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Cover Page Footnote
This article was prepared while the author served as a planner with the City of Eagan, Minnesota, and with the Metropolitan Council. The author greatly appreciates the support for this work by respective policymakers, supervisors, and colleagues. In particular, the author would like to recognize the assistance of Mr. Jon Hohenstein, Ms. Meg McMonigal, and Ms. Garet Walsh. The substantive nature of this paper would have been compromised without their generous assistance. Special acknowledgement, however, is reserved for Professor Gerald Torres of the University of Minnesota Law School. Professor Torres encouraged the author to prepare this article as a way to learn more about the complex nature of land use and environmental law. His encouragement and advice throughout this exercise has been greatly appreciated.
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LOCAL GOVERNMENTS AND IMPACT FEES: Public Need, Property Rights, and Judicial Standards

STEVEN B. SCHWANKE*

I. INTRODUCTION

Suburban local governments have experienced significant population growth since the late 1940s and employment growth since the 1970’s. Consequently, they have discovered that new development is expensive. The cost of providing facilities for new development is ever-increasing in an era of scarce public resources. The problematic nature of financing new development has forced local governments to identify new revenue sources to ensure provision of facilities and services for new residents.

Impact fees, or subdivision exactions,¹ have become a popular way for local governments to deal with the burdens occasioned by growth. Local governments view impact fees as an attractive means for financing and regulating growth, but are reluctant to use impact fees as regulatory tools because of potential and unknown legal and administrative challenges.

This article addresses the legal environment surrounding impact fees by analyzing the legal foundation and judicial standards established principally by state courts. Most state courts have adopted the “rational nexus” test for ascertaining the legitimacy of subdivision exac-


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¹. The terms impact fees and exactions are used interchangeably throughout this article. Impact fees are actually only one type of development exaction.
tions, thus allowing local governments to charge a "fair share" of costs associated with new facilities and services to new development. The recent United States Supreme Court decision in Nollan v. California Coastal Commission\(^2\) adopted a more stringent approach, one which appears to require local governments to demonstrate that a subdivision exaction will "substantially advance legitimate state interests."\(^3\) Nollan is the first subdivision exaction case to be decided by the Supreme Court and one of few decided by federal courts,\(^4\) and "clearly indicates that the federal courts . . . will require a strict accounting from local governments of how they use land development exactions."\(^5\)

A subdivision exaction test which balances the competing interests of subdivider property rights and local government police power seems eminently more appropriate.\(^6\) Land subdivision is a business that is afforded the right and privilege to operate freely in an entrepreneurial fashion. However, like most businesses, land subdivision is subject to business regulations. These subdivision regulations must be fashioned such that local governments have the flexibility to exercise broad police powers to promote and protect public health, safety, and welfare. One form of this broad police power is the ability of local governments to institute subdivision exactions which ensure the provi-

\(^3\) Id. at 3146. See also Sellergren, Development Exactions and Fees—Public Need, Private Rights, Fairness, and the Law, 3(11) MINN. REAL EST. L.J. 161, 166 (1987) ("[t]his decision has the potential to make the rational-nexus standard an even stricter test").
\(^5\) Id. at 29.
\(^6\) Such a test should consider and balance the divergent equities and interests of government, developers and consumers, the last of whom will ultimately pay for these public improvements. . . . The task at hand is thus to promote the health, safety, and welfare of the community while recognizing the legitimate interests of developers and consumers. . . .

Delaney, Gordon & Hess, The Needs-Nexus Analysis: A Unified Test for Validating Subdivision Exactions, User Impact Fees and Linkage, 50(1) L. & CONTEMP. PROBS. 139, 143-44 (1987). Delaney, Gordon & Hess propose a new test, the "needs-nexus" test, which "reaffirms the rational nexus test in slightly amended form as it pertains to subdivision exactions, while adapting it to fit the more complex issues and equities presented by user impact fees and linkage." Id. at 157. They reason that the consolidation of the existing [judicial] tests into one unified, flexible test, applicable to subdivision exactions, user impact fees, and linkage, would simplify court review of these regulations and reduce the current confusion. An inquiry into the need created by the proposed development and the nexus between that need and the public benefits deriving from the imposition of the regulation is thus a preferable approach. To be equitable, such an inquiry must also balance the "legitimate interests of the developer and the general welfare concerns and power of the municipality."

Id. (citation omitted).
sion of necessary facilities and services to meet the demands of new population and employment growth.

II. The Local Government Dilemma

Historically, the United States has been perceived as a nation of unbridled opportunity and abundant land. This perception fostered a sociopolitical myth that an endless and bountiful frontier existed for land development and speculation. This perception, however, was shattered in the late 19th century by Frederick Jackson Turner, who, in his classic work "The Frontier In American History," asserted that the frontier had closed.\(^7\)

With Turner's proclamation came the end of a period of American history. Often referred to as the Gilded Age, this era was typified by rapid industrial expansion and land speculation which encouraged unplanned and haphazard growth. In its place came an era of planned land development and public sector involvement in shaping urban development patterns. Local governments have played a significant role in shaping this era of planned land development and public sector planning.

Planned land development is best achieved through the provision of essential public facilities and services. Local governments have had the responsibility of providing essential public facilities and services to accommodate urban growth.\(^8\) Facilities and services provided by local governments may vary, but do include such basic items as schools, police and fire protection, parks, water supply, sanitary sewer, and street and highway improvements. While federal and state government spending influences the type and quantity of public facility construction,\(^9\) local governments must ultimately bear the burden and obligation of providing essential services and facilities.

In recent years, it has become increasingly evident that the demand for basic public facilities and services exceeds local governments' financial ability to supply those commodities. Cities experiencing economic and population decline find it difficult to replace deteriorated or obsolete facilities. Conversely, cities experiencing noticeable economic and population growth continually seek innovative ways to meet facility and service demands of new residents and employees.


A report prepared for the Joint Economic Committee of the United States Congress\(^\text{10}\) clearly demonstrated the problematic nature of financing essential facilities and services. In particular, this report documented the basic and fundamental gap between the demand for public facilities and allocated funds. The United States is expected to experience a $443 billion shortfall by the year 2000 in wastewater collection and treatment, water supply and delivery, roads and bridges, and other transportation modes such as airports and mass transit.\(^\text{11}\) All areas of the country project future facility needs in excess of historic spending levels, particularly with respect to highway and bridge funding.\(^\text{12}\)

The increasing demand for public facilities occurs at a time when federal and state governments are reducing their per capita commitment to financing infrastructure.\(^\text{13}\) Moreover, while experiencing healthy revenue increases from 1952 to 1978, the federal government began to decrease investment in public facilities, first under President Jimmy Carter and then under President Ronald Reagan. After adjusting for inflation, federal expenditures for public facilities decreased by 5.2\% from 1978 to 1984. At the same time, federal grants to local and state governments for infrastructure financing decreased by 3.3\%. State government capital outlays decreased by 2.0\% for the period of 1970 to 1978, though a noticeable increase was experienced for the 1978 to 1981 period.\(^\text{14}\)

This declining per capita investment for public facilities by federal and state governments has forced local governments to assume an extraordinary financial responsibility. This is due in large part to President Reagan's "new federalism." In an effort to reduce the federal government's role in public facility financing, the Reagan administra-


\(^{11}\) Id. at 2, 5.

\(^{12}\) The Hard Choices report focused on infrastructure problems that are common to all regions of the country. Twenty-three states were studied, and separate appendices for each were included in the report; these states were Alabama, California, Colorado, Florida, Indiana, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Missouri, Montana, New Jersey, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, South Carolina, Tennessee, Texas, and Washington. For more Florida-specific information, see Frielich & Chinn, supra note 7, at 159-60.

\(^{13}\) Infrastructure describes "the basic network of facilities that drive our economy: our transportation, water and wastewater facilities." Hard Choices: A Summary Report of the National Infrastructure Study Prepared for the Joint Economic Committee of the United States Congress 3 (1984).

\(^{14}\) Joint Economic Comm., U.S. Cong., supra note 8, at 85.
tion has cut taxes and reduced areas of the budget dedicated to local government assistance, all of which has passed the responsibility for facility financing essentially to the local level.

