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THE CHANGING CULTURE OF AMERICAN LAND USE REGULATION: PAYING FOR GROWTH WITH IMPACT FEES

Ronald H. Rosenberg*

I. INTRODUCTION

AMERICA, over the last century, has been a society of change—a dynamic, growing society. This dynamism has been reflected in a nation characterized by expansion of every kind—demographic, educational, economic, and geographic. Throughout much of the twentieth century, the concept of growth was regarded by some as the fundamental American destiny, as a natural outcome of a prosperous economic system, and as an indicator of the superiority of the American political system. Under this ideology, in a general sense, growth was “good” and it was to be facilitated by public policy and public subsidies as well as by private investment. The physical growth of our living communities possessed organic connotations reflecting social progress and the nation’s economic vitality. Following this view, a century ago even the adverse impacts of industrialization such as air pollution could be considered to be the inevitable and necessary costs of prosperity.¹ The American growth ideal associated general economic expansion with greater personal opportunity and higher individual real incomes which would, in turn, lead to a superior quality of life. This growth concept also suggested greater personal freedom and choice in the selection of the form and location of one’s residence. To fulfill this desire, throughout the last century and into the present, most Americans have aspired to achieve the twin goals of owning their own homes² and living in suburban areas

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1. In the late nineteenth and early twentieth centuries, Pittsburgh, Pennsylvania, was called the “smokey city.” This nickname was considered a positive identification since it signified the economic prosperity associated with industrial facilities. In fact, coal dealer William P. Rend spoke before the Union City Club of Chicago in 1892 and he said “[s]moke is the incense burning on the altars of industry. It is beautiful to me.” *Smoke Prevention: Report of the Special Committee on Prevention of Smoke, Presented to Engineers’ Club of St. Louis, J. ASS’N ENG’G SOC’YS 11 (1892) (quoted in DAVID STRADLING, SMOKESTACKS AND PROGRESSIVES: ENVIRONMENTALISTS, ENGINEERS AND AIR QUALITY IN AMERICA, 1881-1951, at 43-44 (1999)).*

2. The social goal of home ownership is particularly strong in the United States and it is accurate to say that Americans are a nation of homeowners. As of 2003, overall home ownership rates reached 68.3% of all American families regardless of income. However, there are significant disparities between demographic subgroups depending upon race, age,

outside of the central city.³

Growth in America cannot to be measured solely by the numbers—that is, the expanding population⁴ or the general increase in families or individual incomes.⁵ The idea of growth has a physical and a spatial dimension to it. As the nation's population has grown over the last century, the form and distribution of living patterns has changed as well. Today, America can best be described as a suburban nation with over 80% of its total population concentrated in metropolitan areas⁶ and, overwhelmingly, they are living in single family, detached homes.⁷ The nation has transformed itself over the last century so that the location of homes and jobs have drastically shifted from cities to suburbs⁸ and there is little evi-

and state. See U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES: 2004-2005 (124th ed. 2004) [hereinafter 2004-2005 CENSUS].

3. This suburban migration reflects what Anthony Downs terms the “dominant vision” of metropolitan growth which reflect residential norms for the last fifty years. Downs sees this “dominant vision” as possessing five components: 1) ownership of detached single-family homes on spacious building lots; 2) ownership of automobiles; 3) working in low-rise workplaces in park-like settings; 4) residence in small communities with strong local governments; and 5) environments free from the signs of poverty. See ANTHONY DOWNS, *NEW VISIONS FOR METROPOLITAN AMERICA* 5-6 (1994). Following the incentives of “consumer sovereignty,” developers have provided the market with suburban environments that people demand. See, e.g., Peter Gordon & Harry W. Richardson, *Prove It: The Costs and Benefits of Sprawl*, BROOKINGS REV. 23 (Fall 1998) (“it is hard to avoid concluding that ‘sprawl’ is most people’s preferred lifestyle”).

4. American population has consistently grown during the twentieth century. By July, 2003, the Census Bureau estimated the nation’s population to be just over 291 million people. This should be compared to the population in 1900 which was approximately 76 million—nearly a quadrupling of population in a century. 2004-2005 CENSUS, *supra* note 2, at 7 tbls. 1&2. During the period from 1970 to 2000, American overall population grew by over 32%. This population increase resulted from both increased numbers of American citizens and higher numbers of immigrants. In fact, in the decade of the nineties the immigrant population growth rate grew faster (3.4% per year) than in any decade other than 1900 to 1910, 1910 to 1920 and 1920 to 1930. *Id.* at 8 tbl. 5.

5. Nominal incomes for all American households measured in constant 2002 dollars, have risen approximately 16% over the past twenty-two years, growing from \$36,608 in 1980 to \$42,409 in 2002. 2004-2005 CENSUS, *supra* note 2, at 443 tbl. 666. The real shift over this period occurred in the distribution of income with the trend over the last two decades being the concentration of income in the top 5% of the population with this segment increasing its share of income total from 14.6% in 1980 to 20.8% in 2002, measuring in constant 2002 dollars. *Id.* at 447 tbl. 672. During this same period, the lowest fifth of the population experienced a nearly 20% drop in the distribution of aggregate income demonstrating that the rich did get richer and the poor got poorer.

6. In fact, the percentage of the American population living in metropolitan areas has increased from 68.6% to 80.3% during the last two decades, with the amount of land area occupied by this growing metropolitan populace also expanding from 10.9% to 20% of the nation’s land base. See STATISTICAL ABSTRACT OF THE UNITED STATES 31 tbl. 29 (122d ed. 2002) [hereinafter 2002 CENSUS].

7. Statistics indicate that, during the nineties, the single family unit was by far the most common form of new residential construction. In 2003, single family structures represented approximately 80% of the new housing construction starts. See 2004-2005 CENSUS, *supra* note 2, at 599 tbl. 928.

8. Immediately following World War II, approximately 70% of metropolitan residents lived in cities. By 1990, this percentage had declined to nearly 40% of such residents. See DAVID RUSK, *CITIES WITHOUT SUBURBS* 5 (2d ed. 1995). Not only have cities become relatively less populous, their remaining residents have become disproportionately poor. In 1990, 50% of all poor people lived in cities, while in 1960 only 33% of the poor lived there. See F. KAID BENFIELD ET. AL., *ONCE THERE WERE GREENFIELDS* 123 (1999).

dence to suggest that a reversal of this pattern will be forthcoming anytime soon.⁹

Suburban American growth also reflects a greater affluence of American families with house size and housing amenities now common features in new housing.¹⁰ However, the suburban lifestyle is described by more than just house size and the number of bathrooms, garages and other amenities. It is also defined by a wide array of site-specific, neighborhood and community-wide public services enhancing the quality of life; for example, sidewalks, curbs and gutters, internal subdivision streets, libraries, emergency medical, and social services, as well as public schools, recreational facilities, and fire stations. While some of these services may be provided by private corporate suppliers, the bulk are the responsibility of units of local government. Therefore, the construction of a single home cannot be considered as an isolated event, but rather as part of a continuum of connected public responses linking new residents to the broad range of community improvements and services. Funding these growth-related capital costs has become one of the most controversial contemporary policy questions and one which has been initially determined in the many chambers of local government and ultimately, when contested, resolved in the state courts and the legislatures.

For most growing communities today, meeting this fiscal demand presents a formidable financial challenge. Most growing communities are under tremendous fiscal pressure to fund community services expected by

While the poor have become concentrated in cities, job growth has located primarily in suburban areas. See Anne Gearan, *Clinton to Help Needy Own Car*, ATLANTA CONST., Feb. 24, 2000, at C1 (stating two-thirds of all new jobs are created in the suburbs).

9. Sociologist J. John Palen suggests that suburbanization is likely to continue for the immediate future and he writes that a suggested "back-to-the-city" movement was largely the creation of the popular media. J. JOHN PALEN, *THE SUBURBS* 226 (1995). However, the pursuit of the suburban ideal has actually had mixed results in terms of the suburbanite's level of satisfaction. While America has become a suburban nation, its "low density, dispersed, single-use, automobile-dependent new development" have been critically termed "sprawl." See Oliver A. Pollard, III, *Smart Growth: The Promise, Politics, and Potential Pitfalls of Emerging Growth Management Strategies*, 19 VA. ENVTL. L.J. 247, 248 n.2 (2000). Sprawl development patterns have been associated with a number of serious problems including air and water pollution and the loss of open space, agricultural land, and natural areas, as well as serious traffic congestion. This has occurred in spite of planning, zoning and land use control efforts. See generally Lee R. Epstein, *Where Yards Are Wide: Have Land Use Planning and Law Gone Astray?*, 21 WM. & MARY ENVTL. L. & POL'Y REV. 345 (1997). But see Steven Hayward, *Suburban Legends*, NAT'L REV., Mar. 22, 1999, at 35, 38 (suggesting that anti-sprawl forces think that "commuting suburbanites are making unenlightened lifestyle choices because they lack the expert supervision that only their betters in government can provide").

10. Census data has indicated that the average new home size has increased to 2,330 square feet as of 2003, which constitutes a jump of nearly 50% from the average new home in 1970. 2004-2005 CENSUS, *supra* note 2, at 600 tbl. 930. Beyond size, new American homes are much more likely to be two or more stories, to have four or more bedrooms, 2.5 or more bathrooms, have central air conditioning, fireplaces, and garages than they did in 1970. See 2004-2005 CENSUS, *supra* note 2, at 600 tbl. 930. In fact, features such as central air conditioning have become so commonplace that they are not even considered to be amenities, but rather standard features, in 88% of new homes. *Id.*

residents and often required by state and federal government.¹¹ Public debate in many communities often focuses upon the question of how to supply needed public improvements without increasing the general taxes on existing residents.¹² This local funding problem has been exacerbated over the last twenty years by at least two factors: 1) significant reductions in intergovernmental funding transfers from both state and federal government and 2) the imposition of voter-mandated limitations on the ability of the locality to generate tax revenues from community-wide taxation sources.¹³ In this atmosphere of fiscal conservatism, even the local funding of public services for *existing* residents becomes a controversial and disputed public issue. Not surprisingly, there is often little support for using scarce local tax revenues to pay for the capital needs caused by the influx of *future* community residents. Often the public discourse repeats the mantra that new growth “should pay its own way.” Frequently, the issue of funding infrastructure needs for new growth has emerged as an extremely significant growth management question as well. In many locales, land development is characterized as being “out of control” and causing a problem termed “sprawl.”¹⁴ No community wishes to subsidize

11. Minimum service levels are specified and required by state and, occasionally, federal law. This has become known as the unfunded mandate problem that has engendered such strong hostile reaction from local governments. State legislatures have responded, and at least seventeen states have adopted statutes requiring state government to reimburse local governments for complying with the costs of new mandates and this has resulted in litigation. *See, e.g., City of Sacramento v. State*, 785 P.2d 522 (Cal. 1990); *County of Los Angeles v. State*, 729 P.2d 202 (Cal. 1987); *Schmidt v. Dep't of Educ.*, 490 N.W.2d 584 (Mich. 1992).

12. Localities, constrained in their ability to raise sufficient revenues for needed public services, have resorted to a range of techniques to enhance their economic well-being. *See, e.g., Jennifer Lenhart, Leesburg Revives Growth Debate*, WASH. POST, Feb. 11, 2002, at B1 (discussing town's annexation of 7,000 acres of county land for commercial purposes to improve the town's tax base). Some jurisdictions have imposed a direct real estate sales tax on each sale transaction. In England, the Department of Inland Revenue has imposed a “stamp duty” or property transaction tax of up to 4% depending on the value of the property being sold. *See Anthea Masey, Stealthy Way to Avoid Tax*, EVENING STANDARD, June 5, 2002, at 7.

13. The most famous example of this kind of property tax revolt was the 1978 California statewide initiative known as Proposition 13, which served to amend the California Constitution to impose strict limits on the rate at which real property was to be taxed and upon the rate at which realty assessments were to be increased from year to year. *Nordlinger v. Hahn*, 505 U.S. 1, 1 (1992). The United States Supreme Court sustained this method of preferential tax assessment against a Fourteenth Amendment Equal Protection challenge finding at least two constitutionally satisfying justifications for the system in *Nordlinger v. Hahn*. *Id.* at 15.

14. Nearly thirty years ago, with the beginning of the environmental movement in America, commentators began to critique the prior assumptions about the desirability of endless economic growth. One writer, employing rhetoric reminiscent of the National Environmental Policy Act of 1969 or NEPA, expressed thoughtful doubts about this premise and described a nascent attitude challenging the short-term thinking of growth advocates. He wrote,

Once, citizens automatically accepted the idea that growth—in numbers of people, in jobs, in industries—would ease the public burden by increasing the tax rolls and spreading per capita costs. Now they have doubts. They seem to be expressing the belief that larger size reflects not only lesser quality but also higher costs. Pressed by inflation, they listen carefully arguments about the hidden costs of growth.

the sprawl that afflicts it.

While much has been written about the environmental, energy, and social consequences of sprawling suburban development;¹⁵ far less attention has been given to the issue of how new development costs are funded. American local government law and civic culture has increasingly privatized development costs that had previously been carried as general societal expenses. Growth now occurs as local governments attempt to shift development costs away from themselves.¹⁶ Increasingly, local governments combine their traditional land use regulatory powers with their authority to impose land development conditions. This practice has become known as requiring “exactions” as a condition of land use approval,¹⁷ often demanding an array of developer on-site and off-site improvements, land dedications, and cash payments made to the locality. These up-front costs, reaching \$20,000 or more per residential unit,¹⁸ are allocated to one or more participants in the development process rather than

The new mood reflects a burgeoning sophistication on the part of citizens about the overall, long-term economic impact of development. Immediate economic gains from job creation, land purchases, and the construction of new facilities are being set against the public costs of schools, roads, water treatment plants, sewers, and the services new residents require.

WILLIAM K. REILLY, *THE USE OF LAND* 33-34 (1973).

15. See Robert W. Burchell & Naveed A. Shad, *The Evolution of the Sprawl Debate in the United States*, 5 HASTINGS W.-NW. J. ENVTL. L. & POL'Y 137, 141 (1999) (describing the consumption of exurban agricultural and other lands); William W. Buzbee, *Urban Sprawl, Federalism, and the Problem of Institutional Complexity*, 68 FORDHAM L. REV. 57, 72-75 (1999) (describing air pollution, water pollution and other environmental impacts of sprawl); Arnold W. Reitze, Jr., *A Century of Air Pollution Control Law: What's Worked; What Failed; What Might Work*, 21 ENVTL. L. 1549, 1572 (1991) (sprawl commuting patterns increase traffic and auto air pollution). Sprawl development patterns and the reliance on automobiles for home to work commuting have been blamed for the steadily growing commuting times experienced by suburban residents. One recent study concluded that Washington, D.C. drivers traveling at rush hour lost 84 hours being stuck in traffic in 2000. This was up from 24 hours per year in 1982. Katherine Shaver, *Wasting Time to Save Time*, WASH. POST, June 21, 2002, at B1. The economic implication of road congestion and delay are substantial. According to a study prepared by the Texas Transportation Institute, the Washington, D.C. region lost \$2.3 billion a year in lost time and other expenses due to traffic congestion. See Neil Irwin, *Clogged Roads Cost Area Firms Billions*, WASH. POST, June 21, 2002, at A1.

16. There is more than a small degree of hypocrisy in the insistence of existing residents demand that newcomers “pay their own way” when previous infrastructure costs had been paid by the community as a whole through debt financing repaid with general tax revenues. Describing this inconsistency Professor Jonathan C. Levine has written that,

[W]hen existing residents are called upon to pay for infrastructure that benefits newcomers principally, they rebel—despite the fact that their own infrastructure had been financed in precisely the same fashion. In this context [of higher property tax increases to service debt], the impact fee is viewed as an alternative financing mechanism that comes to resolve any inequities in the burdens that may be generated by such property tax hikes.

Jonathan C. Levine, *Equity in Infrastructure Finance: When are Impact Fees Justified?*, 70 LAND ECON. 210, 221 (1994).

17. See generally ALAN A. ALTSHULER & JOSE A. GOMEZ-IBANEZ, *REGULATION FOR REVENUE: THE POLITICAL ECONOMY OF LAND USE EXACTIONS* (1993).

18. A 1999 statewide study undertaken in California found that residential development fees alone ranged from a low of \$4,000 to a high of more than \$60,000 per unit. See DEPT. OF HOUSING & CMTY. DEV., *PAY TO PLAY—RESIDENTIAL DEVELOPMENT FEES IN CALIFORNIA CITIES AND COUNTIES*, 1999, at 1 (2001).

being absorbed by the community. Consequently, one of the most significant public policy questions confronting localities today is “who will pay the initial infrastructure and capital costs necessitated by new population growth?”¹⁹

Using the rhetoric of financial impact analysis,²⁰ local governments have required that builders, land developers, and, ultimately, home buyers pay development cash impact fees to fund a wide array of public costs attributable to new land development. Past funding patterns have changed as society and the courts have grown to accept the idea that new growth should absorb its own fiscal impacts. Not surprisingly, this emerging impact fee practice has been exceedingly popular with local governments and current residents, and it has dramatically accelerated over the last twenty years. On the other hand, the practice has also been strongly criticized by landowners, developers, and affordable housing advocates as unfairly increasing the cost of new construction, imposing an unfair “tax” and raising housing prices. Some have suggested that such fees actually constitute *de facto* growth controls with exclusionary implications.²¹ Further, the construction industry has argued without significant success that emerging federal constitutional “Takings Clause” principles should strictly limit this rapidly-spreading exaction practice. The underlying social and legal attitudes have shifted to a point where existing suburban residents believe that impact fees are a legitimate means of assigning development costs. The culture of having communities collectively bear

19. It has been asserted that the “costs of growth are little known, poorly understood and typically understated.” Eben V. Fodor, *The Real Cost of Growth in Oregon*, 18 POPULATION & ENV'T 373, 387 (1997). Fodor's analysis of seven public infrastructure costs associated with the construction of a typical single-family house in Eugene, Oregon in 1995—schools, sewer, storm drainage, roads, water service, parks and recreation and fire protection—set them at \$24,502. In 1995, the system development charges imposed in Eugene were only \$2,054, leaving the public to assume public costs of \$22,448 per house and totaling \$24.6 million for residential construction in that year alone. *Id.* at 386. The argument is that even when impact fees are charged to developers, they only capture a fraction of the public infrastructure costs associated with residential growth and do not account for other environmental and quality of life impacts. EBEN FODOR, BETTER NOT BIGGER 87 fig.5-5 (1999) [hereinafter FODOR, BETTER NOT BIGGER].

20. Some have drawn the analogy between the emerging land development exactions and the use of environmental impact analysis in environmental impact statements required by the National Environmental Policy Act and numerous state laws. See 42 U.S.C. §§ 4321-4370e (2005).

21. As growth controls become more prevalent in a metropolitan area, they cause population growth to be diverted to other less expensive and less exclusionary areas, often farther away from the city center. Professor William Fischel has argued that these practices exacerbate sprawl development patterns. See WILLIAM A. FISCHEL, DO GROWTH CONTROLS MATTER? 55 (1990). Growth retarding policies have also been identified as having beneficial economic impacts for existing homeowners when local governments either limit the supply of new housing or raise the entry costs or both. See Nicole Stelle Garnett, *Trouble Preserving Paradise?*, 87 CORNELL L. REV. 158, 177 (2001) (“existing owners can charge prospective homeowners the premium that they gain when the government limits new development”). But see VICKI BEEN, IMPACT FEES AND HOUSING AFFORDABILITY 35 (HUD Report, 2004) (evidencing of disproportionate effects on low and moderate income consumers or racial minorities is “thin” due to limited research).

public capital expenses has given way to a view of individual responsibility.

It is the increasing use of development impact fees which is the subject of this article. Part I will focus on the general subject of municipal finance with an analysis of the changing pattern of the sources of local government tax and non-tax revenue. Special consideration will then be given to the wide range of methods that local governments could use to finance capital improvements necessary for community development. This part will conclude that by mixing a number of different techniques, increasingly municipalities have shifted the costs of accommodating new development to the land development industry, land owners, and home purchasers. Operating out of financial necessity, this process has resulted in the integration of local government's land use planning and zoning efforts with municipal financial planning goals resulting in a system that can be said to "regulate for revenue."²² In Part II, the evolution of the American land use exaction tradition will be examined. This part will conclude that rather than a recent innovation, exactions have existed in some form for over a century with impact fees being the most recent example of this tradition. Part III will analyze the characteristics, policy rationale and development implications of development impact fees. Available empirical research related to the device will be analyzed. This part will conclude that despite the widespread use of the impact fee, little empirical analysis has been published but that which exists confirms common sense assumptions about the economic impact of the fees. Part IV will examine the oversight given by both federal and state courts to rapidly expanding local government impact fees. This critique will analyze this litigation in three phases: the pre-*Nollan* period (pre-1987), the *Nollan/Dolan* era (1987-1994), and the post-*Dolan* (post-1994) time frame. This part will draw two main conclusions: 1) that impact fee policy has been influenced more directly by state legislative action and state court supervision than by federal constitutional rulings and 2) that as the legal and political culture has evolved, state courts have generally accepted impact fees as the expression of social attitudes on a fundamental question of public responsibility. This history concludes that development impact fees are truly products of the state law compromises balancing the competing interests in distributing development-related costs and increasing localities have deflected public responsibilities.

PART I—LOCAL GOVERNMENT FINANCE AND THE FUNDING OF NEW MUNICIPAL INFRASTRUCTURE

A. FUNDING THE COSTS OF NEW DEVELOPMENT— "WHO PAID FOR THE NEW ELEMENTARY SCHOOL?"

Public services, such as school buildings and fire stations, are most often provided by units of local government. However, in our daily lives,

22. See generally ALTSHULER & GOMEZ-IBANEZ, *supra* note 17.

most citizens only have the vaguest idea of who provides their local public services and who pays for them. Bricks and mortar cost money, but it is not always clear who actually funds them. When a new school, road, or police station is built; most residents generally believe that these developments are paid for by "the government" with "tax money." But which government and what money? Who is actually footing the bill? Conceivably, the federal government could fund the construction of local public facilities. In reality, however, this does not happen since most of these expenses are borne by local communities, sometimes with state assistance. In addition, it is often not clear to residents which unit of the local government is providing the service. This is due to the fact that the structure of local government often is not transparent to residents since it is composed of several entities operating within the same geographic area such as special service districts (that is, school, sewerage, water, and recreation) as well as general purpose local government units (that is, cities, counties, towns and villages). More significantly, few citizens comprehend the basic funding patterns of local government infrastructure and service provisions. Roads, schools, and fire stations mysteriously appear from time to time, with most people assuming that they were built, furnished and staffed by some level of "government," yet with no clear concept of who actually paid for the expenses land, materials, and labor.

The details of local government fiscal questions, both in terms of taxing and spending, are vaguely understood by most residents, with most citizens merely hoping that someone else actually pays the cost. Ordinary local government budgeting matters are only the concern of the most intensely-interested citizen's organizations or groups dedicated to government economy or policies of tax reduction. In most cases, such interest focuses on local government fiscal issues in a general, non-specific way. The frequently-heard call is for "tax relief," and it is usually made in support of a reduction in the local real property taxes which have significantly increased in many areas due to rising property values. Even if an interested, anti-tax local resident knew that a particular new school or fire station was being budgeted by their local government, it would be very difficult for them to associate one planned construction project to their *general* real estate or sales tax burden. That is not to say that focused opposition cannot exist, but rather, it is not easy for citizens to disaggregate the costs of one school or library from their total tax burden. An exception to this can arise, however, when a specific project or category of projects requires explicit citizen approval as in the case of the issuance of bonds or an increase in local taxes dedicated to individual construction projects.²³ In these instances, citizens can and do mobilize around the specific construction project to either support or defeat it.

23. The creation of state taxation policy can also be controversial and, on occasion, lead to serious political and functional paralysis. See Manuel Roig-Franzia, *A Tennessee Tangle Brings State to Halt—Deal to Raise Sales Tax Ends Tense Shutdown*, WASH. POST, July 4, 2002, at A1. Due to legislative inaction, the Tennessee state government was shut down for three days resulting in nearly half of its 45,000 state employees not coming to

B. WHERE DO LOCAL GOVERNMENTS OBTAIN FUNDS FOR THEIR SPENDING OR "HOW DID WE PAY FOR THE NEW ELEMENTARY SCHOOL?"

In the nineteenth century, local governments were commonly referred to as "municipal corporations," with the intended analogy being made to the private corporation. As mentioned above, the municipality's functions were set out in a governmental charter or were specified, either directly or indirectly, by state enabling legislation. Cities and counties initially defined their public functions in a way that balanced the expressed desires of their residents with the legal limitations inherent in their authorities. However, the descriptive analogy to the private corporation only shared a degree of parallelism. While the private firm could freely decide to raise or lower prices, drop unprofitable lines of business, embark on new business opportunities, lay off unneeded workers, and raise new funds for expansion in the capital markets, their municipal counterparts found themselves highly circumscribed by state law obligating them to provide certain public services and giving them carefully specified fiscal powers that could be employed to generate necessary revenues to fund its activities.²⁴ Political considerations associated with expected levels of public services also placed pressures on municipal corporations that were not experienced by private companies. Furthermore, municipal budgeting priorities could also be skewed by state and federal policies imposing "unfunded mandates" which demand that localities assume costs associated with programmatic preferences required by the "superior" level of government.²⁵

Local governments are not like their state or federal counterparts: they have extremely limited freedom in developing their own fiscal policies.

work, state universities canceling summer school classes, and dozens of motor vehicle registration offices being closed.

24. See generally David Gelfand, *Seeking Local Government Financial Integrity Through Debt Ceilings, Tax Limitations, and Expenditure Limits: The New York City Fiscal Crisis, the Taxpayers' Revolt, and Beyond*, 63 MINN. L. REV. 545 (1979) (describing the history of state law limiting or reducing real estate tax rates, imposing maximum levy or tax revenue limits, and expenditure increase limits).

25. The term "mandates" has been more broadly defined to include several different techniques used by the federal government to regulate states and localities. This list includes: direct orders to carry out federal policy, grant conditions, cross cutting requirements or linked compliance requirements, and partial and total preemptions of local action. See PAUL L. POSNER, *THE POLITICS OF UNFUNDED MANDATES* 4 (1998). This unidirectional federalism has been more graphically described in the academic literature as "shift and shaft federalism." See Stephen D. Gold & Sarah Ritchie, *State Policies Affecting Cities and Counties in 1991: Shifting Federalism*, PUBLIC BUDGETING AND FINANCE 23-46 (Winter 1992). The "unfunded mandate" problem also adversely affects state governments which must respond to federal mandates such as Medicare. It has been estimated that Medicaid, a federal health care program, has costs which have been growing at a double-digit rate and now account for 20% of the average state budget. See Dan Balz, *States' Budget Outlook Remains Bleak—Even Tougher Measures May Be Needed to Make Up for Revenue Shortfalls*, WASH. POST, July 16, 2002, at A5. State government also imposes these mandates on localities. DAVID R. BERMAN, *STATE-LOCAL RELATIONS: AUTHORITY, FINANCES, COOPERATION* 49-50 (Int'l City Mgmt. Ass'n, Mun. Yearbook 2002) [hereinafter BERMAN 2002].

Under the legal theory prevalent in many jurisdictions, local governments either derive their authority to act upon delegation from the state or find limits to their authority in statutory or constitutional provisions. Although the political and social traditions of different states result in varying levels of local autonomy, in general, state statutory and constitutional law imposes substantial restrictions upon local government financial management, including property assessment, taxation, debt-issuance, budgeting, accounting, auditing, and fiscal reporting.²⁶ As a result of this tradition, the power of local governments to tax is one of the most carefully circumscribed authorities.²⁷ Unlike a private corporation, local governments cannot freely raise “prices” of their general governmental services in response to higher costs. They must raise taxes or find stable intergovernment transfers to pay these expenses. More specifically, a county or city usually may not raise its sales or real estate tax rate or borrow money unless it closely follows state law procedures and substantive policies.²⁸ Often such a tax policy change or borrowing decision must

26. Traditionally, state government has carefully overseen the taxing and debt issuance powers of local governments as an aspect of state supervision of local affairs. See OSBORNE M. REYNOLDS, JR., *LOCAL GOVERNMENT LAW* 354-59, 369-70 (2d ed. 2001). However, following the high number of local government financial defaults and other failures during the Great Depression of the thirties, state legislatures imposed an impressive array of financial controls on localities and in some states reserved the power to review and approve local budgets. More recently, important voter initiated “lid laws” have been adopted which impose property tax rate and revenue limits, limits on property assessment practices, and revenue rollbacks. See DONALD AXELROD, *BUDGETING FOR MODERN GOVERNMENT* 181-82 (1995).

27. Florida is an example of a state whose constitution strictly governs the power of the state and local governments to levy taxes. Article VII, § 1(a) of the Florida Constitution provides:

No tax shall be levied except in pursuance of law. No state ad valorem taxes shall be levied upon real estate or tangible personal property. *All other forms of taxation shall be preempted to the state except as provided by general law.* (emphasis added).

This section emphasizes the centralized control of local taxing power that the Florida Constitution vests in the state’s legislature. Another section of Article VII—§ 9(a)—specifically mandates that counties, school districts, and municipalities be legislatively authorized to levy ad valorem or property taxes. All other forms of taxation are preempted and reserved to the state unless authorized by general law, that is, state statute. The Florida courts have rigorously enforced this strict reading of legislative supremacy and the lack of implied local powers of taxation. See, e.g. *Collier County v. State*, 733 So. 2d 1012, 1014 (Fla. 1999) (holding if an “interim governmental services fee” is a “tax,” it is unconstitutional as unauthorized).

28. State legislatures control nearly every aspect of local government financial management including assessment practices, taxation forms, debt issuance, budgetary methods, accounting and auditing rules, and reporting to the state government. Some states have “truth-in-taxation” statutes demanding public disclosure of proposed tax increases. Most notably, state law often limits or prohibits tax rates and assessment increases. In some states, the total amount of tax revenue that can be lawfully collected is correlated to growth measures such as income, inflation or population. See BERMAN 2002, *supra* note 25, at 66. In addition, state taxation policy often restricts local government in defining its real estate tax base by granting exemptions to certain categories of land owners which has the effect of shrinking the local property tax base. In some municipalities, 60% or more of the potential property tax base has been exempted by state law. See John P. Thomas, *Financing County Government: An Overview*, INTERGOVERNMENTAL PERSPECTIVE 12 (Winter 1991). Major owners of local, tax exempt realty include governments, schools, charitable organi-

be preceded by public referenda—occasionally requiring favorable supermajorities—as a precondition of such a financial shift. Citizens, in the current era, have been particularly skeptical of proposed tax increases. This state-mandated legal structure has restricted the raising of conventional tax revenues and, as a result, has hindered the ability of local government units to acquire the tax-based funds needed to build new public facilities. Therefore, local governments have the worst of both worlds; the obligation to provide public services combined with the absence of lawful and effective means of raising needed revenues.

Since local government is the unit of government “closest” to most people and the one which provides the most extensive array of direct public services affecting the average citizen’s day-to-day life,²⁹ the various means that local governments employ to raise revenue must be identified. In general, the locality’s revenue stream is composed of three parts: 1) local taxes and other charges (general revenues); 2) local utility and other revenues;³⁰ and 3) intergovernmental transfers from the federal and state governments. In terms of national averages, in 2002 these three categories of revenue provided 55.1%, 8.4%, and 36.8% respectively of local government revenues.³¹ Contrary to common opinion, most local government revenue is derived from sources within the locality itself—64.3% or nearly two-thirds of the total. This locally-generated, two-thirds proportion has been stable—virtually unchanged—since 1970.³² Intergovernmental aid to local governments—the other one-third—has been a substantial and similarly-stable portion of local revenue. It is composed of two elements: 1) transfers from the state government and 2) transfers from the federal government. On average, state aid constitutes 30% of local revenues while federal assistance contributes a bit over 3%.³³ While

zations, hospitals, and religious groups, but veterans and senior citizens also benefit from preferential exemptions.

