey of issues and trends reveals governments are still struggling to find ways to maintain existing infrastructure while building new facilities, 102 AM. CITY & COUNTY 32-35 (Nov. 1987) (hereafter Anderberg); Levherz, Crumbling Infrastructure Poses Financing Problem, The Plain Dealer, Oct. 31, 1988 at 11-D, col. 1. (hereafter Levherz).
3 Id.; CHICAGO FED LETTER, supra note 1, at 1; See generally Bell, All the King’s Horses and All the King’s Men, EPA JOURNAL 13 (May 1988) (Hereafter Bell).
4 Advisory Commission on Intergovernmental Relations, Financing Public Infrastructure: A Commission Report (1984) (hereafter ACIR); See also, Levherz, supra note 1. (Who reports the apparent lack of American economic competitiveness can be blamed on deterioration of infrastructure, which in turn is due to spending cutbacks and failure to expand infrastructure to accommodate growth.) For a theoretical analysis of the relationship between lack of resources (including infrastructure) and the deterioration of the urban state, see Levine, Rubin, & Wolohojian, Resource Scarcity and the Reform Model: The Management of Retrenchment in Cincinnati and Oakland, 41 PUBLIC ADMINISTRATION REVIEW 619 (Nov.-Dec. 1981).
5 CHICAGO FED LETTER, supra note 1 at 2. See also, ACIR, supra note 4 at 15.
6 ACIR, supra note 4, at 15-17 (discussing economic forces and issues resulting from deterioration in infrastructure. The report states colorfully at 15, “If we continue with past policies of papering over the widening cracks in our public works, then ... recovery will stumble over ill-paved roads and ruptured water mains.”) Infrastructure has bearing on the public health, safety, and welfare. Garbage collection and solid waste disposal, water purification and distribution, highways, roads and bridges, mass transit, and hazardous waste disposal all qualify as infrastructure according to ACIR. Thus, failure to maintain, expand, or repair infrastructure has the potential for causing injury. See, e.g., Bell, supra note 3 (describing the collapse of a 100 foot section of the Connecticut Turnpike Bridge into the Mianus River in June, 1983); Schwarz, New York City Held not Liable in Building Collapse, 23 MUN. ATTY. 21 (Nov.-Dec. 1983) (collapse of public building); Watson & Stafford, Cables in Trouble, 4 CIVIL ENGINEERING 38 (1988) (suspension bridge cables deteriorating); Thornton, Lessons from Schoharie Creek, 5 CIVIL ENGINEERING 46 (1988) (thoughtful discussion the structural infrastructure weaknesses that lead to the collapse of the Schoharie Creek Bridge on the New York State Thruway in April, 1987).
7 Levherz, supra note 1. Traditionally, state and local governments shouldered the burden of paying for infrastructure. After the New Deal, federal grants, revenue sharing, and other assistance programs have provided financial help to municipalities. See, e.g., O. REYNOLDS, HANDBOOK OF LOCAL GOVERNMENT LAW, § 106 (1982) (hereafter Reynolds) discussing federal financial assistance to local government. However, federal infrastructure programs are beyond the scope of this comment.

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infrastructure financing issues in declining cities differ from infrastructure issues due to population expansion.  

Part I is particularly relevant to declining cities. It reviews traditional methods by which state and local government obtain operating revenues, and the use of these revenues for infrastructure. It discusses trends and developments which have made traditional financing schemes less useful for infrastructure.

Part II applies in large part to growing cities. Growth creates demand for new infrastructure while straining existing core infrastructure. Alternative financing schemes have arisen to accommodate growth. Along with alternative financing have come new legal issues. Part II discusses the most prevalent of these financing and legal issues.

Part III explains how Ohio's newly-enacted Public Infrastructure Capital Improvements Act will operate to provide infrastructure financing opportunities for the state’s municipalities, townships and unincorporated areas.

**Traditional Revenue Sources for Infrastructure**

*General Obligation Bonds and Ad Valorem Taxes*

Tradition holds that society is responsible for providing infrastructure. Individuals have played a part in infrastructure development and finance by paying general taxes, such as property - or *ad valorem* - taxes. The mainstay infrastructure funding device has been the general obligation bond, secured by a tax levy on property. General obligation bonds are the least expensive method to pay for capital infrastructure financing because the issuer backs general obligation bonds with the issuer's full faith and credit. Usually, general obligation bonds pose little risk to investors because the bonds are secured by a pledge of the proceeds of a property tax. An added benefit to investors accrues

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10 H.B. 704, amending Ohio Rev. Code §§ 126.11 and 1525.11 and enacting §§ 164.01 - 164.13. See infra, notes 136-161.


