# IMPACT FEES: THE "SECOND GENERATION"[1]

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SYNOPSIS

Impact fees are increasingly viewed as a way to meet the public infrastructure and service needs of growing communities. To some, they represent the wave of the future; to others they represent an unjustified shift away from the traditional notion that the general public should bear the cost of public facilities, not just new development. Impact fees have been given many different labels and definitions. This Article analyzes the evolution of impact fees in a number of states that have had the longest experience with impact fees to determine how more than a decade of legislation and litigation has changed the form and substance of local impact fee ordinances in those states.

1. Note: This Article was developed from a paper presented by Brian Blaesser at the 1989 Institute on Zoning & Planning which was co-sponsored by the Department of Urban & Regional Planning at the University of Illinois at Champaign-Urbana and the Illinois Chapter of the American Planning Association.

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## I. INTRODUCTION

Impact fees are a relatively new local government technique for funding capital facilities needed to serve new development in high growth areas of the country. As with most regulations, states differ in their approaches to impact fees. For example, Arizona's development fee legislation, adopted in 1982, is very broad in the range of public improvements funded and the scope of local discretion to determine how fees should be calculated. Florida, which has dealt with impact fees for more than a decade, does not yet have specific state impact fee legislation; instead it has relied on judicial opinions to define the contours of constitutionally valid impact fees.[4] Learning from over a decade of litigation in Florida and other "high-growth" states, Texas adopted the first general legislation in the country for "true" impact fees in 1987, creating a model for other high-growth states like Illinois, Tennessee and Virginia. In those states, strict judicial attitudes toward development regulations and fees had generally precluded the use of impact fees without enabling legislation. Despite the differing sources of authority for the "first generation" of impact fees in the various states, the common characteristics of the "second generation" of impact fees are the heightened level of detail, reduced local discretion to

4. In 1985, the Florida legislature authorized the use of impact fees as a growth management technique under its amended Growth Management Act, Part II, which encourages the use of innovative capital facilities financing mechanisms, including impact fees. FLA. STAT. ANN. § 163 (West 1972 & Supp. 1990).

determine the types of facilities funded and related standards, the classes of fee payers and the amounts of fees.

Part I of this Article presents necessary background for a clearer understanding of the "second generation" impact fee legislation described in Part II. The implications of new impact fee legislation for local governments that are not covered under the new legislation is discussed at the end of Part II. The remainder of this Article addresses some of the ongoing legal dilemmas regarding the use of various types of exactions (Part III) and new developments in the implementation of impact fee ordinances (Part IV).

### A. *The Capital Facilities Financing Dilemma*

Since the beginning of suburbanization and migration to warmer climates, local governments in growing communities have struggled to provide new infrastructure and services for their swelling populations. In Illinois, for example, the legal battles over who should bear the cost of new growth and development began in the 1950s, with the flight of urban populations to large, suburban tract developments requiring new roads, water, sewer, schools and parks.[5] Fortunately for contemporaries of that post-war era, the federal government funded most of those public facilities. Even then, however, the courts were asked to decide who should pay for the costs of growth.[6]

#### 1. Governments' Responses to the Dilemma

In the early 1950s, long-term, general obligation debt accounted for roughly half of capital improvement funds. During the next two decades, federal grants became the dominant funding source, comprising more than forty percent of state and local capital funds by the early 1970s.[7] Taxes and special assessments comprised the other primary

5. *See generally* RESIDENTIAL PLANNING CORPORATION, THE FISCAL IMPACT OF GROWTH: AN EVALUATION OF THE FISCAL EFFECT OF RESIDENTIAL GROWTH UPON LOCAL GOVERNMENTS IN LAKE COUNTY, ILLINOIS (prepared for The Homeownership Institute, December, 1988); C. HAAR, THE END OF INNOCENCE: A SUBURBAN READER (1972).

6. *See, e.g.*, People ex rel. County of Du Page v. Smith, 21 Ill. 2d 572, 173 N.E.2d 485 (1961) (describing population growth in Du Page County in the context of determining the validity of County-imposed water and sewer connection fees); Associated Home Builders v. City of Walnut Creek, 4 Cal. 3d 633, 484 P.2d 606, 94 Cal. Rptr. 630, *appeal dismissed*, 404 U.S. 878 (1971).

7. J. PETERSEN & R. FORBES, INNOVATIVE CAPITAL FINANCING, AMERICAN PLANNING ASSOCIATION, PLANNING ADVISORY SERVICE REPORT NO. 392 (1985).

sources of funding. With federal funding now greatly reduced in an era of budget deficits, local governments have been forced to increase local taxes and reduce local spending.

Not surprisingly, increased reliance on the property tax resulted in taxpayer revolts in several states (e.g., California, Massachusetts). Left with few alternatives, strapped local governments have sought to restrain new growth and development and, in effect, impose a mandate: "No public facilities, no development permit." To enforce this mandate, city governments in many growing communities rewrote local codes to include provisions for mandatory dedication of land on subdivision plats, or fees in lieu of dedication. The requirement that developers dedicate land, or fees in lieu of dedication or specific types of facilities within their subdivisions, as a condition to plat approval is now specifically authorized by statutes in many states.[8] Impact fees are also now expressly authorized by statute in a number of states.[9]

The legal battles fought in the 1950s and 1960s over dedication and reservation requirements are often cited in current impact fee litigation. In addition, the constitutional tests developed to ensure that there is some relationship between the required dedication and the need for public facilities have carried over into impact fee cases.

### 2. Early Experience with Exactions and Impact Fees

Early during the suburban boom, many state courts held that it was unconstitutional to require a single development to bear the entire cost of major public improvements. However, this constitutional limitation did not preclude local governments from requiring each new development to pay a "fair share fee," which reflects that portion of the total cost that is attributable to the need created by that development.[10] Im-

8. *See, e.g.*, COLORADO REV. STAT. § 30-28-133(4)(a)(II) (1973) (subdivision enabling legislation authorizing regulations requiring dedication of school sites or payment of money in lieu, when "reasonably necessary" to serve the proposed subdivision); MINN. STAT. ANN. § 462.358 (West 1989) (authorizing municipalities to require, as a condition for subdivision approval, dedication of a "reasonable portion" of subdivision property for parks and playgrounds or cash equivalent).

9. *See infra* notes 50-85 and accompanying text (discussion of impact fee legislation).

10. *See* discussion of early Florida impact fee cases in Smith, *From Subdivision Improvement Requirements to Community Benefit Assessments and Linkage Payments: A Brief History of Land Development Exactions*, 50 LAW & CONTEMP. PROBS. 5, 16-19 (1987); Home Builders & Contractors Association v. Board of County Commissioners of Palm Beach County, 446 So. 2d 140 (Fla. Dist. Ct. App. 1983), *cert. denied*, 451 So. 2d 848, *appeal dismissed*, 469 U.S. 976 (1984) (upholding "fair share" road impact fee).

pact fees were conceived as a mechanism to offset the growth costs resulting from the need for large-scale public improvements located off-site of new developments. These fees also had the potential to satisfy developers' need for more predictable development costs as compared to negotiated developer contributions.

### A. CALIFORNIA'S MANDATORY DEDICATION

Although early courts had few difficulties with mandatory dedication requirements for public road and park improvements within a proposed subdivision, the idea of requiring mandatory dedication of off-site improvements was less palatable. A 1949 California case, *Ayres v. City Council*,[11] was among the earliest to approve local regulations requiring the dedication of an additional right-of-way along an existing public street bordering on a proposed subdivision. Other courts later cited the case for the proposition that mandatory dedication requirements need not necessarily fulfill solely the needs of a proposed subdivision. The *Ayres* court held that where the dedication of a right-of-way "is a condition reasonably related to increased traffic and other needs of [a] proposed subdivision it is voluntary in theory and not contrary to constitutional concepts."[12] The court upheld the exaction based in part on the theory that government approval is a privilege or benefit to which the government may impose reasonable conditions.[13]

In the landmark 1971 case of *Associated Home Builders v. City of Walnut Creek*,[14] the California Supreme Court reaffirmed its deference to local regulations conditioning development approval on the dedication of land or fees-in-lieu. The court's sympathy for the mandatory open space regulations in *Associated Home Builders* was based in part on the "urgent needs caused by present and anticipated future population growth" and the "disappearance of open land."[15] These problems have served as the basis for a broad array of new development fees under recent legislative enactments.

