REVOLUTIONARY IDEAS IN PLANNING
Proceedings of the 1998 National Planning Conference
AICP Press

Exactions, Impact Fees And Other Land Development Conditions *

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Abstract*

Government imposes impact fees and exactions on the land development process in order to pay for public facilities needed to service a particular project. To the extent that the fee or exaction exceeds the land developer's proportionate share of the facility's cost, the levy is an unconstitutional taking of property. Courts scrutinize the calculations for imposing such fees and exactions by government, particularly if they are "ad hoc". It is therefore useful, if not necessary, for government to "regularize" the land development condition process through appropriate local ordinances.

I. Introduction and Background

Land development of any size and substance drives the need for a variety of public facilities to support it. Most common is the need for additional roads, public utilities, parks and schools. To this list one could logically add police and fire stations and sanitary landfills. The time is long past since government - particularly local government - has borne the principal burden of these costs. State and local financial resources have been woefully inadequate at least since the end of massive federal subsidies in the early 1980's. For decades, local government has charged land developers for a part of the cost of such public facilities, at least with respect to those facilities intrinsic to the development, in the form of subdivision dedications and fees. Initially "charged" as the price of drawing and recording the simpler and cheaper subdivision plat in place of the lengthy, tedious and easily-flawed metes and bounds description for land development, these fees and dedications soon became part of the regulatory land use process, exercised by local government under the police power for the health, safety and welfare of the people, often as a method to control or manage growth.1

However, by justifying such land development dedications and fees as police power regulations, rather than "voluntary" costs of using the subdivision, local governments invite judicial scrutiny under the takings clause of the Fifth Amendment to the U.S. Constitution, which permits the taking of private property for public use only upon payment of just compensation. While early cases by and large upheld such intrinsic dedications and fees, the more recent charges of "impact fees" for the shared construction by several land developments of large and expensive public facilities (such as municipal wastewater treatment

plants and sanitary landfills) outside or extrinsic to the development upon which the fee is levied, led knowledgeable courts to scrutinize the connection between such fees and the need generated by the charged development for the particular facility in question.2 Nevertheless, it is generally agreed that the law applicable to impact fees, exactions and in lieu fees, as well as to compulsory dedications, is the same, given that they all represent land development conditions, levied at some point in the land development process such as subdivision approval, building permit, occupancy permit or utility connection.3 Therefore, except where the text specifically makes such distinctions, the terms are here used interchangeably.

The search for such a connection or "nexus," without which such fees, dedications and exactions are generally unconstitutional takings of property without compensation, is the major legal issue with respect to such land development regulations, particularly after the U.S. Supreme Court decisions in Nollan v. California Coastal Commission,4 and Dolan v. City of Tigard.5 Therefore much of this paper is devoted to these cases and their progeny.

Critical as the takings/nexus issue is, there are other legal requirements for attaching conditions to the development of land. Among these are the need for authority to levy such dedications, fees and other exactions, in the form of enabling legislation and local ordinances, to avoid the charge that they are "ad hoc," and the need to expend the fee, whether "in lieu" of a dedication requirement or an impact fee, within a reasonable period of time after collection. As the history and cases make abundantly clear, such land development conditions are development driven: to be valid, they must be collected (and exactions and dedications required) for, and only for, public facilities and infrastructure for which land development causes a need.6 Courts uniformly strike down (usually as an unauthorized tax) land development conditions which are not so connected.7 Generally, this includes attempts to remedy existing infrastructure deficiencies,8 or to provide for operation and maintenance of facilities.9 Of course, if payment for a public facility, or its construction or dedication, is in part fulfillment of a landowner's contractual obligations under a development agreement between landowner and local government, then the legal issues and analysis are entirely different and the need for nexus and proportionality, at least as a matter of constitutional law, disappears.10

II. Nexus, Proportionality, and Takings: Nollan, Dolan and Progeny

Once courts recognized land development conditions such as impact fees, dedications and other exactions as an exercise of the police power, limitations thereon soon became obvious and evident. A series of state cases dealt with such issues throughout the 1970's and 1980's. However, the U.S. Supreme Court's decisions in Nollan v. California Coastal Commission11 and Dolan v. City of Tigard,12 imposed a national uniformity on the police power common law with respect to such land development conditions, particularly concerning the necessary connection between the exaction or condition and the land development project which is subject to such an exaction or condition. The cases preceding Nollan and Dolan are therefore less important as a class than those which follow. Both, however, are treated in this extended section.

A. Nollan and Nexus. Decided on the last day of the U.S. Supreme Court's 1987 term, Nollan v.

California Coastal Commission13 deals ostensibly with beach access. The plaintiffs sought a coastal development permit from the California Coastal Commission in order to tear down a beach house and build a bigger one. The Commission imposed a condition on the permit, requiring the granting of an easement to permit the public to use one-third of the property on the beach side. For the privilege of substantially upgrading a beach house, the owner was forced to dedicate to the public lateral access over much of his backyard for more beach for the public to walk upon. The California Court of Appeal had held this was a valid exercise of the Commission's police power under its statutory duty to protect the California Coast.

The U.S. Supreme Court reversed. Noting that the taking of such an access over private property by itself would require compensation, the Court then examined whether the same requirement, imposed under the police or regulatory power of the Commission rather than under its powers of eminent domain, would modify the "just compensation" requirement.14 The direct holding of the Court was that in this case it did not and that compensation was required. The rationale of the Court is critical. The Court observed that land use regulations do not effect takings if they substantially advance legitimate state interests and do not deny an owner the economically viable use of his land. But even assuming (without deciding) that legitimate state interests include, in the Commission's words, protecting public views of the beach and assisting the public in overcoming the psychological barrier to the beach created by overdevelopment, the Court could not accept the Commission's position that there was any nexus between these interests and the condition attached to Nollan's beach house redevelopment:

> *It is quite impossible to understand how a requirement that people already on the public beaches be able to walk across the Nollans' property reduces any obstacles to viewing the beach created by the new house. It is also impossible to understand how it lowers any "psychological barrier" to using the public beaches, or how it helps to remedy any additional congestion on them caused by construction of the Nollans' new house. We therefore find that the Commission's imposition of the permit condition cannot be treated as an exercise of its land use power for any of these purposes.15*

However, said the Court, it is an altogether different matter if there is an "essential nexus" between the condition (read impact fee or exaction) and what the landowner proposes to do with the property:

> *Thus, if the Commission attached to the permit some condition that would have protected the public's ability to see the beach notwithstanding the construction of the new house--for example, a height limitation, a width restriction, or a ban on fences--so long as the Commission could have exercised its police power (as we assumed it could) to forbid construction of the house altogether, imposition of the condition would also be constitutional. Moreover (and here we come closer to the facts of the present case), the condition would be constitutional even if it consisted of the requirement that the Nollans provide a viewing spot on their property for passersby with whose sighting of the ocean their new house would interfere. . . . The evident constitutional propriety disappears, however, if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition. . . . the lack of nexus between the condition and the original purpose the building restriction converts that purpose into something other than what it was. The purpose then becomes, quite simply, the obtaining of an easement to serve some valid*

> *governmental purpose, but without payment of compensation. Whatever may be the outer limits of "legitimate state interests" in the takings and land use context, this is not one of them.16*

In short, the Supreme Court appears to have adopted the "rational nexus" test concerning exactions, in-lieu fees and impact fees.

