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## I. INTRODUCTION

Imagine a cleared commercial site that is being prepared for redevelopment in a city. Now try to imagine that a request for rezoning to residential use creates a loss of public value[1] that supports the public

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1. *See infra* Part VI and accompanying notes. Richard J. Roddewig and Gary R. Papke state that:

> [P]ublic value refers to a hypothetical contribution made by public authorities or by neighboring property owners rather than by the individual owner to the market value of a property. In this . . . usage, traditional market value is higher than either the public or private component and is in effect the combination of the two.

Richard J. Roddewig & Gary R. Papke, *Market Value and Public Value: An Exploratory Essay*, 61 THE APPRAISAL J. 52, 53 (1993). Roddewig and Papke note that a purpose of public value is to aid government in deciding to invest in natural resources. *Id.* at 54-55.

The existence of public value in private property or land is not a new issue. Paul W. Gates' comments exemplify the issue:

> [W]hile the management of our remaining public domain is still a most serious and important question, the management of that portion of our territory that has become private property is a more serious problem. In fact, the old distinction between public and private is losing it sharpness, or is being eroded away, and for the sake of later generations it should be. Has a man a right to destroy good, irreplaceable agricultural land by covering it up with cement or strip-mining it?

policy of a development impact exaction[2] to offset the public costs of administrative activities by the municipality to replace the commercial facility. This has actually happened and it could happen again. When private recreational facilities that produce congestible public goods[3] are considered public ends that constitute legitimate state interests, the discontinuance of these facilities may exacerbate social programs to provide these local needs that, in turn, justify regulatory means to advance and relate to municipal demands for these needs.[4] The social needs that would be affected are deficient public services and public inconvenience that result from the unavailability of these facilities for public use.[5] A public benefit that is enlarged by the opportunity for public use of these private facilities creates public value providing the justification for the

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Paul W. Gates, *Overview of American Land Policy*, 50 SMITHSONIAN AGRIC. 227-28 (Apr. 1975) *quoted in* TIM LEHMAN, PUBLIC VALUES, PRIVATE LANDS 4 (1995). Professor Lehman notes that "[i]f private land has inherent public value, how it is to be governed in a society that resists regulatory controls?" *Id.* Policy-makers, scholars, landowners and conservationists have yet to address this question in the preservation of farmland that is protected by federal, state and local programs. *See* James E. Holloway & Donald C. Guy, *Rethinking Local and State Agricultural Land Use and Natural Resources Policies: Coordinating Programs to Address the Interdependency and Combined Losses of Farms, Soils and Farmland*, 5 J. LAND USE & ENVTL. L. 383-91 (1990). Although the degradation, pollution and destruction of land and water resources directly alter our way of life, environmental qualities, and recreational activities, the public value in private farmland and other natural resources remain difficult policy-making by imposing forceful regulatory controls. *See generally* Lehman, *supra* note 1, at 152-56.

The question of public value in private property is made more perplexing when a court concludes that public value exists in a commercial enterprise in which local government grants a public benefit, such as changing its land use plan when the use of "private recreational facilities created a public benefit by enlarging the availability of such facilities . . . ." Ehrlich v. City of Culver City, 911 P.2d 429, 445 (Cal. 1966), *cert. denied*, 117 S.Ct. 299 (1996). Yet public value in commercial property that must be granted a public benefit would permit local governments to request a regulatory fee to offset the costs of government actions and activities to secure a legitimate state interest supported by this public value. If there is public value in a recreational facility that is enlarged by public use, then government can request a regulatory fee to advance recreational interests that are supported by this public value. *See id.* at 445-46. This public value justifies, when federal and state revenues are declining, the collection of regulatory fees, namely an exaction or mitigation fee, to assist in correcting the loss of public value caused by a private action, namely changes in the use of private property. *See id.* In contrast, some land use policies give cash and other incentives to secure public value in private farmland that is open space, a way of life and business. *See* Holloway & Guy, *supra* note 1, at 386-87 nn.12-30. Yet a mitigation fee operates in the opposite way. Landowners pay government a regulatory fee to diminish or destroy public value by changing the use of commercial land that negatively impacts legitimate state interests. *See* Ehrlich, 911 P.2d at 449-50. But if the cost of public value *greatly reduces* the return on capital invested in the development of commercial property, this cost could eventually affect the market value that a purchaser is willing to pay to acquire land for development. *See* Roddewig & Papke, *supra* note 1, at 60-61.

For a discussion of tying compensation to government use of private land that it takes by eminent domain for public use, see Robert Innes, *The Economics of Takings and Compensation When Land and its Public Use Value Are In Private Hands*, 76 LAND ECON. 195, 195-212 (2000).

2. *See infra* Part II and accompanying notes.
3. *See infra* Part IV.A and accompanying notes.
4. *See infra* Part III and accompanying notes.
5. *See infra* Part IV.A and accompanying notes.

impact exaction.[6] Although the public need is not generated by the impact of the development of the demolished commercial site, public value is the ends connector or policy linchpin between the public need and the private action.[7] This connector or linchpin validates a public need and thus enables an exaction to advance a legitimate state interest and to relate to policy justifications.[8] The tenuous reality of this linchpin is that this value to the public confounds both jurisprudential and economic theories by permitting the discontinuance of some land use to support an impact exaction to further a public end.[9]

### *A. Recapturing the Value of Public Association with Business*

Recapturing, or using the value to the public, of congestible public goods as policy requirements to impose a mitigation fee requiring the landowner to internalize some public costs for the discontinuance of commercial land use, raises both economic and jurisprudential questions.[10] The jurisprudence of public value that results from a public benefit derived from the public use of commercial property is not well settled under regulatory takings doctrine.[11] Moreover, the economics of public value that support government action to preserve natural resources and private facilities by imposing legal obligations are not fully developed in economic theory.[12] These private recreational, parking and other facili-

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6. *See infra* note 9 and accompanying text.

7. *See infra* Part V and accompanying notes.

8. *See infra* Part III, Part V and accompanying notes.

9. *See Ehrlich*, 911 P.2d at 440-47. *Ehrlich* raises a regulatory taking issue regarding public value under the nature of government action. *Id.* at 445-46. Another state takings case raised a related question regarding the role of public value in determining the economic effects of regulation on market value. *See* Penn Cent. Transp. Co. v. City of New York, 336 N.E.2d 1271, 1275 (N.Y. 1977), *affirmed on other grounds*, 438 U.S. 104 (1978), in the context of interference with investment-backed expectations of regulatory taking doctrine. The Court of Appeals of New York concluded that the return on investment from the Grand Central Terminal had increased because government invested in the railroad and infrastructure surrounding the railroad. The court of appeals noted that:

> Absent this heavy public governmental investment in the terminal, the railroads and connected transportation, it is indisputable that the terminal would be worth but a fraction of its current economic value. Plaintiffs may not now frustrate legitimate and important social objectives by complaining, in essence, that government regulation deprives them of a return on so much of the investment made not by private interests but by the people of the city and State through their government. . . .

*Penn Cent.*, 366 N.E.2d at 1276. In *Ehrlich*, the Supreme Court of California addresses an issue raised by public value directly affecting the nature of government action. Ehrlich, 911 P.2d at 445-47. The city and state through the government made no substantial contribution to Ehrlich's commercial site but wanted to exact money for public facilities. *See id.* at 445. The Supreme Court found that the public's utilization of this facility created a public value that justifies an exaction. *Id.* at 445-46.

10. *See supra* notes 1-3 and accompanying text.

11. *See infra* note 28 and accompanying text.

12. *See infra* Part IV and accompanying notes.

ties on commercial land can be similar or identical to public services and programs.[13] Many of these facilities are congestible public goods.[14] Government programs provide these goods under a social purpose that supports the redistribution of these goods.[15] A redistribution program "alters the state of the distribution"[16] of those goods that were lost by the termination of a commercial enterprise.[17] A redistribution program alters distribution when it treats a private association or relationship between users of these goods and a commercial enterprise as public value connecting the public need for these goods to an unrelated regulation. Consequently it recaptures public value as a redistributive or distributive goal of land use policy, such as demanding a mitigation fee to provide recreational services.[18]

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13. *See infra* Part IV.A and accompanying notes.

14. *See id.*

15. *See Infra* Part II.A and accompanying notes. Another view of the cathedral considers the nature of rights, interests, and relationships under law and economics. Eminent domain is a liability rule that permits government to take property, but government must pay the market value for the land under the takings clause. *See* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1092 (1972). *Ehrlich* is a limit on a liability rule and permits government to burden the property interest without paying. The Supreme Court of California limits a liability rule by giving residents of Culver City an entitlement, a public interest. These residents can exact money or a fee to pay for administrative services in replacing a commercial business but are not subject to liability for exacting this fee. Their entitlement is public value that is derived from residents' use of commercial property in a market transaction. *See Ehrlich*, 911 P.2d at 445-46.

Obviously, the purpose of the liability rule that protects public value can effect wealth transfer and distributional goals, *see* Calabresi & Malamed, *supra*, at 1110, that effect the protection of a merit good, Id. at 1101, namely recreational services, for residents of Culver City. Economic efficiency, distributional goals, and public policy must be considered in assigning a liability rule or property rule to protect an interest. In *Ehrlich*, the court held that economic efficiency may not be achieved in that the transfer to the residents of public value makes Ehrlich less well off by reducing his return on investments in the land and increasing transaction costs of development. *See generally* Calabresi & Malamed, *supra*, at 1093-95 (discussing economic efficiency in creating entitlements). Policy rationales favoring public value merely support inclusive public policy that requires developers and owners to share in providing and financing public facilities. Although it seems rational, one can also conclude that residents have a worthier need, namely recreational services. Obviously, the economic efficiency, distributional goals and policy rationales for resident-benefit public value justify more research to define emerging concepts of public value that recapture past public and resident contributions and benefits that municipalities purposely provide to private enterprise in infrastructure or administrative actions. *See generally* Ehrlich, 911 P.2d at 434 (making both past and present changes in general and special land use plans for a site); *Penn Cent.*, 336 N.E.2d at 1276 (providing public infrastructure and facilities for a commercial enterprise).

16. Fernando Furtando, *Rethinking Value Capture Policies of Latin America*, LAND LINES, Lincoln Institute of Land Policy, 8, at 8, May 2000. See also KENNETH D. GEORGE AND JOHN SOREY, THE ALLOCATION OF RESOURCES: THEORY AND POLICY, 68-102 (1978) (discussing the distribution of wealth and income under less than the perfect conditions in an economy).

17. *See Ehrlich*, 911 P.2d at 434. In *Ehrlich*, the landowner demolished the recreational facilities that the government desired for use by local residents. *See id.*

18. *See* Furtando, *supra* note 16, at 8.

Obviously an impact exaction alone is not sufficient to restore these goods,[19] but can affect government policies and programs that either provide or find a provider for these goods.[20] These facilities, services and programs further legitimize state interests generally valid under takings doctrine.[21] Municipalities can use exactions and perhaps other regulation to capture the value that the public contributes to a commercial enterprise. However, exactions recapture public value provided entirely by an economic relationship between local residents and a commercial enterprise. This recapture of public value should raise jurisprudential concerns under the takings doctrine. Namely, constitutional jurisprudence looks first to the source and character of the government action. When regulation imposes a highly recognized public burden on an owner's application for a rezoning and a building permit through an impact exaction or conditional demand, it implicates the Takings Clause in its efforts to use or recapture public value by imposing a public burden on the termination of the use of private property.[22]

### *B. Takings Principle Limiting the Nature of Recapture*

The *nature of government action* factor[23] of regulatory takings doctrine requires a conditional demand or exaction to advance a public purpose and to relate to policy justifications. Specifically, under this takings principle, the takings test is a means-ends fit that scrutinizes the connection between conditional demands, public interests and grounds for a rezoning, issuance of a building permit or other regulation.[24] Acquiring public benefits by public use of commercial land could be commonplace in commercial land use,[25] permitting municipalities to exact or demand uncompensated benefits. Therefore, a closer examination under economic and jurisprudential principles is in order.

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19. *See* Ehrlich, 911 P.2d at 449-50; *see infra* Part IV.B and accompanying text.

