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James A. Kushner
Southwestern University School of Law

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JAMES A. KUSHNER*

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* Professor of Law, Southwestern University School of Law. Research for this article was supported by a research grant from Southwestern University. Professor Kushner is the author of *Subdivision and Growth Management* (Clark Boardman Callaghan, 1991 & Supp. 1992).

I. INTRODUCTION

As national inflation and recession produce local government fiscal austerity, the rapidly escalating costs of financing infrastructure and capital facilities such as roads, schools, drainage, and sewage treatment have increasingly fallen on the shoulders of developers and ultimately on the backs of consumers. Inflating the cost of housing by the imposition of expensive exactions in the form of on-site development conditions and fees renders access to decent housing for most Americans increasingly expensive and unobtainable. While the economic policy questions concerning urban growth policy and shelter are fascinating, those questions are currently dwarfed by the legal questions surrounding exactions. The U.S. Supreme Court has spoken recently on the question of regulatory controls and the limits of imposing conditions on developers. The Court, however, has raised far more unanswered questions in its recent opinions. This article surveys exaction practices, the current jurisprudence of exactions, and the principles and policy reflected in the mystical ruminations of the Rehnquist Court.

II. THE PUBLIC LAND USE PLANNING PROCESS

Typically, local governments regulate land by first executing a master plan for community development, generally designating the policies for community development, the projected population, location of roads and other facilities, and siting of different types of land uses.[1] Second, a zoning map is adopted whereby each area is specifically classified according to height, bulk, and use.[2] This zoning scheme should be consistent with the master plan.[3] Finally, specific projects are approved under a system of subdivision or site approval.[4] It is in this approval process that the community assures

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1. DANIEL R. MANDELKER, LAND USE LAW §§ 3.01-.04 (2d ed. 1988).

2. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

3. CAL. GOV'T CODE § 65860 (West 1983); O'Loane v. O'Rourke, 42 Cal. Rptr. 283 (Ct. App. 1965); Udell v. Haas, 235 N.E.2d 897 (N.Y. 1968) (holding that variance from original zoning of comprehensive plan is void as ultra vires absent sufficient reason); Fornaby v. Feriola, 239 N.Y.S.2d 185 (App. Div. 1963); Baker v. City of Milwaukie, 533 P.2d 772 (Or. 1975); Fasano v. Board of County Comm'rs, 507 P.2d 23 (Or. 1973) (requiring proof of public need for zone changes inconsistent with plan). *But see* Kozesnik v. Township of Montgomery, 131 A.2d 1 (N.J. 1957) (noting that plan consistency reflects good housekeeping but master plan adoption optional with plan reflected in zoning ordinance itself and need not be a separate document; amendments available). *See generally* Robert K. Lincoln, Comment, *Inconsistent Treatment: The Florida Courts Struggle with the Consistency Doctrine*, 7 J. LAND USE & ENVTL. L. 333 (1992) (discussing the politics behind the consistency doctrine).

4. MANDELKER, *supra* note 1, ch. 9.

proper neighborhood planning and the adequacy of facilities and infrastructure such as roads, schools, water supply, sewage treatment, police and fire protection, and parks. Communities may also adopt capital improvement budgets aimed at financing and expanding infrastructure to accommodate future growth in conformity with the master plan.[5]

The subdivision or site review process establishes standards for the design and approval of on- and off-site facilities, services, improvements, roadways, and dedications. These measures often take the form of fees to cover off-site facilities such as flood control, streets, parks, or schools. The process may also require the posting of a bond or other assurance for the completion of improvements.[6]

When the suburban growth movement exploded after the Second World War, communities anxious to develop often made subdivision improvements to encourage growth.[7] These communities were often heavily subsidized by grants for federal highways,[8] water and sewage facilities,[9] parks,[10] and other developments.[11] As time went on and costs increased, with the suburban lifestyle having established its own demand, communities moved to different financing schemes such as special assessments whereby each lot would pay a proportionate share of improvement costs.[12] Later, communities began to impose direct costs on developers because of concerns about the rising costs of services such as street, park, and school development and police and fire protection, and the inadequacy of general revenue to support capital facilities plans.[13]

Beginning with dedications of land[14] for parks and streets, infrastructure financing schemes were expanded to require development of all on-site[15] and some off-site[16] facilities such as roads,[17] recrea-

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5. Golden v. Planning Bd., 285 N.E.2d 291 (N.Y.), *appeal dismissed*, 409 U.S. 1003 (1972).
6. ROBERT M. ANDERSON, AMERICAN LAW OF ZONING § 25.46 (3d ed. 1986).
7. *See generally* JAMES A. KUSHNER, APARTHEID IN AMERICA 44-52 (1980).
8. *See generally* ROBERT A. CARO, THE POWER BROKER: ROBERT MOSES AND THE FALL OF NEW YORK (1974); ALAN LUPO ET AL., RITES OF WAY: THE POLITICS OF TRANSPORTATION IN BOSTON AND THE U.S. CITY (1971); LEWIS MUMFORD, THE HIGHWAYS AND THE CITY (1963).
9. *See* Housing and Urban Development Act of 1965, 42 U.S.C. § 3102 (1970).
10. *See* 42 U.S.C. § 1500 (1970).
11. KUSHNER, *supra* note 7, at 20-30.
12. *See infra* part V.E.
13. *See infra* part V.D.
14. *See infra* part V.B.
15. *See infra* part V.A.
16. *See infra* part V.C.
17. *See infra* notes 277, 289-93 and accompanying text.

tional amenities,[18] and schools,[19] as well as other off-site facilities[20] such as sewage treatment plants,[21] flood control drainage systems,[22] and regional parks.[23] Communities have more recently imposed fees in lieu of dedications for some of the improvements,[24] and today are charging impact fees for future and current service and facilities expansion.[25] Recent funding mechanisms include the facilities benefit district, whereby facilities are funded from charges placed on individual lots when permits are sought, with the charges establishing liens on the property.[26] The evolution of charges has witnessed communities taking a broad view of community service needs and the costs imposed by new development in terms of using up available land and imposing greater demands on existing facilities. Today, communities impose taxes or fees on new development to fund low-cost housing,[27] public transportation,[28] and other community services.[29]

III. THE SOURCE OF EXACTION POWER

In *Gorieb v. Fox*,[30] the U.S. Supreme Court approved of uniform setback of building development from the front parcel boundary.

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18. *See infra* note 278 and accompanying text.
19. *See infra* note 287 and accompanying text.
20. *See infra* part V.C.
21. *See infra* note 284 and accompanying text.
22. *See infra* notes 294-96 and accompanying text.
23. *See infra* notes 278-79 and accompanying text.
24. *See infra* part V.D.1.
25. *See infra* part V.D.2.
26. J.W. Jones Cos. v. San Diego, 203 Cal. Rptr. 580 (Ct. App. 1984); *see infra* part V.F.
27. *See infra* parts V.C.1-3.
28. *See infra* note 390-92 and accompanying text.
29. *See infra* part V.D.2.
30. 274 U.S. 603 (1927); *see also* Weiner v. City of Los Angeles, 441 P.2d 293 (Cal. 1968) (sustaining setback rules); City of Leadville v. Rood, 600 P.2d 62 (Colo. 1979) (setback); Di Salle v. Giggal, 261 P.2d 499 (Colo. 1953) (validating frontage and yard size rules); Kefauver v. Zoning Bd. of Appeals, 195 A.2d 422 (Conn. 1963) (enforcing setback); City of Miami v. Romer, 58 So. 2d 849 (Fla. 1952); City of Carbondale v. Van Natta, 338 N.E.2d 19 (Ill. 1975) (enforcing extraterritorial setback); Stemwedel v. Village of Kenilworth, 153 N.E.2d 79 (Ill. 1958) (rearyard setback); Adams v. Brian, 212 So. 2d 128 (Ct. App.), *writ refused*, 214 So. 2d 549 (La. 1968); Emond v. Board of Appeals, 541 N.E.2d 380 (Mass. 1989) (deviating frontage based on neighborhood development pattern under special site permit); Ridgefield Land Co. v. City of Detroit, 217 N.W. 58 (Mich. 1928) (dedicating streets of minimum width as condition of subdivision approval); Zampieri v. Township of River Vale, 152 A.2d 28 (N.J. 1959) (validating setback but invalidating modification as applied); Sierra Constr. Co. v. Board of Appeals, 187 N.E.2d 123 (N.Y. 1962); Headley v. City of Rochester, 5 N.E.2d 198 (N.Y. 1936); Fimiani v. Swift, 180 N.E. 355 (N.Y. 1932) (per curiam) (sideyard); Town of Islip v. F.E. Summers Coal & Lumber Co., 177 N.E. 409 (N.Y. 1931); Ujka v. Sturdevant, 65 N.W.2d 292 (N.D. 1954) (sideyard); State *ex rel.* Cataland v. Birk, 125 N.E.2d 748 (Ohio Ct. App. 1953) (setback); Miller & Son Paving, Inc. v. Wrightstown Township,

Just as the Court had heartily endorsed the institution of zoning in *Village of Euclid v. Ambler Realty Co.*,[31] the California Supreme Court in *Ayers v. City Council*[32] enthusiastically led the nation in endorsing subdivision regulation and subdivision exactions. Courts saw each form of regulation as representing an "average reciprocity of advantage"[33] whereby the effect of uniform regulation does not deny any reasonable use of the properties and the value of the properties is in fact enhanced by a uniform planned district. Such regulation lies squarely within the police power,[34] the power to regulate for the public's health, safety, welfare, and morals, retained by the states through the Tenth Amendment.[35] The Supreme Court has at times appeared to support planning initiatives, such as in *Village of Belle Terre v. Boraas*,[36] in which it adhered to *Euclid* in upholding a narrow definition of "family" to preserve family-type communities, and in supporting programs of regulation broadly advancing the public interest as in *Keystone Bituminous Coal Ass'n v. DeBenedictis*.[37] The Court, however, sent mixed signals in *Nollan v.*

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451 A.2d 1002 (Pa. 1982); Bouchard v. Zetley, 220 N.W. 209 (Wis. 1928) (maximum setback). *But cf.* Landmark Universal, Inc. v. Pitkin County Bd. of Adjustment, 579 P.2d 1184 (Colo. Ct. App. 1978) (variance as effect of setback and rearyard yielded total interference with any development); Hill v. Busbia, 125 S.E.2d 34 (Ga. 1962) (invalidating application to a particular lot where conforming structure prohibited by setback and yard requirements); Jewish Reconstructionist Synagogue of N. Shore, Inc. v. Incorporated Village of Roslyn Harbor, 342 N.E.2d 534 (N.Y. 1975) (precluding through First Amendment unique setback rule for religious uses), *cert. denied*, 426 U.S. 950 (1976); Burt Realty Corp. v. City of Columbus, 257 N.E.2d 355 (Ohio 1970) (invalidating application to prior nonconforming structure); Schmaltz v. Buckingham Township Bd. of Adjustment, 132 A.2d 233 (Pa. 1957) (rationale for setbacks inapplicable to rural areas); Franklin Towne Realty, Inc. v. Zoning Hearing Bd., 391 A.2d 63 (Pa. Commw. Ct. 1978) (variance as full setback required steep driveways causing drainage problems, an interference with reasonable use); Westminster Corp. v. Zoning Bd. of Review, 238 A.2d 353 (R.I. 1968) (excepting setback and off-street parking variance for office building under minimal scrutiny, rather than using variance as reasonably necessary for full enjoyment; granting mere lip service to unnecessary hardship test); Salt Lake County v. Kartchner, 552 P.2d 136 (Utah 1976) (finding setback unenforceable where pattern of six similar violations in vicinity); Board of Supervisors v. Rowe, 216 S.E.2d 199 (Va. 1975) (validating minimum lot width, setback, open space, and perimeter rules, but cumulatively eliminating 29% of buildable lot area excessive). *See generally* Verhard Woerner, Annotation, *Validity of Zoning Regulations Requiring Open Side or Rear Yards*, 94 A.L.R.2D 398 (1964); Verhard Woerner, Annotation, *Validity of Front Setback Provisions in Zoning Ordinance or Regulation*, 93 A.L.R.2D 1223 (1964).

31. 272 U.S. 365 (1926); *see also* Welch v. Swasey, 214 U.S. 91 (1909) (upholding height restrictions).

32. 207 P.2d 1 (Cal. 1949).

33. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

34. Schmidt v. Board of Adjustment, 88 A.2d 607 (N.J. 1952).

35. U.S. CONST. amend. X.

36. 416 U.S. 1 (1974).

37. 480 U.S. 470 (1987). *See generally* John A. Humbach, *Economic Due Process and the Takings Clause*, 4 PACE ENVTL. L. REV. 311 (1987).

California Coastal Commission,[38] in which it ruled that requiring a lateral public beach access easement as a condition for replacing a single-family home constituted a physical invasion of property and, therefore, a taking. *Nollan* raises questions about the limits of the imposition of conditions in the form of dedications and exactions. Also perplexing is the ruling in *First English Evangelical Lutheran Church v. County of Los Angeles*[39] that excessive land regulation may result in a finding of a taking and liability for temporary or permanent damages, and how that case may be applied. *First English* puts a damper on land use planning, chilling the full exercise of police powers for fear of incurring liability. Like *Nollan*, *First English* raises a cloud over the extent of power and the willingness to exercise it in assuring adequate facilities, infrastructure, and proper community design.

The Court's apparent unwillingness to merely defer to the full exercise of police powers was seen again most recently in *Lucas v. South Carolina Coastal Council*.[40] In *Lucas*, a majority of the Court rejected the legislative declaration of what constitutes a nuisance, or harmful use of property, sufficient to deprive a landowner of all economically beneficial use of his land without compensation.[41] The use of police powers to confiscatorily regulate, the Court said, must "inhere in the title [of the land] itself, in restrictions that background principles of the State's law of property and nuisance already place upon land ownership."[42] The issues surrounding exactions are insulated from the holding in *Lucas*; however, the tenor of the opinion is likely to further chill the full exercise of legislative authority to control community design.

The U.S. Supreme Court has also condemned certain land use practices it deems discriminatory, such as excessively restrictive definitions of "family," as in *Moore v. East Cleveland*,[43] in which a grandmother was not permitted to have two grandchildren live with her because they were the children of two different parents, and as in *City of Cleburne v. Cleburne Living Center, Inc.*,[44] in which

38. 483 U.S. 825 (1987).

39. 482 U.S. 304 (1987).

40. 112 S. Ct. 2886 (1992). *See generally* John R. Nollan, *Footprints in the Shifting Sands of the Isle of Palms: A Practical Analysis of Regulatory Takings Cases*, 8 J. LAND USE & ENVTL. L. 1 (1992) (analyzing holding in *Lucas*).

41. 112 S. Ct. at 2899 ("*A fortiori* the legislature's recitation of a noxious-use justification cannot be the basis for departing from our categorical rule that total regulatory takings must be compensated."); *see id.* at 2909 (Blackmun, J., dissenting).

42. *Id.* at 2900.

43. 431 U.S. 494 (1977).

44. 473 U.S. 432 (1985).

group homes for the mentally retarded were excluded from multifamily districts. Further, in *Schad v. Borough of Mount Ephraim*,[45] the Court invalidated a "no live entertainment ordinance" in a community using commercial and entertainment zoning as a means to exclude nude dancing. Both *Mount Ephraim* and *Cleburne* suggest that distinctions made by local government must be rational and must not have the effect of excluding noninjurious uses.

On many occasions, the Supreme Court has approved the use of police powers to effect zoning and regulate land use. Most notably, the Court in *Village of Euclid v. Ambler Realty Co.*[46] upheld zoning and endorsed land use planning. In *Berman v. Parker*,[47] the Court approved urban renewal as a legitimate function of government, and has implicitly endorsed it in *Village of Belle Terre v. Boraas*,[48] and *Metromedia, Inc. v. San Diego*,[49] by generally approving aesthetic-based community redevelopment. Other cases applied a similar logic. In *Arlington Heights v. Metropolitan Housing Development Corp.*,[50] the Court upheld the exclusion of multifamily housing from a single-family district over racial discrimination claims due to adherence to a comprehensive planning policy. In *Young v. American Mini Theaters, Inc.*,[51] and *City of Renton v. Playtime Theaters, Inc.*,[52] the Court sustained adult entertainment zoning schemes aimed at concentration and dispersal. *Euclid*, *Belle Terre*, *Arlington Heights*, *Young*, and *Renton* present a nearly unbroken string of Supreme Court endorsements of the zoning concept and the power of states and units of local government to regulate land use, height, and bulk through community districting legislation.

The source of exaction powers also finds expression in the authority to regulate subdivisions. The California Supreme Court's seminal decision in *Ayers v. City Council*[53] sustained subdivision

45. 452 U.S. 61 (1981). *But cf.* Barnes v. Glen Theater, Inc., 111 S. Ct. 2456 (1991) (holding nude dancing not protected by First Amendment, sustaining mandatory "pasties" and "G-string" under public decency statute).

46. 272 U.S. 365 (1926).

47. 348 U.S. 26 (1954) (aesthetic rationale for eminent domain); *see also* Hawaii Hous. Auth. v. Midkiff, 467 U.S. 229 (1984) (using broad public purpose definition to sustain land condemnation to eliminate land oligopoly).

48. 416 U.S. 1 (1974).

49. 453 U.S. 490 (1981) (invalidating commercial billboard advertising restrictions on political speech in community where no aesthetic motivations existed).

50. 429 U.S. 252 (1977).

51. 427 U.S. 50 (1976) (endorsing zoning dispersal policy); *accord* City of Renton v. Playtime Theaters, Inc., 475 U.S. 41 (1986).

52. 475 U.S. 41 (1986).

53. 207 P.2d 1 (Cal. 1949).

exactions in the form of land dedications and improvement conditions, and thereby implicitly endorsed the power to engage in subdivision regulation. Courts have uniformly sustained the power of the state to enable local subdivision regulation[54] and have approved state and local requirements that local improvements generated by development be paid for by the subdivider-developer rather than by the community.[55]

IV. THE TAKINGS CLAUSE

In 1987, the Takings Clause[56] received ostensibly near plenary attention by the U.S. Supreme Court.[57] In *Keystone Bituminous Coal*

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54. *See, e.g.*, Bella Vista Ranches, Inc. v. City of Sierra Vista, 613 P.2d 302 (Ariz. Ct. App. 1980); *In re* Sidebotham, 85 P.2d 453 (Cal. 1938) (requiring notice of offer to sell to be provided to state agency with power to investigate), *cert. denied*, 307 U.S. 634 (1939); People v. Maxwell, 427 P.2d 310 (Colo. 1967) (validating subdivision registration used to avoid consumer fraud); County of Ada v. Henry, 668 P.2d 994 (Idaho 1983); City of Bellfontaine Neighbors v. J.J. Kelley Realty & Bldg. Co., 460 S.W.2d 298, 302 (Mo. Ct. App. 1970) (enabling authority); *In re* Sayewich, 413 A.2d 581 (N.H. 1980); Patenaude v. Town of Meredith, 392 A.2d 582, 585 (N.H. 1978); Chiplin Enters., Inc. v. City of Lebanon, 411 A.2d 1130 (N.H. 1980); Blevins v. City of Manchester, 170 A.2d 121 (N.H. 1961); Mansfield & Swett, Inc. v. Town of W. Orange, 198 A. 225 (N.J. 1938); Golden v. Planning Bd., 285 N.E.2d 291 (N.Y.), *appeal dismissed*, 409 U.S. 1003 (1972).

55. *See, e.g.*, Benny v. City of Alameda, 164 Cal. Rptr. 776 (Ct. App. 1980); Blevins v. City of Manchester, 170 A.2d 121 (N.H. 1961); Lionel's Appliance Ctr., Inc. v. Citta, 383 A.2d 773 (N.J. Super. Ct. Law Div. 1978); Village of Lynbrook v. Cadoo, 169 N.E. 394 (N.Y. 1929) (implicit); Mid-Continent Builders, Inc. v. Midwest City, 539 P.2d 1377 (Okla. 1975) (holding exactions valid and not confiscatory as condition for subdivision because developer not forced to subdivide); Zastrow v. Village of Brown Deer, 100 N.W.2d 359 (Wis. 1960).

56. U.S. CONST. amend. V.

57. *See* Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987) (limiting conditions for development approval); First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987) (awarding damages for excessive, even temporary regulation); Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987) (validating regulation serving broad public interest retaining economic use for landowner). *See generally* BRUCE A. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION (1977); RICHARD A. EPSTEIN, TAKINGS (1985); John A. Humbach, *Economic Due Process and the Takings Clause*, 4 PACE ENVTL. L. REV. 311 (1987); Douglas W. Kmiec, *The Original Understanding of the Taking Clause is Neither Weak nor Obtuse*, 88 COLUM. L. REV. 1630 (1988); Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles Part II—Takings as Intentional Deprivations of Property Without Moral Justification*, 78 CAL. L. REV. 55 (1990); Andrea L. Peterson, *The Takings Clause: In Search of Underlying Principles Part I—A Critique of Current Takings Clause Doctrine*, 77 CAL. L. REV. 1299 (1989); Carol M. Rose, *Property Rights, Regulatory Regimes and the New Takings Jurisprudence—An Evolutionary Approach*, 57 TENN. L. REV. 577 (1990); Randall T. Shepard, *Land Use Regulation in the Rehnquist Court: The Fifth Amendment and Judicial Intervention*, 38 CATH. U. L. REV. 847 (1989); Richard G. Wilkins, *The Taking Clause: A Modern Plot for an Old Constitutional Tale*, 64 NOTRE DAME L. REV. 1 (1989); Gary Eisenberg, Note, *Property: The Takings Clause of the Fifth Amendment*, 1988 ANN. SURV. AM. L. 1101 (1990); Neal S. Mane, Note, *Reexamining the Supreme Court's View of the Taking Clause*, 58 TEX. L. REV. 1447 (1980); William M. Treanor, Note, *The Origins and Original Significance of the Just Compensation Clause of the Fifth Amendment*, 94 YALE L.J. 694 (1985); Symposium, *The Jurisprudence of Takings*, 88 COLUM. L. REV. 1581 (1988).

Ass'n v. DeBenedictis,[58] the Court endorsed land use regulation serving broad public purposes where reasonable economic use is retained and investment-backed expectations are not thwarted.[59] In contrast, the Court invalidated a requirement of providing lateral public beach access as a condition of granting a coastal zone redevelopment permit to reconstruct a single-family home in *Nollan v. California Coastal Commission*.[60] The Court did not find the broad public benefit as in *Keystone*, and treated the access as a physical invasion type of inverse condemnation of an easement. The Court also placed a cloud over planning initiatives in *First English Evangelical Lutheran Church v. County of Los Angeles*[61] by ruling that if land use controls regulate excessively, the remedy may be damages, including temporary damages to the time of invalidation.[62]

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58. 480 U.S. 470 (1987) (upholding regulation promoting health, environment, area fiscal integrity; distinguishing the narrow goal of a similar law in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) to benefit private parties; sustaining coal subsidence law protecting surface owners against damage from mineral rights mining). *Compare id. with* Western Energy Co. v. Genie Land Co., 737 P.2d 478 (Mont. 1987) (finding surface owner consent-based coal mining permit a taking under state constitution; distinguishing *Keystone*; finding coal mining not tantamount to a public nuisance in Montana).

59. *Keystone*, 480 U.S. at 485, 499. *See generally* Susan J. Krueger, Comment, Keystone Bituminous Coal Association v. DeBenedictis: *Toward Redefining Takings Law*, 64 N.Y.U. L. REV. 877 (1989).

60. 483 U.S. 825 (1987); *see also* Timothy A. Bittle, Nollan v. California Coastal Commission: *You Can't Always Get What You Want, But Sometimes You Get What You Need*, 15 PEPP. L. REV. 345 (1988); Charles H. Clarke, *Constitutional Property Rights and the Taking of the Police Power: The Aftermath of* Nollan *and* First English, 20 SW. U. L. REV. 1 (1991); Gilbert L. Finnell, *Public Access to Coastal Public Property: Judicial Theories and the Taking Issue*, 67 N.C. L. REV. 627 (1989); Robert H. Freilich & Terry D. Morgan, *Municipal Strategies for Imposing Valid Development Exactions: Responding to* Nollan, 10 ZONING & PLAN. L. REP. 169 (1987); Norman Karlin, *Back to the Future: From* Nollan *to* Lochner, 17 SW. U. L. REV. 627 (1988); Nathaniel S. Lawrence, *Means, Motives and Takings: The Nexus Test of* Nollan v. California Coastal Commission, 12 HARV. ENVTL. L. REV. 231 (1988); Steven J. Lemon et al., Comment, *The First Applications of the* Nollan *Nexus Test: Observations and Comments*, 13 HARV. ENVTL. L. REV. 585 (1989); Note, *Taking a Step Back: A Reconsideration of the Takings Test in* Nollan v. California Coastal Commission, 102 HARV. L. REV. 448 (1988).

61. 482 U.S. 304 (1987); Jack R. White & Farzad Barkhordari, *The* First English Evangelical Lutheran Church *Case: What Did it Actually Decide?*, 7 UCLA J. ENVTL. L. & POL'Y 155 (1988).

62. 482 U.S. at 319; *see also* Moore v. City of Costa Mesa, 886 F.2d 260 (9th Cir. 1989) (holding that despite excessive invalid condition of dedication of 10% of land for street widening not here appealed, as could continue business and thereby enjoy an economically viable use of land and despite alleged higher costs of development due to litigation and administrative delay over the condition, no taking resulted which would generate a temporary damage remedy), *cert. denied*, 496 U.S. 906 (1990); Corrigan v. City of Scottsdale, 720 P.2d 513 (Ariz.) (awarding damages for excessive downzoning to conservation area; damages available from time of taking until invalidation), *cert. denied*, 479 U.S. 986 (1986). *See generally* Emeline C. Acton, *Much Ado About* Nollan: *The Supreme Court Addresses the Complex Network of Property Rights, Land Use Regulations, and Just Compensation in the* Keystone, Nollan *and* First English *Cases*, 17 STETSON L. REV. 727 (1988); Michael M. Berger, *Happy Birthday, Constitution: The Supreme Court Establishes New*

The effect of these Court rulings was to raise far more questions than the Court answered. The definition of a taking and how such a definition might apply to land use controls, particularly those associated with subdivision approval and developer exactions, is the central question. Second is the problem of valuation. How much in damages will the Court require for regulation that goes too far? Will the size of such rulings discourage aggressive protection of the environment through conscientious growth management? The determination of exactly what damages will flow from land use controls found to exceed the police power must await cases interpreting *First English*. It is, however, possible to establish a model to analyze when controls amount to a taking.

Ground Rules For Land-Use Planning, 20 URB. LAW. 735 (1988); Robert K. Best, *New Constitutional Standards for Land Use Regulation: Portents of* Nollan *and* First English Church, 1988 INST. ON PLAN. ZONING & EMINENT DOMAIN 6-1; David L. Callies, *Property Rights: Are There Any Left?*, 20 URB. LAW. 597 (1988); Richard F. Duncan, *Commentary—On the Status of Robbing Peter to Pay Paul: The 1987 Takings Cases in the Supreme Court*, 67 NEB. L. REV. 318 (1988); Richard A. Epstein, *Takings Descent and Resurrection*, 1987 SUP. CT. REV. 1; William A. Falik & Anna C. Shimko, *The "Takings" Nexus—The Supreme Court Chooses a New Direction in Land-Use Planning: A View from California*, 39 HASTINGS L.J. 359 (1988); William A. Falik & Anna C. Shimko, *The Takings Nexus: The Supreme Court Forges a New Direction in Land-Use Jurisprudence*, 23 REAL PROP. PROB. & TRIAL J. 1 (1988); Robert H. Freilich & Richard G. Carlisle, *The U.S. Supreme Court Blockbusters of 1986-1987: Analyzing the Inverse Condemnation and Regulatory Taking Cases*, 1988 INST. ON PLAN. ZONING & EMINENT DOMAIN 9-1; Bruce Goldstein & Sharon Buccino, *Is the Bundle Bigger? The Legal and Practical Implications of* Nollan v. California Coastal Commission *and* First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 8 STAN. ENVTL. L.J. 46 (1989); Daniel C. Kramer, *When Does a Regulation Become a Taking? The United States Supreme Court's Most Recent Pronouncements*, 26 AM. BUS. L.J. 729 (1989) (trilogy); Donald W. Large, *The Supreme Court and the Takings Clause: The Search for a Better Rule*, 18 ENVTL. L. 3 (1987); Joseph LaRusso, *"Paying for the Change:"* First English Evangelical Lutheran Church of Glendale v. County of Los Angeles *and the Calculation of Interim Damages for Regulatory Takings*, 17 B.C. ENVTL. AFF. L. REV. 551 (1990); Daniel Mandelker, *Waiving the Taking Clause: Conflicting Signals from the Supreme Court*, 40 LAND USE & ZONING DIG. No. 11 at 3 (Nov. 1988); Frank Michelman, *Takings, 1987*, 88 COLUM. L. REV. 1600 (1988); Gene R. Rankin, *The First Bite at the Apple: State Supreme Court Takings Jurisprudence Antedating* First English, 22 URB. LAW. 417 (1990); E. George Rudolph, *Let's Hear it for Due Process—An Up to Date Primer on Regulatory Takings*, 23 LAND AND WATER L. REV. 355 (1988); Peter W. Salsich, Jr., Keystone Bituminous Coal, First English *and* Nollan: *A Framework for Accommodation?*, 34 WASH. U. J. URB. & CONTEMP. L. 173 (1988); Joseph Sax, *Property Rights in the U.S. Supreme Court: A Status Report*, 7 UCLA J. ENVTL. L. & POL'Y 139 (1988); Charles L. Siemon & Wendy U. Larsen, *Commentary—The Taking Issue Trilogy: The Beginning of the End?*, 33 WASH. U. J. URB. & CONTEMP. L. 169 (1988); Michael Simon, *The Supreme Court's 1987 "Takings" Triad: An Old Hat in a New Box or a Revolution in Takings Law?*, 1 FLA. J.L. & PUB. POL'Y 103 (1987); Frank R. Strong, *Commentary—On Placing Property Due Process Center Stage in Takings Jurisprudence*, 49 OHIO ST. L.J. 591 (1988) (only expropriation a taking); Robert A. Williams, Jr., *Legal Discourse, Social Vision and the Supreme Court's Land Use Geneology of the Lochnerian Recurrence in* First English Lutheran Church *and* Nollan, 59 U. COLO. L. REV. 427 (1988); Norman Williams & Holly Ernst, *Commentary—And Now We Are Here on a Darkling Plain*, 13 VT. L. REV. 635 (1989); Anne C. Davies, Note, Keystone Bituminous Coal Ass'n v. DeBenedictis: *When Regulation Becomes a Taking*, 7 UCLA J. ENVTL. L. & POL'Y 185 (1988).

In 1992, the U.S. Supreme Court returned to the takings issues in *Yee v. City of Escondido*[63] and *Lucas v. South Carolina Coastal Council*.[64] In *Yee*, the Court refused to invalidate a mobile home rent control ordinance allowing occupants to transfer their controlled interest, narrowly limiting the physical occupation strand of takings jurisprudence to instances of traditional appropriation or situations where the right to exclude by those not voluntarily engaging in commerce with the public is restricted.[65] Notably, the Court declined the invitation to expand property rights through the extension of a constructive physical occupation theory.[66]

In *Lucas*, in ruling that a coastal building setback designed to protect against serious beach erosion could constitute a taking,[67] the Court generated more confusion than enlightenment by initially offering a tentative per se rule that regulations denying all economically beneficial or productive use of land constitute a taking.[68] The Court, however, backed off in acknowledging that regulations designed to abate nuisances constitute valid regulations.[69] Restrictions on use arising from preexisting property law (presumably rights arising from sources such as prescriptive easements or the public trust doctrine), the Court held, may justify curtailment of an owner's right to develop land.[70] While *Lucas* does not appear to threaten most forms of zoning, subdivision, and other development restrictions, it does place in jeopardy environmental and development regulation of sensitive ecological areas unsuitable for development.

A. Physical Invasion

The test sketched in *Penn Central Transportation Co. v. City of New York*[71] and adhered to in both *Keystone*[72] and *Nollan*[73] is a balancing test of many factors. The Court, however, is actually misrepresenting its lack of a test. As in the case of numerous other Court-attempted constitutional analyses,[74] the Court has been split and

63. 112 S. Ct. 1522 (1992).
64. 112 S. Ct. 2886 (1992).
65. *Yee*, 112 S. Ct. at 1530.
66. *Id.*
67. *Lucas*, 112 S. Ct. at 2902.
68. *Id.* at 2893-94.
69. *Id.* at 2899-902.
70. *Id.* at 2900-01.
71. 438 U.S. 104 (1978).
72. 480 U.S. 470 (1987).
73. 483 U.S. 825 (1987).
74. *E.g.*, City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) (voluntary affirmative action); Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978) (contract clause); Flagg Bros., Inc. v. Brooks, 436 U.S. 149 (1978) (state action).

confused. The result is a substantive due process form of review[75] where each set of facts garners enough votes to be defined as either a taking or the simple exercise of police powers. Nevertheless, as the Court adheres to precedent and considers the character[76] and effect[77] of the government's regulation, it inches toward a well-defined, albeit mystical, creature called a taking.

Ostensibly the simplest fact pattern is the physical invasion.[78] Where the government takes physical occupancy, such as in highway,[79] dam,[80] or urban renewal cases,[81] the appropriation of property is easily seen as a taking. Physical invasion by airplane overflights interfering with property use[82] or flooding by public improvement[83] are other forms. *Loretto v. Teleprompter Manhattan CATV Corp.*[84] stands as testimony to the technical nature of this

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75. *Cf.* JAMES A. KUSHNER, GOVERNMENT DISCRIMINATION § 4.05 (1988 & Supp. 1992); James A. Kushner, *Substantive Equal Protection: The Rehnquist Court and the Fourth Tier of Judicial Review*, 53 MO. L. REV. 423 (1988) (subjective).

76. *See, e.g.*, Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 485-93 (1987); Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).

77. *See, e.g.*, *Keystone*, 480 U.S. at 493-506; *Penn Central*, 438 U.S. at 124; *cf.* Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984) (taking for government allowing use of trade secret data submitted to regulatory agency for licensing).

78. *Penn Central*, 438 U.S. at 124 (citing United States v. Causby, 328 U.S. 256 (1946) (overflights)).

79. 2A JULIUS L. SACKMAN, NICHOLS' THE LAW OF EMINENT DOMAIN § 7.22 (3d ed. 1987).

80. United States *ex rel.* Tenn. Valley Auth. v. Welch, 327 U.S. 546 (1945).

81. Berman v. Parker, 348 U.S. 26 (1954).

82. *See, e.g.*, Griggs v. Allegheny, 369 U.S. 84 (1962); United States v. Causby, 328 U.S. 256 (1945); *see also* Varjabedian v. City of Madera, 572 P.2d 43 (Cal. 1977) (finding that odors from adjacent municipal sewage plant may constitute inverse condemnation if direct and substantial injury albeit non-physical); Rogers v. City of Cheyenne, 747 P.2d 1137 (Wyo. 1987) (sustaining tree height limit in airport approach zones), *appeal dismissed*, 485 U.S. 1017 (1988); WILLIAM B. STOEBUCK, NONTRESPASSORY TAKINGS IN EMINENT DOMAIN (1977).

83. *See, e.g.*, Hildre v. Imperial Irrigation Dist., 194 Cal. Rptr. 654 (Ct. App. 1983) (flooding by highway embankment but opinion not officially published); *see also* Orme v. State *ex rel.* Dep't of Water Resources, 147 Cal. Rptr. 735 (Ct. App. 1978) (awarding litigation costs and interest after damages for temporary flooding). *But cf.* Archer v. Los Angeles, 119 P.2d 1 (Cal. 1941) (finding that drainage improvement upstream causing some flooding downstream not confiscatory); Barney's Furniture Warehouse v. City of Newark, 303 A.2d 76 (N.J. 1973) (refusing to recognize tort liability for flooding by sewage system's functional incapacity).

84. 458 U.S. 419 (1982) (invalidating as inadequate compensation of state commission one time one dollar fee; suit by purchaser of cable installed building despite significant public benefit and minimal economic impact; not a use regulation as limited to rental buildings); *see also* United States v. Sperry Corp., 493 U.S. 52 (1989) (sustaining reasonable user fee imposed on successful claimants before Iran-United States Claims Tribunal, rejecting ruling of court of appeals that fee constituted physical occupation of property; fees also not so high as to belie user fee characterization); NYT Cable TV v. Homestead at Mansfield, Inc., 543 A.2d 10 (N.J. 1988) (interpreting state cable access statute through equally divided court to require compensation for property access). *But cf.* Yee v. City of Escondido, 112 S. Ct. 1522 (1992) (opting for a narrowing of the definition of physical taking); FCC v. Florida Power Corp., 480 U.S. 245 (1987) (finding utility pole charge

physical standard. In *Loretto*, an ordinance required the installation of cable television for tenants against the property owner's wishes. The Court ruled that the cable wires constituted a permanent physical invasion warranting a finding of a taking. *Loretto* followed *Kaiser Aetna v. United States*,[85] in which the Army Corps of Engineers required a landowner to allow public access to a private lake following the issuance of a permit to the landowner to establish a waterway to the ocean from the lake. The Court ruled that despite the owner's having previously sought permission, the requirement interfered with the right to exclude.

Somewhat confusing is the Court's decision in *Pruneyard Shopping Center v. Robins*,[86] in which it ruled that the right to exclude was not abridged where the state ordered a private shopping mall operator to permit the exercise of expressive activity on the premises. In *Yee*, the Court refused to extend *Loretto* to reach constructive physical occupation as an alternative to making an excessive regulation-based takings case by refusing to invalidate a mobile home rent control ordinance which allowed resident-tenants to transfer and assign their interests to third party residents, emphasizing the owner's voluntary participation in the market.[87] Although *Yee* treated the physical occupation theory as generally leading to a finding of a taking, the Court in *Lucas* appeared to refer to *Loretto* and physical occupation as a per se rule of taking. Even though interference with the right to exclude was far more significant in *Pruneyard* than in *Loretto* or *Kaiser Aetna*, the Court reasoned that because the public was invited, the effect of some of those invited engaging in expression rather than shopping had a *de minimis* im-

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regulation not an occupation due to voluntary participation); Alan M. Goldberg, Note, *The Constitutionality of Pole Attachments Legislation: Not a Taking, but a Valid Regulation of Cable Television*, 17 Sw. U. L. Rev. 321 (1987). *Compare* Hall v. City of Santa Barbara, 833 F.2d 1270 (9th Cir. 1986) (denying motion to dismiss on the grounds that mobile home rent control with near unlimited duration leases alienable by tenants may be physical occupation), *cert. denied*, 485 U.S. 940 (1988) *and* Seawall Assocs. v. City of New York, 542 N.E.2d 1059 (N.Y.) (finding that five year single room occupancy conversion moratorium requiring restoration and leasing at controlled rent for indefinite period interferes with right to exclude resulting in a physical taking despite provision for exemption purchase), *cert. denied*, 493 U.S. 976 (1989) *with* Gibbs v. Southeastern Inv. Corp., 705 F. Supp. 738 (D. Conn. 1989) (evicting mobile home tenants only for cause validated). *See also* Mary E. McAlister, Note, Hall v. City of Santa Barbara: *A New Look at California Rent Controls and the Takings Clause*, 17 Ecology L.Q. 179 (1990); Note, *The Constitutionality of Rent Control Restrictions on Property Owners' Dominion Interests*, 100 Harv. L. Rev. 1067 (1987).

85. 444 U.S. 164 (1979).

86. 447 U.S. 74 (1980).

87. Yee v. City of Escondido, 112 S. Ct. 1522, 1528 (1992) (citing FCC v. Florida Power Corp. 480 US. 245 (1987)).

pact on the right to exclude.[88] The decision in *Nollan*, ruling that conditioning a permit to rebuild a single-family home on providing lateral public beach access was a taking, can best be understood as involving interference with the right to exclude. Interestingly, the case was not decided as a physical invasion case, but as an excessive regulation case.[89] *Nollan* is better explained under *Kaiser Aetna* or *Loretto*. Yet, as the public has the right of access to the beach, and because the lateral easement only guaranteed lateral access at high tide, the impact might be arguably no more significant than in *Pruneyard*. *Nollan* may also indicate that a significant governmental interest such as environmental protection may justify a physical invasion.[90]

B. Excessive Regulation

Keystone[91] reiterated in a slightly modified form the taking definition offered in *Penn Central*[92] and *Agins v. City of Tiburon*,[93] that a

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88. *Pruneyard*, 447 U.S. at 83-84.

89. The Court's theory is that *Loretto* would invalidate a mandatory public access easement, but when the exaction is a condition of development and a government permit then the excessive regulation model controls. *Nollan*, 483 U.S. at 831-34; *see also, e.g.*, Whalers' Village Club v. California Coastal Comm'n, 220 Cal. Rptr. 2 (Ct. App. 1985) (sustaining dedication of public beach access easement as condition to construct revetment following loss of supporting beachfront caused by storms), *cert. denied*, 476 U.S. 1111 (1986).

90. *See, e.g.*, Goodyear v. Trust Co. Bank, 276 S.E.2d 30 (Ga. 1981) (finding that concern for beach erosion justified construction of revetments which interfere with beach access and ingress and egress easements).

91. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987).

92. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978); *see also* Margaret V. Lang, Penn Central Transportation Co. v. New York City: *Fairness and Accommodation Show the Way Out of the Takings Corner*, 13 URB. LAW. 89 (1981); Nathaniel S. Lawrence, *Regulatory Takings: Beyond the Balancing Test*, 20 URB. LAW. 389 (1988). *See generally* REGULATORY TAKING: THE LIMITS OF LAND USE CONTROLS (G.R. Hill ed., 1990); Robert H. Freilich, *Solving the "Taking" Equation: Making the Whole Equal the Sum of Its Parts*, 15 URB. LAW. 447 (1983); John A. Humbach, *A Unifying Theory for the Just-Compensation Cases: Takings, Regulation and the Public Use*, 34 RUTGERS L. REV. 243 (1982); Russ B. Lipsker & Rebecca L. Heldt, *Regulatory Takings: A Contract Approach*, 16 FORDHAM URB. L.J. 195 (1988) (proposing reasonable expectations economic analysis); David A. Myers, *Some Observations on the Analysis of Regulatory Takings in the Rehnquist Court*, 23 VAL. U. L. REV. 527 (1989); William H. Rodgers, Jr., *Bringing People Back: Toward a Comprehensive Theory of Taking in Natural Resources Law*, 10 ECOLOGY L.Q. 205 (1982); E. George Rudolph, *Let's Hear it For Due Process—An Up to Date Primer on Regulatory Takings*, 23 LAND & WATER L. REV. 355 (1988); Richard L. Settle, *Regulatory Taking Doctrine in Washington: Now You See it, Now You Don't*, 12 U. PUGET SOUND L. REV. 339 (1989) (multiple factor *Penn Central* model); Thomas A. Hippler, Comment, *Reexamining 100 Years of Supreme Court Regulatory Taking Doctrine: The Principles of "Noxious Use," "Average Reciprocity of Advantages," and "Bundle of Rights" From* Mugler *to* Keystone Bituminous Coal, 14 B.C. ENVTL. AFF. L. REV. 653 (1987); Comment, *The Impacts and Issues Surrounding the Regulatory Confiscation of Real Property*, 2 B.Y.U. J. PUB. L. 99 (1988).

93. 447 U.S. 255, 260 (1980) (finding taking when zoning ordinance fails to substantially advance legitimate state interest, or denies an owner economically viable use).

court is to examine the benefits to the public welfare from the regulation and whether the regulation leaves the owner with an economic use for the property or if the regulation frustrates investment-backed expectations.[94] The excessive regulation cases focus on character and effect. If the motive of the regulation may be to resolve broad public concerns,[95] such as environmental protection[96] and the protection of community as presented in *Keystone*,[97] or to abate or avoid a nuisance[98] or injury from activities on the land adversely affecting neighboring property, it is likely to be approved.[99] Land use regulations seeking to prevent a public harm as compared to those designed to create a public benefit are typically sustained.[100]

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94. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987); Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978); *see also* Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984) (finding taking when government allows use of trade secret data submitted to regulatory agency for licensing). *But cf.* Western Energy Co. v. Genie Land Co., 737 P.2d 478 (Mont. 1987) (finding coal mining restrictions a taking under state constitution, the court distinguishing *Keystone*, finding coal mining not tantamount to a public nuisance in Montana).

95. Pennell v. San Jose, 485 U.S. 1 (1988) (rent control).

96. *E.g.*, Andrus v. Allard, 444 U.S. 51 (1979) (sustaining Migratory Bird Act prohibition on sale of artifacts such as bald eagle feathers as requires no confiscation); Smoke Rise, Inc. v. Washington Suburban Sanitary Comm'n, 400 F. Supp. 1369, 1373, 1382 (D. Md. 1975) (sewer moratorium in face of pollution emergency); First English Evangelical Lutheran Church v. Los Angeles, 258 Cal. Rptr. 893 (Ct. App. 1989) (validating flood district interim moratorium following fire), *cert. denied*, 493 U.S. 1056 (1990); Salamar Builders Corp. v. Tuttle, 275 N.E.2d 585 (N.Y. 1971) (reducing number of septic tanks for environmental protection). *But cf.* Westwood Forest Estates, Inc. v. Village of S. Nyack, 244 N.E.2d 700 (N.Y. 1969) (invalidating sewer-based halt to multi-family where at 75% of capacity and motive was to avoid curing treatment facility deficiencies).

97. 480 U.S. at 487-88.

98. *E.g.*, Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992) (insufficient showing in denial of development to avert beach erosion); Allied-Gen. Nuclear Servs. v. United States, 839 F.2d 1572 (Fed. Cir.) (finding moratorium on nuclear fuel processing plant under construction nuisance preventative justifying license denial over taking claim following *Keystone* and *Nollan*), *cert. denied*, 488 U.S. 819 (1988); First English Evangelical Lutheran Church v. Los Angeles, 258 Cal. Rptr. 893 (Ct. App. 1989) (validating flood district interim moratorium following fire), *cert. denied*, 493 U.S. 1056 (1990); Western Energy Co. v. Genie Land Co., 737 P.2d 478 (Mont. 1987) (finding coal mining restrictions a taking under state constitution; distinguishing *Keystone* on basis that coal mining not tantamount to a public nuisance in Montana); *see also* Catherine R. Connors, *Back to the Future: The "Nuisance Exception" to the Just Compensation Clause*, 19 CAP. U. L. REV. 139 (1990).

99. Hadacheck v. Sebastian, 239 U.S. 394 (1915).

100. *See, e.g.*, Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962) (quarry regulation in area adjacent to residences); Village of Euclid v. Ambler Realty, 272 U.S. 365 (1926) (zoning); Mugler v. Kansas, 123 U.S. 623, 668-69 (1887) (nuisance abatement); Adolph v. Federal Emergency Mgmt Agency, 854 F.2d 732 (5th Cir. 1988) (finding local ordinances conforming to federal flood plain development guidelines not a taking); Ocean Acres Ltd. Partnership v. Dare County Bd. of Health, 707 F.2d 103 (4th Cir. 1983) (sustaining septic tank ban as effort to preserve public water supply); Pompa Constr. Corp. v. City of Saratoga Springs, 706 F.2d 418 (2d Cir. 1983) (sustaining prohibition of quarrying in conservancy district); Terrace Knolls, Inc. v. Dalton, Dalton, Little & Newport, Inc., 571 F. Supp. 1086 (N.D. Ohio 1983) (validating flood plain absent allegation of deprivation of all use), *aff'd mem.*, 751 F.2d 387 (6th Cir. 1984); Deltona Corp. v. United States,

This distinction was criticized by Justice Scalia in *Lucas* as turning

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657 F.2d 1184 (Ct. Cl. 1981) (allowing wetlands protection as use restriction), *cert. denied*, 455 U.S. 1007 (1982); Smoke Rise, Inc. v. Washington Suburban Sanitary Comm'n, 400 F. Supp. 1369, 1373, 1382 (D. Md. 1975) (finding sewer moratorium valid in face of environmental hazard); Archer v. Los Angeles, 119 P.2d 1 (Cal. 1941) (finding drainage improvement upstream causing some flooding downstream not confiscatory); Graham v. Estuary Properties, Inc., 399 So. 2d 1374 (Fla.) (waterway development), *cert. denied*, 454 U.S. 1083 (1981); Moviematic Indus. Corp. v. Board of County Comm'rs, 349 So. 2d 667 (Fla. 3d DCA 1977) (sustaining downzoning from industrial to low density residential to protect ecology); Pope v. City of Atlanta, 249 S.E.2d 16 (Ga. 1978) (sustaining flood plain zone prohibiting tennis court within 150 feet of river), *cert. denied*, 440 U.S. 936 (1979); Turnpike Realty Co. v. Town of Dedham, 284 N.E.2d 891 (Mass. 1972) (sustaining flood plain districting), *cert. denied*, 409 U.S. 1108 (1973); S. Kemble Fischer Realty Trust v. Board of Appeals, 402 N.E.2d 100 (Mass. App. Ct.) (validating denial of fill permit in flood plain zone despite no permitted use), *cert. denied*, 449 U.S. 1011 (1980); Bond v. Department of Nat. Resources, 454 N.W.2d 395 (Mich. Ct. App. 1989) (no taking to designate land as wetlands so as to require permit despite an application rejected); Claridge v. State Wetlands Bd., 485 A.2d 287 (N.H. 1984) (upholding denial of fill permit to accommodate single-family home in wetlands); Patenaude v. Town of Meredith, 392 A.2d 582 (N.H. 1978) (sustaining subdivision denial; requiring five acres of shoreline and 20 acres of wetlands within 100-acre tract set aside for recreational use not a taking); Salamar Builders Corp. v. Tuttle, 275 N.E.2d 585 (N.Y. 1971) (downzoning to reduce number of septic tanks for environmental protection); Haines v. Flacke, 481 N.Y.S.2d 376 (App. Div. 1984) (may deny home permit within tidal wetlands boundary but remanded to determine if entitlement to compensation); Responsible Citizens in Opposition to the Flood Plain Ordinance v. City of Asheville, 302 S.E.2d 204 (N.C. 1983) (validating flood hazard zoning allowing only development which prevents or minimizes flood damage); Presbytery of Seattle v. King County, 787 P.2d 907 (Wash.) (citing *Nollan* that exactions valid if calculated to compensate for adverse public impacts of proposed development), *cert. denied*, 111 S. Ct. 284 (1990); Maple Leaf Investors, Inc. v. State, 565 P.2d 1162 (Wash. 1977) (upholding exclusion of homes from flood plain); Just v. Marinette County, 201 N.W.2d 761 (Wis. 1972) (estuary protection particularly as in furtherance of state law and policy). *But see, e.g.*, Dooley v. Town Plan & Zoning Comm'n, 197 A.2d 770 (Conn. 1964) (finding flood plain district a taking as applied because uses allowed greatly reduced economic value or were impracticable); Department of Agric. v. Mid-Florida Growers, Inc., 521 So. 2d 101 (Fla. 1988) (finding that destruction of healthy citrus plants to control spread of citrus infection confers public benefit and does not prevent a harm); Hager v. Louisville & Jefferson County Planning Comm'n, 261 S.W.2d 619 (Ky. 1953) (taking to amend master plan placing land in ponding area for flood protection); State v. Johnson, 265 A.2d 711 (Me. 1970) (finding that wetlands law precluding marsh filling where unfilled land without commercial value denied reasonable use); Morris County Land Improvement Co. v. Parsippany-Troy Hills Township, 193 A.2d 232 (N.J. 1963) (invalidating flood basin zoning for swampland because water retention basin a facility of benefit to community and not beneficial to owner); Lemp v. Town Bd., 394 N.Y.S.2d 517 (Sup. Ct. 1977) (finding that prohibition of house and permitting only a stair to preserve sand dunes and grasses frustrates use and destroys economic value). *But cf.* Florida Rock Indus. v. United States, 791 F.2d 893 (Fed. Cir. 1986) (finding that denial of wetlands mining permit a "substantial possibility" of a taking if excessive diminution of value based on potential sales to speculators), *cert. denied*, 479 U.S. 1053 (1987); Minnesota v. Erickson, 7 Hous. & Dev. Rep. (BNA) 524 (Minn. Oct. 12, 1979) (validating injunction of demolition of historic homes in pursuit of historic preservation); Harbor Farms, Inc. v. Nassau County Planning Comm'n, 334 N.Y.S.2d 412 (App. Div. 1972) (evidence failed to support pollution and environmental harm sufficient to justify subdivision denial and implicitly all development in marshy area). *See generally* David P. Bryden, *A Phantom Doctrine: The Origins and Effects of* Just v. Marinette County, 1978 AM. B. FOUND. RES. J. 397; Jerry F. English & John J. Sarno, *The Freshwater Wetlands Protection Act: Give and "Take" in New Jersey*, 12 SETON HALL LEGIS. J. 249 (1989); John A. Humbach, *Law and a New Land Ethic*, 74 MINN. L. REV. 339 (1989) (endorsing existing use zoning

upon the eye of the beholder,[101] but his opinion embraced true nuisance abatement-like activities as valid regulation rather than a taking. Where private land uses conflict,[102] as in some cases of environmental protection,[103] or as in the spread of a disease,[104] the government, as umpire, will be sustained.[105] Where the state, however, regulates to protect only a few private parties,[106] as in *Pennsylvania Coal Co. v. Mahon*,[107] in which the Court invalidated restraints on coal mining that might cause the destruction of a private home where the coal company had reserved the right to mine minerals, or where the state attempts to impose a burden that should be shared by the community on a single property owner because of the location of the property,[108] the character of the regulation tends to suggest a taking. For example, if the government zones property for parking across from a civic project with inadequate parking, or regulates beach property for recreation only because of inadequately planned recreational uses, the courts are likely to invalidate such regulation. The lesson is that courts become skeptical of regulations that are merely designed to enhance such government enterprises.[109]

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without right of development); Zygmunt J.B. Plater, *The Takings Issue in a Natural Setting: Floodlines and the Police Power*, 52 TEX. L. REV. 201 (1974); Gerald Torres, *Wetlands and Agriculture: Environmental Regulation and the Limits of Private Property*, 34 U. KAN. L. REV. 539 (1986); Gary R. Garretson, Comment, *Wetlands Regulation: The "Taking" Problem and Private Property Interests*, 12 URB. L. ANN. 301 (1976).

101. Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2897 (1992).

102. Miller v. Schoene, 276 U.S. 272 (1928) (cedar rust tree disease).

103. *See, e.g.*, Hadacheck v. Sebastian, 239 U.S. 394 (1915) (eliminating brick making in urbanizing area); Just v. Marinette County, 201 N.W.2d 761 (Wis. 1972) (estuary protection). *But see* Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992).

104. *See, e.g.*, Miller v. Schoene, 276 U.S. 272 (1928) (cedar rust tree disease). *But see* Department of Agric. v. Mid-Florida Growers, Inc., 521 So. 2d 101 (Fla. 1988) (finding a taking on the facts because destruction of healthy citrus plants to control spread of citrus infection conferred public benefit but did not prevent public harm).

105. *Miller*, 276 U.S. at 279 (conflict of cedar rust threatening adjacent apple orchards).

106. *See* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 486-88 (1987) (upholding Subsidence Act because it did not merely protect private parties).

107. 260 U.S. 393 (1922).

108. *E.g.*, Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992); Arastra Ltd. Partnership v. City of Palo Alto, 401 F. Supp. 962 (N.D. Cal. 1975) (finding open space zoning after attempts at acquisition and delay a taking), *and vacated*, 417 F. Supp. 1125 (N.D. Cal. 1976) (vacated upon settlement); Eldridge v. City of Palo Alto, 129 Cal. Rptr. 575 (Ct. App. 1976) (finding a taking in permanent open space and conservation zoning with ten-acre homesite parcels and public access); Allingham v. City of Seattle, 749 P.2d 160 (Wash. 1988) (en banc) (finding green belt ordinance denying all use of 40 to 70% of property ruled a taking); *cf.* Westwood Forest Estates, Inc. v. Village of S. Nyack, 244 N.E.2d 700 (N.Y. 1969) (holding as an impermissible use of zoning powers a multifamily housing halt not motivated by need to relieve stress on sewer capacity and desire to avoid curing treatment facility inadequacy).

109. *See* Nollan v. California Coastal Comm'n, 483 U.S. 825, 835-36 & n.4 (1987) (invalidating

Creation of an important public benefit is in itself an insufficient basis to regulate land.[110] Similarly, the courts will invalidate regulation designed to devalue property so that anticipated public acquisition will be less expensive.[111] Easiest to sustain are planning requirements presenting an "average reciprocity of advantage,"[112] whereby the property regulated is enhanced in value because of uniform restrictions, such as restrictions involving uniform setbacks,[113]

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lateral beach access easement); Parks v. Watson, 716 F.2d 646 (9th Cir. 1983) (per curiam) (invalidating platted street vacation for apartment project conditional on compensation in the form of dedicating property with geothermal well sites); Rohn v. City of Visalia, 263 Cal. Rptr. 319 (Ct. App. 1989) (affirming writ to delete imposed solely for shifting cost of public benefit to one not responsible, or only remotely or speculatively benefiting from it); Peacock v. County of Sacramento, 77 Cal. Rptr. 391 (Ct. App. 1969) (finding an indeterminate, nine-year-old airport development building moratorium a taking under state constitution because its operation extended beyond the three years and seven months deemed a reasonable time to adopt a development plan); Hager v. Louisville & Jefferson County Planning & Zoning Comm'n, 261 S.W.2d 619 (Ky. 1953) (finding of plan's designation of property as "ponding area" for flood protection a taking under state and federal constitutions); Baker v. Planning Bd. of Framington, 228 N.E.2d 831 (Mass. 1967) (holding improper a denial of subdivision plan solely because town had used property as a drainage water storage area and approval would increase town costs); Kessler v. Town of Shelter Island Planning Bd., 338 N.Y.S.2d 778 (App. Div. 1972) (holding invalid denial of subdivision plan based on town's desire to designate entire plat a recreation site on the official map).

110. *Nollan*, 483 U.S. at 831; Allingham v. City of Seattle, 749 P.2d 160 (Wash. 1988) (finding "green belt" ordinance requiring 40 to 70% of certain lots maintained or returned to natural state a taking).

111. Ehrlander v. Alaska, 797 P.2d 629 (Alaska 1990) (holding that under state constitution aggrieved owner need not show extraordinary delay or bad faith motive to depress land values, only unreasonable delay); Klopping v. City of Whittier, 500 P.2d 1345 (Cal. 1972) (en banc) (approving of compensation for owner injured by delays in eminent domain proceedings following precondemnation statements); Smith v. City and County of San Francisco, 275 Cal. Rptr. 17 (Ct. App. 1990) (finding no precondemnation actions taken reducing value despite various discussions of potential use for property and modified plans; precondemnation abuse must be raised in eminent domain proceedings; holding fraud, interference with economic advantage inapplicable to precondemnation devaluation; rejecting claim of covenant of good faith and fair dealing absent a contract); Department of Transp. *ex rel.* People v. Amoco Oil Co., 528 N.E.2d 1018 (Ill. App. Ct. 1988) (affirming trial court's refusal to enforce permit conditioning grant of access to freeway on agreement that improvements would not increase value of the right of access when eventually terminated or condemned; permit condition was designed to depress property value and unrelated to valid state purpose under *Nollan*); Riggs v. Township of Long Beach, 538 A.2d 808 (N.J. 1988) (invalidating downzoning of property for purposes of reducing fair market valve prior to condemnation); State *ex rel.* Miller v. Manders, 86 N.W.2d 469 (Wis. 1957) (upholding validity of official map act in absence of legislative motives to depress property values); *cf.* Joint Ventures, Inc. v. Department of Transp., 563 So. 2d 622 (Fla. 1990) (statute providing for reservation of land and denying development rights during preacquisition for highway use a moratorium and a taking for lack of a compensation provision and use as an improper alternative to condemnation, over dissent arguing cure by availability of inverse condemnation action); *see also* Michael D. Dorum, Comment, *Takings Claims Involving Pre-Condemnation Land Use Planning: A Proposal for Means-Ends Analysis*, 43 RUTGERS L. REV. 457 (1991) (violative if long or dilatory).

112. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922); James A. Kushner, *Non-Owner Rights in Real Property and the Impact on Property Taxes*, 7 URB. L. & POL'Y 333 (1985).

113. *E.g.*, Gorieb v. Fox, 274 U.S. 603 (1927); Weiner v. City of Los Angeles, 441 P.2d 293

sideyards,[114] rearyards,[115] street abutment or frontage,[116] off-street

(Cal. 1968) (en banc); City of Leadville v. Rood, 600 P.2d 62 (Colo. 1979) (en banc); Di Salle v. Giggal, 261 P.2d 499 (Colo. 1953) (en banc) (validating frontage and yard size rules); Kefauver v. Zoning Bd. of Appeals, 195 A.2d 422 (Conn. 1963); Mayer v. Dade County, 82 So. 2d 513 (Fla. 1955) (setback measured from property line rather than proposed street and may not single out parcel for more restrictive setback requirement); City of Miami v. Romer, 58 So. 2d 849 (Fla. 1952); City of Carbondale v. Van Natta, 338 N.E.2d 19 (Ill. 1975) (extraterritorial enforcement); Adams v. Brian, 212 So. 2d 128 (Ct. App.), *writ refused*, 214 So. 2d 549 (La. 1968); Emond v. Board of Appeals, 541 N.E.2d 380 (Mass. App. Ct. 1989) (deviation of frontage based on neighborhood development pattern under specific site permit); Ridgefield Land Co. v. City of Detroit, 217 N.W. 58 (Mich. 1928) (upholding setback requirement as subdivision plat approval condition); Zampieri v. Township of River Vale, 152 A.2d 28 (N.J. 1959) (modification invalid as applied); Sierra Constr. Co. v. Board of Appeals, 187 N.E.2d 123 (N.Y. 1962); Headley v. City of Rochester, 5 N.E.2d 198 (N.Y. 1936) (validating setback for 25 feet of 19,000-square-foot lot valid); Fimiani v. Swift, 180 N.E. 355 (N.Y. 1932) (per curiam); Town of Islip v. F.E. Summers Coal & Lumber Co., 177 N.E. 409 (N.Y. 1931); Wulfson v. Burden, 150 N.E. 120 (N.Y. 1925) (upholding setbacks and open space area); Grinspan v. Adirondack Park Agency, 434 N.Y.S.2d 90 (Sup. Ct. 1980) (shoreline river setback); Ujka v. Sturdevant, 65 N.W.2d 292 (N.D. 1954); State *ex rel.* Cataland v. Birk, 125 N.E.2d 748 (Ohio 1953) (implicit); Miller & Son Paving, Inc. v. Wrightstown Township, 451 A.2d 1002 (Pa. 1982); Bouchard v. Zetley, 220 N.W. 209 (Wis. 1928) (maximum setback); *cf.* Lizotte v. Conservation Comm'n, 579 A.2d 1044 (Conn. 1990) (sustained setback of septic tanks, animal shelters and other buildings from wetlands); Cope v. Zoning Hearing Bd., 578 A.2d 1002 (Pa. Commw. Ct. 1990) (setback measured from ultimate right-of-way use rather than existing line). *But cf.* Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992) (implying that setback which denies any profitable use constitutes taking unless based on previously existing property right or nuisance abatement); Landmark Universal, Inc. v. Pitkin County Bd. of Adjustment, 579 P.2d 1184 (Colo. Ct. App. 1978) (entitled to variance; effect of setback and rearyard yielded total denial of development); Ocean Villa Apartments, Inc. v. City of Fort Lauderdale, 70 So. 2d 901 (Fla. 1954) (invalid where setback precludes only use for which property adapted, here 17-foot buildable land subject to future street widening and demolition of any construction); Hill v. Busbia, 125 S.E.2d 34 (Ga. 1962) (unreasonable as applied to lot where conforming structure prohibited by setback and yard requirements); Jewish Reconstructionist Synagogue of N. Shore, Inc. v. Incorporated Village of Roslyn Harbor, 342 N.E.2d 534 (N.Y. 1975) (First Amendment precludes unique setback rule for religious uses), *cert. denied*, 426 U.S. 950 (1976); Burt Realty Corp. v. City of Columbus, 257 N.E.2d 355 (Ohio 1970) (invalid as applied to prior nonconforming structure); Schmalz v. Buckingham Township Bd. of Adjustment, 132 A.2d 233 (Pa. 1957) (rationale for setbacks inapplicable to rural areas); Franklin Towne Realty, Inc. v. Zoning Hearing Bd., 391 A.2d 63 (Pa. Commw. Ct. 1978) (variance granted as full setback required steep driveway causing drainage problem); Westminster Corp. v. Zoning Bd. of Review, 238 A.2d 353 (R.I. 1968) (variance granted for office building under liberal test); Salt Lake County v. Kartchner, 552 P.2d 136 (Utah 1976) (unenforceable where pattern of six similar violations in vicinity); Board of Supervisors v. Rowe, 216 S.E.2d 199 (Va. 1975) (setback, open space, and perimeter rules eliminating 29% of buildable lot area excessive). *See generally* Annotation, *Validity of Front Setback Provisions in Zoning Ordinance or Regulation*, 93 A.L.R.2D 1223 (1964).

114. Sideyard requirements are typically sustained as a means of providing light, air, drainage, and fire protection. *See, e.g.*, Allen v. Zoning Bd. of Appeals, 235 A.2d 654 (Conn. 1967); Adams v. Brian, 212 So. 2d 128 (Ct. App.), *writ refused*, 214 So. 2d 549 (La. 1968); Akers v. Mayor of Baltimore, 20 A.2d 181 (Md. 1941) (height limit and maximum percentage of lot use based on size of sideyard, rearyard, and density standards); City of Cleveland v. Young, 111 So. 2d 29 (Miss. 1959) (area under attached carport deemed part of structure); Fimiani v. Swift, 180 N.E. 355 (N.Y. 1932) (per curiam); Ujka v. Sturdevant, 65 N.W.2d 292 (N.D. 1954). *But see, e.g.*, Ziman v. Village of Glencoe, 275 N.E.2d 168 (Ill. App. Ct. 1971) (invalidating five-foot sideyard as applied to narrow lot as narrow house aesthetically and economically infeasible, the court ordering a vari-

parking,[117] street or sidewalk[118] dedication, site ratios whereby a maximum buildable percentage of a lot is designated,[119] zoning,[120] minimum lot size,[121] height restrictions,[122] surface development sup-

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ance). *See generally* Annotation, *Validity of Zoning Regulations Requiring Open Side or Rear Yards*, 94 A.L.R.2D 398 (1964).

115. *E.g.*, Stemwedel v. Village of Kenilworth, 153 N.E.2d 79 (Ill. 1958); Ottaviano v. Zoning Bd. of Adjustment, 376 A.2d 286 (Pa. Commw. Ct. 1977) (variance to build greenhouse covering entire rearyard violative of zoning code which required 30% of lot be open space and invalid); Bouchard v. Zetley, 220 N.W. 209 (Wis. 1928) (maximum setback). *See generally* Annotation, *Validity of Zoning Regulations Requiring Open Side or Rear Yards*, 94 A.L.R.2D 398 (1964).

116. *E.g.*, Di Salle v. Giggal, 261 P.2d 499 (Colo. 1953) (frontage and yard size rules validated as relates to open space as affects lot size); MacNeil v. Town of Avon, 435 N.E.2d 1043 (Mass. 1982); Chaume v. Board of Zoning Appeals, 538 N.E.2d 31 (Mass. App. Ct. 1989) (valid as applied to deny building permit on undersized substandard lot and not a taking absent proof of market value and other possible uses); Cryderman v. Birmingham, 429 N.W.2d 625 (Mich. Ct. App. 1988); Ridgefield Land Co. v. City of Detroit, 217 N.W. 58 (Mich. 1928); Brough v. Heidelberg Township Bd. of Supervisors, 554 A.2d 133 (Pa. Commw. Ct. 1989) (properly denied plat with four landlocked parcels). *But cf.* Metzger v. Town of Brentwood, 374 A.2d 954 (N.H. 1977) (invalid as applied where large lot and no access problem); Ardolino v. Board of Adjustment, 130 A.2d 847 (N.J. 1957) (variance sustained). *See generally* Annotation, *Validity and Construction of Zoning Regulations Prescribing a Minimum Width or Frontage for Residence Lots*, 96 A.L.R.2D 1367 (1964).

117. *E.g.*, Stroud v. City of Aspen, 532 P.2d 720 (Colo. 1975); Montgomery County v. Woodward & Lothrop, Inc., 376 A.2d 483, 502 (Md. 1977), *cert. denied*, 434 U.S. 1067 (1978); Yates v. Mayor of Jackson, 244 So. 2d 724 (Miss. 1971); Zilinsky v. Zoning Bd. of Adjustment, 521 A.2d 841 (N.J. 1987) (two spaces per family dwelling); Grace Baptist Church v. City of Oxford, 358 S.E.2d 372 (N.C. 1987) (paved); Westminster Corp. v. Zoning Bd. of Review, 238 A.2d 353 (R.I. 1968) (variance granted for office building under liberal test). *See generally* Annotation, *Zoning: Residential Off-Street Parking Requirements*, 71 A.L.R.4TH 529 (1989).

118. *E.g.*, State v. Lundberg, 788 P.2d 456 (Ct. App. 1990) (10-foot strip adjacent to street condition for building permit or zone change), *aff'd*, 825 P.2d 641 (Or. 1992).

119. *E.g.*, La Salle Nat'l Bank v. City of Chicago, 125 N.E.2d 609 (Ill. 1955); Akers v. Mayor of Baltimore, 20 A.2d 181 (Md. 1941).

120. *E.g.*, Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); Baytree of Inverrary Realty Partners v. City of Lauderhill, 873 F.2d 1407 (11th Cir. 1989) (no taking for refusal to rezone).

121. *E.g.*, First Nat'l Bank v. City of Chicago, 185 N.E.2d 181 (Ill. 1962).

122. *E.g.*, Welch v. Swasey, 214 U.S. 91 (1909); William C. Haas & Co. v. City and County San Francisco, 605 F.2d 1117 (9th Cir. 1979) (downzoning), *cert. denied*, 445 U.S. 928 (1980); City of St. Paul v. Chicago, St. Paul, Minneapolis & Omaha Ry. Co., 413 F.2d 762 (8th Cir.), *cert. denied*, 396 U.S. 985 (1969); Landmark Land Co. v. City of Denver, 728 P.2d 1281 (Colo. 1986) (en banc) (to protect view), *appeal dismissed*, 483 U.S. 1001 (1987); La Salle Nat'l Bank v. City of Evanston, 312 N.E.2d 625 (Ill. 1974); Adams v. Brian, 212 So. 2d 128 (Ct. App.), *writ refused*, 214 So. 2d 549 (La. 1968); Wulfson v. Burden, 150 N.E. 120 (N.Y. 1925); Washington v. Pacesetter Constr. Co., 571 P.2d 196 (Wash. 1977) (implicit as applied); Atkinson v. Piper, 195 N.W. 544 (Wis. 1923) (within police power); Rogers v. City of Cheyenne, 747 P.2d 1137 (Wyo. 1987) (tree height limit on land in airport approach zone sustained), *appeal dismissed*, 485 U.S. 1017 (1988). *But cf.* La Salle Nat'l Bank v. City of Chicago, 125 N.E.2d 609 (Ill. 1955) (invalid as inconsistent with building height in surrounding area); Loyola Fed. Sav. & Loan Ass'n v. Buschman, 176 A.2d 355 (Md. 1961) (variance). *See generally* Annotation, *Validity of Building Height Regulations*, 8 A.L.R. 963 (1949).

port,[123] protection from environmental harm,[124] or designation of property on an official street map,[125] master plan,[126] urban renewal plan,[127] or subdivision requirements.[128] *Keystone* may have broad-

123. *E.g.*, Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987).

124. *E.g.*, First English Evangelical Lutheran Church v. Los Angeles, 258 Cal. Rptr. 893 (Ct. App. 1989) (flood district interim moratorium following fire validated), *cert. denied*, 493 U.S. 1056 (1990).

125. *E.g.*, Lomarch Corp. v. Mayor of Englewood, 237 A.2d 881 (N.J. 1968) (one year reservation with implied duty of compensation both of value of option and in full if exercised); Rieder v. State Dep't of Transp., 535 A.2d 512 (N.J. Super. Ct. App. Div. 1987) (allowing reservation from development by designation on alignment preservation map for future highway development despite adverse effect on market value resulting from potential 165 day freeze on development pending department decision to condemn); Petosa v. City of New York, 522 N.Y.S.2d 904 (App. Div. 1987) (mapping on city street expansion map not a taking as could seek permit or "demapping"); Rochester Business Inst. v. City of Rochester, 267 N.Y.S.2d 274 (App. Div. 1966) (per curiam) (no taking where property placed on map where impact of development modification only 6% of construction costs); State *ex rel.* Miller v. Manders, 86 N.W.2d 469 (Wis. 1957); CAL. GOV'T CODE §§ 66479 (West 1983 & Supp. 1990) (authority for reservation of land for public use), 66480 (West 1983) (acquisition required within two years); FLA. STAT. §§ 336.02 (future road reservation with optional five-year extension allowing owner to petition if unreasonable effect, mandatory prompt commencement of condemnation if found by hearing), 337.241 (2)(3) (administrative claim can result in 180 day order to condemn if substantial portion of beneficial use denied), 337.241(3) (held unconstitutional by Joint Ventures, Inc. v. Department of Transp., 563 So. 2d 622 (Fla. 1990)) (1991); *cf.* Wedinger v. Goldberger, 522 N.E.2d 25 (N.Y.) (designation on wetlands map thereby requiring state permit for development not a taking), *cert. denied*, 488 U.S. 850 (1988). *But see, e.g.*, Urbanizadora Versalles, Inc. v. Rivera Rios, 701 F.2d 993 (1st Cir. 1983) (designation of intersection on official map thwarting development of economic use for 14 years a taking although reasonable term would be valid); Joint Ventures, Inc. v. Department of Transp., 563 So. 2d 622 (Fla. 1990) (holding unconstitutional a statute providing for reservation of land and denying development rights during preacquisition for highway use); Jensen v. City of New York, 369 N.E.2d 1179 (N.Y. 1977) (official map restriction denying use of property for indefinite period void yet denying damages). *See generally* Daniel Mandelker, *Interim Development Controls on Highway Programs: The Taking Issue*, 4 J. LAND USE & ENVTL. L. 167 (1989).

126. *E.g.*, Oceanic Cal., Inc. v. City of San Jose, 497 F. Supp. 962 (N.D. Cal. 1980) (no taking by general plan designation); Selby Realty Co. v. City of San Buenaventura, 514 P.2d 111 (Cal. 1973) (en banc) (no taking by general plan designation); Guinnane v. City and County of San Francisco, 241 Cal. Rptr. 787 (Ct. App. 1987) (designation on plan as for possible acquisition neither cloud on title nor taking), *cert. denied*, 488 U.S. 823 (1988); Jones v. People *ex rel.* Dep't of Transp., 583 P.2d 165 (Cal. 1978) (en banc) (freeway plan or route adoption designating land for future acquisition does not create inverse condemnation but denial of subdivision by denying access creates a taking claim); Headley v. City of Rochester, 5 N.E.2d 198 (N.Y. 1936) (designation of street on plat establishes no taking and does not obligate city to commence condemnation); Suess Builders Co. v. City of Beaverton, 656 P.2d 306 (Or. 1982) (taking by designation only if induces owner to abandon all development), *on remand*, 714 P.2d 229 (Or. Ct. App. 1986) (no claim arises until development plan rejected); *cf.* Orsetti v. City of Fremont, 146 Cal. Rptr. 75 (Ct. App. 1978) (holding that mere declaration of intent to plan does not create cause of action for condemnation); Lake Intervale Homes, Inc. v. Township of Parsippany-Troy Hills, 147 A.2d 28 (N.J. 1958) (one-year reservation of subdivision land for schools and parks); Cochran v. Planning Bd., 210 A.2d 99 (N.J. Super. Ct. Law Div. 1965) (plan only a guide).

127. *E.g.*, City of Chicago v. R. Zwick Co., 188 N.E.2d 489 (Ill.), *appeal dismissed*, 373 U.S. 542 (1963) (urban renewal plan designation implicitly not a taking); *cf.* Beacon Syracuse Assocs. v. City of Syracuse, 560 F. Supp. 188 (N.D.N.Y. 1983) (no taking in amending plan designated uses

ened the notion of average reciprocity of advantage in defining it to encompass broad benefit to the public interest.[129] Historic preservation laws are generally sustained because such laws protect unique resources and tend to provide a reciprocity of advantage to the regulated landowner through the enhanced value of the protected district.[130]

On the impact side of the taking equation, the courts look to the frustration of investment-backed expectations.[131] Does this mean that the owner is entitled to a vested right to develop the property as zoned and regulated at purchase? Is it a reflection of the value of the property when acquired by the owner? These questions have not been answered by the Court; however, diminution of value alone through regulatory change is not determinative.[132] Although state

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without notice and hearing for adjacent landowner). *See generally* Gideon Kanner, *Condemnation Blight: Just How Just is Just Compensation?*, 48 NOTRE DAME L. REV. 765 (1973).

128. *But cf.* Board of County Comm'rs v. Goldenrod Corp., 601 P.2d 360 (Colo. Ct. App. 1979) (regulations a taking as applied where substantial sums expended prior to adoption, where nearly half of the lots sold, where application would preclude any reasonable use).

129. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 485-93 (1987); *see also* Raymond R. Coletta, *Reciprocity of Advantage and Regulatory Takings: Toward a New Theory of Takings Jurisprudence*, 40 AM. U. L. REV. 297 (1990).

130. Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978); Maher v. City of New Orleans, 516 F.2d 1051 (5th Cir. 1975), *cert. denied*, 426 U.S. 905 (1976); Minnesota v. Erickson, 7 Hous. & Dev. Rep. (BNA) 524 (Minn. Oct. 12, 1979). *But cf.* Lutheran Church in America v. City of New York, 316 N.E.2d 305 (N.Y. 1974) (effect of law denied reasonable use as applied to specific property).

131. Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987); Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104 (1978); Jerry L. Anderson, *Takings and Expectations: Toward a "Broader Vision" of Property Rights*, 37 U. KAN. L. REV. 529 (1989); *cf.* Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886 (1992). In first offering a per se rule that regulations that deny all economically beneficial or productive use of land constitute a taking and then withdrawing by acknowledging the validity of true nuisance abatement or recognition of pre-existing property rights—such as through prescriptive easements or the public trust doctrine—the majority in *Lucas* did not mention investment-backed expectations. Yet, *Lucas* appears to emphasize a version of vested rights, particularly where here beach property was zoned for single family development and subsequently permits were withheld after the passage of a coastal zone beach erosion setback regulation precluding development. *But see* Furey v. City of Sacramento, 780 F.2d 1448 (9th Cir. 1986) (no taking where downzone to agriculture after owner voluntarily and unilaterally initiates special assessment sewer district and sewer installation in pursuit of plan which forecasts extensive residential and commercial development). *Compare Furey*, 780 F.2d at 1448 *with* Furey v. City of Sacramento, 598 P.2d 844 (Cal.) (taking if open space zoning denies benefits of assessment district), *appeal dismissed*, 444 U.S. 976 (1979).

132. First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 319-20 (1987) (mere fluctuation in value during decision-making process as incident of ownership, citing *Agins*); Agins v. City of Tiburon, 447 U.S. 255 (1980) (downzoning value loss insufficient); Park Ave. Tower Assocs. v. City of New York, 746 F.2d 135 (2d Cir. 1984) (reduction of floor area ratio after building permit issuance sustained where property remains marketable), *cert. denied*, 470 U.S. 1087 (1985); Couf v. DeBlaker, 652 F.2d 585 (5th Cir. Unit B Aug. 1981) (downzoning from 54 dwellings per acre to 24 frustrating condominium project but generally reflecting plan validated),

courts, applying more rigorous taking standards established under state constitutions, will occasionally find a taking where regulations significantly depress land values,[133] the U.S. Supreme Court appears concerned with whether the regulation removes any reasonable economic use.[134] *First English*[135] suggests that interim or temporary de-

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cert. denied, 455 U.S. 921 (1982); William C. Haas & Co. v. City and County of San Francisco, 605 F.2d 1117 (9th Cir. 1979) (downzoning through height limitation not taking despite value impairment), *cert. denied*, 445 U.S. 928 (1980); MacNamara v. County Council, 738 F. Supp. 134 (D. Del.) (adjacent landowner lacks interest in adjacent property zone change despite diminution of value), *aff'd mem.*, 922 F.2d 832 (3d Cir. 1990); Stephans v. Tahoe Regional Planning Agency, 697 F. Supp. 1149 (D. Nev. 1988) (downzone to single-family leaves reasonable use); HFH, Ltd. v. Superior Court, 542 P.2d 237 (Cal. 1975) (en banc) (downzoning), *cert. denied*, 425 U.S. 904 (1976); County of Ada v. Henry, 668 P.2d 994 (Idaho 1983) (dicta citing *Agins* in sustaining 80-acre minimum agricultural zoning); Stone v. City of Wilton, 331 N.W.2d 398 (Iowa 1983) (downzoning sustained); Parranto Bros., Inc. v. City of New Brighton, 425 N.W.2d 585 (Minn. Ct. App. 1988) (downzoning sustained); Golden v. Planning Bd., 285 N.E.2d 291 (N.Y.) (relative factor with magnitude an indicia but does not of itself establish confiscation), *appeal dismissed*, 409 U.S. 1003 (1972); Salamar Builders Corp. v. Tuttle, 275 N.E.2d 585 (N.Y. 1971) (downzoning to reduce number of septic tanks for environmental protection); *see also* Pennell v. San Jose, 485 U.S. 1 (1988) (validating rent control); FCC v. Florida Power Corp., 480 U.S. 245 (1987) (reasonable rate regulation, here utility pole charges for cable operators and not a physical occupation due to voluntary participation in space rental). *But see* East Neck Estates, Ltd. v. Luchsinger, 305 N.Y.S.2d 922 (Sup. Ct. 1969) (ruling confiscatory a mandatory dedication of shorefront parcel as condition for subdivision approval, which would reduce value of plat almost in half). *But cf.* Westwood Forest Estates, Inc. v. Village of S. Nyack, 244 N.E.2d 700 (N.Y. 1969) (invalidating zoning amendment in part because it reduced parcel values from $125,000 to between $10,000 and $50,000; court noted motive in amendment was to avoid meeting sewage treatment standards).

133. *Compare* Ehrlander v. Alaska, 797 P.2d 629 (Alaska 1990) ("damage" provision of state taking clause broader protection than federal, allowing delay damages) *with* HFH, Ltd v. Superior Court, 542 P.2d 237 (Cal. 1975) ("damage" provision of state constitution creates no greater rights than those under federal constitution, with property value loss by downzoning noncompensable), *cert. denied*, 425 U.S. 904 (1976) *and* Comment, *Federal Regulatory Taking Jurisprudence and Missouri Inverse Condemnation Proceedings*, 58 UMKC L. REV. 421 (1990) (discussing how "or damaged" provision ignored by Missouri intermediate appellate courts). *Cf.* Ellison v. County of Ventura, 265 Cal. Rptr. 795 (Ct. App. 1990) (finding no taking by downzoning where value doubled despite more restrictive zoning provisions).

134. First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987) (regulatory taking where all use denied); Nectow v. City of Cambridge, 277 U.S. 183 (1928); Lockary v. Kayfetz, 908 F.2d 543 (9th Cir. 1990) (while denial of water hookup destroys major portion of viable use, not a taking if caused by water shortage rather than the government regulation); Herrington v. County of Sonoma, 857 F.2d 567, 570 (9th Cir. 1988) (all or substantially all economic viable use must be taken under *First English*), *cert. denied*, 489 U.S. 1090 (1989); A.A. Profiles, Inc. v. City of Ft. Lauderdale, 850 F.2d 1483 (11th Cir. 1988) (downzoning excessive and ruled a taking where city had approved industrial project and investment made in reliance), *cert. denied*, 490 U.S. 1020 (1989); Citizen's Ass'n v. International Raceways, Inc., 833 F.2d 760 (9th Cir. 1987) (all economically viable use must be denied under *First English* and *Nollan*); Pace Resources, Inc. v. Shrewsbury Township, 808 F.2d 1023 (3d Cir.) (downzoning diminishing value not violative of investment-backed expectations where developer failed to obtain final approval of industrial project within three years from preliminary plan approval as provided under Pennsylvania law), *cert. denied*, 482 U.S. 906 (1987); Urbanizadora Versalles, Inc. v. Rivera Rios, 701 F.2d 993 (1st Cir. 1983) (designation of intersection on official map thwarting development of economic use for 14 years a taking although reasonable term would be valid); Barbian v. Panagis, 694 F.2d 476

velopment halts or moratoria may constitute a temporary taking;[136]

(7th Cir. 1982) (must deny all or an essential use for the grant of a variance to constitute a taking); Faux-Burhans v. County Comm'rs, 674 F. Supp. 1172 (D. Md. 1987) (all use must be denied under the 1987 trilogy, here airplane zoning permitted operation of airfield); Q.C. Constr. Co. v. Gallo, 649 F. Supp. 1331 (D.R.I. 1986) (moratorium on building permits and sewer connections reducing land value by 90% in the face of no limit on duration and no efforts to plan for service capacity expansion ruled a taking), *aff'd mem.*, 836 F.2d 1340 (1st Cir. 1987); Oceanic Cal., Inc. v. City of San Jose, 497 F. Supp. 962 (N.D. Cal. 1980) (no taking by general plan designation); Smoke Rise, Inc. v. Washington Suburban Sanitary Comm'n, 400 F. Supp. 1369 (D. Md. 1975); Benenson v. United States, 548 F.2d 939 (Ct. Cl. 1977) (five-year cloud of condemnation leaving no economic use for historic building an unreasonable act amounting to a taking); Drakes Bay Land Co. v. United States, 424 F.2d 574 (Ct. Cl. 1970) (inclusion of land in tracts to be acquired for national seashore thereafter declining to condemn yet leaving cloud of potential condemnation on land ruled a taking); Long Beach Equities, Inc. v. County of Ventura, 282 Cal. Rptr. 877 (Ct. App. 1991) (facial validation of partial moratorium to protect public health, safety, or morals, unless total and unreasonable in purpose; no regulatory taking from increased restrictions severely reducing profits); Smith v. City and County of San Francisco, 275 Cal. Rptr. 17 (Ct. App. 1990) (finding no precondemnation actions taken reducing value despite various discussions of potential use for property and modified plans; stating precondemnation abuse must be raised in eminent domain proceedings; holding fraud, interference with economic advantage claims inapplicable; declining to consider covenant of good faith and fair dealing claims absent a contract); Rohn v. City of Visalia, 263 Cal. Rptr. 319 (Ct. App. 1989) (condition imposed solely for shifting cost of public benefit to one not responsible, or only remotely or speculatively benefiting from it); Griffin Homes, Inc. v. Superior Court, 274 Cal. Rptr. 456 (Ct. App. 1990) (vacating demurrer challenge of building cap in the face of expensive infrastructure installation far in excess of need generated by limited number of building permits so far awarded; court strongly endorsing growth management, leaving policy conflicts to legislators; holding that inverse condemnation based on delay in building permit was untimely; endorsing a *Nollan*-like model for analysis in looking to a lack of substantial relationship to public health, safety, morals, or general welfare; emphasizing need to show a deprivation of all or substantially all use), *ordered not to be published*, 822 P.2d 1317 (1992); Viso v. State, 154 Cal. Rptr. 580 (Ct. App. 1979) (sustaining demurrer to complaint which failed to allege there was no economic use remaining); Peacock v. County of Sacramento, 77 Cal. Rptr. 391 (Ct. App. 1969) (finding an indeterminate, nine-year-old airport development building moratorium a taking under state constitution because of its operation the three years and seven months deemed a reasonable time to adopt a development plan); Board of County Comm'rs v. Goldenrod Corp., 601 P.2d 360 (Colo. Ct. App. 1979) (dismissing suit to enforce subdivision regulations; holding that application of regulations would constitute a taking where substantial sums were expended prior to adoption, where nearly half of the lots sold, where application would preclude any reasonable use); Lackman v. Hall, 364 A.2d 1244 (Del. Ch. 1976) (holding unconstitutional statute allowing highway department to reserve use of land intended for future highway corridor whenever owner intended to use property to increase eventual acquisition costs); Allen Realty, Inc. v. City of Lawrence, 790 P.2d 948 (Kan. Ct. App. 1990) (holding that statute restricting lot development adjacent to historic building was not a taking); Maryland-Nat'l Capital Park & Planning Comm'n v. Chadwick, 405 A.2d 241 (Md. 1979) (declaring a three-year public reservation for parks and parkways a taking yet finding reservations were not per se invalid); Guy v. Brandon Township, 450 N.W.2d 279 (Mich. Ct. App. 1989) (per curiam) (declaring a taking ordinance requiring 2.5-acre minimum mobile home park lots); Jensen v. City of New York, 369 N.E.2d 1179 (N.Y. 1977) (voiding official map restriction denying use of property for indefinite period); Arverne Bay Constr. Co. v. Thatcher, 15 N.E.2d 587, 591 (N.Y. 1938); Oakwood Co. v. Planning Bd., 452 N.Y.S.2d 457 (App. Div. 1982) (finding that approval of modified cluster development for 17 rather than the original 42 units based on environmental analysis did not deprive economic use); Grinspan v. Adirondack Park Agency, 434 N.Y.S.2d 90 (Sup. Ct. 1980) (disapproved of three-lot subdivision yet granting shoreline variance diminished value but not a total deprivation of use); Albrecht Realty Co. v. Town of

however, the courts have not yet ruled that reasonable delays in processing,[137] building permit issuance,[138] or interim planning development controls constitute a taking.[139] *Nollan v. California Coastal Commission*[140] suggests a taking upon the finding that development conditions unreasonably exceed the needs for such conditions generated by the project.[141] More specifically, to be valid, the condition may have to substantially further a government interest which would justify the denial of a permit.[142]

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particularly as no plan to expand school capacity); Miller v. City of Beaver Falls, 82 A.2d 34 (Pa. 1951) (law allowing city three years to decide to condemn land for park a taking); *cf.* Lomarch Corp. v. Mayor of Englewood, 237 A.2d 881 (N.J. 1968) (no taking to allow placing land on official map designated as a park allowing up to one year for condemnation where interpreted to cover compensation for the year as an option). *But cf.* Selby v. City of San Buenaventura, 514 P.2d 111 (Cal. 1973) (en banc) (designation of future streets in general plan not a taking); Guinnane v. City and County of San Francisco, 241 Cal. Rptr. 787 (Ct. App. 1987) (designation on plan as open space for possible future acquisition but without reservation not a taking), *cert. denied*, 488 U.S. 823 (1988); Lord Calvert Theater v. Mayor of Baltimore, 119 A.2d 415 (Md. 1956) (finding no taking in 20-foot reservation to widen streets even after 25-five year delay in condemnation); Kingston E. Realty Co. v. New Jersey, 336 A.2d 40 (N.J. Super. Ct. App. Div. 1975) (120-day reservation of land prior to condemnation not a temporary taking); Dunn v. City of Redmond, 739 P.2d 55, 56 (Or. Ct. App. 1987) (*First English* states no new regulatory taking analysis standards); Peterson v. Dane County, 402 N.W.2d 376 (Wis. 1987) (declining to find taking in self-imposed hardship-based inverse condemnation claim following town's refusal to rezone where predecessor split two-acre parcel without complying with subdivision ordinance). *See generally* Daniel R. Mandelker, *Interim Development Controls in Highway Programs: The Taking Issue*, 4 J. LAND USE & ENVTL. L. 167 (1989).

135. 482 U.S. 304 (1987).

136. *But cf.* Moore v. City of Costa Mesa, 886 F.2d 260 (9th Cir. 1989) (finding that three-year delay in development of property did not constitute a temporary taking despite the fact that the delay was imposed by invalid variance condition requiring dedication of land for street widening), *cert. denied*, 496 U.S. 906 (1990).

137. *E.g.*, Guinnane v. City and County of San Francisco, 241 Cal. Rptr. 787 (Ct. App. 1987) (designation on plan as for possible acquisition neither cloud on title nor taking), *cert. denied*, 488 U.S. 823 (1988); Valley View Indus. Park v. City of Redmond, 733 P.2d 182 (Wash. 1987) (pre-*First English*).

138. *E.g.*, Griffin Homes, Inc. v. Superior Court, 274 Cal. Rptr. 456, 466 (Ct. App. 1990), *and vacated*, 280 Cal. Rptr. 792 (Ct. App. 1991) (vacation on ripeness grounds), *ordered not to be published*, 822 P.2d 1317 (Cal. 1992).

139. *See* First English Evangelical Lutheran Church v. Los Angeles, 258 Cal. Rptr. 893 (Ct. App. 1989) (flood district interim moratorium following fire validated), *cert. denied*, 493 U.S. 1056 (1990); Guinnane v. City and County of San Francisco, 241 Cal. Rptr. 787 (Ct. App. 1987), *cert. denied*, 488 U.S. 823 (1988).

140. 483 U.S. 825 (1987). *See generally* William A. Falik & Anna C. Shimko, *The "Takings" Nexus—The Supreme Court Chooses a New Direction in Land-Use Planning: A View From California*, 39 HASTINGS L.J. 359 (1988).

141. McKain v. Toledo City Plan Comm'n, 270 N.E.2d 370 (Ohio Ct. App. 1971) (holding unconstitutional a requirement that owner dedicate off-site land to improve adjacent road vastly in excess of need generated by minor subdivision); *cf.* Associated Builders & Contractors, Golden Gate Chapter, Inc. v. Baca, 769 F. Supp. 1537 (N.D. Cal. 1991) (declining to find *Nollan* a taking in imposition of "prevailing wage" requirement to building permit; holding that is limited to land use regulatory conditions and inapplicable to building standards and conditions).

142. *Nollan*, 483 U.S. at 834-37; *see also* Griffin Homes, Inc. v. Superior Court, 274 Cal. Rptr.

In *Lucas v. South Carolina Coastal Council*,[143] the Supreme Court offered another unfocused partial definition of a taking, one which did not depart significantly from the *Penn Central* balancing model. The Court first offered a tentative per se rule that regulations denying all economically beneficial or productive use of land constitute a taking[144] but then receded from this position by acknowledging the validity of regulations designed to abate nuisances.[145] The Court reversed the South Carolina Supreme Court's holding that a coastal building setback abated a nuisance and directed the state court to inquire into restrictions on use arising from preexisting property law.[146] *Lucas* does not appear to threaten most forms of zoning, subdivision, and other development restrictions. At most, it resolves a unique group of cases involving the near total wipe out of a land owner. In the vast majority of land regulation situations, the *Penn Central* model calling for the balancing of various concerns remains intact.

The balancing of these concerns might eventually be charted in terms of balancing the importance of state intervention with the extent of diminution of value and the value of the retained permitted use. This vague, undefined creature called a taking presents a cloud over developer exactions, growth control initiatives, and land use controls in general, and suggests the need to develop such controls on a record of extraordinary community necessity and to be as sensitive as possible toward leaving regulated land with a valid economic use.

One example of the need for a carefully documented relationship between an exaction and its good occurred in *Marblehead v. City of Clemente*.[147] The trial court in *Marblehead* invalidated a growth control initiative election-created plan that would have prohibited new development for which adequate roads, sewers, flood control, parks, police, and emergency services were unavailable.[148] The court ruled that requiring property owners to mitigate conditions not caused by their development and to cure inadequacies of prior development violated the nexus test required by *Nollan*.[149] While the

456 (Ct. App. 1990) (endorsing a *Nollan*-like model of analysis in looking to a lack of substantial relationship to public health, safety, morals, or general welfare).

143. 112 S. Ct. 2886 (1992).

144. *Id.* at 2893-94.

145. *Id.* at 2899-902.

146. *Id.* at 2900-01.

147. Marblehead v. City of San Clemente, CAL. OFFICE OF PLAN. & RES. PARTNERSHIP NEWSL., Nov.-Dec. 1988, at 6 (Cal. Super. Ct. Oct. 18, 1988), *aff'd*, 277 Cal. Rptr. 550 (Ct. App. 1991).

148. *Id.*

149. *Id.*

ruling was affirmed, the appellate court ruled only that the initiative should have provided for the amendment of the community's general plan indicating which elements were modified and it was defective for the initiative to merely direct the city council to amend the plan.[150] A different California district court of appeals followed the reasoning of the earlier trial court ruling and refused to accept a development condition of dedicating land to correct a long-standing intersection alignment problem, the need for which, according to the court, was not generated by the proposed development.[151] Despite these holdings, subdivision approval standards and growth management schemes linking development approval to the adequacy of infrastructure have generally been sustained.[152]

V. Financing Capital Improvements

The following is a collection of devices, other than general taxation, that provide for the financing of infrastructure, and the existing jurisprudence establishing limits upon developer charges. Although the pre-*Nollan* scheme appears to follow a general pattern, the results reflect differing state rules and yet typically accord judicial deference for legislative judgment. In addition to the impractical choice of public provision of facilities and infrastructure from general tax revenues, regulating communities have universally required on-site development conditions and dedication of land for public use and have increasingly mandated off-site payment of exactions, typically in the form of fees. To provide a full picture, this section also reviews the traditional use of assessments and the newer techniques of facilities benefit assessments and urban redevelopment.

A. Conditions

As in all cases of discretionary land use approval, it is typical, appropriate, and legitimate to impose conditions upon the granting

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150. Marblehead v. City of San Clemente, 277 Cal. Rptr. 550, 553-54 (Ct. App. 1991).

151. *See* Rohn v. City of Visalia, 263 Cal. Rptr. 319 (Ct. App. 1989).

152. *See, e.g.*, Associated Homebuilders of the Greater Eastbay, Inc. v. City of Livermore, 557 P.2d 473 (Cal. 1976) (building permit approval conditioned on adequate sewage disposal and water supply facilities); Twain Harte Homeowners Ass'n v. County of Toulomne, 188 Cal. Rptr. 233 (Ct. App. 1982) (adequate water); P-W Invs., Inc. v. City of Westminster, 655 P.2d 1365 (Colo. 1982) (upholding linkage of building permits linked to water and sewer service availability); District Land Corp. v. Washington Suburban Sanitary Comm'n, 292 A.2d 695 (Md. 1972) (water and sewer service only to development consistent with master plan prospective and not applicable to previously approved project with water and sewer lines already constructed); *see also* Steven L. Egert, Comment, *Traffic-Linked Growth Control in California*, 16 Ecology L.Q. 481 (1989).

of permit approval[153] and to assure that police power concerns of health, safety, welfare, and morals are met[154] and that subdivisions are well-planned and attractive.[155] Mandated conditions should typi-

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153. *E.g.*, Nollan v. California Coastal Comm'n, 483 U.S. 825, 834 (1987); *see also* Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 113 (1978); Gorieb v. Fox, 274 U.S. 603, 606 (1927) (setback); Ayers v. City Council, 207 P.2d 1, 3 (Cal. 1949) (en banc) (upholding reasonable subdivision conditions relating to design, dedication, improvement, and restrictive use of land); City of Sierra Madre v. Superior Court, 12 Cal. Rptr. 836, 838 (Ct. App. 1961) (off-site property acquisition and dedication); City of Buena Park v. Boyar, 8 Cal. Rptr. 674, 676 (Ct. App. 1960) (statutory drainage condition); Soderling v. City of Santa Monica, 191 Cal. Rptr. 140, 142 (Ct. App. 1983) (upholding if consistent with map act, reasonably required, and not in conflict with specific restriction; necessary or convenient to insure conformity to general plan; statute authorizes subdivision design and improvement, here allowing smoke detectors); Pioneer Trust & Sav. Bank v. Village of Mount Prospect, 176 N.E.2d 799, 801 (Ill. 1961); Collis v. City of Bloomington, 246 N.W.2d 19, 22 (Minn. 1976) (upholding constitutionality of statute authorizing municipalities to require dedication of land for parks and recreation as condition for subdivision approval); Blevens v. City of Manchester, 170 A.2d 121 (N.H. 1961) (supply of municipal services despite benefit to other lots); Home Owners' Preservation League v. Clackamas County Planning Comm'n, 533 P.2d 838, 839 (Or. 1975) (approving restriction on subdivision name precluding use of name similar to another subdivision unless common developer of contiguous plats); Frank Ansuini, Inc. v. City of Cranston, 264 A.2d 910, 913 (R.I. 1970); City of Mequon v. Lake Estates Co., 190 N.W.2d 912, 915-16 (Wis. 1971) (park and school fees); Zastrow v. Village of Brown Deer, 100 N.W.2d 359 (Wis. 1960); Prudential Trust Co. v. City of Laramie, 492 P.2d 971, 973 (Wyo. 1972) (design conformity with other development); MO. ANN. STAT. § 89.410(2) (Vernon 1989) (land reservation or dedications for public use). *But see* ARIZ. REV. STAT. ANN. § 9-463.01(D)-(F) (1990) (locality must compensate subdivider by purchase within one year if require reservation of land for park, school, or fire station); *cf.* CAL. GOV'T CODE § 66478 (West 1983) (county school board must compensate subdivider for reserved school site dedicated to school district); FLA. STAT. § 336.02(4) (1991) (highway reservation establishes setback and where unreasonable effect owner permitted to petition requiring amendment, acquisition, or condemnation within 180 days); N.J. STAT. ANN. 40:55D-44 (West 1990) (planning board may require subdivider to reserve land for streets, ways, and basins for one year after final map approvals compensation due for actual loss caused by temporary reservation of land for public use if land reverts to subdivider).

154. *See, e.g.*, Archer v. City of Los Angeles, 119 P.2d 1, 4 (Cal. 1941) (holding that drainage improvement upstream causing some downstream flooding was not a taking); Soderling v. City of Santa Monica, 191 Cal. Rptr. 140, 142 (Ct. App. 1983) (approving imposition of conditions for smoke alarms, street alignment, drainage, sanitary facilities, fire roads, fire breaks, traffic access, and grading; holding that conditions need not be specifically authorized in enabling statute); Concordia Collegiate Inst. v. Duke, 290 N.Y.S.2d 105, 106 (App. Div. 1968) (requiring site plan approval conditions be reasonably necessary).

155. *E.g.*, Town of Seabrook v. Tra-Sea Corp., 410 A.2d 240, 241-43 (N.H. 1979) (upholding ordinances that ensure "harmonious development of the municipality and its environs," and for "open spaces of adequate proportion" including roads). *See generally* DEVELOPMENT EXACTIONS (James E. Frank & Robert M. Rhodes eds., 1987); Donald G. Hagman, *Exactions, User Fees and Assessments: What Are the Limits?*, *in* ZONING AND PLANNING LAW HANDBOOK 45 (Fredric A. Strom ed., 1983); Kenneth B. Bley, *Exactions in the 1980s*, 1984 INST. ON PLAN. ZONING & EMINENT DOMAIN 297; Fred P. Bosselman & Nancy E. Stroud, *Pariah to Paragon: Developer Exactions in Florida, 1975-85*, 14 STETSON L. REV. 527 (1985); David L. Callies & Malcolm Grant, *Paying For Growth and Planning Gain: An Anglo-American Comparison of Development Conditions, Impact Fees and Development Agreements*, 23 URB. LAW. 221, 236 (1991); Donald L. Connors, *Paying the Piper: What Can Local Governments Require as a Condition of Development Approval?*, 1986 INST. ON PLAN. ZONING & EMINENT DOMAIN 2.1; Ira M. Heyman & Thomas K.

cally be established by statute, ordinance, or regulation.[156] Local governments are not required to resort to deficit financing to provide the infrastructure to support new development, and subdividers may be required to pay their fair share of expanding infrastructure capacity.[157] Yet some communities may lack the authority to halt development pending the availability of supporting facilities. The New Hampshire Supreme Court, for example, ruled that a blanket moratorium on nonresidential development pending completion of street changes exceeded the "condition" powers.[158] While the legislative or administrative approval or denial of subdivision faces scrutiny, conditioning approval on town or developer provision of facilities is not a subdivision denial.[159] Conditions are typically on-site or adjacent facilities and services, and often include street improvements.[160]

Gilhool, *The Constitutionality of Imposing Increased Community Costs on New Suburban Residents Through Subdivision Exactions*, 73 YALE L.J. 1119 (1964); John D. Johnston, *Constitutionality of Subdivision Control Exactions: The Quest for a Rationale*, 52 CORNELL L. REV. 871 (1967); Mary A. Nelson, *Land Exaction: A Selective Bibliography*, 50 LAW & CONTEMP. PROBS. 177 (Winter 1987); R. Martin Smith, *From Subdivision Improvement Requirements to Community Benefit Assessments and Linkage Payments: A Brief History of Land Development Exactions*, 50 LAW & CONTEMP. PROBS. 5 (Winter 1987); Benjamin J. Trichelo, *Subdivision Exactions: Virginia Constitutional Restrictions*, 11 U. RICH. L. REV. 21 (1976); Michael G. Trachtman, Comment, *Subdivision Exactions: The Constitutional Issues, the Judicial Response, and the Pennsylvania Situation*, 19 VILL. L. REV. 782 (1974); Thomas M. Pavelko, Note, *Subdivision Exactions: A Review of Judicial Standards*, 25 WASH. J. URB. & CONTEMP. L. 269 (1983); Symposium, *Exactions: A Controversial New Source For Municipal Funds*, 50 LAW & CONTEMP. PROBS. 1 (Winter 1987) (pro-developer symposium).

156. Cherry Hills Resort Dev. Co. v. City of Cherry Hills Village, 790 P.2d 827, 832 (Colo. 1990) (en banc).

157. Contractors & Builders Ass'n v. City of Dunedin, 329 So. 2d 314, 320 (Fla. 1976) (approving water and sewer fees earmarked for system expansion).

158. Leda Lanes Realty, Inc. v. City of Nashua, 293 A.2d 320, 322 (N.H. 1972) (restricting regulatory powers to those consistent with official map).

159. Golden v. Planning Bd., 285 N.E.2d 291, 298-99 (N.Y.), *appeal dismissed*, 409 U.S. 1003 (1972). *But cf.* J.D. Land Corp. v. Allen, 277 A.2d 404 (N.J. Super. Ct. App. Div. 1971) (holding that ordinance may require certificate of occupancy and may condition approval on completion of installation of site improvements but may not deny occupancy for single house because all subdivision improvements not completed unless needed for health or safety of occupants of that house).

160. *E.g.*, Ridgefield Land Co. v. City of Detroit, 217 N.W. 58, 59 (Mich. 1928) (dedication for minimum street widths as condition of plat approval); Holmes v. Planning Bd., 433 N.Y.S.2d 587, 594-95 (App. Div. 1980) (eliminating individual driveway curb cuts to control traffic congestion on main road and requiring grant of common easement for alley); County Builders, Inc. v. Lower Providence Township, 287 A.2d 849 (Pa. Commw. Ct. 1972) (holding that ordinance may require cul-de-sac at end of dead end streets); Prudential Trust Co. v. City of Laramie, 492 P.2d 971 (Wyo. 1972) (approving requirement that configuration of subdivision streets consistent with adjacent exterior roads); *cf, e.g.*, Traymore Assocs. v. Board of Supervisors, 357 A.2d 729 (Pa. Commw. Ct. 1976) (requiring state transportation department permit to reopen access street a condition of final plat approval). *But cf, e.g.*, William J. (Jack) Jones Ins. Trust v. City of Fort Smith, 731 F. Supp. 912 (W.D. Ark. 1990) (denying permit to gas station to build convenience store for

The historical antecedent of subdivision development conditions was the official map act requiring the dedication of streets within a planned development.[161] The dedication and improvement of streets,

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refusal to expand right-of-way for street purposes invalid under *Nollan* as no indication of increased generated traffic or other externality); Batch v. Town of Chapel Hill, 376 S.E.2d 22, 36 (N.C. Ct. App. 1989) (invalidating condition subdivision approval on road improvement unrelated to need generated by project even if road is part of an existing highway plan), *rev'd on other grounds*, 387 S.E.2d 655 (N.C.), *cert. denied*, 496 U.S. 931 (1990).

161. *See, e.g.*, Snead v. Tatum, 25 So. 2d 162 (Ala. 1946) (dedication to residents and often the public generally where subdivision plat shows streets); Krieger v. Planning Comm'n, 167 A.2d 885 (Md. 1961) (denying plat as project encroached on area reserved on master highway plan); Lord Calvert Theatre v. Mayor of Baltimore, 119 A.2d 415 (Md. 1956) (finding no taking in twenty-foot reservation to widen streets even for 25-year delay in condemnation); Rieder v. State Dep't of Transp., 535 A.2d 512 (N.J. Super. Ct. App. Div. 1987) (allowing reservation from development by designation on alignment reservation map for future highway development despite adverse effect on market value resulting from potential 165 day freeze on development pending department decision to condemn); Jensen v. City of New York, 369 N.E.2d 1179 (N.Y. 1977) (map restriction denying use of property void); Headley v. City of Rochester, 5 N.E.2d 198 (N.Y. 1936) (reservation without compensation); Petosa v. City of New York, 522 N.Y.S.2d 904 (App. Div. 1987) (designation not a taking); Rochester Business Inst. v. City of Rochester, 267 N.Y.S.2d 274 (App. Div. 1966) (per curiam) (reservation without compensation affecting but 6% of land); State *ex rel.* Miller v. Manders, 86 N.W.2d 469 (Wis. 1957) (no right to erect building in street designated on official map unless owner substantially damaged pursuant to savings clause); *cf.* North Landers Corp. v. Planning Bd., 400 N.E.2d 273 (Mass. App. Ct. 1980); Burgess v. City of Concord, 391 A.2d 896 (N.H. 1978) (amendment of official map requires notice and hearing); Nigro v. Planning Bd., 584 A.2d 1350 (N.J. 1991) (holding that official map deserves highest degree of deference that is substantial but not absolute deference; noting that official map is not immutable and subdivision plan may vary as to minor elements); Lomarch Corp. v. Mayor of Englewood, 237 A.2d 881 (N.J. 1968) (no permanent taking to place land on official map for parkland with one year to condemn so long as city pays as compensation for the year as an option); Wedinger v. Goldberger, 514 N.Y.S.2d 474 (App. Div. 1987) (freshwater wetlands designation thereby requiring a permit not a taking); Foster v. Atwater, 38 S.E.2d 316 (N.C. 1946) (streets and alleys shown on plat dedicated to use by purchasers and sometimes to public); FLA. STAT. § 336.02 (1991) (future road reservation with building permit denial endorsement suspect following Joint Ventures, Inc. v. Department of Transp., 563 So. 2d 622 (Fla. 1990)). *But cf.* Urbanizadora Versalles, Inc. v. Rivera Rios, 701 F.2d 993 (1st Cir. 1983) (confiscatory to place major intersection on parcel rendering undevelopable and delay acquisition, freezing land development for 14 years); Benenson v. United States, 548 F.2d 939 (Ct. Cl. 1977) (five-year cloud of condemnation an unreasonable act amounting to a taking leaving no economic use for historic building); Drakes Bay Land Co. v. United States, 424 F.2d 574 (Ct. Cl. 1970) (inclusion of land in tracts to be acquired for national seashore thereafter declining to condemn yet leaving a cloud of potential condemnation ruled a taking); Lackman v. Hall, 364 A.2d 1244 (Del. Ch. 1976) (reserving parcel for future highway a taking where acquisition provided for when owner intends to use property so as to increase eventual acquisition cost); Joint Ventures, Inc. v. Department of Transp., 563 So. 2d 622 (Fla. 1990) (statute providing for reservation of land and denying development rights during preacquisition for highway use a moratorium and a taking for lack of a compensation provision and use as an improper alternative to condemnation, over dissent arguing cure by availability of inverse condemnation action); Howard County v. JJM, Inc., 482 A.2d 908 (Md. 1984) (must bear nexus between exaction and generated need from development here unlimited duration reservation without nexus a taking); Maryland-Nat'l Capital Park and Planning Comm'n v. Chadwick, 405 A.2d 241 (Md. 1979) (three-year public reservation for parks and parkways a taking yet reservations not per se invalid); Kessler v. Town of Shelter Island Planning Bd., 338 N.Y.S.2d 778 (App. Div. 1972) (invalid subdivision denial because entire plat shown

at the expense of the subdivider,[162] to serve the subdivision and the improvement of adjacent street systems to handle the demands created by the proposed subdivision are nearly universally validated.[163]

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on official map as recreation site); Curry v. Oklahoma City, 519 P.2d 910 (Okla. 1974) (must be compelling necessity to demand right-of-way dedication to divide one lot after previously approved the current parcel as part of earlier subdivision without a dedication condition and no road improvement anticipated within five years). *See generally* Joseph C. Kucirek & J.H. Beuscher, *Wisconsin's Official Map Law: Its Current Popularity and Implications for Conveyancing and Planning*, 1957 WIS. L. REV. 176; Daniel R. Mandelker, *Interim Development Controls in Highway Programs: The Taking Issue*, 4 J. LAND USE & ENVTL. L. 167 (1989).

162. *E.g.*, Cutting v. Muzzey, 724 F.2d 259 (1st Cir. 1984) (requiring developer to complete subdivision and not just post bond or mortgage for completion); Hoover v. Kern County, 257 P.2d 492 (Cal. Ct. App. 1953); McDavitt v. Planning Bd., 308 N.E.2d 786 (Mass. App. Ct. 1974) (subdivision conditioned on completion of streets aligned with existing streets thereby creating a continuous thoroughfare); Allen v. Stockwell, 178 N.W. 27 (Mich. 1920) (may require that adequate assurance streets be graded and surface drains and sewers installed); City of Bellefontaine Neighbors v. J.J. Kelley Realty & Bldg. Co., 460 S.W.2d 298 (Mo. Ct. App. 1970); KBW, Inc. v. Town of Bennington, 342 A.2d 653 (N.H. 1975) (per curiam) (cost of on- and off-site road improvements necessitated by project a valid condition, here to road bordering subdivision); Levin v. Township of Livingston, 173 A.2d 391 (N.J. 1961); Ghen v. Piasecki, 410 A.2d 708 (N.J. Super. Ct. App. Div. 1980) (sewers and streets, here remanding to consider compensation for that part of the way by necessity needed to accommodate the residential development beyond the easement needed to serve just the landlocked owner); Draper v. Haynes, 567 S.W.2d 462 (Tenn. 1978) (ordinance prohibits lot sales unless public street frontage). *But cf.* Carter v. City Council, 163 N.W. 195 (Iowa 1917) (lack of enabling authority to condition plat approval upon indemnity bond posted to cover street improvements).

163. *See, e.g.*, Gordon v. Board of Zoning Appeals, No. 90-2516, 1991 WL 202148 (4th Cir. Oct. 10, 1991) (per curiam) (not officially published opinion) (sustaining condition of improving private access road to county standards as condition for conditional use zoning for private club); Nicoli v. Planning Comm'n, 368 A.2d 24 (Conn. 1976) (approving of conditioning of plat on connecting streets to public streets; no duty of town to extend roads to remote plat); Krieger v. Planning Comm'n, 167 A.2d 885 (Md. 1961) (regulation requiring allowance for future highway widening and vehicle access proper); J.E.D. Assocs. v. Town of Atkinson, 432 A.2d 12 (N.H. 1981) (removal of off-site ledge obstructing vision on access road); Town of Seabrook v. Tra-Sea Corp., 410 A.2d 240 (N.H. 1979); Land/Vest Properties, Inc. v. Town of Plainfield, 379 A.2d 200 (N.H. 1977) (off-site access road improvement to extent of developer's fair share but may not condition on upgrading roads leading to subdivision unless rational nexus to subdivision generated needs); J.D. Land Corp. v. Allen, 277 A.2d 404 (N.J. Super. Ct. App. Div. 1971) (street grading and pavement); Mac Lean v. Planning Bd., 228 A.2d 85 (N.J. Super. App. Div. 1967) (access to all lots); Noble v. Chairman of Township Comm., 219 A.2d 335 (N.J. Super. Ct. App. Div. 1966) (adequate road facilities); Brous v. Smith, 106 N.E.2d 503 (N.Y. 1952) (internal street improvement or bond posting valid condition for six single-family building permits); Medine v. Burns, 208 N.Y.S.2d 12 (Sup. Ct. 1960) (grading and paving of internal streets while need not pave road from subdivision to highway outside plat as statute only requires access to public highway not specifying as in the case of internal improvements that it should be at developer's expense); *cf.* Bethlehem Evangelical Lutheran Church v. City of Lakewood, 626 P.2d 668 (Colo. 1981) (street dedication, curb, gutter, sidewalk, and street improvement appropriate conditions for building permit issuance); Iddings v. Board of Appeals, 255 N.E.2d 604 (Mass. 1970) (may deny building permit to interior lot not fronting on public way as required by zoning regulation); North Landers Corp v. Planning Bd., 400 N.E.2d 273 (Mass. App. Ct. 1980) (requires explicit standards); Loyer Educ. Trust v. Wayne County Road Comm'n, 425 N.W.2d 189 (Mich. Ct. App. 1988) (sustained conditioning driveway permit on installation of passing lane on opposite side of road for safe and effi-

Subdivision approval may be conditioned on a street configuration

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cient left turn traffic), *cert. denied*, 493 U.S. 825 (1989); Kligman v. Lautman, 251 A.2d 745 (N.J. 1969) (streets may be planned a minimum of 250 feet from existing streets for no dedications within 250 feet accepted); Levin v. Township of Livingston, 173 A.2d 391 (N.J. 1961) (may specify type of street construction and paving); Ghen v. Piasecki, 410 A.2d 708 (N.J. Super. Ct. App. Div. 1980) (subdivider not responsible to compensate for way by necessity easement available under state law, but under subdivision law would be responsible to acquire a larger way to serve the demand of the increased number of lots in excess of that of the landlocked parcel). *But see, e.g.*, Arnett v. City of Mobile, 449 So. 2d 1222 (Ala. 1984) (must pay compensation for land outside subdivision reserved for future thoroughfare as no subdivision lots adjacent to parcel sold nor did need arise from plat with different result if require reservation within plat for street to traverse development); Ventures in Property I v. City of Wichita, 594 P.2d 671 (Kan. 1979) (invalid to require reservation of 18 out of 48 acres of the undeveloped parcel for possible future highway); Howard County v. JJM, Inc., 482 A.2d 908 (Md. 1984) (confiscation to require reservation of new state road without compensation); V.S.H. Realty, Inc. v. Zoning Bd. of Appeals, 570 N.E.2d 1044 (Mass. App. Ct. 1991) (invalid to condition shopping center certificate of occupancy upon off-site street widening where such action was governmental decision beyond control of developer); Arrowhead Dev. Co. v. Livingston County Rd. Comm'n, 322 N.W.2d 702 (Mich. 1982) (agreement to pay off-site county road improvement exceeded road commission's statutory subdivision authority); Hylton Enters., Inc. v. Board of Supervisors, 258 S.E.2d 577 (Va. 1979) (no express or implied statutory or ordinance-based power to impose condition of improving public highways abutting subdivision; condition imposed by trial court invalid); *cf.* Beaver Meadows v. Board of County Comm'rs, 709 P.2d 928 (Colo. 1985) (improvement of 4.73-mile off-site access road invalid as regulations failed to allocate according to generated need nor specify off-site obligations); Hernando County v. Budget Inns, 555 So. 2d 1319 (Fla. 5th DCA 1990) (requirement that owner show frontage road on building plans as condition to obtain building permit and invalid land banking as no present need and violates nexus requirement as no showing of need in reasonably immediate future); Paradyne Corp. v. Florida Dep't of Transp., 528 So. 2d 921 (Fla. 1st DCA 1988) (may condition on design to accommodate existing traffic but may not require landowner as a condition of road connection permit to construct drive on property for use and benefit of abutting landowner), *review denied*, 536 So. 2d 244 (Fla. 1988); City of Sycamore v. Gauze, 264 N.E.2d 597 (Ill. 1970) (may not deny building permit to interior lot not fronting on public way as required by zoning regulation; must allow use of landlocked parcel with utilities and reachable by fire trucks; no irreparable harm to justify injunction pending further proceedings); Briar West, Inc. v. Lincoln, 291 N.W.2d 730 (Neb. 1980) (unreasonable to require subdivider to pay half the cost of paving and widening arterial abutting streets where required subdivider to relinquish right of direct vehicular access from such abutting streets, the court not reaching if adopts nexus or uniquely attributable test); Robbins Auto Parts, Inc. v. City of Laconia, 371 A.2d 1167 (N.H. 1977) (cannot require easement to widen adjacent streets for general public benefit to serve need not generated by proposed project); Brazer v. Borough of Mountainside, 262 A.2d 857 (N.J. 1970) (subdivision condition to reserve right-of-way for future street simply because it was on master plan an invalid taking where exceeded a rational nexus of need generated by the subdivision); Magnolia Dev. Co. v. Coles, 89 A.2d 664 (N.J. 1952) (lack of authority from project review and filing statute to condition approval on 26-foot compact gravel roadway); Princeton Research Lands, Inc. v. Planning Bd., 271 A.2d 719 (N.J. Super. Ct. App. Div. 1970) (may require off-site street improvement and bear portion of cost relating to needs generated but could not require dedication of land to expand existing right-of-way already serving the municipality); Battaglia v. Wayne Township Planning Bd., 236 A.2d 608 (N.J. Super. Ct. App. Div. 1967) (improvement and dedication of 50-foot easement minimally benefitting single-family building permit applicant not subject to exaction as unauthorized by statute or ordinance as well as a taking); Coates v. Planning Bd., 445 N.E.2d 642 (N.Y. 1983) (arbitrary to require widening and paving of adjoining roadway as no significant additional traffic from two houses and frontage improvement would neither promote traffic safety nor reduce congestion); Batch v. Town of Chapel Hill, 376 S.E.2d 22 (N.C. Ct. App. 1989) (invalid to condition extraterritorial subdivision

corresponding with existing adjacent rights-of-way,[164] the removal of any traffic hazards likely to be caused by the proposed development,[165] and minimum road widths in a plat,[166] or obtaining an access permit from the public transportation authority.[167]

Upon subdivision approval, streets contained in the final plat become part of the official map.[168] Massachusetts limits subdivision road construction standards to those currently required by the town without requiring comparison to earlier projects.[169] Placement and installation of subdivision identification, the identification of facilities and amenities within the subdivision, and street markers within a subdivision, as well as adjacent facilities expanded to serve the subdivision, are common and appropriate.[170] Successors in title from the subdivider are bound by earlier conditions of approval.[171]

The dedication and improvement of parks and recreational amenities to serve the subdivision,[172] or simply the requirement of provision by reservation or payment in lieu of dedication, without dedication,[173] including adjacent or nearby parks and facilities to be

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approval on road improvement unrelated to need generated by project), *rev'd on other grounds*, 387 S.E.2d 655 (N.C.), *cert. denied*, 496 U.S. 931 (1990); Associated Milk Producers, Inc. v. City of Midwest City, 583 P.2d 491 (Okla. 1978) (dedication uncontested but requirement of paving to 50 feet from center line of major street preempted by statute requiring conversion of two-lane road to four lanes to have petition by half the abutting owners); Unlimited v. Kitsap County, 750 P.2d 651 (Wash. Ct. App. 1988) (may condition on design to accommodate existing traffic but may not require landowner as a condition of road connection permit to construct drive on property for use and benefit of abutting landowner, here an attempted easement exaction for substantially landlocked parcel).

