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Local Government Environmental Mitigation Fees: Development Exactions, the Next Generation

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NOTES

LOCAL GOVERNMENT ENVIRONMENTAL MITIGATION FEES: DEVELOPMENT EXACTIONS, THE NEXT GENERATION

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* This note is dedicated to my parents, Bill and Melanie, who sparked my interest in real property many years ago, and to my wife, Sealy. Thank you for all your love and support. I would also like to thank Professors James C. Nicholas and Julian C. Juergensmeyer for their guidance and insights.

I. INTRODUCTION

Real estate development has progressed for years in this country without full consideration of the externalities[1] imposed on society. Negative externalities, which developers pass on to society, include the cost of expanding or improving overburdened public facilities, destruction of wetlands, destruction of endangered species' habitats, and various forms of environmental pollution.[2] Development exactions[3] are one method which local governments can use to force developers to internalize some of these externalities.[4] However, exactions have been largely limited to physical infrastructure costs which would otherwise have to be borne by the local government.[5]

Environmental pollution is an externality typically not compensated for by developers unless government intervenes.[6] If government may intervene after the fact, why should the government not be able to intervene at the outset and assess the development for the calculated impact?[7] The concept of exacting the costs of these impacts from developers simply requires developers to consider the economic viability of a given project in

1. JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 38-39 (2d ed. 1988). Externalities exist when someone makes a decision about the use of resources without taking into account all the costs and benefits borne by others external to the decision. *Id.*

2. DONALD G. HAGMAN & JULIAN C. JUERGENSMEYER, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW 284 (2d ed. 1986). Externalities can be either positive or negative; positive externalities are regarded as social benefits, negative externalities are regarded as social costs. *Id.*

3. James E. Frank & Robert M. Rhodes, *Introduction, in* DEVELOPMENT EXACTIONS 1, 2-4 (James E. Frank & Robert M. Rhodes eds., 1987). Development exactions are charges imposed on developers by local governments to lessen the adverse impacts of development on the community. *Id.* The charges may be in the form of land, facilities, or money and are imposed as a means of providing community facilities made necessary by new development. *Id.* Common examples include fees for road improvements, water and sewer system expansion, utility provision, parks and recreation, and construction of schools. *Id.* An impact fee is an example of a development exaction imposed by local governments against new development to fund capital improvements necessitated by the new development. *See* Julian C. Juergensmeyer & Robert M. Blake, *Impact Fees: An Answer to Local Governments' Capital Funding Dilemma*, 9 FLA. ST. U. L. REV. 415, 418-20 (1981). In theory, they represent the pro rata share of the cost of providing the capital improvements to each developmental unit. *Id.* "They are grounded upon the concept of economic impact management." 1 JULIAN C. JUERGENSMEYER & JAMES B. WADLEY, FLORIDA LAND USE AND GROWTH MANAGEMENT LAW § 9.01, at 9-3 (1975 & Supp. 1988).

4. ROBERT R. WRIGHT & SUSAN W. WRIGHT, LAND USE IN A NUTSHELL 126-27 (2d ed. 1985). The rationale is that the public should not have to subsidize developers in their entrepreneurial activities by "picking up the tab for the spillover costs created by [the developers'] activit[ies]." *Id.* at 127.

5. *See* Fred P. Bosselman & Nancy E. Stroud, *Pariah to Paragon: Developer Exactions in Florida 1975-85*, 14 STETSON L. REV. 527, 527-28 (1985).

6. Robert Collin & Michael Lytton, *Linkage: An Evaluation and Exploration*, 21 URB. LAW. 413, 428 (1989).

7. *See In re* Kimber Petroleum Corp., 539 A.2d 1181, 1188 (N.J. 1988) (finding that the Department of Environmental Protection's power to compel the polluter to initiate clean-up implies power alternatively to exact money from the polluter equal to the cost of clean-up).

its entirety, rather than reaping the short-term profit and passing the hidden costs on to society.

Physical infrastructure or service-based exactions allocate capital improvement costs to the developments which create a need for capital improvement expenditures.[8] For example, developers are often required to pay the proportional cost of the direct impacts their development places on public utilities, transportation, schools, parks and recreation, police and fire protection, storm water drainage, and solid waste disposal.[9] Local governments typically impose these fees as a precondition to development approval under authority of their broad police powers.[10]

The tremendous success of development exactions as a capital funding source has led local governments to search for new uses for this ingenious concept. Their search led to the extension of the development exaction model to various linkage fee programs.[11] While linkage fees have the same basic philosophy as exactions, they are linked to social infrastructure rather than physical infrastructure.[12] These fees are typically used to help finance services and facilities for classes of people impacted by the new development but not necessarily occupying the development.[13] For example, the new development may be linked to an increased need for affordable housing, child care facilities, public art, open spaces, and historical preservation.[14]

This note addresses the legal rationale for extending the concept of

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8. *See* Collin & Lytton, *supra* note 6, at 428.

9. *See, e.g.*, A Local & Regional Monitor v. City of Los Angeles, 16 Cal. Rptr. 2d 358, 363-64 (Ct. App. 1993); Contractors & Builders Ass'n v. City of Dunedin, 329 So. 2d 314, 317 n.1 (Fla. 1976), *cert. denied*, 444 U.S. 867 (1979); Town of Longboat Key v. Lands End, Ltd., 433 So. 2d 574, 575 (Fla. 5th DCA 1983); Wald Corp. v. Metropolitan Dade County, 338 So. 2d 863, 864 n.1 (Fla. 3d DCA 1976); Banberry Dev. Corp. v. South Jordan City, 631 P.2d 899, 900 (Utah 1981); Jordan v. Village of Menomonee Falls, 137 N.W.2d 442, 443-44 (Wis. 1965), *appeal dismissed*, 385 U.S. 4 (1966).

10. The conditions placed on the developer must be related to the health, safety, and general welfare of those who will occupy the development as well as the general public. *See, e.g.*, Nollan v. California Coastal Comm'n, 483 U.S. 825, 827-29 (1987); Commercial Builders v. City of Sacramento, 941 F.2d 872, 874 (9th Cir. 1991); *Wald*, 338 So. 2d at 869; *Jordan*, 137 N.W.2d at 445.

11. *See infra* text accompanying notes 32-42.

12. *See* Jane E. Schukoske, *Housing Linkage: Regulating Development Impact on Housing Costs*, 76 IOWA L. REV. 1011, 1013 (1991). "Social infrastructure" was coined in Jerold S. Kayden, *Planning Gain: Developer Provision of Public Benefits in Britain, in* PRIVATE SUPPLY OF PUBLIC SERVICES 163, 168 (Rachelle Alterman ed., 1988).

13. *See* Holmdel Builders Ass'n v. Township of Holmdel, 583 A.2d 277, 284 (N.J. 1990); Arthur C. Nelson et al., Environmental Linkage Fees Are Coming 12 (1993) (unpublished manuscript, on file with the Florida Law Review) (discussing linkage of development impact to persons living within historic ranges of wildlife displaced by the project).

14. *See Regional Monitor*, 16 Cal. Rptr. 2d at 365; *Holmdel*, 583 A.2d at 283-85; Emily G. Caplan, Comment, *Child Care Land Use Ordinances—Providing Working Parents with Needed Day Care Facilities*, 135 U. PA. L. REV. 1591, 1606-08 (1987).

development exactions beyond current uses to environmental mitigation fee programs. A local government environmental mitigation fee program would evaluate the adverse environmental impacts of development and exact a fee from the developer proportional to the impact. By collecting a fee as a precondition of development approval, local governments could create an environmental trust fund from which to mitigate the negative effects of development.[15] In the case of species' habitat destruction, for example, the mitigation might entail using the trust funds to purchase large off-site parcels of similar lands for perpetual preservation.[16] This would be similar to the use of mitigation banks which are gaining popularity in the context of wetlands mitigation.[17] The ultimate question is whether this next generation of exactions will pass constitutional muster under the traditional exactions analysis, or under some reasonable extension of that theory.

Part II of this note chronicles the historical evolution of development exactions from required dedications to linkage fees. Part III examines the common developer challenges to traditional service-based or physical infrastructure exaction programs and the legal analyses that courts apply in evaluating their validity. Part IV develops the theory behind environmental mitigation fees and questions whether courts should analyze them under the same legal framework applied to traditional exactions. The argument posed is that because environmental mitigation fees are resource-based rather than service-based, the analysis should focus solely on the burden placed on localities rather than on needs created by and benefits conferred upon the development.

Part V discusses the practical aspects of implementing environmental fee programs and the problems local governments are likely to confront. It also offers one solution to compensate for the potential limitations of fee

15. An example of such a trust fund is the use of wetland mitigation banks now approved by the EPA, Army Corps of Engineers, and some state environmental agencies. *See* DAVID SALVESEN, WETLANDS—MITIGATING AND REGULATING DEVELOPMENT IMPACTS 4-6 (1990). A mitigation bank is created when one party purchases, creates, or restores a large wetland site. *Id.* at 4. The values of the restored wetland are quantified and used as credits. *Id.* at 4-5. Developers needing to mitigate may purchase these credits up to the amount of their required mitigation. *Id.* at 5. In essence, this is a fee in lieu of in-kind mitigation. *See id.* at 3-5. Wetland mitigation banking is especially useful for mitigating small wetland impacts and for large projects, such as marinas, where on-site mitigation is not possible. *Id.* at 3-4.

16. *See* Nelson et al., *supra* note 13, at 4-5. Under current federal and state mitigation programs, developers are required, as a precondition to development approval, to mitigate the adverse effects of their developments on wetlands. *See* SALVESEN, *supra* note 15, at 2-3. Wetlands mitigation is a catch-all term for any activity taken to avoid or minimize damage to wetlands, or to preserve, create, or restore wetlands when avoidance is not possible. *Id.* at 3. The environmental mitigation fee would serve as a fee in lieu of mitigation and would be collected for local environmental mitigation efforts rather than federal or state programs.

17. SALVESEN, *supra* note 15, at 3.

programs. This note concludes that environmental mitigation fee programs should pass judicial scrutiny under a modification of the current exactions analysis. However, local governments may have practical and economic difficulty in establishing environmental impact standards and implementing mitigation fee programs.

II. HISTORICAL EVOLUTION OF EXACTIONS

The earliest land use regulations were required dedications.[18] These laws were designed to exact a portion of the capital costs associated with new development from developers.[19] Local governments conditioned their approval of subdivision plats upon the developer's agreement to dedicate improvements such as streets and utility right of ways.[20]

As the concept of developer dedications became widely accepted, local governments expanded it to encompass additional facilities.[21] In lieu of actual dedication, local governments required developers to pay money for public facilities such as schools, parks, and open spaces.[22] In this way several developments could share the cost of common facilities to lessen the overall burden.[23] However, these fees, known as in lieu fees, were really just a refinement of required dedications and as such, were limited to situations where required dedications could be used appropriately.[24] In their quest to overcome this limitation and find more flexible funding mechanisms, local governments turned to impact fees.[25]

Impact fees evolved from in lieu fees and are conceptually and functionally similar in that both require a payment of money for capital im-

18. *See* Fred P. Bosselman & Nancy Stroud, *Legal Aspects of Development Exactions, in* DEVELOPMENT EXACTIONS, *supra* note 3, at 70, 71; Juergensmeyer & Blake, *supra* note 3, at 418.