12 The most common *ad valorem* tax, or tax according to value, is imposed by states and municipalities on real estate. See BLACK'S LAW DICTIONARY 48 (5th ed. 1979).


14 Reynolds, supra note 7, at § 104.
because interest on general obligation bonds is exempt from federal income tax.\(^{16}\)

A city may issue general obligation bonds only if the issue is authorized in the state constitution, state statutes, or the issuer’s home rule charter.\(^{17}\) However, states often place restriction on the issuer’s borrowing and taxing capacity.\(^{18}\) These restrictions often hamper area-wide capital infrastructure improvements.\(^{19}\) Further, the issuer must call a voter referendum to approve the new tax levy; more often than not, voters seem reluctant to approve new taxes to finance infrastructure bonds.\(^{20}\)

Declining population brings with it a reduction in industry and a reduced tax base.\(^{21}\) Older cities which have lost population find it more difficult to coax the remaining residents to pay for capital improvements through increased taxes.\(^{22}\) If a declining city’s credit rating is in doubt, the investor’s market will mandate that general obligation bonds bear a higher interest rate to compensate for risk of default,\(^{23}\) making the bonds more expensive to issue.\(^{24}\) Despite these drawbacks, nearly 13 percent of cities in a recent survey rely on general obligation bonds to finance infrastructure projects.\(^{25}\) In light of limitations on general obligation bond financing and the magnitude of capital outlay required for infrastructure, general obligation bonds are seldom the end of the quest for revenue for infrastructure projects.

**Revenue Bonds**

When a government issues revenue bonds, it promises to repay the bond from a special fund, consisting of revenues from the financed facility.\(^{26}\) If a municipality is expressly authorized by statute, it may pledge income from a designated tax such as a license tax to secure revenue bonds.\(^{27}\) Otherwise, the issuer must pay the bond only with the bond-specified revenue.\(^{28}\)

\(^{16}\) I.R.C. § 103(a) (1986).
\(^{17}\) Reynolds, *supra* note 7, at § 100.
\(^{18}\) See *e.g.*, Ohio Const. art. VIII, § 2; Reynolds, *supra* note 7, at §§ 100, 101.
\(^{19}\) Humphrey, *supra* note 8, at 10.
\(^{20}\) See *e.g.*, Humphrey, *supra* note 8, at 10; compare, The Cincinnati Enquirer, July 2, 1988 at A-4, col. 1 (reporting citizens of Cincinnati passed tax hike for infrastructure) and Bivens, *San Antonio Sells Tax Hike to the Public*, 100 AM. CITY & COUNTY 66 (Aug. 1985) (recounting how voters sustained interest in preserving infrastructure led them to approve a $100 million bond issue for infrastructure).
\(^{21}\) See *e.g.*, Humphrey, *supra* note 8, at 10.
\(^{22}\) Id.; Anderberg, *supra* note 1, at 33.
\(^{24}\) Issuer pays more for financing because it must pay higher interest in order to compensate purchasers for higher risk.
\(^{25}\) Anderberg, *supra* note 1, at 34.
\(^{26}\) Reynolds, *supra* note 7, § 104.
\(^{27}\) Id.
\(^{28}\) Id.
The government issues revenue bonds pursuant to its borrowing power. Revenue bonds are direct obligations of the government. Thus, the interest on revenue bonds is generally tax-exempt. In one case, a city sold bonds to construct an electric utility. Revenue from the sale of the utility's electricity secured the bonds. When a private utility purchased the plant, but placed revenues in escrow for the city's benefit to pay the bonds, the interest earned on the escrow account was not taxable to the private utility or to the bondholders. Revenue bonds remain useful in financing public infrastructure. Like general obligation bonds, revenue bonds are generally subject to the state debt limits. Because the government does not commit public tax revenues as security for revenue bonds, voter approval is not essential. Revenue bonds carry a modicum of risk to the investor because the financed facility must be profitable in order to generate revenues to pay the bond. Thus, revenue bonds are more expensive to the issuer because the issuer's interest rates upon borrowing reflect that risk.