B. Dolan and Proportionality. In Dolan v. City of Tigard, the Supreme Court struck down a municipal building permit condition that the landowner dedicate bike path and greenway/floodplain easements to the city. As the Court pointed out, had Tigard simply required such dedications, it would be required to pay compensation under the Fifth Amendment. Attaching them as building permit conditions required a more sophisticated analysis closely following Nollan v. California Coastal Commission, since the police power is implicated rather than the power of eminent domain. In the process, the Court signaled how far local government may go in passing on the cost of public facilities to landowners. The answer: only to the extent that the required dedication is related both in nature and extent to the impact of the proposed development.

The Dolans own and operate a 9700 square foot plumbing and electrical supply store on main street in Tigard's central business district. Seeking to double the size of the store and pave a 39-space parking lot, the Dolans applied for a building permit from the City Planning Commission. Tigard had previously adopted a comprehensive land use plan required by state comprehensive land use management statutes, in accordance with statewide goals.17 Many of the plan's features are codified in Tigard's Community Development Code (CDC). Among the plan's requirements:

1. In accordance with a pedestrian/bicycle pathway plan, new development must dedicate land for pathways where shown on the plan;
2. In accordance with a master drainage plan, to combat the risks of flooding in 100-year floodplains, especially as exacerbated by increased impervious surface through development, developers along waterways such as Fanno Creek (which borders the Dolan parcel to the west), must guarantee the floodway and floodplain are free of structures and able to contain floodwaters by preserving the land alongside as greenway.

As a result of the plan and its codification in the CDC, the Commission granted the Dolans their building permit upon condition that they dedicate the portion of their property in the floodplain as a greenway, and that an additional 15-foot strip be dedicated adjacent to the greenway as a pedestrian bicycle path. The basis of these requirements is a series of Commission findings.

With respect to the bikeway, the Commission found that the pathway system as an alternative means of transportation "could" offset some of the traffic demand on nearby streets and lessen the increase in traffic congestion. The Commission also found it was reasonable to assume that some of the Dolans' customers and staff could use the pathway for transportation and recreation. With respect to the floodplain greenway dedication, the Commission found it was reasonably related to the Dolans' application since the site would have more impervious surface. This would result in increased stormwater drainage. Therefore the dedication requirement was related to the applicants' plans for more intensive development of their land.

After appealing to various local and state administrative agencies and to the Oregon courts without success, the Dolans challenged the holding of the Oregon Supreme Court that the City of Tigard could condition the approval of their building permit on the dedication of property for flood control and traffic improvement. The U.S. Supreme Court granted certiorari to set out the "required degree of connection between the exactions imposed by the city and the projected impacts of the proposed development."18

The Court essentially adopted a three-part test:

1. Does the permit condition seek to promote a legitimate state interest?
2. Is there an essential nexus between the legitimate state interest and the permit condition?
3. Is there a required degree of connection between the exactions and the projected impact of the development?

The Court disposed of the first two quickly and affirmatively. Certainly the prevention of flooding along the creek and the reduction of traffic in the business district "qualify as the type of legitimate public purposes we have upheld."19 Moreover, the court held it was "equally obvious" that a nexus exists between preventing flooding and limiting development within the creek's floodplain, and that "the same may be said for the city's attempt to reduce traffic congestion by providing for alternative means of transportation" like a "pedestrian/bicycle pathway."20 So far, so good: we have public purpose (which the Court assumed without deciding in Nollan) and essential nexus (which the Court decided was lacking in Nollan). The question remained, with respect to the third test: "[W]hether the degree of the exactions demanded by the city's permit conditions bear the required relationship to the projected impact of petitioner's proposed development."21

The Court said no: the city's "tentative findings" concerning increased stormwater flow from the more intensively developed property, together with its statement that such development was "anticipated to generate additional vehicular traffic thereby increasing congestion" on nearby streets, were simply not "constitutionally sufficient to justify the conditions imposed by the city on petitioner's building permit."22

The Court's test is "rough proportionality":

> *[T]he city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.23*

Applying the test to the Dolan hardware store property, the Court concluded that the City of Tigard demanded too much to pass this third nexus/rough proportionality test. Simply concluding that a bikeway easement could offset some of the traffic demand which the new hardware store would generate did not constitute sufficiently quantified findings for the taking of an easement. While the Court

> *[has] no doubt that the city was correct in finding that the larger retail sales facility proposed by petitioner will increase traffic on the streets . . . the city has not met its burden of demonstrating that the additional number of vehicle and bicycle trips generated by the petitioner's development*

> *reasonably relate to the city's requirement for a dedication of the pedestrian/bicycle pathway easement. The city simply found that the creation of the pathway "could offset some of the traffic demand . . . and lessen the increase in traffic congestion . . . ." [T]he city must make some effort to quantify its findings . . . beyond the conclusory statement [quoted above].24*

As to the greenway easement, while the Court said

> *It is axiomatic that increasing the amount of impervious surface will increase the quantity and rate of storm-water flow from petitioner's property . . . the city demanded more--it not only wanted petitioner not to build in the floodplain, but it also wanted petitioner's property along Fanno Creek for its Greenway system. The city has never said why a public greenway, as opposed to a private one, was required in the interest of flood control.25*

The constitutional problem in both instances is "the loss of [their] ability to exclude" which the Court reminds us is one of the most essential sticks in the bundle of rights that are characterized as property:

> *We see no reason why the Takings Clause of the Fifth Amendment, as much a part of the Bill of Rights as the First Amendment [free speech, press, religion, association, assembly] or Fourth Amendment, [search and seizure] should be relegated to the status of a poor relation in these comparable circumstances.26*

C. Applicability to All Land Development Conditions. An initial issue is the range of land development conditions to which Nollan and Dolan are applicable. At one extreme is the view that only land dedication conditions are affected by these two decisions, since land dedications were the only such conditions at issue in either case. This view is bolstered by the language in Dolan and other recent U.S. Supreme Court opinions which focus on property rights and the ability to exclude, which Chief Justice Rehnquist either wrote, or in which he concurred.27 At the other extreme is the view that the cases apply to all land development conditions. An arguable middle view is that the cases apply to impact and in lieu fees as well as land dedications.

