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Floyd B. Olson

Daniel J. Greensweig

Scott J. Riggs

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Floyd B. Olson[†]
Daniel J. Greensweig[††]
Scott J. Riggs[†††]

[†] Of counsel, Kennedy & Graven, Chartered, Minneapolis, MN; former Deputy City Attorney, City of Minneapolis, Civil Division; former Bloomington City Attorney; former Assistant Hennepin County Attorney; and former Adjunct Professor, William Mitchell College of Law, Local Government and Land Use Planning.
[††] Attorney, Kennedy & Graven, Chartered, Minneapolis, MN.
[†††] Attorney, Kennedy & Graven, Chartered, Minneapolis, MN.

I. INTRODUCTION

Experts in public infrastructure financing universally acknowledge the increasing use of impact fees to reduce the economic burdens that new development can place on existing taxpayers.[1] One of the dominant reasons for the trend is the "New

1. *See* Brian W. Blaesser & Christine M. Kentopp, *Impact Fees: The 'Second Generation,'* 38 WASH. U. J. URB. & CONTEMP. L. 55, 55 (1990); 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 (1991); 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; James C.

Federalism" and the resulting loss of federal revenue-sharing funds formerly available to municipalities.[2] As the use of impact fees has increased, however, litigation over these fees has also increased.

This litigation typically has focused on whether municipalities have legislative authority to impose impact fees and, if so, what constitutional limitations govern that authority. Where legislative authority is less than clear, there has been much discussion as to whether legislation is needed and what provisions should be included if legislation is to be adopted.

Minnesota has in many ways typified the debate over impact fees, and its experience merits particular observation. In *Country Joe, Inc. v. City of Eagan*,[3] the City of Eagan's use of a road unit connection charge was challenged as an unauthorized impact fee.[4] Although the Minnesota Supreme Court sidestepped the issue, it has directed renewed attention to the use and legitimacy of impact fees in Minnesota. Because impact fees are likely to ultimately be used in Minnesota and because most states addressing these questions have done so with a view to the courts and legislatures of other jurisdictions, this article focuses on issues raised in state and federal courts, the legislative enactments adopted by other states to deal with impact fees, and how Minnesota can avoid the problems that have surfaced elsewhere.[5]

II. IMPACT FEES DEFINED

Distinguishing impact fees from other types of developer exactions is not a simple task.[6] Many of the features of impact fees

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Nicholas, *Impact Exactions: Economic Theory, Practice, and Incidence*, LAW & CONTEMP. PROBS., Winter 1987, at 85.

2. Terry D. Morgan, *State Impact Fee Legislation: Guidelines for Analysis, Part I*, LAND USE LAW, Mar. 1990, at 3.

3. 560 N.W.2d 681 (Minn. 1997).

4. *See id.* at 682.

5. This article does not attempt to address other means of recovering the cost to municipalities of new development, such as the use of tax increment financing. *See, e.g.*, MINN. STAT. § 469.176, subd. 4(d) (1996 & Supp. 1997) (authorizing that tax increment derived from housing district may be used to finance cost of public improvements directly related to a housing project); MINN. STAT. §§ 444.075–.26 (1996 & Supp. 1997) (authorizing that a municipality may create storm sewer district in which taxes may be imposed for purposes of constituting and maintaining storm sewer systems and related facilities).

6. *See generally* Blaesser & Kentopp, *supra* note 1, at 64 (describing the results of a survey of 109 local governments in Illinois). The survey results indicate misperceptions about the meaning of the term "impact fee." Forty-two

are common to other forms of exactions. Nevertheless, differences exist. The Minnesota Supreme Court has defined an impact fee as a type of exaction which is:

- in the form of a predetermined money payment;
- assessed as a condition to the issuance of a building permit, an occupancy permit or plat approval;
- pursuant to local government powers to regulate new growth and development and to provide for adequate public facilities and services;
- levied to fund large-scale, off-site public facilities and services necessary to serve new development;
- in an amount which is proportionate to the need for public facilities generated by the new development.[7]

These elements set impact fees apart from ad valorem taxes,[8] special assessments,[9] excise taxes,[10] and other forms of exactions, such as

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percent of the local governments who reported using impact fees were not actually administering impact fees, as the term was defined in the survey. Conversely, twenty percent of the governments who said that they did not utilize impact fees were actually doing so, according to the survey definition. *See id.*

7. *Country Joe*, 560 N.W.2d at 685 (quoting Brian W. Blaesser & Christine M. Kentopp, *Impact Fees: The "Second Generation," in* 1991 ZONING AND PLANNING HANDBOOK 255, 264 (Kenneth H. Young ed., 1991)).

8. Ad valorem taxes, like other taxes, are revenue raising measures subject to the limitations of the Minnesota Constitution, which requires that "[t]axes shall be uniform upon the same class of subjects and shall be levied and collected for public purposes . . . ." MINN. CONST. art. X, § 1. Tax levies are designed to promote the requirements of general government and similarly classified persons or properties are therefore expected to bear equal shares of the cost of government. *See* Hassler v. Engberg, 233 Minn. 487, 490, 48 N.W.2d 343, 347 (1951); *see also* State v. Federal Reserve Bank, 25 F. Supp. 14, 20 (D. Minn. 1938).

9. Special assessments are primarily one-time apportionments of public improvement costs to properties that derive a special benefit from the improvement. When the cost of the improvement exceeds the value of the benefit, an unconstitutional taking occurs. *See* Tri-State Land Co. v. City of Shoreview, 290 N.W.2d 775, 776 (Minn. 1980) (remanding for consideration of whether benefits to plaintiff from storm sewer for which plaintiff paid a higher per acre assessment than its neighbors equaled plaintiff's cost); Buettner v. City of St. Cloud, 277 N.W.2d 199, 200 (Minn. 1979) (finding a court may independently review the trial court's determination of whether an assessment constitutes an unconstitutional taking).

10. Excise taxes are not based on the assessed value of property, but on one act,

fees-in-lieu of dedication,[11] utility fees,[12] connection charges[13] and linkages.[14] While impact fees are readily distinguishable from taxes and assessments, they are less distinguishable from other forms of exactions, including such charges as sewer access charges (SAC charges).[15]

The importance of defining and distinguishing impact fees from revenue raising measures and other exactions cannot be overstated.

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event, or occurrence. *See* Bloom v. City of Fort Collins, 784 P.2d 304, 307 (Colo. 1989). Like ad valorem taxes, excise taxes must conform to constitutional uniformity requirements. *See* State *ex rel.* City of St. Paul v. Spaeth, 223 Minn. 218, 221, 26 N.W.2d 115, 116 (1947).

11. Fees-in-lieu of dedication are authorized by statute in Minnesota. *See* MINN. STAT. § 462.358, subd. 2b (1996). While dedications of park land are permitted as on-site exactions, money in lieu of land has been exacted for off-site park improvements where the subdivision is too small to justify a land dedication or where a subdivision creates a need for a new park outside the geographic area of the subdivision. The Minnesota Supreme Court has adopted the reasonable relationship test in upholding the constitutionality of park dedications. *See* Collis v. City of Bloomington, 310 Minn. 5, 13-14, 246 N.W.2d 19, 24 (1976); *see also infra* notes 82-89 and accompanying text for discussion of *Collis*. In-lieu-of fees meet the characteristics of impact fees adopted in *Country Joe*. *See* 560 N.W.2d at 685.

12. At least in Colorado, transportation utility fees are subject to constitutional uniformity requirements. *See Bloom*, 784 P.2d at 309. In *Bloom*, the fee was assessed for the purpose of providing revenues for the maintenance of local streets, was imposed under a formula established by ordinance, and was charged to owners and occupants of developed lots fronting on city streets. *See id.* at 305-06.

13. Connection charges have been used in Minnesota to collect money from property owners when sewer and water connections are made to new and existing developments. They can be charged even though special assessments may be voided, or may be charged in addition to special assessments. They have been used to recoup costs allocated by the Metropolitan Waste Control Commission. *See* Crown Cork & Seal Co. v. City of Lakeville, 313 N.W.2d 196, 200 (Minn. 1982). Connection charges are authorized by state statute in Minnesota. *See* MINN. STAT. § 444.075, subd. 3 (1996).

14. Linkages, one of the newest forms of an exaction, are also distinguishable from impact fees. The underlying basis for linkage fees is that development in one area of a city leads to the requirement of a companion development project elsewhere in the city. A prime example is a downtown office project that leads to an increased need for off-site housing. *See* Theodore C. Taub, *Exactions, Linkages, And Regulatory Takings: The Developer's Perspective*, 20 URB. LAW. 515, 524 (1988). A city would condition approval of an office project on a linked housing project development. *See id.* This type of linkage is rationalized on the basis that the office project will attract new residents to the city, thereby decreasing the amount of available housing stock. *See id.* The developer is thus required to provide additional housing or funds to help create the housing. Unlike linkages requiring additional private development as a condition for project approval, impact fees are used to ensure that a development project pays for its fair share of the cost of providing necessary off-site public services and infrastructure. *See* Richard J. Roddewig, *Recent Developments in Land Use, Planning and Zoning Law*, 22 URB. LAW. 719, 779 (1990).

15. *See* Taub, *supra* note 14, at 524.

At least one survey suggests that those local governments that believed they were using impact fees were not, and those that believed they were not using impact fees actually were.[16] In Minnesota, for example, while a city insisted that its road unit connection charge was an impact fee, the state supreme court decided that the failure to utilize a needs and benefits standard meant that the charge was really a general revenue raising measure.[17] The question of whether a charge is a regulatory fee has been addressed by courts in Colorado,[18] Florida,[19] and Idaho.[20] The distinction implicates important constitutional limitations, and is rooted in fundamental differences between taxing authority and regulatory authority.[21]

III. AUTHORITY TO IMPOSE IMPACT FEES AND EXACTIONS IN GENERAL

Traditionally, local governmental authority to operate was deemed to be subject to "Dillon's Rule,"[22] which states:

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16. *See supra* note 6.

17. *See* Country Joe, Inc. v. City of Eagan, 560 N.W.2d 681, 686 (Minn. 1997).

18. *See* Bloom v. City of Fort Collins, 784 P.2d 304, 304-05 (Colo. 1989). In holding a transportation utility fee to be a valid special fee rather than a tax subject to constitutional uniformity requirements, the Colorado Supreme Court distinguished a fee from an ad valorem tax, an excise tax, and a special assessment. *See id.* at 309-11.

19. *See* Home Builders & Contractors Ass'n of Palm Beach County, Inc. v. Board of County Comm'rs, 446 So. 2d 140, 144 (Fla. Dist. Ct. App. 1983). The Florida appeals court candidly pointed out that, "[a]s one reads the various cases involving the dichotomy between a fee and a tax the distinction almost seems to become more amorphous rather than less." *Id.*

20. *See* Idaho Building Contractors Ass'n v. City of Coeur d'Alene, 890 P.2d 326, 330 (Idaho 1994). In that case, the Idaho Supreme Court held that a purported fee imposed to pay for libraries, police, fire, and streets was designed to generate revenues to be used for capital improvements throughout the city by all residents, and not solely for the benefit of those seeking a building permit, and was therefore actually a tax. *See id.*

21. *See* Waters Landing Ltd. Partnership v. Montgomery County, 650 A.2d 712, 716 (Md. 1994). The distinction can become one of form over substance, as may have happened in Maryland, where a local governmental body was allowed to accomplish its objectives by adopting a "development impact tax." *Id.* at 717. In rejecting an argument that a property tax and impact tax were duplicative, the court reasoned "that the impact tax is not a tax on property, but rather, a tax on . . . *developing* property." *Id.* at 722 (emphasis added).

22. *See* Blaesser and Kentopp, *supra* note 1, at 87; *see also* John J. Delaney, Larry A. Gordon & Kathryn J. Hess, *The Needs-Nexus Analysis: A Unified Test For Validating Subdivision Exactions, User Impact Fees And Linkage*, 50 LAW & CONTEMP. PROBS. 139, 146 n.48 (1987).

> It is a general and undisputed proposition of law that a *municipal corporation possesses and can exercise the following powers, and not others*: First, those granted in *express words*; second, those *necessarily or fairly implied in* or *incident* to the powers expressly granted; third, those *essential* to the accomplishment of the declared objects and purposes of the corporation,—not simply convenient, but indispensable.[23]

In other words, local governments can only exercise authority based upon express statutory language or home rule charter language.

One of the most important criteria in determining whether or not impact fees are permissible is whether there is legislative authority to impose them.[24] If so, although "[s]ubject to the limitations of a particular jurisdiction, impact fees generally may be used to provide any public facilities which can reasonably be construed to fall within state enabling legislation and home rule powers."[25]

A. *Statutory Authority*

Express statutory enabling legislation for impact fees has been adopted in various states[26] and has been proposed in others.[27] Impact fee enabling legislation is often limited in scope to larger local government jurisdictions, or to specific public improvements.[28] In jurisdictions that have not passed such statutes, impact fees may be invalidated.[29] Conversely, impact fees may be upheld based upon the

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23. Blaesser and Kentopp, *supra* note 1, at 87 n.89 (quoting 1 J. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS § 237 (5th ed. 1911)) (emphasis in original).