29. Nationally, categories of local government spending has remained remarkably consistent over the twenty-two year period from 1979-2002 with municipal budgets being spent in the following proportions in 2002: public education (38.0%), highways (3.9%), welfare (3.5%), health and hospitals (7%), police and fire protection (7.1%), administration (4.6%), insurance trust (2%), utilities (10.5%), and others (23.5%). TAX FOUNDATION, *FACTS AND FIGURES ON GOVERNMENT FINANCE* 263 tbl. F-5 (38th ed. 2004) [hereinafter *FACTS AND FIGURES*].

30. In 2002, this category generated 8.4% of total local government revenue. *FACTS AND FIGURES*, *supra* note 29, at 268 tbl. F-8. A large number of states help to assist local government revenue needs with funds from a variety of sources including legalized gambling and lotteries, state-run liquor sales, and government electric and other utility businesses. As of 2004, forty states had lotteries, and in that year, Pennsylvania approved up to 61,000 slot machines to help raise revenue. See DAVID R. BERMAN, *STATE-LOCAL RELATIONS: AUTHORITY, FINANCES, COOPERATION* 53 (Int’l City Mgmt. Ass’n, Mun. Yearbook 2005).

31. *FACTS AND FIGURES*, *supra* note 29, at 268 tbl. F-8.

32. *Id.*

33. 2002 CENSUS, *supra* note 6, at 286 tbl. 431. The federal government’s share has varied significantly over the twentieth century from a low of 0.1% in 1927, to a high of 9.0% of local government revenues in 1978, leveling off to 4% in 2002. *FACTS AND FIGURES*, *supra* note 29, at 268. However, much of the money granted by states to local governments originated in the federal government and merely “passes through” the states.

the total intergovernmental contribution is substantial, it is overwhelmingly from state sources and not the federal government with a ten to one ratio. This degree of state support to localities varies greatly from jurisdiction to jurisdiction.³⁴

Nationally, the largest component of the local government revenue stream (55.1% in 2002) is found in local general revenue sources—from both tax and non-tax “charge” sources. Taxes comprise the larger part of this category with ad valorem or real property taxes constituting nearly 75% of local government’s tax revenues.³⁵ As high as this percentage may appear to be, over the past fifty years this form of local tax has fallen in importance as income and sales taxes have grown to comprise a larger percentage of the municipal tax revenue base.³⁶ Even more striking is the significant *decline* in the relative importance of taxes, *of any kind*, in relation to governmental “charges and miscellaneous” sources of local government revenue. For example, in 1960, local taxes represented nearly 43.6% of locally-generated government revenue while by 2002 this percentage had dropped to 34.1%.³⁷ This phenomena may be attributable to state and local government taxation and expenditure limitations such as California’s Proposition 13, Missouri’s Hancock Amendment, and Michigan’s Headlee Amendment which all required voter approval of taxes above specified levels.³⁸

These intergovernmental transfers take the form of 1) categorical grants; 2) general fiscal assistance; 3) cost reimbursement; and 4) block grants.

34. Intergovernmental revenue transfers range widely throughout the nation accounting for a small part of local government revenues in New Hampshire (14.7%), Hawaii (18.4%), and Nebraska (19.5%) while representing a substantial component of local government revenue in New Mexico (52.8), West Virginia (44%), Wisconsin (44%), Michigan (42.1%), Idaho (41.4%), and Arkansas (40%). In the latter list of states having *high* percentages of intergovernmental transfer, the greater percentage is usually due to greater state government support, not federal aid. *FACTS AND FIGURES*, *supra* note 29, at 287 tbl.F-25.

35. There is a great deal of regional variation in the significance of real property taxes as the main component of local government tax revenues. For instance, in 1991, it constituted 98.2% of local taxes in New England while only 70.8% in the Far West. *See* GLENN W. FISHER, *THE WORST TAX? A HISTORY OF PROPERTY TAX IN AMERICA* 204 tbl. 11.2 (1996). One thing is certain; the property tax exists as one of the most controversial and unpopular taxes in the United States. *See* Richard L. Cole & John Kincaid, *Public Opinion and American Federalism: Perspectives on Taxes, Spending and Trust—An ACIR Update*, 30 *PUBLICUS* 189, 189-201 (2000).

36. *FACTS AND FIGURES*, *supra* note 29, at 270 tbl. F-10. As high as real property taxes’ 72.9% share of local taxes may seem, it represents one of the lowest percentage relied on by local governments in nearly a century. For instance, during the twenties, real estate taxes constituted as much as 97.3% of local taxes. This decline in real property taxation can be traced to the tax revolts of the Economic Depression of the early thirties when many property owners could not pay their taxes. Tax delinquency was as high as 26.3% in cities in 1933, and between 1932 and 1933, sixteen states and many localities enacted property tax limits. States compensated for the loss of real property revenue by passing law imposing sales and income taxes. *See* ARTHUR O’SULLIVAN ET AL., *PROPERTY TAXES AND TAX REVOLTS—THE LEGACY OF PROPOSITION 13-3* (1995).

37. *FACTS & FIGURES*, *supra* note 29, at 268 tbl.F-8.

38. DANIEL R. MANDELKER ET AL., *STATE AND LOCAL GOVERNMENT IN A FEDERAL SYSTEM* 347-56 (2002).

As taxes have fallen as a portion of municipal revenue, the “charges and miscellaneous” category of revenues has steadily risen. This should not be surprising since the “hard” costs of capital infrastructure provision must be paid by someone (the construction crew does not work for free!). The changing financial statistical pattern reveals that an important, yet gradual transformation in local government financial affairs has occurred over the last thirty years including: 1) a movement away from the earlier dependence on real property taxation; 2) a decrease in revenue-raising by way of measures termed “taxes;” and 3) an increased reliance on “non-tax” devices, such as development exactions, to fund public needs. Advancing this third theme, localities have re-characterized municipal costs as various forms of user charges and direct benefit assessments. At the same time, they have shifted an increasing range of building-related expenses to land developers by imposing a wide array of land use exactions. The undeniable trend is that development impact costs have been increasingly “privitized.”

C. WHAT ARE THE AVAILABLE TECHNIQUES FOR FINANCING
THE INITIAL CAPITAL COSTS OF GROWTH?
WHAT ARE THE OPTIONS?

When the new elementary school building appears in the community, its construction must be paid for in some way. The locality will build and operate this new structure in order to provide a required level of educational service to the residents in the vicinity of the school. Often this construction will be undertaken to meet service demands imposed by state, federal, or accreditation bodies. Not infrequently, it will be done so that the locality can successfully compete with other communities for new residents and to maintain an existing reputation for having “good or excellent schools” and thereby reinforce high real estate values.³⁹ The same is true with regard to other public services such as sewer and water treatment, roads, storm water management, streets, curbs, sidewalks, streetlights, recreation, public safety and fire, and solid waste disposal. The challenge for most local governments is to assemble and implement a lawful *and* politically-palatable assortment of revenue-raising techniques that will permit them to build and operate such facilities.⁴⁰ The mix of the funding options used by the community will vary over time according to the locality’s revenue needs, the legally-authorized fiscal tools of the

39. See Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 416-24 (1956) (serving as the origin of the “Tiebout Hypothesis”).

40. Localities owning visible and marketable structures such as sports facilities have begun to sell the naming rights to a range of corporate entities. Such “naming rights” can generate significant municipal revenues. The rights for the new stadium in Denver, Colorado, were valued at \$89 million but their sale—and the resulting name change away from the Mile High Stadium—has been considered a controversial and undesirable step. Michael Janofsky, *What’s in a Stadium Name—Tradition or Money?*, N.Y. TIMES, Oct. 29, 2000, at A14.

local government, the political will of the elected leadership and, ultimately, the support of the local citizenry.

The range of potential capital funding mechanisms available to local governments under state law may actually be quite extensive. Local governments have been extremely creative in designing funding techniques, within available authority, for a wide range of capital improvements. These techniques have developed into municipal fiscal traditions over the years which offer a number of different approaches for funding public projects. Funds for local capital projects could be collected from one or more of the following list: 1) *intergovernmental transfers* from the federal and/or state government—grants, revenue sharing, and subsidies; 2) *gifts* from private corporate, foundation, or individual benefactors; 3) *taxes*—property, sales, income, special purpose, gasoline, excise, and real estate transfer or recording; 4) *bonds*—general obligation or revenue; 5) *special assessments*; 6) *user charges*; 7) *special taxing districts revenues*; and 8) *land use exactions*, including development impact fees. This mix of funding techniques represents an exhaustive listing, but not a realistic portrayal, of the actual alternative funding approaches in each locality. Rather than being provided with limitless possibilities of these devices, localities actually face a much more constrained range of funding options. There are a number of explanations for this fact. For example, 1) state law may not allow the local government to exercise the technique; 2) the method—such as gifts and transfers—may only be available in theory but not in fact; 3) the device may only be permitted as a funding method for certain kinds of public improvements but not others; 4) the particular technique may not be a “traditional” revenue-raising activity in the specific locality; or 5) there might be no political support or in fact, strong opposition to its adoption.⁴¹ Therefore, the locality’s fiscal choices are influenced by authority, familiarity, and necessity.

Currently, localities fund the capital costs of responding to the impacts of new community growth with a blend of financial resources; sometimes relying upon the local government’s general revenues for certain community-wide improvements in combination with intergovernmental grants, user charges, special assessments, excise taxes,⁴² on-site subdivision improvements, dedications, and in-lieu of payments, as well as cash develop-

41. Some analysts of the current system of the local government regulation of community growth and development have criticized government for promoting and subsidizing growth and have not actually sought to recover the costs imposed by new growth. See FODOR, BETTER NOT BIGGER, *supra* note 19, at 108-09 fig. 6-2.

42. In some states, local governments are authorized to charge a development excise tax on “the business of subdividing land or developing property.” See Eric J. Strauss & Martin L. Leitner, *Financing Public Facilities With Development Excise Taxes: An Alternative to Exactions and Impact Fees*, 11 ZONING & PLANNING L. REP. 17, 19 (1988). Although this practice appears similar to impact fees in their police power, regulatory effect, they are considered purely revenue-raising tax measures. As tax measures, they are liberated from the demanding constitutional law requirements of proportionality of effect and earmarking and, as a consequence, these funds may be added to a community’s general fund with all of the other tax revenue. See William H. Ethier & Howard J. Weiss, *Development Excise Taxes: An Exercise in Cleverness and Imagination*, LAND USE LAW 3 (Feb. 1990).

ment impact fees.⁴³ As the statistical data have shown, the unmistakable trend in local government capital financing has been gradually moving towards a system of local government “non-financing” through increased reliance on cost-shifting to the developer and, indirectly, to the raw land owner and the construction consumer. When viewed in its totality, the current era of land development regulation actually is a period of shared, public/private partnership with the private sector assuming an ever-growing role providing land, physical improvements, and cash to offset the impacts of new growth. This development is consistent with a larger trend towards the increased privatization of other community services and functions in private homeowners associations and restricted access or gated communities.⁴⁴

During the last two decades, the rhetoric and analytical techniques of environmental impact analysis have been adapted and applied to development exactions in two significant ways: 1) to analyze and identify the community capital improvement needs “caused” by new land development and 2) to assess a reasonable, proportionate share of developer responsibility for the costs associated with those needs. This pattern of cost shifting has a long standing twentieth century tradition. During this time, localities have steadily accelerated the integration of financial, cost-shifting objectives with their traditional police power regulatory goals in land use control. The evolution in American land use exactions culminating in the recent, cash development impact fee is the subject of the next section.

PART II—USING REGULATORY CONDITIONS ON LAND DEVELOPMENT TO FUND COMMUNITY SERVICES: AN AMERICAN TRADITION

Modern American land use regulation was first adopted during the first quarter of the twentieth century. Authorized under the local government’s “police power” to regulate for the common good, zoning became commonplace following the U.S. Supreme Court’s 1926 decision in *Village of Euclid v. Ambler Realty Co.*⁴⁵ sustaining the practice against a facial constitutional attack. Zoning became a fundamental regulatory function of local government and one which shaped the future physical character and quality of life of the community. However, even at this

43. In some cities, the development impact fee technique has been imposed as a condition for the construction of new office buildings under the name of “linkage” programs. These fees—arising in California, Massachusetts, New Jersey, Connecticut and Florida—have been charged to compensate for the loss of low income housing and to provide for public transportation, job training programs, and child care facilities. See generally Jane E. Schukoske, *Housing Linkage: Regulating Development Impact on Housing Costs*, 76 IOWA L. REV. 1011 (1991).

44. In 2005, the Community Associations Institute (CAI) estimated there were 274,000 association-governed communities containing 54.6 million people and that 1.25 million people serve on association boards. See COMMUNITY ASSOCIATIONS INSTITUTE, DATA ON U.S. COMMUNITY ASSOCIATIONS, <http://www.caionline.org/about/facts.cfm> (last visited Dec. 19, 2005).

45. 272 U.S. 365 (1926).

early point another tradition was being formed, one which combined the local government's regulatory powers with its duty to provide public services. Termed "regulation for revenue" by modern observers,⁴⁶ this methodology blended land use regulation with revenue-enhancing or cost-shifting objectives to establish a local governmental practice known as imposing "development exactions." This hybrid regulatory practice is now common and often is used to mitigate an extensive list of development effects. This land use exaction practice, rather than being a recent local government creation, has a long and well-supported tradition at the state and local level of government.

A. THE TRADITIONAL NATURE OF COMMUNITY LAND USE CONTROL AND EARLY AMERICAN EXACTION PRACTICES

The American tradition of governmental control over land use is an old one beginning in the early seventeenth century with the establishment of colonial towns. The social interest in having an orderly division of large parcels of land into smaller units has even more ancient antecedents.⁴⁷ Municipal land use controls have developed from this early colonial period to the present, culminating with modern zoning, subdivision regulation, and comprehensive planning, as well as environmental controls. Twentieth century land use control has also witnessed a parallel development of another aspect of land use control: a steady growth in the use of land development exactions to impose specific costs on land developers. This trend has accelerated in the last two decades and has resulted in the widespread use of subdivision land improvement and dedication requirements, impact fees, and linkage programs all having the effect of shifting development-related expenses from the community to the land developer.

Land use control has a lengthy history in America. Colonial communities, from the earliest times,⁴⁸ considered the locality's land base to be an important natural resource and one which should be carefully managed by town authorities. These colonial communities exercised regulatory

46. See generally ALTSHULER & GOMEZ-IBANEZ, *supra* note 17.

47. Land subdivision practices have been considered an important topic of social regulation for thousands of years.

The Egyptians, as well as the Greeks, maintained orderly systems for the division of land and the development of communities. The Roman grid plan for laying out communities, borrowed from earlier systems, was adopted and used by other European communities, and it remains the underlying spacial framework for a number of cities in Europe. Variations of the rectangular survey were brought to the United States by Spanish, English and French settlers, and the grid patterns observable in the street plans of Manhattan and old Philadelphia.

ROBERT ANDERSON, 4 AM. LAW OF ZONING 3D 263 (1986). This penchant for order in land subdivision was also reflected in large scale Jeffersonian rectangular survey methods employed to measure and divide large portions of the America west of the original thirteen colonies.

48. See DAVID L. CALLIES ET AL., CASES AND MATERIALS ON LAND USE 2-3 (3d ed. 1999) (explaining English ordinances from the Elizabethan period regulating minimum residential building lot size, building height and window size).

control in a number of ways including regulating the location of dwellings, specifying the nature of permissible land use, prohibiting construction with unsafe and flammable materials, imposing uniform building height restrictions, requiring the fencing of agricultural parcels, and setting forth the timing of land development.⁴⁹ Rather than recognizing land ownership as an absolute individual right, colonial rules governed many aspects of development choice. In fact, some early town controls appear extremely modern foreshadowing anti-sprawl, infill policies.⁵⁰ Significantly, historical evidence exists indicating that colonial ordinances and royal directives during this early period demanded that land developers provide a number of physical improvements as a pre-condition for permission to build on a parcel of land.⁵¹ This historical reference provides a lineage for modern land use exactions reaching back to colonial times.

Through the period leading up to the early twentieth century, American local governments were authorized to exercise broad police powers to protect the public health, safety, morals, and general welfare. They also employed their public nuisance authorities to abate the more serious threats to health and safety. Acting under their police power authority, local governments adopted a wide range of individual laws regulating a variety of specific land use problems including the separation of incompatible uses⁵² and building bulk, height, and location restrictions.⁵³ This problem-specific system of land use control was gradually replaced by comprehensive zoning ordinances which were upheld in *Village of Euclid v. Ambler Realty Co.*⁵⁴ By the time of the *Euclid* decision, the zoning technique had spread rapidly across the nation with 654 cities and towns

49. See generally John F. Hart, *Colonial Land Use Law and Its Significance for Modern Takings Doctrine*, 109 HARV. L. REV. 1252 (1996).

50. See JULIAN C. JUERGENSMEYER & THOMAS E. ROBERTS, *LAND USE PLANNING AND DEVELOPMENT REGULATION LAW* 44 (2003) (discussing 1632 Cambridge Massachusetts law prohibiting construction of structures in remote areas before development of closer vacant parcels).

51. See Jerry T. Ferguson & Carol D. Rasnic, *Judicial Limitations on Mandatory Subdivision Dedications*, 13 REAL EST. L.J. 250, 252 (1984). Colonial ordinances required the compulsory drainage of wetlands and often demanded the sharing of costs of these projects with neighbors. Further site improvements such as barberry removal, compelled development of urban land and mines, and fencing requirements were imposed by colonial governments. See Hart, *supra* note 49, at 1263-80.

52. *Pierce Oil Corp. v. Hope*, 248 U.S. 498, 499-500 (1919) (upholding ordinance excluding oil storage closer than three hundred feet from residences); *Hadacheck v. Sebastian*, 239 U.S. 394, 414 (1915) (upholding Los Angeles ordinance excluding existing brickyards from a residential area of the city); *Reinman v. Little Rock*, 237 U.S. 171, 180 (1915) (upholding ordinance excluding stables from a commercial district); *L'Hote v. New Orleans*, 177 U.S. 587, 600 (1900) (upholding New Orleans ordinance establishing areas of the city for prostitution).

53. See *Welch v. Swasey*, 214 U.S. 91, 107 (1909) (upholding Boston's building height limitations); see also *Eubank v. Richmond*, 226 U.S. 137, 145 (1912) (invalidating neighbor consent provision to establish building setback lines).

54. 272 U.S. 365 (1926).

having adopted a zoning ordinance.⁵⁵ This rapid adoption of zoning was facilitated by the preparation of a model state zoning enabling act by the United States Department of Commerce, which by 1926 had been enacted in forty-three states.⁵⁶ After the *Euclid* decision, zoning spread even faster and was considered to be an indispensable component of a modern locality's techniques necessary for the creation of a pleasant and harmonious community. The decades following *Euclid* saw an institutionalizing of zoning as the premier regulatory device to control community development.

B. PRECURSORS OF MODERN LAND USE EXACTIONS

Zoning, by itself, initially imposed restrictions such as use and dimensional rules on land owners, and in so doing, it limited the land developer's discretion in selecting the size, use and form of new land development projects. With zoning, questions of building density, placement of structures in relation to roads, and the mixture of land uses would be determined by municipal ordinance and regulation. The designers of the early zoning systems made a crucial choice by making the process of building permit review the principal method for assuring compliance with substantive zoning rules. Now, the construction of new buildings would be unlawful without a building permit and this certificate would not be issued until it was determined that the proposed structure complied with all zoning rules. Permit-based pre-construction review gave localities the means of assuring compliance with mandatory setback, height limit, and use restrictions. In addition, it would serve as the point of certifying that other municipal demands—such as the contribution of development exactions—had been satisfied.

While zoning might restrict the range of land uses of a desired development, it did not force the landowner to contribute money, land, or improvements as a condition of obtaining zoning permission to proceed with a proposed project. These exactions were first implemented in conjunction with the twentieth century device of residential subdivision regulation and its precursors—official map acts⁵⁷ and benefit assessment

55. Comprehensive zoning containing specified uses in designated city-wide zones was first adopted in New York City in 1916 and upheld by New York courts four years later in *Lincoln Trust Co. v. Williams Building Corp.*, 128 N.E. 209, 209 (1920).

56. JUERGENSMAYER & ROBERTS, *supra* note 50, at 24 n.1.

57. Official map acts permitted local government to provide for the exact location of future streets, parks, and other public facilities. Once streets were mapped, future land development would have to conform to the lay out of the streets. The siting of streets was considered so important during the early twentieth century that statutes were necessary to reserve precise road locations and for the installation of utilities and other services. Landowners were sometimes required to dedicate the land and, occasionally, improve the streets established by the official map. See JAMES KUSHNER, *SUBDIVISION LAW AND GROWTH MANAGEMENT* §1.04[1] (1999 and 2005 Supp.); Joseph Kucirek & J.H. Beuscher, *Wisconsin's Official Map Law*, 1957 Wis. L. REV. 176 (1957). These statutes had a mixed record of surviving constitutional takings scrutiny. See *e.g.*, *Urbanizadora Versalles, Inc. v. Rivera Rios*, 701 F.2d 993 (1st Cir. 1983) (fourteen-year highway reservation); *Lomarch Corp. v. Mayor & Common Council*, 51 N.J. 108, 237 A.2d 881 (N.J. 1968) (one-year park

districts.⁵⁸ Residential land subdivision concerned local governments from the beginning. From the 1880s through the 1920s to respond to land development “booms,” many localities adopted land platting laws which were primarily concerned with making subdivided land sales more efficient.⁵⁹ These early platting laws only required that, prior to selling any building lots, the land developer file a development plat which would specifically describe individually numbered building lots as well as any applicable real covenants, easements, or other significant features of the development.⁶⁰ Once subdivision plats were filed with the locality, lots could be lawfully conveyed to individual purchasers describing them by way of lot numbers rather than by way of a conventional metes and bounds land description. This residential subdivision platting and registration practice simplified land description and title recording making the marketing of building lots less costly and easier to accomplish.⁶¹

This land subdivision method accomplished another significant purpose—it legally justified the imposition of development conditions. Under the reasoning of the day, the public recording of a subdivision plat became a legal requirement for the “privilege” of selling lots in a subdivi-

reservation); *Miller v. Beaver Falls*, 82 A.2d 34, 37 (Pa. 1951) (three year park reservation). Where variance provisions are included to relieve hardship situations, courts are more supportive. See *Palm Beach County v. Wright*, 612 So. 2d 709 (Fla. Dist. Ct. App. 1993).

58. Benefit or special assessment districts have a long tradition in the United States extending as far back as 1690. Dean J. Mischynski, *Special Assessments, in WINDFALLS FOR WIPEOUTS: LAND VALUE CAPTURE AND COMPENSATION* 311 (Donald G. Hagman & Dean J. Mischynski eds. 1978). Special assessments are widely used and have been applied to finance a wide range of public improvements ranging from sidewalks, curbs and gutters, fire and medical rescue services, business improvements, security, street lights and paving, and sewers. These charges, although similar to impact fees, differ in that they are imposed only on existing landowners in a defined benefit zone, who often request the specific improvement and usually enjoy the benefits associated with the improvement directly. They are often assessed in proportion to a quantitative measure such as front footage, acreage or lot area. See generally EUGENE MCQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* (3d rev. ed. 1987 & 2005 Supp.).

59. Not infrequently, “boom” time subdivisions were more illusory than real. See DANIEL J. BOORSTIN, *THE AMERICANS—THE DEMOCRATIC EXPERIENCE* 280 (1973).

60. Earlier subdivision regulation statutes passed in the late nineteenth century as “map or plat acts” required the public recordation of subdivision plats. The intent was to make the conveyancing of individual numbered and identified parcels more efficient and not reliant upon the traditional metes and bounds land descriptions. Land speculation in the twenties resulted in the platting of numerous subdivisions many of which had small lots and lacked or had incomplete streets and utilities. Many of these projects were abandoned by their developers and in the twenties and thirties became the responsibility of the localities through developer default. See generally JUERGENSMEYER & ROBERTS, *supra* note 50, at 264-65.

61. The desire to simplify land records and to prevent confusion in land description was an initial objective of subdivision regulation and one which continued as an important factor in later court decisions. The Wisconsin Supreme Court stated with regard to the practice of plat registration that,

[T]he legislature was attempting to provide for orderly urban development and to insure accurate and easy descriptions of land in the offices of the registers of deeds. One main purpose of such regulations was to avoid cluttering the books of the registers of deeds with metes and bounds descriptions of small tracts of land.

Alan Realty Co. v. Fair Deal Inv. Co., 73 N.W.2d 517, 520 (Wis. 1955).

sion. Under this "right/privilege" distinction, since the land developer had voluntarily elected to employ the subdivision procedure, they were prevented from challenging a wide range of conditions which might be applied to the request.⁶² Later, through this "privilege" rationale, municipalities would demand subdivision exactions including land dedication for streets as a condition for the "privilege" to subdividing residential land. The "privilege" characterization had another consequence—it allowed local governments broad discretion in approving or denying subdivision proposals. In this early time period, the residential subdivider was not responsible for providing any of the subdivision infrastructure such as streets, sidewalks, curbs, gutters, and drainage facilities.⁶³ Infrastructure requirements would be provided by the local government or funded by the lot purchasers themselves through lot special assessment schemes. Ironically, the community's assumption of these subdivision infrastructure costs in the thirties, and the catastrophic economic consequences it later caused, would lead to the imposition of expanded subdivision land exactions just a few years later.

C. LESSONS FROM THE ECONOMIC DEPRESSION OF THE 1930S

During the twenties, the suburban areas of the nation were under intense development pressure and huge land speculation was occurring. The rapid growth of Los Angeles County, California in this decade provides one vivid example. During the twenties alone, the net immigration into the county increasing 136% (from 936,000 to 2,208,000) which was greater than the total county immigration in the prior seventy years from 1850 to 1920.⁶⁴ Such an enormous influx of population, attracted by the reputation for an excellent climate and ample job opportunities, triggered an explosion in residential land subdivision farther into remote areas of the county.⁶⁵ Land development standards and the existing road system proved to be grossly inadequate to accommodate the huge influx. This extreme population growth pressure in Los Angeles, and in other parts of the nation, led to speculative land development which proved to be unsustainable. The drive to create even more residential communities led to the platting of thousands of residential subdivisions on the outer edge of existing American cities. These developments contained millions of lots

62. See, e.g., *Ayres v. City Council*, 207 P.2d 1, 7 (Cal. 1949); *Ridgefield Land Co. v. City of Detroit*, 217 N.W. 58, 58-60 (Mich. 1928).

63. Even as late as the forties, some local governments continued the practice of subsidizing land subdividers by installing public improvements. A 1944 edition of the newsletter of the Municipal Finance Officers Association warned that,

[T]hese land merchandisers, in effect subsidized by the taxpayers, would then sell lots to people of moderate or small incomes at relatively high prices, and if the economy should go into a tailspin, soon or later there would be defaults on payments, mounting tax delinquencies, and more financial troubles such as municipalities experienced from 1929 to 1935.

MEL SCOTT, *AMERICAN CITY PLANNING SINCE 1890*, at 452 (1969).

64. *Id.* at 208.

65. In 1921, subdividers filed approximately 350 subdivision maps with the Los Angeles County Recorder. By 1923, the number of filings had grown to 1,434. *Id.* at 207.

many of which were small and of a largely unusable size often with inadequate or non-existent streets and utilities. Much of this prematurely subdivided land remained vacant and tax delinquent for many years after its platting thereby imposing huge municipal tax losses.⁶⁶

Local government policy of not requiring the pre-funding of basic subdivision improvements during the first quarter of the twentieth century had several serious negative impacts that led to the imposition of development exactions. As mentioned previously, this municipal practice encouraged the premature subdivision of land that resulting in many suburban building lot markets being overfilled with surplus lots in excess of reasonable market demands. Without any effective regional growth policy, subdivided parcels would spring up farther and farther from the metropolitan center thereby causing early examples of suburban sprawl. Oversupply of platted, yet not improved, subdivision lots resulted in numerous failed projects which frequently became blighted areas causing new development to leapfrog over "these unusable, close-in subdivisions . . . leaving 'slums' of vacant lands."⁶⁷ Community development would thereafter occur in a disorderly, non-contiguous fashion that was often inconsistent with municipal or regional planning goals.

There were two significant adverse financial effects of the early twentieth century subdivision policy that would affect the future. First, developers often abandoned the under-sold, under-developed and under-improved subdivisions after an initial period of marketing success. This resulted in many real estate tax delinquencies with the ultimate ownership of the parcels reverting to local governments through tax foreclosure. Secondly, municipal bonds issued to secure financing for subdivision improvements often went into default during the thirties due to devastating economic effect of the Great Depression. Bond interest and principal repayments were set based on the assumption of the new homeowner's regular payment of special assessments tied to subdivision improvements. With the collapse of the suburban real estate market during the Depression, residential building lots did not sell resulting in the non-payment of the existing assessments, leading to substantial defaults

66. The huge negative impact of "dead" subdivisions on their surrounding communities is demonstrated by the following description of the situation in Chicago and Cook County, Illinois.

In the southern portion of Cook County, lots subdivided in the 1890's were vacant still [by the 1940's], and many were tax delinquent. Twenty-two percent of the subdivision parcels in Chicago in 1945 had been delinquent for 10 years. In suburban Cook County, 40 percent of the parcels were chronically delinquent. The Chicago situation was not unique. Cleveland, in 1929, had 175,000 vacant lots in its registered total of 375,000 lots.

ROBERT ANDERSON, 4 AM. LAW OF ZONING 264-65 (3d ed. 1986).

67. JUERGENSMEYER & ROBERTS, *supra* note 50, at 264. To eliminate these empty spaces, eminent domain or condemnation authority was sometimes used to assemble land for construction. See *People ex rel. Gutknecht v. City of Chicago*, 111 N.E.2d 626 (Ill. 1953).

on municipal bonds.⁶⁸ The major bond defaults of the thirties adversely effected municipal debt financing for many years thereafter. Most importantly, they influenced the post-World War II local government development policies requiring land developers themselves to construct on-site infrastructure improvements as a condition of subdivision approval. They also led to the imposition of bonding and surety conditions to back up the construction promises made by the developers.⁶⁹

D. SUBDIVISION REGULATION'S DESIGN STANDARDS

With the issuance of the Department of Commerce's 1928 model Standard City Planning Enabling Act,⁷⁰ most states passed enabling acts authorizing localities to impose subdivision controls.⁷¹ After the adoption of these statutes, municipal subdivision approval began to incorporate municipal planning goals into the physical development of the subdivided parcels. No longer would subdivision control be principally concerned with the efficiency needs of residential land mass marketing, but rather localities began to require that subdivisions be designed with the community's functional and practical concerns in mind. The emphasis was now on the creation of design standards which would guide residential land development and would result in well-planned areas where the streets would be sufficient to carry the projected traffic and where other infrastructure and land would be provided. For example, § 14 of the model Standard City Planning statute provided,

68. R. Marlin Smith, *From Subdivision Improvement Requirements to Community Benefit Assessments and Linkage Payments: A Brief History of Land Development Exactions*, LAW & CONTEMP. PROBS. 5-6 (Winter 1987).

69. Land improvements such as roads, sidewalks, curbs and gutters, and drainage facilities are often required as part of the regulation of residential subdivisions. However, these physical improvements are costly, and a developer might wish to begin selling lots in one part of a subdivision project prior to the completion of all the necessary site improvements in other parts. Assurance that the land developer will actually complete the required improvements—and not default on these required exactions—has led to the use of a number of guarantee devices providing the local government with financial security that the work be completed in the event of developer default. Surety bonds, cash or property escrows, letters of credit and subdivision improvement agreements are the most common examples of these devices. See PATRICK J. ROHAN, ZONING AND LAND USE CONTROLS § 45.03[4], at 8 (2003).

70. STANDARD STATE PLANNING ENABLING ACT, U.S. Dep't of Commerce (1928), included in the ALI MODEL LAND DEVELOPMENT CODE, app. B (Tentative Draft No. 1, 1988). This model act was produced as a companion to the Standard State Zoning Enabling Act, however there were competing model subdivision laws which were adopted by a number of states. See MODEL SUBDIVISION REGULATION ACT (A.E. Bettman); MUNICIPAL PLANNING ENABLING ACT (Bassett and Williams).