20. *See* James E. Holloway & Donald C. Guy, *A Limitation on Development Impact Exactions to Limit Social Policy-Making: Interpreting the Takings Clause to Limit Land Use Policy-Making for Social Welfare Goals of Urban Communities*, 9 DICK. J. ENVTL. L. & POL'Y 1, 32-33 (2000).

21. U. S. CONST. amend. V.

22. Armstrong v. United States, 364 U.S. 40, 49 (1960).

23. *Penn Cent.*, 438 U.S. at 124. The nature of public value is not the only concern in examining the legal and economic implications of recapturing public value through regulatory fees. Another concern is the nature of the regulatory action that can be imposed on a landowner who requests a government action that would permit him or her to destroy public value accrued during the operation of a commercial enterprise that provided services similar to government provided services. The latter concern permits government to expand the regulatory and administrative means to further state interests, which may not be broadly favored by the public. *See* Ehrlich, 911 P.2d at 429.

24. *See infra* Part III and accompanying notes.

25. *See infra* Part IV.A and accompanying notes.

Part I examines the nature of government action to ascertain whether a mitigation fee for discontinuing the operation of recreational facilities that results in a loss of public value to the municipality is *requisite* to address the means-ends fit under takings analysis and economic analysis.[26] Part II discusses the purpose and policy of using land use regulation that imposes conditional demands that provide public services, programs, and infrastructure. It finds that conditional demands further public interests and goals, including recreational facilities, culture programs, and parkland. Part III reviews the regulatory takings jurisprudence.[27] It examines the role of public purposes and policy justifications in determining the validity of exercises of the police power to impose zoning, exactions and other land use regulations. Part III recognizes that public value is only a policy *requirement* to support the finding of a sufficient means-ends relationship. Part IV examines seminal federal decisions that review the nature of government action imposing conditional demands based on public purposes and policy justifications. Part V examines the Supreme Court of California's means-ends analysis that includes scrutiny of a policy linchpin to find and validate the role of public value under federal takings doctrine.[28] Part VI examines the recognition of public value as a public

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26. *See, e.g.*, James E. Holloway & Donald C. Guy, *Land Dedication Conditions and Beyond the Essential Nexus: Determining "Reasonably Related" Impacts of Real Estate Development under the Takings Clause*, 27 TEX. TECH L. REV. 73 (1996); Julian C. Juergensmeyer & Robert M. Blake, *Impact Fees: An Answer to Local Government's Capital Funding Dilemma*, 9 FLA. ST. U. L. REV. 418 (1981).

27. *See* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413-15 (1922). In *Pennsylvania Coal*, the Court created the federal regulatory taking doctrine by concluding that land use regulations and other exercises of police power authority regulation may impose an unreasonable burden and thus take property rights in violation of the Takings Clause of the United States Constitution, U.S. CONST. amend. V. *Pennsylvania Coal*, 260 U.S. at 413-15. State courts have adopted the regulatory taking doctrine under takings provisions of state constitutions. *See* Dolan v. City of Tigard, 512 U.S. 374, 389-91 (1994). They have also applied the federal takings doctrine in disputes that raised regulatory taking claims under both federal and state takings provisions. *See id.*

28. One might conclude that an *ends analysis* under the nature of government action factor of the ad hoc takings analysis, *see Penn Cent.*, 438 U.S. at 124, provides proper scrutiny of the public value derived from the community's use of private property to further legitimate state interests. Public value is neither means nor ends. In fact, it is merely a linchpin or connector underlying the purposes and policy justifications for a sufficient means-ends relationship. An ends analysis under the takings clause would best determine the nature of public value that would permit an exaction to connect to a social need generated by the termination of the use of commercial land. Obviously, the ends or goals rest on the validity of public value as a connector between public needs and private actions. The better question is whether public policy can have a proximate connection to a private action that merely changes the use of land but causes no harm or has a nominal impact on public services. A change in land use that is an antecedent for development can affect public facilities and services that are not directly caused by the impact of development. It is a usual consequence of a change in land use to affect public services that are regularly provided by government. Generally, changes in land use that precede development are not necessarily a direct or proximate connection to a decrease in public services that residents of a community want. A request for a rezoning may not necessarily mean that any development will sufficiently reduce open space, recreational facilities, or affordable housing and thus support a public need on which an essential nexus and rough proportionality could attach.

benefit when contained within a congestible public good affected by a legitimate state interest. Part VII discusses the public value of private property through examining the definition of public value as a component of commercial land's market value that produces congestible public goods. It notes that recreational facilities are a kind of public good[29] promoting the public interest[30] that may not be unique to recreational interests[31] unless the site of the facility is given a special governmental benefit.[32] Part VIII concludes that a mitigation fee assessed for the loss of public value must be consistent with jurisprudential principles and eco-

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Any change in land use could and often does reduce the public use of private property, including its esthetic, economic or social benefits to the community. Just any proximate connection to a public service, say for example open space, should not necessarily generate a public need that would justify regulation. Simply, we are asking how municipalities determine public policy that reflects the political direction of the community in providing for public needs. The Court might tread lightly here until the causal relationship between public value and public needs is better defined in an analytical scheme that includes property, public policy, and takings law. The Court has been wise to leave the highest courts of California and New York, though decades apart, to say what is the public policy significance of a public investment or administrative action to the commercial development of land. We believe the linchpin or connector between this investment or action, such as a change in land use, and the public need could be an ends analysis because the public investment or action supported a past land use to provide for a public need. Penn Central's transportation facilities and Ehrlich's recreational facilities were given favorable public actions in providing for an obvious public need. For a discussion of the resurrection of a heightened ends analysis of social regulations, see Note, *Resurrecting Economic Rights: The Doctrine of Economic Due Process Reconsidered*, 103 HARV. L. REV. 1363, 1379-80 (1990); RICHARD A. EPSTEIN, TAKINGS: PROPERTY AND THE POWER OF EMINENT DOMAIN 107-145 (1985).

Watching public ends expand is the norm of the Court, but all ends are not necessarily burdensome. The Court has not applied an ends analysis to protect property rights since the *Lochner* era. *See* Lochner v. New York, 198 U.S. 45 (1905). The *Lochner* era came to an end in 1937 in West Coast Hotel v. Parrish, 300 U.S. 379 (1937), which sustained a state statute setting wages for women. However, the demise of the *Lochner* era had been foretold by Nebbia v. New York, 291 U.S. 502 (1934), which sustained a New York statute fixing the price of milk. In United States v. Carolene Products Co., 304 U.S. 144 (1938), the Court made a distinction between property and economic rights and other fundamental rights and concluded that the application of substantive due process to scrutinize exercises of governmental authority in matters involving property rights and economic rights was too intrusive on legislative judgment. *Carolene Products Co.*, 304 U.S. at 152 n.4. Therefore, we focus on the use of a means analysis to determine whether an exaction can be used to demand a regulatory fee at the termination of a business.

29. *See* DAVID N. HYMAN, PUBLIC FINANCE: A CONTEMPORARY APPLICATION OF THEORY TO POLICY 129-30 (4th ed. 1993). In economics, public goods are defined as goods whose benefits cannot be withheld from those who do not pay and are shared by large groups of consumers. Hyman, *supra*, at 129-30. They are not rivals in consumption, meaning that a given quantity of a public good can be enjoyed by more than one consumer without decreasing the amounts enjoyed by rival consumers. *See id.* at 130. There are several types of public goods. *See id.* at 129-30.

30. *See Nebbia*, 291 U.S. at 502; *but see Dolan*, 512 U.S. at 395; Nollan v. California Coastal Comm'n, 483 U.S. 825, 834 (1987)(imposing limits of exercise of police power authority). The U. S. Supreme Court had recognized the right of states to regulate prices charged by businesses "affected with a public interest." Munn v. Illinois, 94 U.S. 113 (1877). In *Nebbia*, the Court upheld the authority of the states to regulate prices as part of the states' general powers to promote the public welfare. *Nebbia*, 291 U.S. at 537; *see* John N. Drobak, *Constitutional Limits on Price and Rent Control: The Lessons of Utility Regulation*, 64 WASH. U. L. Q. 107, 107 (1986).

31. *See infra* Part IV.A and accompanying notes.

32. *See Penn Cent.*, 336 N.E.2d at 1275; *supra* note 9 and accompanying text.

nomic theories when the public benefit derived from the use of commercial land results from an unavailable public service.

## II. THE PUBLIC POLICY OF CONDITIONAL DEMANDS ON LAND USE AND LAND

Normally, such an internalization of these costs might appear as an aberration. But congestible public goods that constitute a legitimate public interest are as common as the land itself.[33] Private parking lots, roads, streets, museums, golf courses, theaters, and open space share the same nature as recreational facilities. Thus public value derived from the public benefit of using these facilities is common among these goods.[34] The study of the nature of government action includes economics and jurisprudence to explain the allocation of municipal resources affected by public value, to examine the commercial use of private property by residents to accrue public value, and to examine the burden imposed on private enterprise affected by public value. This section discusses the public purposes and policy justifications underlying the need to burden private enterprise and effect the allocation of public resources.

### *A. Legitimate State Interests and Policy Justifications*

Development impact exactions offset the cost of expanding existing facilities and providing new public facilities and infrastructure. Exactions include land dedication conditions, impact fees, linkage programs and inclusionary zoning.[35] These conditions and fees finance public facility needs and public wants in many municipalities. Exactions shift the financial burden of public wants and needs to the real estate developers.[36]

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33. *See supra* Part IV.A and accompanying notes.

34. *See id.*

35. John J. Delaney, Larry A. Gordon & Kathyrn J. Hess; *The Needs-Nexus Analysis: A Unified Test For Validating Subdivision Exactions, User Impact Fees, and Linkage*, 50 LAW & CONTEMP. PROBS. 139, 139-40 (Winter 1987).

36. *See* Holloway & Guy, *supra* note 20, at 28-31. Other "[n]ewly developed forms of exactions are impact fees, linkage, and inclusionary zoning." Michael H. Crew, *Development Agreements After* Nollan v. California Coastal Commission, *483 U.S. 825 (1987)*, 22 URB. LAW. 23, 24 (1990). These exactions are defined as follows:

1.Traditional construction, dedication, or in-lieu-fee payment for site-specific needs imposed at the time of subdivision. These improvements are usually categorized as being "minor" in scope and cost, and are typically provided on-site. Examples include subdivision streets, sidewalks, trails, utility easements, and open space.

2.Impact fees - more recent device to fund major, off-site infrastructure expansion imposed at the building permit stage. Examples include expansion or improvement of sewage treatment, facilities, landfills, primary roadways, schools, and active recreational parks. . . .

3.Linkage - Emerging technique of off-site development impact exaction, imposed at the certificate-of-occupancy stage upon large-scale mixed use or nonresidential developments, to promote social programs or policies. Examples include low and moderate-income housing and job training.

Municipalities impose exactions to cope with social, cultural and other needs that are attributable to the impact of residential, commercial and industrial development.[37]

Government actions that include both legislative determinations and adjudicative decisions are often evidence of new changes in social or political circumstances that effect local, state, and federal policy.[38] These

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*See* Delaney, Gordon, & Hess, *supra* note 35, at 139-40.

37. *See* Holloway & Guy, *supra* note 20, at 31-37. The United States Supreme Court applies heightened scrutiny to land dedication conditions under *Dolan*, 512 U.S. 374 (1994) and *Nollan*, 483 U.S. at 825. *Nollan* requires a more causal link or essential nexus between the legitimate state interest and the land dedication condition. *Nollan*, 483 U.S. at 834. *Dolan* requires a rough proportionality that imposes a more direct connection between the land dedication condition and projected impact of development. *See Dolan*, 512 U.S. at 389-91.

