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The Legality of California Development Fees

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I. INTRODUCTION

Because California is such a desirable place to live, the state has experienced a massive increase in population over the past half-century.[1] Paralleling this human expansion has been a growth in residential and commercial real estate development. As a result, municipalities have been saddled with increased demands for public facilities and services.[2]

Local government has traditionally provided for these needs, with the costs being offset by revenue derived from property taxes as well as state and federal government funds. However, when development accelerated, municipalities were forced to seek other financing techniques, such as increasing property taxes, declaring special assessments,[3] resorting to long-term debt-financing,[4] and requiring developers to dedicate land or pay in-lieu fees (exactions) as a prerequisite to obtaining subdivision and building permits.[5]

Sources of revenue in California have narrowed considerably within the last few years. The passage of Proposition 13 on June 6, 1978, which was incorporated into article XIIIA of the California Constitution,[6] limited the taxes that could be obtained from property

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1. In 1940, approximately 6,950,000 people lived in California. In 1983, the estimated population of California was 25,174,000. DEPARTMENT OF FINANCE, STATE OF CAL., CALIFORNIA STATISTICAL ABSTRACT 13 (1984).

2. The increase of new residents and businesses in municipalities has caused local governments to provide new streets, recreational facilities, schools, law enforcement personnel and facilities, fire stations, and open space. 2 P. ROHAN, ZONING AND LAND USE CONTROLS § 9.01[1] (1985).

3. Direct benefits supplied to particular properties were charged to landowners or developers through special assessments. 5 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Taxation* § 5 (8th ed. Supp. 1984).

4. 2 P. ROHAN, *supra* note 2, § 9.01[1].

5. California has legislation authorizing municipalities to require dedication of land or fees in lieu of the dedications as a prerequisite for approval of subdivision plans. *See* CAL. GOV'T CODE §§ 66410-66499.58 (West 1983 & Supp. 1985).

6. Proposition 13 was incorporated into article XIIIA of the California Constitution in relevant part as follows:

> Section 1. (a) The maximum amount of any ad valorem tax on real property shall not exceed one percent (1%) of the full cash value of such property. The one percent (1%) tax to be collected by the counties and apportioned according to law to the districts within the counties.
>
> (b) The limitation provided for in subdivision (a) shall not apply to ad

owners to 1% of the assessed valuation of the property. Since property taxes had been the main source of funds for municipalities, their revenues were sharply reduced.[7]

Under President Reagan's new federalism plan, which advocates more power at the state level and thus less federal assistance, municipalities have not received as much federal assistance as they had previously received. California has been slow to approve measures to provide funds for local needs. High interest rates have caused debt-financing to become prohibitive. Because of the rapid increase in development, the advent of Proposition 13, the reduction of federal and state monies, and higher interest rates, municipalities are placing more emphasis on obtaining dedications. In-lieu fees from developers and the concept of "impact fees" have evolved to help pay for public structures and services.[8]

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valorem taxes or special assessments to pay the interest and redemption charges on any indebtedness approved by the voters prior to the time this section becomes effective.

Section 2. (a) The full cash value means the county assessor's valuation of real property as shown on the 1975-76 tax bill under "full cash value" or, thereafter, the appraised value of real property when purchased, newly constructed, or a change in ownership has occurred after the 1975 assessment. All real property not already assessed up to the 1975-76 full cash value may be reassessed to reflect that valuation. . . .

(b) The full cash value base may reflect from year to year the inflationary rate not to exceed 2 percent for any given year or reduction as shown in the consumer price index or comparable data for the area under taxing jurisdiction. . . .

. . . .

Section 3. From and after the effective date of this article, any changes in State taxes enacted for the purpose of increasing revenues collected pursuant thereto whether by increased rates or changes in methods of computation must be imposed by an Act passed by not less than two-thirds of all members elected to each of the two houses of the Legislature, except that no new ad valorem taxes on real property, or sales or transaction taxes on the sales of real property may be imposed.

Section 4. Cities, counties and special districts, by a two-thirds vote of the qualified electors of such district, may impose special taxes on such district, except ad valorem taxes on real property or a transaction tax or sales tax on the sale of real property within such City, County or special district.

Section 5. This article shall take effect for the tax year beginning on July 1 following the passage of this Amendment, except Section 3 which shall become effective upon the passage of this article.

Section 6. If any section, part, clause, or phrase hereof is for any reason held to be invalid or unconstitutional, the remaining sections shall not be affected but will remain in full force and effect.

CAL. CONST. art. XIIIA, §§ 1-6.

7. Although tax revenues to municipalities decreased, state funds were directed to local governments to partially offset that decrease. A. RABUSHKA & P. RYAN, THE TAX REVOLT 95 (1982).

8. Case, *Implications of Proposition 13 on the Private Sector Economy*, in RESEARCH ON PROPOSITION 13 15-16 (J. Danziger ed. 1982). According to one writer, development fees are an appropriate way to face the challenges of increased development and a reduced tax base because they are "innovative methods of directing and financing local growth and development." Note, *Development Fees: Standards to Determine Their Reasonableness*, 1982 UTAH L. REV. 549, 549. *See also* Johnston, *Constitutional-*

This comment will trace the evolution of dedications, in-lieu fees, and "impact fees" required of developers before their projects can be initiated, examine how they are being challenged by developers, explain how they have been justified by California courts, incorporate issues relating to the taxation feature of the exactions and impact fees, and discuss the concerns relating to legal actions by developers who feel that these fees are unfair or unconstitutional. It will also discuss the course of legal proceedings resulting from these issues, and examine the trends evolving from these legal proceedings.

II. THE EVOLUTION OF DEDICATIONS, IN-LIEU FEES, AND IMPACT FEES

New development forces local government to provide new public structures and additional services.[9] In the past, taxation of real property provided municipalities with the most productive source of revenue to fund these needs. Prior to the passage of Proposition 13 on June 6, 1978, local governments received adequate percentages of the real property value to cover these costs.[10] Proposition 13 greatly diminished property taxes, and municipalities had to find alternative sources of revenue.

Special assessments had also been used to finance public infrastructure.[11] These assessments were historically limited to money needed for improvements which would directly benefit new developments. Hence, when paying for special assessments, developers knew that they would gain from the expenditure. However, California's intense growth created the need for educational and recreational facilities, as well as public facilities and services, and special assessments could not legally cover such projects. Special assessments were designed to finance direct benefits for the developers, and assessments to cover educational and recreational facilities would only indirectly benefit new developments.

New and more flexible financing techniques had to be established.

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ity of Subdivision Control Exactions: The Quest for a Rationale, 52 CORNELL L.Q. 871, 873 (1967), in which the author believes the imposition of fees and dedications are the answer to connecting increased capital costs of new development to the rapid "pace of urbanization."

9. *See* Note, *supra* note 8, at 549-50.

10. Before Proposition 13, the tax rate was approximately 2.5% of the value of the property. *See* A. RABUSHKA & P. RYAN, *supra* note 7, at 10-11.

11. D. HAGMAN & D. MISCZYNSKI, WINDFALLS FOR WIPEOUTS 311 (1978). Special assessments were used to fund projects such as residential streets, sidewalks, curbs, sewers, and storm drains. *Id.*

The California Legislature took a giant step forward in adding the Subdivision Map Act,[12] following that with the enactment of the School Facilities Act.[13] Pursuant to the Subdivision Map and School Facilities Acts, municipalities could condition subdivision permits on the requirement that developers either dedicate land to the municipality or pay fees in lieu of dedications for projects such as school facilities,[14] parks,[15] streets,[16] and sewer facilities.[17] Municipalities could then acquire land immediately at prevailing costs, rather than at a later time when costs would be higher.[18] In-lieu fees applied to those situations when it was impractical for dedications.

Another method of funding which evolved from dedications and in-lieu fees is the impact fee. Impact fees have been defined as charges levied by local governments against new development to generate revenue for capital funding necessitated by that development.[19] The purpose of impact fees is therefore the same as the purpose of dedications and in-lieu fees. However, since the use of dedications and in-lieu fees had been restricted by application of the Subdivision Map Act and School Facilities Act, the range of impact fees that could be required of developers broadened.[20] Also, rezonings, zoning variances, special or conditional use permits, and building permits could also be made conditional on payment of impact fees.[21]

III. CONSTITUTIONAL CHALLENGES TO IMPACT FEES

Exactions and impact fees have been challenged by developers in

12. CAL. GOV'T CODE §§ 66410-66499.58 (West 1983 & Supp. 1986).

13. *Id.* § 65970-65981.

14. *Id.* § 65974 (city ordinance may require fees for interim classroom facilities where overcrowding exists).

15. *Id.* § 66479 (local ordinance may require real property within the subdivision to be reserved for parks, recreational facilities, fire stations, libraries, and other public uses).

16. *Id.* § 66475 (local ordinance may require dedication of real property within the subdivision for streets).

17. *Id.* § 66483 (local ordinance may require subdivider to provide for storm drains and local sewer facilities).

18. D. HAGMAN & D. MISCZYNSKI, *supra* note 11, at 344.

19. Juergensmeyer & Blake, *Impact Fees: An Answer to Local Governments' Capital Funding Dilemma*, 9 FLA. ST. U.L. REV. 415, 417 (1981). Note that impact fees are different than in-lieu fees because in-lieu fees are based on dedication requirements, while impact fees may extend beyond fees in lieu of dedications. *Id.* at 418-20.

20. *Id.*

21. D. HAGMAN & D. MISCZYNSKI, *supra* note 11, at 344. Impact fees can be applied to developments which are not land intensive, such as commercial developments and apartment developments, because such developments also cause a burden to the city. These types of developments sometimes escape the liabilities of dedications and in-lieu fees since they are not covered by subdivision regulations under the Subdivision Map Act. *See also* Associated Home Builders v. City of Walnut Creek, 4 Cal. 3d 633, 484 P.2d 606, 94 Cal. Rptr. 630, *appeal dismissed*, 404 U.S. 878 (1971) (plaintiff claimed unfair treatment because developers who developed on single parcels in Walnut Creek were not regulated by the Subdivision Map Act).

