SUBDIVISION EXACTIONS: A REVIEW OF JUDICIAL STANDARDS

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Suburban fringe areas[1] are the fastest growing territories in the United States.[2] In order to meet the housing demands of suburban expansion, subdivision[3] development has prospered.[4] Yet, because of recurring monetary concerns, unethical developers may try to minimize their costs through defective planning or design.[5] To prevent such defects, municipalities have responded with subdivision con-

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1. Deans, *Mobility in American Life*, in THE FUTURE OF THE CITY 74 (H. Gimlin ed. 1974). "Fringe areas" describe the suburbs that form a ring, or fringe, around large central cities. *Id.*

2. *See* G. STERNLIEB & J. HUGHES, CURRENT POPULATION TRENDS IN THE UNITED STATES 74 (1978). Between 1960 and 1970, suburbs accounted for 80% of the total population increase in American metropolitan areas. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, IMPROVING URBAN AMERICA: A CHALLENGE TO FEDERALISM (1976), *reprinted in* D. MANDELKER & R. CUNNINGHAM, PLANNING AND CONTROL OF LAND DEVELOPMENT, at 3 (1979). By 1974, 37% of the national population resided in the suburban fringes, "while the remainder was divided about evenly between central cities and nonmetropolitan areas." *Id.*

3. Generally, this term is defined by statute as a division of a parcel of land into smaller parcels for the purpose of sale or building development. *See, e.g.*, ALASKA STAT. § 40.15.190(2) (1971); ARIZ. REV. STAT. ANN. § 9-463.02(A) (1977); CONN. GEN. STAT. § 8.18 (1981); N.J. STAT. ANN. § 40:55-1.2 (West 1967); VA. CODE § 15.1-430(*l*) (1981); WIS. STAT. ANN. § 236.02(7) (West 1957); WYO. STAT. § 15.1-501(a)(iii) (1977).

4. *See* 11 E. MCQUILLIN, MUNICIPAL CORPORATIONS § 33.04a (Supp. 1981).

5. Call v. City of West Jordan, 606 P.2d 217, 219 (Utah 1979). *See* Frey, *Subdivision Control and Planning*, 1961 U. ILL. L.F. 411, 411; Ledbetter, *Subdivision Control in South Carolina*, 24 S.C. L. REV. 155, 165 (1972). *See generally* Adelstein & Edelson, *Subdivision Exactions and Congestion Externalities*, 5 J. LEGAL STUD. 147, 157 (1976).

trols,[6] which require developers to make specific improvements or follow certain procedures prior to plan approval.[7] Although such impositions initially may appear restrictive, effective use of subdivision controls benefits the developer, the future residents, and the community.[8]

A subdivision exaction is one form of subdivision control, which requires that developers provide certain public improvements at their own expense.[9] By means of regulation of this type, the subdivision's

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6. Subdivision control regulations resemble, but are separate and distinct from, zoning regulations. *See, e.g.*, 4 R. ANDERSON, AMERICAN LAW OF ZONING § 23.02 (2d ed. Supp. 1981); 5 N. WILLIAMS, AMERICAN LAND PLANNING LAW § 156.09 (1974). Zoning controls the uses of land and buildings. *E.g.*, Town of Seabrook v. Tra-Sea Corp., 119 N.H. 937, 941, 410 A.2d 240, 243 (1979). *See also* Reps & Smith, *Control of Urban Land Subdivision*, 14 SYRACUSE L. REV. 405, 407 (1963) (zoning involves the negative prohibition of uses). In contrast, subdivision control regulations monitor the division of land in order to protect against imperfect development and design. *E.g.*, Town of Seabrook v. Tra-Sea Corp., 119 N.H. 937, 941, 410 A.2d 240, 243 (1979). *See generally* 4 R. ANDERSON, *supra* § 23.03 (2d ed. 1968) (objectives of subdivision control); 4 A. RATHKOPF, LAW OF ZONING AND PLANNING 71-6 (4th ed. 1975) (reasons for subdivision).

7. Subdivision regulations often require that the developer meet planning or design provisions, or install public improvements, prior to approval of the plan. *See, e.g.*, Comment, *Money Payment Requirements as Conditions to the Approval of Subdivision Maps: Analysis and Prognosis*, 9 VILL. L. REV. 294, 297 (1964). *See also* 1A C. ANTIEAU, MUNICIPAL CORPORATION LAW § 8A.12 (1982).

8. Frey, *supra* note 5, at 449. Effective regulations are not so onerous that they impose undue hardship upon developers. On the contrary, they result in a well-designed subdivision, so that the property values remain stable rather than depreciating and jeopardizing the owner's equity. 4 A. RATHKOPF, *supra* note 6, at 71-8.

9. "Subdivision exaction" describes various municipal impositions upon final approval of the developer's subdivision plan, which shift capital development costs from the municipality to the developer. *See* Heyman & Gilhool, *The Constitutionality of Imposing Increased Community Costs on New Suburban Residents Through Subdivision Exactions*, 73 YALE L.J. 1119, 1121 (1964); Comment, *Subdivision Exactions: The Constitutional Issues, the Judicial Response and the Pennsylvania Situation*, 19 VILL. L. REV. 782, 784 (1974).

Exactions usually take the form of land dedications or fees in lieu of land. Juergensmeyer & Blake, *Impact Fees: An Answer to Local Governments' Capital Funding Dilemma*, 9 FLA. ST. U.L. REV. 415, 418 (1981). Dedication involves a conveyance of an interest in land to the government for a public purpose. The interest may be an easement or a fee entitlement. 7 P. ROHAN, ZONING AND LAND USE CONTROLS § 45.04[2] (1982). *See generally* 23 AM. JUR. 2d *Dedications* (1965).

Reservations are a less familiar form of subdivision exaction. Reservations do not effect a conveyence to the government. Rather, they restrict the subdivider's right to use the reserved land. Municipalities often require reservations in lieu of dedication. 4 R. ANDERSON, *supra* note 6, § 23.25.

Dedications required under subdivision control regulations must be distinguished

residents enjoy the benefits of municipal facilities[10] while the developer carries the related financial burden.[11] The exaction, therefore, does not burden the municipal budget. On the contrary, these regulations prevent developers from thrusting the additional municipal costs resulting from the subdivision upon present municipal residents.[12]

This Note examines the settings in which municipalities impose exactions[13] and the judicial standards used to determine their validity.[14]

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from common law dedications. Common law dedication involves an offer to dedicate land and a corresponding acceptance by the municipality. Because the developer offers the land, he is estopped from later questioning the municipality's acceptance. In statutory or compulsory dedications, however, questions of constitutionality and legislative authority arise. 4 R. ANDERSON, *supra* note 6, § 23.26. Hereinafter, the term "dedication" shall refer to the statutory form of dedication.

10. *See* 1 P. ROHAN, *supra* note 9, § 5.03[3][a]. "When land is subdivided to make way for new housing development, existing streets must be extended, water and sewage facilities must be provided and recreational space must be expanded." *Id.*

11. *Id.* § 9.01[1]. *See supra* note 9. These imposed conditions serve to resolve the difficult problem of financing the extension of public facilities.

> In the past, municipalities met the increased financial burden of new developments by means of long-term debt financing and imposition of higher real estate taxes on residents. Recognizing the need to apportion the burden more equitably between existing residents and developers, many state legislatures also enacted statutes empowering local communities to require developers to dedicate land or to contribute fees in lieu of dedication.

1 P. ROHAN, *supra* note 9, § 9.01[1].

12. Subdivision controls require an initial determination of the costs for supplying municipal services to a new development. To the extent that the municipalities require exactions, "the fiscal well-being of that community may be improved." U.S. DEP'T OF HOUSING AND URBAN DEVELOPMENT, THE FISCAL IMPACT GUIDEBOOK: ESTIMATING LOCAL COSTS AND REVENUES OF LAND DEVELOPMENT 301 (1979). Fiscal considerations have taken a predominant role in subdivision control. Municipalities often lack adequate financial resources to accommodate and maintain necessary government services. Subdivision controls enable municipalities to pass the costs resulting from subdivision development to the developers. *See, e.g.*, 5 N. WILLIAMS, *supra* note 6, § 156.09; Juergensmeyer & Blake, *supra* note 9, at 415. This technique is justifiable because it compensates community residents for capital costs that would otherwise be borne by existing public facilities. Feldman, *The Constitutionality of Subdivision Exactions for Educational Purposes*, 76 DICK. L. REV. 651, 659 (1972). Ultimately, the subdivider's increased costs fall upon the future residents in increased housing costs. *See, e.g.*, Marcus, *A Comparative Look at TDR, Subdivision Exactions, and Zoning as Environmental Preservation Panaceas: The Search for Dr. Jekyll Without Mr. Hyde*, 20 URBAN L. ANN. 3, 21 (1980); Comment, *supra* note 9, at 784. Modern taxpayer revolts, such as Proposition 13, have shown that subdivision exactions also provide an effective alternative to property taxes. Rose, *State Tax and Spending Restraints: The Implications for Developers*, 10 REAL EST. L.J. 210 (1982).