*Dolan* is silent on the application of heightened scrutiny to other kinds of development impact exactions. *See* City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 702-708 (1999). In *Del Monte Dunes,* the Court granted a writ of certiorari to the United States Court of Appeals for the Ninth Circuitv. Del Monte Dunes at Monterey, Ltd., 95 F.3d 1422 (9th Cir. 1996), *reh'g denied*, 127 F.3d 1149 (9th Cir. 1997), *cert. granted*, 523 U.S. 1045 (1998), *aff'd*, 526 U.S. 687 (1999). In *Del Monte Dunes*, petitioner denied the respondent a site development permit after it made several applications over a period of five years. *Del Monte Dunes*, 526 U.S at 695-97. Respondent brought a Section 1983, 42 U.S.C. § 1983, claim, alleging that it had been denied the right to receive just compensation in violation of the Federal Takings Clause, U.S. CONST. amend V. *Del Monte Dunes*, 526 U.S. at 698. The United States District Court for the Northern District of California submitted the regulatory taking claim to a jury and awarded respondent $1.45 million in damages for a denial of right to receive just compensation caused by the long delay in refusing to grant the site development permit. *See Id.* at 701. The Ninth Circuit affirmed the judgment of the district court. *Id.* The Ninth Circuit concluded that relationship or connection between the denial of permit and proffered justifications was lacking under the Court's precedents. *See id.* at 702.

*In Del Monte Dunes,* the Court decided whether *Nollan* and *Dolan* apply to a regulatory taking claim where the landowner alleges an insufficient connection between the denial of a site development permit and the proffered policy justifications of the City of Monterey. *See id.* The Court concluded that *Nollan* and *Dolan* do not apply to regulatory taking claims that challenge the validity of a regulatory denial for site development permit and concluded that the reasonably related test was the standard of review for zoning decisions, such as regulatory denials. *See id.* at 702-704. Most importantly, the Court stated that *Dolan*'s rough proportionality applies to exactions, *See id.* at 705-705, but did not state whether they must apply to adjudicative actions or legislative determinations.

In *Del Monte Dunes*, the Court concludes that the reasonably related test applies to ad hoc zoning decisions, *See id.*, but it was silent on whether rezoning decisions that impose conditional demands would not be subject to heightened scrutiny. A rezoning and issuance of building permit generally applies to one lot or development. Treating this lot or development differently under Takings Clause, U. S. CONST. amend. V, could create an anomaly. Applying the reasonable related test to rezoning decisions that impose conditional demands requires a loose fit between these demands and their public purposes and policy justifications and thus would more likely validate the use of public value as public benefit to justify conditional demands. The same conditional demands imposed on the issuance of a building permit would receive greater scrutiny and thus must have a closer fit where public value is the grounds for these demands.

38. Many local and state governments are joining the Smart Growth Movement and proposing and enacting land use and other legislation to implement land use and growth management strategies that combat urban sprawl, control economic development, control land use, protect environmental and natural resources, and improve the quality of life. *See generally* ROBERT H. FREILICH, FROM SPRAWL TO SMART GROWTH: SUCCESSFUL LEGAL, PLANNING AND ENVIRONMENTAL SYSTEMS, (2000) (discussing how to limit urban sprawl and initiate Smart Growth); AMERICAN PLANNING ASSOCIATION, THE GROWING SMART[SM] LEGISLATIVE GUIDEBOOK: MODEL STATUTES FOR PLANNING AND THE MANAGEMENT OF CHANGE, PHASES I AND II INTERIM EDITION (1998) (dis-

changes justify the need to protect the public health, safety, and welfare.[39] Social, economic, and natural circumstances generally require government regulation and taxation to provide public facilities, services and infrastructure. Financing infrastructure is difficult for many city and county governments as public capital investments grow much more slowly than commercial and residential developments and their effects on public facilities.[40] Local governments finance the maintenance of infrastructure and expansion with local tax revenues and federal and state assistance.[41] Local fiscal restraints, taxpayers' revolts, and greater public needs have caused municipal governments to increase reliance on exactions to improve and expand infrastructure and public facilities.[42] Many local governments recognize that growth creates the need for new and expanded public facilities. New residential, commercial, and industrial developments result in an increase in traffic and population, the degradation of natural and environmental resources and greater demands for pub-

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cussing policy-making, legislative and regulatory proposal and other actions to implement Smart Growth); Brian W. Ohm, *Reforming Land Planning Legislation at the Dawn of the 21st Century – The Emerging Influence of Smart Growth and Livable Communities*, 32 URB. LAW. 181, 181-210 (2000) (discussing the influence of smart growth on legislative activities); James A. Kushner, *Smart Growth: Urban Growth Management and Land Use Regulation Law in America*, 32 URB. LAW. 211, 211-38 (2000) (discussing whether state and federal law and policy support smart growth); NATIONAL ASSOCIATION OF HOME BUILDERS, SMART GROWTH: BUILDING BETTER PLACES TO LIVE, WORK AND PLAY, (2000) (discussing what smart growth means to housing and economic development).

Setting priorities for social goals appears even more challenging than in the past. Recent public and private initiatives in growth management and land use controls indicate new challenges in land use policy-making. State, regional, and local policy-makers must weigh economic development and the quality of life in the growth of municipalities and regions. These initiatives must find cooperation among businesses, conservationists, planners, developers, citizens and policy-makers. Municipal governments want to limit urban sprawl or unchecked development; revitalized inner cities and downtowns and provide for sustainable development. Likewise, developers must now consider the impact of commercial, residential and other development on the natural resources and the quality of life of the community and region, such as the city and regional watersheds. *See generally* William A. Johnson, Jr., *Smart Growth and Regional Cooperation: A Tale of a City and County*, STATE & LOCAL LAW NEWS, at 1, 1 & 18-21 (A speech that was given by The Honorable William A. Johnson, Jr., Mayor of Rochester, (New York, at the "Smart Growth and Regional Cooperation" panel at the American Bar Association's Section on State and Government Law meeting in Kansas City, on October 16, 1999. Mayor Johnson discussed policy concerns regarding the way communities grow and develop in response to urban sprawl and global markets.).

39. *See Dolan*, 512 U.S. at 411 (Stevens, J., dissenting).

40. *See, e.g.*, James A. Kushner, *Property and Mysticism: The Legality of Exactions as a Condition for Public Development Approval in the Time of the Rehnquist Court*, 8 J. LAND USE & ENVTL. L. 53, 53-55 (1992); James C. Nicholas, *Impact Exactions: Economic Theory, Practice and Incidence*, 50 LAW & CONTEMP. PROBS. 85, 85-86 (1987); Marlin Smith, *From Subdivision Improvement Requirements To Community Benefit Assessment And Linkage Payments: A Brief History of Land Development Exactions*, 50 LAW & CONTEMP. PROBS. 5, 5 (1987).

41. Nicholas, *supra* note 40, at 85-86. In Banberry Dev. Corp. v. Smith Jordan City, 631 P.2d 899 (Utah 1981), the Utah Supreme Court noted that "[t]he conventional means of financing municipal facilities are tax revenues, special assessments, and bonding. . . ." *Banberry*, 631 P.2d at 902.

42. *See* Nicholas, *supra* note 40 at 85-86; Juergensmeyer & Blake, *supra* note 26, at 419.

lic services and facilities.[43] Therefore, municipal governments shift some of the burden for public capital expansion and improvements to residential, commercial and industrial development, by using exactions.[44]

Exactions are land use regulations that shift the cost of improving and expanding public facilities and infrastructure.[45] This exercise of police power, rather than taxation, by municipalities shifts public capital financing to real estate and other developers.[46]

### *B. Public Burdens on Public Enterprise in Land Development*

Municipalities demand exactions to hold developers accountable for the negative externalities of developing land for residential (housing), commercial (office) and industrial (manufacturing) uses.[47] Public facilities and infrastructure needs can occur on the development site, such as streets and sidewalks, or off the development site, such as sewer facilities and parks. On-site dedication conditions and fees require land and money, respectively, for public improvements or facilities in development. Real estate developers dedicate land or pay fees to install water systems, sewer lines, streets, and parks.[48] Federal and state courts have approved many on-site dedications and fees because these dedications and fees improve or finance public facilities that are a direct result of the impact of real estate development projects.[49]

Off-site exactions require developers to construct, install, and pay for public improvements and facilities that are situated off of real estate development project sites. Off-site land dedication conditions and fees in lieu of dedication are problematic, however. Often it is not entirely clear how a particular development project creates a public need for the improvements of off-site public facilities and infrastructure.[50] Courts may not approve off-site exactions because they are not always connected to development impacts.[51] Off-site dedication conditions and impact fees

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43. *See* Nicholas, *supra* note 40, at 88-89.

44. *See id.* at 88.

45. *See id.*

46. *See id.*

47. *See id.*; Crew, *supra* note 36, at 24-25; Smith, *supra* note 40, at 7-9.

48. *See* Crew, *supra* note 36, at 24; Smith, *supra* note 40, at 7.

49. *See infra* Part III.B and accompanying notes.

50. *See* Crew, *supra* note 36, at 25; Kushner, *supra* note 40, at 107-120; Smith, *supra* note 40, at 7-9. There are two types of off-site subdivision improvements. *See* Smith, *supra* note 40, at 5-6. One type of off-site dedication condition requires that public facilities and improvements be extended to "land bordering on the edge of the subdivision, crossing it, or extending out from it." *Id.* at 8. The other off-site dedication condition requires public improvements and facilities that provide capacity in excess of the needs of the development project. *See id.*; Kushner, *supra* note 40, at 108 nn. 281-282.

51. *See* Crew, *supra* note 36, at 25; Smith, *supra* note 40, at 8; *but see* Ayres v. City Council of the City of Los Angeles, 207 P.2d 1 (1949) (approving off-site exactions for parks.).

may, however, provide positive benefits that also support growth and development within an area of the municipality.[52]

## III. LIMITATIONS ON PUBLIC BURDEN OF THE LANDOWNER UNDER TAKINGS JURISPRUDENCE

The Fifth Amendment's guarantee prohibits state and local "... [g]overnments from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[53] The Court examines the facts and circumstances of each case to determine whether use and other restrictions imposing burdens on owners' exercise of property rights effect a regulatory taking in violation of the Takings Clause, though there was no exercise of eminent domain power and thus no payment of just compensation.[54] The Court's "ad hoc, factual inquiries"[55] focus on several factors to determine whether land use and other restrictions on property rights effect a regulatory taking in violation of the Takings Clause. These factors include the nature of government action, the economic impact of the regulation, and the extent of interference with investment-backed expectations.[56] In deciding whether use restrictions on residential and commercial developments are an as-applied taking, federal and state courts apply these factors to the facts and circumstances of each dispute.

### *A. Limits on Exactions Under The Federal Takings Clause*

The Court has observed on several occasions that land use regulations do not effect a regulatory taking if they "substantially advance legitimate state interests" and do not "den[y] an owner economically viable use of his land."[57] Thus, the Court has found that a variety of land use regulations substantially advance legitimate state interests.[58] However, in some circumstances, government regulation of land use has been found not to serve the public interest and the regulation thus becomes a regulatory taking of private property for public use. An example, which took place in the genesis of regulatory taking law, is *Pennsylvania Coal Co. v.*

52. *See Ehrlich*, 911 P.2d at 445-46.

53. *Armstrong*, 364 U.S. at 49.

54. United States v. Central Eureka Mining Co., 357 U.S. 155, 168 (1958); *Penn Cent.*, 438 U.S. at 124.

55. *Penn Cent.*, 438 U.S. at 125.

56. *See id.* at 124.

57. Agins v. City of Tiburon, 447 U.S. 255, 260 (1980).

58. Euclid v. Ambler Realty Co, 272 U.S. 365 (1926) (establishing urban zoning); Agins v. City of Tiburon, 447 U.S. 255 (1980) (preserving open space in an urban setting); *Penn Cent.*, 438 U.S. at 104 (preserving a historic landmark); Keystone Bituminous Coal Ass'n v. Debenedictis, 480 U.S. 470 (1987) (preventing subsidence damages by subsurface mining operations).

*Mahon.*[59] In *Pennsylvania Coal*, the Court found that Pennsylvania legislation forbidding subsurface mining, which mining caused subsidence of residences and cemeteries, protected only a private interest of the less fortunate party to an executed contract for the purchase of land.[60] More than a half century later, the state of Pennsylvania enacted similar legislation establishing a public interest in protecting surface structures from the subsidence, which the Court upheld.[61] Thus, public interests do evolve or change with society, or as policy-makers become more sensitive to changes in the finite resources and public needs that are subject to greater harm by unplanned development and other uses of these resources.