71. See ROBERT M. ANDERSON & BRUCE B. ROSWIG, PLANNING, ZONING, SUBDIVISION: A SUMMARY OF STATUTORY LAW IN THE 50 STATES 228, chart 13 (1966). In some jurisdictions the authority to regulate subdivisions and impose conditions is implied as a power of local planning and land use regulation under the powers delegated by the standard zoning enabling act. See generally *Flanders Lumber & Bldg. Supply Co. v. Town of Milton*, 258 A.2d 804 (Vt. 1969); *Y.D. Dugout Inc. v. Bd. of Appeals*, 255 N.E.2d 732 (Mass. 1970); *Kozesnik v. Township of Montgomery*, 131 A.2d 1 (N.J. 1957); *Homebuilders Ass'n v. City of Charlotte*, 442 S.E.2d 45 (N.C. 1994).

for the arrangement of streets in relation to other existing or planned streets and to the master plan, for adequate and convenient open spaces of traffic, utilities, access of fire fighting apparatus, recreation, light and air, and for avoidance of congestion of population, including minimum width and area of lots.⁷²

Central to the subdivision regulation concept at this time was that this form of land development would be arranged so as to ensure adequate access to homes while also providing the residents with a safe and attractive living environment. The belief was that suburban, single-family detached housing would be the future choice of housing consumers who would increasingly rely on the automobile for transportation. Subdivisions would have to be planned and would have to provide the kinds facilities and services likely to be demanded by these single family housing purchasers. History has borne out these early assumptions regarding the housing preferences of successive generations of Americans.

Besides providing design standards for subdivision development, the early subdivision regulations of the late twenties through forties also began to incorporate land dedication requirements for public improvements within the residential subdivision itself. Under these rules, land developers were required to dedicate land to the local government for a range of purposes. However, the Standard Planning Act did not authorize the imposition of dedications of land or cash in-lieu of fees, and this omission led to uncertainty about their lawfulness.⁷³ Today, this mandatory practice requiring such land dedication is a form of development exaction. The early exactions were dedications for internal roads and sidewalks, usually necessary to provide access to the homes being constructed in the subdivision. These demands proved to be relatively uncontroversial due to their functional necessity and also because they benefited the subdivision lots and made them more salable.⁷⁴ It was also yet another device used to transfer the subdivision improvement costs to land developers and, by extension, to new home purchasers.⁷⁵ Through the pre-construction review process, land dedication requirements were then imposed as a condition of subdivision plat approval by the local government.⁷⁶ Al-

72. STANDARD CITY PLANNING ENABLING ACT, U.S. Dep't of Commerce (1928).

73. In some states, the absence of specific enabling authority to impose land dedication and fee-in-lieu of requirements on the approval of proposed residential subdivisions led to state courts finding no implied authority to undertake the practice. *See, e.g.*, *Hylton Enters. v. Bd. of Supervisors*, 258 S.E.2d 577 (Va. 1979) (narrow construction of local government authority in strict Dillon's Rule state). The practice of charging monetary fees-in-lieu of land dedication also fell subject to the same legal challenge as not being authorized by state enabling legislation. *See, e.g.*, *City of Montgomery v. Crossroads Land Co.*, 355 So. 2d 363 (Ala. 1978) (no specific authority to require cash-in-lieu of payment for parkland); *Enchanting Homes, Inc. v. Rapanos*, 143 N.W.2d 618 (Mich. Ct. App. 1966) (lack of statutory authority); *Haugen v. Gleeson*, 359 P.2d 108 (Or. 1961) (unauthorized tax).

74. OSBORNE M. REYNOLDS, JR., *LOCAL GOVERNMENT LAW* 484 n.9 (2d ed. 2001).

75. *See* Thomas M. Pavelko, Note, *Subdivision Exactions: A Review of Judicial Standards*, 25 WASH. U. J. URB. & CONTEMP. L. 269, 272 (1983).

76. Julian C. Juergensmeyer & Robert M. Blake, *Impact Fees: An Answer to Local Governments' Capital Funding Dilemma*, 9 FLA. ST. U. L. REV. 415, 418 (1981).

though resisted at first, the subdivision land dedication rules were largely upheld in the courts, and they have become a standard feature of most communities' subdivision regulations.⁷⁷

Significantly, the model act also specifically required a land developer to provide physical infrastructure such as streets, water mains, sewer lines, and other utilities *within the boundaries* of the subdivision as a condition of regulatory approval.⁷⁸ This statutory innovation created the precedent for developer-funded site improvements which would later translate into a wide range of land dedication and site improvements within the residential subdivision. Land developers were not only required to dedicate land for these features, but they also had to construct the improvements themselves. Due to the direct benefit these on-site improvements gave in response to a need generated by the new subdivision, challenges to these on-site land and physical improvement exactions were generally unsuccessful and the practice was upheld in the state courts.⁷⁹ After World War II, suburban localities experienced a surge in the demand for land suitable for development into new residential communities. The pent-up housing demand caused by World War II created immense pressures on these communities to provide for the educational and recreational needs of their new populations. In response, many localities, acting under their state subdivision regulation enabling legislation, added the requirement that residential developers dedicate land *within* their developments for these two purposes.⁸⁰ By this time, the idea had been firmly accepted that land developers could legally be required to provide for the infrastructure needs of the new residents being attracted to the new subdivisions and the extension of the subdivision regulation principle to the new purposes was not difficult for courts to accept.⁸¹

77. See *Brous v. Smith*, 106 N.E.2d 503, 507 (N.Y. 1952). See generally, Michael M. Shultz & Richard Kelley, *Subdivision Improvement Requirements and Guarantees: A Primer*, 28 WASH. U. J. URB & CONTEMP. L. 3, 68 (1985).

78. THOMAS P. SNYDER & MICHAEL A. STEGMAN, *PAYING FOR GROWTH: USING IMPACT FEES TO FINANCE INFRASTRUCTURE* 22 (1986).

79. See, e.g., *Petterson v. City of Naperville*, 137 N.E.2d 371 (Ill. 1956) (curbs and gutters requirement); *Ridgefield Land Co. v. Detroit*, 217 N.W. 58 (Mich. 1928) (upholding mandatory land dedication for subdivision streets); *Allen v. Stockwell*, 178 N.W. 27 (Mich. 1920) (sidewalks); *Blevens v. City of Manchester*, 170 A.2d 121 (N.H. 1961); *Medine v. Burns*, 208 N.Y.S.2d 12 (N.Y. Special Term 1960) (sewers); *Brous*, 106 N.E.2d at 503 (upholding dedication of roads within the subdivision); *Zastrow v. Vill. of Brown Deer*, 100 N.W.2d 359 (Wis. 1960) (water mains).

80. See Juergensmeyer & Blake, *supra* note 76, at 416-18. The first case upholding the practice of requiring the dedication of subdivision land for park purposes was the New York case of *In re Lake Secor Development Co.*, 252 N.Y.S. 809 (N.Y. Sup. Ct. 1931). See also *Frank Ansuini, Inc. v. City of Cranston*, 264 A.2d 910 (R.I. 1970) (stating that a natural result of residential subdivision is the increased need for recreation space). However, some courts found school site dedication requirements to be unauthorized by enabling statute and void as *ultra vires* municipal acts. See, e.g., *Kelber v. City of Upland*, 318 P.2d 561 (Cal. Ct. App. 1957); *West Park Ave. v. Twp. of Ocean*, 224 A.2d 1 (N.J. 1966). See also *James P. Karp, Subdivision Exactions for Park and Open Space Needs*, 16 AM. BUS. L.J. 277 (1979).

81. In *Jordan v. Menomonee Falls*, 137 N.W.2d 442 (Wis. 1965), the Wisconsin Supreme Court upheld an ordinance which required the land developer to dedicate land for

The land dedication requirements for residential growth continued to multiply-extending to the land nearby or adjacent to the actual lots being developed. The earlier success of local governments in obtaining exactions for *on-site* subdivision land or improvements led to the extension of the concept to *off-site* improvements. For rapidly-growing municipalities, the logic of developer responsibility for these off-site impacts of residential development impact seemed clear. During the period spanning from 1965 through the end of the eighties, local government subdivision exaction practices requiring the construction of improvements on bordering, adjacent, or physically separate land met with a varied responses. For instance, when these off-site land exactions were designed to reduce the additional traffic burden caused by the new residential development, they were generally upheld.⁸² However, if the land developer was charged for a disproportionate share of a community wide system upgrade, the demand could be found to be confiscatory and invalid.⁸³ In the early eighties, state courts began to fashion the legal rules that would govern the expanding exaction practices, at least until state legislatures would later enter the fray with statutes regulating the practice. With this, the seeds were sown for modern development impact analysis to consider a broader range of local needs affected by the construction of new housing and to convert these impacts into cash payments.

E. TRANSLATING LAND AND PHYSICAL IMPROVEMENTS INTO CASH PAYMENTS

Up to this point, municipal development exaction policy was literal in its approach: it required either the dedication of land or physical improvements to facilitate the new land development. Gradually, a transformation of exaction practice from the literal to the symbolic began to occur in the post-World War II era. Exaction practice began to convert

school or park purposes or to pay a set sum of money in lieu of the land dedication. It reached this result by reasoning that,

The municipality by approval of a proposed subdivision plat enables the subdivider to profit financially by selling the subdivision lots as home building sites and thus realizing a greater price than could have been obtained if he had sold his property as unplatted lands. In return for this benefit the municipality may require him to dedicate part of his platted land to meet a demand to which the municipality would have been put but for the influx of people into the community to occupy the subdivision lots.

Id. at 448.

82. The California courts have long sustained off-site road improvements as a condition of developmental approval. *See, e.g., Ayres v. City Council*, 207 P.2d 1 (Cal. 1949) (ten-foot strip to widen an abutting highway); *Briar West, Inc. v. City of Lincoln*, 291 N.W.2d 730 (Neb. 1980) (seventeen-foot strip for widening of abutting street). The *Ayres* case led to a series of state decisions upholding exactions when there was a "reasonable relationship" to the needs created by the new development. This test of "nexus" was later specifically rejected by the United States Supreme Court in the case of *Dolan v. City of Tigard*, 512 U.S. 314 (1994), where it was found not to satisfy the demands of the Fifth Amendment's Takings Clause.

83. *See Lake Intervale Homes v. Twp. of Parsippany-Troy Hills*, 147 A.2d 28 (N.J. 1957).

existing land dedication requirements into "in lieu of" cash payments made to the locality. Money began to be substituted for land and improvements.⁸⁴ "In lieu of" payments were invented to replace or substitute for the developer's obligation to dedicate subdivision land when the land to be given would be situated inconveniently, would be too small to serve the intended purpose, or for some other reason could not fulfill the need created by the subdivision.⁸⁵ These "in lieu of" payments were the first form of financial, conditional regulation on suburban growth and they constituted the forerunner of the cash impact fee common today.

This financial substitution policy is noteworthy since it represents an initial attempt to extract cash from developers for public improvements that would be constructed beyond the physical limits of the new subdivision itself. The "in-lieu of" fee idea begins the practice of charging new development, in financial terms, for its contribution for *off-site* community facilities when the need for the new facility is related to the population occupying the new residential subdivision.⁸⁶ Importantly, after several negative outcomes based upon the municipality's lack of delegated authority to impose "in lieu of" fees,⁸⁷ this technique was approved

84. A curious analogy exists in the transformation of services required by feudal land tenures in Medieval England which underwent a similar change from specific performance of personal obligations into money rents. One example of this shift can be found in the military tenure that required that the land tenant annually provide the king a specified number of days of "knights service" each year. It has been reported that,

[W]ithin a hundred years after the Conquest, with England pacified, the king had begun to take money payment (scutage or shield money) in its stead and to employ mercenaries to fight foreign wars. At this point tenants by knight service lost their military function and were slowly transformed into country gentlemen.

JESSE DUKEMINIER & JAMES E. KRIER, *PROPERTY* 199 (5th ed. 2002).

85. An example of the in lieu of payment is provided in the following quotation:

Payment in lieu is employed when actual dedication or provision of land or improvements is not practical or feasible. For example, under a requirement to set aside 5 percent of a development's land area as open space, a five-acre subdivision would reserve one-quarter of an acre. Such a site might prove to be totally impractical for both the subdivision and the community. The alternatives were either to exempt smaller subdivisions from such requirements or to allow a payment to be made in lieu of dedication. This resulted in local governments requiring money in lieu of land dedication. The money exacted was to equal the value of the land that would have been dedicated.

JAMES C. NICHOLAS, ARTHUR C. NELSON & JULIAN C. JUERGENSMEYER, *A PRACTITIONER'S GUIDE TO DEVELOPMENT IMPACT FEES* 11 (1991). *See also* DAVID L. CALLIES, ROBERT H. FREILICH & THOMAS E. ROBERTS, *CASES AND MATERIALS ON LAND USE* 200 n.7 (2d ed. 1994); Fred Jacobsen & Jeff Redding, *Making Development Pay Its Way*, 55 N.C. L. REV. 407 (1977).

86. *See* Associated Home Builders v. Walnut Creek, Inc., 484 P.2d 606 (Cal. 1971) (in lieu of fee for open space and recreation); Jenad, Inc. v. Vill. of Scarsdale, 218 N.E.2d 673 (N.Y. 1966) (in lieu of fee for recreational purposes). *See also* THOMAS P. SNYDER & MICHAEL A. STEGMAN, *PAYING FOR GROWTH: USING DEVELOPMENT FEES TO FINANCE INFRASTRUCTURE* 10, 17-18 (1986).

87. *See generally* Kelber v. City of Upland, 318 P.2d 561 (Cal. Ct. App. 1961); Rosen v. Village of Downers Grove, 167 N.E.2d 230 (Ill. 1960); Coronado Dev. Co. v. City of McPherson, 368 P.2d 51 (Kan. 1962); Haugen v. Gleason, 359 P.2d 108 (Or. 1961). A few more recent decisions also have invalidated the in-lieu of practice by characterizing it as an unauthorized tax. *See generally* City of Montgomery v. Crossroads Land Co., 355 So. 2d 363

in judicial tests because of its “equivalence” to other mandatory subdivision requirements.⁸⁸ They have also been authorized by more recent state enabling legislation.⁸⁹ Today, these fees are commonly used to fund the acquisition and construction of off-site schools and park facilities and in some jurisdictions, street improvements, flood control, public resource access, and other public facilities.⁹⁰ The “in lieu of” fee concept, being adopted in the post-World War II decades, can be considered as one form of monetary exaction and setting the stage for future developer cash payments to localities as part of the land use regulatory process: an antecedent of modern impact fee practice.⁹¹ In Canada, during the fifties, Ontario municipalities developed the concept of “development charges” as a means of requiring developer financial contributions for off-site capital facilities.⁹²

Modern American land regulation has consistently and increasingly relied on land developers to build or fund basic improvements and infrastructure within property subdivisions they initiate, as well as requiring that they contribute to off-site capital improvements necessitated by their developments. While the practice began in a physical, literal way with on-site improvements and land interest dedications, it has now evolved to add cash payments, including development impact fees, to the long and complex list of local government infrastructure financing techniques. Local government-imposed land development exactions have existed as long as localities have used zoning and subdivision regulation practices. This essential technique is not new, but rather represents a continuing effort to shift the capital costs of providing needed public facilities to land devel-

(Ala. 1978); *Town of Longboat Key v. Lands End Ltd.*, 433 So. 2d 574 (Fla. Dist. Ct. App. 1983); *see also Sanchez v. City of Santa Fe*, 481 P.2d 401 (N.M. 1971).

88. *See, e.g. Associated Home Builders v. City of Walnut Creek*, 484 P.2d 606, 613-14 (Cal. 1971); *Krughoff v. City of Naperville*, 54 N.E.2d 489 (Ill. App. Ct. 1976), *aff'd*, 369 N.E.2d 892 (Ill. 1977); *Jenad, Inc.*, 218 N.E.2d at 673; *Call v. City of West Jordan*, 606 P.2d 217 (Utah 1979); *Jordan v. Vill. of Menominee Falls*, 137 N.W.2d 442 (Wis. 1965).

89. *See, e.g., Colo. Rev. Stat. § 30-28-133(4)(a)* (authorizing park and school sites or fees reasonably necessary to serve the subdivision).

90. *See JAMES A. KUSHNER, 1 SUBDIVISION LAW AND GROWTH MANAGEMENT § 6:30* (2d ed. 2005).

91. *See Ira M. Heymann & Thomas K. Gilhool, The Constitutionality of Imposing Increased Community Costs on New Suburban Residents through Subdivision Exactions*, 73 *YALE L.J.* 1119, 1121-22 (1964).

92. David P. Amborski, *Impact Fees Canadian Style: The Use of Development Charges in Ontario*, in *DEVELOPMENT IMPACT FEES-POLICY RATIONALE, PRACTICE, THEORY AND ISSUES* 52 (Arthur C. Nelson ed., 1988). In describing this early Canadian practice, Professor Amborski summarized some of the salient features of the Ontario *Municipal Act* in the following terms,

[W]hen municipalities received contributions in relation to expenses anticipated due to the subdivision of lands, those funds should be used for expenditures that benefit the occupants of the land within the subdivision. It further stated that contributions received in this manner should be placed in a reserve account that is subject to the regulations placed in the act on those accounts. Basically, these regulations attempt to ensure accountability by having the funds earmarked so that they will be spent in the manner specified above.

Id. at 53-54.

opers and new residents.⁹³ It is the extension of this practice to development impact fees that will be the subject of the remaining analysis of this article.

PART III—THE LAND DEVELOPMENT IMPACT FEE— THE MODERN FORM OF EXACTION

A. DEFINING THE IMPACT FEE

American municipal land use regulation has had a longstanding tradition of tying governmental approval of development projects with regulatory conditions imposing an increasing array of site improvements, land dedications, and financial charges. Interestingly, this history has assessed these development charges as an aspect of local government police power regulation and not as a direct form of business or consumer taxation. While this progression may be explained under a theory of regulatory “incrementalism,” it has had significant effects on the design of modern exaction programs, most notably land development impact fees. These fees, with their police power rather than tax-based lineage, are subjected to a series of constitutional and common law qualifying tests when they undergo judicial review.⁹⁴ This is an area where labels matter and the judicial categorization of a financial charge placed on land development as a tax, a special assessment, or a development impact fee can be determinative in determining lawfulness. In a particular state context, one of these devices may be authorized and available to the locality, while another technique may not.⁹⁵ Not surprisingly, local governments will fre-

93. The application of municipal land use exactions has rapidly increased with the changing local government fiscal landscape and the shifting public attitudes regarding government and general taxation. David R. Berman wrote that,

[N]ationwide, the number of exactions (required improvements, property set-asides, fees and taxes) imposed on developers has increased greatly in the past two decades. To some extent, this increase reflects the notion that growth must pay for itself. In part, however, it has also stemmed from the financial difficulties of many localities. Just as the federal and state governments tried to cope with their economic problems by passing costs on to local governments, local governments have attempted to ease their economic difficulties—and the burden on current taxpayers—by passing costs on to developers. That developers have not offered more resistance may be attributable to the fact that they can, in turn, pass the costs on to residential or commercial buyers.

INT’L CITY MGMT. ASS’N, *State-Local Relations: Authority, Finances, Cooperation*, in THE MUNICIPAL YEARBOOK 2002, at 53 (2002).

94. Ironically, constitutional law imposes minimal constitutional constraints upon taxation devices—minimal due process or equal protection scrutiny—and no need to prove any semblance of rough proportionality as required in *Dolan v. City of Tigard*. See *Amador Valley Joint Union High School Dist. v. State Bd. of Equalization*, 583 P.2d 1281, 1292 (Cal. 1978).

95. The power of taxation is distributed to local governments across the nation in non-uniform ways. In some states such as Maryland, certain large jurisdictions such as Montgomery County are accorded broad power of taxation equal to that of the state. When the county’s impact fee policy was invalidated by the Maryland Court of Appeals as a revenue raising measure disguised as a regulatory fee, ample authority existed for the program to be reconstituted as an “excise tax.” See *E. Diversified v. Montgomery County*, 570 A.2d 850, 855 (Md. 1990). Such an excise tax was imposed on the act of developing property and

quently attempt to employ the label most likely to survive judicial scrutiny. However, they do not always use consistent terminology, and therefore, cash payments related to land development have been called many things.⁹⁶ Sometimes, localities will adopt a fee policy using one descriptive label, and later, they will redefine the technique in what they believe is a legally-defensible term when challenged in court. This ploy is met with mixed success since courts feel free to take a fresh look at the device under attack and to characterize it as they see fit. As always, the courts have the final say.

A development impact fee is the assessment by local government of financial charges upon the owner of new land development projects needed to offset capital expenditures made by the local government on infrastructure required to serve or made necessary by the new building.⁹⁷ Nelson and Moody have described it more succinctly as “really nothing more than an intervention by local officials to solve the problem of providing infrastructure to sustain development in rapidly growing areas.”⁹⁸ Most often, this fee is charged one time only, based upon a set schedule of administratively or legislatively-adopted rates and, usually, at the moment of development approval rather than later in the building process.⁹⁹ The range of impact fee purposes is potentially as broad as the range of public services accorded to new development and fees have been imposed for an ever-expanding range of purposes.¹⁰⁰ However, many jurisdictions limit their impact fee programs to cost categories for which they have specific authority and proportionate cost data sufficient to justify imposition of the fee. Impact fees are uniformly dedicated to the purpose of funding or capitalizing on the construction of new infrastructure systems or the expansion of existing ones and not for their operational or maintenance (O&M) expenses—¹⁰¹such O&M expenses being regarded

was sustained in *Waters Land Ltd. P'ship v. Montgomery County*, 650 A.2d 712, 716 (Md. 1994).

96. See, e.g. *Home Builders Ass'n of Cent. Ariz.*, 930 P. 2d 993, 994 (Ariz. 1997) (water resource development fee); *San Remo Hotel L.P. v. City of San Francisco*, 41 P.3d 87, 104 (Cal. 2002) (housing replacement fee); *Country Joe, Inc. v. City of Eagan*, 548 N.W.2d 281 (Minn. Ct. App. 1996) (road unit connection charge); *City of N. Las Vegas v. Pardee Constr. Co.*, 21 P.3d 8, 8 (Nev. 2001) (water connection charge).

97. NICHOLAS, NELSON & JUERGENSMEYER, *supra* note 85, at 1.

98. ARTHUR C. NELSON & MITCH MOODY, *PAYING FOR PROSPERITY: IMPACT FEES AND JOB GROWTH 16* (Discussion Paper, Brookings Institution Center On Urban and Metropolitan Policy 2003).

99. Arthur C. Nelson, *Development Impact Fees*, 54 J. AM. PLAN. ASS'N 3 (1988) (“single payments required to be made by builders or developers at the time of developmental approval and calculated to be the proportionate share of the capital cost of providing major facilities to that development”).

100. If appropriate enabling authority and local political will existed, impact fees could be imposed to provide for water treatment and supply, sewage collection and treatment, solid and/or hazardous waste treatment and storage, roads, bridges, mass transit, flood control, pollution control, schools, libraries, parks, open space and recreational facilities, sidewalks, affordable housing, and artwork. See JAMES A. KUSHNER, *SUBDIVISION LAW AND GROWTH MANAGEMENT* at 1 § 6:31, at 1 (2d ed. 2005).

101. It has been uniformly stated by analysts, courts, and legislatures that on-going operation and maintenance expenses are not to be paid for by impact fees and that the fees

as the proper subject of tax or user fee support.

These fees (*unlike* traditional, on-site development exactions) fund capital improvements made necessary by the new building which are physically situated off-site, that is, some distance from the new residential, and sometimes, industrial or commercial construction.¹⁰² Nelson has described development impact fees as "scheduled charges applied to new development to generate revenue for the construction or expansion of capital facilities located outside the boundaries of the new development (off-site) that benefit the contributing development."¹⁰³ One way to conceptualize the difference between traditional development exactions and development impact fees is to consider exactions as being tied to the specific site under development (project charges) while the impact fees are related to more system-wide service provision or infrastructure (system charges). A "project charge" might impose the cost of installing curbs and gutters within a residential subdivision while a "system charge" would provide the local government with funds to expand the treatment capacity of the municipal sewage treatment plant. It is this detachment from the actual location of land development that makes impact fees so controversial and so often subject to legal attack. Other, more comprehensive definitions of impact fees do exist.¹⁰⁴

B. WHY IMPACT FEES ARE RAPIDLY BEING ADOPTED THROUGHOUT THE UNITED STATES

Attitudes regarding the desirability of community growth have changed significantly in the post-World War II period. Where once growth would be heralded as evidence of the health and the desirability of the community, now the approval of new single and multi-family developments is met with skepticism and concern about the deterioration of the locality's financial well-being and its general quality of life. In some

are only to provide funding for capital improvement costs necessitated by development. This view apparently stems from the view that the funding of operation and maintenance should come from generally- derived tax revenues as a general operating cost of government. Implicit in this outlook is the idea that such a general community expense should not be charged to a limited segment of the locality's population through a focused impact fee on new development. See JUERGENSMEYER & ROBERTS, *supra* note 50, at 328-32.

102. It is also noteworthy that development impact fees are most frequently applied to residential or home construction. However, some systems of fee collection also impose these charges on other forms of land development—that is, commercial, industrial, and institutional- and therefore, attempt to consistently tax all forms of development which are causally related to new community infrastructure charges. See generally Fred Bosselman & Nancy Stroud, *Pariah to Paragon: Developer Exactions in Florida 1975-1985*, 14 STETSON L. REV. 528 (1985).

103. See NICHOLAS, NELSON & JUERGENSMEYER, *supra* note 85, at 1-2.

104. Blaesser and Kentopp have defined impact fees as a land use exaction: 1) in the form of a predetermined money payment; 2) assessed as a condition to the issuance of a building permit, an occupancy permit or plat approval; 3) pursuant to local government powers to regulate new growth and development and provide for adequate public facilities and services; 4) levied to fund large-scale, off-site public facilities, and services necessary to serve new development; and 5) in an amount which is proportionate to the need for public facilities generated by new development. See Brian Blaesser & Christine M. Kentopp, *Impact Fees: The Second Generation*, 38 WASH. U. J. URB. & CONTEMP. LAW 55, 64 (1990).

locations, this concern has been expressed in more extreme terms with calls for building and utility connection moratoria. In an increasing number of locales, the impact fee device is being adopted by local governments. In 2000, the General Accounting Office (GAO) surveyed local governments and discovered high rates of impact fees use. The study found 59.4% or 564 cities with populations in excess of 25,000 and 39% or 238 metropolitan area counties employed impact fees.¹⁰⁵ Indirect evidence (from state enabling legislation in twenty-five states, numerous newspaper reports of municipal controversies, website postings of interest groups and reported litigation) confirms this report and suggests that impact fees are prevalent and that their use is growing.¹⁰⁶ But why is this trend currently accelerating and why didn't the pre-existing funding patterns continue? Several distinct justifications for the modern adoption of development impact fee can be identified.

1. *Using Conventional Legal Theory—The Police Power “Harm Avoidance” Justification for Impact Fees*

Development impact fees have been imposed under the authority of a locality's police power. This broad, traditional source of authority encompasses a wide range of municipal functions that can be generally said to further public health, safety or the general welfare. As general as police power goals may sound, they authorize a wide variety of protective and programmatic action to further the well-being of the community. Not surprisingly, most local government land use regulation is legally justified under this harm-prevention rationale. When new land development is proposed, it presents a variety of “harms” as potential impacts. Unmitigated, these development effects could present serious adverse consequences for the locality. For instance, a new housing subdivision, by itself, could increase site runoff and increase loads on existing drainage

105. U.S. GENERAL ACCOUNTING OFFICE, LOCAL GROWTH ISSUES—FEDERAL OPPORTUNITIES AND CHALLENGES 43 & 62 (2000). A Florida survey published in 1991 indicated that 52% of Florida's counties employed impact fees. FLORIDA ADVISORY COUNCIL ON INTERGOVERNMENTAL RELATIONS, 1991 FLORIDA IMPACT FEE REPORT.

106. In 1986, there were only three states—Arizona, California, and New Jersey—with state impact fee enabling legislation. By 1993, the number had grown to twenty jurisdictions with general state-wide law. Two others, Maryland and Tennessee, enacted law giving impact fee authority to enumerated counties. See Martin L. Leitner & Susan P. Schoettle, *A Survey of State Impact Fee Enabling Legislation*, 25 URB. LAW. 491, 492 nn.6-7 (1993). Finally, in 2002, the total had grown to twenty-four states. This total undoubtedly understates the prevalence of the practice since some states justify local impact fee practice under home rule or general planning and zoning authority. *Id.* at 507. In fact, Florida has a long litigation history of challenges to impact fees in the absence of specific enabling authority. See, e.g., *Contractors & Builders Ass'n v. City of Dunedin*, 329 So. 2d 314 (Fla. 1976). Alternatively, impact fees—often by other names—are imposed by way of negotiated land use approval practices. For instance, in Virginia, the land rezoning process is used as the vehicle for charging cash exactions offsetting the costs of new development. Under this practice, the land developer can offer “voluntary” cash “proffers” to the local government to support its rezoning request. As long as these proffers are “voluntary,” the Virginia courts have allowed the practice to continue. The Virginia General Assembly has restricted the availability of this technique to certain “high growth” localities. See VA. CODE ANN. § 15.2-2298 et seq.

structures, thereby overwhelming the capacity to properly handle the storm water generated by the subdivision. Numerous other examples of development impacts imposing community burdens exist. Requiring impact fees which fund the capital costs of public facilities needed to avoid or abate the adverse effects of new development can be viewed as a police power "harm" minimizing policy. By ensuring that there is adequate infrastructure in place to offset or avoid these negative development impacts, impact fees serve the main police power goal of maintaining community health, safety, and general welfare. In this way, the traditional police power harm minimizing rationale can be used to support impact fees.

2. *Achieving Economic Objectives at a Low Political Cost*

Throughout history, devising a revenue-raising policy has proved controversial and intensely political—sometimes spawning violent revolts.¹⁰⁷ In its most visible context, setting national tax policy in the United States consistently engenders strong political debate over the eternal questions of what conduct should be taxed, who should pay taxes, and in what amounts? At this level, setting tax policy involves highly charged political values. As with these national tax issues, local government tax policy for the funding of public investments such as roads, schools, and parks has also been a contested public issue in recent years, as evidenced by California's Proposition 13 in 1978. In the last decade, local tax policy has raised significant and controversial political questions when it concerns the financing of public facilities necessitated by new community growth.

In earlier times, communities paid for growth-related costs with annually-generated general tax revenues and general obligation debt financing. The political landscape in the last two decades has significantly changed. With the reductions in intergovernmental subsidies of local government and the increasingly popular resistance to raising real property taxes and approving bond referenda, local governments have found it necessary to develop alternative methods of financing the capital costs of growth. Such methods must meet the three-part test of being 1) financially adequate; 2) legally defensible; and 3) acceptable to the local electorate as a political matter. Development impact fees, as they have evolved over the past two decades, fit this description. By adopting ordinances embracing development impact fee regimes, local governments si-

107. In 1792, following Alexander Hamilton's plan for building a strong federal government possessing significant revenue raising powers, Congress enacted an excise tax to be imposed on strong alcoholic beverages. This action triggered what became to be known as the "Whiskey Rebellion," and this tax was especially offensive to farmers in western Pennsylvania who converted their grain to whiskey for sale since it imposed a tax equal to one-third the price of whiskey. See GLENN W. FISHER, *THE WORST TAX? A HISTORY OF THE PROPERTY TAX IN AMERICA* 35-36 (1996). The flames of the rebellion were fanned at protest meetings, the tarring and feathering of tax collectors, a mob attack on the house of a federal inspector and a march on Pittsburgh by up to 5,000 men. *Id.* In response, President George Washington called up 13,000 militiamen (triple the number at Valley Forge) and the rebellion was put down by the troops. *Id.* at 37.

multaneously achieve a series of attractive political objectives, and they do so without having to consider any potential objections from interest groups unrepresented in the existing voting populace. The major arguments in favor of the adoption of impact fees can be stated in the following terms.