This decentralization of public facility programs from federal to local government has occurred in an atmosphere of countervailing policies. While passing the responsibility for facility financing to local governments, the federal government has pursued policies which make fulfilling this new responsibility difficult.\(^{15}\) Perhaps the best example of these contradictory federal policies was the termination of the tax-exempt status of public facility bonds. Under this provision of the federal tax law, local governments paid a lower interest rate with tax-exempt bonds because of income tax benefits received by investors. However, today taxable bonds must be sold at higher interest rates to be attractive investment options, which has the effect of increasing local government borrowing and public facility construction costs.

The widening gap between the demand for public facilities and services and the fiscal capability of local governments to supply these commodities is a national problem, one to which many interlocking factors have contributed. The fiscal crisis has been most acute in mature central cities and growth areas experiencing noticeable employment and population increases.\(^{16}\)

The principal problem for local governments experiencing noticeable population and employment growth is that a much greater demand for urban facilities and services is created by new residents and employees than can be afforded.\(^{17}\) The result is that existing city residents experience a lower level of service delivery and facility performance coterminal with increasing local taxes.\(^{18}\) Not surprisingly, grassroot support for control of public facility and service expansion has also resulted.

\(^{15}\) Moore, *The Bridge is Out!* Nat'l J., April 1988, at 868, 869. Moore found that local governments are squeezed by competing demands from the federal and state governments. Washington has imposed costly new mandates on local governments, such as clean water requirements that could cost $1 billion over the next decade. The 1986 Tax Reform Act limits local governments' ability to raise money for infrastructure projects. It limited the total amount of tax-exempt bonds that cities can issue. It eliminated tax breaks on depreciation as well as the investment tax credit, two crucial components in many public-private partnerships. Finally, most states restrict local governments' ability to raise taxes. Id.


\(^{17}\) Freilich & Chinn, *supra* note 7, at 154.

Many issues, such as environmental protection, urban sprawl, and transportation gridlock, flame the fires of anti-growth sentiment. Fiscal considerations, however, are at the heart of local resident concerns. Local citizens do not want to pay for capital facility expansions that accommodate new growth. In response to this citizen outcry, local governments need to develop new regulatory tools which will ensure adequate provision for facilities to support new development.

III. THE FUNCTION OF IMPACT FEES

Impact fees have become a popular public facility financing tool as a consequence of state and federal government fiscal and tax policies and human settlement preferences. Changing intergovernmental relations have placed a much greater burden on local governments to finance public facilities. For some cities, this shift in responsibility has occurred simultaneously with a decentralized settlement pattern. This settlement pattern has resulted in significant population and employment growth for suburban local governments and therefore higher public facility costs.

This unbridled population and employment growth has caused some local governments to institute growth management programs, because of the resulting environmental, social, and administrative problems. Further, cost-revenue studies have indicated that growth does not pay its own way.

At the heart of these growth management programs is the use of impact fees as a regulatory tool. The regulatory function of impact fees normally takes the form of synchronizing new development with the installation of new facilities. This approach sidesteps the problem of congestion of facilities which results from development approvals being issued before service capacity is available. Thus, local governments prohibit new development unless sufficient facility capacity ex-

ists. Impact fees provide the means to install new facilities simultaneously with new development.\textsuperscript{25}

Impact fees can be an important financing and growth management tool for capital-depleted cities experiencing population and employment growth,\textsuperscript{26} and an effective regulatory tool for local governments to manage urban development. However, special precaution is required to ensure that impact fees are implemented in a legally correct fashion. The following sections establish legal parameters for the proper implementation of impact fees.

IV. Legal Foundation for Impact Fees

A. Legal Theory for Impact Fees

Historically, the courts seldom have articulated a specific legal foundation for impact fees, leaving this task to legal scholars and commentators. The legal basis generally articulated for impact fees appears to be police power: The transfer of the costs of growth to the specific development creating the additional public facility needs is a reasonable exercise of police power necessary to protect the public health, safety and welfare.

This legal doctrine may be applied in two ways. The first is frequently referred to as the "privilege theory," which postulates that mandatory dedications are justified in return for the valuable "privilege" of having a subdivision plat recorded.\textsuperscript{27} The court in Trent Meredith, Inc. v. City of Oxnard\textsuperscript{28} asserted that exactions were justified "on the privilege of subdividing land."\textsuperscript{29} As stated by a Wisconsin court,

[t]he basis for upholding a compulsory land dedication requirement in a platting ordinance . . . is this: The municipality by approval of a proposed subdivision plat enables the subdivider to profit financially by selling the subdivision lots as home building sites and thus realizing a greater price than could have been obtained if he had sold his property as unplatted lands.\textsuperscript{30}

\textsuperscript{25} Barnebey, Paying for Growth: Community Approaches to Development Impact Fees, 54 J. AM. PLAN. A. 18 (1988).
\textsuperscript{26} Snyder & Stegman, Financing the Public Costs of Growth, GOVT. FIN. R., Aug. 1986, at 23.
\textsuperscript{27} Stroud, supra note 4, at 30.
\textsuperscript{29} Id. at 325, 170 Cal. Rptr. at 689.
A more compelling argument, however, results from inverting the "privilege" theory. Then, impact fees are justified on the theory that the cost of providing new facilities is shifted from the general public to those who create the need for the facilities. These "development" fees are permissible because the developer is paying for the additional burdens placed on the local government by the development. Because local government may regulate adverse impacts of development, it has the obligation to use its regulatory power to mitigate such impacts.31

It appears that state judicial systems have granted local governments almost unilateral authority to require exactions for facilities and services as a mitigative measure against development’s negative impacts. The regulation of development and its negative impacts has been upheld with respect to timing and sequencing of growth,32 environmental impact33 and provision of adequate public facilities. A New Jersey court ruled that a city may require a developer to provide, at its own expense, for adequate on-site streets and sewers to serve the subdivision.34 Courts have also validated the denial of a development when shown that the subdivision will worsen or significantly impact off-site public facilities.35

These cases demonstrate that a sufficient legal foundation exists to support the theory that "requirements of land dedication, fees in lieu of dedication, or fees charged for the impact new development presumably will have on public services and facilities" are permissible local government actions.36 These actions are permissible because developers must help to finance those facilities and services negatively impacted or burdened by development.37 Further, local governments


36. Sellergren, supra note 3, at 161.

37. Impact fees are based on the simple philosophy that new development should "pay its own way," arguably an equitable standard. If a subdivision or commercial development induces growth that requires additions or improvements to public services and infrastructure, then the developer should make contributions toward meeting the costs of the improvements. After all, the development will presumably benefit from the improvements. A simple philosophy, however, does not preclude controversy. Sellergren, supra note 3, at 161 (footnotes omitted).
would be remiss not to collect exactions. In the absence of exactions, the developer would enjoy a windfall because the community at large would finance development-generated public facility costs. Therefore, it is imperative for local governments to collect exactions as a regulatory function to manage the impact of development.

B. Constitutional Issues Surrounding Impact Fees

Local governments do not have unlimited authority to impose impact fees on developers of private land. The primary constitutional issue surrounding impact fees is the "taking" doctrine. The United States Constitution limits the reach of local governments concerning this issue through the takings clause, which mandates that private property shall not "be taken for public use without just compensation," and which may be used to limit the scope of local government activities surrounding imposition of impact fees.\textsuperscript{38} As Justice Holmes explained in the landmark case of \textit{Pennsylvania Coal Co. v. Mahon},\textsuperscript{39} "if the regulation goes too far, it will be recognized as a taking,"\textsuperscript{40} which requires just compensation under the United States Constitution.