California courts on numerous occasions based on constitutional privileges.[22] The substance of these arguments has been that there is a "taking" of property for the benefit of the community without just compensation to the developer.

Taking claims are based on the fifth amendment of the United States Constitution, which guarantees that private property will not be taken for public use without payment of just compensation.[23] In 1977, the United States Supreme Court made a clear statement on "taking" law in *Penn Central Transportation Co. v. New York City.*[24] In that case, the Court admitted that it could not fashion any set formula to determine when justice and fairness require that economic injuries caused by a public action be compensated.[25] Instead, the court indicated that the merits of each case should be decided upon its own factual circumstances.[26]

In line with its ad hoc approach to the taking issues, the Court in *Penn Central* set forth factors to determine if there was a taking. In *Penn Central,* the New York Landmarks Preservation Commission designated Grand Central Terminal in New York City a "landmark," and designated the block where it was located a landmark site. Penn Central subsequently entered into a lease agreement with another corporation which was to construct a multi-story office building

22. *See* Associated Home Builders v. City of Walnut Creek, 4 Cal. 3d 633, 484 P.2d 606, 94 Cal. Rptr. 630, *appeal dismissed,* 404 U.S. 878 (1971) (leading case involving due process challenges). *See also* Ayres v. City Council of Los Angeles, 34 Cal. 2d 31, 207 P.2d 1 (1949); Grupe v. California Coastal Comm'n, 166 Cal. App. 3d 148, 212 Cal. Rptr. 578 (1985); Georgia-Pacific Corp. v. California Coastal Comm'n, 132 Cal. App. 3d 678, 183 Cal. Rptr. 395 (1982); Liberty v. California Coastal Comm'n, 113 Cal. App. 3d 491, 170 Cal. Rptr. 247 (1980); Selby Realty Co. v. City of San Buenaventura, 10 Cal. 3d 110, 514 P.2d 111, 109 Cal. Rptr. 799 (1973); Mid-Way Cabinet Fixture Mfg. v. County of San Joaquin, 257 Cal. App. 2d 181, 65 Cal. Rptr. 37 (1967).

23. The fifth amendment provides in pertinent part: "No person shall be . . . deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. Similarly, the California Constitution prohibits the state from taking private property without the payment of just compensation. CAL. CONST. art. I, § 19. *See also* Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy,* 71 CALIF. L. REV. 839, 901-02 (1983). "The root of a takings claim is that some public act has placed on an individual or group too high a proportion of some burden — a burden which all (or at least some larger portion of the community) should bear." *Id.* (footnote omitted).

24. 438 U.S. 104 (1977).

25. *Id.* at 124.

26. "[W]hether 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.' " *Id.* (quoting United States v. Central Eureka Mining Co., 357 U.S. 155, 168 (1958)).

above the terminal. The commission denied plans for a fifty-three story building and plans for a fifty-four story building. Penn Central filed suit in state court, claiming that the denial to allow construction violated the fifth and fourteenth amendments of the United States Constitution because it amounted to a taking of property without just compensation. The trial court's grant of relief was reversed by the New York Court of Appeals with a finding that Penn Central's property had not been taken.[27]

The Supreme Court set forth three factors to use in deciding if there is a taking. First, the economic impact of the regulation on the claimant, particularly the extent to which the regulation has interfered with investment-backed expectations should be considered.[28] Second, the character of the governmental action is relevant. "A 'taking' may more readily be found when the interference with property can be characterized as a physical invasion by government . . . than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good."[29] Finally, the Court recognized that "government actions that may be characterized as acquisitions of resources to permit or facilitate uniquely public functions have often been held to constitute 'takings.' "[30]

Interestingly enough, California courts have not often addressed the taking factors set forth in *Penn Central* when determining whether an exaction or impact fee amounts to an incursion of the fifth and fourteenth amendments requiring the payment of compensation or invalidation of the action.[31] Instead, California courts have generally emphasized justifications in denying constitutional challenges. These include the voluntariness, privilege, benefit, and police

27. 438 U.S. at 119-22.

28. *Id.* at 124. Any finding of a taking must necessarily be based upon the claim that the regulations result in a diminution of property value. However, most land use regulations have "the inevitable effect of reducing the value of regulated properties." Fisher v. City of Berkeley, 37 Cal. 3d 644, 686, 693 P.2d 261, 294, 209 Cal. Rptr. 682, 715 (1984). Even a significant diminution in value is insufficient to establish a confiscatory taking. Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

29. 438 U.S. at 124 (citation omitted).

30. *Id.* at 128.

31. Grupe v. California Coastal Comm'n, 166 Cal. App. 3d 148, 212 Cal. Rptr. 578 (1985), is the only California case discovered by this author that has referred to *Penn Central* in determining whether an exaction was a "taking." However, California courts have generally emphasized the "economic impact" test of *Penn Central* in determining whether a *zoning law* amounts to a "taking." *See* Agins v. City of Tiburon, 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979), *aff'd*, 447 U.S. 255 (1980); Furey v. City of Sacramento, 24 Cal. 3d 862, 598 P.2d 844, 157 Cal. Rptr. 684, *cert. denied*, 444 U.S. 976 (1979). Although the *Agins* and *Furey* courts concentrated on issues relating to whether a zoning law amounted to a taking, these cases are still relevant to exaction and impact fee cases because they show the California Supreme Court's reliance on the "economic impact" test in determining whether a "taking" has occurred. *Grupe*, 166 Cal. App. 3d at 175, 212 Cal. Rptr. at 595-96.

power justifications.[32]

The voluntariness justification is based on the fact that a developer is not forced to develop within a particular city. If he does not like the exaction and impact fee requirements of one municipality, he does not have to build his project there. If he disagrees with the requirements, yet adheres to them and goes ahead with his project, then he is voluntarily paying the charges[33] — the owner dedicates land or pays fees in return for the advantage of developing in that location.

The city's granting of the privilege to build or subdivide entitles that city to require payments or dedications to fund improvements required by the new development.[34] One case has recognized that the right to develop land is not a right at all but merely a privilege granted to developers. Therefore, the city may require an exaction or impact fee from the developer.[35]

Courts have granted significant support to the benefit justification based on the fact that it is the developer who seeks to acquire the advantages of development.[36] *Associated Home Builders v. City of Walnut Creek*[37] illustrates this position. In that case, the plaintiff attempted to obtain approval of a subdivision. The court reasoned that the land in question would be rendered more valuable by the fact of subdividing. In return for this benefit, the city could require plaintiff to dedicate a portion of his land or pay a fee.[38] In addition to the benefit to the developer, there is an increased burden on the community. It is then only fair that the city should be able to share in the windfall of the developer and apply the fee to costs incurred

32. Johnston, *supra* note 8, at 876.

33. *Id.* at 877. One commentator claims that the voluntariness of a developer to build in a particular city is strictly an economic analysis. Submission by the developer indicates his belief that "the projected subdivision will be sufficiently profitable to absorb the (losses). . . ." *Id.* at 881.

34. Juergensmeyer & Blake, *supra* note 19, at 427.

35. Trent Meredith, Inc. v. City of Oxnard, 114 Cal. App. 3d 317, 170 Cal. Rptr. 685 (1981). In that case, the right to develop was regarded as something the city could give or withhold. If the city chose to allow development, then the developer could be asked to compensate the city through exactions or impact fees for granting the privilege. The case is therefore a strong statement on the privilege theory in California.

36. *See* Associated Home Builders v. City of Walnut Creek, 4 Cal. 3d 633, 484 P.2d 606, 94 Cal. Rptr. 630, *appeal dismissed*, 404 U.S. 878 (1971); Ayres v. City Council of Los Angeles, 34 Cal. 2d 31, 207 P.2d 1 (1949).

37. 4 Cal. 3d 633, 484 P.2d 606, 94 Cal. Rptr. 630, *appeal dismissed*, 404 U.S. 878 (1971).

38. 4 Cal. 3d at 644, 484 P.2d at 615, 94 Cal. Rptr. 639.

by the new development.[39]

The most commonly used justification for exactions and impact fees is police power. Police power is not defined or referred to in the United States Constitution, but is implied as an attribute of state sovereignty.[40] The legislature of each state must use its own discretion in exercising its right of police power.[41] One of the most common subjects of police power regulations is the area of land development.[42] Within the context of issues relating to dedications, in-lieu fees, and impact fees, police power is defined "as the exercise of governmental power to limit, regulate, or prohibit personal and business activity and property uses without government compensation in order to protect the public health, safety, morality, and general welfare."[43] The proper exercise of that power is not a deprivation of property without due process of law.[44]

Limits on the use of police power are also not well-defined. *Berman v. Parker*[45] is the leading United States Supreme Court case which attempts to define the limitations of police power. According to the majority opinion: "An attempt to define its reach or trace its outer limits is fruitless, for each case must turn on its own facts. The definition is essentially the product of legislative determinations addressed to the purposes of government, purposes neither abstractly nor historically capable of complete definition."[46]

A California Supreme Court case has declared that police power is "capable of expansion to meet existing conditions of modern life . . . ."[47] However, police power is not absolute.

> The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation . . . . When this seemingly absolute protection is

39. *See* 2 P. ROHAN, *supra* note 2, § 9.02.

40. Johnston, *supra* note 8, at 887.

41. *Id. See also Trent Meredith*, 114 Cal. App. 3d at 325, 170 Cal. Rptr. at 689 (police power held to be an inherent reserved power of the state, and it is within the state's discretion to subject individual rights to reasonable regulations in the area of land use and development).

42. *Trent Meredith*, 114 Cal. App. 3d at 325, 170 Cal. Rptr. at 689. *See also* 5 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law* § 444 (8th ed. 1974 & Supp. 1984).

43. D. MCCARTHY, LOCAL GOVERNMENT LAW IN A NUTSHELL 104 (1975).

44. *See* Selby Realty Co. v. City of San Buenaventura, 10 Cal. 3d 110, 119, 514 P.2d 111, 117, 109 Cal. Rptr. 799, 805 (1973) (holding that city may take property without paying due compensation when it acts reasonably under its police power).