3. *Pragmatic Considerations Underlying Impact Fees*

A variety of practical factors make the increasing modern reliance on impact fees understandable. *First*, by adopting development impact fees, the locality assures itself that there will be a continuing stream of capital-funding revenues that will permit the planning and building of needed infrastructure in a timely fashion correlated with the arrival of new population to the community. By obtaining this flow of impact fees, the local government can avoid the common problem of having new residential growth overload or “congest” existing public facilities such as public schools, libraries, and parks. With a steady supply of impact fee revenues, public facilities can be constructed in a more synchronized fashion with the demands of new residents, minimizing the need for the community to “play catch-up” after falling behind those growing needs. *Second*, localities will have less need to access the capital markets in order to borrow funds for this capital construction, thereby conserving their limited borrowing authority and reducing the future budgetary strain of debt service that would have been incurred to finance the improvements. *Third*, impact fees provide a dedicated source for funding public improvements that were not provided by conventional land use exactions. The expansion of a fire station or a drinking water treatment plant miles away from new development provides an example of this principle. The impact fee can provide funding for this kind of system-wide improvement necessitated by new growth. *Fourth*, these new fees can, in theory, be applied to all forms of new development—not just residential single-family home subdivisions. Impact fee programs could be designed for all categories of land uses and also for different forms of uses within the same category or group.¹⁰⁸ Such a well-constructed impact fee program would more accurately connect the fiscal impacts of development to its social costs, thereby avoiding imprecise average cost pricing problems.¹⁰⁹ *Fifth*, the timing of the collection of impact fees can be set at a point closer to the

108. A case study from Rochester, Illinois, imposes a development impact fee for water and sewer capital costs on residential, educational and commercial land uses depending on the number of “interior plumbed fixtures” regardless of the land use category. See Bradford Townsend, *Development Impact Fees: A Fair Share Formula for Success*, 78 PUB. MGMT. 10 (1996). Other impact fee systems impose charges adjusted for future expected fiscal impact on the community. See Roger K. Dahlstrom, *Development Impact Fees: A Review of Contemporary Techniques for Calculation, Data Collection, and Documentation*, 15 N. ILL. U. L. REV. 557 (1995) (describing the Elgin, Illinois Fiscal Impact Land Use Model which generates fees that are demand, cost, and revenue sensitive).

109. See R. Marlin Smith, *From Subdivision Improvement Requirements, to Community Benefit Assessments: A Brief History of Land Development Exactions*, 50 LAW & CONTEMP. PROBS. 5, 15 (1987).

developer's actual sale of the finished residential unit, making the fee less onerous to the builder. Impact fee systems could be structured to impose the fee at the point of building permit issuance or even later, thereby relieving the land developer's need to finance the impact fee expense during construction. This timing advantage for the land developer could make the fee more palatable to developers. *Sixth*, impact fees may also constitute desirable policy because they represent a more efficient use of public infrastructure. If impact fees are carefully designed to reflect the cost of actually providing public services to new development, they may serve to impose the true marginal costs of using public facilities upon new growth. Further, by integrating these expenses into the cost of new housing, the housing market will tend to maximize overall social utility because the price of homes will more accurately reflect all of the positive and negative effects that residential growth brings to the community. *Seventh*, an impact fee program may actually make new growth possible when infrastructure capacity limits have been reached and a community has adopted a real or *de facto* development moratorium. By providing for a stable source of infrastructure capital, impact fees may actually eliminate a serious objection to new residential growth and serve as a growth-accommodating policy. In this way, they could also be viewed as development timing devices.

C. ASSESSING THE ECONOMIC IMPLICATIONS OF DEVELOPMENT IMPACT FEES

Academic and professional studies have examined the general topic of the fiscal impacts of different forms of modern suburban growth.¹¹⁰ Considerably less comprehensive analysis exists regarding the use and effects of the development impact fees. Some fundamental questions concerning the general economic effects concerning the use of impact fees remain largely unanswered. For example, do fees expand or contract the supply of developable land?¹¹¹ Are fees consistent with higher or lower levels of

110. The most comprehensive assessment of the cost savings afforded by planned development considered the New Jersey State Development and Redevelopment Plan. The 1992 report concluded that New Jersey could save \$1.3 billion in infrastructure costs for roads, utilities and schools over a twenty year period if a state managed growth plan were followed rather than developing in the traditional sprawl form of land development. See ROBERT W. BURCHELL ET AL., *IMPACT ASSESSMENT OF THE NEW JERSEY INTERIM STATE DEVELOPMENT AND REDEVELOPMENT PLAN, REPORT II: RESEARCH FINDINGS* (1992). However, increased housing costs have been observed with growth controls. See William A. Fischel, *Do Growth Controls Matter: A Review of Empirical Evidence on the Effectiveness and Efficiency of Local Government Land Use Regulation*, in LINCOLN INST. FOR LAND POL'Y (1990); Jane H. Lillydahl & Larry D. Dingell, *The Effects of Growth Management on the Housing Market: A Review of Theoretical and Empirical Evidence*, 9 J. URB. AFF. 63 (1987).

111. Impact fees may actually increase the supply of developable land in a community and, as a consequence, enable more residential growth. The impact fees can provide the needed capital to fund infrastructure needs required by "adequate public facilities" planning. See VICKI BEEN, *IMPACT FEES AND HOUSING AFFORDABILITY* 8 (HUD Report 2004).

local employment in areas where they are used?¹¹² Perhaps the absence of this economic research reflects both the difficulty of data collection and the isolation of the effects and incidence of the fees. In recent years, however, the academic literature has just begun to examine seriously this technique both in theoretical terms and case study analyses. The emphasis of these studies has been in economic focus with considerable effort expended to the application of statistical methods to discern precise empirical patterns to explain the real world impact of these fees. These studies, drawn from localized data sets, have considered three interrelated questions: 1) what are the price effects of impact fees on new and existing home prices; 2) what is the incidence of the impact fees or who actually pays the additional cost imposed by the impact fee; and 3) does the use of local government impact fees result in greater economic efficiency in patterns of suburban growth?

1. Housing Cost Price Effect Data

Intuitively, one might assume that the imposition of development impact fees would result in developers attempting to pass the additional cost along to the housing consumer in the form of higher prices for new construction. The impact fee would merely represent an additional cost component. However, such pricing power would seemingly depend upon the competitiveness and profitability of an area's housing market, the availability of new homes in communities that do not impose impact fees (or have lower fee levels) and the ability of developers to force land sellers to capitalize or deduct all or some of the fee from the cost of the raw land sales price. Each of these factors could result in a diffusion of the impact fee with each of the market participants—the housing consumer, developer, and land owner—each absorbing part of the new additional cost. Research has provided limited insight into the potential effect that impact fees might have on housing price and supply.

The few empirical studies undertaken seem to indicate that fees are largely passed on to the consumer of new housing and often in excess of the actual amount of the impact fee itself. This phenomenon is referred to as “overshifting,” where the developer receives a bonus in excess of the cost of the development fee.¹¹³ One study undertaken in the mid-nineties by Brett Braden, Don Coursey, and Jeannine Kannegiesser examined the price effects of impact fees in eight Chicago suburbs and found that new house prices rose more than the cost of the impact fee in

112. One recent regression analysis of data from thirty-four Florida counties from 1993 to 1999 concerning the relationship of numerous factors on local economic development found “a significant positive association between impact fees collected per building permit in one year and job growth over the next two years.” NELSON & MOODY, *supra* note 98, at 15.

113. John Yinger, *The Incidence of Development Fees and Special Assessments*, 51 NAT'L TAX J. 23, 35 (1998).

six out of eight localities.¹¹⁴ The range of price increases spanned from 70% to 210% of the actual cost of the impact fee.¹¹⁵ The explanation of why developers are able to pass on the impact fee cost plus an additional increment appears to rest upon consumer willingness to pay for established, in-place services that will benefit them immediately in a predictable way. The price effect of impact fees on existing housing has also been studied, and it has been found that impact fees also had a positive effect on existing houses—not subject to the impact fees—increasing their value by at least the amount of the impact fees being charged to new home development. This price phenomenon reflected the fact that existing homes represented a potential substitute for newly-constructed homes and that rising prices would increase their prices as well. Some theorists have suggested that the existing house price increase might also reflect the market's perception that, with impact fees, the likelihood of future real estate tax rate increases will be reduced. It is hardly surprising that current property owners have an incentive to support the imposition of impact fees on new construction for the usual stated reasons and the desire to enjoy windfall capital gains.

Other studies reinforce these findings. For instance, in 1990, Singell and Lillydahl analyzed similar price impacts during 1983-85 in Loveland, Colorado, and found that an impact fee of \$1,182 was related to a new house price increase of \$3,800—over three times the cost of the fee.¹¹⁶ They concluded that “the results imply that the buyers of new homes in Loveland, rather than land owners or developers, bear the burden of the impact fees.”¹¹⁷ These results suggest developers “overshifting” as described above resulting in a tripling of the return on their “investment” in impact fees. Even more striking are the results of the analysis related to the price effects on existing housing in Loveland, Colorado during the period under study. Singell and Lillydahl found that the price of old or existing housing increased an average of \$7,000 when impact fees were imposed on new housing.¹¹⁸ These findings indicate that existing homeowners derived significant indirect benefits from the assessment of impact fees on new construction.¹¹⁹ In fact, existing housing prices rose \$7,000,

114. BRETT M. BADEN, DON L. COURSEY & JEANNINE M. KANNEGISSER, [THE HEARTLAND INSTITUTE], *EFFECTS OF IMPACT FEES ON THE SUBURBAN CHICAGO HOUSING MARKET* 36 (1999) (finding that in the period from 1995 to 1997 single family home impact fees in the eight Chicago communities ranged from \$2,223 to \$8,942.)

115. *Id.* At the low end of this range—70% cost increase—the builder must absorb the missing 30% or force the landowner's selling land for development to reduce their asking prices in order to capitalize the cost of the impact fees. The large price effects—210%—were not attributed to price gouging or strong market conditions, but were rather “probably due to the imposition of fees causing substantial uncertainty and delay costs, as well as other fee and regulatory costs. . . .” *Id.*

116. Larry D. Singell & Jane H. Lillydahl, *An Empirical Examination of the Effects of Impact Fees on the Housing Markets*, 66 *LAND ECON.* 82, 89 (1990).

117. *Id.*

118. *Id.*

119. *Id.* at 89. Theoretical research has confirmed this price effect increasing the value of developed land when impact fees are adopted. See Jan K. Brueckner, *Infrastructure, Financing and Urban Development: The Economics of Impact Fees*, 66 *J. PUB. ECON.* 383,

while new house prices increased by \$3,800 in the study.¹²⁰ Other empirical studies have reinforced the point that housing prices rise at least on par with the cost of the impact fee.¹²¹ If these research findings are correct as a general matter, it is not hard to understand why existing residents support the imposition of impact fees on new development: they are beneficial by raising the capital value of the existing housing stock. There is also evidence that fees may also slow the rate of residential construction, thereby limiting the addition of new housing supply to the market.¹²² These results support the idea that impact fees raise the cost of new housing construction to the consumer and indirectly increase the value of existing homes in a simultaneous fashion.¹²³

2. Who Actually Pays Impact Fees the Question of Incidence

The incidence of a tax indicates who actually pays it and this issue has been the subject of research within the context of development impact fees.¹²⁴ The studies done in this area have focused on the price effects or trends for new and existing housing in jurisdictions imposing impact fees. The initial question posed by this research has been a determination of whether a local government's imposition of an impact fee affects the price of new and used housing in an area. Certainly, since the impact fee is imposed upon the land developer at some point in the development approval process, it can be said that the fee is nominally or literally paid by the developer. Also, since the development fee is an "up-front charge" in the building process, it represents an additional cost element in the construction of a unit of housing. However, once imposed, the impact fee may not stay where it is first charged. That is, the land developer may first attempt to shift the development fee "backwards" to the raw land seller through lower prices paid for land. In the alternative, the devel-

405 (1997). Consequently, it is not difficult to comprehend yet another reason why development impact fees have become so widespread throughout the United States during the last two decades. They also raise the market value of homes owned by existing property owners in the locality.

120. Singell & Lillydahl, *supra* note 116, at 89.

121. Charles J. Delaney & Marc T. Smith, *Impact Fees and the Price of New Housing: An Empirical Study*, 17 J. AM. REAL EST. & URB. ECON. ASS'N 41, 54 (1989) (impact fees in Dunedin, Florida rose relative to other cities in Pinellas County, Florida); Andrejas Sakburskis & Mohammad Qadeer, *An Empirical Estimation of the Price Effects of Development Impact Fees*, 29 URB. STUD. 653, 667 (1992) (\$1.00 in impact fees caused lot prices to rise \$1.88 in Toronto, Canada). *But see* Marla Dresch & Steven M. Sheffrin, *Who Pays For Development Fees and Exactions?*, PUB. POL'Y INST. OF CAL. (1997) (inconsistent findings some showing no overshift).

122. Mark Skidmore & Michael Peddle, *Do Development Impact Fees Reduce the Rate of Residential Development?*, GROWTH AND CHANGE 383-400 (Fall 1998) (reducing the rate of residential construction between 29% and 31% from 1977 through 1992 in DuPage County, Illinois). *But see* Christopher J. Mayer & C. Tsuriel Somerville, *Land Use Regulation and New Construction*, 30 REG. SCI. & URB. ECON. 639 (2000) (little effect found on construction).

123. Charles J. Delaney & Marc T. Smith, *Pricing Implications of Development Exactions on Existing Housing Stock*, GROWTH AND CHANGE 12 (Fall 1989).

124. *See, e.g.*, Forrest E. Huffman et al., *Who Bears the Burden of Development Impact Fees?* 54 J. AM. PLAN. ASS'N 49, 49-55 (1988).

oper might attempt to transfer all or part of the impact fee "forward" to the housing consumer through higher prices that must be paid for a completed home. Studies have revealed that impact fee costs are shifted in both directions.

Research by John Yinger has rigorously analyzed the incidence issue and has concluded that development impact fees actually shift approximately a quarter of the burden of these fees onto the owners of undeveloped land with the size of this effect estimated to be varied.¹²⁵ Backward-shifting of the fees has proved controversial and has been discussed in other studies.¹²⁶ At the same time, the imposition of impact fees confers a small capital gain on existing homeowners.¹²⁷ This seems to be consistent with the conclusions of the Singell and Lillydahl study and earlier research.¹²⁸ Not surprisingly, new home purchasers will bear the rest of the impact fee burden in higher purchase prices, but they will be rewarded for shouldering this cost with a higher level of infrastructure serving their new homes and, potentially, higher resale values.¹²⁹ Finally, Yinger concludes that in a competitive housing construction market the fees do not impose any burden on the land developer.¹³⁰ The collective conclusion of this research indicates that fees are shared by all of the participants in the land development process but that the process of "shifting" is not well understood, necessitating more study.¹³¹

3. *Impact Fees as a Way to "Efficient Growth"*

Earlier community development practices have been criticized as being economically inefficient in that builders add housing to a locality without absorbing all, or even a majority, of the capital and other costs imposed

125. See generally Yinger, *supra* note 113. This phenomenon has been observed.

126. Keith R. Ihlanfeldt & Timothy M. Shaughnessy, *An Empirical Investigation of the Effects of Impact Fees on Housing and Land Markets*, 2 & 15 (Lincoln Institute of Land Policy Working Paper No. CP02A13 2002) (stating that undeveloped land values decline if the increase in the price of housing is insufficient to guarantee developers of new housing a competitive rate of return); see also William A. Fischel, *The Economics of Land Use Exactions: A Property Rights Analysis*, 50 LAW & CONTEMP. PROBS. 101 (1987); Andrew R. Watkins, *Impacts of Land Development Charges*, 75 LAND ECON. 415-424 (1999).

127. Yinger, *supra* note 113, at 37. If the existing homeowners also receive benefits from the infrastructure funded by impact fees paid by new home owners, the windfall to these existing residents would be even greater. In this research, Professor Yinger also concluded that special assessment, rather than development impact fees, appeared to be the fairer financing mechanism for infrastructure, and he notes that "special assessments are the most neutral policy: The burden fall entirely on new owners who receive all the benefit from the infrastructure." *Id.* at 33.

128. See Huffman et al., *supra* note 124, at 52 ("if housing prices . . . rise because of impact fees, the price of existing homes that are close substitutes for new homes will also rise. That results in a windfall profit to owners of existing homes.")

129. The Ihlanfeldt & Shaughnessy study estimated that this increase in the price of housing equals "the present value of the property tax savings expected by homeowners from the shift from property tax finance to the use of impact fees to pay for new public capital services." Ihlanfeldt & Shaughnessy, *supra* note 126, at 16. This view assumes a remarkable and unrealistic degree of housing consumer awareness of future taxes and the ability to discount these future savings to present value.

130. Yinger, *supra* note 113, at 37.

131. See generally Watkins, *supra* note 126.

on the community by the new construction. In this view, builders, as economic actors, force negative economic externalities upon localities by requiring that the general community respond with general tax revenues to finance the infrastructure and the other adverse effects of new growth. Following this theory, it is assumed that, in economic terms, the act of land development is inefficient if it shifts negative effects or costs away to be borne by others who have not agreed to bear them. By avoiding these costs, land developers have benefited themselves and, in the short run, housing consumers by supplying the housing market with additional units at a sales price not fully reflecting their economic impact on the local community. The result of this phenomenon of not internalizing these costs is to provide housing to consumers at an artificially low price or to provide unjustified profits to builders or a little of both.

Land development may be considered “efficient” when the cost of infrastructure is included in the price charged to the consumer. Viewed in this light, it has been argued that development impact fees are justified as a method of properly assigning the costs of growth to those enjoying the benefits. Expressed in other terms, these fees demand a greater internalization of development costs, resulting in improvement in the economic efficiency in the provision of infrastructure. Some economic analysts have concurred with this view. Within an urban growth model, Jan K. Brueckner compared the traditional community cost sharing method of infrastructure financing with the approach taken by development impact fees. This research concluded that “the impact fee scheme . . . [is] the infrastructure financing method that leads the efficient growth path because impact fees force developers to take into account the infrastructure costs imposed by new residents. Impact fees thus align private and social incentives.”¹³² The research results suggest that even though impact fees only result in the recovery of part of new development-related costs, they do more closely align the housing consumer with the costs of providing new services. As a result, impact fees may be viewed as enhancing economic efficiency. In addition, higher housing prices following the imposition of impact fees may actually reflect the fact that the housing consumer receives greater value in the property purchase through better infrastructure or reduced future local tax increases.

132. Skidmore & Peddle, *supra* note 122, at 398 (describing Jan K. Brueckner, *Infrastructure, Financing and Urban Development: The Economics of Impact Fees* (Manuscript at the University of Illinois at Champaign-Urbana)).

PART IV—JUDICIAL SUPERVISION OF EXACTIONS
AND IMPACT FEES

A. STATE COURTS IMPACT FEE POLICY DEVELOPMENT
PRIOR TO THE *NOLLAN/DOLAN* DECISIONS

1. *Early State Law on Cost Shifting*

As land use control techniques developed throughout the twentieth century, police power authority was increasingly used to shift the economic costs of new residential growth to the land developer. Gradually, regulatory power was employed to require that land use projects contained physical improvements that were functionally sound, integrated into community-wide systems, and sufficient to serve the needs of the new residents who would live in the area.¹³³ This early stage, however, focused on physical requirements of land improvements such as streets, gutters, sidewalks, and water and sewer lines within the area being developed. Later, in the post-World War II period, these subdivision rules expanded requiring land dedication for schools, parks, and other public facilities. Since these land exactions were usually attached to the regulation of large scale land development, courts analyzed them as police power-based rules, and they were often approved by the state judiciary and legislatures.¹³⁴ By this time, the government approval of residential subdivisions had become dependent upon the land developer's agreement to provide internal physical improvements and to dedicate land for public purposes. The key element satisfying court review of these land and capital improvements was their direct relationship to the land being developed at the actual site. It was not difficult for courts to consider these costs to be attributable to or caused by the new land development and, therefore, a proper subject for regulation.

With this regulatory power firmly established in the local government's array of capital cost-shifting techniques, it did not take long for some of these land and physical improvement exactions to be converted into cash payments made to the local government. Consequently, required land dedications were often converted into a cash payment that was made "in lieu of" the otherwise inefficient land exaction. By the sixties, these "in lieu of" payments had been reviewed by numerous state courts and they had become common land use control techniques in the United States.¹³⁵ The acceptance of the "in lieu of" fees would set the stage for future cash impact fees that would provide for off-site system improvements that

133. JUERGENSMEYER & ROBERTS, *supra* note 50, at 275. Even nineteenth century case law upheld the practice of charging new development for common improvements serving the buildings. *See, e.g.*, *City of Fergus Falls v. Boen*, 80 N.W. 961, 961-62 (Minn. 1899) (upholding a per house connection charge offsetting costs of sewer pipes).

134. *See, e.g.*, *Billings Props. Inc. v. Yellowstone County*, 394 P.2d 182, 185 (Mont. 1964) (recreational land); *Blevens v. City of Manchester*, 170 A.2d 121, 122 (N.H. 1961).

135. THOMAS P. SNYDER & MICHAEL A. STEGMAN, *PAYING FOR GROWTH: USING DEVELOPMENT FEES TO FINANCE INFRASTRUCTURE* 10, 17-18 (Washington: Urban Land Institute 1986).

would not be so closely tied to the actual parcel of land being developed. In reality, both of these techniques require cash transfers from the land developer to the local government to offset capital costs associated with new growth. Even at this early stage, both devices raised the concern of commentators that they could be abused and serve as illicit "entrance taxes" on new residents if not properly administered.¹³⁶

The period of 1960-1980 resulted in tremendous population growth and land development in the United States. The "growth mandate" of the earlier part of this period was followed by a time when pro-growth attitudes of local government met intense citizen resistance. One of the more serious arguments raised against continued development was the increasing concern about the inadequacy of local public infrastructure. Overcrowded schools and overburdened sewer and water systems were viewed as the result of poorly planned, excessive community growth. Localities turned to development impact fees to shore up the financial shortages they were experiencing with higher costs to service ever-increasing levels of growth. Local governments first sought to impose these fees as modern extensions of the traditional, special assessments or following public utility models of municipal finance.¹³⁷ This view of financing capital improvements connected a specific physical improvement such as a sidewalk, curb and gutter, or sewer or water pipe connection to an exact parcel which was both benefited by the investment and burdened with a financial charge to liquidate its cost. This linear burden and benefit relationship had legally reinforced a wide range of financial special assessments over the years.¹³⁸ During this modern growth period, however, land use impact fees began to expand in their range of purposes until they reached physical improvements that spread well beyond the boundaries of the building lots subject to the fees. With possible spillover effects accruing to the community at large, some critics believed that the increasingly popular impact fees were actually stealth taxation devices redistributing wealth rather than preventing negative impacts caused by the new development.¹³⁹ Not surprisingly, the state courts were asked by

136. See, e.g., Ira M. Heyman & Thomas K. Gilhool, *The Constitutionality of Imposing Increased Community Costs on New Subdivision Residents Through Subdivision Exactions*, 73 YALE L.J. 1119; John D. Johnston, Jr., *Constitutionality of Subdivision Exactions: The Quest for a Rationale*, 52 CORNELL L.Q. 871 (1967).

137. Some localities in California have adapted this traditional technique to provide funding for a proportionate share of public improvements such as fire stations by using a "facilities benefit assessment" to obtain funds from developers. This practice has been upheld in California in *J.W. Jones Cos. v. City of San Diego*, 157 Cal. App. 3d 745, 758 (1984). Arizona courts have allowed similar devices to be used to fund sewer line extensions under "special taxing district" authorities. See *Est. of Crain v. City of Williams*, 965 P.2d 76, 81 (Ariz. Ct. App. 1998).

138. Special assessments have a long history in the United States reaching back to the seventeenth century. See *People ex rel. Griffen v. Mayor of Brooklyn*, 4 N.Y. 419, 438 (1851). See also OSBORNE M. REYNOLDS, JR., *LOCAL GOVERNMENT LAW* 349-54 (2d ed. 2001).

139. See Frank Bosselman & Nancy Stroud, *Pariah to Paragon: Developer Exactions in Florida 1975-85*, 14 STETSON L. REV. 527, 529 (1985); John W. Reps & Jerry L. Smith, *Control of Urban Land Subdivision*, 14 SYRACUSE L. REV. 405 (1963); Benjamin J.

land developers and other pro-growth interests to restrict this emerging funding device found to be so attractive by local governments around the nation.

In this three decade period before United States Supreme Court intervention in the *Nollan* and *Dolan* decisions, state law was required to sort out the claims against impact fees and to determine their lawfulness. During this time, state courts frequently addressed three central questions regarding the legality of development fees. Even though cases contained a number of overlapping issues and were decided largely under a particular state's law, not federal law, they were principally concerned with the following inquiries: 1) were they police power-based regulatory actions or impermissible forms of local taxation; 2) were these charges properly authorized local government actions under statutory or constitutional law; and 3) even if authorized, were these fees "reasonable" exercises of the police power under state law constitutional law tests? Since the courts were evaluating local practices that grew from indigenous sources and followed no national pattern, it is not surprising that their decisions followed no consensus of opinion. The following patterns emerged through this formative period, and they reflect state judiciaries' attempt to balance competing claims to the legitimacy of a popular, yet contested, method of public finance.

a. The "Regulation" or "Taxation" Inquiry

A surprisingly large number of cases during this time period addressed the question of whether the cash charge was to be categorized as a police power regulation or as a form of taxation. While appearing as a rather formalistic objection to the local government's action, the regulation/taxation classification held great potency for challengers to impact fee practices. In *Regulation for Revenue*, Altschuler and Gomez-Ibanez noted a fundamental difference between these two financial techniques,

Governments may regulate and impose fees on the basis of their police power, but they may not impose taxes. A tax can be used for any purpose; no connection, in principle, need exist between the source of revenue and the purposes for which it is used. Fees, on the other hand, must be justified with reference to the cost of providing services to the payers or of mitigating harm to others that would otherwise be caused by the payers' activities.¹⁴⁰

This distinction emphasizes the fact that taxes may be imposed following criteria unrelated to service costs or harm mitigation. Income and property taxes provide common examples of this phenomenon where the obligatory charges are set solely with reference to income or wealth levels. More importantly, the regulatory fee/tax dichotomy relates more directly to identifying proper sources of authority for each form of action. In

Trichelo, *Subdivision Exactions: Virginia Constitutional Problems*, 11 U. RICH. L. REV. 21 (1976).

140. ALTSCHULER & GOMEZ-IBANEZ, *supra* note 17, at 51.

practice, state legislatures carefully limit the power of local governments to impose taxes much more restrictively than they do the allocation of planning and land use control power.¹⁴¹ They also impose more onerous procedural demands such as super majority voting or citizen referendum requirements on the adoption of new taxes. Courts also have the tendency to interpret taxing authority in a narrower fashion, as well.¹⁴²

Discerning the differences between invalid taxes and permissible regulatory fees has been difficult for courts to do with any defining principle or consistency. It has been even harder for them to articulate a coherent rationale for the distinctions they have drawn. Some cases like *S & P Enterprises, Inc. v. City of Memphis*¹⁴³ claim to examine the purpose for which the monies have been required by the local government. As commonly explained in cases such as this, if the objective of the fee was to raise general revenue for the community rather than to accomplish a police power regulatory purpose, the charge would be considered a tax.¹⁴⁴ For example, in the 1961 case of *Western Heights Land Corp. v. City of Fort Collins*, the Colorado Supreme Court ruled that levying a charge for water and sewer service on a square foot basis was not a "tax," because it was not a revenue measure intended to defray general municipal expenses.¹⁴⁵ In other cases during this period, courts found that a regulatory

141. See REYNOLDS, *supra* note 26, at 335-37 ("[T]he power [to tax] must be derived from the state, and a grant of it will be strictly construed, with doubts resolved against the existence of any particular aspect of the power."). However, it should be noted that some jurisdictions accord local governments broad authority to impose certain kinds of taxes and, in addition, specifically exempt such taxes from the restrictive policies embodied by state impact fee legislation. See, e.g., *Centex Real Est. Corp. v. City of Vallejo*, 24 Cal. Rptr. 2d 48, 51 (Cal. Ct. App. 1993) (upholding Property Development Excise Tax as a valid tax "on the privilege of developing property" and not a development fee subject to state law on development fees); *Westfield-Palos Verdes Co. v. City of Rancho Palos Verdes*, 141 Cal. Rptr. 36, 44 (Cal. Ct. App. 1977) (upheld a \$500 tax per bedroom); *Associated Home Builders v. City of Newark*, 95 Cal. Rptr. 648, 648-50 (Cal. Ct. App. 1971) (upheld a business licensing tax at building permit stage in development process).

142. In *Daniels v. Borough of Point Pleasant*, 129 A.2d 265 (N.J. 1957), the court struck down a local ordinance substantially increasing (by 700%) the building permit fee on residential home construction. *Id.* at 267. The New Jersey Supreme Court struck down the fee ruling that without clear statutory power, a locality may not impose fees that exceed the cost of running the regulatory program as that would constitute use of the police power to defray the costs of government. *Id.* at 268. This rule has been extremely persuasive and it continues with modern cases. See, e.g., *Idaho Bldg. Contractors Ass'n v. City of Coeur D'Alene*, 890 P.2d 326 (Idaho 1995).

143. 672 S.W.2d 213 (Tenn. Ct. App. 1983).

144. *Id.* at 215. Not all taxes are held to be void. If the requisite municipal authority exists, a local government may lawfully impose a revenue-raising measure similar to an impact fee or other financial development charge. See, e.g., *Cherry Hills Farms, Inc. v. City of Cherry Hills*, 670 P.2d 778, 783 (Colo. 1983) (finding service fee to be a valid excise tax); *Towne Props., Inc. v. City of Fairfield*, 364 N.E.2d 289, 290 & 292 (Ohio 1977) (upholding a \$50 per unit recreation tax levied on dwelling units not requiring building permits); *Paul L. Smith, Inc. v. S. York County Sch. Dist.*, 403 A.2d 1034, 1937 (Pa. Commw. Ct. 1979) (upholding school privilege tax upheld). See William H. Ethier & Howard J. Weiss, *Development Excise Taxes: An Exercise in Cleverness and Imagination*, 42 LAND USE L. & ZONING DIG. 3 (1990).

145. See, e.g., *W. Heights Land Corp. v. City of Fort Collins*, 362 P.2d 155, 158 (Colo. 1961); *Contractors and Builders Ass'n of Pinellas County v. City of Dunedin*, 329 So. 2d 314, 318 (Fla. 1976); *Haugen v. Gleason*, 359 P.2d 108, 111 (Or. 1961) (in lieu of fees were

fee was present in instances when the local government classified the charge as such, when the fee was not in excess of the regulatory costs and when it segregated and spent the collected funds for a specific regulatory purpose.¹⁴⁶ Courts have struggled with this classification question, and they have looked for clear indicators pointing to circumstances when development fees were actually taxing devices serving to augment the general local governmental treasury.

b. Was There Lawful Authority to Impose Financial Charges on Development?

A central tenet of local government law states that these units of government may only act when they possess lawful authority to do so. This represents a serious restraint on local government initiative and a powerful means of attacking legally unjustified action. In addition, local units of government are traditionally considered to have no inherent governmental power. Therefore, when they act, they must be able to identify a legitimate source of their governing authority—usually in specific enabling statutes or the provisions of constitutional or statutory home rule law. Not surprisingly, early attempts to impose development impact fees were met with this kind of challenge—that they were unauthorized and, therefore, illegal government action. A few state courts struck down the new fees for lacking proper authorization.¹⁴⁷ At this juncture, few states had enacted legislation that explicitly allowed for impact fees, and therefore, local governments sought to identify less direct, implied sources of power from other statutory language and law. In a surprisingly large number of cases, the courts reinforced local efforts to charge impact fees by holding that the authority to do so was implied within other express powers such as local charters,¹⁴⁸ utility operation statutes,¹⁴⁹ home rule powers,¹⁵⁰ planning and zoning authority, or even generally within the

held to be an unauthorized tax because they were not earmarked to benefit the subdivision providing them).

146. *Teter v. Clark County*, 704 P.2d 1171, 1180-81 (Wash. 1985).

147. *Home Builders Ass'n v. Riddel*, 510 P.2d 376, 379 (Ariz. 1973) (finding building permit fee found to be unauthorized by the state's constitution, statutes, or the local charter); *Hylton Enters. v. Bd. of Supervisors*, 258 S.E.2d 577, 581 (Va. 1979) (holding dedication and in-lieu of fees were not authorized by state law); *Hillis Homes, Inc. v. Snohomish County*, 650 P.2d 193, 196 (Wash. 1982) (holding that development fees were taxes and invalid for lack of statutory authority). *But see* *N.J. Builders Ass'n v. Bernards Twp.*, 528 A.2d 555, 562 (N.J. 1987) (striking down a road impact fee because it exceeded state granted authority). Some modern cases continue this tradition and strike down impact fee ordinances as unauthorized under state enabling legislation. *See, e.g.*, *Idaho Bldg. Contractors Ass'n v. City of Coeur D'Alene*, 890 P.2d 326 (Idaho 1995).