13. *See infra* notes 17-57 and accompanying text.

After this overview, the Note proposes an alternative standard, under which courts apply a reasonableness test based upon both an evaluation of the municipality's needs resulting from the development and benefits accruing to the developer and the new residents. The Note also recommends that courts apply a stricter test when the exaction seeks land beyond the subdivision plan or equalization fees in lieu of land.[15]

I. SUBDIVISION EXACTIONS: AN OVERVIEW

A. *Factual Settings Where Subdivision Exactions Arise*

Historically, municipalities used subdivision exactions only to obtain dedications[16] of land for streets and sidewalks.[17] These minimal requirements often failed to protect against poor subdivision plans.[18] In response to such problems, many states amended their delegation statutes to extend municipal authority[19] by allowing further exactions of land. By requiring more substantial capital outlay, these additional impositions more thoroughly bind the subdivider to his plans.[20]

This section analyzes the three forms of subdivision exactions: internal land exactions,[21] external land exactions,[22] and fees in lieu of land.[23] Before a court can intelligently determine the validity of the exaction, it must ascertain the setting in which the particular exaction

14. Courts uphold reasonable subdivision exactions as valid within the police power. A municipality's ability to claim the police power is dependent upon state delegation through an enabling act. *See infra* notes 60-65 and accompanying text. If the exaction ordinance is unreasonable, it is beyond the limits of the police power. Courts will revoke such municipal ordinances as invalid. *See infra* notes 66-69 and accompanying text. *See also* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922) ("while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking").

15. *See infra* notes 116-40 and accompanying text.

16. *See supra* note 9.

17. *See* Melli, *Subdivision Control in Wisconsin*, 1953 WIS. L. REV. 389, 438. Further impositions were considered undesirable because they encouraged evasion of the platting law and discouraged development generally. *Id.*

18. 4 R. ANDERSON, *supra* note 6, § 23.01.

19. *See infra* notes 64-65 and accompanying text.

20. 4 R. ANDERSON, *supra* note 6, § 23.25.

21. *See infra* notes 25-42 and accompanying text.

22. *See infra* notes 43-50 and accompanying text.

23. *See infra* notes 51-56 and accompanying text.

arises.[24]

1. Land Within the Subdivision Plan

a. Internal Roads and Sidewalks

Subdivision exactions that require dedications of land for internal roads and sidewalks are the least controversial form of exaction. For several reasons, courts generally have no difficulty upholding these requirements.[25] First, several state enabling acts define "subdivision" specifically to include new streets and sidewalks.[26] Second, most municipalities require provisions for the development of internal roads and sidewalks prior to subdivision plan approval.[27] Finally, developers realize that internal streets and sidewalks provide necessary access from the individual lots to external road systems and therefore comply with the requirement without complaint.[28] Thus, even developers who bear the added costs usually decline to dispute municipal requirements of access.[29]

While developers rarely challenge the validity of these "accessibility" exactions, they view street improvement exactions less approvingly. These exactions typically require street width expansion[30] or

24. *See infra* notes 132-40 and accompanying text.

25. *E.g.*, Raybestos-Manhattan, Inc. v. Planning & Zoning Comm'n, 186 Conn. 466, 442 A.2d 65 (1982) (extension of internal road approved; court espoused no standard, but relied upon police power rhetoric). *See* Heyman & Gilhool, *supra* note 9, at 1122. *See generally* O. REYNOLDS, LOCAL GOVERNMENT LAW 484 (1982).

26. 4 R. ANDERSON, *supra* note 6, § 23.31. *See, e.g.*, FLA. STAT. ANN. § 177.031(18) (West Supp. 1981); OHIO REV. CODE ANN. § 711.001(B) (Page 1976); VA. CODE § 15.1-430(*l*) (1950).

27. Heyman & Gilhool, *supra* note 9, at 1122.

28. *See* 4 R. ANDERSON, *supra* note 6, § 23.32. Dedication of streets and sidewalks has the reciprocal advantage of relieving the developer of future taxes, liabilities, and maintenance of the dedicated land. *Id.*

29. *Id.* On rare occasions, however, developers have questioned the validity of exactions that require internal street development. *See, e.g.*, Raybestos-Manhattan, Inc. v. Planning & Zoning Comm'n, 186 Conn. 466, 442 A.2d 65 (1982) (extension of cul-de-sac to connect two major highways abutting the subdivision); Brous v. Smith, 304 N.Y. 164, 106 N.E.2d 503 (1952) (although many lots abutted existing highways, others were located upon "paper" streets only); City of Staunton v. Cash, 220 Va. 742, 263 S.E.2d 45 (1980) (although city accepted street, it was not incorporated into the city street system). Because implicit statutory authority exists, courts are hesitant to disturb the requirements imposed by local authorities. *E.g., Raybestos-Manhattan, Inc.*, 186 Conn. at —, 442 A.2d at 67; *Brous*, 304 N.Y. at 168-69, 106 N.E.2d at 505; *Cash*, 220 Va. at 747, 263 S.E.2d at 48.

30. *See, e.g.*, R.G. Dunbar, Inc. v. Toledo Plan Comm'n, 52 Ohio App. 2d 45, 367

the grading and paving of unimproved streets.[31] In such cases, developers argue that the required improvements are invalid as unreasonable exactions, which impose costs for public benefits that are unrelated to subdivision development.[32]

b. Schools

Recently, municipalities have begun to require the dedication or reservation of land within larger subdivisions for school sites or other educational purposes.[33] Developers often raise challenges to these

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N.E.2d 1193 (1976) (dedication requirement of a 100 foot wide road through the subdivision for use as an anticipated major thoroughfare); Gary D. Reihart, Inc. v. Township of Carroll, 487 Pa. 461, 409 A.2d 1167 (1979) (50 foot width requirement); Breuer v. Fourre, 76 Wash. 2d 582, 458 P.2d 168 (1969) (60 foot width requirement). *See generally* 4 R. ANDERSON, *supra* note 6, § 23.34.

31. *See, e.g.*, Pima County v. Arizona Title Ins. & Trust Co., 115 Ariz. 344, 565 P.2d 524 (1977) (ordinance requiring the paving of interior streets in all subdivisions); Glacier Sand & Stone Co. v. Board of Appeal, 362 Mass. 239, 285 N.E.2d 411 (1972) (requirement of grading, paving, and otherwise improving streets). *See generally* 4 R. ANDERSON, *supra* note 6, § 23.34.

32. *See, e.g.*, R.G. Dunbar, Inc. v. Toledo Plan Comm'n, 52 Ohio App. 2d 45, 51, 367 N.E.2d 1193, 1196 (1976). In *R.G. Dunbar, Inc.*, a typical improvement case, the developer sought to enjoin the city plan commission from denying subdivision approval. *Id.* at 45, 367 N.E.2d at 1193. The commission, alternatively, sought dedication of a 100-foot wide strip of land through the proposed subdivision for later use as a major highway. *Id.* at 46, 367 N.E.2d at 1194. Because the court viewed the requirement as an unreasonable confiscation of private property, it reversed the lower court judgment for the defendants. *Id.* at 52, 367 N.E.2d at 1197. *See supra* note 30-31.

Statutory dedication conveys a fee interest in the land. The developer conveys the entire rights of the land, including rights beneath the surface of the street. 4 R. ANDERSON, *supra* note 6, § 23.26. *See* Pittman v. City of Amarillo, 598 S.W.2d 941 (Tex. 1980) (subjugation of prior private sewer rights to dedication of public street rights). Municipal requirements of water connections, drainage and sewer systems, therefore, are often joined to street improvement exactions. *See, e.g.*, Lake Intervale Homes, Inc. v. Township of Parsippany-Troy Hills, 28 N.J. 423, 147 A.2d 28 (1958) (water main extensions); Torsoe Bros. Constr. Corp. v. Board of Trustees, 81 Misc. 2d 702, 366 N.Y.S.2d 810 (1975) (water connection charges), *modified* 49 A.D.2d 461, 375 N.Y.S.2d 612 (1975); Norco Constr. Co. v. King County, 97 Wash. 2d 680, 649 P.2d 103 (1982) (en banc) (ordinance provided for approval of preliminary plats if the water system was adequate). *See generally* Annot., 48 A.L.R.2d 122 (1971). Because these improvements are essential to health and safety, their relation to the police power is rarely challenged. 4 R. ANDERSON, *supra* note 6, § 23.43. *See supra* note 60.