Needless to say, the cases which strike down land dedications for lack of nexus and/or proportionality are legion, both pre- and post- Nollan and Dolan. One such case, from the Second Circuit, is Walz v. Town of Smithtown,28 There, landowners were denied access to the public water supply when they refused to deed the front fifteen feet of their property to Smithtown for road widening purposes. Finding a total lack of nexus between water service and road widening, the court found that "As landowners, the Walzes surely had a right not to be compelled to convey some of their land in order to obtain utility service."29

Similarly, the court in Schultz v. City of Grants Pass30 struck down the city's condition that Schultz dedicate a parcel for street widening in exchange for approval of an application to partition the parcel. The court first addressed the extent of the dedication, concluding that the dedication would require the owners to part with 20,000 square feet of their land. The city had determined that with full development of the parcel, 15 to 20 homes could be placed on the parcel, causing considerable impact on transportation on the streets. The court held that the city was required to examine the actual proposed development--here

partitioning into 2 lots--to determine the impact on transportation. Applying Dolan to the proposed condition, the court concluded that a slight increase of traffic from the two lots did not justify a 20,000 square foot dedication, and therefore there was no rough proportionality between the exaction and the impact from the development.

Applying a specifically and uniquely attributable test a Connecticut court in Timber Trails Corp. v. Planning and Zoning Comm'n of the Town of Sherman,31 struck down an off-site road improvement condition on subdivision approval on the ground that problems with existing highways were not so specifically and uniquely attributable to abutting subdivisions. The Connecticut Supreme Court applied a less stringent test in Property Group, Inc. v. Planning and Zoning Comm'n of the Town of Tolland,32 striking down a road widening condition on a subdivision approval for only ten lots. The court found that the road problems were preexisting and there was no substantial evidence the widening was necessitated by the proposed development. The Kentucky court of appeals also struck down a bridge construction and dedication requirement as a subdivision approval and rezoning requirement in Lexington-Fayette Urban County Government v. Schneider and Hi Acres Development Company,33 because there was no reasonable relationship between the development and the need for the bridge.

A more egregious example is Amoco Oil Co. v. Village of Schaumburg,34 in which the Village attempted to exact 20% of Amoco's land for roadway widening purposes before permitting other redevelopment at a gasoline service station. Finding that such an exaction on the basis of a 0.4% increase in traffic "does not correspond with the slightest notions of rough proportionality,"35 the court held that exaction "constitutes a taking under both the Fifth Amendment of the United States Constitution and Article I, Section 15 of the Illinois Constitution."36

To the same effect is Cobb v. Snohomish County,37 striking down a road improvement fee because the county could not show the improvements were reasonably necessary for the particular level of service to be provided;38 Dellinger v. City of Charlotte,39 striking down a road dedication requirement for failure to make written findings relating dedication to traffic from a proposed subdivision; and The Luxembourg Group, Inc. v. Snohomish County,40 striking down the dedication of a 60 foot right of way as a disproportional condition for approving a 15 lot subdivision.

Although the above cases deal mainly with land dedication requirements, it is difficult to support the view that the proportionality and nexus tests identified in Nollan and Dolan apply only to such land dedications. First, the Court remanded the California impact fees case of Ehrlich v. Culver City to the California Court of Appeals just days after deciding Dolan, with the direction that it be reviewed in light of the Dolan decision. Second, and equally as important, the California Supreme Court accepted review of the remanded Court of Appeals decision in Ehrlich and in a lengthy and complex opinion, held that Dolan applied beyond land dedication conditions to impact fees, though only to a limited range of such fees as are ad hoc and not part of a regularized system of exactions.41 Citing Nollan, the Ehrlich court expressed concern that adjudicative, ad hoc conditions on development present "an inherent and heightened risk that local government will manipulate the police power to impose conditions unrelated to legitimate land use regulatory ends, thereby avoiding what would otherwise be an obligation to pay just compensation."42 In response to this concern, the court drew a distinction between legislatively formulated development fees

imposed on a broad class of property owners and individually imposed conditions.

The court held that in the "relatively narrow class of land use cases" that involve individual "land use 'bargains' between property owners and regulatory bodies. . . where the individual property owner-developer seeks to negotiate approval of a planned development. . . the combined Nollan and Dolan test quintessentially applies."43 In the more common situation when exactions are imposed pursuant to a general legislative act, cities act within their traditional police powers.

The Ehrlich court is not alone in holding that such legislative exactions are immune to Dolan's proportionality/nexus standards.44 Why this should be so is not particularly clear. Justice Thomas of the U. S. Supreme Court has commented that "The distinction between sweeping legislative takings and particularized administrative takings appears to be a distinction without a difference."45 Although noting that it was not bound by Justice Thomas's dissent, an Illinois court concurred, stating that it found his comments ". . . particularly persuasive and consonant with the rationale underlying Dolan and similar cases. Certainly a municipality should not be able to insulate itself from a takings challenge merely by utilizing a different bureaucratic vehicle when expropriating a citizen's property."46 To the same effect is Shultz v. City of Grants Pass,47 striking down a 20,000 square foot exaction required by the terms and standards of a local ordinance.