24. *See id.* at 69.

25. *Id.* at 68.

26. *See id.* at 71 n.50. For the states which have enacted impact fee enabling legislation, *see infra* note 55.

27. *See id.* at 71-72 & n.53 (noting an Arizona HB 2648 impact fee bill defeated during the 1989 legislative session and a Delaware HB 475, 135th Gen. Ass., 1989 transportation impact fee bill).

28. Blaesser and Kentopp, *supra* note 1, at 71 & nn.51-52.

29. *See, e.g.*, Aunt Hack Ridge Estates, Inc. v. Planning Comm'n of Danbury, 273 A.2d 880, 883 (Conn. 1970) (noting a city planning commission may only exercise powers expressly granted it by statute); Coronado Dev. Co. v. City of McPherson, 368 P.2d 51, 52 (Kan. 1962) (stating that city governments exist only by statute and only have the power expressed in the statutes); Middlesex Boston St. Ry. v. Board of Aldermen, 359 N.E.2d 1279, 1283-84 (Mass. 1977) (overruling board of

general language of zoning statutes,[30] or based upon a city's valid exercise of its police power authority.[31] The following are examples of various impact fee laws.

1. Texas

In 1987, Texas adopted the nation's first comprehensive impact fee enabling statute.[32] The act, entitled "Impact Fees for Capital Improvements or Facility Expansion,"[33] allows any political subdivision in Texas to impose impact fees for capital improvements or facilities expansion.[34] Permissible capital improvements must have a life expectancy of at least three years and include water supply, treatment and distribution facilities; wastewater collection and treatment facilities; storm water, drainage, and flood control facilities; and roadway facilities.[35] Permissible facilities expansion includes the expansion of the capacity of an existing permissible improvement.[36]

The Texas enabling statute contains very detailed definitions, applicability standards, procedures for adoption, notice requirements, limitations on the use of proceeds and refund

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Aldermen's decision requiring developer to lease units at discounted rate, as no express statutory legislation empowered board to make decision); Holmdel Builders Ass'n v. Township of Holmdel, 556 A.2d 1236, 1240-41 (N.J. Super. Ct. App. Div. 1989) (determining municipality derived no power to levy fees on developers absent express legislative grant); Albany Area Builders Ass'n v. Town of Guilderland, 546 N.E.2d 920, 921 (N.Y. 1989) (recognizing municipality's authority to enact legislation is limited by the express grant of such authority by the state).

30. *See, e.g.*, Divan Builders, Inc. v. Planning Bd., 334 A.2d 30, 37-38 (N.J. 1975) (upholding municipality's decision based on explicit language in zoning statute that developer be assessed costs associated with off-site drainage facility improvement); Call v. City of W. Jordan, 606 P.2d 217, 221 (Utah 1979) (finding city ordinance requiring subdivider to dedicate percentage of land for use in flood control or pay equivalent value in cash as within scope of powers granted to city).

31. *See, e.g.*, Coulter v. City of Rawlins, 662 P.2d 888, 898 (Wyo. 1988) (finding legislatively empowered municipality has full authority and control over public water and sewage systems).

32. *See* Morgan, *supra* note 1, at 4-2 (noting the codification of the Act as TEX. REV. CIV. STAT. ANN. art. 1269; now codified as TEX. LOC. GOV'T CODE ANN. § 395.041-.055 (West Supp. 1998)).

33. TEX. LOC. GOV'T CODE ANN. § 395.041-.055 (West Supp. 1998); *see also* Blaesser and Kentopp, *supra* note 1, at 82 (noting that the establishment of the Texas Act has served as the model for impact fee legislation in Illinois and Georgia).

34. TEX. LOC. GOV'T CODE ANN. § 395.041-.055.

35. *See* Morgan, *supra* note 1, at 5-6 & n.3 (citing TEX. LOC. GOV'T CODE ANN. § 395.001(1)).

36. *See id.* at 6.

provisions, and other elements, and provides a specific list of the capital improvements to which impact fees may be applied.[37] The Texas model has been followed in other states.[38]

2. Illinois

In 1987, shortly after Texas adopted its comprehensive impact fee legislation, Illinois adopted its Road Improvement Impact Fee statutes[39] using the Texas law as a model. In 1989, it was repealed and replaced by new legislation[40] resulting in a much longer and more detailed piece of enabling legislation than the previous version.[41]

The 1987 legislation was adopted to allow the larger counties surrounding Chicago[42] to "establish transportation impact districts and collect transportation impact fees from new developments that would require direct or indirect access to the state or county highway system."[43] The 1989 statute can be seen as authorizing a "second generation" impact fee, distinguishable from "first generation" impact fees[44] based on refinements to the elements of statutory basis, methodology, procedure, scope of coverage, and exemptions.[45] This second generation of impact fees expanded and refined its predecessor by recognizing home rule authority to impose impact fees, removing the population cap to which the earlier legislation applied, and expanding state control over local government impact

37. *See* Blaesser and Kentopp, *supra* note 1, at 82. The Texas Act also provides that the political subdivision must establish an advisory committee composed of representatives of the real estate development and building industries. *See id.*

38. *See id.* at 82 & n.80 (describing Illinois' Road Improvement Impact Fee legislation).

39. *See id.* at 82; *see also* Transportation Impact Fee Legislation, 121 ILL. COMP. STAT. ANN. 5/5-608 (West 1980 & Supp. 1989) (repealed 1989).

40. *See* Road Improvement Impact Fee legislation, 605 ILL. COMP. STAT. ANN. 5/5-901 to 5-918; (repealing 121 ILL. COMP. STAT. ANN. 5/5-608, effective July 26, 1989).

41. *See* Blaesser and Kentopp, *supra* note 1, at 73.

42. The Act applied only to counties with population between 400,000 and 1,000,000. *See* 121 ILL. COMP. STAT. ANN. 5/5-608 (West 1980 & Supp. 1989) (repealed 1989).

43. Blaesser and Kentopp, *supra* note 1, at 74.

44. Illinois' original Transportation Impact Fee Legislation, 121 ILL. COMP. STAT. ANN. 5/5-608 (West 1980 & Supp. 1989) (repealed 1989).

45. *See* Blaesser and Kentopp, *supra* note 1, at 69-71 (describing the judicially created elements and standards necessary for the implementation of second generation impact fees).

fee ordinances.[46] The statute contains extensive substantive and procedural standards, including notice and public hearing requirements, while also attempting to incorporate the most recent constitutional tests and standards applicable to valid subdivision exactions.[47]

The Texas and Illinois legislation illustrate a willingness on the part of state legislatures to allow impact fees as a new financing source for local government infrastructure. At the same time, however, the procedural requirements and limitations set forth in these statutes reveal a certain legislative distrust of local governments when it comes to impact fee ordinances.[48]

B. Home Rule Charters

Authority for impact fees may also be found in local enabling provisions contained in local home rule charters. Unless a state has expressly preempted local regulation through an exclusive reservation or intention to occupy a particular subject area, or a local government is acting outside the scope of its local government powers, the authority bestowed by a home rule charter may provide the necessary power to impose impact fees.[49] A local government's police power authority can often form the basis for the enactment of various ordinances.[50] Nevertheless, governments can only "assess impact fees pursuant to home rule powers if it can be established that the financing of a particular type of facility or service is a matter of local concern, and not the exclusive jurisdiction of the state or other government unit."[51]

C. Other Forms of Authority

Absent an express statutory grant of authority or appropriate home rule charter authority, local government units must look for authority to impose impact fees in the idea that they may exercise powers that are fairly implied or essential to accomplish their duties.[52] That is to say:

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46. *See id.* at 74-75 & nn.61-64.
47. *See id.* at 79-80 (citing 121 ILL. COMP. STAT. ANN. 5/5-904 (West 1989)).
48. *See id.* at 80, 82.
49. *See id.* at 87-89.
50. *See supra* note 31.
51. Blaesser and Kentopp, *supra* note 1, at 88-89.
52. *See id.* at 86; *see also* Delaney, Gordon & Hess, *supra* note 22, at 146.

> Generally, non-home rule units of local government that seek to adopt impact fees other than those expressly authorized by enabling legislation must rely on zoning and planning enabling statutes and other statutes governing the planning and financing of educational facilities, water and sewer facilities, and other types of public facilities and services, to the extent that the authority to adopt impact fees may be expressly or impliedly "granted to them by law" in these other statutes.[53]

A power from which authority to impose impact fees can be implied may take a number of forms. Still, express authority eliminates much of the uncertainty that may otherwise surround the issue and is therefore preferable from a municipality's point of view.[54]

IV. CONSTITUTIONAL ISSUES

More than twenty states have expressly authorized development impact fees.[55] Express legislation obviously resolves many authority

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53. Blaesser and Kentopp, *supra* note 1, at 86.

54. *But see supra* note 29.

55. *See, e.g.*, ARIZ. REV. STAT. ANN. § 11-1101 (West Supp. 1997-1998) (defining an impact fee as a "fee imposed on a benefit area by the board to pay for a proportionate share of the public facilities required to serve the development."); CAL. GOV. CODE § 66000 (West 1997) (defining an impact fee as a "fee . . . that is charged by a local agency to the applicant in connection with approval of a development project for the purpose of defraying all or a portion of the cost of public facilities related to the development project . . . ."); COLO. REV. STAT. ANN. §22-54-102 (1998) (providing for development fees to finance schools); GA. CODE ANN. § 36-71-1 (1993) (defining an impact fee as a "payment of money imposed upon development as a condition of development approval to pay for a proportionate share of the cost of system improvements needed to serve new growth and development."); HAW. REV. STAT. ANN. § 46-141 (1996) (defining an impact fee as "the charges imposed upon a developer by a county to fund all or a portion of the public facility capital improvement costs required by the development from which it is collected, or to recoup the cost of existing facility capital improvements made in anticipation of the needs of a development"); IDAHO CODE § 67-8102 (Supp. 1997) (providing for a "payment of money imposed as a condition of development approval to pay for a proportionate share of the cost of system improvements needed to serve development."); 605 ILL. COMP. STAT. 5/5-903 (West 1993) (defining an impact fee as a "charge or fee levied or imposed by a unit of local government as a condition to the issuance of a building permit . . . in connection with a new development . . . ."); IND. CODE ANN. § 36-7-4-

issues. Even if the problem of authority is rendered moot by express legislation or judicially implied power, however, constitutional issues related to the municipality's regulatory authority may still arise.[56]

Various judicial standards and tests have been developed to

1300 (West 1997) (defining an impact fee as "a monetary charge imposed on new development by a unit to defray or mitigate the capital costs of infrastructure that is required by, necessitated by, or needed to serve the new development."); ME. REV. STAT. ANN. tit. 30-A, § 4354 (West 1996) (providing that "[a] municipality may enact an ordinance under its home rule authority requiring the construction of off-site capital improvements or the payment of impact fees . . . ."); MD. CODE ANN., CORPS. – MUNICIPAL § 44 (1997) (providing for impact fees in connection with bus financing); MICH. COMP. LAWS ANN. § 324.11532 (West 1997) (providing for impact fees in connection with solid waste treatment); N.H. REV. STAT. ANN. § 674:21 (1996) (defining an impact fee as "a fee or assessment imposed upon development, including subdivision . . . in order to help meet the needs occasioned by that development for the construction or improvement of capital facilities . . . ."); N.J. STAT. ANN. § 27:1C-1 (West Supp. 1997) (providing for "a fee assessed on development pursuant to an ordinance or resolution . . . ."); N.M. STAT. ANN. § 5-8-1 (Michie 1993) (providing for "a charge or assessment imposed by a municipality or county on new development in order to generate revenue for funding or recouping the costs of capital improvements or facility expansions necessitated by and attributable to the new development."); OR. REV. STAT. § 391.235 (1996) (defining an impact fee as "that portion of a charge or fee adopted and assessed against development for the purpose of funding streets, roads and related improvements that principally provide for automobile circulation."); 53 PA. STAT. ANN. tit. 53 § 10502-A (West 1997) (defining an impact fee as "a charge or fee imposed by a municipality against new development in order to generate revenue for funding the costs of transportation capital improvements necessitated by and attributable to new development"); TEX. LOC. GOV'T CODE ANN. § 395.001 (West Supp. 1998) (providing for "a charge or assessment imposed by a political subdivision against new development in order to generate revenue for funding or recouping the costs of capital improvements or facility expansions necessitated by and attributable to the new development."); UTAH CODE ANN. § 11-36-101 (1996) (providing for "a payment of money imposed upon development activity as a means of development approval."); VT. STAT. ANN. tit. 24, § 5201 (1992) (defining an impact fee as a "fee levied as a condition of issuance of a zoning or subdivision permit which will be used to cover any portion of the costs of an existing or planned capital project . . . or to compensate the municipality for any expenses it incurs as a result of construction); VA. CODE ANN. § 82.02.050 (Michie Supp. 1998) (providing for a "payment of money imposed upon development as a condition of development approval to pay for public facilities needed to serve new growth and development . . . ."); WASH. REV. CODE ANN. § 82.02.050 (1997) (providing for impact fees to cover capital improvements); W. VA. CODE § 7-20-3 (1997) (providing for impact fees to cover capital improvements); WIS. STAT. ANN. § 66.55 (West Supp. 1997) (providing for "cash contributions, contributions of land or interests in land or any other items of value that are imposed on a developer by a political subdivision . . . .").