33. *See* 5 N. WILLIAMS, *supra* note 6, § 156.08a (Supp. 1981). *See also* O. REYNOLDS, *supra* note 25, at 484-85. Municipalities impose the requirement to avoid passing the costs on to the current property owners, who provide by property tax the largest single source of school revenue. *See* D. MANDELKER & D. NETSCH, STATE AND LOCAL GOVERNMENT IN A FEDERAL SYSTEM 738-39 (1977). Municipalities re-

exactions because most state enabling acts do not explicitly grant to municipalities the exaction authority for educational purposes.[34]

Courts have been receptive to this argument and usually hold the municipal ordinances invalid.[35] The *ultra vires* rationale enables courts to avoid lurking constitutional issues, such as denials of equal protection or due process, and taking without compensation.[36] Nonetheless, the result is identical to a constitutional invalidation—the subdivision receives approval without provision of the desired exaction.

c. Open Space and Parks

Another recent form of subdivision exaction requires dedication or reservation of land for open space, parks, or recreational areas.[37]

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quire land dedication when the subdivision creates the need for additional school locations. Smaller subdivisions do not create the full requisite need. Nor do small subdivisions contain sites of adequate size or location for a school. Therefore, the municipality may impose fees upon these smaller subdivisions in lieu of the dedication. *See* 4 R. ANDERSON, *supra* note 6, § 23.42.

34. *See infra* notes 60-65 and accompanying text.

35. 4 R. ANDERSON, *supra* note 6, § 23.41. *See, e.g.*, Kelber v. City of Upland, 155 Cal. App. 2d 631, 318 P.2d 561 (1957) (school exactions materially change the map approval requirements of the enabling act); West Park Ave. v. Township of Ocean, 48 N.J. 122, 224 A.2d 1 (1966) (school exactions without statutory authority amounted to extortion). *But cf.* Jordan v. Village of Menomonee Falls, 28 Wis. 2d 608, 137 N.W.2d 442 (1965) (enabling statute made explicit reference to schools), *appeal dismissed*, 385 U.S. 4 (1966).

The constitutional basis for these exactions does not differ significantly from the rationale behind more familiar forms of exactions. The same methods of analysis, therefore, apply to school exactions as well. 2 P. ROHAN, *supra* note 9, § 9.04[3]; 5 N. WILLIAMS, *supra* note 6, § 156.08a. *See infra* notes 79-114 and accompanying text. *See generally* Feldman, *supra* note 12.

36. *See infra* notes 70-115 and accompanying text. *See generally* D. MANDELKER, LAND USE LAW 15-45 (1982).

37. *See, e.g.*, Aunt Hack Ridge Estates, Inc. v. Planning Comm'n, 160 Conn. 109, 273 A.2d 880 (1970) (exaction requirement of not more than four percent of the total); Carlann Shores, Inc. v. City of Gulf Breeze, 26 Fla. Supp. 94 (1966) (exaction requirement of five percent of the total area); Smith v. Gwinnett County, 248 Ga. 882, 286 S.E.2d 739 (1982) (reservation of open space in subdivisions larger than 20 acres); Billings Properties, Inc. v. Yellowstone County, 144 Mont. 25, 394 P.2d 182 (1964) (exaction requirement of at least one-ninth of the total area). *See also* O. REYNOLDS, *supra* note 25, at 484-85. *See generally* Karp, *Subdivision Exactions for Park and Open Space Needs*, 16 AM. BUS. L.J. 277 (1979).

Park space exactions are growing in popularity. *See* 2 P. ROHAN, *supra* note 9, § 9.03[1]. This popularity if represented by "a sharp increase" in ordinances requiring dedication of park sites. *Id.*

Park space exactions developed upon the premise that recreation is a necessary component of healthy community life within the subdivision,[38] and that the proper time for the municipality to preserve open space is before development takes place. Otherwise, development depletes the locality of available open land.[39]

The unique nature of internal exactions for park space requirements leaves them highly susceptible to judicial attack.[40] The rationale for invalidating these exactions often rests upon evidence that they are not intended to produce park space, but merely to "freeze" development or "bank" the land for future development.[41] If this is indeed the case, the exaction is properly classified as invalid.[42] To be valid, the overriding purpose must be the development of park and recreational facilities.

2. Land Beyond the Subdivision Plan

Subdivision exactions arose to protect the municipality and its resi-

38. Associated Homes Builders v. City of Walnut Creek, 4 Cal. 3d 633, 641, 484 P.2d 606, 613, 94 Cal. Rptr. 630, 636, *appeal dismissed*, 404 U.S. 878 (1971). *See* Frank Ansuini, Inc. v. City of Cranston, 107 R.I. 63, 68, 264 A.2d 910, 913 (1970) (an increased need for community recreation areas is a natural result of subdivision development.) *But see* Berg Dev. Co. v. City of Missouri City, 603 S.W.2d 273, 275 (Tex. 1980) (recreational purposes not a valid exaction purpose). Although traditionally courts review exactions by using a standard of reasonableness, they have a difficult time applying that standard to park and open space exaction cases. Some commentators has questioned this perceived difficulty.

> If the use of the police power to obtain street space is so routine, why has the same mechanism to obtain outdoor recreation space proven so troublesome? . . . [W]hereas vehicular rights-of-way are readily justified as to purpose and width, the court professes ignorance as to why or how much land must be set aside for outdoor frolic.

Platt & Merkle, *Municipal Improvisation: Open Space Exactions in the Land of* Pioneer Trust, 5 URB. LAW. 706, 709 (1973).

39. Karp, *supra* note 37, at 278. Planners agree that short-term energy shortages and continued conservation efforts will increase the demand for local recreation areas. *Id.*

40. *E.g.*, Admiral Dev. Corp. v. City of Maitland, 267 So. 2d 860 (Fla. Dist. Ct. App. 1972) (requirement of one-third of subdivision land for park and recreation purposes held beyond the scope of authority); Lomarch Corp. v. Mayor of Englewood, 51 N.J. 108, 237 A.2d 881 (1968) (ordinance designating land for park use effected a freeze upon development); East Neck Estates, Ltd. v. Luchsinger, 61 Misc. 2d 619, 305 N.Y.S.2d 922 (1969) (board requirement of dedication of the best land in the subdivision held confiscatory). *See infra* notes 126-30 and accompanying text.

41. *See* Miller v. City of Beaver Falls, 368 Pa. 189, 82 A.2d 34 (1951). *See also infra* notes 126-31 and accompanying text.

42. *See infra* note 65 and accompanying text.

dents from bearing the burdens created by new development.[43] Because subdivision development also affects off-site areas, municipalities must be able to shift the financial burden of off-site costs to the developer.[44] To achieve this end, enabling acts[45] and ordinances[46] often authorize the municipality to exact land in order to regulate these external effects.

Typically, exactions for land beyond the subdivision arise in response to the same types of needs and expenditures as internal exactions.[47] The most prevalent type of external exaction provides for the dedication or improvement of external roadways. Municipalities generally limit these street exactions to abutting roadways[48] and access roads.[49] These exactions are designed to offset additional traffic burdens, caused by the development, on highways inadequate for the increased volume.[50]

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43. *See supra* notes 11-12 and accompanying text.

44. *See* 4 R. ANDERSON, *supra* note 6, § 23.36.

> Subdivision controls are imposed on the supportable premise that a new subdivision is not an island, but an integral part of the whole community, which must mesh efficiently with the municipal pattern of streets, sewers, water lines, and other installations which provide essential services and vehicular access. The regulation of new subdivisions is a process of accommodating the new neighborhood to the developed areas which may be expected to undergo future development.

Id.

45. *See infra* notes 60-65 and accompanying text.

46. *See infra* notes 66-69 and accompanying text.

47. *See supra* notes 17-42 and accompanying text. *See generally* D. MANDELKER & R. CUNNINGHAM, PLANNING AND CONTROL OF LAND DEVELOPMENT 810 (1979).

48. *See, e.g.*, Ayres v. City Council, 34 Cal. 2d 31, 207 P.2d 1 (1949) (10 foot strip to widen an abutting highway); Maryland-National Capital Park & Planning Comm'n v. Washington Business Parks Assoc., 294 Md. 302, 449 A.2d 414 (1982) (widening an abutting highway); Briar West, Inc. v. City of Lincoln, 206 Neb. 172, 291 N.W.2d 730 (1980) (17 foot strip for widening of abutting street, plus paving and installation costs); Longridge Builders, Inc. v. Planning Bd., 52 N.J. 348, 245 A.2d 336 (1968) (paving an abutting highway). *Cf.* Valmont Homes, Inc. v. Town of Huntington, 89 Misc. 2d 702, 392 N.Y.S.2d 806 (1977) (sidewalk along abutting highway).

49. *See, e.g.*, Daviau v. Planning Comm'n, 174 Conn, 354, 387 A.2d 562 (1978) (ordinance valid even though developer did not own or control the 154 feet of land needed for right-of-way); Oakes Constr. Co. v. City of Iowa City, 304 N.W.2d 797 (Iowa 1981) (claim by developer that city must establish the needed access street held invalid); McKain v. Toledo City Plan Comm'n, 26 Ohio App. 2d 171, 270 N.E.2d 370 (1971) (dedication of 30 foot strip of land for widening an access street).

50. *See, e.g.*, North Landers Corp. v. Planning Bd., — Mass. —, —, 416 N.E.2d 934, 936 (1981) (inadequate access); Land/Vest Properties, Inc. v. Town of Plainfield, 117 N.H. 817, 820, 379 A.2d 200, 202 (1977) (developer refused to upgrade access).