Indeed, many courts since Dolan, both state and federal, appear to have adopted the nexus and proportionality tests which mark that decision for more than land dedications. An excellent example is the Eighth Circuit decision in Christopher Lake Dev't Co. v. St. Louis County,48 where the court applied Dolan to strike down a county drainage system requirement. The County granted the owner of forty-two acres preliminary development approval for two residential communities on condition that it provide a drainage system for an entire watershed. First, the court dealt with the public purpose issue, or part one of the Dolan test. The court stated that "even assuming the legitimacy of the County's purpose in requiring a drainage system, the application of the Criteria may violate the equal protection clause."49 Citing Nollan for the nexus or second test, the court then opined that "Although the County's objective to prevent flooding may be rational, it may not be rational to single out the Partnership to provide the entire drainage system."50 The court then found such a requirement disproportionate to the drainage problems resulting from the proposed development:

> *[F]rom our review of the record, the County has forced the Partnership to bear a burden that should fairly have been allocated throughout the watershed area. "A strong public desire to improve the public condition will not warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."51*

As for a remedy, the court said:

> *We believe that the Partnership is entitled to recoup the portion of its expenditures in excess of its pro rata share and remand to the district court to determine the details and amounts.52*

To be fair, there are cases which would limit such exactions to land dedications only, but most are pre-

Ehrlich and the reasoning does not appear as sound.53 Most courts, however, apply Dolan beyond dedications, at least to impact fees and in-lieu fees. The reasoning is compelling. As an Oregon appeals court said in Clark v. City of Albany:54

> *[T]he fact that Dolan itself involved conditions that required a dedication of property interests does not mean that it applies only to conditions of that kind. . . . For purposes of a takings analysis, we see little difference between a requirement that a developer convey title to the part of the property that is to serve a public purpose and a requirement that the developer himself make improvements on the affected and nearby property and make it available for the same purpose.55*

Thus, for example, in Castle Homes & Dev't, Inc. v. City of Brier,56 the court struck down a $3000 per lot road impact fee on a proposed 28 lot subdivision on nexus and proportionality grounds. The court in Trimen Dev't County v. King Co.57 upheld a park development fee, but only after finding proportionality. Other pre-Dolan cases similarly applied nexus/proportionality standards in either upholding or striking down fees rather than dedications of land: Lancaster Redevelopment Agency v. Dibley,58 striking down a traffic impact fee to fund housing; Shapell Indus. Inc. v. Governing Bd. of the Milpitas Unified Sch. Dist.,59 striking down school impact fee designed to benefit all new students rather than those generated only by the development.

Some courts are willing to extend the nexus/proportionality requirements to all land development regulations. Going well beyond both land dedications and impact fees is the application of Dolan in Manocherian v. Lenox Hospital.60 There, the New York Court of Appeals struck down a rent stabilization statute in part because it did not advance "a closely and legitimately connected State interest." Citing both the Dolan and Nollan cases, the court said:

> *[T]he Supreme Court refrained from placing any limitations or distinctions or classifications on the application of the "essential nexus" test. This suggests and supports a uniform, clear and reasonably definitive standard of review in takings cases . . . . Indeed, Justice Brennan, in dissent in Nollan, expressly attributed to the majority's holding in Nollan an impact on all regulatory takings cases, stating that the Court's "exactitude, is inconsistent with our standard for reviewing the rationality of a State's exercise of its police power for the welfare of its citizens."61*

D. Level of Detail for Showing Nexus and Proportionality. Few if any courts are enforcing the "uniquely and specifically attributable" test, particularly after Dolan, although they are arguably free to do so as the test is more protective of constitutionally protected private property rights. Several courts have addressed this issue, both before and after Nollan and Dolan. They also deal concretely with the level of detail required to meet proportionality and nexus standards. An excellent example of what is required comes from the New Jersey case of F & W Associates v. County of Somerset.62 Holding that traffic impact fees assessed against a developer met the rational nexus test, the court held:

> *The developer's pro-rata share must be "necessitated or required by the construction or improvements within such subdivision. . . ." [citation omitted] The statute is a codification . . . which focused on the "rational nexus" between the needs created by, and the benefits conferred*

upon, the subdivision and the cost of the off-tract improvements.63

Noting that the ordinance assessing the impact fees was adopted "only after a comprehensive study of such factors as existing road facilities, current zoning, projected population growth, and existing commercial uses in the area[,]"64 the court dismissed the notion that:

a causal nexus between the necessity for off-tract improvements and the development must be measured with precision. . . . What must be demonstrated is a "rational" nexus, not mathematical certainty. For example, the assessment should not be invalidated simply because there may be residual benefit conferred to the general public in its use of the off-tract road improvement. An assessment is subject to challenge only if the developer is required to pay a "disproportionate share of the cost of improvements that also benefit other persons."65

The court set out in detail what an acceptable comprehensive study should contain:

The study devised a volume-capacity ratio, measuring the demand volume and Mountain Boulevard's capacity. Based on projected full development of potential residential, retail and office use, the study adopted vehicle "trip generation" methodology and from this model, predicted incremental traffic impact resulting from future development of the land. The study estimated how much extra traffic would be generated by each development in the target area (Mountain Boulevard and surrounding roadways). The estimates were grounded on industrial standards, observations and empirical data obtained from traffic counts. The study then suggested what roadway improvements would be needed to accommodate the increased demands, and estimated the cost of those improvements.66

Noting that the township ordinance adopted the results of this "exacting study," the court observed that the ordinance authorized traffic impact fees according to the formula for calculating each developer's share of the cost of the needed off-tract improvements. Not only does the ordinance provide for adjustment of the developer's pro rata share if conditions change, but it also exempts a developer from the fee altogether if the development's off-tract impact is negligible, or if the developer does not benefit from the highway improvement.67

Even before Dolan, the court in Northern Illinois Home Builders Ass'n, Inc. v. County of Du Page68 also set out a procedure for land development conditions described by one expert in the field as "overwhelming" and demonstrating "a level of effort that he had never seen before."69 The county was seeking to meet Illinois' strict "specifically and uniquely attributable" test for road improvement impact fees provided for by statute. First, the court held that the county met the test of imposing a fee only for road improvements made necessary by the additional traffic generated by the new development:

The formula used by the county imposes fees only on road improvement costs generated by new development. In order to quantify the amount of travel generated by different types of development, the county used the Chicago Area Transit (CATS) model, which mathematically traces cars as they leave particular developments and enter on the roads. The county also used trip-generation data

collected by the Institute for Transportation Engineering.