Arbitrage bonds are an exception to the general rule that interest paid on government bonds is tax-exempt. Arbitrage bonds are government bonds which are used to acquire securities with a "materially higher" yield. An issuer leverages debt through arbitrage bonds. The issuer reinvests the proceeds of its loan (the bond issue) in securities paying a higher rate of interest. The issuer pays its debt expenses while earning income from its investment.

Private Financing

1. Tax Reform's Effect on Private Infrastructure Financing

While it is beyond the scope of this comment to explain and apply all the myriad and complex tax provisions relevant to private financing of infrastructure facility projects, a brief overview is necessary to explain the chilling effect the Tax Reform Act of 1986 has had upon privatized infrastructure financing.

29 I.R.C. § 103(a); see also Newman v. Commissioner, 68 T.C.433 (1977).
30 I.R.C. § 150(a)(1); see also Rev. Rul. 60-179, 1960-1 C. B. 37; Comm'r v. Meyer, 104 F.2d 155 (2d Cir., 1939). The statutory definition of "bond" was codified for the first time in 1986.
31 I.R.C. § 103(a). There are many exceptions to the tax-exempt municipal obligation. This section of the statute does not exempt interest on every type of legal liability that municipal corporations incur. Power Equipment Co. v. United States, 748 F.2d 1130 (6th Cir. 1984, rev'g. 83-2 U.S.T.C. para.9483 (1983)).
33 Id.
31 See supra note 18; City of Palatka v. State, 440 So.2d 1271 (Fla. 1983).
34 Id.
36 See generally I.R.C. § 103.
38 Tres. Regs. § 1.103-13(b)(5)(c).
40 See Feldman, supra note 11, at Appendix A (presenting overview of changes wrought by 1986 Act in the area of privatization). Among other things, the 1986 Act reduced the marginal tax rate for individuals, making
The 1986 Act significantly constrains the use of the municipal bond market for private financing.\textsuperscript{41} In addition, the Tax Act reduces significant tax advantages formerly inherent in private infrastructure financing transactions.\textsuperscript{42} These tax advantages had lured private investment dollars into infrastructure financing.\textsuperscript{43} Arguably, those incentives had caused an infusion of private dollars into public projects, for the public good. The reduction in incentives to private investors has reduced privatization as a way to finance infrastructure. Public policy forbidding private gain through public activities has resulted in government disincentives to privatization.\textsuperscript{44}

A typical private financing transaction involves a government (tax-exempt) entity financing the construction of an infrastructure facility with tax-exempt industrial revenue bonds.\textsuperscript{45} Following construction, the government typically leases the facility to a private investor.\textsuperscript{46} The private investor, who paid income tax at a high marginal rate before the 1986 Act, received tax advantages from the tax exempt financing.\textsuperscript{47} Deals of this kind provided the private investor with attributes of ownership sufficient to allow the investor to take tax deductions for depreciation.\textsuperscript{48} The investor also qualified for the investment tax credit under certain circumstances.\textsuperscript{49}

The 1986 Act reduces private investors’ advantages and lessens general availability of tax exempt financing. Among other things, the investor’s lower income tax rate and the alternative minimum tax may all but eliminate the tax advantages to the investor of the tax-exempt financing.\textsuperscript{50}

If that is not enough, the 1986 Act reduces the possibility of obtaining tax-exempt financing.\textsuperscript{51} The 1986 Act accomplishes this by lower volume cap allow-
ances, somewhat draconian rules on the use of bond proceeds for "non-qualifying" purposes, and complex arbitrage rules.

2. Public-Private Partnerships

A public-private partnership contemplates a marriage between governmental authority and private technology. The private partner avoids purchase and start-up costs. The public partner may retain ownership, or earn revenue to pay for revenue bond financing or a subsidy. In such a partnership, the opportunity exists to maximize the strengths of each partner.