19. *See* Juergensmeyer & Blake, *supra* note 3, at 418.

20. *Id.* These early mandatory dedications survived takings challenges on the privilege theory. Bosselman & Stroud, *supra* note 18, at 72. Under this theory, government could not force a dedication but could attach the requirement of dedication to the privilege of subdividing the land. *Id.* In return for dedicating the land necessary for streets and right of way easements, the developer would be granted the privilege of having his plat recorded. *Id.* Mandatory dedications were also supported on the theory that because local government could impose a special assessment to cover the cost of improvements, it was just as easy for developers to construct and finance the improvements and then dedicate them to the government. *Id.* In either case, the cost would be passed on to the ultimate user. *Id.*

21. *See* Bosselman & Stroud, *supra* note 5, at 527-28.

22. Frona M. Powell, *Challenging Authority for Municipal Subdivision Exactions: The* Ultra Vires *Attack*, 39 DEPAUL L. REV. 635, 641 (1990).

23. *See* Juergensmeyer & Blake, *supra* note 3, at 418-20.

24. *Id.* at 419.

25. *Id.* at 418-19. Some commentators have suggested that the notion of impact fees evolved from the National Environmental Policy Act which required that environmental impact be evaluated and considered prior to issuance of permits involving federal lands and navigable water ways. *See, e.g.*, Nelson et al., *supra* note 13, at 1.

provements as a condition of development approval.[26] However, because impact fees are not predicated on dedication requirements, they have greater flexibility and three basic advantages over in lieu fees.[27] The first advantage is that local governments may use impact fees to finance off-site capital improvements that are impacted by the development.[28] The second advantage is that impact fees are imposed at the permit stage of development allowing local governments to collect the fees from developments which were platted and recorded before the use of required dedications.[29] The third and perhaps most significant advantage is that impact fees can be applied to developments other than traditional housing subdivisions.[30] These developments include apartments and condominiums that generally avoided dedication or in lieu fees because of the small amount of land involved, or the inapplicability of subdivision regulations.[31]

Linkage programs are the latest in this line of developer exactions. Local governments used the impact fee rationale to extend the exaction concept to development impacts on social infrastructure.[32] The linkage programs evolved from local governments' efforts to overcome problems of exclusionary zoning.[33] Localities concluded that they could resolve the problem by requiring that a given number of housing units in each new development be set aside for affordable housing.[34] Realizing that the residential development community could not fulfill the entire need, local governments turned to nonresidential development for primary funding.[35]

One rationale for linking nonresidential development to the need for affordable housing was that those developments attracted employees who, in many cases, needed low-cost housing that was previously unavail-

26. Juergensmeyer & Blake, *supra* note 3, at 418.

27. *Id.* at 420.

28. *Id.*; *see also* Powell, *supra* note 22, at 641 (stating that typically impacted areas are parks, schools, and water and sewer facilities).

29. Juergensmeyer & Blake, *supra* note 3, at 420. If impact fees were not imposed upon these developments, residents could avoid contributing their proportional share of the actual impact on the local facilities affected by the development. *See id.*

30. *See* DAVID L. CALLIES & ROBERT H. FREILICH, CASES AND MATERIALS ON LAND USE 385 (1986); Juergensmeyer & Blake, *supra* note 3, at 420.

31. Juergensmeyer & Blake, *supra* note 3, at 420.

32. *See* Fred P. Bosselman & Nancy E. Stroud, *Mandatory Tithes: The Legality of Land Development Linkage*, 9 NOVA L.J. 381, 390 (1985).

33. *Holmdel*, 583 A.2d at 283-85; Bosselman & Stroud, *supra* note 18, at 88. *Holmdel* arose out of attempts by several municipalities to comply with their obligation to provide a realistic opportunity for the construction of affordable housing under Southern Burlington County NAACP v. Mount Laurel Township, 456 A.2d 390 (N.J. 1983), and the New Jersey Fair Housing Act which codified *Mt. Laurel*. *Holmdel*, 583 A.2d at 279-80.

34. *See* Bosselman & Stroud, *supra* note 18, at 89.

35. *Id.* at 90.

able.[36] Another rationale was that land consumed in the development process reduced the supply of land available for affordable housing.[37] Under either of these rationales, it was deemed fair to assess the development for its proportional impact upon the availability of affordable housing.[38]

Once local governments realized that linkage fees were an effective means to subsidize affordable housing, they enacted fee programs to fund other social concerns. Local governments adopted linkage programs to fund "employment opportunities, child care facilities, transit systems and the like."[39] The basic premise behind these linkage fee programs was that development created a burden on local facilities; therefore, developers should provide financial assistance to local governments which were obligated to meet the increased burden.[40]

Prior to adopting linkage programs, localities often negotiated with developers on an ad hoc basis during the zoning approval process. The result would often be that developers, as a condition of development approval, would contribute to one or more of the social causes now funded by linkage programs.[41] Linkage programs offer more certainty for governments and developers, avoid unnecessary time delays of ad hoc negotiations, and provide greater mitigation flexibility.[42]

Environmental mitigation programs on the federal, state, and local levels generally require the same ad hoc, case by case negotiation that linkage programs once required.[43] If the development exaction rationale can be extended to local government social linkage programs, the same reasoning should apply to local environmental mitigation programs. The question is whether this evolutionary step can be justified under the legal analysis applied to traditional development exactions.

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36. *See Holmdel*, 583 A.2d at 284-85.

37. *Id.* at 285.

38. *See* Schukoske, *supra* note 12, at 1018-19.

39. Anne E. Mudge, *Impact Fees for Conversion of Agricultural Land: A Resource-Based Development Policy for California's Cities and Counties*, 19 ECOLOGY L.Q. 63, 71 (1992).

40. *See* Russ Bldg. Partnership v. City & County of San Francisco, 246 Cal. Rptr. 21, 24 (Ct. App. 1987); *infra* notes 192-230 and accompanying text.

41. *See, e.g.*, Dupont Circle Citizens Ass'n v. District of Columbia Zoning Comm'n, 431 A.2d 560, 562 (D.C. 1981) (upholding the zoning commission's approval of an increase in height and density for a planned unit development in exchange for an arcade containing retail shops and a mini-park where regulations allowed for flexibility and the commission's findings of fact were supported by substantial evidence).

42. *See* Schukoske, *supra* note 12, at 1023-24. Developers benefit because time is not wasted in negotiating the permit conditions and the exaction amount is not dependent upon relative bargaining power. *See id.* at 1024. Local governments prefer linkage fee programs over ad hoc decisions because linkage fee programs consume less time and resources per project. *See id.* Once the initial economic analyses are completed and the fee amounts are determined, the government can focus its efforts on fulfilling the social need. *Id.* at 1023-24.

43. *See infra* notes 155-95 and accompanying text.

III. LEGAL ANALYSIS OF DEVELOPMENT EXACTIONS

The legal challenges to local government exactions programs generally fall into two categories: whether the program is a proper exercise of the local government police powers; and whether the program can survive challenges arising under the Due Process,[44] Equal Protection,[45] and Takings Clauses of the federal[46] and state constitutions.[47] The two considerations may be intertwined because if a court determines that imposition of the fee was not a valid exercise of the local government's police powers, the exaction can be deemed a taking without just compensation.[48]

A. *Justification Under Police Powers*

Local governments must possess legal authority to exercise their police powers. While police power authority is inherent in state governments, local governments must derive their authority directly from specific enabling legislation,[49] other general land use enabling legislation,[50] state taxing power,[51] home rule powers,[52] or the broad police powers.[53] Alternatively, police power authority may be found in a local government's

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44. U.S. CONST. amend. XIV, § 1.

45. *Id.* The amendment states, "No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." *Id.*

46. U.S. CONST. amend. V (applying to the states through the Fourteenth Amendment). The Fifth Amendment provides "nor shall private property be taken for public use, without just compensation," *id.*, and "applies to the States through the Fourteenth Amendment." First English Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 311 n.4 (1987).

47. *See* Juergensmeyer & Blake, *supra* note 3, at 421.

48. *See* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) (stating the general rule that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking").

49. *See, e.g.*, VT. STAT. ANN. tit. 24, §§ 5200-5203 (1992).

50. *See, e.g.*, CAL. GOV'T CODE § 66477 (West Supp. 1994); FLA. STAT. §§ 163.3174, .3177 (1993). Part II of chapter 163 also requires each local government to include a conservation element in its comprehensive plan for the conservation and protection of natural resources including wetlands, beaches, wildlife, and other natural and environmental resources. FLA. STAT. § 163.3177(6)(d) (1993).

51. *See* Schukoske, *supra* note 12, at 1039 n.200. State governments possess the inherent power to tax. *Id.* However, local governments do not have the same inherent taxing power. *Id.* The state must authorize any tax imposed by local governments. *Id.*

52. *See, e.g.*, William W. Merrill, III & Robert K. Lincoln, *The Missing Link: Legal Issues and Implementation Strategies for Affordable Housing Linkage Fees and Fair Share Regulations*, 22 STETSON L. REV. 469, 476 (1993). Municipal home rule powers derive either from provisions in state constitutions, from legislative delegation of power, or from implied power recognized by state courts as inherent in the corporate status of municipalities. *See id.* at 476 n.23. Modern constitutional provisions authorize local governments to exercise all powers of local self government, including land use control, which are not in conflict with statutory law. *See id.*

53. *See id.* Police power is generally defined as the inherent power of the state to provide for the health, safety, morals, and welfare of the people. Local governments do not share this power, however, unless it is vested in them through state constitutional provisions, statutes, or charters. *Id.*

comprehensive planning act, if applicable.[54] Local government exaction ordinances passed without authority are void as ultra vires.[55]

Assuming authority is found, the exaction ordinance may alternatively be challenged as an unauthorized tax.[56] While there is no bright line distinction between a tax and a fee,[57] each has distinctive characteristics.[58] A tax is a compulsory charge which provides revenue for the general support of the government.[59] With a tax, there is no correlation of charges to benefits.[60] "The only benefit to which a taxpayer is constitutionally entitled is that derived from his enjoyment of the privileges of living in an organized society. . . ."[61]

A fee is also a charge which provides revenue for the government,[62] but it is not a compulsory charge.[63] It is imposed only on those who elect to engage in the activity subject to the fee.[64] A fee is a specific charge for the use of publicly owned or publicly provided facilities or services, the amount of which is based on the cost of the benefit provided.[65]

A fee collected in the exercise of police power generally may not exceed the reasonable cost of providing the service or regulatory activity for which the fee is charged.[66] A key for local governments to prevail

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54. *E.g.*, FLA. STAT. § 163.3177 (1993); *see also supra* note 50 (discussing Florida's requirements for a local government's comprehensive plan).

55. *See* Juergensmeyer & Blake, *supra* note 3, at 421.

