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# CONSCRIPTING PRIVATE RESOURCES TO MEET URBAN NEEDS: THE STATUTORY AND CONSTITUTIONAL VALIDITY OF AFFORDABLE HOUSING IMPACT FEES IN NEW YORK

## I. Introduction

Urban local governments face greater financial strain today than perhaps at any other time in American history.[1] Demographic changes in American cities, particularly those in the industrial Northeast and Midwest, have placed municipal governments in a financial dilemma where demand for government economic and social assistance has expanded dramatically while municipal revenue bases have contracted.[2] This situation has been compounded by the accelerating decay of urban infrastructure. Many of the infrastructural assets so vital to cities, such as bridges, water mains, and highways, were built in the early twentieth century.[3] In recent years, an alarming number of these facilities have deteriorated to the point where emergency repairs or replacement is necessary.[4] In short, many American cities were in need of social and physical rebuilding by the end of the 1980's.

Sources of municipal revenue have not kept pace with the need for expenditure, however. Today's city governments draw from a revenue base which has contracted sharply over the past twenty years. The urban middle class, which provided urban governments with a strong and reliable tax base, fled the inner city beginning in the 1960's.[5] In their place came a population of significantly lower socioeconomic status[6] whose incomes proved to be a less lucrative source of revenue. Widespread property abandonment and tax avoidance resulted in a tremendous number of municipal property foreclosures,[7]

1. Shari Rudavsky, *Financially Strapped Cities Seek Help*, WASH. POST, July 9, 1992, at A21.

2. JAMES HEILBRUN, URBAN ECONOMICS AND PUBLIC POLICY 443 (1987).

3. Pete Bowles, *NYC: A Subject for Mr. Fix-Its*, N.Y. NEWSDAY, Sept. 15, 1992, at 26.

4. *Id.*; *see also* JEFFERY R. HENIG, PUBLIC POLICY & FEDERALISM 134 (1985).

5. *See* HEILBRUN, *supra* note 2, at 443; PETER O. MULLER, CONTEMPORARY SUBURBAN AMERICA 55 (1981).

6. *See* Michael Abromowitz, *The Urban Boom: Who Benefits? Building Frenzy's Failure to Help Cities' Poor Core Puts Some Economic Assumptions in Doubt*, WASH. POST, May 10, 1992, at H1. Between 1980 and 1990, the percentage of central city residents living beneath the poverty line increased from 16.5 to 18.7 percent.

7. During the 1970's, New York City alone took ownership of over 100,000 housing units as a result of abandonment and tax foreclosure. The numbers are rising again —

leaving cities owning thousands of the properties that had once provided so much in property tax revenue. When cities turned to corporate incomes to raise needed revenue, frequently they found long-established corporations ready to relocate to suburban or sunbelt locations on short notice.[8]

This shrinking tax base had an adverse impact on municipalities' other primary source of revenue — debt financing. In the wake of municipal financial disasters such as New York City's near-default in 1975 and Bridgeport, Connecticut's total bankruptcy in 1991, investors have cast a skeptical eye on municipal bonds as a prudent and attractive investment. In recent years, several cities have had their municipal bond ratings downgraded.[9] Philadelphia, the nation's fifth-largest city, inspires such a low level of investor confidence that it has come to be called the "junk bond town."[10] Given this depressed level of investor support, cities have experienced far greater difficulty raising funds through bond issues, and lower ratings have forced them to pay higher interest rates for the bonds they do manage to sell.[11]

Finally, cities' fiscal situations have been exacerbated by political and intergovernmental factors. Beginning in 1981, the Reagan Administration's "New Federalism" approach to federal funding changed the relationship which had existed between cities and federal government since the 1960's. Under President Lyndon Johnson's Great Society programs, federal urban programs provided for direct transfers between the federal and local governments. The "New Federalism" approach, however, sought to increase states' participation in these programs. Direct federal payments to cities were therefore reduced significantly,[12] as a greater percentage of federal aid was dis-

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the city took foreclosure action against twice as many properties in the first half of 1990 as in all of 1989. *See* John Gilbert, *This Property is Abandoned*, N.Y. NEWSDAY, Jan. 8, 1991, at 40.

8. Susan Sachs, *Tax Incentives Are Urged to Keep Companies Here*, N.Y. NEWSDAY, June 16, 1990, at 43.

9. New York City's bonds were downgraded by Moody's Rating Service on February 11, 1991. Jennifer Preston, *Moody's Downgrades City Bonds*, N.Y. NEWSDAY, Feb. 12, 1991, at 7. Washington, D.C. had its bond rating lowered in May, 1990. Michael Abromowitz, *Rating of D.C. Bonds Reduced; City Faces Higher Costs for Projects*, WASH. POST, May 4, 1990, at C1.

10. Michael Specter, *Philadelphia's Story is a Fiscal Cliffhanger; Fifth Largest City on Brink of Bankruptcy*, WASH. POST, Aug. 26, 1990, at A3.

11. *See supra* note 9.

12. In 1980, the federal government provided $47 billion in direct transfers to local governments. Ten years later, this number had fallen to $19.8 billion. Abromowitz, *supra* note 6. In particular, federal housing aid was cut 75% between fiscal years 1981 and 1989. Becky Sherblum, *Affordable Housing and Local Governments*, *in* THE MUNICIPAL YEAR BOOK 39 (Int'l City Mgmt. Assoc. 1991).

tributed in the form of "block grants" to the states, which in turn distributed the funds to local governments.[13] As a result of the declining level of political influence enjoyed by cities (due to a relative loss in population compared with suburban areas) and general unwillingness of suburban voters to support subsidies and other programs designed to aid the cities they fled,[14] cities found it difficult to compensate for their declining sources of revenue.[15]

Faced with these fiscal realities, urban governments have sought innovative new ways of shifting a portion of their financial burdens to private actors. One recent method of burden-shifting involves the use of impact fees and linkage. Impact fees and linkage represent a uniquely urban adaptation of the exaction and dedication requirements that have long been used by suburban governments to shift certain burdens of development to residential subdivision developers. Through impact fee and linkage requirements, cities such as San Francisco, Sacramento, and Boston have forced private developers to share the cost of mitigating the potential impacts of their developments on transportation, infrastructure, and affordable housing by conditioning development permits on developers' payment of fees to help fund these government services.[16] Not surprisingly, developers frequently have sought to challenge these fee requirements in court.

New York City faces the stiff challenges described above. Throughout 1990 and 1991, New York confronted what has been described as its most difficult financial situation since the 1975 fiscal crisis.[17] The City's 1993-94 budget also included a significant budget deficit, requiring cutbacks in many areas.[18] These recent financial difficulties have endangered one of the largest undertakings by a city government in recent years — New York City's ten-year, $5.2 billion plan to increase and preserve, through new construction and rehabilitation, the city's stock of affordable housing.[19] While New York City

13. *See* ANN O'M. BOWMAN & RICHARD C. KEARNEY, THE RESURGENCE OF THE STATES 6-8 (1986).

14. *See* HENIG, *supra* note 4, at 19.

15. *See supra* text accompanying notes 1-8.

16. *See generally* John J. Delaney et al., *The Needs-Nexus Analysis: A Unified Test for Validating Subdivision Exactions, Impact Fees, and Linkage*, 50 LAW & CONTEMP. PROBS. 139 (1987).

17. *See* Michael Specter, *N.Y. Budget Morass has City, State on Brink; Imminent Fiscal Crisis Fails to Force Consensus*, WASH. POST, May 18, 1991, at A3.

18. William Bunch, *They're Back: City's Fiscal Woes*, N.Y. NEWSDAY, June 14, 1993, at 12. The city has projected budget deficits of $1.69 billion for 1994, $2.24 billion for 1995, and $2.61 billion for 1996.