3. Land Inappropriate for Exactions

Theoretically, every subdivision increases the need for additional streets, parks, and schools.[51] Yet developers may be unable to acquire sufficient land to satisfy that need.[52] In this situation, the municipality often locates the improvement beyond the development site to allow maximum accessibility to the surrounding community. A fee is then exacted[53] from the developers building in the area to the extent that the improvement benefits their land.[54]

While this technique protects the municipality from due process and equal protection claims, it simultaneously opens the exaction to attack as an improper taxation.[55] In such cases, courts generally uphold the requirement if some special benefit, advantage, or increase

51. *See, e.g.*, Frank Ansuini, Inc. v. City of Cranston, 107 R.I. 63, 68, 264 A.2d 910, 913 (1970) (natural result of subdivision is increased need for recreation needs). *See generally* 4 R. ANDERSON, *supra* note 6, §§ 23.40, 23.42. Each new subdivision increases the need for municipal services because it represents municipal growth. Reps & Smith, *supra* note 6, at 411.

52. *See* Karp, *supra* note 37, at 281. Requirements of land from each subdivision, without regard to their size or shape, would often give the municipality dedication sites that were too small or improperly located. "The in-lieu fee solves this problem by substituting a money payment for dedication when the local government determines the latter is not feasible." Juergensmeyer & Blake, *supra* note 9, at 418. *See* Haugen v. Gleason, 226 Or. 99, 103, 359 P.2d 108, 110 (1961) (land dedication from small subdivisions presents problems of maintenance, inadequate surface area and inconvenient location).

53. Municipalities usually exact fees in lieu of dedication upon a "per lot" basis. Marcus, *supra* note 12, at 22. *See, e.g.*, Newport Building Corp. v. City of Santa Ana, 210 Cal. App. 2d 771, 775, 26 Cal. Rptr. 797, 801 (1962) (fee of $50 per lot for parks and recreation purposes); Jenad, Inc. v. Village of Scarsdale, 18 N.Y.2d 78, 82, 218 N.E.2d 673, 675, 271 N.Y.S.2d 955, 956 (1966) (fee of $250 per lot to be used for park, playground, and recreational purposes); Jordan v. Village of Menomonee Falls, 28 Wis. 2d 608, 614, 137 N.W.2d 442, 444 (1965) (fee of $200 per lot to be used for school and park purposes), *appeal dismissed*, 385 U.S. 4 (1966).

54. Reps & Smith, *supra* note 6, at 411. *See, e.g.*, Cimarron Corp. v. Board of County Comm'rs, 193 Colo. 165, 168, 563 P.2d 946, 948 (1977) (in-lieu fees for park and school space); Coronado Dev. Co. v. City of McPherson, 189 Kan. 174, 176, 368 P.2d 51, 52 (1962) (in-lieu fees for public open space); Call v. City of West Jordan, 606 P.2d 217, 218 (Utah 1979) (in-lieu fees for flood control facilities).

Where the area served includes prior municipal inhabitants, the danger of unreasonable exactions is increased.

> [T]here is a danger of abuse if local government officials incline toward making the new inhabitants bear more than a fair share. This is often a likelihood, rather than a mere possibility, since the officials are members of the local population which would otherwise have to share the cost.

Comment, *supra* note 7, at 295.

55. *See* Haugen v. Gleason, 226 Or. 99, 103, 359 P.2d 108, 110 (1961) (county

in value accrues to the developer.[56]

4. Summary

Subdivision exactions take three general forms: internal land exactions; external land exactions; and fees in lieu of land. Once a court determines the form of exaction involved, it can then determine whether that exaction is valid.[57]

B. *Judicial Standards to Determine the Validity of Subdivision Exactions*

When a developer challenges a subidivision exaction, the court determines its validity based upon three factors: whether the municipality has authority to act under a state enabling act; whether the municipality has properly applied this authority by ordinance; and whether the exaction is constitutionally valid as a reasonable police power regulation.[58] The developer succeeds in avoiding the subdivision exaction if the court decides against the municipality on any one of these issues.[59]

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exceeded its authority when it sought to produce revenue from subdividers). *See generally* 2 P. ROHAN, *supra* note 9, § 9.01[3]; Karp, *supra* note 37, at 281.

56. *See, e.g.*, City of Hallandale v. Meekins, 237 So. 2d 318 (Fla. Dist. Ct. App. 1970) (no special benefit from large capacity sewers); Fluckey v. City of Plymouth, 358 Mich. 447, 110 N.W.2d 486 (1960) (mere location of road near one's property does not automatically confer a benefit); NcNally v. Township of Teaneck, 132 N.J. Super. 442, 334 A.2d 67 (1975) (increase in fair market value demonstrates benefit from street improvement). *See generally* D. MANDELKER & D. NETSCH, *supra* note 33, at 332-41.

57. *See infra* notes 58-115 and accompanying text.

58. *See* 2 P. ROHAN, *supra* note 9, §§ 9.01[3], 45.01[3]. Because developers typically plan subdivisions as a business venture, the decision of a court pertaining to the exaction may be critical to the financial success of the venture. One commentator has addressed the effect of exactions on the profitability of developments:

> From a private developer's standpoint, imposition of [subdivision exactions] by a municipality can adversely affect the profitability of his enterprise. . . . It is not surprising, therefore, that developers have sometimes vigorously contested the legality of each of these devices, usually claiming that they are *ultra vires*, deprive the developer of his property without due process of law, or constitute a taking of public property without compensation.

Johnston, *Constitutionality of Subdivision Control Exactions: The Quest for a Rationale*, 52 CORNELL L.Q. 871, 873 (1967).

59. *See, e.g.*, Snyder v. Owensboro, 528 S.W.2d 663, 665 (Ky. 1975) (lack of clearly applicable subdivision regulation); Simpson v. City of North Platte, 206 Neb. 240, 292 N.W.2d 297, 301 (1980) (inappropriate exercise of police power); Hylton Enters., Inc. v. Board of Supervisors, 220 Va. 435, 258 S.E.2d 577, 580 (1979) (no

1. Municipal Authority Through State Enabling Legislation

A municipality must have state authorization before it can control subdivisions and impose exactions.[60] Typically, a state enabling statute provides the municipality[61] with the authority to approve or disapprove proposed subdivision plats.[62] Further, the statute often sets out standards by which the municipality should judge the subdivision proposal.[63]

Each state has adopted subdivision control legislation.[64] A devel-

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statutory authority). *See generally* 1A C. ANTIEAU, *supra* note 7, § 8A.00; 2 P. ROHAN, *supra* note 9, § 9.01[3].

60. *See* Karp, *supra* note 37, at 279; Comment, *supra* note 7, at 297. *See generally* O. REYNOLDS, *supra* note 25, at 160-61; 7 P. ROHAN, *supra* note 9, § 45.01[3]. The municipality may protect the public interest through the exercise of the police power, which it acquires as a subdivision of the state. *See* Piper v. Meredith, 110 N.H. 291, 295, 266 A.2d 103, 106 (1970).

Because the Supreme Court has never taken a subdivision control case, state courts often apply the police power standard set in the landmark zoning case, Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

> [In *Euclid*,] the court restated as a general principle that comprehensive zoning ordinances would be upheld unless found to be "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."

Reps & Smith, *supra* note 6, at 406 (citing *Village of Euclid*, 272 U.S. at 395). After analyzing the fundamental differences between zoning ordinances and subdivision controls, some commentators have advocated a more specific test of reasonable relationship. Reps & Smith, *supra* note 6, at 407.

61. The power to approve subdivision plats is usually vested in a separate planning board. If this is not the case, the power is granted to the legislative body of the municipality. *See* 4 R. ANDERSON, *supra* note 6, §§ 23.04, 23.05; Reps & Smith, *supra* note 6, at 405-06.

62. *See* 7 P. ROHAN, *supra* note 9, § 45.01[3][b]. The model for most enabling acts is ADVISORY COMM'N ON PLANNING AND ZONING, U.S. DEP'T OF COMMERCE, STANDARD CITY PLANNING ENABLING ACT (1928).

63. *See* 4 A. RATHKOPF, *supra* note 6, at 71-16. These standards include provisions requiring the developer to meet the exactions set by the appropriate local department. *Id. See infra* note 64.