In \textit{Nollan v. California Coastal Commission},\textsuperscript{41} the United States Supreme Court ruled that a condition placed on a building permit violated the takings clause because the condition did not further the public purposes the permit requirements served. The Court assumed that the California Coastal Commission's objective of preserving public access and the character of the shoreline was legitimate, but ruled that the condition did not rationally further that objective.\textsuperscript{42} The condition was not so substantially related to a governmental purpose as to justify a denial of the permit.\textsuperscript{43}

In dissent, Justice Brennan characterized the standard used by the majority as "a precise quid pro quo of burdens and benefits."\textsuperscript{44} He considered the "precise accounting system in this case insensitive to the fact that increasing intensity of development in many areas calls for farsighted, comprehensive planning that takes into account both the interdependence of land uses and the cumulative impact of development."\textsuperscript{45}

\begin{itemize}
\item 38. U.S. Const. amend. V.
\item 39. 260 U.S. 393 (1922).
\item 40. \textit{Id.} at 415.
\item 41. 107 S. Ct. 3141 (1987).
\item 42. \textit{Id.} at 3147-48.
\item 43. \textit{Id.}
\item 44. \textit{Id.} at 3160 (Brennan, J., dissenting).
\item 45. \textit{Id.} at 3161-62 (Brennan, J., dissenting).
\end{itemize}
In Pioneer Trust & Savings Bank v. Village of Mount Prospect, the court declared an ordinance that required the dedication of one acre per sixty residential lots in a subdivision for schools, parks, and other public purposes, outside the scope of the police power. The court based its holding on the finding that the improvements to be financed were not "specifically and uniquely attributable" to the development project or the funds were not to be used solely for the benefit of the residents of a particular subdivision charged.47

C. Police Power v. Taxing Power of Impact Fees

A critical issue in the determination of the legal validity of an impact fee is whether the particular exaction is a regulation authorized under the police power or an invalid tax.48 The stated purposes for enactment, or the intent of the impact fee ordinance, are important in distinguishing between exercises of police power and exercises of taxing power.

If an impact fee is characterized as primarily regulatory in nature to assure provision of adequate facilities and services necessitated by land development and thus an exercise of the police power, judicial deference to legislative action will generally lead to validation of the measure.49 Conversely, if the purpose of the ordinance is to raise revenues for financing the expansion of public facilities and services, and not to serve as tools in the regulation of land subdivision, the ordinance will be regarded as a tax.50 An impact fee is also considered a tax when, as a part of the approval process, the revenues collected exceed the cost of administering the system.51

The taxing versus police power issue is significant for judicial and legislative reasons. Local governments must have specific statutory authority to exercise taxing powers and once granted, this power is scrutinized carefully by the state government and judicial system. Conversely, the judicial system typically gives legislative deference to local government regulatory powers.52 The courts appear to have

47. Id. at 381, 176 N.E.2d at 802.
48. See also Delaney, supra note 6, at 143 (footnotes omitted) ("[i]mpact fees are either held unconstitutional as unauthorized taxes, or are supported on police power rationales").
52. Morgan, supra note 31, at 50-51.
adopted a three point inquiry to ascertain whether an impact fee system serves a regulatory or revenue-generating function: state statutory authority, the relationship between development to be charged and the purpose and amount of the required payment, and the use of the collected fees.

To date, the courts have given broad interpretation to state statutory authority, generally in the context of managing community development effectively. Local governments are able to use impact fees pursuant to enabling planning legislation and as a growth management tool. The power of local government to exercise zoning and subdivision controls comes from state enabling statutes.

A primary attack on required impact fees used as capital expenses is that they are not authorized by state statute or constitution, and, as a consequence, are void as ultra vires. However, numerous court cases have decided that local governments have the authority to levy impact fees as an exercise of police power. In Billings Properties, Inc. v. Yellowstone County,53 and Jenad, Inc. v. Village of Scarsdale,54 the fees were held to be valid regulations under the police power. In Associated Home Builders v. City of Walnut Creek,55 the court found a park and recreational fee analogous to traditional land use and zoning controls such as "minimum lot size and [building] setback requirements."56

The impact fee as a regulatory tool pursuant to state enabling statutes is also applied to municipal utilities. In Coulter v. City of Rawlins,57 the Wyoming Supreme Court held that the power to impose impact fees for sewer connections was "fairly and necessarily" implied from powers expressly granted to the city as a means to effectuate its duty to regulate, maintain, construct, and operate a sewer system.58

Affirming this use as a growth management tool, a Florida court held that collection of an impact fee as a condition of subdivision approval, for use in expanding a county level park system to accommodate the additional burden of new residents, was a reasonable regulation under the police power.59 Citing a number of cases, includ-

56. Id. at 644-45, 484 P.2d at 615, 94 Cal. Rptr. at 639.
57. 662 P.2d 888 (Wyo. 1983).
58. Id. at 900.
ing Contractors & Builders Association v. City of Dunedin,60 and Wald Corp. v. Metropolitan Dade County,61 the Hollywood, Inc. v. Broward County62 court stated: "We discern the general legal principle that reasonable dedication or impact fee requirements are permissible so long as they offset needs sufficiently attributable to the subdivision and so long as the funds collected are sufficiently earmarked for the substantial benefit of the subdivision residents."63

In Home Builders & Contractors Association v. Board of County Commissioners,64 the court made two significant findings concerning the assertion that impact fees may be levied as an exercise of the police power to protect public health, safety, and welfare. First, the court held that Palm Beach County had the authority to impose an impact fee on new land development for the purpose of accommodating subsequent impact on the area transportation system.65 Second, the court held that the impact fee was regulatory in nature and did not constitute a "prohibited tax."66

The courts generally have upheld state subdivision and zoning legislation and local governments' police power, concluding that impact fees are a regulatory tool to manage community development activities effectively. This is only one of three tests, however, the courts consider in ascertaining whether an impact fee fits the regulatory definition. The other two tests are the relationship of development to the purpose and amount of payment and the use of the collected fees.

In addressing the question of fee amount and relation to need, the courts generally focus on whether the development costs assessed are proportionate to the impact on associated facilities. This "proportion-

60. 329 So. 2d 314 (Fla. 1976), cert. denied, 444 U.S. 867 (1979). Contractors & Builders Ass'n "established for Florida the 'dual rational nexus' test, which requires that the level of impact fees must be related to the new facilities needed to serve contributing development, and that the fees must be earmarked specifically for those facilities." Lillydahl, Nelson, Ramis, Rivasplata & Schell, The Need for a Standard State Impact Fee Enabling Act, 54 J. Am. Plan. A. 7, 10 (1988) [hereinafter Lillydahl].
61. 338 So. 2d 863 (Fla. 3d DCA 1976), cert. denied, 348 So. 2d 955 (Fla. 1977).
62. 431 So. 2d 606 (Fla. 4th DCA 1983), rev. denied, 440 So. 2d 352 (Fla. 1983).
63. Id. at 611. In fact, Florida courts have been unusually sympathetic to the financial needs of communities. It is as though the courts have reluctantly supplanted the legislature in telling communities how to write acceptable ordinances. Those two features, while not directly reviewed by courts, have become additions to the rational nexus ethic in Florida. Lillydahl, supra note 60, at 10.
64. 446 So. 2d 140 (Fla. 4th DCA 1983), rev. denied, 451 So. 2d 848 (Fla. 1984), appeal dismissed, 469 U.S. 976 (1984).
65. Id. at 143.
66. Id. at 145.
ate share" or "fair share" language is the key focus of the "rational
nexus" test.\textsuperscript{67} If the costs are proportionate to the impact, the impact
fee is generally regarded regulatory and an appropriate exercise of the
police power. Conversely, if the cost is not proportionate to the facility
impact, the fee may be considered "confiscatory" and not a legit-
imate exercise of the police power.\textsuperscript{68}

Many cases addressing the issue of state enabling legislation and use
of the police power to impose an impact fee also discuss implementa-
tion and administration of such a fee. For example, in \textit{Hollywood,
Inc.}, the court found a park and recreational impact fee to be a
proper use of regulatory powers, as long as the local government dem-
onstrated "a reasonable connection, or rational nexus, between the
need for additional capital facilities and the growth in population
generated by the subdivision" and "a reasonable connection, or rational
nexus, between the expenditures of the funds collected and the bene-
fits accruing to the subdivision."\textsuperscript{69}

Courts have adopted this "rational nexus" test in several other
cases.\textsuperscript{70} \textit{Wald Corp.} is of particular interest. There, the court rejected
both the "specifically and uniquely attributable" and "reasonable re-
lation" approaches and adopted the "rational nexus" test. Citing \textit{Jor-
dan v. City of Menomonee Falls},\textsuperscript{71} the \textit{Wald Corp.} court held that the
rational nexus approach was the appropriate standard to apply be-
cause "[i]t allows the local authorities to implement future-oriented
comprehensive planning without according undue deference to legisla-
tive judgments."\textsuperscript{72}