56. *See, e.g.*, Home Builders & Contractors Ass'n v. Board of County Comm'rs, 446 So. 2d 140, 144 (Fla. 4th DCA 1983), *appeal dismissed*, 469 U.S. 976 (1984). A municipality's power to tax is subject to the restrictions enumerated in the state constitution. *See* FLA. CONST. art. VII, §§ 1, 9. In Florida, for example, local governments may not impose any tax other than an ad valorem tax without authority from general law. *Id.*

57. *See Russ*, 246 Cal. Rptr. at 24; Coy v. Birth-Related Neurological Injury Compensation Plan, 595 So. 2d 943, 945 (Fla.), *cert. denied*, 113 S. Ct. 194 (1992); *Home Builders*, 446 So. 2d at 144 ("As 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."); Jordan v. Village of Menomonee Falls, 137 N.W.2d 442, 449 (Wis. 1965), *appeal dismissed*, 385 U.S. 4 (1966); Sharon Liebman, Case Comment, *State-Enforced Fees for Special Benefits Conferred: Taxes or User Fees?*, 45 FLA. L. REV. 325, 334-35 (1993).

58. *See* Jacksonville Port Auth. v. Alamo Rent-A-Car, 600 So. 2d 1159, 1163 (Fla. 1st DCA 1992).

59. *See* Commonwealth Edison Co. v. Montana, 453 U.S. 609, 621-22 (1981).

60. *See id.* In fact, there is often an inverse relationship between the amount of tax paid and the benefits received from government. *See id.* at 623.

61. Carmichael v. Southern Coal & Coke Co., 301 U.S. 495, 522 (1937).

62. A fee is also distinguishable from a special assessment. *See* City of Boca Raton v. State, 595 So. 2d 25, 29 (Fla. 1992). The land burdened by a special assessment must receive a specific benefit. *Id.* Also, each benefitted property must share a fair and reasonable portion of the special assessment. *Id.*

63. *See Alamo*, 600 So. 2d at 1163.

64. *See id.* at 1162.

65. *See id.*

66. *See* Bixel Assocs. v. City of Los Angeles, 265 Cal. Rptr. 347, 349 (Ct. App. 1989); *Russ*, 246 Cal. Rptr. at 25 (citing Terminal Plaza Corp. v. City & County of San Francisco, 223 Cal. Rptr.

when a fee is challenged is to provide factual data sufficient to prove a nexus between the amount of the fee and the actual benefit provided to the fee payer.[67] If the program is deemed a tax, the exaction ordinance will generally be held unconstitutional.[68]

Assuming that legal authority is found and the fee is deemed a land use regulation fee under the police powers and not a tax, the local fee ordinance must still be necessary to promote a legitimate health, safety, or welfare purpose of the community.[69] Whether courts find an appropriate means-end nexus ultimately depends on the standard of review applied. Courts have used three different standards: the "reasonable relation" test,[70] a highly deferential standard; the "specifically and uniquely attributable" test,[71] a very strict judicial standard; and the most commonly applied "dual rational nexus"[72] (rational nexus) test, which finds a middle ground between the other two.

The rational nexus test evaluates both the needs placed on local government by the development and the benefits received by the development from the land use regulation fee collected.[73] The rational nexus test was derived from the standard applied by the Wisconsin Supreme Court in *Jordan v. Village of Menomonee Falls*.[74] In *Jordan*, the developer challenged a local ordinance requiring the payment of $200 per residential building lot for future educational and recreational capital improvements.[75] The developer alleged that the fee was an unconstitutional taking of private property without just compensation and was unauthorized by statute.[76] After deciding that the required fee payment was statutorily authorized,[77] the court focused on the appropriate judicial standard to test the reasonableness of regulations under the police power.[78]

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379 (Ct. App. 1986)). *But see* Holmdel Builders Ass'n v. Township of Holmdel, 583 A.2d 277, 293 (N.J. 1990) (finding that "where primary purpose is regulatory, 'it does not necessarily matter that the incidental result is revenue above the actual cost' ") (quoting Bellington v. Township of E. Windsor, 112 A.2d 268 (N.J. 1955)).

67. *See* Contractors & Builders Ass'n v. City of Dunedin, 329 So. 2d 314, 321 (Fla. 1976), *cert. denied*, 444 U.S. 867 (1979).

68. *See id.*; *Holmdel*, 583 A.2d at 293 (arguing that even if authorized as a tax, the fee may be struck down under the state uniformity of taxation requirement).

69. *See* Ayres v. City Council of Los Angeles, 207 P.2d 1, 5-6 (Cal. 1949).

70. *Id.* at 8.

71. Pioneer Trust & Sav. Bank v. Village of Mount Prospect, 176 N.E.2d 799, 802 (Ill. 1961).

72. The term "dual 'rational nexus' " test, coined by Professor Juergensmeyer, is more descriptive of the two-prong rational nexus test. Juergensmeyer & Blake, *supra* note 3, at 433. This note uses the shorter description consistent with a majority of the case law.

73. *Id.*

74. 137 N.W.2d 442 (Wis. 1965), *appeal dismissed*, 385 U.S. 4 (1966).

75. *Id.* at 444.

76. *Id.* at 446.

77. *Id.* at 447.

78. *Id.* The court actually framed its discussion in terms of an unconstitutional taking of private

The *Jordan* court rejected the test applied by the Illinois Supreme Court[79] which required that the burden cast upon the subdivider be "specifically and uniquely attributable to his activity."[80] The *Jordan* court found that in most cases a municipality could not possibly prove that an exaction was required to fill a need solely attributable to the impacts of a given development.[81] Rather, the court found that if the municipality could prove[82] the development contributed to the need for capital improvements there would be a sufficient nexus to support the exaction.[83]

Additionally, the Wisconsin Supreme Court rejected the direct benefit requirement that had been advocated by other courts.[84] The fact that residents outside the assessed subdivision would also enjoy the educational and recreational facilities was not detrimental.[85] The court implied that if the assessed subdivision enjoyed a reasonable benefit, then the benefit did not have to be exclusive.[86]

Although the *Jordan* court did not use explicitly the term rational nexus, other courts inferred a rational nexus requirement from the language of the decision.[87] In *Wald Corp. v. Metropolitan Dade County*,[88] for example, a developer challenged a required dedication of canal right of ways and maintenance easements imposed as a condition of plat approv-

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property for public purpose. *Id.* at 446. It found that a reasonable regulation under the police power would not be an unconstitutional taking. *Id.* at 447-48.

79. *Id.* at 447.

80. *Pioneer Trust*, 176 N.E.2d at 802.

81. *Jordan*, 137 N.W.2d at 447.

82. The court considered factual evidence offered to support the need created by additional subdivisions such as the required area of parks necessary to meet the need of each family, and the actual and projected growth in school population. *Id.* at 448. The court essentially applied a cost accounting approach which considers the existing facilities or existing levels of service and the anticipated levels of service necessitated by anticipated growth. *See id.*; Ira M. Heyman & Thomas K. Gilhool, *The Constitutionality of Imposing Increased Community Costs on New Suburban Residents Through Subdivision Exactions*, 73 YALE L.J. 1119, 1121 (1964).

83. *Jordan*, 137 N.W.2d at 447.

84. *Id.* at 448; *see* Gulest Assocs. v. Town of Newburgh, 209 N.Y.S.2d 729 (Sup. Ct. 1960), *aff'd*, 225 N.Y.S.2d 538 (App. Div. 1962), *overruled by* Jenad, Inc. v. Village of Scarsdale, 218 N.E.2d 673 (N.Y. 1966). The *Gulest* decision imposed a requirement that the funds collected directly benefit the assessed subdivision. Overruled by the *Jenad* decision, the direct benefit-type test used by the *Gulest* court is substantively the same as the specifically and uniquely attributable test, *see Jenad*, 218 N.E.2d at 676-77, and is not considered as a separate test hereafter.

85. *Jordan*, 137 N.W.2d at 448.

86. *Id.*

87. *See, e.g.*, Commercial Builders v. City of Sacramento, 941 F.2d 872, 874 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1997 (1992); Leroy Land Dev. Corp. v. Tahoe Regional Planning Agency, 939 F.2d 696, 698 (9th Cir. 1991); *Contractors & Builders Ass'n*, 329 So. 2d at 318; Home Builders & Contractors Ass'n v. Board of County Comm'rs, 446 So. 2d 140, 144 (Fla. 4th DCA 1983), *appeal dismissed*, 469 U.S. 976 (1984); Wald Corp. v. Metropolitan Dade County, 338 So. 2d 863, 868 (Fla. 3d DCA 1976); Banberry Dev. Corp. v. South Jordan City, 631 P.2d 899, 904-05 (Utah 1981).

88. 338 So. 2d 863 (Fla. 3d DCA 1976).

al.[89] Citing *Jordan*, the Florida Third District Court of Appeal upheld the exaction as a reasonable exercise of the police power.[90] The court found that the development created a need that would not otherwise have been a local concern and that the residents would benefit from the imposed condition.[91] The *Wald* court concluded that the rational nexus test provides a more feasible basis for testing development exactions than either the specifically and uniquely attributable test or the direct benefit test.[92] It noted that the rational nexus approach allows local governments to implement comprehensive planning oriented toward the future.[93] Also, the rational nexus approach requires a balancing of the prospective needs of the community against those of the private property developer.[94]

The Florida Supreme Court first adopted the rational nexus test in *Contractors & Builders Ass'n v. City of Dunedin*.[95] In *Dunedin*, the plaintiffs challenged the city's imposition of an exaction for capital improvements to the city's water and sewerage systems on the ground that it was a forbidden tax.[96] The court accepted the principle that a municipality could transfer the costs of capital improvements to a new user in the form of impact fees or exactions without running afoul of state constitutional restrictions on taxation.[97] However, the court struck down the city's fee under what was essentially a rational nexus analysis.[98]

The court found that the fees assessed could not exceed a development's pro rata share of reasonably anticipated costs of expansion.[99] By charging a new development more than its proportional share of the costs, local government would give old users a windfall at the expense of new users.[100] The court also required that the money collected be restricted to the use of which it was collected.[101] This earmarking requirement provided substantive assurance that whose who paid the fee would benefit from its use.[102]

Although the City of Dunedin lost the case, the Florida Supreme Court opened the door for future local government exactions programs.

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89. *Id.* at 864.
90. *Id.* at 867-68.
91. *Id.* at 867.
92. *See id.* at 868.
93. *Id.*
94. *Id.*
95. 329 So. 2d 314 (Fla. 1976).
96. *Id.* at 317.
97. *Id.* at 317-18.
98. *Id.* at 321.
99. *Id.* at 320.
100. *Id.* at 321.
101. *Id.*
102. *Id.*

The rational nexus theory provided local governments with a flexible theory that could justify demands for fees to fund any number of capital improvements.[103] Using a cost accounting approach, local governments could estimate future capital outlay expenditures with reasonable accuracy and assess each developmental unit with its proportional share of the impact.[104]

As the rational nexus test gained universal acceptance, it evolved into a definitive two-prong analysis.[105] The first prong requires that the development create a need for the additional facilities the local government wishes to expand.[106] Most courts require that the exaction bear some reasonable relationship to the proportion of the need attributable to the development.[107] The second prong requires that a reasonable benefit be conferred upon the development, although it need not be direct.[108] Under the second prong, some courts require that the exacted funds be earmarked for the specific purpose for which they were collected.[109]

The rational nexus test is beneficial to both developers and local governments. Developers are protected from paying a disproportionate share of the cost of capital improvements. Local governments benefit by ensuring that the developer pays for capital improvements necessitated by the development, even if the developer is not the sole contributor to the need.