164. Prudential Trust Co. v. City of Laramie, 492 P.2d 971 (Wyo. 1972).

165. Arrowhead Dev. Co. v. Livingston County Rd. Comm'n, 283 N.W.2d 865 (Mich. 1979) (regrading road outside subdivision in accord with development agreement).

166. Ridgefield Land Co. v. City of Detroit, 217 N.W. 58 (Mich. 1928); *see also* Town of Brookfield v. Greenridge, Inc., 418 A.2d 907 (Conn. 1979) (implicit obligation to construct roads in conformity with good road building practices regardless of plat map or local regulation).

167. Traymore Assocs. v. Board of Supervisors, 357 A.2d 729 (Pa. Commw. Ct. 1976).

168. Simonson v. Hutchins, 191 N.Y.S.2d 857 (Sup. Ct. 1959).

169. Miles v. Planning Bd., 536 N.E.2d 328 (Mass. 1989); MASS GEN. LAWS ANN. ch. 41, § 81Q (West 1989 & Supp. 1990).

170. *E.g.*, N.J. STAT. ANN. § 40:55D-2 (West Supp. 1990); N.Y. GEN. CITY LAW § 33 (McKinney 1989); N.Y. TOWN LAW § 277 (McKinney 1987 & Supp. 1991); City of Bellefontaine Neighbors v. J.J. Kelley Realty & Bldg. Co., 460 S.W.2d 298 (Mo. Ct. App. 1970); *see also* City National Bank v. City of Coral Springs, 475 So. 2d 984 (Fla. 4th DCA 1985) ("right turn only signs" proper condition to assure safe and adequate access).

171. Costanza & Bertolino, Inc. v. Planning Bd., 277 N.E.2d 511 (Mass. 1971).

172. *E.g.*, Associated Home Builders of the Greater E. Bay, Inc. v. City of Walnut Creek, 484 P.2d 606 (Cal.) (available for use by subdivision residents or generally benefiting neighborhood), *appeal dismissed*, 404 U.S. 878 (1971); Messer v. Town of Chapel Hill, 297 S.E.2d 632 (N.C. Ct. App. 1982) (recreation area to serve residents means intended to be used by all residents in area not only subdivision residents).

173. *E.g.*, Patenaude v. Town of Meredith, 392 A.2d 582 (N.H. 1978) (valid to require five

used by the subdivision's residents and to accommodate the demands created by the proposed subdivision, are typically validated[174] in light of the common phenomenon of the "appallingly rapid disappearance of open areas in and around our cities."[175] Some early decisions required specific enabling legislation to mandate the provision of open space in subdivisions.[176] Park fees may also be imposed

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acres of shoreline and 20 acres of wetlands set aside for wildlife habitat and recreation use in 100-acre subdivision); Bayswater Realty Corp. v. Planning Bd., 560 N.E.2d 1300 (N.Y. 1990) (approving recreation fee of $5000 per lot in lieu of dedication; remanded for a finding that a park within the development by dedication or reservation impractical); Town of Seabrook v. Tra-Sea Corp., 410 A.2d 240 (N.H. 1979) (open space); River Birch Assocs. v. City of Raleigh, 388 S.E.2d 538 (N.C. 1990) (upholding requirement that developer convey open space for common area to homeowners' association; finding condition not a taking because of nexus to valid regulatory purpose; ambiguity resolved by parol evidence of scheme such as field map, sales brochure, maps, advertising, or oral statement upon which purchasers relied); *cf.* Crane-Berkley Corp. v. Lavis, 263 N.Y.S. 556 (App. Div. 1933) (where park reserved by grantor, that grantor is not to be assessed for taxes when control and use reserved to subdivision residents); Messer v. Town of Chapel Hill, 297 S.E.2d 632 (N.C. Ct. App. 1982) (may require change in location of recreation area); Board of Supervisors v. Rowe, 216 S.E.2d 199 (Va. 1975) (open spaces privately owned and maintained).

174. *E.g.*, Aunt Hack Ridge Estates, Inc. v. Planning Comm'n, 273 A.2d 880 (Conn. 1970) (validating lesser of 10,000-square-feet or 4% of subdivision); Collis v. City of Bloomington, 246 N.W.2d 19 (Minn. 1976) (parks and playground dedication); Bayswater Realty & Capital Corp. v. Planning Bd., 560 N.E.2d 1300 (N.Y. 1990) (validating $5000 per lot in lieu of recreation fee for cluster development earmarked for a facility serving the development); Jenad, Inc. v. Village of Scarsdale, 218 N.E.2d 673 (N.Y. 1966) (holding village has option of either requiring developer to allot land for parks or provide or charge in lieu fee), *abrogated*, Weingarten v. Town of Lewisboro, 542 N.Y.S.2d 1012 (Sup. Ct. 1989) (also sustaining park reservation or in lieu fee but eschewing "reasonableness" standard of *Jenad* for a more restrictive *Nollan* nexus model; ironic as *Nollan* cited *Jenad* with approval), *aff'd mem.*, 559 N.Y.S.2d 807 (App. Div.), *appealed dismissed*, 564 N.E.2d 67 (1990), *modified*, 572 N.E.2d 40 (N.Y. 1991) (dismissing on ripeness); Reggs Homes, Inc. v. Dickerson, 179 N.Y.S.2d 771 (Sup. Ct. 1958), *aff'd mem.*, 186 N.Y.S.2d 215 (App. Div. 1959); *In re* Lake Secor Dev. Co., 252 N.Y.S. 809 (Sup. Ct. 1931); Foster v. Atwater, 38 S.E.2d 316 (N.C. 1946) (parks shown on plat dedicated to use by purchasers and sometimes to public); *cf.* Ayers v. City Council, 207 P.2d 1 (Cal. 1949) (planted rear lot buffer strips); City National Bank v. City of Coral Springs, 475 So. 2d 984 (Fla. 4th DCA 1985) (validating 10-foot landscaped buffer strip around convenience store); Three Lakes Ass'n v. Kessler, 285 N.W.2d 300 (Mich. Ct. App. 1979) (holding that nonriparian subdivision residents may use riparian lands conveyed to owners' association). *But see, e.g.*, ARIZ. REV. STAT. ANN. § 9-463.01 (1990) (requiring that locality compensate subdivider if it demands reservation of land for parks or recreation); Kessler v. Town of Shelter Island Planning Bd., 338 N.Y.S.2d 778 (App. Div. 1972) (holding that a subdivisional denial is invalid if based solely upon board's recommendation that the entire plat be used for recreational purposes; holding valid park dedications or in lieu payments reasonably related to area under consideration). *See generally* James P. Karp, *Subdivision Exactions for Park and Open Space Needs*, 16 AM. BUS. L.J. 277 (1979); Christopher Grace, Note, *Los Altos: Reconsidering the Park Land Subdivision Exaction*, 4 STAN. ENVTL. L. ANN. 104 (1983); Douglas Y. Curran, Note, *Constitutional Law—Mandatory Subdivision Exactions for Park and Recreational Purposes*, 43 Mo. L. REV. 582 (1978).

175. Associated Home Builders of the Greater E. Bay, Inc. v. City of Walnut Creek, 484 P.2d 606, 618 (Cal.), *appeal dismissed*, 404 U.S. 878 (1971).

176. *See, e.g.*, Kelber v. City of Upland, 318 P.2d 561 (Cal. Ct. App. 1957) (invalidating fees for future city park needs); Ridgemont Dev. Co. v. City of E. Detroit, 100 N.W.2d 301 (Mich. 1960); Grand Land Co. v. Township of Bethlehem, 483 A.2d 818 (N.J. Super. Ct. App. Div. 1984) (holding that subdivider cannot be required to reserve land for any public purpose).

as a condition of development.[177] The exaction should be rationally related to the park needs generated. In *Frank Ansuini, Inc. v. City of Cranston*,[178] a Rhode Island court invalidated an automatic dedication of 7% of the subdivision for recreation purposes—a scheme validated in some other states.[179]

It has become common in newer communities to impose upon the subdivider the obligation to establish a system, typically through the creation of a homes association bound by covenants or equitable servitudes, to maintain the subdivision's common areas and facilities, from street lighting to landscaping of streets and parks as well as public amenity facilities such as parks, playgrounds, swimming pools, and tennis courts.[180]

Other on-site conditions including paving of streets, sidewalks,[181] gutters, storm drains, park and recreational facilities within a subdi-

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177. Banberry Dev. Corp. v. South Jordan City, 631 P.2d 899 (Utah 1981).

178. 264 A.2d 910 (R.I. 1970); *cf.* Haugen v. Gleason, 359 P.2d 108 (Or. 1961) (excessive land or fee characterized as tax).

179. *See, e.g.*, Creative Environments, Inc. v. Estabrook, 491 F. Supp. 547 (D. Mass. 1980) (validating 10% park reservation rule over a taking claim; while statute required compensation for subdivision park dedication conditions, here dedication was precipitated by landowner's offer), *aff'd*, 680 F.2d 822 (1st Cir.), *cert. denied*, 459 U.S. 989 (1982); Aunt Hack Ridge Estates, Inc. v. Planning Comm'n, 273 A.2d 880 (Conn. 1970) (validating rule requiring dedication of lesser of 10,000-square-feet or 4%); Collis v. City of Bloomington, 246 N.W.2d 19 (Minn. 1976) (upholding facial validity of 10% as a general rule); Call v. City of W. Jordan, 606 P.2d 217 (Utah 1979) (mandatory 7% dedication policy sustained but permitting a hearing on whether reasonable relation to need generated by subdivision), *modified on reh'g*, 614 P.2d 1257 (Utah 1980).

180. *See, e.g.*, Frisco Land & Mining Co. v. State, 141 Cal. Rptr. 820 (Ct. App. 1977) (continued maintenance of common areas), *cert. denied*, 436 U.S. 918 (1988); *cf.* Brentwood Subdivision Road Ass'n v. Cooper, 461 N.W.2d 340 (Iowa 1990) (subdivision lot owners bound by covenants to maintain streets and subject to lawsuit to contribute necessary share of costs); Deerfield Estates, Inc. v. Township of E. Brunswick, 286 A.2d 498 (N.J. 1972) (may require maintenance guarantee for two years on water mains of up to 15% of cost); Board of Supervisors v. Rowe, 216 S.E.2d 199 (Va. 1975) (open spaces privately owned and maintained); 61 Op. Att'y Gen. 466 (1978) (county may elect not to accept dedication of roads into county system and instead may condition plat approval on maintenance by subdivision). *See generally* 5 RICHARD POWELL, POWELL ON REAL PROPERTY ¶ 675[2][a] (Patrick J. Rohan ed., 1990) (covenants for maintenance payments); Todd Brower, *Communities Within the Community: Consent, Constitutionalism, and other Failures of Legal Theory in Residential Associations*, 7 J. LAND USE & ENVTL. L. 203, 208-16 (1992) (discussing history of residential associations).

181. *E.g.*, Sansoucy v. Planning Bd., 246 N.E.2d 811 (Mass. 1969); Mac-Rich Realty Constr., Inc. v. Planning Bd., 341 N.E.2d 916 (Mass. App. Ct. 1976); Allen v. Stockwell, 178 N.W. 27 (Mich. 1920); City of Bellefontaine Neighbors v. J.J. Kelley Realty & Bldg. Co., 460 S.W.2d 298 (Mo. Ct. App. 1970); J.D. Land Corp. v. Allen, 277 A.2d 404 (N.J. Super. Ct. App. Div. 1971); *cf.* Miles v. Planning Bd., 558 N.E.2d 1150 (Mass. App. Ct. 1990) (rather than deny plat for traffic problems, mitigation with traffic improvements and sidewalk construction must be undertaken as a condition of approval). *But cf.* Suburban Homes Corp. v. Anderson, 261 N.E.2d 376 (Ind. Ct. App. 1970) (lack of ordinance authority to require sidewalk installation as ordinance limited duty to where adjacent to subdivision with sidewalks or where average density exceeded 3.5 lots per acre); Valenti Homes, Inc. v. City of Sterling Heights, 233 N.W.2d 72 (Mich. Ct. App. 1975) (lack

vision as well as adjacent facilities expanded to serve the subdivision are common and appropriate.[182] These include instances of the installation and paving of curbs and gutters within a subdivision as well as adjacent walk and roadways expanded to serve the subdivision,[183] energy conservation,[184] monuments and street markers,[185] sign removal,[186] parking,[187] bridges,[188] landscaping,[189] fire fighting

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of charter authority to impose criminal sanctions for failure to meet sidewalk construction requirements); Magnolia Dev. Co. v. Coles, 89 A.2d 664 (N.J. 1952) (lack of authority from project review and filing statute to condition approval on sidewalk installation).

182. *Cf.* Levin v. Township of Livingston, 173 A.2d 391 (N.J. 1961) (may specify type of street construction and paving). *But cf.* Briar West, Inc. v. Lincoln, 291 N.W.2d 730 (Neb. 1980) (unreasonable to require subdivider to pay half the cost of paving and widening arterial abutting streets where required subdivider to relinquish right of direct vehicular access from such abutting streets; failing to reach the question of adopting nexus or uniquely attributable test); Associated Milk Producers, Inc. v. City of Midwest City, 583 P.2d 491 (Okla. 1978) (dedication uncontested but requirement of paving to 50 feet from center line of major street preempted by statute requiring conversion of two-lane road to four lanes to have petition by half the abutting owners).

183. City of Carbondale v. Brewster, 398 N.E.2d 829 (Ill. 1979) (dicta), *appeal dismissed*, 446 U.S. 931 (1980); Petterson v. City of Naperville, 137 N.E.2d 371 (Ill. 1956) (noting it irrelevant that curbs, gutters, and drainage facilities cost more than open ditches and culverts); Mac-Rich Realty Constr., Inc. v. Planning Bd., 341 N.E.2d 916 (Mass. App. Ct. 1976); J.D. Land Corp. v. Allen, 277 A.2d 404 (N.J. Super. Ct. App. Div. 1971); *cf.* Bethlehem Evangelical Lutheran Church v. City of Lakewood, 626 P.2d 668 (Colo. 1981) (holding street dedication, curb, gutter, sidewalk, and street improvement appropriate conditions for building permit issuance). *But cf.* Magnolia Dev. Co. v. Coles, 89 A.2d 664 (N.J. 1952) (holding lack of authority from project review and filing statute to condition approval on curbs and gutter and other improvements).

184. CAL. GOV'T CODE § 66473.1 (West 1983) (subdivision, excluding condominium conversion, must to extent feasible provide for future passive or natural heating and cooling opportunities); 64 Op. Att'y Gen. 328 (1981) (must disapprove of subdivision not meeting § 66473.1 design criteria).

185. J.D. Land Corp. v. Allen, 277 A.2d 404 (N.J. Super. Ct. App. Div. 1971); CAL. GOV'T CODE § 66495 (West 1983).

186. Circle K Corp. v. City of Mesa, 803 P.2d 457 (Ariz. Ct. App. 1990) (sign elimination or modification condition for new sign permit reviewed and sustained under *Nollan* although apparent minimal scrutiny where no physical occupation involved); King Serv., Inc. v. Town Bd., 539 N.Y.S.2d 594 (App. Div. 1989) (sign removal valid condition on expansion of prior nonconforming service station as substantially advances legitimate state interest without denial of economically viable use under *Nollan*), *aff'd*, 554 N.E.2d 1278 (N.Y. 1990).

187. Potomac Greens Assocs. Partnership v. City Council, 761 F. Supp. 416 (E.D. Va. 1991) (upholding city's authority to require elimination of third level of parking structure as within police powers); Liberty v. California Coastal Comm'n, 170 Cal. Rptr. 247 (Ct. App. 1980) (upholding requirement that developer provide parking for restaurant but invalidating further requirement that developer provide public parking for beach users).

188. CAL. GOV'T CODE § 66484 (West Supp. 1991) (dedication for additions and supplemental thoroughfares and construction but must charge entire benefitted area a fee); Squires Gate, Inc. v. County of Monmouth, 588 A.2d 824 (N.J. Super. Ct. App. Div. 1991) (upholding subdivision condition requiring off-site widening despite no enabling legislation).

189. Ayers v. City Council, 207 P.2d 1 (Cal. 1949) (en banc) (planted rear lot buffer strips); City National Bank v. City of Coral Springs, 475 So. 2d 984 (Fla. 4th DCA 1985) (upholding requirement of 10-foot landscaped buffer strip around convenience store); Mac-Rich Realty Constr., Inc. v. Planning Bd., 341 N.E.2d 916 (Mass. App. Ct. 1976); J.D. Land Corp. v. Allen, 277 A.2d 404 (N.J. Super. Ct. App. Div. 1971) (shade trees).

services,[190] fire alarm signal devices, and grading and installation of drainage, erosion and flood control system.[191]

The installation of water pipes and facilities to accommodate development, and the assurance of a water supply to meet the needs of the subdivision including adjacent or nearby wells, pumping stations, water mains, or treatment systems to accommodate the demands created by the proposed subdivision are also universally validated.[192] Development may be conditioned on the provision of

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190. Schoonover v. Klamath County, 806 P.2d 156 (Or. Ct. App. 1991) (valid to condition subdivision on annexation of land within a fire district despite rejection or request by available districts), *review denied*, 812 P.2d 828 (Or.), *cert. denied*, 112 S. Ct. 375 (1991).

191. Leroy Land Dev. v. Tahoe Regional Planning Agency, 939 F.2d 696 (9th Cir. 1991) (although pre-*Nollan* settlement of conditions dispute not subject to post-*Nollan* re-litigation, court in dicta ruled erosion mitigation measures including installation of energy dissipator devices, stabilization devices for cut slope, secondary access and acquisition of adjacent and nonadjacent land for open space and other mitigation measures met *Nollan* nexus to legitimate government purpose); Delight, Inc. v. Baltimore County, 624 F.2d 12 (4th Cir. 1980), *aff'g* 475 F. Supp. 754 (D. Md. 1979) (dicta); City of Carbondale v. Brewster, 398 N.E.2d 829 (Ill. 1979) (dicta endorsing storm water drainage facilities), *appeal dismissed*, 446 U.S. 931 (1980); Petterson v. City of Naperville, 137 N.E.2d 371 (Ill. 1956) (irrelevant that curbs, gutters, and drainage facilities more costly than open ditches and culverts); Brown v. City of Joliet, 247 N.E.2d 47 (Ill. App. Ct. 1969) (adequate drainage condition); Brown v. Joliet, 247 N.E.2d 47 (Ill. App. Ct. 1969) (storm sewers); United Reis Homes, Inc. v. Planning Bd., 270 N.E.2d 402 (Mass. 1971) (board of health recommended drainage conditions); Vitale v. Planning Bd., 409 N.E.2d 237 (Mass. App. Ct. 1980) (board of health conditions and planning board drainage requirements validated with health board findings binding on planning board; hearing to be provided because of conflict in affidavits for health board and developer); Hamilton v. Planning Bd., 345 N.E.2d 906 (Mass. App. Ct. 1976); Allen v. Stockwell, 178 N.W. 27 (Mich. 1920); Divan Builders, Inc. v. Planning Bd., 334 A.2d 30 (N.J. 1975) (cost must be equitably apportioned among benefitted lands); J.D. Land Corp. v. Allen, 277 A.2d 404 (N.J. Super. Ct. App. Div. 1971) (drainage and storm sewers); Coates v. Planning Bd., 445 N.E.2d 642 (N.Y. 1983); Akin v. South Middleton Township Zoning Hearing Bd., 547 A.2d 883 (Pa. Commw. Ct. 1988) (drainage easement to accommodate waterway across property valid and if adjacent landowner experiences trespass they may have a cause of action against the developer); DeStefano v. City of Charleston, 403 S.E.2d 648 (S.C. 1991) (sustaining condition of providing drainage easement for building permits over taking challenge); Hylton Enters., Inc. v. Board of Supervisors, 258 S.E.2d 577 (Va. 1979); *cf.* Ardolino v. Board of Adjustment, 130 A.2d 847 (N.J. 1957) (condition on permit that construction not adversely affect drainage easement validated); Auto Acceptance, Inc. v. City of Allentown, 244 A.2d 722 (Pa. 1968) (city not liable for storm sewer installation on proposed subdivision land because of authority to impose installation cost on subdivision developer). *But cf.* Chacksfield v. Los Angeles County Flood Control Dist., 53 Cal. Rptr. 774 (Ct. App. 1966) (developer not obligated to complete improvement as flood control channel not constructed by district according to specifications making developer completion impossible although third party developer could not mandate district compliance); Wood Bros. Homes, Inc. v. City of Colorado Springs, 568 P.2d 487 (Colo. 1977) (invalid to require builder to bear full cost of drainage channel serving area larger than subdivision as no ordinance supporting the rule and not cured by provision for refund of fees in excess of actual costs, the court not reaching the constitutional issue); Castle Estates, Inc. v. Park Bd., 182 N.E.2d 540 (Mass. 1962) (drainage subdivision condition invalid as not authorized by law or regulations); CAL. GOV'T CODE § 66419(a) (West Supp. 1990). *See also* CAL. GOV'T CODE § 66411 (West Supp. 1991) (requires local ordinances with standards).

192. *See, e.g.*, Allen v. City of Fredericktown, 591 S.W.2d 723 (Mo. Ct. App. 1979) (holding

an adequate water supply,[193] including the mandatory connection to available public water system regardless of the availability of wells or alternate water supply.[194]

Similarly, the installation of sewer pipes and facilities to accommodate development, and the assurance of sewage treatment to meet the needs of the subdivision are universally validated.[195] Such

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no right of developer to recover cost of water and sewer installation in absence of contract despite ordinance providing for reimbursement deemed authority for contract); City of Bellefontaine Neighbors v. J.J. Kelley Realty & Bldg. Co., 460 S.W.2d 298 (Mo. Ct. App. 1970) (water lines); J.D. Land Corp. v. Allen, 277 A.2d 404 (N.J. Super. Ct. App. Div. 1971) (water mains); Rounds v. Board of Water and Sewer Comm'rs, 196 N.E.2d 209 (Mass. 1964) (holding that water board could refuse water service until developer replaced two-inch with six-inch pipe although requirement was beyond scope of subdivision review ordinance standards); Axelrod v. Branche, 456 N.Y.S.2d 847 (App. Div. 1982) (water system installation); Torsoe Bros. Constr. Corp. v. Board of Trustees, 366 N.Y.S.2d 810 (Sup. Ct.) (invalidating tap-in fee), *modified on other grounds*, 375 N.Y.S.2d 612 (App. Div. 1975); Se-Frank Devs., Inc. v. Gibson, 157 N.Y.S.2d 812 (Sup. Ct. 1956), *modified on other grounds*, 169 N.Y.S.2d 136 (App. Div. 1957); Mid-Continent Builders, Inc. v. Midwest City, 539 P.2d 1377 (Okla. 1975) (installation and dedication of water mains); Crownhill Homes, Inc. v. City of San Antonio, 433 S.W.2d 448 (Tex. Civ. App. 1968) (on-site water main extension); Zastrow v. Village of Brown Deer, 100 N.W.2d 359 (Wis. 1960) (holding city may require dedication of completed subdivision water system); *see also* ARIZ. REV. STAT. ANN. § 45-578 (Supp. 1990-91) (requiring a certificate of assured water supply when proposed subdivision is located in ground water active management area); *cf.* City of Colo. Springs v. Kitty Hawk Dev. Co., 392 P.2d 467 (Colo. 1964) (holding no obligation of city to reimburse developer for 8% of value of land annexed according to agreement as condition for providing water and sewage services to subdivision), *cert. denied*, 379 U.S. 647 (1965); N.H. REV. STAT. ANN. § 149-E:3(I) (Supp. 1989) (authorizing state sewage and waste systems review standards). *But see In re* Lake Secor Dev. Co., 252 N.Y.S. 809 (Sup. Ct. 1931) (lack of statutory authorization to require installation of water system); *cf.* Zimring-McKenzie Constr. Co. v. City of Pinellas Park, 237 So. 2d 576 (Fla. 2d DCA 1970) (subdivider entitled to value of water and sewer facilities installation where city took over systems characterized as personal property); Deerfield Estates, Inc. v. Township of E. Brunswick, 286 A.2d 498 (N.J. 1972) (right of reimbursement only if established by ordinance); Lake Intervale Homes, Inc. v. Township of Parsippany-Troy Hills, 147 A.2d 28, 39 (N.J. 1958) (holding that developer cannot be required to pay for off-site water mains where ordinance was without standards to determine if improvements were needed by development); S.T.C. Corp. v. Planning Bd., 476 A.2d 888 (N.J. Super. Ct. App. Div. 1984) (assure availability of adequate water supply for fuel oil storage site permit).

193. Mac-Rich Realty Constr., Inc. v. Planning Bd., 341 N.E.2d 916 (Mass. App. Ct. 1976); S.T.C. Corp. v. Planning Bd., 476 A.2d 888 (N.J. Super. Ct. App. Div. 1984).

194. Town of Ennis v. Stewart, 807 P.2d 179 (Mont. 1991) (upholding requirement that faucets inside residence use only town water as not a violation of privacy because owners may use well for drinking water); McMahon v. City of Virginia Beach, 267 S.E.2d 130 (Va.) (holding residence must connect but need not use water), *cert. denied*, 449 U.S. 954 (1980).

195. *See, e.g.*, Mefford v. City of Tulare, 228 P.2d 847 (Cal. Ct. App. 1951); Buffalo, Dawson, Mechanicsburg Sewer Comm'n v. Boggs, 488 N.E.2d 258, 260 (Ill. 1986); Allen v. Stockwell, 178 N.W. 27 (Mich. 1920); City of Bellefontaine Neighbors v. J.J. Kelley Realty & Bldg. Co., 460 S.W.2d 298 (Mo. Ct. App. 1970); J.D. Land Corp. v. Allen, 277 A.2d 404 (N.J. Super. Ct. App. Div.) (sewage disposal and sanitary sewers); Axelrod v. Branche, 456 N.Y.S.2d 847 (App. Div. 1982) (sewer system installation); Medine v. Burns, 208 N.Y.S.2d 12 (Sup. Ct. 1960); Demoise v. Dowell, 461 N.E.2d 1286, 1290 (Ohio 1984); Crownhill Homes, Inc. v. City of San Antonio, 433 S.W.2d 448 (Tex. Civ. App. 1968); Rupp v. Grantsville City, 610 P.2d 338 (Utah 1980) (mandatory

improvements may be at the developer's expense.[196] Where water and sewer lines are installed by the developer but not dedicated to the approving unit of local government, and thereafter the plat is annexed by a municipality, the annexing community taking over such utility lines may be required to compensate the developer.[197] Although developers in some communities may elect to provide alternatives to public sewer service connection,[198] others require mandatory hookup to the public system.[199] As a condition, a developer may be required to join a special sewer district.[200]

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public sewer hookup condition valid); Kingmill Valley Pub. Serv. Dist. v. Riverview Estates Mobile Home Park, Inc., 386 S.E.2d 483 (W. Va. 1989) (no taking to mandate public connection and abandon private system); *see also* CAL. GOV'T CODE §§ 66419 (utilities), 66483, 66486 (installation as condition of approval) (West 1983 & Supp. 1991); N.H. REV. STAT. ANN. § 149-E:3(I) (Supp. 1989) (authorizing state sewage and waste systems review standards); *cf.* City of Colorado Springs v. Kitty Hawk Dev. Co., 392 P.2d 467 (Colo. 1964) (holding no obligation of city to reimburse developer for 8% of value of land annexed according to agreement as condition for providing water and sewage services to subdivision), *cert. denied*, 379 U.S. 647 (1965). *But cf.* CAL. GOV'T CODE § 66486 (West Supp. 1991) (requiring that if oversized sewers are required, subdivider be reimbursed for excess cost charged to those benefited); Batch v. Town of Chapel Hill, 376 S.E.2d 22 (N.C. Ct. App. 1989) (holding as invalid to condition extraterritorial subdivision approval on sewer improvement as extension not in purview of the approving town board; ruling improvement must be proportionately related to impact of development), *rev'd on other grounds*, 387 S.E.2d 655 (N.C.), *cert. denied*, 496 U.S. 931 (1990).

196. Allen v. City of Fredericktown, 591 S.W.2d 723 (Mo. Ct. App. 1979) (holding no right of developer to recover cost of water and sewer installation in absence of contract despite ordinance providing for reimbursement deemed only authority for contract); Ghen v. Piasecki, 410 A.2d 708, 713 (N.J. Super. Ct. App. Div. 1980) (dicta). *But cf.* Zimring-McKenzie Constr. Co. v. City of Pinellas Park, 237 So. 2d 576 (Fla. 2d DCA 1970) (holding subdivider entitled to value of water and sewer facilities installation where city took over systems characterized as personal property).

197. *See, e.g.*, Jackson v. City of Gastonia, 98 S.E.2d 444 (N.C. 1957); *cf.* Zimring-McKenzie Constr. Co. v. City of Pinellas Park, 237 So. 2d 576 (Fla. 2d DCA 1970) (holding subdivider entitled to value of water and sewer facilities installation where city took over systems characterized as personal property). *But cf.* City of Houston v. Lakewood Estates, Inc., 429 S.W.2d 938 (Tex. Civ. App. 1968) (recovery denied, but for lack of market value evidence).

198. *E.g.*, Heinzman v. U.S. Home, Inc., 317 So. 2d 838 (Fla. 2d DCA 1975); *cf.* Fischer v. Board of County Comm'rs, 462 So. 2d 480 (5th DCA 1984) (holding it a taking to refuse hookup and the approval of an alternative package treatment plant despite mandatory connection policy), *review denied*, 472 So. 2d 1181 (Fla. 1985).

199. *See, e.g.*, Buffalo, Dawson, Mechanicsburg Sewer Comm'n v. Boggs, 488 N.E.2d 258, 260 (Ill. 1986); McNeill v. Harnett County, 398 S.E.2d 475 (N.C. 1990); Demoise v. Dowell, 461 N.E.2d 1286, 1290 (Ohio 1984) (when sewer lines become operative); Rupp v. Grantsville City, 610 P.2d 338 (Utah 1980); Kingmill Valley Pub. Serv. Dist. v. Riverview Estates Mobile Home Park, 386 S.E.2d 483 (W. Va. 1989) (holding it is no taking to mandate public connection and abandon private system); *cf.* N.H. REV. STAT ANN. § 149-E:3(I) (Supp. 1989) (authorizing state sewage and waste systems review standards). *But see* Fischer v. Board of County Comm'rs, 462 So. 2d 480 (Fla. 5th DCA 1984) (holding as a taking the refusal of hookup and the approval of an alternative package treatment plant despite mandatory connection policy).

200. Medine v. Burns, 208 N.Y.S.2d 12 (Sup. Ct. 1960) (including $2750 per home fee for treatment and disposal).

Developers also may be required to provide for solid waste disposal,[201] underground utilities,[202] sidewalk installation,[203] access for the physically handicapped,[204] street access,[205] street lighting,[206] other public services or facilities,[207] reservation of land for public use,[208] access to public resources,[209] nondiscrimination in public ac-

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201. Middlesex & B. St. Ry. Co. v. Board of Alderman, 359 N.E.2d 1279 (Mass. 1977) (holding no violation of equal protection to condition approval on landowner responsibility for solid waste disposal where developer one of first to come under new city policy).

202. Sansoucy v. Planning Bd., 246 N.E.2d 811 (Mass. 1969) (compulsory undergrounding sustained).

203. *Sansoucy*, 246 N.E.2d 811; Mac-Rich Realty Constr. v. Planning Bd., 341 N.E.2d 916 (Mass. App. Ct. 1976); Allen v. Stockwell, 178 N.W. 27 (Mich. 1920); City of Bellefontaine Neighbors v. J.J. Kelley Realty & Bldg. Co., 460 S.W.2d 298 (Mo. Ct. App. 1970); J.D. Land Corp. v. Allen, 277 A.2d 404 (N.J. Super. Ct. App. Div. 1971). *But cf.* Suburban Homes Corp. v. Anderson, 261 N.E.2d 376 (Ind. Ct. App. 1970) (holding no ordinance authority to require sidewalk installation as ordinance limited duty to where adjacent to subdivision with sidewalks or where average density exceeded 3.5 lots per acre); Valenti Homes, Inc. v. City of Sterling Heights, 233 N.W.2d 72 (Mich. Ct. App. 1975) (holding no charter authority to impose criminal sanctions for failure to meet sidewalk construction requirements); Magnolia Dev. Co. v. Coles, 89 A.2d 664 (N.J. 1952) (holding no authority for project review and filing statute to condition approval on sidewalk installation).

204. Wilshire Fin. Tower v. City of Los Angeles, 265 Cal. Rptr. 685 (Ct. App. 1990) (ruling that proper condition for 21-story office building renovation permit unable to qualify for statutory multistoried public accommodations exemption).

205. Cooper v. Board of Ada County Comm'rs, 534 P.2d 1096 (Idaho 1975) (holding that mobile homes must front on or have direct access to major arterial for conditional use permit; finding that the burden to attack on the challenger); Petterson v. City of Naperville, 137 N.E.2d 371 (Ill. 1956) (curbs and gutters uniquely needed by subdivision); *cf.* People *ex rel.* First Nat'l Bank & Trust Co. v. Village of Deerfield, 200 N.E.2d 120 (Ill. App. Ct. 1964) (approving tract despite single-family lot used for driveway to multifamily development where rule required frontage for each lot denied as merger resulted in project abutting road).

206. J.D. Land Corp. v. Allen, 277 A.2d 404 (N.J. Super. Ct. App. Div. 1971).

207. *But cf.* Beaver Meadows v. Board of County Comm'rs, 709 P.2d 928 (Colo. 1985) (invalidating provision of emergency medical services due to inadequate regulations and the failure to allocate according to generated need).

208. Batch v. Town of Chapel Hill, 376 S.E.2d 22 (N.C. Ct. App. 1989) (requiring exercise of eminent domain in timely fashion where ordered to reserve land for school), *rev'd on other grounds*, 387 S.E.2d 655 (N.C.) (taking claim may not be raised in certiorari proceeding to review subdivision denial), *cert. denied*, 496 U.S. 931 (1990); N.C. GEN. STAT. § 160A-372 (1989) (18-month hold on subdivision approval for board of education to decide whether to purchase for school use); *see also* S. Carry Gaylord & Kimbel L. Merlin, *Status of Right-of-Way Reservations: How Far Can the Government Go?* 1990 INST. ON PLAN. ZONING & EMINENT DOMAIN 7-1. *But see* Howard County v. JJM, Inc., 482 A.2d 908 (Md. 1984) (holding as a taking the imposition of a reservation of unlimited duration).

209. Paoli v. California Coastal Comm'n, 223 Cal. Rptr. 792 (Ct. App. 1986) (conditioning permit on open space easement); Whalers' Village Club v. California Coastal Comm'n, 220 Cal. Rptr. 2 (Ct. App. 1985) (dedication of public beach access easement as condition to construct revetment following loss of supporting beachfront caused by storms), *cert. denied*, 476 U.S. 1111 (1986); Kern River Pub. Access Comm. v. City of Bakersfield, 217 Cal. Rptr. 125 (Ct. App. 1985) (requiring public access to all navigable waters for subdivision approval); Grupe v. California Coastal Comm'n, 212 Cal. Rptr. 578 (Ct. App. 1985) (holding valid a lateral beach access single-family home permit condition, but ruling disapproved of by *Nollan*); Remmenga v. California

cess or membership in related facilities,[210] municipal annexation,[211] uniform building setback,[212] and building standards.[213] Conditions may also include the payment of fees[214] and agreements to defend subdivision approval challenges or to indemnify the municipality for liability arising from the development.[215]

While some state statutes suggest improvements that may be required, they have not attempted an exclusive catalogue.[216] Problems arise where, due to inadequate infrastructure, the developer is required to provide a resource such as a road, school, water, sewer, or flood control facility which will subsequently be utilized by other

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Coastal Comm'n, 209 Cal. Rptr. 628 (Ct. App.) (public beach access or $5000 in lieu fee where beach otherwise virtually inaccessible most of the year although lot one mile from beach), *appeal dismissed*, 474 U.S. 915 (1985); Georgia-Pac. Corp. v. California Coastal Comm'n, 183 Cal. Rptr. 395 (Ct. App. 1982) (validating beach access easement condition; rejecting lateral easement and vertical easement on noncontiguous parcel); CAL. GOV'T CODE § 66478.11-.12 (West 1983) (requiring public access for subdivisions on coast, lake, or reservoir); CAL. HEALTH & SAFETY CODE § 18406 (West Supp. 1990) (requiring public access to coast or park for mobile home parks); *cf.* Slocum v. Borough of Belmar, 569 A.2d 312 (N.J. Super. Ct. Law Div. 1989) (ruling beach user fees excessive in light of public trust doctrine). *But cf. Nollan*, 483 U.S. 825 (1987) (invalidating lateral beach access easement dedication condition for permission to rebuild single-family home); Surfside Colony, Ltd. v. California Coastal Comm'n, 277 Cal. Rptr. 371 (Ct. App. 1991) (invalidating condition of public beach use of private beach for permit to build revetment to protect community from beach erosion under *Nollan* as erosion or revetment did not generate need for public access); Pacific Legal Found. v. California Coastal Comm'n, 180 Cal. Rptr. 858 (Ct. App.) (invalidating public beach access condition), *vacated for ripeness*, 655 P.2d 306 (1982) (holding valid a restaurant parking requirement but cannot demand 30-year deed restriction reserving parking for public daytime beach users); Liberty v. California Coastal Comm'n, 170 Cal. Rptr. 247 (Ct. App. 1980); Mackall v. White, 445 N.Y.S. 486 (App. Div. 1981) (holding invalid a condition subdivision on public easement to cross property to bay). *See generally* Gilbert L. Finnell, Jr., *Public Access to Coastal Public Property: Judicial Theories and the Taking Issue*, 67 N.C. L. REV. 627 (1989); Steven W. Turnbull, Note, *The Public Trust Doctrine: Accommodating the Public Need Within Constitutional Bounds*, 63 WASH. L. REV. 1087 (1988).

210. Jonathan Club v. California Coastal Comm'n, 243 Cal. Rptr. 168 (Ct. App.) (not officially published) (sustaining nondiscrimination in membership condition to allow development on land connected with leased state land used exclusively by club members and located immediately adjacent to most heavily used public beach in state), *appeal dismissed*, 488 U.S. 881 (1988).

211. Long Beach Equities v. County of Ventura, 282 Cal. Rptr. 877 (Ct. App. 1991) (holding facially valid county development guidelines requiring annexation to city as a condition for urban development to assure provision of the full range of urban services).

212. Ridgefield Land Co. v. City of Detroit, 217 N.W. 58 (Mich. 1928).

213. Soderling v. City of Santa Monica, 191 Cal. Rptr. 140 (Ct. App. 1983) (smoke alarms in condominium conversion); *cf.* Green v. Board of Appeal, 263 N.E.2d 423 (Mass. 1970) (limiting structural conditions to approved plans; refusing to enforce condition not endorsed on recorded plan when seeking building permit); Ellen M. Gifford Sheltering Home Corp. v. Board of Appeals, 208 N.E.2d 207 (Mass. 1965) (limiting lot development to single structure).

214. Banberry Dev. Corp. v. South Jordan City, 631 P.2d 899 (Utah 1981).

215. CAL. GOV'T CODE § 66474.9(b)(1) (West 1989 & Supp. 1991) (but may not under § 66474.9(a) condition on indemnity for improper review or approval by government).

216. *See, e.g.*, MONT. CODE ANN. § 76-3-501 (1987) (list); NEV. REV. STAT. ANN. § 278.4715 (Michie 1990) ("reasonably necessary"); N.M. STAT. ANN. § 3-19-6.B(4) (Michie 1985) (other necessary matters); WASH. REV. CODE § 58.17.110 (1990) (not limited to list).

developers.[217] While assessment districts provide a potential financing technique, the market may not be able to absorb additional development.

Illinois has employed a "recapture agreement,"[218] whereby subsequent developers benefiting from the improvement pay connection fees allowing the unit of local government to reimburse the developer initially financing the improvement. Other jurisdictions, however, have ruled this arrangement to be in excess of enabling legislation.[219] Developers forced with expensive conditions and exactions may not recover from adjacent benefitted landowners under a theory of unjust enrichment.[220]

Communities may require the payment of lawful fees as a condition of appeal.[221] State law may typically require developer completion of improvements or the posting of a performance bond to cover the cost.[222] A condition may require a covenant to complete improvements and installation of municipal services within a set time period to avoid automatic subdivision rescission.[223] In some jurisdictions, final subdivision approval may not be conditioned upon the installation and completion of improvements where state law provides for the posting of security as an appropriate condition.[224] Occasionally, conditions on subdivision approval include agreements

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217. *Cf.* CAL. GOV.T CODE § 66462.5 (West Supp. 1991) (cannot refuse final tract approval where off-site improvements called for on land owned by third party whereby the city must move to condemn the land within 120 days; by agreement developer may have to complete improvements on the acquired land).

218. ILL. ANN. STAT. ch. 24, paras. 9-5-1 to 9-5-3 (Smith-Hurd 1990).

219. *See, e.g.*, Kelber v. City of Upland, 318 P.2d 561 (Cal. Ct. App. 1957) (holding inconsistent a subdivision law to charge more than need generated by subdivision); Rosen v. Village of Downers Grove, 167 N.E.2d 230 (Ill. 1960) (holding that charges to subdivision beyond scope of statute and ordinance); Coronado Dev. Co. v. City of McPherson, 368 P.2d 51 (Kan. 1962) (ruling that exaction for public parks was a revenue measure in excess of authority); Ridgemont Dev. Co. v. City of E. Detroit, 100 N.W.2d 301 (Mich. 1960) (holding no authority to require a deed of property for parks before plat approval).

220. Dinosaur Dev. v. White, 265 Cal. Rptr. 525 (Ct. App. 1989) (road condition served landlocked adjacent parcel).

221. Benny v. City of Alameda, 164 Cal. Rptr. 776, 779 (Ct. App. 1980) (dicta); Santa Clara County Contractors Ass'n v. City of Santa Clara, 43 Cal. Rptr. 86 (Ct. App. 1965) (invalidating fee directed to general revenues for general city benefit).

222. Ayers v. City Council, 207 P.2d 1 (Cal. 1949) (requiring improvement before approval); Friends of the Pine Bush v. Planning Bd., 450 N.Y.S.2d 966 (App. Div. 1982) (allowing waiver only if improvement not related to health, safety or welfare, otherwise installed or bonded), *aff'd*, 452 N.E.2d 1252 (N.Y. 1983); Tuckerman v. Dassler, 121 N.Y.S.2d 205 (Sup. Ct. 1953) (allowing issuance of building permits after plat filed and improvements secured by performance bond).

223. Costanza & Bertolino, Inc. v. Planning Bd., 277 N.E.2d 511 (Mass. 1971) (two years).

224. *E.g.*, Toll Bros., Inc. v. Township of Greenwich, 582 A.2d 1276 (N.J. Super. Ct. App. Div. 1990).

by developers to limit the use or pace of development.[225] Conditions prohibiting future subdivisions are subject to invalidation.[226] Validity of conditions and other exactions under the U.S. Constitution may depend on a finding that such condition substantially furthers government purposes which justify denial of a permit.[227] In addition, conditions must be authorized under state law which often may be hostile to subdivision exactions.[228] Standards governing the construction and installation of improvements should be set forth with reasonable detail in local legislation.[229] One court invalidated a condition for subdivision approval that all real estate taxes be paid.[230] Where a unit of local government lacks the power to regulate land beyond its geographical jurisdiction it may be powerless to impose conditions in the portion of plats extending beyond their boundaries.[231] Although conditions may be imposed on resubdivision,[232] or on building permits sought by a good faith purchaser

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225. *See, e.g.*, Guiliano v. Town of Edgartown, 531 F. Supp. 1076 (D. Mass. 1982) (sustaining limit of development or conveyance of not more than 10 lots per year absent special permit over motion for preliminary injunction although a possible remedy at law); *cf.* Paoli v. California Coastal Comm'n, 223 Cal. Rptr. 792 (Ct. App. 1986) (holding valid a permit conditioned on review of future development for consistency with "view easement").

226. *See* Moscowitz v. Planning & Zoning Comm'n, 547 A.2d 569 (Conn. App. Ct. 1988) (voiding notation on plat restricting further subdivision).

227. *E.g.*, Nollan v. California Coastal Comm'n, 483 U.S. 825, 835-36 (1987) (listing by illustration, scenic zoning, landmark preservation, and residential zoning, including maintenance of public view or access to the ocean); Sederquist v. City of Tiburon, 765 F.2d 756, 761 (9th Cir. 1985) (remanding to determine if violative of California law a requirement that applicant submit master plan for area; reversing summary judgment requiring joint action by other owners); *cf. infra* note 260 and accompanying text.

228. Grand Land Co. v. Township of Bethlehem, 483 A.2d 818 (N.J. Super. Ct. App. Div. 1984) (barring municipality from conditioning subdivision approval on reservation of land for public purpose be it for park or school); ARIZ. REV. STAT. ANN. § 9-463.01 (1990) (require locality to compensate subdivider if locality requires reservation of land for park, school, or fire station). *But cf.* Ayers v. City Council, 207 P.2d 1 (Cal. 1949) (implicit power to require a reservation).

229. Deerfield Estates, Inc. v. Township of E. Brunswick, 286 A.2d 498 (N.J. 1972); *cf.* CAL. GOV'T CODE § 65913.2 (West Supp. 1990) (held ordinance invalid because improvements to be constructed subject to no greater standards than those imposed on public funded improvements, here so as to exclude affordable housing and not achieve housing element goals).

230. *See* Sussex Woodlands, Inc. v. Mayor of W. Milford, 263 A.2d 502 (N.J. Super. Ct. Law Div. 1970). *But see* People *ex rel.* Tilden v. Massieon, 116 N.E. 639 (Ill. 1917) (validating plat approval conditioned on all taxes and special assessments having been paid); *cf.* CAL. GOV'T CODE § 66493 (West Supp. 1990) (validating assurance of tax payment requirement before subdivision recorded).

231. Brookhill Dev. Ltd. v. City of Waukesha, 307 N.W.2d 242 (Wis. 1981) (invalidating condition on portion of plat lying outside extraterritorial plat approval jurisdiction); *cf.* Batch v. Town of Chapel Hill, 376 S.E.2d 22 (N.C. Ct. App. 1989) (invalidating condition requiring extraterritorial subdivision approval on sewer improvement because septic tank system approval was not in purview of the approving town board; requiring government to proportionately relate to development impact), *rev'd on other grounds*, 387 S.E.2d 655 (N.C.), *cert. denied*, 496 U.S. 931 (1990).

232. *E.g.*, Ardolino v. Board of Adjustment, 130 A.2d 847 (N.J. 1957) (condition imposed on variance from changed zoning following subdivision or on resubdivision).

whose grantor failed to seek subdivision approval,[233] conditions imposed on the conversion of already existing development may be limited.[234]

Conditions must typically be imposed prior to plat approval.[235] Communities may apply different conditions to different types of projects, such as conditioning plat approval on completion of utility installation for projects without water and sewer service.[236] Despite the validity of conditions for land subdivisions, certificates of occupancy for a single-family house in an approved phase may not be withheld pending completion of all improvements.[237] A permit to rebuild following storm damage could not, however, be based on a waiver of eligibility for public disaster relief funds, an overbroad condition.[238] Placement and installation of fire alarm signal devices in public places throughout the subdivision, just as in the case of building code requirements for structures, are increasingly common and appropriate.[239] Conditions may include the execution of guaran-

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233. *E.g.*, Keizer v. Adams, 471 P.2d 983 (Cal. 1970).

234. *See* Ivy Club Investors Ltd. Partnership v. City of Kennewick, 699 P.2d 782 (Wash. Ct. App. 1985) (invalidating conditioning of condominium conversion on park fee payment, here characterized as a tax, as development already in existence). *But cf.* Wilshire Fin. Tower v. City of Los Angeles, 265 Cal. Rptr. 685 (1990) (ruling proper condition for 21-story office building renovation permit unable to qualify for statutory multistoried public accommodations exemption).

235. Lodico v. Herdman, 352 N.Y.S.2d 510 (App. Div. 1974) (invalidating commission's reversal of decision and requirement of dedication or fee in lieu following approval where plan commission had waived park fees due to on-site facilities and plat approved); *cf.* Perlmutter Assocs. v. Northglenn, 534 P.2d 349 (Colo. Ct. App. 1975) (holding that recorded plat owners entitled to building permits without new restraints upon annexation). *But see* DeStefano v. City of Charleston, 403 S.E.2d 648 (S.C. 1991) (sustaining condition of providing drainage easement for building permits over taking challenge); *cf.* Russ Bldg. Partnership v. City and County of San Francisco, 750 P.2d 324 (Cal.) (transit impact fee of $5 per square foot for commercial property development sustained despite enabling ordinance established two years after permit and construction commencement because the permit and environmental impact report envisioned a transit funding obligation), *appeal dismissed sub nom.* Crocker Nat'l Bank v. City and County of San Francisco, 488 U.S. 881 (1988); Laguna Village, Inc. v. County of Orange, 212 Cal. Rptr. 267 (Ct. App. 1985) (imposing school fees after tentative tract approval as condition for building permit); Miles v. Planning Bd., 558 N.E.2d 1150 (Mass. App. Ct. 1990) (validating approval indicating with conditions while filing conditions 16 days later).

236. *See, e.g.*, Delight, Inc. v. County of Baltimore, 624 F.2d 12 (4th Cir. 1980) (security posting).

237. J.D. Land Corp. v. Allen, 277 A.2d 404 (N.J. Super. Ct. App. Div. 1971) (unless needed for health and safety of occupants).

238. Whalers' Village Club v. California Coastal Comm'n, 220 Cal. Rptr. 2 (Ct. App. 1985), *cert. denied*, 476 U.S. 1111 (1986).

239. *See, e.g.*, Soderling v. City of Santa Monica, 191 Cal. Rptr. 140 (Ct. App. 1983) (appropriate condition for condominium conversion includes smoke alarms); N.Y. GEN. CITY LAW § 33 (McKinney 1989) (fire protection, alarm cables, necessary ducts, and fire signal boxes appropriate plat conditions); N.Y. TOWN LAW § 277(4) (McKinney 1987); N.Y. VILLAGE LAW § 7-730(2) (McKinney 1973) (fire protection, alarm cables, necessary ducts, and fire signal boxes appropriate plat conditions).

tees such as performance bonding to assure improvement completion.[240] In addition, improvements must be maintained by the developer absent dedication acceptance or agreement otherwise.[241] Public authorities may not require the applicant to attain joint action of other landowners[242] or other governmental entities[243] as a condition to development. Care must be taken as compliance with development conditions[244] or the settlement of disputed conditions and exaction issues[245] may waive subsequent judicial challenge. Conditions generally may be challenged in actions to mandate the approval of the subdivision or other discretionary project.[246]

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240. *See generally* Lane Kendig, *Performance Guarantees*, 35 LAND USE & ZONING DIG. 4 (Feb. 1983); Michael M. Shultz & Richard Kelly, *Subdivision Improvement Requirements and Guarantees: A Primer*, 28 WASH. U. J. URB. & CONTEMP. L. 3 (1985).

241. County of Kern v. Edgemont Dev. Corp., 35 Cal. Rptr. 629 (Ct. App. 1963).

242. Sederquist v. City of Tiburon, 765 F.2d 756 (9th Cir. 1985) (following Keizer v. Adams, 471 P.2d 983 (Cal. 1970)).

243. V.S.H. Realty, Inc. v. Zoning Bd. of Appeals, 570 N.E.2d 1044 (Mass. App. Ct. 1991) (invalid to condition shopping center certificate of occupancy upon off-site street widening where such action was governmental decision beyond control of developer). *But see* Schoonover v. Klamath County, 806 P.2d 156 (Or. 1991) (valid to condition subdivision on annexation of land within a fire district despite rejection or request by available districts).

244. *E.g.*, Rossco Holdings Inc. v. State, 260 Cal. Rptr. 736 (Ct. App. 1989) (compliance with coastal zone permit condition waives challenge), *cert. denied*, 494 U.S. 1080 (1990); Candid Enters. v. Grossmont Union High Sch. Dist., 197 Cal. Rptr. 429 (Ct. App. 1983) (cannot receive benefits of building permit, satisfy condition under protest, and later litigate validity of condition requirement), *vacated*, 705 P.2d 876 (Cal. 1985); Pfeiffer v. City of La Mesa, 137 Cal. Rptr. 804 (Ct. App. 1977) (cannot construct under protest and then pursue inverse condemnation); Fulling v. Palumbo, 233 N.E.2d 272 (N.Y. 1967) (dedication challenge waived after dedicate); Squires Gate, Inc. v. County of Monmouth, 588 A.2d 824 (N.J. Super. Ct. App. Div. 1991) (successor in interest could not challenge voluntary payment absent payment under duress even if action not legal under "voluntary rule"); *see also*. California Coastal Comm'n v. Superior Court, 258 Cal. Rptr. 567 (Ct. App. 1989) (failure to file petition for writ of administrative mandate to contest permit waives inverse condemnation challenge to beach access condition); B & P Dev. Corp. v. City of Saratoga, 230 Cal. Rptr. 192 (Ct. App. 1986) (subdivision map act provides exclusive means to obtain fee refund following final map recordation and subdivided lots must revert to aceage as a condition precedent). *But see* Trend Homes, Inc. v. Central Unified Sch. Dist., 269 Cal. Rptr. 349 (Ct. App. 1990) (30 days before initiating lawsuit notice of basis for challenge, 120 days to file action to attack ordinance, 180 days to seek restitution after tender in protest where previously had to halt work); McLain Western #1 v. County of San Diego, 194 Cal. Rptr. 594 (Ct. App. 1983) (new fee condition on a later phase of a development already underway exception); Illinois Department of Transp. *ex rel.* People v. Amoco Oil Co., 528 N.E.2d 1018 (Ill. App. Ct. 1988) (execution of agreement accepting invalid condition does not constitute waiver); Middlesex & B. St. Ry. Co. v. Board of Alderman, 359 N.E.2d 1279 (Mass. 1977) (no waiver or estoppel where comply with condition under protest asserting intent to proceed simultaneously with legal challenge); *cf.* Moscowitz v. Planning & Zoning Comm'n, 547 A.2d 569 (Conn. App. Ct. 1988) (notation on plat restricting further subdivision void and no estoppel by knowledge of condition).

245. Leroy Land Dev. v. Tahoe Regional Planning Agency, 939 F.2d 696 (9th Cir. 1991) (public policy precludes post-*Nollan* taking challenge of exaction settlement entered pre-*Nollan* although condition sustained in dicta).

246. *E.g.*, Town of Auburn v. McEvoy, 553 A.2d 317 (N.H. 1988) (must litigate invalid exac-

B. Dedications

As in the case of other conditions for discretionary subdivision, use permits, variances, site review, zoning change, or other land use approval, it is typical, appropriate, and legitimate to require the dedication of land by the subdivider for facility and service use so as to assure that police power concerns of health, safety, welfare, and morals are met and that subdivisions are well planned and attractive.[247] Although typically mandated, dedication requires governing body approval.[248] Dedications usually involve on-site or adjacent land reserved for facilities, services, or amenities,[249] such as parks,[250]

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tion on appeal of determination of the illegality and may not institute separate lawsuit to recover dedication for purchasers), *overruling* J.E.D. Assocs. v. Town of Atkinson, 432 A.2d 12 (N.H. 1981); Divan Builders, Inc. v. Planning Bd., 334 A.2d 30 (N.J. 1975). *But cf.* Griffin Homes, Inc. v. Superior Court, 280 Cal. Rptr. 792 (Ct. App. 1991) (civil rights claim based on illegal or excessive exactions must be filed within one year after actions demanded while may not challenge denial of building permits despite exactions far in excess of needs generated by permits granted under doctrine of ripeness as may reapply for permits in 1992 when developer anticipates progress with remaining phase of project).

247. *E.g.*, CAL. GOV'T CODE § 66475-478 (West 1983 & Supp. 1992) (dedication authority); ARIZ. REV. STAT. ANN. § 9-463.01 (1990) (locality must compensate subdivider if require reservation of land for park, school, or fire station); MO. ANN. STAT. § 89.410(2) (Vernon 1989). *But see* Parks v. Watson, 716 F.2d 646 (9th Cir. 1983) (per curiam) (dedication exaction of parcel containing geothermal wells in exchange for right to vacate platted streets for apartment project, a dedication unrelated to project generated needs invalid as a taking, violation of equal protection, and possibly a Clayton Act antitrust violation); Ridgemont Dev. Co. v. City of E. Detroit, 100 N.W.2d 301 (Mich. 1960) (lack of enabling authority). *See generally* MARK BROOKS, MANDATORY DEDICATION OF LAND OR FEES-IN-LIEU OF LAND FOR PARKS AND SCHOOLS (1971); Lisalee Anne Wells & Tom Lallas, Note, *Subdivision Land Dedication: Objectives and Objections*, 27 STAN. L. REV. 419 (1975).