Nearly forty years after *Ayres*, the U.S. Supreme Court invalidated a beach access exaction in the famous exactions case of *Nollan v. Califor-*

11. 34 Cal. 2d 31, 207 P.2d 1 (1949).

12. *Id.* at 40, 207 P.2d at 8.

13. *Id.*

14. 4 Cal. 3d 633, 484 P.2d 606, 94 Cal. Rptr. 630, *appeal dismissed*, 404 U.S. 878 (1971).

15. *Id.* at 639-40, 484 P.2d at 611, 94 Cal. Rptr. at 636.

*nia Coastal Commission*,[16] which established a heightened level of judicial scrutiny in exactions cases.

### B. ILLINOIS SUBDIVISION EXACTIONS

Illinois' earliest exactions case, decided in 1956, upheld the authority of local governments to require developers to install curbs and gutters along dedicated roads in a proposed subdivision.[17] Five years later, however, the Illinois Supreme Court struck down a provision of the Village of Mount Prospect plan that required the mandatory dedication of land for school and park uses on the site of a proposed 250-unit subdivision because it was not "specifically and uniquely attributable" to the proposed development.[18]

The most significant factor in the evolution of exactions law in Illinois was the amendment of the state constitution in 1970 to give certain municipalities and counties home rule power, except in subject areas where the state legislature expressly reserved power. The types of exactions that have been litigated since the home rule amendment to the Illinois Constitution in 1970 include:

* mandatory dedication of school sites and recreation sites;[19]
* mandatory dedication of school site plus cash toward construction of the school;[20]
* cash contributions to the local school district;[21]
* recording of a restrictive covenant limiting the use of land and the dedication of a 50-foot strip of land for road purposes;[22]

16. 483 U.S. 825 (1987). *See infra* notes 114-78 and accompanying text, discussing the potential effect of *Nollan* on state constitutional standards.

17. Petterson v. City of Naperville, 9 Ill. 2d 233, 137 N.E.2d 371 (1956).

18. Pioneer Trust & Savings Bank v. Village of Mount Prospect, 22 Ill. 2d 375, 176 N.E.2d 799 (1961). It was in this landmark case that the Illinois Supreme Court articulated more fully the "specifically and uniquely attributable" standard for determining the constitutional validity of developer exactions. *Id.* at 379, 176 N.E.2d at 801.

19. Krughoff v. City of Naperville, 68 Ill. 2d 352, 369 N.E.2d 892 (1977) (condition to subdivision approval).

20. Board of Education of School Dist. No. 68, Du Page County v. Surety Developers, Inc., 63 Ill. 2d 193, 347 N.E.2d 149 (1975) (condition to issuance of a special use permit).

21. Duggan v. County of Cook, 60 Ill. 2d 107, 324 N.E.2d 406 (1974) (condition to the issuance of a special use permit).

22. Ziemer v. County of Peoria, 33 Ill. App. 3d 612, 338 N.E.2d 145 (1975) (condition to rezoning approval).

* construction of a gasification plant;[23] and
* conveyance of land and payment of funds to a local school district.[24]

Not suprisingly, home rule power is often a crucial source of authority for impact fee ordinances adopted in states that do not yet have express impact fee legislation.

### C. Wisconsin School and Park Dedication

The Wisconsin Supreme Court made its significant contribution to exactions law in the 1966 case of *Jordan v. Menomonee Falls*.[25] The case involved a challenge to local subdivision regulations requiring the mandatory dedication of land or fees in lieu of land for school or recreation purposes. The *Jordan* court rejected the stringent standard adopted by Illinois courts that exactions are only valid if the local government can prove that the exaction is "specifically and uniquely attributable" to a proposed development. The court reasoned that "[i]n 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 [a] particular subdivision."[26] In the court's view, the fact that others outside a subdivision might use the required roads or sidewalks did not invalidate the exaction. This case laid the legal foundation for later cases upholding similar exactions under the pragmatic "rational nexus" constitutional standard.

### D. Florida Water and Sewer Connection Fees

The next most common form of exaction after mandatory dedication requirements are user fees and connection fees. In Florida, the 1976 landmark case of *Contractors and Builders Ass'n of Pinellas County v. City of Dunedin*,[27] upholding water and sewer connection fees, formed the current basis for the widespread application of impact fees for all types of public facilities and services. The Florida Supreme Court rejected the argument that the connection charges were an illegal tax on

23. Goffinet v. County of Christian, 65 Ill. 2d 40, 357 N.E.2d 442 (1976) (condition to rezoning approval).

24. Village of Orland Park v. First Federal Savings & Loan Ass'n of Chicago, 135 Ill. App. 3d 520, 481 N.E.2d 946 (1985) (pursuant to a preannexation agreement).

25. 28 Wis. 2d 608, 137 N.W.2d 442 (1966).

26. *Id.* at 6, 137 N.W.2d at 447.

27. 329 So. 2d 314 (Fla. 1976), *cert. denied*, 444 U.S. 876 (1979).

newcomers. As in most states, the issue was whether or not local governments had the power to condition development approval on the payment of fees for the necessary expansion of the public capital facilities. After the *Dunedin* court resolved this issue, the issue of how fees should be calculated without risking invalidation on constitutional grounds became popular in state courts. By 1983, the Florida courts had established fairly definite standards to determine which fees would meet the "rational nexus" test for constitutionally valid development fees in the cases of *Hollywood, Inc. v. Broward County*[28] and *Home Builders and Contractors Ass'n of Palm Beach County, Inc. v. Board of County Comm'rs of Palm Beach County.*[29] These cases have largely dictated the form and substance of "second generation" impact fee ordinances in Florida and in other states.

### B. *Impact Fees Properly Defined*

Local governments are empowered, in varying degrees, to regulate land use and to provide adequate public facilities to serve new growth. To meet the substantial cost of providing new roads, schools and other public facilities to serve new growth, local governments have required developers to contribute public facilities or pay a proportionate cost of those facilities to offset the impact of proposed developments on capital facilities. "Exactions" or "developer exactions" are nothing more than conditions to development approval. Exactions may take the form of: (1) mandatory dedications of land for roads, schools or parks, as a condition to plat approval, (2) fees-in-lieu of mandatory dedication, (3) water or sewer connection fees and (4) impact fees.

Nevertheless, a great deal of confusion still exists about how impact fees differ from other types of exactions and what limitations apply to their use. For example, the Northeastern Illinois Planning Commission (NIPC) recently conducted a survey on the use and types of impact fees by 109 local governments in northeastern Illinois.[30] Using a definition of "impact fees" provided in the survey instructions,[31] the

28. 431 So. 2d 606 (Fla. Dist. Ct. App. 1983) (upholding local regulations requiring land dedication or fees in lieu for expansion of county-wide park system).

29. 446 So. 2d 140 (Fla. Dist. Ct. App. 1983) (upholding Palm Beach County's "Fair Share Contribution for Road Improvements" Ordinance).

30. NORTHEASTERN ILLINOIS PLANNING COMMISSION, TO FEE OR NOT TO FEE?, REGIONWIDE DEVELOPMENT FEE SURVEY: INITIAL FINDINGS REPORT (July 24, 1989).

31. Respondents were given the following general definition of impact fees: "Impact

survey asked respondents whether their local government is currently using an impact fee system.