The quintessential problem with the rational nexus test is clearly de-
fining exactly what constitutes a proportionate or fair share. How
does a court or local government know when an impact fee is applied
in a fashion that is proportionate to the burden placed on local gov-
ernment systems and services by one or more developments? The
courts and legal commentators are not clear as to what constitutes a
development's proportionate share of local government facility and
service expenses. Authors alternately contend that the judicial system

\textsuperscript{67} \textit{See infra} notes 73-81 and accompanying text.
\textsuperscript{68} Morgan, \textit{supra} note 31, at 53.
\textsuperscript{69} 431 So. 2d at 611-12.
\textsuperscript{70} \textit{See Jordan, 28 Wis. 2d at 608, 137 N.W.2d at 442; Contractors & Builders Ass'n, 329
So. 2d at 314; Banberry Dev. Corp. v. South Jordan City, 631 P.2d 899 (Utah 1981); Wald
Corp. v. Metropolitan Dade County, 338 So. 2d 863 (Fla. 3d DCA 1976), cert. denied, 348 So.
2d 955 (Fla. 1977).
\textsuperscript{71} 28 Wis. 2d 608, 137 N.W.2d 442 (1965), \textit{appeal dismissed}, 385 U.S. 4 (1966).
\textsuperscript{72} \textit{Wald Corp.}, 338 So. 2d at 868.
has not clearly addressed this issue,\(^{73}\) and that the courts’ inability to clearly define what constitutes a reasonable impact fee motivates developers and builders not to litigate for fear of adverse legal precedent.\(^{74}\) Admittedly, it appears that courts have not clearly articulated what costs are proportionate to a particular development. However, some general parameters exist.

First, courts have held that only costs associated with facilities and services to accommodate new development are appropriate to levy in an impact fee system. In *Home Builders & Contractors Association*, the court found that charges levied only against new development were reasonable to the extent that “the improvements adequately benefit the development which is the source of the fee.”\(^{75}\) In *Contractors & Builders Association*, the court held that “the cost of new facilities should be borne by new users to the extent new use requires new facilities, but only to that extent.”\(^{76}\)

Second, courts have used the method for allocating public facility construction costs. Sometimes referred to by developers as “double taxation,” the principle is that properties against which an impact fee is levied for public facility construction should not also be forced to pay an ad valorem tax to finance the debt service on bonds for those improvements:

Governments too often calculate impact fees in a simplistic way that relates all future infrastructure costs to the amount of new development expected. That method can easily result in the sort of “double taxation” that angers developers and builders. The calculation method should incorporate recognized methods for determining development impacts on various types of public facilities and should employ reasonable standards for facility capacities. Facility impacts should reflect the marginal increases in needs that new development causes and should exclude existing deficiencies in facilities. The fee should take account of other taxes and fees new development will pay that will retire debt on existing and new facilities. Formulation of a reasonable fee, in other words, requires an analytical approach that accounts for a number of financial factors.\(^{77}\)

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75. 446 So. 2d at 144.
76. 329 So. 2d at 321.
77. Porter, *Will Developers Pay to Play?* 54 J. AM. PLAN. A. 71, 74 (1988). Other authors view “double taxation” as occurring when occupants of the development pay property, sales, and other taxes that also pay
This concern regarding double taxation is best demonstrated in *Lafferty v. Payson City*, where the court felt compelled to examine the method of facility financing to assure that a property owner did not "pay for some portion of the same capital value a second time." Third, courts have inquired whether the impact fee has any relationship to the costs created by the development. An impact fee may be held invalid if it places "disproportionate and unfair" burdens on new households. For example, in *Weber Basin Home Builders Association v. Roy City*, the court ruled that the city had authority to raise fees for the increasing cost of city government services, but the new residents were entitled to be treated equally and on the same basis as the existing residents. The court reached this conclusion based on the city's failure to assert that "a major purpose of the increase was to bring the permit fee in line with the costs of regulating building construction"; instead, the city contended that the fee was necessary to improve water and sewer systems to accommodate the additional demand of new home construction.

Finally, courts have used an approach based on the premise that new residents are obligated to pay only their "fair share" of capital costs associated with new development. Impact fees that serve a regulatory function are levied in a manner that distributes only those costs associated with new development generated by new residents. To burden new residents with costs associated with existing residents would probably be viewed as an ultra vires tax, and not regulatory in nature.

The leading case in this area is *Banberry Development Corp. v. South Jordan City*. There, the city required, as a condition of final approval of the subdivision, a water and park improvement fee. In addressing the question of what constituted a "reasonable" subdivision fee, the court stated that "to comply with the standard of reason-
ableness, a municipal fee related to services like water and sewer must not require newly developed properties to bear more than their equitable share of the capital costs in relation to benefits conferred.” 84 An equitable share is determined by ascertaining 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; the fee in question should not exceed the amount sufficient to equalize the relative burdens of newly developed and other properties.” 85 Under this approach, it is not enough for the courts to conclude that a reasonable relationship exists between the impact fee and associated facilities and services. Even if the fee is primarily regulatory in nature, it may not be able to withstand the test for a regulatory tool if the revenues are utilized inappropriately.

The most common mistake made by local governments using impact fees is that the fees are not dedicated solely to the function for which they were collected. Many local governments have collected a fee for a particular function and spent the money on an entirely separate project. If an impact fee is collected for the purpose of financing roadway improvements necessitated by new development, then it must be used for that purpose and no other. Impact fees collected and distributed for different purposes may be held to be invalid taxes.

D. The Use of Impact Fees as a Planning Tool

For impact fees not to be classified as taxes, they must be expressly regulatory, and must protect the public health, safety, and welfare. It logically follows that this exercise of the police power may allow impact fees to be used as a planning tool, particularly with respect to implementation of a growth management program. The purpose of fees collected pursuant to the police power is to assure that development proposals are supported by adequate levels of essential facilities and services. As a consequence, some impact fee systems have been adopted, not from specific enabling legislation, but from general planning, zoning, and subdivision enabling legislation. 86

Golden v. Planning Board 87 is a classic case in which the court empowered local governments to regulate the timing and sequencing of development based on the availability of public facilities and services. While the subject ordinance resulted in development delays of up to

84. Id. at 903.
85. Id.
eighteen years for some properties, Ramapo was committed to supplying necessary services via a capital improvements program.

The requirement of a relationship between the exercise of the police power and the provision of facilities and services has been affirmed in other state courts. In 1976, a Florida court ruled that an adequate basis for exercising the police power exists if a city can demonstrate empirically that new development will require the provision of specific facilities and services.\textsuperscript{88}

Several cities' ordinances have withstood the test of "adequacy provisions" in comprehensive plans. This concept requires that adequate provision for facilities and services be included in the development review process. In \textit{J.W. Jones Cos. v. City of San Diego},\textsuperscript{89} the court upheld a provision of the comprehensive plan that forced developers to pay for city facilities and services such as sewers, drainage facilities, streets, parks, fire stations, and libraries, before receiving building permits. The court based its holding on the findings that the fees were an appropriate exercise of the police power, and that the charges were reasonably based on studies and implemented development policies.\textsuperscript{90}

These cases reinforce the notion of using impact fees as a regulatory tool for residential, commercial, and industrial development. Impact fees may be employed as an effective planning tool, one which facilitates coordination of development approval with the necessary financing to provide additional local government facilities and services.