248. Prudential Trust Co. v. City of Laramie, 492 P.2d 971 (Wyo. 1972); JAMES A. KUSHNER, SUBDIVISION LAW AND GROWTH MANAGEMENT § 6.02[6], at 6-36 (1991 & Supp. 1992) (dedication acceptance).

249. *See, e.g.*, Lambach v. Town of Mason, 53 N.E.2d 601 (Ill. 1944) (mineral rights dedicated with right-of-way while adjacent owners have rights if municipality only acquired an easement and a right to use the street); Dotty Realty Co. v. Bills Constr. Co., 211 N.E.2d 212 (Ohio Ct. App. 1965) (subdivision may make no reservation of land pending municipality's improvement of the land); Burns v. Board of Supervisors, 312 S.E.2d 731 (Va. 1984) (dedicator may not reserve any rights in utilities under the dedicated land as local government enjoys dominion). *See generally* J. Bruce Aycock & James R. Bray, *Constitutionality of Requiring Park Dedication as a Condition of Plat Approval*, 45 TEX. B.J. 721 (1982); Robert L. Dolbeare, *Mandatory Dedication of Public Sites as a Condition in the Subdivision Process in Virginia*, 9 U. RICH. L. REV. 435 (1975); Jerry T. Ferguson & Carol D. Rasnic, *Judicial Limitations on Mandatory Subdivision Dedications*, 13 REAL EST. L.J. 250 (1985); Paul Gougelman, Note, *Impact Fees: National Perspectives to Florida Practice; A Review of Mandatory Land Dedications and Impact Fees that Affect Land Developments*, 4 NOVA L.J. 137 (1980); Lynn James Hinson, *Mandatory Dedication of Land by Land Developers*, 26 U. FLA. L. REV. 41 (1973); Harold J. Smotkin, Comment, *Subdivision Regulation and the Park Problem*, 12 UCLA L. REV. 917 (1965).

250. *E.g.*, CAL. GOV'T CODE §§ 66475.1 (West 1983) (bicycle path dedication if subdivision contains 200 or more parcels), 66477 (West Supp. 1990) (park dedication authorization, generally providing three acres for 1000 persons); Associated Home Builders of the Greater E. Bay, Inc. v.

streets,[251] internal roads, adjacent street widening,[252] transit,[253]

City of Walnut Creek, 484 P.2d 606, 609 (Cal.) (2.5 acres per 1000 residents or a fee equal to the value), *appeal dismissed*, 404 U.S. 878 (1971); Norsco Enters. v. City of Fremont, 126 Cal. Rptr. 659 (Ct. App. 1976) (may require dedication or fee in lieu as condition of condominium conversion); Cimarron Corp. v. Board of County Comm'rs, 563 P.2d 946 (Colo. 1977) (dedication or in lieu payment, not both); Aunt Hack Ridge Estates, Inc. v. Planning Comm'n, 273 A.2d 880 (Conn. 1970) (4% dedication rule with minimum of 10,000 square feet validated); Hollywood, Inc. v. Broward County, 431 So. 2d 606 (Fla. 4th DCA 1983) (three acres per 1000 residents, value in lieu, or schedule impact fee); City of Carbondale v. Brewster, 398 N.E.2d 829 (Ill. 1979) (dedication or in lieu fee valid according to dicta), *appeal dismissed*, 446 U.S. 931 (1980); Krughoff v. City of Naperville, 369 N.E.2d 892 (Ill. 1977) (dedication or in lieu fee valid; trial court found need uniquely attributable and fairly apportioned to the development; exempting industrial and commercial projects valid; outside of city's jurisdiction even though within school district valid, suggesting a less rigorous rational nexus standard); Collis v. City of Bloomington, 246 N.W.2d 19 (Minn. 1976) (10% dedication requirement as a general rule, facially valid); Home Builders Ass'n v. City of Kansas City, 555 S.W.2d 832 (Mo. 1977) (four acres per 100 living units or 9% of land, or an in lieu fee if less than two acres available or if an insurmountable hardship to development, valid if increase of community need for recreation reasonably attributable to development; here trial court improperly placed burden on city to justify the standard; remanding the reasonableness need nexus issue); Billings Properties, Inc. v. Yellowstone County, 394 P.2d 182 (Mont. 1964) (sustaining presumption that development of areas of between 10 and 20 acres reflects need for dedication of at least one-ninth of land for parks with approval of waiver provision and application of principles to areas of less than 10 acres); *In re* Lake Secor Dev. Co., 252 N.Y.S. 809 (Sup. Ct. 1931); Fortson Inv. Co. v. Oklahoma City, 66 P.2d 96 (Okla. 1937) (5% park and public use dedication); City of College Station v. Turtle Rock Corp., 680 S.W.2d 802 (Tex. 1984) (or money in lieu); Jordan v. Village of Menomonee Falls, 137 N.W.2d 442 (Wis. 1965) (may be used by other than subdivision residents; authorized by general subdivision law), *appeal dismissed*, 385 U.S. 4 (1966); *cf.* CAL. GOV'T CODE §§ 66479 (West Supp. 1990) (park recreation, fire station, library, and public use reservation), 66480 (West 1983) (acquisition within two years); Allied Am. Inv. Co. v. Pettit, 179 P.2d 437 (Ariz. 1947) (dedication for parks vests in county in trust for public and thus not subject to assessment and sale for delinquent taxes although here not a condition of plat approval); Honey Springs Homeowners Ass'n v. Board of Supervisors, 203 Cal. Rptr. 886 (Ct. App. 1984) (dedication of open space surrounding low density cluster housing development accepted as partial basis to permit cancellation of agricultural preserve); River Birch Assocs. v. City of Raleigh, 388 S.E.2d 538 (N.C. 1990) (condition of conveyance of open space for common area to homeowners' association sustained over taking claim as nexus to valid regulatory purpose; ambiguity resolved by parol evidence of scheme such as field map, sales brochure, maps, advertising, or oral statement upon which purchasers relied); Call v. City of W. Jordan, 614 P.2d 1257 (Utah 1980) (7% dedication or in lieu fee within local power but remanded to determine if reasonable relation to needs generated by the subdivision), *and appeal after remand*, 727 P.2d 180 (Utah 1986) (ordinance void because statutory requirement for adoption of ordinance was not met), *and appeal on other grounds after remand*, 788 P.2d 1049 (Utah) (damages issues), *and cert. denied*, 800 P.2d 1105 (Utah 1990). *But see* ARIZ. REV. STAT. ANN. § 9-463.01 (D), (E) (1990) (Supp. 1975) (locality must compensate subdivider if require reservation of land for parks and recreation) Ridgemont Dev. Co. v. City of E. Detroit, 100 N.W.2d 301 (Mich. 1960) (lack of enabling authority); Kamhi v. Planning Bd., 452 N.E.2d 1193 (N.Y. 1983) (town lacked power to compel park dedication without compensation as condition of cluster development under statute allowing park conditions); Berg Dev. Co. v. City of Missouri City, 603 S.W.2d 273 (Tex. Civ. App. 1980) (park dedication condition of one-half acre or its value for every 150 persons based on 3.5 persons per single-family home and 2.4 per multifamily unit invalid as bears no relation to health and safety, but decision discredited by *Turtle Rock*); *cf.* City of Montgomery v. Crossroads Land Co., 355 So. 2d 363 (Ala. 1978) (lack of fee enabling authority for 1.8 acres per dwelling unit or in lieu fee policy, implicitly endorsing dedication); Town of Longboat Key v. Lands End, Ltd., 433 So. 2d 574 (Fla. 2d DCA 1983) (five acres

bridges,[254] flood control,[255] sidewalks,[256] solar easements,[257] water

per 1000 residents dedication or in lieu ordinance invalidated as a tax for failure to earmark so as to benefit the subdivision remanding new ordinance to determine if proper nexus to subdivision needs); Admiral Dev. Corp. v. City of Maitland, 267 So. 2d 860 (Fla. 4th DCA 1972) (no express charter authority for 5% parkland dedication); Pioneer Trust & Sav. Bank v. Village of Mount Prospect, 176 N.E.2d 799 (Ill. 1961) (record failed to show need for one acre for 60 residential units or one-tenth acre for each commercial or industrial acre of use for parks and schools as specifically and uniquely attributable to development); Riegert Apartments Corp. v. Planning Bd., 441 N.E.2d 1076 (N.Y. 1982) (park dedication or in lieu fee condition available under plat approval statute but not under site plan review statute); East Neck Estates, Ltd. v. Luchsinger, 305 N.Y.S.2d 922 (Sup. Ct. 1969) (park dedication of shore front property reducing value of tract nearly in half confiscatory); Haugen v. Gleason, 359 P.2d 108 (Or. 1961) (holding exaction of requiring use of fee for direct benefit of subdivision an illegal tax); Doran Inv. v. Muhlenberg Township, 309 A.2d 450 (Pa. Commw. Ct. 1973) (could not require public dedication of land set aside as private park for residents of planned residential community where project met ordinance and regulations regarding open space); Frank Ansuini, Inc. v. City of Cranston, 264 A.2d 910 (R.I. 1970) (dedications impliedly authorized by state statute but may not use across the board 7% of subdivision rule). *See generally* MARY BROOKS, MANDATORY DEDICATION OF LAND OR FEES-IN-LIEU OF LAND FOR PARKS AND SCHOOLS (1971); Christopher Grace, *Los Altos: Reconsidering the Park Land Subdivision Exaction*, 4 STAN. ENVTL. L. ANN. 104 (1982-83); James P. Karp, *Subdivision Exactions for Park and Open Space Needs*, 16 AM. BUS. L.J. 277 (1979); Elliot A. Landau, *Urban Concentration and Land Exactions for Recreational Use: Some Constitutional Problems in Mandatory Dedication Ordinances in Iowa*, 22 DRAKE L. REV. 71 (1972); Rutherford H. Platt & Jon Moloney-Merkle, *Municipal Improvisation: Open Space Exactions in the Land of Pioneer Trust*, 5 URB. LAW. 706 (1973) (indicating varying local responses from eliminating exactions and abdicating responsibility to plan to defiance and circumvention); Patricia A. Brooks, Note, *The Future of Municipal Parks in a Post-*Nollan *World: A Survey of Takings Tests as Applied to Subdivision Exactions*, 8 VA. J. NAT. RES. L. 141 (1988); Douglas Y. Curran, *Constitutional Law—Mandatory Subdivision Exactions for Park and Recreational Purposes*, 43 Mo. L. REV. 582 (1978).

251. *E.g.*, CAL. GOV'T CODE § 66475 (West 1983) (street dedication); Arnett v. City of Mobile, 449 So. 2d 1222, 1224-25 (Ala. 1984) (dicta); City of Mobile v. Waldon, 429 So. 2d 945 (Ala. 1983) (dedication of land for service roads and marginal access roads where subdivisions abut major streets sustained); Newton v. American Sec. Co., 148 S.W.2d 311 (Ark. 1941) (dedication for adjacent street widening); Selby Realty Co. v. City of San Buenaventura, 514 P.2d 111 (Cal. 1973); Ayers v. City Council, 207 P.2d 1 (Cal. 1949); Lee County v. New Testament Baptist Church, 507 So. 2d 626 (Fla. 2d DCA 1987) (ordinance requiring dedication of land for right-of-way to meet minimum county standards regardless of need generated by subdivision violates rational nexus test); Pioneer Trust & Sav. Bank v. Village of Mount Prospect, 176 N.E.2d 799 (Ill. 1961) (if need specifically and uniquely attributable to development, not a major thoroughfare); Hudson Oil Co. v. City of Wichita, 396 P.2d 271 (Kan. 1964) (10-foot strip on edge for service or access road to maintain uniformity sustained); Lampton v. Pinaire, 610 S.W.2d 915, 919 (Ky. Ct. App. 1980) (as long as based on burdens caused by the development); Ridgefield Land Co. v. City of Detroit, 217 N.W. 58 (Mich. 1928) (streets of minimum width); Vogel v. Board of County Comm'rs, 483 P.2d 270 (Mont. 1971) (frontage road); Town of Seabrook v. Tra-Sea Corp., 410 A.2d 240 (N.H. 1979) (individual lot access roads); Brous v. Smith, 106 N.E.2d 503 (N.Y. 1952); Associated Milk Producers, Inc. v. Midwest City, 583 P.2d 491 (Okla. 1978); County Builders, Inc. v. Lower Providence Township, 287 A.2d 849 (Pa. Commw. Ct. 1972) (upholding requirement of 50-foot right-of-way); City of College Station v. Turtle Rock Corp., 680 S.W.2d 802, 806 (Tex. 1984) (streets and alleys); Berg Dev. Co. v. City of Mo. City, 603 S.W.2d 273 (Tex. Civ. App. 1980) (dedication of streets, alleys, water mains, and sewers substantially related to health and safety); Crownhill Homes, Inc. v. City of San Antonio, 433 S.W.2d 448 (Tex. Civ. App. 1968) (streets and alleys); *cf.* Snead v. Tatum, 25 So. 2d 162 (Ala. 1946) (dedication for purchasers' use and often the public generally where subdivision plat shows streets); Southern Pac. Co. v. City of Los Angeles, 51 Cal. Rptr. 197

and sewer[258] facilities, or schools.[259] Public access easements re-

(Ct. App. 1966) (dedication for street widening in accord with master plan a valid building permit condition to construct warehouse), *appeal dismissed*, 385 U.S. 647 (1967); Bethlehem Evangelical Lutheran Church v. City of Lakewood, 626 P.2d 668 (Colo. 1981) (street dedication, curb, gutter, sidewalk, and street improvement appropriate conditions for building permit issuance); People *ex rel.* Tilden v. Massieon, 116 N.E. 639 (Ill. 1917) (no defect to use numerals to describe street widths rather than word "feet"); Mayor of Rockville v. Brookeville Turnpike Constr. Co., 228 A.2d 263 (Md. 1967) (compulsory dedication when land annexed to municipality); McDavitt v. Planning Bd., 308 N.E.2d 786 (Mass. App. Ct. 1974) (subdivision conditioned on completion of streets aligned with existing streets thereby creating a continuous thoroughfare); Foster v. Atwater, 38 S.E.2d 316 (N.C. 1946) (streets and alleys shown on plat dedicated to use by purchasers and sometimes the public); Brous v. Smith, 106 N.E.2d 503 (N.Y. 1952); Associated Milk Producers, Inc. v. Midwest City, 583 P.2d 491 (Okla. 1978); Crownhill Homes, Inc. v. City of San Antonio, 433 S.W.2d 448 (Tex. Civ. App. 1968) (developer to pay for local on-site water main extensions). *But see* Simpson v. City of N. Platte, 292 N.W.2d 297 (Neb. 1980) (dedication of future street where no present need constitutes illegal "land banking" requiring compensation; not cured by variance availability; dedications must be for presently contemplated immediate improvements), *and appeal after remand*, 338 N.W.2d 450 (Neb. 1983); R. G. Dunbar, Inc. v. Toledo Plan Comm'n, 367 N.E.2d 1193 (Ohio Ct. App. 1976) (invalid to freeze or require dedication for major highway shown on street plan through subdivision where no immediate improvement plans); *cf.* Rohn v. City of Visalia, 263 Cal. Rptr. 319 (Ct. App. 1989) (invalidated condition for requiring dedication of 14% of the parcel to permit realignment of the streets at the nearest intersection as a condition of site approval and a building permit for a commercial project; court emphasized that the need for realignment was due solely to poor prior planning and not in anyway due to projected demand generated by the proposed project; court appeared to believe that the result was dictated by *Nollan* in that the project could not be denied due to the alignment problem); Hernando County v. Budget Inns, 555 So. 2d 1319 (Fla. 5th DCA 1990) (requirement that owner show frontage road on building plans as condition to obtain building permit an invalid land banking as no present need and violates nexus requirement as no showing of need in reasonably immediate future); Paradyne Corp. v. Florida Dep't of Transp., 528 So. 2d 921 (Fla. 1st DCA 1988) (may condition on design to accommodate existing traffic but may not require landowner as a condition of road connection permit to construct drive on property for use and benefit of abutting landowner); Princeton Research Lands, Inc. v. Planning Bd., 271 A.2d 719 (N.J. Super. Ct. App. Div. 1970) (may require subdivider to make off-site street improvements and to bear portion of cost relating to needs generated, but could not require dedication of land to expand existing right-of-way already serving the municipality); Battaglia v. Wayne Township Planning Bd., 236 A.2d 608 (N.J. Super. Ct. App. Div. 1967) (holding permit conditioned on improvement and dedication of 50-foot easement a taking; landowner/applicant would receive no discernible benefit from compliance and exaction unauthorized by statute or ordinance); R. G. Dunbar, Inc. v. Toledo Plan Comm'n, 367 N.E.2d 1193 (Ohio Ct. App. 1976) (invalidating requirement of 100-foot-wide road dedication through subdivision for future improvement not specifically and uniquely attributable to subdivider's activity but for benefit of general public); County Builders, Inc. v. Lower Providence Township, 287 A.2d 849 (Pa. Commw. Ct. 1972) (upholding deed or formal offer of dedication a condition of plat approval); Unlimited v. Kitsap County, 750 P.2d 651 (Wash. Ct. App. 1988) (invalidating two exactions: preventing abutting parcel from becoming commercially landlocked not valid public purpose and dedication of land for road extension not necessitated by development); J. & B. Dev. Co. v. King County, 631 P.2d 1002 (Wash. Ct. App. 1981) (validating dedication of land requiring additional setback of building to meet street width requirements), *rev'd on other grounds*, 669 P.2d 468 (Wash. 1983).

252. *E.g.*, Moore v. City of Costa Mesa, 886 F.2d 260 (9th Cir. 1989) (despite previous determination that condition of dedication of 10% of land for street widening was invalid since owner could continue business and thereby enjoy an economically viable use of land and despite alleged higher costs of development due to litigation and administrative delay over the condition, no taking

quired of subdividers, as in the case of other conditions, may be

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William J. (Jack) Jones Ins. Trust v. City of Fort Smith, 731 F. Supp. 912 (W.D. Ark. 1990) (denial of permit to gas station to build convenience store for refusal to expand right-of-way for street purposes invalid under *Nollan* as no indication of increased generated traffic or other externality); Cottage Hill Land Corp. v. City of Mobile, 443 So. 2d 1201 (Ala. 1983) (mandatory dedication for access roads and planned major streets valid but for major future street reservations, especially if need generated by general public demands rather than the development); Ayers v. City Council, 207 P.2d 1 (Cal. 1949) (bordering the subdivision); City Nat'l Bank v. City of Coral Springs, 475 So. 2d 984 (Fla. 4th DCA 1985) (invalid to require adjacent street widened to four lanes); Hudson Oil Co. v. City of Wichita, 396 P.2d 271 (Kan. 1964) (valid to condition plat approval on dedication for frontage road to maintain uniformity of streets); Lampton v. Pinaire, 610 S.W.2d 915 (Ky. Ct. App. 1981) (regulations requiring dedication of half of each adjacent street facially valid but must be made reasonably necessary by the development but cannot condition plat approval on improvement of county road); Krieger v. Planning Comm'n, 167 A.2d 885 (Md. 1961) (regulation requiring allowance for future highway widening and vehicle access proper); J.E.D. Assocs. v. Town of Atkinson, 432 A.2d 12 (N.H. 1981) (subdevelopment open to pay cost of removal of off-site ledge obstructing vision on access road only to that extent that subdivision results in increased traffic), *and overruled on other grounds*, Town of Auburn v. Mevoy, 553 A.2d 317 (N.H. 1988); Town of Seabrook v. Tra-Sea Corp., 410 A.2d 240 (N.H. 1979) (individual lot access roads); Land/Vest Properties, Inc. v. Town of Plainfield, 379 A.2d 200 (N.H. 1977) (requiring off-site access road improvement valid to extent necessary to protect public safety but may not condition on upgrading roads leading to subdivision unless rational nexus to subdivision generated needs); Longridge Builders, Inc. v. Planning Bd., 245 A.2d 336 (N.J. 1968) (per curiam) (cost of off-site road improvements not apportioned to benefit the subdivision and not limited by rational nexus standard); J.D. Land Corp. v. Allen, 277 A.2d 404 (N.J. Super. Ct. App. Div. 1971) (plat approval may be conditioned on street grading and pavement); Mac Lean v. Planning Bd., 228 A.2d 85 (N.J. Super. Ct. App. Div. 1967) (dedication to provide access to all lots); Noble v. Chairman of Township Comm., 219 A.2d 335 (N.J. Super. Ct. App. Div. 1966) (valid to condition minor subdivision permit on adequate road facilities); Brous v. Smith, 106 N.E.2d 503 (N.Y. 1952) (internal street improvement or bond posting valid condition for six single-family building permits); Medine v. Burns, 208 N.Y.S.2d 12 (Sup. Ct. 1960) (upholding condition requiring paving of streets within the subdivision, but not from subdivision to highway outside plat as statute only requires access to public highway not specifying, as in the case of internal improvements, that it should be at developer's expense); McKain v. Toledo City Plan Comm'n, 270 N.E.2d 370 (Ohio Ct. App. 1971) (dedication of parcel 700 feet from minor subdivision unrelated to the size of the minor division and confiscatory); Board of Supervisors v. Fiechter, 566 A.2d 370 (Pa. Commw. Ct. 1989) (requirement of dedication of 8.5 feet of road footage adjacent to subdivision invalid condition under *Nollan* as need for such widening to local street width standards not generated by the project); *cf.* Bringle v. Board of Supervisors, 351 P.2d 765 (Cal. 1960) (dedication of easement for street widening a condition for variance); Iddings v. Board of Appeals, 255 N.E.2d 604 (Mass. 1970) (may deny building permit to interior lot not fronting on public way as required by zoning regulation); North Landers Corp v. Planning Bd., 400 N.E.2d 273 (Mass. App. Ct. 1980) (vagueness of regulations on adequacy of public way or access to public way makes impermissible as condition for denying permit); Loyer Educ. Trust v. Wayne County Rd. Comm'n, 425 N.W.2d 189 (Mich. Ct. App. 1988) (sustained conditioning driveway permit on installation of passing lane on opposite side of road for safe and efficient left turn traffic), *cert. denied*, 493 U.S. 825 (1989); Kligman v. Lautman, 251 A.2d 745 (N.J. 1969) (streets may be planned a minimum of 250 feet from existing streets for no dedications within 250 feet accepted); Levin v. Township of Livingston, 173 A.2d 391 (N.J. 1961) (may specify type of street construction and paving); Ghen v. Piasecki, 410 A.2d 708 (N.J. Super. Ct. 1980) (subdivider not responsible to compensate for way by necessity easement available under state law, but under subdivision law would be responsible to acquire a larger way to serve the demand of the increased number of lots in excess of that of the landlocked parcel). *But see, e.g.*, Ventures in Property I v. City of Wichita, 594 P.2d 671 (Kan. 1979) (invalid

valid under federal constitutional principles if they are designed to

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to require reservation of 18 out of 48 acres of the undeveloped parcel for possible future highway); Howard County v. JJM, Inc., 482 A.2d 908 (Md. 1984) (confiscation to require reservation for proposed state road without reasonable nexus); Arrowhead Dev. Co. v. Livingston County Rd. Comm'n, 322 N.W.2d 702 (Mich. 1982) (requiring developer to agree to pay off-site county road improvement exceeded road commission's statutory subdivision authority); Hylton Enters., Inc. v. Board of Supervisors, 258 S.E.2d 577 (Va. 1979) (no express or implied statutory or ordinance-based power to impose condition of improving public highways abutting subdivision); *cf.* Arnett v. City of Mobile, 449 So. 2d 1222 (Ala. 1984) (must pay compensation for land outside subdivision reserved for future thoroughfare as no subdivision lots adjacent to parcel sold nor did need arise from plat but dicta of different result if require reservation within plat for street to traverse development); City of Sycamore v. Gauze, 264 N.E.2d 597 (Ill. 1970) (may not deny building permit to interior lot not fronting on public way as required by zoning regulation; must allow use of land-locked parcel with utilities and reachable by fire trucks); Schwing v. Baton Rouge, 249 So. 2d 304 (La. Ct. App. 1971) (invalid to condition plat on road dedication for use of public at large where no present intent to improve); Robbins Auto Parts, Inc. v. City of Laconia, 371 A.2d 1167 (N.H. 1977) (cannot require easement to widen adjacent streets for general public benefit to serve need not generated by proposed project); Brazer v. Borough of Mountainside, 262 A.2d 857 (N.J. 1970) (subdivision condition to reserve right-of-way for future street simply because it was on master plan an invalid taking where exceeded a rational nexus of need generated by the subdivision); Magnolia Dev. Co. v. Coles, 89 A.2d 664 (N.J. 1952) (lack of authority from project review and filing statute to condition approval on 26-foot compact gravel roadway); Princeton Research Lands, Inc. v. Planning Bd., 271 A.2d 719 (N.J. Super. Ct. App. Div. 1970) (may require subdivider to make off-site street improvements and bear portion of cost relating to needs generated but could not require dedication of land to expand existing right-of-way already serving the municipality); 181 Inc. v. Salem County Planning Bd., 336 A.2d 501 (Law Div. 1975) (invalidating dedication where no specific and presently contemplated street widening; no rational nexus to needs generated by project), *modified per curiam on other grounds*, 356 A.2d 34 (N.J. Super. Ct. App. Div. 1976); Coates v. Planning Bd., 445 N.E.2d 642 (N.Y. 1983) (arbitrary to require widening and paving of adjoining roadway as no significant additional traffic from two houses and frontage improvement would neither promote traffic safety nor reduce congestion). Batch v. Town of Chapel Hill, 376 S.E.2d 22 (N.C. Ct. App. 1989) (invalid to condition extraterritorial subdivision approval on road improvement unrelated to need generated by project), *rev'd on other grounds*, 387 S.E.2d 655 (N.C.), *cert. denied*, 496 U.S. 931 (1990); Associated Milk Producers, Inc. v. Midwest City, 583 P.2d 491 (Okla. 1978) (dedication uncontested but requirement of paving to 50 feet from center line of major street preempted by statute requiring conversion of two-lane road to four lanes to have petition by half the abutting owners); Unlimited v. Kitsap County, 750 P.2d 651 (Wash. Ct. App. 1988) (may condition on design to accommodate existing traffic but may not require landowner as a condition of road connection permit to construct drive on property for use and benefit of abutting landowner, here an attempted easement exaction for substantially landlocked parcel).

253. *E.g.*, CAL. GOV'T CODE § 66475.2 (West 1983) (land for facilities, bus stops, turnouts, and benches, if subdivision of more than 200 dwellings or 100 acres or more).

254. *E.g.*, CAL. GOV'T CODE § 66484 (West Supp. 1991) (must impose fee on entire benefitted area for dedicated and constructed bridges).

255. *E.g.*, Wald Corp. v. Metropolitan Dade County, 338 So. 2d 863 (3d DCA 1976) (canal system right-of-way to control periodic flooding), *cert. denied*, 348 So. 2d 955 (Fla. 1977); Akin v. South Middleton Township Zoning Hearing Bd., 547 A.2d 883 (Pa. Commw. Ct. 1988) (developer required to provide drainage easement on land but not to acquire from nearby owner); DeStefano v. City of Charleston, 403 S.E.2d 648 (S.C. 1991) (sustained condition of providing drainage easement for building permits over taking challenge); Call v. City of W. Jordan, 614 P.2d 1257 (Utah 1980) (valid but right to hearing on whether amount bears reasonable relationship to need created by subdivision), *and appeal after remand*, 727 P.2d 180 (Utah 1986) (ordinance void because statu-

substantially further a government purpose that would justify the

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tory requirement for adoption of ordinance was not met), *and appeal on other grounds after remand*, 788 P.2d 1049 (Utah) (damages issues), *and cert. denied*, 800 P.2d 1105 (Utah 1990).

256. *E.g.*, State v. Lundberg, 788 P.2d 456 (Or. Ct. App. 1990) (10-foot strip adjacent to street condition for building permit or zone change on its face consistent with *Nollan*), *aff'd*, 825 P.2d 641 (Or. 1992); Board of Supervisors v. Rowe, 216 S.E.2d 199 (Va. 1975).

257. *E.g.*, CAL. GOV'T CODE § 66475.3 (West 1983) (requires implementing ordinance following statutory criteria).

258. *E.g.*, CAL. GOV'T CODE §§ 66419 (utilities), 66483, 66486 (West 1983 & Supp. 1992) (installation as condition of approval); Mid-Continent Builders, Inc. v. Midwest City, 539 P.2d 1377 (Okla. 1975) (installation and dedication of water mains); City of College Station v. Turtle Rock Corp., 680 S.W.2d 802, 806 (Tex. 1984) (water and sewer mains according to dicta); Berg Dev. Co. v. City of Missouri City, 603 S.W.2d 273 (Tex. Civ. App. 1980); Crownhill Homes, Inc. v. City of San Antonio, 433 S.W.2d 448 (Tex. Civ. App. 1968) (approving conditions requiring drains, sewer, and water mains); *cf.* Spaugh v. City of Winston-Salem, 68 S.E.2d 838 (N.C. 1952) (water and sewer system became property of annexing city not requiring compensation); Zastrow v. Village of Brown Deer, 100 N.W.2d 359 (Wis. 1960) (agreement to terminate water trust upon connection to village system constituted dedication of subdivision water system).

259. *E.g.*, CAL. GOV'T CODE §§ 65970-65981 (West 1983 & Supp. 1990) (adequacy of schools mandated, providing for dedication or fees where school overcrowding); Trent Meredith, Inc. v. City of Oxnard, 170 Cal. Rptr. 685 (Ct. App. 1981) (dedication or in lieu payment not an illegal tax with enabling legislation limiting to reasonable relation to needs generated); Cimarron Corp. v. Board of County Comm'rs, 563 P.2d 946 (Colo. 1977) (dedication or in lieu, not both); City of Carbondale v. Brewster, 398 N.E.2d 829 (Ill. 1979), *appeal dismissed*, 446 U.S. 931 (1980) (dedication or in lieu fee approved in dicta); Krughoff v. City of Naperville, 369 N.E.2d 892 (Ill. 1977) (dedication or in lieu fee; trial court found need uniquely attributable and fairly apportioned to the development; exempting industrial and commercial projects and applied only to projects within city and not those outside yet within school district suggesting a less rigorous rational nexus standard); Board of Educ. v. Surety Developers, Inc., 347 N.E.2d 149 (Ill. 1975) (school need generated by development warranted dedication of land, contribution to construction, and fees); Morris Community High Sch. Dist. No. 101 v. Morris Dev. Co., 320 N.E.2d 37 (Ill. App. Ct. 1974); Jordan v. Village of Menomonee Falls, 137 N.W.2d 442 (Wis. 1965), *appeal dismissed*, 385 U.S. 4 (1966). *But see, e.g.*, ARIZ. REV. STAT. ANN. § 9-463.01 (1990) (locality must compensate subdivider if require reservation of land for schools); CAL. GOV'T CODE § 66478 (West 1983) (school site dedication with right of repurchase); Rosen v. Village of Downers Grove, 167 N.E.2d 230 (Ill. 1960) (no statutory authority to require dedication despite ability to plan for school sites in subdivisions and no standards on amount to be dedicated); Pioneer Trust & Sav. Bank v. Village of Mount Prospect, 176 N.E.2d 799 (Ill. 1961) (if need specifically and uniquely attributable to development not simply because current school at capacity here finding one acre for each 60 units for parks and schools excessive); Batch v. Town of Chapel Hill, 376 S.E.2d 22 (Ct. App. 1989) (must exercise eminent domain in timely fashion where ordered to reserve land for school), *rev'd*, 387 S.E.2d 655 (N.C.) (taking compensation claim may not be raised in challenge to subdivision approval decision), *cert. denied*, 496 U.S. 931 (1990). *See generally* Harvey A. Feldman, *The Constitutionality of Subdivision Exactions for Educational Purposes*, 76 DICK. L. REV. 651 (1972).

The following cases contrast the California courts' interpretations of sections 65995(e) and 65996 of the California Government Code and the impact of those interpretations on the authority of the Development Monitoring System (DMS), a system establishing mandatory guidelines to assure adequate infrastructure capacity. In William S. Hart Union High School District v. Regional Planning Commission, 277 Cal. Rptr. 645 (Ct. App. 1991), two school districts alleged that due to erroneous legal advice from county counsel the county failed to consider the impact that a zoning change allowing residential development would have on the overcrowding of the schools. The court ruled that school facilities legislation did not prohibit the county from denying a zoning change based on

denial of the development permit.[260] The preservation of a scenic view or public access to a public resource such as the beach would

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inadequate school facilities and remanded the case to allow the school to amend its petition.

The decision, however, weakened the authority of the DMS. The court interpreted § 65996 to conclude that the DMS was preempted by state school impact fee legislation from denying development proposals based on the inadequacy of schools. So, although the court recognized the authority of the DMS to establish methods to mitigate the impact that legislative zoning decisions will have on school facilities, in dicta, the court stated that the impact fee was the sole mitigation measure in administrative development review.

Section 65996 limited mitigation of school inadequacy to a fee on development as set out in the statute, but the statute is expressly directed to mitigation of adverse environmental impact under the California Environmental Quality Act requiring environmental assessment. Thus, the court's interpretation of the statute extended its coverage to include the subdivision approval process and growth management facilities timing policies. This extension severely limited the ability of communities to restrict growth to assure adequate school capacity.

The analysis in *William S. Hart Union High* is inconsistent with the ruling in Lincoln Property Co. N.C. v. Cucunonga School, 280 Cal. Rptr. 68 (Ct. App. 1991). Although the case was ordered not to be published upon denial of review by the California Supreme Court, the court upheld the imposition of a school impact fee over a developer's protest. The court interpreted California's School Facilities Act as not preempting the imposition of fees authorized by other sources such as the state's constitution, the police powers consistent with the role of school districts, or, as in *Lincoln Property*, general school district enabling legislation.

The DMS process was also supported by the decision in Murrieta Valley Unified School District v. County of Riverside, 279 Cal. Rptr. 421 (Ct. App. 1991). This court ruled that mitigation measures other than developer's fees were not preempted by state environmental or planning legislation. The school district could bring an action in mandamus to challenge a project that would further aggravate the inadequacy of school facilities. Such challenge is particularly relevant where, as here, the county's general plan contains conflicting provisions on the need to coordinate with the school district to mitigate the impact of land development decisions on school facilities. The court indicated that appropriate action might be to reduce residential densities or impose a controlled phasing of development to time growth with school capacity expansion. *Id.* at 434. The court pointed out that the prohibition in § 65995(e) against financing school facilities with fees on development does not preempt a public agency from enacting general plan provisions including land use and development objectives to mitigate adverse impact on schools. *Id.*

260. Nollan v. California Coastal Comm'n, 483 U.S. 825, 835-36 (1987); Agins v. City of Tiburon, 447 U.S. 255 (1980); *see also* Surfside Colony, Ltd. v. California Coastal Comm'n, 277 Cal. Rptr. 371 (Ct. App. 1991) (condition of public beach use of private beach for permit to build revetment to protect community from beach erosion invalid under *Nollan* as erosion or revetment did not generate need for public access); Paoli v. California Coastal Comm'n, 223 Cal. Rptr. 792 (Ct. App. 1986) (permit conditioned on open space easement); Whalers' Village Club v. California Coastal Comm'n, 220 Cal. Rptr. 2 (Ct. App. 1985) (dedication of public beach access easement as condition to construct revetment following loss of supporting beachfront caused by storms), *cert. denied*, 476 U.S. 111 (1986); Grupe v. California Coastal Comm'n, 212 Cal. Rptr. 578 (Ct. App. 1985) (lateral beach access single-family home permit condition but ruling rejected in *Nollan*); Remmenga v. California Coastal Comm'n, 209 Cal. Rptr. 628 (Ct. App.) (public beach access or $5000 in lieu fee where beach otherwise virtually inaccessible most of the year although lot one mile from beach), *appeal dismissed*, 474 U.S. 915 (1985); Georgia-Pac. Corp. v. California Coastal Comm'n, 183 Cal. Rptr. 395 (Ct. App. 1982) (beach access easement condition but rejecting lateral easement and vertical easement on noncontiguous parcel); Mackall v. White, 445 N.Y.S.2d 486 (App. Div. 1981) (may not condition subdivision on public easement to cross property to bay); *cf.* Gilbert L. Finnell, *Public Access to Coastal Public Property: Judicial Theories and the Taking Issue*, 67 N.C. L. REV. 627 (1989); *supra* note 227 and accompanying text.

meet the test if the development approval condition bore such a relationship.[261] However, the holding in *Nollan v. California Coastal Commission*[262] may illustrate that the condition imposed must be closely connected to the burden that the development will place on the legitimate governmental interest. Failing this "essential nexus," the governmental objectives might only be achieved through the powers of eminent domain which require compensation. In *Nollan*, the U.S. Supreme Court invalidated a lateral ocean easement along the ocean front to facilitate public access.[263] The scheme inadequately served the claimed ends of facilitation of the public's view of the beach and the public perception of accessibility.[264] The easement was not to cut across the property to gain access to the beach, but to expand above high tide the already existing access along the ocean front connecting the public beaches just north and south of the property.[265] *Nollan* simply involved the replacement of a small vacation bungalow with a single-family home.[266] In addition to the *Nollan* nexus requirement, some jurisdictions insist on a finding that the land dedicated is needed by the governmental body for the completion of parks, facilities, or other public need.[267]

Spaces without designation on a subdivision plat are deemed reservations rather than dedications,[268] for the intent to dedicate must be clear.[269] Streets and alleys shown on a recorded approved plat are

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261. Nollan v. California Coastal Comm'n, 483 U.S. 825, 835 (1987).

262. *Id.*

263. *Id.* at 837-39.

264. *Id.*

265. *Id.* at 827-28; *see also* Paoli v. California Coastal Comm'n, 223 Cal. Rptr. 792 (Ct. App. 1986) (permit conditioned on open space easement); Whalers' Village Club v. California Coastal Comm'n, 220 Cal. Rptr. 2 (Ct. App. 1985) (dedication of public beach access easement as condition to construct revetment following loss of supporting beachfront caused by storms), *cert. denied*, 476 U.S. 1111 (1986); Grupe v. California Coastal Comm'n, 212 Cal. Rptr. 578 (Ct. App. 1985) (lateral beach access single-family home permit condition but ruling rejected in *Nollan*); Remmenga v. California Coastal Comm'n, 209 Cal. Rptr. 628 (Ct. App.) (public beach access or $5000 in lieu fee where beach otherwise virtually inaccessible most of the year although lot one mile from beach), *appeal dismissed*, 474 U.S. 915 (1985); Georgia-Pac. Corp. v. California Coastal Comm'n, 183 Cal. Rptr. 395 (Ct. App. 1982) (beach access easement condition but rejecting lateral easement and vertical easement on noncontiguous parcel); East Neck Estates, Ltd. v. Luchsinger, 305 N.Y.S.2d 922 (Sup. Ct. 1969) (dedication of shore frontage valued at one-third of the entire tract confiscatory).

266. 483 U.S. at 828.

267. *See, e.g.*, J.E.D. Assocs. v. Town of Atkinson, 432 A.2d 12 (N.H. 1981); *accord* Town of Auburn v. McEvoy, 553 A.2d 317 (N.H. 1988).

268. *E.g.*, Earle v. McCarty, 70 So. 2d 314 (Fla. 1954).

269. *E.g.*, Gricius v. Lambert, 288 N.E.2d 496 (Ill. App. Ct. 1972) (sale of lot and permission for use of road for access not an implied dedication simply agreement for private use); *cf.* Patel v. Planning Bd., 539 N.E.2d 544 (Mass. App. Ct. 1989) (no easement created by mere designation in approved plat of proposed roadway over lot, should have conditioned dedication or improvement).

dedicated to the public with divestiture occurring upon recordation.[270] A notation must be placed on the plat if dedication of streets is not intended.[271] Dedications may not be imposed once the plat is approved.[272] Completion of demanded mandatory dedication may waive the right to subsequently litigate the exaction.[273]

C. *Exactions: Conditions Not Physically Attached to the Site*

New development imposes substantial additional costs to the delivery of community services. These capital costs are neither reflected in on-site improvements nor equitably financed through general revenues. As a condition for discretionary land use approval, communities typically impose exactions in the subdivision process.[274] In addition, development reduces the supply of open land, increasing the demand and cost of remaining land. Exactions can assure the availability and affordability of land needed for public use—a need generated by new development.[275] "Exactions" often

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But cf. Allied Am. Inv. Co. v. Pettit, 179 P.2d 437 (Ariz. 1947) (dedication effective despite park not designated in recorded plat where map shown to purchasing lot owners marked and public use as park followed).

270. *E.g.*, Martin v. Fuller, 37 So. 2d 851 (La. 1948); Lucchiaria v. Robinson, 34 So. 2d 84 (La. Ct. App. 1948) (dedication upon passage of ordinance declaring plat part of official map); Kirchen v. Remenga, 288 N.W. 344 (Mich. 1939) (recorded plat has effect of express grant and estoppel is applicable); Curtiss & Yale Co. v. City of Minneapolis, 144 N.W. 150 (Minn. 1913) (dedication by plat filing or public use). *But see* Levine v. Young, 104 N.Y.S.2d 1004 (Sup. Ct. 1951) (map with designation just an intent to offer for dedication since not relied on before being replaced by another map); *cf.* Patel v. Planning Bd., 539 N.E.2d 544 (Mass. App. Ct. 1989).

271. *E.g.*, Cottage Hill Land Corp. v. City of Mobile, 443 So. 2d 1201 (Ala. 1983); Village of Lynbrook v. Cadoo, 169 N.E. 394, 397 (N.Y. 1929).

272. *E.g.*, Lodico v. Herdman, 352 N.Y.S.2d 510 (App. Div. 1974).

273. *E.g.*, Fulling v. Palumbo, 233 N.E.2d 272 (N.Y. 1967); *cf.* Town of Auburn v. McEvoy, 553 A.2d 317 (N.H. 1988) (must litigate invalid exaction on appeal of determination of the illegality and may not institute separate lawsuit to recover dedication, *overruling* J.E.D. Assocs. v. Town of Atkinson, 432 A.2d 12 (N.H. 1981)); Gary D. Reihart, Inc. v. Township of Carroll, 409 A.2d 1167 (Pa. 1979) (no inverse condemnation action for excessive dedication requirement, must challenge the requirement as specified in the planning code). *But cf.* Admiral Dev. Corp. v. City of Maitland, 267 So. 2d 860 (Fla. 4th DCA 1972) (no estoppel to challenge because entered into negotiations over dedication or in lieu payment; did not comply with dedication); Enchanting Homes, Inc. v. Rapanos, 143 N.W.2d 618 (Mich. Ct. App. 1966) (upon failure to seek final plat approval, dedicator entitled to reconveyance or recovery of value).

274. *See generally* DEVELOPMENT EXACTIONS (James E. Frank & Robert M. Rhodes eds., 1987) (legal limits and general economic and social impact); Fred P. Bosselman & Nancy E. Stroud, *Pariah to Paragon: Developer Exactions in Florida 1975-85*, 14 STETSON L. REV. 527 (1985); Charles J. Delaney & Marc T. Smith, *Development Exactions: Winners and Losers*, 17 REAL EST. L.J. 195 (1989) (supports linkage and impact fees identifying economic impact dependent on market competition); Frona M. Powell, *Challenging Authority for Municipal Subdivision Exactions: The Ultra Vires Attack*, 39 DEPAUL L. REV. 635 (1990); Symposium, *Exactions: A Controversial New Source for Municipal Funds*, 50 LAW & CONTEMP. PROBS. 1 (Winter 1987).

275. Associated Home Builders, Inc. v. City of Walnut Creek, 484 P.2d 606 (Cal.), *appeal dismissed*, 404 U.S. 878 (1971).

refers to various dedications and conditions, but it also includes fees or charges for off-site improvements, service capacity expansion, or facilities.[276] Typical exactions include water and sewer facilities, off-site street improvements,[277] parks,[278] public resource access,[279] and flood control.[280] More recently, communities have begun to charge exactions for various services and facilities where it has been found that general tax revenues and user fees cannot adequately finance development, expansion, and maintenance of facilities and services such as affordable housing, schools, transportation, area and regional street programs, housing, cultural facilities,[281] and day care.[282] Developers might obtain refunds of exactions exceeding the costs fairly apportioned which benefit the regulated subdivision.[283]

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276. Divan Builders, Inc. v. Planning Bd., 334 A.2d 30 (N.J. 1975) (subdivider may be charged the value that off-site improvements exceed special benefits conferred on landowner).

277. *See, e.g.*, La Canada Flintridge Dev. Corp. v. Department of Transp., 212 Cal. Rptr. 334 (Ct. App. 1985) (street widening); City of Sierra Madre v. Superior Court, 12 Cal. Rptr. 836 (Ct. App. 1961) (condition of acquisition of off-site property valid). *But cf.* Beaver Meadows v. Board of County Comm'rs, 709 P.2d 928 (Colo. 1985) (holding requirement that developers of planned unit development improve 4.73 miles of off-site access roads exceeded board's authority; remanding to evaluate the adequacy of the access road or developer's fair share of improvement cost); New Jersey Builders Ass'n v. Mayor of Bernards Township, 528 A.2d 555 (N.J. 1987) (invalid to charge new development for its proportional share of all new road improvements in region under N.J. STAT. ANN. 40:55D-42 (West Supp. 1990), valid to assess only those costs of off-site improvements necessitated by the development).

278. *See, e.g.*, Associated Home Builders, Inc. v. City of Walnut Creek, 484 P.2d 606 (Cal.), *appeal dismissed*, 404 U.S. 878 (1971). *But cf.* Patenaude v. Town of Meredith, 392 A.2d 582 (N.H. 1978) (open space exaction must be necessitated by subdivision itself).

279. *See, e.g.*, Remmenga v. California Coastal Comm'n, 209 Cal. Rptr. 628 (Ct. App.) (public beach access or $5000 in lieu fee where beach otherwise virtually inaccessible most of the year although lot one mile from beach), *appeal dismissed*, 474 U.S. 915 (1985).

280. *See, e.g.*, Divan Builders, Inc. v. Planning Bd., 334 A.2d 30 (N.J. 1975) (authority to require contribution to off-site drainage facility implied from planning statute but costs must be equitably apportioned among benefitted land); Ghen v. Piasecki, 410 A.2d 708 (N.J. Super. Ct. App. Div. 1980) (streets and sewers). *But cf.* Princeton Research Lands, Inc. v. Planning Bd., 271 A.2d 719 (N.J. Super. Ct. App. Div. 1970) (may require subdivider to make off-site street improvements and bear portion of cost relating to needs generated but could not require dedication of land to expand existing right-of-way already serving the municipality).

281. *But cf.* Plote, Inc. v. Minnesota Alden Co., 422 N.E.2d 231, 236 (Ill. App. Ct. 1981) (not reached due to estoppel but critical of cultural center exaction was without the element of public necessity accorded to either recreational or education functions).

282. *See, e.g.*, San Franciscans For Reasonable Growth v. City and County San Francisco, 258 Cal. Rptr. 267 (Ct. App. 1989) (sponsors of real estate projects to provide child care facilities or in lieu funding; grandfathering of earlier projects sustained); Natalie M. Hanlon, Note, *Child Care Linkage: Addressing Child Care Needs Through Land Use Planning*, 26 HARV. J. ON LEGIS. 591 (1989).

283. CAL. GOV'T CODE §§ 66484 (West Supp. 1992) (bridge dedication and construction conditions but must charge entire benefitted area), 66486 (if sewer requirements exceed needs of subdivision, subdivider is reimbursed for excess cost); Divan Builders, Inc. v. Planning Bd., 334 A.2d 30 (N.J. 1975) (authority to require contribution to off-site drainage facility implied from planning statute but costs must be equitably apportioned among benefitted land); *cf.* Cammarano v. Allen-

Many communities require subdividers to contribute to the costs of service capacity expansion resulting from the new development in terms of water supply costs, facilities, off-site pipes, and sewage treatment.[284] As with all exactions, the critical issue is the appropriateness of the improvement based upon the existence of a rational nexus between the exaction charged and the estimated costs and needs generated by the new development.[285] If the developer is charged for more than a fair share, for example, for upgrading the entire community's system, the exaction may be confiscatory.[286]

The high cost of school construction and operation and the limited willingness of voters to approve tax increases has led communities to pass on part of the cost of school capital expansion as a subdivision exaction.[287] The exaction must bear a reasonable rela-

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dale, 167 A.2d 431 (N.J. Super. Ct. Ch. Div. 1961) (refund of money deposited to guarantee improvements on plat denial). *But cf.* Milton Constr. Co. v. Metropolitan Saint Louis Sewer Dist., 352 S.W.2d 685 (Mo. 1961) (refund of developer's sewer improvement deposit to lot purchasers in event of bond of approval issuance for trunk sewer).

284. *See, e.g.*, Ghen v. Piasecki, 410 A.2d 708 (N.J. Super. Ct. App. Div. 1980) (sewers). *But cf.* Reid Dev. Corp. v. Parsippany-Troy Hills Township, 107 A.2d 20 (N.J. Super. Ct. App. Div. 1954) (no enabling authority to charge developer for water main extension).

285. Southern Nev. Homebuilders Ass'n v. Las Vegas Valley Water Dist., 693 P.2d 1255 (Nev. 1985) (water feeder main connection charge must be limited to recover costs identified with the property or to initial costs of oversizing lines to prepare for anticipated growth, here rule an inequitable allocation); Reid Dev. Corp. v. Parsippany-Troy Hills Township, 107 A.2d 20 (N.J. Super. Ct. App. Div. 1954) (where township had enabling authority to charge developer for water extension, government could not charge to the benefit of other lot owners even if developer receives the major benefit).

286. *Cf.* Lake Intervale Homes, Inc. v. Township of Parsippany-Troy Hills, 147 A.2d 28 (N.J. 1958) (holding that government cannot require developer to pay cost of water main extensions where only isolated parcels to be approved and extensions benefit others as well; also, ordinance without standards to determine the proper allocation of costs to the development).

287. *See* VT. STAT. ANN. tit. 24, § 4417(5) (Supp. 1990) (school site exactions from subdivisions of more than 100 dwellings authorized); Trent Meredith Inc. v. City of Oxnard, 170 Cal. Rptr. 685, 689 (Ct. App. 1981) (school financing facilities fee valid levy on privilege of developing and thus not a special tax on property); Board of Educ. v. Surety Developers, Inc., 347 N.E.2d 149 (Ill. 1975) ($50,000 contribution toward construction together with site dedication and $200 per home fee exaction); *cf.* Builders Ass'n v. Superior Court, 529 P.2d 582 (Cal. 1974) (rezoning moratorium initiative requiring applicant to agree to provide satisfactory alternative to permanent school construction), *appeal dismissed*, 427 U.S. 901 (1976); Board of Educ. v. Surety Developers, Inc., 347 N.E.2d 149 (Ill. 1975) (agreement to contribute to school construction enforced as condition for sewage treatment plant special use permit). *But see* CAL. GOV'T CODE § 66478 (West 1983) (local government must compensate for reserving school sites); Midtown Properties, Inc. v. Township of Madison, 172 A.2d 40 (N.J. Super. Ct. Law Div. 1961) (cannot require developer to finance new school even to accommodate demands of subdivision), *aff'd*, 189 A.2d 226 (N.J. Super. Ct. App. Div. 1963); *cf.* CAL. GOV'T CODE § 65961 (Deering Supp. 1991) (permit may not be conditioned where such condition could have been imposed at subdivision approval) (distinguished in Lincoln Property Co. N.C. v. Cucunonga Sch., 280 Cal. Rptr. 68 (Ct. App. 1991) (section 65961 inapplicable to school facilities act impact fee for permanent facilities)); William S. Hart Union High Sch. Dist. v. Regional Planning Comm'n, 277 Cal Rptr. 645 (Ct. App. 1991); Beach v. Planning &

tionship to the number of students anticipated to reside in the subdivision in relation to the capacity of the schools to be developed.[288]

Increases in public transit fares and reductions of service have meant the decline of public transit systems, a decline often exacerbated by grandiose plans for rapid transit lines that are so expensive to construct and operate that they tend to perpetuate continued decline. These factors drive communities to look for alternate financing.[289] Subdivisions with residents who add to the demand for transit usage or who add to the congestion of streets increase the community need for mass transit to relieve congestion. Subdivisions increasingly may be asked to make exactions for transit systems just as they have universally supported road systems.[290] Measuring the actual needs generated by the development is difficult, but the exactions generally remain valid unless the particular state finds that such an exaction exceeds local power or the reasonable demand generated by the development.[291]

The impact of new subdivisions not only presents congestion problems for internal roads and adjacent streets, but may also impact intersections miles from the development, with each new subdivision adding to the cumulative impact on the entire area and regional system of roads. It is reasonable to have subdivision exactions for off-site street improvements in relation to that regional im-

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Zoning Comm'n, 103 A.2d 814 (Conn. 1954) (requires strict guidelines and enabling authority to condition plat approval on adequacy of schools); Baltimore Planning Comm'n v. Victor Dev. Co., 275 A.2d 478 (Md. 1971) (lack of specific authority under city charter and may not charge developer for general communitywide problems such as school overcrowding, here reversing plat rejection). *See generally* Harvey A. Feldman, *The Constitutionality of Subdivision Exactions for Educational Purposes*, 76 DICK. L. REV. 651 (1972). See *supra* note 259 for discussion of cases interpreting sections 65995(e) and 65996 of California Government Code to understand the impact the courts' interpretations had on the possibility of subdivision exaction as a means of ensuring adequate school facilities.

288. *But cf.* Oakwood at Madison, Inc. v. Madison Township, 371 A.2d 1192 (N.J. 1977) (school construction to accommodate .5 children for each unit resulting in a $1275 per unit fee for a large development ruled invalid as exclusionary).

289. *See generally* James A. Kushner, *Urban Transportation Planning*, 4 URB. L. & POL'Y 161 (1981); Yale Rabin, *Federal Urban Transportation Policy and the Highway Planning Process in Metropolitan Areas*, 451 ANNALS 21 (1980); Yale Rabin, *Highways as a Barrier to Equal Access*, 407 ANNALS 63 (1973); Gilbert P. Verbit, *The Urban Transportation Problem*, 124 U. PA. L. REV. 368 (1975).

290. *Cf.* Russ Bldg. Partnership v. City and County San Francisco, 750 P.2d 324 (Cal.) (sustaining transit impact fee of $5 per square foot on commercial development), *appeal dismissed sub nom.* Crocker Nat'l Bank v. City and County San Francisco, 488 U.S. 881 (1988).

291. *See* Arnett v. City of Mobile, 449 So. 2d 1222 (Ala. 1984) (cannot require uncompensated reservation of tract outside subdivision for future thoroughfare where lots adjacent were not sold pursuant to future street); Ventures in Property I v. City of Wichita, 594 P.2d 671 (Kan. 1979) (invalid to require reservation of 18 out of 48 acres of undeveloped parcel for possible future highway).

pact.[292] Computer programs exist that can determine the impact on intersection congestion flowing from proposed projects reflecting estimates of generated trips. The Los Angeles County Development Monitoring System utilizes such technology so that developers whose developments increase congestion at area intersections above a set standard contribute to make necessary off-site road improve-

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292. *Cf.* Ayers v. City Council, 207 P.2d 1 (Cal. 1949) (dedication for street widening of road adjacent to subdivision); La Canada Flintridge Dev. Corp. v. Department of Transp., 212 Cal. Rptr. 334 (Ct. App. 1985) (street widening); J.E.D. Assocs. v. Town of Atkinson, 432 A.2d 12 (N.H. 1981) (subdivider to pay cost for removal of off-site ledge obstructing vision on access road only in proportion to increase in traffic), *and overruled on other grounds*, Town of Auburn v. McEvoy, 553 A.2d 317 (N.H. 1988); Land/Vest Properties, Inc. v. Town of Plainfield, 379 A.2d 200 (N.H. 1977) (requiring off-site access road improvement valid to extent of developer's fair share considering such factors as traffic increase potential, maintenance standards for similar roads, and character and development potential of land served by the access roads); Garipay v. Town of Hanover, 351 A.2d 64 (N.H. 1976) (can reject subdivision application for inadequacy of access road despite some development in area); Squires Gate, Inc. v. County of Monmouth, 588 A.2d 824 (N.J. Super. Ct. App. Div. 1991) (off-site bridge widening subdivision condition valid despite no enabling legislation); S.T.C. Corp. v. Planning Bd., 476 A.2d 888 (N.J. Super. Ct. App. Div. 1984) (fuel oil storage facility approval requiring contribution for off-site street improvements rendered necessary because of heavy traffic to be generated by proposed use); Lionel's Appliance Ctr. v. Citta, 383 A.2d 773 (N.J. Super. Ct. Law Div. 1978) (contribution for improvements of project effect on off-site traffic); Cranberry Township v. Builders Ass'n, 587 A.2d 32 (Commw. Ct.) (ordinance providing for area highway impact fee used formula based on percentage of area roads needed due to new development ($75,000,000) allocating unit costs based on projected weekday trip generation ($91.82 per trip)), *appeal granted*, 600 A.2d 955 (Pa. 1991); Board of County Supervisors v. Sie-Gray Developers, Inc., 334 S.E.2d 542 (Va. 1985) (voluntary agreement to make off-site improvements valid). *But see* WASH. REV. CODE ANN. § 82.02.020 (West Supp. 1992) (exactions and conditions authorized but not for off-site transportation needs); Potomac Greens Assocs. Partnership v. City Council, 761 F. Supp. 416 (E.D. Va. 1991) (under Virginia law, city lacks authority to require private landowner to build additional highway lanes as a condition for site review); Arnett v. City of Mobile, 449 So. 2d 1222 (Ala. 1984) (cannot require uncompensated reservation of tract outside subdivision for future thoroughfare where lots adjacent were not sold pursuant to future street); Cottage Hill Land Corp. v. City of Mobile, 443 So. 2d 1201 (Ala. 1983) (city's power to mandate reservation for major off-site street statutorily limited, particularly if need primarily generated by general public); Arrowhead Dev. Co. v. Livingston County Rd. Comm'n, 322 N.W.2d 702 (Mich. 1982) (agreement to pay off-site county road improvement and regrading exceeded road commission statutory authority); New Jersey Builders Ass'n v. Mayor of Bernards Township, 528 A.2d 555 (N.J. 1987) (invalid to charge new development for its proportional share of all new road improvements in region; under N.J. STAT. ANN. 40:55D-42 (West Supp. 1990), valid to assess only the cost of off-site improvements necessitated by the development); Hylton Enters. v. Board of Supervisors, 258 S.E.2d 577 (Va. 1979) (could not require reconstruction of two abutting state secondary roads); *cf.* Anderson v. Pima County, 558 P.2d 981 (Ariz. Ct. App. 1976) (lack of enabling authority and lack of compliance with zoning enabling act procedures in adopting interim ordinance requiring off-site improvements as condition for subdivision); V.S.H. Realty, Inc. v. Zoning Bd. of Appeals, 570 N.E.2d 1044 (Mass. App. Ct. 1991) (invalid to condition shopping center certificate of occupancy upon off-site street widening where such action was governmental decision beyond control of developer). *See generally* Richard P. Adelstein & Noel M. Edelson, *Subdivision Exactions and Congestion Externalities*, 5 J. LEGAL STUD. 147 (1976) (economic model to internalize costs).

ments, contribute to area benefit assessment programs, or scale back the size of the proposed subdivision.[293]

Regional flood control systems, especially those in outlying rural hilly areas, may require extensive and expensive flood control improvements to accommodate the conversion of the area to one that is more urbanized. In recent years, subdivisions exactions have supported such flood control systems, typically through fees[294] or as part of a facilities benefit district.[295] As with other exactions, the charge must be proportional to demand generated by the subdivision.[296]

1. Affordable Housing

With the decline of federal subsidies for housing, an increasing number of communities face the problem of a decreasing available supply of affordable housing.[297] Many states responded to the housing shortage through the creation of state housing agencies.[298] Unfortunately, most state housing finance agencies marketed tax-exempt bonds which merely allowed the incremental lowering of mortgage financing for new housing.[299] These funds were typically piggy-backed with federal subsidies to lower rates but failed to generate alone much development of low-cost housing. Some communi-

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293. JAMES A. KUSHNER, SUBDIVISION LAW AND GROWTH MANAGEMENT § 2.14, ch. 4 (1991 & Supp 1992); James A. Kushner, *The Development Monitoring System (DMS): Computer Technology for Subdivision Review and Growth Management*, 11 ZONING & PLAN. L. REP. 33 (1988).