The survey results indicate misperceptions about the meaning of the term "impact fee." Forty-two percent of the local governments who reported using impact fees were not actually administering impact fees, as the term was defined in the survey. Conversely, twenty percent of the governments who said that they did not utilize impact fees were actually doing so, according to the survey definition.[32]

Before the legal requirements applicable to impact fees, as distinguished from other types of development fees, can be meaningfully discussed, a uniform, consistent definition must be established.

An "IMPACT FEE" is a type of exaction which is:

* in the form of a predetermined money payment;
* assessed as a condition to the issuance of a building permit, an occupancy permit or plat approval;
* pursuant to local government powers to regulate new growth and development and provide for adequate public facilities and services;
* levied to fund large-scale, off-site public facilities and services necessary to serve new development;
* in an amount which is proportionate to the need for the public facilities generated by new development.

Simply put, impact fees are designed to require that each development pays its proportionate share of the cost of providing the off-site public services and facilities required by new development.[33] The key definitional elements described above distinguish impact fees in one or more respects from taxes, special assessments and other types of exactions, such as fees-in-lieu of mandatory dedication, connection fees and user fees.

### 1. Impact Fees Distinguished from Taxes

A common legal attack against impact fees is that they constitute taxes imposed in violation of the constitutional requirement that taxes

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fees are charges levied on new development in order to generate revenue for funding capital improvement necessitated by such new development." *Id.*

32. Uncertainty regarding the legality of impact fees was also apparent from the survey results. Only 18 percent of the respondents believed that Illinois' existing enabling legislation was adequate. *Id.*

33. *See* Hollywood, Inc. v. Broward County, 431 So. 2d 606 (Fla. Dist. Ct. App. 1983).

on real property be levied uniformly.[34] However, if properly defined, impact fees are distinguishable from taxes. Each is authorized under different delegated powers of local government and is subject to different constitutional requirements.

In general, a local government's authority to impose regulatory fees is derived from the state's police power to regulate businesses or activities for the public's health, safety or general welfare, while the more restricted taxing power is exercised only to raise general revenue.[35] An Illinois example illustrates this legal proposition.

In 1961, the Illinois Supreme Court addressed the issue of whether sewer service connection charges constituted illegal taxes in violation of the uniformity of taxation requirements of the Illinois Constitution.[36] *People ex rel County of Du Page v. Smith*[37] involved a challenge to a statute enacted to alleviate the stresses new development and rapid population growth placed on suburban sewer facilities. The statute authorized the five "collar" counties surrounding Cook County to impose charges for connections made to their sewer systems. In rejecting the claim that these charges violated the constitutional requirement that taxes be uniform, the court explained that:

> there is a clear cut and definite distinction between the legal conception of such charges and taxes. Taxes are an enforced proportional contribution levied by the State by virtue of its sovereignty for support of the government. Service charges, tolls, water rates and the like are, on the other hand, contractual in nature, either express or implied, and are compensation for the use of another's property, or of an improvement made by another, and their amount is determined by the cost of the property or improvement and the consideration of the return which such an expenditure should yield.[38]

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34. For example, uniformity of taxation is required under the Illinois and Florida state constitutions. *See* ILL. CONST. art. IX, § 4(a) and FLA. CONST. art. VII, § 2.

35. *See* Bauman & Ethier, *Development Exactions and Impact Fees: A Survey of American Practices*, 50 LAW & CONTEMP. PROBS. 51, 54 (1987).

36. The Illinois Constitution requires that:

> Except as otherwise provided in this Section, taxes upon real property shall be levied uniformly by valuation ascertained as the General Assembly shall provide by law.

ILL. CONST. art. IV, § 4(8).

37. 21 Ill. 2d 572, 173 N.E.2d 485 (1961).

38. *Id.* at 578, 173 N.E.2d 491-92 (citations omitted).

In a more recent case, the Illinois Supreme Court restated the differences between "fees" and "taxes":

> A fee is defined as "a charge fixed by law for services of public officers," and is regarded as compensation for the services rendered. . . . On the other hand, a charge having no relation to the services rendered, assessed to provide general revenue rather than compensation, is a tax.[39]

In other cases, the Illinois Supreme Court also established that the authority for development exactions is the police power, and not local governments' powers of taxation or eminent domain.[40]

Other jurisdictions have also sustained impact fees and other types of fees imposed as a condition of development approval as valid police power regulations.[41] Thus, if impact fee legislation ties the fee imposed to the benefit received, the constitutional requirements relevant to the levy and assessment of real property taxes will be found inapplicable.

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39. Crocker v. Finley, 99 Ill. 2d 444, 452, 459 N.E.2d 1346, 1349-50 (1984) (citations omitted) (finding filing fee imposed on petitioners for dissolution of marriage for use in general welfare program was an illegal tax). *See also* Emerson College v. City of Boston, 391 Mass. 415, 462 N.E.2d 1098 (1984) (discussing the distinguishing traits of fees as opposed to taxes).

40. *See* Petterson v. City of Naperville, 9 Ill. 2d 233, 137 N.E.2d 371 (1956) (upholding a subdivision ordinance requirement that developers install curb and gutter improvements as a condition to plat approval). *See also* Krughoff v. City of Naperville, 68 Ill. 2d 352, 369 N.E.2d 892 (1977) (upholding mandatory dedication of land, or fees in lieu of land, for school and park purposes as a condition of plat approval).

41. *See* Russ Bldg. Partnership v. City and County of San Francisco, 750 P.2d 324, 244 Cal. Rptr. 682 (1988) (upholding San Francisco Transit Impact Development Fee Ordinance); Home Builders and Contractors Ass'n of Palm Beach County, Inc. v. Board of County Comm'rs of Palm Beach County, 446 So. 2d 140 (Fla. Dist. Ct. App. 1983) (upholding road impact fee); Contractors & Builders Ass'n v. City of Dunnedin, 329 So. 2d 314, 317-20 (Fla. 1976), *cert. denied*, 444 U.S. 867 (1979) (impact fee a regulation, if proper limitations placed on amounts collected); Call v. City of West Jordan, 606 P.2d 217 (Utah 1979) (in-lieu-fee for flood control, park and recreational purposes upheld); Jordan v. Menomonee Falls, 137 N.W.2d 442 (Wis. 1965) (in-lieu-fees for school, park, and recreational purposes upheld as reasonable police power regulation); Jenad, Inc. v. Village of Scarsdale, 18 N.Y.2d 78, 218 N.E.2d 673, 271 N.Y.S.2d 955 (1966) (in-lieu-fee for recreational purposes held valid under the police power); Billings Properties, Inc. v. Yellowstone County, 394 P.2d 182 (Mont. 1964) (fee in lieu of dedication is a regulation which is valid under the police power); *see also* Nollan v. California Coastal Commission, 483 U.S. 825 (1987) (indicating that an exaction placed on development as a condition of approval is constitutional where the exaction substantially advances a legitimate public interest). *But see* Eastern Diversified Properties, Inc. v. Montgomery County, Maryland, 570 A.2d 850 (Md. 1990) (invalidating road impact fee as an improper tax for general revenue purposes).

### 2. Impact Fees Distinguished from Special Assessments

Impact fees are also sometimes confused with special assessments or special benefit taxes. The primary difference is that special assessments represent a measure of the benefit of public improvements on new or existing development, whereas impact fees typically measure the cost of the demand or need for public facilities as a result of new development only.[42]

### 3. Impact Fees Distinguished from Fees in Lieu of Land Dedication

Local governments may impose fees in lieu of dedication as a condition of development approval where land may not be sufficient to meet the local governments' need for off-site facilities. The fee-in-lieu allows local governments to pool fees from various subdivisions to finance necessary facilities such as off-site schools and parks in the event that the dedication of on-site land or facilities is impractical because of the limitations of the site.[43] It is important to note that fees received in lieu of dedication may only fund these facilities for which on-site dedication may be required under local subdivision authority.[44] Thus, the types of facilites which can be funded in this manner are more limited than those funded through impact fees.