45. 348 U.S. 26 (1954).

46. *Id.* at 32.

47. Miller v. Board of Public Works, 195 Cal. 477, 485, 234 P. 381, 383 (1925). *See also* 16 AM. JUR. 2D *Constitutional Law* § 296 (1964), which states that local governments should not be put into a "straight jacket" by due process concerns, and that the police power should be flexible to adapt to continuous changes in social and economic conditions; Johnston, *supra* note 8, at 886 (police power is expansible to meet emerging public needs).

> found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States.[48]

Police power can be delegated to political subdivisions of the state.[49] The authorization for municipalities to exercise exaction and impact fee power is derived from certain California statutes and the California Constitution. California statutes explicitly detail municipal authority to obtain dedications and in-lieu fees in two sections. The Subdivision Map Act[50] allows municipalities to require dedications and in-lieu fees from developers as conditions for final approval of their subdivision maps. This act can be applied for many purposes, including dedications of park lands,[51] corridors for streets,[52] sewer facilities for local or neighborhood areas,[53] and public access to natural resources.[54] The School Facilities Act authorizes dedications and in-lieu fees for temporary school facilities.[55]

In general terms, the California Constitution confers broad powers to the municipality. Article XI, section 7 authorizes each city and county to "make and enforce within its limits all local . . . ordinances and regulations not in conflict with general laws."[56] Article XI, section 5 allows charters to provide that cities may "make and enforce all ordinances and regulations in respect to municipal affairs, subject only to restrictions and limitations provided in their several charters and in respect to other matters they shall be subject to general laws."[57] These provisions may be used to justify dedications, in-lieu fees, and more importantly, impact fees.

These statutory and constitutional provisions "enable" municipalities to obtain certain exactions and impact fees from developers. In this respect, they may be referred to as enabling constitutional provisions and statutes.[58]

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48. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).
49. *See* Johnston, *supra* note 8, at 887.
50. CAL. GOV'T CODE § 66410-66499.58 (West 1983 & Supp. 1986).
51. *Id.* § 66477.
52. *Id.* § 66475.
53. *Id.* § 66483.
54. *Id.* §§ 66478.1-66478.14.
55. *Id.* §§ 65970-65981.
56. CAL. CONST. art. XI, § 7.
57. CAL. CONST. art. XI, § 5.
58. The principal sources of power for local control are state statutes and constitutional provisions delegating the state's power to local governments. These so-called enabling acts authorize local governments to regulate, and the power to impose

IV. IS THERE A VALID EXERCISE OF POLICE POWER?

State acts enabling municipalities to impose exactions and impact fees are rarely challenged as unconstitutional exercises of the police powers of the state. Most of the legal battles focus on the municipal ordinances which are based on the enabling acts.[59] In determining whether a municipal ordinance is a valid exercise of police power, the courts usually employ two requirements: (1) there must be a permissible government objective behind the ordinance; and (2) the ordinance must be reasonable.[60]

The first test is that the exaction or impact fee must be imposed to achieve a valid governmental goal. This is a substantive due process concern.[61] The California Supreme Court has expressly held that there is no violation of substantive due process if the regulation of the use of real property reasonably relates to a legitimate government purpose.[62] Indeed, there is almost always a permissible objective behind a municipal ordinance which incorporates an exaction or impact fee.[63]

The most common criticism of municipal ordinances is that they are unreasonable and, thus, unconstitutional exercises of the state's police power.[64] Courts of the United States have approached the question of reasonableness in several ways. Although police power allows a city to protect the health, safety, and morals of a city,[65] police power certainly is not unlimited.[66] The courts of Illinois used this rationale in setting forth a reasonable test. In *Pioneer Trust and Savings Bank v. Village of Mount Prospect*,[67] the Supreme Court of Illinois placed an almost insurmountable burden on local governments seeking money payments or dedications of land for extra-de-

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conditions may be either express or implied. *See* 2 CAL. JUR. 3D *Administrative Law* § 74 (1973).

59. *See* Note, *supra* note 8, at 555.

60. D. HAGMAN & D. MISCZYNSKI, *supra* note 11, at 348. *See also* Heyman & Gilhool, *The Constitutionality of Imposing Increased Community Costs on New Suburban Residents Through Subdivision Exactions*, 73 YALE L.J. 1119, 1122 (1964); Billings Properties, Inc. v. Yellowstone County, 144 Mont. 25, 394 P.2d 182 (1964) (despite explicit enabling statute, the court still had to tackle the constitutional issue of reasonableness of the exercise of police power in the particular situation).

61. *See* 13 CAL. JUR. 3D *Constitutional Law* § 364 (1974). The law must not be unreasonable, arbitrary, or capricious, but must have a real and substantial relation to the object sought to be obtained. *Id.*

62. Agricultural Labor Relations Bd. v. Superior Court, 16 Cal. 3d 392, 409-10, 546 P.2d 687, 698-99, 128 Cal. Rptr. 183, 194-95 (1976); Hernandez v. Department of Motor Vehicles, 30 Cal. 3d 70, 78, 634 P.2d 917, 921, 177 Cal. Rptr. 566, 570 (1981).

63. *See* 2 P. ROHAN, *supra* note 2, § 9.01[2]. "The type of exactions required of land developers obviously furthers the public good." *Id.*

64. Note, *supra* note 8, at 561.

65. Euclid v. Ambler Realty Co., 272 U.S. 365, 395 (1926); *see also* 13 CAL. JUR. 3D *Constitutional Law* § 117 (1973).

66. *See supra* note 48 and accompanying text.

67. 22 Ill. 2d 375, 176 N.E.2d 799 (1961).

velopment costs.[68] In that case, a land dedication was held invalid because it was not directly related to the costs generated by the subdivision.[69] The court made a finding of fact that school facilities in the village where the development was to be located were near capacity because of the existing size of the schools.

With these facts in mind, the court recognized that the overcrowding was not caused exclusively by the new development, and hence the municipality could not legally exact land from the developer for school facilities.[70] The court held that the only time a developer could be required to dedicate land or make a payment was when the increased costs of the city were "specifically and uniquely attributable" to the new development.[71]

Another strict test was set forth in New York in the case of *Gulest Associates, Inc. v. Town of Newburgh.*[72] The court was concerned that there was no guarantee under present standards that exactions obtained from the developer would be applied to the direct benefit of the development itself. Hence, the court held that exactions were prohibited unless it could be shown that the exactions would directly benefit the development to which they were related.[73] Subsequently, however, the New York court in *Jenad, Inc. v. Village of Scarsdale* specifically held that the ruling in *Gulest* was incorrect.[74] The court instead focused on the *need* for certain public goods created by a development, and not on the necessity of a direct benefit flowing from an exaction.[75]

Although *Gulest* was overruled, *Pioneer* is still valid law in Illinois. However, other states have followed a standard more relaxed than the *Pioneer* ruling. The most widely-used test is the "rational nexus" test, which requires a developer to assume costs which have a "rational nexus to the needs created by, and benefits conferred upon, the subdivision."[76] One commentator has declared that the rational

68. Juergensmeyer & Blake, *supra* note 19, at 427-29.

69. *Pioneer*, 22 Ill. 2d at 381, 176 N.E.2d at 802; *see also* Heyman & Gilhool, *supra* note 60, at 1135.

70. *Pioneer*, 22 Ill. 2d at 381-82, 176 N.E.2d at 802.

71. *Id.* at 379, 176 N.E.2d at 801 (following Rosen v. Village of Downers Grove, 19 Ill. 2d 448, 167 N.E.2d 230 (1960)).

72. 25 Misc. 2d 1004, 209 N.Y.S.2d 729 (1960), *aff'd*, 15 A.D.2d 815, 225 N.Y.S.2d 538 (1962), *overruled*, Jenad v. Scarsdale, 18 N.Y.2d 78, 218 N.E.2d 673, 271 N.Y.S.2d 955 (1966).

73. 25 Misc. 2d at 1007, 209 N.Y.S.2d at 732-33.

74. 18 N.Y.2d 78, 84, 218 N.E.2d 673, 676, 271 N.Y.S.2d 955, 957 (1966).

75. *Id.* at 84, 218 N.E.2d at 676, 271 N.Y.S.2d at 958.

76. Longridge Builders, Inc. v. Planning Bd. of Princeton Township, 52 N.J. 348,

nexus test is "similar to the specifically and uniquely attributable test [set forth in *Pioneer*] in its two-pronged examination of needs and benefits,"[77] but that it is different in "the degree of evidence required to validate the police power exercise — the rational nexus test increases the presumption of validity."[78] However, another commentator has claimed that the municipality's burden of establishing a rational nexus between its exactions and the needs attributable to the development is a "substantial one."[79]

In an attempt to exclude subjective review from standards used to evaluate the reasonableness of municipal ordinances, the Utah Supreme Court in *Banberry Development Corp. v. South Jordan City*[80] set forth a more objective standard. The court suggested that to properly measure a developer's share of increased community costs, "a municipality should determine the relative burdens previously borne and yet to be borne by those properties in comparison with the other properties in the municipality as a whole."[81] It decided that several factors could be used to judge costs borne by the new development.[82] According to at least one commentator, the standards set forth in this case should lead to increased cooperation between developers and city officials and therefore less litigation.[83]

California courts have developed a different approach. In 1949, the California Supreme Court in *Ayres v. City Council of Los Angeles*[84]

350, 245 A.2d 336, 337 (1968). *See also* Brazer v. Borough of Mountainside, 55 N.J. 456, 465-66, 262 A.2d 857, 862 (1970); Jordan v. Village of Menomonee Falls, 28 Wis. 2d 608, 137 N.W.2d 442, *appeal dismissed*, 385 U.S. 4 (1966); Juergensmeyer & Blake, *supra* note 19, at 433 (the rational nexus test "properly focuses on and balances the legitimate interests of the developer and the general welfare concerns and power of the municipality"); Pavelko, *Subdivision Exactions: A Review of Judicial Standards*, 25 WASH. U.J. URB. & CONTEMP. L. 269, 287 (1983).