A number of states have maintained statutory bars against this type of privatization. Laws barring public-private ventures contemplate the possibility that the private partner could usurp the public trust or monopolize public authority. Ohio's constitution forbids public-private joint ventures except when they serve a "proper public purpose" such as creating jobs or fostering economic growth. In State ex rel Ryan v. City Council of Gahanna, the city of Gahanna issued general obligation bonds, and pledged tax revenue from a levy to pay for the bonds. The Ohio Supreme Court found that Gahanna issued the bonds to purchase and develop property for a private industrial park, not to eliminate urban blight as the city claimed. Thus, the court found Gahanna in direct violation of provisions in the Ohio Constitution which forbid joint ventures with private industry. The court noted that Gahanna could have overcome Ohio's constitutional hurdles by forming an industrial development corporation to develop the industrial park. Particularly,
the court found Gahanna’s bond issue and tax levy impermissible, because as a matter of public policy, the government must not facilitate the private partner’s gain at the public’s expense. Statutory safeguards against private abuse include debt ceilings, pay-as-you-go features, and public approval of public-private debt financing arrangements. Despite a generally cautious approach to privatization, almost all cities and counties in a recent study had contracted out governmental services to private parties. Over one-third of the surveyed cities had used privatization as a technique for developing infrastructure projects.

ALTERNATIVE REVENUE SOURCES FOR INFRASTRUCTURE

Public Financing: Distributing Costs

Public financing methods distribute the costs of infrastructure so that those who do not necessarily benefit from the project contribute a share of its cost. Thus, a characteristic of public financing is that both users and non-users foot the bill. Although general obligation bonds and general property taxes constitute public financing by the foregoing definition, today’s public financing trends have moved toward user fees and special taxes. In part, distinctions between long term debt financing on the one hand and user fees and special tax financing on the other, are centered on which generation of the public actually pays the cost. Traditionally, established residents pay for long-term bond obligations through property taxes. However, in growing cities, equity often argues against raising property taxes in established areas to pay for growing areas. In part, user fees and special taxes resolve property tax equity issues by creating cost sharing over time and between generations of taxpayers. Thus, one generation of users pays the cost of infrastructure which is then available for future generations.

1. User fees

It seems appropriate to charge user fees to users of facilities such as parking, recreation areas, transit, water resources and treatment plants, solid waste facilities

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67 Id.
68 Id.
69 See MacDonald, supra note 43; Feldman, supra note 11.
70 Feldman, supra note 11.
71 Kutz, Study Released on Privatization, 102 AM. CITY & COUNTY 23 (NOV. 1987).
73 T. SNYDER & M. STEGMAN, supra note 9.
74 Id. at 9-17.
75 Id. at 4.
76 Id. at 9-17.
77 Id.
and sewers. User fees defray the cost of the facility or service. If the city financed the facility with revenue bonds, user fees could defray the debt on the bonds. It follows that the right to access user fee financed infrastructure turns on payment of the user fees. The effectiveness of user fee financing is dependent on the government’s ability to withhold access from those who do not pay the user fee. Where government is not able to deny access in response to non-payment of the user fee, users end up paying for “free riders.” Thus, user fees work best for water, sewer, waste disposal, transit, and parking.

The rate that users ultimately pay for infrastructure is dependent upon the cost of the facility. For example, users of water and sewer infrastructure must pay for expansion occasioned by growth. Thus, user fees are typically an intergenerational financing scheme, meaning present and future generations of users share the costs of the infrastructure. In this way, user fees are not strictly apportioned by individual use.

2. Special Taxes and Municipal Income Tax

Special taxes select a single economic activity for taxation. Examples of municipal special taxes include selective sales taxes, motor fuel tax, public utility tax, and “sin taxes” on alcohol and tobacco. The taxable base underlying special taxes approximates a pool of users, and in this way, special taxes are not unlike user fees. Special taxes are also subject to the effects of growth. For example, a municipality that has assessed a motor fuel tax to pay for streets and roads may increase the tax as more streets and roads are needed to accommodate growth.

Major municipalities in Pennsylvania, New York, and Ohio assess municipal income taxes. Statutory authorizations of municipal income taxes have withstood constitutional challenge. This is true, even when a non-resident is taxed upon income earned in the city. Where municipal income tax is the city’s major source of revenue, it too finances the infrastructure.