Notwithstanding *Pennsylvania Coal*'s analysis to limit the expansion of public interests by burdening economic development, many government actions that advance a legitimate state interest are not regulatory takings, even when such actions deny reasonable use or prohibit beneficial use. Zoning laws restrict development,[62] preserve open space and control urbanization,[63] and require owners to forego other residential and commercial uses that are usually most beneficial.[64] Other government actions restrict or deny existing beneficial use and even result in individualized harm to the owner's property interest.[65] These actions impose harm but are unlike zoning and other land use regulations that broadly affect a community of landowners who jointly share the burden and benefit of regulations.

### *B. The Nature of Government Action Under Challenges to Exactions*

Municipalities often impose land dedication conditions and other exactions on development projects,[66] and developers have often challenged these conditions and fees as unreasonable exercises of police powers.[67]

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59. 260 U. S. 393 (1922).

60. *Pennsylvania Coal*, 260 U. S. at 413.

61. *Keystone Bituminous Coal*, 480 U.S. at 470-474 (holding that legislation to prevent subsidence damages by mining operations was not a regulatory taking.).

62. *Euclid*, 272 U.S. at 396-97.

63. *Agins*, 447 U.S. at 262-63.

64. *See Penn Cent. Transp. Co.*, 438 U.S. at 137-38.

65. Miller v. Schoene, 276 U.S. 272 (1928); Hadacheck v. Sebastian, 239 U.S. 394 (1915); Goldblatt v. Hempstead, 369 U.S. 590 (1962).

66. Smith, *supra* note 40, at 10 & nn.28-37.

67. *Id.* at 10. State Supreme Courts generally did not hold that land dedication conditions and fees in lieu of dedication were *ultra vires* acts and illegal taxes. State Supreme Courts held that land conditions and fees in lieu of dedication were not in excess of state constitutional and legislative authority granted, expressly or impliedly, to municipal governments. *See id.;* Kushner, *supra* note 40, at 124-25 & n.359. Other courts held that ordinances imposing land dedication conditions were invalid as unauthorized acts. *See* Smith, *supra* note 40, at 10, & nn.34-37; Thomas M. Pavelko, *Subdivision Exactions: A Review of Judicial Standards*, 25 J. URB. & CONTEMP. PROBS. 269, 275

Developers alleged that imposing land dedication conditions and fees in lieu of dedication required developers to contribute more than their fair share to the cost of local capital improvements, which cost did not necessarily result from the impact of their development projects.[68] Courts recognized such challenges as valid constitutional arguments but did not find such regulation unconstitutional.[69] Developers also challenged land dedication conditions and fees in lieu of dedication as not demonstrating a "direct and demonstrable relationship between the exaction and the needs of the subdivision development . . . "[70] Developers believed that they were being asked to bear more than their fair share of costs for municipal improvements in the face of economic development.

State and federal courts determine the validity of exactions under state and federal takings provisions.[71] State and federal courts have developed and applied three standards of review:[72] (1) reasonableness test,[73] (2) reasonable relationship or rational nexus test[74] and (3) uniquely and specifically attributable test.[75] These standards all require that a de-

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(1983). When the state legislature explicitly granted municipalities the authority to make ordinances imposing land dedication conditions and fees in lieu of dedication, state and federal courts generally held that these conditions and fees were not *ultra vires* acts. *See Ayres*, 207 P.2d at 3-5.

Any sense of relief by municipalities was short lived as developers challenged the fees in lieu of dedication as an illegal tax. Smith, *supra* note 40, at 15. Many municipalities chose to impose fees in lieu of dedication when a dedication "would be too small or too poorly placed to be useful to the public." *Id.* at 14. The fees in lieu of dedication required developers to pay their fair share of the costs of paying for needed municipal improvements. State Supreme Courts generally agreed with municipalities and held that fees in lieu of dedication were not a tax. However, some courts have held that the fees in lieu of dedication were "a special tax violating the uniform taxation requirement." *Id.* at 14-15 & 15 nn.58-64. With careful drafting and limited use of fees in lieu of dedication, the special tax claim was avoided by municipalities. *Id.* at 15-16. It is now well settled among the states that fees in lieu of dedication are unauthorized acts or illegal taxes.

When *ultra vires* and tax claims were not successful in state courts, real estate developers challenged land dedication conditions and fees in lieu of dedication as unreasonable regulation in the exercise of police power. Smith, *supra* note 40, at 11 & nn.38-40.

68. *See id.* at 11.

69. *Id.*

70. *See id.*

71. *See* Holloway & Guy, *supra* note 20, at 152-65.

72. Smith, *supra* note 40, at 11-14; Kushner, *supra* note 40, at 152-60; Judith W. Wegner, *Moving Toward the Bargaining Table: Contract Zoning, Development Agreements, and the Theoretical Foundations of Government Land Use Deals*, 65 N.C. L. REV. 957, 1017 (1987).

73. *Ayres*, 207 P.2d at 6. The reasonableness or rational relationship standard gives the government almost unlimited powers, and thus is highly deferential to government regulations and their rationales. Smith, *supra* note 40, at 13-14; Wegner, *supra* note 72, at 1017.

74. Jordan v. Village of Menomonee Falls, 137 N.W.2d 442 (1965), *appeal dismissed*, 385 U.S. 4 (1966); Associated Home Builders v. City of Walnut Creek, 484 P.2d 606 (1971), *appeal dismissed*, 404 U.S. 868 (1971). The rational nexus or reasonable relationship standard is an intermediate standard and requires a direct connection between the exaction and the impact. Pavelko, *supra* note 67, at 287.

75. *See* Pioneer Trust and Savings Bank v. Village of Mount Prospect, 176 N.E.2d 799 (1961). All commentators agree that the "uniquely and specifically attributable" standard requires the highest level of scrutiny. *See* Smith, *supra* note 40, at 13; Blake & Juergensmeyer, *supra* note

gree of connection must exist between the exactions and the impact of development on public facilities, infrastructure, and social welfare.[76] They differ significantly, however, in the closeness of the relationship between exactions and impacts of residential and other developments.[77]

The least stringent test is the reasonably related test.[78] The application of this test or standard is mostly discredited by the Court's rough proportionality in *Dolan v City of Tigard*.[79] It requires only that a public need exists for the regulation, such as exactions for public improvements.[80] Next, the rational nexus or reasonable relationship test requires a closer relationship between an exaction and development impacts.[81] This test is thought to be closest to the federal norm, that is, *Dolan*'s rough proportionality.[82] In applying this standard, state and federal courts require that exactions bear a reasonable connection to needs generated by the development, and not just public needs surrounding the development.[83] Finally, Illinois and a few other states apply the most restrictive test, titled the 'specifically and uniquely attributable test.'[84] Under this test, "the subdivision creates the entire need for the new facilities and the fees benefit the subdivision residents exclusively."[85] The specifically and uniquely attributable test is not preferred by the majority of federal and state courts because it is the most stringent standard.[86]

These standards determine the nature and extent of the relationship between exactions and the impact of the development projects.[87] Each standard imposes different burdens on developers and also permits various municipal demands for public improvements and facilities.[88] Having

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26, at 429.

76. *See Dolan*, 512 U.S. at 388.

77. *Id.* at 389-90.

78. *Id.* at 389.

79. 512 U.S. at 391; *See also Del Monte Dunes*, 526 U.S. at 702. For the facts of *Dolan*, *see infra* Part V.B and accompanying notes.

80. Kushner, *supra* note 40, at 156-57. In *Del Monte Dunes*, 526 U.S. 687, the Court applies this test to zoning and other land use decisions that generally do not impose forceful conditional demands for money or land.

81. *Dolan*, 512 U.S. at 390-91. *See infra* Part V.B and accompanying notes.

82. *Dolan*, 512 U.S. at 391.

83. Kushner, *supra* note 40, at 153-55; Crews, *supra* note 36, at 27. The reasonable relationship or rational nexus test was formulated in Longridge Builders, Inc. v. Planning Board, 245 A.2d 336, 337 (N. J. 1968) (applying the test to off-site improvements); Jordan v. Village of Menomonee Falls, 137 N.W.2d 442 (Wis. 1965), *appeal dismissed*, 385 U.S. 4 (1966) (applying the test to impact fees for educational and recreational purposes).

84. Kushner, *supra* note 40, at 499.

85. Kushner, *supra* note 40, at 159-60. The specifically and uniquely attributable test was formulated in *Pioneer Trust & Savings Bank*, 176 N.E.2d at 799 (land dedication for a park and school).

86. *Dolan*, 512 U.S. at 389-90.

87. *Ehrlich*, 911 P.2d at 435.

88. *See Dolan*, 512 U.S. at 388-91. *Dolan* and other takings precedents effect the standard of

a federal norm establishes a uniform burden on developers under the takings clause, but municipal requirements for facility and infrastructure needs that are legitimate state interests are not uniform. Moreover, municipalities' relationships between social needs generated by development and the exactions to offset the cost of these needs may not have the same underlying public policy that would justify the validity of a demand for land or money.

## IV. THE PUBLIC VALUE OF CONGESTIBLE PUBLIC GOODS

Public value that creates the link between social needs generated by development and an exaction must have an existence, validity and utility in public policy and legislative policy-making that advances and justifies public purposes. Attempting to ascertain existence, validity and utility of public value, however, is elusive. It is difficult to sort out the issues and concerns surrounding the economics of public value derived from a *public-benefit contribution*. Moreover, distinguishing between public value and private value of congestible public goods, such as recreational facilities and parking lots, could be a problem of valuing a partial interest in land. However, the congestible public goods provided by private enterprise must have some value to the public. Richard Roddewig and Gary Papke in *Market Value and Public Value: An Exploratory Essay*[89] discuss the issue of distinguishing between public value and private value in determining the economic value of public value. They find three different views of public value: natural value, a segmented portion of market value, and option or contingent value.[90] Roddewig and Papke, however, find severe limitations on the use of public value as a component of the appraised economic or market value of land that is often burdened by government regulations and demands.[91]

### *A. The Nature of Congestible Public Goods*

More controversial is public value derived from the members of the community enlarging the use of congestible public goods[92] that are provided by a commercial enterprise. In *Ehrlich v. City of Culver City*,[93] the Supreme Court of California concluded that public value can be derived

review applied by state courts under state takings provisions. *See* Holloway & Guy, *supra* note 20, at 157-65.

89. 61 THE APPRAISAL J. 52 (1993).

90. *See id.* at 54-58.

91. *See id.* at 58-61.

92. *See infra* notes 98-99 and accompanying text.

93. 911 P.2d at 429.

from enlarging the availability of congestible public goods.[94] Part VI gives the facts of *Ehrlich* and examines the Supreme Court's holding that applies federal regulatory taking law to mitigation fee underlain by public value. Here, however, we explore the nature of the public value that the Supreme Court finds in *Ehrlich*. The case involved the loss of a tennis club. We shall refer to this public value as a *resident-benefit contribution* derived from enlarging a commercial enterprise that provides congestible public goods.

Things like air pollution or a scenic view are probably good examples of pure public goods which would require collective action to achieve production of the desired level of the good.[95] There is no market for these goods. In public finance theory, pure public goods are goods that are collectively consumed, are not subject to crowding, and are not excludable or are excludable at very high cost. A classic example is national defense. The degree of defense provided is a group decision which is made in a political process. The cost of providing for defense is paid for by general taxation and is available to all members of the society. Consumption by one individual does not reduce the amount available to other citizens. It would be very difficult to exclude someone from being defended even if they did not pay their taxes.

Recreational facilities like those at issue in *Ehrlich* are not pure public goods but are congestible public goods.[96] Congestible public goods are provided for by taxation and are collectively consumed but the benefits are subject to crowding. There is a possibility of exclusion and users of these goods may be charged user fees to fund their production. The city in *Ehrlich* considered acquiring the facility and charging a user fee for the club. The marginal cost of supplying the benefits to more citizens is close to zero until the system begins to approach capacity. Another example is a road. Once the road is built, many people can use it. The marginal cost of adding additional users is low as long as everyone does not

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94. *Id.* at 445. Although the Supreme Court of California finds that the commercial enterprise is private property, it still concluded that public value does exist and is valid and useful in public policy-making. The Supreme Court stated that:

> The assumption that because property is designated for private recreational use, it lacks public value and that its subsequent withdrawal has no public impact is flawed as a matter of logic. Although privately owned and operated, plaintiff's health club was a business establishment, accessible to the public on the payment of a membership fee. The opportunity of Culver City residents to use such private recreational facilities created a public benefit by enlarging the availability of such facilities. Without such a facility, residents would have to travel further, wait longer, and put up with other inconveniences and restricted choices in their recreational pursuits. Thus, the fact that a recreational facility is privately rather than publicly owned does not erase its value to the public.