Furthermore, Du Page County developed its own computer model which gave it the ability to model future travel based on new development. The County did travel surveys which allowed it to determine which road segments were deficient due to existing development. Impact fee funds are not spent on those roads. . . . We hold that the data gathered by Du Page County ensures that it imposes impact fees only for the improvements made necessary by new development.70

Then, the court further found that under the county system the new developments receive direct and material benefit from the road improvements financed by their impact fees:

Du Page County divided itself into 11 districts based on the following criteria: location of existing and proposed municipal boundaries; locations of major developable parcels of land; existing major retail/employment centers; location of potential transportation corridors; CATS one-quarter-section-based zone system; and the existing county highway system. The funds collected from new development in a particular district are used to finance improvements in that same district. Testimony at trial established that fee payers in a district do benefit from the decrease in congestion resulting from the improvements made in that district.71

III. Authority

While most courts will uphold a local government exaction or impact fee as an extension of statutory subdivision or development code police power authority,72 several states have nevertheless passed specific legislation to enable the collection of impact fees on the land development process. Typically, these statutes tend to place limits on exactions and impact fees - either by type or by extent - rather than extend authority beyond what can usually be fairly implied from planning and subdivision state enabling statutes. Typical in this regard is the new impact fees enabling act in Hawaii which requires a series of preliminary steps, including a needs study, before a county can levy such a fee.73 But on balance, courts increasingly decide the validity of fees and exactions on police power issues discussed in Section II, rather than on the basis of specific statutory authority.74

There are nevertheless some cases which imply that enabling legislation is necessary in order to impose impact fees as opposed to intrinsic subdivision dedications and in-lieu fees which are based upon planning and subdivision statutes. Thus, for example, in Englewood Water Dist. v. Halstead,75 a Florida court upheld impact fees for a new water and sewer system because a state enabling statute authorized the District "to fix and collect rates, fees and other charges for the use of the facilities and services provided by any water system or sewer system."76 Also, in City of Arvade v. Denver,77 the Colorado Supreme Court upheld a development fee for water on all new development on virtually identical statutory grounds. It also similarly upheld a "facilities development fee" for sewers,78 while striking down a school impact fee on the ground the county lacked specific authority.79

Other courts have held that if a county has the power to fail to approve a plat because of the inadequacy of park and recreational space, it has the power to levy a fee in lieu of dedication. In Jenad, Inc. v. Village of

Scarsdale,80 the New York Court of Appeals held that the planning board's requirement that a subdivider dedicate land within the subdivision for a park, or pay a fee in lieu of such dedication, was a valid exercise of the police power. The court rejected the argument that the fees were a tax, and analogized them to a type of zoning, like setback and side yard regulations. If counties have the power to zone lands for recreational purposes, they certainly should have the power to exact fees to accomplish the same purpose:

> *This is not a tax at all but a reasonable form of village planning for the general community good. . . This was merely a kind of zoning, like setback and side yard-regulations, minimum size of lots, etc., and akin also to other reasonable requirements necessary sewers, water mains, lights, sidewalks, etc. If the developers did not provide for parks. . . the municipality would have to do it.81*

Jenad's rationale supports the general proposition that the authority to enact an impact fee springs from the discretion to deny subdivision approval, unless parks were suitably located. The power to restrict includes the power to compel:

> *We find in section 179-1 of the Village Law a sufficient grant to villages of power to make such exactions. In specific terms the statute validates "in proper case" requirements by village planning boards that a subdivision map, to obtain approval, must show "a park or parks suitably located for playground and recreational purposes." There is, to be sure, no such specificity as to a village rule setting up a "money in lieu of land system." However, section 179-1 says that a village planning board, when specific circumstances of a particular plat are such that park lands therein are not requisite, may "waive" provisions therefor, "subject to appropriate conditions and guarantees."82*

Specific authority to levy one exaction--for school site dedication or in-lieu fee at the subdivision approval stage--has been held to preempt a county from levying a later (occupancy certificate stage) impact fee for facilities construction and expansion, however.83

IV. Segregation Of Funds, Credits And Refunds

Funds collected by local government as impact fees must be placed in separate bank accounts relating to the public facility for which the fee is collected, and then used only for that kind or type of public facility, and both the Livermore, California ordinance and the Hawaii statute, appended to this chapter, so require. Thus, for example, it would be illegal to use road impact fees for the construction of schools. Of course, under the proportionality and rational nexus principles discussed above, the facility constructed must be useful to the developer paying the fee, which usually means it must be nearby. This requirement has led many local governments to create "zones" in which needed public facilities will be constructed with funds only from new developments in the same zone.84

Capital improvements or public facilities, constructed with impact fees, must "adequately" benefit the new development which paid the fee. By earmarking fees collected into separate accounts apart from general funds, and spending those funds reasonably quickly, local governments avoid charges that the fees are merely veiled attempts at taxation--for which they must have specific authority from the state. In Home Builders Ass'n v. Board of County Commissioners of Palm Beach County,85 the court held that benefits

accruing to the community generally do not adversely affect the validity of a development regulation as long as the fee does not exceed the cost of the improvements serving the new development and the improvements adequately benefit the development which is the source of the fee. The court reasoned: "It is difficult to envision any capital improvement for parks, sewers, drainage, roads, or whatever, which would not in some measure benefit members of the community who do not reside in or utilize the new development."86 Earlier, Amherst Builders Ass'n v. City of Amherst87 upheld a sewer tap-in charge, requiring the fees to be placed into a sewer fund, apart from general revenues. Coulter v. City of Rawlins88 held: "The limitation on this power is the requirement that any fees collected in lieu of raw-land dedication must be earmarked to accounts for the purpose of acquiring needed park and maintenance of existing park facilities." Indeed, a Utah court has struck down a fee charged for improving a water and sewer system because the fees collected went into the general fund.89 To the same effect is Lafferty v. Payson City,90 Waterbury Dev't Co. v. Witten,91 and Hayes v. City of Albany.92

Dividing the County into impact fee districts, depending upon the public facility or capital improvement is recommended to "localize" the benefit, ensuring that capital improvements or public facilities funded "adequately" benefit the new development which paid the fee, even if the community at large also benefits.93 Thus, for example, the Palm Beach County ordinance based fees in Home Builders Ass'n v. Board of County Commissioners of Palm Beach County94 on a formula that considered the costs of road construction and the number of motor vehicle trips generated by different types of land use. Alternatively, the developer may determine his fair share by furnishing his own independent study. Fees are deposited into one of the special trust funds established for each of forty zones within the county, and funds may be spent only in the zone from which they were collected. If funds are not spent within a reasonable time (six years), they are returned to the present owner of the property.95 Even though improvements constructed with the fees collected will benefit the community generally, the above factors insured that the ordinance satisfied the two prong rational nexus test which requires 1) that the fee not exceed the cost of the improvements required by the new development, and 2) that the improvements adequately benefit the development which is the source of the fee.96 As indicated in the discussion of the Home Builders case above, if the fee collected and deposited in an appropriate fund is not used within a reasonable period of time it must be refunded to the developer, on the ground that this development-driven fee is really not needed after all. Moreover, if the land developer has already made contributions in the form of money, land or facilities, or if development property tax dollars are going to pay for part of the new facility, the developer is usually credited against the fee normally levied for these amounts.97 By the same reasoning, it has been held that specific statutory authority to require dedication of land or levy fees in lieu thereof for school purposes will preempt a county from levying an additional impact fee for school facilities at the occupancy certificate stage, based on state general enabling legislation.98

V. Planning Consistency

Courts are more likely to uphold impact fees, and the fees are more successfully and logically calculated, when the local government has a plan - which anticipates growth - which shows how and when public facilities needs are likely to be generated in terms of type and location of facility.99 Few cases turn on this requirement, but at least one state supreme court has held that impact fees and other exactions can be collected only if pursuant to a local government's comprehensive plan.100 Most well drafted impact fee

ordinances require such a plan.