B. *Constitutional Challenges*

1. Equal Protection

The requirement of equal protection in the land use context means that "similarly situated landowners may not be treated dissimilarly."[110] However, constitutional challenges to development exactions brought under the Equal Protection Clause are rarely successful.[111] This is due

103. Bosselman & Stroud, *supra* note 18, at 75.

104. Heyman & Gilhool, *supra* note 82, at 1141-46. The five requirements for an impact fee ordinance in a locality in which the rational nexus test applies are: (1) the cost or impact must be carefully documented; (2) a formula must be used for apportioning costs among multiple development projects; (3) the funds must be segregated from the general fund and earmarked for the purpose for which they were collected; (4) funds must be spent in the localized area where the impact occurs; and (5) the funds must be spent within a reasonable time period or refunded to the developer. R. Marlin Smith, *From Subdivision Improvement Requirements to Community Benefit Assessments and Linkage Payments: A Brief History of Land Development Exactions*, 50 LAW & CONTEMP. PROBS. 5, 19 (1987).

105. Juergensmeyer & Blake, *supra* note 3, at 430-31.

106. *Id.* at 431.

107. *Id.*

108. *Id.* at 432-33.

109. *See, e.g., Contractors & Builders Ass'n*, 329 So. 2d at 321; Amherst Builders Ass'n v. City of Amherst, 402 N.E.2d 1181, 1183 (Ohio 1980).

110. Heyman & Gilhool, *supra* note 82, at 1125.

111. *See, e.g.*, Pengilly v. Multnomah County, 810 F. Supp. 1111, 1114 (D. Or. 1992). *Contra*

largely to the deferential rational-relation standard of review that courts apply to legislative enactments that do not affect a suspect class or a fundamental right.[112] If the ordinance bears a reasonable relationship to a legitimate governmental purpose it passes constitutional muster.[113] Today, rational-relation review almost assures that an exaction ordinance will withstand an equal protection challenge.[114]

2. Due Process

Landowners may challenge a land use ordinance under the Due Process Clause of the Fourteenth Amendment on the ground that it deprives the owner of the most beneficial or profitable use of the owner's land.[115] Substantive due process essentially requires that a municipal body act in a manner that is not arbitrary and capricious when it enact laws and regulations and renders decisions.[116] If an exaction ordinance is rationally related to the promotion of health, safety, or general welfare, the substantive due process requirement is generally met.[117]

3. Takings

The line between a land use regulation which is a valid exercise of the police power and one which runs afoul of the Takings Clause[118] is not always clear.[119] The United States Supreme Court in *Agins v. Tiburon*[120] held that a land use regulation may constitute a taking of private property without just compensation if it meets two conditions: first, if it "does not substantially advance legitimate state interests,"[121] and sec-

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Parks v. Watson, 716 F.2d 646, 654-55 (9th Cir. 1983) (holding a municipal well dedication requirement violated developer's equal protection rights because it had no rational relationship to any legitimate government purpose).

112. *See* DeSisto College, Inc. v. Town of Howey-in-the-Hills, 706 F. Supp. 1479, 1498 (M.D. Fla. 1989); Russ Bldg. Partnership v. City & County of San Francisco, 246 Cal. Rptr. 21, 26 (Ct. app. 1987).

113. *See, e.g.*, Home Builders & Contractors Ass'n v. Board of County Comm'rs, 446 So. 2d 140, 144 (Fla. 4th DCA 1983), *appeal dismissed*, 469 U.S. 976 (1984).

114. *See, e.g.*, Lyng v. UAW, 485 U.S. 360, 370 (1988); Metropolitan Life Ins. v. Ward, 470 U.S. 869, 881 (1985) (arguing that an equal protection challenge cannot prevail where it is debatable that there is a rational relationship between the challenged statute and a legitimate state purpose).

115. *See* Merrill & Lincoln, *supra* note 52, at 493.

116. *See* Duke Power Co. v. Carolina Envtl. Study Group, Inc., 438 U.S. 59, 83 (1978).

117. *See* Merrill & Lincoln, *supra* note 52, at 491-92.

118. U.S. CONST. amend. V, § 1 (applying to the states through the Fourteenth Amendment).

119. *See* Jordan v. Village of Menomonee Falls, 137 N.W.2d 442, 447-48 (Wis. 1965), *appeal dismissed*, 385 U.S. 4 (1966).

120. 447 U.S. 255 (1980).

121. *Id.* at 260.

ond, if it "denies an owner economically viable use of his land."[122] Although the Court has not articulated a definitive test for either prong, its decision in *Nollan v. California Coastal Commission*[123] may have given teeth to the first by requiring an "essential nexus" between the regulation and the governmental purpose.[124]

In *Nollan*, property owners[125] sought a building permit from the California Coastal Commission to demolish and replace their beach-front bungalow with a larger three-bedroom house.[126] The Commission granted the permit subject to the condition that the Nollans grant a public lateral access easement across their property between their seawall and the mean high tide line.[127] The Nollans objected to the condition on the ground that it was an unconstitutional taking of private property without just compensation.[128]

The California Court of Appeal held there was no taking.[129] It found that so long as a project contributed to the need for public access, imposing an access condition on the development permit was sufficiently related to burdens created by the project to be constitutional.[130] It reasoned that "an indirect relationship between the access exacted and the need to which the project contributed" was a sufficient nexus.[131] The court also found that there was no taking because the easement did not deprive the Nollans of all reasonable economic use of their land even though it did diminish the land's value.[132]

The United States Supreme Court reversed the California appellate court finding that there was an unconstitutional taking without just compensation.[133] The Court reasoned that there was a lack of an essential nexus between the original purpose of the Commission's condition and the exaction imposed upon the Nollans.[134] The permit condition, even if accepted, would not have furthered the governmental purposes of providing beach access from the road and lowering any psychological barrier citizens

122. *Id.*
123. 483 U.S. 825 (1987).
124. *Id.* at 837.
125. At the time the permit condition was imposed, the Nollans were actually lessees whose option to purchase was conditioned on their receipt of a building permit to demolish and replace the bungalow. *Id.* at 827.
126. *Id.* at 828.
127. *Id.*
128. *Id.* at 829.
129. *Id.* at 830.
130. *Id.*
131. *Id.*
132. *Id.*
133. *See id.* at 841-42.
134. *Id.* at 837.

might have had to using the public beaches.[135]

The Court reasoned that if a prohibition designed to accomplish a legitimate purpose was a legitimate exercise of the police power, an alternative condition which accomplished the same purpose would also be valid.[136] The Court reasoned:

> The evident constitutional propriety disappears, however, if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition. . . . [T]he lack of nexus between the condition and the original purpose of the building restriction converts that purpose to something other than what it was. . . . [U]nless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but "an out-and-out plan of extortion."[137]

Lower federal courts and state courts are split as to the scope of *Nollan*'s essential nexus requirement.[138] Legal commentators have also debated its meaning and effect, positing three primary interpretations.[139] The first is that the test could be a move toward applying heightened scrutiny to all land use regulations.[140] This could result in subjecting the government objectives and means to a higher level of scrutiny.[141] The second, an extremely narrow interpretation, is that the heightened scrutiny should only be applied when the regulation requires a physical invasion of property as a permit condition.[142] The third is that the nexus test is nothing more than a balancing test which weighs the property owner's interests against the government's interests. Under this interpretation, the level of scrutiny should vary depending on the degree of infringement on the owner's rights.[143]

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135. *Id.* at 838.

136. *Id.* at 836-37.

137. *Id.* at 837 (quoting J.E.D. Assocs. v. Town of Atkinson, 432 A.2d 12, 14-15 (N.H. 1981)).

138. *Compare, e.g.*, Dolan v. City of Tigard, 854 P.2d 437, 443 (Or.) (holding that it is essential to show a nexus between the exaction and the impact of the development to pass the "reasonably related" test), *cert. granted*, 114 S. Ct. 544 (1993) *with* Leroy Land Dev. Corp. v. Tahoe Regional Planning Agency, 733 F. Supp. 1399, 1401 (D. Nev. 1990) (holding that an exaction ordinance will be upheld only where it can be shown that the development is directly responsible for the social ill that the exaction is designed to alleviate), *rev'd*, 939 F.2d 696 (9th Cir. 1991).

139. *See* Steven J. Lemon et al., Note, *The First Application of the* Nollan *Nexus Test: Observations and Comments*, 13 HARV. ENVTL. L. REV. 585, 590 (1989).

140. *See* Nathaniel S. Lawrence, *Means, Motives, and Takings: The Nexus Test of* Nollan v. California Coastal Commission, 12 HARV. ENVTL. L. REV. 231, 231-32 (1988).

141. *See, e.g., Leroy Land*, 733 F. Supp. at 1401; Lawrence, *supra* note 140, at 231-32.

142. *See* Frank Michelman, *Takings, 1987*, 88 COLUM. L. REV. 1600, 1601 (1988).

143. Susan Rose-Ackerman, *Against Ad Hocery: A Comment on Michelman*, 88 COLUM. L. REV.

The first interpretation could be seen as a shift in focus from the economic interest of the property owner to the efficacy of the zoning regulation.[144] This new focus would require a closer look at the means-end relationship and would shift the burden to the government to demonstrate the reasonableness of its objective or purpose and the substantial nexus between the regulation and the purpose.[145] For example, in *Seawall Associates v. City of New York*,[146] the Supreme Court of New York County struck down a New York City housing shortage ordinance under *Nollan* because the city had less drastic means available to achieve its goal of preserving single-room occupancy buildings.[147] Courts applying this heightened scrutiny see *Nollan* as "a move . . . toward a non-deferential, substantive due process analysis of takings claims."[148]

In practical terms, courts accepting the heightened scrutiny interpretation of *Nollan* may require, at a minimum, the application of the rational nexus test to all local government regulations imposed as a condition to issuing a development permit.[149] This more careful, particularized review proposed by this interpretation of *Nollan*[150] is consistent with the rational nexus test which requires a court to closely examine local governments' factual support for the need created by and the benefit conferred upon the new development.[151] Should this interpretation ultimately prevail, the long-term effect on local government land use decisionmaking could be profound.

1697, 1700 (1988).

144. Cottonwood Farms v. Board of County Comm'rs, 763 P.2d 551, 556 (Colo. 1988).

145. *See, e.g.*, McNulty v. Town of Indialantic, 727 F. Supp. 604 (M.D. Fla. 1989); Department of Transp. v. Amoco Oil Co., 528 N.E.2d 1018 (Ill. 1988). Some states have adopted a similar shift of burden in the context of a rezoning action which entails the application of a general rule or policy to specific individuals, interests, or activities. *See, e.g.*, Board of County Comm'rs v. Snyder, 627 So. 2d 469, 475-76 (Fla. 1993); Fasano v. Board of County Comm'rs, 507 P.2d 23 (Or. 1973). These courts have held that because a property owner's right to own and use his property is constitutionally protected, review of any governmental action denying or abridging that right is subject to closer judicial scrutiny. *Snyder*, 627 So. 2d at 475-76; *Fasano*, 507 P.2d at 27.

146. 523 N.Y.S.2d 353 (Sup. Ct. 1987).

147. *Id.* at 366.

148. *See* Lemon et al., *supra* note 139, at 591.

149. *See* Peter F. Neronha, Casenote, *A Constitutional Standard of Review for Permit Conditions, Exactions, and Linkage Programs:* Nollan v. California Coastal Commission, 30 B.C. L. REV. 903, 931 (1989).