294. *See, e.g.*, City of Buena Park v. Boyar, 8 Cal. Rptr. 674 (Ct. App. 1960) (developer may not withhold payment due to delay in city completion of drainage ditch absent repudiation by city of its obligation); Call v. City of W. Jordan, 606 P.2d 217 (1979) (dedication in lieu fee of 7% for flood control, parks, and recreation), *and reh'g*, 614 P.2d 1257 (Utah 1980). *But see* Divan Builders, Inc. v. Planning Bd., 334 A.2d 30 (N.J. 1975) (must reimburse developer for off-site drainage facility despite other properties not specially benefitted).

295. *See* J.W. Jones Cos. v. City of San Diego, 203 Cal. Rptr. 580 (Ct. App. 1984).

296. *E.g.*, Leroy Land Dev. v. Tahoe Regional Planning Agency, 939 F.2d 696 (9th Cir. 1991) (although pre-*Nollan* settlement of conditions dispute not subject to post-*Nollan* relitigation, court in dicta ruled erosion mitigation measures including installation of energy dissipator devices, stabilization devices for cut slope, secondary access, and acquisition of adjacent and nonadjacent land for open space and other mitigation measures met *Nollan* nexus to legitimate government purpose); Maloco Realty Corp. v. Town of Brookhaven Planning Bd., 312 N.Y.S.2d 429 (App. Div. 1970) ($1200 per acre charge not a uniform rate applicable to every development keyed to actual and contemplated drainage expenditures invalid); Call v. City of W. Jordan, 614 P.2d 1257 (Utah 1980) (right to hearing to determine if dedication in lieu fee of 7% for flood control, parks, and recreation reasonably related to needs generated).

297. C. DAYE ET AL., HOUSING AND COMMUNITY DEVELOPMENT ch. 3 (2d ed. 1989).

298. HOUSING FOR ALL UNDER THE LAW (Richard P. Fishman ed., 1978); Peter W. Salsich, *Housing Finance Agencies: Instruments of State Housing Policy or Confused Hybrids?*, 21 ST. LOUIS U. L.J. 595 (1978).

299. *See* Kenneth Pearlman, *State Housing Finance Agencies and the Myth of Low-Income Housing*, 7 CLEARINGHOUSE REV. 649 (1974).

ties utilized tax increment financed redevelopment to generate funds to provide lower cost mortgages or subsidies to offer affordable rental housing.[300]

Most promising strategies to provide affordable housing are programs of inclusionary zoning and linkage programs, whereby developers agree to build or contribute to trust funds to support affordable housing development.

2. *Inclusionary Zoning*

Inclusionary zoning is the opposite of exclusionary zoning; it explicitly includes traditionally disfavored uses such as affordable housing.[301] An appropriate remedy in an exclusionary zoning case going to the exclusionary character of an entire ordinance would be to amend the ordinance to one which is inclusionary, that is, one which affirmatively includes the excluded use. In *Southern Burlington County NAACP v. Township of Mount Laurel (Mount Laurel II)*,[302] the New Jersey Supreme Court established authority to impose broad affirmative relief orders which may include inclusionary zoning in the form of density bonuses or other development incentives and set-asides of units for lower income households. Before *Mount Laurel II, Southern Burlington County NAACP v. Township of Mount Laurel (Mount Laurel)*[303] required that each develop-

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300. *See infra* notes 454-58, 464-71 and accompanying text.

301. *See* CAL. GOV'T CODE §§ 65302(c), 65583, 65584 (West Supp. 1990) (standards under state's mandatory master plan housing element requiring planning for housing needs of all economic segments). *See generally* HERBERT M. FRANKLIN ET AL., IN-ZONING (1974); ALAN MALLACH, INCLUSIONARY HOUSING PROGRAMS (1984); Michael Banzhaf, *Are Mandatory Inclusionary Housing Programs Passe? The Orange County Experience*, 13 W. ST. U. L. REV. 473 (1986); Linda J. Bozung, *A Positive Response to Growth Control Plans: The Orange County Inclusionary Housing Program*, 9 PEPP. L. REV. 819 (1982); Paul Davidoff & Linda Davidoff, *Opening the Suburbs: Toward Inclusionary Land Use Controls*, 22 SYRACUSE L. REV. 509 (1971); Donald Hagman, *Taking Care of One's Own Through Inclusionary Zoning: Bootstrapping Low-and Moderate-Income Housing By Local Government*, 5 URB. L. & POL'Y 169 (1982); Henry A. Hill, *Government Manipulation of Land Values to Build Affordable Housing: The Issue of Compensating Benefits*, 13 REAL EST. L.J. 3 (1984); Thomas Kleven, *Inclusionary Ordinances, Policy and Legal Issues in Requiring Private Developers to Build Low Cost Housing*, 21 UCLA L. REV. 1432 (1974); Harold A. McDougall, *From Litigation to Legislation in Exclusionary Zoning*, 22 HARV. C.R.-C.L. L. REV. 623 (1987); C.E. "Ted" Parker, *Inclusionary Zoning—A Proper Police Power Function or a Constitutional Anathema?*, 9 W. ST. U. L. REV. 175 (1982); S. Mark White, *Development Fees and Exemptions for Affordable Housing: Tailoring Regulations to Achieve Multiple Public Objectives*, 6 J. LAND USE & ENVTL. L. 25 (1990); Carolyn K. Longstreth, Comment, *Inclusionary Zoning: An Alternative for Connecticut Municipalities*, 14 CONN. L. REV. 789 (1982); Thomas E. Noonan, Case Comment, 10 SUFFOLK U. L. REV. 623 (1976).

302. 456 A.2d 390 (N.J. 1983) (*Mount Laurel II*). *See generally* Norman Williams, Jr., *The Background and Significance of* Mount Laurel II, 26 WASH. U. J. URB. & CONTEMP. L. 3 (1984).

303. 336 A.2d 713 (N.J.) (*Mount Laurel*), *cert. denied*, 423 U.S. 808 (1975).

ing community make possible through its land use controls the development of its fair share of the regional need for affordable housing. *Mount Laurel*, rather than resolving the problems of exclusion, complicated them because it failed to specify the remedial obligation and the definitions established. In *Oakwood at Madison, Inc. v. Township of Madison*,[304] the New Jersey Supreme Court limited the remedial obligation to controls which provided for overzoning of "least cost housing" so as to depress land prices.[305]

In *Mount Laurel II*, the New Jersey Supreme Court increased the obligation actually to make affordable housing available either through use of mobile homes,[306] subsidies,[307] development incentives such as density bonuses,[308] tax incentives,[309] and conceivably rent skewing, where the subsidy for affordable units of housing was supplied by raising the price of unsubsidized units within a development, or the mandatory set-aside of a percentage of units in new developments for affordable housing.[310] The court designated *Mount Laurel* specialty judges to hear disputes[311] and ordered that the state planning agency's definition of region and fair share be utilized.[312] The New Jersey legislature then passed a Fair Housing Act[313] establishing state and regional commissions to establish the fair share levels, partially abolishing a site specific relief authorized in *Mount Laurel II*.[314]

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304. 371 A.2d 1192 (N.J. 1977).
305. *Id.* at 1207.
306. 456 A.2d at 450-51.
307. *Id.* at 444.
308. *Id.* at 445-46.
309. *Id.* at 445.
310. *Id.* at 446-50.
311. *Id.* at 459.
312. *Id.* at 422-41.
313. N.J. STAT. ANN. §§ 52:27D-301 to 52:27D-334 (West 1985). *See generally* Harold A. McDougall, *From Litigation to Legislation in Exclusionary Zoning*, 22 HARV. C.R.-C.L. L. REV. 623 (1987); *The Fair Housing Act Sponsors' Comments and Legislative Note*, 9 SETON HALL LEGIS. J. 569 (1986); Henry L. Kent-Smith, Note, *The Council on Affordable Housing and the* Mount Laurel *Doctrine: Will the Council Succeed?*, 18 RUTGERS L.J. 929 (1987).
314. Hills Dev. Co. v. Township of Bernards, 510 A.2d 621 (N.J. 1986) (validating state fair housing law implementing *Mount Laurel II* through state agency, the Council on Affordable Housing, empowered to set guidelines on *Mount Laurel* requirements, and review of local implementing plans; the law also provides funding for implementation and includes a moratorium on the builder's remedies, with preservation of judicial review), *modifying sub nom.* Morris County Fair Hous. Council v. Boonton Township, 507 A.2d 768 (N.J. Sup. Ct. 1985) (Fair Housing Act designed to implement *Mount Laurel II* sustained, allowing 50% of municipality's obligation to be transferred to another community; establishing administrative agency and procedure to resolve conflicts), *earlier proceedings*, 484 A.2d 1302 (Law Div. 1984), *aff'd per curiam*, 506 A.2d 1284 (N.J. Super. Ct. App. Div. 1985) (*Mount Laurel* binding on nonparties); *In re* Borough of Roseland, 588 A.2d 1256 (N.J. Super. Ct. App. Div. 1991) (where community's *Mount Laurel* obligation is reduced due to

Devices and strategies of inclusionary zoning are likely to proliferate in the form of public policy initiatives, exactions, or remedies as states begin to mandate the provision of housing for all segments of the community. Although one court has raised doubts about inclusionary zoning as a public policy initiative,[315] others have endorsed enthusiastically the concept.[316] There is little doubt that such

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limited remaining developable land it is not to be recalculated where community enters into regional contribution agreement whereby part of that obligation is to be met outside the community; admission preference on half of units must be granted to local workers as well as current residents under statute); *In re* Township of Denvill, 588 A.2d 1248 (N.J. Super. Ct. App. Div. 1991) (while community and Council on Affordable Housing must undertake comprehensive fact finding on remand regarding proposed site suitability; no violation of *Mount Laurel*, state legislation, or federal fair housing act, because community elects to plan free standing affordable housing project separate from other residential developments and despite speculative fear of producing a ghetto based on 64.1% minority applicants, the court stressing the current 1.1% minority presence in township; undue concentration not an element of the *Mount Laurel* principle; as to discrimination, even if a prima facie case made, approval appears to present a legitimate governmental interest and no alternative could serve that interest with less discriminatory effect; the court also noting that half the units may be set aside for residents and township workers); *In re* Township of Warren, 588 A.2d 1227 (N.J. Super. Ct. App. Div. 1991) (regional cooperation agreements whereby up to half of community's *Mount Laurel* obligation may be satisfied by payment to city to build or rehabilitate housing validated; also no violation of Title VIII, the federal fair housing act, as is the regulation allowing up to half of units to be set aside for preferences for residents or those employed in the community, the court simply rejecting effects challenge as a justification present and a conclusory finding of no alternatives; Council on Affordable Housing authority to establish affordability standards within range that could enable developers to construct economically viable developments and lack of subsidies may excuse from producing housing for the poorest as no duty to build or form a housing authority); Calton Homes, Inc. v. Council on Affordable Hous., 582 A.2d 1024 (N.J. Super. Ct. App. Div. 1990) (although a 1000 unit cap on municipal fair share invalid, implicitly approving a cap of 20% of municipality's 1987 occupied housing stock; court endorsed "affordable accessory apartments" provision, counting self-contained residential units created in existing residential structures in up to 3% of municipality's dwelling units; also approved rental bonus rule providing one and one-third unit credit for new constructed apartments including those with firm commitments until such time as reach in excess of 20% of fair share, the court accepting at face value the filtration theory whereby the council assumes that market rate rentals and condominiums will filter down to become affordable housing rather than appreciate in value); Township of Bernards v. New Jersey Dep't of Community Affairs, 558 A.2d 1 (N.J. Super. Ct. App. Div. 1989) (finding Fair Housing Act regulation on fair share allocation invalid in considering only units restricted to persons of low or moderate income, but sustaining those crediting only those created or rehabilitated after April 1, 1980 under one-for-one statutory obligation; considering aggregate per capita income a factor in allocating burden; considering only of those projects with six units per acre minimum density; permitting reservation of 3% of vacant land for active recreation rather than reserving for housing sites, and the refusal to consider a lack of vacant land as an allocation factor so as not to reward for exclusionary practices); Van Dalen v. Washington Township, 556 A.2d 1247 (N.J. Super. Ct. App. Div. 1989) (proper for Council to use state development guide plan as one factor in allocation but developer may challenge reasonableness of particular growth designation as applied to given municipality); Paula A. Franzese, Mount Laurel III: *The New Jersey Supreme Court's Judicious Retreat*, 18 SETON HALL L. REV. 30 (1988).

315. *See* Board of Supervisors v. DeGroff Enters., 198 S.E.2d 600 (Va. 1973) (finding ordinance mandating 15% of units in development to be for low and moderate income persons invalid despite need because it exceeded enabling authority).

316. *See* Zoning Bd. of Appeals v. Housing Appeals Comm., 446 N.E.2d 748 (Mass. App. Ct.

initiatives make appropriate remedies in cases following a finding of discriminatory or exclusionary land use controls.[317]

Inclusionary zoning techniques have taken the form of mandatory percentages of lower cost housing in individual developments.[318] Other inclusionary zoning techniques include development incentive devices such as bonus densities[319] or the waiver of development

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1983) (10% low and moderate income under permit standard not met, entitling state agency to override local rules and issue permits for applicable housing); Holmdel Builders Ass'n v. Township of Holmdel, 583 A.2d 277 (N.J. 1990) (finding that state's fair housing act requiring development of fair share of affordable housing implicitly authorizes housing linkage impact fee exaction, but requires authorizing regulations containing standards to be issued by the Council on Affordable Housing); *In re* Egg Harbor Assocs., 464 A.2d 1115 (N.J. 1983) (10 to 20% mandatory set aside for low income housing required for permits in coastal zone even absent clear enabling legislation); Southern Burlington County NAACP v. Township of Mount Laurel, 456 A.2d 390 (N.J. 1983) (*Mount Laurel II*); Uxbridge Assocs. v. Township of Cherry Hill, 7 Hous. & Dev. Rep. (BNA) 979 (N.J. Super. Ct. App. Div. Mar. 17, 1980) (validation of 5% mandatory low or moderate income in all multifamily zones).

317. *See, e.g.*, Southern Burlington County NAACP v. Township of Mount Laurel, 456 A.2d 390 (N.J. 1983) (*Mount Laurel II*).

318. *See, e.g., In re* Egg Harbor Assocs., 464 A.2d 1115 (N.J. 1983) (10 to 20% mandatory set aside for low income housing required for permits in coastal zone even absent clear enabling legislation); Holmdel Builders Ass'n v. Township of Holmdel, 556 A.2d 1236 (N.J. Super. Ct. App. Div. 1989) (mandatory set asides or fees for affordable housing valid only if reasonable compensatory benefits such as density bonuses offered; South Brunswick imposed a suspect linkage fee of 10 to 15 cents per square foot for residential development and 25 to 50 cents per square foot for nonresidential development; Middletown required an invalid 7% set aside; Holmdel allowed .2 units per acre bonus on project if fees representing 2.5% of sale price of units which is valid unless artificial downzoning as pretext to impose exaction; *Egg Harbor Assocs.* distinguished as a large intense development rather than an exaction fee condition in a small project), *modified*, 583 A.2d 277 (N.J. 1990) (state's fair housing act requiring development of fair share of affordable housing implicitly authorizes housing linkage impact fee exaction, but require authorizing regulations containing standards to be issued by the Council on Affordable Housing); Uxbridge Assocs. v. Township of Cherry Hill, 7 Hous. & Dev. Rep. (BNA) 979 (N.J. Super. Ct. App. Div. Mar. 17, 1980) (validation of 5% mandatory low or moderate income in all multifamily zones); ABN 51st St. Partners v. City of New York, 724 F. Supp. 1142 (S.D.N.Y. 1989) (validating requirement that renovating property owner found to have engaged in harassment of tenants to encourage displacement to retain "at least 28%" of apartment building as low income housing as a permit condition; holding condition not a physical occupation under *Nollan* as condition furthers government interest in fighting displacement); *cf.* Zoning Bd. of Appeals v. Housing Appeals Comm., 446 N.E.2d 748 (Mass. App. Ct. 1983) (10% low and moderate income under permit standard not met, entitling state agency to override local rules and issue permits for applicable housing). *But cf.* Middlesex & B. St. Ry. Co. v. Board of Alderman, 359 N.E.2d 1279 (Mass. 1977) (finding lack of legislative authority to require mandatory lease of five of 54 units to housing authority at a reduced rent as a special permit condition); Board of Supervisors v. DeGroff Enters., 198 S.E.2d 600 (Va. 1973) (invalidating ordinance mandating 15% of units in development to be for low and moderate income persons despite need because it exceeded enabling authority). Note that the authority found lacking in *Middlesex* has been legislatively enacted. Theodore C. Taub, *Exactions, Linkages, and Regulatory Takings: The Developer's Perspective*, 20 URB. LAW. 515, 537-38 (1988). *See generally* Jerome G. Rose, *From the Legislatures—The Mandatory Percentage of Moderately Priced Dwelling Ordinance (MPMPD) Is the Latest Technique of Inclusionary Zoning*, 3 REAL EST. L.J. 176 (1974).

319. *E.g.*, Cameron v. Zoning Agent, 260 N.E.2d 143 (Mass. 1979); MASS. GEN. LAWS ANN.

exactions[320] if low-cost housing is included in the development. An alternative method would be the New Jersey approach of overzoning for the excluded use.[321] Any court or legislative body imposing inclusionary devices must be sensitive to land economics, for the failure to overzone for uses such as apartments or mobile homes may have the effect of inflating land prices and rendering development infeasible or discouraging developments because the few developable parcels are not in the control of potential developers of low-cost housing. Alternatively, some argue that the economic impact of inclusionary ordinances may be to subsidize middle income home seekers on a trivial level while increasing housing costs.[322]

3. *Linkage Programs*

Originating in San Jose, California,[323] linkage programs were designed to charge commercial developers to either construct lower income housing in proportion to the size of their commercial development or contribute an in lieu share to a city trust fund de-

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ch. 40-A, § 9 (West Supp. 1990) (density bonus enabling legislation for additional open space, affordable housing, traffic improvements, and other amenities); CAL. GOV'T CODE §§ 65590(b) (affordable replacement housing in coastal zone), (d) (density bonuses), 65915-65918 (non-coastal zone) (West 1983 & Supp. 1990) (interpreted in 63 Op. Att'y Gen. 478 (1980)); *cf.* Dupont Circle Citizens Ass'n v. District of Columbia Zoning Comm'n, 431 A.2d 560, 562 (D.C. 1981) (approving density bonuses for provision of amenities such as parks, landscaping, and retail shops under planned unit development regulation); J. GETZELS & M. JAFFE, ZONING BONUSES IN CENTRAL CITIES (1988); Jerold S. Kayden, *Zoning for Dollars: New Rules for an Old Game? Comments on the* Municipal Art Society *and* Nollan *Cases*, 39 WASH. U. J. URB. & CONTEMP. L. 3 (1991); *see also* Molly A. Sellman, *California's Legislative Response to the Affordable Housing Crisis: Inclusion of Manufactured Homes in Residential Districts*, 14 ZONING & PLAN. L. REP. 89 (1991). *See generally* HERBERT M. FRANKLIN ET AL., IN-ZONING 122-24 (1974); Gregory M. Fox & Barbara R. Davis, *Density Bonus Zoning to Provide Low and Moderate Cost Housing*, 3 HASTINGS CONST. L.Q. 1015 (1976); Robert A. Johnston et al., *Selling Zoning: Do Density Bonus Incentives for Moderate-Cost Housing Work?*, 36 WASH. U. J. URB. & CONTEMP. L. 45 (1989); *Project Retained for Low-Income Use in Exchange for Density Rights*, 12 Hous. & Dev. Rep. (BNA) 541 (1984) (developer agreed to retain units for low income tenants in exchange for development rights).

320. *E.g.*, CAL. GOV'T CODE §§ 65915-65918 (West Supp. 1990) (interpreted in 63 Op. Att'y Gen. 478 (1980)) (density bonus of 25% or waiver of dedication or off-site improvement requirements where development includes 25% of units for low and moderate income persons).

321. *See* Oakwood at Madison, Inc. v. Township of Madison, 371 A.2d 1192 (N.J. 1977). *But cf.* Southern Burlington County NAACP v. Township of Mount Laurel, 456 A.2d 390 (N.J. 1983) (*Mount Laurel II*) (approving of the technique but recognizing that alone it was an inadequate strategy to achieve inclusion of affordable housing).

322. *See* Robert C. Ellickson, *The Irony of "Inclusionary" Zoning*, 54 S. CAL. L. REV. 1167 (1981).

323. Linda D. Major, *Linkage of Housing and Commercial Development: The Legal Issues*, 15 REAL EST. L.J. 328 (1987).

signed to support affordable housing development.[324] The San Francisco program which requires developers of 50,000 or more square feet of office space to build or cause to be built .9 housing units, representing 640 square feet, for every 1000 square feet of office space,[325] has been effective in producing 2600 units from $19,000,000 dollars in exactions from twenty-seven developers.[326] Boston requires developers of over 100,000 square feet of office space to contribute a "neighborhood impact excise" of five dollars

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324. M. BROOKS, A SURVEY OF HOUSING TRUST FUNDS (1989); DOWNTOWN LINKAGES (Douglas R. Porter ed., 1985); INCLUSIONARY ZONING MOVES DOWNTOWN (Dwight Merriam et al. eds., 1985); Fred P. Bosselman & Nancy E. Stroud, *Mandatory Tithes: The Legality of Land Development Linkage*, 9 NOVA L.J. 381 (1985); Robert Collin & Michael Lytton, *Linkage: An Evaluation and Exploration*, 21 URB. LAW. 413 (1989); Donald L. Connors & Michael E. High, *The Expanding Circle of Exactions: From Dedication to Linkage*, 50 LAW & CONTEMP. PROBS. 69 (Winter 1987); Charles J. Delaney & Marc T. Smith, *Development Exactions: Winners and Losers*, 17 REAL EST. L.J. 195 (1989) (supports linkage and impact fees identifying economic impact dependent on market competition); Dennis Keating, *Linking Downtown Development to Broader Community Goals: An Analysis of Linkage Policy in Three Cities*, 52 J. AM. PLAN. A. 133 (1986); Linda D. Major, *Linkage of Housing and Commercial Development: The Legal Issues*, 15 REAL EST. L.J. 328 (1987); *see also* Rachelle Alterman, *Evaluating Linkage and Beyond: Letting the Windfall Recapture Genie Out of the Exactions Bottle*, 34 WASH. U. J. URB. & CONTEMP. L. 3 (1988); Jerold S. Kayden & Robert Pollard, *Linkage Ordinances and Traditional Exactions Analysis: The Connection Between Office Development and Housing*, 50 LAW & CONTEMP. PROBS. 127 (Winter 1987); Richard A. Newman & Phil T. Feola, *Housing Incentives, A National Perspective*, 21 URB. LAW. 307 (1989); Douglas R. Porter, *Boston's Linkage Program: Sharing or Shackling Downtown Development?*, 44 URB. LAND 34 (Jan. 1985); Paul S. Quinn, *Inclusionary Zoning and Linkage: Land Use Planning Techniques in an Age of Scarce Public Resources*, 1 U. FLA. J.L. & PUB. POL'Y 21 (1987); Tegeler, *Developer Payments and Downtown Housing Trust Funds*, 18 CLEARINGHOUSE REV. 679 (Special Issue 1984); Paul E. Meyer, Note, *Chicago's Linked Development Fund: The Legality of Imposing an Exaction Fee on Large-Scale Downtown Office Development*, 62 NOTRE DAME L. REV. 205 (1987); *Symposium, Downtown Office Development and Housing Linkage Fees*, 54 J. AM. PLAN. A. 197 (1988); *cf.* Natalie M. Hanlon, Note, *Child Care Linkage: Addressing Child Care Needs Through Land Use Planning*, 26 HARV. J. ON LEGIS. 591 (1989).

325. Werth, *Tapping Developer*, 51 PLAN. 21 (Jan. 1984); *see* Susan R. Diamond, *San Francisco Office/Housing Program Social Policy Underwritten By Private Enterprise*, 7 HARV. ENVTL. L. REV. 449 (1983); Susan R. Diamond, *San Francisco's Office-Housing Production Program*, 35 LAND USE L. & ZONING DIG. 4 (1983); *see also* Guyton v. City of Alameda, 18 Hous. & Dev. Rep. (WGL) 97 (Cal. Super. Ct. 1990) (settlement in challenge to growth control restriction on multifamily housing development called for continuing program of commercial developers contributing $3 per square foot for low income housing development); Blagden Alley Ass'n v. District of Columbia Zoning Comm'n, 590 A.2d 139 (D.C. 1991) (implicit approval of linkage condition on planned unit development approval absent mandatory linkage ordinance or regulation but with remand to consider plan consistency of linkage units being non-adjacent to PUD); *cf.* San Franciscans For Reasonable Growth v. City and County of San Francisco, 258 Cal. Rptr. 267 (Ct. App. 1989) (grandfathering of earlier projects sustained; exempting from child care and housing exactions and low income housing concerns adequately addressed by environmental impact report).

326. George Sternlieb & David Listokin, *A Review of National Housing Policy*, *in* HOUSING AMERICA'S POOR 14, 38-39 (Peter D. Salins ed., 1987).

per square foot over twelve years to a neighborhood housing trust.[327] Although a Massachusetts trial court characterized Boston's linkage fee as an invalid tax lacking specific authorization,[328] the state supreme court overturned the ruling and endorsed the concept as within legislative enabling authority.[329]

In the first linkage challenge to reach the federal appellate level, the Court of Appeals for the Ninth Circuit, in *Commercial Builders v. City of Sacramento*,[330] upheld an ordinance requiring nonresidential developers to make contributions to an affordable housing trust fund so as to offset burdens placed on the city as a result of job creation over taking claims. The court stressed an impact study undertaken by the city and noted that the fee reflected but half of the projected subdivision cost; therefore, the fee bore a proper nexus under *Nollan* to the needs generated by the development.[331] Miami, Florida, has established a linkage program conditioning a density bonus, increasing the floor area ratio from 3.25 to 4.25, on the construction of .15 square feet of affordable housing for every square foot of added space, or the contribution of $4 per square foot of added space to the city's housing fund.[332] Vermont generates funding for a low income housing trust fund through increased real estate transfer taxes.[333] Dade County, Florida, taxes property transfers to assist low and moderate income homebuyers,[334] while

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327. Werth, *Tapping Developer*, 51 PLAN. 21, 23 (Jan. 1984); *see also* Douglas R. Porter, *Boston's Linkage Program: Sharing or Shackling Downtown Development?*, 44 URB. LAND 34 (Jan. 1985) (additional $1 per square foot for city job training program); Richard J. Gallogly, Comment, *Opening the Door for Boston's Poor: Will "Linkage" Survive Judicial Review?*, 14 B.C. ENVTL. AFF. L. REV. 447 (1987).

328. Bonan v. General Hosp. Corp., No. 76438 (Mass. Super Ct. Mar. 31, 1986), *rev'd sub nom.* Bonan v. City of Boston, 496 N.E.2d 640 (Mass. 1986) (cited in Donald L. Connors & Michael E. High, *The Expanding Circle of Exactions: From Dedication to Linkage*, 50 LAW & CONTEMP. PROBS. 69, 79-83 (Winter 1987)).

329. Bonan v. City of Boston, 496 N.E.2d 640 (Mass. 1986) (reversing trial court invalidation for lack of standing but indicating authorizing legislation might cure any defects). Enabling legislation was subsequently enacted. Theodore C. Taub, *Exactions, Linkages, and Regulatory Takings: The Developer's Perspective*, 20 URB. LAW. 515, 537-38 (1988); Middlesex & B. St. Ry. Co. v. Board of Alderman, 359 N.E.2d 1279 (Mass. 1977) (invalidating mandatory set aside of 10% of apartments in projects at reduced rent for affordable housing because of defective enabling authority now established after *Bonan*).

330. 941 F.2d 872 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1997 (1992).

331. *Id.* at 875.

332. Paul S. Quinn, *Inclusionary Zoning and Linkage: Land Use Planning Techniques in an Age of Scarce Public Resources*, 1 U. FLA. J.L. & PUB. POL'Y 21 (1987); Theodore C. Taub, *Exactions, Linkages, and Regulatory Takings: The Developer's Perspective*, 20 URB. LAW. 515, 547-48 (1988).

333. James M. Libby, Jr., *The Vermont Housing and Conservation Trust Fund: A Unique Approach to Developing Affordable Housing*, 23 CLEARINGHOUSE REV. 1275 (1990).

334. *Florida County To Subsidize Home Purchases, Rehabilitation From New Property Surtax*, 11 Hous. & Dev. Rep. (BNA) 404 (1983).

condominium conversion taxes are being utilized by Montgomery County, Maryland to generate rent supplements,[335] and wagering impact fees are used to fund affordable housing in Baltimore.[336] Although a scheme requiring relocation of displacees or contribution to a low income housing fund in residential conversion was invalidated as an illegal tax by a Washington court,[337] a California court endorsed a developer fee designed to replace converted residential units.[338] The New Jersey Supreme Court has endorsed the imposition of an affordable housing fee on housing developers as an alternative to the mandatory set aside of affordable units when imposed under standards established by a state agency.[339]

D. Fees

Exactions are imposed in recognition that new development imposes substantial additional costs to the delivery of community services, costs not reflected in on-site improvements. As a condition on subdivision or other discretionary land use permit approval, communities may impose such exactions in the form of fees.[340] The term "exactions" includes various dedications and conditions, often in the form of fees in lieu of dedication, or fees for community impact. In other words, exactions are fees or charges for off-site improvements, service capacity expansion, or facilities. While

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335. *Maryland County Condo Conversion Tax to Supplement Rents on New Developments*, 11 Hous. & Dev. Rep. (BNA) 405 (1983).

336. *Race Track Impact Fees Make Housing More Affordable in Baltimore*, 18 Hous. & Dev. Rep. (WGL) 371 (1990).

337. *See* San Telmo Assocs. v. City of Seattle, 735 P.2d 673 (Wash. 1987).

338. *See* Terminal Plaza Corp. v. City and County of San Francisco, 223 Cal. Rptr. 379 (Ct. App. 1986) (ruling that relocation assistance and one-for-one replacement of converted residential hotel units not a tax).

339. *See* Holmdel Builders Ass'n v. Township of Holmdel, 583 A.2d 277 (N.J. 1990).

340. *See generally* PAUL B. DOWNING, USER CHARGES AND SERVICE FEES (1982); THOMAS SNYDER & MICHAEL A. STEGMAN, PAYING FOR GROWTH: USING DEVELOPMENT FEES TO FINANCE INFRASTRUCTURE (1986); William A. Fischel, *The Economics of Land Use Exactions: A Property Rights Analysis*, 50 LAW & CONTEMP. PROBS. 101 (Winter 1987); Donald G.Hagman, *Landowner-Developer Provision of Commercial Goods Through Benefit-Based and Harm Avoidance Payments (BHAPS)*, 5 ZONING & PLAN. L. REP. 17 (1982); Fred Jacobsen & Jeff Redding, *Impact Taxes: Making Development Pay Its Way*, 55 N.C. L. REV. 407 (1977); James C. Nicholas, *Impact Exactions: Economic Theory, Practice and Incidence*, 50 LAW & CONTEMP. PROBS. 85 (Winter 1987); Michael A. Stegman, *Development Fees For Infrastructure*, 45 URB. LAND 2 (May 1986); David D. DiBari, Comment, *Impact Fee Exactions in New York: The Taxman Always Rings Twice*, 52 ALB. L. REV. 287 (1987); Martha Lester, Comment, *Subdivision Exactions in Washington: The Controversy Over Imposing Fees on Developers*, 59 WASH. L. REV. 289 (1984); James Vollman, Note, *Impact Fees: Michigan Joins the National Debate on Who Pays the Cost of Development*, 34 WAYNE L. REV. 1667 (1988) (noting validity of fees if assessment-like but not if general welfare revenue-like).

subdivision regulatory powers do not include the power to tax,[341] and some fees may be characterized as taxes[342] or special

341. *E.g.*, Trend Homes, Inc. v. Central Unified Sch. Dist., 269 Cal. Rptr. 349 (Ct. App. 1990) (ruling that fees are special taxes if they exceed reasonable cost of providing services or activity); Eastern Diversified Properties, Inc. v. Montgomery County, 570 A.2d 850 (Md. 1990) (invalidating impact fee for area transportation expansion needs; the court demonstrating hostility in characterizing the generation of funds as taxing which even charter counties lack specific enabling authority to enact); Haugen v. Gleason, 359 P.2d 108 (Or. 1961).

342. *See, e.g.*, Bixel Assocs. v. City of Los Angeles, 265 Cal. Rptr. 347 (Ct. App. 1989) (invalidating fire hydrant building permit condition fee for failure of city to show that method used to calculate fee bore a fair and substantial relation to developer's benefit deemed required by § 54990 of the California Government Code and thus constitutionally mandated; insisting that the fee should exclusively reflect the cost of new development, such as where fee is earmarked and directed to undeveloped area facilities or based on square footage generation factor; court appeared to apply the uniquely attributable test rather than the California reasonableness standard); Bloom v. City of Fort Collins, 784 P.2d 304 (Colo. 1989) (holding that authorization of city council to transfer excess transportation fee for other purposes transformed fee to impermissible tax although provision severable); Broward County v. Janis Dev. Corp., 311 So. 2d 371 (Fla. 4th DCA 1975) (holding that $200 per new dwelling to finance citywide road and bridge construction exceeds city authority thus constituting an illegal tax for failing to specify how and when funds would be spent); Eastern Diversified Properties, Inc. v. Montgomery County, 570 A.2d 850 (Md. 1990) (invalidating area highway impact fee imposed as condition of building permit by home rule county as unauthorized tax; characterizing the generation of money as a tax; refusing to interpret as regulatory exaction despite earmarking and an arguable nexus to generated need); Lechner v. City of Billings, 797 P.2d 192 (Mont. 1990) (holding that water and sewer system development fees were not an impermissible sales tax); Daniels v. Borough of Point Pleasant, 129 A.2d 265 (N.J. 1957) (finding building permit inspection fee at 700% of cost to offset school costs an invalid tax); Sanchez v. City of Santa Fe, 481 P.2d 401 (N.M. 1971) (exemplifying a lack of regulatory authority to impose public facilities fee which did not include power to tax); Albany Area Builders Ass'n v. Town of Guilderland, 534 N.Y.S.2d 791, 797 (N.Y. 1988) (invalidating transportation impact fees of $937 per house and $375 per multifamily unit to be used for roads and imposed on development generating traffic increase for lack of enabling authority because effects extend beyond local boundaries and because the fee resembles a tax; further holding that fees were impliedly preempted by state highway funding laws), *aff'd*, 546 N.E.2d 920 (N.Y. 1989); Ohio *ex rel.* Waterbury Dev. Co. v. Witten, 377 N.E.2d 505 (Ohio 1978) (sewer and park fees met neither taxation nor assessment requirements); Haugen v. Gleason, 359 P.2d 108 (Or. 1961) (finding that primary purpose was revenue and added no benefit to the subdivision); Cranbarry Township v. Builders Ass'n, 587 A.2d 32 (Pa. Commw. Ct. 1991) (dismissing appeal for mootness as now validated by retroactive authorization statute where the trial court had invalidated the highway impact fee ordinance as a tax); Weber Basin Home Builders Ass'n v. Roy City, 487 P.2d 866 (Utah 1971) (permit fee increase conceded to raise money for general fund, not claimed to be in line with regulatory cost); San Telmo Assocs. v. City of Seattle, 735 P.2d 673 (Wash. 1987) (holding that resident relocation or contribution to low income housing fund as conversion condition an illegal tax), *superseded*, Southwick, Inc. v. City of Lacey, 795 P.2d 712 (Wash. Ct. App. 1990) (holding that cost alone does not constitute a tax; conditions for fire sprinklers, alarm systems, and water supply within "voluntary agreement" statutory exemption); Hillis Homes, Inc. v. Snohomish County, 650 P.2d 193 (Wash. 1982) (invalidating, because of improper fiscal motive, a $250 per dwelling park fee as a tax designed to accomplish public benefits costing money rather than regulation); *accord* Prisk v. City of Poulsbo, 732 P.2d 1013 (Wash. Ct. App. 1987) (holding that park fees in lieu of dedication are authorized by environmental mitigation power); Ivy Club Investors Ltd. Partnership v. City of Kennewick, 699 P.2d 782 (Wash. Ct. App. 1985) (finding that a city may not condition condominium conversion, not within subdivision definition, on park fee payment, characterized

assessments[343] in the course of invalidation, fees reflecting off-site service and facility extension impact costs increasingly are validated.[344] Typical are fees in lieu of dedication,[345] impact fees,[346] and utility connection fees.[347] These fees may cover the costs of service

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as a tax, as development already in existence); WASH. REV. CODE ANN. § 82.02.020 (West Supp. 1990) (on-site impact fee authorization); *cf.* Santa Clara County Contractors and Home Ass'n v. Santa Clara, 43 Cal. Rptr. 86 (Ct. App. 1965) (invalidating fee as it was directed to general revenues for general city benefit); *see also* Holmdel Builders Ass'n v. Township of Holmdel, 583 A.2d 277 (N.J. 1990) (invalidating municipal fee as an invalid effect if primary purpose is to raise general revenue, but finding a permissible regulatory exaction if primary purpose is to reimburse municipality for services reasonably related to development; upholding inclusionary housing linkage fees). *But see* Home Builders & Contractors Ass'n v. Board of County Comm'rs, 446 So. 2d 140 (Fla. 4th DCA 1983), *appeal dismissed*, 409 U.S. 976 (1984) (road impact fee not a tax); *cf.* The Pines v. City of Santa Monica, 630 P.2d 521 (Cal. 1981) (municipal tax on condominium subdivisions not preempted by state subdivision law); Westfield-Palos Verdes Co. v. City of Rancho Palos Verdes, 141 Cal. Rptr. 36 (Ct. App. 1977) (sustaining tax of $500 per bedroom, up to $1000 per dwelling); Associated Home Builders v. City of Newark, 95 Cal. Rptr. 648 (Ct. App. 1971) (holding that business license tax may be imposed on building permits); Call v. City of W. Jordan, 606 P.2d 217, 220-21 (1979) (considering an attempt to challenge in lieu fee for flood control, parks, and recreation as a tax merely an exercise in semantics), *reh'g*, 614 P.2d 1257 (Utah 1980).

343. *See, e.g.*, Kern County Builders, Inc. v. North of the River Mun. Water Dist., 263 Cal. Rptr. 5 (Ct. App. 1989).

344. *See* South Shell Inv. v. Town of Wrightsville Beach, 703 F. Supp. 1192 (E.D.N.C. 1988) (impact fees and utility connection fees), *aff'd mem.*, 900 F.2d 255 (4th Cir. 1990); Associated Home Builders of the Greater E. Bay, Inc. v. City of Walnut Creek, 484 P.2d 606 (Cal.), *appeal dismissed*, 404 U.S. 878 (1971) (dedication of land or in lieu park and recreation fee not double taxation); Building Indus. Ass'n v. City of Oxnard, 267 Cal. Rptr. 769 (Ct. App. 1990) (partially published opinion sustaining "growth requirements capital fee" charged to new development for a share of the cost of expanded public facilities with commercial and industrial development not charged for recreation, cultural, and civic facilities, the funds placed in trust fund earmarked for expansion; the fee approximating the per-square-foot cost of existing facilities; need not prove precise facilities funded serve the project under *Walnut Creek* as reasonable needs generation nexus under *Nollan*); City of Key West v. R.L.J.S. Corp., 537 So. 2d 641 (Fla. 3d DCA 1989) (fee imposed on condominium development after permit); Jenad, Inc. v. Village of Scarsdale, 218 N.E.2d 673 (N.Y. 1966) (in lieu park fee not a tax); Cranberry Township v. Builders Ass'n, 587 A.2d 32 (Commw. Ct.) (although highway impact fee ordinance invalidated as tax by trial court, appeal dismissed for mootness as now validated by retroactive authorization statute), *appeal granted*, 600 A.2d 955 (Pa. 1991). *But cf.* Johnson v. Reasor, 392 S.W.2d 54 (Ky. 1965) (utility connection fees imposed on subdividers but not individual lot owners ruled discriminatory); New Jersey Builders Ass'n v. Mayor of Bernards Township, 528 A.2d 555 (N.J. 1987) (invalid to charge new development for its proportional share of all new road improvements in region as fails to bear nexus to demand created by the development as off-site improvements must be necessitated by the development under N.J. STAT. ANN. 40:55D-42 (West Supp. 1990)). *See generally* ROBERT W. BURCHELL & DAVID LISTOKIN, PRACTITIONER'S GUIDE TO FISCAL IMPACT ANALYSIS (1980) (utilizing fiscal impact analysis to support fees); Robert W. Burchell et al., *Fiscal Impact Analysis as a Tool for Land Use Regulation*, 7 REAL EST. L.J. 132 (1978); James Nicholas & Arthur C. Nelson, *Determining the Appropriate Development Impact Fee Using the Rational Nexus Test*, 54 J. AM. PLAN. A. 56 (1988).

345. *See infra* part V.D.1.

346. *See infra* part V.D.2.

347. *See infra* part V.D.3.

expansion associated with water and sewer facilities, off-site street improvements, and flood control. More recently, communities have begun to charge exactions for various services and facilities where it has been found that general tax revenues and user fees cannot adequately finance development, expansion, maintenance, and delivery of services such as schools,[348] transportation,[349] area and regional street programs,[350] day care,[351] and affordable housing.[352] Whether a fee is sustained or characterized as an improper tax may be a function of form. The locality should ensure that the measure or its preamble states the objectives of the regulation and designates a specific fund to receive the revenues.[353] A court must be able to con-

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348. *See, e.g.*, Trend Homes, Inc. v. Central Unified Sch. Dist., 269 Cal. Rptr. 349 (Ct. App. 1990); Laguna Village, Inc. v. County of Orange, 212 Cal. Rptr. 267 (Ct. App. 1985) (imposing school fees after tentative tract approval as condition for building permit); Trent Meridith, Inc. v. City of Oxnard, 170 Cal. Rptr. 685 (Ct. App. 1981) (requiring developer to dedicate land to school district or pay fees).

349. *See, e.g.*, Russ Bldg. Partnership v. City and County of San Francisco, 750 P.2d 324 (Cal.), *appeal dismissed sub nom.* Crocker Nat'l Bank v. City and County of San Francisco, 488 U.S. 881 (1988) (sustaining $5 per square foot transit fee for commercial property development despite the fact that the fee was established two years after permit and construction commencement as the court ruled the permit and environmental impact report envisioned as transit funding obligation); CAL. GOV'T CODE § 66475.1 (West 1983) (providing that subdiv. of 200 parcels or more may require dedication of land for bicycle paths); Bloom v. City of Fort Collins, 784 P.2d 304 (Colo. 1989) (ruling that transportation utility fee for street maintenance charged to fronting lots not a property tax but a special fee and need not be based on assessed property value; invalidating provision allowing excess revenues to be used for other purposes); City of Key West v. R.L.J.S. Corp., 537 So. 2d 641 (Fla. 3d DCA 1989) (fee for traffic imposed on condominium development after permit); *see also* York, *Transportation Utility Fees: The Newest Revenue Enhancement*, 43 LAND USE L. & ZONING DIG. 3 (Aug. 1991). *But cf.* Albany Area Builders Ass'n v. Town of Guilderland, 546 N.E.2d 920 (N.Y. 1989), *aff'g* 534 N.Y.S.2d 797 (App. Div. 1988).

350. *See, e.g.*, Eastern Diversified Properties, Inc. v. Montgomery County, 570 A.2d 850 (Md. 1990) (invalidating area highway impact fee imposed as condition of building permit by home rule county as unauthorized tax; characterizing the generation of money as a tax and refusing to interpret as regulatory exaction despite earmarking and arguable nexus to generated need). *But cf.* New Jersey Builders Ass'n v. Mayor of Bernards Township, 528 A.2d 555 (N.J. 1987) (holding that it is invalid to charge new development for its proportional share of all new road improvements in region as fails to bear nexus to demand created by the development under N.J. STAT. ANN. 40:55D-42 (West 1990)); Albany Area Builders Ass'n v. Town of Guilderland, 546 N.E.2d 920 (N.Y. 1989), *aff'g* 534 N.Y.S.2d 791 (App. Div. 1988).

351. *See, e.g.*, San Franciscans For Reasonable Growth v. City and County of San Francisco, 258 Cal. Rptr. 267 (Ct. App. 1989) (grandfathering of earlier projects sustained).

352. *See, e.g.*, Commercial Builders v. City of Sacramento, 941 F.2d 872 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1997 (1992); Terminal Plaza Corp. v. City and County of San Francisco, 223 Cal. Rptr. 379 (1986) (validating fee for converted residential units); Holmdel Builders Ass'n v. Township of Holmdel, 583 A.2d 277 (N.J. 1990). *But see* San Telmo Assocs. v. City of Seattle, 735 P.2d 673 (Wash. 1987) (housing fund contribution or relocation ruled an illegal tax).

353. *See* Bixel Assocs. v. City of Los Angeles, 265 Cal. Rptr. 347 (Ct. App. 1989) (invalidating fire hydrant building permit condition fee as invalid tax for failure of city to show method used to calculate fee bore a fair and substantial relation to developer's benefit as deemed required by *California Government Code* section 54990 and constitutionally mandated but without

clude that the primary purpose is regulatory rather than revenue raising.[354] For example, the Arizona Supreme Court, in *Home Builders Ass'n v. Riddel*,[355] invalidated a $100 building permit fee as a tax unauthorized by state law.[356]

Impact fees,[357] unlike taxes,[358] often do not require specific enabling legislation.[359] In addition, the fees should reasonably reflect

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analysis or explanation; court insisted the fee should exclusively reflect the cost of new development, such as where fee is earmarked and directed to undeveloped area facilities or based on square footage generation factor; court appeared to apply the uniquely attributable test rather than the California reasonableness standard); B & P Dev. Corp. v. City of Saratoga, 230 Cal. Rptr. 192 (Ct. App. 1986) (engineering and inspection fees, while not authorized by map act, valid under state housing law); Trent Meridith, Inc. v. City of Oxnard, 170 Cal. Rptr. 685 (Ct. App. 1981) (fee is charge on privilege of development thus not a property or special tax); Town of Longboat Key v. Lands End, Ltd., 433 So. 2d 574 (Fla. 2d DCA 1983) (invalidating dedication or in lieu ordinance as a tax for failure to earmark so as to benefit the subdivision); Gulest Assocs. v. Town of Newburgh, 209 N.Y.S.2d 729 (Sup. Ct. 1960) (proceeds into general fund invalid), *overruled by* Jenad, Inc. v. Village of Scarsdale, 218 N.E.2d 673 (N.Y. 1966) (approving park dedication in lieu fee); S & P Enters., Inc. v. City of Memphis, 672 S.W.2d 213 (Tenn. Ct. App. 1983) (fee found to reasonably relate to regulating mechanical amusement devices); *cf.* Holmdel Builders Ass'n v. Township of Holmdel, 583 A.2d 277 (N.J. 1990) (ruling that municipal fee is an invalid effect if primary purpose is to raise general revenue, but the fee is a permissible regulatory exaction if primary purpose is to reimburse municipality for services reasonably related to development; upholding inclusionary housing linkage fees); Call v. City of W. Jordan, 606 P.2d 217, 220 (Utah 1979) (holding that in lieu fees for flood control, parks, and recreation impliedly becomes a trust fund for the purpose collected).

354. American Nat'l Bldg. & Loan Ass'n v. City of Baltimore, 224 A.2d 883 (Md. 1966); Holmdel Builders Ass'n v. Township of Holmdel, 583 A.2d 277 (N.J. 1990) (ruling that municipal fee is for an invalid effect if primary purpose is to raise general revenue, but the fee is a permissible regulatory exaction if the primary purpose is to reimburse municipality for services reasonably related to development).

355. 510 P.2d 376 (Ariz. 1973).

356. *See also* Merrelli v. City of Saint Clair Shores, 96 N.W.2d 144 (Mich. 1959) (building permit fee in excess of cost of administration an invalid tax); Daniels v. Borough of Point Pleasant, 129 A.2d 265 (N.J. 1957) (holding that an increased builder permit fee is an ultra vires tax); Lafferty v. Payson City, 642 P.2d 376 (Utah 1982) (holding that an $1000 per unit impact fee deposited in general revenue fund is an invalid tax).

357. *E.g.*, Jordan v. Village of Menomonee Falls, 137 N.W.2d 442 (Wis. 1965), *appeal dismissed*, 385 U.S. 4 (1966).

358. *E.g.*, Norwick v. Village of Winfield, 225 N.E.2d 30 (Ill. App. Ct. 1967) (reasonable user fee allowed).

359. South Shell Inv. v. Town of Wrightsville Beach, 703 F. Supp. 1192 (E.D.N.C. 1988) (impact fees and utility connection fees in North Carolina), *aff'd mem.*, 900 F.2d 255 (4th Cir. 1990); Lechner v. City of Billings, 797 P.2d 192 (Mont. 1990); Holmdel Builders Ass'n v. Township of Holmdel, 583 A.2d 277 (N.J. 1990) (holding that state's fair housing act requiring development of fair share of affordable housing implicitly authorizes housing linkage impact fee exaction, but also requires authorizing regulations containing standards to be issued by the Council on Affordable Housing); Albany Area Builders Ass'n v. Town of Guilderland, 546 N.E.2d 920 (N.Y. 1989), *aff'g* 534 N.Y.S.2d 791 (App. Div. 1988) (invalidating transportation impact fees of $937 per house and $375 per multifamily unit to be used for roads and imposed on development generating traffic increase; finding lack of enabling authority because effects extend beyond local boundaries and because the fee resembles a tax; further holding that fees

increased capital costs relative to the benefit conferred on the development,[360] and the fees should be earmarked for the timely execution of the capital facilities expansion program.[361] One effective

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were impliedly preempted by state highway funding laws). *But see* City of Montgomery v. Crossroads Land Co., 355 So. 2d 363 (Ala. 1978) (holding that in lieu park fee cash payments that are characterized as tax require specific statutory authority; strictly construing assessment legislation against the municipality); Midtown Properties, Inc. v. Township of Madison, 172 A.2d 40 (N.J. Super. Ct. 1961) (lack of enabling legislation to condition subdivision approval on school fees), *aff'd*, 189 A.2d 226 (N.J. App. Div. 1963); Cranberry Township v. Builders Ass'n, 587 A.2d 32 (Commw. Ct.) (although highway impact fee ordinance invalidated as tax by trial court, appeal dismissed for mootness as now validated by retroactive authorization statute), *appeal granted*, 600 A.2d 955 (Pa. 1991).

360. Bixel Assocs. v. City of Los Angeles, 265 Cal. Rptr. 347 (Ct. App. 1989) (invalidating a fire hydrant building permit condition fee as invalid tax for failure of city to show that method used to calculate fee bore a fair and substantial relation to developer's benefit as deemed required by *California Government Code* section 54990 and constitutionally mandated; insisting that fee should exclusively reflect the cost of new development, such as where fee is earmarked and directed to undeveloped area facilities or based on square footage generation factor; appearing to apply the uniquely attributable test rather than the California reasonableness standard); Contractors & Builders Ass'n v. City of Dunedin, 329 So. 2d 314 (Fla. 1976), *subsequent proceedings*, 358 So. 2d 846 (Fla. 2d DCA 1978), *cert. denied*, 444 U.S. 867 (1979); City of Key West v. R.L.J.S. Corp., 537 So. 2d 641 (Fla. 3d DCA 1989); Hayes v. City of Albany, 490 P.2d 1018 (Or. Ct. App. 1971) (sewer connection fee); Lafferty v. Payson, 642 P.2d 376 (Utah 1982) (may not require double payment by paying for existing facilities and payment of existing indebtedness through future taxes); Cranberry Township v. Builders Ass'n, 587 A.2d 32 (Commw. Ct.) (ordinance providing for area highway impact fee used formula based on percentage of area roads needed due to new development ($75,000,000); allocating unit costs based on projected weekday trip generation ($91.82 per trip)), *appeal granted*, 600 A.2d 955 (Pa. 1991); Banberry Dev. Corp. v. South Jordan City, 631 P.2d 899, 903 (Utah 1981); Hillis Homes, Inc. v. Public Util. Dist. No. 1, 714 P.2d 1163 (Wash. 1986) (holding that reasonableness of fees is based on a balancing of factors including cost of existing capital facilities, current financing techniques, extent of contribution to system by newly developed properties and extent in future, extent of credit to developer for providing facilities which will benefit other properties, extraordinary costs in servicing new facilities, and the current value of previous improvements to allow a fair comparison of funds paid over time; also recognizing the need for flexibility due to the difficulty of exact measurement); *cf.* Trend Homes, Inc. v. Central Unified Sch. Dist., 269 Cal. Rptr. 349 (Ct. App. 1990) (holding that fees are special taxes if exceed reasonable cost of providing services or activity).

361. Bixel Assocs. v. City of Los Angeles, 265 Cal. Rptr. 347 (Ct. App. 1989) (invalidating fire hydrant building permit condition fee as invalid tax for failure of city to show that method used to calculate fee bore a fair and substantial relation to developer's benefit deemed required by § 54990 of the California Government Code and constitutionally mandated but without analysis or explanation; insisting the fee should exclusively reflect the cost of new development, such as where fee is earmarked and directed to undeveloped area facilities or based on square footage generation factor; appearing to apply the uniquely attributable test rather than the California reasonableness standard); Santa Clara County Contractors Ass'n v. City of Santa Clara, 43 Cal. Rptr. 86 (Ct. App. 1965) (invalidating building permit fee as proceeds go to general revenue for future recreational needs throughout community); Contractors Ass'n v. City of Dunedin, 329 So. 2d 314 (Fla. 1976); *subsequent proceedings*, 358 So. 2d 846 (Fla. 2d DCA 1978), *cert. denied*, 444 U.S. 867 (1979); City of Key West v. R.L.J.S. Corp., 537 So. 2d 641 (Fla. 3d DCA 1989) (imposing fee on condominium development after permit); Home Builders Ass'n v. Board of County Comm'rs, 446 So. 2d 140 (Fla. 4th DCA 1983), *appeal dismissed*, 469 U.S. 976 (1984)

drafting device is to provide for fee refunds for fees in excess of expended revenues.[362] California has established guidelines for the collection, retention, and refund of fees.[363] Despite liberal California fee guidelines, redevelopment agencies are not authorized under the subdivision map act or redevelopment law to exact impact fees, particularly where imposed to permit reimbursement for developer costs from subsequent benefitted developers.[364] Permit fees should

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(holding that fees of $300 per house, $200 per multifamily unit, and $175 per mobile home did not exceed costs of improvement which benefitted the development to be spent in zone within six years); Town of Longboat Key v. Lands End, Ltd., 433 So. 2d 574 (Fla. 2d DCA 1983) (invalidating dedication or in lieu ordinance as a tax for failure to earmark so as to benefit the subdivision); Hollywood, Inc. v. Broward County, 431 So. 2d 606 (Fla. 4th DCA 1983) (earmarked for parks within 15 miles); Village of Royal Palm Beach v. Home Builders Ass'n, 386 So. 2d 1304 (Fla. 4th DCA 1980) (impact fees); Broward County v. Janis Dev. Corp., 311 So. 2d 371 (Fla. 4th DCA 1975) ($200 per new dwelling to finance citywide road and bridge construction exceeds city authority constituting an illegal tax for failing to specify how and when funds would be spent); Gulest Assocs. v. Town of Newburgh, 209 N.Y.S.2d 729 (Sup. Ct. 1960) (lack of earmarking), *overruled by* Jenad, Inc. v. Village of Scarsdale, 218 N.E.2d 673 (N.Y. 1966); Amherst Builders v. City of Amherst, 402 N.E.2d 1181 (Ohio 1980) (earmarked in special fund and expended in reasonable time or refunded); Haugen v. Gleason, 359 P.2d 108, 111 (Or. 1961) (payments into general fund yield tax characterization); Hayes v. City of Albany, 490 P.2d 1018 (Or. Ct. App. 1971) (holding that sewer connection fee must be reasonably related to expansion costs, observing earmarked for expansion under ordinance); City of College Station v. Turtle Rock Corp., 680 S.W.2d 802, 805-06 (Tex. 1984): Berg Dev. Co. v. Missouri City, 603 S.W.2d 273 (Tex. Civ. App. 1980) (invalidating fee in lieu as fees not earmarked to benefit subdivision); Lafferty v. Payson City, 642 P.2d 376, 378 (Utah 1982) (holding that $1000 per dwelling building permit impact fee deposited in general fund is an invalid tax); Call v. City of W. Jordan, 606 P.2d 217, 220 (Utah 1979) (holding that in lieu fees for flood control, parks, and recreation impliedly becomes a trust fund for the purpose collected); *cf.* Associated Home Builders of the Greater E. Bay, Inc. v. City of Walnut Creek, 484 P.2d 606, 613, *appeal dismissed*, 404 U.S. 878 (1971) (holding that in lieu park fee requires expenditure for only those park or recreational purposes available to all residents; distinguishing fees going into general revenue funds from in lieu fee, as here that are earmarked for park and recreational facilities); City of Miami Beach v. Jacobs, 315 So. 2d 227 (Fla. 3d DCA 1975) (ruling water "fire line" charge as a discriminatory tax as unrelated to use since funds were not earmarked for system expansion).

362. Coates v. Planning Bd., 445 N.E.2d 642, 643 (N.Y. 1983); *cf.* Amherst Builders v. City of Amherst, 402 N.E.2d 1181 (Ohio 1980) (earmarked in special fund and expended in reasonable time or refunded).

363. *See* Trend Homes, Inc. v. Central Unified Sch. Dist., 269 Cal. Rptr. 349 (Ct. App. 1990) (showing the statute of limitations as 30 days before initiating suit notice of basis for challenge, 120 days to file action to attack ordinance, and 180 days to seek restitution after tender in protest where previously had to halt work); CAL. GOV'T CODE §§ 66000-66003 (West Supp. 1991) (requires identification of purpose demonstrating the reasonable relationship to the need and type of development and that fairly attributable to the developer where improvement not on-site), 66006 (West Supp. 1991) (requires deposit of fees and findings of continuing need if not expended within five years and unspent proceeds and interest to be refunded to current owners unless outweighed by administrative cost); *see also* RRLH, Inc. v. Saddleback Valley Unified Sch. Dist., 272 Cal. Rptr. 529 (Ct. App. 1990) (school fees may be collected as condition of permit under state statute rather than previous local rule allowing payment at final inspection).