56. *See, e.g.*, Country Joe, Inc. v. City of Eagan, 560 N.W.2d 681, 687 n.7 (Minn. 1997) (stating that "[b]ecause we conclude that the road unit connection charge is unauthorized under Minnesota law, we need not reach the contractor's argument that the charge is an unconstitutional taking without just compensation.").

determine the constitutional validity of imposing exactions. Among the most significant of the cases passing judgment on this issue is the 1987 Supreme Court case of *Nollan v. California Coastal Commission.*[57] The *Nollan* opinion held that development exactions constitute a "taking" unless they "substantially advance" a legitimate state purpose and there is an "essential nexus" between the public purpose of the land use action and the conditions attached to the approval of the development.[58] In *Nollan,* the court invalidated a beach access exaction, on the grounds that it was completely unrelated to the purpose for which it was required.[59] *Nollan* also raised the specter of a heightened scrutiny test where a condition of development approval leads to a permanent physical occupation or requires conveyance of title to the property.[60]

Over the years, state courts have developed a variety of tests for evaluating the constitutionality of exactions.[61] Still, the long-term effect of *Nollan* on these tests is likely to be somewhat limited as the opinion cites a long list of state standards that are deemed to be constitutionally sufficient.[62]

Florida courts, for example, have had no difficulty in implying the power for both statutory and home-rule charter local governments.[63] In the District Court of Appeals of Florida, the Fourth District found implied authority to impose a regulatory fee for roads from broad state constitutional and statutory provisions governing non-charter county governments.[64] The issue of whether the fee imposed was really a tax was resolved in favor of the county because of restrictions in the ordinance, including the fact that the

57. 483 U.S. 825 (1987).

58. *Id.* at 834, 837.

59. *Id.* at 841.

60. DAVID L. CALLIES & ROBERT H. FREILICH, CASES & MATERIALS ON LAND USE 84 n.3 (1986 & Supp. 1991). Thus, if a taking is involved, the heightened scrutiny test under *Nollan* will apply. *See also* Cheyenne Airport Bd. v. Rogers, 707 P.2d 717, 727 (Wyo. 1985), *appeal dismissed,* 476 U.S. 110 (1986) (upholding a zoning ordinance against a second constitutional attack) for an application of the heightened scrutiny test where the condition of trimming a tree to comply with the zoning ordinance was directly tied to the "legitimate public interest" Cheyenne was attempting to protect.

61. *See* CALLIES & FREILICH, *supra* note 60, at 372.

62. *See Nollan,* 483 U.S. at 839-40; *see also* CALLIES & FREILICH, *supra* note 60, at 84-85 n.4.

63. *See* Home Builders & Contractors Ass'n v. Board of Palm Beach County Comm'rs, 446 So. 2d 140, 143 (Fla. Dist. Ct. App. 1983).

64. *See id.* at 143. The *Home Builders* court held "that Palm Beach County had the power and authority to enact the fee impact ordinance in question, assuming the ordinance involves a regulatory fee rather than a tax." *Id.*

"expenditure of the funds collected is localized by virtue of the zone system."[65]

Legal authority has also been found under the statutory power of home rule charter counties in Florida to adopt charter provisions that allow park dedications for new developments.[66] In *Hollywood, Inc. v. Broward County*,[67] the court recognized that "[i]n the absence of preemptive federal or state statutory or constitutional law, the paramount law of a charter county is its charter."[68]

A. *Takings in State Courts*

1. *The Specifically and Uniquely Attributable Test*

Prior to the United States Supreme Court decision in *Nollan v. California Coastal Commission*,[69] legal standards applicable to exactions were largely developed by state courts.[70] The most restrictive standard, sometimes referred to as the "specifically and uniquely attributable test," was first adopted in a 1961 Illinois case.[71] The test remains in use today, as the Illinois Supreme Court recently demonstrated in upholding the second of two enabling acts authorizing counties to impose transportation impact fees on new development.[72] In doing so, the court had no difficulty in

65. *Id.* at 145. *But see* Contractors & Builders Ass'n v. City of Dunedin, 329 So. 2d 314, 320 (Fla. 1976) (stating that "[r]aising expansion capital by setting connection charges, which do not exceed a *pro rata* share of reasonably anticipated costs of expansion, is permissible where expansion is reasonably required, *if use of the money collected is limited to meeting the costs of expansion.*") (emphasis in original). In the instant case, since the new users had to share the cost of retiring certificates used to finance the original facilities, the ordinance was declared invalid. *See id.* at 321. "If the ordinance in the present case had [properly] restricted use of the fee . . . , there would be little question as to its validity." *Id.* The ordinance was later amended and upheld. *See* City of Dunedin v. Contractors & Builders Ass'n, 358 So. 2d 846, 848 (Fla. Dist. Ct. App. 1978).

66. *See* Hollywood, Inc. v. Broward County, 431 So. 2d 606, 609 (Fla. Dist. Ct. App. 1983).

67. 431 So. 2d at 606 (Fla. Dist. Ct. App. 1983).

68. *Id.* at 609.

69. 483 U.S. 825 (1987).

70. *See infra* Section IV.B and note 90.

71. Pioneer Trust & Sav. Bank v. Village of Mount Prospect, 176 N.E.2d. 799, 802 (Ill. 1961). The court held that a requirement is permissible if it is written within the municipality's statutory grant of power and if the burden on the subdivider is "specifically and uniquely attributable to his activity." *Id.*

72. *See* Northern Ill. Home Builders Ass'n, Inc. v. County of DuPage, 649 N.E.2d 384, 389 (Ill. 1995).

recognizing "that the need to minimize or reduce traffic congestion is a legitimate state interest."[73] The extent of the exaction required to satisfy the projected impact was considered the more difficult question.[74] Relying on the specifically and uniquely attributable test, the court stated that "if the local government cannot demonstrate that its exaction is *directly proportional to the specifically created need*, the exaction becomes 'a veiled exercise of the power of eminent domain and a confiscation of private property behind the defense of police regulations'."[75]

2. The Rational Nexus Test

A more moderate approach relies on the rational nexus standard. Florida's adoption of this test is typical. In *Hollywood, Inc. v. Broward County*,[76] the court reviewed its earlier opinions[77] from which it "discern[ed] the general legal principle that reasonable dedications or impact fee requirements are permissible so long as they offset needs sufficiently attributable to the subdivision and so long as the funds collected are sufficiently earmarked for the substantial benefit of the subdivision residents."[78] Hence, impact fees are permissible in Florida if the local government can "demonstrate a reasonable connection, or rational nexus, between the need for additional capital facilities and the growth in population generated by the subdivision."[79] The local government must also "show a reasonable connection, or rational nexus, between the expenditures of the funds collected and the benefits accruing to the subdivision."[80]

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73. *Id.* at 389 (citations omitted).

74. *See id.*

75. *Id.* at 381 (emphasis in original)(citations omitted). The court also stated that under the test, a county "can only impose impact fees for the road improvements made necessary by the additional traffic generated by the *new* development . . . [and] the new development paying the impact fee must receive a *direct* and *material* benefit from the improvement financed by the impact fee." *Id.* at 390 (emphasis in original). *But see* Dolan v. City of Tigard, 512 U.S. 374, 390 (1994) (stating "[w]e do not think the Federal Constitution requires such exacting scrutiny, given the nature of the interests involved.").

76. 431 So. 2d 606 (Fla. Dist. Ct. App. 1983).

77. *See id.* at 610-11 (reviewing Wald Corp. v. Metropolitan Dade County, 338 So. 2d 863 (Fla. Dist. Ct. App. 1976), *cert. denied*, 348 So. 2d 955 (Fla. 1977); Admiral Dev. Corp. v. City of Maitland, 267 So. 2d 860 (Fla. Dist. Ct. App. 1972); City of Dunedin v. Contractors and Builders Ass'n, 358 So. 2d 846 (Fla. Dist. Ct. App. 1978), *cert. denied*, 370 So. 2d 458 (Fla. 1979), *cert. denied*, 444 U.S. 867 (1979)).

78. *Broward Co.*, 431 So. 2d at 611.

79. *Id.*

80. *Id.* at 611-12.

3. *The Reasonable Relationship Test*

The third standard is often and perhaps understandably confused with the rational nexus standard.[81] The Minnesota Supreme Court adopted the Minnesota reasonable relationship standard in *Collis v. City of Bloomington*,[82] a case which upheld a subdivision park dedication ordinance.[83] The *Collis* court considered whether statutory authorization for dedication of land[84] and a city ordinance implementing that authority[85] constituted a taking of property without just compensation in violation of the United States and Minnesota Constitutions.[86] The Bloomington ordinance required each developer to pay ten percent of undeveloped land value or contribute ten percent of the land to the city.[87] The Court recognized that a developer might be required to pay a disproportionate share of the city's park costs, but that as applied to the specific developer in question the requirement was not unreasonable.[88]

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81. In *Broward Co.*, 431 So. 2d at 611 n.5, the court contended that the rational nexus test was advanced, at least in part, in Jordan v. Village of Menomonee Falls, 137 N.W.2d 442 (Wis. 1965), *appeal dismissed*, 385 U.S. 4 (1966). In *Collis v. City of Bloomington*, 310 Minn. 5, 246 N.W.2d 19 (1976), the Minnesota Supreme Court showed a different understanding of *Jordan*, when it "decline[d] to follow the extreme approaches of the Illinois and Montana cases . . . We choose instead to follow the lead of Wisconsin [*Jordan*], California, and New York, and those cases which hold that a reasonable relationship between the approval of the subdivision and the municipality's need for land is required." *Id.* at 18, 246 N.W.2d at 26.

82. 310 Minn. 5, 246 N.W.2d 19 (1976).

83. *Id.* at 19, 246 N.W.2d at 28.

84. *See* MINN. STAT. § 462.358, subd.2 (1971). Subdivision 2 was repealed in 1980 and the dedication authorization now exists as MINN. STAT. § 462.358 subd. 2b (1996).

85. *See* Bloomington City Code, § 20.09IIB.

86. *Collis*, 310 Minn. at 9-10, 246 N.W.2d at 21-22.

87. *See id.* at 9, 246 N.W.2d at 21.

88. *See id.* at 20, 246 N.W.2d at 27.

> While the city has apparently made a record in this case showing that 10 percent is not unreasonable as to the property of these plaintiffs, given the particular needs of Bloomington, a 10 percent requirement might be arbitrary as a matter of law because it does not consider the relationship between this particular subdivision and recreational need in the community as required by the *Pioneer Trust* [Illinois] and *Jordan* [Wisconsin] cases.

Id. Because the Bloomington ordinance stated "as a general rule, it is reasonable to require" a ten percent dedication, the court concluded that it was not facially

Whether the subtle differences separating these three standards are well understood is open to debate. In any event, those differences may be more important on an academic level than in practice, because the reasonable relationship standard "consider[s] a myriad of factors"[89] which can include factors encompassing the same considerations used under the specifically and uniquely attributable and rational nexus standards.

B. Taking in Federal Courts

Before 1987, federal court decisions contributed little to discussions concerning the appropriate standards to apply in exactions cases, perhaps out of judicial reluctance to interfere in local affairs.[90] Indeed, when the United States Supreme Court broke its silence in *Nollan v. California Coastal Commission*[91] and adopted the "essential nexus" test, Justice Brennan, in dissent, declared that "[s]uch a narrow conception of rationality . . . has long since been discredited as a judicial arrogation of legislative authority."[92] In subsequent years, that traditional reluctance largely disappeared.

1. The Essential Nexus Test

In *Nollan*, a building permit condition required the owner to dedicate an easement to the public along the shoreline.[93] This requirement was found to be a taking because the "essential nexus" between the regulation and legitimate state interests could not be established.[94] According to the majority, "the lack of nexus between the condition and the original purpose of the building restriction [to allow the public access along the beach to enjoy the natural beauty of the ocean] converts that purpose to something other than what it

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unconstitutional. *Id.* The court added that the constitutionality of the ordinance remained open to attack in judicial review proceedings on "as applied to plaintiffs' property" grounds. *Id.* at 21, 246 N.W.2d at 28.