64. 4 R. ANDERSON, *supra* note 6, § 23.05. *See, e.g.*, ALA. CODE §§ 11-52-30 to -36 (1975); ARIZ. REV. STAT. ANN. §§ 9-463 to 9-463.05 (1977 & Supp. 1982); CAL. GOV'T CODE §§ 66475-66478 (Deering 1979); DEL. CODE ANN. tit. 9 §§ 3001-3004 (1975); GA. CODE ANN. § 69-1214 (1976); ILL. ANN. STAT. ch. 34 § 414 (Smith-Hurd Supp. 1981); MICH. STAT. ANN. §§ 26.430(101)-(293) (Callaghan 1982); MO. ANN. STAT. § 89.410 (Vernon 1971); MONT. CODE ANN. §§ 76-3-501 to -504 (1981); N.J. STAT. ANN. §§ 40:55D-37-39 (West Supp. 1981); OHIO REV. CODE ANN. § 711-09 (Page 1976); PA. STAT. ANN. tit. 53, § 10501 (Purdon 1972); TENN. CODE ANN. § 13-4-303 (1980); UTAH CODE ANN. §§ 57-5-1 to -8 (1974); VT. STAT. ANN. tit. 24, §§ 4413-4424 (1975 & Supp. 1982); VA. CODE §§ 15.1-465 to -485 (1981 & Supp.

oper cannot claim, therefore, that the municipality has no authority to control subdivisions. Rather, the developer must argue that the municipality has surpassed its statutory authority in imposing certain exactions upon the development.[65]

2. Municipal Application of Authority Through Ordinances

Municipal ordinances regulating subdivision development must be enacted pursuant to state enabling acts.[66] While the state statutes set forth general standards for determining subdivision plat approval,[67] local ordinances establish specific community standards for these determinations.[68] Municipalities may use these regulations to advance any objectives attainable under the police power. Nevertheless, their

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1982); WASH. REV. CODE ANN. § 58.17.110 (Supp. 1981); W. VA. CODE §§ 8-24-28 to -35 (1976); WIS. STAT. ANN. §§ 236.45-.46 (Supp. 1982).

When the municipality has home rule powers, the effect of the enabling statute is unclear. "The courts have usually ruled that a home rule government may seek power from a state statute as well as from its charter or home-rule provision, and indeed it would seem inconsistent if a home-rule government were to enjoy less power than a non-home-rule government in the same state." D. MANDELKER & D. NETSCH, *supra* note 33, at 180.

65. *See, e.g.*, City of Montgomery v. Crossroads Land Co., 355 So. 2d 363 (Ala. 1978) (beyond statutory authority to impose fees in lieu of park land); Gordon v. Village of Wayne, 370 Mich. 329, 121 N.W.2d 823 (1963) (beyond statutory authority to impose fees in lieu of school land); Briar West, Inc. v. City of Lincoln, 206 Neb. 172, 291 N.W.2d 730 (1980) (statute grants police power to assure proper meshing of subdivision and community, but not to evade constitutional limits); Hylton Enters., Inc v. Board of Supervisors, 220 Va. 435, 258 S.E.2d 577 (1979) (only provisions explicitly approved by state legislature may be included in subdivision ordinances). *But see* Call v. City of West Jordan, 606 P.2d 217, 219 (Utah 1979) (absence of applicable subdivision control enabling act did not preclude the municipality from requiring exactions when the court could imply the power from the zoning and planning enabling acts).

66. *See, e.g.*, Admiral Dev. Corp. v. City of Maitland, 267 So. 2d 860, 862 (Fla. Dist. Ct. App. 1972) (ordinance beyond the scope of city's charter provisions); Snyder v. Owensboro, 528 S.W.2d 663, 665 (Ky. 1975) (no clear subdivision regulation allowed or required the planning commission to request the dedication).

67 *See supra* note 63 and accompanying text.

68. *See, e.g.*, BERKELEY, MO., CODE § 22.05 (1973); FLORISSANT, MO., CODE app. A, § V (1969); ST. CHARLES, MO., REV. ORDINANCES § 26A (Supp. 1971). A typical ordinance is set out in *Pioneer Trust & Savings Bank v. Village of Mount Prospect*.

> The plat shall have lettered upon it a statement of dedication properly conveying all usable lands dedicated for such public uses as streets, public schools, parks or any other public use, and there shall be attached to the plat a certificate of ownership of all such lands to be so dedicated by said plat. Public grounds, other than streets, alleys and parking areas, shall be dedicated in appropriate locations by the plat (a) at the rate of at least one (1) acre for each sixty (60) residential

primary motivation is to provide adequate facilities in a manner that is financially equitable to present as well as incoming inhabitants.[69]

3. Application of Statutes and Ordinances—Constitutional Analysis

Once it has determined that the municipality has based its subdivision exaction upon a valid ordinance and state delegation of authority, a court must determine whether the exaction is reasonable as applied to the particular development.[70] A reasonable exaction violates no constitutional or statutory guarantees and is a valid exercise of the police power.[71] If on the other hand it is unreasonable and onerous,[72] it fails as an improper exercise of the police power.[73] In the latter instance, the developer may further raise a taking claim.[74]

In early exaction cases, courts granted perfunctory review of the constitutional issues through use of the privilege test.[75] Under this approach, courts could give blanket approval for any imposition. More recently, however, courts have articulated reasonableness tests

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building sites or family living units, which may be accommodated under the restrictions applying to the land. . . .
22 Ill. 2d 375, 377, 176 N.E.2d 799, 800 (1961).

69. *See* 4 R. ANDERSON, *supra* note 6, § 23.03; Note, *Subdivision Land Dedication: Objectives and Objections*, 27 STAN. L. REV. 419, 432 (1975). Because of the fiscal rationale behind municipal exaction ordinances, issues of discrimination or taking may arise—"whether the subdivision homebuyers, who ultimately finance such exactions, will be required to pay more than a 'fair' share . . . ." Heyman & Gilhool, *supra* note 9, at 1134.

70. *See* Heyman & Gilhool, *supra* note 9, at 1122.

71. *See* 6 E. MCQUILLIN, *supra* note 4, § 24.09. Subdivision development falls within the police power because development affects the general economy. Blevens v. City of Manchester, 103 N.H. 284, 286, 170 A.2d 121, 122 (1961). *See supra* note 60. *See generally* D. WEBSTER, URBAN PLANNING AND MUNICIPAL PUBLIC POLICY 440-73 (1958); 82 AM. JUR. 2d *Zoning and Planning* §§ 7-24 (1976).

72. *See* Heyman & Gilhool, *supra* note 9, at 1154. Application arguments seek to demonstrate that the exactions are unfair as applied to the developer. *See* Comment, *supra* note 9, at 788.

73. *E.g.*, Gary D. Reihart, Inc. v. Township of Carroll, 487 Pa. 461, 469, 409 A.2d 1167, 1172 (1979) (Larsen, J., dissenting). *See* P. NICHOLS, LAW OF EMINENT DOMAIN § 1.42[2] (rev. 3d ed. 1980). Under a proper exercise of the police power, a municipality need not provide compensation. *Id.* § 1.42[3].

74. D. MANDELKER & R. CUNNINGHAM, *supra* note 47, at 810. *See, e.g.*, Bethlehem Evangelical Lutheran Church v. City of Lakewood, 626 P.2d 668, 673 (Colo. 1981); Simpson v. City of North Platte, 206 Neb. 240, 245, 292 N.W.2d 297, 301 (1980).

75. *See infra* notes 79-82 and accompanying text.

designed to determine whether the exaction is a valid exercise of police power. Generally, the various jurisdictions use three different tests: the strict need test;[76] the specifically and uniquely attributable test;[77] and the rational nexus test.[78]

a. The Privilege Test

The privilege test emerged when subdivision controls were relatively new forms of municipal regulation. Courts faced with a developer's challenge to such an ordinance took judicial notice of the fact that developers voluntarily chose to subdivide their land. By undertaking this voluntary venture, developers were held estopped from challenging virtually any condition the municipality placed upon subdivision plan approval.[79] Such superficial review and the ensuing justification for municipal requirements characterized the privilege test. This test granted broad discretion to the municipality for approving and disapproving plans.[80] In its broad grant of discretion, the test also permitted the municipality to burden the developer with arbitrary and unreasonable conditions.[81] Because of this inherent flaw, the privilege test has since fallen from favor as a primary test of exaction validity.[82]

76. *See infra* notes 83-88 and accompanying text.

77. *See infra* notes 89-101 and accompanying text.

78. *See infra* notes 102-12 and accompanying text.

79. *See, e.g.*, Ayres v. City Council, 34 Cal. 2d 31, 42, 207 P.2d 1, 7 (1949); Brous v. Smith, 304 N.Y. 164, 170-71, 106 N.E.2d 503, 506-07 (1952). Subdivision approval could be so conditioned because it was granted at the discretion of the municipality. *See* Marcus, *supra* note 12, at 54.

80. *See* D. MANDELKER & R. CUNNINGHAM, *supra* note 47, at 810.

81. *See* Ayres v. City Council, 34 Cal. 2d 31, 48, 207 P.2d 1, 11 (1949) (dissenting opinion). While the majority applied the privilege test, the dissent argued that the standard left the developer with three choices: giving the dedication, letting the land sit idly; or going to jail. In the dissent's view, these unsatisfactory choices amounted to duress. *Id.*

82. *See* Johnston, *supra* note 58, at 876. The Supreme Court of New Jersey defeated an attempt to invoke the privilege in a later case. *See* West Park Ave., Inc. v. Township of Ocean, 48 N.J. 122, 128, 224 A.2d 1, 5 (1966). Currently, courts use the privilege test only as a secondary basis for validating the exaction. *See, e.g.*, Trent Meredith, Inc. v. City of Oxnard, 114 Cal. App. 3d 317, 328, 170 Cal. Rptr. 685, 691 (1981); Mid-Continent Builders, Inc. v. Midwest City, 539 P.2d 1377, 1382 (Okla. 1975).

b. The Strict Need Test

Municipalities often justify subdivision exactions as a necessary response to a need or burden created by the influx of newcomers.[83] Some courts have adopted this same rationale, as the basis for the application of a reasonableness test.[84] For a court to hold an exaction valid under this test, the new subdivision must have generated the need for the additional services.