The method of assessment of impact fees also makes impact fees dis-

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42. *Compare* Montgomery County v. Schultze, 302 Md. 481, 489 A.2d 16 (1985) (invalidating special assessment that failed to reflect a reasonable relationship between the actual benefit to the assessed property and the amount of the assessment) *with* Pioneer Trust and Savings Bank v. Village of Mount Prospect, 22 Ill. 2d 375, 176 N.E.2d 799 (1961) (establishing requirement that subdivision exactions be "specifically and uniquely attributable" to the development activity in question). *See also* Smith, *From Subdivision Improvement Requirements to Community Benefit Assessments and Linkage Payments: A Brief History of Land Development Exactions*, 50 LAW & CONTEMP. PROBS. 5, 19-24 (1987) (regarding the reintroduction of special assessments as an alternative to impact fees in some states).

43. *See, e.g.*, Trent Meredith, Inc. v. City of Oxnard, 114 Cal. App. 3d 317, 170 Cal. Rptr. 685 (1981) (upholding mandatory dedication of land or fees in lieu to local school district as precondition to issuance of building permit); Krughoff v. City of Naperville, 68 Ill. 2d 352, 369 N.E.2d 892 (1977) (upholding requirement of dedication of land or fees in lieu of land, for school and park purposes); Jenad, Inc. v. Village of Scarsdale, 18 N.Y.2d 78, 218 N.E.2d 673, 271 N.Y.S.2d 955 (1966) (upholding fees in lieu of dedication of parkland); Jordan v. Village of Menomonee Falls, 28 Wis. 2d 608, 137 N.W.2d 442 (1966) (upholding fees in lieu of dedication of land for schools or parks).

44. *See* Conners & High, *The Expanding Circle of Exactions: From Dedication to Linkage*, 50 LAW & CONTEMP. PROBS. 69, 71-72 (1987).

tinguishable from fees in lieu of dedication. Whereas the amount of land or in-lieu fees exacted as a condition to subdivision approval usually depends on the total acreage and projected "build out" of an entire subdivision or phase of a subdivision, impact fees are commonly imposed on a "per unit" basis, depending on the number of bedrooms or square footage of a unit. In this regard, impact fees are more flexible than mandatory "on-site" dedications of roads or park land because they do not require developers to pay "up-front" large costs for an entire subdivision or planned development. Instead, they only charge the developer for the proportionate impacts of new development on public services and facilities in terms of units actually constructed.

4. Impact Fees Distinguished from Connection Fees

Connection fees, "tap-in" fees or "user" fees have become an important source of funding in some states for the expansion of water and sewer facilities.[45] Although theoretically akin to water and sewer connection fees, impact fees are distinguishable in the scope of public improvements which they fund and in the statutory basis for their assessment. Many state statutes expressly authorize connection fees.[46] Further, impact fees, however, are not limited to water and sewer facilities. Subject to the limitations of a particular jurisdiction, impact fees generally may be used to provide any public facilities which can reasonably be construed to fall within state enabling legislation and home rule powers.

### C. *First and Second Generation Impact Fees*

The first generation of true impact fees, mostly those adopted in the 1970s, were simpler than current impact fees. Most were adopted without enabling legislation, guidelines or standards. Fees were imposed in a climate of hot real estate markets, development booms and an immediate need for public facilities to serve new development. In short, there was no time to argue the fairness of impact fees in court.

Now that real estate markets have cooled in many parts of the coun-

45. *See, e.g.*, Contractors and Builders Ass'n of v. City of Dunnedin, 329 So. 2d 314 (Fla. 1976) (upholding fees for connection to water and sewer system); People Ex rel County of Du Page v. Smith, 21 Ill. 2d 572, 173 N.E. 2d 485 (1961) (upholding sewer connection fees).

46. *See* CAL. GOV'T CODE § 66483 (West 1981); FLA. STAT. ANN., § 180.13(2) (1987); ILL. ANN. STAT. ch. 42, § 306 (Smith-Hurd 1960 & Supp. 1989) ILL. ANN. STAT. ch. 24., § 11-150-1; OHIO CONST. art. XVIII, § 4.

try and courts and legislatures have had a decade of debate over the appropriateness of broad, discretionary impact fee ordinances, the second generation of impact fee ordinances has emerged. These ordinances are enacted under enabling statutes or are designed to reflect the principles of well-established case law. Fee amounts are calculated using more complex formulas and computer models, and often are administered by engineers rather than planners. Second generation impact fee statutes and ordinances also contain more specific substantive and procedural standards and attempt to address questions of reasonableness and equity.

### D. *Authority to Impose Impact Fees*

One of the most important criteria in determining whether or not impact fees are legally feasible in a given locale is whether or not there is any existing authority to impose them. The adoption of enabling legislation, if necessary, can require months and often years of lobbying and consensus building. Part II, which follows, explains the various sources of authority under which impact fees may be adopted, and documents the national trend toward adoption of state impact fee enabling legislation.

## II. "SECOND GENERATION" IMPACT FEES

### A. *Elements of Second Generation Impact Fees*

Early impact fees were often confused with taxes, special assessments, connection fees and other types of fees. This was understandable, given that there was neither state enabling legislation nor any concrete case law to distinguish them from other capital facilities financing tools. At first, impact fees were viewed as unauthorized, illegal extortion. The idea of raising funds for capital facilities financing through "land use regulations" rather than bond referenda was revolutionary. Developers naturally revolted, compelling courts and legislatures to define the elements and standards of what is increasingly referred to as "second generation" impact fees.

The drafters of "second generation" impact fee legislation have attempted to learn from their predecessors' mistakes. In general, second generation impact fees are distinguishable from first generation impact fees by the following elements:

1. Statutory Basis

Impact fee legislation has become more widespread, indicating the efforts of many jurisdictions to ensure that there is clear legal authority for impact fees and indicating the increased political acceptance of impact fees as a means to address capital facility requirements.

2. Methodology

Data and staffing requirements for second generation impact fees are significant. Unlike early fees-in-lieu of dedication requirements, based simply on a fixed cash payment per acre,[47] and first generation impact fees, second generation impact fees use complex formulas and computer models, incorporating population and employment projections, trip generation data and capital facilities cost estimates.[48]

3. Procedures

Second generation impact fees are usually subject to detailed and rigorous notice and hearing requirements, not only for the ordinance itself but also for the capital improvements plans and land use assumptions which justify the impact fee ordinance.[49] Especially in states with newly-adopted impact fee legislation, these heightened procedural requirements reflect a legislative intent to provide uniform, statewide standards and procedures for impact fees and limit the potential for local abuse of discretion.

4. Scope of Facilities Funded

Though most impact fee ordinances are still designed to fund one or more of the traditional types of capital improvements (e.g., roads, parks, schools), modern impact fees may fund a broader array of capi-

47. *See, e.g.*, Jordan v. Village of Menomonee Falls, 28 Wis. 2d 608, 137 N.W.2d 442 (1965), *appeal dismissed*, 385 U.S. 4 (1966) (upholding ordinance requiring dedication of land for public school, park and recreation sites or pay a fee of $200 per residential lot created by the proposed subdivision).

48. *See generally*, NICHOLAS, THE CALCULATION OF PROPORTIONATE-SHARE IMPACT FEES, PLANNING ADVISORY SERVICE REPORT NO. 408 (1988).

49. *See* TEXAS GOV'T CODE ANN. § 395.041-.055 (Vernon Supp. 1990) (requiring separate notice and public hearings to consider the ordinance adopting the "land use assumptions within the designated service area that will be used to develop the capital improvements plan," and the ordinance adopting a capital improvements plan and imposing an impact fee).

tal improvements, such as government buildings, libraries and public services like police, fire and emergency medical services.