19. *See* Jennifer Preston, *Addition to Housing Plan Announced*, N.Y. NEWSDAY, May 5, 1988, at 30.

has not pursued a formal impact fee or linkage strategy as a means of assisting its housing programs, it has long used its political leverage informally to condition development plan approval on the developer's agreement to provide funds for municipal necessities. While this has at times been successful, the city's ad hoc burden-sharing schemes have largely been dominated by personalities, political bickering, and favoritism.[20] In light of these practices, a formal impact fee provision enacted by the New York City Council clearly would inject more uniformity and fairness into the city's burden-sharing practices.

This Note examines whether New York City could, consistent with its statutory powers and constitutional principles, enact an affordable housing impact fee ordinance. Part II of this Note provides a background discussion of the burden-sharing devices used by local governments to date. Part III examines the judicial standards that have been used to review these exaction requirements, focusing closely on the impact of recent New York caselaw and the United States Supreme Court's 1987 decision in *Nollan v. California Coastal Commission*.[21] Part IV discusses recent federal and state interpretations of *Nollan*, and will argue that New York City validly may enact an affordable housing impact fee ordinance. Part V concludes by encouraging the New York City Council to consider enacting such an ordinance. The appendix to this Note offers a model affordable housing linkage provision which should be able to survive judicial review on both statutory and constitutional grounds.

## II. An Overview of Municipal Burden-Sharing Devices

### A. Subdivision Exaction

Subdivision exaction (or dedication) requirements are the oldest type of municipal burden-sharing device, having been in use since the 1930's.[22] Exaction requirements condition plat[23] or subdivision ap-

20. The city was recently at odds with the state Metropolitan Transportation Authority (MTA) over an informal linkage scheme whereby developer Donald Trump, in order to receive approval of his expansive development proposal for the West Side of Manhattan, would have to provide money for the rehabilitation and expansion of the nearby 72nd Street IRT subway station. While the city has no jurisdiction over the station, it was a city official who held up the development plan's approval until the station rehabilitation was agreed to by Trump. The MTA, which is responsible for the station's management and maintenance, was not represented in the negotiations, and (unhappily) called the resulting deal "unbelievable." *See* David Henry, *Why is This Man Smiling? MTA: Sellout! Says Messinger Trumped Deal*, N.Y. NEWSDAY, Aug. 28, 1992, at 3.

21. 483 U.S. 825 (1987).

22. *See* Theodore Taub, *Exactions, Dedications, and Impact Fees*, C750 ALI-ABA 885 (1992).

23. "Plat" is defined as a "map of a specific land area such as a town, section or

proval on the developer's agreement to dedicate land to the municipality for the streets, sidewalks, and utilities necessitated by the new development.[24] Early dedication requirements involved the exaction of land on the development site.[25] Eventually, however, municipalities began to require dedications of off-site land for improvements such as schools and parks.[26] Today, municipalities frequently require subdivision developers to construct and dedicate the necessary facilities, rather than simply dedicate the land.[27]

### B. In-Lieu Payments

The traditional exaction requirement proved inappropriate for use in all situations. For example, development of a small subdivision might not have a large enough impact to justify exaction of an entire school, though it undoubtedly would have an impact on existing educational resources by adding to the development area's school age population. In-lieu payments emerged as a refinement of the traditional exaction requirement.[28] An in-lieu payment requires the subdivision developer to pay a fee that approximates the additional burden placed on municipal resources by the proposed development.[29] Using the preceding example, an in-lieu payment would work in the following manner: if a new subdivision were projected to bring fifty new students to a district, the municipality would require the developer to pay a fee equal to one-tenth of the cost of a new 500-seat school.[30] Money collected under in-lieu fee provisions must be placed in a fund earmarked specifically for the facilities.[31]

### C. Impact Fees and Linkage

The impact fee is similar to the in-lieu payment, but is designed to address a wider variety of needs. Impact fees are collected in the same manner as in-lieu fees, but are used to finance large scale capital projects such as sewage treatment plants, resource recovery facilities,

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subdivision showing the location and boundaries of individual parcels subdivided into lots." BLACK'S LAW DICTIONARY 1151 (6th ed. 1990).

24. *See, e.g.*, N.Y. GEN. CITY LAW § 33 (McKinney 1989); N.Y. TOWN LAW § 274 (McKinney 1987); CAL. GOV'T CODE § 66477 (West 1983 & Supp. 1987).

25. *See* Delaney, *supra* note 16, at 139.

26. *Id.* at 141.

27. *Id.*

28. *Id.* at 142.

29. *Id.*

30. The fee could also be used to expand or otherwise mitigate the development's impact on an existing school.

31. *See* Donald L. Connors & Michael E. High, *The Expanding Circle of Exactions: From Dedication to Linkage*, 50 LAW & CONTEMP. PROBS. 70, 71 (1987).

and water and public safety projects.[32]

Linkage represents an extension of the impact fee concept, and as such is the broadest and most powerful burden-shifting tool available to municipalities. Through linkage requirements, municipalities condition subdivision, plat, and site plan[33] approval on payment of a fee to finance social and subsidized development programs, such as low-income housing and job training.[34]

In addition to being used to finance a wider variety of projects, impact fees and linkage are distinguishable from traditional exaction requirements in that they are applied to *all* types of new development, not just subdivisions.[35] These two distinguishing factors make impact fees and linkage a much more powerful and flexible tool than traditional exaction requirements, and make them particularly useful to city (as opposed to suburban and rural) governments.

## III. Judicial Standards Used to Review Exaction and Impact Fee Requirements

Faced with onerous fee requirements designed to shift the burdens of municipal governance onto them, developers frequently have sought to challenge the validity of municipal exaction requirements. Legal challenges to exaction and impact fees traditionally have taken one of two forms. First, developers have sought to challenge exaction requirements on the ground that municipalities lacked the statutory authority to impose them. Second, exactions have been challenged as unconstitutional takings in violation of the Fifth and Fourteenth Amendments to the United States Constitution.[36]

Traditional exaction and in-lieu payment requirements have received deferential treatment from reviewing courts.[37] Impact fee and linkage requirements, however, have been scrutinized more carefully.[38] Courts have been hesitant to find that municipalities possess the statutory authority to impose impact fee and linkage requirements. Where the requisite statutory authority has been found to ex-

32. Delaney, *supra* note 16, at 142.

33. "Site plan" refers generally to a plat prepared for a single property. *See supra* note 23; *see also* N.Y. VILLAGE LAW § 7-725(1) (McKinney Supp. 1993).

34. Delaney, *supra* note 16, at 143.

35. *Id.*

36. Developers have also charged that exaction requirements violate state and federal due process and equal protection guarantees, and that they represent unauthorized taxes. These claims involve different concepts than the statutory authority and takings claims, and are beyond the scope of this Note.

37. *See* Delaney, *supra* note 16, at 141; Ayres v. City Council, 207 P.2d 1 (Cal. 1949).

38. *See* Delaney, *supra* note 16, at 141.

ist, courts have also engaged in probing inquiries as to the constitutionality of the impact fee provision in light of the often attenuated relationship between the purpose underlying the fee and the development approval, which is conditioned upon payment of the fee.

### A. Statutory Authority

Local governments, unlike the federal government[39] and the states,[40] have no independent authority. Any power exercised by a municipal government must have been conferred upon it through express or implied grant from the state.[41] Consequently, municipalities must be authorized under a state constitution or statute to enact impact fee[42] requirements. As of August, 1992, however, only nineteen states specifically had authorized municipalities to impose impact fees.[43]

In the states where impact fee legislation has not been enacted, the question of whether municipalities may impose impact fees is likely to depend on how broadly the state construes municipal powers generally. Typically, state courts that construe municipal power broadly find that impact fees represent permissible exercises of the exaction power[44] that has been granted, in varying degrees, to municipalities in every state.[45] In states where courts take a more limited view of municipal power, courts have found that impact fee requirements are either *ultra vires*[46] or preempted by general state laws.[47]

While the New York State Legislature has considered impact fee

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39. *See* U.S. CONST. art. I, § 8.