89. *Id.* at 18, 246 N.W.2d at 26.

90. In 1987, the United States Supreme Court decided three important cases involving regulation and the takings clause. *See* Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470 (1987); First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304 (1987); and Nollan v. California Coastal Comm'n, 483 U.S. 825 (1987).

91. 483 U.S. 825 (1987).

92. *Id.* at 846 (Brennan, J., dissenting).

93. *See id.* at 828 (Brennan, J., dissenting).

94. *Id.* at 837.

was."[95] To avoid payment of compensation under the Fifth Amendment's property clause, regulation through the police power must substantially advance a legitimate state interest, and the connection between the state interest and the regulation becomes the focus of a court's inquiry.[96]

2. The Rough Proportionality Test

In 1994, a question left unanswered in *Nollan* was resolved by the United States Supreme Court's decision in *Dolan v. City of Tigard*.[97] The Oregon Supreme Court had held that the City of Tigard could, as a condition of a building permit, require that part of the owner's land be dedicated for flood control and traffic improvements.[98] In *Dolan*, the heart of the matter was "the required degree of connection between the exactions [imposed by the city] and the projected impact of the proposed development."[99]

The Court had no difficulty in determining that an essential nexus existed between the permit conditions and the legitimate state interests of dealing with stormwater run-off and reducing traffic congestion.[100] In evaluating the necessary *degree* of connection, however, the Court adopted the substance of the reasonable relationship test previously used in *Collis*.[101] Denominating this test the "rough proportionality" test, the court held that, "[n]o precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development."[102]

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95. *Id.*
96. *See id.* at 841-42.
97. 512 U.S. 374 (1994).
98. *See id.* at 383.
99. *Id.* at 386.
100. *See id.* at 387-88.
101. *See id.* at 391("[W]e think the 'reasonable relationship' test adopted by a majority of state courts is closer to the federal constitutional norm than either of those previously discussed."); *see also supra* notes 81-89 and accompanying text. The *Dolan* Court rejected the specific and uniquely attributable test and other state approaches said to be nothing more than "very generalized statements as to the necessary connection between the required dedication and the proposed development." *Dolan*, 512 U.S. at 389. At least for federal constitutional purposes, *Dolan* eliminated any distinctions between the reasonable relationship and rational nexus tests.
102. *Dolan*, 512 U.S. at 391.

C. Nollan *and* Dolan *in State Courts*

1. Adjudicative and Legislative Decisions

After the Supreme Court of Arizona directed the Arizona Court of Appeals to evaluate a water resource development in light of *Dolan*, the court of appeals upheld the fee charged by the city of Scottsdale.[103] In determining the applicability of *Dolan*, the court implied that *Dolan* did apply to regulatory fees.[104] Noting that "the Scottsdale ordinance involve[d] a legislative, rather than an adjudicative determination," the court of appeals concluded that *Dolan* was limited to adjudicative decisions.[105] On appeal,[106] the Arizona Supreme Court agreed, stating that "[t]he risk of... leveraging [the landowners] does not exist when the exaction is embodied in a generally applicable legislative decision."[107]

2. Possessory and Non-Possessory Regulations

California courts have also reviewed the applicability of both *Nollan* and *Dolan* to impact fees.[108] In *Commercial Builders of Northern California v. City of Sacramento*,[109] the Ninth Circuit Court of Appeals found an adequate nexus to satisfy *Nollan* where an ordinance imposed a development fee to help fund low-income housing needed for workers who were arriving to take jobs on new projects.[110] In reviewing the problems of other courts, the court noted that "[n]one [of the other circuits] have interpreted [*Nollan*] as changing the level of scrutiny to be applied to regulations that do not constitute a physical encroachment of land."[111] The California Court

103. *See* Home Builders Ass'n of Cent. Arizona v. City of Scottsdale, 902 P.2d 1347, 1352 (Ariz. Ct. App. 1995).

104. *See id.* at 1350 ("If the fees constitute a land-use regulation, eminent domain is implicated. If the fees are a tax, however, they are not subject to the Takings Clause.").

105. *Id.* at 1351. "While *Dolan* also involved a city ordinance, the crucial distinction lies in the amount of adjudicative, staff-level discretion permitted by each ordinance." *Id.*

106. Home Builders Ass'n of Cent. Arizona v. City of Scottsdale, 930 P.2d 993, 994 (Ariz. 1997).

107. *Id.* at 1000.

108. *See, e.g.*, Commercial Builders of N. Cal. v. City of Sacramento, 941 F.2d 872 (9th Cr. 1991).

109. 941 F.2d 872 (9th Cir. 1991).

110. *See id.* at 872-73.

111. *Id.* at 874.

of Appeals took a similar approach in upholding a traffic exaction ordinance, reasoning that the exaction in *Nollan* was possessory and that "any heightened scrutiny test contained in *Nollan* [was] limited to possessory rather than regulatory takings cases."[112]

Several years later, in *Ehrlich v. City of Culver City*,[113] a case with a complex procedural history, the California Supreme Court rejected the simple proposition that *Nollan* and *Dolan* do not apply to cases involving monetary exactions.[114] In *Ehrlich*, the rough proportionality test of *Dolan* was held to apply to non-possessory exactions that are individual and discretionary.[115] The court nonetheless concluded that "it is not at all clear that the rationale . . . of *Nollan* and *Dolan* applies to cases in which the exaction takes the form of a *generally* applicable development fee . . . [where] the courts have deferred to legislative and political processes . . . ."[116]

3. *Reasonable Relationship, Essential Nexus, and Rough Proportionality*

Although courts have referenced the heightened scrutiny required by *Nollan* and *Dolan*, the rigor of the essential nexus and rough proportionality tests is probably somewhat exaggerated. Justice Brennan's dissent in *Nollan* portrayed the majority view as a radical departure from traditional rationality standards used in

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112. Blue Jeans Equities W. v. City and County of San Francisco, 4 Cal. Rptr. 2d 114, 118 (Cal. Ct. App. 1992).

113. 911 P.2d 429 (Cal. 1996).

114. *See id.* at 433.

115. *See id.* at 444. Under the court's view of "the consolidated 'essential nexus' and 'rough proportionality' tests, it matters little whether the local land use permit authority demands the actual *conveyance* of property or the *payment* of a monetary exaction." *Id.*

116. *Id.* at 447. The court added:

> [W]hen a local government imposes special, discretionary permit conditions on development by individual property owners—as in the case of the recreational fee at issue in this case—*Nollan* and *Dolan* require that such conditions, whether they consist of possessory dedications or monetary exactions, be scrutinized under the heightened standard.

Id. *See also* Loyola Marymount Univ. v. Los Angeles Unified Sch. Dist., 53 Cal. Rptr. 2d 424, 424 (Cal. Ct. App. 1996). The California Court of Appeals noted that both *Commercial Builders* and *Blue Jeans Equities* involved "legislatively formulated assessments imposed on a broad class of property owners." *Id.* at 434. Since the school development fees at issue were of this type, the heightened scrutiny standards of *Nollan* and *Dolan* did not apply. *See id.* at 434-35.

police power cases,[117] and Justice Steven's dissent observed that "[e]ven the wisest lawyers would have to acknowledge great uncertainty about the scope of this Court's takings jurisprudence."[118] Similarly, Justice Steven's dissent in *Dolan* as to the rough proportionality test asserted that "[n]ot one of the state cases cited by the Court announces anything akin to a 'rough proportionality' requirement."[119] Further examination of the test's application however, suggests that Justices Stevens and Brennan had less to fear than they might have originally thought.

When the Arizona Supreme Court reviewed the impact of *Dolan* in *Home Builders Association of Central Arizona v. City of Scottsdale*,[120] it referred to state court decisions, including *Collis*[121] and *Jordan*,[122] as producing a widely accepted standard.[123] That standard referred to as the dual nexus test "requires first that the exaction imposed on the developer be factually related to the need for public services created by the proposed development. Second, the nature and extent of the exaction must bear a reasonable relationship to that portion of the public burden created by the proposed development."[124] The latter half of this test, the court concluded, is embodied in the *Dolan* rough proportionality test.[125]

In California, while judicial application of *Nollan* similarly tends to minimize the effect of that case, *Ehrlich*[126] suggests tests for such relationships. *Ehrlich* additionally speculates that "*Nollan* and *Dolan* cast substantial doubt on the sufficiency of the [California reasonable relationship test],"[127] and that the objective of the standards is still to assure that the regulatory fee will advance a

117. Nollan v. California Costal Comm'n, 483 U.S. 825, 842-64 (Brennan, J., dissenting).

118. *Nollan*, 483 U.S. at 866 (Stevens, J., dissenting).

119. Dolan v. City of Tigard, 512 U.S. 374, 398 (1994) (Stevens, J., dissenting).

120. 930 P.2d 993 (Ariz. 1997).

121. Collis v. City of Bloomington, 310 Minn. 5, 246 N.W.2d 19 (1976); *see supra* notes 81-88 and accompanying text for discussion of the *Collis* case.

122. Jordan v. Village of Menomonee Falls, 137 N.W.2d 442, 442 (Wis. 1965).

123. *Home Builders Ass'n*, 930 P.2d at 997.

124. *Id.*

125. *See id.* at 1000. "Adopting the predominant test developed by the state courts, the Supreme Court held that the exaction must bear a roughly proportional relationship to the community burden created by the proposed development. 'Roughly proportional' is actually a term substituted for 'reasonable relationship' . . . ." *Id.* at 999.

126. 911 P.2d 429 (Cal. 1996).

127. *Id.* at 437.

legitimate state interest and be proportional to the impact.[128] In general, however, most earlier state court decisions, such as *Collis*[129] and *Jordan*,[130] can be seen as consistent with *Nollan*[131] and *Dolan*.[132]

4. Nollan, Dolan, *and the Specifically and Uniquely Attributable Test*

In *Dolan*, the majority rejected the specifically and uniquely attributable test, declaring that "[w]e do not think the Federal Constitution requires such exacting scrutiny . . . ."[133] A number of states had previously relied on this more stringent test, including Illinois,[134] New Hampshire,[135] New Jersey,[136] Ohio,[137] and Rhode Island.[138] Under this standard, "[t]he new development paying the impact fee . . . must receive a direct and material benefit from the . . . improvement constructed with the impact fees paid."[139] Whether

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128. *See id.* To accomplish this

> *Nollan* requires a reviewing court to scrutinize the instrumental efficacy of the permit condition in order to determine whether it logically furthers the same regulatory goal as would outright denial of a development permit. A court must also, under the standard formulated in *Dolan*, determine whether the factual findings made by the permitting body support the condition as one that is more or less proportional, in both nature and scope, to the public impact of the proposed development.

Id. at 438-39. *See generally* Building Indus. Ass'n of S. Cal. v. City of Oxnard, 267 Cal. Rptr. 769, 769 (Cal. Ct. App. 1990) (upholding growth capital fee); Blue Jeans Equities W. v. City & County of San Francisco, 4 Cal. Rptr. 2d 114, 115 (Cal. Ct. App. 1992) (upholding traffic impact fee); Commercial Builders of N. Cal. v. City of Sacramento, 941 F.2d 872, 872-73 (9th Cir. 1991) (upholding fee for low-income housing needs).

129. Collis v. City of Bloomington, 310 Minn. 5, 246 N.W.2d 19 (1976).

130. Jordan v. Village of Menomonee Falls, 137 N.W.2d 442, 445 (Wis. 1965).

131. 483 U.S. 825 (1987). "Our conclusion . . . is consistent with the approach taken by every other court that has considered the question, with the exception of the California state courts." *Id.* at 839.

132. 512 U.S. 374 (1994).

133. *Id.* at 390.

134. *See* Northern Ill. Home Builders Ass'n v. County of Du Page, 649 N.E.2d 384, 394 (Ill. 1995).

135. *See* J.E.D. Assocs. v. Town of Atkinson, 432 A.2d 12, 14-15 (N.H. 1981).

136. *See* Divan Builders, Inc. v. Planning Bd. of Township of Wayne, 34 A.2d 30, 40 (N.J. 1975).

137. *See* McKain v. Toledo City Plan Comm'n, 270 N.E.2d 370, 374 (Ohio Ct. App. 1971).

138. *See* Frank Ansuini, Inc. v. City of Cranston, 264 A.2d 910, 913 (R.I. 1970).

139. *Northern Ill. Home Builders Ass'n*, 649 N.E.2d at 389-90 (quoting 605 Ill.

judicial adherence to this standard will continue in the face of the United States Supreme Court's pronouncements on the subject remains to be seen.

D. Equal Protection and Due Process

Most challenges to impact fee statutes and ordinances have been made under state and federal takings standards. The Fourteenth Amendment's equal protection and due process clauses provide a separate and independent means of attack on these regulations, but the fact that they trigger a lower level of scrutiny than takings claims perhaps explains why there are fewer of these types of challenges.[140] Some examples are instructive.