In *Lampton v. Pinaire*,[85] the Kentucky Court of Appeals provided a leading recent example of the strict need test. The *Lampton* court recognized that any substantial subdivision development inevitably puts additional burdens upon utilities and neighboring streets.[86] Dedications to the municipality allows development to continue while eliminating imposition of an unreasonable burden on the community.[87] The court reasoned, therefore, that a dedication or other exaction is valid only if it "is based on the reasonably anticipated burdens to be caused by the development."[88]

c. The Specifically and Uniquely Attributable Test

The specifically and uniquely attributable test is a more restrictive version of the strict need test.[89] Under this method of analysis, a municipality demonstrates the validity of the exaction if it establishes that the developer's activities have generated a need, and that the benefits arising from the exaction accrue directly to the developer and his property.[90]

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83. *See* Comment, *supra* note 9, at 788. The strict need argument is especially forceful when applied to streets, sewers, pavements, water systems and most internal exactions. *Id.*

84. *See, e.g.*, Baltimore Planning Comm'n v. Victor Dev. Co., 261 Md. 387, 393, 275 A.2d 478, 482 (1971). Furthermore, the needs examined must relate to the subdivision control enabling act. *Id.*

85. 610 S.W.2d 915 (Ky. Ct. App. 1980).

86. *Id.* at 919.

87. This is essential for continued development. "Most local governments barely have funds for necessary maintenance purposes, much less for original construction purposes." *Id.* at 919.

88. *Id.* The court held that the subdivision regulations were not facially invalid, but remanded for further consideration of the effect of the regulations as applied. The court instructed the trial court to use a strict need test in deciding this issue. *Id.*

89. *See* Karp, *supra* note 37, at 283-84.

90. *See* 4 A. RATHKOPF, *supra* note 6, at 71-55. The principle that justifies the rule is the special assessment doctrine of tax. *See, e.g.*, Holmes v. Planning Bd., 78

A strong minority of jurisdictions apply the specifically and uniquely attributable test.[91] Among these jurisdictions, Illinois has made the most prolific use of the standard.[92] The Illinois Supreme Court's leading decision, *Pioneer Trust and Savings Bank v. Village of Mount Prospect*,[93] is still regarded as the seminal case nationwide.[94]

In *Pioneer*, the developer asked the court to invalidate an ordinance requiring dedication of land for school purposes.[95] He based his claim upon evidence that the school district had been overburdened prior to development of his subdivision.[96] Because the

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A.D.2d 1, 17, 433 N.Y.S.2d 587, 597 (1980). Under special assessment law, the costs of an improvement may be levied against property if the improvement provides special benefit to the property. *E.g.*, White v. County of San Diego, 26 Cal. 3d 897, 904, 608 P.2d 728, 731 (1980). *See* J. FORDHAM, LOCAL GOVERNMENT LAW 599-600 (2d ed. 1975).

91. A majority of jurisdictions follow the rational nexus standard. *See infra* note 105 and accompanying text. Courts have used the specifically and uniquely attributable test for all fact situations. *See, e.g.*, Aunt Hack Ridge Estates, Inc. v. Planning Comm'n, 160 Conn. 109, 273 A.2d 880 (1970) (upheld exaction requiring land for open space, parks, and playgrounds); Carlann Shores, Inc. v. City of Gulf Breeze, 26 Fla. Supp. 94 (1966) (struck down exaction requiring fees in lieu of park space); McKain v. Toledo City Plan Comm'n, 26 Ohio App. 2d 171, 270 N.E.2d 370 (1971) (struck down exaction requiring land for streets); Frank Ansuini, Inc. v. City of Cranston, 107 R.I. 63, 264 A.2d 910 (1970) (struck down exaction requiring land for recreational purposes).

92. *See, e.g.*, People *ex rel.* Exch. Nat'l Bank v. City of Lake Forest, 40 Ill. 2d 281, 239 N.E.2d 819 (1968) (struck down internal street exaction because land subdivided merely to allow single house thereon to be marketable); Rosen v. Village of Downers Grove, 19 Ill. 2d 448, 167 N.E.2d 230 (1960) (struck down exaction requiring land for educational purposes); Krughoff v. City of Naperville, 41 Ill. App. 2d 334, 354 N.E.2d 489 (1976) (upheld exaction requiring land for schools and parks), *aff'd*, 68 Ill. 2d 352, 369 N.E.2d 892 (1979). The Illinois courts have explicitly adopted the specifically and uniquely attributable test as the state standard for determining the reasonableness of subdivision exactions. *E.g.*, Krughoff v. City of Naperville, 41 Ill. App. 2d 334, 346, 354 N.E.2d 489, 499 (1976), *aff'd*, 68 Ill. 2d 352, 369 N.E.2d 892 (1977). *But see* Plote, Inc. v. Minnesota Alden Co., 96 Ill. App. 3d 1001, 1006-07, 422 N.E.2d 231, 235-36 (1981) (dictum) (the Illinois Supreme Court is currently tending toward a less restrictive test).

93. 22 Ill. 2d 375, 176 N.E.2d 799 (1961).

94. *Pioneer Trust* is typically cited as authority when a court applies the specifically and uniquely attributable test. *E.g.*, McKain v. Toledo City Plan Comm'n, 26 Ohio App. 2d 171, 174, 270 N.E.2d 370, 372 (1971); Frank Ansuini, Inc. v. City of Cranston, 107 R.I. 63, 67, 264 A.2d 910, 914 (1970).

95. *McKain*, 26 Ohio App. 2d at 377, 176 N.E.2d at 800-01. *See supra* notes 33-36 and accompanying text.

96. *Id.* at 380, 176 N.E.2d at 802. "[T]he present school facilities of Mount Prospect are near capacity. This is the result of the total development of the community.

need for additional schools arose from factors other than the new subdivision, the court invalidated the ordinance as applied to the complaining developer.[97]

The New Hampshire Supreme Court recently applied the specifically and uniquely attributable test in *J.E.D. Associates, Inc. v. Town of Atkinson*.[98] There, the town passed an ordinance requiring each subdivision developer to dedicate seven-and-one-half percent of their total acreage or pay a proportionate fee.[99] Evidence indicated that the town had no intended use for the acreage.[100] Looking particularly at the "need" requirement of the test, the court held that the regulation was an arbitrary blanket requirement, which constituted an unconstitutional taking.[101]

d. The Rational Nexus Test

The Wisconsin Supreme Court examined the specifically and uniquely attributable test in *Jordan v. Village of Menomonee Falls*.[102] Although the court professed acceptance of that standard, they also

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If this whole community had not developed to such an extent or if the existing school facilities were greater, the purported need supposedly would not be present." *Id.*

97. *Id.* at 381, 176 N.E.2d at 803. "However, this record does not establish that the need for recreational and educational facilities in the event that said subdivision plat is permitted to be filed, is one that is specifically and uniquely attributable to the addition of the subdivision and which should be cast upon the subdivider as his sole financial burden." *Id.*

98. 121 N.H. 581, 432 A.2d 12 (1981).

99. The regulation required this amount of "land of a character suitable for playgrounds *or for other town use*." *Id.* at 583, 432 A.2d at 13 (emphasis added).

100. *Id.* at 584, 432 A.2d at 14. The town's recreation commission had declined the lot as a park or playground. Plaintiff further argued that the need for open space was satisfied by large-lot zoning. *See* Brief for Plaintiff at 5, 8, J.E.D. Assocs., Inc. v. Town of Atkinson, 121 N.H. 581, 432 A.2d 12 (1981).

101. J.E.D. Assocs., Inc. v. Town of Atkinson, 121 N.H. 581, 585, 432 A.2d 12, 15 (1981). Plaintiff raised a second issue regarding removal of a visual obstruction upon an external access road. The court remanded for a determination of whether the traffic volume had increased and if a new state route in the area cancelled the benefit accruing to the subdivision. *Id. See also* Brief for the Plaintiff at 22-26, J.E.D. Assocs., Inc. v. Town of Atkinson, 121 N.H. 581, 432 A.2d 12 (1981).

Chief Justice Grimes, who wrote the opinion in *J.E.D. Associates, Inc.*, leads a majority of the New Hampshire Supreme Court that favors broad construction of individual property rights and stricter scrutiny of land use ordinances. *See* Gilrain, *Recent Developments in Land Use Regulation*, 19 N.H. B.J. 257 (1978).