*Id.*

95. *See* HYMAN, *supra* note 29, at 129-131.

96. *See id.*

want to go to the same place at the same time. As more and more people try to use the same road at the same time, average speed falls and the danger of accidents increases. Portions of the system may be converted to toll roads if enough people are willing to pay additional user fees rather than pay the usual congestion tolls.[97]

The recreational facilities in Culver City are an example of a congestible public good. The Supreme Court of California was concerned about the impact of the loss of the tennis club because "residents would have to travel further, wait longer, and put up with other inconveniences . . ."[98] This finding is a description of the costs of congestion as additional users are added to the system. The Supreme Court of California finds public value through a resident-benefit contribution that results from the residents in the community using private commercial property. However this public value does not necessarily compare favorably to the other three concepts of public value.

### *B. Natural Value and Segmented Value*

Some scholars, commentators, and policy-makers advocate a move away from traditional appraisal methods to determine the value of land or real estate.[99] A historic site or an environmentally sensitive area may have a value to the society that is not reflected in the marketplace. Scholars have relied on Adams and Mundy who discuss the value of old growth forests as having a natural value to society that is not reflected in market value.[100] For example, once an old growth forest has been logged, it is lost forever to future generations. Roddewig and Papke, however, are critical of this movement away from the market.[101] They believe the problems of natural value can best be integrated into the appraisal process by treating it as investment value rather than a special increment to market value.[102] The traditional appraisal concept of investment value includes the possibility that a property will have a higher value in a particular use or to a particular owner than it will in the market. Whether or not natural value is a valid view of public value, it does not seem to correspond to the use of public value by the Supreme Court in *Ehrlich*. The recreational club or commercial facility was not a facility that could never be reproduced on some other site in Culver City.

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97. *See generally Ehrlich*, 911 P.2d at 448-49.

98. *See* HYMAN, *supra* note 29, at 129-131.

99. *See* Roddewig & Papke, *supra* note 1, at 55-56.

100. *Id.* at 55-56 (citing Victoria Adams and Bill Mundy, *The Valuation of High-Amenity Natural Land*, 59 THE APPRAISAL J. 48, 48-53 (1991)).

101. *See* Roddewig & Papke, *supra* note 1, at 58-60.

102. *See id.* at 61-62.

Segmented value is another concept of public value. Segmented value is the notion that total value can be segmented into private value and public value components.[103] Appraisal and economics deal with the effects of neighborhood and other types of externalities on the value of a particular property. The improvements might not exist and the land has little value if it were not for the existing public infrastructure, such as roads and utilities. The quality of local public services such as police and fire protection and local schools have an effect on the value of virtually all properties in the community. Actually separating out the public value, however, is very difficult. Roddewig and Papke do not think this separation should be done and raise the issue whether these values should be segmented generally.[104] This type of public value is probably closely related, but does not quite seem to capture the Supreme Court's use of public value. The public value at issue in *Ehrlich* is the value that a recreational facility creates for the public rather than the value created in commercial property by other public investment.[105]

### *C. Option or Contingent Value*

The third concept of public value discussed by Roddewig and Papke is option or contingent value.[106] In recent years economists, particularly natural resource economists, have done a number of studies intended to measure the value to the public of certain types of public goods for which there is no market.[107] Boyle and others compare means of three different data sets with open-ended and with dichotomous-choice formats.[108] Smith and Osborne also deal with methodological issues and use

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103. *See id.* at 57-58 & 59-60.

104. *See id.* at 59.

105. *See Ehrlich*, 911 P2d at 445-46. This issue of segmented public and private value may be "the other side of the coin" as the problem that the United States Supreme Court wrestled with in *Pennsylvania Coal*, 260 U. S. at 413. *Pennsylvania Coal* involved two private property owners who had a contractual agreement. *See id.* at 412. The state of Pennsylvania enacted legislation, which, in effect, voided the contract and left one owner's rights with less economic value. *Id.* Justice Oliver Wendell Holmes Jr., writing for the majority, stated that:

> Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized, some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits or the contract and due process clauses are gone.

*Id.* at 413. Three quarters of century after Justice Holmes wrote that opinion, the courts are still having great difficulty in drawing that line between reduction in economic value incidental to legitimate government regulation and a regulation that attempts to evade the requirements of the takings clause by imposing a public burden on private enterprise. *See Dolan*, 512 U.S. at 385-86.

106. *See* Roddewig & Papke, *supra* note 1, at 55-57.

107. *See id.* at 54-55.

108. *See* Kevin J. Boyle, F. Reed Johnson, Daniel W. McCollum & William H. Desvousages, Richard W. Dunford & Sara P. Hudson, *Valuing Public Goods: Discrete Versus Continuous Contin-*

the public's willingness to pay for improving or maintaining visibility at national parks as their example.[109] Other contingent valuation studies have been done to determine the public's willingness to pay additional taxes for other public goods, such as preserving air or water resources.[110] Economic studies of contingent valuation may eventually provide an appropriate methodology for measuring the value of the lost recreational opportunities from this literature.[111]

Thus, the use of contingent valuation may not be appropriate if there is a market for the good in question. For example, the citizens of Culver City, as individuals and as a community acting through their elected officials, have shown that they are not willing to pay for the services provided by the tennis club. The club consistently lost money when operated as a 'for profit' enterprise. This occurred despite several managerial changes, presumably looking for a profitable package of fees and services. The city council decided that they could not afford to purchase the club to operate as a public facility, and they thought it would be too risky to purchase the club and operate it as a public facility paid for by user charges. [112] The council members apparently did not think that the citizens would be willing to pay the cost of providing these services.

## V. EXAMINING THE NATURE OF PUBLIC VALUE UNDERLYING GOVERNMENT ACTION

Public value that forms the link between social needs generated by development and the exactions to offset the cost of these needs must survive scrutiny under takings jurisprudence. The nature of government action that applies mostly a means analysis determines whether the use of public value as the underlying public policy would be a conditional demand for land or money. Takings jurisprudence requires these exactions advance public interests that were the purposes of their design to protect the public, and not give the public benefits without the payment of just compensation.[113] Moreover, takings jurisprudence requires that a particu-

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*gent-Valuation Responses*, 72 LAND ECON. 381, 381-396 (1996).

109. *See* V. Kerry Smith & Laura L. Osborne, *Do Contingent Valuation Estimates Pass a 'Scope' Test? A Meta-Analysis*, 31 J. ENVTL. ECON. & MGMT., 297, 297-301 (1996).

110. *See* Roddewig & Papke, *supra* note 1, at 54-55.

111. *See generally* Note, *"Ask A Silly Question . . .": Contingent Valuation of Natural Resources Damages*, 105 HARV. L. REV. 1981 (1981) (arguing that contingent values are too speculative).

112. *See Ehrlich*, 911 P.2d at 434. The fact that Culver City wanted the club as a public facility but did not have the money to buy it raises the possibility that they would try to acquire the facilities in another way - through extortion as described by Justice Scalia in *Nollan*. *See id.* at 438-39.

113. *See Nollan*, 483 U. S. at 837; *see also* Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992) (holding that a land use regulation is a per se taking if it denies the owner all economically viable use of his or her land, though the government has proffered legitimate interests.).

lar degree of connection must exist between these exactions and the projected impacts of the development.[114] This jurisprudence analysis permits courts to examine the public policy that is set forth by the public purposes and policy justifications of the nature of the exaction.[115]

### *A. Advancing Legitimate State Interests Under Public Policy*

The *resident-benefit contribution*[116] establishes a public value that supports regulation to advance a social need or a public purpose, such as providing recreational facilities. Public value creates a policy linchpin between a social need and a private action that diminishes availability of congestible public goods. Heightened scrutiny of the means to further the public purpose is necessary to determine if a *resident-benefit contribution* to commercial land is sufficient to exact a public benefit to offset the need created by the loss of the private facilities. The Court has yet to review a case that involves a conditional demand based on a resident-benefit contribution to support a public purpose. It has, however, addressed whether a land dedication condition can require landowners to further a public purpose that is a legitimate state interest but is not necessarily advanced by this land dedication condition.

In *Nollan v. California Coastal Commission*, the Nollans leased and then purchased a beachfront lot in Ventura County, California. In their purchase agreement, the Nollans promised to remove and replace a small bungalow that was on the lot. The Nollans, however, needed a construction permit from the California Coastal Commission (Commission) to develop the lot. The Commission issued a permit granting the Nollans approval to demolish the bungalow and construct a new house on condition that the Nollans grant a public right-of-way easement. The easement was above the high tide mark of the beach and ran parallel to the ocean. The Commission wanted the easement so that the public would have access to the ocean. The easement would not give the public access to the ocean from the highway, but would permit the public to move unrestricted along the beach once people were on the beach. When the Nollans objected to the land dedication condition, the Commission overruled their objection and relied on the public need for access to the ocean. The Nollans filed an action in the state trial court claiming that the grant of a right-of-way easement on their land violated the federal takings clause.[117] The California state trial court held that the land dedication condition,

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114. *See Dolan*, 512 U.S. at 390-91.

115. *See Dolan*, 512 U.S. at 386.

116. For public-benefit contribution by the City of New York that made a direct capital investment in a private transportation facility, see *supra* note 9 and accompanying text.

117. *See Nollan*, 483 U.S. at 829-32.

requiring the Nollans to grant a lateral easement, was a taking of private property in violation of the Fifth[118] and Fourteenth[119] Amendments.[120] The California Court of Appeals concluded that a public need for access was justification enough to support the condition.[121] The Nollans appealed to the United States Supreme Court.

The Supreme Court reversed the decision. It held that the land dedication condition required for the issuance of a building permit was a regulatory taking in violation of the Fifth and Fourteenth Amendments to the Constitution.[122] The Court concluded that no essential nexus existed between the legitimate state interest and the land dedication condition imposed under the Commission's exercise of the police power.[123] The Court stated that beach access, though presumed to be a legitimate state interest,[124] would not be "substantially advance[d]" by land use regulation in the form of a land dedication condition that mandates the granting of an easement in return for a construction permit.[125] Although the Court found that the condition provided for lateral movement on the beach,[126] it did not find that this condition would necessarily make the beach accessible to the public, when the public could not even see the beach from the highway.[127]

*Nollan* addressed the nature of the link or connection between an exaction and its public purpose that generally furthers some social or other public need.[128] The land dedication condition would give the Commission a property interest in the Nollans' land and take their property rights. But the Public Trust Doctrine would not necessarily, without more, give the Commission's control over Nollans' right to develop and use their property.[129] The Public Trust Doctrine protects public value in

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118. *See* U. S. CONST. amend. V. The Takings Clause's guarantee states that "nor shall private property be taken for public use, without just compensation." *Id.*

119. *See* U. S. CONST. amend. XIV. The Takings Clause of the Fifth Amendment of the United States Constitution is made applicable to the States through the Fourteenth Amendment. *See* Chicago, B. & Q. R. Co. v. Chicago, 166 U.S. 226, 239 (1897).

120. *See Nollan*, 483 U.S. at 829.

121. 223 Cal.Rptr. 28 (1986).

122. *See Nollan*, 483 U.S. at 841-42.

123. *See id.* at 839-40.

124. *See id.* at 834-35.

125. *See id.* at 838-40

126. *See id.* at 838-39.

127. *See id.*

128. *See Nollan*, 483 U.S. at 834-35.