VI. Subject-Specific Impact Fees

Exactions are levied for a variety of public facilities. The law applicable to such fees is not generally dependant on the type of fee, but rather the strength of the public purpose behind the fee. Such a demonstrated public purpose, while often presumed, is necessary before reaching either nexus or proportionality.

Within the two subsets of dedication and impact fees exists an expansive list of what can be considered an exaction. School facilities, water and sewer improvements, park and recreational fees, low-income housing fees, street improvements, all have been imposed as either dedication or fee conditions to development or redevelopment of property. Courts have upheld both on-site and off-site conditions. As might logically be expected, the more clearly the exaction relates to the impact of the development, the more likely a court is to uphold the exaction. On this basis, as a class, street improvements and sewer and water improvements are more likely to be upheld than low-income housing fees and set-asides, as the former are more clearly impacted by most land development than the latter. If the local government can show that there is an essential or rational nexus between the exaction and the government's legitimate state interests in relieving the impact of the development by imposing the exaction, and that the exaction is roughly proportionate to the impact of the development, the exaction will withstand judicial scrutiny. If, however, either test cannot be met, courts will strike down the exaction as an uncompensated taking. In sum, the type of exaction itself may well determine whether there exists an essential nexus, and the character of the exaction may impact on the proportionality requirement.

VII. Cost And Calculation Of Fees

Impact fees are charged for a variety of public facilities in local governments throughout the United States, including, but not limited to, transportation, wastewater treatment, water distribution, solid waste disposal, parks, schools, libraries, public electricity, police and fire stations, and public housing. According to a recent study, such fees can add considerably to the cost of the development upon which they are levied.101

Typical impact fee calculations might look like those shown in Table One.

Table One: Typical Impact Fee Calculations*

Type of Impact Fee	Single Home Per Unit	General Industry Per 1000 sq. foot	General Office Per 1000 sq. foot	General Retail Per 1000 sq. foot
Road				
Low	$16	$41	$79	$200
High	$7,782	$5,210	$16,500	$36,063

Ave.	$1,567	$1,364	$2,141	$3,268
Park				
Low	$50	$130	$130	$130
High	$12,000	$1,688	$1,688	$1,688
Ave.	$1,035	$702	$715	$703
Public Facility				
Low	$49	$7	$57	$57
High	$7,169	$12,000	$12,000	$12,000
Ave.	$910	$1,385	$1,447	$1,481
Police				
Low	$14	$8	$8	$8
High	$933	$520	$520	$520
Ave.	$120	$86	$110	$111
Fire				
Low	$21	$1	$3	$3
High	$2,500	$1,000	$1,370	$2,400
Ave.	$217	$157	$204	$244
Library				
Low	$90	$90	$90	$90
High	$238	$150	$261	$158
Ave.	$130	$118	$167	$133
School				
Low	$135	$250	$250	$250
High	$3,160	$280	$280	$280
Ave.	$2,663	$259	$259	$259
Water				
Low	$60	$30	$30	$30
High	$11,660	$50	$104	$62
Ave.	$1,225	$37	$55	$41
Sewer				
Low	$40	$60	$60	$60
High	$9,405	$1,440	$1,440	$1,440

Ave.	$1,558	$750	$750	$750
TOTAL				
LOW	$415	$617	$811	$828
HIGH	$54,847	$22,538	$34,163	$54,611
AVE.	$9,425	$4,858	$5,848	$6,990
LESS WATER & SEWER				
LOW	$315	$527	$707	$738
HIGH	$33,782	$21,048	$33,519	$53,009
AVE.	$7,642	$4,071	$5,043	$6,199

* These averages originate from the 206 local governments participating in this survey.

An impact fee ordinance should relate the fee charged to needs generated by the new development and benefits conferred. Calculation of the fees should be tied to a study, report, or plan based on an analysis of new development's impact, as cases discussed in parts II and VI, and the text of the attached ordinance from Livermore, California demonstrate. For example, most water and sewer impact fees are based on the amount of flowage required by a certain type of development. As with all types of impact fees, the analysis should demonstrate that the capital improvements planned with the funds collected are necessitated at least in part by the fee payor, and that fees collected will adequately benefit the new development paying the fee.102

Thus, in Amherst Builders Ass'n v. City of Amherst,103 the schedule of fees was based on average sewage flow for various types of structures, as estimated by the Environmental Protection Agency, resulting in a fee of $400 for a single family home. In response to charges that the fee was invalid, the city introduced evidence demonstrating that the "capital cost" of each connection (the cost of facilities required to service each new user of the system) was an average of $1,186 per connection. The Ohio Supreme Court stated:

> *While it is true that the $1 per gallon charge is not a mathematically precise estimate of the cost of service to each new user, appellant is hard-pressed to assert this as a basis for invalidating the ordinance when one considers that the resultant $400 fee is much less than the figure derived from a more precise analysis.104*

The court also noted that, by keying the schedule to the EPA guidelines, the city was attempting to make the fee of each new user proportionate to the gallons of sewage flow contributed by a particular type of structure. "Thus, the fee not only attempts to equalize the burden between present and new users, but also among the latter, depending on the burden each puts on the system."105

Similarly, the Florida Supreme Court has observed that when water and sewer connection fees are less than the costs a city would incur in accommodating new users of its water and sewer systems, it would reject characterizing the fees as taxes.106 The court stated that "raising expansion capital by setting connection charges, which do not exceed a pro rata share of reasonably anticipated costs of expansion, is

permissible where expansion is reasonably required, if use of money collected is limited to meeting the costs of expansion."107

The sewer and water "development fee" ordinance in Coulter v. City of Rawlins,108 was upheld even though the city did not demonstrate how it arrived at a fee schedule. The facts state only that the city estimated a need for $36,000,000 in capital improvements to expand the sewer and water system to meet population projections, according to a plan developed by the city.109 However, it is now necessary to have a demonstrable basis for such fees, after the Dolan and Nollan cases. In Lafferty v. Payson City,110 an impact fee imposed partly for sewer and water was struck down by the court because the ordinance did not specify what the funds collected would be used for. The court remanded the case for a determination of the reasonableness of the fees in accordance with the test identified in its prior decision Banberry Dev't Corp. v. South Jordan City.111 The court held that the municipality has the burden of disclosing the basis of its calculations to whomever challenges the reasonableness of the fees.112