77. Pavelko, *supra* note 76, at 287.

78. *Id.*

79. Johnston, *supra* note 8, at 924.

80. 631 P.2d 899 (Utah 1981).

81. *Id.* at 903.

82. *Id.* at 904. The factors were listed as follows:

> (1) the cost of existing capital facilities; (2) the manner of financing existing capital facilities . . .; (3) the relative extent to which the newly developed properties and the other properties in the municipality have already contributed to the cost of existing capital facilities . . .; (4) the relative extent to which the newly developed properties and the other properties in the municipality will contribute to the cost of existing capital facilities in the future; (5) the extent to which the newly developed properties are entitled to a credit because the municipality is requiring their developers or owners . . . to provide common facilities . . . that have been provided by the municipality and financed through general taxation or other means . . . in other parts of the municipality; (6) extraordinary costs, if any, in servicing the newly developed properties; and (7) the time-price differential inherent in fair comparisons of amounts paid at different times.

Id.

83. *See* Note, *supra* note 8, at 550.

84. 34 Cal. 2d 31, 207 P.2d 1 (1949).

set the stage for a reasonableness standard in the state. Plaintiff intended to subdivide a thirteen acre tract, but the City of Los Angeles imposed four conditions as prerequisites for the approval of the subdivision. These conditions involved the dedication of land for expanding a roadway and for planting trees. According to the plaintiff, the benefit to the subdivision would be relatively small compared to the beneficial return to the city.[85] Hence, the plaintiff argued, the conditions were unreasonable. Based on several principles, the court dispensed with the reasonableness claim, emphasizing that (1) at least some of the need for the dedications was attributable to the plaintiff's proposed subdivision;[86] and (2) the dedications required by the city had *economically* benefited the subdivision — the fact that the dedications would incidentally benefit the city as a whole had no relevancy and was therefore no defense.[87] The court placed greater weight on the *need* caused by the development than on the *benefit* to the development as a result of the dedication.

The *Ayres* decision was not limited to its particular facts and hence it was followed by other California cases that have validated and invalidated dedications and fees pursuant to the *Ayres* test.[88] The significance of *Ayres,* however, was that it set a foundation for the court's decision in *Associated Home Builders v. City of Walnut Creek.*[89] In that case, plaintiff challenged the constitutionality of a Subdivision Map Act statute which required dedication of land for parks and recreation, and the ordinance that followed it.[90]

The principal contentions of the plaintiff in *Associated Home Builders* were that there was not a direct relationship between the

85. *Id.* at 39-40, 207 P.2d at 6.

86. *Id.* at 38-39, 207 P.2d at 5-6.

87. *Id.* at 40-41, 207 P.2d at 6-7.

88. *See* Bringle v. Board of Supervisors, 54 Cal. 2d 86, 351 P.2d 765, 4 Cal. Rptr. 493 (1960) (California Supreme Court cited *Ayres* and upheld a dedication of an easement for widening of a street because of a reasonable relationship between increased traffic needs and the dedication); Mid-Way Cabinet Fixture Mfg. v. County of San Joaquin, 257 Cal. App. 2d 181, 65 Cal. Rptr. 37 (1967) (court of appeal held that dedication of land for a road was improper because such dedication had no real relationship to the needs created by the expansion of a building); Kelber v. City of Upland, 155 Cal. App. 2d 631, 318 P.2d 561 (1957) (court of appeal ruled that fees for park and school site fund and for subdivision drainage fund were not related to the needs created by the new subdivision).

89. 4 Cal. 3d 633, 484 P.2d 606, 94 Cal. Rptr. 630, *appeal dismissed,* 404 U.S. 878 (1971).

90. At the time the case was before the court, the Subdivision Map Act statute in question was found in CAL. BUS. & PROF. CODE § 11546 (West 1964). It is now located in CAL. GOV'T CODE § 66477 (West Supp. 1986).

new development and the increased needs of the community, and the contribution to the city would not directly benefit the new development. In response, the court admitted that the new development was not the sole cause of decreasing open space and the city would also incidentally benefit from the exaction. However, the court noted that to accomplish the objectives mentioned by plaintiffs would be virtually impossible. The court ruled that (1) there need not be a direct relationship between a particular development and the increase in community needs,[91] and (2) if the land or fees exacted by the municipality bears a reasonable relationship to the use of the facilities by the future inhabitants of the subdivision or development, the requirement is deemed valid.[92] The court therefore held that the particular dedication required of plaintiff for subdivision approval was reasonable under the circumstances.

In determining the reasonableness of the statute and ordinance in *Associated Home Builders,* the court placed tremendous value on the public interest in having open spaces in and around the municipality. The court also looked at the individual interests of the subdivider, but these interests did not outweigh the public interest. There seemed to be a type of balancing test based on the facts of the case.

According to the *Associated Home Builders* court, only an indirect benefit affecting the new development need be shown and increased needs of the community only have to be reasonably related to the new development in order for an exaction to be deemed valid. These rulings left an open-ended test for the courts to use in determining the reasonableness of certain dedications and fees.[93]

In *Liberty v. California Coastal Commission,*[94] the California appellate court introduced a limiting factor to the open-ended test of *Associated Home Builders.* In *Liberty,* the plaintiff planned to develop a restaurant near the beach and was required to provide free public parking to alleviate parking problems in the area. Plaintiff

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91. 4 Cal. 3d at 639-40, 484 P.2d at 611, 94 Cal. Rptr. at 635.

92. *Id.* at 640, 484 P.2d at 612, 94 Cal. Rptr. at 636. In this part of the holding, the court cited sections 11546(c) and (e) of the Business and Professions Code. The court added the following: "Whether or not such a direct connection is required by constitutional considerations, section 11546 provides the nexus which concerns Associated." *Id.* Consider the following analysis of a commentator: "If the benefit nexus, as that term is used by the *Associated* court, is not constitutionally required for a valid exercise of the police power, perhaps the court is presaging the possible abandonment of any benefit test in the future." Note, *Taking Without Compensation Through Compulsory Dedication — New Horizons for California Land Use Law,* 5 LOY. L.A.L. REV. 218, 236 (1972).

93. Under this test, few municipal ordinances have been found to be unreasonable simply because most new developments increase needs of the community surrounding them, and most fee and dedication payments benefit the development at least incidentally.

94. 113 Cal. App. 3d 491, 170 Cal. Rptr. 247 (1980).

contended that the problem of parking was a need the restaurant would not create and the benefit to plaintiff of providing such free parking would be nonexistent. The court held the following:

> Where the conditions imposed are not related to the use being made of the property but are imposed because the entity conceives a means of shifting the burden of providing the cost of a public benefit to another not responsible for or only remotely or speculatively benefiting from it, there is an unreasonable exercise of police power.[95]

The "needs" and "benefits" tests have remained prevalent in California decisions relating to exactions and impact fees. However, in line with *Associated Home Builders*, the courts have placed particular emphasis on the "needs" to which a particular development contributes. A good example of this approach is *Trent Meredith, Inc. v. City of Oxnard*.[96] The City of Oxnard required an exaction from plaintiff developer as a prerequisite to the development of residential property. In discussing the reasonableness of the exaction, the court commented that the fee or dedication need only "bear a reasonable relationship to the need for parks or school facilities generated by the new development."[97] The court also recognized that the exaction would benefit the lot owners of the development, but did not consider this benefit in its analysis.[98]

In applying the needs and benefits tests, courts may look to the particular ordinance in question. In *Building Industry Association of Southern California v. City of Oxnard*,[99] the court of appeal invalidated an ordinance because it did not indicate what needs a new development might create and what benefits a development might recover from a fee. Plaintiff objected to a growth requirement capital fee applicable to the new development. The court recognized the police power of the city, but went on to question the validity of the city's exercise of that police power. The court stated that "fairness"[100] is the determining factor in deciding if there is a valid exer-

95. *Id.* at 502, 170 Cal. Rptr. at 254 (citing *Mid-Way Cabinet*, 257 Cal. App. 2d at 191-92, 65 Cal. Rptr. at 44).

96. 114 Cal. App. 3d 317, 170 Cal. Rptr. 685 (1981).

97. *Id.* at 327, 170 Cal. Rptr. at 690 (footnote omitted).

98. *Id.* at 328, 170 Cal. Rptr. at 691.

99. 150 Cal. App. 3d 535, 198 Cal. Rptr. 63 (1984), *vacated*, 40 Cal. 3d 1, 706 P.2d 285, 218 Cal. Rptr. 672 (1985).

100. "A decision is fair if it is in basic accord with the community's sense of justice." Berger, *A Policy Analysis of the Taking Problem*, 49 N.Y.U. L. REV. 165, 167 (1974). Fairness may be interchangeable with reasonableness in analyzing the legitimacy of exactions and impact fees.

cise of police power.[101]

The court closely scrutinized two clauses in the Oxnard ordinance. It first questioned the 2.8% growth capital requirement fee charged "any new development." "It is unfair to impose the same percentage of the cost of construction of new development on *all* projects without taking into consideration the relative impact each new project has upon the need for additional public facilities."[102] This pointed out the importance of calculating the need a specific development might create.[103] Second, the wording relating to "general purpose capital needs" was also troublesome because the funds could have been applied to the benefit of the whole community.

The court concluded that the ordinance was unfair for two reasons: (1) there was no reasonable relationship between the fee and the needs created by the development, and (2) the fee was only for general revenue capital needs benefiting the community as a whole rather than for needs caused by a particular development.[104]

The *Building Industry Association* case was a rare victory for developers around the state, but it was a limited one. According to the court, the vagueness of the ordinance was a problem. Subsequent to the decision of the court of appeal, the California Supreme Court granted a hearing to the City of Oxnard. However, the City of Oxnard changed the wording of its ordinance; the court, in a brief unsigned opinion, stated that it would not rule on the validity of the ordinance because it had been changed.[105]

The California Court of Appeal decided *Grupe v. California Coastal Commission*[106] in 1985, making uncertain the test for the validity of fees and dedications. *Grupe* concerned the validity of a condition imposed upon the granting of a coastal development permit issued by the California Coastal Commission. Plaintiff purchased a lot consisting of 15,250 square feet of land in Santa Cruz next to the ocean where he planned to build a home. The California Coastal Commission conditioned the building permit on the dedication of between 8,000 to 10,000 square feet of land for public access to the beach for twenty-one years. Plaintiff contended that such a requirement was an invalid exaction.