148. *See, e.g.*, *City of Mesa v. Home Builders Ass'n*, 523 P.2d 57, 59 (Ariz. 1974) (deciding city's charter implies the authority to charge residential development tax).

149. *See, e.g.*, *Home Builders Ass'n v. Provo City*, 503 P.2d 451, 452 (Utah 1972) (authorizing \$100 sewer connection charge by statute); *Coulter v. City of Rawlins*, 662 P.2d 888, 899 (Wyo. 1983) (finding sewer impact fee authority in power to construct and operate a sewer system).

150. *Krughoff v. City of Naperville*, 369 N.E.2d 892, 895 (Ill. 1977) (upholding school and park land and/or fee requirement as within city's home rule power); *Amherst Builders*

police power.¹⁵¹ This general permissiveness actually led to the adoption of state statutes in more than a third of the states by the time the Supreme Court issued its ruling in the *Dolan* case.¹⁵²

c. Determining the “Reasonableness” of Impact Fees

Once an impact fee was found to be authorized by state law and not to be a form of illegal taxation, state courts in the pre-*Nollan/Dolan* era applied another level of analysis to determine the legality of a charge—they examined its “reasonableness.” The courts’ pursuit of reasonableness reflected a range of concerns that were described in equitable, constitutional, or common law terms. At base, each of these early court decisions attempted to express a formula to fairly apportion land and infrastructure costs to new development when the benefits were not to be solely enjoyed by those paying the fees. In addition, when exactions and impact fees began to be used in a way that would combine contributions from numerous development projects to fund the capital cost of off-site, large-scale public facilities, courts were pressed to find a “reasonableness” limit.¹⁵³ Not surprisingly, the state courts reached widely varying positions on this question, some only requiring a weak correlation to the new building while others demanding a strict, nearly-linear connection. These judicial standards spanned a range of views, but they could be categorized into three central concepts: 1) the “specifically and uniquely attributable” test; 2) the “rational nexus” test; and 3) the “reasonable relationship” test.¹⁵⁴ In different ways, these three judicial formulations measured the connection between new land development and local government capital needs related to it. As always, the courts’ challenge was to devise a method for determining when excessive burdens were being imposed on new development. In this quest to identify a fair and lawful standard, state courts fashioned a sophisticated body of law that mediated the competing claims of the contending interest groups.

i. *The Specifically and Uniquely Attributable Test*

During the sixties, some state courts took a highly restrictive view concerning the legality of land use exactions. In *Pioneer Trust & Savings*

Ass’n v. City of Amherst, 402 N.E.2d 1181, 1184 (Ohio 1980) (providing home rule authority the power to charge an impact fee).

151. Terry D. Morgan, *State Impact Fee Legislation: Guidelines for Analysis* (pts. 1 & 2), LAND USE L. & ZONING DIG. 3 (Mar. 1990), LAND USE L. & ZONING DIG. 3 (Apr. 1990).

152. Martin L. Leitner & Susan P. Schoettle, *A Survey of State Impact Fee Enabling Legislation*, 25 URB. LAW. 491, 492 n.6 (1993) (noting that in 1986 only three states had passed specific impact fee legislation while by 1993 the number had grown to seventeen).

153. Heymann and Gilhool recognized this “new” problem in 1964 and proposed a cost accounting methodology to fairly distribute the costs of financing new public facilities when there were a number of new development projects all contributing to the need for the common infrastructure. See generally, Heymann & Gilhool, *supra* note 91, at 1119-57.

154. Chief Justice Rehnquist’s majority opinion in *Dolan v. City of Tigard* outlined this three-part typology and, ultimately, selected the “reasonable relationship” test to be “closer to the federal constitutional norm than either of those [two other tests].” 512 U.S. 374, 389-91 (1994).

Bank v. Village of Mount Prospect,¹⁵⁵ the Supreme Court of Illinois announced the most exacting test when it struck down a local ordinance requiring developers to dedicate one acre of land for each sixty residential units for schools, parks and other public purposes. In this case, the land owner was required to provide the village with 6.7 acres for a school site.¹⁵⁶ Relying on the analytical framework provided in its 1960 decision in *Rosen v. Village of Downers Grove*,¹⁵⁷ the court announced that unless the local government could establish that the demand for the new public facilities was "specifically and uniquely attributable" to the proposed land development, the exaction would not only be "unreasonable" but would also "amount to a confiscation of private property."¹⁵⁸ In this case, the Illinois Supreme Court was convinced that while the developers would worsen school crowding; the developers were being asked to bear disproportionate costs of remedying an already overfilled public school system in the village and that the need for the new school site was not "specifically and uniquely attributable" to the new residential project. By its explicit terms, the Illinois test demanded a rigorous review of land use exactions and a near-linear cause and effect relationship between growth and public infrastructure.¹⁵⁹ Any failure in demonstrating this direct proportionality to specifically created need would be met with invalidation.¹⁶⁰

Immediately following the *Pioneer Trust* decision, several other state courts issued rulings of an equally limiting nature most often in cases requiring land dedications as a condition of development approval.¹⁶¹ Most notably, in *Gulest Associates, Inc. v. Newburgh*, the New York intermediate appeals court struck down as an unreasonable police power regulation a recreational "in lieu of" fee that could not be shown to be tied to capital improvements that would directly benefit the residents of the residential subdivision who paid the fee.¹⁶² This restrictive "direct benefit" rule would last only four years when the New York Court of Appeals overruled it in *Jenad, Inc. v. Village of Scarsdale*¹⁶³ and replaced it with a

155. 176 N.E.2d 799 (Ill. 1961).

156. *Id.* at 800.

157. 167 N.E.2d 230 (Ill. 1960) (finding land dedication or \$325 per lot in lieu of fee for schools unrelated to the proposed development).

158. *Id.* at 802.

159. *Id.*

160. *Id.*

161. See, e.g., *Aunt Hack Ridge Estates, Inc. v. Planning Comm'n*, 273 A.2d 880 (Conn. 1970); *Gulest Assocs., Inc. v. Newburgh*, 209 N.Y.S.2d 729 (Sup. Ct. 1960), *aff'd*, 225 N.Y.S.2d 538 (1962); *McKain v. Toledo City Planning Comm'n*, 270 N.E.2d 370, 374 (Ohio 1971); *Frank Ansuini, Inc. v. Cranston*, 264 A.2d 910, 913 (R.I. 1970). While not explicitly adopting the language of the *Pioneer Trust* decision, the Supreme Court of New Hampshire subject both on-site and off-site land exactions to be unconstitutional. See *J.E.D. Assocs. v. Town of Atkinson*, 432 A.2d 12, 13 (N.H. 1981) (terming dedication requirement as an "an out and out plan of extortion"); *Robbins Auto Parts, Inc. v. City of Laconia*, 371 A.2d 1167, 1169 (N.H. 1977).

162. *Gulest Assocs., Inc.*, 209 N.Y.S.2d at 799.

163. 218 N.E.2d 673 (N.Y. 1966).

new test that would impose the least demand possible.¹⁶⁴ While the *Pioneer Trust* rule received a small following in the sixties and seventies, its inflexibility in the face of ever-expanding suburban growth and related public facility needs doomed it to the status of an historical exception. Its current vitality even in Illinois is unclear.¹⁶⁵

ii. Reasonable Relationship Test

At the other end of the spectrum from *Pioneer Trust* was the reasonable relationship test which required that the needs created by the new land development merely have some “reasonable relationship” to the charge or the exaction which has been imposed. Not surprisingly, this test has been considered extremely deferential to local government exaction policy and has been associated with state court decisions approving of exactions with little direct cause and effect nexus shown. The earliest example of the reasonable relationship test can be found in the 1949 *Ayres v. City Council* decision of the California Supreme Court which upheld an off-site land dedication requirement for a street expansion as a condition of plat approval.¹⁶⁶ The court dismissed all suggestions that the land dedication would have community-wide benefits both at present and in the future, and it expansively ruled that the conditions that the city had imposed were both reasonable and necessary responses to the post-World War II growth problems.¹⁶⁷ This case provided the foundation for later rulings in California that upheld land dedication or in lieu of cash payment requirements even if the exaction did not solely benefit the new

164. This test was characterized by the U.S. Supreme Court in *Dolan v. City of Tigard* as only requiring “very generalized statements as to the necessary connection between the required dedication and the proposed development. . . .” The Court found this standard to be “too lax to adequately protect [landowner’s] right to just compensation if her property is taken for a public purpose.” 512 U.S. 374, 389 (1994).

165. FRED P. BOSSELMAN & NANCY STROUD, *LEGAL ASPECTS OF DEVELOPMENT EX-ACTIONS IN DEVELOPMENT EXACTIONS* 74 (James E. Frank & Robert M. Rhodes eds., 1987) (noting that no state still follows the *Pioneer Trust* “specifically and uniquely attributable” test and that it “is now of historical interest only”); DANIEL R. MANDELKER, *LAND USE LAW* 9-21 (5th ed. 2003) (“[L]ater Illinois cases upheld in-lieu fees for parks and schools in cases that either distinguished or claimed to apply the *Pioneer* test”). *But see* N. Ill. Home Builders Ass’n v. DuPage County, 649 N.E.2d 384, 388-91 (Ill. 1995) (showing a rigorous review of local exactions under state statute which codifies the *Pioneer Trust* test). Some have argued that the statute actually establishes a more relaxed test similar than required by the Illinois Supreme Court in *Krughoff v. City of Naperville*, 369 N.E.2d 892 (Ill. 1977) and *Bd. of Educ. v. Sur. Devs., Inc.*, 347 N.E.2d 149 (Ill. 1975). *See* Mark W. Cordes, *Legal Limits on Development Exactions: Responding to Nollan and Dolan*, 15 N. ILL. L. REV. 513, 519 n.40 (1995).

166. 207 P.2d 1, 8 (1949).

167. *Id.* at 8. The California Supreme Court made numerous references to *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), in this case, and it did so in order to echo the deferential standard of review to be given to zoning as a form of police power regulation. Also, at this time some state courts held a view that land subdivision was a “privilege” and not a right. Consequently, under the “privilege” theory, local government held great power in deciding when and whether to recognize that privilege to develop land. *See, e.g.*, *Ridgefield Land Co. v. City of Detroit*, 217 N.W. 58 (Mich. 1928); *Brous v. Smith*, 106 N.E.2d 503, 506-07 (N.Y. 1952). *See also* Thomas M. Pavelko, Comment, *Subdivision Exactions: A Review of Judicial Standards*, 25 WASH. U. J. URB. & CONTEMP. L. 269, 283 (1983)

land development.¹⁶⁸ Most important to the court was the fact that the municipality was using its police powers to combat serious local problems.¹⁶⁹ Furthermore, in *Associated Home Builders v. City of Walnut Creek*,¹⁷⁰ the California high court also held that it was not necessary for the local government to establish that the need for the new public facilities was attributable to the proposed development.¹⁷¹ An "incidental" benefit to the city as a whole would not make the exaction "improper."¹⁷²

The reasonable relationship test, with its undemanding features and its strong support for the achievement of community objectives, had been followed in a small number of other jurisdictions including New York, Minnesota, and Montana.¹⁷³ Clearly rejecting the *Pioneer Trust* doctrine's demand for precision and proof of the nexus between new development and new community facilities, the "reasonable relationship" theory applied a considerably more relaxed approach to the question of a necessary connection, echoing the presumption of validity usually accorded to general zoning measures. If there was some relationship between a mandatory exaction and development effects or if the development contributed to the worsening of a public facilities problem, the required association had been shown.¹⁷⁴ Altshuler and Gomez-Ibanez have described this as the "anything goes" rule,¹⁷⁵ and in *Dolan*, the United States Supreme Court specifically rejected it as a model for establishing federal constitutional rights. Where *Pioneer Trust* sought to rein in exaction practice with the tight fitting collar of its "specifically and uniquely attributable" test, the very generalized nexus requirements in the "reasonable relationship" jurisdictions allowed the possibility of local governments shifting too much of the general community growth costs to specific new development projects. As might be expected, most states avoided both of the extremes in policy and gravitated towards a more sophisticated and sensitive middle ground—the "rational nexus" test announced by the Wisconsin Supreme Court in 1965 in *Jordan v. Village of Menomonee Falls*¹⁷⁶ and elaborated in a number of other state court opinions.

168. See *supra* note 167.

169. *Id.*

170. 484 P.2d 606 (Cal. 1971).

171. *Id.* at 610.

172. *Id.*

173. See generally *Collis v. City of Bloomington*, 246 N.W.2d 19 (Minn. 1976); *Billings Props., Inc. v. Yellowstone County*, 394 P.2d 182 (Mont. 1964) (exemplifying legislative judgment that subdivisions of over twenty acres created the need for a park without individualized assessment); *Jenad, Inc. v. Scarsdale*, 218 N.E.2d 673 (N.Y. 1966). It was also applied to development impact fees in *California in Builders Ass'n of Santa Clara v. Sup. Ct.*, 529 P.2d 582, 584-85 (Cal. 1974).

174. *Grupe v. Cal. Coastal Comm'n*, 212 Cal. Rptr. 578 (Cal. Ct. App. 1985); *Holmes v. Planning Bd. of New Castle*, 433 N.Y.S.2d 587, 598 (N.Y. App. Div. 1980).

175. ALTSHULER & GOMEZ-IBANEZ, *supra* note 17, at 52.

176. 137 N.W.2d 442 (Wis. 1965).

iii. The Rational Nexus Test

During this period of substantial residential growth and sharply rising public infrastructure costs, the state courts represented the first line of challenge to development exactions and impact fees. Addressing questions of legality, these courts approached the problem of devising a “fair” or equitable limit to land use exactions from the many different perspectives affected by their own unique statutory, constitutional, and common law histories and traditions. Not surprisingly, a variety of legal approaches were employed by the many state courts dealing with the problem. Eventually, a centrist view—one not obviously favoring either land developers or local governments—became the benchmark and most states adopted it during the pre-*Dolan* period. This intermediate scrutiny analysis has been termed the “rational nexus” or, in some jurisdictions, the “dual rational nexus” test, and it requires that exactions “bear a rational nexus to the needs created by, and benefits conferred upon, the subdivision.”¹⁷⁷ The application of these two reinforcing elements varies from state to state, making it difficult to generalize about the nature of the test employed.

The Wisconsin Supreme Court’s 1965 decision in *Jordan v. Village of Menomonee Falls* has been heralded as the origin of this test.¹⁷⁸ In *Jordan*, the court considered the legality of an ordinance imposing a \$200 per lot in lieu of payment for schools, parks, and recreational facilities.¹⁷⁹ The developer paid the fee rather than dedicating land and then challenged both the local government’s authority to impose such fees and the constitutionality of the ordinance itself. The Wisconsin court first analyzed the practice and rejected *Pioneer Trust’s* demanding “specifically and uniquely attributable” doctrine as being unworkable and largely impossible to satisfy.¹⁸⁰ It then announced a rule of decision that contained two components intended to circumscribe exaction practice and make it conform to state constitutional law principle.¹⁸¹ The first inquiry would be to determine whether there was a reasonable connection between the need for additional capital facilities and the population growth generated by

177. *Longridge Builders, Inc. v. Planning Bd.*, 245 A.2d 336, 337 (N.J. 1969). There has been no agreement among writers or courts over whether these are two distinct tests or are one. See Cordes, *supra* note 33, at 520 n.41. Even the United States Supreme Court used the term “reasonable relationship” in its *Dolan* opinion when it referred to this test. 512 U.S. 374, 389 (1994).

178. 137 N.W.2d 442 (Wis. 1965). The term “rational nexus” was not actually used in the *Jordan* decision, but rather, it was expressed by the New Jersey Supreme Court four years later in *Longridge Builders*, 245 A.2d at 337. Since that time, the “rational nexus” label has been employed in several other state decisions. See, e.g., *Hollywood, Inc. v. Broward County*, 431 So. 2d 606 (Fla. Dist. Ct. App. 1983); *Howard County v. JJM, Inc.*, 482 A.2d 908, 920-21 (Md. 1984); *Arrowhead Dev. Co. v. Livingston County Road Comm’n*, 283 N.W.2d 865, 869 (Mich. 1979); *Batch v. Town of Chapel Hill*, 376 S.E.2d 22, 31 (N.C. 1989).

179. 137 N.W.2d 442, 448-49 (Wis. 1965).

180. *Id.*

181. *Id.*

the new project.¹⁸² The second element required the local government to show that there was a rational nexus between the spending of the fees and the benefits accruing to the residential subdivision.¹⁸³ These two components were intended to be mutually reinforcing as a means of drawing the line between excessive cost shifting to developers and proper cost internalization.¹⁸⁴

The rational nexus test soon found support in the high growth state of Florida where, in 1976, its supreme court upheld the imposition of impact fees for the expansion of water and sewer facilities. This opinion struggled with the essential definition of the lawful rational nexus.¹⁸⁵ As several years passed, the Florida courts specifically adopted the two-pronged, Wisconsin test that they would later describe as the "dual rational nexus test." This test was explained in *Hollywood, Inc. v. Broward County* as follows:

In order to satisfy these requirements, the local government must demonstrate a reasonable connection, or rational nexus, between the need for additional capital facilities and the growth in population generated by the subdivision. In addition, the government must show a reasonable connection, or rational nexus, between the expenditures of the funds collected and the benefits accruing to the subdivision. In order to satisfy this latter requirement, the ordinance must specifically earmark the funds collected for use in acquiring capital facilities to benefit the new residents.¹⁸⁶

This rational nexus or dual nexus judicial test was hardly uniform in its application from state to state.¹⁸⁷ However, this approach represented a more sophisticated attempt to verbalize a judicially-administrable standard that was sensitive to the needs of local governments, as well as the land development industry.

The rational nexus test has been adopted as the mainstream American test for land use exactions. In most states, the test contained the following common themes. First, a cost accounting element was required which correlated the fee charged with service needs attributable to the new development. This provision would protect new projects from being

182. *Id.*

183. *Id.*

184. *Id.*

185. Attempting to provide a verbal formulation for the required relationship, the court stated that "raising expansion capital by setting connection charges, which do not exceed a pro rata share of reasonably anticipated costs of expansion, is permissible where expansion is reasonably required, if use of the money collected is limited to meeting the costs of expansion." *Contractors & Builders Ass'n v. City of Dunedin*, 329 So. 2d 314, 320 (Fla. 1976).

186. *Hollywood, Inc.*, 431 So. 2d at 611-12. With the articulation of a two-pronged standard in *Dunedin*, the Florida appellate court rejected the more flexible "reasonable relationship" approach taken in California concluding that it could no longer be used in Florida. *Id.*

187. For descriptions of the evolution of the "rational nexus" test, see Lawrence Friedman & Eric W. Wodlinger, *Municipal Impact Fees in Massachusetts*, 88 MASS. L. REV. 131, 136-37 (2004) (advocating the dual rational test); R. Marlin Smith, *supra* note 189, at 5-30.

“taxed” for community needs that they did not create or to which they did not contribute. While it was also true that the linkage between cause and effect was expressed in differing terms,¹⁸⁸ all state courts sought to achieve the consistent goal of fashioning a test of proportionality which would limit development exactions to offset the burdens that the building would impose on the community. The Supreme Court of Utah in *Banberry Development Corp. v. South Jordan* provided relatively clear guidance on how an “equitable share” of capital costs should be evaluated when it identified five factors for judicial consideration.¹⁸⁹ These elements have been widely followed in other states. Recognizing the difficulty that local governments might have satisfying this demand, most courts did not require a mathematically-precise correlation in the apportionment of costs.

Second, the payment of impact fees must also have provided a benefit to the development paying the charge that is “reasonable” in relation to the fees paid. This element was designed to prevent impact fees from imposing substantial cross subsidies between a new development and other future building. Concerned that new construction causing the need for a small amount of community infrastructure would be required to contribute capital funds far in excess of the development’s impact, the courts fashioned a second “reasonable nexus” to examine the benefit received by this project. It was believed that the “benefit” requirement could prevent one new project from being forced to fund large capital improvements that would provide services to many users. As such, this feature demands a correlation between the benefits received and the amount charged.

Third, courts often required that the capital improvements funded by impact fees be a part of a comprehensive plan or planning process. This element connected the impact fee to pre-existing plans for community development and provided judges the ability to assess whether the fees were fairly priced and whether they reasonably related to the actual needs of the jurisdiction. As localities employed more detailed capital planning and budgeting techniques, reviewing courts had more confidence that impact fees and other exactions were actually correlated in a coherent way to the impact of new development. Such a procedure has even been held to satisfy the more exacting demands of the Illinois “spe-

188. See generally *St. Johns County v. N.E. Fla. Builders Ass’n, Inc.*, 583 So. 2d 635, 637 (Fla. 1991) (is there a “reasonable connection”); *Collis v. City of Bloomington*, 246 N.W.2d 19, 24-26 (Minn. 1976) (“reasonable portion”); *Home Builders Ass’n v. City of Kansas City*, 555 S.W.2d 832, 835 (Mo. 1977) (exactions “to the extent” they create need); *Simpson v. City of N. Platte*, 292 N.W.2d 297, 301 (Neb. 1980) (rational nexus means “substantial” nexus); *Land/Vest Props., Inc. v. Town of Plainfield*, 379 A.2d 200, 204-05 (N.H. 1977) (“proportionality test”); *Longridge Builders, Inc. v. Planning Bd.*, 245 A.2d 336 (N.J. 1968) (“apportionment”); *Batch v. Town of Chapel Hill*, 376 S.E.2d 22, 32 (N.C. 1989) (“prorated portion”); *Banberry Dev. Corp. v. S. Jordan*, 631 P.2d 899, 903 (Utah 1981) (“their equitable share of the capital costs”).

189. 631 P.2d at 903-04.

cifically and uniquely attributable" test.¹⁹⁰ Consequently, the linkage of impact fees to coherent plans or impact assessment methods has worked to restrict the likelihood that development exactions will be imposed in an excessive and opportunistic manner.

Fourth, courts often required that impact fees be handled with special accounting practices. This resulted in these monies being kept segregated from other funds held by the local government in order to ensure that they would be used for the particular capital construction purposes for which they were collected. Such an earmarking of impact fees served to prevent their use as a source of general revenue for the locality. Furthermore, many states required that the impact fee funds be held for a finite period of time, and if not used in a timely fashion, they were to be refunded to the payor sometimes with interest. These financial management requirements imposed restrictions on impact fee practices in the states with the result being that these monies would actually be disbursed correctly or they would be given back to the land developer who had paid them.

As the prior discussion indicates, when the Supreme Court announced the *Nolan* decision in 1987 and the *Dolan* opinion later in 1994, it did so against a backdrop of nearly three decades of state court adjudication which had considered the lawfulness of emerging impact fee and exaction practices under state law principles. While some of these decisions rested upon state constitutional law ideas, it is noteworthy that federal constitutional protection of property rights was rarely mentioned in any of the decisions. Soon, the adequacy of these state law rules would be challenged under developing federal constitutional principles.

B. ATTEMPTING TO EMPLOY FEDERAL CONSTITUTIONAL NORMS TO LIMIT IMPACT FEE PRACTICE

1. *Bringing Conditional Land Use Control Practices under Reinivorated Federal Takings Analysis*

The use of land use exactions including cash impact fees became common during the eighties as many areas in the United States experienced significant growth pressures. Local governments, the providers of most of the fundamental public services needed by new residents, were confronted with an expanding and increasingly costly obligation to fund the construction of new roads, schools, recreational facilities, and libraries. This occurred at a time when shortages in the quantity and quality of basic infrastructure was predicted to reach crisis proportions by the year 2000.¹⁹¹ Acting independently and without a uniform set of local govern-

190. *N. Ill. Home Builders Ass'n v. County of Du Page*, 621 N.E.2d 1012, 1020 (Ill. App. Ct. 1993) (using Chicago Area Transit, or CAT, model and other models to estimate future travel demand attributable to new development).

191. See NAT'L INFRASTRUCTURE ADVISORY COMM., JOINT ECON. COMMITTEE, 98TH CONG., *HARD CHOICES: SUMMARY REPORT OF THE NATIONAL INFRASTRUCTURE STUDY* (1984) (showing shortfall in infrastructure funding from 1984 to 2000 estimated to be \$400

mental authority, these governments increasingly sought to shift these mounting capital expenses from the community at large to the land developers who were building the new homes and other buildings. The payment of these growth-related capital costs which previously had been borne as a community-wide development expense increasingly was paid with cash charges that focused on or targeted the builders of new residential units.¹⁹² This shift took many forms including upgraded subdivision development requirements, buffer rules, and offsite improvement demands. However, the requirement of an up-front, cash payment to local governments to offset community-wide infrastructure costs became increasingly common. At first, these costs were described as “tap fees” or connection charges, but by the end of the eighties, cash impact fees were being imposed to land developers by a growing number of localities.

Impact fees represented not only a change in the method of financing local public facilities, but also a subtle effort by local governments to combine their police power-based regulatory powers with a device that would have a fiscal, revenue raising purpose. Described as “regulation for revenue” by Altshuler and Gomez-Ibanez,¹⁹³ the emergence of land development impact fees represented yet another form of land use exaction that would be challenged by developers and land owners in numerous court cases. While the impact fee was viewed as being financially necessary and as desirable policy by many local governments and their existing residents, the emerging cash exaction practice was simultaneously condemned by critics as a distortion of legitimate land use regulation.¹⁹⁴ This combining of revenue raising within land use regulation was resisted and criticized by the development community and property rights advocates as a blurring of governmental functions, an abuse of regulatory

billion); *see also* RANDALL W. EBERTS, NAT'L COUNCIL ON PUB. WORKS IMPROVEMENT, AN ASSESSMENT OF THE LINKAGE BETWEEN PUBLIC INFRASTRUCTURE AND ECONOMIC DEVELOPMENT (1987) (recommending a way of financing needed improvements including development exactions).

192. Similar focused cash payments have been imposed as non-tax, special assessments on a range of other land users including local businesses. *See* Richard Briffault, *A Government for Our Time: Business Improvement Districts and Urban Governance*, 99 COLUM. L. REV. 365, 389-90 (1999). In theory, these special assessments are not considered to be taxes under state law and, as such, they are free from a number of constraints applicable to “taxes” under state constitutional and statutory law. *See* WILLIAM D. VALENTE ET AL., STATE AND LOCAL GOVERNMENT LAW 552 (5th ed. 2001).

193. *See generally* ALSHULER & GOMEZ-IBANEZ, *supra* note 17.

194. Some property rights advocates have asserted that the significant expansion of land use and environmental regulation during the last century has unfairly and excessively subordinated property ownership rights to the will of legislatures and government agencies. One scholarly critic has written that:

Government has misused the eminent domain power to take property from some for the benefit others. On a far vaster scale, it has misused the police power that was intended to protect individual rights, using it instead to violate rights. Claiming to be acting under that power, government regularly subordinates rights in the name of public goods and public benefits.

Steven J. Eagle, *The Birth of the Property Rights Movement*, 14 (Cato Institute, Policy Analysis No. 404 2001).

authority and an imposition of an illegal tax.¹⁹⁵ Arising at a time of heightened anti-government sentiment, these opponents of impact fee practice feared that granting local governments a wide latitude to impose such fees would actually encourage regulation as a pretext that would result in a smokescreen concealing the true revenue-enhancing objectives of government. Regulating for revenue, in this view, would actually convert zoning and land development regulation from being a harm-preventing enterprise to one that would confer financial benefits to the existing community by imposing common costs on the shoulders of the few.

This opposition to the charging of impact fees through land use exactions was characterized by these opponents as not only being unfair as a selective and illegal land development tax but, more importantly, as being an unconstitutional taking of the developer's property.¹⁹⁶ While some advocates chose to contest the use of impact fees in state court, employing state constitutional and statutory theories, others chose to rein in the emerging practice in federal court using federal constitutional ideas. During the eighties, when impact fees began to gain greater acceptance as a local government technique, property owner advocates found an increasingly sympathetic United States Supreme Court that was willing to reinterpret the contours of the Takings Clause of the Fifth Amendment to bolster property owner rights. While the main focus of this constitutional law approach was to restrict excessive regulation that made property less useful and less valuable in the private market, a related theme was the narrowing of conditional regulation, where governmental permission would be granted as long as the applicant transferred something of value to the local government. Advocates of this view argued that if excessive and devaluing regulation could work a "taking" of private property, then land use regulation that would impose a fee or charge as a condition of development approval would also violate the Fifth Amendment as well. The eighties and nineties witnessed an attempt to revive the Takings

195. The illegal tax characterization is a significant legal issue because state law often restricts available methods of taxation, imposes super-majority requirements for adoption and requires uniformity of taxes across similar taxpayers. This fee/tax distinction is often difficult to discern and must be litigated in order to obtain resolution. *See, e.g.* *Sinclair Paint Co. v. State Bd. of Equalization*, 937 P.2d 1350, 1358 (Cal. 1997) (upholding fees on manufacturers contributing to lead contamination to combat lead poisoning); *City of Gary v. Ind. Bell Tel. Co.*, 732 N.E.2d 149, 156 (Ind. 2000) (upholding telecommunications providers right of way fee upheld as a valid charge for the private, commercial use of municipality's real estate); *President Riverboat Casino-Mo., Inc. v. Mo. Gaming Comm'n*, 13 S.W.3d 635, 640 (Mo. 2000) (finding admission fee on riverboat gambling to be a tax since they substantially exceeded administrative costs of collection for several years).

196. Similar devices were developed by local governments to deal with other serious local government problems. Employing the special assessment model where a defined category of properties within a jurisdiction would be subject to special charges earmarked for a fund that would be used to combat an important local condition such as a decaying downtown or business district. These assessments were challenged in state court using arguments that they represented illegal taxes or that they violated the uniformity principles found in most state constitutions. *See, e.g.*, *2d ROC-Jersey Assocs. v. Town of Morristown*, 731 A.2d 1, 12-13 (N.J. 1999) (upholding a Special Improvement District charge as a special assessment under New Jersey law).

Clause and to give modern meaning to Justice Holmes's obscure admonition in *Pennsylvania Coal Co. v. Mahon* that when government regulation had gone "too far" it would constitute an unconstitutional taking of property.¹⁹⁷ (Constitution in Exile cite)

2. *Sympathy for the Developer—Giving the Takings Clause New Life*

While the *Pennsylvania Coal* decision may today be considered an icon of an enhanced regulatory takings doctrine, by the late seventies the Fifth Amendment did not present much of an inhibition to local government land use control activities. These forms of regulation had drastically grown since the Supreme Court's 1926 *Euclid v. Ambler Realty Co.* decision validated the general practice of zoning against a due process attack.¹⁹⁸ In 1978, the Supreme Court decided the well known *Penn Central Transportation Co. v. City of New York* case that considered whether that city's landmarks preservation ordinance affected a taking of the railroad's property.¹⁹⁹ *Penn Central* had been thwarted in its attempt to secure permission to build a fifty-story office building above the existing edifice of the Grand Central Station in midtown Manhattan due to its landmark status under New York City law. Justice Brennan's majority opinion set forth the principal analytical framework for assessing regulatory taking claims that remains in place as the constitutional law standard today.²⁰⁰ Within the context of the case, Justice Brennan established a flexible, multi-factor test for judging whether a government regulation had crossed the line and had become a taking of private property thereby requiring that "just compensation" be paid. This test required a consideration and balancing of three factors: 1) the nature of the government action at issue; 2) the degree of interference that the regulation imposed on the property owner's reasonable investment-backed expectations; and 3) the adverse economic impact of the rule.²⁰¹

Applying this test to the facts at hand, the Court held in a six to three decision that the New York City landmark law did not take *Penn Cen-*

197. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). Justice Stevens commented in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002), that "it was Justice Holmes' opinion in [*Pennsylvania Coal*] that gave birth to our regulatory takings jurisprudence." *Id.* at 325. Even though the *Pennsylvania Coal* case has been identified as the origin of the modern regulatory takings doctrine, academic commentators have viewed it as part of the substantive due process tradition of the early twentieth century. See Robert Brauneis, *The Foundation of Our Regulatory Takings Jurisprudence: The Myth and Meaning of Justice Holmes's Opinion in Pennsylvania Coal Co. v. Mahon*, 106 *YALE L.J.* 613 (1996); Ronald H. Rosenberg & Nancy Stroud, *When Lochner Met Dolan: The Attempted Transformation of American Land Use-Law by Constitutional Interpretation*, 33 *URB. LAW.* 663, 667 (2001).