79 Id.; Roberts, Municipal User Fees--the Switch is On, 7 CURRENT MUN. PROBS. 446 (1981) (presenting user fee scheme in municipalities in the State of Maine).
80 T. SNYDER & M. STEGMAN, supra note 9, at 9-17.
81 Id.
82 Id.
83 Id.
84 Id.
85 Id.
86 Id. at 16.
87 Fordham & Mallison, Local Income Taxation, 11 OHIO ST. L.J. 217 (1950); Reynolds, supra note 8.
88 T. SNYDER & M. STEGMAN, supra note 9, at 14.
89 Id.
90 Reynolds, supra note 7 at § 97.
91 Id.
92 Id.
Private Financing: Paying for Direct Benefits

Private financing shifts the cost of infrastructure to those who derive direct benefit from it.\(^4\) In this way, private financing is converse to public financing.\(^5\) Private financing schemes are geared to geography or new development areas.\(^6\) Special assessments are limited to property which directly will benefit from infrastructure improvements.\(^7\)

1. Special Assessments

Special assessments are charges assessed to property owners for specific public improvements that benefit the owners' property.\(^8\) Legal foundations for special assessments have existed since the late 1800's.\(^9\) Special assessments are legally defensible against challenges of unconstitutional taking.\(^10\) In Stehling v. City of Beaver Dam, the court held that special assessments rise to the level of an unconstitutional taking of property when there is no direct benefit to the property.\(^11\) In general, special assessments are constitutional if they meet a two-prong test: First, the assessment must finance a particular public improvement; second, the assessed property owner must derive special benefit from the improvement.\(^12\) That special benefits are reasonable is well-settled.\(^13\) Special benefits from property improvements increase property values, which in turn justify the assessment.\(^14\) Whether the improvement is specific or general generates a great deal of litigation because special assessments are invalid when used for general improvements.\(^15\) For example, assessments on property that generate indirect benefits have been upheld under the rubric of special benefits in some states.\(^16\)

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\(94\) Id. at 16.

\(95\) Id.

\(96\) Id.

\(97\) Id.; See Anderson v. Town of Litchfield, 4 Conn. App. 24, 492 A.2d 210 (1985) (assessment must not exceed special benefit to property. Where property owners can establish assessments exceed benefit, assessment will be reduced) and Regents of the Univ. of Cal. v. City of Los Angeles, 100 Cal. App.3d 547, 160 Cal.Rptr. 925 (1972) (a special assessment shifts the burden of financing public improvements to those whose property is benefitted by the improvement) and In re Installation of Storm Sewers, 79 Wis.2d 279, 255 N.W.2d 521 (1977).

\(98\) T. Snyder & M. Stegman, supra note 9, at 12; Sands & Libonati, Local Government Law (1985).

\(99\) T. Snyder & M. Stegman, supra note 9, at 54, 63.


\(101\) 114 Wis.2d 197, 336 N.W.2d 401 (Wis. App. 1983).

\(102\) Id.

\(103\) Id.


\(105\) Id.

\(106\) Sands & Libonati, supra note 98; see generally Mandelker, Land Use Law (2d ed. 1988).

\(107\) The Pines v. City of Santa Monica, 29 Cal.3d 656, 175 Cal. Rptr. 336, 630 P.2d 521 (1981), Wright v. Proffitt, 26 S.C. 68, 198 S.E.2d 275 (1973) (holding that, "Indirect benefits which may accrue within the sub district may include enhanced property value resulting from decreased distance to sewer disposal lines,
Special assessments are commonly used to finance sidewalks, local roads, and sewers, all of which abut upon or indirectly benefit assessed property.\(^\text{108}\)

2. Exactions

Many growing communities have turned to exactions to finance new infrastructure. Exactions shift the cost of new infrastructure, and consequently growth, from the general tax base to the specific development.\(^\text{109}\) Legalities surrounding some exactions financing are still evolving.\(^\text{110}\)