150. *Nollan*, 483 U.S. at 841.

151. The *Nollan* majority stated that its decision was consistent with decisions of other courts that had considered this question. *Id.* at 839. The court relied on Parks v. Watson, 716 F.2d 646 (9th Cir. 1983). In *Parks*, the court used language consistent with the rational nexus test and found a violation of the Fifth Amendment because the required dedication had no reasonable relationship to the needs created by the subdivision. *Id.* at 653. In *Dolan*, the dissent argues that the critical question is whether the proposed development "shows an increased intensity of such magnitude that it creates the *need* for the exaction." *Dolan*, 854 P.2d at 446 (Peterson, J., dissenting).

Most courts, however, have not interpreted *Nollan* as requiring a heightened level of scrutiny unless the regulation authorizes a permanent physical occupation of the property.[152] They have instead adopted the second interpretation of *Nollan* and have continued to treat governmental land use regulations deferentially.[153] One rationale for this interpretation is that the *Nollan* court did not specify "how close a 'fit' between the condition and the burden is required" because it found that the regulation in question did not meet even the most "untailored standards."[154]

The third interpretation of *Nollan* is that the essential nexus requirement is nothing more than an ad hoc balancing test.[155] Courts accepting this interpretation are unwilling to impose a substantial nexus requirement unless regulations significantly burden property interests.[156] In *Cottonwood Farms v. Board of County Commissioners*,[157] for example, the Supreme Court of Colorado ruled that there was no taking because the owner was not denied all reasonable economic use of his property.[158] Mixing the two prongs of the *Agins*[159] takings analysis, the Colorado Supreme Court ruled that because viable use was not denied, the property interest affected did not outweigh the government's regulatory interest.[160] Under this interpretation, a substantial nexus or compelling governmental purpose will be required only when a property interest is significantly burdened by a governmental action.[161]

The United States Supreme Court will have another opportunity to consider the essential nexus issue when it decides *Dolan v. City of*

152. *See, e.g.*, Commercial Builders v. City of Sacramento, 941 F.2d 872, 874 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1997 (1992); St. Bartholomew's Church v. City of New York, 914 F.2d 348, 357 n.6 (2d Cir. 1990), *cert. denied*, 499 U.S. 905 (1991); Adolph v. Federal Emergency Management Agency, 854 F.2d 732, 737 (5th Cir. 1988); Naegele Outdoor Advertising, Inc. v. City of Durham, 844 F.2d 172, 178 (4th Cir. 1988); Builders Serv. Corp. v. Planning & Zoning Comm'n, 545 A.2d 530, 539 (Conn. 1988).

153. *See* cases cited *supra* note 152.

154. *Commercial Builders*, 941 F.2d at 874 (quoting *Nollan*, 483 U.S. at 838).

155. *See* Penn Cent. Transp. Co. v. New York City, 438 U.S. 104, 123-24 (1978) (holding that "whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely 'upon the particular circumstances [in that] case' ") (quoting United States v. Central Eureka Mining Co., 357 U.S. 155, 168 (1958)) (alteration in original); Rose-Ackerman, *supra* note 143, at 1700.

156. *See, e.g.*, Citizen's Ass'n v. International Raceways, 833 F.2d 760, 762 (9th Cir. 1987); Cottonwood Farms v. Board of County Comm'rs, 763 P.2d 551, 554 (Colo. 1988); Cryderman v. City of Birmingham, 429 N.W.2d 625, 629 (Mich. Ct. App. 1988).

157. 763 P.2d 551 (Colo. 1988).

158. *Id.* at 558.

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

160. *Cottonwood*, 763 P.2d at 558. The court relied on the *Agins* test by implication only. *Id.*

161. *See* Lemon et al., *supra* note 139, at 602.

Tigard[162] during the summer of 1994.[163] In *Dolan*, a developer challenged an exaction which required the dedication of approximately ten percent of the developer's land for a pedestrian/bicycle pathway and a greenway to assist in the management of storm water runoff.[164] The primary issue in *Dolan* is whether the *Nollan* essential nexus requirement requires a "substantial relationship" between development exactions and the needs created by the development or whether it is essential to show a "reasonable relationship" between the two.[165] Hopefully the Supreme Court will provide clear guidance on this critical point.

In summary, the two most significant legal challenges that exactions face are charges that the exaction ordinance is an unreasonable exercise of the police power and that the exaction amounts to an unconstitutional taking of private property. To prove reasonableness under their police powers, local governments must generally demonstrate that both prongs of the rational nexus test are met.[166] Under the takings challenge, the government must show some nexus between the exaction and a legitimate health, safety, or welfare purpose.[167] How close that fit has to be in the takings context will depend on the respective court's interpretation of *Nollan* and ultimately on the Supreme Court's decision in *Dolan*.

The ultimate question is whether environmental mitigation fees should be scrutinized under the exactions analysis or whether they are sufficiently distinguishable to warrant application of a modified standard. Since mitigation fees are based on the impacts of development, does it make sense to apply the benefits prong of the rational nexus test? Even if a more deferential standard is applied, can mitigation fees survive a takings challenge under *Nollan*? The next section develops the environmental mitigation fee theory and attempts to answer these questions.

IV. ENVIRONMENTAL MITIGATION FEES

An environmental mitigation fee would be a one-time assessment by a local government against new development to reimburse the community for the new development's proportional impact on the environment. The exaction would be resource-based in the sense that it would reimburse the community for loss of environmental resources caused by the development. The impact could be measured in terms of habitat destruction, air or water pollution, erosion, or any other valuable environmental characteris-

162. 854 P.2d 437 (Or.), *cert. granted*, 114 S. Ct. 544 (1993).
163. *Id.* at 446; *infra Author's Note* (discussing the Supreme Court's *Dolan* decision).
164. *Dolan*, 854 P.2d at 438-39.
165. *Id.* at 441.
166. *See supra* notes 105-09 and accompanying text.
167. *See supra* notes 118-24 and accompanying text.

tic. Exacted fees would be placed in a trust fund to finance mitigation of the negative environmental effects from development.

A. *Development of the Theory*

The concept of environmental mitigation fees is similar to environmental exactions now imposed on certain types of development activities. For example, the Environmental Protection Agency (EPA) has recently required industrial and commercial polluters of natural resources in addition to cleaning up toxic spills, to restore the damaged environment to its natural state, or to pay damages in lieu of restoration.[168] Similarly, strip mining entities[169] must make provisions to guarantee future reclamation of their mining sites, and manufacturers of hazardous materials have been required to pay a special excise tax into a superfund for five years to finance environmental clean-up work.[170]

Environmental mitigation on the federal level has occurred for many years. One of the earliest applications of environmental mitigation was the effort to compensate for the effect of dams on anadromous fish populations under the Fish and Wildlife Coordination Act.[171] Another application is the requirement, under section 404 of the Clean Water Act,[172] that developers create, restore, or preserve wetlands to mitigate the destruction of wetlands necessitated by the development.[173] Similarly, under the federal Endangered Species Act,[174] developers are required to mitigate the destruction of an endangered species' habitat by creating or preserving a similar habitat elsewhere.[175]

State governments also require developers to mitigate adverse environmental impacts. In Florida, the Department of Environmental Protection (DEP) regulates the dredging and filling-in of surface waters of the

168. *See* Michael Parrishi, *U.S. to Require Polluters to Restore Wildlife, Habitat*, L.A. TIMES, June 16, 1990, at A1.

169. 30 U.S.C. § 1265 (1988 & Supp. IV 1992); *see* Hodel v. Indiana, 452 U.S. 314, 328-30 (1981). In Florida, phosphate miners are required to reclaim the land when the extraction is completed. *See* FLA. STAT. § 378 (1993).

170. *See* Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. §§ 9601-9675 (1988 & Supp. IV 1992).

171. Fish and Wildlife Coordination Act, 16 U.S.C. § 661 (1988); Robert E. Merritt, Mitigation as a Solution to Wetlands and Endangered Species Encounters 830 (Oct. 12, 1991) (unpublished manuscript, on file with the Florida Law Review).

172. Clean Water Act, 33 U.S.C. § 1251 (1988 & Supp. IV 1992).

173. Recently, the EPA and the U.S. Army Corps of Engineers interpreted the regulations to set a goal of no-net-loss of wetlands, or 1:1 mitigation ratio. *See* Memorandum of Agreement (MOA); Clean Water Act Section 404(b)(1) Guidelines; 55 Fed. Reg. 9210, 9211 (EPA & Dep't of Defense 1990).

174. Endangered Species Act, 16 U.S.C. §§ 1531-1544 (1988 & Supp. V 1993).

175. 16 U.S.C. § 1539 (Supp. V 1993).

state.[176] If adverse impacts cannot be avoided, the DEP will consider mitigation.[177] In New Jersey, the state DEP generally requires a 2:1 mitigation ratio for both coastal and freshwater wetlands.[178] The California Environmental Quality Act (CEQA) plays a role in virtually all development in California.[179] Under CEQA, a local government agency evaluates the impact of each development and prepares an environmental impact report.[180] If the impacts are significant, the developer is required to mitigate their effects in some fashion.[181]

A local government mitigation fee program would have several advantages over the federal and state mitigation programs now in existence. A fee program would be administratively efficient because developers and governmental entities could avoid time-consuming, ad hoc negotiation on a case-by-case basis.[182] Because fees would be based on a set of preestablished standards, developers would not have to engage in additional studies to determine the extent of local impacts and the mitigation required. Developers would also have greater cost predictability which would provide more marketing security.[183] Finally, local governments would have more flexibility in deciding where and how to expend the funds to mitigate the adverse impacts.

Several states have already moved toward implementing mitigation fee programs. In Florida as well as New Jersey, the states' DEP have approved mitigation banking under certain circumstances.[184] A mitigation bank is created when one party purchases, creates, or restores a large wetland site.[185] The values of the restored wetland are quantified and

176. *See* SALVESEN, *supra* note 15, at 50. The Warren S. Henderson Wetlands Protection Act of 1984 directs the DEP (formerly the Department of Environmental Regulation (DER)) to regulate dredge and fill permits. *Id.*

177. *See* FLA. ADMIN. CODE ANN. R. 17-342.100 to .850 (1994).

178. SALVESEN, *supra* note 15, at 50.

179. *Id.* at 56-57.

180. *Id.*

181. *See id.*

182. *See* Robert H. Freilich & Terry D. Morgan, *Municipal Strategies for Imposing Valid Development Exactions: Responding to* Nollan, 10 ZONING & PLAN. L. REP. 169, 175 (1987). A mitigation fee based on standards developed from a factual study also rests on firmer legal footing than an exaction program based on ad hoc negotiation. *See id.* Ad hoc negotiation runs a greater risk of running afoul of the proportionality aspect of the *Nollan* essential nexus requirement. *See id.*

183. *See, e.g.*, Phil Long, *Disney's Payback to Beauty and Beasts*, MIAMI HERALD, Apr. 24, 1993, at 1A. In return for conveying 8500 acres of environmentally sensitive land to The Nature Conservancy, Walt Disney World received permission from the State of Florida to develop 446 acres of protected wetlands. *Id.* Disney management, relieved at ending three years of negotiation, said the exchange was financially worthwhile because of the certainty of finally having the environmental issues regarding its property resolved. *Id.*

184. *See* SALVESEN, *supra* note 15, at 50-55.