364. Price Dev. Co. v. Redevelopment Agency, 852 F.2d 1123 (9th Cir. 1988).

not exceed the cost of system administration.[365] Although tax characterization is typically the death knell for fees, some states have endorsed impact fee taxes.[366] Unlike compliance with other development conditions, most courts have ruled that payment of fees does not waive objections to the validity of the charge.[367] Developers who successfully challenge exaction fees may be forced to refund such

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365. Santa Clara County Contractors Ass'n v. Santa Clara, 43 Cal. Rptr. 86 (Ct. App. 1965) (holding that a city may impose reasonable fees covering cost of map examination, engineer certificate, and to defray actual costs of site and neighborhood drainage facilities); Merrelli v. City of Saint Clair Shores, 96 N.W.2d 144 (Mich. 1959); Lodge of the Ozarks, Inc. v. City of Branson, 796 S.W.2d 646 (Mo. Ct. App. 1990) (sustaining permit fees from $1 to $4.25 per $1000 of cost of construction in light of evidence that actual inspection costs were far in excess of fees); Daniels v. Borough of Point Pleasant, 129 A.2d 265 (N.J. 1957) (invalidating building permit inspection fee 700% of cost to offset school costs as an impermissible tax); Flama Constr. Corp. v. Franklin Township, 493 A.2d 587 (N.J. Super. Ct. App. Div. 1985) (may require funds deposited in escrow to cover professional subdivision review fees); Economy Enters., Inc. v. Township Comm., 250 A.2d 139 (N.J. Super. Ct. App. Div. 1969) (finding inspection and engineering supervision fees reasonable but invalidating subjective estimate of reimbursable fee or escrow for repairs or damages; recommending a fixed mathematical schedule with fees deposited in general treasury with budgeted payments to engineer); Prudential Co-op. Realty Co. v. City of Youngstown, 160 N.E. 695 (Ohio 1928) (reasonable plan commission fees); Weber Basin Home Builders Ass'n v. Roy City, 487 P.2d 866 (Utah 1971). *But cf.* National Realty Corp. v. City of Va. Beach, 163 S.E.2d 154 (Va. 1968) (finding lack of charter or other authorization to impose $25 per lot examination and plat approval fee); Fairfield Dev. Corp. v. City of Virginia Beach, 180 S.E.2d 533 (Va. 1971) (fee enabling legislation adopted).

366. *See, e.g.*, Cherry Hills Farms, Inc. v. City of Cherry Hills Village, 670 P.2d 779 (Colo. 1983) (invalidating development fee tax); CAL. GOV'T CODE §§ 65970-65981 (West 1983 & Supp. 1991); *cf.* The Pines v. City of Santa Monica, 630 P.2d 521 (Cal. 1981) (holding $1000 per unit condominium conversion charge not preempted by subdivision law), *disapproving* Santa Clara County Contractors Ass'n v. Santa Clara, 43 Cal. Rptr. 86 (Ct. App. 1965) (invalidating fee as directed to general revenues for general city benefit, as here for future city park and recreation needs).

367. *See, e.g.*, South Shell Inv. v. Town of Wrightsville Beach, 703 F. Supp. 1192 (E.D.N.C. 1988) (statute of limitations runs from payment), *aff'd mem.*, 900 F.2d 255 (4th Cir. 1990); Trend Homes, Inc. v. Central Unified Sch. Dist., 269 Cal. Rptr. 349 (Ct. App. 1990) (showing statute of limitations as 30 days before initiating suit notice of basis for challenge, 120 days to file action to attack ordinance, and 180 days to seek restitution after tender in protest where previously had to halt work); Newport Bldg. Corp. v. City of Santa Ana, 26 Cal. Rptr. 797 (Ct. App. 1962); Rosen v. Village of Downers Grove, 167 N.E.2d 230 (Ill. 1960) (escrow accounts paid under protest and duress); Ridgemont Dev. Co. v. City of E. Detroit, 100 N.W.2d 301 (Mich. 1960); S.S. & O. Corp. v. Township of Bernards Sewerage Auth., 301 A.2d 738 (N.J. 1973); *cf.* Admiral Dev. Corp. v. City of Maitland, 267 So. 2d 860 (Fla. 4th DCA 1972) (holding that no estoppel existed to challenge because entered into negotiations over dedication or in lieu payment); Call v. City of W. Jordan, 606 P.2d 217 (Utah 1979) (implicit), *reh'g*, 614 P.2d 1257 (Utah 1980). *But cf.* B & P. Dev. Corp. v. City of Saratoga, 230 Cal. Rptr. 192 (Ct. App. 1986) (holding that subdivision map act provides exclusive means to obtain fee refund following final map filing by petition after five years without lot sale); Board of Educ. v. Surety Developers, Inc., 321 N.E.2d 99 (Ill. App. Ct. 1974), *aff'd on other grounds*, 347 N.E.2d 149 (Ill. 1975) (may enforce illegal exaction if agreed to in contract); Goforth Properties, Inc. v. Town of Chapel Hill, 323 S.E.2d 427 (N.C. Ct. App. 1984) (restaurant owners estopped to challenge where proceeded to construct under what in effect was a variance in the form of a conditional use permit conditioned on a fee or provision of off-street parking but distinguished in *South Shell Inv.*).

fees to subdivision homeowners to the extent such fees increased home prices.[368] Fees may be collected from lot owners pursuant to covenant-created obligations.[369] Conversely, agreements such as leases providing for services or facilities without fee provision may bar the application of subsequently imposed fee provisions.[370] Communities increasingly rely on user fees to finance service delivery as an alternative to taxation.[371]

1. Fees In Lieu of Dedication

Traditionally, subdivision regulations required a portion of the subdivision to be dedicated for use as park, open space, or playground. In many communities and neighborhoods, comprehensive park plans may rely on regional rather than on neighborhood parks, or there may already be a large park developed or proposed on a neighboring tract. In the absence of in lieu fees, communities composed of numerous very small subdivisions might otherwise be denied significant parks offering comprehensive recreation facilities. In such cases, it makes good sense to develop the park plan and, in lieu of land dedication, require the subdivider to pay a fee equal in value to the land dedication to support an equitable share of the park development program.[372]

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368. *See, e.g.*, Colonial Oaks W., Inc. v. Township of E. Brunswick, 296 A.2d 653, 660 (N.J. 1972); *accord* S.S. & O. Corp. v. Township of Bernards Sewerage Auth., 301 A.2d 738, 747 (N.J. 1973); *cf.* Coleman v. Bossier City, 305 So. 2d 444 (La. 1974) (invalidating contract between developer and city for half of water and sewer fees to be refunded, but finding that developer could recover in *quantum meruit*).

369. Rasp v. Hidden Valley Lake, Inc., 519 N.E.2d 153 (Ind. Ct. App. 1988) (sewer and water fees).

370. *See* Lodge of the Ozarks, Inc. v. City of Branson, 796 S.W.2d 646 (Mo. Ct. App. 1990) (holding that lease providing for sewer connection foreclosed imposition of "capacity" fee).

371. Laurence J. Zielke, *Comment—User Fees in Lieu of Taxes: Avoiding Constitutional Limitations*, 23 URB. LAW. 439 (1991).

372. *See* Associated Home Builders of the Greater E. Bay, Inc. v. City of Walnut Creek, 484 P.2d 606 (Cal.), *appeal dismissed*, 404 U.S. 878 (1971) (ruling that dedication of parkland or recreation in lieu of a fee equal to the value of 2.5 acres per 1000 persons is applicable to properties of less than 50 parcels or where area already served by parks); Remmenga v. California Coastal Comm'n, 209 Cal. Rptr. 628 (Ct. App.), *appeal dismissed*, 474 U.S. 915 (1985) (validating $5000 beach access right-of-way fee in lieu because it reflects single-family home as a portion of total subdivision); Norsco Enters. v. City of Fremont, 126 Cal. Rptr. 659 (Ct. App. 1976) (requiring dedication of fee in lieu as condition of condominium conversion valid); Cimarron Corp. v. Board of County Comm'rs, 563 P.2d 946 (Colo. 1977) (dedication or in lieu, not both); City of Colorado Springs v. Kitty Hawk Dev. Co., 392 P.2d 467 (Colo. 1964) (holding no obligation of city to reimburse developer for 8% of value of land annexed according to agreement as condition for providing water and sewage services to subdivision used for park acquisition), *cert. denied*, 379 U.S. 647 (1965); Hollywood, Inc. v. Broward County, 431 So. 2d 606 (Fla. 4th DCA 1983) (exhibiting choice of scheduled fee, dedication of three acres per 1000 residents or the

Fees in lieu of dedication may also be used in the case of street improvements[373] or where land might have been required for flood

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value of that standard to be earmarked for local expenditure); City of Carbondale v. Brewster, 398 N.E.2d 829 (Ill. 1979) (approving in dicta park and school fees or dedication), *appeal dismissed*, 446 U.S. 931 (1980); Krughoff v. City of Naperville, 369 N.E.2d 892 (Ill. 1977) (regarding dedication or in lieu fee, trial court found need uniquely attributable and fairly apportioned to the development; city ordinance requiring the fee exempting industrial and commercial projects applied only to projects within city and not those outside yet within school district; the courts approval of this ordinance suggesting a less rigorous rational nexus standard); Collis v. City of Bloomington, 246 N.W.2d 19 (Minn. 1976) (holding that 10% as a general rule facially valid); Bayswater Realty Corp. v. Planning Bd., 560 N.E.2d 1300 (N.Y. 1990) (remanding for a required finding that a park within the development by dedication or reservation was impractical even though $5000 per lot in lieu recreation fee condition for cluster development was earmarked for a facility serving the development); Jenad, Inc. v. Village of Scarsdale, 218 N.E.2d 673 (N.Y. 1966) (implying $250 per lot under park provision waiver ordinance), *abrogated*, Weingarten v. Town of Lewisboro, 542 N.Y.S.2d 1012 (Sup. Ct. 1989), *aff'd mem.*, 559 N.Y.S.2d 807 (App. Div. 1990) (also sustaining park reservation or in lieu fee but eschewing "reasonableness" standard of *Jenad* for a more restrictive *Nollan* nexus model; ironic as *Nollan* cited *Jenad* with approval), *modified for ripeness*, 572 N.E.2d 40 (N.Y. 1991); Kessler v. Town of Shelter Island Planning Bd. 338 N.Y.S.2d 778 (App. Div. 1972) (if of adequate size a park cannot be located in plat or if impractical); City of College Station v. Turtle Rock Corp., 680 S.W.2d 802 (Tex. 1984) (or dedication); Call v. City of W. Jordan, 606 P.2d 217 (Utah 1979) (holding that cash or equivalent of 7% of subdivided land for flood control, park, and recreation within local power and impliedly held in trust fund for the improvement), *modified on reh'g*, 614 P.2d 1257 (Utah 1980) (entitling to hearing on whether fee reasonably related to needs generated by subdivision); Jordan v. Village of Menomonee Falls, 137 N.W.2d 442 (Wis. 1965), *appeal dismissed*, 385 U.S. 4 (1966) ($80 per lot school fee not a tax); CAL. GOV'T CODE §§ 65970-65971 (dedication and/or fees where school overcrowding), 66475-78 (West 1983 & Supp. 1991). *But see* City of Montgomery v. Crossroads Land Co., 355 So. 2d 363 (Ala. 1978) (finding no specific statutory authority for in lieu payments; holding enabling statute for "open spaces" insufficient); Aunt Hack Ridge Estates, Inc. v. Planning Comm'n, 230 A.2d 45 (Conn. Super Ct. 1967) (holding in lieu cash park development exaction unconstitutional because not earmarked to benefit subdivision but could be used to purchase parkland for entire town); Town of Longboat Key v. Lands End, Ltd., 433 So. 2d 574 (Fla. 2d DCA 1983) (invalidating dedication or in lieu ordinance as a tax for failure to earmark so as to benefit subdivision); Admiral Dev. Corp. v. City of Maitland, 267 So. 2d 860 (Fla. 4th DCA 1972) (holding that park development exaction ordinance calling for 5% of value or 5% dedicated exceeded charter powers); Coronado Dev. Co. v. City of McPherson, 368 P.2d 51 (Kan. 1962) (no enabling authority); Gordon v. Village of Wayne, 121 N.W.2d 823 (Mich. 1963) (lack of enabling authority); Home Builders Ass'n v. Kansas City, 555 S.W.2d 832 (Mo. 1977) (validating dedication requirement of four acres per 100 living units or 9% of land or an in lieu fee if less than two acres or an insurmountable hardship to development if reasonably attributable to development; recognizing that the increasing community need for recreation, if threatening to contribute to community need, should bear fair share of burden, and that trial court improperly placed burden on city to justify the standard; remanding the reasonableness need nexus issue); East Neck Estates, Ltd. v. Luchsinger, 305 N.Y.S.2d 922 (Sup. Ct. 1969) (validating in lieu fee or dedication for park and recreation, but ruling that the fee was here confiscatory and thereby invalid as applied where dedication of shore front property reduced value of tract nearly in half); Haugen v. Gleason, 359 P.2d 108 (Or. 1961) (invalidating a land acquisition fee not for direct benefit of subdivision as an invalid tax); Berg Dev. Co. v. Missouri City, 603 S.W.2d 273 (Tex. Civ. App. 1980) (invalidating park fee in lieu or dedication condition of one-half acre or its value for every 150 persons based on 3.5 persons per single-family home or 2.4 per multifamily unit because it bears no relation to health and safety, and it was a taking without compensation even though fees may be earmarked to benefit subdivision

control,[374] schools,[375] public resource access,[376] or other public facilities.[377] Arguments that in lieu fees constitute assessments against fu-

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with set time to make improvements; note that this decision was discredited by *Turtle Rock*); *cf.* Riegert Apartments Corp. v. Planning Bd., 441 N.E.2d 1076 (N.Y. 1982) (holding that park dedication or in lieu fee condition available under plat approval statute but not under site plan review statute); Hillis Homes, Inc. v. Snohomish County, 650 P.2d 193 (Wash. 1982) (holding $250 per dwelling park fee invalid as a tax as designed to accomplish public benefits costing money rather than regulation, an improper fiscal motive); *accord* Prisk v. City of Poulsbo, 732 P.2d 1013 (Wash. Ct. App. 1987) (holding that park fees in lieu of dedication authorized by environmental mitigation power); Ivy Club Investors, Ltd. Partnership v. City of Kennewick, 699 P.2d 782 (Wash. Ct. App. 1985) (holding that condominium conversion may not be conditioned on payment of park fees due to prior existence). Note that earlier decisions of *Hollis* and *Prisk* were superseded by WASH. REV. CODE ANN. § 82.02.020 (West. Supp. 1990) (providing in lieu enabling or exaction condition authority). *See generally* MARY E. BROOKS, MANDATORY DEDICATION OF LAND OR FEES IN LIEU OF LAND FOR PARKS AND SCHOOLS (1971); James P. Karp, *Subdivision Exactions for Park and Open Space Needs*, 16 AM. BUS. L.J. 277 (1979); John Osterhaus, Note, *Los Altos: Reconsidering the Park Land Subdivision Exaction*, 4 STAN. ENVTL. L. ANN. 104 (1982-83); Douglas Y. Curran, *Constitutional Law—Mandatory Subdivision Exactions for Park and Recreational Purposes*, 43 Mo. L. REV. 582 (1978).

373. *But cf.* Broward County v. Janis Dev. Corp., 311 So. 2d 371 (Fla. 4th DCA 1975) (holding that $200 per dwelling to finance citywide road and bridge construction exceeds city authority, thus constituting an illegal tax for failing to specify how and when funds would be spent).

374. *See, e.g.*, Call v. City of W. Jordan, 606 P.2d 217 (Utah 1979) (cash equivalent of 7% of subdivision land for flood control, parks, and recreation), *modified on reh'g*, 614 P.2d 1257 (Utah 1980) (ruling that developer entitled to hearing on whether fee reasonably related to needs generated by subdivision).

375. *See, e.g.*, Trent Meredith, Inc. v. City of Oxnard, 170 Cal. Rptr. 685, 689 (Ct. App. 1981) (a charge on privilege of development rather than a property tax); CAL. GOV'T CODE §§ 65970-65971 (West Supp. 1991) (dedication and/or fees where school overcrowding); Cimarron Corp. v. Board of County Comm'rs, 563 P.2d 946 (Colo. 1977) (dedication or in lieu, not both); City of Carbondale v. Brewster, 398 N.E.2d 829 (Ill. 1979), *appeal dismissed*, 446 U.S. 931 (1980) (dicta); Krughoff v. City of Naperville, 369 N.E.2d 892 (Ill. 1977) (finding by trial court in regards to dedication or in lieu fee that need uniquely attributable and fairly apportioned to the development where the city ordinance exempted industrial and commercial projects and applied only to projects within city and not those outside yet within school district; this decision thus suggesting a less rigorous rational nexus standard); Board of Educ. v. Surety Developers, Inc., 347 N.E.2d 149 (Ill. 1975) (holding that $50,000 and $200 per home authorized and reasonable where 98% of students from development); Morris Community High Sch. Dist. No. 101 v. Morris Dev. Co., 320 N.E.2d 37 (Ill. App. Ct. 1974); Jordan v. Village of Menomonee Falls, 137 N.W.2d 442 (Wis. 1965), *appeal dismissed*, 385 U.S. 4 (1966). *But see, e.g.*, Rosen v. Village of Downers Grove, 167 N.E.2d 230 (Ill. 1960) (ruling no statutory authority to require per lot fee despite ability to plan for school sites in subdivisions and no standards on amount to be contributed); *cf.* Haugen v. Gleason, 359 P.2d 108 (Or. 1961) (holding that land acquisition fee not for direct benefit of subdivision an invalid tax). *See generally* MARY E. BROOKS, MANDATORY DEDICATION OF LAND OR FEES-IN-LIEU OF LAND FOR PARKS AND SCHOOLS (1971).

376. *See, e.g.*, Remmenga v. California Coastal Comm'n, 209 Cal. Rptr. 628 (Ct. App.), *appeal dismissed*, 474 U.S. 915 (1985) (invalidating beach access or $5000 fee in lieu where beach otherwise virtually inaccessible most of year although the lot is a mile from the beach and the fee for single-family home as a portion of total subdivision).

377. *See, e.g.*, Aunt Hack Ridge Estates, Inc. v. Planning Comm'n, 230 A.2d 45 (Conn. Super. Ct. 1967) (parks). *But see* Coronado Dev. Co. v. City of McPherson, 368 P.2d 51 (Kan. 1962) (holding that 10% fee for public land purchase and improvement fund unauthorized);

ture property users denied the typical procedural rights of hearing and protest have been rejected.[378] In lieu fees must be imposed prior to plat approval, and courts will not permit a planning commission to reverse its approval to impose a fee condition.[379]

2. *Impact Fees*

A variation on the theme of fees in lieu of dedication is the impact fee.[380] Impact fees reflect the fact that all new development im-

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Gordon v. Village of Wayne, 121 N.W.2d 823 (Mich. 1963) (ruling lack of authority to require contribution in lieu of parkland dedication).

378. *See, e.g.*, Associated Home Builders of the Greater E. Bay, Inc. v. City of Walnut Creek, 484 P.2d 606, 614 n.10 (Cal.), *appeal dismissed*, 404 U.S. 878 (1971); Jenad, Inc. v. Village of Scarsdale, 218 N.E.2d 673 (N.Y. 1966) (holding that there is no obligation if equal showing of cost by all benefitted lots); Jordan v. Village of Menomonee Falls, 137 N.W.2d 442, 450 (Wis. 1965), *appeal dismissed*, 385 U.S. 4 (1966) ($200 per lot fee not a tax).

379. Lodico v. Herdman, 352 N.Y.S.2d 510 (App. Div. 1974). *But cf.* Kern County Builders, Inc. v. North of the River Mun. Water Dist., 263 Cal. Rptr. 5 (Ct. App. 1989) (holding that a "water development fee," originally called "connection charge," of $2500 per acre due at the time of development was an invalid impact fee because water district was without statutory authorization or police powers; holding that since the fee was like a tax in violation of Proposition 13 supermajority referendum requirement, it constituted a special assessment as levied in relation to benefit and thus violative of hearing and notice requirement for the establishment of an assessment).

380. THE CHANGING STRUCTURE OF INFRASTRUCTURE FINANCE (J. Nicholas ed., 1985); DEVELOPMENT IMPACT FEES (A. Nelson ed., 1989); THOMAS P. SNYDER, PAYING FOR GROWTH, USING DEVELOPMENT FEES TO FINANCE INFRASTRUCTURE (1986); Andrea C. Barach & Jane P. Wood, *Impact Fees in Tennessee, a Public and Private Partnership*, 18 MEM. ST. U. L. REV. 685 (1988); Barnebey et al., *Paying for Growth: Community Approaches to Development Impact Fees*, 54 J. AM. PLAN. A. 18 (1988); Gus Bauman & William H. Ethier, *Development Exactions and Impact Fees: A Survey of American Practices*, 50 LAW & CONTEMP. PROBS. 51 (Winter 1987); Fred P. Bosselman & Nancy E. Stroud, *Pariah to Paragon: Developer Exactions in Florida 1975-85*, 14 STETSON L. REV. 527 (1985); David L. Callies, *Review Essay: Impact Fees, Exactions and Paying for Growth in Hawaii*, 11 U. HAW. L. REV. 295 (1989); George C. Campbell et al., *Practical Applications of Impact Fees and Development Exactions: The Arlington, Texas, Model*, 1990 INST. ON PLAN. ZONING & EMINENT DOMAIN 5-1; Charles Connerly, *The Social Implications of Impact Fees*, 54 J. AM. PLAN. A. 75 (1988); Charles J. Delaney & Marc T. Smith, *Development Exactions: Winners and Losers*, 17 REAL EST. L.J. 195 (1989) (supporting linkage and impact fees identifying economic impact dependent on market competition); James Duncan et al., *Drafting Impact Fee Ordinances: Implementation and Administration (Part II)*, 9 ZONING & PLAN. L. REP. 57 (1986); Janet Stidman Eveleth, *The Cost of Growth: Impact Fees*, 21 MD. B.J. 16 (Mar.-Apr. 1988); Julian Conrad Juergensmeyer & Robert Mason Blake, *Impact Fees: An Answer to Local Governments' Capital Funding Dilemma*, 9 FLA. ST. U. L. REV. 415 (1981); Wendy U. Larsen & Michelle J. Zimet, *Impact Fees: et tu, Illinois?*, 21 J. MARSHALL L. REV. 489 (1988); Martin Leitner & Strauss, *Elements of a Municipal Impact Fee Ordinance, With Commentary*, 54 J. AM. PLAN. A. 225 (1988); Lawrence A. Levy, *Impact Fees, Concurrency, and Reality: A Proposal for Financing Infrastructure*, 21 URB. LAW. 471 (1989); Lillydahl et al., *The Need for a Standard State Impact Fee Enabling Act*, 54 J. AM. PLAN. A. 7 (1988); Terry D. Morgan, *Recent Developments in the Law of Impact Fees with Special Attention to Legislation*, 1990 INST. ON PLAN. ZONING & EMINENT DOMAIN 4-1; Terry D. Morgan, *The Effect of State Legislation on the Law of Impact Fees With Special Emphasis on Texas Legislation*,

poses costs on the community. Costs for additional services,[381] expansion of capital facilities,[382] and service provision capacity are reflected in impact fees.[383] Communities impose fees on the basis of

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1988 INST. ON PLAN. ZONING & EMINENT DOMAIN 7-1; Terry D. Morgan et al., *Drafting Impact Fee Ordinances: Legal Foundation for Exactions (Part I)*, 9 ZONING & PLAN. L. REP. 49 (1986); James C. Nicholas, *Impact Exactions: Economic Theory, Practice and Incidence*, 50 LAW & CONTEMP. PROBS. 85 (Winter 1987); Louise H. Renne, *Developers Fee: Housing and Transit Fees in the City and County of San Francisco—Nexus and Due Process*, 1989 INST. ON PLAN. ZONING & EMINENT DOMAIN 3-1; Steven B. Schwanke, *Local Governments and Impact Fees: Public Need, Property Rights, and Judicial Standards*, 4 J. LAND USE & ENVTL. L. 215 (1989); Charles L. Siemon, *Who Bears the Cost?*, 50 LAW & CONTEMP. PROBS. 115 (Winter 1987); Michael A. Stegman, *Development Fees for Infrastructure*, 45 URB. LAND 2 (May 1986); Michael A. Stegman, *Development Fees—In Theory and Practice*, 46 URB. LAND 2 (Apr. 1987); James G. Sweeney, *The "Impact Fee," an Exciting and Troublesome Concept*, 60 N.Y. ST. B.J. 52 (1988) (possible legality in New York); David W. Sweet & Lee P. Symons, *Pennsylvania's New Municipalities Planning Code: Policy, Politics, and Impact Fees*, 94 DICK. L. REV. 61 (1989); E. Allen Taylor, Jr., *How to Develop and Use Impact Fees Successfully*, 1988 INST. ON PLAN. ZONING & EMINENT DOMAIN 11-1; Paul A. Tiburzi, *Impact Fees in Maryland*, 17 U. BALT. L. REV. 502 (1988) (authority for small cities yet not large counties, endorsing extension); Weschler et al., *Politics and Administration of Development Exactions*, *in* DEVELOPMENT EXACTIONS 15 (James Frank & Robert Rhodes eds., 1987); David D. DiBari, Comment, *Impact Fee Exactions in New York: The Taxman Always Rings Twice*, 52 ALB. L. REV. 287 (1987); Robert C. Widner, Comment, *Supporting Municipal Impact Fee Ordinances: A Kansas Perspective*, 37 U. KAN. L. REV. 621 (1989) (argues for authority); Paul Gougelman, Note, *Impact Fees: National Perspectives to Florida Practice: A Review of Mandatory Land Dedications and Impact Fees that Affect Land Developments*, 4 NOVA L.J. 137 (1980); Kathleen Meehan DalCortivo, Note, *Impact Fees and You: Perfect Together?*, 15 SETON HALL LEGIS. J. 401 (1991); Pamina Ewing, Note, *Impact Fees in Pennsylvania: Requiring Land Developers to Bear Developer-Related Costs*, 50 U. PITT. L. REV. 1101 (1989).

381. *See, e.g.*, Northampton Corp. v. Washington Suburban Sanitary Comm'n, 366 A.2d 377 (Md. 1976) (interim sewage treatment).

382. *See, e.g.*, Building Indus. Ass'n v. City of Oxnard, 267 Cal. Rptr. 769 (Ct. App. 1990) (sustaining "growth requirements capital fee" charged to new development for a share of the cost of expanded public facilities with commercial and industrial development not charged for recreation, cultural, and civic facilities; where funds were placed in a trust fund earmarked for expansion; the fee approximated the per square foot cost of existing facilities; ruling that the city need not prove that the precise facilities funded serve the project under *Walnut Creek* as reasonable needs generation nexus under *Nollan*); Longridge Estates v. Los Angeles, 6 Cal. Rptr. 900 (Ct. App. 1960) (sewage fee); City of Dunedin v. Contractors & Builders Ass'n, 358 So. 2d 846 (Fla. 2d DCA 1978), *cert. denied*, 444 U.S. 867 (1979), *earlier proceedings*, 329 So. 2d 314 (Fla. 1976); Lechner v. City of Billings, 797 P.2d 191 (Mont. 1990) (holding that water and sewer system development fees not an impermissible sales tax); Cranberry Township v. Builders Ass'n, 587 A.2d 32 (Commw. Ct.) (ordinance providing for area highway impact fee used formula based on percentage of area roads needed due to new development ($75,000,000) allocating unit costs based on projected weekday trip generation ($91.82 per trip)), *appeal granted*, 600 A.2d 955 (Pa. 1991). *But see, e.g.*, Sanchez v. City of Santa Fe, 481 P.2d 401 (N.M. 1971) (invalidating $50 per lot public utility purchase fund fee).

383. *See, e.g.*, Russ Bldg. Partnership v. City and County of San Francisco, 750 P.2d 324 (Cal.) (applying the downtown office space developer $5 per square foot transit impact development fee as condition for occupancy certificate to project under construction; finding notice in the permit and environmental impact report indicating a transit problem requiring some program to provide funding), *appeal dismissed sub nom.* Crocker Nat'l Bank v. City and County of San Francisco, 488 U.S. 881 (1988).

residential unit constructed[384] or square feet of commercial or industrial development[385] in order to finance new water supply acquisition, water[386] and sewer[387] or solid waste[388] facilities, sewage

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384. Westfield-Palos Verdes Co. v. City of Rancho Palos Verdes, 141 Cal. Rptr. 36 (Ct. App. 1977) (ruling that an environmental "bedroom" excise tax of $500 per bedroom up to $1000 per dwelling a valid business license tax, here applied to condominium project); Home Builders Ass'n v. Board of County Comm'rs, 446 So. 2d 140 (Fla. 4th DCA 1983), *appeal dismissed*, 469 U.S. 976 (1984); *cf.* The Pines v. City of Santa Monica, 630 P.2d 521 (Cal. 1981) ($1000 per unit condominium conversion charge).

385. Russ Bldg. Partnership v. City and County of San Francisco, 750 P.2d 324 (Cal.), *appeal dismissed sub nom.* Crocker Nat'l Bank v. City and County San Francisco, 488 U.S. 881 (1988); Building Indus. Ass'n v. City of Oxnard, 267 Cal. Rptr. 769 (Ct. App. 1990) (sustaining in a partially published opinion residential charges of facilities expansion fee also by square foot).

386. *See, e.g.*, South Shell Inv. v. Town of Wrightsville Beach, 703 F. Supp. 1192 (E.D.N.C. 1988) (ruling that the city could charge new development causing need despite benefit to older development consistent with equal protection), *aff'd mem.*, 900 F.2d 255 (4th Cir. 1990); Baywood Const. Inc. v. City of Cape Coral, 507 So. 2d 768 (Fla. 2d DCA 1987) (holding that water and sewer capital expansion impact fee need not meet more stringent zoning ordinance standards); City of Dunedin v. Contractors & Builders Ass'n, 358 So. 2d 846 (Fla. 2d DCA 1978), *cert. denied*, 444 U.S. 867 (1979), *earlier proceedings*, 329 So. 2d 314 (Fla. 1976); Lechner v. City of Billings, 797 P.2d 192 (Mont. 1990); Torsoe Bros. Constr. Corp. v. Board of Trustees, 375 N.Y.S.2d 612 (N.Y. App. Div. 1975) (higher tap-in charge for commercial rational); Patterson v. Alpine City, 663 P.2d 95 (Utah 1983) (impact fee authorized by connection fee authorization statute); CAL. GOV'T CODE § 66484.5 (West 1991) (ground water recharge); *cf.* Simmons v. City of Clarkesville, 216 S.E.2d 826 (Ga. 1975) (holding that agreement of city to assist developer in recovery of $1000 water and sewer tap-in fees is illegal because it binds future governing authorities). *But see, e.g.*, Ohio *ex rel.* Waterbury Dev. Co. v. Witten, 377 N.E.2d 505 (Ohio 1978) (invalidating fee covering $500 "equity value" over connection and installation cost); Weber Basin Home Builders Ass'n v. Roy City, 487 P.2d 866 (Utah 1971) (imposing excessive burden on new households violates equal protection clause); *cf.* Kern County Builders, Inc. v. North of the River Mun. Water Dist., 263 Cal. Rptr. 5 (Ct. App. 1989) (holding that a "water development fee," originally called "connection charge," of $2500 per acre due at the time of development was an invalid impact fee because the water district was without statutory authorization or police powers; holding that since the fee was like a tax in violation of Proposition 13 supermajority referendum requirement, it constituted a special assessment as levied in relation to benefit and thus violative of hearing and notice as required for the establishment of an assessment); Southern Nev. Homebuilders Ass'n v. Las Vegas Valley Water Dist., 693 P.2d 1255 (Nev. 1985) (holding the board is limited to imposing a feeder connection charge only if it is used to recover costs identifiable with the properties charged; ruling the board's allocation inequitable).

387. *See, e.g.*, South Shell Inv. v. Town of Wrightsville Beach, 703 F. Supp. 1192 (E.D.N.C. 1988) (holding that the city could charge new development causing need despite benefit to older development consistent with equal protection), *aff'd mem.*, 900 F.2d 255 (4th Cir. 1990); City of Key West v. R.L.J.S. Corp., 537 So. 2d 641 (Fla. 3d DCA 1989); Baywood Const. Inc. v. City of Cape Coral, 507 So. 2d 768 (Fla. 2d DCA 1987) (water and sewer capital expansion impact fee need not meet more stringent zoning ordinance standards); City of Dunedin v. Contractors & Builders Ass'n, 358 So. 2d 846 (Fla. 2d DCA 1978), *cert. denied*, 444 U.S. 867 (1979), *earlier proceedings*, 329 So. 2d 314 (Fla. 1976); Lechner v. City of Billings, 797 P.2d 192 (Mont. 1990); Medine v. Burns, 208 N.Y.S.2d 12 (Sup. Ct. 1960) (sustaining development condition of joining special sewer district which required $2750 per house fee for treatment and disposal); Patterson v. Alpine City, 663 P.2d 95 (Utah 1983) (holding that impact fee authorized by connection fee authorization statute); Coulter v. City of Rawlins, 662 P.2d 888 (Wyo. 1983) (power implied

treatment,[389] roads,[390] bridges,[391] mass transit,[392] flood control,[393]

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from utility operations authority); *cf.* CAL. GOV'T CODE § 66483 (West 1983) (sewer drainage fees limited to no greater than necessary to benefit subdivision); Simmons v. City of Clarkesville, 216 S.E.2d 826 (Ga. 1975) (holding agreement of city to assist developer in recovery of $1000 water and sewer tap-in fees illegal as binding future governing authorities). *But see, e.g.*, Weber Basin Home Builders Ass'n v. Roy City, 487 P.2d 866 (Utah 1971) (imposing excessive burden on new households violates Equal Protection clause).

388. *See, e.g.*, City of Key West v. R.L.J.S. Corp., 537 So. 2d 641 (Fla. 3d DCA 1989).

389. *See, e.g.*, Northampton Corp. v. Washington Suburban Sanitary Comm'n, 366 A.2d 377 (Md. 1976) (holding that interim sewer service charge to finance interim treatment and ease moratorium is not special assessment); Hayes v. City of Albany, 490 P.2d 1018 (Or. Ct. App. 1971) (upholding sewer connection charges).

390. *See, e.g.*, City of Key West v. R.L.J.S. Corp., 537 So. 2d 641 (Fla. 3d DCA 1989) (traffic); Home Builders Ass'n v. Board of County Comm'rs, 446 So. 2d 140 (Fla. 4th DCA 1983) (holding fees of $300 per house, $200 per multifamily unit, and $175 per mobile home did not exceed costs of improvement which benefitted the development to be spent in zone within six years), *appeal dismissed*, 469 U.S. 976 (1984); CAL. GOV'T CODE §§ 66484 (West Supp. 1991) (road and bridge fee authorization), 66484.3 (West Supp. 1991) (Orange County transportation corridor fee); Cranberry Township v. Builders Ass'n, 587 A.2d 32 (Commw. Ct.) (ordinance providing for area highway impact fee used formula based on percentage of area roads needed due to new development ($75,000,000) allocating unit costs based on projected weekday trip generation ($91.82 per trip)), *appeal granted* 600 A.2d 955 (Pa. 1991); *cf.* Committee of Seven Thousand v. Superior Court, 754 P.2d 708 (Cal. 1988) (holding that local city authorization to impose transportation corridor impact fees not subject to local initiative excluding locality as regional transportation a matter of statewide concern). *But see, e.g.*, Eastern Diversified Properties, Inc. v. Montgomery County, 570 A.2d 850 (Md. 1990) (invalidating area highway impact fee imposed as condition of building permit by home rule county as an unauthorized tax; characterizing the generation of money as a tax and refused to interpret it as a regulatory exaction despite earmarking and arguable nexus to generated need); New Jersey Builders Ass'n v. Mayor of Bernards Township, 528 A.2d 555 (N.J. 1987) (holding it is invalid to charge new development for its proportional share of all new road improvements in the region as the charge fails to bear nexus to demand created by the development as off-site improvements must be necessitated by the development under N.J. STAT. ANN. 40:55D-42 (West Supp. 1990)); Albany Area Builders Ass'n v. Town of Guilderland, 546 N.E.2d 920 (N.Y. 1989), *aff'g* 534 N.Y.S.2d 797 (1988) (invalidating transportation impact fees of $937 per house and $375 per multifamily unit to be used for roads and imposed on development generating traffic increases for lack of enabling authority as effects extend beyond local boundaries and because the fee resembles a tax; and further, the fees were impliedly preempted by state highway funding laws); *cf.* Broward County v. Janis Dev. Corp., 311 So. 2d 371 (Fla. 4th DCA 1975) (holding that $200 per dwelling to finance citywide road and bridge construction exceeds city authority thus constituting an illegal tax for failing to specify how and when funds would be spent); Kode Harbor Dev. Assocs. v. County of Atlantic, 553 A.2d 858 (N.J. Super Ct. App. Div. 1989) (county lacked authority to condition site plan on road assessment for impact on county roads as statute required project to abut county road for review jurisdiction; dicta renders suspect the allocation technique based on trip generation percentage setting developer's cost percentage with more than half paid by public in light of *Bernards Township*). *See generally* York, *Transportation Utility Fees: The Newest Revenue Enhancement*, 43 LAND USE L. & ZONING DIG. 3 (Aug. 1991).

391. *Cf.* CAL. GOV'T CODE § 66484 (West Supp. 1991) (may require dedication and construction but must charge entire benefitted area a fee). *But cf.* Broward County v. Janis Dev. Corp., 311 So. 2d 371 (Fla. 4th DCA 1975) (holding that $200 per dwelling to finance citywide road and bridge construction exceeds city authority constituting an illegal tax for failing to specify how and when funds would be spent). *See generally* York, *supra* note 390.

392. *See, e.g.*, Russ Bldg. Partnership v. City and County of San Francisco, 750 P.2d 324 (Cal.) (finding notice in the permit and environmental impact report indicating a transit problem

schools,[394] libraries,[395] parks,[396] open space,[397] affordable housing,[398]

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requiring some program to provide funding), *appeal dismissed sub nom.* Crocker Nat'l Bank v. City and County of San Francisco, 488 U.S. 881 (1988) (a $5 per square foot downtown office space developer transit impact development fee as condition for building permit or occupancy certificate applied to project under construction).

393. *See, e.g.*, B & P Dev. Corp. v. City of Saratoga, 230 Cal. Rptr. 192 (Ct. App. 1986) (holding that storm drain connection fee of $6655.70 authorized by map act); Santa Clara County Contractors Ass'n v. Santa Clara, 43 Cal. Rptr. 86 (Ct. App. 1965) (holding may charge developer fees to defray actual costs of drainage facilities for site and neighborhood area); City of Buena Park v. Boyar, 8 Cal. Rptr. 674 (Ct. App. 1960) (for relief of drainage problems within subdivision as subdivision approval condition pursuant to contract); CAL. GOV'T CODE § 66483 (West 1983) (drainage facilities limited to no greater than necessary to benefit subdivision). *But cf.* 66 Op. Att'y Gen. 120 (1983) (local rules not limited to section 66483 standards if condition based on other local police power requirement); Perlmutter Assocs. v. Northglenn, 534 P.2d 349 (Colo. Ct. App. 1975) (holding that upon annexation, recorded plat owners entitled to building permits without new restraints, as here could not impose $200 per lot drainage escrow fee as approval final).

394. *See, e.g.*, Candid Enters. v. Grossmont Union High Sch. Dist., 705 P.2d 876 (Cal. 1985) (holding that school district's imposition of school impact fees on developer to finance permanent school facility was related to legitimate purpose of requiring developers to mitigate overcrowding in schools caused or aggravated by development of residential subdivision); RRLH, Inc. v. Saddleback Valley Unified Sch. Dist., 272 Cal. Rptr. 529 (Ct. App. 1990) (holding that school fees may be collected as condition of permit under state statute rather than under previous local rule that allowed payment at final inspection); Trend Homes, Inc. v. Central Unified Sch. Dist., 269 Cal. Rptr. 349 (Ct. App. 1990); Fontana Unified Sch. Dist. v. City of Rialto, 219 Cal. Rptr. 254 (Ct. App. 1985) (upholding school facilities fee upheld despite applied to land subdivided four years earlier); Laguna Village, Inc. v. County of Orange, 212 Cal. Rptr. 267 (Ct. App. 1985) (school fees imposed after tentative tract approval as condition for building permit); Trent Meredith Inc. v. City of Oxnard, 170 Cal. Rptr. 685 (Ct. App. 1981) (facilities fee or dedication in lieu); CAL. GOV'T CODE §§ 53080 (fees levied by school districts), 65970 (school facilities authorization), 65995.1 (25 cents per square foot cap on school fees from new construction projects to be occupied solely by senior citizens, limiting conversion to other uses only on payment of such fees), 66000-66007 (impact fee statute), 65995 ($1.50 per square foot residential fee and 25 cents per square foot for commercial development authorized with caps to increase with inflation) (West 1983 & Supp. 1990); St. Johns County v. Northeast Fla. Builders Ass'n, 583 So. 2d 635 (Fla. 1991) (upholding in part county ordinance imposing impact fee on new residential construction to be used for new school facilities); Board of Educ. v. Surety Developers, Inc., 347 N.E.2d 149 (Ill. 1975) ($200 per home in addition to dedication and contribution exaction where schools attended almost exclusively by residents of subdivision); Jordan v. Village of Menomonee Falls, 137 N.W.2d 442 (Wis. 1965) (authorized by general subdivision law), *appeal dismissed*, 385 U.S. 4 (1966); *cf.* Board of Educ. v. E.A. Herzog Constr. Co., 172 N.E.2d 645 (Ill. 1961) (sustaining voluntary contract between developer and local government to contribute school construction funds). *But see, e.g.*, Kelber v. City of Upland, 318 P.2d 561 (Cal. 1957) (holding school fees for future city parks violated subdivision map act); West Park Ave., Inc. v. Township of Ocean, 224 A.2d 1 (N.J. 1966) (invalidating $300 per lot school construction fee invalidated due to unfair burden on new construction as schools serve other portion of school district and no authority to charge for services traditionally supplied by general revenues other than on-site installation of capital facilities); Daniels v. Borough of Point Pleasant, 129 A.2d 265 (N.J. 1957) (ruling as an invalid tax a building permit inspection fee of 700% of cost to offset school costs an invalid tax); Midtown Properties, Inc. v. Township of Madison, 172 A.2d 40 (N.J. Super. Ct. Law Div. 1961) (lack of enabling legislation to condition subdivision approval on school fees based on formula of number of houses built), *aff'd*, 189 A.2d 226 (App. Div. 1963); *cf.* William S. Hart Union High Sch. Dist. v. Regional Planning Comm'n, 277 Cal Rptr. 645 (Ct. App. 1991) (holding that development proposals may not be denied for inade-

or other forms of infrastructure.[399]

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quate school capacity, finding the issue preempted by state school impact fee legislation). The DMS, a system to review projects to assure adequate infrastructure capacity, was weakened by the decision in *William S. Hart Union High*. It reviewed the interpretation by Los Angeles County that the DMS was preempted on the issue of adequacy of schools by the state school impact fee legislation, § 65996 of the California Government Code, which limited mitigation where school inadequacy to a fee on development as set out in the statute. The California appellate court, while ruling DMS enforceable even as to school inadequacy in zone change legislative decision making, in dicta, ruled that the impact fee was the sole mitigation measure in administrative development review and that school inadequacy would not be a basis to deny development approval. The court misinterpreted § 65996 which is expressly directed to mitigation of adverse environmental impact under the California Environmental Quality Act requiring environmental assessment and does not cover the subdivision approval process or growth management facilities timing policies. The preposterous conclusion of the appellate court in *William S. Hart Union High*, that communities may not restrict growth to assure adequate school capacity, is inconsistent with the analysis in Lincoln Property Co. N.C. v. Cucumonga Sch. Dist., 280 Cal. Rptr. 68 (Ct. App. 1991), a ruling, although ordered not to be published upon denial of review by the California Supreme Court, interpreting California's School Facilities Act as not preempting the imposition of fees authorized from other sources such as the state's constitution or, as in *Lincoln Property*, general school district enabling legislation, or under the community's police powers. The court upheld the imposition of a school impact fee over a developer's protest. The DMS process was also supported by the decision in Murrieta Valley Unified Sch. Dist. v. County of Riverside, 279 Cal. Rptr. 421 (Ct. App. 1991), ruling that mitigation measures other than fees were not preempted by state environmental or planning legislation. The school district could bring an action in mandamus to challenge a project in the face of inadequate school facilities, particularly where, as in the case of DMS, the project is inconsistent with general plan standards. The court indicated that an appropriate action might be to reduce residential densities or imposing a controlled phasing of development to time growth with school capacity expansion. The court in *Murrieta Valley* treated the imposition of mitigation fees or charges on the developer as a totally separate question. The court explicitly ruled that communities are not preempted from enacting general plan provisions providing development mitigation such as the adequacy of facilities. The court in *William S. Hart Union High* remanded the case to allow an amendment of the complaint to allege both that the county failed to consider school impact in making the zone change due to erroneous legal advice from county counsel and that the specific development approval lacked a record including adequate findings. *See also* California Bldg. Indus. Ass'n v. Governing Bd., 253 Cal. Rptr. 497 (Ct. App. 1988) (characterizing development fees as special taxes if exceed reasonable cost of service requiring supermajority vote and by statute limited to $1.50 per square foot cap); Duggan v. County of Cook, 324 N.E.2d 406 (Ill. 1975) (lack of statutory authorization to condition zoning on school fee payment); Oakwood at Madison, Inc. v. Madison Township, 371 A.2d 1192 (N.J. 1977) (ruling invalid as exclusionary school construction to accommodate .5 children for each unit resulting in a $1275 per unit fee for a large development); Haugen v. Gleason, 359 P.2d 108 (Or. 1961) (holding that a land acquisition fee to be used for recreation or schools not directly benefiting the subdivision an illegal tax); CAL. GOV'T CODE § 65961 (West 1991) (a permit may not be conditioned where such condition could have been imposed at subdivision approval) (distinguished by *Lincoln Property* (§ 65961 inapplicable to school facilities act impact fee for permanent facilities), following *Candid Enters*). *See generally* Harvey A. Feldman, *The Constitutionality of Subdivision Exactions for Educational Purposes*, 76 DICK. L. REV. 651 (1972).

395. James A. Kushner, *The Development Monitoring System (DMS): Computer Technology for Subdivision Review and Growth Management*, 11 ZONING & PLAN. L. REP. 33 (1988).

396. *See, e.g.*, B & P Dev. Corp. v. City of Saratoga, 230 Cal. Rptr. 192 (Ct. App. 1986) (park development fee authorized by map act); Hirsch v. City of Mountain View, 134 Cal. Rptr. 519 (Ct. App. 1976) (allowing park fee condition on use of six parcels to build apartment house

Fees and even impact taxes[400] are authorized by some state statutes[401] and have been judicially endorsed as an incident of assur-

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on one parcel, thus applying to divisions of any land); P-W Invs., Inc. v. City of Westminster, 655 P.2d 1365 (Colo. 1982) (implicit); Aunt Hack Ridge Estates, Inc. v. Planning Comm'n, 230 A.2d 45 (Conn. Super. Ct. 1967) (ruling that cash park development exaction unconstitutional; not earmarked to benefit subdivision but could be used to purchase parkland for entire town); Town of Lockport Key v. Lands End, Ltd, 433 So. 2d 574 (Fla. 2d DCA 1983) (invalidating parks and open space impact fee as neither earmarked nor the need proven to be generated by the development); Hollywood, Inc. v. Broward County, 431 So. 2d 606 (Fla. 4th DCA 1983) (schedule fee, dedication of three acres per 1000 persons, or its value in lieu within police powers); Torsoe Bros. Constr. Corp. v. Board of Trustees, 375 N.Y.S.2d 612 (1975) (upholding $30 park fee on single-family dwellings); Banberry Dev. Corp. v. South Jordan City, 631 P.2d 899 (Utah 1981) (park improvement fee of $235 per lot); City of Mequon v. Lake Estates Co., 190 N.W.2d 912 (Wis. 1971) ($80 per lot); Jordan v. Village of Menomonee Falls, 137 N.W.2d 442 (Wis. 1965) ($200 fee not a tax and authorized by general subdivision law), *appeal dismissed*, 385 U.S. 4 (1966). *But see, e.g.*, Coronado Dev. Co. v. City of McPherson, 368 P.2d 51 (Kan. 1962) (finding no enabling authority to require 10% of appraised value); Ohio *ex rel.* Waterbury Dev. Co. v. Witten, 377 N.E.2d 505 (Ohio 1978) (invalidating single family permit park fee as not meeting taxing or assessment requirements); Hillis Homes, Inc. v. Snohomish City, 650 P.2d 193 (Wash. 1982) (holding that $250 per dwelling park fee invalid as a tax as designed to accomplish public benefits costing money rather than regulation); *accord* Prisk v. City of Poulsbo, 732 P.2d 1013 (Wash. Ct. App. 1987) (authorizing park fees by environmental mitigation power); Ivy Club Investors, Ltd. Partnership v. City of Kennewick, 699 P.2d 782 (Wash. Ct. App. 1985) (holding that may not condition condominium conversion, not within subdivision definition, on park fee payment, characterized as a tax, as development already in existence); WASH. REV. CODE ANN. § 82.02.020 (West Supp. 1990) (*Hillis* superseded); *cf.* CAL. GOV'T CODE § 66477 (West Supp. 1991) (park and recreation fees authorization); Gulest Assocs. v. Town of Newburgh, 209 N.Y.S.2d 729 (Sup. Ct. 1960) (lack of earmarking), *aff'd*, 225 N.Y.S.2d 538 (App. Div. 1962), *overruled by* Jenad, Inc. v. Village of Scarsdale, 218 N.E.2d 673 (N.Y. 1966) (approving park dedication in lieu fee), *abrogated*, Weingarten v. Town of Lewisboro, 542 N.Y.S.2d 1012 (Sup. Ct. 1989), *aff'd mem.*, 559 N.Y.S.2d 807 (1990) (eschewing the *Jenad* reasonableness standard in favor of a more exacting so-called *Nollan* test although result unchanged yet curious as *Jenad* cited with approval in *Nollan*), *modified for ripeness*, 572 N.E.2d 40, (N.Y. 1991); Haugen v. Gleason, 359 P.2d 108 (Or. 1961) (holding that a land acquisition fee to be used for recreation or schools not directly benefiting the subdivision an illegal tax).

397. *But cf.* Town of Longboat Key v. Lands End, Ltd., 433 So. 2d 574 (Fla. 2d DCA 1983) (invalidating open space impact fee as there was no guarantee that the fee would mitigate impact collected to address as funds not earmarked nor clearly based on need generated by project).

398. *See, e.g.*, Commercial Builders v. City of Sacramento, 941 F.2d 872 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1997 (1992); Holmdel Builders Ass'n v. Township of Holmdel, 583 A.2d 277 (N.J. 1990) (treating as within obligation under state's fair housing act requiring development of fair share of affordable housing which implicitly authorizes housing linkage impact fee exaction rather than as an exaction bearing a nexus to developer's project; requiring authorizing regulations containing standards to be issued by the Council on Affordable Housing).

399. *See, e.g.*, Bixel Assocs. v. City of Los Angeles, 265 Cal. Rptr. 347 (Ct. App. 1989) (invalidating of fire hydrant building permit condition fee as invalid tax for failure of city to show that method used to calculate fee bore a fair and substantial relation to developer's benefit as deemed required by *California Government Code* section 54990 and constitutionally mandated; insisting the fee should exclusively reflect the cost of new development, such as where fee is earmarked and directed to undeveloped area facilities or based on square footage generation factor; appearing to apply the uniquely attributable test rather than the California reasonableness standard); Plote, Inc. v. Minnesota Alden Co., 422 N.E.2d 231 (Ill. App. Ct. 1981) (not reached due to estoppel but critical of cultural center exaction not viewed as recreational); Laf-

ing adequate planning and facilities to accommodate growth.[402] In

reached due to estoppel but critical of cultural center exaction not viewed as recreational); Lafferty v. Payson City, 642 P.2d 376, 378 (Utah 1982) (invalidating $1000 per dwelling building permit impact fee deposited in general fund as a tax). *But see, e.g.*, Sanchez v. City of Santa Fe, 481 P.2d 401 (N.M. 1971) (ruling a $50 per lot public facilities fee as an invalid tax for lack of regulatory exaction authority); *cf.* Village of Royal Palm Beach v. Home Builders Ass'n, No. 79-1538 (Cir. Ct.), *aff'd*, 386 So. 2d 1304 (Fla. 4th DCA 1980) (invalidating fee for administrative service, police, fire, and maintenance for lack of earmarking to use, area, and time of expenditures). *See generally* Theodore C. Taub, *Exactions, Linkages, and Regulatory Takings: The Developer's Perspective*, 20 URB. LAW. 515, 535-36, 547 (1988) (reporting Boston fees of $1 per square foot for footage in excess of 100,000 square feet for job training, San Francisco fees for child care facilities, and Miami charges for police and fire facilities and personnel, general services administration, as well as traditional off-site amenities and infrastructure such as storm sewers, streets, parks, and solid waste collection); Natalie M. Hanlon, Note, *Child Care Linkage: Addressing Child Care Needs Through Land Use Planning*, 26 HARV. J. ON LEGIS. 591 (1989).

400. *See, e.g.*, CAL. GOV'T CODE §§ 65970-65981 (West 1983 & Supp. 1990); *cf.* Pines v. City of Santa Monica, 630 P.2d 521 (Cal. 1981) (holding that $1000 per unit condominium conversion charge not preempted by subdivision law). *But see* Julian Conrad Juergensmeyer & Robert Mason Blake, *Impact Fees: An Answer to Local Governments' Capital Funding Dilemma*, 9 FLA. ST. U. L. REV. 415, 422-27 (1981) (tax characterization fatal in some jurisdictions); Lillydahl et al., *The Need for a Standard State Impact Fee Enabling Act*, 54 J. AM. PLAN. A. 7 (1988).

401. *See, e.g.*, Committee of Seven Thousand v. Superior Court, 754 P.2d 708 (Cal. 1988) (ruling incorporated cities may not opt out of corridor impact fee program by ordinance or initiative as state authorization legislation deemed to displace home rule autonomy with freeway corridors ruled not matters of local concern); Cranberry Township v. Builders Ass'n, 587 A.2d 32 (Commw. Ct.) (although highway impact fee ordinance invalidated as tax by trial court, appeal dismissed for mootness as now validated by retroactive authorization statute), *appeal grated* 600 A.2d 955 (Pa. 1991); ARIZ. REV. STAT. ANN. § 9.463.05 (1990) (impact fee authorization); CAL. GOV'T CODE §§ 65970-65981 (West 1983 & Supp. 1990) (school facilities), 65995 (West 1983 & Supp. 1990) (school impact fees), 66000-66007 (West Supp. 1991) (requiring identification of purchase of any fee and how it reasonably relates to the proposed project), 66005 (West Supp. 1991) (providing that fees not to exceed reasonable cost of providing facilities or sewer needs generated by development), 66477 (West Supp. 1990) (park and recreation), 66484 (West Supp. 1991) (for major thoroughfares and bridges), 66484.3 (West Supp. 1991) (authorizing impact fees for new Orange County freeway corridor development; the fees are placed in a special fund and general funds may be spent or borrowed against in expectation of fee collection); FLA. STAT. §§ 163.3202(3), 380.06(15)(d)(1) (1991) (generated needs from projects with regional impact); N.J. STAT. ANN. § 40:55 D-42 (West Supp. 1990); TEX. LOCAL GOV'T CODE ANN. § 395.0011 (West Supp. 1991) (authorizing impact fee covering facilities for water supply, treatment, and distribution, waste water collection and treatment, storm water drainage, flood control, and roadways within city limits excluding federal and state highways; prohibiting development moratoria to await completion); WASH. REV. CODE ANN. § 82.02.020 (West Supp. 1990) (limiting fees to voluntary agreements for facilities reasonably necessary as a direct result of the planned development to mitigate direct impact authorizing transportation benefit districts, utility connection charges, park dedication and in lieu fees but requiring that fees be earmarked for capital improvement mitigation). *But cf.* South Shell Inv. v. Town of Wrightsville Beach, 703 F. Supp. 1192 (E.D.N.C. 1988) (recognizing that there is no need for specific authorization under North Carolina law which permits imposition of costs for utility provision), *aff'd mem.*, 900 F.2d 255 (4th Cir. 1990).

402. *See, e.g.*, St. Johns County v. Northeast Fla. Builders Ass'n, 583 So. 2d 635 (Fla. 1991) (upholding in part county ordinance imposing impact fee on new residential construction to be

Heisey v. Elizabethtown Area School District,[403] the intermediate appellate court of Pennsylvania invalidated a 1% school impact tax imposed on building permits due to its exclusionary effect. Impact fees are more likely to be sustained where they are earmarked for specific improvement projects rather than general revenue measures.[404] In addition, they should equitably reflect the facilities ex-

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used for new school facilities); City of College Station v. Turtle Rock Corp., 680 S.W.2d 802 (Tex. 1984) (within home rule powers); Banberry Dev. Co. v. South Jordan City, 631 P.2d 899 (Utah 1981); *cf.* Holmdel Builders Ass'n v. Township of Holmdel, 583 A.2d 277 (N.J. 1990) (holding state's fair housing act requiring development of fair share of affordable housing implicitly authorizes housing linkage impact fee exaction, but requires authorizing regulations containing standards to be issued by the Council on Affordable Housing).

403. 445 A.2d 1344 (Commw. Ct. 1982), *vacated*, 467 A.2d 818 (Pa. 1983).

404. *See* Bixel Assocs. v. City of Los Angeles, 265 Cal. Rptr. 347 (Ct. App. 1989) (invalidating fire hydrant building permit condition fee as invalid tax for failure of city to show that method used to calculate the fee bore a fair and substantial relation to developer's benefit as deemed required by *California Government Code* section 54990 and as constitutionally mandated; insisting the fee should exclusively reflect the cost of new development, such as where fee is earmarked and directed to undeveloped area facilities or based on square footage generation factor; appearing to apply the uniquely attributable test rather than the California reasonableness standard); Santa Clara County Contractors Ass'n v. Santa Clara, 43 Cal. Rptr. 86 (Ct. App. 1965) (invalidating building permit fee as proceeds go to general revenue for future recreation needs throughout community); Aunt Hack Ridge Estates, Inc. v. Planning Comm'n, 230 A.2d 45 (Conn. Super. Ct. 1967) (ruling cash park development exaction unconstitutional; not earmarked to benefit subdivision but could be used to purchase parkland for entire town); Contractors & Builders Ass'n v. City of Dunedin, 329 So. 2d 314 (Fla. 1976), *subsequent proceedings*, 358 So. 2d 846 (Fla. 2d DCA 1978), *cert. denied*, 444 U.S. 867 (1979); City of Key West v. R.L.J.S. Corp., 537 So. 2d 641 (Fla. 3d DCA 1989); Baywood Const. Inc. v. City of Cape Coral, 507 So. 2d 768 (Fla. 2d DCA 1987) (water and sewer capital expansion impact fee not due until service extended to property charged); Home Builders Ass'n v. Board of County Comm'rs, 446 So. 2d 140 (Fla. 4th DCA 1983), *appeal dismissed*, 469 U.S. 976 (1984) (ruling that fees of $300 per house, $200 per multifamily unit, and $175 per mobile home did not exceed costs of improvement which benefitted the development to be spent in zone within six years); Hollywood, Inc. v. Broward County, 431 So. 2d 606 (Fla. 4th DCA 1983) (earmarked for parks within 15 miles); Village of Royal Palm Beach v. Home Builders Ass'n, 386 So. 2d 1304 (Fla. 4th DCA 1980); Broward County v. Janis Dev. Corp., 311 So. 2d 371 (Fla. 4th DCA 1975) (holding that $200 per new dwelling to finance citywide road and bridge construction exceeds city authority constituting an illegal tax for failing to specify how and when funds would be spent); Lechner v. City of Billings, 797 P.2d 192 (Mont. 1990); Gulest Assocs. v. Town of Newburgh, 209 N.Y.S.2d 729 (Sup. Ct. 1960) (lack of earmarking), *aff'd*, 225 N.Y.S.2d 538 (1962), *overruled by* Jenad, Inc. v. Village of Scarsdale, 218 N.E.2d 673 (N.Y. 1966) (approving park dedication in lieu fee); Haugen v. Gleason, 359 P.2d 108, 111 (Or. 1961) (recognizing that payments into general fund yield tax characterization); Hayes v. City of Albany, 490 P.2d 1018 (Or. Ct. App. 1971); Lafferty v. Payson City, 642 P.2d 376, 378 (Utah 1982) (holding that $1000 per dwelling building permit impact fee deposited in general fund invalid tax); *cf.* Associated Home Builders of the Greater E. Bay, Inc. v. City of Walnut Creek, 484 P.2d 606, 613 (Cal.) (holding that in lieu park fee requires expenditure for park or recreational purposes only which are available to all residents distinguishing fees going into general revenue funds from the in lieu fee here earmarked for park and recreational facilities), *appeal dismissed*, 404 U.S. 878 (1971); City of Miami Beach v. Jacobs, 315 So. 2d 227 (Fla. 3d DCA 1975) (ruling that water "fire line" charge is a discriminatory tax as unrelated to use nor earmarked as funds for system expansion).

pansion necessitated by the project.[405] Florida's intermediate appellate court, in *Town of Longboat Key v. Lands End, Ltd.*,[406] was unable to find that an open space impact fee would mitigate the impact of new development. Montgomery County, Maryland, is taxing condominium conversions to generate rent supplements in new developments,[407] but a Washington court has invalidated a scheme requiring resident relocation or contribution to a low income housing fund as a condition for conversions as an illegal tax.[408] Despite liberal California fee guidelines, redevelopment agencies are not authorized under the subdivision map act or redevelopment law to exact impact fees, particularly where imposed to permit reimbursement for developer costs from subsequent benefitted developers.[409]

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405. *See* City of Mesa v. Home Builders Ass'n, 523 P.2d 57, 60 (Ariz. 1974) (no double taxation result); City of Key West v. R.L.J.S. Corp., 537 So. 2d 641 (Fla. 3d DCA 1989); Lechner v. City of Billings, 797 P.2d 192 (Mont. 1990) (inflationary costs of new water and sewer facilities needed to replace units of capacity used up by new customers hooking into system); Cranberry Township v. Builders Ass'n, 587 A.2d 32 (Commw. Ct.) (ordinance providing for area highway impact fee used formula based on percentage of area roads needed due to new development ($75,000,000) allocating unit costs based on projected weekday trip generation ($91.82 per trip)), *appeal grnted*, 600 A.2d 955 (Pa. 1991); Lafferty v. Peyson, 642 P.2d 376 (Utah 1982) (recognizing that government may not require double payment by paying for existing facilities and pay existing indebtedness through future taxes); Banberry Dev. Corp. v. South Jordan City, 631 P.2d 899, 903 (Utah 1981) (capital costs in relation to benefits received); *cf.* Trend Homes, Inc. v. Central Unified Sch. Dist., 269 Cal. Rptr. 349 (Ct. App. 1990) (stating that fees are special taxes if exceed reasonable cost of providing services or activity). *See generally* JAMES NICHOLAS, CALCULATING PROPORTIONATE-SHARE IMPACT FEES (1988).