Apparently basing his argument on California precedent, the plain-

101. 150 Cal. App. 3d at 541, 198 Cal. Rptr. at 65 (citing *Mid-Way Cabinet*, 257 Cal. App. 2d at 192, 65 Cal. Rptr. at 44).

102. 150 Cal. App. 3d at 541, 198 Cal. Rptr. at 66 (emphasis added).

103. For instance, an industrial or commercial development is not going to result in the same needs as a residential development; commercial development will not directly cause overcrowding of schools as will the typical large residential development.

104. 150 Cal. App. 3d at 541, 198 Cal. Rptr. at 66.

105. 40 Cal. 3d 1, 706 P.2d 285, 218 Cal. Rptr. 672 (1985).

106. 166 Cal. App. 3d 148, 212 Cal. Rptr. 578 (1985).

tiff asserted that a particular exaction is valid only if it (1) is related to a need to which the development contributes, and (2) either directly or indirectly benefits the development.[107] The first prong of the test was clearly met. Grupe's project, according to the court, contributed to a need:

> Although respondent's home alone has not created the need for access to the tidelands fronting his property, it is one small project among a myriad of others which together do severely limit public access to the tidelands and beaches of this state, and therefore collectively create a need for public access.[108]

As for the second prong of the test, it was not clear whether the dedication would either directly or indirectly benefit the Grupes' planned house construction. The state maintained that there was no requirement that the exaction either directly or indirectly benefit the development for it to be valid. The court agreed with this argument because the court in *Associated Home Builders* never firmly decided whether there had to be a nexus between the benefit to the development and the exaction.[109] The court also noted that the benefit/nexus question was instead answered in *Sea Ranch Association v. California Coastal Commission*[110] and *Georgia-Pacific Corp. v. California Coastal Commission*,[111] at least with respect to beach access dedications. In each of these cases, the court had approved beach access dedication conditions without requiring that any benefit be conferred upon the conditioned development.[112] In line with the court's reading of *Associated Home Builders, Sea Ranch,* and *Georgia-Pacific,* it concluded that there need only be an indirect relationship between a proposed exaction and a need to which the development contributes, and that the exaction does not have to benefit the development at all.[113]

The court in *Grupe* appeared to limit its holding to beach access

107. *Id.* at 163-64, 212 Cal. Rptr. at 587.

108. *Id.* at 167, 212 Cal. Rptr. at 589-90 (citing Remmenga v. California Coastal Comm'n, 163 Cal. App. 3d 623, 630, 209 Cal. Rptr. 628, 632 (1985)).

109. 166 Cal. App. 3d at 165, 212 Cal. Rptr. at 588.

110. 527 F. Supp. 390 (N.D. Cal.), *vacated,* 454 U.S. 1070 (1981) (involving a challenge to public access conditions required for the approval of 32 building permits).

111. 132 Cal. App. 3d 678, 183 Cal. Rptr. 395 (1982) (public access easements required as a condition of expansion and improvement of a Georgia-Pacific industrial facility).

112. *Grupe,* 166 Cal. App. 3d at 165, 212 Cal. Rptr. at 588. "The fact that the development has no direct nexus to the condition, that the benefit to the public is greater than to the developer, or that future needs are taken into consideration, does not destroy the validity of the condition." *Id.* (quoting *Sea Ranch,* 527 F. Supp. at 395) (emphasis omitted).

113. *Grupe,* 166 Cal. App. 3d at 166, 212 Cal. Rptr. at 589.

dedications. How the case will affect other fee and dedication controversies is uncertain. If *Grupe* is applied to other situations, there will be a new level upon which cities may step in drafting ordinances. One major contention of plaintiffs in the past has been that the required dedications and fees do not apply to their developments, but rather to the community at large. This contention may be entirely wiped out by *Grupe*. *Grupe* will probably be applied only to beach access dedication, and the California courts will most likely continue to use the traditional needs and benefit tests in other types of fees and dedications cases.

V. EXACTIONS AND IMPACT FEES AS REGULATIONS OR TAXATION

Dedications, in-lieu, and impact fees have generally been tagged as regulations. It is not difficult to label dedications and in-lieu fees as regulations in California because the legislature has provided for specific exactions in the Subdivision Map Act and School Facilities Act[114] which are regulatory by nature. However, if the dedications or in-lieu fees are beyond the enabling legislation, they are considered taxes.

Impact fees, which reach beyond the enabling legislation, are a little more difficult to label. Because impact fees are functionally similar to dedications and other land use planning and growth management tools, the regulation tag seems appropriate.[115] If construed as regulations, they are usually justified by the police power in line with constitutional provisions.

However, at times it seems that the tax label is more appropriate for certain impact fees. It is a tough line to draw in setting the two apart. What exactly is a tax? In its broadest sense, a tax is a compulsory exaction imposed by the legislature upon persons or property for the purpose of raising revenue to fund a government endeavor.[116] In narrower contexts, the definition of the word does not include charges to particular individuals which do not exceed the value of the governmental benefit conferred upon or the service rendered to the individuals.[117]

Another effort at a definition may be helpful. A tax probably only includes charges imposed for the purposes of raising revenue for a general fund. Hence, taxes can be distinguished from charges im-

114. *See supra* notes 12-18 and accompanying text.

115. Juergensmeyer & Blake, *supra* note 19, at 422.

116. *See* Westfield-Palos Verdes Co. v. City of Rancho Palos Verdes, 73 Cal. App. 3d 486, 495-96, 141 Cal. Rptr. 36, 42-43 (1977); Associated Home Builders at Greater East Bay, Inc. v. City of Newark, 18 Cal. App. 3d 107, 109-11, 95 Cal. Rptr. 648, 648-50 (1971); City of Madera v. Black, 181 Cal. 306, 310-11, 184 P. 397, 400 (1919).

117. *See* County of Fresno v. Malmstrom, 94 Cal. App. 3d 974, 984, 156 Cal. Rptr. 777, 783 (1979).

posed for purposes of regulation in the exercise of the police power.[118]

There are, in fact, several rationales for classifying impact fees as taxes. One is that impact fees are a positive exaction of funds, as are taxes.[119] Another is that impact fees are sometimes imposed to generate revenue for general purpose needs of a municipality, and taxes are likewise used to generate revenue for a general fund.[120]

Regulations have limits as to how they may be applied. The general rule in California is that a regulatory fee must not "exceed the sum reasonably necessary to cover the costs of the regulatory purpose sought . . . ."[121] Other states limit taxes as well, and where taxes are imposed on a developer that exceed the costs generated by a new development, constitutional problems arise. In most other states, the rule is that cities should not be able to exact taxes from developers which exceed the costs generated by the new developments.[122] In California, on the other hand, a tax need not be related to the benefits received (i.e., classes of businesses or activities may be taxed and the money used for unrelated public purposes which do not benefit those taxpayers).[123] Therefore, taxes may be used in California to collect revenue for general purposes.

If an ordinance is declared to be tax-like because of its general revenue-raising purposes, then it follows that the "tax" must be authorized to be considered valid under California tax law. Local governments in the past relied upon constitutional privileges under article XI, section 7, and article XI, section 5 of the California Constitution, which delegate police powers as the fundamental grant of authority to tax.[124] However, article XIIIA, section 4 of the California Constitution (hereinafter "section 4") was enacted June 6, 1978, and

118. John Rapp & Son v. Kiel, 159 Cal. 702, 706-07, 115 P. 651, 653 (1911).

119. Juergensmeyer & Blake, *supra* note 19, at 424.

120. Consider the following argument: impact fees and exactions are not imposed for the public health, safety, or welfare. Rather, they "are efforts by the community to shift the financial burden of providing necessary public improvements in [and around] new subdivisions [and other developments]. This is a tax problem, and it ought to be treated accordingly." Note, *Subdivision Exactions: Where is the Limit?*, 42 NOTRE DAME LAW. 400, 404 (1967).

121. Mills v. County of Trinity, 108 Cal. App. 3d 656, 661, 166 Cal. Rptr. 674, 677 (1980) (quoting United Business Comm'n v. City of San Diego, 91 Cal. App. 3d 156, 165, 154 Cal. Rptr. 263, 269 (1979)).

122. D. HAGMAN & D. MISCZYNSKI, *supra* note 11, at 368.

123. *See* 5 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Taxation* § 1 (8th ed. 1974).

124. Naurnan, *Local Government Taxing Authority Under Proposition 13*, 10 SW. U.L. REV. 795, 798-99 (1978).

provides the following: "Cities, counties and special districts, by a two-thirds vote of the qualified electors of such district, may impose special taxes on such district, except ad valorem taxes on real property . . . within such City, County or special district."[125]

Although it can be argued that section 4 provides cities, counties, and special districts with a new taxing authority, the framers of the constitution really intended to restrict the imposition of certain taxes.[126] As noted by the California Supreme Court, section 4 restricts the imposition of special taxes by mandating a two-thirds voter approval requirement.[127]

If a court finds that an ordinance requiring a fee or dedication is not a regulation, but really a tax because of the ordinance's general revenue-raising purposes, and that the ordinance was enacted before June 6, 1978, the ordinance will not come under section 4 scrutiny. However, if the ordinance is found to be a tax, and it was approved after June 6, 1978, then the limitations of section 4 apply.