5. Exemptions

Early impact fees usually applied to all new development, or a broad category of new development, such as new residential or office/commercial development. For equitable reasons, some second generation impact fees exempt a narrow class of land uses, such as affordable housing or non-profit organizations, in order to avoid the harsh impact of development fees on less-profitable, socially beneficial land uses.

### B. *New Impact Fee Legislation*

Local governments in various states have asserted the right to assess impact fees under two major sources of authority: express enabling legislation and broad home rule authority to regulate new growth and development.

One of the major forces shaping modern impact fee ordinances is new state legislation. To date, several of states have enacted impact fee legislation,[50] and within these states, the legislation is usually limited in its application to certain specified jurisdictions[51] or specific types of public improvements.[52] However, proposed impact fee legislation has

50. *See, e.g.*, ARIZ. REV. STAT. ANN. § 9-463.05 (1990) (development fees for "necessary public services"); CAL. GOV'T CODE § 66477 (West 1983) (park and recreational fees), § 65970 (school facilities fees), § 66483 (drainage and sewer facilities), § 66484 (roads and bridges) and § 66484.5 (groundwater recharge fees); FLA. STAT. ANN. § 163.3202(3) (encouraging the use of "innovative land development regulations" impact fees); GA. CODE ANN. §§ 36-71-1 to -13 (1987 & Supp. 1990) (development impact fees for 7 categories of public facilities); Ill. Act of July 26, 1989, P.A. 86-97, §§ 5-901 to 5-918, 1990 Ill. Legis, Serv. 968-77 (West) (to be codified at ILL. ANN. STAT. ch. 121, § 5-901 to 5-918) (road improvement impact fees); ME. REV. STAT. ANN. tit. 30-A, § 4354 (1989); TEXAS REV. CIV. STAT. ANN. art. 1269 (Vernon 1988 & Supp. 1990) (comprehensive capital improvements impact fee statute); VT. STAT. ANN. tit. 24, §§ 5200-5206 (1975 & Supp. 1989) ("capital projects" impact fees); VA. CODE ANN. §§ 15.1-498.1 to -498.10 (1989) (road impact fees).

51. *See, e.g.*, Illinois Road Improvement Fee Law, *infra* notes 58-79 (applicable only to counties with a population exceeding 400,000 and home rule municipalities); VA. CODE ANN., § 15.1-498.1 to .10 (1989) (fee applicable only to counties having a population of 500,000 or more, and adjacent counties and municipalities).

52. *See, e.g.*, Act of July 26, 1989, P.A. 86-97, § 5-901 to 5-918, 1990 Ill. Legis. Serv. 968-77 (West) (to be codified at ILL. ANN. STAT. ch. 121, para. 5-901 to 5-918) (applicable only to "road improvements").

been or is under consideration in a number of states[53] and has the potential of becoming law within the next two or three years.

The limited scope of most statutes leaves those subdivisions of local government not covered by the new impact fee legislation wondering whether they are precluded from adopting impact fees or have some other authority on which to rely. The last section of this part of the Article describes potential non-legislative sources of authority for these local governments to adopt impact fees.

### 1. *Arizona Development Fees*

Arizona has the oldest impact fee legislation in the country. Adopted in 1982, the legislation authorizes any municipality to assess "development fees" to "offset costs to the municipality associated with providing necessary public services to a development."[54] The legislation imposes only a few, general limitations, namely:

1. Development fees must result in a beneficial use to the development;
2. Collected fees must be placed in a separate fund and may only be used for the purposes stated in the legislation (there are none stated besides the general purpose of offsetting costs to the municipality);
3. Fee schedules must be provided by the municipality; residential developers are required to pay when construction permits are issued;
4. The amount of the fee must bear a "reasonable relationship" to the burden imposed upon the municipality to provide additional necessary public services to the development;
5. Fees must be assessed in a non-discriminatory manner;
6. Fees must take into account all public infrastructure provided by a community facilities district, established under separate legislation; and
7. Notice and a public hearing must be conducted prior to the scheduled date of adoption of the new or increased impact fee.[55]

No definition of "public services" or any other term is provided. This legislation, like the first Illinois Transportation Impact Fee legis-

53. Arizona HB 2648 (impact fee bill, defeated in 1989 legislative session); Delaware HB 475, 135th Gen. Ass., 1989 (transportation impact fee bill expected to be introduced in January 1990).

54. ARIZ. REV. STAT. ANN. § 9-463.05 (1982).

55. *Id.*, § 9-463.05(C).

lation,[56] confers broad discretion to local officials to determine the amount of fees, what types of facilities are funded and who should pay the fees.

2. California Development Fees

Rather than adopting a single, comprehensive impact fee statute, California has adopted separate development fee statutes over the past decade for a variety of public facilities, including park and recreation facilities fees, school facilities fees, drainage and sewer facilities fees, and groundwater recharge fees.[57]

The widespread use of this variety of development fees in California has no doubt been attributable to limitations on other, more traditional sources of capital facilities financing by Proposition 13 and other taxpayer initiatives.

3. Illinois Road Improvement Impact Fees

Illinois provides a classic case study in the evolution of impact fees. In the 1960s, Illinois was a state with no home rule delegation of powers to local governments, no state impact fee legislation and a cautious judiciary. After a 1970 constitutional amendment, home rule units of local government began imposing developer exactions for broad ranges of public facilities. Not until 1987 did the Illinois General Assembly adopt Transportation Impact Fee legislation.

After the 1987 impact fee legislation was adopted, fiscal life was made easier for only a few local governments, which were given broad discretion to design and adopt transportation impact fees under the legislation. Following the Texas example, the Illinois legislature adopted new legislation in 1989 that was much longer and more detailed than the predecessor. Though the new legislation attempts to prescribe a formula for constitutionally valid impact fees, it raises two new questions: 1) whether interpretation and implementation of an extensive, more complex statute is worth the trouble for those that are empowered to act under its authority; and 2) whether local governments that are not covered under the new legislation are preempted

56. Formerly ILL. ANN. STAT. ch. 121, para. 608 (1980 & Supp. 1989) (repealed effective July 27, 1989, by ILL. ANN. STAT. ch. 121, para. 5-901 to 5-918).

57. CAL. GOV'T CODE § 66477 (West 1983) (park and recreational fees), § 65970 (school facilities fees), § 66483 (drainage and sewer facilities), § 66484 (roads and bridges), § 66484.5 (groundwater recharge fees).

from adopting impact fees under other sources of authority for other types of public improvements.

What follows is a detailed case study of the history and evolution of the Illinois road impact fee legislation, illustrating how states are beginning to make the transition from "first generation" to "second generation" impact fees. The Illinois experience also illustrates the convergence of disparate state court tests for determining the constitutional validity of impact fees. While first generation impact fees were commonly judged by one of three different standards (the "rational basis" test, the "rational nexus" test, or the "specifically and uniquely attributable" test), the "rational nexus" test is emerging as the most frequently used test for judging the constitutional validity of more complex "second generation" impact fees.

### A. HISTORY OF THE ILLINOIS ROAD IMPACT FEE LAW

The Illinois legislature originally approved transportation impact fee legislation in 1987,[58] largely in response to new development and increasing traffic congestion in the collar counties surrounding Chicago. As originally enacted, the legislation was applicable only to larger counties with a population of over 400,000 but less than 1,000,000.[59] The legislation authorized these counties to establish transportation impact districts and collect transportation impact fees from new developments that would require direct or indirect access to the state or county highway system. The county was empowered to establish the fee amounts, by ordinance, based on the amount of estimated traffic generated by various land uses and the amount of improvements needed to maintain a reasonable level of service on the existing and proposed highway systems. The legislation also established other restrictions regarding the timing and use of fees.