1. Equal Protection

The United States District Court in North Carolina and the Ohio Court of Appeals have applied rational basis analysis to impact fees with differing results.[141] In *South Shell Investors v. Town of*

Comp. Stat. 5/5-903 (West 1992)).

140. *See* Ehrlich v. City of Culver, 911 P.2d. 429, 437-38 (Cal. 1996). The court stated that

> [t]he high court's recent takings jurisprudence, as we comprehend it, underlines the separate nature of the takings clause as an independent constitutional guarantee, one that is not only distinct from the commands of the due process and equal protection provisions of the federal Constitution, but which embodies a standard of judicial review that is greater than the 'minimal level of scrutiny' mandated by those provisions.

Id. at 437.

141. *See infra* notes 142-50 and accompanying text. The Fourteenth Amendment to the United States Constitution was ratified eleven years after the adoption of the Minnesota Constitution. The Minnesota Constitution contains no equal protection clause. Nevertheless, the Minnesota Supreme Court has found an equal protection principle in the Minnesota Constitution, though its interpretation has not been uniform. That court has suggested that the state's constitution requires a "more stringent" constitutional test for rational basis review than does the federal constitution. *See* State v. Russell, 477 N.W.2d 886, 889 (Minn. 1991). The court acknowledged that it "has not been consistent in explaining whether the rational basis standard under Minnesota law, although articulated differently, is identical to the federal standard or represents a less deferential standard under the Minnesota Constitution." *Id.* In any event, whether challenged under the Minnesota Constitution's Article I, section 2 (rights and privileges), or Article X (uniformity in taxation), rationally based classifications are generally upheld as constitutional. *See* Village of Burnsville v. Ornischuk, 222 N.W.2d 523, 527 (Minn.

Wrightsville Beach,[142] impact fees imposed on owners of newly developed property to cover the costs of water and sewer systems were held not to violate equal protection even though the improvements benefited all residents in the municipality.[143] The federal district court noted that "[t]he principles of law enunciated in *Nollan* . . . involve the Takings Clause of the Fifth Amendment and are not directly applicable . . . ."[144] Thus, the plaintiff's burden in challenging the constitutionality of impact fees could be met "only by showing that there is no 'conceivable basis which may support' the Town's actions."[145] After reviewing the sewer and water demand figures, the court concluded that the Town had a rational basis to impose the fees.[146]

Taking a different view, the Ohio Court of Appeals struck down a park impact fee ordinance, holding that the measure was a tax.[147] Significantly, the court noted that one provision of the ordinance authorized the city to use impact fee revenues solely on operation and maintenance of existing facilities.[148] Because there was no guarantee that the fees would benefit new development, the court concluded that ". . . it is not fair or reasonable to shift the funding of the present recreation system from the general public to the developers and purchasers of new construction."[149] Because residents of existing housing and commercial buildings would also be using the city's recreational facilities, the ordinance violated the equal protection clauses of the state and federal constitutions.[150]

Ultimately, whether the basis for treating new residents differently from established residents is rational may have more to do with a court's sense of who can more equitably bear the burden of the cost of new capital improvements than with deference to legislative decision-making. For example, in *Building Industry Association v. City of Oxnard*,[151] the California Court of Appeals wrote

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1974) (stating that "[t]he uniformity clause [is] no more restrictive than the equal protection clause").

142. 703 F. Supp. 1192 (E.D.N.C. 1988).

143. *Id.* at 1201.

144. *Id.* at 1201 n.5.

145. *Id.* at 1201.

146. *See id.* at 1201-03.

147. *See* Building Indus. Ass'n of Cleveland & Suburban Counties v. City of Westlake, 660 N.E.2d 501, 504 (Ohio Ct. App. 1995).

148. *See id.*

149. *Id.*

150. *See id.* at 506.

151. 267 Cal. Rptr. 769 (Cal. Ct. App. 1990)

that " . . . where a landowner develops property in a city with existing public facilities it is difficult to see why a fee may not be exacted to purchase more such facilities to maintain the proper balance between the number of people in the community and the amount of public facilities available."[152]

2. Due Process

The city of Modesto, California, was held not to have violated the due process of developers when it established impact fees after the city approved a tentative map.[153] As the court noted, "[a]pproval of the tentative or final map . . . does not necessarily confer on a developer a vested right to complete the subdivision free from new [impact fees]."[154] Although the city could not have conditioned map approval on payment of the fees, since it had none at the time, it was not later barred from conditioning issuance of building permits on payment of impact fees under the due process clause of the Fourteenth Amendment to the United States Constitution.[155]

V. THE MINNESOTA EXPERIENCE: BEFORE *COUNTRY JOE*

A. Exaction Enabling Legislation in Minnesota

Cities and other subdivisions in Minnesota possess some authority to impose and utilize what arguably may be classified as exactions for a variety of purposes. Subdivision approval in Minnesota may be conditioned on fulfillment of a variety of requirements, including the construction of sewers and streets, electric, gas, drainage, and water facilities, and similar utilities.[156] The statute also allows a city to require a developer to dedicate land for parks or pay the equivalent value in cash in lieu of the land dedication.[157]

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152. *Id.* at 772.

153. *See* Golden State Home Building Assocs. v. City of Modesto, 31 Cal. Rptr. 2d 572, 579-80 (Cal. Ct. App. 1994).

154. *Id.* at 575.

155. *See id.* at 579-80; *see also* Blanche Rd. Corp. v. Bensalem Township, 57 F.3d 253, 263 (3d Cir. 1995) (stating that when municipal officials insisted upon payment of impact fees required by county ordinance, developers could not prevail on claim that their civil rights were violated in absence of a showing that officials' actions were motivated by bias, bad faith or improper motive).

156. *See* MINN. STAT. § 462.358, subd. 2b (1996).

157. *See id.* This section of the statute is often utilized in situations of a small

In situations where a need for off-site infrastructure is created by new development, cities are authorized to pass on to land developers and builders the sewer availability charge (SAC) imposed by the Metropolitan Waste Control Commission for the construction of off-site sewer interceptors necessitated by the project development.[158] Further, cities are also authorized to impose charges for connection to existing off-site sanitary sewer, storm sewer and water mains.[159]

Keeping in mind the general notions and restraints of Dillon's Rule,[160] limited authority arguably exists under legislative grants of zoning or other authority for the imposition of development exactions.[161] Nonetheless, courts are unlikely to construe Minnesota Statutes section 462.358 as granting any authority to impose specific impact fees such as road access charges.[162] The only other source of

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subdivision development, where the dedication of a very small portion of land would not be in the public interest.

158. *See* MINN. STAT. § 473.521 (1997).

159. *See* MINN. STAT. § 444.075, subd. 3 (1997).

160. *See supra* note 22-23 and accompanying text.

161. *See id.*

162. *See, e.g.*, New Jersey Builders Ass'n v. Mayor & Township Comm. of Bernards Township, 528 A.2d 555, 562 (N.J. 1987). There, a road access charge based upon the number of trips generated by a new development was invalidated because the New Jersey enabling legislation, similar to Minnesota Statutes section 462.358, did not explicitly authorize the road access impact fee. *See id.* at 562. New Jersey's enabling legislation at issue in *New Jersey Builders Ass'n* is similar to section 462.358 of the Minnesota statute. *See* N.J. STAT. ANN. § 40:55D-42 (West 1991):

> The governing body may by ordinance adopt regulations requiring a developer, as a condition for approval of a subdivision or site plan, to pay his pro-rata share of the cost of providing only reasonable and necessary street improvements and water, sewerage and drainage facilities, and easements therefor, located outside the property limits of the subdivision or development but necessitated or required by construction or improvements within such subdivision or development.

Compare MINN. STAT. § 462.358 (1997):

> To protect and promote the public health, safety, and general welfare, to provide for the orderly, economic, and safe development of land, to preserve agricultural lands, to promote the availability of housing affordable to persons and families of all income levels, and to facilitate adequate provision for transportation, water, sewage, storm drainage, schools, parks, playgrounds, and other public services and facilities, a municipality may by ordinance adopt subdivision regulations establishing standards, requirements, and procedures for the

enabling authority that cities can look to is the general welfare clause ("police power")[163] in the statutes governing statutory cities[164] or the general welfare clause contained in most home rule charters.

B. *Judicial Interpretation of Exactions in Minnesota*

Minnesota judicial interpretation of exactions has historically not been as demanding as that of other jurisdictions. Prior to *Country Joe*, the leading cases in Minnesota were *Collis v. City of Bloomington*[165] and *Middlemist v. City of Plymouth*.[166] Both dealt with land dedication requirements that were a condition for plat approval. In *Collis*, a developer was required to dedicate ten percent of his land for parks or to pay an equivalent amount in cash in lieu of the dedication.[167] The Minnesota Supreme Court held that a park dedication requirement in conjunction with the approval of a plat would constitute a taking unless the dedication required was proportional to the need created by the subdivision.[168] In *Middlemist*, the developer was required to dedicate land for a county road.[169] The court held that a taking would result unless the need for the

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review and approval or disapproval of subdivisions. The regulations may contain varied provisions respecting, and be made applicable only to, certain classes or kinds of subdivisions.

163. *See supra* note 31 and accompanying text.

164. *See* MINN. STAT. § 412.221, subd. 32 (1996). The statute provides:

> The council shall have power to provide for the government and good order of the city, the suppression of vice and immorality, the prevention of crime, the protection of public and private property, the benefit of residence, trade, and commerce, and the promotion of health, safety, order, convenience, and the general welfare by such ordinances not inconsistent with the constitution and laws of the United States or of this state as it shall deem expedient.

Id.

165. 310 Minn. 5, 246 N.W.2d 19 (1976).

166. 387 N.W.2d 190 (Minn. Ct. App. 1986).

167. *See Collis*, 310 Minn. at 82, 246 N.W.2d at 21. The court cautioned that the ten percent (10%) dedication requirement may be arbitrary in some circumstances because it does not account for the relationship between the particular subdivision and the need created by the development. *See id.* at 20, 246 N.W.2d at 30.

168. *Id.* at 19, 246 N.W.2d at 26.

169. *Middlemist*, 387 N.W.2d at 192.

road was "sufficiently related" to the development plat.[170] In doing so, the court rejected the "specifically and uniquely attributable" test adopted elsewhere.[171] It is not entirely clear what to call the test the court adopted in *Collis*,[172] but the important point is that the validity of the enabling legislation was upheld.[173]

C. *Impact Fees in Minnesota—Are They Valid?*

There is no explicit statutory authority for cities or other political subdivisions in Minnesota to impose impact fees on developers. As a result, unless authority is found in home rule charter language or can be necessarily implied from some other statutory authority, municipalities do not have authority to impose impact fees in Minnesota. There have been various recent attempts, all dealing with street access charges, to enact impact fee enabling legislation in Minnesota. All have failed.

In 1987 a bill was introduced which allowed home rule or statutory cities to impose street access charges by ordinance.[174] The legislation would have restricted the use of generated funds to arterial and collector street and highway capital improvement projects.[175] In 1989, proposed land use legislation would have allowed local governmental units to impose impact fees following the adoption of a capital improvement program.[176] The impact fee would have been required to be reasonably related to and expended for the study, development, or improvement of existing and future public facilities affected or impacted by an existing or proposed development project. Yet another legislative attempt to give local governments authority to impose impact fees was contained in the

170. *See id.* at 194.

171. *See supra* notes 69-75 and accompanying text for discussion of "specifically and uniquely attributable" test.

172. *Compare* Sellergren, *Development Exactions and Fees - Public Need, Private Rights, Fairness, and the Law*, 3 MINN. REAL EST. L.J. 162, 164 (1987) (terming it the rational nexus test) *with* Knutson, *The (Uncertain) Status of "Impact Fees" and Other Conditions Imposed on Development* 2 [Paper prepared for 1988 City Attorney Update Conference] (1988) (on file with author) (terming it the reasonable relationship test).

173. Sellergren, *supra* note 172, at 164. The relevant statute, MINN. STAT. § 462.358, subd. 2b, was modified in 1980 to include language developed in *Collis*. *See* Act of April 15, 1980, ch. 566 § 27, 1980 Minn. Laws, 566 (amending MINN. STAT. § 462.358).

174. MINN. H.F. 1163, 75th Leg. (1987).

175. *Id.*

176. MINN. S.F. 1510, 76th Leg. (1989).

1990 Transportation Bill.[177] The language of that bill authorized street access surcharges to be imposed and paid in a similar manner to property taxes. Most recently, the 1994 Minnesota Legislature tackled the question of whether to allow impact fees. Like the others, it declined to do so.