Section 4 requires two-thirds voter approval of the county's qualified voters for imposition of a "special tax."[128] If an ordinance is declared a tax, and the ordinance was enacted after June 6, 1978, the issue becomes whether the tax is a "special tax" and therefore whether it is subject to section 4 limitations. The *Building Industry Association*[129] court summarily dismissed this question by declaring that a fee authorized by an ordinance was a tax. It assumed then, without discussion, that the tax was a special tax under section 4: "Our conclusion that the ordinance as written does not create a valid regulatory fee requires a finding it is a tax. Such a tax is void because it . . . has not been approved by a two-thirds vote of the electorate of the city."[130]

Others in the legal profession have not disposed of the issue so easily because the term "special tax" has no established or well-defined meaning. The California Attorney General has approached the issue several times amidst different factual circumstances. An attorney general opinion dated May 18, 1979, held that fees imposed under Government Code section 65974 (School Facilities Fees) constituted

125. CAL. CONST. art. XIIIA, § 4.

126. Nauman, *supra* note 124, at 802 (section 4 supplements the implied grant of power under statutes delegating taxing authority to the municipalities). *See also* Hagman, *Born Again Special Assessments and the Landowner or Developer as Community Financier*, 5 REAL PROP. L. REP. 89, 91 (1982).

127. Amador Valley Joint Union High School Dist. v. State Bd. of Equalization, 22 Cal. 3d 208, 227, 583 P.2d 1281, 1288, 149 Cal. Rptr. 239, 246 (1978) ("The requirement of section 4 that any 'special taxes' must be approved by a two-thirds vote . . . restricts but does not abolish the power of local governments in the raising of revenue.").

128. CAL. CONST. art. XIIIA, § 4.

129. 150 Cal. App. 3d at 541, 198 Cal. Rptr. at 66.

130. *Id.*

special taxes within the meaning of article XIIIA of the California Constitution.[131] The opinion referred to a "tax" as a compulsory exaction imposed by use of legislative power upon several persons or property to fund a government endeavor.[132] The opinion then concluded that the fees in question were taxes.[133] The issue then became whether the fees were "special taxes." In a brief statement, the Attorney General considered the tax a "special tax" because the "framers would support a broad concept of 'special' taxes covering all local taxes levied, other than property taxes, to support local programs."[134]

On November 1, 1979, the Attorney General handed down another opinion on an issue relating to the definition of "special taxes."[135] The question presented was whether "[a]n in-lieu fee imposed by a county as a condition for issuing a building permit for the purpose of providing housing for low and moderate income persons is a 'special tax.' "[136] After recognizing that taxes have more revenue-raising characteristics than regulatory or compensatory characteristics, the Attorney General declared that the fees in question were for the primary purpose of raising revenue and therefore were a tax.[137] The Attorney General went on to claim that "special taxes," as referred to in section 4, means any new or increased exaction for revenue purposes[138] and thus were a "special tax" within the meaning of section 4.[139]

California courts have been reluctant to apply a special tax label to tax-like ordinances. In *J.W. Jones Co. v. City of San Diego*,[140] the supreme court examined the question of whether an impact fee was a special tax under article XIIIA, section 4.[141] Plaintiffs J.W. Jones Companies and partners were developers and landowners in North

131. 62 Op. Cal. Att'y Gen. 254 (1979).
132. *Id.* at 256. *See supra* note 116 for cases that the attorney general used in defining what constitutes a "tax."
133. 62 Op. Cal. Att'y Gen. at 257.
134. *Id.* (citing DEPARTMENT OF STATE, STATE OF CAL., CALIFORNIA VOTERS PAMPHLET 58 (June 6, 1978)). *See also Amador Valley*, 22 Cal. 3d at 226, 583 P.2d at 1288, 149 Cal. Rptr. at 246; Nauman, *supra* note 124, at 824 ("It would appear . . . that the most likely . . . option for the courts in defining 'special taxes' is one that embraces 'all taxes other than property taxes' ").
135. 62 Op. Cal. Att'y Gen. 673 (1979).
136. *Id.* at 673.
137. *Id.* at 677-79.
138. *Id.* at 686.
139. *Id.* at 687.
140. 157 Cal. App. 3d 745, 203 Cal. Rptr. 580 (1984).
141. *Id.* at 747-48, 203 Cal. Rptr. at 582. In this case, an impact fee was under con-

University City, an area affiliated with San Diego. San Diego had formulated a resolution imposing a facilities benefit assessment ("FBA") on undeveloped property in North University City, to be used to improve streets and parks in that city.[142]

Plaintiffs claimed that the FBA fees were a special tax under section 4, and thus void because there was not a two-thirds majority of the electorate approving the tax. In deciding the issue, the court concluded that a special assessment is a charge to real property to pay for benefits that property has received from a local improvement,[143] and that the FBA fee was within that definition.[144] Furthermore, the court recognized that the special assessment was included in the state's police power.[145] The court also recognized that a special tax as used in section 4 does not mean "special assessment," but rather taxes levied for a specific purpose.[146] Therefore, the court concluded that the FBA fee was a special assessment and therefore not a special tax subject to section 4.[147] Hence, voter approval of the fees in question was not required.

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sideration, and not a dedication or fee relating to a statute (i.e., a statute included within the Subdivision Map Act).

142. *Id.* at 750, 203 Cal. Rptr. at 583.

143. *Id.* at 754, 203 Cal. Rptr. at 586 (citing County of Fresno v. Malmstrom, 94 Cal. App. 3d 974, 983-84, 156 Cal. Rptr. 777, 782-83 (1979)). Once the assessment results in revenue above the cost of the improvement or is of general public benefit, it is no longer a special assessment — it is a tax. *See also* City of Los Angeles v. Offner, 55 Cal. 2d 103, 108-09, 358 P.2d 926, 929-30, 10 Cal. Rptr. 470, 473-74 (1961); Hagman, *Landowner-Developer Provision of Communal Goods Through Benefit-Based and Harm Avoidance "Payments" (BHAPS)*, 5 ZONING & PLAN. L. REP. 17, 19 (1982) (special assessments are tax-like).

144. 157 Cal. App. 3d at 758, 203 Cal. Rptr. at 589.

145. *Id.* (citing Trent Meredith, Inc., v. City of Oxnard, 114 Cal. App. 3d 317, 170 Cal. Rptr. 685 (1981) and Solvang Mun. Improvement Dist. v. Board of Supervisors, 112 Cal. App. 3d 545, 553, 169 Cal. Rptr. 391, 395-96 (1980)).

146. 157 Cal. App. 3d at 754, 203 Cal. Rptr. at 586 (citing City Council of San Jose v. South, 146 Cal. App. 3d 320, 332, 194 Cal. Rptr. 110, 118 (1983)). *See also* Mills v. County of Trinity, 108 Cal. App. 3d 656, 662, 166 Cal. Rptr. 674, 678 (1980), where the court stated that the special tax referred to in section 4 of article XIIIA excludes "special assessments charged for improvements to individual properties which do not exceed the benefits the assessed properties receive from the improvement." *Contra* Nauman, *supra* note 124, at 820 (concluding that the voting public probably intended to include special assessments within the meaning of "special tax").

147. 157 Cal. App. 3d at 758, 203 Cal. Rptr. at 589. The attorney general has also introduced an opinion incorporating the same special assessment exception incorporated in *J.W. Jones.* 62 Op. Cal. Att'y Gen. 663 (1979). The opinion involved fees imposed pursuant to CAL. GOV'T CODE § 66484 (West Supp. 1986). It recognized that the purpose of section 4 was to circumvent property tax relief. It declared, however, that special assessments fell outside the purview of section 4. *Id.* at 670. The opinion followed a California case in noting that the basis of an imposition of a special assessment is the benefit inuring to the property assessed. *Id.* at 669 (citing Anaheim Sugar Co. v. County of Orange, 181 Cal. 212, 216, 183 P. 809, 811 (1919)). Fees under Government Code section 66484 were determined to be special assessments because "the exaction of section 66484 is designed to build improvements of benefit to subdivided property and charge against that property no more than the share of costs attributable to that benefit." *Id.* at 670.

In *Trent Meredith Inc. v. City of Oxnard,*[148] the court took an extreme position in declaring that an exaction imposed under Government Code section 65970 was not a "special tax" within the meaning of section 4. In doing so, the court relied on *County of Fresno v. Malmstrom:*

> [A] major thrust of Article XIIIA is aimed at controlling ad valorem property taxes. . . . Thus, Section 1 limits the ad valorem tax rate to a maximum of 1 percent of market value; section 2 sets the 1975-1976 tax year as a "base" for assessed value and limits further increases to 2 percent per year; section 3 provides that the Legislature may not impose new ad valorem taxes on real property; and section 4 provides that cities, counties and special districts may not impose new ad valorem property taxes.[149]

While this quote is basically a correct interpretation of article XIIIA, it is incomplete because it does not mention any *restriction* on the definition of "special taxes." However, the court in *Trent Meredith* used this interpretation as if it were complete. It found that the fee in question was not an ad valorem tax and, pursuant to the above interpretation, concluded that there was no restriction in section 4 against imposing such a fee.[150]

The trend seems to be that California courts will try to avoid placing a "special tax" label on a tax-like ordinance, although the California Attorney General has not appeared reluctant to do so. Since case law is stronger precedent than attorney general opinions, it will probably predominate in future cases before the court.

VI. THE PREEMPTION ARGUMENT

California has explicit statutes granting authority to local governments to obtain dedications and fees from developers. These statutes are included within the Subdivision Map Act and the School Facilities Act. However, "[t]he obvious problem with explicit statutes is that the more precisely they define the extent of municipal power, the less flexibility they provide communities to deal with uniquely local situations . . . ."[151] In other words, the specific statutes constitute both an authority for the imposition of fees and dedications and

148. 114 Cal. App. 3d 317, 170 Cal. Rptr. 685 (1981).

149. *Id.* at 324, 170 Cal. Rptr. at 689 (quoting *County of Fresno,* 94 Cal. App. 3d at 980-81, 156 Cal. Rptr. at 780-81).

150. 114 Cal. App. 3d at 325, 170 Cal. Rptr. at 689. In the alternative, this court concluded that the fee in question was not a tax at all because the fee was regulatory in nature and a valid exercise of the state's police power. *Id.* at 327-28, 170 Cal. Rptr. at 691.