Toward the end of the 1989 legislative session, the Illinois General Assembly repealed the 1987 transportation impact fee legislation, largely in response to the concerns of both developers and local gov-

58. House Bill 1672, Public Act 85-464, added to the Illinois Highway Code a new paragraph authorizing the creation of transportation impact districts. ILL. ANN. STAT. ch. 121, para. 5-608 (Smith-Hurd 1960 & Supp. 1989). For a history and background on this legislation, see Larsen & Zimet, *Impact Fees: Et Tu, Illinois?*, 21 J. MARSHALL L. REV. 489 (1988).

59. These population parameters effectively limited the applicability of the legislation to the two most populous counties bordering on Cook County and the City of Chicago: Du Page County and Lake County.

ernments that the legislation gave unfettered discretion to a select few local governments. The resulting new road improvement impact fee legislation contains more explicit standards and procedures.[60]

As with the original Illinois Transportation Impact Fee legislation, the "second generation" legislation authorizes road improvement impact fees only. However, it expands the 1987 legislation by expressly recognizing home rule authority to adopt impact fees, subject, of course, to constitutional limits.[61] The 1987 legislation applied only to counties with a population between 400,000 and 1,000,0000 while the 1989 legislation eliminated the 1,000,000 population cap, thereby confirming the authority of Cook County, the only home rule county to adopt road impact fees. Because General Assembly members determined that home rule municipalities were authorized to adopt road impact fees pursuant to their home rule powers even though not expressly authorized under the original legislation, the legislators added these units of local government to the list of governmental units expressly authorized to adopt road improvement impact fee ordinances.[62]

In addition, the 1989 legislation expanded state control over local governments in the area of impact fees by adding minimum standards with which local impact fee ordinances and resolutions must comply. The legislation prohibits the levy of road impact fees by a unit of local government[63] if another unit is already assessing fees for the same

60. Du Page County, the only county to adopt a transportation fee ordinance pursuant to the 1987 legislation, is now defending lawsuits filed by the Northern Illinois Home Builders Association and the Home Builders Association of Chicago, challenging the validity of the impact fee enabling legislation and the county's ordinance.

61. The transcript of the House of Representatives debate on June 30th, 1989, immediately preceding the vote to adopt the new legislation included the following exchange between Representative Stern and Representative Keane:

*Rep. Stern*: "Does the [Road Improvement Impact Fee] Act expand the authorization or scope of the original impact fee statute?"

*Rep Keane*: "No, the intention was to limit the authorization for the imposition of impact fees to roadway impact fees and to jurisdictions that had the authority to impose impact fees under the original impact fee statute."

State of Illinois, 86th General Assembly, House of Representatives Debate Transcription, June 20, 1989.

62. *See supra* note 61. It was noted later in the House debate that the City of Naperville, a home rule municipality that had enacted a transportation impact fee ordinance under its home rule powers, would have continued authority under the new legislation to assess these fees, provided that the fees were brought into compliance with the new legislation within 12 months from the effective date of the new legislation [July 26, 1989].

63. Section 5-903 of the new legislation defines "units of local government" as

roads.[64] Beyond the scope of the new legislation, other sources of authority provide a less defined and therefore uncertain legal basis for the adoption of impact fees for other types of impact fees. (See Part II.C., Other Sources of Authority, below).

### B. DEFINITIONS

"First generation" impact fee legislation and ordinances rarely provided definitions. The 1987 Illinois legislation did not define the types of "improvements" for which transportation impact fees could be collected. By contrast, the 1989 legislation specifically defines "road improvements" as the construction or expansion of local roads, streets, highways, bridges, rights-of-way and traffic control improvements (as well as state-owned ramps, tollway ramps, streets or highways, subject to intergovernmental agreement). The definition does not include the "soft costs" to plan and design the improvements, although these costs are authorized as a proper use of impact fees under a different section of the legislation.[65] The new legislation defines a "new development" as

> any residential, commercial, industrial or other project which is being newly constructed, reconstructed, redeveloped, structurally altered, relocated, or enlarged, and which generates additional traffic within the service area or areas of the unit of local government.[66]

The new legislation also attempts to clarify some of the existing ambiguities associated with the constitutional requirement developed by the Illinois courts that various types of developer exactions be "specifically and uniquely attributable" to the "proportionate share" of the need for new public facilities created by a proposed development. Unfortunately, the definitions of these same terms in the legislation create more questions than they answer. The definitions of the terms "specifically and uniquely attributable" and "proportionate share" are as follows:

> "Specifically and uniquely attributable" means that a new development creates the need, or an identifiable portion of the need, for additional capacity to be provided by a road improvement. Each

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"counties with a population over 400,000 and all home rule municipalities." ILL. ANN. STAT. ch. 121, para. 5-903.

64. ILL. ANN. STAT. ch. 121, para. 5-911.

65. ILL. ANN. STAT. ch. 121, para. 5-904.

66. ILL. ANN. STAT. ch. 121, para. 5-903.

> new development paying impact fees used to fund a road improvement must receive a direct and material benefit from the road improvement constructed with the impact fees paid. The need for road improvements funded by impact fees shall be based upon generally accepted traffic engineering practices as assignable to the new development paying the fees.
>
> "Proportionate share" means the cost of road improvements that are specifically and uniquely attributable to a new development after consideration of the following factors: the amount of additional traffic generated by the new development, any appropriate credit or offset for contribution of money, dedication of land, construction of road improvements or traffic reduction techniques, payments reasonably anticipated to be made by or as a result of a new development in the form of user fees, debt service payments, or taxes which are dedicated for road improvements and all other available sources of funding road improvements.[67]

The definition of "specifically and uniquely attributable" attempts to clarify an issue yet to be addressed by the Illinois courts—namely, whether impact fees may be validly imposed for public road improvements when more than one new development is responsible for creating the need for those improvements. The new legislation answers this issue affirmatively, providing for fees attributable to "an identifiable portion of the need" for road improvements. This language effectively refutes any argument that road impact fees adopted pursuant to the state legislation may only be valid when a new development is the "sole cause" of the need for such public improvements.[68] The need for capital facilities may be caused by more than one new development, each of which would be required to contribute its proportionate share of the total cost of the road improvements necessitated by the development.

The definition of "specifically and uniquely attributable" includes the requirement that "[e]ach new development paying impact fees used to fund a road improvement must receive a direct and material benefit from the road improvement constructed with the impact fees paid."

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67. *Id.*

68. The issue which some state courts and legal commentators have raised is whether impact fees or other types of development exactions may only be validly imposed when a particular development is the "sole cause" of the need for the new public facilities, or whether fees may be assessed against multiple developments contributing cumulatively to the need for new facilities, provided that the amount of the fee is within constitutional bounds of reasonableness. *See* Jordan v. Menomonee Falls, 28 Wis. 2d 608, 137 N.W.2d 442 (1966); *infra* note 188-95 and accompanying text.

Although the definition does not explain what types of impact fees would confer some "direct and material benefit" to the new development paying the fee, the possibility of fees for "off-site" improvements is supported by the definition of "road improvements" for which fees may be expended. "Road improvements" are not limited to improvements on the site of a new development subject to the fee, but rather may include improvements to any roads, streets or highways under the jurisdiction of the local government.

The definition of "proportionate share" requires adjustments to the formula which local governments typically use as the basis for their fee schedules. These adjustments no doubt were intended to avoid the "double taxation" trap. These definitions are repeated, in somewhat different form, in a later section of the legislation relating to impact fee ordinance requirements.[69]

The legislation identifies eight specific factors which must be considered by the local government unit in determining the proportionate share of the cost of road improvements to be paid by the developer. These are:

(1) the cost of existing roads within the service area,
(2) the financing sources used to cure existing road deficiencies,
(3) the extent to which the new development required to pay the fee has contributed, in prior years, to the cost of road improvements through taxation, assessments, or developer contributions,
(4) the extent to which the new development will be required to contribute to the cost of road improvements in the future,
(5) the extent to which new development should be credited for providing road improvements to other properties within the service area,
(6) extraordinary costs incurred in servicing a particular development,
(7) consideration of the time and price differential inherent in a fair comparison of fees paid at different times, and
(8) the availability of other sources of funding road improvements, including, but not limited to, user charges, general tax levies, intergovernmental transfers and special taxation or assessments.