40. *See* U.S. CONST. amend. X.

41. *See, e.g.*, Coconato v. Town of Esopus, 547 N.Y.S.2d 953, 954 (App. Div. 1989) (citing Kew Gardens Rd. Assoc. v. Tyburski, 514 N.E.2d 1114 (N.Y. 1987)).

42. For purposes of brevity, *impact fee* will be used to refer to both impact fee and linkage requirements for the remainder of this Note, except where the difference between the concepts is relevant.

43. *See* ARIZ. REV. STAT. ANN. § 45-1983 (1991); CAL. GOV'T CODE § 65683.12 (West 1992); FLA. STAT. § 163.3202 (1990); GA. CODE ANN. § 36-71-1 (1991); HAW. REV. STAT. § 46-142 (1992) (counties only); IDAHO CODE § 67-8202 (1992); ILL. ANN. STAT. § 5-903 (Smith-Hurd 1991); IND. CODE ANN. § 36-7-4-1311 (Burns 1991); KY. REV. STAT. ANN. § 65.910 (Michie/Bobbs-Merrill 1992); ME. REV. STAT. ANN. tit. 30-A, § 4301 (West Supp. 1992); MD. LOCAL GOV'T CODE ANN. § 9 (1990); NEV. REV. STAT. ANN. § 278B.020 (Michie 1991); N.H. REV. STAT. ANN. § 674.21 (1991); PA. STAT. ANN. § 10503-A (1992); TEX. LOCAL GOV'T CODE ANN. § 395.015 (West Supp. 1992); VT. STAT. ANN. § 4350 (1987); VA. CODE ANN. § 15.1-466 (Michie 1992); WASH. REV. CODE ANN. § 82.02.050 (West Supp. 1992); W. VA. CODE § 7-20-7 (1990).

44. *See, e.g.* St. Johns County v. Northeast Florida Builders Ass'n, 583 So. 2d 635 (Fla. 1991) (broad construction of general municipal authority supported impact fee requirement).

45. *See* Delaney, *supra* note 16, at 146.

46. *See, e.g.*, Eastern Diversified Properties v. Montgomery County, 570 A.2d 850

legislation, it has not enacted an impact fee statute.[48] Therefore, the statutory validity of any impact fee requirement imposed by a New York municipality would depend upon how broadly New York courts construe municipalities' general and exaction powers.

Any examination of a New York municipality's authority must begin with an examination of Article IX of the New York Constitution. Municipalities' inherent powers are set forth in Article IX, section one of the constitution, which states that "[e]ffective local self-government and intergovernmental cooperation are purposes of the people of the state."[49] Among the powers set forth in section one is the power of local governments to "apportion the cost of a governmental service or function upon any portion of its area, as authorized by act of the legislature."[50] The caveat inserted at the end of this section is found in each subsection of section one, making clear that the "Bill of Rights" confers no self-executing powers at all — the powers set forth may not be executed until the legislature gives its authorization.[51]

Article IX, section two, however, does grant local governments a limited amount of inherent power.[52] Section two grants local governments the power to "adopt and amend local laws not inconsistent with the provisions of this constitution or any general law relating to its property, affairs, and government."[53] This power to adopt local laws relating to these subjects, however, is expressly subordinated to the state legislature's power to make general laws.[54] In short, while the state constitution speaks of the state's interest in "effective local self-government,"[55] it clearly subordinates the authority and interests of local governments to those of the state.

In light of these state constitutional provisions, any attempt by a municipality to impose exaction or impact fee requirements would have to be supported by legislative grant, unless it fell squarely within

(Md. 1990) (narrow construction of municipal power rendered impact fee ordinance invalid absent specific legislative authority).

47. *See infra* text accompanying notes 55-80.

48. N.Y.A.B. 10127, 214th General Assembly, 2d sess. (1991); N.Y.S.B. 6224, 214th Senate, 2d sess. (1991). The Assembly bill was referred to the Assembly Ways & Means Committee in June, 1991. No further action was taken. The Senate bill was withdrawn prior to consideration by the Senate.

49. N.Y. CONST. art. IX, § 1 ("Bill of Rights for local governments").

50. *Id.*

51. *Id.*

52. N.Y. CONST. art. IX, § 2 ("home rule powers of local governments; statute of local governments").

53. *Id.* § 2(3)(i). This power was subsequently conferred by statute as well. *See* N.Y. MUN. HOME RULE LAW § 10 (McKinney 1969 & Supp. 1993).

54. *See* Wambat Realty Corp. v. State of New York, 362 N.E.2d 581 (N.Y. 1969).

55. *See supra* note 49 and accompanying text.

the area of local authority granted by Article IX, section two. Two recent cases, decided on the same day by the New York Court of Appeals, provide an excellent discussion of the proper construction of municipalities' general and exaction[56] powers.

In *Kamhi v. Planning Board*,[57] the Court of Appeals faced a statutory challenge to the Town of Yorktown's in-lieu payment requirement. The town sought to apply its in-lieu fee ordinance to a *site plan* approval for development of open space,[58] though the language of the state Town Law provision authorizing exactions and in-lieu fees referred only to *subdivision* approvals.[59] The plaintiff claimed that the failure of the legislature to include the term "site plan" in the statute rendered Yorktown's ordinance *ultra vires*, and therefore void.[60]

The Court of Appeals agreed, finding that the language of the Town Law permitted in-lieu fee requirements to be placed only on subdivision approvals.[61] The court reasoned that, as site plans were not mentioned specifically in the statute, they were not contemplated in the statutory grant of exaction authority.[62] The court did not find this to be dispositive, however. Rather, it noted that Article IX's promise of home rule, bolstered by the Municipal Home Rule Law,[63] gave municipalities a considerable additional sphere of authority over matters of local concern, authority which must be "liberally construed."[64]

While local enactments which are inconsistent with state laws are ordinarily void,[65] the court noted that the Municipal Home Rule Law provides local governments with a "supersession authority."[66] Pursuant to this authority, a town may

> amend or supersede, in its local application, any provision of the town law relating to the property, affairs or government of the town or to other matters in relations to which it is authorized to adopt local laws by this section, notwithstanding that such provi-

56. Each type of municipality in New York has been given some form of the traditional exaction power. *See* N.Y. VILLAGE LAW § 7-725(a) (McKinney Supp. 1993); N.Y. GEN. CITY LAW § 30 (McKinney 1989); N.Y. TOWN LAW § 277 (McKinney 1987).

57. 547 N.E.2d 346 (N.Y. 1989).

58. *See supra* note 33.

59. *See* N.Y. TOWN LAW § 274-a (McKinney 1987).

60. *Kamhi*, 547 N.E.2d at 348.

61. *Id.*

62. *Id.*

63. N.Y. MUN. HOME RULE LAW § 10 (McKinney 1969 & Supp. 1993).

64. *Kamhi*, 547 N.E.2d at 349.

65. *See infra* text accompanying note 81.

66. *Kamhi*, 547 N.E.2d at 349; N.Y. MUN. HOME RULE LAW § 10(1)(ii)(d)(3) (McKinney 1969 & Supp. 1993).

> sion is a general law, unless the legislature expressly shall have prohibited the adoption of such a local law.[67]

Based on this provision of the Home Rule Law, the court concluded that since parkland was a "uniquely local"[68] concern, the town could supersede the Town Law to the extent that the statute did not grant exaction authority to site plan approvals.[69] In summary, the court construed the Town Law's exaction provision narrowly, but held that localities' powers under it would be construed more broadly when the exaction is being used to finance a facility, such as a park, which is "local" in character.