102. 28 Wis. 2d 608, 137 N.W.2d 442 (1965), *appeal dismissed*, 385 U.S. 4 (1966).

expressed concern about its rigid elements.[103] Therefore, the *Jordan* court put forward a new standard, which required a rational connection between the new subdivision and the desired exaction.[104] The Wisconsin standard is similar to the specifically and uniquely attributable test in its two-pronged examination of needs and benefits.[105] It differs, however, in the degree of evidence required to validate the police power exercise—the rational nexus test increases the presumption of validity.[106]

The rational nexus test of *Jordan* has become the most widely held standard for examining subdivision exactions.[107] Most recently, the

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103. *Id.* at 617, 137 N.W.2d at 447. The *Jordan* majority commented:

> We deem this to be an acceptable statement of the yardstick to be applied, 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. In most instances it would be impossible for the municipality to prove that the land required to be dedicated for a park or a school site was to meet a need solely attributable to the anticipated influx of people into the community to occupy this particular subdivision.

Id.

104. *Id.* at 618, 137 N.W.2d at 448.

105. Juergensmeyer & Blake, *supra* note 9, at 433. "[T]he concept of benefits received is clearly distinct from the concept of needs attributable. As the *Jordan* court recognized, the benefit accruing to the subdivision, although it need not be direct, is a necessary factor in analyzing the reasonableness [of the exaction]." *Id. See generally* Karp, *supra* note 37, at 285-89.

106. *See* Juergensmeyer & Blake, *supra* note 9, at 433. "[O]nce these 'rational nexi' are established, the burden to disprove the reasonableness of the payment requirement shifts to the developer, according the local government a semblance of the presumption of validity it enjoys in zoning and other land use matters." *Id. See also* Banberry Dev. Corp. v. South Jordan City, 631 P.2d 899, 904 (Utah 1981) (initial burden on municipality because of its greater accessibility to the required evidence).

107. *See, e.g.*, Ivy Steel & Wire Co. v. City of Jacksonville, 401 F. Supp. 701 (M.D. Fla. 1975) (upheld exaction requiring fees for water pollution control and sewer connection); Wald Corp. v. Metropolitan Dade County, 338 So. 2d 863 (Fla. 1976) (upheld exaction requiring land for canal purposes); Schwing v. City of Baton Rouge, 259 La. 770, 249 So. 2d 304 (1971) (struck down exaction requiring street extension); Glacier Sand & Stone Co. v. Board of Appeals, 362 Mass. 239, 285 N.E.2d 411 (1972) (upheld exaction requiring street improvement); Home Builders Assoc. v. City of Kansas City, 555 S.W.2d 832 (Mo. 1977) (en banc) (upheld exaction requiring land for park and playground purposes); Land/Vest Properties, Inc. v. Town of Plainfield, 117 N.H. 817, 379 A.2d 200 (1977) (struck down exaction requiring highway improvement); Longridge Builders, Inc. v. Planning Bd., 52 N.J. 348, 245 A.2d 336 (1968) (struck down exaction requiring improvement to external roadway); Jenad, Inc. v. Village of Scarsdale, 18 N.Y.2d 78, 218 N.E.2d 673, 271 N.Y.S.2d 955 (1966) (upheld exaction requiring fees in lieu of park land dedications). *See also* 181, Inc. v. Salem County Planning Bd., 133 N.J. Super. 350, 336 A.2d 501 (1975) (excellent state-

Michigan courts adopted the test in *Arrowhead Development Co. v. Livingston County Road Commission*.[108] In *Arrowhead*, the county road commission demanded regrading costs for a hazardous road outside the subdivision,[109] arguing that the hazardous condition arose solely from the subdivision development.[110] The court, in its review, adopted the rational nexus test as a "useful analytic framework" for testing external exactions.[111] Here, since the blindspot intersection arose directly because of subdivision development, the court upheld the exaction based upon the rational nexus between the hazard and the development.[112]

e. Summary

As demonstrated above, courts have often looked to both the cause

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ment concerning the breadth of the rational nexus test). *See generally* Trichelo, *Subdivision Exactions: Virginia Constitutional Problems*, 11 U. RICH. L. REV. 21, 27 (1976).

Several courts have described their reasonableness test as a "reasonable relationship test." *See, e.g.*, Coronado Dev. Co. v. City of McPherson, 189 Kan. 174, 178, 368 P.2d 51, 54 (1962); State *ex rel.* Noland v. St. Louis County, 478 S.W.2d 363, 367-68 (Mo. 1972). These tests do not differ from the rational nexus test. The rational nexus test originated from concepts developed in Jordan v. Village of Menomonee Falls, 28 Wis. 2d 608, 137 N.W.2d 442 (1965), *appeal dismissed*, 385 U.S. 4 (1966). The test's name arose from language in the opinion. Nonetheless, the ultimate holding in *Jordan* required a reasonable basis for the exaction. *Id.* at 618, 137 N.W.2d at 447-48. *But see* 181, Inc. v. Salem County Planning Bd., 133 N.J. Super. 350, 357-58, 336 A.2d 501, 505 (1975) (rational nexus and reasonable requirement tests are two different standards).

108. 92 Mich. App. 31, 283 N.W.2d 865 (1979).

109. The subdivision plan required the opening of an access road. The intersection created a visibility problem due to the area terrain and grade. *Id.* at 34, 283 N.W.2d at 866.

110. *Id.* While an enabling act existed, the developer argued that it was limited in scope to internal exactions. *Id.* at 34, 283 N.W.2d at 866. The court did not agree:

> The statute itself contains no limiting provision which requires that exactions take place only within the physical confines of the proposed subdivision. . . . We find the absence of limiting language in the statute to be consistent with the legislature's intent to endow county road commissions with broad authority to carry out their public duties. To construe the statute to permit exactions only within the plat would be to impose an arbitrary and unrealistic limitation upon the road commission's authority. . . .

Id. at 35-36, 283 N.W.2d at 867.

111. *Id.* at 39, 283 N.W.2d at 868-69.

112. *Id.* at 40, 283 N.W.2d at 869-70. "[T]he evidence adduced here clearly establishes a rational nexus between the creation of Arrowhead Subdivision and the hazardous traffic condition. . . ." *Id.*

and effect of exactions in evaluating their validity. Resolving the causation issue requires an investigation into why the need for the exaction arises. Determining the exactions effect requires identifying where the benefit accrues. The privilege test incorporates neither branch in analyzing subdivision exactions.[113] The strict need test looks only to the causation element.[114] The specifically and uniquely attributable test and the rational nexus test, however, incorporate both cause and effect into their analysis.[115]

II. A SYNTHESIS

A. *Elimination of the Strict Need and Privilege Tests*

Courts may reach irrational results if they fail to consider both need and benefit before determining the validity of an exaction. Without a determination of need, a municipality could exact land or money to provide improvements needed before the developer subdivided his land. Similarly, unless courts weigh the benefit resulting from the exaction, a municipality could, with monetary exactions, place an improvement so far from the particular subdivision that no special benefit accrues to its residents. Therefore, courts should avoid using the strict need test and the privilege test since neither provides the necessary two-step analysis.

Need, or causation, analysis limits subdivision exactions to those needs that result specifically from the subdivision development.[116] Benefit, or effect, analysis ensures that the subdivision receives the requisite relief from this perceived need.[117] A two-pronged test incorporating both standards effectively constrains the reach of the municipality to that range of exactions which is irrefutably valid—exactions imposed to shift the collateral costs of subdividing to the developer and ultimately the subdivision's future residents who benefit from the development. Both the specifically and uniquely attributable test and the rational nexus test permit this result.[118]

The problems inherent in less stringent standards was demon-

113. *See supra* notes 79-82 and accompanying text.
114. *See supra* notes 83-88 and accompanying text.
115. *See supra* notes 89-112 and accompanying text.
116. *See supra* notes 80-88 and accompanying text.
117. *See supra* note 90 and accompanying text.
118. *See supra* notes 89-112 and accompanying text.

strated in *Call v. City of West Jordan*.[119] In *Call*, the city required a dedication of seven percent of the subdivision land area.[120] At the city's option, it could require cash in lieu of land.[121] The city exercised the latter option and accepted money for use in flood control and park land.[122] Although the need for additional flood control arose directly from the development, no specific benefit accrued to the subdivision.[123] Nevertheless, the court decided that the absence of a special benefit did not impair the ordinance's validity even though it was not clear that the exaction had a reasonable effect.[124] The lesson of *Call* is clear: If benefit is not considered along with need, the municipality will be free to exact amounts of cash or land from the subdivider without returning an equal share in benefits.[125]

Other exaction cases, involving land banks or land "freezes," also satisfy less stringent tests.[126] The New Jersey Supreme Court dealt with a land freeze case in *Lomarch Corp. v. Mayor of the City of Englewood*.[127] In *Lomarch*, plaintiff attacked an ordinance requiring

119. 606 P.2d 217 (Utah 1979).

120. *Id.* at 218.

121. *Id.*

122. *Id.* at 218.

123. *Id.* at 220.

124. *Id.* The court then used vague and sweeping language in an attempt to justify its lack of benefit analysis. "[I]t is so plain as to hardly require expression that if the purpose of the ordinance is properly carried out, it will redound to the benefit of the subdivision as well as to the general welfare of the whole community." *Id.*

125. A petition for rehearing was granted. Call v. City of West Jordan, 614 P.2d 1257 (Utah 1980) (Call II). In *Call II*, the court ruled that the holding of *Call I* could not be applied without allowing the plaintiff an opportunity to show that the exaction was unreasonable.