198. 272 U.S. 365, 396-97 (1926).

199. 438 U.S. 104, 138 (1978).

200. The recent holding in *Lingle v. Chevron U.S.A., Inc.* reaffirms the central importance of the *Penn Central* holding to regulatory takings theory. See 125 S. Ct. 2074, 2081-82 (2005) (identifying four Fifth Amendment takings categories and characterizing *Penn Central* as a "principal guideline.").

201. *Penn. Cent. Transp. Co.*, 438 U.S. at 124.

tral's property rights in violation of the Fifth Amendment.²⁰² Beyond the particular facts of the case, the *Penn Central* majority opinion was significant in that it announced a "soft" constitutional takings rule allowing judges to evaluate the legitimacy of regulations in a contextual, non-specific fashion allowing for a maximum amount of discretion in reaching judgment. Clearly, the *Penn Central* test did not mandate finding a taking of property in any specific situation, and the legacy of the case is that it has not been used to invalidate very many cases of regulatory overkill. In particular, the *Penn Central* holding merely provided general guidance for the consideration of those cases when a governmental regulator had gone "too far" and had imposed excessive losses on private owners.²⁰³ However, with the *ad hoc* nature of the analysis and the flexible approach described in the majority opinion, *Penn Central* continued the longstanding tradition of subjecting social and economic regulation to a rather deferential form of judicial review.²⁰⁴ With this case, the Supreme Court signaled its rekindled interest in the general field of land use control, as well as an emerging conflict between two competing points of view on the regulatory taking question.²⁰⁵ Importantly, the decision had little to say about the phenomena of conditional regulation or municipal exactions. Those topics would be treated in later cases.

Following the *Penn Central* decision, regulatory taking claims continued to reach the United States Supreme Court and they would increasingly find a greater sympathy for the plight of the unfairly regulated landowner. In 1980, in *Agins v. City of Tiburon*, a California property owner, whose valuable five-acre parcel had been down-zoned to reduce substantially the permissible density for residential new home construction, petitioned the Court to consider a remedial issue related to a taking

202. *Id.* at 104.

203. *Penn Central* continues as the essential Supreme Court regulatory taking formula in the absence of actual physical acquisition in total value or use obliteration. See *Lingle*, 125 S. Ct. at 2082.

204. Following the Supreme Court's decision in *Euclid*, the Court largely withdrew from zoning cases leaving the work of developing the law of zoning to the state courts. By the fifties and sixties, local government zoning decisions would be accorded considerable deference when challenged. See NORMAN WILLIAMS JR. & JOHN M. TAYLOR, *AMERICAN LAND PLANNING LAW* § 5.04 (1988). The low level due process scrutiny applied in *Euclid* had been applied in numerous state cases using principles presuming the constitutional validity of zoning regulation and applying the "fairly debatable" test for analyzing much decision making. While each state's law bore unique characteristics, they all relied on a generally permissive federal constitutional foundation.

205. In his dissent, Chief Justice Rehnquist expressed a considerably different view on the constitutionality of the New York City law. He believed that the Fifth Amendment's Takings Clause should operate to prevent certain severe regulatory burdens from being imposed on a limited number of property owners for the benefit of society in general. Expressing this idea, Rehnquist wrote that the "Fifth Amendment . . . was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Penn Cent. Transp. Co.*, 438 U.S. at 148 (Rehnquist, J., dissenting) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)). This outlook would find further expression in the *Nollan* and *Dolan* cases that would follow.

claim.²⁰⁶ The California Supreme Court had ruled that a regulatory takings case could not be brought as an inverse condemnation case for compensation under the Fifth Amendment but that the exclusive remedy in such a case would be judicial invalidation of the offending regulation.²⁰⁷ By ruling in this way, the California court treated the takings argument as a due process violation, and it denied a property owner the right to argue that an excessive police power regulation was actually an act of eminent domain.

Oddly, the United States Supreme Court ignored the certified question of constitutional remedy and framed the issue at hand as being whether the local zoning ordinance took Agins' property without paying just compensation—a pure regulatory takings claim. The remedial question would wait until another day for resolution.²⁰⁸ However, the Court's treatment of the case took a more unusual turn when Justice Powell ruled that judicial review of the regulatory taking claim was premature since Agins had not sought a definitive statement or ruling as to the number of residential units that would be allowed under the revised Tiburon zoning ordinance.²⁰⁹ He found that under these circumstances there was no "concrete controversy regarding the application of the specific zoning provisions."²¹⁰ With this finding of a lack of ripeness on the taking claim, it would seem as though the matter would have ended there, but it did not. Even though it did not need to do so, the Supreme Court's opinion then inexplicably announced a new two-pronged, substantive takings test that significantly differed from the standard set out just two years before in the *Penn Central* decision. Justice Powell wrote, "The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests . . . or denies an owner economically viable use of his land."²¹¹ This new test established two alternative grounds for finding unconstitutional land use regulation violating the Fifth Amendment. The Court then applied both prongs of this new test to the facts in *Agins* and concluded that the Tiburon ordinance had actually satisfied both elements.²¹²

Although largely unheralded at the time, the *Agins* decision represents a significant step in the modern evolution of takings doctrine because it was considered to have transformed what had previously been considered a Fourteenth Amendment substantive due process argument into a Fifth Amendment takings violation. Justice Powell's opinion had introduced a novel "substantially advance legitimate state interests" prong as a judicial

206. 447 U.S. 255, 257 (1980).

207. *Agins v. City of Tiburon*, 598 P.2d 25, 29 (Cal. 1979).

208. Seven years later in 1987, the United States Supreme Court would reach this issue and agree with the petitioner in *Agins* that compensation is a required remedy when a taking of property occurs. See *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 322 (1987).

209. *Agins*, 447 U.S. at 260.

210. *Id.*

211. *Id.* (citing *Penn. Cent. Transp. Co. v. City of N.Y.*, 438 U.S. 104, 138 n.36 (1978)).

212. *Id.* at 262-63.

decisional principle in takings cases,²¹³ and by so doing, it added important doctrinal support for a wider and more sweeping taking clause analysis. With the Supreme Court's growing interest in protecting landowner's rights in the eighties and nineties, this language from *Agins* soon had developed into a frequently-cited, shorthand definition of a regulatory taking: one focusing upon the legitimacy and rationality of the regulation at issue and not exclusively on the degree of its adverse economic impact.²¹⁴ In 2005, in *Lingle v. Chevron U.S.A., Inc.*, the Supreme Court recognized the doctrinal confusion that it had created in *Agins*, and it reversed course by ruling that its "substantially advances" inquiry "was derived from due process, not takings, precedents."²¹⁵ The Court effectively ended its use in pure regulatory takings cases. Curiously, the *Lingle* ruling continued the constitutional vitality of the *Agins* "substantially advances" test in limiting regulations imposing land use exactions.²¹⁶

During the eighties, the Supreme Court changed personnel and began what Justice Stevens termed a "philosophical shift" in the Court that made it clear that "property owners have surely found a new friend."²¹⁷ The Court expressed greater receptivity to constitutional arguments against excessive land regulation and a striking sensitivity to the interests of property owners rather than regulators. In fact, in 1981, the call for a stricter form of constitutional review of land use control was made by an unlikely advocate in Justice William Brennan. In a case raising regulatory taking issues, Justice Brennan wrote that local regulators must observe the Fifth Amendment's limits of his or her authority. He said, "[a]fter all, if a policeman must know the Constitution, then why not a planner?"²¹⁸ Foreshadowing the Court's shift to a more conservative position on the taking issue, Justice Brennan's comment heralded a view that the Constitution's Just Compensation requirement was needed to control or disci-

213. The first prong of Justice Powell's takings test cites the 1928 case of *Nectow v. City of Cambridge*, 277 U.S. 183 (1928), as its exclusive supporting precedent. A careful reading of *Nectow* reveals that it is a substantive due process "invalidation" decision—not a takings case. The Court in *Nectow* merely affirmed the lower court decision that the city's zoning district boundary was drawn at an irrational and illogical location and remanded it to the municipality for correction. *Id.* at 188-89. Justice Powell's opinion in *Agins* had the effect of elevating *Nectow*'s due process conclusion into a violation of the Fifth Amendment's taking clause—all done without explanation or support.

214. The *Agins* two-prong takings test has been consistently restated, without much analysis, in the line of Supreme Court decisions during the eighties and nineties. See *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 704 (1999); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1016 (1992); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 485 (1987); *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 834 (1987). It has found its way into modern land use cases culminating with the *Del Monte Dunes* decision, where it was central to the jury's verdict that the city had taken the plaintiff's property. Academic writers have severely criticized this inclusion of a substantive due process element. See, e.g., ROGER A. CUNNINGHAM ET AL., *THE LAW OF PROPERTY* 519 (2d ed. 1993); JUERGENSMEYER & ROBERTS, *supra* note 50, at 405-06.

215. 125 S. Ct. 2074, 2083 (2005).

216. *Id.* at 2082-87.

217. *Dolan v. City of Tigard*, 512 U.S. 374, 405 (1994) (Stevens, J., dissenting).

218. *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 661 n.26 (1981).

pline “overzealous regulatory attempts.”²¹⁹ While the principal focus of this trend was on extreme forms of regulation limiting the range of economically-beneficial land uses and reducing the economic value of land, it would later shift to encompass development exactions as well. Considering local governments to have “monopoly” power over land regulation, property rights advocates would argue that the Taking Clause was needed to ensure that government would not achieve eminent domain goals through an abuse of the police power. Under this view, legitimate regulatory authority could be distorted by overbearing governmental conduct that would convert regulation into unfair “taxation” by bundling regulatory approval with expansive exactions that were unrelated to the projects under consideration. Throughout the remainder of the eighties, the Supreme Court would decide an expanding number of Fifth Amendment takings law cases refining the procedure and substance of this form of constitutional litigation.²²⁰ And, in 1987, it would deal with the issue of the constitutionality of land use exactions in *Nollan v. California Coastal Commission*.

3. *Regulating for Revenue and Property: Constitutionalizing Land Use Exaction Practice*

Over the course of the twentieth century, land use control had become a significantly more complex regulatory enterprise than that described in the early zoning case of *Village of Euclid v. Ambler Realty*.²²¹ Change has manifested itself in many ways including increases in the number of governmental entities imposing restrictions on land development and an expansion in the purposes to be achieved. Beyond that, the form of regulation has changed as well, moving away from the purely prescriptive rules of *Euclid* to a more sophisticated regulatory regime seeking to customize regulatory burdens with obligatory conditions. This modern form of land use regulation imposed conditions containing exactions demanding that land developers convey something of value to the local government in order to obtain permission to proceed with their projects. While state legislation and constitutional law principles generally defined the parameters of acceptable land use exaction practice, an effort was made in the late eighties and early nineties to set federal constitutional limits to the regulatory activity taking place throughout the nation. As part of the attempt to have property rights accorded a higher level of constitutional law protection under the Fifth Amendment’s Takings Clause, advocates found a responsive Supreme Court in two cases: *Nollan v. California*

219. *Id.*

220. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304 (1987); *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470 (1987); *MacDonald, Sommer & Frates v. Yolo County*, 477 U.S. 340 (1986); *Williamson County Regional Planning Comm’n v. Hamilton Bank*, 473 U.S. 172 (1985).

221. 272 U.S. 365 (1926).

*Coastal Commission*²²² and *Dolan v. City of Tigard*.²²³ In both of these five to four decisions, the Court ruled for the property owner and articulated federal constitutional doctrine in a way that would, in theory, restrict land use exaction practices by establishing constitutionally-mandated norms.²²⁴ Speaking in constitutional terms, these cases forcefully advanced the idea that regulatory conditions requiring private owners to give property to government as part of the land use control process would be carefully scrutinized under elevated standards of constitutional review. In addition, a reinvigorated Fifth Amendment Takings Clause would be employed in a prophylactic fashion to prevent local governments from using regulatory power in an extortionate fashion.

a. *Nollan v. California Coastal Commission (1987)*

The *Nollan* case presented a straightforward fact pattern of a family seeking to replace an extremely small and dilapidated beachfront cottage with a new, larger oceanfront home. The Nollans purchased a beachfront lot in Ventura County, California on condition that they would demolish an existing, 504-square foot dilapidated bungalow and replace it with a new structure.²²⁵ In the usual case, the Nollans would only have had to comply with the local government's zoning or building ordinances in order to proceed with this reconstruction. However, this lot was located in California's coastal zone, and state law required that they apply for and obtain a coastal development permit from the California Coastal Commission.²²⁶ The Nollans permit request proceeded smoothly at first, and they were granted the permit. The grant of the permit was subject to a condition that they grant an easement allowing the public to pass along the portion of their property bounded by the mean high-tide line on one side and their backyard seawall on the other.²²⁷ In effect, this condition required that the Nollans convey a lateral easement to the state on the ocean side of their lot and behind their planned home.²²⁸ This easement would make it easier for the public to walk across the beach and reach two state parks that were situated approximately a quarter of a mile away.²²⁹ At this point in the controversy, the state coastal agency was attempting to impose the easement as a development exaction and making approval of the coastal development permit contingent on the Nollans' compliance.²³⁰ The Nollans believed this state requirement to be unlawful and unfair.²³¹

222. 483 U.S. 825 (1987).

223. 512 U.S. 374 (1994).

224. *Id.*; *Nollan*, 483 U.S. at 825.

225. 483 U.S. at 827-28.

226. *Id.* at 828.

227. *Id.*

228. *Id.* at 829.

229. *Id.*

230. *Id.*

231. *Id.*

They unsuccessfully protested the easement dedication requirement before the Coastal Commission and later sued in California Superior Court, which ruled in their favor based upon non-constitutional, statutory grounds.²³² However, the Nollans' victory was short-lived. The California Court of Appeals reversed the trial court ruling, that (1) the Coastal Act required a "conditioned" permit for a building replacement proposal; (2) the requirement was constitutional as long as the project contributed, even indirectly, to the need for public beach access; and (3) there had not been an unconstitutional taking in the case since the condition merely diminished the value of the Nollans' lot, but it did not deprive them of all reasonable use of their property.²³³ Dissatisfied with this result, the Nollans took their case to the U.S. Supreme Court raising only the unconstitutional taking issue.

In a five to four majority opinion, Justice Scalia ruled that the Coastal Commission's permit condition requiring the transfer of a lateral easement across the beach constituted a violation of the Fifth Amendment's ban on the taking of private property without just compensation.²³⁴ To reach this conclusion, the Court employed the two-pronged takings test expressed in the *Agins v. City of Tiburon* decision.²³⁵ Focusing on the substantive due process prong of this test, Justice Scalia held that a land use regulation violates the Fifth Amendment if it does not "substantially advance legitimate state interests."²³⁶ California had advanced three justifications²³⁷ as the state's purposes for the beachfront regulation.²³⁸ However, the *Nollan* majority concluded that, although all three of these policy rationales were "legitimate state interests," the state's permit condition requiring the Nollans to donate a beachfront easement to the public failed to demonstrate even a reasonable relationship to the achievement of these purposes.²³⁹ In the Court's estimate, the reasons given by the State of California justifying the exaction appeared to be

232. *Id.* The Superior Court ruled that there was insufficient evidence in the administrative record for concluding that the proposed bungalow replacement would create a direct or a cumulative burden on public access to the ocean. *Id.*

233. *Nollan v. Cal. Coastal Comm'n*, 223 Cal. Rptr. 28, 30-31 (Cal. Ct. App. 1986).

234. *Nollan*, 483 U.S. at 841-42.

235. *Id.* at 834.

236. *Id.*

237. The majority opinion suggested that the permit requirement would be unconstitutional if the condition "utterly fails to further the end advanced as the justification for the prohibition." *Id.* at 837. This was the Court's conclusion in the *Nollan* case, making the regulatory exaction appear to be an opportunistic property grab by the State of California.

238. The Coastal Commission suggested three main purposes behind its coastal regulatory scheme: (1) protection of the public's ability to see the beach; (2) assisting the public in overcoming the "psychological barrier" to seeing the beach created by a developed shore front; and (3) preventing congestion on the public beaches. *Id.* at 835.

239. The Court found that the state failed to establish this fundamental relationship or "essential nexus." Justice Scalia found that the justifications given were sorely lacking. He wrote,

[i]t is quite impossible to understand how a requirement that people already on the public beaches be able to walk across the Nollans' property reduces any obstacles to viewing the beach created by the new house. It is also impossible to understand how it lowers any "psychological barrier" to using the

completely disconnected to the harm to be mitigated by the beachfront management scheme: it “utterly fails to further the end advanced as the justification for the prohibition.”²⁴⁰ In this first land use exaction case, the Court demanded that such development conditions would require a heightened level of judicial review that would need to find an “essential nexus” or connection between the exacted property and the government’s regulatory purpose. Exaction cases would henceforth be treated as a different species of regulatory actions and the relaxed, rational basis scrutiny would not be sufficient to test their constitutionality.²⁴¹

The *Nollan* opinion reflected a deep skepticism of state and local government land use regulation and for the regulators themselves. In the majority’s view, the exercise of legitimate police power authority, approved with great deference in the *Euclid* opinion, was now being misused as a pretext for the government’s forced acquisition of privately-owned easements and other property interests.²⁴² Under this view, regulatory misbehavior in the land use exaction context demanded a constitutional law response—careful judicial review under the hybrid substantive due process/takings standard announced in the *Agins* decision. *Nollan* announced a more searching form of judicial oversight that proposed to test the relationship between governmental means and ends with a heightened form of scrutiny. This new level of constitutional analysis would not only result in the invalidation of defective land use regulation, but it would impose the financial consequences of “just compensation” upon government when it violated these constitutional norms. Justice Scalia and his majority colleagues apparently believed that the doctrine set forth in *Nollan* would impose a federal constitutional barrier that would discipline this unfair form of regulatory taxation.²⁴³ Left open for

public beaches, or how it helps to remedy any additional congestion on them caused by construction of the Nollans’ new house.

483 U.S. at 838-39. In his estimation, demanding the exaction as part of the beachfront management process actually demonstrated an example of “out and out . . . extortion.” *Id.* at 837.

240. *Id.* at 838.

241. As Juergensmeyer and Roberts note,

Nollan’s revision or articulation of the *Agins-Nectow* “substantially advances” test insists that when the state conditions development permission on the owner dedicating property to public use it may only do so without paying compensation if the dedicated land is “reasonably necessary” to prevent or counteract anticipated adverse public effects of the proposed development. The word “substantially” is given emphasis by the Court to make it clear that low-level, rational basis scrutiny is insufficient to test the strength of the nexus.

JUERGENSMEYER & ROBERTS, *supra* note 50, at 407.

242. Numerous arguments were made calling for a heightened scrutiny of conditional land use regulation. At base, the most persuasive claims asked that local governments not overreach or abuse their monopolies over land use control. See Christopher J. St. Jeanos, *Dolan v. Tigard and the Rough Proportionality Test: Roughly Speaking, Why Isn’t a Nexus Enough?*, 63 *FORDHAM L. REV.* 1883, 1896 (1995).

243. Even after striking down the *Agins* “substantially advance” test in regulatory takings cases, the Supreme Court preserved this relational analysis in the land use exaction context. See *Lingle v. Chevron U.S.A., Inc.*, 125 S. Ct. 2074, 2087 (2005).

another day was the question of how strong the “essential nexus” between the regulatory objective and the exaction would have to be. That opportunity came seven years later in the case of *Dolan v. City of Tigard*.²⁴⁴

b. *Dolan v. City of Tigard (1994)*

Land use exaction practices received further constitutional scrutiny in the case of *Dolan v. City of Tigard*. In *Dolan*, the landowner planned to expand her small hardware store into a larger business on the same building site.²⁴⁵ This otherwise ordinary business project would never have come to the Supreme Court’s attention but for the fact that the City of Tigard had adopted two city policies concerning floodplain and transportation management.²⁴⁶ Tigard’s planning commission had approved reconstruction of the hardware store, but it added mandatory conditions requiring the Dolans to dedicate public easements for a greenway near the adjacent floodplain and for a pedestrian/bicycle path.²⁴⁷ The land dedication requirement totaled about 7,000 square-feet of the 1.67 acre parcel or about ten percent of its area.²⁴⁸ Believing this development condition to be unwarranted and unjustified, the Dolans began their appeal that would eventually take their case to the United States Supreme Court.

They first appealed the planning commission’s decision to the Oregon Land Use Board of Appeals (LUBA). This approach was not successful. The LUBA upheld the two dedication requirements by finding that a “reasonable relationship” existed between the impact of the proposed development and both land contributions.²⁴⁹ The Oregon Court of Appeals affirmed the LUBA decision, finding that body had applied the correct test in analyzing the case.²⁵⁰ The Oregon Supreme Court agreed, concluding that the “reasonable relationship” test had not been abandoned by the United States Supreme Court in the *Nollan* decision and that the conditions imposed upon the Dolans bore an essential nexus to the site and to the proposed building.²⁵¹ Undaunted, the Dolans filed a petition for *certiorari* which was granted, with the argument to occur during the 1993 to 1994 term.

Once again, a five to four decision of the Supreme Court considered the development exactions and ruled that the city’s practice violated the

244. 512 U.S. 374 (1994).

245. *Id.* at 379.

246. *Id.* at 377-79.

247. *Id.* at 380.

248. *Id.* at 379-80.

249. *Dolan v. City of Tigard*, 20 Or. LUBA 411 (1991); *Dolan v. City of Tigard*, 22 Or. LUBA 617 (1992).

250. *Dolan v. City of Tigard*, 832 P.2d 853, 855 (Or. Ct. App. 1992).

251. *Dolan v. City of Tigard*, 854 P.2d 437, 443 (Or. 1993), *rev'd*, 512 U.S. 374 (1994).

Fifth Amendment's Takings Clause.²⁵² Writing for the majority,²⁵³ Chief Justice Rehnquist held that since an "essential nexus" existed between the city's development exaction and legitimate state interests of flood control and the reduction of traffic congestion, the basic relational requirement of *Nollan* had been satisfied.²⁵⁴ However, satisfying that relationship requirement was not enough. The major significance of the *Dolan* opinion was its discussion of the intensity of the required relationship between the city's development exactions and the impact of the proposed redevelopment project.²⁵⁵ As Chief Justice Rehnquist noted,

[T]he second part of our analysis requires us to determine whether the degree of the exactions demanded by the city's permit conditions bear the required relationship to the projected impact of petitioner's proposed development.²⁵⁶

With this analysis, the Court refined its Fifth Amendment takings law to require a correlation between the land use exaction and the impact of the proposed project. This change remains the law today.²⁵⁷ But how tight a fit did this have to be? This relationship, Chief Justice Rehnquist insisted, was merely to be one of "rough proportionality" and not one reflecting a mathematical, cause and effect precision. The rough proportionality test, drawn as it was from state land use law,²⁵⁸ suggested limits to the amount of property exaction that could be constitutionally demanded in the development process. This new *Dolan* standard was intended to have a checking or restraining effect on state and local governments. The required measure of "nexus" was structured so as to prevent local government land use exactions from becoming *de facto* opportunities for taxing newcomers for the benefit of existing residents. The implicit meaning of this relational test was that any exaction or dedication requirement that did not bear such a "rough proportionality" would violate the Takings Clause and, consequently, would be unconstitutional.

c. The Impact of *Nollan* and *Dolan* on the Constitutional Law Theory of Land Use Exactions

With the decisions in *Nollan* and *Dolan*, the Supreme Court's majority attempted to bring the nationally-expanding practice of conditional land

252. *Dolan*, 512 U.S. 374 (1994).

253. The majority in *Dolan* was composed of Chief Justice Rehnquist and Justices Kennedy, O'Connor, Scalia, and Thomas. *Id.* at 375.

254. *Id.* at 386.

255. *Id.* at 388.

256. *Id.*

257. See, e.g., *Hallmark Inns & Resorts, Inc. v. City of Lake Oswego*, 88 P.3d 284, 290 (Or. Ct. App. 2004).

258. *Dolan*, 512 U.S. at 388-91. Surveying the range of state practices, Chief Justice Rehnquist decided that a "reasonable relationship" test employed by a majority of the states would be adopted by the Court. In a summary fashion, he stated that this test "is closer to the federal constitutional norm than [other state positions]." *Id.* at 391. Because the term "reasonable relationship" sounded "confusingly similar" to the due process/equal protection standard, Rehnquist chose the label "rough proportionality" to describe the new federal standard. *Id.* at 325.

use regulation within the bounds of federal constitutional doctrine. It did so in ways that both set substantive legal standards and established procedures for government regulation. These decisions changed federal constitutional doctrine in ways that their supporters believed would restrict the exaction process by using federal supremacy as the means of achieving the result.²⁵⁹ In imposing the new “rough proportionality” constraint upon exaction practices, the *Dolan* court managed to change, in a subtle way, the constitutional presumption of validity that police power-based land use regulation had enjoyed since the *Village of Euclid v. Ambler Realty* decision. Imbedded in a footnote, this reversal of traditional judicial deference to local government land use decisions was justified as being necessary to monitor difficult-to-monitor adjudicative decisions.²⁶⁰ Local governments would now have to defend challenges to their exaction practices in the first instance by demonstrating that the *Dolan* test had been met. No longer would a regulatory measure that was found to be illogical, irrational, or excessive be merely struck as down as a denial of property without due process of law. Punishment for unlawful land use exactions would now be elevated to a higher plane of constitutional offense—a taking of property for which compensation must be paid. Another important implication sprang from this alteration of the traditional presumption of constitutionality; the burden of proving the required “rough proportionality” relationship was shifted from the challenging landowner to the defending municipality.²⁶¹ This change had practical as well as psychological impacts. An exaction lacking this required degree of nexus would be stricken as well as being found to be an unconstitutional taking. Furthermore, *Dolan* imposed procedural demands as well. Chief Justice Rehnquist insisted that in order to impose such exactions, municipalities must make “some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.”²⁶² At the very least, this part of the *Dolan* opinion required new governmental procedures designed to measure more accurately individual development impacts and to assign more proportional landowner burdens.

The *Nollan* and *Dolan* decisions stand as icons of federal court supremacy over state and local government under constitutional theory. Justified as a necessary counter-weight to what it considered to be abu-

259. The Supreme Court's opinion in *Dolan* triggered exaggerated responses from some commentators who expected the decision to devastate local government power to condition development in a way which that mitigate adverse impacts. See Matthew J. Cholewa & Helen L. Edmonds, *Federalism and Land Use after Dolan: Has the Supreme Court Taken Takings from the States?*, 28 URB. LAW. 401, 419 n.104 (1996).

260. *Dolan*, 512 U.S. at 391 n.8 (citing *Euclid* and *Nollan*). But see *id.* at 405 (Stevens, J., dissenting) (arguing that the Court “stumbled badly” by making this “serious error [of] abandoning the traditional presumption of constitutionality and imposing a novel burden of proof on a city implementing an admittedly valid land use plan”).

261. *Id.* at 395-96.

262. *Id.* at 391. The mechanisms employed by the city and the information relied upon to set the land exactions were found to be inadequate under this new approach.

sive and extortionate uses of the police power, the Rehnquist Court employed evolving Fifth Amendment norms to set new ground rules for a wide range of land use and environmental regulation. These “new rules” would require a higher level of precision and justification in governmental regulatory behavior.²⁶³ This constitutional line-drawing, as it related to the features of conditional regulation, was clearly intended to stress the primacy of federal constitutional norms limiting state and local land use regulation. Implicitly, it also suggested the inadequacy of state law to deal effectively and fairly with the subject. Federal law was, therefore, believed to be necessary to serve as the benchmark of lawful regulatory practices, the ultimate legal standard needed to police “runaway” governments.²⁶⁴

With these two opinions, the Court also apparently believed that it was sending a message to state courts regarding the minimum standards they should demand of state and local government exactions. In 1994, the Supreme Court appeared ready to embark upon an expansionist course of supervising and managing state land use control law to assure compliance with federal constitutional doctrine. As the prior section has demonstrated, by that time, state courts and legislatures had already fashioned land use exaction law for nearly three decades. In the decade following *Dolan*, state court decisions considering impact fees would reflect the two conclusions: 1) state law was more than adequate in setting legal limits to development exaction; and 2) states were largely satisfied with the results of their own law, not needing the encouragement of the U.S. Supreme Court. Today, state law remains as the main source of policy and legal guidance for impact fee practices. It has evolved at the sub-federal level through a familiar process of public policy development. In the end, the Supreme Court’s venture into the area of conditional regulation would

263. Later litigation would attempt to extend the *Dolan* principal of “rough proportionality” to pure forms of regulation that did not have connections to development exactions. See *Spinell Homes, Inc. v. Municipality of Anchorage*, 78 P.3d 692, 702-03 (Alaska 2003) (rejecting application in attack on subdivision requirements); *Wonders v. Pima City*, 89 P.3d 810, 815-16 (Ariz. Ct. App. 2004) (native plant preservation law not an exaction); *Hensler v. City of Glendale*, 876 P.2d 1043 (Cal. 1994) (rejecting application in rent control context); *Manocherian v. Lenox Hill Hosp.*, 643 N.E.2d 479, 479-80 (N.Y. 1994) (rent control application). Ultimately, the United States Supreme Court expressed no interest in extending *Nollan/Dolan* analysis to “mere regulations” with Justice Kennedy’s dicta in *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 703 (1999) (showing rough proportionality test of *Dolan* is “inapposite” to a case involving a permit denial).

264. The use of Fifth Amendment Takings Clause doctrine as an interventionist device limiting government regulation may have actually peaked with the *Dolan* decision. See *Parking Ass’n of Ga., Inc. v. City of Atlanta*, 515 U.S. 1116 (1995), *cert. denied*, 515 U.S. 1178 (1995) (denying certiorari despite dissent by Justices Thomas and O’Connor); *Eastern Enters. v. Apfel*, 524 U.S. 498, 540 (1998) (questioning the continued vitality of the *Agins* “substantially advance” prong of the Takings test and whether the Takings Clause is implicated in a requirement to pay money by Justice Kennedy); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); *Lingle v. Chevron U.S.A., Inc.*, 125 S. Ct. 2074, 2084 (2005) (stating that the *Agins* “substantially advance” test “is not a valid method discerning whether private property has been taken for purposes of the Fifth Amendment.”).

generally be seen as a symbolic gesture with the states remaining in control of their own policy.

C. IMPACT FEE LITIGATION FOLLOWING THE SUPREME COURT'S RULINGS IN *NOLLAN* AND *DOLAN*

1. *The Effect of the U.S. Supreme Court's Nollan/Dolan Rulings*

With the announcement of the *Dolan v. City of Tigard* decision in June of 1994, property rights advocates had reason to believe that the Supreme Court had taken an interest in the plight of the land developer and had chosen to express federal constitutional norms that would rein in what they believed were extremely burdensome development exactions. Speaking with the force of the Takings Clause of the Fifth Amendment in its ruling, the Court's majority had articulated a new federal constitutional standard for conditional regulation that possessed substantive aspects as well as procedural ones. A "rough proportionality" standard, derived from the state law "rational nexus" principle, was defined as a mandatory, substantive constitutional benchmark while an individualized determination of each exaction was required to satisfy the necessary procedural demand. By pulling conditional land use regulation within the confines of the Takings Clause, the Court sought to assume a hierarchical control over state and local regulation—policing the police power with federal constitutional norms. Casting aside any possible federalism concerns that might respect state legislative policy choices,²⁶⁵ the *Dolan* majority chose to express itself with an agitated rhetoric aimed at extortionate regulation.²⁶⁶

The immediate effect of the decision was to place a degree of doubt into the minds of local government officials and a dash of hope into the hearts of property rights advocates.²⁶⁷ However, in the end, the *Nollan/Dolan* principles did not override and dominate a well-developed body of state statutory and constitutional law, and federal litigation did not become the crucible for determining the legality of impact fee practices.²⁶⁸

265. Cholewa & Edmonds, *supra* note 243, at 402-03.

266. There are extreme cases like *Walz v. Town of Smithtown*, 46 F.3d 162 (2d Cir. 1995), where a local government demanded a fifteen-foot easement across private property for a roadway expansion project in exchange for connecting a house to public water supply. In that case, the Second Circuit upheld a jury award of \$102,000 that was granted to remedy the locality's action. *Id.*

267. See, e.g., Mark W. Cordes, *Legal Limits on Development Exactions: Responding to Nollan and Dolan*, 15 N. ILL. U. L. REV. 513, 514-15 (1995); Craig R. Habicht, *Dolan v. City of Tigard: Taking a Closer Look at Regulatory Takings*, 45 CATH. U. L. REV. 221, 231 (1995); Sam D. Starritt & John H. McClanahan, *Land Use Planning and Takings: the Viability of Conditional Exactions to Conserve Open Space in the Rocky Mountain West after Dolan v. City of Tigard*, 30 LAND & WATER L. REV. 415, 420 (1995); Kim I. Stollar, *How Much is Enough Assessing the Impact of Dolan v. City of Tigard*, 46 CASE W. RES. L. REV. 193, 194 (1995); Jonathan M. Block, Note, *Limiting the Use of Heightened Scrutiny to Land Use Exactions*, 71 N.Y.U. L. REV. 1021, 1030-31 (1996).