The calculation of a park impact fee should insure that the fee is reasonably proportionate to the cost of providing the additional park facilities and open space attributable by the new development. In Hollywood v. Broward County,113 the court refused to characterize a park impact fee as a tax. Instead the court held the fee as valid on the grounds that the cost anticipated to be paid by the county would exceed the amount generated by the fee.114

The constitutional standards for fee calculations after Dolan is set out in some detail in part II of this paper. Likewise, in the pre-Dolan case of Commercial Builders of Northern California v. City of Sacramento,115 the court noted with approval the detailed consultant's report commissioned by Sacramento to derive a low-income housing needs basis for requiring fees for such housing from a hotel developer. Also important to the court was the willingness of Sacramento to pay for a far larger share of such housing than the city's consultant report would have required.

There are two broad categories of impact fee ordinances based on method of computation: 1) fixed fee based on a unit of development, and 2) variable formula calculated on a standard relative to the need for facilities generated by the development.116 Attached in the appendix are examples of each type. While most ordinances are of the fixed variety and take the form of a per-unit charge, the formula approach more accurately reflects the proportionate costs of public facilities attributable to specific types of new development. This is a distinct advantage, given the importance which the Dolan opinion attaches to proportionality.117

1. Exactions, Impact Fees and Dedications: Shaping Land-Use Development and Funding Infrastructure in the Dolan Era (Robert H. Freilich & David W. Bushek eds., 1995); David L. Callies et al., Cases and Materials on Land Use 148 (2d ed. 1994); Robert L. Freilich and Michael M. Shultz, National Model Subdivision Regulations, Planning and Law 1-6 (1994); Daniel R. Mandelker, Land Use Law (3d ed. 1993); Susan P. Schoettle & David G. Richardson, "Nontraditional Uses of the Utility Concept to Fund Public Facilities," 25 Urb. Law. 519, 519-22 (1993); Frona M. Powell, "Challenging Authority for Municipal Subdivision Exactions: The Ultra Vires Attack," 39 DePaul L. Rev. 635, 635-36 (1990); Julian C. Juergensmeyer & Robert M. Blake, "Impact Fees: An Answer to Local Governments' Capital Funding

Dilemna," 9 Fla. St. U. L. Rev. 415 (1981); Thomas M. Pavelko, "Subdivision Exactions: A Review of Judicial Standards," 25 J. Urb. & Contemp. L. 269 (1983); Development Exactions (James E. Frank & Robert M. Rhodes eds., 1987).

2. Ira M. Heyman & Thomas K. Gilhool, "The Constitutionality of Imposing Increased Community Costs on New Suburban Residents Through Subdivision Exactions," 73 Yale L.J. 1119 (1964); See also John D. Johnston, Jr., "Constitutionality of Subdivision Exactions: The Quest for a Rationale," 52 Cornell L.Q. 871 (1967).

3. Board of County Commissioners of Boulder Co., Colo. v. Homebuilders Ass'n of Metropolitan Denver, No. 95SC479, 1996 WL 700564 at *4 (Colo. 1996) (citing Donald G. Hagman & Julian C. Juergensmeyer, Urban Planning and Land Development Control Law § 9.8 (2d ed. 1986)); Frank & Rhodes, supra note 1, at 3-4.

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

5. Dolan v. City of Tigard, 114 S. Ct. 2309 (1994).

6. James C. Nicholas, "Impact Exactions: Economic Theory, Practice, and Incidence," 50 Law & Contemp. Probs. 85 (1987); Nicholas, Nelson & Juergensmeyer, A Practitioner's Guide to Development Impact Fees 37-38 (1991); Takings: Land Development Conditions and Regulatory Takings after Dolan and Lucas (David L. Callies ed., 1996).

7. See cases cited infra part IV.

8. Marblehead v. City of San Clemente, 277 Cal. Rptr. 550 (1991).

9. But see Bloom v. City of Fort Collins, 784 P.2d 304 (1989).

10. David L. Callies & Malcolm Grant, "Paying for Growth and Planning Gain: An Anglo-American Comparison of Development Conditions, Impact Fees and Development Agreements," 23 Urb. Law. 221, 239-40 (1991); See Rohan, chapter 9A on Development Agreements.

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

12. Dolan v. City of Tigard, 114 S. Ct. 2309 (1994).

13. 483 U.S. 825 (1987).

14. Id.

15. Id. at 838-39.

16. Id. at 836.

17. See Sullivan, "Oregon Blazes a Trail," in State and Regional Comprehensive Planning: Implementing New Methods for Growth Management (Buchsbaum & Smith eds., 1993).

18. Dolan, 144 S. Ct. at 2312.

19. Id. at 2318 (citing Agins v. Tiburon, 447 U.S. 255, 260-62 (1980)).

20. Dolan, 114 S. Ct. at 2318.

21. Id.

22. Id.

23. Id. at 2319-20.

24. Id. at 2321-22.

25. Id. at 2320 (emphasis added).

26. Id. at 2320.

27. See e.g., Kaiser Aetna v. United States, 444 U.S. 164 (1979).

28. 46 F.3d 162 (2d Cir. 1995).

29. Id. at 169 (citing Dolan v. City of Tigard, 114 S. Ct. 2309, 2317 (1994)).

30. 884 P.2d 569 (Or. 1994).

31. No. 27 21 70, 1992 WL 239100 (Conn. Super. Ct. Sept. 16, 1992).

32. 628 A.2d 1277 (Conn. 1993).

33. 849 S.W.2d 557 (Ky. Ct. App. 1992).

34. 661 N.E.2d 380 (Ill. 1995).

35. Id. at 391.

36. Id. at 392.

37. 829 P.2d 169 (Wash. Ct. App. 1991).

38. See also Dellinger v. City of Charlotte, 441 S.E.2d 626 (N.C. Ct. App. 1994) (striking down a road dedication requirement because the city planning staff failed to make written findings relating the dedication to traffic from the proposed subdivision).

39. 441 S.E.2d 626 (N.C. 1994).

40. 887 P.2d 446 (Wash. 1995).

41. 911 P.2d 429 (Cal. 1996).