Because local governments are development-driven, they view the use of impact fees as a tool for encouraging long-range, comprehensive planning. Conversely, many courts view long-range, comprehensive planning as a precursor to validating impact fees. Local governments must demonstrate empirically and analyze sufficiently existing and future development circumstances in planning documents.\textsuperscript{91} Impact fees may be held invalid in the absence of appropriate planning studies, subsequent development standards, and administrative structures to effectuate the fee collection system.\textsuperscript{92}

Planning studies must precede implementation of an impact fee system. The primary goal of planning studies is to create an effective paradigm from which a legally defensible impact fee system may be developed. The planning objective is to demonstrate that the need for

\textsuperscript{88} \textit{Contractors & Builders Ass'n}, 329 So. 2d at 321.
\textsuperscript{89} \textit{Id.} at 758, 203 Cal. Rptr. at 589.
\textsuperscript{90} \textit{Id.} at 758, 203 Cal. Rptr. at 589.
\textsuperscript{91} \textit{See Contractors & Builders Ass'n}, 329 So. 2d at 314; \textit{Banberry}, 631 P.2d at 902.
\textsuperscript{92} \textit{See Hollywood, Inc.}, 431 So. 2d at 611; \textit{Home Builders & Contractors Ass'n v. Board of County Comm'rs}, 446 So. 2d 140, 144 (Fla. 4th DCA 1983), \textit{rev. denied}, 451 So. 2d 848 (Fla. 1984), \textit{appeal dismissed}, 469 U.S. 976 (1984).
additional facilities is derived from new development, not from deficiencies in the existing system. Planning studies of this nature are eminently defensible when appropriate facility standards are developed, existing facility deficiencies are identified, and a capital improvement plan is used to schedule necessary improvements.93

V. JUDICIAL STANDARDS FOR IMPACT FEES

As with the legal foundation for impact fees, specific judicial standards are not clearly articulated in case law. This may be due to the fact that most planning and land use cases are decided by state courts, the consequence of which seems to be contradictory and disjointed judicial standards.94 The United States Supreme Court's recent decision in Nollan v. California Coastal Commission,95 however, may prove to be a federal judicial standard for impact fee rulings.96

The "reasonableness" of local government action is the principal due process criterion related to evaluation of impact fee systems. Three very different standards have developed: 1) the "specifically and uniquely attributable" test, which is considered the most restric-

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94. According to Delaney, supra note 6, at 145,
   [s]everal divergent tests for evaluating the validity of subdivision exactions have developed in the state courts. The standards imposed by these state court tests range from judicial deference toward the legislative enactments to the stringent requirement that the need for an exaction be specifically and uniquely attributable to a proposed subdivision. Furthermore, these state tests fail to draw a discernible distinction between traditional subdivision exactions and user impact fees. Yet the different degree of burden imposed by the regulations should compel the reviewing courts to distinguish between them. User impact fees involve large-scale, off-site regional public facilities, the need for which is not directly attributable to a particular subdivision. Moreover, the cost of such facilities may become prohibitive to the consumer and ultimately exclusionary for certain economic classes.
96. While the Nollan Court distinguished "California's undemanding approach from land dedication cases in all other state courts," we cannot consider the holding in Nollan to be limited to California. In one of its most important findings, the court held that the takings clause of the Constitution requires a closer relationship between a land use regulation and the police power purposes of the regulation than it has required of other constitutional [sic] challenges.

Stroud, supra note 4, at 34. Before Nollan was decided by the Supreme Court, one author reasoned that there is no federal test for evaluating the validity of subdivision exactions or user impact fees. Although some decisions have been appealed to the United States Supreme Court, they have been dismissed for want of a substantial federal question. Thus to avoid further confusion, state and federal courts alike should adopt a single, flexible test for evaluating the constitutional validity of subdivision exactions, user impact fees, and linkage.

Delaney, supra note 6, at 145 (footnote omitted).
tive; 2) the "reasonable relation" test, which is viewed as a liberal standard that defers to local government decisions; and 3) the "rational nexus" test, which is considered a moderate standard that balances private property rights and the exercise of the police power by local governments.

A. Specifically and Uniquely Attributable Test

The "specifically and uniquely attributable" test was articulated by the Illinois Supreme Court for the review of subdivision exactions in *Pioneer Trust & Savings Bank v. Village of Mount Prospect.* This case involved the validity of an ordinance requiring the dedication of one acre per sixty residential lots in a subdivision for schools, parks, and other public purposes.

The test has a two-prong requirement: A city must show that 1) the new development causes a need for public improvements, and 2) the improvements confer benefits directly to the developer and his property. As stated by the *Pioneer Trust* court, the test is based conceptually on the premise that adequate statutory authority exists for subdivision exactions "if the burden cast upon the subdivider is specifically and uniquely attributable to his activity, then the requirement is permissible; if not, it is forbidden and amounts to a confiscation of private property in contravention of the constitutional prohibitions rather than reasonable regulation under the police power."  

The "specifically and uniquely attributable" test represents a shift from earlier cases which approved nearly any exaction by stating that it was the price to pay for the "privilege" of subdivision. This restrictive test requires that facilities be for the exclusive benefit of the subdivision, and inordinately places the burden of proof on local governments as to whether the fee is a valid exercise of the police power.

B. Reasonable Relation Test

The "reasonable relation" test, at the opposite end of the spectrum from the "specifically and uniquely attributable" test, is perhaps the most permissive judicial standard for impact fees. It was established in the landmark California case, *Ayres v. City Council.* In *Ayres,* the court approved the use of a requirement for the dedication of a roadway that provided benefits to the city while it served to meet spe-
specific subdivision needs. It required only that a "reasonable relationship" exist between the conditions imposed on the developer and the public needs generated by the new subdivision.101 Citing other courts, the Ayres court concluded that "where it is a condition reasonably related to increased traffic and other needs of the proposed subdivision it is voluntary in theory and not contrary to constitutional concepts" to require roadway dedication that benefits the specific subdivision and the community at large.102

C. Evolution of the "Rational Nexus" Test

In recent years, the "specifically and uniquely attributable" and "reasonable relation" tests have been scrutinized closely by legal commentators and the courts, who have established divergent and conflicting judicial standards for exercises of the police power. The debate concerning an appropriate judicial standard for subdivision exactions certainly caused confusion and consternation at the local government level, where public and private entities did not know what to expect from the courts. This debate has raged for at least half a century, beginning with Ridgefield Land Co. v. City of Detroit103 in 1928. However, a review of current literature and recent court cases indicates that a rational nexus standard dominates judicial review of subdivision exactions. Many state courts have adopted the rational nexus approach and one author contends that the recent Nollan decision has institutionalized this test at the federal level.104

Jordan and Wald Corp. illustrate the judicial evolution toward a "rational nexus" test. In Jordan, the city's ordinance required subdividers to pay $200.00 per lot in lieu of a land dedication.105 Jordan initially paid the exaction, which totalled $5,000.00, but brought an action for the return of his money.106 The Wisconsin Supreme Court expressed reservations about the ability or necessity of a local government to demonstrate that a fee or land dedication requirement should be levied to meet the demand for facilities and services solely generated by a particular subdivision.107 In rejecting the "specifically and

101. Id. at 37, 207 P.2d at 5.
102. Id. at 42, 207 P.2d at 8.
104. Stroud, supra note 4, at 34.
105. 28 Wis. 2d at 611, 137 N.W. 2d at 444.
106. Id. at 612, 137 N.W. 2d at 444-45.
107. Id. at 617-18, 137 N.W. 2d at 447-48.
uniquely attributable’’ test, the court found that fees or land dedication requirements for educational and recreational purposes were a valid exercise of the police power, if there were a ‘‘reasonable relation’’ between the need for additional facilities and the growth generated by the subdivision.

Jordan is particularly significant in the evolution of exaction judicial doctrine for two reasons. First, unlike other states, Wisconsin had not established a judicial standard regarding the subdivision exaction question. Therefore, Jordan may be viewed as an independent and objective legal analysis based on the economic, political, and social realities of the day. This is contrary to the legal circumstances in states like California, Connecticut, and New York, which have established records concerning subdivision exactions going back to 1949.

The second significant feature of Jordan is that it directly addressed the ‘‘specifically and uniquely attributable’’ judicial standard set forth in Pioneer Trust. Adopting the reasoning of Ayres, the Jordan court redefined the Pioneer Trust test such that the ‘‘words 'specifically and uniquely attributable' to [the divider’s] activity are not so restrictively applied as to cast an unreasonable burden of proof upon the municipality which has enacted the ordinance under attack.’’ Thus, the Jordan court dramatically changed the judicial standards for review of impact fees. No longer did the burden of proof rest solely upon local governments to demonstrate the validity of a fee or land dedication requirement. Jordan simply required that additional needs, and subsequently the exaction, stem from development in general and not exclusively from one subdivision.