Nearly half of all developers in the United States pay one or more exactions as a condition of development.\(^\text{111}\) Unlike special assessments, exactions are uncompensated charges precedent to subdivision development.\(^\text{112}\) Exactions include mandatory dedications and payments in lieu of dedication.\(^\text{113}\) Most subdivision control ordinances require developers to set aside, or dedicate, land for streets, parks, and any public facilities required by development.\(^\text{114}\) In lieu fees pay for off-site public facilities that will serve aggregated developments where each individual development is too small to support its own public facility.\(^\text{115}\) It is clear that dedications and in lieu fees are legal. Beginning with Ayres v. City Council of the City of Los Angeles,\(^\text{116}\) courts have upheld these forms of exaction in the face of claims that exactions are a form of uncompensated taking without due process.\(^\text{117}\) Justice Holmes’ rule in Pennsylvania Coal Co. v. Mahon\(^\text{118}\) teaches that while property may be regulated, overregulation constitutes a taking.\(^\text{119}\) However, since Pennsylvania...
Coal, courts have struggled with the concept that exactions require compensation.\textsuperscript{120} The landmark case of Pioneer Trust & Savings Bank v. Village of Mount Prospect\textsuperscript{121} placed the burden on the government to justify exactions as rendering benefits “specifically and uniquely attributable” to the exaction.\textsuperscript{122} Just a few years after Mount Pleasant, however, the court in Jordan v. Village of Menomonee Falls, rejected the plaintiff’s contention that exaction was an unconstitutional taking by applying the “rational nexus” test.\textsuperscript{123} The “rational nexus” test requires a reasonable relationship to exist between the exaction and the public needs generated by the development.\textsuperscript{124} Ten years later, in City of Dunedin v. Contractors & Builders Association of Pinellas County,\textsuperscript{125} the national trend toward analyzing exactions cases under the “rational nexus” test became firmly established.\textsuperscript{126} Today, dedications and in lieu fees generally are accepted as long as the developer’s responsibility does not exceed the need created by his or her development.\textsuperscript{127}

The legality of another type of exaction, development fees, is less settled.\textsuperscript{128} Development fees are set fees that developers must pay upon applying for, or before securing, a building permit.\textsuperscript{129} Often, development fees are not authorized directly by statute or ordinance; therefore, local governments impose them under the police power.\textsuperscript{130} The “rational nexus” test has emerged to decide the majority of development fee cases.\textsuperscript{131}

Many cities seek exactions far beyond limits the court would find to be reasonable.\textsuperscript{132} Developers do not challenge the fees, but pass them on to the purchaser of subdivided property.\textsuperscript{133} Because subdivisions are predominantly residential, exactions, especially development fees, pass the cost of growth to the newcomers.\textsuperscript{134} This is true whether the cost is reasonable or not.\textsuperscript{135} The political and

\textsuperscript{120} Larsen & Siemon, supra note 100; Penn Central Transportation Co. v. City of New York, 438 U.S. 104 reh. den., 99 S. Ct. 226 (1979).
\textsuperscript{121} 22 Ill.2d 375, 176 N.E.2d 799 (Ill. 1961).
\textsuperscript{122} 28 Wis.2d 608, 137 N.W.2d 442 (Wis. 1965), app. dismissed, 385 U.S. 4 (1966).
\textsuperscript{123} Id.
\textsuperscript{124} Id.; T. Snyder & M. Stegman, supra note 73.
\textsuperscript{125} 312 So.2d 763 (Fla. App. 1975), dec. quashed 329 So. 2d 314 (Fla. 1976), on remand, 330 So. 2d 74 (Fla. App. 1976), appeal after remand, 358 So.2d 846 (Fla. App. 1978), aff’d, 370 So.2d, 1978) (Development fees upheld under the rational nexus text for first time in Florida).
\textsuperscript{126} Id.
\textsuperscript{127} Staples, supra note 112, at 143.
\textsuperscript{128} Stegman, Development Fees for Infrastructure, URB. LAND 2 (May, 1986) (hereafter M. Stegman).
\textsuperscript{129} Id.
\textsuperscript{130} M. Stegman, supra note 128, at 3.
\textsuperscript{131} T. Snyder & M. Stegman, supra note 73, at 56-58 (discussion of cases and applications of the rational nexus test in exactions and special assessments); Delaney, Gordon, Hess, Exactions: A Controversial New Source of Municipal Funds, 50 LAW & CONTEMP. PROBS. 139 (1987) (Discussing the “needs-nexus analysis as a unified test for validating subdivision exactions & user impact fees”).
\textsuperscript{132} Id.
\textsuperscript{133} Id.
\textsuperscript{134} Id.
\textsuperscript{135} Id.; But see, Curtain & Durkee, Bill Will Require Justifying Development Fees, L.A. Daily J., July 11, 1988 at 4, col. 3.
economic repercussions of high development fees will require reasonableness and fairness in designing future exaction fee systems for new infrastructure.

STATE INFRASTRUCTURE LEGISLATION: INTERGOVERNMENTAL COOPERATION

Finding the right formula to package financing for infrastructure has become a challenge of the 1980's. Cooperation between state and local governments can powerfully address infrastructure needs in municipalities and unincorporated areas alike.