129. *See id. at* 832-33. The public trust doctrine gives the states ownership of all navigable waters and tidelands and other underlying lands within their borders. The states hold these waters in public trust for the citizens of the states. *See, e..g.,* Illinois Cent. Railroad v. Illinois, 146 U.S. 387, 435 (1892); Arnold v. Mundy, 6 N.J.L. 1, 79 (1821). The public trust doctrine is state law and thus may vary from state to state. *See e.g., Illinois Cent. Railroad*, 146 U.S. at 435; Arnold, 6 N.J.L. at 79. For interpretations of the public trust doctrine by California courts, see, e.g., Mark v. Whitney,

the land below the high-tide mark of navigable waters,[130] but according to the *Nollan* Court, it would not create a public-benefit contribution to permit a lateral easement along the beach to advance a public purpose.[131] Even close proximity to publicly controlled land that definitely possesses public value through its natural qualities does not necessarily create a public-benefit contribution that would justify a lateral easement.[132] The Commission's demand required the Nollans to grant the state a property right and public access to the Nollans' land.[133] In rejecting the Commission's demand, the Court found the nexus or link between the conditional demand for the grant of a lateral easement for public use and the public's need for accessibility to the beach lacking.[134]

### *B. Establishing a Sufficient Relationship between Means and Ends*

The public value of a *resident-benefit contribution* permeates commercial and industrial operations and thus may apparently support public purpose when the policy linchpin between development and social needs appears even unlikely to exist in fact and theory. The *resident-benefit contribution* may lessen the need for policy justifications by permitting courts to minimize both the nature and scope of development impacts. The Court has yet to review a case involving a conditional demand that relies on a *resident-benefit contribution* to support an essential nexus that would permit consideration of the policy justifications for this demand. The Court has, however, reviewed a case requiring consideration of the policy justifications for a land dedication condition.[135]

In *Dolan v. City of Tigard*,[136] a landowner asked the Court to decide the degree of connection required between a land dedication condition and the impact of development on infrastructure and public facilities.[137] The petitioner, Ms. Florence Dolan, operated a retail electric and plumbing supply business on 1.67 acres of land within the City of Tigard, Oregon (Tigard).[138] The petitioner applied to Tigard for a permit for commercial development of her land. In the first phase, petitioner wanted to

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491 P.2d 374 (1971) (enlarging the public uses of trust lands); National Audubon Society v. Superior Court, 658 P.2d 709 (1983), *cert. denied*, 464 U.S. 977 (1983) (extending the public trust doctrine to non-navigable waters).

130. *See supra* note 129 and accompanying text. California extends protection under its public trust doctrine to non-navigable waters. *National Audubon Society*, 658 P.2d at 712-13.

131. *See Nollan*, 483 U.S. at 839 n.6.

132. *See id.*

133. *Id.* at 831-32.

134. *Id.* at 838-39.

135. 512 U.S. 374 (1994).

136. 512 U.S. 374 (1994).

137. *See Dolan*, 512 U.S. at 386.

138. *See id.* at 379.

increase the size of the present 9,700 square foot building to 17,600 square feet to relocate her electric and plumbing supply business in the larger building. Petitioner also wanted to expand the size of her parking lot. In approving the permit, the Commission required that petitioner dedicate the property for improvement of a storm drainage system and for a pedestrian/bicycle pathway. The two land dedications comprised approximately 7,000 square feet or 10 percent of petitioner's 1.67 acres. When petitioner requested a variance from those dedications, the Commission denied the request[139] and also the variance.[140] The Commission found that the dedications for stormwater management and the pedestrian/bicycle pathway were reasonably related to petitioner's request to intensify the use of her site.[141] The Tigard City Council approved the denial of the variance and affirmed the Commission's final order.[142] Petitioner appealed to the Land Use Board of Adjustment (LUBA).[143] Petitioner argued that Tigard's conditional demands were not related to the proposed development and violated the takings clause.[144] LUBA concluded that a reasonable relationship existed between the development and the public need for the pedestrian/bicycle pathway that provided an alternative means of transportation.[145] According to LUBA, these land dedication conditions were not a regulatory taking.[146]

The Oregon Court of Appeals affirmed LUBA's decision.[147] Petitioner appealed to the Supreme Court of Oregon. The Court affirmed the decision of the court of appeals.[148] Petitioner requested the United States Supreme Court to review the case, and the Court granted a *writ of certiorari*.[149] The U.S. Supreme Court reversed the Supreme Court of Oregon.[150] The Court concluded that the federal standard of review for a regulatory taking claim is a rough proportionality.[151] The rough proportionality standard requires municipalities to conduct a thorough finding of fact while requiring courts to apply a stringent level of scrutiny to justify the imposition of land dedication conditions and fees in lieu of dedi-

139. *See id.* at 380.
140. *See id.* at 381.
141. *See id.* at 381-82.
142. *See Dolan*, 512 U.S. at 382.
143. *Id.*
144. *See id.* at 382-83.
145. *See id.*
146. *See Dolan*, 512 U.S. at 382-83.
147. *See id.* at 383; Dolan v. City of Tigard, 832 P.2d 853 (Or. Ct. App. 1992).
148. *See* Dolan v. City of Tigard, 854 P.2d 437 (Or. 1993).
149. 510 U.S. 989 (1993).
150. *See Dolan*, 512 U.S. at 396.
151. *See id.* at 391.

cation.[152] The Court requires that "the city make some sort of individualized determinations . . ." [153] in its imposition of land dedication conditions. In applying the test to examine the nature of the government action, the Court focused its standard of reasonableness on the nature of the adjudicative action, requiring an individual or site-specific evaluation of the projected impact. For this action, it requires a higher level of scrutiny that examines both the nature and extent of the impact of the proposed development.[154] Simply stated, a minimal connection will not survive the kind of scrutiny that is required under the rough proportionality test. The connection need not, however, be mathematically precise.[155]

The *Dolan* Court's rough proportionality test would permit the connection to be minimized when the public purpose and policy justification rest on public policy that could prove elusive or speculative. Public value inordinately increasing the public burden of a developer based on a benefit contribution that is readily present would need to create a clear line of sight between regulation and development impacts. When the *resident-contribution benefit* is the foundation of public value that underpins government action to limit private enterprise, the public burden imposed on landowners should be readily justifiable. Such a public burden is not easily ascertainable from the definition of public value that exists alongside market value in the ownership of land subject to a public burden for its impact.

*Nollan* and *Dolan* create a means-ends analysis that scrutinizes the link between the conditional demand and its public needs. The result of this analysis is a finding that public needs are legitimate state interests that are better left to the wisdom of policy-makers, but cleverly shows some ends sensitivity to increasing public demands. However, federal and state courts must decide whether the public policy underlying a government decision to link a business enterprise and a public need is within the link or nexus and thus permits consideration of policy justifications under *Dolan*.

## VI. A STATE COURT SCRUTINIZING THE NATURE OF PUBLIC VALUE UNDERLYING A MITIGATION FEE

Recently, the Supreme Court of California was asked to decide whether the resident-benefit contribution underlying a mitigation fee to link a development project and recreational facility needs falls within

152. *See id.* at 390-91.

153. *Id.* at 391.

154. *See id.*

155. *See Dolan*, 512 U.S. at 391.

*Nollan*'s essential nexus and thus permits consideration of policy justifications under *Dolan*'s rough proportionality.

In light of takings jurisprudence and the economics regarding public value, the Supreme Court of California finds public value through *resident-benefit contribution* in the rezoned use of private commercial property on which a municipality had relied to meet public demand for recreational facilities. Its findings and conclusions of law permit state and local policy-makers to impose conditional demands on rezonings and development applications to maintain social needs.[156] The impact of development results in a loss of private recreational facilities that had been supplying a public good. These exactions are examples of municipal policy-making to assist in finding ways or programs to replace private recreational facilities.[157]

### *A. The Loss of Public Value through Changing Land Use*

Municipal policy-makers have used exactions and other conditional demands to offset the cost of providing for an increase in public needs caused by the impact of development. Some municipalities find that additional negative impact of development is the loss of private recreational and other services and facilities that had been supplying congestible public goods[158] to the community. These municipalities are using exactions to assist in their administrative and policy-making efforts to replace the congestible public goods.[159] These exactions raise takings issues regarding the initial link between the exaction and the social needs (public purpose) generated by the development. If the link exists, the issue becomes the fit between an exaction and its policy justifications. Strangely, the initial link can rest mostly on a *resident- benefit contribution* that creates public value by enlarging the availability of the congestible public good.

The case is *Ehrlich*.[160] In this case, Ehrlich developed a site as a private recreation club.[161] In August 1988, however, he closed the club due to financial losses.[162] Ehrlich then decided to build a "30-unit condominium complex valued at $30 million."[163] In September 1988, he applied to Culver City to rezone the site from commercial to residential and to change its specific and general land use plans.[164] Culver City considered

156. *See Ehrlich*, 911 P.2d at 436-38.
157. *See id.* at 449-50.
158. *See supra* notes 98-99 and accompanying text.
159. *See Ehrlich*, 911 P.2d at 449-50.
160. 911 P.2d 429 (Cal. 1996), *cert. denied*, 117 S.Ct. 299 (1996).
161. *See id.* at 434.
162. *See id.*
163. *Id.*
164. *See id.*

purchasing the site and hired a consultant to study the feasibility of purchasing it.[165] Because the study determined that the Club had been poorly managed and needed major capital improvements, the City decided not to purchase the site.[166] In April 1989, Culver City denied the application for rezoning and other changes that had been requested by Ehrlich,[167] declaring that the loss of the club reduced needed recreational facilities of the community.[168] In the meantime, Ehrlich requested and received a demolition permit and demolished the club. He donated some of the equipment to Culver City[169] and also indicated that he would be willing to build four new tennis courts.[170] Later, Culver City agreed to approve the application for rezoning and changed its plans conditioned on Ehrlich agreeing to pay a mitigation fee (one-time impact fee) of $280,000 in lieu of building the tennis courts.[171] Culver City would use the fee to replace needed recreational facilities that had been lost to the community by the closing of Ehrlich's club.[172]

Ehrlich challenged the mitigation fee, *inter alia*, as a violation of the Takings Clause of the Federal[173] and California Constitutions,[174] claiming that the fee was insufficiently related to the impact of his development.[175] The trial court held that Culver City's mitigation fee for recreational facilities was not reasonably related to the impact of the development project and was thus a regulatory taking.[176] The court of appeals reversed the trial court on the mitigation fee,[177] concluding that "[t]he mitigation fee was imposed to compensate the City for the benefit conferred on the developer by the City's approval of the townhouse project and for the burden to the community resulting from the loss of the recreational facilities."[178] "The court of appeals found . . . [that a ] 'substantial nexus' [existed] between the proposed condominium project and

165. *See id.*

166. *See id.*

167. *See id.*

168. *See id.*

169. *See id.*

170. *See id.*

171. *See id.* at 434-35.

172. *See id.* at 435.

173. U. S. CONST. amend. V.

174. CAL. CONST. art. I, § 19.

175. *See Ehrlich*, 911 P.2d at 435. *Ehrlich* challenged Arts in Public Places as violations of the takings clause of the Federal, U. S. CONST. amend. V, and California, CAL. CONST. art. I, § 19, Constitutions, as not sufficiently related to the impact of his development. *See Ehrlich*, 911 P.2d at 435. The trial court held that the Arts in Public Places was not a regulatory taking. *See id.* at 435.

176. *See Ehrlich*, 911 P.2d at 435.

177. *See id.* at 435 (*citing* Ehrlich v. City of Culver City, 15 Cal.App.4th 1737, 19 Cal.Rptr.2d at 468.).

178. *Id.* at 436 (*quoting Ehrlich*, 15 Cal.App.4th 1750, Cal.Rptr.2d at 468.).

the $280,000 exaction,"[179] though the need for these facilities was not a result of the impact of the development project.[180] Ehrlich requested the United States Supreme Court grant a *writ* of *certiorari* to the California Court of Appeals.[181] The Court simultaneously granted *certiorari*, vacated the judgment and remanded *Ehrlich* to the court of appeal with instructions to apply *Dolan*.[182] On remand, the court of appeals concluded that the application of *Dolan* did not change the outcome of its decision, but did not publish an opinion.[183] Ehrlich requested review by the Supreme Court of California.[184] It agreed to review the decision of the court of appeal and concluded that the loss of public value was enough of an impact to justify the mitigation fee and thus this fee was not a taking of private property for public use.[185]

### *B. Commercial Land Possessing Public Value by a Resident-Benefit Contribution*

In *Ehrlich*, the Supreme Court of California found well-settled law infrequently used to support exactions such as Culver City's mitigation fee that advanced a need for recreation.[186] The Supreme Court, however, found a valid nexus between the exaction and development impacts under *Nollan*'s analytical framework but relied strongly on protection of the public interest.[187] The trial court recognized that the public impact of a zoning change would not justify a mitigation fee to replace recreational

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179. *Id.*

180. *See id.* Next, the court of appeal affirmed the trial court's holding that the Arts in Public Places was not a taking of private property for public use. *Id.* The Supreme Court of California held that Arts in Public Places was not a taking of private property for public use. *See id.* at 450. The Supreme Court concluded "that the arts in public places is not a development exaction of the kind subject to the *Nollan-Dolan* takings analysis." *Id.* The Supreme Court found Arts in Places similar to traditional land use regulations, such as set backs, landscaping requirements, and other design conditions and thus a legislative determination. *See id.*

Ehrlich paid but did not challenge the $30,000 fee in lieu of dedication of parkland. *Id.* at 435 n.2. Nevertheless, the Supreme Court observed that development impact fees for park and recreational purposes are legitimate exercises of police power authority by local governments. *See Ehrlich*, 911 P.2d at 448 (citing Associated Home Builders, Inc., 484 P.2d at 606).