Jordan articulated a legal framework which adequately addressed the problems of population and employment growth faced by local governments and, in the process, illustrated the archaic nature of the ‘‘specifically and uniquely attributable’’ test. Of equal significance, however, was the record established in Wald Corp., where the Florida court made a deliberate effort to evaluate the appropriateness of both

108. But see Sellergren, supra note 3, at 164 (the Jordan court ‘‘adopted the ‘specifically and uniquely attributable’ test but relaxed the burden of proof associated with it’’). In fact, the court found the ‘‘specifically and uniquely attributable’’ test acceptable, ‘‘provided the words 'specifically and uniquely attributable to his activity' are not so restrictively applied as to cast an unreasonable burden of proof upon the municipality which has enacted the ordinance under attack.’’ Jordan, 28 Wis. 2d at 617, 137 N.W.2d at 447.

109. 28 Wis. 2d at 618, 137 N.W.2d at 448.


111. 22 Ill. 2d 375, 176 N.E.2d 799 (1961).

112. 28 Wis. 2d at 617, 137 N.W.2d at 447.
the "specifically and uniquely attributable" and "reasonable relation" tests.\footnote{See also Frielich & Chinn, supra note 7, at 173 (in Wald Corp., "the court adopted a moderate 'rational nexus' approach which looks to the benefits conferred upon the development and requires a balancing of the prospective needs of the community against the property rights of the developer").}

In Wald, a developer challenged, under the due process and equal protection clauses of the federal constitution and Article X of the Florida Constitution, the constitutionality of a county ordinance that required dedication of land for canal drainage as a condition of approval for the developer's proposed subdivision plan.\footnote{338 So. 2d at 864.} The developer refused to dedicate and filed suit. The trial court granted summary judgment for the county, upholding the subdivision requirements under either of the two prevailing standards of review.\footnote{Id. at 865.}

On appeal, the court began its analysis by recognizing that two judicial standards existed for the review of subdivision exactions.\footnote{Id.} Citing Ayres as an example of the "reasonable relation" test, the court found that this standard had been diluted because of its application in numerous cases with markedly different fact patterns and inconsistent holdings.\footnote{Id. at 865-67.} The court found fault with the Ayres standard of "reasonable relation" because it placed an inordinate burden on the private sector to demonstrate that the fee or land dedication requirement had no "relation to the general health, safety, and welfare."\footnote{Id. at 866.} As a result, the court concluded that the Ayres standard inappropriately deferred exclusively to legislative judgment as to whether a subdivision threatens the health and safety of existing and future residents.\footnote{Id.}

Citing Pioneer Trust, the Wald court also resoundingly rejected the "specifically and uniquely attributable" test.\footnote{Id. at 866-67.} Noting that the Pioneer Trust decision was based on Ayres, the court properly illuminated the contradictory conclusions and identified the two holdings as conflicting and opposing judicial standards.\footnote{Id.}

The Wald Corp. court viewed the Pioneer Trust "specifically and uniquely attributable" test as being "unduly restrictive of local exercises of police power."\footnote{Id. at 866.} The court also was concerned that this standard undermined the assumed "validity" associated with "police
power measures,” and afforded “little deference to the judgment of the local legislative authority.” The court recognized the problems associated with population and employment increases experienced by some counties and cities, and stated that growth involved an entire community and not just one subdivision. Affirming a local government’s right to control development and rejecting the “specifically and uniquely attributable” standard, the court found:

The cause and effect approach advocated by Pioneer Trust disallows a formidable method of subdivision control, which is an integral part of comprehensive planning. And while it is important to guard against unbridled municipal discretion, it is equally important that those who propose to subdivide may be subjected to rational dedication requirements.

The court in Wald Corp. took a unique approach in creating a subdivision exaction review standard between the two extremes of Ayres and Pioneer Trust. In referring to a Florida Supreme Court decision concerning the regulation of outdoor advertising signs, the court concluded that modern day subdivision of land is tantamount to a business and therefore is subject to business regulations. From this point of view, the court found it logical to conclude that “subdivision control exactions are actually business regulations” designed to monitor the subdivider whose creation of lots is motivated purely by profit and not necessarily by the safety and welfare of future residents. Thus, local governments may use these business regulations as a means to promote the needs and interests of people not yet living in the subdivision.

In rejecting the “specifically and uniquely attributable” test of Pioneer Trust and the “reasonable relation” test of Ayres, the Wald Corp. court adopted the “rational nexus” test. The court chose this test because it “requires a balancing of the prospective needs of the community and the property rights of the developer” and “allows local authorities to implement future-oriented comprehensive planning without according undue deference to legislative judgments.” Significantly, the court supported the rational nexus approach because it

123. Id.
124. Id. at 866-67.
125. Id. at 867.
126. Id. (citing Ekind v. City of Vero Beach, 159 So. 2d 209 (Fla. 1963)).
127. Id. (quoting Johnston, Constitutionality of Subdivision Control Exactions: The Quest for a Rationale, 52 Cornell L.Q. 871, 923 (1967)).
128. Id.
129. Id. at 868.
“treats the business of subdividing as a profit-making enterprise . . . drawing proper distinctions between the individual property-holder and the subdivider.”

The rational nexus test, the judicial standard-bearer for evaluating the appropriateness of subdivision exactions, has been adopted by courts because it balances the competing interests of local governments' police powers and comprehensive plans with subdividers' property and business rights. Assuredly, other judicial standards are espoused for reviewing subdivision exactions. However, these espousals may be viewed as anomalous and the result of a judicial system decentralized in the area of land use law where the preponderance of cases are decided by state courts.

D. Rational Nexus Test

The critical question under the rational nexus test is whether the impact fee accurately reflects new development's proportionate share of the cost of the new facility. Most courts generally judge impact fees by the same standards applied to subdivision exactions.

The rational nexus test involves two principles. First, there must be a reasonable connection between the community growth generated by new development and the need for additional facilities to serve that growth. Second, there must be a connection between the expenditure of the fees collected from contributing development and the benefits that development enjoys. Thus, the rational nexus test calls upon local governments to show that growth will result in a need for the new or expanded facilities, which in turn will be financed by impact fees assessed against new development. Moreover, local governments must show that the funds collected will not only provide the needed facilities but will also benefit the contributing development.

Contractors & Builders Association is an important case which adopted the prevailing rational nexus test. There, the Florida Supreme Court recognized the difficulty of matching the "costs of expansion" and timing of certain capital expenditures and held that "perfection is not the standard" of the city's duty to establish the nexus between the impact fee and reasonably anticipated costs of development. The court concluded that impact fees are permissible when: 1) expansion of public facilities is reasonably required as a result of development;

130. Id.
131. Nicholas & Nelson, supra note 93, at 56.
133. Id. at 320 n.10 (quoting Rutherford v. City of Omaha, 183 Neb. 398, 405, 160 N.W.2d 223, 228 (1968)).
2) the fees collected "do not exceed a pro rata share of reasonably anticipated costs of expansion"; and 3) "the use of the money collected is limited to meeting the costs of expansion." 134 Citing Contractors & Builders Association, the Washington Supreme Court held that the fact that a connection charge necessarily imposes some burden on new customers does not make it an invalid tax. 135

In the early 1980's, the Utah Supreme Court provided specific guidance for application of the reasonable relation or rational nexus test. In Banberry, 136 the court created a framework for cost calculations that apply across a variety of capital facilities and attempt to prevent new development from being "double-charged." 137 This framework includes variables related to the cost and manner of financing capital facilities; financial contribution of newly developed properties to the cost of existing and future facilities; and extraordinary costs related to servicing new development. 138

The court in Banberry also emphasized the need for "flexibility" to deal realistically with impact fees since they are not susceptible to exact measurement. 139 This opinion was also reflected in Jordan, where the Wisconsin Supreme Court held that a municipality need not show that an exaction meets a need solely attributable to a particular development or that it confers benefits directly to the particular development which is subject to the exaction. 140 Rather, it held that the cumulative impact of new growth over several years could form a reasonable basis for the subdivision exaction. 141

VI. JUDICIAL AND POLICY CONSIDERATIONS

The last section of this article considers judicial and policy implications of existing and evolving judicial standards for subdivision exactions, including an analysis of the recently decided Nollan case. This section also identifies the legal authority required by local governments to manage population and employment growth effectively. The burden placed on local governments by the Nollan decision is considered in light of the realities of metropolitan and urban growth and development faced by local governments in the late 1980's. From the

134.  *Id.* See also Sellergren, supra note 3, at 165 ("[i]n states like Florida and Utah," the rational nexus test "is being applied in its strictest form").
135.  *Hillis Homes, Inc.*, 105 Wash. 2d at 300, 714 P.2d at 1169.
137.  *Id.* at 903.
138.  *Id.* at 904.
139.  *Id.*
140.  28 Wis. 2d 608, 137 N.W.2d 442 (1965), appeal dismissed, 385 U.S. 4 (1966).
141.  *Id.* at 619-20, 137 N.W.2d at 447.
practitioner's point of view, the burning question is: What tools are required by local governments to ensure that the public health, safety, and welfare are protected in subdivision activities?