The Ohio legislature recently enacted two pieces of legislation dedicated to public infrastructure financing at the local level. Article VIII, section 2k of the Ohio Constitution authorizes "the issuance of bonds for local government infrastructure capital improvements." $120 million in general obligation bonds financing stands ready each year to pay for the public infrastructure. Section 2k authorizes aggregate capital financing of one billion two hundred million dollars, for Ohio's infrastructure.

H.B.704 became law on March 29, 1988. H.B. 704 implements section 2k by establishing an administrative scheme linking state and local governments in the process of funding infrastructure.

It is clear from the scope of the Ohio legislation that the Ohio legislature believes infrastructure is a pressing public problem. The legislature recognized the importance of infrastructure to a sound economy and the inherent shared interest of state and local government in maintaining infrastructure. It is fair to say that no other state has enacted such a comprehensive, intergovernmental commitment to better infrastructure.

The legislation is designed so that local government proposals for infrastructure projects will reach a review board. Participants in the program must inventory
their infrastructure and draft a five-year needs projection. Standardized proposals are not necessary until 1991. The clear emphasis of the program in H.B. 704 is upon repair and replacement of existing infrastructure; over 90 percent of the funding is set aside for that purpose. Districts can set aside as much as 20 percent of their funding for new projects. New infrastructure projects receive only half funding from the state, however. Provisions exist for low interest loans and a revolving infrastructure loan fund. Set-asides of $12 million for small government infrastructure, and $2.5 million for infrastructure emergencies assure that funding dollars reach all levels in the state. Each district will receive approximately $10 per capita funding through the state infrastructure program. Governments must come up with matching funds pursuant to a formula in the legislation.

H.B. 704 establishes a new Ohio Public Works Commission and local administration boards called District Public Works Integrating Committees, as well as a scheme for appointing members to each. Each project will be tested against the legislation’s ten “Criteria of Need.” The Small Government Fund applies to projects that have little or no chance of success at the state level, but that have merit when evaluated against the Criteria of Need. The state’s counties are divided into nineteen districts, each with rules of governance. This accounts for the unavoidable fact that several districts are predominantly urban, while some have only rural areas.

The law provides a complex set of standards, regulations, rules, and phase-ins that appear somewhat daunting at first glance. In order to derive maximum statewide benefit from the state-local alliance, it is incumbent on local leaders to work out the complexities and come to an understanding of the program as presented. Delegations to local subcommittees limit local authority to selecting and referencing projects to the state level. It appears that the legal machinery is in place to develop a precedent-setting infrastructure financing plan for Ohio.

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145 Id.
146 Id. at § 164.05(a)(10).
147 Id. at §164.05(d).
148 Id. at § 164.05(h).
149 Id. at § 164.05(d).
150 Id. at § 164.05(e), (f); 164.08(c)(1).
151 Id. at § 164.08(b)(2), (3), (4).
152 Id. at § 164.08(b)(4), (5).
153 Id. at § 164.05(d)(1)-(d)(4).
154 Id. at § 164.05.
155 Id. at § 164.02(c)(1), 164.04(a).
156 Id. at § 164.04.
157 Id. at § 164.06(b)(1)-(b)(10).
158 Id. at § 164.02(c)(1).
159 Id. at § 164.03.
160 Id. See also Mahoney, supra note 143, at 17.
161 Mahoney, supra note 143, at 4, 5.
Ohio’s infrastructure legislation promises to substantially impact on the state’s public works infrastructure needs. Combining an innovative administrative scheme which involves local officials with state planners, the Ohio legislation is unique in concept and scope. Because funding capital for the new law comes from general obligation bonds, Ohio’s electorate approved the financing scheme. The support of Ohio’s voters underscores the importance of infrastructure to the state.

The new law comes in time to infuse new monies into infrastructure projects that could have been lost due to adverse effects of the 1986 Act on privatization projects. Ohio’s infrastructure legislation is focused upon repair and replacement of existing infrastructure. Thus, it may not answer the needs for new infrastructure in growth areas. Development fees and exactions are available to fill this financing gap. However, it is incumbent on local governments to develop systems of development fees that result in fairness and bear a rational relationship to the needs of the development.

Public works infrastructure is essential to the health, safety, welfare and prosperity of America’s cities. Ohio’s leadership role in public works infrastructure financing assures Ohio long-term future benefit from capital infrastructure investment.

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