In *Albany Area Builders Ass'n v. Town of Guilderland*,[70] the Court of Appeals apparently sought to limit its holding in *Kamhi*. In *Albany Area Builders*, the court reviewed an impact fee ordinance designed to provide the municipality with funds to upgrade its road network. The Town of Guilderland, a suburb of Albany, had concluded that its population would increase "substantially" over a twenty-year period.[71] It found further that this projected population increase would have a direct and adverse impact on the town's transportation network, as existing roads were considered insufficient to handle projected increases in traffic.[72] To address this transportation problem, the town enacted an ordinance requiring applicants for development permits to pay a fee which would be used to fund future expansion of the town's transportation network.[73] The plaintiff developer alleged, *inter alia*, that the impact fee requirement constituted an unauthorized exercise of town authority.[74]

The Court of Appeals unanimously agreed. As in *Kamhi*, the court noted at the outset of its discussion the "fundamental principle" that municipal power is derived entirely from the state, and that municipalities enjoy certain powers pursuant to the state constitution.[75] The court then discussed the preemption doctrine, which limits municipal home rule powers (the doctrine was found inapplicable in *Kamhi*[76]). The court described New York's preemption doctrine as follows:

> [w]hile localities have been invested with substantial powers both

67. N.Y. Mun. Home Rule Law § 10(1)(ii)(a)(3) (McKinney 1969 & Supp. 1993).
68. *Kamhi*, 547 N.E.2d at 350.
69. *Id.*
70. 546 N.E.2d 920 (N.Y. 1989).
71. *Id.*
72. *Id.* at 921.
73. *Id.* at 920.
74. *Id.* at 921.
75. *Albany Area Builders*, 546 N.E.2d at 921.
76. *Kamhi*, 547 N.E.2d at 350.

> by affirmative grant and restriction on State powers in matters of local concern, the overriding limitation of the preemption doctrine embodies "the untrammeled primacy of the [state] legislature to act . . . with respect to matters of state concern."[77]

State preemption of local enactments is found readily by New York courts. Preemption occurs in two situations. First, a local enactment is preempted by state law where there is "express conflict" between the provisions of state and local law.[78] Second, state preemption occurs where the state has "evidenced its intent to occupy [a] field."[79] The state is not required to express its intent in order to preempt a local law; the state's intent may be inferred "from the nature of the subject matter being regulated and the purpose of intent" of the state's legislative scheme.[80]

The Court of Appeals applied this preemption test to the Guilderland impact fee, and found that state law indeed preempted the ordinance.[81] The court found that, through its passage of several provisions of the Town and Highway laws, the legislature had "evidenced its decision to regulate how roadway improvements are budgeted, how these improvements are financed, and how moneys for these improvements are to be expended."[82] Under the "intent to occupy" prong of the preemption doctrine, the creation of such a comprehensive regulatory scheme for highway development and maintenance — the same purposes sought to be promoted by the Guilderland ordinance — resulted in preemption. The Guilderland ordinance was therefore invalidated.[83]

Based on the Court of Appeals' rulings in *Kamhi* and *Albany Area Builders*, New York courts generally will construe municipal exaction

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77. *Albany Area Builders*, 546 N.E.2d at 922 (quoting Wambat Realty Corp. v. State of New York, 362 N.E.2d 581 (N.Y. 1969)).

78. *Id.* (citing In re Landstown Entertainment Corp. v. New York City Dep't of Consumer Affairs, 543 N.E.2d 725 (N.Y. 1989)).

79. *Id.* (citing Consolidated Edison Co. v. Town of Red Hook, 456 N.E.2d 487 (N.Y. 1983)).

80. *Id.* (citing New York State Club Ass'n v. City of New York, 505 N.E.2d 915 (N.Y. 1987)). Note the difference between the New York state constitutional standard for preemption and the federal preemption standard, under which Congress clearly must state its intent to preempt state law. *See, e.g.*, Penn. Terra Ltd. v. Pennsylvania Dep't of Envtl. Resources, 733 F.2d 267, 272-73 (3d Cir. 1984) (stating that federal preemption analysis begins with the "basic assumption that Congress did not intend to displace state law;" also noting that Congress must have clearly intended to preempt state law for courts to find preemption); *see also* Eric W. Hess, Note, *Federal Preemption of Rent Regulation Under FIRREA*, 20 FORDHAM URB. L.J. 939, 945 (1993).

81. *Albany Area Builders*, 546 N.E.2d at 922.

82. *Id.*

83. *Id.* at 923.

powers narrowly, limiting them to their express terms. However, in cases where the municipality exercises its exaction authority to promote a local interest relating to its "property, affairs, or government," its authority will be construed more broadly. Where the interest underlying exaction or in-lieu payment requirements is not uniquely local, reviewing courts will invalidate any exaction ordinance that is not specifically authorized by statute, or that is preempted by general state laws.[84]

## B. Constitutional Issues

Review of impact fee requirements involves a two-step analysis.[85] Assuming a municipal impact fee requirement is authorized by state statute, it must still pass muster under the federal and state constitutions. This part reviews the tests developed by state courts to analyze exactions and impact fees. It then discusses the Supreme Court's 1987 decision in *Nollan v. California Coastal Commission*,[86] which represents the standard by which exaction and impact fee requirements are reviewed under the Takings Clause of the United States Constitution.[87]

Traditional exaction and dedication requirements have been upheld because they addressed needs which flowed directly from the proposed development.[88] Impact fees, however, raise revenue in order to address municipality-wide needs.[89] They frequently attack problems that existed prior to the proposed development, and therefore cannot be justified solely on the ground that the problem sought to be addressed is uniquely attributable to the proposed development.

The justification for impact fees is more likely to rest on traditional police power grounds, with the municipality maintaining that the impact fee is required to promote the health, safety, or general welfare of the municipality.[90] While the police power grants states and local

84. *See also* Home Builders Ass'n v. County of Onondaga, 573 N.Y.S.2d 863, 865 (state laws establishing comprehensive sewer district regulation scheme preempted county from imposing sewer impact fee). Given the ease with which New York courts find preemption, it may well be that the rule in *Kamhi* will be limited to local parkland exactions.

85. *See supra* notes 36-38 and accompanying text.

86. 483 U.S. 825 (1987).

87. U.S. CONST. amend. V.; *see also* Chicago B. & Q. R. R. v. Chicago, 166 U.S. 226 (1897) (stating that takings clause of U.S. Constitution applies against States through fourteenth amendment).

88. *See* Connors & High, *supra* note 31, at 70.

89. *See supra* notes 32-35 and accompanying text.

90. *See* Connors & High, *supra* note 31, at 75.

governments a great deal of authority to address these concerns,[91] it is not unlimited; courts have long recognized that where police power regulation goes too far, it may be voided as an unconstitutional taking.[92] This tension between a municipality's police power and the Takings Clause is pertinent in analyzing the constitutionality of impact fees.

### *1. Pre-*Nollan *Standards of Review*

Prior to 1987, state courts generally used one of three tests to determine the validity of exaction and impact fee requirements.[93] The first of these tests was known as the "uniquely and specifically attributable" test.[94] This standard, developed by the Illinois courts, permitted exaction requirements to stand only when they addressed burdens which were specifically and uniquely attributable to the subject development.[95] In addition to requiring a close nexus between the development and the exaction requirement, the test required that all benefit to be derived from the exaction flow solely to the proposed development, not to the public at large.[96] As a result of its strict requirements and the inherent difficulty of containing benefits to a single development, New York joined the majority of jurisdictions that considered this test and rejected it as too strict.[97]

The second test was the "rational nexus" test. Under this test, a developer could be compelled to pay a fee which bore a "rational nexus" to the needs and benefits arising from and resulting to the subject development.[98] Unlike the uniquely and specifically attributable standard, the rational nexus test permitted some benefit from exactions to flow to the public at large. Nevertheless, New York courts rejected this approach to exaction as well, finding that the need to apportion costs and benefits between the subject development and public at large would be unworkable in a densely populated state with so many competing interests.[99]

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91. *See, e.g.*, Ziffrin v. Reeves, 308 U.S. 132, 139 (1940); Nebbia v. New York, 291 U.S. 502, 542 (1934) (police power is the "least limitable" power of government).