> Implicit in this rule is the requirement that if the subdivision generates such needs and West Jordan exacts the fee in lieu of dedication, it is only fair that the fee so collected be used in such a way as to benefit demonstrably the subdivision in question. This is not to say that the benefit must be solely to the particular subdivision, but only that there be some demonstrable benefit to it.

Id. at 1259.

126. *See, e.g.*, Simpson v. City of North Platte, 206 Neb. 240, 246, 292 N.W.2d 297, 301 (1980) (dedication of land for proposed thoroughfare was a land banking operation); 181, Inc. v. Salem County Planning Bd., 133 N.J. Super. 350, 358, 336 A.2d 501, 506 (1975) (benefit branch of the rational nexus test requires specific and presently contemplated improvements); R.G. Dunbar, Inc. v. Toledo Plan Comm'n, 52 Ohio App. 2d 45, 50, 367 N.E.2d 1193, 1196-97 (1976) (city had taken no action to propose exact location of major intersection). *See also supra* notes 40-42 and accompanying text. *See generally* Annot., 36 A.L.R.3d 751 (1971).

127. 51 N.J. 108, 237 A.2d 881 (1968).

reservation of park land for the period of one year.[128] If the municipality failed to purchase the land or institute condemnation proceedings within the one year period, all rights would revert to the developer.[129] The court invalidated the ordinance, concluding that its effect would freeze the land without benefiting the subdivision.[130] If the court had held the ordinance valid, the municipality thereafter could have exacted unreasonable amounts of land based only upon potential benefit.

When courts employ the strict need test or the privilege test, therefore, excessive exactions are often upheld.[131] Courts could avoid this inequitable result by abandoning these inadequate tests in favor of the specifically and uniquely attributable test and the rational nexus test.

B. *Application of Different Standards to Different Factual Situations*

It is frequently the case that once a jurisdiction has decided a subdivision exaction case and has applied one form of the reasonableness test, later courts in the same jurisdiction apply the same test to other exaction cases, regardless of whether the factual situation is the same.[132] Courts should abandon this habit and apply different tests when the facts so require.

When the subdivision exaction pertains to land within the subdivision,[133] courts should accord more deferential treatment to the municipality's interests manifested in the exaction ordinance. The need

128. *Id.* at 111, 237 A.2d at 882.

129. *Id.*

130. *Id.* If the municipality had begun condemnation proceedings and had purchased an option from the developer, the just compensation issue would have been resolved. *Id.* at 113-14, 237 A.2d at 884.

131. It is important to note that cases invalidating subdivision exactions do not require the court to analyze both need and benefit. If the exaction is invalid under the need requirement, for example, the court has no reason to examine the benefits as well. *See, e.g.*, J.E.D. Assocs., Inc. v. Town of Atkinson, 121 N.H. 581, 432 A.2d 12 (1981).

132. *See, e.g.*, Krughoff v. City of Naperville, 41 Ill. App. 3d 334, 346, 354 N.E.2d 489, 499 (1976) (Illinois follows the specifically and uniquely attributable test), *aff'd* 68 Ill. 2d 352, 369 N.E.2d 892 (1977); Home Builders Ass'n v. Kansas City, 555 S.W.2d 832, 835 (Mo. 1977) (Missouri follows the rational nexus test). *Cf.* Briar West, Inc. v. City of Lincoln, 206 Neb. 172, 291 N.W.2d 730, 734 (1980) (unnecessary to adopt a state rule in this case since issues could be decided on other grounds).

133. *See supra* notes 25-42 and accompanying text.

for these internal exactions is likely to arise from the subdivision's development. Further, a benefit is likely to accrue to a subdivision when the streets, schools, and parks are located in close proximity to the development.[134] Under these circumstances, courts should accord an increased presumption of validity to the ordinance. The rational nexus test accomplishes this result,[135] yet maintains sufficient scrutiny to ensure the validity of the exaction as applied.

The presumption of validity should be lessened, however, when the subdivision exaction applies to land beyond the subdivision.[136] The somewhat attenuated relationship between the exaction and the development warrants less deferential judicial review.[137] In this situation, however, it may be difficult to demonstrate that the development "specifically and uniquely" benefits from the external exaction. Application of the specifically and uniquely attributable test, therefore, may lead to harsh results.[138] To alleviate the problem, courts should modify the test. Under this modified form, the court would deem the subdivision exaction to be reasonable if the need for the exaction arises "specifically and uniquely" from the development and a reasonable benefit accrues to the development. The practical effect of this modification would be to increase the municipality's burden of proof only upon the need branch of the test.[139] The modi-

134. "When land is dedicated for public streets or for the furnishing of water mains and sewers, their location insures some definite benefit to the rest of the land in the plat." Jordan v. Village of Menomonee Falls, 28 Wis. 2d 608, 621, 137 N.W.2d 442, 451 (1965) (Hallows, J., dissenting on other grounds), *appeal dismissed*, 385 U.S. 4 (1966).

135. *See supra* note 106 and accompanying text.

136. *See supra* notes 44-50 and accompanying text.

137. That is, as the benefit's distance from the subdivision increases, the relationship of the exaction to the subdivision decreases. *See, e.g.*, Holmes v. Planning Bd., 78 A.D.2d 1, 17, 433 N.Y.S.2d 587, 597 (1980) (requiring spatial proximity between the improvement and the property). This is not a problem, however, when the exaction is internal.

138. *See, e.g.*, Gulest Assocs. Inc. v. Town of Newburgh, 25 Misc. 2d 1004 (difficult to prove that external recreational facilities will uniquely benefit the subdivision), *aff'd*, 15 A.D.2d 815, 225 N.Y.S.2d 538 (1962). *See also supra* notes 89-101 and accompanying text.

139. The rational nexus test relieved the problems of rigidity inherent in the specifically and uniquely attributable test. Holmes v. Planning Bd., 78 A.D.2d 1, 18, 433 N.Y.S.2d 587, 598 (1980). Additionally, the rational nexus test increased the problems of benefit analysis. *Id.* The hybrid test set forth in this Note attempts to rectify this problem as well by specifically introducing a less rigid form of benefit analysis.

fication would also assure the subdivider of greater protection when the potential for harm increases.

When the municipality exacts fees in lieu of land, the relationship between the fees paid and the benefit to the development may also become attenuated. This occurs because of the tendency of municipalities to apply the fees to the purchase and improvement of external land.[140] A subdivision developer in this situation would be in the same position as one with an objectionable external land exaction. Courts should therefore use the modified specifically and uniquely attributable test discussed above.

C. *The Practical Results*

The practical effects of these changes would be significant. First, the demise of the privilege and strict need tests would promote more equitable decisions. Courts could allow developers to continue development, but hold them responsible for the costs arising from their subdivision. These decisions would provide developers with greater security in the knowledge that the costs exacted upon them would also benefit their subdivision.

Secondly, these changes would require the courts to examine thoroughly the fact situation presented by the case before determining which form of the reasonable test to apply. This would have the desirable effect of altering the present judicial practice of undertaking a cursory examination of the facts before routinely applying the jurisdiction's standard test.

Finally, the use of varying standards for differing fact situations may have a significant effect upon municipal exaction ordinances. Often, the ordinances require a fixed percentage of the subdivision land or an equivalent amount of cash in lieu of land. Such ordinances would not survive under the specifically and uniquely attributable test. Some courts deem fixed exactions to be arbitrary and unreasonable under the need branch of this test.[141] All jurisdictions,

140. *See supra* notes 51-55 and accompanying text.

141. *See, e.g.*, J.E.D. Assocs., Inc. v. Town of Atkinson, 121 N.H. 581, 432 A.2d 12, 15 (1981) (ordinance requiring seven-and-one-half percent of land area struck down as unreasonable); Frank Ansuini, Inc. v. City of Cranston, 107 R.I. 63, 68, 264 A.2d 910, 913 (1970) (a fixed percentage requirement creates inequities which are less likely to arise under the specifically and uniquely attributable test). *See generally* Cutler, *Legal and Illegal Methods for Controlling Growth on the Urban Fringe*, 1961 WIS. L. REV. 370.

however, are not in accord. Nonetheless, such ordinances would be suspect as unreasonable when applied to external lands or fees in lieu of land.

III. CONCLUSION

It is well established that municipalities can impose subdivision exactions under the police power. When effectively imposed, these exactions benefit both the subdivision and the surrounding community. They serve to hold the developer responsible for any additional municipal burdens without unduly discriminating against the venture.

Courts have used various tests in judging the validity of subdivision exactions. Of these, only the rational nexus test and a modified specifically and uniquely attributable test should remain in use. These tests, when applied in differing factual settings, best ensure that the exactions accomplish the socially desirable role of shifting the costs of new developments to the responsible parties when the need for additional municipal services arises from the developments and a benefit accrues to them.

COMMENTS