42. Ehrlich v. Culver City, 911 P.2d 429, 439 (Cal. 1996).

43. Id. at 438, 439.

44. Accord Arcadia Development Corp. v. City of Bloomington, 552 N.W.2d 281 (Minn. 1996), Lambert v. C. & C. of San Francisco, 67 Cal. Rptr. 2d 562 (Cal. Ct. App., 1997) and Pringle v. City of Wichita 917 P.2d 1351 (Kans. Ct. App. 1996).

45. Parking Ass'n of Georgia v. City of Alabama, 115 S. Ct. 2268, 2269 (1995) (Thomas, J., dissenting).

46. Amoco Oil Co. v. Village of Schaumburg, 661 N.E.2d 380, 390 (Ill. 1995).

47. 884 P.2d 569 (Or. 1994).

48. 35 F.3d 1269 (8th Cir. 1994).

49. Id. at 1274.

50. Id.

51. Id. at 1275 (quoting Dolan v. City of Tigard, 114 S. Ct. 2309 (1994)).

52. Id.

53. See Sarasota County v. Taylor Woodrow Homes, 652 So. 2d 1247 (Fla. 1995); McCarthy v. City of Leawood, 894 P.2d 836 (Kan. 1995); and Village Pond Inc. v. Town of Darien, 60 F.3d 1273 (7th Cir. 1995).

54. 904 P.2d 185 (Or. 1995).

55. Id. at 190.

56. 882 P.2d 1172 (Wash. 1994).

57. 877 P.2d 187 (Wash. 1994).

58. 25 Cal. Rptr. 2d 593 (1993).

59. 1 Cal. Rptr. 2d 818 (1991).

60. 643 N.E.2d 479 (N.Y. 1994).

61. Id. at 483 (citing Nollan v. California Coastal Comm'n, 483 U.S. 825, 842-43 (1987)).

62. 648 A.2d 482 (N.J. Super. Ct. App. Div. 1994).

63. Id. at 486 (citations omitted).

64. Id. at 487.

65. Id. (citing Holmdel Builders Ass'n v. Township of Holmdel, 583 A.2d 277, 287 (N.Y. 1990)).

66. Id.

67. Id. at 488.

68. 621 N.E.2d 1012 (Ill. Ct. App. 1993), aff'd in part, rev'd in part, No. 76503, 1995 WL 123705 (Ill. March 23, 1995).

69. Id. at 1020 (citing Dr. James Nicholas, professor at the University of Florida, who surveyed impact fee programs across the country).

70. Id.

71. Id. For an odd opinion which implies no need for specificity allegedly based on Ehrling but clearly counting on Bolloy, see Homebuilders Association of Central Arizona v. City of Scottsdale, 930 P.2d 993 (Ariz. 1997).

72. A few - generally older cases - have not: See Norwick v. Village of Winfield, 225 N.E.2d 30 (Ill. 1967); Home Builders Ass'n, Inc. v. Riddel, 510 P.2d 376 (Ariz. 1973).

73. See Nicholas and Davidson, Impact Fees in Hawaii: Implementing the State Law (Land Use Research Foundation of Hawaii 1992). This statute is set out in full as an appendix to this chapter.

74. Juergensmeyer & Blake, supra note 1, at 427.

75. 432 So. 2d 172 (Fla. 1983).

76. Id. at 173.

77. 663 P.2d 611 (Colo. 1983).

78. Loup-Miller Construction Co. v. Denver, 676 P.2d 1170 (Colo. 1974).

79. Board of County Commissioners of Douglas County v. Homebuilders Ass'n of Metropolitan Denver, 929 P.2d 961 (Colo. 1997).

80. 218 N.E.2d 673 (N.Y. 1966).

81. Id. at 676.

82. Id. at 675.

83. Board of County Commissioners of Boulder Co., Colo. v. Homebuilders Ass'n of Metropolitan Denver, No. 95SC479, 1996 WL 700564 (Colo. 1996).

84. Nicholas et al., supra note 6; Fred P. Bosselman & Nancy E. Stroud, "Pariah to Paragon, Developer Exactions in Florida," 14 Stetson L. Rev. 527, 537 (1989).

85. 446 So. 2d 140 (Fla. Dist. Ct. App. 1983).

86. Id. at 143.

87. 402 N.E.2d 1181, 1184 (Ohio 1980).

88. 662 P.2d 888, 903 (Wyo. 1983).

89. Weber Basin Home Builders Ass'n v. Roy City, 487 P.2d 866 (Utah 1971).

90. 642 P.2d 376 (Utah 1982).

91. 377 N.E.2d 505 (Ohio 1978).

92. 490 P.2d 1018 (Or. 1971) (upholding fee in part on segregation of funds grounds).

93. Nicholas, The Changing Structure of Infrastructure Finance 41 (Lincoln Institute of Land Policy Monograph No. 85-5 Feb. 1985).

94. 446 So. 2d 140 (Fla. Dist. Ct. App. 1983).

95. Id. at 142.

96. Id. at 143-44.

97. Nicholas & Davidson, supra note 75.

98. Board of County Commissioners v. Homebuilders Ass'n of Metropolitan Denver, No. 95SC479, 1996 WL 700564 (Colo. 1996).

99. Nicholas et al., supra note 6.

100. City of Fayetteville v. IBI, 659 S.W.2d 505 (Ark. 1983); Accord Nicholas et al., supra note 6, at 37-38 (1991); Morgan, Duncan & McLendon, "Drafting Impact Fee Ordinances: Legal Foundation for Exactions," 9 Zoning & Plan. L. Rep. 49, 56 (1986).

101. Nicholas & Davidson, supra note 75, at 9.

102. Nicholas, Florida's Experience with Impact Fees, (Lincoln Institute of Land Policy Monograph No. 85-5, Feb. 1985).

103. 402 N.E.2d 1181, 1182 (Ohio 1980).

104. Id. at 1184.

105. Id.

106. Contractors & Builders Ass'n v. City of Dunedin, 329 So. 2d 314, 318 (Fla. 1976).

107. Id. at 320.

108. 662 P.2d 888 (Wyo. 1983).

109. Id. at 890.

110. 642 P.2d 376 (Utah 1982).

111. 631 P.2d 899 (Utah 1981).

112. 642 P.2d at 379.

113. 431 So. 2d 606 (Fla. Dist. Ct. App. 1983).

114. Id. at 612.

115. 941 F.2d 872 (9th Cir. 1991).

116. Nicholas et al., supra note 6.

117. Callies et al., supra note 1, at 212-13.

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* This paper is adopted and revised from the author's ch. 9 on the same subject, prepared for Rohan (E. Kelly, ed.) Zoning and Land Use Controls (1997).