VI. *COUNTRY JOE*: AN ISSUE UNDECIDED

In the context of unpredictable and expensive development costs for local government, and facing a shortfall of revenues needed to upgrade its road system, the city of Eagan, Minnesota, a statutory city with a rapidly expanding population, developed a "road unit connection charge" applicable to persons seeking building permits.[178] The charge was patterned on Minnesota Statutes, section 444.075, subdivision 3, which authorizes charges to be imposed in connection with waterworks systems, sewer systems, and storm sewer systems.[179] In 1978, when the fee was first established, the "road unit connection charge" for a new single-family residence was $75.00, an amount recommended by the city's consulting engineers after a study had determined the extent of the shortfall.[180] Funds collected through these charges were used to expand and improve the road system and were generally paid by developers without significant complaint.[181] In 1994, however, by which time the charges had risen to $410.00 for a single-family residence, several contractors challenged the legality of the charge.[182]

The district court granted summary judgment to the city and decided that the charge was not an illegal tax.[183] On appeal, the Minnesota Court of Appeals reviewed *de novo* the legality of the City's charge, concluded that the charge was a tax, and held that the city lacked express or implied statutory authority to levy such a tax.[184]

177. MINN. S.F. 598, 77th Leg. (1991).

178. Country Joe, Inc. v. City of Eagan, 560 N.W.2d 681, 682-83 (Minn. 1997).

179. *See id.* at 682; *see also* MINN. STAT. § 44.075, subd. 3 (1996).

180. *Country Joe, Inc.*, 560 N.W.2d at 683.

181. *See* Country Joe, Inc. v. City of Eagan, 548 N.W.2d 281, 283 (Minn. Ct. App. 1996).

182. *See id.* Certification as a class action was deferred until motions could be decided. *See id.*

183. *See id.*

184. *See id.* The court of appeals noted that on a purely legal issue it need not give deference to the district court's decision. *See id.* Although the parties argued the case on the assumption that the road unit connection charge was an impact fee, the court of appeals noted "[o]ur analysis does not depend upon a conclusion that

The city argued that the Minnesota Supreme Court had earlier found that municipalities had implied power to do things such as impose a moratorium on development[185] and eliminate nonconforming land uses.[186] The court of appeals rejected these analogies reasoning that because the legislature had clearly expressed its intent to restrict city taxing authority, the court was "not persuaded that the broad interpretation of general police power set forth in . . . [the earlier cases] extends to confer a right to impose unauthorized taxes."[187] As a result, the appeals court reversed the district court and remanded the case for further proceedings, prompting the city's appeal to the Minnesota Supreme Court.[188]

On March 6, 1997, the Minnesota Supreme Court affirmed the court of appeals decision.[189] After reviewing the Municipal Planning Act[190] and several other statutes relating to statutory cities, the supreme court held that authority to impose a road unit connection charge could not be implied from the planning authority granted to the city.[191] After acknowledging the positions of the city and the contractors concerning the sources of authority needed to uphold the imposition of impact fees,[192] the court concluded that the road unit connection fee did meet the definition of an impact fee[193] proposed by Blaesser and Kentopp[194] because it was not "in an amount which is proportionate to the need for the public facilities generated by new development."[195]

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road connection charges are, in fact, impact fees, and we do not reach that conclusion." *Country Joe, Inc.*, 548 N.W.2d at 285 n.4.

185. *See* Almquist v. Town of Marshan, 308 Minn. 52, 65, 245 N.W.2d 819, 826 (1976) (upholding moratorium on development which was of limited duration and was enacted in good faith without discrimination).

186. *See* Naegele Outdoor Adver. v. Village of Minnetonka, 281 Minn. 492, 500, 162 N.W.2d 206, 213 (1968) (upholding the village council's decision to eliminate all commercial uses, including billboards, from residential districts).

187. *Country Joe Inc.*, 548 N.W.2d at 284.

188. *See id.* at 287.

189. Country Joe Inc. v. City of Eagan, 560 N.W.2d 681, 687 (Minn. 1997).

190. MINN. STAT. ch. 462 (1996 & Supp. 1997).

191. *See Country Joe*, 560 N.W.2d at 683-84.

192. *See id.* at 685. The city argued that impact fees could be upheld under the implied power doctrine; the contractors insisted the power had to be expressly conferred by the Legislature. *See id.*

193. *See id.* at 685-86; *see also supra* note 7 and accompanying text for a definition of an impact fee.

194. *See* Blaesser and Kentopp, *supra* note 1.

195. *Country Joe Inc.*, 560 N.W.2d at 685 (quoting Brian W. Blaesser & Christine M. Kentopp, *Impact Fees: The "Second Generation," in* 1991 ZONING AND PLANNING HANDBOOK 255, 264 (Kenneth H. Young ed., 1991)).

Instead, the Eagan charge was found to be a revenue raising measure and not a regulatory fee permitted under the general welfare powers conferred on statutory cities.[196] The court further concluded that because the road unit connection charge was not an impact fee, it "need not reach the issue of whether impact fees are authorized in Minnesota in order to pass on the validity of the road unit connection charge imposed by the city."[197] As the city had disregarded its engineer's recommendations to update cost changes and revenue projections, it could not show that the fees were "proportionate to the need created by the development upon which the burden of payment fell."[198]

Rejecting the city's final argument, the court decided that general revenue raising measures were not permitted under the city's regulatory authority.[199] The court reserved to the future the questions of whether impact fees are authorized by the Municipal Planning Act, or can be authorized under home rule charters or the statutes applicable to statutory cities.[200]

VII. EFFECT OF *COUNTRY JOE* ON MINNESOTA LAW—ISSUES TO BE RESOLVED

Minnesota has neither given cities express legislative authorization to enact impact fees,[201] as other states have,[202] nor definitively answered whether implied authority to do so exists under current law.[203] The question must then be asked: What effect did *Country Joe* actually have on Minnesota law?

In *Country Joe*, the Minnesota Supreme Court decided that the road unit connection charge established by the City of Eagan was not authorized under the implied power doctrine.[204] To the contrary, the fact that the legislature had expressly provided for sewer and water connection charges[205] and for road improvements by special

196. *Id.* at 686.
197. *Id.* at 685.
198. *Id.* at 685-86.
199. *See id.* at 686.
200. *See id.*
201. *But see supra* note 11.
202. *See supra* note 55.
203. *See supra* note 53.
204. *See Country Joe, Inc.*, 560 N.W.2d at 684; *see also supra* note 191 and accompanying text.
205. *See* MINN. STAT. § 444.075, subd. 3 (1996).

assessment[206] "supports the opposite conclusion."[207] The court noted that since the legislature had "*specifically provided* a funding mechanism for road improvements [through special assessments]; . . . no funding mechanism need be implied to effectuate the legislative grant of authority to undertake road improvements."[208] Consequently, the court refused to "imply that the legislature . . . intended to confer broad *financing* powers under the [Municipal Planning Act]."[209] In sum, the City of Eagan was attempting to exercise the powers of taxation and not those of regulation.

The *Country Joe* analysis fails to address two critical issues: First, whether the charge, if properly within the definition of an impact fee, would be authorized under the Municipal Planning Act or under the general welfare provisions applicable to statutory cities;[210] and second, whether a home rule charter city could use its charter to confer upon itself the authority to impose either a road unit connection charge similar to the charge imposed by the City of Eagan, or a regulatory impact fee of the type described by Blaesser and Kentopp.[211] The first issue focuses on the distinction between taxing authority and regulatory authority. The second issue requires an evaluation of the differences in the powers conferred by the legislature on statutory cities and the powers that home rule charter cities can confer upon themselves.

Distinguishing between general revenue raising through taxation and recoupment of costs through the imposition of regulatory fees is fundamental. Cities in Minnesota have no inherent sovereign power to tax, but only such power as has been conferred by the state constitution on the legislature.[212]

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206. *See id.* §§ 429.021, subd. 1(1); 412.221, subd. 6 (1996).

207. Country Joe, Inc. v. City of Eagan, 560 N.W.2d 681, 684 (Minn. 1997).

208. *Id.* at 684 (citations omitted) (emphasis added).

209. *Id.* (emphasis added).

210. *See id.* (reserving "the issue of whether impact fees are authorized under Minnesota law"); *see also* MINN. STAT. ch. 462 (1996 & Supp. 1997); MINN. STAT. § 412.221, subd. 32 (1996).

211. *See supra* note 6 and accompanying text.

212. *See* Hyland v. Metropolitan Airports Comm'n, 538 N.W.2d 717, 719-20 (Minn. Ct. App. 1995) (stating that "[M]unicipalities have no inherent power of taxation, but only that power granted by the Constitution or legislature."). Village of Brooklyn Ctr. v. Rippen, 255 Minn. 334, 335-36, 96 N.W.2d 585, 587 (1959) (finding that "[i]t is well settled that municipalities have no inherent powers but have only such powers as are expressly conferred by statute or are implied as necessary in aid of those powers which are expressly conferred"); Costley v. Caromin House, Inc.,

In *Country Joe*, the court merely determined that the city had not been delegated authority to impose a tax. Once the court had done so, its decision was relatively easy. The power to regulate, however, "includes the power to deny development that is contrary to the public health, safety, or general welfare," and "includes the power to condition development approval on compliance with standards or contribution of land, improvements, or fees to mitigate otherwise harmful 'impacts' on the community."[213]

Notwithstanding the court's conclusion in *Country Joe*, that there appears to be no express power in state legislation to impose impact fees in Minnesota,[214] the question remains whether such authority can be reasonably implied from the Municipal Planning Act,[215] be created by charter,[216] or be found in the general welfare powers of statutory cities set forth in section 412.221 of the Minnesota statutes.[217]

A. *Municipal Planning Act*

Although the court in *Country Joe* concluded that "we need not reach the issue of whether impact fees are authorized in Minnesota in order to pass on the validity of the road unit connection charge,"[218] dicta by the court gives little reason for optimism that the court expects to find this power in the Municipal Planning Act as currently written. As the court stated, "[t]hat the Municipal Planning Act expressly confers broad municipal *planning* powers on cities does not necessarily imply that the legislature similarly intended to confer broad *financing* powers under the Act."[219]

313 N.W.2d 21, 27 (Minn. 1981) (holding that "[i]n Minnesota, however, a municipality has no inherent power to enact zoning regulations. A municipality receives power to zone only by legislative grant of authority by the state.").

213. Morgan, *supra* note 2, at 6; Collis v. City of Bloomington, 310 Minn. 5, 246 N.W.2d 19 (1976).

214. *See supra* Part V.C. (discussing lack of express statutory authority for impact fees). *But see* MINN. STAT. § 462.358, subd. 2b. (1996) (authorizing a cash payment in lieu of park dedication pursuant to a local subdivision regulation).

215. *See* MINN. STAT. § 462.351 (1996).

216. *Id.* § 410.01 (1996).

217. *Id.* § 412.221, subd. 6 (1996).

218. Country Joe, Inc. v. City of Eagan, 560 N.W.2d 681, 685 (Minn. 1997).

219. *Id.* at 684 (determining the legislature failed to expressly provide for a road charge) (emphasis added).

B. *Charter Authority*

Country Joe involved a statutory city.[220] Article 12, section 4 of the Minnesota Constitution confers power on the Legislature to enact legislation permitting local government units to adopt home rule charters.[221] Minnesota statutes allow home rule charter cities to provide "for the regulation of all local municipal functions, as fully as the legislature might have done before home rule charters for cities were authorized by constitutional amendment in 1896."[222] Thus, if the capital facilities being funded through impact fees are a matter of local or municipal concern, arguably a charter amendment could be drafted to permit impact fees within the constraints of *Country Joe.*

Country Joe clearly rejects the view that authority to impose impact fees for Eagan's road unit connection charge can be implied from the Municipal Planning Act.[223] What is not clear is whether this conclusion refers only to Eagan's charge, which was determined to be a tax, or whether the lack of implied delegated authority by the legislature applies to *any* road unit connection charge, including those imposed by a charter city. In either case, the fact that the Minnesota Supreme Court "reserve[d] the issue of whether impact fees are authorized under Minnesota law,"[224] provides an opportunity to attempt to resolve the issue through the adoption of an express charter amendment.

C. *Police Power*

Under current Minnesota law, a city cannot rely on broad statutory authorizations conferring regulatory powers to justify the use of a road unit connection charge.[225] This view is more typical than not.[226] Nothing in *Country Joe* suggests that the Minnesota

220. *See id.* at 683 (noting that the City of Eagan is a municipal corporation that has not adopted a home rule charter).

221. *See* MINN. CONST. art. 12, § 4. Relevantly, the section provides "[a]ny local government unit when authorized by law may adopt a home rule charter for its government." *Id.*

222. MINN. STAT. § 410.07 (1996).

223. *See Country Joe, Inc.*, 560 N.W.2d at 684 (finding where legislature has specifically provided a funding mechanism for road improvements, no funding mechanism may be implied from a city's municipal planning authority).

224. *Id.* at 686.

225. *See id.* at 686 (stating "[w]e have consistently rejected that the general police power extends to permit revenue raising measures by municipalities.").