The obvious intent of the legislature in requiring consideration of these factors is to guard against arbitrary or unreasonable impact fees. However, the meaning and relevance of some of the factors to the con-

69. ILL. ANN. STAT. ch. 121, para. 5-906.

stitutional "proportionate share" test for valid impact fees is unclear. For example, what are "existing road deficiencies" mentioned in factor number two? What is the relevance of "the extent to which the new development required to pay the fee has contributed, *in prior years*, to the cost of road improvements through taxation, assessments or developer contributions"? To what extent must these factors be considered, and what findings would justify the levy of impact fees? Rather than taming the beast called "unfettered local discretion," the legislature may have created, in the new road impact fee legislation, the same beast but with different spots.

### C. STANDARDS

Unlike the original transportation impact fee legislation, the new road improvement impact fee legislation contains extensive substantive and procedural standards. Substantively, the new legislation authorizes a unit of local government to impose impact fees for new development within designated "service areas"[70] only in accordance with certain specified requirements,[71] including:

> 1. An impact fee payable by a developer shall not exceed a *proportionate share of costs* incurred by a unit of local government which are *specifically and uniquely attributable* to the new development paying the fee in providing road improvements, but . . .
> 2. [The fee] may be used to cover costs associated with the surveying of the service area, with the acquisition of land and rights-of-way, with engineering and planning costs, and with all other costs which are directly related to the improvement, expansion, enlargement or construction of roads, streets or highways within the service area or areas as designated in the comprehensive road improvement plan.
> 3. An impact fee shall not be imposed to cover costs associated with the repair, reconstruction, operation or maintenance of existing roads, streets or highways, nor shall an impact fee be used to cure existing deficiencies or to upgrade, update, expand or replace existing roads in order to meet stricter safety or environmental requirements; provided, however, that . . .
> 4. Such fees may be used in conjunction with other funds available to the unit of local government for the purpose of curing existing deficiencies, but . . .
> 5. In no event shall the amount of impact fees expended exceed

70. Compare "transportation impact districts" in the existing legislation.

71. ILL. ANN. STAT. ch. 121, para 5-904 (emphasis added).

> the development's proportionate share of the cost of such road improvements. And,
> 6. [n]othing in this Section shall preclude a unit of local government from providing credits to the developer for services, conveyances, improvements or cash if provided by agreement.

Each of these requirements relates to, and incorporates, constitutional "reasonableness" requirements for valid impact fees as these requirements have been developed by courts in Illinois and other states. The reference to fees that represent a "proportionate share of costs" and that are "specifically and uniquely attributable" to the new development paying the fee are direct reflections of the constitutional test developed by the Illinois Supreme Court for valid subdivision exactions.

The use of impact fees is also limited under the new legislation to road improvements within the service area or areas as specified in the comprehensive road improvement plan, which must be updated at least every five years.[72]

Procedurally, the 1989 legislation illustrates the trend in state distrust of local government discretion in the adoption of impact fees.[73] The 1987 legislation gave qualified counties broad discretion "to establish transportation districts," "collect transportation impact fees" and "adopt reasonable rules and regulations to administer and enforce" the impact fee legislation. The 1989 legislation requires units of local government to give notice and conduct a public hearing, prior to the adoption of an impact fee ordinance or resolution, "to consider land use assumptions[74] that will be used to develop the comprehensive road improvement plan."[75] Potentially the most significant of the new proce-

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72. ILL. ANN. STAT. ch. 121, para. 5-914 and 5-915.

73. *Cf.* Texas impact fee legislation, *infra* note 81, containing similar extensive procedural requirements.

74. The definitions section, ILL. ANN. STAT. ch. 121, para. 9-903, defines "land use assumptions" as follows:

> "LAND USE ASSUMPTIONS" means a description of the service area or areas and the roads, streets or highways incorporated therein, including projections relating to changes in land uses, densities and population growth rates which affect the level of traffic within the service area or areas over a 10 year period of time. "SERVICE AREA" means one or more land areas within the boundaries of the unit of local government which has been designated by the unit of local government in the comprehensive road improvement plan.

*Id.*

75. *See* ILL. ANN. STAT. ch. 121, para. 5-905(b). The required elements of the Comprehensive Road Improvements Plan are set out in para. 5-910.

dural requirements is the directive to create a local Advisory Committee comprised of representatives of the real estate, development, building and labor industries, as well as the local government.[76] The committee is responsible for reviewing the "land use assumptions," which form the basis of an impact fee ordinance, and recommending, within thirty days after the public hearing has been held, the adoption, rejection or modification of the assumptions.

Once an ordinance or resolution approving the land use assumption has been approved, the local government unit must prepare a comprehensive road improvement plan[77] and hold another public hearing to consider the proposed plan and the imposition of impact fees related to the plan. After the Advisory Committee reviews the plan and makes a recommendation, the unit of local government may adopt, by ordinance or resolution, the proposed plan and impact fees, subject to the required standards, described above.

Any person aggrieved by payment of an impact fee may appeal to the local legislative body in accordance with the procedures included in the impact fee ordinance or resolution.[78]

### D. GRANDFATHERING OF RECENTLY APPROVED DEVELOPMENT

The 1989 Road Improvement Impact Fee legislation specifically exempts:

> any new development for which site specific development approval has been given by a unit of local government within 18

76. ILL. ANN. STAT. ch. 121, para. 5-907. Note, however, that units of local government have the option of treating the Plan Commission as the Advisory Committee and appointing additional members, for the limited purpose of dealing with impact fees, in order to meet the statutory requirement that at least forty percent of the Committee members be representatives of the real estate, development, building and private labor industries.

77. According to ILL. ANN. STAT. ch. 121, para. 5-910, the comprehensive road improvement plan must be developed by qualified professionals familiar with generally accepted engineering and planning practices. The plan must contain a description of all existing roads with their existing deficiencies and all proposed roads with a schedule for construction. In addition, para. 5-914 provides that fees collected shall only be used for those road improvements specified in the plan in the same manner as motor fuel tax monies. Para. 5-915 requires updates of the plan every 5 years.

78. ILL. ANN. STAT. ch. 121, para. 5-917. This section grants standing to any persons paying fees to appeal almost anything done under an impact fee ordinance in accordance with provisions set out in the ordinance itself. Appeals would initially go to the governing body of the municipality or county, but then to a court in a *de novo* proceeding.

months before the first date of publication by the unit of local government of a notice of public hearing to consider [the background issues related to the adoption of impact fees].[79]

4. Texas Capital Improvements Impact Fees

In June 1987, only a few months before Illinois adopted its original transporation impact fee legislation, the Texas General Assembly approved the nation's first comprehensive impact fee legislation, which has since served as a model for impact fee legislation in at least one other state.[80] Entitled "Impact fees for capital improvements or facility expansions,"[81] the legislation empowers any "political subdivision" of the state to adopt impact fees for capital improvements or facility expansions. "Capital facilities" are defined as water supply facilities, wastewater facilities, stormwater, drainage and flood control facilities, or roadway facilities, with a life expectancy of three or more years, owned and operated by or on behalf of a political subdivision.

The legislation contains detailed definitions, applicability standards, procedures for adoption, notice requirements, limitations on the use of proceeds, refund provisions, capital plan improvement update requirements, requirements that the political subdivision establish an advisory committee composed of, among others, representatives of the real estate development and building industries; and general provisions. In contrast to the broad Arizona development fee legislation, described in Section B.1., above, which authorizes the adoption of impact fees for any public services in only a single page, the Texas legislation authorizes the adoption of impact fees for a defined list of capital improvements in a detailed ten-page statute.