406. 433 So. 2d 574 (Fla. 2d DCA 1983) (showing a lack of earmarking as required to bear proper nexus to needs of development).

407. *See also* Building Indus. Ass'n v. City of Oxnard, 198 Cal. Rptr. 63 (Ct. App. 1984) (invalidating 2.8% of building value fee for permit as tax unrelated to needs generated by project), *vacated for mootness*, 706 P.2d 285 (Cal. 1985); (vacating due to ordinance amendment); *Maryland County Condo Conversion Tax to Supplement Rents in New Developments*, 11 Hous. & Dev. Rep. (BNA) 405 (1983).

408. *See* San Telmo Assocs. v. City of Seattle, 735 P.2d 673 (Wash. 1987); *see also* Haugen v. Gleason, 359 P.2d 108 (Or. 1961) (holding that land acquisition fee to be used for recreation or schools not directly benefiting the subdivision an illegal tax); Ivy Club Investors Ltd. Partnership v. City of Kennewick, 699 P.2d 782 (Wash. 1985) (holding that city may not condition condominium conversion, not within subdivision definition, on a park fee payment, characterized as a tax, as the development is already in existence); Hillis Homes, Inc. v. Snohomish City, 650 P.2d 193 (Wash. 1982) (holding that $250 per dwelling park fee invalid as a tax as designed to accomplish public benefits costing money rather than regulation), *superseded by statute*, WASH. REV. CODE ANN. § 82.02.020 (West Supp. 1990).

409. Price Dev. Co. v. Redevelopment Agency, 852 F.2d 1123 (9th Cir. 1988); *cf.* Kern County Builders, Inc. v. North of the River Mun. Water Dist., 263 Cal. Rptr. 5 (Ct. App. 1989) (holding that a "water development fee," originally called "connection charge," of $2500 per acre due at the time of development was an invalid impact fee because the water district was without statutory authorization or police powers; although the fee resembled a tax, in violation of Proposition 13 supermajority referendum requirement, court deemed it a special assessment as levied in relation to benefit and thus violative of hearing and notice as required for establishment of assessment district).

Impact fees may be imposed even following the issuance of permits and the vesting of development rights permission.[410] It is not essential that the developer have the opportunity to pass the fee on to new residents and may be imposed after the sale of some lots or units.[411] Impact fees may not be subject to the more stringent procedural requirements associated with passage of zoning ordinances.[412]

3. *Utility Connection Fees*

A technique used to finance the cost of water acquisition, storage, and treatment, sewage treatment, and related capital facilities is the imposition of a one-time connection fee, which, in addition to user fees, finances the maintenance, rehabilitation, and construction of the utility systems.[413] The only significant limitation placed on such

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410. Russ Bldg. Partnership v. City and County of San Francisco, 750 P.2d 324 (Cal.) (finding notice in the permit and environmental impact report indicating a transit problem requiring some program to provide funding), *appeal dismissed sub nom.* Crocker Nat'l Bank v. City and County of San Francisco, 488 U.S. 881 (1988) (downtown office space developer transit impact development fee as condition for occupancy certificate applied to project under construction); City of Key West v. R.L.J.S. Corp., 537 So. 2d 641 (Fla. 3d DCA 1989); City of Pontiac v. Mason, 365 N.E.2d 145 (Ill. 1977) (imposition of sewage connection fee following building permit validated); *cf.* People v. H. & H. Properties, 201 Cal. Rptr. 687 (Ct. App. 1984) (holding it is valid to impose relocation obligations by ordinance on condominium converter following conversion approval); Westfield-Palos Verdes Co. v. City of Rancho Palos Verdes, 141 Cal. Rptr. 36 (Ct. App. 1977) (giving example of an environmental "bedroom" excise tax of $500 per bedroom and up to $1000 per dwelling and business license tax applied after permit, financing, and substantive condominium construction commenced, and upholding the exemption of units already sold). *But cf.* CAL. GOV'T CODE § 65961 (West Supp. 1991) (permit may not be conditioned where such condition could have been imposed at subdivision approval).

411. City of Key West v. R.L.J.S. Corp., 537 So. 2d 641 (Fla. 3d DCA 1989).

412. *E.g.*, Baywood Constr., Inc. v. City of Cape Coral, 507 So. 2d 768 (Fla. 2d DCA 1987).

413. *See, e.g.*, South Shell Inv. v. Town of Wrightsville Beach, 703 F. Supp. 1192 (E.D.N.C. 1988) (holding that under North Carolina law could charge new development although existing development received some benefit), *aff'd mem.*, 900 F.2d 255 (4th Cir. 1990); B & P Dev. Corp. v. City of Saratoga, 230 Cal. Rptr. 192 (Ct. App. 1986) (holding that storm drain connection fee of $6655.70 authorized by map act); City of Arvada v. City of Denver, 663 P.2d 611 (Colo. 1983) (zoning and utility enabling statutes interpreted to permit); P-W Invs., Inc. v. City of Westminster, 655 P.2d 1365 (Colo. 1982) (implicit); City of Pontiac v. Mason, 365 N.E.2d 145 (Ill. App. Ct. 1977) (imposed following building permit issuance); Marriott v. Springfield Sanitary Dist., 357 N.E.2d 666 (Ill. App. Ct. 1976) (sewer); Robert T. Foley Co. v. Washington Suburban Sanitary Comm'n, 389 A.2d 350 (Md. 1978) (sustaining interim sewage treatment program financed by new connection charges over claim of impaired contractual rights of subdivision developers); Northampton Corp. v. Washington Suburban Sanitary Comm'n, 366 A.2d 377 (Md. 1976) (ruling that interim sewer service charge to finance interim treatment and ease moratorium is not special assessment); Exeter Realty Corp. v. Town of Bedford, 252 N.E.2d 885 (Mass. 1969) (holding that fee valid even though sewer system installed at developer's expense as constituted initial assessment for remaining system capital costs); Colonial Oaks W., Inc. v. Township of E. Brunswick, 296 A.2d 653 (N.J. 1972) (giving example of developer voluntarily undertaking expense of water tap-in while knowing fees for extension and installation required by ordinance); Airwick Indus., Inc. v. Carlstadt Sewerage Auth., 270 A.2d 18 (N.J. 1970), *ap-*

fees is that they must relate to the proportionate cost of service ex-

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peal dismissed, 402 U.S. 967 (1971) (sewer connection fee); Warrenville Plaza, Inc. v. Warren Township Sewage Auth., 553 A.2d 874 (N.J. Super. Ct. App. Div. 1989) (finding no equal protection violation to impose higher sewer connection charge on nonresidential condominium where charge calculated according to gallons per day rather than set residential fee with single-family residence used as basic minimum charge and even though fee might exceed noncondominium project); Torsoe Bros. Constr. Corp. v. Board of Trustees, 375 N.Y.S.2d 612 (App. Div. 1975) (holding that village ordinance which charged tap-in permit fee of $15,000 was in conflict with state statute which set forth exclusive amount to recoup costs of improving and extending a village system as general taxation, special benefit assessment, and water rents and thus village ordinance was unconstitutional); McNeill v. Harnett County, 398 S.E.2d 475 (N.C. 1990); Atlantic Constr. Co. v. City of Raleigh, 230 N.C. 365, 53 S.E.2d 165 (1949); Amherst Builders v. City of Amherst, 402 N.E.2d 1181 (Ohio 1980) (authorized by state constitution); Ohio *ex rel.* Waterbury Dev. Co. v. Witten, 387 N.E.2d 1380 (Ohio Ct. App. 1977) (water tap-in charge if bears substantial relation to cost of providing service), *aff'd per curiam*, 377 N.E.2d 505 (Ohio 1978); Hayes v. City of Albany, 490 P.2d 1018 (Or. Ct. App. 1971) (validating sewer connection fee if reasonably related to expansion costs, and as here, earmarked under ordinance); Patterson v. Alpine City, 663 P.2d 95 (Utah 1983) (authorized by statute); Banberry Dev. Corp. v. South Jordan City, 631 P.2d 899, 903 (Utah 1981) (holding that water connection fee may be imposed on subdivider rather than awaiting actual hookup by lot purchaser); Rupp v. Grantsville City, 610 P.2d 338 (Utah 1980) (holding that city may terminate utilities to collect water connection fee authorized under general welfare statute); Home Builders Ass'n v. Provo City, 503 P.2d 451 (Utah 1972) (upholding $100 sewer connection fee under general sewer charge statute); McMahon v. City of Virginia Beach, 221 Va. 102, 267 S.E.2d 130 (Va.), *cert. denied*, 449 U.S. 954 (1980); Prisk v. City of Poulsbo, 732 P.2d 1013 (Wash. Ct. App. 1987) (holding that city may exempt old customers charging new customers for current historical costs of utility system); Coulter v. City of Rawlins, 662 P.2d 888 (Wyo. 1983) (implying power from home rule and utility operation power); WASH. REV. CODE ANN. § 82.02.020 (West Supp. 1990) (authorization requiring earmarking of funds for capital improvement to mitigate impact of development); *cf.* Community Builders, Inc. v. City of Phoenix, 652 F.2d 823 (9th Cir. 1981) (holding that water connection fee not violative of antitrust laws); Apartment Ass'n v. Los Angeles, 141 Cal. Rptr. 794 (Ct. App. 1977) (validating sewer service charge despite only applicable to projects of five or more units on single water meter). *But see, e.g.*, Norwick v. Village of Winfield, 225 N.E.2d 30 (Ill. App. Ct. 1967) (ruling that connection fee is an invalid tax lacking statutory authorization); *cf.* Kern County Builders, Inc. v. North of the River Mun. Water Dist., 263 Cal. Rptr. 5 (Ct. App. 1989) (holding that "water development fee," originally called "connection charge," of $2500 per acre due at the time of development was an invalid impact fee because the water district was without statutory authorization or police powers; holding that while the fee was like a tax, in violation of Proposition 13 supermajority referendum requirement, it constituted a special assessment as levied in relation to benefit and thus violative of hearing and notice as required for the establishment of assessment district); City of Miami Beach v. Jacobs, 315 So. 2d 227 (Fla. 3d DCA 1975) (ruling a water "fire line" charge a discriminatory tax because the charge was unrelated to use nor were funds earmarked for system expansion); City of Boise v. Bench Sewer Dist., 773 P.2d 642 (Idaho 1989) (per curiam) (invalidating city-imposed sewer connection fee as only district has power to enact); Beauty Built Constr. Corp. v. City of Warren, 134 N.W.2d 214 (Mich. 1965) (exempting existing but as yet unconnected homes from sewer hookup charges of $200 per dwelling with higher commercial rates discriminatory); S.S. & O. Corp. v. Township of Bernards Sewerage Auth., 301 A.2d 738 (N.J. 1973) (invalidating sewer connection fees on houses higher than those imposed on comparable dwellings invalid although connection fees plus cost installing laterals to sewage system considered valid); Strahan v. City of Aurora, 311 N.E.2d 876 (Ohio Misc. 1973) (ruling that water hookup charges on developers valid but exempting resident homeowners discriminatory).

pansion generated by the unit charged.[414] Once the municipality discloses the basis for a fee calculation, the burden shifts to the challenger to show the unconstitutionality of the charge.[415] The charge should be authorized by ordinance and should apply prospectively.[416] New development may not be charged with the costs to rebuild the system for the entire metropolitan area.[417] Sewer charges incurred prior to final subdivision approval may be imposed on the developer.[418] Connection charges should be imposed equally on all dwelling units served.[419] Although developers in some communities may elect to provide alternatives to public sewer service connection,[420] others require mandatory hookup to the public system.[421]

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414. Hayes v. City of Albany, 490 P.2d 1018 (Or. Ct. App. 1971); Banberry Dev. Corp. v. South Jordan City, 631 P.2d 899, 904 (Utah 1981) (setting out seven criteria to factor fairness of fees similar to *Hillis* including the reasonable relation to benefits received and the fact that other parcels may have already contributed); Hillis Homes, Inc. v. Public Util. Dist. No. 1, 714 P.2d 1163 (Wash. 1986) (setting out criteria for reasonableness of fees based on a balancing of factors including cost of existing capital facilities, current financing techniques, extent of contribution to system by newly developed properties and extent in future, extent of credit to developer for providing facilities which will benefit other properties, extraordinary costs in servicing new facilities, and the current value of previous improvements to allow a fair comparison of funds paid over time; recognizing further the need for flexibility due to the difficulty of exact measurement). *But cf.* Exeter Realty Corp. v. Town of Bedford, 252 N.E.2d 885 (Mass. 1969) (holding that fee valid even though sewer system installed at developer's expense as constituted initial assessment for remaining system capital costs); Colonial Oaks W., Inc. v. Township of E. Brunswick, 296 A.2d 653 (N.J. 1972) (tap-in fee despite developer installed taps).

415. Home Builders Ass'n v. Kansas City, 555 S.W.2d 832 (Mo. 1977); Banberry Dev. Corp. v. South Jordan City, 631 P.2d 899 (Utah 1981).

416. City of Coppell v. General Homes Corp., 763 S.W.2d 448 (Tex. Ct. App. 1988) (holding that water and sewer connection fees not authorized by ordinance inapplicable to already approved subdivision).

417. Contractors & Builders Ass'n v. City of Dunedin, 329 So. 2d 314 (Fla. 1976), *subsequent proceedings*, 358 So. 2d 846 (Fla. 2d DCA 1978), *cert. denied*, 444 U.S. 867 (1979).

418. Longridge Estates v. Los Angeles, 6 Cal. Rptr. 900 (Ct. App. 1960).

419. S.S. & O. Corp. v. Township of Bernards Sewerage Auth., 301 A.2d 738 (N.J. 1973); Strahan v. City of Aurora, 311 N.E.2d 876 (Ohio Misc. 1973) (holding that water hookup charges on developers while exempting resident homeowners was discriminatory).

420. Heinzman v. U.S. Home, 317 So. 2d 838 (Fla. 2d DCA 1975); *cf.* Fischer v. Board of County Comm'rs, 462 So. 2d 480 (Fla. 5th DCA 1984) (alternative package treatment plants serving limited areas).

421. *See, e.g.*, Buffalo, Dawson, Mechanicsburg Sewer Comm'n v. Boggs, 488 N.E.2d 258 (Ill. 1986); Town of Ennis v. Stewart, 807 P.2d 179 (Mont. 1991) (ruling that requirement that faucets inside residence use only town water no violation of privacy as owners may use well for drinking water); McNeill v. Harnett County, 398 S.E.2d 475 (N.C. 1990); Demoise v. Dowell, 461 N.E.2d 1286 (Ohio 1984) (when sewer lines become operative); Rupp v. Grantsville City, 610 P.2d 338 (Utah 1980); McMahon v. City of Virginia Beach, 267 S.E.2d 130 (Va.) (mandatory water hookup), *cert. denied*, 449 U.S. 954 (1980). *But cf.* Fischer v. Board of County Comm'rs, 462 So. 2d 480 (Fla. 5th DCA 1984) (ruling that county actions of refusing to hookup or give approval of an alternative package treatment plant despite a county mandatory hookup policy constituted and unconstitutional taking without due compensation).

Agreements such as leases providing for services or facilities without fee provision may bar the application of subsequently imposed fee provisions.[422]

E. Assessments

One technique used to finance public infrastructure improvements is the special benefit assessment.[423] Virtually all forms of infrastructure, from new sidewalks and gutters to fire districts, have been financed through this technique.[424] The assessment works by charging each benefitted parcel for the cost of improvement in proportion to the benefit received.[425] The assessments help retire the bond indebt-

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422. *See, e.g.*, Lodge of the Ozarks, Inc. v. City of Branson, 796 S.W.2d 646 (Mo. Ct. App. 1990) (foreclosing imposition of "capacity" fee based on provision in the lease which allowed for sewer connection by the city at no expense to the developer).

423. EUGENE MCQUILLIN, MUNICIPAL CORPORATIONS §§ 38.01-38.338 (Jeffery T. Reinholtz ed., 3d rev. ed. 1987 & Supp. 1990); DOUGLAS R. PORTER ET AL., SPECIAL DISTRICTS: A USEFUL TECHNIQUE FOR FINANCING INFRASTRUCTURE (1987); 4 C. DALLAS SANDS & MICHAEL LIBONATI, LOCAL GOVERNMENT LAW ch. 24 (1982 & Supp. 1991); Richard S. Volpert, *Creation and Maintenance of Open Spaces in Subdivisions: Another Approach*, 12 UCLA L. REV. 830 (1965).

424. *See, e.g.*, Bloom v. City of Fort Collins, 784 P.2d 304 (Colo. 1989) (holding "transportation utility fee" for street maintenance not a property tax but a special fee and need not be based on assessed property value as in the case of special assessments. The provision allowing excess revenues to be used for other purposes was invalid.); CAL. GOV'T CODE §§ 50078-50078.20 (West 1983 & Supp. 1991) (authorizing benefit assessment for fire suppression services); CAL. PUB. RES. CODE §§ 5780-5780.19 (West 1984) (authorizing benefit assessment district for parks); CAL. STS. & HIGH. CODE §§ 10000-10610 (West 1969 & Supp. 1991) (authorizing benefit assessment districts for streets, services, and all public works). *But cf.* Kern County Builders, Inc. v. North of the River Mun. Water Dist., 263 Cal. Rptr. 5 (Ct. App. 1989) (holding that a "water development fee," originally called "connection charge," of $2500 per acre due at the time of development was an invalid impact fee because the water district was without statutory authorization or police powers; while the fee was like a tax, in violation of Proposition 13 supermajority referendum requirement, the court deemed it a special assessment as levied in relation to benefit and thus violative of hearing and notice as required for the establishment of assessment district).

425. *See* Myles Salt Co. v. Board of Comm'rs, 239 U.S. 478 (1916) (holding property must receive benefit to be included within drainage district), *rev'g* 64 So. 825 (La. 1914); Hollywood Cemetery Ass'n v. Powell, 291 P. 397 (Cal. 1930) (upholding assessment against cemetery property as a "unit," despite map showing subdivision into burial lots; cemeteries later became exempt from taxation and local assessment under state constitutional amendment CAL. CONST. art. XIII, § 1b (amended 1926)); *see also* Solvang Mun. Improvement Dist. v. Board of Supervisors, 169 Cal. Rptr. 391 (Ct. App. 1980) (distinguishing special assessments from an ad valorem tax on real property requiring a supermajority election in California); City of Treasure Island v. Strong, 215 So. 2d 473, 476 (Fla. 1968) (holding assessment a taking of property to extent assessment exceeds benefit; holding that it was not necessary for the city to make findings of proportional benefit to each lot, only to properties in district); Montgomery County v. Schultze, 489 A.2d 16 (Md. 1985) (in assessing property abutting highway project, must take into account whether special benefit received by landowner is less than total project cost); Ohio *ex rel.* Waterbury Dev. Co. v. Witten, 387 N.E.2d 1380 (Ohio Ct. App. 1977), *aff'd per curiam*, 377 N.E.2d 505 (Ohio 1978) (assessment may not exceed actual benefit); *cf.* Smoke Rise, Inc. v. Washington Suburban Sanitary Comm'n, 400 F. Supp. 1369, 1392-94 (D. Md. 1975) (holding when morato-

edness incurred to finance the improvement project. Typically, the charges are based on square footage or the acreage of the parcel or portion benefitted,[426] the lineal or proportional frontage of the property,[427] or the value of the property.[428] This technique has lost favor because existing homeowners are often unable or unwilling to pay the added assessment. Under some assessment schemes, property owners may force a referendum election on the formation of an improvement district.[429] The preferred financing technique today is through the exaction or impact fee.[430]

Special benefit assessments require that the parcel charged for the improvement be assessed in direct proportion to the benefit received. All benefit parcels share the cost proportionally.[431] The assessments are earmarked for the improvement or the payment of the bond indebtedness due.[432] Jurisdictions differ on whether there is a time limit following the improvement to impose the assessment,[433] as

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rium imposed subsequent to assessment conditioning hiatus of benefit assessment payments on application for exemption at time of assessment violates due process); Property Owners Ass'n v. City of Ketchikan, 781 P.2d 567 (Alaska 1989) (entitling subdivision lot owners only to notice and hearing as to assessment under due process); Vail v. City of Bandon, 630 P.2d 1339 (Or. Ct. App. 1981) (sustaining higher sewer district assessment on unimproved properties; holding "sewer district assessment formula" could be applied to determine greater benefit to unimproved property without violating due process). *But cf.* Furey v. City of Sacramento, 780 F.2d 1448 (9th Cir. 1986) (downzoning to agricultural from intensive residential and commercial, not a taking where landowners voluntary participated in special assessment sewer district and improvements).

426. *See, e.g., In re* City of Bellingham, 292 P. 113 (Wash. 1930) (per curiam) (street improvements).

427. *See, e.g.*, Montgomery County v. Schultze, 489 A.2d 16 (Md. 1985); Wilson v. Upper Moreland-Hatboro Joint Sewer Auth., 132 A.2d 909 (Pa. Super. Ct. 1957) (multiplying ratio between frontage of lot and frontage abutting the improvement by total assessable cost).

428. *See, e.g.*, Jeffery v. City of Salinas, 42 Cal. Rptr. 486 (Ct. App. 1965); Solvang Mun. Improvement Dist. v. Board of Supervisors, 169 Cal. Rptr. 391 (Ct. App. 1980); Mullins v. City of El Dorado, 436 P.2d 837 (Kan. 1968) (holding assessment must be in proportion to benefit received).

429. *E.g.*, Southern Cal. Rapid Transit Dist. v. Bolen, 269 Cal. Rptr. 147 (Ct. App.) (by limiting vote to landowners subject to assessment, and requiring a petition of owners of at least 25% of the assessed value of property the district, statutorily mandated referendum procedures held violative of the equal protection clause), *rev'd*, 822 P.2d 875 (Cal.), *cert. denied*, 112 S. Ct 3031 (1992).

430. McNeill v. Harnett County, 398 S.E.2d 475 (N.C. 1990) (authorizing county to finance through connection fees and user fees or statutory assessment procedure to finance sewer project).

431. C. DALLAS SANDS & MICHAEL LIBONATI, LOCAL GOVERNMENT LAW § 24.30 (1982 & Supp. 1988); *cf. In re* Cayuga Heights Village Sewer Sys., 211 N.Y.S.2d 873 (App. Div. 1961) (allowing village board to deviate from strict frontage rule and consider benefit internal sewer system would be to property if in future, subdivided for residential housing).

432. Bloom v. City of Fort Collins, 784 P.2d 304 (Colo. 1989) (funds generated from a special assessment cannot be diverted for other purposes).

433. Sands & Libonati, *supra* note 431, § 24.44.

well as the formalities of notice[434] and hearing.[435] Where the assessments are held for subsequent improvements, the earmarked funds should be expended on the benefiting project in a reasonable period of time.[436] Lien foreclosures help enforce the assessment program.[437] Purchasers of property benefitted by a special assessment may be committed to pay the assessment despite the improvement having been previously completed.[438]

F. Facilities Benefit Districts

The newest technique to finance development infrastructure is the facilities benefit assessment. The facilities benefit assessment is linked to the expansion of service capacity to accommodate new development. The improvements are financed from the assessment. The unique characteristics of the facilities benefit assessment are that: (1) the assessment is collected at the time of construction of the new housing unit rather than at the time of subdivision, with the assessment becoming a lien on the undeveloped parcel; and (2) the ability to impose the assessment is based solely on new development, exempting already developed housing and development.[439]

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434. *Id.* § 24.25.

435. *Id.* § 24.26.

436. *Id.* § 24.51; *see also* Call v. Feher, 155 Cal. Rptr. 387 (Ct. App. 1979) (validating foreclosure of street improvement bond against subdivision owners who failed to make assessment payments; rejecting doctrine of commercial frustration as a defense on asserted ground that zoning amendment subsequent to tentative tract approval made development impossible); City of Treasure Island v. Strong, 215 So. 2d 473 (Fla. 1968) (lack of benefit not a foreclosure defense).

437. Sands & Libonati, *supra* note 431, § 24.50.

438. *See* Phillip Wagner, Inc. v. Leser, 239 U.S. 207 (1915); Moody v. City of Vero Beach, 203 So. 2d 345 (Fla. 4th DCA 1967); Hall v. Street Comm'rs, 59 N.E. 68 (Mass. 1901) (previously completed sewer may be assessed proportionately to those benefitted within two years from completion).

439. *See* J.W. Jones Cos. v. City of San Diego, 203 Cal. Rptr. 580, 588 (Ct. App. 1984); Beauty Built Constr. Corp. v. City of Warren, 134 N.W.2d 214 (Mich. 1965) (exempting existing homes, unconnected to public system, from sewer hookup charges of $200 per dwelling held discriminatory; rejecting argument that only new construction established demand for facilities expansion); Lechner v. City of Billings, 797 P.2d 191 (Mont. 1990) (validating water and sewer system development fees limited to new or expanded service); *see also* Building Indus. Ass'n v. City of Oxnard, 267 Cal. Rptr. 769 (Ct. App. 1990) (partially published opinion sustaining "growth requirements capital fee" charged to new development for a share of the cost of expanded public facilities with commercial and industrial development; where fees not charged for recreation, cultural, and civic facilities, and funds placed in a trust fund earmarked for expansion, and fees based on approximate per square foot cost of existing facilities, court ruled not necessary to prove precise facilities funded to serve the project under *Walnut Creek* as met reasonable needs generated nexus under *Nollan*); City of San Diego v. Holodnak, 203 Cal. Rptr. 797 (Ct. App. 1984) (sustaining facilities benefit assessment for providing special benefit to area,

In addition to exempting developed, possibly benefitted property, facilities benefit assessment dispenses with the traditional rule that benefits be contiguous to the assessed property.[440] The assessment approval also dispenses with majority protest provisions typically associated with special assessment districts.[441] States that do not permit a proportion charge to new development for facility expansion might not permit the facilities benefit assessment district.[442] The facilities benefit assessment district was approved by the California court in *J.W. Jones Cos. v. City of San Diego*;[443] however, it is typically limited to a smaller, more compact benefitted districts. In that case, however, the district was for areawide rather than neighborhood benefit.[444] The facilities benefit assessment approach was endorsed by the California Supreme Court in *Russ Building Partnership v. City and County of San Francisco*,[445] where the court sustained a transit improvement impact fee imposed solely on new commercial development.

As with special assessments, a facilities benefit district assessment should be earmarked for specific capital expansion and would have to be programmed for expenditure in a reasonable period of time so as to avoid any characterization as a revenue tax. In the event the

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despite some benefit to general public); Barnebey et al., *Paying for Growth: Community Approaches to Development Impact Fees*, 54 J. AM. PLAN. A. 18 (1988); *cf.* Robert T. Foley Co. v. Washington Suburban Sanitary Comm'n, 389 A.2d 350 (Md. 1978) (sustaining interim sewage treatment program financed by new connection charges; rejecting claim of impaired contractual rights of subdivision developers). *But cf.* Southern Cal. Rapid Transit Dist. v. Bolen, 269 Cal. Rptr. 147 (Ct. App. 1990) (district scheme invalidated in part due to exemption of residential property), *rev'd*, 822 P.2d 875 (Cal.), *cert. denied*, 112 S. Ct. 3031 (1992).

440. *See Jones*, 203 Cal. Rptr. at 588.

441. *See* Russ Bldg. Partnership v. City and County of San Francisco, 750 P.2d 324, 330 (Cal.), *appeal dismissed sub nom.* Crocker Nat'l Bank v. City and County of San Francisco, 488 U.S. 881 (1988).

442. *See, e.g.*, New Jersey Builders Ass'n v. Mayor of Bernards Township, 528 A.2d 555 (N.J. 1987) (invalidating charge to new development for pro rata share of all new road improvements in region; failing statutory nexus limiting assessments for improvements need arising as direct consequence of the new development).

443. 203 Cal. Rptr. 580 (Ct. App. 1984). *But cf.* Kern County Builders, Inc. v. North of the River Mun. Water Dist., 263 Cal. Rptr. 5 (Ct. App. 1989) (holding that a "water development fee," originally called "connection charge," of $2500 per acre due at the time of development was an invalid impact fee because the water district was without statutory authorization or police powers; while fee was like a tax, in violation of Proposition 13 supermajority referendum requirement, court deemed it a special assessment as levied in relation to benefit and thus violative of hearing and as notice required for the establishment of assessment district).

444. 203 Cal. Rptr. at 582.

445. 750 P.2d 324 (Cal.), *appeal dismissed sub nom.* Crocker Nat'l Bank v. City and County of San Francisco, 488 U.S. 881 (1988).

developer failed to develop the property within a reasonably designated period, the community could foreclose on the lien placed on each new subdivision lot benefitted.[446] The district may be terminated and the liens discharged upon a finding that the facilities project is not needed.[447]

G. *Urban Redevelopment*

The federal urban renewal program[448] operated through federal grants to cover the difference between the cost of planning, land acquisition, clearance, and marketing for redevelopment and the eventual sale price of land for redevelopment.[449] The program was replaced in 1974 with the community development block grant program under which communities receive annual grants for redevelopment, rehabilitation, and the extension of community services.[450] These grants are generally targeted toward poorer neighborhoods[451] and urban revitalization, although a portion of the grants may be used to finance some of the infrastructure capacity expansion and even land necessary to accommodate new development.[452] Under both the Reagan and Bush administrations, the amount budgeted and congressionally appropriated has dropped considerably.[453]

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446. *See Jones*, 203 Cal. Rptr. at 583 (holding benefit conferred is what enables the assessment to avoid the tax label which might have subjected the program to popular election under California's Proposition 13).

447. *Id.*

448. Title I of the Housing Act of 1949, 42 U.S.C. §§ 1441-1490j (1976 & Supp. IV 1981).

449. *See* MARTIN ANDERSON, THE FEDERAL BULLDOZER: A CRITICAL ANALYSIS OF URBAN RENEWAL, 1949-1962 (1964); CHARLES E. DAYE ET AL., HOUSING AND COMMUNITY DEVELOPMENT ch. 5 (2d ed. 1989); URBAN RENEWAL: THE RECORD AND THE CONTROVERSY (J.Q. Wilson ed., 1966).

450. CHARLES E. DAYE ET AL., HOUSING AND COMMUNITY DEVELOPMENT § 5(C) (2d ed. 1989); JAMES A. KUSHNER, FAIR HOUSING § 6.01 (1983 & Supp. 1990); Richard P. Fishman, *Title I of the Housing and Community Development Act of 1974: New Federal and Local Dynamics in Community Development*, 7 URB. LAW. 189 (1975); James A. Kushner, *Litigation Strategies and Judicial Review Under Title I of the Housing and Community Development Act of 1974*, 11 URB. L. ANN. 37 (1976); Richard S. Williamson, *Community Development Block Grants*, 14 URB. LAW. 283 (1982).

451. The 1990 block grant amendments required that "not less than 70 percent of the aggregate of the federal assistance provided . . . shall be used for the support of activities that benefit persons of low and moderate income." National Affordable Housing Act, Pub. L. No. 101-625, 104 Stat. 4079.

452. 42 U.S.C. § 5305(a) (1988); 24 C.F.R. §§ 570.201-570.205 (1990).

453. Paul R. Dommel & Michael J. Rich, *The Rich Get Richer: The Attenuation of Targeting Effects of the Community Development Block Grant Program*, 22 URB. AFF. Q. 552 (1987); James A. Kushner, *The Reagan Urban Policy: Centrifugal Force in the Empire*, 2 UCLA J. ENVTL. L. & POL'Y 209 (1982).

State redevelopment relies largely on the imaginative use of tax incentives,[454] although some states such as New York[455] conduct redevelopment on a grandiose scale with the sale of bonds. Early efforts were directed toward incentives for redevelopment through tax exemption or partial abatement.[456]

During the past decade, a very popular program has been tax increment finance redevelopment.[457] Under this scheme, the tax payments made to local taxing districts are frozen for a period of time and bonds are sold to finance land acquisition, clearance, and facilities installation, with the increased taxes from the redeveloped property providing the funds to pay off the indebtedness and provide additional community amenities.[458]

The latest concept in tax incentives is the enterprise zone, where districts slated for primarily commercial and industrial redevelopment are provided lowered levels of sales, property, or income taxation.[459] Congress has authorized the designation of federal

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454. Jonathan M. Davidson, *Tax Increment Financing as a Tool for Community Redevelopment*, 56 U. DET. J. URB. L. 405 (1979); *see also* Carrie K. Welbaum & Thomas R. McSwain, *Community Redevelopment in Florida: A Public/Private Partnership*, 4 J. LAND USE & ENVTL. L. 271 (1989).

455. HOUSING FOR ALL UNDER LAW 505-08 (Richard Fishman ed., 1978).

456. *See, e.g.*, MO. ANN. STAT. §§ 353.010-353.180 (Vernon 1966 & Supp. 1992).

457. *See generally* Jonathan M. Davidson, *Tax Increment Financing as a Tool for Community Redevelopment*, 56 U. DET. J. URB. L. 405 (1979); Jonathan M. Davidson, *Tax-Related Development Strategies for Local Government*, 13 REAL EST. L.J. 121 (1984); Thomas J. Burnside, Comment, *Tax Increment Financing: "Rational Basis" or "Revenue Shell Game"?*, 22 URB. L. ANN. 283 (1981); Michael Newman, Comment, *Tax Increment Financing for Development and Redevelopment*, 61 OR. L. REV. 123 (1982); Randall V. Reece & M. Duane Coyle, Note, *Urban Redevelopment: Utilization of Tax Increment Financing*, 19 WASHBURN L.J. 536 (1980).

458. Jonathan M. Davidson, *Tax Increment Financing as a Tool for Community Redevelopment*, 56 U. DET. J. URB. L. 405, 407-08 (1979).

459. *Compare* STUART BUTLER, ENTERPRISE ZONES (1981) (favorable) *and* Stuart Butler, *Enterprise Zones in the Inner City*, *in* NEW TOOLS FOR ECONOMIC DEVELOPMENT: THE ENTERPRISE ZONE, DEVELOPMENT BANK, AND RFC 24 (George Sternlieb & David Listokin eds., 1981) (favorable) *and* Robert W. Benjamin, Comment, *The Kemp-Garcia Enterprise Zone Bill: A New, Less Costly Approach to Urban Redevelopment*, 9 FORDHAM URB. L.J. 659 (1981) (favorable) *with* URBAN RESEARCH & STRATEGY CENTER, GENERAL ANALYSIS OF THE KEMP-GARCIA BILL (1981) (critical) *and* James A. Kushner, *The Reagan Urban Policy: Centrifugal Force in the Empire*, 2 UCLA J. ENVTL. L. & POL'Y 209 (1982) (critical yet endorsed as a component of policy); *see also* David Boeck, *The Enterprise Zone Debate*, 16 URB. LAW. 71 (1984); David L. Callies & Gail M. Tamashiro, *Enterprise Zones: The Redevelopment Sweepstakes Begins*, 15 URB. LAW. 231 (1983); Robin P. Malloy, *The Political Economy of Co-Financing America's Urban Renaissance*, 40 VAND. L. REV. 67 (1987); Charles J. Orlebecke, *Administering Enterprise Zones*, 18 URB. AFF. Q. 31 (1982); Marilyn Marks Rubin & Edward J. Trawinski, *Comment—New Jersey's Urban Enterprise Zones: A Program that Works*, 23 URB. LAW. 461 (1991); Robert A. Williams, *State and Local Development Incentives for Successful Enterprise Zone Initiatives*, 14 RUTGERS L.J. 41 (1982); Michael A. Wolf, *An "Essay in Re-Plan:" American Enterprise Zones in Prac-*

enterprise zones although specific federal taxation and other regulatory programs for such districts remain to be established.[460] While Congress remains stalled in establishing a national enterprize zone program, thirty-two states have enacted limited zones, although unable to alter federal tax burdens.[461] The American Planning Association has called for state infrastructure policy and budgeting, infrastructure banks, with efforts supported by federal grants, tax policies, user fees, and developer exactions.[462] There also exists a proposal for the American adoption of the redevelopment technique of private land readjustment or land pooling whereby owners of various previously subdivided parcels join together to consolidate the parcels for redevelopment and replatting, charging each proportionately for the cost of dedication, infrastructure, and amenities, while each transfers a deed to any new parcel purchaser.[463]

Initially, under the California statute,[464] few limits were placed on what use could be made of the tax increment (i.e., the tax revenues generated in addition to the prior frozen levels of taxation). In Los Angeles, huge surpluses have been used to subsidize affordable housing through mechanisms such as reduced mortgage financing of condominiums.[465] The scheme has drawn criticism from city resi-

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tice, 21 URB. LAW 29 (1989); Michael A. Wolf, *Potential Legal Pitfalls Facing State and Local Enterprise Zones*, 8 URB. L. & POL'Y 77 (1986); Note, *Enterprise Zones As Tools of Urban Industrial Policy*, 6 MICH. Y.B. INT'L LEGAL STUD. 233 (1986); *Academic, Urban Experts Examine U.S., British Enterprise Zones*, 13 Hous. & Dev. Rep. (BNA) 294 (1985).

460. Housing and Community Development Act of 1987, 42 U.S.C. §§ 11501-11505 (1988); *see also*, Kevin D. Bird, Note, *Bringing New Life to Enterprise Zones: Congress Finally Takes the First Step with the Housing and Community Development Act of 1987*, 35 WASH. U. J. URB. & CONTEMP. L. 109 (1989); *Change in Federal Enterprise Zones Statute Could Raise Application Rankings*, 16 Hous. & Dev. Rep. (BNA) 522 (1988) (McKinney Homeless Assistance Act reauthorization modifies HUD's methods of scoring designation applications).

461. *See Colorado, Hawaii Enact Enterprise Zone Legislation*, 14 Hous. & Dev. Rep. (BNA) 16 (1986) (29 states have enacted enterprise zones); *West Virginia Enterprise Zone Bill Signed; New York Legislature Approves Zone Measure*, 14 Hous. & Dev. Rep. (BNA) 189 (1986); CAL. GOV'T CODE §§ 7070-7079 (West Supp. 1992) (authorizing 25 zones with state income tax credits, tax exemption for profits from new business investment, and rapid depreciation); VA. CODE ANN. §§ 59.1-270 to 59.1-284 (Michie 1987 & Supp. 1991).

462. *User Fees, Capital Budgeting, Are Needed, Planners Say*, 17 Hous. & Dev. Rep. (WGL) 246 (1989).

463. LAND READJUSTMENT: A DIFFERENT APPROACH TO FINANCING URBANIZATION (William A. Doebele ed., 1982); Frank Schnidman, *Land Readjustment*, 47 URB. LAND 2 (Feb. 1988); Michael M. Shultz & Frank Schnidman, *The Potential Application of Land Readjustment in the United States*, 22 URB. LAW. 197 (1990).

464. *See* CAL. HEALTH & SAFETY CODE §§ 33670-33679 (West 1973 & Supp. 1992) (tax increment financing); *see also id.* §§ 33000-330799 (West 1983 & Supp. 1991) (redevelopment law); Arnold P. Schuster & Phillip R. Recht, *Tax Allocation Bonds in California After Proposition 13*, 14 PAC. L.J. 159 (1983).

465. George Lefcoe, *When Governments Becomes Land Developers: Notes on the Public-*

dents outside the district. These citizens claim other neighborhoods, forced to pay the higher costs of community services, subsidize the redevelopment, while state restraints on tax increases have reduced the size of increments available to finance redevelopment. The state statute has also been amended to reduce the uses of the increment. In California, the program is typically administered by the local redevelopment authority,[466] the agency that had initially administered the urban renewal program before those programs were taken over by the city agency-administered block grant program. In some communities, the local legislative entity serves as the redevelopment authority.[467] The legislative initiative has been followed in many jurisdictions.[468]

Missouri initiated a private redevelopment program whereby private corporations could sponsor redevelopment through a plan approved by local government.[469] The redevelopment was funded by

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Sector Experience in the Netherlands and California, 51 S. CAL. L. REV. 165 (1978); Sonya B. Molho & Gideon Kanner, *Urban Renewal: Laissez-Faire for the Poor, Welfare for the Rich*, 8 PAC. L.J. 627 (1977).

466. *See, e.g.*, CAL. HEALTH & SAFETY CODE §§ 33100-33115 (commission), 33120-33458 (activities), 33200-33206 (West 1973 & Supp. 1991) (legislative body may act as redevelopment agency).

467. *See id.* §§ 33114.5, 33200-06 (West 1973 & Supp. 1992).

468. *See, e.g.*, Florida v. Miami Beach Redev. Agency, 392 So. 2d 875 (Fla. 1980) (per curiam) (sustaining tax supported bond financed redevelopment administered by city redevelopment agency); Village of Wheeling v. Exchange Nat'l Bank, 572 N.E.2d 966 (Ill. App. Ct. 1991) (holding property and project area qualified for TIF program if either "blighted" or within a "conservation area;" lack of necessity not a defense for condemnation of specific property); *In re* Advisory Opinion, 422 N.W.2d 186 (Mich. 1988) (invalidating tax increment financing); School Dist. v. City of Auburn Hills, 460 N.W.2d 258 (Mich. Ct. App. 1990) (per curiam) (sustaining TIF plan for private facility not yet in existence, to allow barrier-free access for proposed Chrysler Technology Center); Dennehy v. Department of Revenue, 756 P.2d 13 (Or. 1988) (invalidating tax increment financing); Wolper v. City Council, 336 S.E.2d 871 (S.C. 1985); Meierhenry v. City of Huron, 354 N.W.2d 171 (S.D. 1984) (invalidating tax increment financing); *see* Metropolitan Dev. & Hous. Agency v. Leech, 591 S.W.2d 427 (Tenn. 1979) (tax increment financing approved); *see also* Knoxville's Community Dev. Corp. v. Knox County, 665 S.W.2d 704 (Tenn. 1984) (invalidating and limiting tax increment financing to large cities and excluding counties within specified population bracket); N.Y. CONST. art. 16, § 6; ILL. ANN. STAT. ch. 24, paras. 11-74.4-1 to 11-74.4-11 (Smith-Hurd 1990); MICH. COMP. LAWS ANN. §§ 125.1801-125.1830 (West 1992); OR. REV. STAT. §§ 457.420-457.460 (1989); John S. Young, Comment, *The Tax Increment Allocation Redevelopment Act: The 'Blighted' Statute*, 15 S. ILL. U. L.J. 145 (1990); Michael L. Molinaro, Note, *Tax Increment Financing: A New Source of Funds for Community Redevelopment in Illinois*—People ex rel. City of Canton v. Crouch, 30 DEPAUL L. REV. 459 (1981); Dan McMahan, Note, *Municipal Corporations: The Constitutionality of Oklahoma's Central Business District Redevelopment Act*, 35 OKLA. L. REV. 821 (1982); Note, *The 1979 Minnesota Tax-Increment Financing Act*, 7 WM. MITCHELL L. REV. 627 (1981).

469. *See* MO. ANN. STAT. §§ 353.010-353.180 (Vernon 1966 & Supp. 1991); Michael M. Shultz, *Missouri's Chapter 353: Promoting Private Land Assembly and Development Through Tax Incentives and the Delegation of the Power of Eminent Domain*, 1989 INST. ON PLAN. ZONING & EMINENT DOMAIN 8-1; Michael M. Shultz & F. Rebecca Sapp, *Urban Redevelopment and*

tax abatements.[470] Missouri later adopted a system of tax increment financing modeled after the California system.[471]

VI. THE POWER TO EXACT FEES, DEDICATIONS, AND IMPROVEMENT CONDITIONS

The most interesting and controversial issue in the field of land use control and the area of financing infrastructure is the limit of local government power to impose exactions on a development permit.[472] For example, a town desiring the construction of a road across private property would have to condemn private property and pay compensation; however, the conditioning of a development permit on road improvement or park dedication is traditionally not deemed a taking requiring compensation.[473] The critical question is when an exaction goes beyond the scope of the police power so as to be characterized as an excessive or confiscatory taking of private property.

Land use development conditions must "substantially advance a legitimate state interest," otherwise the regulation will be deemed a taking of private property.[474] The Supreme Court in *Nollan v. California Coastal Commission*[475] announced a test to determine when land use regulations "substantially advance" the legitimate governmental purpose. The *Nollan* Court assumed that the coastal commission land use regulation furthered a legitimate state interest and determined that the permit condition substantially advances that interest if "the permit condition serves the same governmental pur-

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the Elimination of Blight: A Case Study of Missouri's Chapter 353, 37 WASH. U. J. URB. & CONTEMP. L. 3 (1990); W. Scott McBride, Note, *The Use of Eminent Domain Under Missouri's Urban Redevelopment Corporations Law*, 37 WASH. U.J. URB. & CONTEMP. L. 169 (1990).

470. MO. ANN. STAT. § 353.110 (Vernon 1991) (10 years full exemption followed by 15 years at 50%).

471. *See* Tax Increment Fin. Comm'n v. J.E. Dunn Constr. Co., 781 S.W.2d 70 (Mo. 1989) (en banc) (sustaining tax increment financing over claim increased taxes require voter approval); Missouri *ex rel.* Plaza Properties, Inc. v. Kansas City, 687 S.W.2d 875 (Mo. 1985) (en banc per curiam) (holding Real Property Tax Increment Allocation Redevelopment Act facially constitutional); MO. ANN. STAT. §§ 99.800-99.865 (Vernon 1989 & Supp. 1992); Michael T. White, *Tax Increment Financing in Missouri*, 46 Mo. B.J. 453 (1990); Christina G. Dudley, Comment, *Tax Increment Financing for Redevelopment in Missouri: Beauty and the Beast*, 54 UMKC L. REV. 77 (1985).

472. *See generally* John J. Delaney et al., *The Needs-Nexus Analysis: A Unified Test for Validating Subdivision Exactions, User Impact Fees and Linkage*, 50 LAW & CONTEMP. PROBS. 139 (Winter 1987) (reviewing tests and proposal for more rigorous property rights oriented standard).

473. *See* Petterson v. City of Naperville, 137 N.E.2d 371, 378 (Ill. 1956); Brous v. Smith, 106 N.E.2d 503, 505, 506 (N.Y. 1952); Frank Ansuini, Inc. v. City of Cranston, 264 A.2d 910, 913 (R.I. 1970).

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

475. 483 U.S. 825 (1987).

pose as the development ban."[476] Furthermore, the courts have sustained planning and subdivision requirements presenting an "average reciprocity of advantage"[477] where the property regulated is enhanced in value due to the uniform restrictions, such as from uniform set-backs,[478] zoning, or subdivision requirements. *Keystone Bituminous Coal Ass'n v. DeBenedictis*[479] may have broadened the notion of "average reciprocity of advantage" by defining it to encompass regulations that provide broad public interest or benefit. Courts reviewing the limits of exactions have traditionally articulated a number of tests, including a rational nexus test, one of reasonableness, and the uniquely attributable examination. The recent *Nollan* decision raises questions about exactions and conditions for development, questions which remain to be answered. In addition, the equal protection clause[480] prohibits the discriminatory application of exaction standards against particular subdividers.[481] Regardless of the standard, once the municipality discloses the basis of a fee calculation, the burden shifts to the challenger to show the unconstitutionality of the exaction.[482]

A. Rational Nexus

In *Ayers v. City Council*,[483] the California Supreme Court found that dedications of land for parks, for buffering green space areas,

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476. *Id.* at 837.

477. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

478. Gorieb v. Fox, 274 U.S. 603 (1927); Town of Islip v. Summers Coal & Lumber Co., 177 N.E. 409 (N.Y. 1931); Fimiani v. Swift, 180 N.E. 355 (N.Y. 1932) (per curiam).

479. 480 U.S. 470 (1987).

480. U.S. CONST. amend. XIV.

481. *See generally* JAMES A. KUSHNER, GOVERNMENT DISCRIMINATION (1988 & Supp. 1992); Brown v. City of Joliet, 247 N.E.2d 47, 50 (Ill. App. Ct. 1969) (requiring only one subdivider to install storm drain trunklines because only case with a drainage problem); Johnson v. Reasor, 392 S.W.2d 54 (Ky. 1965) (invalidating utility connection fees imposed solely on subdividers while exempting individual lot owners); Beauty Built Constr. Corp. v. City of Warren, 134 N.W.2d 214 (Mich. 1965) (holding sewer hookup charges on developers but not single lot owners discriminatory); Divan Builders, Inc. v. Planning Bd., 334 A.2d 30 (N.J. 1975) (holding improper requirement that developer pay $20,000 toward drainage facility without charging the many other landowners benefiting from improvement); S.S. & O. Corp. v. Township of Bernards Sewerage Auth., 301 A.2d 738 (N.J. 1973) (invalidating sewer connection fees imposed at higher rate on houses in development than imposed on "comparable dwellings"); McKain v. Toledo City Plan Comm'n, 270 N.E.2d 370 (Ohio Ct. App. 1971) (holding adjacent subdivider not required to dedicate land for street widening); Strahan v. City of Aurora, 311 N.E.2d 876 (Ohio Misc. 1973) (imposing water hookup charges on developers but exempting resident homeowners held discriminatory).

482. Banberry Dev. Corp. v. South Jordan City, 631 P.2d 899 (Utah 1981); Home Builders Ass'n v. Kansas City, 555 S.W.2d 832 (Mo. 1977).

483. 207 P.2d 1, 7 (Cal. 1949) (reasonably required by the subdivision). California has enacted legislation requiring a nexus between exactions or fees and needs for services or facilities generated by the development. *See* CAL. GOV'T CODE § 66005 (West Supp. 1992).

and for road expansion of adjacent roadways and other street improvements were reasonable requirements for a city to impose on development to further health, safety, and welfare. The general rule as stated by the New Jersey Supreme Court in *Longridge Builders, Inc. v. Planning Board*,[484] and first applied by the Wisconsin Supreme Court in *Jordan v. Village of Menomonee Falls*,[485] is that exactions should bear some reasonable relationship to needs generated by the subdivision.[486]

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484. 245 A.2d 336, 337 (N.J. 1968) (per curiam) (holding failure to establish standards to apportion costs of off-site street improvements based on benefit to subdivision "fatal" to planning board's attempt to require subdivider to pave right-of-way); *accord* Holmdel Builders Ass'n v. Township of Holmdel, 583 A.2d 277 (N.J. 1990) (holding under state's fair housing act when requires development of fair share of affordable housing, municipalities may impose housing linkage impact fee exaction rather than an exaction bearing a nexus to developer's project; requiring authorization of regulations providing standards for imposition of development fees, to be issued by the Council on Affordable Housing); New Jersey Builders Ass'n v. Mayor of Bernards Township, 528 A.2d 555 (N.J. 1987) (invalidating charge to new developers for their proportional share of all new road improvements in region; holding charge failed to bear nexus to demand created by the development as required under *New Jersey Statutes* section 40:55D-42; ostensibly creating test of necessity in the case of off-site improvement change); Divan Builders, Inc. v. Planning Bd., 334 A.2d 30, 39-40 (N.J. 1975) (requiring apportionment of costs of off-site improvements between benefitted land); Squires Gate, Inc. v. County of Monmouth, 588 A.2d 824 (N.J. Super. Ct. App. Div. 1991) (rational nexus of off-site bridge widening); Brazer v. Borough of Mountainside, 262 A.2d 857 (N.J. 1970); 181 Inc. v. Salem County Planning Bd., 336 A.2d 501 (N.J. Super. Ct. Law Div. 1975) (rational nexus), *modified on other grounds per curiam*, 356 A.2d 34 (N.J. Super. Ct. App. Div. 1976); Princeton Research Lands, Inc. v. Planning Bd., 271 A.2d 719 (N.J. App. Div. 1970) (rational nexus relating to needs generated by the subdivision); Reid Dev. Corp. v. Parsippany-Troy Hills Township, 107 A.2d 20 (N.J. Super. Ct. App. Div. 1954) (holding invalid to charge developer for entire cost of water extension where benefit and water service received by other lot owners, even if developer incurs the major benefit); Batch v. Town of Chapel Hill, 376 S.E.2d 22 (Ct. App. 1989) (street improvement condition unrelated to generated need), *rev'd on other grounds*, 387 S.E.2d 655 (N.C.), *cert. denied*, 496 U.S. 931 (1990); Banberry Dev. Corp. v. South Jordan City, 631 P.2d 899 (Utah 1981) (using "reasonableness" language; however, issue is relation to benefit received and allocation fairness); *cf.* Plote, Inc. v. Minnesota Alden Co., 422 N.E.2d 231 (Ill. App. Ct. 1981) (recognizing replacement of uniquely attributable model with less rigorous proportionality).

485. 137 N.W.2d 442 (Wis. 1965), *appeal dismissed*, 385 U.S. 4 (1966).

486. *See also* Parks v. Watson, 716 F.2d 646, 653 (9th Cir. 1983) (per curiam); Contractors & Builders Ass'n v. City of Dunedin, 329 So. 2d 314 (Fla. 1976) (imposing impact fees only to extent new uses require facilities); Hernando County v. Budget Inns, 555 So. 2d 1319 (Fla. 5th DCA 1990) (invalidating requirement that owner show frontage road on building plans as precondition to obtaining a building permit; finding land banking based on lack of present need and violative of nexus requirement because no showing of need in reasonably immediate future); Lee County v. New Testament Baptist Church, 507 So. 2d 626 (Fla. 2d DCA 1987) (holding dedication of right-of-way meeting minimum county standards regardless of subdivision size violates rational nexus test requiring reasonable connection between dedication of land and anticipated needs of community due to new development); Home Builders Ass'n v. Board of County Comm'rs, 446 So. 2d 140 (Fla. 4th DCA 1983), *appeal dismissed*, 469 U.S. 976 (1984) (holding fair share of reasonably anticipated cost of expansion of new roads attributable to the new development and no defect because others would benefit from the improvement; not in excess of cost of improvements required by the development); Town of Longboat Key v. Lands End, Ltd.,

B. Reasonableness

Ayers may be a reasonableness decision. Dedication requirements could arguably be upheld even if a particular subdivision does not

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433 So. 2d 574 (Fla. 2d DCA 1983) ("proper nexus" to needs generated by development); Hollywood, Inc. v. Broward County, 431 So. 2d 606 (Fla. 4th DCA 1983) (holding government must prove need for additional facilities and demonstrate rational nexus between expenditure and benefit to the subdivision; rejecting taking claim); Wald Corp. v. Metropolitan Dade County, 338 So. 2d 863 (Fla. 3d DCA 1976) (rational nexus; holding periodic flooding justified exaction); FLA. STAT. § 380.06(15)(d) (1991) (rational nexus and reasonably attributable); Lampton v. Pinaire, 610 S.W.2d 915, 919 (Ky. Ct. App. 1980) (reasonably necessary); Howard County v. JJM, Inc., 482 A.2d 908 (Md. 1984) (holding unlimited duration reservation without nexus between exaction and generated need from development an unconstitutional taking of developer's property); Baltimore Planning Comm'n v. Victor Dev. Co., 275 A.2d 478 (Md. 1971) (holding city planning commission may not charge fees or deny plat approval because of general community-wide problems such as school overcrowding); Arrowhead Dev. Co. v. Livingston County Rd. Comm'n, 283 N.W.2d 865 (Mich. 1979) (road improvements; "rational nexus" between development and hazardous conditions of intersection outside development), *rev'd*, 322 N.W.2d 702 (Mich. 1982) (holding commission exceeded its statutory power in conditioning plat approval upon developer's agreement to pay for off-site improvement); Collis v. City of Bloomington, 246 N.W.2d 19, 23 (Minn. 1976) (holding reasonable basis to find need occasioned by subdivider's activity; rejecting the uniquely attributable test); Home Builders Ass'n v. Kansas City, 555 S.W.2d 832 (Mo. 1977) (reasonably attributable); Simpson v. City of N. Platte, 292 N.W.2d 297 (Neb. 1980) (requiring reasonable relationship nexus to immediate improvement needs directly occasioned by project); Land/Vest Properties, Inc. v. Town of Plainfield, 379 A.2d 200 (N.H. 1977) (validating charge for improvements to outside access road, only to extent fee has a rational nexus to benefit conferred upon subdivision); 181, Inc. v. Salem County Planning Bd., 336 A.2d 501 (Law Div. 1975) (invalidating dedication where no "specific and presently contemplated" street widening; finding no rational nexus to needs generated by project), *modified on other grounds per curiam*, 356 A.2d 34 (N.J. Super. Ct. App. Div. 1976); Jenad, Inc. v. Village of Scarsdale, 218 N.E.2d 673 (N.Y. 1966), *abrogation recognized*, Weingarten v. Town of Lewisboro, 542 N.Y.S.2d 1012 (1989), *aff'd mem.*, 559 N.Y.S.2d 807 (1990) (adopting a more rigorous *Nollan* nexus test with no change in outcome of park fee approval; ironic result as *Jenad* cited with approval in *Nollan*), *modified for ripeness*, 572 N.E.2d 40 (N.Y. 1991); Holmes v. Planning Bd., 433 N.Y.S.2d 587 (App. Div. 1980) (reasonable relation of conditions to plat problems); Kessler v. Town of Shelter Island Planning Bd., 338 N.Y.S.2d 778, 780 (App. Div. 1972) (holding park reasonably related to area under consideration); Ohio *ex rel.* Waterbury Dev. Co. v. Witten, 387 N.E.2d 1380 (Ohio Ct. App. 1977), *aff'd per curiam*, 377 N.E.2d 505 (Ohio 1978) (following assessment standards, water tap-in charge and park fee must bear substantial relationship to the cost involved in providing the service to the landowner); Schoonover v. Klamath County, 806 P.2d 156, 158 (Or. Ct. App. 1991) (holding approval of subdivision conditioned on annexation by fire districts, bears nexus to government goal of assessing fire protection; citing *Nollan*, despite denial of requests by districts); City of College Station v. Turtle Rock Corp., 680 S.W.2d 802, 805-6 (Tex. 1984) (finding "reasonable connection" and "extraordinary" burden on challenging developer); Banberry Dev. Corp. v. South Jordan City, 631 P.2d 899 (Utah 1981) (fee for capital costs in relation to benefits conferred); Jordan v. Village of Menomonee Falls, 137 N.W.2d 442 (Wis. 1965), *appeal dismissed*, 385 U.S. 4 (1966) (holding $200 per lot charge in lieu of dedicating land is reasonable, if development will generate need for community to provide schools, parks, or playgrounds). *See generally* Jerold S. Kayden & Robert Pollard, *Linkage Ordinances and Traditional Exactions Analysis: The Connection Between Office Development and Housing*, 50 LAW & CONTEMP. PROBS. 127, 128 n.3 (Winter 1987) (similarity of nexus tests); Note, *Municipal Development Exactions, the Rational Nexus Test, and the Federal Constitution*, 102 HARV. L. REV. 992 (1989).

solely create the need for the dedication, at least as to the street improvement crossing the small subdivision. The California Supreme Court went far beyond *Ayers*, however, in *Associated Home Builders of the Greater East Bay, Inc. v. City of Walnut Creek*,[487] in which the court upheld exactions in the form of park fees in lieu of dedication which would be used away from the subdivision, not necessarily where subdivision residents would make use of the facilities.[488] The court looked to the aggregate community need for parks generated by development rather than the neighborhood need, recognizing that some areas are served already. The court reasoned that developers should share in providing the parks when the need for them increases with new development.[489] In *Walnut Creek*, as in *Ayers*, the California Supreme Court intimated that the nexus between

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487. 484 P.2d 606 (Cal.), *appeal dismissed*, 404 U.S. 878 (1971); *see also* Building Indus. Ass'n v. City of Oxnard, 267 Cal. Rptr. 769 (Ct. App. 1990) (partially published opinion sustaining "growth requirements capital fee" charged to new development for a share of the cost of expanded public facilities with commercial and industrial development; where fee not charged for recreation, cultural, and civic facilities, and funds were placed in trust fund earmarked for expansion, and fee fee based on approximate per square foot cost of existing facilities, court ruled not necessary to prove precise facilities funded serve the project under *Walnut Creek*, as reasonable needs generation nexus under *Nollan*); Candid Enters. v. Grossmont Union High Sch. Dist., 705 P.2d 876 (Cal. 1985) (validating school impact fees on developers where development aggravates overcrowding problem); Home Builders Ass'n v. Kansas City, 555 S.W.2d 832 (Mo. 1977) (nominal adoption); Simpson v. City of N. Platte, 292 N.W.2d 297 (Neb. 1980) (requiring reasonable relationship nexus to immediate improvement needs occasioned by project); Call v. City of W. Jordan, 606 P.2d 217 (Utah 1979), *modified on reh'g*, 614 P.2d 1257 (Utah 1980) (validating a requirement of 7% park dedication but subject to hearing to determine if reasonable relationship to need for recreation generated by the subdivision exists).