92. *See* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).

93. *See* Holmes v. Planning Bd., 433 N.Y.S. 587, 597 (App. Div. 1980); Delaney, *supra* note 16, at 148-53.

94. *Holmes*, 433 N.Y.S.2d at 597.

95. *Id.* (citing Pioneer Trust & Savings Bank v. Village of Mt. Prospect, 176 N.E.2d 799 (Ill. 1961)).

96. *Id.* (citing Aunt Hack Ridge Estates v. Planning Comm'n, 230 A.2d 45 (Conn. 1967)).

97. *Id.*

98. *Id.* at 598 (citing Longbridge Bldrs. v. Planning Bd., 245 A.2d 336 (N.J. 1968)).

99. *Holmes*, 433 N.Y.S.2d at 598.

The third test used prior to *Nollan* was the "reasonable relationship" test, which was developed by the California courts.[100] Unlike the first two tests, the reasonable relationship test permitted municipalities to impose exaction or fee requirements solely on police power grounds — the exaction could be enacted specifically for the purpose of promoting the general welfare of the municipality. Under this test, exaction requirements would be upheld so long as there was a reasonable connection between the problem sought to be alleviated and the proposed development. If this liberal cause and effect relationship could be demonstrated, and the exaction did not impose an "undue cost burden" on the developer, the exaction requirement would be upheld.[101]

### 2. *Traditional New York Exaction Analysis*

The New York Court of Appeals appeared to establish its own standard for exaction requirements in *Jenad, Inc. v. Village of Scarsdale*.[102] In *Jenad*, the court upheld an ordinance that gave the Scarsdale Planning Commission the power to demand either a dedication of land or an in-lieu payment as a condition precedent to subdivision or plat approval.[103] If a fee was exacted, it was to be placed in a separate account earmarked specifically for park or recreational purposes.[104]

Having found that the Scarsdale ordinance was expressly authorized by the New York Village Law,[105] the court considered the constitutional arguments. The plaintiff claimed that the in-lieu payment was invalid because it was an illegal taking and imposed a "tax" on developers. It argued further that, while the fee was designated for "general government purposes," it was assessed only against subdivision developers. The Court of Appeals rejected these arguments, characterizing the requirement as a reasonable form of planning designed to promote the general good.[106] The court supported its holding as follows:

> Scarsdale and other communities, observing that their vacant lands were being cut up into subdivision lots, and being alert to their responsibilities, saw to it, before it was too late, that the subdivi-

100. *See* Ayres v. City of Los Angeles, 207 P.2d 1 (Cal. 1949).
101. *Holmes*, 433 N.Y.S.2d at 598.
102. 218 N.E.2d 673 (N.Y. 1966).
103. *Id.* at 675. Whether land or a fee was to be exacted was left to the Planning Commission's discretion.
104. *Id.*
105. *Id.* at 674.
106. *Id.* at 676.

> sions make allowance for open park spaces therein. This was merely a kind of zoning [similar to] other reasonable requirements for necessary [infrastructure]. If the developers did not provide for parks and playgrounds in their own tracts, the municipality would have to do it since it would now be required *for the benefit of all the inhabitants.*[107]

*Jenad* contained no mention of the three tests discussed above. In fact, the court cited opinions from other states that had applied the strikingly different "specifically and uniquely attributable" and "reasonable relationship" tests.[108] However, in *Holmes v. Planning Board*,[109] the Appellate Division noted that the above-quoted language suggests strongly that the Court of Appeals saw the police power, standing alone, as a legitimate basis for exaction and fee requirements. Specifically, the court stated in *Holmes* that "*Jenad* strongly emphasize[d] a police power rationale" in upholding Scarsdale's fee requirement.[110] New York courts following *Jenad* and *Holmes* have therefore examined exaction and fee requirements in a deferential manner, and have upheld exaction requirements which were reasonably related to the subject development and which did not place an undue or confiscatory cost burden on the affected developer.

### *3.* Nollan v. California Coastal Commission

All cases involving alleged regulatory takings implicate the Federal Constitution, which provides the minimum requirements for governmental taking of private property.[111] In 1987, the Supreme Court decided *Nollan v. California Coastal Commission*,[112] a case involving a state-imposed exaction requirement. The case arose when the petitioner, a beachfront property owner, sought a permit to replace the bungalow on his property with a new house. California law required the California Coastal Commission (the "Commission") to approve all coastal development permits.[113] In considering Nollan's application, the Commission found, *inter alia*, that the new house would block visual access to the beach. It therefore conditioned approval of

107. *Jenad*, 218 N.E.2d at 676 (emphasis added).

108. *Id.* Specifically, the Court of Appeals cited Jordan v. Menomonee Falls, 137 N.W.2d 442 (Wis. 1956) (reasonable relationship) and Billings Properties v. Yellowstone Co., 394 P.2d 182 (Mont. 1964) (specifically and uniquely attributable).

109. 433 N.Y.S.2d 587 (App. Div. 1980).

110. *Id.* at 590. This characterization of *Jenad* and the proper test to be used in New York has been restated frequently by New York courts confronted with the issue. *See, e.g.*, Castle Properties v. Ackerson, 558 N.Y.S.2d 334 (App. Div. 1990).

111. *See supra* note 87.

112. 483 U.S. 825 (1987).

113. *Id.* at 828.

the building permit on Nollan's dedication of a lateral public easement linking the two public beach areas which bordered his property.[114] Justice Scalia opened his opinion for the Court with the following observation:

> Had California simply required the Nollans to make an easement available to the public on a permanent basis in order to increase public access to the beach, rather than conditioning their permit to rebuild their house on their agreeing to do so, we have no doubt there would have been a taking.[115]

In the Court's view, therefore, the easement requirement upon which the development permit was conditioned was the crucial factor in the case. Justice Scalia then noted the fundamental test that historically had guided the Court in its regulatory takings jurisprudence — land use regulations and permit conditions would be valid so long as they substantially advanced legitimate state interests.[116] If the challenged regulation or restriction was not reasonably necessary to promote a legitimate state interest, then it would be found to represent a taking for which the affected owner would have to be compensated.[117]

The Commission argued that a condition imposed as part of the development permitting process would not be a taking if it advanced the same police power objective as an outright refusal to grant the permit.[118] The Court agreed with this characterization of the test, holding that conditions placed on permit issuance would be upheld so long as they served the same governmental purpose as would a ban on development.[119] In short, the Court required a nexus between the stated governmental objective and the permit condition. Failure to establish this nexus would, in Justice Scalia's words, transform the regulation into an "out-and-out plan of extortion."[120]

Having established the test, the Court applied it to the Commission's easement requirement and found the requisite nexus to be lacking.[121] Rather than finding that the Commission's requirement substantially advanced the asserted visual access interest, the Court

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114. *Id.* at 828-29.

115. *Id.* at 831.

116. *Id.* at 841.

117. *Nollan*, 483 U.S. at 841 (citing Agins v. Tiburon, 447 U.S. 255 (1980) and Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978)).

118. *Id.* at 836.

119. *Id.; see also* note 147, *infra*.

120. *Id.* at 837 (quoting J.E.D. Associates, Inc. v. Atkinson, 432 A.2d 12, 14-5 (N.H. 1981)).