A. Nollan and State Court Judicial Standards

In June 1987, the United States Supreme Court decided *Nollan v. California Coastal Commission*.142 There, the Nollans owned a small 500 square foot bungalow on a beach lot, which was located between two public beaches.143 After a period of time, the bungalow became "rundown," and the Nollans proposed to demolish it and construct a 2,500 square foot, three bedroom house, complete with garage.144 The California Coastal Commission granted approval to the development, subject, however, to the condition that a lateral easement along the beach in front of the house be granted to facilitate public movement between the two public beaches.145 The public easement would vary in width up to ten feet, depending upon the time of year.146 Similar deed restrictions had been imposed by the Commission since 1979 on forty-three other new development projects in the same area.147

The Commission’s rationale in conditioning the construction permit was that the erection of the Nollan’s house would create a "psychological barrier" which would prohibit the public from realizing that there was coastline connecting the two public beaches.148 In addition, the Commission believed that this "psychological barrier" would make public use more difficult while increasing private use of the coastline adjacent to the Nollans’ property.149

The Supreme Court held that the easement required by the Commission was a "permanent physical occupation" of the Nollans’ property.150 The Court articulated its standard for "taking" cases as cited in *Agins v. Tiburon*,151 that the regulation must "substantially advance" the legitimate state interest sought to be achieved.152 While admitting that a "broad range of governmental purposes," such as

143. Id. at 3143.
144. Merriam, Commentary on Nollan v. California Coastal Commission, 12(4) AM. PLAN.
145. *Nollan*, 107 S. Ct. at 3143.
146. Merriam, supra note 144, at 9.
147. Id.
148. *Nollan*, 107 S. Ct. at 3143-44.
149. Id.
150. Id. at 3145.
152. *Nollan*, 107 S. Ct. at 3146-47.
scenic zoning, landmark preservation, and residential zoning, satisfied this standard, the court required the demonstration of a close nexus between the condition imposed and the restriction on development.\textsuperscript{153}

In the majority's opinion, a lateral easement would not further the state's interest, although the Commission constitutionally could have required the Nollans to "provide a viewing spot on their property for passersby with whose sighting of the ocean their new house would interfere."\textsuperscript{154} In addition, the condition imposed on a permit, according to the majority, should be constitutional if the legitimate denial of the permit would achieve the same goal.\textsuperscript{155} Accordingly, traditional land use regulations, such as "a height limitation, a width restriction, or a ban on fences," would have been permissible to control development activities and protect the public's view of the beach.\textsuperscript{156}

Close scrutiny of land dedication requirements is the significant holding of \textit{Nollan}.\textsuperscript{157} The Court held that the Takings Clause of the United States Constitution required a closer relationship between a land use regulation and the police power purposes it seeks to advance than has previously been the case with due process and equal protection claims.\textsuperscript{158} This is particularly true when property is physically invaded as a result of local government action. In adopting this position, the Court rejected the California version of a reasonable relationship between the permit condition and the governmental objective.\textsuperscript{159} The new standard articulated that the regulation must "substantially advance legitimate state interests."\textsuperscript{160}

In dissent, Justice Brennan argued that local governments must have flexibility to exercise police powers and manage development related activities, and that the close nexus between permit condition and government objective is unnecessary.\textsuperscript{161} His dissent is predicated on the theory that growth management is a delicate balancing act between the exercise of local government police power and property rights of land developers. Justice Brennan recognized that local gov-

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\textsuperscript{153.} Id. at 3147-48.
\textsuperscript{154.} Id.
\textsuperscript{155.} Id.
\textsuperscript{156.} Id.
\textsuperscript{157.} \textit{See also} Note, \textit{The Supreme Court, 1986 Term: Leading Cases}, 101 \textit{Harv. L. Rev.} 119, 245-46 (1987) (\textit{Nollan} "articulates a more absolute conception of protected property rights and subjects land-use regulations to a heightened standard of judicial review" and "signals that the Court is prepared to reduce the flexibility of governments in favor of expanded protection of property rights under the takings clause").
\textsuperscript{158.} \textit{Nollan}, 107 S. Ct. at 3147.
\textsuperscript{159.} Id. at 3148.
\textsuperscript{160.} Id. at 3146.
\textsuperscript{161.} Id. at 3151-60 (Brennan, J., dissenting).
ernments must be afforded the authority and flexibility to protect the welfare of existing and future citizens.162 Conversely, private property owners need sufficient guarantees that land development may occur without arbitrary stipulations by local government.

In attacking the Nollan nexus test, Justice Brennan stated that the Supreme Court has historically required that a state’s means be reasonably related to the state’s purpose, or that a state “could rationally have decided” that the regulation might achieve its public purpose.163 Justice Brennan found little reason for the Supreme Court to make a distinction between the Commission’s effort to preserve “lateral access” along the coast and “visual access.”164 Justice Brennan stated that “[s]uch a narrow conception of rationality, however, has long since been discredited as a judicial arrogation of legislative authority. ‘To make scientific precision of criterion of constitutional power would be to subject the State to an intolerable supervision hostile to the basic principles of our Government.’”165

Justice Brennan’s argument for a rational relationship between the condition and regulation is based on the premise that state and local governments, not the courts, can best judge what constitutes a fair, equitable, and reasonable land use regulation. The dissent quoted the following language from Day-Brite Lighting, Inc. v. Missouri:166

> Our recent decisions make it plain that we do not sit as a super-legislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare . . . . [S]tate legislatures have constitutional authority to experiment with new techniques; they are entitled to their own standard of the public welfare.167

The most disturbing aspect of the Nollan decision is that it may not be exclusively related to conditioning building permits or requiring lateral beach access. To the contrary, Nollan may influence many types of development exaction programs, including open-space set asides in residential subdivisions, mandatory affordable housing linkage programs,168 impact fees, and off-site infrastructure improvement programs.169

162. Id. at 3156-57 (Brennan, J., dissenting).
163. Id. at 3151 (Brennan, J., dissenting).
164. Id. at 3152 (Brennan, J., dissenting).
165. Id. at 3153 (Brennan, J., dissenting) (quoting Sproles v. Binford, 286 U.S. 374 (1932)).
168. Linkage is an extension of the impact fee concept, and is a new concept which the
The Nollan decision appears to have established a "hybrid" judicial standard which may severely restrict the flexibility, and subsequent opportunity, for local governments to manage community development activities.\textsuperscript{170} However, the trend in judicial standards of subdivision exactions has been towards the "rational nexus" test which achieves a balancing of the competing interests of local government police powers and private property rights. In fact, Nollan appears conceptually to be more in tune with the restrictiveness of the "specifically and uniquely attributable" test of Pioneer Trust.\textsuperscript{171}

The Supreme Court adopted an antiquated judicial standard that unnecessarily burdens local governments and, in many cases, provides a windfall benefit to private property owners. The Court passed over the rational nexus test, which has evolved over a number of years by judicial trial and error.\textsuperscript{172} Starting with Jordan\textsuperscript{173} and progressing to

courts have not yet addressed in depth. Delaney, supra note 6, at 143-44. Linkage programs "link the right to construct new large-scale mixed use or nonresidential developments to the provision of new housing." Id.

169. See also Sellergren, supra note 3, at 168 ("[a] definite trend is emerging in judicial decisions toward a more rigorous test of rational, factual basis for exactions, particularly if they are either for off-site lands or for fees for capital facilities").