488. *Walnut Creek*, 484 P.2d at 612 n.6 (court did not reach issue, but approved of argument that park exactions might be used for facilities not conveniently located for residents of the subdivision); *see also* Georgia-Pac. Corp. v. California Coastal Comm'n, 183 Cal. Rptr. 395 (Ct. App. 1982) (holding need not benefit project as long as condition bears reasonable relationship to project site; holding public access easement serves goals of coastal law); Grupe v. California Coastal Comm'n, 212 Cal. Rptr. 578 (Ct. App. 1985) (holding exaction as condition for approval of new development need not benefit project as long as serves needs to which project contributes and public interest; holding lateral beachfront easement served coastal zone goals; ruling discredited by *Nollan*). *Compare* Jenad, Inc. v. Village of Scarsdale, 218 N.E.2d 673 (N.Y. 1966) (allowing park dedication or in lieu fee if reasonably related to development) *with* Weingarten v. Town of Lewisboro, 542 N.Y.S.2d 1012 (1989), *aff'd mem.*, 559 N.Y.S.2d 807 (1990) (sustaining such exactions but eschewing "reasonableness" of *Jenad* in favor of more exacting *Nollan* nexus test with no change in outcome of park fee approval; ironic result as *Jenad* cited with approval in *Nollan*), *modified for ripeness*, 572 N.E.2d 40 (N.Y. 1991); Call v. City of W. Jordan, 606 P.2d 217 (Utah 1979) (validating requirement of cash or equivalent of 7% of subdivided land for flood control, park, and recreation and impliedly held in trust fund for the improvement), *modified on reh'g*, 614 P.2d 1257 (Utah 1980) (holding developer entitled to hearing on whether fee reasonably related to needs generated by subdivision; need not solely benefit individual subdivision). *But see* Haugen v. Gleason, 359 P.2d 108 (Or. 1961) (holding land acquisition fee, to be used for recreation or schools not directly benefiting the subdivision as an illegal tax).

489. *Walnut Creek*, 484 P.2d at 610.

the needs generated by the development and the size and nature of the exaction need only be reasonable rather than mathematically connected.[490] Although the ordinance allowed credit for recreation provided on-site, the credit was not mandatory.[491] The court approved of the calculation of generated need based on an approximation of the actual needs imposed on the community and upheld the spending of exactions collected on a regional basis.[492] The limits of the *Walnut Creek* decision are unclear because the action merely brought a facial challenge to the ordinance rather than a challenge based on the impact of an exaction on a particular subdivision. Regardless of the potential expansiveness of *Walnut Creek*, a number

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490. *Id.*; *see also* Transamerica Title Ins. Co. v. City of Tucson, 533 P.2d 693 (Ariz. Ct. App. 1975) (creating public need proves reasonableness); Griffin Homes, Inc. v. Superior Court, 280 Cal. Rptr. 792, 803 (Ct. App. 1991) (inferring reasonable relationship to benefit inferred); J.W. Jones Cos. v. City of San Diego, 203 Cal. Rptr. 580, 588 (Ct. App. 1984) (holding city may charge only new development in facility benefit assessment district although already developed properties benefited); Trent Meredith, Inc. v. City of Oxnard, 170 Cal. Rptr. 685 (Ct. App. 1981); Liberty v. California Coastal Comm'n, 170 Cal. Rptr. 247 (Ct. App. 1980) (invalidating condition placed on restaurant to provide free public parking for beach users, while invalidating requirement to provide adequate parking to serve restaurant customers; holding condition unrelated to use is invalid and deemed unreasonable under *Walnut Creek*); Collis v. City of Bloomington, 246 N.W.2d 19 (Minn. 1976) (holding reasonable basis to find need occasioned by subdivider's activity; rejecting the uniquely attributable test); Middlemist v. City of Plymouth, 387 N.W.2d 190 (Minn. Ct. App. 1986) (applying modified version, closer to reasonableness formulation; ostensibly approving land dedication for street requirement; remanding to determine if related to needs generated, yet approval of road dedication for communitywide facilities, the need for which is caused by cumulative impact of development projects); Missouri *ex rel.* Noland v. Saint Louis County, 478 S.W.2d 363, 367 (Mo. 1972) (holding *Pioneer Trust* provides guidance, citing *Ayers*' "reasonable relationship" test to support invalidation of road relocation, widening, and improvement); Billings Properties, Inc. v. Yellowstone County, 394 P.2d 182 (Mont. 1964) (quoting the *Pioneer Trust* test as the landowner's position, but rejecting the argument in favor of a presumption of reasonableness as to the legislative requirement one-ninth of subdivisions 20 acres or less be dedicated for parks); City of College Station v. Turtle Rock Corp., 680 S.W.2d 802, 806 (Tex. 1984) (reasonable connection). Banberry Dev. Corp. v. South Jordan City, 631 P.2d 899 (Utah 1981) (reasonableness described as nexus analysis); Jordan v. Village of Menomonee Falls, 137 N.W.2d 442 (Wis. 1965), *appeal dismissed*, 385 U.S. 4 (1966) (holding $200 per lot charge in lieu of dedicating land is reasonable, if development will generate need for community to provide schools, parks, or playgrounds); CAL. GOV'T CODE § 65909 (West Supp. 1992) (dedication conditions for permits and variances reasonably related to use); *cf.* Briar West, Inc. v. City of Lincoln, 291 N.W.2d 730 (Neb. 1980) (holding unreasonable to require subdivider to pay half the cost of paving and widening arterial abutting streets when also required subdivider to relinquish right of direct vehicular access from such abutting streets; the court not reaching adoption of nexus or uniquely attributable test).

491. *Walnut Creek*, 484 P.2d at 617.

492. *Id.* at 611-13. *But see* Parks v. Watson, 716 F.2d 646 (9th Cir. 1983) (per curiam) (holding dedication of land containing geothermal wells lacked any rational relationship to needs arising from platted street vacation in order to allow apartment development); *cf.* Building Indus. Ass'n v. City of Oxnard, 198 Cal. Rptr. 63 (Ct. App. 1984) (holding funding of capital improvements not related to needs generated by the project), *vacated*, 706 P.2d 285 (1985) (vacated for mootness to reconsider fairness when ordinance amended).

of courts have identified the standard for subdivision conditions as one of reasonableness.[493]

In a post-*Nollan* reconsideration of condition and dedication power, a California appellate court narrowly interpreted *Ayers* and *Walnut Creek* while offering a novel limitation on exactions. In *Rohn v. City of Visalia*,[494] an intermediate appellate opinion authored by now Associate Justice Baxter of the California Supreme Court, invalidated an attempted dedication of what amounted to 14% of the parcel to permit realignment of the streets at the nearest intersection as a condition of site approval and a building permit for a commercial project.[495] The court did not indicate that a different result might flow had the condition been imposed for a plan or zoning change or for subdivision approval. *Rohn* might have been unremarkable had the court emphasized that the need for realignment was due solely to poor prior planning and not in anyway due to projected demand generated by the proposed project. *Rohn* remains unique, however, because of the court's reliance upon a statement in the environmental impact report that the proposed office building would not result in any increased traffic over that which would have been generated if the property were developed as originally zoned for residential use.[496] Never has a court measured needs generated as that in excess of a full buildout under existing land use controls, the equivalent to a vested right in the existing zoning classification. For example, subdivision not involving a planning or zoning change to a more intensive development would generate no need for additional infrastructure and services. The result is a standard that surely will generate massive downzoning and downplanning, will likely stall investment in infrastructure and possibly result in a development halt,

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493. Beach v. Planning Comm'n, 103 A.2d 814 (Conn. 1954); Call v. City of W. Jordan, 606 P.2d 217 (1979), *modified on reh'g*, 614 P.2d 1257 (Utah 1980); *cf.* People *ex rel.* Exchange Nat'l Bank v. City of Lake Forest, 239 N.E.2d 819 (Ill. 1968) (holding "reasonable regulation" would not embrace street dedication where two lots front on public way); Parker v. Board of County Comm'rs, 603 P.2d 1098 (N.M. 1979) (holding legislative standards capable of reasonable application).

494. 263 Cal. Rptr. 319 (Ct. App. 1989).

495. *See also* Bixel Assocs. v. City of Los Angeles, 265 Cal. Rptr. 347 (Ct. App. 1989) (invalidating fire hydrant building permit condition fee as invalid tax due to city's failure to show that method used to calculate fee "bore a fair and substantial relation" to developer's benefit required by § 54990 of the California Government Code and constitutionally mandated but without analysis or explanation; insisting the fee should exclusively reflect the cost of new development, such as where fee is earmarked and directed to undeveloped area facilities or based on square footage generation factor; appearing to apply the uniquely attributable test rather than the California reasonableness standard without discussing *Nollan* or *Walnut Creek*).

496. 263 Cal. Rptr. at 328.

and will surely shift an even greater burden for facilities financing on that smaller class of developers seeking to develop in a classification far more intensive than current restrictions allow. The court professed to apply the reasonable relation test of *Walnut Creek*, yet the denial of authority to condition approval on street misalignment correction regardless of the source of the problem directly contradicts part of the holding in *Ayers*.[497] The commercial project would generate traffic, and the issue in *Ayers* and *Walnut Creek* was the portion of the traffic at the intersection generated by the proposal and the reasonableness of that burden assigned to the development. In concluding that the project would generate no traffic,[498] the court assumed that the result was dictated by *Nollan* in that the project could not be denied due to the alignment problem.

C. *Uniquely Attributable*

A more restrictive analysis was employed by the Illinois Supreme Court in *Pioneer Trust & Savings Bank v. Village of Mount Prospect*,[499] in which the court required that an exaction must be uniquely attributable to the needs generated by the development, and that the subdivision approved must enjoy the benefit of the exaction.[500] An easement for adjacent street widening to accommodate

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497. *See id.* at 323-28.

498. *Id.* at 328.

499. 176 N.E.2d 799, 802 (Ill. 1961) (ruling one acre for each 60 dwelling units an excessive park and school dedication); *see also* Board of Educ. v. Surety Developers, Inc. 347 N.E.2d 149 (Ill. 1975) (sustaining school dedication); Rosen v. Village of Downers Grove, 167 N.E.2d 230, 233-34 (Ill. 1960); Brown v. City of Joliet, 247 N.E.2d 47, 50 (Ill. App. Ct. 1969). *But see* Plote, Inc. v. Minnesota Alden Co., 422 N.E.2d 231 (Ill. App. Ct. 1981) (recognizing replacements "uniquely attributable" model with less rigorous proportionality); Krughoff v. City of Naperville, 369 N.E.2d 892 (Ill. 1977) (citing uniquely attributable model; accepting trial court finding yet appearing to apply a rational nexus approach in accepting various exempted types of development); Middlemist v. City of Plymouth, 387 N.W.2d 190 (Minn. Ct. App. 1986) (applying modified version, closer to reasonableness formulation, ostensibly approving land dedication for street requirement; remanding to determine if related to needs generated, yet approval of road dedication for communitywide facilities, the need for which is caused by cumulative impact of development projects); George A. Staples, Jr., *Exaction—Mandatory Dedications and Payments in Lieu of Dedication*, 1980 INST. PLAN. ZONING & EMINENT DOMAIN 111, 132 (suggesting *Pioneer Trust* no longer the Illinois rule after *Krughoff*).

500. *Accord* Cherry Hills Resort Dev. Co. v. Cherry Hills Village, 790 P.2d 827, 832 (Colo. 1990) (finding improvements were "necessitated by the proposed construction"); Aunt Hack Ridge Estates, Inc. v. Planning Comm'n, 273 A.2d 880 (Conn. 1971) (appearing to apply rational nexus test in endorsing a 4% park dedication rule with a minimum of 10,000 square feet under a strict presumption of validity model); Missouri *ex rel.* Noland v. Saint Louis County, 478 S.W.2d 363, 367 (Mo. 1972) (holding *Pioneer Trust* provides guidance; citing *Ayers*' "reasonable relationship" test to support invalidation of road relocation, widening, and improvement); Southern Nev. Homebuilders Ass'n v. Las Vegas Valley Water Dist., 693 P.2d 1255 (Nev.

the general public benefit rather than needs generated by the project would not meet the test and might not meet more liberal formulations.[501]

D. Nollan *and the Three Nexuses*

When the U.S. Supreme Court invalidated the requirement that a single-family homeowner provide a lateral public beach access easement as a condition to rebuild his single-family home in *Nollan v. California Coastal Commission*,[502] it raised many questions about development exactions while answering only a minor one about public beach access. The central contemporary confusion generated by *Nollan* surrounds the unclear impact, conflict, and possible preemption of the various state exaction standards. Distinguishing the tests for rational nexus and reasonableness is difficult. The California decisions, such as *Ayers v. City Council*[503] and *Associated Home Builders v. City of Walnut Creek*,[504] as well as the New Jersey ruling of *Longridge Builders, Inc. v. Planning Board*[505] and the Wisconsin decision of *Jordan v. Village of Menomonee Falls*[506] all employ models that could be considered interchangeable.

While *Nollan* did involve a condition imposed upon a coastal zone permit, it was not specifically a subdivision exaction, nor would an-

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1985) (holding water feeder main connection charge must be limited to recover costs identified with the property, such as the initial costs of oversizing lines to prepare for anticipated growth; ruling fee an inequitable allocation and recovery over costs); J.E.D. Assocs., Inc. v. Town of Atkinson, 432 A.2d 12, 15 (N.H. 1981) (holding that must show specific public need for the dedication due to nature of the development; contributing only the cost in proportion of increased need attributable to the development); Town of Aubin v. McEvoy, 553 A.2d 317 (N.H. 1988); Patenaude v. Town of Meredith, 392 A.2d 582 (N.H. 1978) (holding need for improvement must be necessitated by the development yet without citing *Pioneer Trust*); R.G. Dunbar, Inc. v. Toledo Plan Comm'n, 367 N.E.2d 1193 (Ohio Ct. App. 1976); McKain v. Toledo City Plan Comm'n, 270 N.E.2d 370, 374 (Ohio Ct. App. 1971); Frank Ansuini, Inc. v. City of Cranston, 264 A.2d 910 (R.I. 1970); *see also* New Jersey Builders Ass'n v. Mayor of Bernards Township, 528 A.2d 555 (N.J. 1987) (invalidating charge to new developers for their proportional share of all new road improvements in region; failing to bear nexus to demand created by the development as required under *New Jersey Statutes* section 40:55D-42 (West Supp. 1990); ostensibly creating test of necessity in the case of off-site improvement charge); *cf.* Bethlehem Evangelical Lutheran Church v. City of Lakewood, 626 P.2d 668 (Colo. 1981) (ruling street dedication and curb, gutter, sidewalk, and street improvement, appropriate conditions for building permit issuance under standard of "necessity").

501. *See* Robbins Auto Parts, Inc. v. City of Laconia, 371 A.2d 1167 (N.H. 1977) (invalidating public benefit of easement exaction unrelated to nature of or needs generated by development).

502. 483 U.S. 825 (1987).

503. 207 P.2d 1 (Cal. 1949).

504. 484 P.2d 606 (Cal.), *appeal dismissed*, 404 U.S. 878 (1971).

505. 245 A.2d 336 (N.J. 1968).

506. 137 N.W.2d 442 (Wis. 1965), *appeal dismissed*, 385 U.S. 4 (1966).

yone argue that the need for the public easement along the ocean was generated by any action desired to be taken by the homeowner.[507] The Court, applying the taking doctrine, discussed the excessive regulation line of analysis and compared the drastic interference with the right to exclude. Yet the Court did not feel obligated to discuss whether any more than *de minimis* economic loss was involved. Rather, the Court stressed the lack of broad public interest behind the regulation, rejecting the notion that the lack of easement somehow psychologically interfered with the public's appreciation of its right of public beach access, particularly in light of the availability of access and the clear public view of the ocean from the highway.

The validity of an exaction under *Nollan* may depend on a finding that the condition substantially furthers governmental purposes that would justify permit denial.[508] The Court's ruling in *Nollan* is more

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507. *Nollan*, 483 U.S. at 838 (identifying the only problem as possible visual access caused by the Nollans). *But cf. id.* at 842, 849-50 (Brennan, J., dissenting, joined by Marshall, J.) (arguing that along with view access, the development would generate additional private beach use of the ocean front thereby burdening the public's ability to traverse to and along the shorefront); *see also* Building Indus. Ass'n v. City of Oxnard, 267 Cal. Rptr. 769 (Ct. App. 1990) (partially published opinion sustaining "growth requirements capital fee" charged to new development for a share of the cost of expanded public facilities with commercial and industrial development; where fee not charged for recreation, cultural, and civic facilities, and funds were placed in trust fund earmarked for expansion, and the fee approximate per square foot cost of existing facilities, the court ruled that it was not necessary to prove precise facilities funded serve the project under *Walnut Creek* as reasonable needs generation nexus under *Nollan*).

508. *See* 483 U.S. at 834-37. This was the interpretation of the Reagan administration. Exec. Order No. 12,630, § 4(a)(1), (2), 3 C.F.R. 554, 557 (1989), *reprinted in* 5 U.S.C.A. § 601 app. at 363-65 (Supp. 1991) (section 3(c) providing that regulation be no greater than necessary to achieve significant health and safety program); Dale A. Norton, *Takings Analysis of Regulations*, 13 HARV. J.L. & PUB. POL'Y 84 (1990); *see also* Commercial Builders v. City of Sacramento, 941 F.2d 872 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1997 (1992); Rohn v. City of Visalia, 263 Cal. Rptr. 319 (Ct. App. 1989); Presbytery of Seattle v. King County, 787 P.2d 907, 915-16 n.30 (citing *Nollan* that exactions valid if calculated to compensate for adverse public impacts of proposed development), *cert. denied*, 111 S. Ct. 284 (1990); William A. Falik & Anna C. Shimko, *The "Takings" Nexus—The Supreme Court Chooses a New Direction in Land-Use Planning: A View From California*, 39 HASTINGS L.J. 359 (1988); Jerold S. Kayden, *Land-Use Regulations, Rationality, and Judicial Review: The RSVP in the* Nollan *Invitation (Part I)*, 23 URB. LAW. 301 (1991) (rejection of argument *Nollan* increases level of scrutiny traditionally provided land use regulation under *Euclid* recognizing that the courts are unclear about *Nollan*); Nathaniel S. Lawrence, *Means, Motives and Takings: The Nexus Test of* Nollan v. California Coastal Commission, 12 HARV. ENVTL. L. REV. 231 (1988); Stewart E. Sterk, Nollan, Henry George, *and Exactions*, 88 COLUM. L. REV. 1731 (1988); Colin C. Deihl, Comment, *The First Applications of the* Nollan *Nexus Test: Observations and Comments*, 13 HARV. ENVTL. L. REV. 585 (1989); Peter F. Neronha, Note, *A Constitutional Standard of Review for Permit Conditions, Exactions, and Linkage Programs:* Nollan v. California Coastal Commission, 30 B.C. L. REV. 903 (1989); Note, *Taking a Step Back: A Reconsideration of the Takings Test of* Nollan v. California Coastal Commission, 102 HARV. L. REV. 448 (1988); Patricia A. Brooles, Note, *The Future of Municipal Parks in a Post-*Nollan *World: A Survey of Takings Tests as Applied to Subdivision Exactions*, 8 VA. J. NAT. RESOURCES L. 141 (1988).

easily understood as a physical invasion case: the taking of an easement for the public.[509] While *Nollan* might appear to have rejected the California test of reasonableness, closer inspection may suggest that state law exaction standards are separate and distinct from the constitutional minimum taking clause and substantive due process standards. The Court characterized reasonableness under California law as requiring that a condition be reasonably related to a public need and that the condition be able to accommodate the need.[510] This so-called California rule, which is not the *Walnut Creek* formulation, was, according to the Court, less restrictive than all the other state decisions that have addressed the issue.[511] Instead, the Court criticized *Grupe v. California Coastal Commission*,[512] in which the California Court of Appeals sustained a lateral beach easement exaction, finding simply that the subject property would contribute to accommodating a public need even if the project standing alone did not create the need. The *Nollan* Court may have impliedly suggested that a rational nexus test may accord sufficient restraints on government police powers to protect against violations of a property owners' Fifth Amendment rights.[513] Alternatively, the Court may have rejected the three then existing tests of reasonableness, rational nexus, and uniquely attributable in favor of a new test applicable to all permit conditions.

A narrower reading, however, may lead one to the conclusion that *Nollan* and the test to determine whether a condition "substantially advances a legitimate state purpose" apply only to permit conditions that cause a permanent physical occupation.[514] In *Kaiser Aetna*

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509. *See* Kaiser Aetna v. United States, 444 U.S. 164 (1979).

510. *See Nollan*, 483 U.S. at 838-39; *see also* Building Indus. Ass'n v. City of Oxnard, 267 Cal. Rptr. 769 (Ct. App. 1990) (partially published opinion sustaining "growth requirements capital fee" charged to new development for a share of the cost of expanded public facilities with commercial and industrial development. Fee not charged for recreation, cultural, and civic facilities. The funds were placed in trust fund earmarked for expansion. The fee based on approximate per square foot cost of existing facilities. The court ruled not necessary to prove precise facilities funded serve the project under *Walnut Creek*, as reasonable needs generation nexus under *Nollan*.).

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

512. 212 Cal. Rptr. 578 (Ct. App. 1985).

513. David L. Callies & Malcolm Grant, *Paying For Growth and Planning Gain: An Anglo-American Comparison of Development Conditions, Impact Fees and Development Agreements*," 23 URB. LAW. 221, 236 (1991) (suggests court adoption of the "rational nexus" test); *see* 483 U.S. at 838-40.

514. *See Nollan*, 483 U.S. at 832-35, 832 n.1; ABN 51st St. Partners v. City of New York, 724 F. Supp. 1142 (S.D.N.Y. 1989) (validating requirement that a renovating property owner, found to have engaged in harassment of tenants, must retain "at least 28%" of apartment building as low income housing as a permit condition; held not a physical occupation under *Nollan* as

v. United States,[515] Kaiser Aetna had acquired Kuapa Pond as private property for the purpose of subdivision and development.[516] Kaiser dredged the pond and created a navigable gateway opening eventually to the Pacific Ocean.[517] The Army Corps of Engineers determined that no permits were needed for this dredging.[518] Sometime thereafter, the United States brought suit asserting that Kaiser must allow public access to Kuapa Pond pursuant to section 10 of the Rivers and Harbors Appropriations Act of 1899 because the result of dredging and other improvements caused the pond to become a navigable waterway of the United States.[519] Therefore, "[i]n light of its expansive authority under the Commerce Clause . . . Congress could assure the public a free right of access to [Kuapa Pond]."[520]

The Court found that the "[g]overnment . . . could have conditioned its approval of the dredging on petitioners' agreement to comply with various measures that it [the government] deemed appropriate for the promotion of navigation."[521] In addition, the Court found that the "imposition of the navigational servitude in this context will result in an actual physical invasion of the privately owned marina."[522] Further, the Court found that the government could impose a permit condition creating a physical occupation, but in this case that condition would go too far and therefore constitute a taking of private property for public use.[523]

The Court stated in dicta that the executive branch with Congress' pronouncement could have imposed a permit condition that creates an actual physical invasion. "Government . . . could have conditioned its approval of the dredging on petitioner's agreement to comply with various measures that it [the government] deemed ap-

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condition furthers government interest in fighting displacement); Circle K Corp. v. City of Mesa, 803 P.2d 457 (Ariz. Ct. App. 1990) (reviewing and sustaining sign elimination or modification of nonconforming sign as a condition for new sign permit under *Nollan* although apparent minimal scrutiny where no physical occupation involved); Grand Forks-Trail Water Users, Inc. v. Hjelle, 413 N.W.2d 344, 347 (N.D. 1987) (prohibiting pipelines within 100 feet of center line of state highway not a *Nollan* permanent physical occupation), *appeal dismissed*, 484 U.S. 1053 (1988); *cf.* Associated Builders v. Baca, 769 F. Supp. 1537 (N.D. Cal. 1991) (limiting *Nollan* to land use regulatory conditions and ruling inapplicable to building standards and conditions, here "prevailing wage" requirement). Ellison v. County of Ventura, 265 Cal. Rptr. 795, 798 (Ct. App. 1990) (finding no taking absent invasion of property rights).

515. 444 U.S. 164 (1979).
516. *Id.* at 167.
517. *Id.*
518. *Id.*
519. *Id.* at 168-69.
520. *Id.* at 174.
521. *Id.* at 179.
522. *Id.* at 180.
523. *Id.* at 178.

propriate for the promotion of navigation."[524] In *Kaiser Aetna*, however, the development was not required to obtain permits from the Army Corp of Engineers.[525] If one assumes that the development did require governmental approval, the Court suggested that the permit condition would be valid.[526] Specifically, the owners of real property would be required to allow the public to pass across their private property. Therefore, the Court impliedly assumed that the permit condition would substantially advance a legitimate governmental interest as now required by *Nollan*.

The *Kaiser Aetna* case, however, did not deal with permit condition regulation but with a permanent physical occupation authorized by the government. The Court found that "imposition of the navigational servitude in this context will result in an actual physical invasion of the privately owned marina."[527] In *Loretto v. Teleprompter Manhattan CATV Corp.*,[528] the Supreme Court stated that "[w]hen faced with a constitutional challenge to a permanent physical occupation of real property, this Court has invariably found a taking."[529]

The *Kaiser Aetna* dictum may have been implicitly rejected in *Nollan*. The *Nollan* Court ruled that the lateral beach easement was not within the government's police powers because the easement did not substantially advance the legitimate governmental purpose, demonstrated by the California Coastal Commission's findings.[530] Furthermore, even if the coastal commission's findings demonstrated a specific connection between provisions for access and burdens on access, such a showing would not void the result of the *Nollan* decision.[531]

Arguably, the Court is subjectively weighing the classic right-of-way easement in *Nollan* against traditional doctrines regarding navigational servitudes in *Kaiser Aetna* to distinguish *Nollan* from *Kaiser Aetna*.[532] The latter is seemingly more important or legiti-

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524. *Id.* at 179.
525. *Id.* at 167.
526. *See id.* at 179.
527. *Id.* at 180.
528. 458 U.S. 419, 427 (1981).
529. *Id. But cf.* FCC v. Florida Power Corp., 480 U.S. 245 (1987) (finding utility pole charge regulation not a physical occupation due to voluntary participation of private utility in utility pole rental business); Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74 (1980) (finding no physical occupation taking in state court mandated private shopping mall access by those engaged in expressive activities).
530. *Nollan*, 483 U.S. at 838.
531. *See id.* at 841.
532. *See id.* at 832 n.1.

mate. Further, the Court focused on the word "substantially." Presumably, if the legitimate governmental interest is great, the condition is not required to go as far in furthering the governmental interest as it would if the legitimate interest were not as great.

The *Nollan* Court could have distinguished *Kaiser Aetna* because *Nollan* presented a permanent physical occupation brought about by a permit condition stemming from a discretionary governmental approval. In *Kaiser Aetna*, however, the permanent physical occupation occurred because of a direct regulation without the property owner's seeking discretionary governmental dredging and full approval. When a permanent physical occupation stems from direct regulation without the property owner's seeking discretionary permit approval, the regulation typically effects a taking, even if the impact is *de minimis*.[533]

The *Nollan* Court, however, determined that an easement creates a permanent physical occupation and questioned whether granting an easement as a permit condition alters the traditional doctrine reiterated in *Loretto*.[534] The Court discussed the rule applicable to permit conditions.[535] The *Nollan* Court concluded that "unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation,"[536] suggesting that the condition must bear a nexus to a problem which would justify project denial.

Applying this test to the *Kaiser Aetna* facts, the denial of the dredging permit would not accomplish the same governmental purpose sought by the permit condition. Assuming that the governmental purpose sought public access to the pond, the denial of the dredging permit would not have allowed the public to enter Kuapa Pond. Without dredging, the pond boats generally could not enter due to a natural sandbar and man-made stone walls. Moreover, even if boats could transverse onto the pond, the pond owner could have excluded the public from the privately owned pond because the right to exclude others is one of the most essential sticks in the bundle of rights that are commonly characterized as property.[537] How-

533. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 427 (1981). *But cf.* FCC v. Florida Power Corp., 480 U.S. 245 (1987) (finding utility pole charge regulation not a physical occupation due to voluntary participation of private utility in utility pole rental business); Pruneyard Shopping Ctr. v. Robins, 447 U.S. 74 (1980) (finding that no physical occupation taking in state court mandated private shopping mall access by those engaged in expressive activities).

534. Nollan v. California Coastal Comm'n, 483 U.S. 825, 831-32 (1987).

535. *See* Agins v. City of Tiburon, 447 U.S. 255, 260 (1980).

536. *Nollan*, 483 U.S. at 837.

537. *Id.* at 831.

ever, the *Nollan* permit condition would allow public access. The hypothetical permit condition discussed in *Kaiser Aetna* fails the *Nollan* test, so it would not be a valid regulation.[538] Hence, *Nollan* may only apply to permit conditions that cause a permanent physical occupation stemming from a traditional right-of-way easement. Other courts, however, have applied the *Nollan* test to other permit conditions to ascertain whether the condition is a valid land use regulation.[539]

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538. *See* Boone v. United States, 743 F. Supp. 1367, 1377-78 (D. Haw. 1990) (following *Kaiser* in refusing to mandate a navigational easement where lagoon improved outside of any permit process, but applying *Nollan* in dicta to invalidate the hypothetical permit condition), *aff'd on other grounds*, 944 F.2d 1489 (9th Cir. 1991) (not subject to public access requirement as not a naturally navigable waterway).

539. *See, e.g.*, Commercial Builders v. City of Sacramento, 941 F.2d 872 (9th Cir. 1991) (upholding an ordinance requiring nonresidential developers to make contributions to an affordable housing trust fund so as to offset burdens placed on the city as a result of job creation over taking claims; relying on an impact study undertaken by the city showing that only half of the projected subdivision generated housing cost and that the fee bore a proper nexus under *Nollan* to the needs generated by the development), *cert. denied*, 112 S.Ct. 1997 (1992); Circle K Corp. v. City of Mesa, 803 P.2d 457 (Ariz. Ct. App. 1990) (reviewing and sustaining sign elimination or modification condition for new sign permit under *Nollan* although apparent minimal scrutiny where no physical occupation involved); Griffin Homes, Inc. v. Superior Court, 274 Cal. Rptr. 456 (Ct. App. 1990) (vacating demurrer challenging building cap under substantive due process and inverse condemnation claims in the face of expensive infrastructure installation far in excess of need generated by limited number of building permits so far awarded, with the court strongly endorsing growth management; leaving policy conflicts to legislators in a decision for which rehearing has been granted; finding delay in building permit issuance-based inverse condemnation claim untimely, yet endorsing a *Nollan*-like model looking to a lack of substantial relationship to public health, safety, morals, or general welfare), *vacated*, 280 Cal. Rptr. 792, 803 (Ct. App. 1991) (vacated on rehearing for ripeness); Marblehead v. City of San Clemente, CAL. OFFICE OF PLAN. & RES. PARTNERSHIP NEWSL., Nov.-Dec. 1988, at 6 (Cal. Super. Ct. 1988) (invalidating growth control initiative election-created plan which would prohibit new development for which adequate roads, sewers, flood control, parks, police, and emergency services were unavailable to serve the project; requiring property owners to mitigate conditions not caused by their development and to cure inadequacies of prior development violated the nexus test required by *Nollan*), *vacated*, 277 Cal. Rptr. 550 (Ct. App. 1991) (vacated on ripeness grounds as the measure directed the city council to amend the community's general plan; ruling that the court ruling that the initiative itself must amend the plan and must specify which elements were to be modified); Department of Transp. *ex rel.* People v. Amoco Oil Co., 528 N.E.2d 1018 (Ill. App. Ct. 1988) (finding *Nollan* applicable to all permits and treated similarly to challenge to ordinance); Holmdel Builders Ass'n v. Township of Holmdel, 556 A.2d 1236 (N.J. Super. Ct. App. Div. 1989) (finding mandatory set-asides or fees for affordable housing valid only if reasonable compensatory benefits such as density bonuses offered; South Brunswick imposed a suspect linkage fee of 10 to 15 cents per square foot for residential development and 25 to 50 cents per square foot for nonresidential development; Middletown required an invalid 7% set-aside; Holmdel allowed .2 units per acre bonus on project if fees representing 2.5% of sale price of units which is valid unless artificial downzoning a pretext to impose exaction; ruling the charge legislatively unauthorized and declining to reach whether the uncompensated charges would be characterized as confiscatory under *Nollan*; suggesting, however, that the need for affordable housing was not generated by the developments and thus compensation would appear not to validate the exaction under a strict reading of *Nollan* because the absence of affordable housing would apparently not

Despite the *Nollan* Court's ostensible analytical confusion, the case obliquely raises several issues affecting exactions. First, the Court stated in dicta that if the house cut off the view of the ocean, the state might condition the construction of a viewing platform.[540] Thus, if construction frustrated access to the ocean, redevelopment might be conditioned on a public easement across the property from the street to the public beach. These observations suggest a rather broad interpretation of exactions power. While the majority cites *Pioneer Trust* within a string of citations of ostensibly acceptable exaction rulings including two other *Pioneer Trust*-type uniquely attributable rulings,[541] and while it cites *Pioneer Trust* as an example of a case that follows the appropriate approach to beach access,[542] did the Court imply that the "uniquely attributable" test is now constitutionally mandated? To the contrary, the Court included within that string of citations a number of cases embracing the rational nexus approach that do not reflect the *Pioneer Trust*

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justify project denial), *aff'd in part and rev'd in part*, 583 A.2d 277 (N.J. 1990) (finding that state's fair housing act requiring development of fair share of affordable housing implicitly authorizes housing linkage impact fee exaction, but requires authorizing regulations containing standards to be issued by the Council on Affordable Housing; summarily rejecting facial taking claim); Weingarten v. Town of Lewisboro, 542 N.Y.S.2d 1012 (Sup. Ct. 1989) (abrogating reasonable relationship test in favor of adopting a more rigorous *Nollan* nexus test with no change in outcome of park fee approval), *aff'd mem.*, 559 N.Y.S.2d 807 (App. Div. 1990), *modified for ripeness*, 572 N.E.2d 40 (N.Y. 1991), *abrogating* Jenad, Inc. v. Village of Scarsdale, 218 N.E.2d 673 (N.Y. 1966); Schoonover v. Klamath County, 806 P.2d 156 (Or. Ct. App. 1991) (subdivision conditioned on annexation by fire districts bears nexus to government goal of assessing fire protection; citing *Nollan*, despite denial of requests by districts), *cert. denied*, 112 S. Ct. 375 (1991).

540. *Nollan*, 483 U.S. at 835-37; *see also* Whalers' Village Club v. California Coastal Comm'n, 220 Cal. Rptr. 2 (Ct. App. 1985) (dedicating public beach access easement as condition to construct revetment but ruling suspect after *Nollan*), *cert. denied*, 476 U.S. 1111 (1986); Grupe v. California Coastal Comm'n, 212 Cal. Rptr. 578 (Ct. App. 1985) (lateral beach access single-family home permit condition ruling discredited by *Nollan*; noting that the myriad of projects which including this home created the need for open space, recreation, and beach access; justifying a lateral easement despite the fact that project did not contribute to the need and that the condition would not address a need to which the project contributed); Remmenga v. California Coastal Comm'n, 209 Cal. Rptr. 628 (Ct. App.) (public beach access or $5000 in lieu fee where beach otherwise virtually inaccessible most of the year although lot one mile from beach), *appeal dismissed*, 474 U.S. 915 (1985); Georgia-Pac. Corp. v. California Coastal Comm'n, 183 Cal. Rptr. 395 (Ct. App. 1982) (finding beach access easement condition but rejecting lateral easement and vertical easement on noncontiguous parcel as failed to bear reasonable relationship to project, a helicopter facility with security fence).

541. J.E.D. Assocs., Inc. v. Town of Atkinson, 432 A.2d 12, 15 (N.H. 1981), *overruled*, Town of Auburn v. McEvoy, 553 A.2d 317 (N.H. 1988); Frank Ansuini, Inc. v. City of Cranston, 264 A.2d 910 (R.I. 1970).

542. 483 U.S. at 839-40; *see also* Michael L. Chapman and Cindy A. Barzell, Note, *When Exactions Become Extortion: The Supreme Court Draws the Line in* Nollan v. California Coastal Commission, 39 MERCER L. REV. 1033 (1988).

"uniquely attributable" model or a more rigorous rule of necessity.[543] Therefore, it appears that the solution to the Court's mysteries must await subsequent decisions.

Second, *Nollan* simply may be authority for the proposition that a government benefit, such as permit approval, may not be conditioned on the applicant's foregoing a constitutional right where the condition is not rationally related to the benefit conferred.[544] This

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543. Littlefield v. City of Afton, 785 F.2d 596, 607 (8th Cir. 1986) (finding that condition must be rationally related to benefit conferred, citing *Parks*); Parks v. Watson, 716 F.2d 646, 653 (9th Cir. 1983) (per curiam) (reasonable relationship to needs generated by subdivision and rational relationship to public purpose); Aunt Hack Ridge Estates, Inc. v. Planning Comm'n, 273 A.2d 880 (Conn. 1970) (endorsing the uniquely attributable test, but appearing to apply rational nexus test in endorsing a 4% park dedication rule with a minimum of 10,000 square feet under a strict presumption of validity review model); Town of Longboat Key v. Lands End, Ltd., 433 So. 2d 574 (Fla. 2d DCA 1983) ("proper nexus" to need generated); Lampton v. Pinaire, 610 S.W.2d 915, 919 (Ky. Ct. App. 1980) (reasonably necessary); Schwing v. Baton Rouge, 249 So. 2d 304 (La. Ct. App. 1971) (invalidating road dedication where no present intent to develop and unrelated to needs generated by project); Howard County v. JJM, Inc., 482 A.2d 908 (Md. 1984) (must bear nexus between exaction and generated need from development; holding unlimited duration reservation without nexus a taking); Collis v. City of Bloomington, 246 N.W.2d 19 (Minn. 1976) (applying reasonable basis test to find need occasioned by subdivider's activity; rejecting the uniquely attributable test); Missouri *ex rel.* Noland v. Saint Louis County, 478 S.W.2d 363 (Mo. 1972) (citing both *Pioneer Trust* and *Ayers* but requiring only a reasonableness showing of condition's relation to needs generated by the development); Billings Properties, Inc. v. Yellowstone County, 394 P.2d 182 (Mont. 1964) (quoting the *Pioneer Trust* test as the landowner's position but rejecting the argument in favor of a presumption of the reasonableness of the legislative judgment requiring one-ninth of subdivisions of 20 acres or less to be dedicated for parks); Simpson v. City of N. Platte, 292 N.W.2d 297 (Neb. 1980) (reasonable relationship nexus directly occasioned by project); Briar West, Inc. v. City of Lincoln, 291 N.W.2d 730 (1980) (finding unreasonable to require subdivider to pay half the cost of paving and widening arterial abutting streets where the subdivider was required to relinquish right of direct vehicular access from such abutting streets); Longridge Builders, Inc. v. Planning Bd., 245 A.2d 336 (N.J. 1968) (per curiam) (rational nexus); Jenad, Inc. v. Village of Scarsdale, 218 N.E.2d 673 (N.Y. 1966) (reasonableness), *abrogation recognized*, Weingarten v. Town of Lewisboro, 542 N.Y.S.2d 1012 (Sup. Ct. 1989) (adopting a more rigorous *Nollan* nexus test with no change in outcome of park fee approval), *aff'd mem.*, 559 N.Y.S.2d 807 (App. Div. 1990) *modified for ripeness*, 572 N.E.2d 40 (N.Y. 1991); City of College Station v. Turtle Rock Corp., 680 S.W.2d 802, 806 (Tex. 1984) (reasonable connection); Call v. City of W. Jordan, 606 P.2d 217 (Utah 1979), *modified on reh'g*, 614 P.2d 1257 (Utah 1980) (reasonable relationship and need not solely benefit individual subdivision); Board of Supervisors v. Rowe, 216 S.E.2d 199 (Va. 1975) (citing the various theories without a specific endorsement of *Pioneer Trust*); Jordan v. Village of Menomonee Falls, 137 N.W.2d 442 (Wis. 1965), *appeal dismissed*, 385 U.S. 4 (1966) (reasonableness, if development will generate need for community to provide schools, parks, or playgrounds). *But see* Nicholas V. Morosoff, Note, *"Take My Beach, Please!": Nollan v. California Coastal Commission and a Rational-Nexus Constitutional Analysis of Development Exactions*, 69 B.U. L. REV. 823 (1989) (suggesting *Nollan* presented a test requiring a nexus between condition and need for the condition generated by the project).

544. Leroy Land Dev. v. Tahoe Regional Planning Agency, 939 F.2d 696 (9th Cir. 1991) (although pre-*Nollan* settlement of conditions dispute not subject to post-*Nollan* relitigation, court in dicta ruled erosion mitigation measures including installation of energy dissipator devices, stabilization devices for cut slope, secondary access and acquisition of adjacent and non-

formulation might be consistent with both *Ayers* and *Walnut Creek*. Although an exaction in excess of the incremental need generated by a project allowed under the reasonableness model may appear to

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adjacent land for open space, and other mitigation measures met *Nollan* nexus to legitimate government purpose); Parks v. Watson, 716 F.2d 646, 652 (9th Cir. 1983) (per curiam) (could not condition street platting vacation to permit apartment project on dedication of geothermal well sites); William J. (Jack) Jones Ins. Trust v. City of Fort Smith, 731 F. Supp. 912 (W.D. Ark. 1990) (invalidating denial of permit to gas station to build convenience store for refusal to expand right-of-way for street purposes under *Nollan* as no indication of increased generated traffic or other externality); ABN 51st Street Partners v. City of New York, 724 F. Supp. 1142 (S.D.N.Y. 1989) (validating requirement that renovating property owner found to have engaged in harassment of tenants to encourage displacement to retain "at least 28%" of apartment building as low income housing as a permit condition; finding condition not a physical occupation under *Nollan* as condition furthers government interest in fighting displacement); Rohn v. City of Visalia, 263 Cal. Rptr. 319 (Ct. App. 1989) (invalidating an attempted dedication of what amounted to 14% of the parcel to permit realignment of the streets at the nearest intersection as a condition of site approval and a building permit for a commercial project; finding the need for realignment was due solely to poor prior planning and not in anyway due to projected demand generated by the proposed project; assuming that the result was dictated by *Nollan* in that the project could not be denied due to the alignment problem); Jonathan Club v. California Coastal Comm'n, 243 Cal. Rptr. 168 (Ct. App.) (ruling not officially published sustaining nondiscrimination in membership condition to allow development on land connected with leased state land used exclusively by club members and located immediately adjacent to most heavily used public beach in state; condition satisfied *Nollan* nexus test as direct connection between government purpose of maximizing public access to state beach lands and the condition imposed), *appeal dismissed*, 488 U.S. 881 (1988); Paradyne Corp. v. Florida Dep't of Transp., 528 So. 2d 921 (Fla. 1st DCA 1988) (may condition on design to accommodate existing traffic but may not require landowner as condition of road connection permit to construct drive on property for use and benefit of abutting landowner); Department of Transp. *ex rel.* People v. Amoco Oil Co., 528 N.E.2d 1018 (Ill. App. Ct. 1988) (permit conditioning grant of access to freeway on agreement that improvements would not increase value of the right of access when eventually terminated or condemned as designed to depress value and unrelated to valid state purpose under *Nollan*); King Serv., Inc. v. Town Bd., 539 N.Y.S.2d 594 (App. Div. 1989) (finding sign removal valid condition on expansion of prior nonconforming service station as substantially advances legitimate state interest without denial of economically viable use under *Nollan*), *aff'd*, 554 N.E.2d 1278 (N.Y. 1990) (for reasons stated by appellate division); River Birch Assocs. v. City of Raleigh, 388 S.E.2d 538 (N.C. 1990) (sustaining condition of conveyance of open space for common area to homeowners' association over taking claim as nexus to valid regulatory purpose; ambiguity resolved by parol evidence of scheme such as field map, sales brochure, maps, advertising, or oral statement upon which purchasers relied); State v. Lundberg, 788 P.2d 456 (Or. Ct. App. 1990) (finding 10-foot strip adjacent to street condition for building permit or zone change on its face consistent with *Nollan* while as applied issue not ripe), *aff'd*, 825 P.2d 641 (Or. 1992); Board of Supervisors v. Fiechter, 566 A.2d 370 (Pa. Commw. Ct. 1989) (requirement of dedication of 8.5 feet of road footage adjacent to subdivision invalid condition under *Nollan* as need for such widening to local street width standards not generated by the project); Unlimited v. Kitsap County, 750 P.2d 651 (Wash. Ct. App. 1988) (exacting easement to substantially landlocked adjacent parcel invalid); *see also* Surfside Colony, Ltd. v. California Coastal Comm'n, 277 Cal. Rptr. 371 (Ct. App. 1991) (invalidating condition of public beach use of private beach for permit to build revetment to protect community from beach erosion under *Nollan* as erosion or revetment did not generate need for public access; heightened scrutiny under *Nollan* for taking cases); Vicki Been, *"Exit" as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine*, 91 COLUM. L. REV. 473 (1991) (in search of market-based limit on exactions in lieu of judicial restraints).

conflict with *Nollan*, that decision would appear to embrace the more liberal state doctrine. The more liberal state doctrine might apply where the lack of infrastructure capacity or environmental concern giving rise to the exaction would justify project denial and where the exaction bears a rational relationship to the strategy necessary to mitigate the problem.

Indeed, *Nollan*-induced confusion may be a shibboleth, albeit one not easily dissipated. *Nollan* presents a qualitative minimum federal standard under the post-*First English*[545] parallel substantive due process/taking test dichotomy. *Nollan*'s two part test asks first for the mandated substantive due process nexus between the permit condition as a means serving a valid state interest.[546] In addition, the test asks if the economic impact is excessive under *Penn Central Transportation Co. v. City of New York*,[547] and *Agins v. City of Tiburon*,[548] by focusing on the retention of an economically viable use for the property.

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545. First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987) (providing inverse condemnation taking damages for regulatory measures found to exceed the vague limits of the police powers and substantive due process).

546. Leroy Land Dev. v. Tahoe Regional Planning Agency, 939 F.2d 696 (9th Cir. 1991) (although pre-*Nollan* settlement of conditions dispute not subject to post-*Nollan* relitigation, court in dicta ruled erosion mitigation measures including installation of energy dissipator devices, stabilization devices for cut slope, secondary access, acquisition of adjacent and nonadjacent land for open space, and other mitigation measures met *Nollan* nexus to legitimate government purpose); ABN 51st Street Partners v. City of New York, 724 F. Supp. 1142 (S.D.N.Y. 1989) (validating requirement that renovating property owner found to have engaged in harassment of tenants to encourage displacement must retain "at least 28%" of apartment building as low income housing as a permit condition; finding condition not a physical occupation under *Nollan* as condition furthers government interest in fighting displacement); Jonathan Club v. California Coastal Comm'n, 243 Cal. Rptr. 168 (Ct. App. 1988), *appeal dismissed*, 488 U.S. 881 (1988) (sustaining nondiscrimination in membership condition to allow development on land connected with leased state land used exclusively by club members and located immediately adjacent to most heavily used public beach in state; finding that condition satisfied *Nollan* nexus test as direct connection between government purpose of maximizing public access to state beach lands and the condition imposed; ruling not officially published); Department of Transp. *ex rel.* People v. Amoco Oil Co., 528 N.E.2d 1018 (Ill. App. Ct. 1988) (permit conditioning grant of access to freeway on agreement that improvements would not increase value of the right of access when eventually terminated or condemned as designed to depress value and unrelated to valid state purpose under *Nollan*); King Serv., Inc. v. Town Bd., 539 N.Y.S.2d 594 (App. Div. 1989) (sign removal valid condition on expansion of prior nonconforming service station as substantially advances legitimate state interest without denial of economically viable use under *Nollan*), *aff'd*, 554 N.E.2d 1278 (N.Y. 1990) (for reasons stated by appellate division); River Birch Assocs. v. City of Raleigh, 388 S.E.2d 538 (N.C. 1990) (condition of conveyance of open space for common area to homeowners' association sustained over taking claim as nexus to valid regulatory purpose; ambiguity resolved by parol evidence of scheme such as field map, sales brochure, maps, advertising, or oral statement upon which purchasers relied).

547. 438 U.S. 104 (1978).

548. 447 U.S. 255 (1980).

The discussion in *Nollan* criticizing the California Court of Appeals decision in *Grupe*[549] suggests a second constitutional nexus, that the need for the permit condition or exaction must have been created or contributed to by the proposed project. Further, the Court may insist that the generated need be substantial. In other words, the need must be such that it would justify permit denial absent mitigation.[550]

Nollan has generated some confusion regarding preexisting state-created "nexus" theories, which are not the same as the "nexus" theory applied by the Supreme Court. The state-created alternative nexus, reasonableness, or uniquely attributable theories represent a third nexus exaction requirement. This historical nexus approach employs a higher standard. The standard is quantitative in that it assures varying, albeit often ad hoc, demands for some level of proportionality between the burden of the condition and benefit enjoyed or needs generated by the development.

VII. CONCLUSION

Perhaps the most interesting application of *Nollan* will come in the review of impact fees used to provide off-site facilities.[551] Co-

549. *Nollan*, 483 U.S. at 838-39.

550. *See* Parks v. Watson, 716 F.2d 646, 653 (9th Cir. 1983) (per curiam) (reasonable relationship to needs generated by subdivision and rational relationship to public purpose) (cited with approval in *Nollan*, 483 U.S. at 839-40); Rohn v. City of Visalia, 263 Cal. Rptr. 319 (Ct. App. 1989) (invalidating an attempted dedication condition of what amounted to 14% of the parcel to permit realignment of the streets at the nearest intersection as a condition of site approval and a building permit for a commercial project; emphasizing that the need for realignment was due solely to poor prior planning and not in anyway due to projected demand generated by the proposed project; appearing to believe that the result was dictated by *Nollan* in that the project could not be denied due to the alignment problem).

551. *See, e.g.*, Russ Bldg. Partnership v. City and County of San Francisco, 750 P.2d 324 (Cal.) (downtown office space developer transit impact development fee as condition for certificate of occupancy applied to project under construction), *appeal dismissed sub nom.* Crocker Nat'l Bank v. City and County of San Francisco, 488 U.S. 881 (1988); Building Indus. Ass'n v. City of Oxnard, 267 Cal. Rptr. 769 (Ct. App. 1990) (sustaining "growth requirements capital fee" charged to new development for a share of the cost of expanded public facilities with commercial and industrial development not charged for recreation, cultural, and civic facilities, the funds placed in trust fund earmarked for expansion; the fee approximating the per square foot cost of existing facilities; need not prove precise facilities funded serve the project under *Walnut Creek* as reasonable needs generation nexus under *Nollan*); Holmdel Builders Ass'n v. Township of Holmdel, 556 A.2d 1236 (Super. Ct. App. Div. 1989) (validating mandatory set-asides or fees for affordable housing only if reasonable compensatory benefits such as density bonuses offered; reviewing suspect South Brunswick linkage fee of 10 to 15 cents per square foot for residential development and 25 to 50 cents per square foot for nonresidential development; invalidating Middletown 7% set-aside; validating Holmdel allowance of .2 units per acre bonus on project if fees representing 2.5 % of sale price of units unless artificial downzoning a pretext to impose exaction); *aff'd* in part and rev'd in part, 583 A.2d 277 (N.J. 1990); *id.* at 1242 n.3,

gent arguments may be advanced on the need for community arts and entertainment as well as child day care, affordable housing, and transit. The way in which new development generates demand for such resources just as it exhausts the supply of available land thereby inflates the cost of remaining developable land and the cost of delivery of the service or provision of the facility. It remains for the Court to endorse the direction taken in most states in utilizing impact fees or in imposing a barrier, making the financing and delivery of community services more difficult, costly, and precarious.

The *Nollan* decision starkly ignores both the benefit to the Nollans of enjoyment of a system of lateral easements along the adjacent coastline,[552] and the body of exaction law measuring exaction validity as a measure of benefit to the development.[553] *Nollan* may represent not simply a loose constitutional cannon generating unnecessary litigation and endless law review commentary; it may represent the Rehnquist Court's exhumation of the long discredited principle of economic substantive due process.[554] Under substantive due process, the Court creates doctrine purely upon ideology.

(ruling the charge legislatively unauthorized and declining to reach whether the uncompensated charges would be characterized as confiscatory under *Nollan*; clearly implying, however, that the need for affordable housing was not generated by the developments and thus compensation would appear not to validate the exaction under a strict reading of *Nollan* for the absence of affordable housing would apparently not justify project denial), *aff'd in part and rev'd in part*, 583 A.2d 277 (N.J. Super. Ct. App. Div. 1990) (finding that state's fair housing act requiring development of fair share of affordable housing implicitly authorizes housing linkage impact fee exaction, but requires authorizing regulations containing standards to be issued by the Council on Affordable Housing; summarily rejecting facial taking claim); Natalie M. Hanlon, Note, *Child Care Linkage: Addressing Child Care Needs Through Land Use Planning*, 26 HARV. J. ON LEGIS. 591 (1989). *See also* Surfside Colony, Ltd. v. California Coastal Comm'n, 277 Cal. Rptr. 371 (Ct. App. 1991) (condition of public beach use of private beach for permit to build revetment to protect community from beach erosion invalid under *Nollan* as erosion or revetment did not generate need for public access).

552. *Nollan*, 483 U.S. at 842, 856 (Brennan, J., dissenting).

553. DANIEL R. MANDELKER & ROGER A. CUNNINGHAM, PLANNING AND CONTROL OF LAND DEVELOPMENT 120-21 (3d ed. 1990).

554. *Id.*; *see also* JAMES A. KUSHNER, APARTHEID IN AMERICA 70-72 (1980), *reprinted as* James A. Kushner, *Apartheid in America: An Historical and Legal Analysis of Contemporary Racial Residential Segregation in the United States*, 22 How. L.J. 547, 615-18 (1979); Patrick Wiseman, *When the End Justifies the Means: Understanding Takings Jurisprudence in a Legal System with Integrity*, 63 ST. JOHN'S L. REV. 433, 447-51 (1988) (substitution of substantive due process with takings jurisprudence). *But see* Jerold S. Kayden, *Land-Use Regulations, Rationality, and Judicial Review: The RSVP in the* Nollan *Invitation (Part I)*, 23 URB. LAW. 301 (1991) (rejecting argument that *Nollan* increases level of scrutiny traditionally provided land use regulation under *Euclid*; recognizing that the courts are unclear about *Nollan*). *See generally* Bruce W. Burton, *"Predatory" Municipal Zoning Practices: Changing the Presumption of Constitutionality in the Wake of the "Takings Trilogy,"* 44 ARK. L. REV. 65 (1990) (interpreting *Nollan* and other 1987 taking cases argues for end of presumption in all land use cases).

For some, the return to pre-New Deal libertarian jurisprudence is a breath of fresh air.[555] For some, *Nollan* stands for the promise that the nonresident developer and new resident will not be unfairly charged with the cost of growth and service delivery. The broad pro-growth interpretation of *Nollan*, however, would dampen the ability of local government to expand infrastructure and would thereby halt growth and aggravate all the policy concerns voiced by its supporters. For this reason, it may be anticipated that the Court will adhere to the narrower and more moderate interpretation of *Nollan*, ruling that: (1) new growth can be made to pay its way by funding the need it generates for infrastructure capacity expansion; and (2) payment must be substantially related to the capacity expansion necessary to accommodate the proposed development. One indication of the Court's deferential endorsement of the rational nexus test for exactions is the dismissal of the appeal in *Russ Building Partnership v. City and County of San Francisco*,[556] in which the U.S. Supreme Court refused to disturb a California Supreme Court decision sustaining a transit improvement impact fee imposed solely on new commercial development.[557]

One can only speculate upon the mystical direction in which the Court embarked in *Nollan*. This article has attempted to identify the various alternatives for that path. Unless the new composition of the Court chooses to overturn the taking definition of *Penn Central*, *Keystone*, and even *Lucas* and *Nollan*, however, the historically infrequent Court dabbling in land use planning suggests that the future will remain relatively unchanged with exactions reflecting the fiscal necessity of regulating jurisdictions and the judicial philosophy of state reviewing courts.

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555. Norman Karlin, *Back to the Future: From* Nollan *to* Lochner, 17 Sw. U. L. Rev. 627 (1988).

556. 750 P.2d 324, 330 (Cal.), *appeal dismissed sub nom.* Crocker Nat'l Bank v. City and County of San Francisco, 488 U.S. 881 (1988).

557. The California Supreme Court, however, refused to address a belated taking clause claim. *Id.* at 327 n.6.