121. *Id.*

found that it did not meet "even the most untailored standards."[122] Specifically, the Court noted that it was impossible to demonstrate how the granting of an easement, which permitted people already on the beach to cross the Nollans' property, would reduce any visual obstacles to the beach. Based on this finding, the Court held that the Commission's imposition of the easement requirement represented a taking which required compensation.[123]

The Court's analysis suggests that a heightened level of review is appropriate when determining whether or not the required substantial advancement has occurred. This heightened level of scrutiny is to be applied to both the legitimacy of the asserted state interest and the extent to which the regulation advances the interest.[124] Despite this seemingly heightened level of review, however, the test enunciated in *Nollan* is indistinguishable from the reasonable relationship standard used previously by the states. The *Nollan* Court never questioned that the police power, standing alone, provided a sufficient basis for imposing exaction requirements.[125] In summary, the Court found in *Nollan* that the reasonable relationship test, as previously developed by the states but more strictly applied, satisfied the takings requirements of the Fifth Amendment.

## IV. Would an Affordable Housing Impact Fee Enacted by New York City Survive Judicial Review?

If New York City were to follow the example of other cities[126] and enact an ordinance authorizing the imposition of affordable housing impact fees on developers, there would be little doubt that the ordinance would be challenged early in its operation. As seen in Part III, the reviewing court would have to determine the ordinance's validity on two grounds. First, the court would have to determine whether or

122. *Nollan*, 483 U.S. at 839.

123. *Id.*

124. *Nollan*, 483 U.S. at 841. That the Court intended to raise the level of scrutiny applied in regulatory takings cases was demonstrated most clearly by Justice Scalia's assertion that "the Fifth Amendment's Property Clause [is] more than a pleading requirement," and that compliance with it is "more than an exercise in cleverness and imagination." *Id.*

125. Recall that two of the three standards developed by the states, the specifically and uniquely attributable and rational nexus tests, required that all or some benefit flow to the affected development. Only the reasonable relationship test, the most liberal test used, recognized the police power as a legitimate basis for use of the exaction power. *See supra* Part III.B.1. In fact, the Court included *Jenad* among the cases it cited as supporting its view. *Nollan*, 483 U.S. at 840.

126. San Francisco, Boston, and Sacramento have all enacted affordable housing impact fee ordinances. *See* Delaney, *supra* note 16 at 143.

not New York City possesses state statutory or constitutional authority to enact the ordinance. Second, the court would have to pass on the ordinance's constitutionality under the Fifth Amendment's Takings Clause.[127]

### A. Statutory Authority

As discussed previously, the New York Legislature has considered, but not enacted, specific impact fee legislation.[128] New York City would therefore have to identify implied authority from either another statute or Article IX of the state constitution.

Section thirty of the General City Law ("GCL") gives cities in New York roughly the same type of exaction authority as that given to towns and villages.[129] Section thirty authorizes city planning commissions to condition subdivision or plat approval on the dedication of land or payment of a fee for park or recreational purposes.[130] The GCL also requires cities to ensure that a developer adequately has provided for paved streets, water mains, and other utilities before allowing the development to proceed.[131]

In *Kamhi*, the Court of Appeals indicated that exaction authority would be construed narrowly and limited essentially to its express terms.[132] Thus, it is unlikely that the GCL's exaction power, which mentions only parks and municipal utilities, could support imposition of impact fees for affordable housing. As affordable housing is not mentioned in the statute, the reviewing court would be compelled under *Kamhi* to find that an affordable housing impact fee is unauthorized under section thirty.

Section thirty-a of the GCL, however, grants cities a limited amount of additional exaction authority.[133] Section thirty-a governs city approval of site plans (recall that section thirty is limited to subdivisions and plats), and authorizes city planning commissions to im-

127. As the New York Constitution also contains a takings clause, N.Y. CONST. art. I, § 7, the ordinance would also be required to pass muster under state constitutional standards. However, the takings requirements under state constitutional standards are essentially similar to those of the Federal Constitution, making it unlikely that the state constitution would provide any independent obstacles to an impact fee ordinance's validity. *See, e.g.*, Seawall Assoc. v. City of New York, 542 N.E.2d 1059 (N.Y.), *cert. denied*, 493 U.S. 976 (1989).

128. *See supra* note 48.

129. *See supra* note 56.

130. *See* N.Y. GEN. CITY LAW § 30 (McKinney 1989).

131. *Id.*

132. *See supra* text accompanying notes 57-69.

133. *See* N.Y. GEN. CITY LAW § 30-a (McKinney 1989).

pose conditions on development permits generally.[134] The statute gives city planning commissions the power to specify any elements to be included in a site plan which "may reasonably be related to the health, safety and general welfare of the community."[135]

This section clearly confers broader exaction authority for development approvals. The open ended police power provision empowers city planning commissions to demand, as a condition of plan approval, that site plan developers provide anything required for the general welfare of the community. As such, the section appears to authorize the imposition of affordable housing impact fees on developers whose site plan proposals are reasonably related to the need for such housing.

As demonstrated by the Court of Appeals' decision in *Albany Area Builders*,[136] however, a finding that a municipality has the statutory power to enact a law is not dispositive; the reviewing court must still determine whether the state has preempted the field. Under the *Albany Area Builders* analysis,[137] the legislature's enactment of a comprehensive general law regulating a broad area evidences its intent to occupy the field, and results in preemption of local legislation which purports to govern the same area. For purposes of this analysis, the question is whether the state has preempted the field of affordable housing development and financing, thus foreclosing municipalities from acting in that area pursuant to otherwise sufficient statutory authority.[138]

Through the General Municipal,[139] Private Housing Finance,[140] and Public Housing[141] Laws, the New York Legislature has set forth an elaborate and seemingly comprehensive statutory scheme which provides for the financing, development, and preservation of affordable housing in the state. As a result of these statutory provisions, it would appear likely that the state has preempted the field.[142] How-

134. *Id.*

135. *Id.* Specifically, section 30(a) permits a city planning commission to

> specify . . . the elements to be included in [site] plans submitted for approval: such elements may include, where appropriate, those relating to parking, means of access, screening, signs, landscaping, architectural features,. . .impact of the proposed land use on adjacent land uses, *and such other elements as may reasonably be related to the health, safety and general welfare of the community.*

*Id.* (emphasis added).

136. *See supra* text accompanying notes 70-83.

137. *Id.*

138. *See supra* text accompanying note 79.

139. N.Y. GEN. MUN. LAW § 690 (McKinney 1986).

140. N.Y. PRIV. HOUS. FIN. LAW § 11 (McKinney 1991).

141. N.Y. PUB. HOUS. LAW § 1 (McKinney 1989).

142. It also seems unlikely that New York City could argue successfully that afforda-

ever, despite the comprehensiveness of the state statutes relating to affordable housing, courts have ruled that no preemption has occurred in the area of affordable housing provision.[143]

Another factor making application of the preemption doctrine unlikely is New York City's broad charter authority relating to the development, financing, and regulation of affordable housing. The New York City Charter creates a City Department of Housing Preservation and Development ("HPD"), and gives HPD expansive powers relating to housing in New York City.[144] For purposes of impact fees, the most significant of these powers is HPD's express authority to collect fees for the financing of housing programs.[145]

Section thirty-a of the General City Law, bolstered by New York City's charter-based authority relating to housing, suggest that New York City possesses ample statutory authority to enact an impact fee ordinance designed to increase the availability of affordable housing.

## B. Constitutional Validity

While it seems likely that New York City possesses the statutory authority to enact an affordable housing impact fee ordinance, such an ordinance must also pass constitutional muster. A carefully drafted impact fee ordinance should, however, be able to satisfy constitutional standards under both federal and state takings jurisprudence.