185. *See id.* at 4.

used as credits.[186] Developers needing to mitigate may purchase these credits up to the amount of their required mitigation.[187] In essence, this is a fee in lieu of in-kind mitigation.

Local governments in several states have also enacted mitigation fee programs.[188] Vermont has enacted explicit enabling legislation for agricultural and wildlife conversion fees.[189] Under the act, local governments may require developers to pay a fee, or mitigate the negative effects of construction that consumes farmlands or wildlife habitats.[190] The funds collected are then used to purchase either similar lands or the development rights of such lands to mitigate the destruction.[191]

Several California localities have implemented similar agricultural mitigation fee programs under the broad authority of the police powers rather than pursuant to specific state enabling legislation.[192] Additionally, the county of Riverside, California has enacted an air pollution mitigation fee.[193] Under this program, initially, each lot for new residential construction will be assessed a fee of twenty-five dollars.[194] The fees will be used to develop an air quality element for the county's comprehensive plan which in turn will be used to justify a more substantial fee to mitigate the effects of development on air quality.[195]

Although several states have enacted local government mitigation fee programs, there is no consensus regarding the legal analysis under which they should be scrutinized. The two primary questions are whether they are legitimate exercises of the police power and whether, in light of *Nollan*, they can withstand a takings challenge under the Fifth Amendment.

B. *Legal Analysis of Environmental Mitigation Fees*

Developers will likely attack environmental mitigation fee programs under police powers and takings jurisprudence. Whether a court deems a

186. *Id.* at 4-5.

187. *Id.* at 5.

188. *Id.* Additionally, local governments may require mitigation measures to protect critical environmental characteristics. In the Lake Tahoe area, for example, developers are required to take a series of mitigation measures to prevent erosion in the Lake Tahoe Basin. *See* Leroy Land Dev. v. Tahoe Regional Planning Agency, 939 F.2d 696, 697-98 (9th Cir. 1991).

189. VT. STAT. ANN. tit. 24, §§ 5200-5203 (1992); Mudge, *supra* note 39, at 72.

190. *See* Mudge, *supra* note 39, at 72.

191. *Id.*

192. *See id.* For example, California has implemented mitigation fee programs in the cities of Davis and Fairfield, and the counties of Solano and Alameda. *See id.* at 72-73.

193. *Id.* at 70.

194. *Id.*

195. *Id.*

local government environmental mitigation fee program a valid exercise of the police powers may depend on whether the jurisdiction subjects the exactions to the rational nexus test or to a reasonable relation test.[196] A fee program which does not sufficiently benefit the development also runs the risk of being struck down as an illegal tax.[197] Additionally, whether a fee program contravenes the Fifth Amendment Takings Clause may depend on the jurisdiction's interpretation of *Nollan*.[198]

1. Are Environmental Mitigation Fees a Legitimate Exercise of Police Powers?

The first issue under a police power analysis is whether imposing an environmental mitigation fee program would promote a legitimate health, safety, or welfare purpose.[199] Under the rule of *Hawaii Housing Authority v. Midkiff*,[200] courts will uphold a stated public purpose unless it is " 'palpably without reasonable foundation.' "[201] *Nollan* reaffirms that local governments will be given great deference in declaring public purposes underlying land use regulations.[202] Moreover, in states requiring local comprehensive plans, such as Florida, courts may infer a legitimate purpose from the land use or conservation element of the plan.[203]

The second issue is whether the mitigation fee program is necessary to promote the legitimate purpose of the community.[204] Most states use the rational nexus test to determine whether traditional service-based or physical infrastructure exactions meet this nexus requirement.[205] Given the differences between traditional service-based exactions and resource-based environmental mitigation fees, a strong argument can be made that the rational nexus test is inapposite in the context of the latter.

Governments impose required dedication, in lieu fees, and impact fees to provide new development with services or infrastructure. A primary rationale for these traditional exactions is that development should pay its fair share because the new development will benefit from the services or

196. *See, e.g.*, Commercial Builders v. City of Sacramento, 941 F.2d 872, 874-75 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1997 (1992).

197. *See supra* notes 56-68 and accompanying text.

198. *See infra* part IV.B.3.

199. This starting point assumes that the local government has authority to enact the ordinance. *See supra* notes 49-55 and accompanying text.

200. 467 U.S. 229 (1984).

201. *Id.* at 241 (quoting United States v. Gettysburg Elec. Ry., 160 U.S. 668, 680 (1896)).

202. *Nollan*, 483 U.S. at 834-35 (finding that "a broad range of governmental purposes and regulations satisfies these requirements").

203. *See, e.g.*, FLA. STAT. § 163.3177 (1993).

204. *See supra* notes 73-109 and accompanying text.

205. *See supra* notes 72-74 and accompanying text.

facilities.[206] Environmental mitigation fees, however, would typically not be tied to services or physical infrastructure. The rationale for environmental mitigation fees is that development consumes environmental resources or otherwise burdens the community with adverse environmental impacts; therefore, developers should compensate the community for any losses incurred.[207]

Because resource-based mitigation fees are not tied to the benefit received by development, courts should limit the nexus analysis to the proportionality of impact.[208] Such a test should be based on the actual, albeit indirect and general, impact of development on the affected environmental characteristics.[209] However, the nexus requirement should not be as stringent as the needs prong of the rational nexus test.[210]

The relationship between development and the need for physical infrastructure is direct and readily quantifiable; the impact on physical infrastructure can be calculated with relative accuracy based on empirical data and statistical analysis.[211] Alternatively, an environmental mitigation fee, while actually linked to a burden, cannot be calculated with such precision. Environmental mitigation fees should therefore be subjected to a reasonable relation test with other safeguards imposed to compensate for the lack of precision.[212]

Several recent linkage fee cases support the use of the reasonable relation test in the context of resource-based fee programs.[213] In *Holmdel Builders Ass'n v. Township of Holmdel*,[214] for example, the Builders Association challenged a local government ordinance imposing a mandatory fee on developers as a condition for receiving a certificate of occupancy.[215] The fees were placed in a trust fund to be used for financing or

206. *See Contractors & Builders Ass'n*, 329 So. 2d at 320.

207. *See* Mudge, *supra* note 39, at 74-75.

208. *See* Freilich & Morgan, *supra* note 182, at 174.

209. *See id.*

210. *See id.*; *supra* notes 105-07 and accompanying text.

211. *See generally* James C. Nicholas & Arthur C. Nelson, *The Rational Nexus Test and Appropriate Development Impact Fees, in* DEVELOPMENT IMPACT FEES 171, 171-87 (Arthur C. Nelson ed., 1988) (outlining and discussing a comprehensive approach to analyzing and calculating appropriate impact fees).

212. For example, the fee could be substantially less than the actual estimated impact. While this would not support a no-net-loss program, the fees collected could be combined with funds raised from other broad-based funding mechanisms to maximize the mitigation efforts. *See infra* notes 300-03 and accompanying text.

213. *Commercial Builders*, 941 F.2d at 874-75; Holmdel Builders Ass'n v. Township of Holmdel, 583 A.2d 277, 286-87 (N.J. 1990).

214. 583 A.2d 277 (N.J. 1990).

215. *Id.* at 279. The case actually consolidated the appeals of several New Jersey municipalities which had passed similar affordable housing ordinances in an attempt to comply with their obligation to "provide a realistic opportunity for the construction of affordable housing" as required by the New

subsidizing the construction of affordable housing.[216] The New Jersey Supreme Court ruled that the rational nexus test was inapposite in determining the validity of affordable housing linkage fees under the police powers.[217]

The *Holmdel* court applied a reasonable relationship test and found an indirect but reasonable relationship between unrestrained nonresidential development and the need for affordable housing.[218] The court found that there was a reasonable relationship between the impact of nonresidential development and affordable housing both in terms of additional need and the opportunity and capacity of municipalities to meet the need.[219] The court reasoned that the fees were permissible because land is an exhaustible resource and any land that is consumed in the development process is land that is not available for the construction of affordable housing.[220]

Although the *Holmdel* court applied a reasonable relation test to the resource-based affordable housing fee, it struck down the ordinance because the state's Council on Affordable Housing had not promulgated rules that would provide standards and guidelines for the imposition and use of the fees.[221] The court implied that even if the standards could not be calculated with the precision of service-based exactions, fees reasonably linked to development's impact on the need for and availability of a public resource would constitute a valid exercise of the police powers.[222]

In a similar case, *Commercial Builders v. City of Sacramento*,[223] the Ninth Circuit upheld an affordable housing linkage fee under a reasonably related analysis.[224] In finding that the fee imposed on the developers was reasonably related to the burden created, the court relied on two primary factors. First, and perhaps most importantly, the fee ordinance was enacted after a careful study revealed the amount of low-income housing that would become necessary due to an influx of workers likely to be attracted by commercial development.[225] Second, the imposed fee amounted to only a small portion of the estimated burden on affordable housing created by commercial development.[226]

Jersey Supreme Court in Southern Burlington County NAACP v. Mount Laurel Township, 456 A.2d 390 (N.J. 1983). *Holmdel*, 583 A.2d at 281.

216. *Holmdel*, 583 A.2d at 281.
217. *Id.* at 288.
218. *Id.*
219. *Id.*
220. *Id.*
221. *Id.* at 291.
222. *See id.*
223. 941 F.2d 872 (9th Cir. 1991), *cert. denied*, 112 S. Ct. 1997 (1992).
224. *Id.* at 874.
225. *Id.*
226. *Id.* This characteristic of the fee protected developers from being assessed more than their

Other courts have essentially employed the Ninth Circuit's analysis in evaluating linkage programs.[227] These courts have evaluated the nexus between the legitimate purpose and the resource-based linkage fee by examining and relying on factual data and studies provided by the governmental entity. In *Russ Building Partnership v. City & County of San Francisco*,[228] the California Court of Appeal upheld a mass transit operation[229] linkage fee on the strength of a detailed financial study which ascertained the impact, calculated the need, and projected the discounted cost of the impact on the transit system.[230] The *Russ* court upheld the lower court's finding that the fee was based on a financial forecast rationally and directly related to the estimated life of the affected buildings.[231]

There are other examples of resource-based linkage fee programs where local governments relied on careful analyses of projected needs and of apportioned costs. These programs include the San Francisco child care linkage fee ordinance,[232] the Boston affordable housing linkage program,[233] the San Francisco affordable housing program,[234] and Seattle's density-bonus program.[235] In each case, the fee substantially promoted a legitimate public interest and was reasonably linked to the actual burden created by the development.[236]

The justification for environmental mitigation fees is analogous to that for linkage fees. Development places a burden on important environmental resources and, therefore, developers should internalize a portion of the impacts by reimbursing the community for the loss. To withstand court challenges, the fee must be based on a careful study of the actual impacts of the development.[237] It should be calculated with conservative estimates and should provide a safeguard against assessing developers disproportionately. Because the fees are not linked to benefits conferred

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proportional share of the burden. *Id.* It acted as a safeguard to compensate for the lack of precision inherent in a resource-based impact calculation. *Id.*

227. *See, e.g., Commercial Builders*, 941 F.2d at 874; Leroy Land Dev. v. Tahoe Regional Planning Agency, 939 F.2d 696, 699 (9th Cir. 1991); Blue Jeans Equities W. v. City & County of San Francisco, 4 Cal. Rptr. 2d 114, 115 (Ct. App. 1992); *Holmdel*, 583 A.2d at 288, 293.