268. The federal courts have not been frequently used as the venue for impact fee litigation either before or after the *Dolan* decision in 1994. See *Home Builders Ass'n of Miss., Inc. v. City of Madison*, 143 F.3d 1006, 1011-13 (5th Cir. 1998) (reasoning impact fees were

State courts continued to play their traditional role of judging the lawfulness of land use controls, and state legislatures increasingly acted to pass legislation permitting impact fees. The review of the decade of state case law decisions following the *Dolan* ruling reflects the nature of the judicial review that met the expanding and increasingly prevalent practice of municipal development impact fees.²⁶⁹

2. Overview of a Decade of Litigation

With two major decisions of the nation's highest court announcing a new and increasingly demanding level of constitutional review of local government land use and environmental exactions, it is worthwhile to determine how the state courts responded to the rules and the rhetoric used by the Supreme Court. How did these two holdings in the *Nollan* and *Dolan* cases affect the ways that state courts viewed the legality of development impact fees? Was the Fifth Amendment constitutional mandate expressed in this decade of cases a driving force in state law development concerning exactions? Did these two cases convince state courts in impact fee challenge cases to shift the traditional burden of proof obligations to local governments and away from the contesting landowner? Did the heightened "rough proportionality" scrutiny and individualized assessment become the norm in state litigation? Examining the ten years following the 1994 *Dolan* decision, an analysis of state cases reveals a number of surprising patterns.

In the period under review, state courts issued a total of 106 opinions directly considering the lawfulness of cash fees required as a condition of development approval.²⁷⁰ This number considered reported case decisions from all levels of the state judiciary—from trial courts to state su-

"taxes" under state law and the Tax Injunction Act bars federal court subject matter jurisdiction); *Blanche Road Corp. v. Bensalem Twp.*, 57 F.3d 253, 263 (3d Cir. 1995) (holding in a § 1983 action, impact fees imposed on commercial development were properly required and were not "in fact motivated by bias, bad faith or improper motive"); *Shell Island Inv. v. Town of Wrightsville Beach*, 900 F.2d 255 (4th Cir. 1990) (upholding decision that water and sewer tap fees were not arbitrarily or unreasonably imposed, did not violate equal protection, and were not unlawful taxes under state law); *Nat'l Ass'n of Homebuilders v. Chesterfield County*, 907 F. Supp. 166, 168 (E.D. Va. 1995) (validating cash proffer policy validated without applying *Dolan* test); *Garneau v. City of Seattle*, 897 F. Supp. 1318, 1325-26 (W.D. Wash. 1995) (holding *Nollan/Dolan* should not be applied to cash exactions in an ordinance requiring landlords to provide displaced tenants relocation assistance because the law did not demand real property).

269. Perhaps it is not surprising to discover that impact fee ordinances are prevalent in some of the jurisdictions experiencing the greatest level of state court litigation. For instance, in the state of Washington, as of November, 2004, seventy-seven cities, towns and counties had adopted at least one form of development impact fee. In some locales, as many as one general impact fee and four specialized fees are imposed simultaneously. See Municipal Research & Services Center of Washington, List of Jurisdictions with Impact Fee Provisions, at <http://www.mrsc.org/Subjects/Planning/impact.aspx> (last modified Nov. 2004).

270. Identifying impact fee cases is a complex task since local governments employ varying terminology for their cash exactions. (Footnote listing all of the case decisions considered.) The actual period under consideration spanned from January 1, 1994 through September 30, 2004—a bit more than ten years.

preme courts. This number of reported cases reflected an average of approximately ten case decisions per year since 1994. Additional research indicates that the annual rate of case decisions did not increase during the three years prior to 1994, when the average annual number of cases was eleven, suggesting that the *Dolan* holding did not trigger an avalanche of litigation challenging impact fees, but rather that case decisions followed a stable long term pattern. During the study period, at least one decision was registered in thirty-five states or 70% of the nation, and these were found in all parts of the nation. However, the national distribution of the reported cases revealed a clustering of cases in a small number of high-growth states: California (16, or 15%), Washington (13, or 12%), New Jersey (6, or 5.6%), Florida (5, or 4.7%), and Texas (5, or 4.7%). These five states produced over 42% of all of the decisions under review. This appears to reflect a pattern of the coexistence of high growth demands, the imposition of impact fees and the use of litigation to challenge the authority to use the fees or their administration. The majority of the remaining states in this group had either one or two reported cases during this ten year period, indicating a much less frequent resort to court suit as a means of resolving conflicts. Not surprisingly, the fifteen states not reporting any cases during this period were those with relatively small populations and, for the most part, below average rates of growth.²⁷¹ It is noteworthy that the total of 106 cases represented opinions of all levels of state court adjudication. However, over 43% of the opinions in the sample were produced by the state's highest court, indicating that impact fee litigation has been highly contested by well-financed parties willing to frequently appeal "up the chain," ultimately receiving the decision of the state supreme court.

3. *Assessing State Jurisprudence on Impact Fees Since Dolan v. City of Tigard*

Analyzing impact fee cases presents difficulties in classification. Local governments employ a wide variety of terms to describe financial charges or fees imposed upon land development, including in lieu of fees,²⁷²

271. These states were: Alabama, Arkansas, Hawaii, Iowa, Kentucky, Louisiana, Mississippi, Montana, Nebraska, New Mexico, North Dakota, Oklahoma, South Dakota, West Virginia, and Wyoming. All of these states, except Arkansas and New Mexico, experienced population growth during the 1990-2000 period below the average growth rate for the United States (13.1%). See U.S. Census 2000—State & County Quickfacts, at <http://www.census.gov/main/www/cen2000.html>.

272. *San Remo Hotel L.P. v. City & County of San Francisco*, 41 P.3d 87, 91 (Cal. 2002) (upholding large in lieu of payment for demolition of single room occupancy low cost housing); *Twin Lakes Dev. Corp. v. Town of Monroe*, 801 N.E.2d 821, 822 (N.Y. 2003) (upholding recreation in lieu of fee).

mitigation fees,²⁷³ water and sewer connection charges,²⁷⁴ excise taxes,²⁷⁵ privilege tax,²⁷⁶ low income housing replacement fees,²⁷⁷ linkage fees,²⁷⁸ standby fees,²⁷⁹ and transportation utility fees.²⁸⁰ However, focusing on those cases where government imposes charges to offset the fixed capital costs of public facilities attributable to new residential and non-residential development, a number of legal issues have frequently been litigated. The review of these cases reflects the wide variety of issues arising under the laws of the different states.

a. Authority to Charge Impact Fees

Early attempts to impose development impact fees were often challenged as being *ultra vires* or beyond the authority of the local government charging them. This traditional form of attack on local government authority was to be expected since most states did not explicitly delegate the power to charge impact fees to their localities through specific enabling acts.²⁸¹ While courts found creative ways to identify sources of implied authority,²⁸² the clear modern trend has been to look to state

273. *Castle Homes & Dev., Inc. v. City of Brier*, 882 P.2d 1172, 1173 (Wash. Ct. App. 1994) (traffic impact mitigation fees); *see also* Thomas W. Ledman, *Local Government Environmental Mitigation Fees: Development Exactions, The Next Generation*, 45 FLA. L. REV. 835 (1993).

274. *Ford v. Georgetown County Water & Sewer Dist.*, 532 S.E.2d 873, 875 (S.C. 2000).

275. *Centex Real Est. Corp. v. City of Vallejo*, 24 Cal. Rptr. 2d 48, 51 (Cal. Ct. App. 1993); *Cherry Hill Farms, Inc. v. City of Cherry Hills Vill.*, 670 P.2d 779, 782 (Colo. 1983); *Waters Landing L.P. v. Montgomery County*, 650 A.2d 712, 716 (Md. 1994).

276. *Home Builders Ass'n of Middle Tenn. v. Maury County*, No. M1999-0238-COA-KK3-CT, 2000 WL 1231374, at *4 (Tenn. Ct. App. Aug. 31, 2000) (holding that development can be taxed as a privilege and for revenue raising purposes).

277. *Town of Coventry Zoning Bd. of Review v. Omni Dev. Corp.*, 814 A.2d 889, 899 (R.I. 2003); *San Telmo Assoc. v. City of Seattle*, 735 P.2d 673 (Wash. 1987) (holding an unauthorized tax). *But see* *Holmdel Builders Ass'n v. Twp. of Holmdel*, 583 A.2d 277, 279-80 (N.J. 1990) (upholding fees on new construction satisfying low income housing responsibilities under *Mt. Laurel* principle).

278. *Commercial Builders v. City of Sacramento*, 941 F.2d 872, 876 (9th Cir. 1991) (upholding low income housing linkage fee if it pays for a social cost reasonably related to new construction); *San Remo Hotel L.P. v. City & County of San Francisco*, 41 P.3d 87 (Cal. 2002) (upholding linkage payment for demolition of low cost housing); *Blue Jeans Equities W. v. City & County of San Francisco*, 4 Cal. Rptr. 2d. 114 (Cal. Ct. App. 1992) (upholding transit fee to offset the higher costs of peak period ridership valid charge and not a regulatory taking); *Russ Bldg. P'ship v. City & County of San Francisco*, 246 Cal. Rptr. 21 (Cal. Ct. App. 1987); *Sintra Inc. v. City of Seattle*, 829 P.2d 765, 773 n.7 (Wash. 1992) (holding demolition fee for low income housing not subject to *Nollan* essential nexus test because fee is cash and not land). *See generally* Jane E. Schukoske, *Housing Linkage: Regulating Development Impact on Housing Costs*, 76 IOWA L. REV. 1011 (1991).

279. *McMillan v. N.W. Harris County Mun. Util. Dist. No. 24*, 988 S.W.2d 337, 338 (Tex. App.—Houston [1st Dist.] 1999); *Samis Land Co. v. City of Soap Lake*, 23 P.3d 477, 488 (Wash. 2000).

280. *State v. City of Port Orange*, 650 So. 2d 1 (Fla. 1994).

281. Authority was sometimes lacking to impose exactions for land or for in lieu of payments as part of the land subdivision process. *See, e.g., Hylton Enters. v. Bd. of Supervisors*, 258 S.E.2d 577, 581 (Va. 1979). *But see* *Divan Builders, Inc. v. Planning Bd.*, 334 A.2d 30, 40-41 (N.J. 1975) (upholding fee for off-site improvements).

282. Multiple sources of implied powers have been identified. Professors Juergensmeyer and Roberts note that

impact fee statutes for the power and for the framework for implementing an impact fee policy. Nearly half of the states have enacted some form of impact fee legislation or law that has been held to permit the charging of impact fees.²⁸³ While these statutes vary widely in terms of their geographic coverage and the purposes for which fees may be charged, they frequently provide highly specific guidance for the implementation of an impact fee program including capital planning and budgeting requirements, financial accounting, and refund provisions, as well as a codified rational nexus element.²⁸⁴

Since the *ultra vires* attack holds a traditional basis for striking down a local government effort to impose fees, numerous litigants have used it with mixed results. When this critique has been successful, courts have found that local government programs have been inconsistent with state enabling statutes. A prime example can be found in *Southern Nevada Homebuilders Association v. City of North Las Vegas* where the Nevada Supreme Court ruled that a local ordinance requiring a fee for fire and emergency medical services (EMS) was not an authorized impact fee.²⁸⁵ The Nevada impact fee statute was interpreted to allow only fees for a list of five kinds of public services which did not include fire and EMS.²⁸⁶ Sometimes localities have the authority to impose impact fees but only within a circumscribed geographical base. For example, in *Nolte v. City of Olympia*, the Washington Court of Appeals held that while a city could impose water and sewer impact fees within its boundaries, it lacked the power to charge them in extraterritorial locations under its regulatory au-

Of those states without authorization or enabling statutes which have considered the issue, most have found authority in home rule power, planning and consistency requirements, or on the theory that impact fees are land use regulations and that a local government with general land use regulatory authority may enact them as part of that power.

JUERGENSMEYER & ROBERTS, *supra* note 50, at 359. Sometimes this power is found in the authority to operate a utility system or as part of plat approval responsibility. *See, e.g.,* *Burke v. Town of Schererville*, 739 N.E.2d 1086, 1092-93 (Ind. Ct. App. 2000); *Homebuilders Ass'n of Charlotte v. City of Charlotte*, 442 S.E.2d 45, 50 (N.C. 1994). *See* Morgan, *supra* note 151, at pts. 1 & 2, LAND USE L. & ZONING DIG. 3 (Mar. 1990), LAND USE L. & ZONING DIG. 3 (Apr. 1990).

283. *See* Stuart Meck ed., *GROWING SMART LEGISLATIVE GUIDEBOOK* (Stuart Meck ed., 2002). The following list identifies the states with Impact Fee Enabling Acts and the year of their initial adoption: Texas (1987), Maine (1988), California (1989), Vermont (1989), Nevada (1989), New Jersey (1989), Illinois (1989), Virginia (1990), West Virginia (1990), Washington (1990), Georgia (1990), Pennsylvania (1991), Oregon (1991), Arizona (1991), New Hampshire (1991), Indiana (1991), Maryland (1992), Rhode Island (1992), Idaho (1992), New Mexico (1993), Wisconsin (1994), and Colorado (2001). ARTHUR C. NELSON & MITCH MOODY, *PAYING FOR PROSPERITY: IMPACT FEES AND JOB GROWTH 2* (Brookings Institution Center on Urban and Metropolitan Policy, June 2003).

284. *See, e.g.,* *Homebuilder's Ass'n of Cent. Ariz. v. City of Scottsdale*, 930 P.2d 993, 998 (Ariz. 1997); *Cherokee County v. Greater Atlanta Homebuilders Ass'n*, 566 S.E.2d 470, 472 (Ga. Ct. App. 2002) (considering only state impact fee statute); *Larson v. City of Sullivan*, 92 S.W.3d 128, 134 (Mo. Ct. App. 2003) (finding authority found for sewer tap fee in statute authorizing sewer systems).

285. 913 P.2d 1276, 1278-79 (Nev. 1996) (statutory language defining "capital improvement" limited to drainage, sanitary sewers, storm sewers, streets, and water projects only).

286. *Id.* at 1278-80.

thority.²⁸⁷ The state's impact fee statute was read as the exclusive source of power and it was interpreted narrowly.²⁸⁸ Other courts have ruled that when a state impact fee statute exists, it is the sole source of local government authority, thereby negating any theory of implied powers. As a consequence, any fees enacted outside of the unique authority are void.²⁸⁹

Some courts determine that there is an absence of local government power after undertaking a conventional Dillon's Rule analysis of authority and refusing to find implied powers. The case of *Home Builders Association of Central Arizona v. City of Apache Junction*²⁹⁰ is one example where the Arizona appeals court struck down the city's attempt to charge school impact fees as not being permitted under the state's development fee statute, which allowed fees for "necessary public services."²⁹¹ The court reasoned that since cities did not have authority over or responsibility for public school matters "necessary public services" did not include funding public schools.²⁹² School impact fees have been particularly controversial and courts have been unwilling to stray beyond the precise permission accorded by state legislation.²⁹³ Road improvement charges do not fare much better without clear legislative authority. In *Country Joe, Inc. v. City of Eagan*,²⁹⁴ the Minnesota Supreme Court concluded that a city's road unit connection charge was not valid as an implied authority under the state's municipal planning law and that it was not a valid impact fee due to the disproportionate cost assigned by the city to the builder.²⁹⁵ System development charges for water have also been struck under Dillon's Rule analysis in New Hampshire when the supreme court found the charge not to be a "toll" which was permissible under state law.²⁹⁶ Also, when fees have been imposed for forbidden purposes or for services that are generally enjoyed by all citizens, the charge may be voided.²⁹⁷ While other authority challenges have resulted in decisions affirming local government power, the absence of a clear source of municipi-

287. 982 P.2d 659, 665-60 (Wash. Ct. App. 1999).

288. *Id.*

289. *See, e.g.*, *Simonsen v. Town of Derry*, 765 A.2d 1033, 1036 (N.H. 2000).

290. 11 P.3d 1032 (Ariz. Ct. App. 2000).

291. *Id.* at 1038-39.

292. *Id.* at 1039.

293. *See, e.g.*, *Bd. of County Comm'rs v. Bainbridge, Inc.*, 929 P.2d 691, 695 (Colo. 1996) (addressing a statute fixing the time and holding the amount of lawful school fees and the county cannot add a second fee later in the development process).

294. 560 N.W.2d 681, 688-87 (Minn. 1997).

295. *Id.* at 685-86 (reserving the issue of whether impact fees were authorized under state law but concluding that even if they were, the amount assessed was unlawful and an unauthorized "tax").

296. *Bd. of Water Comm'rs of Laconia Water Works v. Mooney*, 660 A.2d 1121, 1125 (N.H. 1995) ("a fee imposed to offset the cost of improvements designed to meet the needs occasioned by present and future growth does not fit within this definition [of a toll]").

297. *Richmond v. Shasta Comty. Servs. Dist.*, 116 Cal. Rptr. 2d 343, 350 (Cal. Ct. App. 2002) (holding fire suppression charge violates state constitutional provision forbidding fees for general services to citizens); *Hydropress Envtl. Servs., Inc. v. Twp. of Upper Mt. Bethel*, 836 A.2d 912, 919-20 (Pa. 2003) (holding wastehauler fees for repair of roads struck as not within impact fee authority or any other power).

pal authority makes impact fee programs susceptible to an invalidating attack.²⁹⁸

b. Classification as a Tax or a Regulatory Fee

In the litigation surrounding municipal impact fees, the exact terms used to define the fee charged can mean the difference between upholding a local program and striking it down as being unauthorized. This kind of challenge appears to be the most common form of attack that is leveled against impact fees. Since impact fees require the payment of money from a land developer to the local government, they have been frequently characterized as “taxes” by litigants. The use of this approach is explained by the fact that local government taxation power is often highly limited or regulated under state statutory or constitutional law. Often the assertion that a charge should be classified as a tax really seeks to void the fee because under state law the locality does not possess this form of taxing power.²⁹⁹ Alternatively, if the municipality does possess taxation authority, arguments can be raised that certain procedural formalities have not been followed in their adoption.³⁰⁰ Most commonly, the adoption of new taxes requires voter approval or passage of a local ordinance by a super majority while impact fee programs have only been instituted by simple ordinance change or by administrative action only. Impact fee challengers have also attacked local policy based on alleged deficiencies grounded on the state constitutional law principles of 1) taxation based on land value³⁰¹ and 2) uniformity in taxation—a form of equal protection complaint.³⁰² Ironically, if a fee is found to be a lawfully imposed tax,

298. *N. Ill. Home Builders Ass'n v. County of Du Page*, 649 N.E.2d 384, 892-93 (Ill. 1995); *Burke v. Town of Schererville*, 739 N.E.2d 1086, 1091-92 (Ind. Ct. App. 2000).

299. *Collier County v. State*, 733 So. 2d 1012, 1018-19 (Fla. 1999) (finding interim governmental services fee was unauthorized tax and must be authorized by general law). “Under Massachusetts law, towns do not have the power to tax,” but they can impose impact fees. In *Greater Franklin Developers Association, Inc. v. Town of Franklin*, 730 N.E.2d 900, 901-02 (Mass. App. Ct. 2000), the appeals court struck down a town’s school impact fees by finding that it was an impermissible or forbidden tax rather than a valid municipal fee. In other states, a locality may not have the authority to impose an impact fee but may lawfully charge a cost-based fee. See *City of N. Las Vegas v. Pardee Contr. Co.*, 21 P.3d 8, 10-11 (Nev. 2001).

300. *Grunow v. Twp. of Frankenmuth*, No. 226094, 2002 WL 31376376, at *1 (Mich. Ct. App. 2002) (finding voter approval under Headlee Amendment); *Larson v. City of Sullivan*, 92 S.W.3d 128, 131 (Mo. Ct. App. 2003) (finding a voter requirement for new taxes under Hancock Amendment). *But see*, *Home Builders Ass'n of Middle Tenn. v. Maury County*, No. M1999-C2383-COA-R3-CV, 2000 WL 1231374, at *4 (Tenn. Ct. App. Aug. 31, 2000) (imposing privilege tax on new construction and not an impact fee); *City of Huntington v. Bacon*, 473 S.E.2d 743, 751 n.7 (W. Va. 1996) (noting that the Board of Education argued that a municipal service fee was a tax and not a use fee since it was insulated by state statute from paying taxes).

301. *McMillan v. Tex. Natural Res. Conservation Comm'n*, 983 S.W.2d 359, 364-65 (Tex. App.—Austin 1998, pet denied) (holding that standby fee alleged to violate sections 1 & 20 of Article VIII of Texas Constitution requiring that *ad valorem* taxes on real property must be “in proportion to . . . value” and not “greater than . . . fair cash market value”).

302. *N. Ill. Home Builders Ass'n*, 649 N.E.2d at 394-95 (holding transportation fee does not violate the uniformity clause of the Illinois Constitution); *Bldg. Indus. Ass'n of Cleve-*

it will not be subject to any Takings Clause analysis, and it may be charged in all parts of the jurisdiction without proof of any special benefit to particular parcels.³⁰³

In the cases under review, the “taxation” critique was made in a surprisingly large number of reported cases. This continued the trend identified in the pre-*Dolan* period. However, the decisions did not indicate any clear pattern in results, with half of the impact fees being classified as regulatory devices³⁰⁴ while the other half were characterized as “taxes.”³⁰⁵ However, making the regulatory fee/tax determination is a difficult task, and courts have not used a uniform framework for making this important decision. The most uncomplicated approach focuses on determining what is the “primary purpose” of the impact fee scheme—regulation or revenue raising.³⁰⁶ In *Trimen Development Co. v. King County*,³⁰⁷ the Washington Supreme Court applied this test and ruled that a park development fee imposed upon plat approval was not a tax by concluding that the primary purpose of the fee payment was regulatory. Although it undoubtedly provided funds to the locality, the court found that the fee’s true purpose was to carry out the legitimate regulatory purpose of the local subdivision ordinance—the provision of open space and recreation for new residents.³⁰⁸ Other courts look to the distribution of the benefits provided by the fees finding taxes to exist when those bene-

land v. City of Westlake, 660 N.E.2d 501, 504, 506 (Ohio App. 1995) (applying non-uniform tax on real property only to new construction violating Section 2, Article XII of the Ohio Constitution).

303. See *Volusia County v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 135 (Fla. 2000).

304. *Home Builders Ass’n of Cent. Ariz.*, 902 P.2d 1347, 1350 (Ariz. Ct. App. 2000); *City of Zephyrhills v. Wood*, 831 So. 2d 223, 225 (Fla. Dist. Ct. App. 2002); *Joy Mgmt. Co. v. Oakland County*, No. 203060, 1998 WL 1988945, at *1 (Mich. Ct. App. 1998); *Larson v. City of Sullivan*, 92 S.W.3d 128, 131-33 (Mo. Ct. App. 2003); *Ford v. Georgetown County Water & Sewer Dist.*, 532 S.E.2d 873, 875 (S.C. 2000); *J.K. Constr., Inc. v. W. Carolina Reg’l Sewer Auth.*, 519 S.E. 561, 564 (S.C. 1999); *McMillan*, 983 S.W.2d at 364; *Trimen Dev. Co. v. King County*, 877 P.2d 187, 182 (Wash. 1994); *Bacon*, 473 S.E.2d at 751-53.

305. *Collier County v. State*, 733 So. 2d 1012, 1018 (Fla. 1999); *Idaho Bldg. Contractors Ass’n v. City of Coeur D’Alene*, 890 P.2d 326, 329 (Idaho 1995); *Greater Franklin Dev. Ass’n v. Town of Franklin*, 730 N.E.2d 900, 903 (Mass. App. Ct. 2000); *Grunow*, 2002 WL 31376376, at *1, *3; *City of Billings v. State Dep’t of Revenue*, 891 P.2d 1149, 1153-54 (Mont. 1995); *Phillips v. Town of Clifton Park Water Auth.*, 730 N.Y.S.2d 565, 567 (N.Y. App. Div. 2001); *Douglas County Contractors Ass’n v. Douglas County*, 929 P.2d 253, 257-58 (Nev. 1996); *Bldg. Indus. Ass’n of Cleveland*, 660 N.E.2d at 504; *Henderson Homes, Inc. v. City of Bothell*, 877 P.2d 176, 179-80 (Wash. 1994).

306. The primary purpose label has been used for many years but often in an unrevealing fashion. In *State v. Jackman*, the Wisconsin Supreme Court expressed this view in the following fashion. It said, “[T]he primary purpose of a tax is to obtain revenue for the government, while the primary purpose of a fee is to cover the expense of providing a service or of regulation and supervision of certain activities.” 211 N.W.2d 480, 485 (Wis. 1973). See also *Hillis Homes, Inc. v. Snohomish County*, 650 P.2d 193, 195 (Wash. 1982) (“If the fees are merely tools in the regulation of land subdivision, they are not taxes. If, on the other hand, the primary purpose of the fees is to raise money, the fees are not regulatory, but fiscal, and they are taxes”).

307. 877 P.2d 187, 192 (Wash. 1994) (citing *Hillis Homes* for this rule).

308. *Id.*

fits spill over to enhance other land and people who do not pay them.³⁰⁹ The transfer of impact fee revenues to improve existing recreational facilities for the general public has proved fatal in some instances where courts have termed such a cross subsidy to be a tax.³¹⁰ The Ohio Appeals Court in the *Building Industry Association* case stated that

While it is laudable to seek such a recreational program for the city and its residents, costs associated with that program should be borne by all residents, not merely those purchasing new construction, for the benefits of such a program run to all residents.³¹¹

The principle concern in these cases has been the prevention of the financial abuse of newcomers to a community. The New York Supreme Court expressed this concern by flatly stating that

. . . [T]he law does not permit a municipality to charge “newcomers” an impact fee to cover expansion costs of an existing water facility absent a demonstration that such a fee is necessitated by the particular project (as opposed to future growth and development in that municipality generally) or a demonstration that such a newcomer would be primarily or proportionately benefited by the expansion.”³¹²

This court was particularly motivated by the desire to stop a municipal “welcome stranger” philosophy that would result in the imposition of the burden of capital improvements upon a discrete group of residents in spite of the fact that benefits would be enjoyed by all.³¹³

Some state courts have developed multi-factor tests to assist them in the separation of taxes from regulatory fees.³¹⁴ One such approach uses the concepts derived from traditional special assessments law focused on costs and benefits.³¹⁵ Other state courts employ far more complex schemes that ultimately search for the same “special benefit” aspect of

309. See *Home Builders Ass'n of Cen. Ariz.*, 902 P.2d at 1360. This case noted that Development fees are generally considered regulatory fees if they are reasonably related to the needs created by the new development and are used to benefit the land on which they are imposed. On the other hand, they are considered taxes if the fees are not related to the new development and are used to benefit other property.

Id. at 1350.

310. *Bldg. Indus. Ass'n of Cleveland*, 660 N.E.2d at 504.

311. *Id.* at 505.

312. *Philips v. Town of Clifton Park Water Auth.*, 730 N.Y.S.2d 565, 567 (N.Y. App. Div. 2001).

313. *Id.* at 568.

314. See *Collier Cty v. State*, 733 So.2d 1012, 1017 (Fla. 1999).

315. *Id.* (citing *Lake County v. Water Oak Management Corp.*, 695 So. 2d 667, 669 (Fla. 1997)). *Collier County* recited a two-pronged test that considered: 1) was the property burdened by the assessment deriving a “special benefit” from the service provided by the fee; and 2) was the assessment for the services properly apportioned. For a similar analogy to special assessments, see *Ford v. Georgetown City Water & Sewer District*, 532 S.E.2d 873, 875 (S.C. 2000) (“taxes are imposed on all property for the maintenance of government while assessments are placed only on the property to be benefited”).

special assessment law.³¹⁶ The South Carolina Supreme Court announced such a five-part test in *J.K. Construction, Inc. v. Western Carolina Regional Sewer Authority* that sought to ensure that the fee would be used to primarily benefit those who paid it in a system that could not easily be a camouflaged general taxation program.³¹⁷ The Missouri courts follow another five-part test which considers the timing, the incidence, and the amount of the fee, as well as the nature of the service provided by the charge.³¹⁸ The Massachusetts Supreme Judicial Court stated a three-part test that also places emphasis on the whether the fee provides focused, special benefits for "particular services" funded by the payment and also whether the fee is paid by choice as a voluntary act.³¹⁹ In the end, this inquiry of determining whether an impact fee is actually a tax has the potential of disciplining the use of the device in much the same way as the *Nollan/Dolan* tests of "essential nexus" and "rough proportionality."³²⁰ This point demonstrates that the state courts have developed a number of judicial tools to sort out the acceptable from the unacceptable local government financial tactics.

c. The Administration of an Impact Fee Program

With impact fees being widely authorized under the state enabling statute and judicial opinions, a number of cases have considered questions relating to the administration of the impact fee program at the local level of government. A few cases have examined the methodology that localities must use to design and implement an impact fee system that would satisfy constitutional demands. This is most true in the area of road or transportation impact fees where the amount of money at issue is large and where many existing drivers, in addition to the new residents, will use the roadway improvements. In *F&W Associates v. County of Somerset*, the New Jersey court noted that the rational nexus test could only be satisfied for a traffic impact fee "only after a comprehensive study . . . of such factors as existing road facilities, current zoning, projected population growth, and existing commercial uses in the area."³²¹ As occurs in many such situations, the locality hired a transportation consultant to

316. See *J.K. Constr., Inc. v. W. Carolina Reg'l Sewer Auth.*, 519 S.E.2d 561, 564-65 (S.C. 1999).

317. *Id.* The test approved in *J.K. Construction* required that: 1) the fee primarily benefits those paying it with a special benefit or service provided by the fee; 2) the fee's proceeds be dedicated solely to capital projects; 3) the fee revenue generated will not exceed the cost of the improvement; 4) uniform collection of the fee upon those subject to it; and 5) the government intended the fee to be a charge, not a tax. *Id.*

318. *Larson v. City of Sullivan*, 92 S.W.3d 128, 131-32 (Mo. Ct. App. 2003) (citing *Keller v. Marion County Ambulance Dist.* 820 S.W.2d 301, 304 (Mo. 1991)).

319. *Greater Franklin Developers Ass'n v. Town of Franklin*, 730 N.E.2d 900, 902-03 (Mass. App. Ct. 2000) (citing test from *Emerson College v. Boston*, 462 N.E.2d 1095, 1105 (Mass. 1984)); see also *Bolt v. City of Lansing*, 587 N.W.2d 264, 269 (Mich. 1998) (similar to *Emerson College* test).

320. *Compare Nollan v. Cal. Coastal Comm'n*, 483 U.S. 829, 837 (1987), with *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994).