181. Ehrlich v. City of Culver City, 512 U.S. 1231.

182. *See id.* at 1231.

183. *See Ehrlich*, 911 P.2d at 433.

184. *See id.*

185. *See id.*

186. *Id.* at 444. In *Ehrlich* the Supreme Court states that:

> [P]laintiff and several supporting *amici curiae* insist that because the club was a privately operated facility, accessible only by dues-paying members, a zoning change withdrawing the parcel from such private recreational use could not have a cognizable public interest as a matter of law.

*Id.* at 445.

187. *See id.* at 444.

facilities that were truly for private recreational use,[188] and concluded that Ehrlich had no duty to provide recreational facilities to the City and stated that he had not caused the loss of these facilities by his development project.[189] The California Supreme Court, however, observed that the government cannot impose a conditional demand to exact land or a fee and not have the power to prohibit development of the land.[190] The Supreme Court also observed that if the city condemns the land for use as a public recreational facility, it must pay just compensation.[191] Thus, the Supreme Court recognized that the public impact of the project is not its impact on public facilities but is the loss of private facilities that have been enlarged by public use.[192] We refer to this impact was a *resident benefit-contribution* that establishes public value was a link between the particular regulation and a public need.[193]

The Supreme Court of California concluded that private recreational facilities possessed public value and may impact public needs when removed from private use.[194] The Court found that private ownership does not preclude private property from possessing public value but does affect the value of the loss to the city,[195] and concluded that *Nollan*'s essential nexus and *Dolan*'s rough proportionality apply to a monetary fee that "imposes a special, discretionary permit conditions on development by individual property owners . . . ." [196] The Court held that Culver City's mitigation fee was not a regulatory taking under *Nollan* and *Dolan*'s analytical framework;[197] however, it concluded that the loss of public value in rezoning the site of the private recreational facilities club would not justify a mitigation fee of $280,000.[198] The Court concluded that Culver City could not use the loss of a private recreation facility as the lost value,[199] and gave the lower court some guidelines to apply in determining the amount of monetary fee that could be exacted from Ehrlich for lost value that resulted from rezoning and changing land use plans.[200] It stated that Culver City could consider the economic costs (administrative

188. *See id.* at 445.

189. *See id.*

190. *See id.* at 444-45 (citing *Nollan*, 483 U.S. at 836-37).

191. *See id.* at 445.

192. *See id.* at 445-46; *infra* notes 198-201 and accompanying text.

193. For a discussion of public value that is created by public investment in infrastructure supporting a private facility, see *supra* note 9 and accompanying text.

194. *See id.* at 445.

195. *See id.*

196. *Id.* at 447.

197. *See id.* at 447.

198. *See id.*

199. *See id.*

200. *See id.* at 449.

expenses) of redesignating other property or the public costs of attracting a new recreational facility,[201] but also noted that Culver City could require Ehrlich to transfer the restricted use (recreation) to another site owned by Ehrlich or pay a fee in lieu of this transfer.[202]

The California Supreme Court's use of *resident benefit-contribution* to establish public value permits municipalities to avoid the requirements of the *Nollan-Dolan* means-ends analysis. *Ehrlich* shows that even though an exaction is subject to *Dolan*'s rough proportionality, a developer can be required to pay for public needs not even related to the impact of the development. *Ehrlich* shows that a request for a rezoning and changes to land use plans can result in lost public value by the removal of private facilities from private use. *Ehrlich* points out that developers can pay exactions for the loss of public value for the removal of private facilities that were congestible public goods endowed with public value resulting from a *resident benefit-contribution.*

## VII. THE VALIDITY OF THE MEANS-ENDS FIT IN LAW AND ECONOMICS

The Supreme Court of California held that Culver City's mitigation fee was not a regulatory taking under *Nollan-Dolan* analytical framework.[203] However, it concluded that the loss of public value in rezoning the site of the private recreational facilities club would not justify a mitigation fee of $280,000.[204] The Court concluded that Culver City could not use the loss of a private recreation facility as the lost value,[205] and gave the lower court some guidelines to apply in determining the amount of monetary fee that could be exacted from Ehrlich for lost value that resulted from rezoning and changing land use plans.[206] It stated that Culver City could consider the economic costs (administrative expenses) of redesignating other property or the public costs of attracting a new recreational facility,[207] and also noted that Culver City could require Ehrlich to transfer the restricted use (recreation) to another site owned by Ehrlich or pay a fee in lieu of this transfer.[208] In essence, the Court concluded that a

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201. *See id.* The Supreme Court of California is permitting municipalities to force developers and land owners to internalize the public cost of public decision making to replace congestible public goods. Normally municipalities use exactions to force developers to internalize the cost of public facilities and infrastructure. Municipalities are using public value to link public needs to changes in commercial land use and to burdens on government to address the decline of commercial centers.

202. *See Ehrlich*, 911 P.2d at 449.

203. *See id.* at 447.

204. *See id.*

205. *See id.*

206. *See id.* at 449.

207. *See id.*

208. *Ehrlich*, 911 P.2d at 449. *Ehrlich* also addressed whether *Dolan* applies to legislative determinations. The United States Supreme Court has refused to address this question. *See* Parking

loss of public value has administrative costs or obligations.[209] Thus, while the Court assigned economic value to Culver City's loss of public value[210] and implicated economic theory, its rationale does not support such theory in these circumstances of *Ehrlich*.[211]

### *A. Rough Proportionality Between Exactions and Social Needs*

Not all public value conferred on a landowner by the public enlargement of his or her facilities necessarily justifies a public burden to provide fees for administrative services. In *Ehrlich*, Justice Kennard's dissent does not refer to congestible public goods, but does make some interesting points that implicate a theory of congestible public goods,[212] stating that if the citizens of Culver City were suffering the effects of congestion in public recreation facilities before Ehrlich closed his club, this shortage of facilities could not possibly have been his fault.[213] Justice Kennard pointed out that this is not a typical development impact fee imposed on new development.[214] If the townhouses that Ehrlich wanted to build were to bring new families to Culver City, this would further congest public recreational facilities and justify an impact fee.[215] However,

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Ass'n of Georgia, Inc. v. City of Atlanta, 264 Ga. 764, 450 S.E.2d 200 (Ga. 1994), *cert. denied*, 115 S.Ct. 2268 (1995). In a dissent to this denial of *certiorari*, Justices O'Connor and Thomas argued that the Supreme Court deliberately permitted confusion in federal and state courts' review of land use regulations. *Id.* at 2268. Other federal and state courts have addressed this question but are split on its outcome. *See, e.g.*, Shultz v. City of Grants Pass, 884 P.2d 569 (Or. Ct. App. 1994) (applying to legislative determinations); Southeast Cass Water Resource Dist. v. Burlington Northern R.R. Co., 527 N.W. 2d 884 (N.D. 1995) (does not apply to legislative determinations). Finally in *Del Monte Dunes*, the Court concludes that *Dolan* and *Nollan* do not apply to general land use decisions that deny development permits. *Del Monte Dunes*, 526 U.S. at 687. Federal and state courts do not agree on the nature of the decision-making process that is subject to the *Nollan-Dolan* analytical framework.

*Dolan* has generated many comments regarding its doctrine and application in law review and bar journals. Commentators agree that *Dolan* limits state and local governments' use of land dedication conditions imposed on the application of a building or construction permit. *See e.g.*, Holloway & Guy, *supra* note 26, at 73; Kristen P. Sosnosky, *Dolan: The Sequel to Nollan's Essential Nexus For Regulatory Takings*, 73 N. C. L. REV. 1677 (1995). Commentators do not agree on whether or not *Dolan*'s rough proportionality applies to legislative determinations and development impact exactions. *See, e.g.*, Daniel A. Crane, *Poor Relations: Regulatory Taking After Dolan*, 63 U. CHI L. REV. 199 (1996); Douglas W. Kmiec, *At Last, Supreme Court Solves the Takings Puzzle*, 19 HARV. J. L. & PUB. POL'Y 147 (1995); . Other commentators see *Dolan* as the dawning of a new era in limiting economic regulation. *See* Richard A. Epstein, *The Harms and Benefits of Nollan and Dolan*, 15 N. ILL. L. REV. 479 (1995).

209. *Ehrlich*, 911 P.2d at 449-50.

210. *See id.*

211. *See supra* Part IV and accompanying notes. *See also supra* note 9 and accompanying text (discussing a finding of public value in a private transportation facility that was greatly enhanced by government).

212. *See Ehrlich*, 911 P.2d at 466-68 (Kennard, J., dissenting).

213. *See id.* at 466-67 (Kennard, J., dissenting).

214. *Id.*

215. *See id.* at 466 (Kennard, J., dissenting).

the new development was assessed a parkland fee of $30,000 which Ehrlich paid without protest.[216] With the payment of this fee, Ehrlich was paying the cost of adding recreational services resulting from the new development. Thus, the mitigation fee was really being imposed on the closing of the tennis club (the former land use).[217]

The Supreme Court relied on a statement by Justice Scalia in *Nollan*[218] to describe how to determine whether there was an essential nexus in that case; Justice Scalia wrote, "[i]n short, unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but an out-and-out plan of extortion."[219] The Supreme Court pointed out that the essential nexus was achieved here because requiring Ehrlich to continue in the recreational club business at that site served the same function as the mitigation fee.[220] Justice Kennard, however, disagreed and noted that requiring Ehrlich to remain in the private recreational club business on that site might violate the second part of the test from *Agins v. City of Tiburon*.[221] This requirement could have the effect of denying all economically viable use of the land. Even if it did not deny all economically viable use, it could still constitute illegal *spot zoning* which "occurs where a small parcel is restricted and given lesser rights than the surrounding property . . . .,"[222] and the effect of this spot zoning in this situation is to single out an individual landowner to bear a disproportionate burden in providing for the recreational needs of the city.

In conclusion, the fundamental policy of American takings jurisprudence is that the Takings Clause ". . . bar[s] 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."[223] Ehrlich was made the provider of recreational facilities because the public unknowingly creates public value through a most common *resident benefit-contribution* by using his commercial facility. Therefore, Justice Kennard would find the mitigation fee to be a regulatory taking of property.[224]

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216. *Id.* (Kennard, J., dissenting).
217. *See id.* at 434-35.
218. *Id.* at 445 (*citing Nollan*, 483 U.S. at 837.).
219. *Id.*
220. *See id.* at 445-46.
221. 447 U.S. 255, 260 (1980).
222. *Ehrlich*, 911 P.2d at 467-68 (Kennard, J., dissenting).
223. Armstrong, 364 U.S. at 49.
224. *See Ehrlich*, 911 P.2d at 467-68 (Kennard, J., dissenting).