170. Another commentator has reasoned that recent California legislation and the Nollan case indicate the need for a higher, more mainstream rationale for assessing impact fees—perhaps moving away from the reasonably related standard to the rational nexus standard. In light of evolving, restrictive attitudes toward impact taxes and mitigation fees, and considering recent legislative changes that make less flexible the application of impact fees, as well as the Nollan case, we wonder whether California planners might wish to deflect possible future challenges to impact fees by suggesting consideration of the benefit, equity, and administrative principles embodied in Florida’s ‘rational nexus’ test . . . .

Lillydahl, supra note 60, at 10.

171. 22 Ill. 2d 375, 380, 176 N.E.2d 799, 802 (1961). The Nollan Court found its conclusion to be "consistent with the approach taken by every other court that has considered the question, with the exception of the California state courts," and cited, among other cases, Aunt Hack Ridge Estates, Inc. v. Planning Comm’n, 160 Conn. 109, 273 A.2d 880 (1970); Pioneer Trust & Savings Bank v. Village of Mount Prospect, 22 Ill. 2d 375, 176 N.E.2d 799 (1961); Jenad, Inc. v. Village of Scarsdale, 18 N.Y.2d 78, 218 N.E.2d 673, 271 N.Y.S.2d 955 (1966); and Jordan v. City of Menomonee Falls, 28 Wis. 2d 608, 137 N.W.2d 442 (1965), appeal dismissed, 385 U.S. 4 (1966). Nollan, 107 S. Ct. at 3149-50. However, Sellergren, supra note 3, at 166, sees the Nollan case as one in which [t]he Nollans won by a bare majority, five-to-four, and the majority opinion was severely criticized by the dissenters for using an uncharacteristically demanding standard to judge a police power action. Consequently, it remains to be seen how much weight Nollan will ultimately carry in future development exaction disputes. Nollan may become an aberration, but whatever direction its progeny take [sic], its exacting standard will be ammunition for those seeking greater restrictions on a municipality’s ability to levy development exactions.

172. Some commentators might applaud the Nollan Court’s ignoring of the rational nexus test:

In adopting rational nexus as the legal standard underlying most developer financing
Wald Corp., state courts have developed a well-reasoned framework for the rational nexus approach. As conceptually described in Contractors & Builders Association, Hollywood, Inc., and Home Builders and Contractors Association, the following three requirements must be met for an exaction to be a proper application of regulatory police powers pursuant to the rational nexus approach: 1) expansion of existing facilities and services must be necessary and caused by new development; 2) imposed fees must not exceed a proportionate “fair share” of the costs incurred in accommodating new users; and 3) collected fees must be “earmarked” to ensure expenditure for the purposes for which they were charged.

As stated in Banberry, new development should not be required to bear more than its equitable share of capital costs in relation to benefits conferred. The relative cost burden “previously borne and yet to be borne” by new and existing development must be considered and the “fee in question should not exceed the amount sufficient to equalize the relative burdens of newly developed and other properties.” Banberry established a framework to ensure equitable and fair allocation of capital costs associated with new facilities. Unfortunately, the Nollan Court failed to realize the advantage of a judicial standard for exaction that sufficiently balances private property rights and local government police power rights.

The following section demonstrates that the test enunciated in Nollan—substantial advancement of legitimate state interests—may needlessly harm and restrict local government community development activities. More importantly, it may force communities to adopt of infrastructure, the courts have ignored the tradition of one generation of residents building and financing infrastructure for the next. The primary role of the courts has been a fiduciary one: to protect new development from being assessed the cost of facilities that benefit current residents. When cities adopt the maximum level of developer financing consistent with protecting the interests of new development under rational nexus, they, however, implicitly assume established residents have no responsibility for facilities for future residents. This results in a windfall for established residents, who had much of their infrastructure financed by previous generations of residents. Thus, rational nexus should be considered the minimum standard of intergenerational responsibilities needed to achieve the courts’ fiduciary objective, and not necessarily the socially and economically desirable standard.

Snyder & Stegman, supra note 26, at 26-27.
174. 338 So. 2d 863 (Fla. 3d DCA 1976), cert. denied, 348 So. 2d 955 (Fla. 1977).
176. 431 So. 2d 606 (Fla. 4th DCA 1983).
177. 446 So. 2d 140 (Fla. 4th DCA 1983), rev. denied, 451 So. 2d 848 (Fla. 1984), appeal dismissed, 469 U.S. 976 (1984).
179. Id. at 903.
growth management controls that place an artificial limit on population and employment growth.

B. Tools to Manage Community Development

The planning profession, community development concepts, and subdivision regulations have changed significantly since the turn of the twentieth century. Current planning theory seeks the regulation of subdivisions as they relate to an external environment, to the community as a whole, and in relation to community and regional comprehensive plans.180 This theory is predicated on the conviction that a community must be planned as a whole and not subdivision by subdivision because population and employment growth do not occur in a vacuum:

Property does not exist in isolation. Particular parcels are tied to one another in complex ways, and property is more accurately described as being inextricably part of a network of relationships that is neither limited to, nor usefully defined by, the property boundaries with which the legal system is accustomed to dealing.181

Growth has specific impacts on public facilities and services, causes environmental damage, diminishes open space and agricultural areas, and may have dubious social consequences. Modern subdivision regulation therefore requires a comprehensive and multi-dimensional perspective that anticipates the impact of population and employment growth.

To plan comprehensively, however, local government planners must be reasonably assured that a reliable funding source exists to finance facility and service improvements necessitated by new development. For example, a five year capital improvement plan is only a useful growth management tool when it has incorporated reliable funding sources. In the case of impact fees, having a reliable funding source entails the development of a judicial standard that allows the collec-

180. According to Lillydahl, supra note 60, at 11,
[the Florida legislature has only recently addressed impact fees, under the Local Government Comprehensive Planning and Land Development Regulation Act. Adopted in 1985 and amended in 1986, this act requires communities to include capital improvements in their state-mandated comprehensive planning efforts and includes impact fees as a capital financing option. The legislation does not codify Florida case law however.


tion of a fee in proportion to the development's impact on facilities and services.

A judicial standard such as the "specifically and uniquely attributable" test articulated in Pioneer Trust or the "legitimate state interest" test asserted in Nollan could eliminate the potential for impact fees to function as a viable financing tool for the provision of facilities and services necessitated by development. In both cases, the nexus between need and demand or between condition and regulation are so tightly configured as to ignore the realities of present day urban development and the subsequent necessity to regulate subdivision activities. This point was made most eloquently by Justice Brennan in his Nollan dissent:

[I]t is important to point out that the Court's insistence on a precise accounting system in this case is insensitive to the fact that increasing intensity of development in many areas calls for farsighted, comprehensive planning that takes into account both the interdependence of land uses and the cumulative impact of development.182

The critical dilemma of subdivision regulation and exactions is the nagging question of who pays for the costs associated with population and employment growth. Local governments have only two answers to this question: 1) devise methods that artificially limit the amount of growth that may occur; or 2) assure the presence of a reliable revenue source to fund facility and service expansions necessary to accommodate new residents and employees. If local governments select the latter alternative, it seems appropriate that the funding source be development-driven and that the financial burden of population and employment growth be shifted to those responsible for the new development. In many circumstances, impact fees will be the reliable financing mechanism that meets these criteria. In the absence of reliable funding sources, however, the alternative is a limitation on development activities. No middle ground exists between growth limitations and paying for growth. Local governments simply cannot be placed in a position where they abrogate a responsibility to protect public health, safety, and welfare.

VII. CONCLUSION

This article has demonstrated that local governments experiencing population and employment growth require innovative financing tools

to meet the facility and service demands of new development. An impact fee is an equitable, fair, and reasonable financing tool necessary to regulate the negative impact of new development. The appropriate judicial standard for impact fees is one which: 1) balances the interest of subdividers to exercise property rights and the interest of local governments to promote and protect public health, safety, and welfare; 2) encourages new development to pay its “fair share” of costs associated with new facility and services; and 3) bridges the interests of subdividers, local governments, “existing” residents, and “potential” residents.

Given all of this, however, the same key questions remain. Who pays for facility and service costs associated with new development? And how may local governments regulate subdivision activities? The answers to these questions necessarily shape the formulation of fundamental public policy. The judicial community and state legislatures have historically looked to local governments for the development and implementation of regulations sufficient to control subdivision activities. This regulatory activity must include appropriate financing methods that ensure adequate provision of facilities and services to meet the demand of new population and employment growth.