321. 648 A.2d 482, 487 (N.J. Super. 1994).

conduct the study, which was adopted by its planning commission as part of the town's master plan.³²² Using this "exacting study," the court found that the causal nexus between the new development and the needed road improvements had been measured with precision as part of a "rigorous process designed to achieve a fair allocation of increased traffic costs."³²³ Holding the methodology and the computation of the fee up to an "arbitrary and capricious standard," the court approved the system supported with such a well developed basis.³²⁴

Other cases reflect approval of the use of outside transportation consultants and detailed modeling techniques, and some state impact fee statutes expressly require that the need for improvements "shall be based upon generally accepted traffic engineering practices."³²⁵ Oddly, in most cases there is little discussion of the methods used to design and assign other kinds of impact fees.³²⁶ Often they are the product of planning staff recommendations. When the impact fee program is well organized and carefully explained, some courts appear reluctant to get closely involved in second guessing technical judgments.³²⁷ For example, the Ohio Supreme Court had the opportunity to review the methodology for roadway improvements in *Home Builders Ass'n of Dayton and the Miami Valley v. City of Beavercreek* yet it chose to announce a rule limiting judicial reconsideration of the analytical methods.³²⁸ Perhaps wishing to avoid review of contested methodological choices, the Ohio court stated that it must only determine whether the chosen methodology is "reasonable based on the evidence presented."³²⁹ It then found such a decision to be factual in nature, thereby affirming the trial court's determination that the roadway assessment methodology was reasonable.³³⁰ The Utah Supreme Court refused to force elected officials to explain how they determined the "reasonableness" of impact fees after staff had disclosed the basis for calculations.³³¹

322. *Id.* at 484. The study recommended the establishment of a transportation improvement district in order to fund road improvements on a comprehensive basis. It also provided a formula for calculating each development's pro-rata share of the cost of the roads based on the number of trips generated by that new development each day.

323. *Id.* at 488.

324. *Id.*

325. See N. Ill. Home Builders Ass'n, Inc. v. County of DuPage, 649 N.E.2d 384, 391 (Ill. 1995) (discussing Road Improvement Impact Fee statute); Castle Homes & Dev., Inc. v. City of Brier, 882 P.2d 1172, 1173 (Wash. Ct. App. 1994).

326. Some cases just describe in narrative form this methodology perhaps as a way of demonstrating its non-arbitrary character. See, e.g., Homebuilders Ass'n of Metro. Portland v. Tualatin Hill Park & Recreation Dist., 62 P.3d 404, 412-13 (Or. Ct. App. 2003).

327. Krupp v. Breckenridge Sanitation Dist., 19 P.3d 687, 694-95 (Colo. 2001) (discussing while a municipal charge must be reasonably related to the overall cost of the service, mathematical exactitude is not required and the particular mode adopted to assess the fee is generally a matter of legislative discretion); Everett Sch. Dist. No. 2 v. Mastro, 1999 WL 674782, *6 (Wash. Ct. App. Aug. 30, 1999) (using averages for determining number of school children from apartments is acceptable under state statute).

328. 729 N.E.2d 349, 357-58 (Ohio 2000).

329. *Id.* at 357.

330. *Id.* at 352.

331. Home Builders Ass'n v. City of N. Logan, 983 P.2d 561, 564 (Utah 1999).

A significant number of cases discuss procedural issues related to the adoption and operation of an impact fees as well as to litigation challenging such a program.³³² These cases reflect the fact that these fees are regularly being charged throughout the United States and numerous operational and legal questions arise.³³³ The range of issues that have been litigated relate to filing challenges to the setting of fees,³³⁴ the establishment of vested rights to be exempt from new impact fees,³³⁵ application of impact fees to a project after receiving preliminary plat approval,³³⁶ burden of proof that adopted school impact fees do not exceed the cost of the facility to be built,³³⁷ waiver of right to challenge calculation of impact fees,³³⁸ determining whether state land use vesting statute applies to transportation impact fees after preliminary plat approval,³³⁹ waiver of right to appeal school impact fees "agreed to" by failing to exhaust administrative remedies,³⁴⁰ statute of limitations for state law,³⁴¹ section 1983 claims,³⁴² whether city council members can rely on staff expertise for the calculation of impact fees³⁴³ and are not required to do the basic fact gathering and analysis in setting impact fees,³⁴⁴ standing rules for challenging validity of impact fee ordinance and seeking refund of fees already paid,³⁴⁵ eligibility for refund of unlawful,³⁴⁶ rescinded³⁴⁷ impact fees, application of service fees to government land³⁴⁸ and homeowner's recovery of impact fees that have been paid by a developer.³⁴⁹ Civil procedure and impact fee statutes do not anticipate all of these practical and

332. See, e.g., *Util. Cost Mgm't v. Indian Wells Valley Water Dist.*, 36 P.3d 2, 4 (Cal. 2001).

333. *KMSC, LLC v. County of Ada*, 67 P.3d 56, 63 (Idaho 2003).

334. *Util. Cost Mgmt.*, 36 P.3d at 4 (showing statute of limitations for filing challenge to new water service fee).

335. *MBL Assocs. v. City of S. Burlington*, 776 A.2d 432, 433, 436 (Vt. 2001); *Bohemia Mill Pond v. New Castle County Planning Bd.*, No. 01A-03-007 HLA, 2001 WL 1221685, at *12 (Del. Super. Ct. Oct. 1, 2001).

336. *Pavlina v. City of Vancouver*, 94 P.3d 366, 367 (Wash. Ct. App. 2004).

337. *Gomes v. Ukiah Unified Sch. Dist.*, No. 4104744, 2004 WL 2092022, at *1 (Cal. Ct. App. Sept. 20, 2004).

338. *KMST, LLC.*, 67 P.3d at 63.

339. *New Castle Invs. v. City of LaCenter*, 989 P.2d 569, 570 (Wash. Ct. App. 1999).

340. *W. Coast, Inc. v. Snohomish County*, 16 P.3d 30, 33-34 (Wash. Ct. App. 2000).

341. *Burke v. Town of Schererville*, 739 N.E.2d 1086, 1093 (Ind. Ct. App. 2000); *L.A. Dev. v. City of Sherwood*, 977 P.2d 392, 394-95 (Or. Ct. App. 1999).

342. *Paul v. City of Woonsocket*, 745 A.2d 169, 171 (R.I. 2000).

343. *Home Builders Ass'n v. City of N. Logan*, 983 P.2d 561, 564 (Utah 1999).

344. *Home Builders Ass'n v. City of Am. Fork*, 973 P.2d 425, 431 (Utah 1999).

345. *Raintree Homes, Inc. v. Vill. of Long Grove*, 807 N.E.2d 439, 447-48 (Ill. 2004); *Bldg. Indus. Ass'n of Lancaster County v. Manheim Twp.*, 710 A.2d 141, 144 (Pa. Commw. Ct. 1998); *Metro. Builders Ass'n of Greater Milwaukee v. Town of Pewaukee*, 524 N.W.2d 648 (Wis. Ct. App. 1994).

346. *Imperial Gardens, Inc. v. Town of Walkkill*, 644 N.Y.S.2d 528, 530 (N.Y. App. Div. 1996).

347. *Cardillo v. Fla. Keys Aqueduct Auth.*, 654 So. 2d 1062, 1063 (Fla. Dist. Ct. App. 1995).

348. *Bd. of Educ. v. Sandy City Corp.*, 94 P.3d 234, 239-40 (Utah 2004).

349. *City of Billings v. State*, 891 P.2d 1149, 1150 (Mont. 1995); *Michaud v. City of Woonsocket*, 657 A.2d 1072 (R.I. 1995).

consequential questions, thereby making it highly likely that similar cases will be filed and decided in the future.

d. Adoption of *Nollan/Dolan* Principles

Probably the most interesting questions to be answered from a review of post-*Dolan* state court litigation are: 1) how has the federal constitutional law of *Nollan* and *Dolan* been incorporated by state courts; and 2) how does the state rational nexus test actually work in practice? These questions lie at the heart of the analysis of impact fee law since they ask fundamental questions concerning the level of “connectedness” between new development and specific capital facilities costs. They present the crucial inquiry of determining in what circumstances the individual can be treated separately from the community. In reverse, impact fee policy actually reflects the degree to which a community collectively assumes the financial responsibilities for building public infrastructure.

i. Consideration of *Nollan and Dolan* Decisions

In the *Nollan* and *Dolan* opinions, the Supreme Court took aim at the growing practice of conditional land use regulation requiring the land developer to transfer property interests to the government as a requirement for obtaining project approval.³⁵⁰ In the *Nollan* case, the Court confronted what it considered an egregious misuse of public power, which transformed normally legitimate police power exercises into extortionate demands from a government unit that would use its regulatory authority in place of compensation.³⁵¹ To remedy the perceived problem of regulatory leveraging, the *Nollan* Court ruled that an “essential nexus” must be established between a permit condition and the public reason for the condition.³⁵² Also, the decision eschewed judicial deference to these kinds of land use decisions.³⁵³ Henceforth, courts would be required to closely and carefully examine the government regulation to determine if it “substantially” advanced a legitimate government interest.³⁵⁴ Burdens of proof would be shifted as well.³⁵⁵ In the field of conditional land use control which demands that the applicant contribute property interests to the public, *Nollan* appeared to call for a “heightened scrutiny” into the relationship between regulatory means and ends—a more rigorous test into real motives for regulating.³⁵⁶ This case directed reviewing courts to

350. *Nollan v. Ca. Coastal Comm’n*, 483 U.S. 829, 827 (1987); *Dolan v. City of Tigard*, 512 U.S. 374, 386 (1994).

351. *Nollan*, 483 U.S. at 836-37.

352. *Id.* at 837.

353. *Id.* at 838.

354. *Id.* at 836 n.3.

355. *Dolan*, 512 U.S. at 391 n.8.

356. *Id.* at 836 n.3 (“substantially advance[s] ‘legitimate state interests.’”). Justice Brennan did not agree with the Fifth Amendment-based heightened scrutiny view expressed in footnote 3 and thought that a “minimum rationality” principle of substantive due process analysis was both traditional and the superior approach. Just how high the level of scrutiny and when it must be applied has remained a topic of scholarly speculation. See Jonathan M.

view land use exaction cases more critically and to question superficial justifications.

Dolan took this matter one step further by delving into the degree of the "essential nexus," which Justice Rehnquist defined as "rough proportionality," as being necessary to validate a land exaction.³⁵⁷ Once again, the Supreme Court was concerned with abusive practices being undertaken in the name of public improvement and a distorted use of the local government's police power.³⁵⁸ Importantly, the Court placed the burden of proving this level of connection on the regulating government by way of "some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development."³⁵⁹ This procedural element emphasized the Court's belief that governments needed to explicitly justify their regulatory demands—especially when a land exaction was involved.³⁶⁰

Following the *Dolan* decision in 1994, state courts were confronted with litigation testing the federal constitutionality of impact fees.³⁶¹ One of the first questions that they confronted was the determination of the full reach or extent of the Supreme Court's ruling.³⁶² This decision possessed great potential to reorganize local government practices. Major interpretive questions loomed. Was the *Dolan* case to be considered a broadly sweeping opinion dealing with all kinds of development exactions or did it have a narrow focus extending only to the easement exaction demanded under the specific facts of the case? The state courts addressed this fundamental question in several ways. Several decisions focused on the character of the property being exacted and determined that *Dolan's* demands only applied to forced dedications of land, considering these to be the equivalent of literal government occupation.³⁶³ These courts read the case in the narrowest way possible, intending to limit its effect to nearly identical fact patterns.³⁶⁴ The Kansas Supreme Court took this position in *McCarthy v. City of Leawood* where it summarily concluded that there was nothing in *Dolan* suggesting that its rule would apply to conditional regulation based on payment of money.³⁶⁵ The Maryland Court of Appeals reached the same result with little discussion of

Block, *Limiting the Use of Heightened Scrutiny to Land-Use Exactions*, 71 N.Y.U. L. REV. 1021, 1044 n.154 (1996).

357. 512 U.S. at 386, 391. The Court considered this to be the "outer limits" of what the local government could achieve through the use of regulatory land use control devices.

358. *Id.* at 385.

359. *Id.* at 395.

360. *Id.* at 391.

361. *See, e.g.*, *McCarthy v. City of Leawood*, 894 P.2d 836, 844 (Kan. 1995); *Waters Landing Ltd. P'ship v. Montgomery County*, 650 A.2d 712, 713 (Md. 1994).

362. *See Krupp v. Breckenridge Sanitation Dist.*, 19 P.3d 687, 698 (Colo. 2001); *McCarthy*, 894 P.2d at 845.

363. *See McCarthy*, 894 P.2d at 845.

364. *See Waters Landing Ltd. P'ship*, 650 A.2d at 724.

365. 894 P.2d 836, 845 (Kan. 1995) ("The landowners cite no authority for the critical leap which must be made from a fee to a taking of property.").

the significance of the difference between land and money.³⁶⁶

Other courts took the position that broadly applicable development fees would be subject “to a lesser standard of judicial scrutiny” than required by *Nollan* and *Dolan* because they believed fees to be less objectionable.³⁶⁷ Finally, in 1999 the Supreme Court decided *City of Monterey v. Del Monte Dunes, Ltd.*,³⁶⁸ and the reach of the *Dolan* requirements received some clarification. In addressing the question of whether *Dolan*’s “rough proportionality” test should be applied to evaluate the constitutionality of a regulatory denial, the Court said, “we have not extended the rough-proportionality test of *Dolan* beyond the special context of exactions—*land-use decisions conditioning approval of development on the dedication of property to public use*”(emphasis added).³⁶⁹ This reference from *Del Monte Dunes* would suggest that the *Dolan* rules only apply to exactions requiring the actual dedication of land. Some state courts have cautiously read this to partially limit the scope of *Dolan* to the cash exaction context.³⁷⁰ However, this question is as much a matter of debate as it is a legal fact.³⁷¹

Although the cash/land dichotomy has had a modest effect in restricting the impact of *Dolan*’s constitutional directive, another aspect of the case has been more important and limiting. When viewed as a case evaluating the legality of an individually-designed and negotiated development condition, *Dolan* can be seen as an attempt to harness constitutional law to stop local governments from exercising monopoly control power over development approval when the applicant must “contribute” property or money to the regulator.³⁷² Under this approach, *Dolan*’s procedural and substantive requirements were aimed at restraining extortionate governmental deal making when government could impose its will in individual, ad hoc transactions occurring in low visibility situations. Under this view, restraining the excessive and unchecked exercise of government power was the policy core of the ruling.

One case to characterize *Dolan* in this fashion was the Supreme Court of California’s 1996 decision in *Ehrlich v. City of Culver City*.³⁷³ In *Ehr-*

366. *Waters Landing Ltd. P’ship*, 650 A.2d at 724. The Maryland high court ruled that, “In contrast [to *Dolan*], . . . [the county] imposed the development impact tax by legislative enactment. . . and furthermore, the tax does not require landowners to deed portions of their property to the County.” *Id.*

367. *Home Builders Ass’n of Cen. Ariz. v. City of Scottsdale*, 930 P.2d 993, 1000 (Ariz. 1997) (stating that fees are “a considerably more benign form of regulation”); *Loyola Marymount Univ. v. Los Angeles Unified Sch. Dist.*, 53 Cal. Rptr. 2d 424, 434 (Cal. Ct. App. 1996).

368. 526 U.S. 687 (1999).

369. *Id.* at 702 (emphasis added).

370. *Krupp v. Breckenridge Sanitation Dist.*, 19 P.3d 687, 698 (Colo. 2001).

371. See JUERGENSMEYER & ROBERTS, *supra* note 50, at 368 (noting four schools of thought among commentators). A number of states treat land and money exactions in the same way. See, e.g., *Town of Flower Mound v. Stafford Estates Ltd. P’ship*, 135 S.W.3d 620, 633 (Tex. 2004); *Benchmark Land Co. v. City of Battle Ground*, 14 P.3d 172, 173, 175 (Wash. Ct. App. 2000).

372. See *Ehrlich v. City of Culver City*, 911 P.2d 429, 439 (Cal. 1996).

373. *Id.* at 439.

lich, the owner of a private tennis club closed the club and applied for a rezoning of his site that would accommodate condominiums.³⁷⁴ The city granted a development permit on condition that the owner pay a "recreation fee" to mitigate the loss of the tennis facility and also pay a fee to install art in public places.³⁷⁵ The California court rejected the idea that the *Nolan/Dolan* rules were only to apply to land exactions since the harm from regulatory leveraging would occur with cash payments as well.³⁷⁶ *Ehrlich* typified this situation as one in which a locality can impose "land use conditions in individual cases, authorized by a permit scheme, which by its nature allows for both the discretionary deployment of the police power and an enhanced potential for its abuse."³⁷⁷ The upshot of the *Ehrlich* decision was that if a monetary charge were to be classified as *ad hoc* or discretionary, it would be subject to the searching constitutional review required by *Dolan* while uniform, legislatively mandated fees would only be evaluated by a weaker "reasonable relationship" test.³⁷⁸ Later California cases³⁷⁹ have followed this position as have a number of decisions from several other states.³⁸⁰

A clear pattern in the case decisions following *Dolan* has been that legislatively designed impact fees will not be subjected to the rigors of the United States Supreme Court's heightened scrutiny regime.³⁸¹ Usually expressed in a comparative form with adjudicatory fees, the legislatively imposed, standardized fee is marked by an absence of administrative discretion in its application or computation.³⁸² The Oregon appeals court has defined it as "a generally applicable development fee imposed on a broad range of specific, legislatively determined subcategories of property through a scheme that leaves no meaningful discretion either in the imposition or in the calculation of the fee."³⁸³ The basic assumption underlying this preference for legislative programs is that such efforts will achieve significant public purposes in a uniform way and will distribute development costs in an open and fair fashion.³⁸⁴ Individual, one-sided

374. *Id.* at 433-34.

375. *Id.* at 435 (stating that the recreation fee was \$280,000 and the art fee was \$33,200).

376. *Id.*

377. *Id.* at 439.

378. *Id.* at 441-42.

379. *San Remo Hotel L.P. v. City & County of San Francisco*, 41 P.3d 87, 105-07 (Cal. 2002) (applying only reasonable relationship analysis because the fee was applied through a generally applicable legislation and no *Dolan* heightened scrutiny); *Krupp v. Breckenridge Sanitation Dist.*, 19 P.3d 687, 692 (Colo. 2001) (holding that mandatory plant investment fee imposed by sanitary district was "legislatively established" and not subject to *Nollan/Dolan*); *Home Builders Ass'n of N. California v. City of Napa*, 108 Cal. Rptr. 2s 60 (Cal. Ct. App. 2001).

380. *See, e.g., Waters Landing Ltd. P'ship*, 650 A.2d at 723.

381. *See Home Builders Ass'n of Metro. Portland v. Tualarin Hills Park & Recreation Dist.*, 62 P.3d 404, 409 (Or. Ct. App. 2003).

382. *Id.*

383. *Id.* (citing *Rogers Mach., Inc. v. Wash. County*, 45 P.3d 966, 983 (Or. Ct. App. 2002)).

384. Juergensmeyer and Roberts explain this phenomenon in the following terms: Where a dedication requirement is a part of legislation generally applicable to all development, courts are reluctant to review the condition with de-

“negotiation” would not be involved.

Perhaps this view is aspirational or naïve, but it is widely held by state courts.³⁸⁵ This formula for avoiding federal constitutional law mandates has been repeated by state courts in all parts of the nation including Arizona,³⁸⁶ Colorado,³⁸⁷ Minnesota,³⁸⁸ Maryland, and California.³⁸⁹ The conclusion that may be drawn from this analysis is that the classification of an impact fee as either legislative or adjudicative is highly significant. This categorization will determine the nature of the constitutional analysis that a court will perform upon judicial review. Adjudicative or discretionarily imposed fees will be subjected to the full rigor of *Nollan/Dolan* analysis while legislative or non-discretionary fees will undergo state constitutional review usually under a form of rational nexus evaluation. As Professor Mandelker correctly notes, courts have upheld impact fees under both kinds of review.³⁹⁰

ii. *Judicial Review of Impact Fees under State Constitutional Principles*

With most local governments adopting legislative impact fee policies or being able to conduct negotiated exaction programs without incurring the challenge of litigation, the number of cases analyzing such fees under federal constitutional principles is surprisingly small. During the ten years under review, however, there have been a slightly larger category of judicial decisions arising under state law principles of fairness defined by impact fee statutes or state constitutional doctrines. Increasingly, the impact fee statutes incorporate rational nexus tests for impact fee regimes that have the effect of codifying state constitutional norms making the statute the central focus of court’s analysis.³⁹¹ Also, reviewing courts appear to be satisfied with the legislature’s work.³⁹² In no case reviewed has a state court held that a state impact fee statute violates the state

manding scrutiny. If, for example, all residential development must convey an easement of five feet for sidewalk use or if all commercial property must pay a set transportation fee per square foot of development, the public can debate the propriety of the charge and the legislative process may be assumed to protect persons from unfairness.

JUERGENSMEYER & ROBERTS, *supra* note 50, at 409. Not surprisingly, some landowners complain about the unfairness of uniform, legislatively determined impact fees, and they demand an “individualized assessment.” See, e.g., *Twin Lakes Dev. Corp. v. Town of Monroe*, 801 N.E.2d 821, 824 (N.Y. 2003) (unsuccessful demand).

385. See *Krupp v. Breckenridge Sanitation Dist.*, 19 P.3d 687, 692 (Colo. 2001); *Homebuilders Ass’n of Metro. Portland*, 62 P.3d at 999-1000; .

386. *Home Builders Ass’n of Cen. Ariz. v. City of Scottsdale*, 930 P.2d 993, 999-1000 (Ariz. 1997).

387. *Krupp*, 19 P.3d at 692 (imposing mandatory plant investment fee by sanitary district was “legislatively established” and not subject to *Nollan/Dolan*).

388. *Arcadia Dev. Corp. v. City of Bloomington*, 552 N.W.2d 281, 286 (Minn. Ct. App. 1996).

389. *Ehrlich v. City of Culver City*, 911 P.2d 429, 439 (Cal. 1996).

390. DANIEL R. MANDELKER, *LAND USE LAW* 9-26 (5th ed. 2003).

391. *Home Builders Ass’n of Cen. Ariz.*, 930 P.2d at 999 (applying reasonable relationship test of *Dolan* already codified into Arizona statute).

392. See *id.* at 999-1000; *Krupp*, 19 P.2d at 692.

constitutional requirements. In addition, very few decisions have struck down impact fees for constitutional, or any other, reasons.³⁹³

Although the states express the rational nexus or dual rational nexus test in differing terms, it generally can be described with two statements: 1) the impact fee cannot exceed government capital costs which are reasonably related or attributable to the new building; and 2) the developer paying impact fees must receive a benefit from the infrastructure.³⁹⁴ Most cases analyzing this test focus on the first element.³⁹⁵ Some cases give only the most superficial look to the question of cause and effect proportionality accepting only the most rudimentary justifications.³⁹⁶ Others are tolerant of perceived good-faith efforts to respond to serious growth-induced deficiencies in public facilities even with little established connection to a particular parcel of land.³⁹⁷ A number of courts just appear to give the localities the benefit of the doubt in matters of impact fee program design, accepting the government's explanations even if they have modestly disparate impacts.³⁹⁸

In California, the supreme court chose not to apply its "heightened scrutiny" review first announced in its 1996 *Ehrlich* case but rather a considerably weaker "reasonable relationship" inquiry to uphold a low and moderate income housing linkage program enacted by San Francisco ordinance.³⁹⁹ The justification for this deferential form of review was the complete lack of discretion built into the ordinance.⁴⁰⁰ One curious side effect of attempts to avoid the rigors of *Nollan/Dolan* review appears to

393. See, e.g., *Volusia Cty v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 137 (Fla. 2000) (holding school impact fee unconstitutional as applied to age restricted mobile home park community with binding restrictive covenants); *Town of Flower Mound v. Stafford Estates Ltd. P'hip*, 135 S.W.3d 620, 645 (Tex. 2004) (striking requirement to pay for street improvement not related to new development); *City of Olympia v. Drebeck*, 83 P.3d 443, 444 (Wash. Ct. App. 2004) (striking and remanding traffic impact fee for recalculation so as to be "reasonably related" to project impact); *Vintage Constr. Co. v. City of Bothell*, 922 P.2d 828, 829 (Wash. Ct. App. 1996) (striking park in lieu of fee struck due to no individualized consideration). With an annual, national average of ten state case decisions raising any possible impact fee issue, the volume of litigation is extremely small considering the prevalence of impact fee practice.

394. See *SOLD, Inc. v. Town of Gorham*, No. Civ.A. CV-02-362, 2003 WL 22250339, at *11-12 (Me. Super. Ct. Sept. 26, 2003); *Twin Lakes Dev. Corp. v. Town of Monroe*, 801 N.E. 2d 821, 825 (N.Y. 2003).

395. See *SOLD, Inc.*, 2003 WL 22250339, at *11-12.

396. *Id.*

397. *Twin Lakes Dev. Corp.*, 801 N.E.2d at 825 (exhibiting extremely undemanding review while supposedly applying *Nollan/Dolan* criteria).

398. *Krupp v. Breckenridge Sanitation Dist.*, 19 P.3d 687, 695 (Colo. 2001) (holding that reasonable relationship test was satisfied when impact fees for triplex were 80% higher than the fee for the duplex); *Wellington River Hollow, LLC v. King County*, 54 P.3d 213, 219-20 (Wash. Ct. App. 2002) (using county-wide averages from four of ten districts upheld); *Cherokee County v. Greater Atlanta Homebuilders Ass'n*, 566 S.E.2d 470, 474 (Ga. Ct. App. 2002) (holding that the limited fee area/border benefited area); .

399. *San Remo Hotel L.P. v. City & County of San Francisco*, 41 P.3d 87, 105-07 (Cal. 2002) (applying only reasonable relationship analysis because the fee was applied through a generally applicable legislation and no *Dolan* heightened scrutiny); *Loyola Marymount Univ. v. Los Angeles Unified Sch. Dist.*, 53 Cal. Rptr. 2d 424 (Cal. Ct. App. 1996) (holding that development fees were not subject to *Dolan* heightened scrutiny).

400. *Id.* at 104-05.

be a movement toward less flexible, context-considering regulatory programs.

Some state supreme courts approach the subject of evaluating impact fee programs in a methodical way. In the *City of Beavercreek* case, the Ohio Supreme Court established a rule of decision and then applied it to review a roadway improvement impact fee ordinance.⁴⁰¹ Not surprisingly, the court selected the dual rational nexus test approved by the United States Supreme Court in *Dolan*.⁴⁰² Sounding like a referee standing between two boxers, the court explained that the appropriate test should be one that “balances the interests of the city and developers . . . without unduly restricting local government.”⁴⁰³ It defined the task of judicial review as determining whether a “reasonable relationship” existed to justify each of the two elements.⁴⁰⁴ The role for judicial review was described as making factual findings about the two factors at issue.⁴⁰⁵ In rendering its own judgment, the Ohio Supreme Court relied to a great extent on evaluation of the evidence made at the trial court level and did not conduct its own appraisal of the information considered below.⁴⁰⁶ In *Beavercreek*, the “reasonable relationship” test resulted in rather deferential appellate review.⁴⁰⁷

Other state courts—such as Florida’s—have more experience with applying the dual rational nexus review. A recent decision of the Florida Supreme Court demonstrates the effect of the two-prong test in a situation where the local government does not provide a particularly strong justification for a school impact fee.⁴⁰⁸ In *Volusia City v. Aberdeen at Ormond Beach L.P.*, the developer paid a fee of approximately \$1,000 per lot for a new mobile home park that was to be lawfully age restricted, thereby prohibiting children.⁴⁰⁹ The court struck down the school fee, finding that it failed both parts of the rational nexus test: the mobile homes would not produce any children to be educated, and their owners would not receive any direct benefit from paying the fee.⁴¹⁰ The city’s justifications for the application of impact fees seemed particularly weak in comparison to the complete failure of each mobile home unit to generate children in need of education.⁴¹¹ Other states with long experience in

401. Home Builders Ass’n of Dayton & the Miami Valley v. City of Beavercreek, 729 N.E.2d 349, 397 (Ohio 2000).

402. *Id.* at 356.

403. *Id.* at 355.

404. *Id.* at 357.

405. *Id.*

406. *Id.* at 356-58.

407. *Id.* at 357-58.

408. *Volusia County v. Aberdeen at Ormond Beach L.P.*, 760 So. 2d 126, 130 (Fla. 2000).

409. *Id.* at 136.

410. *Id.*

411. The twin reasons given by the city were: Aberdeen benefits from school construction since they can serve as emergency shelters and they may serve as sites for adult education. *Id.* The more tangential benefits of supporting high-quality education in a community was not seriously considered either by the city or the court.

considering impact fees use earlier case decisions as a referential guide for new litigation.⁴¹²

In summary, the state courts have become comfortable with the application of their own impact fee enabling statutes and state constitutional provisions to render decisions in challenges to land development fees. Slowly, they are developing a jurisprudence that focuses inward on state law and policy. The impact of the *Nollan/Dolan* case line appears to have been confined to an extremely narrow set of circumstances—adjudicated or individually-negotiated impact fees—and these cases do not commonly occur. In addition, there is essentially no successful state litigation pushing for heightened scrutiny or upgraded impact fee procedures. The rhetoric of *Nollan* and *Dolan* suggesting rigorous judicial review under exacting constitutional standards has failed to materialize. The states have dominated this area of public policy, and they appear to be satisfied with the responsibility.

CONCLUSION

All evidence points to the rapid spread of land development impact fees throughout the nation making it a prevalent means of funding new growth. As local governments become pressed to provide an ever-increasing list of costly services to their citizens while at the same finding their financial resources to be squeezed, impact fees will continue to be an attractive supplement for much-needed revenue. Systemwide infrastructure needs are capital intensive, and they are continually expanding. Residents now urge their elected officials to adopt impact fees when the locality has not yet done so. Without having to face the opposition of future residents who do not currently live or vote in the locality, these officials find impact fees an irresistible policy option. With continuing political support, local governments are likely to continue funding their capital expansion with impact fees, and they will attempt to expand these targeted charges to a growing list of municipal services. Contrary to the complaint of opponents, the twin forces of economic need and political reality make impact fees likely to be a fixed element of modern land development landscape in the future.

American political culture has gradually changed, making the privatizing of previously public expenditures acceptable to the majority of suburban residents. This shift, which makes mandatory private funding a substitute for public expenditure, further limits public or community responsibilities to citizens and eliminates the implicit public subsidy that has previously been given to less expensive housing. The privatization movement represents an important transition, raising profound questions about the nature of the social duty of local governments. It also raises

412. *Home Builders Ass'n v. City of Am. Fork*, 973 P.2d 425, 427 (Utah 1999) (mentioning *Banberry* factors); *Home Builders Ass'n v. City of N. Logan*, 983 P.2d 561, 562 (Utah 1999) (referencing to procedural and substantive guidelines established in *Banberry Dev. Corp. v. S. Jordan City*, 631 P.2d 899, 903-04 (Utah 1981)).

questions concerning social and economic exclusion from suburban America. As the impact fee practice expands, state and local government must carefully consider the economic and social impacts related to it. States must closely monitor the conduct of their localities and develop accurate research data evaluating the ramifications of this significant local government policy. Having solid baseline data as well as impact analysis would seem indispensable to any policy evaluation. Furthermore, legislatures must fine-tune impact fee use to ensure that it is fair in its application and that it properly accomplishes state-wide housing and other development goals. All-in-all, states must be more active participants in establishing growth policies so that a broad range of values will be recognized when important local policies are adopted.

What role exists for the United States Supreme Court in this policy area? The Court has expressed its concern that local government exaction practices will run afoul of developing constitutional Fifth Amendment values. Through the *Nollan*, *Dolan*, and other Takings Clause decisions, it has enunciated a strong legal policy against extortionate regulatory demands in the name of land use control. These decisions have espoused a view that regulation should not “go too far” so as to destroy property utility and value and that regulatory conditions not impose cost burdens that should not be imposed on the individual owner. These are laudable policy goals in the abstract. However, they have little usefulness or relevance in designing sophisticated growth policy. In the end, the Supreme Court has not really “led” the state and local governments to new standards of constitutional behavior, but rather it has used elevated rhetoric to reign in particularly oppressive municipal behavior. The states have dominated the development of programmatic rules and constitutional norms in the area of land use impact fees, and this pattern will likely continue. Time will tell whether the United States Supreme Court will attempt to “reconstitutionalize” this debate.