### *B. Mitigation Fee or Exit Fee under Police Power*

To the extent that the mitigation fee is assessed against the closing of the existing land use, this fee could be viewed as an exit fee. Appraisal theory requires that a land use be legally permitted before it can be considered to be the highest and best use for a parcel of land.[225] In *Ehrlich*, the question of highest and best use will inevitably become mired in asking whether a regulatory taking occurs due to the nature of government action.[226] However, in economic theory, a production process would be considered inefficient if the same inputs could be used to produce higher valued output.[227] In this sense, retaining the site as a private recreation club would be inefficient compared to the development of the condominiums on this site. This retention would utilize the same land, but not exactly the same inputs. Many economists consider that any barrier to shifting inputs in production processes, such as a barrier to exit, would produce less efficient allocations and result in a welfare loss to society.[228]

Failure to permit a firm that is losing money to go out of business has other legal and economic implications. Public utilities have been and still are more regulated than other industries because they generally affect legitimate state interests regarding energy usage and economic productivity.[229] As the United States Supreme Court stated in *Munn v. Illinois*,

> When the owner of property devotes it to a use in which the public has an interest, he in effect grants to the public an interest in such use, and must, to the extent of that interest, submit to be controlled by the public, for the common good, as long as he maintains the use. He may withdraw his grant by discontinuing the use.[230]

Even industries regulated as public utilities could escape regulation by going out of business.[231] While the Supreme Court of California, in *Ehrlich*, may have significantly broadened the scope of regulation or expanded the range of firms that can be regulated in the same manner as

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225. *See* Roddewig & Papke, *supra* note 1, at 54.

226. *See supra* Part V.A and accompanying notes.

227. *See* WALTER NICHOLSON, MICRO ECONOMIC THEORY: BASIC PRINCIPLES AND EXTENSIONS, The Dryden Press 520-22 (2d. ed. 1977) (discussing efficiency in the use of resources in production); RICHARD A. LIPSEY, ECONOMICS 203-04 (2d. ed. 1996) (discussing economic efficiency and technical efficiency in the allocation of resources).

228. *See, e.g.,* Nicholson, *supra* note 229, at 520-21.

229. *See* John N. Drobak, *supra* note 30, at 107-09.

230. *See Munn*, 94 U.S. at 126. *See also* Drobak, *supra* note 30, at 119-38 (discussing the constitutionality withdrawal from price-controlled business and government-imposed barriers to exit).

231. *See* Drobak, *supra* note 30, at 119-23.

utilities, public utility law is currently undergoing substantial change and we will leave this aspect of the case for future investigation.[232]

### C. *Conditional Demands on Rezoning or Development*

*Ehrlich* is confusing with respect to the use of regulatory fees in land use regulation. In *Ehrlich*, Justice Kennard, writing for the dissent, pointed out that the mitigation fee focuses on the former land use rather than the proposed new development.[233] This raises another issue in that the fee may, in effect, be a fee for rezoning rather than a development impact fee. The Supreme Court, however, seemed to treat these questions interchangeably,[234] noting that cities have been allowed considerable discretion in zoning issues.[235] However, the Court has recently raised the level of scrutiny required and shifted the burden of proof in cases involving some conditional demands that are imposed by adjudicative actions.[236]

In *Ehrlich*, the Supreme Court of California does not clearly state whether it would require the same level of scrutiny for a mitigation fee imposed directly on a rezoning[237] or whether Culver City could enact an ordinance demanding a mitigation fee for a rezoning or change in land use.[238] However, any rezoning, even though desirable on other grounds, must take something away from the public. For example, a housing complex built on open land in a city with a housing shortage might be very

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232. For a discussion of some of the market concerns and policy issues in the deregulation of public utilities, *see generally* James M. Hogan, Robert Neyland, & E. Mark Gressle, *New Strategy for a New Era*, PUBLIC UTILITIES FORTNIGHTLY, Sep. 15, 1999, at 10-12 (discussing the growth of utility companies during deregulation); Adam D. Thierer, *Energizing America: A Blueprint For Deregulating The Electricity Market*, The Heritage Foundation Backgrounder No. 1100, January 23, 1997 (discussing deregulation of electricity markets); Leigh A. Riddick, *Deregulating Fairly: Untangling the Interests of Stockholders and Customers*, PUBLIC UTILITIES FORTNIGHTLY, 41, at 41-42, April 15, 1995 (discussing a method to protect the interests of stockholders and ratepayers).

233. *See Ehrlich*, 911 P.2d at 462 (Kennard, J., dissenting).

234. *See id.* at 449. The Supreme Court states that "[r]ather, the city insists on a different kind of exaction as a condition for authorizing development: the payment of $280,000." *Id.* at 443. Later it states that "[t]his is not to say, however, that some type of recreational fee imposed by the city as a condition of the zoning and related changes cannot be justified." *Id.* at 449. Moreover, in its finding of fact the Supreme Court noted that the court of appeals stated that "'[t]he mitigation fee was imposed to compensate the City for the benefit conferred on the developer by the City's approval of the townhome project and for the burden to the community resulting from the loss of recreational facilities.'" *Id.* at 436, *quoted in* Ehrlich v. City of Culver City, 19 Cal.Rptr.2d 468 (1993)).

235. *See id.* at 439 & 447.

236. *See Dolan*, 512 U.S. at 391-93.

237. *See supra* note 234 and accompanying text. The Supreme Court of California recognizes zoning and rezoning as a legislative action, *see Ehrlich*, 911 P.2d at 447-48, but it refuses to apply *Dolan* to legislative determinations that impose exactions. *See id.* at 450.

238. *See supra* notes 234-235 and accompanying text. The Supreme Court concludes that *Dolan* does not apply to the Arts in Public Places fee because this fee is merely a traditional legislative determination. *See Ehrlich*, 911 P.2d at 450.

desirable generally, but it does take away open space and perhaps potential farmland when it provides an even greater benefit.[239]

Imposing conditions on the use of the land during a rezoning also raises the question of contract zoning.[240] In *Ehrlich*, Culver City, in effect, told the developer that they did not have to grant his request to rezone, but that it might rezone for the requested use Ehrlich would provide the City with four tennis courts.[241] Not surprisingly, Ehrlich did not like the deal and sued.[242] If an agreement had been reached, however, the agreement would be considered contract zoning.[243] The validity of contract zoning is mixed among the states and some have found it an invalid exercise of police power authority.[244] Contract zoning is often considered inappropriate because it amounts to bargaining away the police power.[245] In expressing the illegality of contract zoning, the Supreme Court of North Carolina stated that:

> The Court of Appeals held . . . that the rezoning in question also constituted illegal "contract zoning" and was therefore also void for that alternative reason. Here, stated the Court of Appeals, the rezoning was accomplished upon the assurance that Mr. Clapp would submit an application for a conditional use permit specifying that he would use the property only in a certain manner. The Court of Appeals concluded that, in essence, the rezoning here was accomplished through a bargain between the applicant and the Board rather than through a proper and valid exercise of Guilford County's legislative discretion. According to the Court of Appeals, this activity constituted illegal 'contract zoning' and was therefore void.[246]

While contract zoning is generally not favored in the courts, economists, legal scholars, and commentators generally agree that a market based solution to some rezoning and development problems would be preferable in many communities.[247] Professor William Fischel treats contract zoning in a law and economics framework and has concluded that a more efficient solution can be used for problems like the ones presented in *Ehrlich* if the private landowner and the city could negotiate a solution

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239. *See generally Del Monte Dunes*, 526 U.S. 687 (planning to build houses on ocean front property); *Agins*, 447 U.S. at 255 (planning to build houses intensively on open land).

240. *See* Shelley R. Saxer, *Planning Gain, Exactions, and Impact Fees: A Comparative Study of Planning Law in England, Wales, and the United States*, 32 URB. LAW. 21, 62-63 (2000); *See* Wegner, *supra* note 72, at 977-82.

241. *See Ehrlich*, 911 P.2d at 434-35.

242. *See id.* at 435.

243. *See* Saxer, *supra* note 240, at 62-63; Wegner, *supra* note 72, at 978-80.

244. *See* Saxer, *supra* note 240, at 60-64; Wegner, *supra* note 72, at 982-86.

245. *See* Saxer, *supra* note 240, at 60-64; Wegner, *supra* note 72, at 982-83.

246. Chrismon v. Guilford County, 322 N.C. 611, 616, 370 S.E.2d 579, 582 (1988).

247. *See infra* notes 258-259 and accompanying text.

that would be satisfactory to both parties.[248] Professor Judith Wegner investigates the background of contract, conditional or contingent zoning to understand how municipalities and developers can find solutions to disputes regarding these types of zoning.[249] Fischel, Wegner and other commentators find merit in market-based solutions such as development agreements that can be established to protect and preserve the interests of the community and landowners.[250]

The mitigation fee attaches to the development, though it follows closely on the process of rezoning.[251] In *Ehrlich*, Culver City rejected the application for rezoning and other changes that had been requested by Ehrlich.[252] It declared that the loss of the club reduced needed recreational facilities of the community.[253] In the meantime, Ehrlich requested and received a demolition permit and demolished the club. He donated some of the equipment to Culver City.[254] He also indicated that he would be willing to build four new tennis courts.[255] Later, Culver City agreed to approve the application for rezoning and change its plans conditioned on Ehrlich agreeing to pay a mitigation fee (one-time impact fee) of $280,000 in lieu of building the tennis courts.[256] Culver City would use the fee to replace needed recreational facilities that had been lost to the community by the closing of Ehrlich's club.[257] However, the Supreme Court of California's conclusion that the public value of the *resident-benefit contribution* existed in rezoned private property that was used by the public has little to do with development and more to do with a change in land use.

Courts would be wise to limit *Ehrlich* to development disputes where the municipality had previously made a substantial change and is now requested to consider another substantial change to its comprehensive land use plan that may affect availability, use and need for public facilities, infrastructure, and social services.[258] Earlier variances and excep-

248. WILLIAM A. FISCHEL, THE ECONOMICS OF ZONING LAWS: A PROPERTY RIGHTS APPROACH TO AMERICAN LAND USE CONTROLS, 75-76 (1985).

249. *See* Wegner, *supra* note 72, at 958-75.

250. *See* Saxer, *supra* note 240, at 58-70.

251. *See supra* note 236 and accompanying text.

252. *Ehrlich*, 911 P.2d at 434.

253. *Id.*

254. *Id.*

255. *Id.*

256. *Id.* at 434-35.

257. *Id.* at 435.

258. *See Ehrlich*, 911 P.2d at 433-34 & 448. *See also* Saxer, *supra* note 240, at 62 & n.278 (citing Wegner, *supra* note 72, at 992). We note that imposing conditional demands that require a change in general and special land use plans that later cannot be changed through another rezoning has the appearance of contract or contingent zoning. *See* Saxer, *supra* note 240, at 62-63. Courts generally invalidate contract or contingent zoning on the theory that it is bargaining away police

tions to permit commercial use may justify an exaction to support a rezoning that would negatively affect the purpose or policy of the earlier exception or variance.[259]

## VIII. CONCLUSION

*Ehrlich* addressed takings issues that clearly illustrate the manner in which local and state governments create exactions that compensate for an increased burden on the public within the limit imposed by *Dolan*. *Ehrlich* showed that the use of public value contributions by resident-benefits that is conferred on commercial land expands the authority to impose exactions with a weak connection to development impacts but a strong policy connection to a public need.

Impact exactions finance infrastructure and public facilities. *Ehrlich* stands for the principle that a legitimate state interest includes public value that can be lost through a change in land use. The Supreme Court of California found that recreational facilities open to the public include public value that will permit the loss of these facilities in order to justify and relate to an exaction. This court's concept of public value that is derived from a *resident-benefit contribution* strains jurisprudential and economic thinking in *Ehrlich*.

We do not argue that Supreme Court of California's concept of public value has merit under some circumstances. However, further research is needed to determine the nature of public benefits and contributions that would justify imposing a mitigation fee for the discontinuance of commercial land use that required special government action for continued use.

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power. *See id.* Contract or contingent zoning imposes limits on a municipality's power to change zoning in the future, *id.*, differs from a development agreement that in some jurisdictions "is a promise by the municipality to freeze the applicable land use regulatory scheme in return for specified performances by the developer. *See id.* at 62-63 (citing Patricia G. Hamnes, *Development Agreements: The Intersection of Real Estate Finance and Land Use Controls*, 23 U. BALT. L. REV. 119, 164 (1993)). Few states have enacted statutes that permit development agreements between municipalities and developers. *Id.* at 59-60.

259. *See generally Ehrlich*, 911 P.2d at 448 (noting that Ehrlich's requests for a rezoning would negatively impact the special plan adopted by Culver City to change the use from residential to commercial). *See id.* at 433-34. Culver City had adopted a special plan that permitted the original development of the site of Ehrlich's recreational facilities. *See id.* at 434.