226. *Compare* Idaho Bldg. Contractors Ass'n v. City of Coeur d'Alene, 890 P.2d 326, 328 (Idaho 1995); Douglas County Contractors Ass'n v. Douglas County, 929

Supreme Court sees any reason to take up the minority position on this subject.

VIII. METROPOLITAN GROWTH AND THE MUNICIPAL CHALLENGE—OR, IMPACT FEES: WHO NEEDS 'EM?

General growth patterns make it clear that assistance for local infrastructure development is essential. Growth in the seven-county metropolitan area of Minnesota from 1970 to 1995 was dramatic.[227] During that twenty-five year period, the population of the area grew by almost 575,000 persons, from 1,874,612 to 2,448,967;[228] employment rose by nearly 611,000 jobs, from 779,000 to 1,389,766;[229] and households increased by about 371,000, from 573,634 to 945,027.[230] Projections suggest that growth from 1995 to the 2020 will be equally dramatic. The population of the area is expected to increase by more than 600,000 persons.[231] Households will grow from 945,027 in 1995 to 1,265,000 in 2020, an increase of almost 320,000,[232] while the number of jobs is expected to increase by almost 400,000.[233]

These projections describe future growth in the seven-county metropolitan area with implications as significant as those of the growth of the previous twenty-five years. Anticipating the

P.2d 253, 259 (Nev. 1996); Building Indus. Ass'n of Cleveland & Suburban County v. City of Westlake, 660 N.E.2d 501, 505 (Ohio Ct. App. 1995); Hillis Homes, Inc. v. Snohomish County, 650 P.2d 193, 195 (Wash. 1982).

227. *See* METROPOLITAN COUNCIL, REGIONAL BLUEPRINT (Dec. 1996). The seven-county metropolitan area includes the counties of Anoka, Carver, Dakota, Hennepin, Ramsey, Scott and Washington. *See id.* at 84. The Metropolitan Council, a statutorily created regional development authority gathered data relating to population, households and employment in the metropolitan area. This data was gathered to forecast metropolitan growth and to create guidelines affecting regional systems. "These forecasts reflect the Council's policies for increasing the density and intensity of land uses in the urban area for redevelopment and reinvestment in the urban core, and for the protection of prime agricultural land and environmentally sensitive areas." *Id.* at 74.

228. *See id.*

229. *See id.*

230. *See id.*

231. *See id.* at 8. The Metropolitan Council's Preliminary Forecasts in March 1997 show the growth figure to be 618,163, from 2,448,967 in 1995 to 3,067,130 in 2020. The Metropolitan Council's publication, METRO 2040 (April 1997), uses the figure 650,000. *See id.*

232. *See id.* (projecting as many as 330,000 more households in the metropolitan area in the year 2040).

233. *See id.* at 74 (projecting job growth in the metropolitan area to increase from 1,389,766 to 1,770,730).

infrastructure demands that these figures imply, Metropolitan Council planners recommend concentrating higher levels of growth within the Metropolitan Urban Service Area (MUSA).[234] By increasing housing density and encouraging job concentration inside the Interstate 494/694 highway system, the Metropolitan Council hopes to encourage the use of the current regional infrastructure and thereby reduce costs that would otherwise arise if the anticipated growth occurred outside the MUSA line.

The lynch pin between these regional policies and the obligations of municipalities lies in the statutory requirement of consistency between local comprehensive plans and metropolitan Council regional system plans, and the requirement that local ordinances conform to local comprehensive plans.[235] By December 31, 1998, all municipalities within the seven-county metropolitan area are required to review their comprehensive plans to assure consistency with local official controls relating to land use, and to assure consistency of the comprehensive plans with the Metropolitan Council's guidelines.[236] Both the anticipated growth and the regional policies of maximizing the use of present regional infrastructure have significant repercussions for cities.

First, large increases in the number of people in the metro area, whether inside or outside the MUSA, will require new services, shopping malls, schools and other traffic generators that increase the local government infrastructure needs. The facts in *Kottschade v. City of Rochester*[237] demonstrate how immediate, direct, and indispensable new local roadways are to new development.[238] Similarly,

234. *See id.* at 27-28. The Metropolitan Urban Service Area, or MUSA, is the built-up area with central sewer and water service. *See id.*

235. *See* MINN. STAT. § 473.858 (1996 & Supp. 1998) (establishing that zoning ordinances in conflict with the comprehensive municipal plan shall be brought into conformity with the plan through review and "if necessary" amendment of the plan by the local governmental units).

236. *See* MINN. STAT. § 473.864 (Supp. 1998); *see also* MINN. STAT. § 473.854 (1996) (finding the council responsible for preparing and adopting guidelines which will assist local government in assuring consistency).

237. 537 N.W.2d 301 (Minn. Ct. App. 1995).

238. In 1978, the City of Rochester and Olmsted County published a study which determined the need for improvements in a portion of the local highway system due to heavy traffic from an IBM plant and anticipated future development. *See id.* at 303. Between 1978 and 1987 Franklin P. Kottschade acquired nearly 24 acres adjoining the highway system in question and planned to develop the site for a retail shopping mall, an office building, a grocery store, a Target store, and two restaurants. *Id.* Between 1980 and 1981 Kottschade petitioned the local planning board for variances to allow him to convey a part of

development of the Mall of America in Bloomington, Minnesota, not only required state and interstate highways improvements, but also huge local expenditures for roads feeding into those highways while increased demand for sewer capacity added another several million dollars in cost to the project. Without the power to make exactions, and impose impact fees and linkage fees, the costs of new development must inevitably be spread in part against the existing tax base.

Second, commercial, industrial, and housing development tends to depend largely on the state of a historically cyclical economy. When borrowing costs are high, developers are reluctant to make large investments in new development. In a metropolitan area, this causes a pent-up demand for housing, office buildings, and retail centers, which is thrust upon local governments when borrowing costs drop.[239]

Third, the effort to control budget deficits at the national level has trickled down to local governments and limited their ability to raise revenues. Whether accomplished by constitutional amendments, as with Proposition 13 in California,[240] or by legislation as in Minnesota,[241] these limitations lead to inadequate local physical and financial resources to provide essential services and capital

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his land to Dayton-Hudson Corporation for the opening of a Target store. *Id.* at 304. The board initially denied the requests because of right-of-way concerns with the new highway system. *Id.* The plan was finally approved after Kottschade submitted a request which did not include land designated as right-of-way on the official city map. *Id.* In late 1985 and early 1986, the city completed plans for the highway improvements and proceeded to acquire the right-of-way from Kottschade through condemnation proceedings. *Id.* On September 24, 1986 the court-appointed condemnation commissioners awarded Kottschade $938,740 ($5.50 per square foot for the land and $.60 per square foot severance damages) for the condemned property. *Id.* In May 1987, Kottschade petitioned the city to vacate an unused street easement along the southern border of his property. *Id.* The city offered to vacate the easement on condition that Kottschade pay $5.50 per square foot based on the figure determined in the condemnation proceeding. *Id.* The city tabled formal action on the application pending determination of the outcome of the parties' appeals concerning the condemnation proceeding. *Id.* In November 1988, the city formally conditioned approval of Kottschade's request for vacation of the easement on his payment to the city of $123,750. *Id.*

239. The unpredictability of development can be regulated to some extent by growth management plans. In New York, a complex system linking the timing and sequencing of development to capital improvements was upheld as falling within the ambit of state enabling legislation. *See* Golden v. Planning Bd. of Town of Ramapo, 285 N.E.2d 291, 300 (N.Y. 1972).

240. CAL. CONST. art. XIIIA, §1.

241. Act of June 2, 1997, ch. 231, art. 3, § 4, 1997 MINN. LAWS 2471.

facilities. In short, development is often both unpredictable and expensive for local governments.

IX. LEGISLATIVE AUTHORITY

A. *Purpose*

In light of *Country Joe*, it seems likely that adoption of appropriate legislation is the surest way to provide municipalities with the ability to meet potentially overwhelming needs for public infrastructure and services. Any such legislation should incorporate at a minimum a well-defined purpose and clear guidelines as to how it is to be applied in practice. Other provisions may be less essential, but should still be considered as ways to make the legislation more palatable to those who will be most directly affected by the legislation.

Enabling legislation should make clear that the imposition of fees is an express delegation of regulatory police power authority and not a revenue raising measure.[242] Morgan[243] recommends several regulatory objectives which can be included in express provisions "such as attraction of economic development, encouragement of low and moderate-income housing opportunities, revitalization of central city areas, and prevention of urban spread."[244]

B. *Reasonableness*

Commentators have identified a number of factors that can be used to evaluate the reasonableness of impact fees.[245] These factors focus on identification of the affected geographical location, the need for new facilities and the benefits of these facilities to the new development, preservation of the fees for the purposes identified, and the amount of the fees.[246] Proposed legislation should address at

242. *See, e.g.*, GA. CODE ANN. §§ 36-71-1 (Michie 1993) (determining that legislative findings include the need to establish an "equitable program for planning and financing public facilities" that includes the police powers necessary for "protect[ing] the public health, safety, and general welfare . . . .").

243. *See* Morgan, *supra* note 2, at 6.

244. *Id.*

245. Martin L. Leitner & Susan P. Schoettle, *A Survey of State Impact Fee Enabling Legislation*, 25 URB. LAW. 491, 491 (1993).

246. *See id.* at 495.

least these factors.

1. Service or Benefit Areas

Presumably, the greater the physical distance between improvements and the development they purportedly serve, the harder it is to demonstrate a benefit to that development. At least half of the states enacting impact fee legislation have provided for service or benefit area requirements.[247] Wisconsin simply defines a service area as "a geographic area delineated by a political subdivision within which there are public facilities."[248] Illinois requires that it be "designated by the unit of local government in the comprehensive road improvement plan."[249] In Georgia, service areas are "a geographic area defined by a municipality, county, or intergovernmental agreement in which a defined set of public facilities provides service to the development within the area," and must "be designated on the basis of sound planning or engineering principles or both."[250] However they may be defined, their purpose is to limit the area to which the fees are applied.

2. Needs and Benefits Provisions

The need for increased capital improvements or facilities as the result of new development can be established through a needs assessment. The assessment can be a separate study process or can be made a part of the capital improvement plan for the new development. Of the states with express statutory authority for impact fees, at least eighteen[251] require some form of capital

247. *See* ARIZ. REV. STAT. ANN. § 11-1105(b) (West Supp. 1997-1998); GA. CODE ANN. § 36-71-4(b) (1993); HAW. REV. STAT. ANN. § 46-143(a) (1996); IDAHO CODE § 67-8107 (Supp. 1997); 605 ILL. COMP. STAT. 5/5-911 (West 1993); IND. CODE ANN. § 36-7-4-1300 (West 1997); N.J. STAT. ANN. § 27:1C-1 (West Supp. 1997); N.M. STAT. ANN. § 5-8-1 (Michie 1993); 53 PA. STAT. ANN. tit. 53, § 10502-A (West 1997); TEX. LOC. GOV'T CODE ANN. § 395.001 (West Supp. 1998); UTAH CODE ANN. § 11-36-101 (1996); VT. STAT. ANN. Tit. 24, § 5201 (1992); VA. CODE ANN. § 82.02.050 (Michie Supp. 1998); WASH. REV. CODE ANN. § 82.02.050 (1997); W. VA. CODE § 7-20-3 (1997); WIS. STAT. ANN. § 66.55 (West Supp. 1997).

248. WIS. STAT. ANN. § 66.55(1)(g) (West 1993 & Supp. 1997).

249. 605 ILL. COMP. STAT. ANN. 5/5-903 (West 1993).

250. GA. CODE ANN. § 36-71-2(17) (1993).

251. ARIZ. REV. STAT. ANN. § 11-1106 (West Supp. 1997-1998); GA. CODE ANN. § 36-71-2(16) (1993); HAW. REV. STAT. ANN. § 46-141 (1996); IDAHO CODE § 67-8103 (Supp. 1997); 605 ILL. COMP. STAT. 5/5-910 (West 1993); IND. CODE ANN. § 36-7-4-1318 (West 1997); ME. REV. STAT. ANN. tit. 30-A, § 4354 (West 1996); N.H. REV. STAT. ANN. § 674:21 (1996); N.J. STAT. ANN. § 27:1C-5, 6 (West Supp. 1997); N.M.

improvement plan that identifies capital improvements for which impact fees may be used.[252]

The elements of capital improvement plans may vary, but their general purpose is to outline the deficiencies in improvements and facilities which exist because of the new development. Indiana's plan requirements, called "zone improvement plan," is typical. As a prerequisite to imposing impact fees a governmental unit must prepare a zone improvement plan that includes:

> (1) A description of the nature and location of existing infrastructure in the impact zone.
>
> (2) A determination of the current level of service.
>
> (3) Establishment of a community level of service. A unit may provide that the unit's current level of service is the unit's community level of service in the zone improvement plan.
>
> (4) An estimate of the nature and location of development that is expected to occur in the impact zone during the following ten (10) year period.
>
> (5) An estimate of the nature, location, and cost of infrastructure that is necessary to provide the community level of service for the development described in subdivision (4). The plan must indicate the proposed timing and sequencing of infrastructure installation.
>
> (6) A general description of the sources and amounts of money used to pay for infrastructure during the previous five (5) years.[253]

STAT. ANN. § 5-8-6 (Michie 1993); OR. REV. STAT. § 391.235 (1996); 53 PA. STAT. ANN. tit. 53, § 10504-A (West 1997); TEX. LOC. GOV'T CODE ANN. § 395.014 (West Supp. 1998); VT. STAT. ANN. tit. 24, § 5201(2) (1992); VA. CODE ANN. § 82.02.050 (Michie Supp. 1998); WASH. REV. CODE ANN. § 82.02.060 (1997); W. VA. CODE § 7-20-3(j) (1997); WIS. STAT. ANN. § 66.55(1)(a) (West Supp. 1997).