151. Note, *supra* note 8, at 558.

a limitation on their imposition.[152]

A. *Subdivision Map Act*

Some years ago, the courts considered preemption arguments involving the Subdivision Map Act. In the case of *Kelber v. City of Upland,*[153] plaintiff sued to recover fees required by the city for its approval of a subdivision map. The ordinance used by the city was allegedly made pursuant to a statute in the Subdivision Map Act. However, the fees in question were intended for the general benefit of the city and were fees that the city was not explicitly authorized to collect. On these facts, the court made the following declaration:

> All of the references to local ordinances in the Subdivision Map Act relate to a local ordinance as defined in the statute, and to the design and improvement of subdivisions which are also defined in the statute. An intent rather clearly appears to limit, by these definitions, the authority of such a city to adopt local ordinances regulating subdivisions.[154]

The court went on to apply this principle to the circumstances of the case, and concluded the following: "The authority to adopt local ordinances containing requirements supplementary to the Map Act is limited by the terms of the statute. . . . It follows that the fees here in question were illegally imposed and collected."[155]

In *Santa Clara County Contractors and Homebuilders Association v. City of Santa Clara,*[156] the court followed the *Kelber* analysis. Plaintiffs challenged the validity of a city ordinance permitting the collection of fees for the purpose of raising revenue for general municipal purposes. Plaintiffs contended that the authorization to impose such general revenue-raising fees was preempted by the specific regulations of the Subdivision Map Act. The court, as in *Kelber,* recognized that the specific statutes had a limiting effect on other fees to be imposed: "the imposition of the fees required by the ordinance in our case is contrary to the terms of the Subdivision Map Act."[157]

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152. Hagman, *supra* note 143, at 29 ("the existence of authority to impose specific exactions could lead to an inference that others are not authorized").

153. 155 Cal. App. 2d 631, 318 P.2d 561 (1957).

154. *Id.* at 637, 318 P.2d at 565.

155. *Id.* at 638, 318 P.2d at 566.

156. 232 Cal. App. 2d 564, 43 Cal. Rptr. 86 (1965).

157. *Id.* at 575, 43 Cal. Rptr. at 93. The Santa Clara ordinance in question required payment of a fee as a condition precedent to the approval of a final subdivision map *and* issuance of a building permit. *Id.* at 571-72, 43 Cal. Rptr. at 90-91. The defendant city referred to an attorney general opinion which concluded that a general revenue fee used as a requirement before issuance of a building permit was valid. *Id.* at 577, 43 Cal. Rptr. at 94. However, the court declined to accept the attorney general opinion as precedent because the Santa Clara ordinance involved approval of *both a* subdivision map and a building permit; the fact that fees were a condition precedent to subdivision map approval was the important factor. "[A] municipality may not use the Subdivision Map Act for general revenue producing purposes." *Id.* at 578, 43 Cal. Rptr. at 94. However, the argument left open the question as to whether general revenue fees for the condition of acceptance of a *building permit* would be preempted by the Subdivision

Pines v. City of Santa Monica[158] shed some light on the issue of preemption of imposing fees — but it failed to yield a complete analysis. Plaintiffs, eight condominium developers, challenged a condominium business license tax which was required by the City of Santa Monica before a condominium license could be issued. This license was a prerequisite to all necessary project approvals and permits, including subdivision approval.[159] Plaintiffs based their challenge on the argument that conditioning subdivision approvals on payment of a tax should be considered preempted by the Subdivision Map Act, citing *Kelber* and *Santa Clara,* among other cases.[160] However, *Pines* involved a tax rather than a fee, and this turned out to be an important distinction. To begin with, the court noted that in an assortment of contexts California courts have upheld local taxes against allegations that they conflict with state regulations.[161] Moreover, "[l]ocal taxes generally do not conflict with state regulatory laws."[162] The court went on to hold that "[t]he Map Act contains no language granting or limiting local tax power."[163] Hence, the city's *tax* could not be considered preempted by the Subdivision Map Act.

However, since *Pines* did not rule on the issue of whether or not the Subdivision Map Act preempts the imposition of regulation-like dedications or fees as conditions of approval of a subdivision map, *Kelber* and *Santa Clara* arguably still apply. *Kelber* and *Santa Clara* and their progeny, however, do not apply to the extent that the cases imply that a *tax ordinance* conflicts with the Subdivision Map Act and is therefore preempted.[164]

A recent opinion on the question issued by the California Attorney General leads one to believe that a municipality may, by preemption,

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Map Act and other related statutes. The question has remained open. *See, e.g.,* Building Indus. Ass'n of So. Cal. v. City of Oxnard, 150 Cal. App. 3d 535, 198 Cal. Rptr. 63 (1984). In that case, there was a general revenue fee imposed by the city as a condition for obtaining a building permit. The court declared that it was not necessary to rule on whether the Subdivision Map Act preempted the imposition of the fee because it found the fee in question invalid on other grounds.

158. 29 Cal. 3d 656, 630 P.2d 521, 175 Cal. Rptr. 336 (1981).

159. *Id.* at 659, 630 P.2d at 521-22, 175 Cal. Rptr. at 336-37.

160. *Id.* at 660, 630 P.2d at 522, 175 Cal. Rptr. at 337.

161. *Id.* at 661, 630 P.2d at 523, 175 Cal. Rptr. at 338.

162. *Id.* at 662, 630 P.2d at 524, 175 Cal. Rptr. at 339.

163. *Id.* at 663, 630 P.2d at 524, 175 Cal. Rptr. at 339.

164. The court in *Pines* made the following concluding comment: "The ordinance here imposes a revenue tax that does not conflict with the state scheme for regulating subdivisions. To the extent that [prior cases] imply a contrary result, they are disapproved." *Id.* at 664, 630 P.2d at 525, 175 Cal. Rtpr. at 340 (citations and footnote omitted).

be precluded from levying a fee or dedication because of the inherent limitations of the Subdivision Map Act.[165] In that opinion, the question arose as to whether a fee may be imposed on a subdivider for installation of traffic signals near the development area, but not within it, or whether it was preempted by the Subdivision Map Act.[166] The Attorney General did not find any express authorization for the fee,[167] and concluded that the Subdivision Map Act preempted its imposition: "A city has no authority to require subdividers, as a condition of approving subdivision maps, to pay money into a fund to be used to install traffic signals at major intersections within the general area but outside the boundaries of the subdivision."[168]

According to this ruling, a fee or dedication may be considered preempted by the Subdivision Map Act if the following facts are present: (1) the fee or dedication is used for purposes other than specific purposes outlined in the Subdivision Map Act, and (2) payment of the fee or dedication is a prerequisite to approval of a subdivision map.

B. School Facilities Act

The question arises whether the School Facilities Act preempts local governments from imposing school facilities fees that are not included in the act. Government Code section 65974 provides for fees to support *temporary* school facilities.[169] But does the School Facilities Act preempt the imposition of school impact fees for providing permanent school structures? The California Attorney General answered this question in the affirmative in 1979,[170] reasoning that since fees for permanent facilities were not included in the Act, it was intended to limit the authority of local governments to make such extractions.[171] The Attorney General went on to conclude that the trend under similar circumstances involving the Subdivision Map Act proves that there is a legislative intent to restrict local control to

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165. 63 Op. Cal. Att'y Gen. 64 (1980).

166. *Id.* at 64.

167. *Id.* at 68.

168. *Id.* at 64.

169. CAL. GOV'T CODE § 65974(a) (West Supp. 1986) provides the following:

> For the purpose of establishing an interim method of providing classroom facilities where overcrowded conditions exist, . . . a city, county, or city and county may, by ordinance, require the dedication of land, the payment of fees in lieu thereof, or a combination of both, for classroom and related facilities for elementary or high schools as a condition to the approval of a residential development . . . .

170. 62 Op. Cal. Att'y Gen. 601 (1979).

171. *Id.* at 607. Three specific factors influenced the decision by the attorney general. First, the attorney general concluded that the legislature intended to preempt the exaction of developer fees for permanent school facilities. *Id.* at 607. Second, the School Facilities Act was amended to exclude fees and dedications for permanent school facilities. Third, the history surrounding the Subdivision Map Act shows a legislative intent to restrict local control in the area of school facilities. *Id.* at 608.

the wording of the statutes.[172]

However, in *Candid Enterprises, Inc. v. Grossmont Union High School District*,[173] the Supreme Court of California refused to follow the attorney general opinion, instead reasoning that "[t]he purpose of the Act is to encourage local school districts to identify, and local governments to deal with, the effects of residential development on school facilities . . . ."[174] Furthermore, "the Legislature evidently intended that local governments use fees authorized by the Act as a short-term solution — *not* that local governments be prohibited from developing and implementing long-term solutions."[175]

The preemption issue revolves around the specific enabling statutes of the Subdivision Map Act and the School Facilities Act. The most creative approach that can be used by municipalities to circumvent the preemption problem is to authorize exactions and impact fees under the broad provisions of the police power. Limitations are then much harder to define.

VII. DEVELOPER LEGAL ACTION

A. Are Developers Harmed by Exactions and Impact Fees?

There is some disagreement as to who really pays for the fees and dedications that cities require of developers. Some believe that it is the landowner who sells the property to the developer. Others say it is the developer who absorbs the cost. Still others conclude that costs of the fees and dedications are passed on to the ultimate purchaser. The most popular opinion is that the developer will pass the added costs of fees and dedications on to new homeowners[176] by adding them to the purchase price.[177] The Construction Industry Research Board claims that exactions and impact fees raise the cost of the average house in California by $10,000 to $20,000.[178]

172. *Id.*

173. 39 Cal. 3d 878, 705 P.2d 876, 218 Cal. Rptr. 303 (1985) (the School Facilities Act does not have a preemptive effect on fees for permanent school facilities because the legislature has recognized the need to permit local regulations relating to permanent school facilities).

174. *Id.* at 889, 705 P.2d at 884, 218 Cal. Rptr. at 311.

175. *Id.* (emphasis in original).

176. *See* 2 P. ROHAN, *supra* note 2, § 9.02.

177. D. HAGMAN & D. MISCZYNSKI, *supra* note 11, at 135.

178. Telephone interview with Ben Bartalato of the Construction Industry Research Board (Nov. 4, 1985). If the costs of the exactions and impact fees are indeed shifted to the consumer, this may force low-income groups out of the housing market. Note, *supra* note 8, at 555.