228. 246 Cal. Rptr. 21 (Ct. App. 1987).

229. The San Francisco fee was unique in that it was not for capital improvement costs but was for the added operational costs of the system caused by the accommodation of higher demand during peak hours. *Id.* at 23. This higher demand was generated by increased downtown development. *Id.*

230. *Id.* at 23-24.

231. *Id.* at 29.

232. *See* Caplan, *supra* note 14, at 1593.

233. *See* Schukoske, *supra* note 12, at 1033-36.

234. *Id.* at 1027-30.

235. *Id.* at 1036-38.

236. *See id.* at 1027-33, 1036-38.

237. *See* Freilich & Morgan, *supra* note 182, at 173.

upon the development and because the impacts are not quantifiable with acute precision, courts should apply a reasonable relation test rather than a rational nexus test in scrutinizing the fees.[238]

2. Can Environmental Mitigation Fees Survive an Illegal Tax Challenge?

If a mitigation fee ordinance passes muster under the reasonable relation test, it may nevertheless be struck down as an illegal tax.[239] At first glance, the fees may appear vulnerable to such an attack because the fee payers do not receive any direct benefits.[240] Upon closer analysis, however, the lack of a direct benefit should not be dispositive.

The line between a tax and a fee is not always clear; the determination is ultimately one of public policy in which several relevant factors are weighed.[241] The extent of the benefit flowing to the development is just one of these factors to consider.[242] Although the development would receive no direct benefit from the mitigation efforts, its occupants would receive the general community benefits of improved environmental conditions. When weighed against other factors, the tenuous benefit connection should not tip the balance in favor of a tax.[243]

Several factors weigh in favor of finding that environmental mitigation fees are not taxes. An environmental mitigation fee would not be a compulsory charge; only those developers who elect to engage in development activities which adversely affect the environment would be subject to the assessment. Additionally, the fee would not be collected for general revenue purposes, but rather would be earmarked and used specifically to mitigate the adverse environmental impacts caused by the development. As long as safeguards are in place to ensure that the assessment does not exceed the actual proportionate impact or the cost of mitigation, it will be more akin to a fee than a tax.

238. *See supra* notes 211-18 and accompanying text.

239. *See* Juergensmeyer & Blake, *supra* note 3, at 428-29, 438-39; *supra* notes 56-68 and accompanying text.

240. *See, e.g.*, Gulest Assocs. v. Town of Newburge, 209 N.Y.S.2d 729 (Sup. Ct. 1960), *aff'd*, 225 N.Y.S.2d 538 (App. Div. 1962), *overruled by* Jenad, Inc. v. Village of Scarsdale, 218 N.E.2d 673 (N.Y. 1966). For a more detailed explanation of the development of the "direct benefit" test, see Juergensmeyer & Blake, *supra* note 3, at 428-30.

241. Juergensmeyer & Blake, *supra* note 3, at 440-41.

242. *See supra* notes 56-68 and accompanying text.

243. *See Contractors & Builders Ass'n*, 329 So. 2d at 318 & n.5.

3. Will Environmental Mitigation Fees Constitute a Regulatory Taking?

An environmental mitigation fee program may constitute a taking of private property without just compensation if it "does not substantially advance legitimate state interests . . . or denies an owner economically viable use of his land."[244] Under the first prong of the regulatory takings test, there must be an essential nexus between the legitimate environmental purpose and the exaction enacted to advance the purpose.[245] Additionally, the exaction must be proportional to the impact.[246] If the exaction meets both tests, there is no taking unless the exaction deprives the owner of all economically viable uses in the land.[247]

a. Substantially Advance Test

The essential nexus requirement of *Nollan* will be met if the mitigation fee ordinance substantially advances a legitimate public purpose.[248] As discussed above in the context of valid police powers, an objective to protect and conserve environmental characteristics is clearly a valid public purpose.[249] The only real question is whether a court will find the required means-end nexus between the public purpose and the fee ordinance. This determination may depend on whether the court interprets *Nollan* to require the application of heightened scrutiny for all land use regulations.[250]

A majority of courts have interpreted *Nollan* as requiring a heightened level of scrutiny only if the regulation in question authorizes a permanent physical occupation of the property.[251] These courts distinguish possessory takings from regulatory takings, holding that a reasonable relation analysis should be applied to nonpossessory regulatory takings.[252]

In *Commercial Builders*, the Ninth Circuit upheld an affordable housing linkage fee ordinance under a reasonable relation standard.[253] The

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

245. *Nollan*, 483 U.S. at 837; *see also supra* notes 118-65 and accompanying text (providing a detailed discussion of *Nollan* and its possible interpretations).

246. *See* Freilich & Morgan, *supra* note 182, at 171-72.

247. *See* Lucas v. South Carolina Coastal Council, 112 S. Ct. 2886, 2895 (1992) (holding that a landowner who is called upon to sacrifice all economically beneficial uses of his land has suffered a taking). An exaction equal in amount to the total economic value of property is functionally equivalent to a deprivation of all economic uses. *Id.*

248. *See supra* notes 138-43 and accompanying text (discussing various interpretations of *Nollan*).

249. *See supra* notes 199-203 and accompanying text.

250. *See supra* notes 138-43 and accompanying text (discussing various interpretations of *Nollan*).

251. *See* cases cited *supra* note 152.

252. *See supra* notes 152-54 and accompanying text.

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

court opined that "*Nollan* does not stand for the proposition that an exaction ordinance will be upheld only where it can be shown that the development is directly responsible for the social ill in question."[254] The court also held that the purely financial exaction did not constitute a taking because it was reasonably related to the activity against which it was assessed.[255]

In *Leroy Land Development v. Tahoe Regional Planning Agency*,[256] the Ninth Circuit noted in dicta that an off-site erosion mitigation requirement was reasonably related to the planning agency's purpose of protecting Lake Tahoe's water quality from pollution caused by development.[257] The court found that the relationship clearly met the *Nollan* nexus requirement and held that the requirement was not an unconstitutional taking.[258] Likewise, in *Blue Jeans Equities West v. City & County of San Francisco*,[259] the California Court of Appeal concluded that the *Nollan* analysis was only applicable to possessory takings.[260] The court upheld a mass transit impact development fee because it was reasonably related to the burdens development placed on the transit system.[261]

Where a regulation imposes a permanent physical occupation of the property, as a condition of a development permit, courts should apply a heightened scrutiny.[262] Courts must be particularly careful about the abridgment of property rights "where the actual conveyance of property is made a condition to the lifting of a land-use restriction, since in that context there is a heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police power objective."[263] Based on recent applications of *Nollan*, however, a more deferential standard of review should be applied to nonpossessory environmental mitigation fee programs.

b. Proportionality Requirement

Although heightened scrutiny arguably should not apply to the means-end nexus of environmental mitigation fee ordinances, local governments are not free to assess an arbitrary amount. *Nollan* suggests that the fee must be proportionate to the actual burden created by the develop-

254. *Id.* at 875.
255. *Id.* at 876.
256. 939 F.2d 696 (9th Cir. 1991).
257. *Id.* at 699.
258. *Id.*
259. 4 Cal. Rptr. 2d 114 (Ct. App. 1992).
260. *Id.* at 118.
261. *Id.* at 119.
262. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 (1982).
263. *Nollan*, 483 U.S. at 841.

ment.[264] Most importantly, a municipality may not require land owners to remedy past environmental impacts.[265] A municipality may consider the cumulative impacts of all development on the environment, but no single land owner may be required " 'to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.' "[266]

The implication of the *Nollan* proportionality requirement is that local governments must conduct careful studies to quantify the adverse environmental impacts. They must develop a factual basis demonstrating the relationship between the development and the need for exactions which mitigate the anticipated harm.[267] This factual data must then be converted into standards that fairly allocate the costs to those who create these burdens.[268] The difficulty of quantifying environmental impacts may be the highest hurdle that local governments must clear.

c. Economic Viability Limitation

Another limitation on environmental mitigation fee amounts is the requirement that an exaction must not deprive the land owner of all economically viable uses of the land.[269] If the fee standards reflect an environmental impact exceeding the fair market value of the land, the locality will not be permitted to recoup the entire loss because full recovery would be tantamount to a one hundred percent dedication requirement without just compensation.[270] As a safeguard, local governments should use conservative standards and impose fees which are less than the actual impacts.

In summary, to withstand a takings challenge under *Nollan*, an environmental mitigation fee program must substantially advance a legitimate state interest.[271] The individual development does not have to benefit directly from the imposition of the exaction, but there must be an essential nexus between the need for mitigation and the amount of the fee.[272] The fee must be proportionate to the development's quantified impact on the respective environmental characteristic and the amount must not deprive the owner of all economic value in the land.[273] If a fee program meets these guidelines, it should pass muster even under the strict *Nollan* inter-

264. *Id.* at 835 n.4.
265. *See id.*
266. *Id.* (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)).
267. Freilich & Morgan, *supra* note 182, at 174.
268. *See id.*
269. *See supra* text accompanying notes 120-22.
270. *See Agins*, 447 U.S. at 260.
271. *See supra* text accompanying notes 199-203.
272. *See* Freilich & Morgan, *supra* note 182, at 175.
273. *See supra* text accompanying notes 264, 269.

pretation argued by the dissent in *Dolan v. City of Tigard*.[274]

V. IMPLEMENTING AN ENVIRONMENTAL MITIGATION FEE PROGRAM

Assuming that the local government has authority to enact an environmental mitigation fee ordinance,[275] the next step would be, as part of the local comprehensive plan, to prepare a local environmental conservation and preservation plan.[276] In preparing the plan, the government should conduct a detailed study to evaluate the adverse environmental impacts of development and identify the characteristics which will be incorporated into the plan.[277] The plan should also identify a desired level of service for each characteristic covered under the plan.

From the factual data provided by the study, the government should develop a set of standards that reflect the need for, the nature of, and the extent of the mitigation fee.[278] Standards should take existing and desired environmental levels of service into account.[279] To valuate a level of service, the government would simply quantify the status of an environmental characteristic such as an air or water quality measurement, or the total acreage of critical species' habitat.[280] The resulting standard would apply a dollar value to a unit of development impact.[281] A unit could possibly be a square foot of building area, or any other variable which closely links the development with its impact.

The amount of the fee must be based on a reasonably calculated standard.[282] It could not merely be a pretext for imposing an obligation on a developer to remedy a public need wholly unrelated to the development. Without factually supported findings, the fee would be vulnerable to attack as an invalid exercise of police powers, an unauthorized tax, and a taking for public use without just compensation.[283]

To ensure that the fee does not exceed the development's proportional impact on the need to mitigate the environmental loss, the measurement of

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274. 854 P.2d 437, 446 (Or.) (Peterson, J., dissenting), *cert. granted*, 114 S. Ct. 544 (1993).

275. *See supra* part III.A. (discussing sources of authority).

276. Professor Charles Haar advocated that local land use regulations be consistent with a legally binding comprehensive plan which would promote future orderly growth, combat individual community pressures for preferential treatment, and clarify judicial standards of review. *See* Charles M. Haar, *"In Accordance with a Comprehensive Plan,"* 68 HARV. L. REV. 1154, 1154-55 (1955).