### *1. Federal Standards*

*Nollan* expressly held that exactions imposed during the permit approval process will be upheld if they 1) promote the same police power objective as a complete ban on development, and 2) are related to and substantially advance that objective.[146] A recent application of *Nollan* by the U.S. Court of Appeals for the Ninth Circuit suggests

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ble housing is a uniquely local concern, permitting it to avail itself of the supersession authority. *See supra* text accompanying notes 66-69.

143. *See* Seawall Assoc. v. City of New York, 523 N.Y.S.2d 435, 444-46 (Sup. Ct. 1986), *rev'd on other grounds*, 534 N.Y.S.2d 958 (App. Div.), *rev'd*, 542 N.E.2d 1059, *cert. denied*, 493 U.S. 976 (1989); Council for Owner Occupied Housing v. Koch, 462 N.Y.S.2d 762 (Sup. Ct. 1983).

144. The only types of housing not subject to HPD's plenary jurisdiction are publicly-owned housing projects, which are developed and owned by the New York City Housing Authority, and certain types of housing for the homeless, which fall under the jurisdiction of the New York City Human Resources Administration. *See* NEW YORK, N.Y., CHARTER § 1801 (1989); N.Y. PUB. HOUS. LAW § 402 (McKinney 1989 & Supp. 1993).

145. *See* NEW YORK, N.Y., CHARTER § 1802 (1989).

146. *See supra* part III.B.3.

that these requirements would easily be satisfied by a well-tailored affordable housing impact fee ordinance.

Municipalities are permitted to impose a moratorium on development in order to preserve resources.[147] A municipality could therefore impose a moratorium on certain types of development if it reasonably could demonstrate that such developments generally place pressures on the supply of affordable housing in the municipality, in turn forcing the municipality to devote more resources to meet housing needs. Assuming this relationship could be demonstrated, an affordable housing impact fee would satisfy the first prong of the *Nollan* test. The fee would serve the same purpose as a development ban by mitigating the financial burden that occurs when development increases the burden on the local stock of affordable housing.

The second prong of the test, reasonable relation to and substantial advancement of the interest, can be satisfied as well. Exaction of an impact fee for affordable housing assistance relates to the municipality's valid objective of providing affordable housing to its residents.[148] So long as the exacted funds are earmarked specifically for housing subsidies, there could be little question that the fee substantially advanced the interest.

The Ninth Circuit substantially adopted the above analysis in *Commercial Builders v. City of Sacramento*.[149] In *Commercial Builders*, the court upheld a Sacramento ordinance that conditioned issuance of nonresidential building permits on payment of an impact fee for low-income housing.[150] The plaintiff in the case did not dispute that the city had a legitimate interest in providing affordable housing,[151] but contended that the Sacramento ordinance placed the "burden of paying for low-income housing on nonresidential developers without a sufficient showing that nonresidential development contributes to the need for low-income housing in proportion to that burden."[152]

The court rejected this view. At the outset of its discussion, the court noted Justice Scalia's observation in *Nollan* that the rational nexus test, the most liberal of the standards developed in the state

147. This is implicit under federal law, as Justice Scalia's discussion in *Nollan* operated necessarily from the premise that development bans represent a valid exercise of the police power. Development bans are also permitted under state constitutional standards. *See Nollan*, 483 U.S. at 835; Golden v. Planning Bd., 285 N.E.2d 291 (N.Y.), *appeal dismissed*, 409 U.S. 1003 (1972).

148. It seems elementary that an adequate supply of affordable housing is related to the health, safety, and general welfare of a municipality.

149. 941 F.2d 872 (9th Cir. 1991), *cert. denied* 112 S. Ct. 1997 (1992).

150. *Id.* at 872.

151. *Id.* at 873.

152. *Id.*

courts prior to 1987, represented the standard for examining exaction requirements in the takings context.[153] Finding that Sacramento had tied the ordinance to empirical findings showing a "substantial connection" between low-income housing needs and nonresidential development,[154] the court held that the Sacramento impact fee satisfied the *Nollan* test, as it was sufficiently related to and substantially advanced the city's interest in maintaining an adequate supply of low-income housing.[155]

The Ninth Circuit's analysis in *Commercial Builders* suggests that an affordable housing impact fee ordinance will be found valid under the Federal Constitution so long as the municipality presents general empirical findings that demonstrate the *Nollan* nexus. Sacramento's ordinance satisfied the nexus requirement by incorporating city-wide findings that nonresidential development, by attracting new employees to the *region*, increased the need for low-income housing in the *city*. Based on this analysis, it appears that the impact on an area's resources of a class of development forms a sufficient basis for enacting an impact fee ordinance — no direct nexus is required between any particular development and the burden sought to be alleviated by the fee.

Under this standard, New York City could establish the required nexus by demonstrating, for example, that certain *classes of development* (as opposed to certain *developments*) lead generally to an increase in the number of construction and office workers residing in the city, a certain percentage of whom will be low-income. This relationship, supported by empirical findings, would link the covered class of development to the need for affordable housing. Having established this nexus, the city would be required to show only that the fee substantially advanced the city's interest in providing affordable housing. If the collected fees were deposited in a discrete account, the substantial advancement would be manifestly clear, as the account would make more money available for housing programs.

### 2. *State Standards*

Under New York's interpretation of *Nollan*, a closer relationship between the asserted governmental interest and the particular development might be necessary to insure validity. The New York Court

153. *Id.* (citing *Nollan*, 483 U.S. at 839). Indeed, the Court in *Nollan* cited a number of cases (including *Jenad*) that had followed the reasonable relationship test in support of its decision.

154. *Commercial Builders*, 941 F.2d at 874.

155. *Id.* at 875.

of Appeals' most significant application of *Nollan* occurred in *Seawall Associates v. City of New York*,[156] a case involving a Takings Clause challenge to a New York City local law that prohibited the conversion or demolition, and required the upkeep, of low-income single room occupancy ("SRO") residential buildings. As a defense to the takings claim, the city had argued that the law was necessary to address the city's homelessness problem.[157] The Court of Appeals, in a five-to-two decision, agreed with the plaintiff developers that the local law resulted in a regulatory taking of their property.[158]

The Court opened its regulatory takings discussion by referring to *Nollan*'s suggestion that the Takings Clause prohibits the passing of public burdens onto private actors.[159] It then restated *Nollan*'s requirement that the city ordinance must substantially advance its purported objective.[160] The court concluded that the anticonversion law could not pass the *Nollan* test.

The city had maintained that the local law was designed to alleviate its homeless situation. While noting that this goal was of the "greatest social importance,"[161] the court construed the law's stated purpose strictly. On its face, the anticonversion law stated specifically that it was designed to *prevent* homelessness.[162] The court interpreted this statement of purpose literally, and analyzed the law for its potential to "substantially alleviate" or "resolve" the problem of homelessness.[163] Not surprisingly, the court found that the law could not achieve its lofty goal.[164] This finding, coupled with the court's conclusion that not all of the units preserved by the anticonversion law would actually go to homeless persons, led the court to conclude that the ordinance had only a "tenuous connection" to its claimed objective.[165] Such a tenuous connection was insufficient to satisfy *Nollan*'s substantial advancement requirement, and the court voided the ordinance as a taking.[166]

The *Seawall Associates* analysis suggests that, in the wake of *Nol-*

156. 542 N.E.2d 1059, *cert. denied* 493 U.S. 976 (1989).

157. SRO buildings have traditionally been used by New York City as a significant housing resource for the homeless.

158. *Seawall Assoc.*, 542 N.E.2d at 1068.

159. *Id.* at 1062 (quoting *Nollan*, 483 U.S. at 835 n.4).

160. *Id.*

161. *Id.* at 1068.

162. *Id.* n.10.

163. *Seawall Assoc.*, 542 N.E.2d at 1068.

164. *Id.* The court noted that the city's homelessness study conceded that the anticonversion law would not "resolve" the problem of homelessness.