A leading real estate commentator believes that the result of exactions and impact fees is to make the original landowner (who sells to the developer) the one who pays,[179] because: (1) the demand for housing is elastic (buyers pay all they can, and when prices go up, demand goes down); and (2) developers determine a set profit margin — the price paid for the land will reflect the amount of the fees and dedications.[180]

This analysis may be faulty for several reasons. First, developers cannot accurately gauge the costs of fees and dedications because they are usually based on a percentage of the value of the improved structures. If the developer cannot accurately gauge these costs, he cannot accurately determine the price that should be paid for the land. Second, the landowner will not sell if the price offered by the developer is reduced by an amount equal to the costs of fees and dedications. Third, the developer cannot set a fixed profit in advance because he typically sells his product at whatever the market will bear, not at a fixed percentage above cost.

Many feel that, because Proposition 13 sharply reduced property taxes, it is only fair that the original landowner bear the brunt of the fees. The windfall handed to those landowners should be spread around. There is also a general belief that landowners do nothing socially useful which warrants profit from their landholdings.[181]

Because courts consistently allow developers to challenge exactions and impact fees, there is strong evidence that developers are harmed by their imposition. If developers were not harmed, then courts would dismiss these cases for failure to state a cause of action. Fees adversely affect an enterprise's profitability because they affect the net profit.[182] A crucial question for the developer then is whether it is economically feasible to build in light of the fees and dedications required.[183] Another consideration is the additional financing the developer must arrange when exactions are required. Thus, exactions may reduce the number of developers, decrease competition in the housing industry, reduce the supply of new housing, and lead to increases in the price of housing.[184]

B. Ability of the Developer to Bring Legal Action

Since developers may be harmed to a certain extent by illegal exactions and impact fees, they have standing to bring action in a court of

179. Hagman, *supra* note 143, at 18.

180. Hagman, *supra* note 126, at 92. *See also* D. HAGMAN & D. MISCZYNSKI, *supra* note 11, at 135.

181. Hagman, *supra* note 143, at 27.

182. Johnston, *supra* note 8, at 873.

183. *Id.* at 924. *See also* D. HAGMAN & D. MISCZYNSKI, *supra* note 11, at 135.

184. D. HAGMAN & D. MISCZYNSKI, *supra* note 11, at 136.

law. If a developer believes that a fee is invalid, he may or may not be in a position to do something about it. Whether he can take action depends upon several factors, one of which is the cost of legal proceedings. Few developers wish to spend the money necessary to litigate an issue involving a dedication or fee.[185] The major concern is that the cost of litigation is expensive.[186] Thus, developers are often forced to negotiate in situations where they would prefer to litigate.[187]

However, a developer may be involved in a substantial amount of business in a city, so it may pay to contest the validity of the city's fees. The costs of fees and dedications will probably be appreciably more than the cost of legal proceedings. Another possibility is to form an association of developers who do business in a particular city, pooling funds for litigation costs.[188]

The question may arise, however, if such an association has standing to sue. If the association does not itself engage in building, can it challenge an exaction or impact fee? California Code of Civil Procedure section 382 provides in relevant part that when a "question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all."[189] In *Santa Clara,* the court ruled that an incorporated nonprofit association had standing to sue, basing the ruling on Code of Civil Procedure section 382. Even *unincorporated* associations may have

185. *Id.* at 345.

186. *Id.*

187. Consider this hypothetical situation: fees of $1,000 per single-family home for school facilities are required of a developer by a city before approving a subdivision map. The developer plans to build 200 homes — 200 homes times $1,000 for each home amounts to a $200,000 school facilities fee. The developer firmly believes that a fair school facilities fee would be $500 per home (for a total of $100,000, constituting a difference of $100,000). If a trial and appeal in the matter would cost $50,000, and the maximum reduction of city fees possible through litigation is $100,000, there is a potential savings of $50,000. Now assume that the developer negotiates with the city before litigation. If there is a potential savings of $25,000 through negotiation (as opposed to a $50,000 savings from litigation), then the developer may wish to accept the $25,000 reduction and get on with the project without further delay. Note that even when a developer negotiates, he may still feel that the reduction is not enough, but he may be forced into settling based strictly on economic considerations.

188. *See* D. HAGMAN, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW 258 (1971). "Builder-subdividers are sometimes able to fight back when a city continues to exact illegal and unreasonable exactions only by cooperative action, such as by bringing a class action." *Id.* (footnote omitted).

189. CAL. CIV. PROC. CODE § 382 (West 1973).

standing to sue.[190]

Another factor that a developer must take into consideration is that legal actions are time-consuming. In initiating a legal proceeding, the developer cannot afford to have a project delayed by the trial and appeal process. Market conditions may change and it may not be feasible to continue a project after a final decision is rendered. As a result, developers may have to pay the exactions or impact fees under protest and expressly reserve the right to contest the regulation. However, municipalities may argue that in these circumstances the developer voluntarily pays an exaction fee and thereby waives any right to a refund. In the past, courts have ruled that fees paid under these conditions represent fees paid under duress, and that the developer has not voluntarily given up any rights by having paid the fees.[191]

California courts have recently treated the matter quite differently. Consider the decision in *Pfeiffer v. City of La Mesa*:[192] "It is fundamental that a landowner who accepts a building permit and complies with its conditions waives the right to assert the invalidity of the conditions and sue the issuing public entity for the costs of complying with them."[193] The rationale for this ruling is that the city or county needs certainty in its affairs, and once a developer has contributed money or land, he should not be permitted to sue for a refund or cancellation.[194]

One court, however, carved out an exception in *McLain Western No. 1 v. County of San Diego*,[195] which involved a project where permits were obtained in phases as building progressed. The court stated:

> Where new law imposes a fee condition on one of the subsequent permits [after development has begun] under circumstances where even the time necessary to challenge the legality of the fee by petition for mandamus is economically impractical, there is in reality no opportunity for an election . . . . Under such limited circumstances the developer should not be required to adhere to the general rule [stated in *Pfeiffer*] . . . .[196]

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190. 6 B. WITKIN, SUMMARY OF CALIFORNIA LAW, *Corporations* § 37 (8th ed. 1974). Any unincorporated association, whether organized for profit or not, may sue and be sued in its own name. *Id.*

191. *See* 2 P. ROHAN, *supra* note 2, § 9.01[1] n.14; Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis*, 86 YALE L.J. 385, 479 n.284 (1977).

192. 69 Cal. App. 3d 74, 137 Cal. Rptr. 804 (1977).

193. *Id.* at 78, 137 Cal. Rptr. at 806. Because this case only dealt with fees relating to a building permit, it can be argued that the rule in the case should not apply to other permit situations. However, this argument probably will not prevail because the case of Air Quality Products, Inc. v. State, 96 Cal. App. 3d 340, 352, 157 Cal. Rptr. 791, 797 (1979) extended *Pfeiffer* to cover all "administrative actions."

194. 69 Cal. App. 3d at 78, 137 Cal. Rptr. at 806. *See also* McClain Western No. 1 v. County of San Diego, 146 Cal. App. 3d 772, 776-77, 194 Cal. Rptr. 594, 596 (1983).

195. 146 Cal. App. 3d 772, 194 Cal. Rptr. 594 (1983).

196. *Id.* at 777, 194 Cal. Rptr. at 596.

If a developer can afford to pay legal costs and delay development, it may be economically feasible to institute legal proceedings.[197] If he can base a challenge of an exaction or impact fee on constitutional grounds, he may also potentially bring the action under sections 1983[198] and 1988[199] of the United States Code, title 42. These sections allow proceedings to redress anyone harmed by unconstitutional activity. A recent United States District Court decision held that a taking claim resulting from land use regulations could be maintained under section 1983.[200]

The real benefit in stating a cause of action under section 1983 is the expanded availability of damages in comparison to inverse condemnation cases. A property owner may recover for the value of the land taken *and* any "consequential loss" caused by the taking.[201]

One final consideration is necessary. Where developers have been allowed to sue for refunds and actually obtained refunds after litigation, some courts outside of California require the developers to share their refunds with the ultimate buyers to the extent that the illegal portions of the exactions were passed on to the consumers.[202] However, California courts have not yet ruled on this issue.

VIII. CONCLUSION

We see that California courts have tended to hold that most exactions and impact fees are reasonable because new developments create added community needs. Moreover, these new developments

197. Most litigation in this area has involved large subdividers. However, nonsubdividers are now becoming more involved in this type of case. 2 P. ROHAN, *supra* note 2, § 9.01[1].

198. Section 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

42 U.S.C. § 1983 (1982).

199. Section 1988 provides in part: "In any action or proceeding to enforce a provision of . . . [section] 1983 . . . of this title, . . . the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs." 42 U.S.C. § 1988 (1982).

200. Jacobson v. Tahoe Regional Planning Agency, 474 F. Supp. 901 (D. Nev. 1979).

201. Comment, *The Availability of 42 U.S.C. § 1983 in Challenges of Land Use Planning Regulations: A Developer's Dream Come True?* 1982 UTAH L. REV. 571, 585.

202. *See, e.g.*, Colonial Oaks West, Inc. v. Township of E. Brunswick, 61 N.J. 560, 574-75, 296 A.2d 653, 660 (1972); S.S. & O. Corp. v. Township of Bernards Sewerage Auth., 62 N.J. 369, 385-86, 301 A.2d 738, 747 (1973).

benefit from the increased facilities and services made possible by exactions and impact fees.

Courts have been subjective in their analyses of the reasonableness of exactions and impact fees, avoiding discussion on specific constitutional principles. They rely instead on the argument that exactions and impact fees are regulations enforceable by the police power of the community. Even where an exaction is tax-like, the courts have been reluctant to give it a "special tax" label. Hence, no article XIIIA limitations are imposed. Preemption arguments have also lost some force since the *Pines* decision.

New home prices are reaching an average of $140,000 in California, partially due to exactions and impact fees, most of which the developers pass on to consumers. Because consumers could eventually be priced out of the housing market if developers continually pay higher development fees, courts will probably be more sympathetic with the developers' position in the future.

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