277. The plan could be part of the land use element, the conservation element, or a separate environmental element. *See, e.g.*, FLA. STAT. § 163.3177(6) (1993).

278. Freilich & Morgan, *supra* note 182, at 175.

279. *See* Bosselman & Straud, *supra* note 18, at 91-93.

280. *Id.* at 91-92.

281. *See id.* at 92.

282. *Id.* at 90.

283. *See supra* part IV.B. (discussing the legal analysis of environmental mitigation fees).

new mitigation needs should be carefully separated from those needs created by existing development.[284] The mitigation effort cannot charge new development for the cost of recouping past environmental losses not attributable to the new development.[285] Therefore, if the planned environmental levels of service exceed the actual service levels, the local government would have to seek alternative funding sources to mitigate adverse environmental effects that occurred prior to adoption of the plan.[286] Localities may be well advised to set planned levels of service at current levels to adopt, in effect, a no-net-loss policy while avoiding the problems of recoupment.

To provide a safety valve against overcharging, the plan should also provide an alternative method for individual owners to calculate the fee.[287] Additionally, the locality must credit fee payers for any payments that the development will otherwise contribute to the mitigation effort.[288] For instance, if a locality earmarked a portion of ad valorem taxes for environmental mitigation, the development would contribute to that funding effort through future ad valorem assessments. Failure to credit the development for its projected future contributions would result in a disproportionate burden for the development. The developer also should receive credits for any on-site mitigation efforts that provide benefits to the locality.[289]

An environmental mitigation fee would also be disproportionate if it reflected all the extraordinary costs associated with mitigation.[290] A comprehensive mitigation fee, for example, should not allocate the cost of wetland mitigation to all developments if wetlands are only located in limited areas. A developer whose property contains no wetlands should not be required to fund wetland preservation when that developer did not contribute to the destruction of wetlands. Likewise, the developer whose land is not located in a critical species' habitat area should not be required to mitigate habitat loss.

Environmental characteristics which are unique to limited areas within the community should be identified and separated as extraordinary costs. Mitigation for those characteristics could be based on the actual specific

284. *See Contractors & Builders Ass'n*, 329 So. 2d at 320-33.

285. *Id.*

286. The plan could provide for several funding mechanisms. Broad based sources of revenue that spread the cost to the community as a whole could be used to recoup prior losses, and mitigation fees could be imposed for reimbursement of new losses. *See infra* text accompanying notes 300-03.

287. *See* St. Johns County v. Northeast Fla. Builders Ass'n, 583 So. 2d 635, 640 (Fla. 1991).

288. *See* Nicholas & Nelson, *supra* note 211, at 175.

289. *Id.*

290. *See id.*

impact of each development.[291] Alternatively, the study could identify resource zones and these extraordinary costs could be allocated to the developments within each zone. Even within these extraordinary zones, however, the fees would be limited by proportionality and economic viability considerations.[292]

Finally, the plan should address the issue of fee payer benefits. Even if the court accepts the argument that the benefits prong of the rational nexus test is inapposite in the context of resource-based mitigation fees,[293] it may consider benefits in balancing the tax versus fee factors.[294] The plan should require that fees be segregated and earmarked for future mitigation expenditures.[295] As part of the earmarking function, the locality should also set a reasonable time limit during which it must either spend or encumber the funds.[296] As an additional assurance that the fee payer will receive benefits from the mitigation fee, a limitation should be placed on the geographical area in which the funds may be used.[297]

From a practical perspective, developing mitigation fee standards under an environmental preservation plan might be the most challenging obstacle facing local governments wishing to implement mitigation fee programs.[298] The task of calculating the proportional impact with sufficient precision to pass constitutional muster may prove to be very difficult and expensive. The problems associated with apportioning extraordinary costs clearly illustrate the difficulty. Moreover, the initial cost of generating the statistical data and empirical evidence necessary to support environmental mitigation standards could be staggering. To minimize these problems, fees will likely have to be narrow in scope and tied to specific, reasonably quantifiable environmental characteristics.[299]

To overcome some of the inherent problems of mitigation fee programs, local governments could adopt concurrent broad based funding

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291. *Id.*

292. *See supra* notes 264-74 and accompanying text.

293. *See supra* text accompanying notes 205-38.

294. *See supra* notes 56-67 and accompanying text.

295. *See* Bosselman & Stroud, *supra* note 5, at 537-38. While courts disagree as to the relevance of earmarking in assessing the validity of mitigation fees, earmarking does ensure that fees will benefit the payer by reserving the fees' usage to the purpose for which they were collected. *Id.* at 537.

296. *See Contractors & Builders Ass'n*, 329 So. 2d at 321 (noting that failure to place necessary restrictions on the use of a mitigation fund inevitably results in confusion and mismanagement); Nicholas & Nelson, *supra* note 211, at 178.

297. *See* Nicholas & Nelson, *supra* note 211, at 177.

298. *Id.* at 172.

299. An air pollution mitigation fee, for example, would be narrow in scope and could be reasonably quantified. The scientific methodologies employed to develop the standards for other fees are beyond the scope of this note and this author's realm of knowledge. Whether environmental mitigation fee standards can be developed with sufficient precision is a matter for future courts to decide. *See id.*

schemes.[300] These complementary schemes could be used to recoup the environmental losses caused by past developments and to compensate the community for the effects of current developments that are not easily quantified. In California, for example, consideration is being given to imposing "impact charges" on utilities and services through utility surcharges, automobile registrations, and driver license fees.[301] The fees collected from these sources would be used to service long-term debt incurred to conserve wildlife habitat.[302]

This same broad based revenue raising concept could also be used to mitigate the effects of air pollution,[303] water pollution, solid waste disposal, chemical and hazardous waste disposal, and any other indirect effects of development. While a combination program of this sort would not force developers to internalize all negative externalities of development, it would be a positive step toward a no-net-loss local environmental policy.

VI. CONCLUSION

Environmental mitigation fees represent the next generation of development exactions. An environmental mitigation fee would be a one-time assessment by a local government against new development to reimburse the community for the new development's proportional impact on the environment. The fee would be resource-based because it would reimburse the community for the loss of environmental resources caused by the development.

Because environmental mitigation fees are resource-based rather than service-based, the legal analysis courts apply should focus on the actual adverse environmental impacts of development rather than on the benefits developments receive in return for payment. Specifically, courts should focus on the need for environmental mitigation created by the development and on the proportional share of the development's impact. If the fee is reasonably related to the impact and is proportional, it should pass judicial scrutiny.

Therefore, the fee must be based on a careful assessment of the actual impacts of development. A study should be conducted pursuant to an environmental comprehensive plan to identify environmental characteristics that the locality wishes to conserve. The fee should be calculated according to conservative estimates and safeguards should prevent assessment of a disproportionate fee amount.

300. *See* Nelson et al., *supra* note 13, at 12.
301. *Id.*
302. *Id.*
303. *Id.* at 13.

From a practical perspective, developing mitigation fee standards under an environmental preservation plan might be the highest hurdle that local governments must clear to implement a mitigation fee program. The reality is that calculating the proportional impact with sufficient precision to pass constitutional muster may prove to be very difficult and expensive. To overcome these difficulties, the fees must be narrow in scope and limited to specific environmental characteristics that can be reasonably quantified. Additionally, mitigation fee programs should be combined with other broad based funding schemes to maximize the potential of achieving a no-net-loss local environmental policy.

Author's Note:

In June 1994 the United States Supreme Court decided *Dolan v. City of Tigard*.[304] Because of the importance of that decision in the area of takings jurisprudence, it warrants some comment. In *Dolan*, the petitioner appealed the decision of the Oregon Supreme Court.[305] The court held that the City of Tigard could condition the grant of a development permit on the dedication of approximately ten percent of the petitioner's land for a pedestrian/bicycle pathway and a greenway to assist in the management of storm water runoff.[306] The primary issue was the nexus required between the exaction imposed and the projected impact of the development.[307]

The United States Supreme Court, in a 5-4 decision,[308] reversed and held that although a development exaction need not be determined by precise mathematical calculation,[309] it must be roughly proportional to both the nature and extent of the impact of the proposed development.[310] The Court essentially adopted a reasonable relationship standard but coined the term "rough proportionality" to distinguish this standard from rational basis minimum scrutiny under the Equal Protection Clause.[311]

The Supreme Court concluded that the City of Tigard's factual find-

304. 114 S. Ct. 2309 (1994).

305. *Id.* at 2312.

306. *Id.* at 2312-15.

307. *Id.* at 2312. The Court granted certiorari to resolve the issue of what degree of connection between a development exaction and the impacts of the development was contemplated by the *Nollan* "essential nexus" requirement. *Id.*

308. *Id.*

309. *Id.* at 2319.

310. *Id.* at 2319-20.

311. *Id.* at 2319.

ings were not constitutionally sufficient to justify the conditions imposed.[312] The city failed to show that the exaction was roughly proportional to the extent of the impact of the proposed development.[313] The required dedication for flood control was found unreasonable because a dedication would eviscerate the petitioner's right to exclude others from her private property—" 'one of the most essential sticks in the [property owner's] bundle of rights.' "[314] In this instance, dedication, as opposed to preservation or mitigation, placed an unfair and unproportional burden on the private property owner in meeting the public objective of flood control.[315] The Court also found that although a pedestrian/bicycle pathway could offset some of the additional traffic demand created by the development, the city failed to show that it would or would likely do so.[316]

Dolan illustrates the problem that local governments will face in generating standards that fairly approximate a development's true environmental impact.[317] Here, the city was acting pursuant to a comprehensive plan and pursuant to an individualized determination that the proposed development would have an impact on several elements of that plan.[318] The city failed, however, to factually demonstrate that the magnitude of the exaction was roughly proportional to the actual impact.[319] Under *Dolan*, local governments must evaluate environmental impacts and then factually demonstrate that the imposed exaction is commensurate with the nature and extent of the impact.[320] Although precise mathematical calculation is not required, local governments will have to engage in some level of quantifiable analysis to support the amount of all exactions.[321]

With its rough proportionality rule, the Court struck a balance between the rights of private property owners and the needs of governments to protect its resources. This decision should help to clarify the confusion which stemmed from the *Nollan* essential nexus test.[322] Rough proportionality, however, is no bright line test; its practical meaning will only be

312. *Id.* at 2321.

313. *See id.*

314. *Id.* at 2320 (quoting Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979)).

315. *See id.* at 2318. "One of the principal purposes of the Takings Clause is 'to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.' " *Id.* at 2316 (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)).

316. *Id.* at 2322.

317. *See supra* text accompanying notes 298-303.

318. *Dolan*, 114 S. Ct. at 2313-15.

319. *Id.* at 2321.

320. *See id.* at 2317-22.

321. *See id.* at 2322.

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

determined as the caselaw applying it develops.

Even though the Court did not fashion a bifurcated rule for service-based and resource-based development exactions, its decision does not preclude individual states from doing so. This decision sets the floor for all development exactions. The rational nexus test, adopted by many states for service-based exactions, is well above the floor. The reasonable relation test advocated by this note for resource-based exactions is consistent with the *Dolan* rough proportionality test and may be imposed at the floor. The analysis and recommendations of this note, found in parts IV and V, are in no way inconsistent with *Dolan*.