165. *Id.* at 1069.

166. *Id.*

*lan*, New York courts will apply closer scrutiny to exaction requirements than the federal courts. Under the analysis employed by the Ninth Circuit in *Commercial Builders*, New York City's ordinance, which probably would have prevented *some* homelessness, would likely have been upheld, as it advanced the city's broadly stated interest. The New York Court of Appeals, however, construed the city's stated interest strictly, finding that its goal of "preventing homelessness" was unlikely to be achieved through the ordinance. The general relationships found sufficient in *Commercial Builders* are apparently insufficient under New York courts' view of *Nollan* and the Takings Clause in general. Instead, only *specific* showings that the stated interest is related to and will be advanced by the challenged requirement will be found satisfactory.[167]

Despite the high level of scrutiny applied to exaction requirements by New York courts, a carefully-drafted affordable housing impact fee ordinance, such as the one presented in the appendix to this Note, should be able to withstand judicial review. In order to ensure its validity, the ordinance should apply on the basis of particular findings, rather than on general findings such as those which supported the Sacramento ordinance. In other words, the fee requirement facially should apply only to those particular development proposals which can be shown to have an impact on affordable housing.

This particular relationship could be established by linking the fee provision to New York City's Environmental Quality Review Procedure ("CEQR"),[168] which requires certain significant land use proposals to be reviewed for their potential environmental impacts. Among the factors which must be reviewed under CEQR is the potential impact of a land use action on "population patterns or existing commu-

167. This interpretation of *Seawall Associates* and the prevailing New York view is supported by a subsequent appellate decision in which the court voided a set of permit conditions which required, *inter alia*, that the developer provide fountains in its development (such a requirement is permitted under the Town Law, which authorizes towns to impose requirements for the purpose of improving aesthetics). The court nullified the fountain requirement on the ground that "nothing in the record [could] show how they would be aesthetically pleasing." The court's holding, which rejected a subjective legislative determination not capable of empirical demonstration, suggests a judicial willingness in New York to scrutinize not only the means-ends relationship, but the legislative body's conclusions regarding how best to achieve desired results. *See* Castle Properties Co. v. Anderson, 558 N.Y.S.2d 334, 336 (App. Div. 1990).

168. *See* NEW YORK, N.Y., Exec. Order No. 91, City Environmental Quality Review, August 24, 1977, *revised* October 1, 1991. CEQR is the process through which New York City complies with the State Environmental Quality Review Act ("SEQRA"), which requires the state and its political subdivisions to conduct thorough reviews of the potential environmental impacts of proposed land use actions prior to their approval. *See* N.Y. ENVTL. CONSERV. LAW § 8-0101 (McKinney 1984).

nity character."[169] A New York City ordinance authorizing impact fees, therefore, could satisfy the nexus requirement by applying facially only to those developments which are found through the CEQR process to have a potentially adverse impact on the availability of affordable housing. This approach would tie the fee requirement to findings made during the CEQR review, providing a solid and particular nexus between the proposed development, the need for affordable housing, and the fee. Such an ordinance should pass muster even under the stricter approach to exactions and takings taken by the New York courts.

## V. Conclusion

Impact fees are an innovative way for municipalities to share their burdens with the private actors who, through their developments, help to create them. Unquestionably, affordable housing has long been one of New York City's most daunting problems. While the city has attacked the problem directly,[170] its efforts have been scaled back in the face of recent fiscal difficulties. The New York City Council should consider the benefits to be gained through the use of affordable housing impact fees. In addition to providing much-needed revenue for housing programs, an impact fee ordinance that provides for uniform fees for those development proposals which have been identified through CEQR to have an impact on housing would inject more fairness and notice into New York City's exaction practices.[171] Far from

169. *See* N.Y. ENVTL. CONSERV. LAW § 8-0105(6) (McKinney 1984); N.Y. COMP. CODES R. & REGS. tit. 6, § 617.2 (1987); *see also* Chinese Staff & Workers v. City of New York, 502 N.E.2d 176, 179-80 (N.Y. 1986).

170. *See supra* part I. For an excellent discussion of the other tools available to municipalities faced with an affordable housing shortage, see generally John R. Nolon, *Shattering the Myth of Municipal Impotence: The Authority of Local Government to Create Affordable Housing*, 17 FORD. URB. L. J. 383 (1989); John P. Dellera, *County Powers in Assisted Housing Programs: The Constitutional Limits in New York*, 20 FORD. URB. L.J. 109 (1993).

171. For a contrary view of the wisdom and legitimacy of affordable housing exactions, see Norman Marcus, *Development Exactions: The Emerging Law of New York State*, C431 ALI-ABA 1725 (1989). While Marcus recognizes that SEQRA could serve as the "enabling predicate" for housing exactions in New York, he argues that general taxation, not exaction, should be used to finance housing programs. One of his three main critiques is that the use of exaction would "raise basic questions as to the integrity of the process best characterized by the dirty words 'zoning for sale.' "

I disagree with this assertion, and would argue that the impact fee ordinance proposed in this Note would remedy, rather than exacerbate, this problem. As demonstrated in Part I, presently the city uses an informal type of exaction. If any process could be characterized as "zoning for sale," it is the present system, in which the "developer concessions" (read "exactions") are "agreed to" through closed door negotiations. The model impact fee ordinance proposed in this Note reforms the present system by provid-

requiring real estate developers to "underwrite social policy,"[172] affordable housing impact fees would help New York City address its housing needs by placing a proportionate amount of the housing burden on the parties whose developments help to create it.

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ing for uniform fees (assessed as a function of the size of the proposed development) which are imposed only where specific stated criteria are present. In short, the ordinance would remove the city's ability to "negotiate" more onerous concessions from wealthy developers.

172. *Commercial Builders*, 941 F.2d at 876 (Beezer, J. dissenting).

## Appendix

MODEL NEW YORK CITY LOCAL LAW AUTHORIZING AFFORDABLE HOUSING IMPACT FEES

§ 1 - POLICY & PURPOSES

The City Council of the City of New York finds that

(1) the city faces a shortage of affordable housing which threatens the health, safety, and general welfare of the municipality;

(2) the city has an obligation to assist in the preservation, rehabilitation, and production of affordable housing;

(3) certain development projects attract new workers to the city, placing pressure on the supply and availability of affordable housing, and impact existing population patterns and community character;

(4) the city incurs substantial costs in providing and assisting in the provision of affordable housing;

(5) it is the policy of the city to require developers to share the housing burdens caused by their developments.

§ 2 - DEFINITIONS

For purposes of this local law, the following definitions shall apply:

(a) "assisted housing" is defined as any housing which is produced, rehabilitated, or otherwise subsidized utilizing city funds in whole or part;

(b) "affected development" is defined as any proposed site plan, subdivision, or plat that:

(1) requires approval under section 197-c of the City Charter, and

(2) has been found, pursuant to the City Environmental Quality Review Procedure, to have a potentially adverse impact on the demand for or supply of affordable housing in the city.

(c) "applicant" is defined as the person whose name appears on an application submitted to the City Planning Commission pursuant to section 197-c requesting permission to build the affected development.

§ 3 - IMPACT FEES

(a) The City Planning Commission may, as a condition of approving an affected development, require the applicant to pay a fee for the preservation and development of assisted housing in the city.

(b) Within six months after the effective date of this local law, the Commissioner of Housing Preservation and Development shall, after consultation with the Comptroller and the Commissioner of Finance, publish a schedule of impact fees. Such fees are to be set on a uniform basis as a function of the proposed population of the affected development.

(c) All impact fees are to be deposited in a separate budget account to

be established by the Comptroller; such fees shall be made available by the Comptroller to the Commissioner of Housing Preservation and Development on an annual basis, and may be used by the commissioner for the sole purpose of providing assisted housing in the city.