252. For definitions of capital improvement plans, *see, e.g.*, IDAHO CODE ANN. § 67-8203(5) (Supp. 1997); TEX. LOC. GOV'T. CODE ANN. § 395.001(2) (West Supp. 1998).

253. IND. CODE ANN. § 36-7-4-1318(b) (West 1993 & Supp. 1997).

Texas, more elaborately, requires:

> (1) a description of the existing capital improvements within the service area and the costs to upgrade, update, improve, expand, or replace the improvements to meet existing needs and usage and stricter safety, efficiency, environmental, or regulatory standards, which shall be prepared by a qualified professional engineer licensed to perform the professional engineering services in this state;
>
> (2) an analysis of the total capacity, the level of current usage, and commitments for usage of capacity of the existing capital improvements, which shall be prepared by a qualified professional engineer licensed to perform the professional engineering services in this state;
>
> (3) a description of all or the parts of the capital improvements or facility expansions and their costs necessitated by and attributable to new development in the service area based on the approved land use assumptions, which shall be prepared by a qualified professional engineer licensed to perform the professional engineering services in this state;
>
> (4) a definitive table establishing the specific level or quantity of use, consumption, generation, or discharge of a service unit for each category of capital improvements or facility expansions and an equivalency or conversion table establishing the ratio of a service unit to various types of land uses, including residential, commercial, and industrial;
>
> (5) the total number of projected service units necessitated by and attributable to new development within the service area based on the approved land use assumptions and calculated in accordance with generally accepted engineering or planning criteria; and

> (6) the projected demand for capital improvements or facility expansions required by new service units projected over a reasonable period of time, not to exceed 10 years.[254]

The analysis required by Subsection (a)(3) may be prepared on a system wide basis within the service area for each major category of capital improvement or facility expansion for the designated service area.[255]

Although these requirements may be more than is necessary to meet constitutional standards, they all attempt to establish a proper foundation for the calculation of the need for capital improvements and facilities caused by new development. If the plan is properly prepared, the supporting data should be sufficient to demonstrate the burden caused by new development and establish that the proposed new facilities are sufficient to satisfy the needs of the new development.

3. Preserving Funds

The purpose of impact fees is not to raise funds for general government revenues. Earmarking and dedicating impact fees assures that the fees collected will be used only for the capital costs of the improvements and facilities necessitated by the new development; failure to do so can be catastrophic to a legislature's intentions.[256] The Florida Supreme Court invalidated an ordinance which authorized impact fees for connecting to water and sewer systems "for failure to spell out necessary restrictions on the use of fees it authorizes to be collected."[257] At least eighteen states separate

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254. TEX. LOC. GOV'T. CODE ANN., § 395.014(a) (West Supp. 1997).
255. *See id.*
256. *See* Contractors & Builders Ass'n v. City of Dunedin, 329 So. 2d 314, 321 (Fla. 1976).
257. *Id.* The court noted that

> [t]he failure to include necessary restrictions on the use of the fund is bound to result in confusion, at best. City personnel may come and go before the fund is exhausted, yet there is nothing in writing to guide their use of these moneys, although certain uses, even within the water and sewer systems, would undercut the legal basis for the fund's existence.

Id.

accounts by service areas, facility type or both so as to prevent commingling with general revenue funds.[258]

4. Amount of the Fee

The amount of the fee in relation to the cost of the needed public improvements and facilities implicates proportionality tests. Needs and benefits standards are obviously indispensable in assisting planners and city officials in meeting these tests. Other provisions have also been used to fine-tune the fee requirements to prevent overcharging new developments. One common provision allows contributions for off-site improvements, which may include park dedications or in-lieu of fees to be adopted against the required impact fee. Fees may also be reduced by funds used from non-local sources to pay for improvements necessitated by the development, such as state highway funds.[259]

Refund provisions are also commonly employed to assure that if the fees are not used to construct the projected improvements, the fees will be repaid.[260] The Florida District Court of Appeal, while holding that a no refund rule was not invalid per se, found that the authority's application of a no-refund rule when the anticipated development did not occur led "to a result which 'defies logic' and is clearly unfair and inequitable."[261] Fee reimbursement is not normally automatic and one-year statutes of limitations are often used, although it is not always clear whether the owner or the developer is entitled to the refund.[262] Finally, states may establish in

258. *See* ARIZ. REV. STAT. ANN. § 11-1105(A)(3)(a) (West Supp. 1997-1998); CAL. GOV. CODE § 66006 (West 1997); COLO. REV. STAT. ANN. §22-54-102 et. seq. (1998); GA. CODE ANN. § 36-71-8 (1993); HAW. REV. STAT. ANN. § 46-144(1) (1996); IDAHO CODE § 67-8103 (Supp. 1997); 605 ILL. COMP. STAT. 5/5-913 (West 1993); IND. CODE ANN. § 36-7-4-1329 (West 1997); ME. REV. STAT. ANN. Tit. 30-A, § 4354(2)(B) (West 1996); N.H. REV. STAT. ANN. § 674:21 (1996); N.M. STAT. ANN. § 5-8-16 (Michie 1993); OR. REV. STAT. § 391.235 (1996); 53 PA. STAT. ANN. tit. 53, § 10505-A(d) (West 1997); TEX. LOC. GOV'T CODE ANN. § 395.024 (West Supp. 1998); VA. CODE ANN. § 82.02.050 (Michie Supp. 1998); WASH. REV. CODE ANN. § 82.02.070 (1997); W. VA. CODE § 7-20-3(a) (1997); WIS. STAT. ANN. § 66.55(8) (West Supp. 1997).

259. Many states include these provisions. *See, e.g.*, WIS. STAT. ANN. § 66.55(6)(d), (e) (West Supp. 1997); IND. CODE ANN. § 36-7-4-1321(c) (West 1997).

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

261. *Id. See also* Nemeth v. Florida Dep't of Rev., 686 So. 2d 778, 779 (Fla. Dist. Ct. App. 1997) (holding that taxpayer had standing to bring action for a refund under impact fee statute even though taxpayer failed to file application for refund).

262. The issue can be easily settled by specifying in the ordinance who may apply

their impact fee legislation the length of time allowed between the collection of the fees and their use in constructing improvements.[263]

C. *Additional Provisions*

1. *Advisory Committees*

About one-third of statues expressly authorizing impact fees provide for an advisory committee to make recommendations to the local unit of government before the adoption of an impact fee ordinance.[264] These provisions generally require that forty percent of the members of the committee be representatives of the real estate, development, and building industries. Illinois also includes labor representatives.[265]

2. *Exemptions from Impact Fees*

In order to respond to criticism that impact fees tend to drive up housing costs, a number of states have excluded low and moderate-income housing from payments of impact fees.[266] Indiana allows for a reduction of fees for affordable housing developments.[267] New Jersey has gone farther in support of its court-created constitutional obligation to provide a realistic opportunity for the development of affordable housing[268] by upholding linkage fees imposed on commercial and non-inclusionary residential development for low-income housing.[269] This authority would be

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for the refund.

263. *See, e.g.*, HAW. REV. STAT. ANN. § 46-144(5) (Michie 1996) (stating that Hawaii has a six year period).

264. *See* GA. CODE ANN. § 36-71-5 (1993); IDAHO CODE § 67-8106 (Supp. 1997); 605 ILL. COMP. STAT. 5/5-907 (West 1993); IND. CODE ANN. § 36-7-4-1338 (West 1997); N.M. STAT. ANN. § 5-8-37 (Michie 1993); 53 PA. STAT. ANN. tit. 53, § 10504-A(3) (West 1997); TEX. LOC. GOV'T CODE ANN. § 395.058 (West Supp. 1998); VA. CODE ANN. § 82.02.050 (Michie Supp. 1998).

265. *See* 605 ILL. COMP. STAT. ANN. 5/5-907(4) (West 1993).

266. *See, e.g.*, WIS. STAT. ANN. § 66.55(7) (West Supp. 1997).

267. *See* IND. CODE ANN. § 36-7-4-1326(a) (West 1997).

268. *See* Southern Burlington County NAACP v. Township of Mount Laurel, 336 A.2d 713, 728 (N.J. 1975), *cert denied*, 423 U.S. 808 (1975) (Mt. Laurel I); Southern Burlington County NAACP v. Township of Mount Laurel , 456 A.2d 390, 415 (N.J. 1983) (Mt. Laurel II).

269. *See* Holmdel Builders Ass'n v. Township of Holmdel, 583 A.2d 277, 288 (N.J. 1990). "It is fair and reasonable to impose such fee requirements on private developers when they possess, enjoy, and consume land which constitutes the primary resource for housing." *Id.*

presumably sufficient to allow municipalities to waive impact fees for lower cost housing if such fees are authorized or to require reasonable fees for non-inclusionary subdivisions.

3. Hearings

All statutes authorizing impact fees require at least one public hearing before the local unit of government adopts the impact fee ordinance.[270] Texas[271] and Illinois[272] are more extreme in their public hearing requirements, which occur separately before adopting land use assumptions, the capital improvements plan, and the impact fee ordinance.

4. The Constitutional Standards

The courts that have considered the standards applied to exaction cases are clearly less than unanimous in their understanding of *Nollan* and *Dolan.* However the courts may interpret the standards, a legislature should carefully consider the wisdom of including the language of constitutional standards in enabling legislation, as a number of states have done.

On the one hand, the Illinois Supreme Court apparently believed it was important to include the specifically and uniquely attributable test in the enabling statute.[273] On the other hand, Morgan, in *State Impact Fee Legislation: Guidelines for Analysis, Part I*[274] recommends against it, for good reason. Although Morgan acknowledges the trend to inclusion of constitutional standards, the drafters of impact fee legislation often confuse the relationship between statutory standards and constitutional analysis, and merely promote litigation.[275] Any legislature considering the adoption of legislation authorizing local governments to use impact fee ordinances should recognize that the constitutional standards will be applied whether or not the statute includes them, and should instead devote its energies to drafting legislation that will simply meet these

270. *See, e.g.*, WIS. STAT. ANN. § 66.55(3) (West Supp. 1997).
271. *See* TEX. LOC. GOV'T. CODE ANN. § 395.055 (West Supp. 1997).
272. *See* 605 ILL. COMP. STAT. ANN. 5/5-905 (West 1993).
273. *See* Northern Ill. Home Builders Ass'n, Inc. v. County of DuPage, 649 N.E.2d 384, 389-90 (Ill. 1995). "[I]t appears clear that the first enabling act (which the Court struck down) was not written with the . . . test in mind . . . . " *Id.* at 390. The second statute did contain the language of the test and was upheld. *See id.*
274. *See* Morgan, *supra* note 2, at 3.
275. *Id.* at 7.

standards.

X. CONCLUSION

In Minnesota, as in all states, new development leads to increasing demands for additional streets, utilities, and other public services. All of these improvements cost money. Taxpayers are already frustrated with what is seen as the high cost of maintaining existing public infrastructure. The resulting legislature- and voter-initiated limits on municipal budgets have only increased the pressure on local governments to find new ways to finance the infrastructure needed to serve new residential and commercial development.

While not a perfect solution, impact fees place financial responsibility for new public facilities at least in part on those who create the need for them. Properly designed impact fees can be one of the most equitable solutions to a problem that may at times seem almost insurmountable to local government, a factor that likely explains much of their increasing popularity.

Whether impact fees will ever be permitted in Minnesota is another matter. The courts have left open the possibility that a home rule charter city could lawfully adopt an impact fee ordinance and, with a close enough eye to existing law, a statutory city could perhaps do the same. The uncertainty surrounding the matter, however, poses significant risks for any city that attempts to do so. Furthermore, the policy implications surrounding impact fees in particular, and infrastructure financing in general, demand a full and public legislative debate.

The ultimate question is not whether someone will have to pay the public costs of new development. The only question is who will pay.