The recently adopted Illinois road impact fee legislation contains many of the same requirements as the Texas legislation, using the exact terminology of the Texas legislation. For example, both require the adoption of "land use assumptions" as a prerequisite to adoption of an impact fee ordinance and both prescribe extensive procedural require-

79. ILL. ANN. STAT. ch. 121, para. 5-903 (definition of "new development"). In addition, the new law requires that these exempt developments obtain a building permit within 18 months after the date that the notice of the public hearing is published.

80. *See* Illinois' Road Improvement Impact Fee legislation, ILL. ANN. STAT. ch. 121, para. 5-901 to 5-918, and proposed comprehensive Georgia development impact fee legislation, original Georgia H.B. 796, introduced at the beginning of the January 1990 legislative session but replaced by a shorter Substitute H.B. 796, enacted *supra* note 50.

81. TEXAS LOCAL GOV'T CODE ANN. § 395.041-.055 (Vernon Supp. 1990) (part of title 28 governing Cities, Towns and Villages).

ments, including the establishment of an "advisory committee" composed of some of representatives of the same industries. The Georgia legislature considered the Texas scheme but opted for a shorter, procedurally simpler impact fee bill.

5. Tennessee Cooperative Public Facilities Financing Act

The Tennessee Cooperative Public Facilities Financing Act,[82] applies only to counties having a metropolitan form of government and having a 1980 population of more than 450,000, effectively limiting its applicability to the Metropolitan Government of Nashville-Davidson County. As with the Illinois legislation, the population parameters are designed to ensure that the impact fee legislation applies only to relatively large local governments that have experienced rapid growth and, presumably, are expected to continue their growth.

The Tennessee legislation falls somewhere between the broad Texas legislation and the relatively narrow Illinois legislation in terms of the scope of facilities that may be funded. Although the Tennessee legislation authorizes "fair share impact fees" for any public facilities that are categorically identified in the comprehensive plan and in the capital improvements budget, it does not go so far as the Texas legislation in specifying that fees may be used to pay the initial costs of acquiring land, conducting a survey and the like.

6. Vermont Impact Fees

In July 1989, the Vermont legislature approved general impact fee legislation authorizing municipalities to assess impact fees as a condition of issuance of a zoning or subdivision permit for "any portion of the costs of an existing or planned capital project that will benefit or is attributable to the users of the development" or "to compensate the municipality for any expenses it incurs as a result of construction."[83] Fees may be levied to recoup the costs of capital outlays for a capital project that will benefit the users of the development. A developer may perform "offsite mitigation" in lieu of an impact fee or as compensation for damage to important land, such as prime agricultural land or an important wildlife habitat.

Though not nearly as lengthy or detailed as the Texas impact fee legislation, the Vermont statute contains a definitions section, specific

82. 1988 Tenn. Pub. Acts 1022.

83. VT. STAT. ANN. tit. 24, §§ 5200-5206.

adoption procedures, standards for determining the amount of a fee and provision for the exemption of "certain types of development."[84]

7. Virginia Road Improvement Impact Fees

Virginia has recently adopted special impact fee legislation, effective July 1990, which authorizes certain counties and cities to assess impact fees on new development in order to pay all or a part of the cost of "reasonable road improvements attributable in substantial part to such development."[85] The legislation is similar to the Illinois and Tennessee road impact fee legislation. It contains a definition of "road improvements" (including construction, expansion or improvement, but not including on-site construction required under subdivision law). Service districts must be established, and a road improvements plan must be adopted, which must contain specific information and must be noticed for public hearing. The legislation specifies times for assessment and collection of fees, assessed before site plan approval, or building permit or certificate of occupancy issuance.

Fees are not assessed if the developer has previously "proffered" off-site road improvements accepted by the local government. Credits are also to be given for any other dedication, construction or contribution of off-site road improvements.

Finally, the legislation restricts the use of funds for road improvements within the service area as set out in the road improvements plan for the service area or district; earmarking of funds is required; refunds must be made if funds are not expended within six years; and upon project completion, any fees in excess of fifteen percent over the actual cost of construction must be refunded.

The recently enacted impact fee enabling statutes described above illustrate the increased willingness of state legislatures to allow impact fees as a financing source for capital facilities and services, provided that stringent standards and procedures are followed. They also illustrate the effects of political compromise. The statutes' inclusion of some political subdivisions, and not others, or the authorization of im-

84. § 5205 provides that:
A municipality may exempt certain types of development from any part or all of the impact fee assessed, provided that the exemption achieves other policies or objectives clearly stated in the municipal plan. The policies or objectives may include, but are not limited to, the provision of affordable housing and the retention of existing employment or the generation of new employment.

85. VA. CODE ANN., § 15.1-498.1 to 15.1-498.10 (1989).

pact fees to recoup the cost of some capital facilities but not others, is evidence for those who believe in the old maxim that one is better off never knowing what goes into the making of laws, or sausages.

### C. *Other Sources of Authority for Impact Fees*

With the enactment of new impact fee enabling legislation in various states, there is no doubt that some local governments, expressly authorized under the legislation, and home rule units of local government have the authority to impose impact fees for various types of public improvements. But what about local governments that are not among those empowered to adopt impact fees under impact fee statutes, and non-home rule units of local government? And what about impact fees for public improvements that are not authorized under the impact fee enabling legislation? These questions are answered by looking to the intent of the state legislatures that enacted the new impact fee legislation and other sources of local government powers—namely, the police power and home rule powers.

#### 1. Non-Home Rule Authority

Typically, non-home rule units of local government have only those powers that are expressly "granted to them by law" or fairly implied.[86] The initial inquiry, therefore, is whether the authority to impose impact fees is expressly "granted to them by law." No state law explicitly gives non-home rule units of local government the authority to adopt impact fees. Impact fee legislation in most states expressly limits the power to adopt impact fees to either large local governments or home rule units of local government. Especially if state legislation has established extensive regulations in a given subject area, a court might find that the authority of non-home rule governmental units is either nonexistent or limited to impact fees regulations which are consistent with the state enabling legislation.

In Illinois, for example, where the new road impact fee legislation is expressly limited to only large counties (of over 400,000 in population) and home rule municipalities, local officials of non-home rule counties and municipalities are uncertain whether the new legislation represents

86. *See, e.g.*, FLA. STAT. ANN. § 166.011 (Municipal Home Rule Powers Act); ILL. CONST. art. 7, § 7 (1970) (limiting the powers of non-home rule counties and municipalities to only powers granted to them by law, and certain specified powers, none of which is useful as authority for impact fees).

the intent of the Illinois legislature to preclude them from enacting impact fees to finance other types of public facilities and services pursuant to other sources of authority.

Generally, non-home rule units of local government that seek to adopt impact fees other than those expressly authorized by enabling legislation must rely on zoning and planning enabling statutes and other statutes governing the planning and financing of educational facilities, water and sewer facilities, and other types of public facilities and services, to the extent that the authority to adopt impact fees may be expressly or impliedly "granted to them by law" in these other statutes.

Where statutes do not *expressly* authorize non-home rule units of government to adopt impact fees for any type of public facility or service, the analysis must focus on whether any authority to adopt impact fees for particular types of public facilities is *implied*. In most states, the scope of authority under planning, zoning and subdivision enabling statutes does not expressly mandate the preparation of a capital improvements plan or authorize financing mechanisms to implement such plans. Only a few states have mandated capital improvements planning or addressed the adequacy of public facilities in general enabling acts.[87] Thus, in most states, non-home rule units of local government have insufficient capital facilities financing authority under general planning and zoning enabling statutes to justify the adoption of impact fees. This is especially true with respect to extraterritorial development.[88]

### 2. Home Rule Authority

At the turn of the century, the popular wisdom was that municipalities were not capable of governing themselves without detailed guidance from the state legislatures. As a result, many courts strictly limited municipal powers to those expressly granted (or fairly implied in grants) by the state legislature. Prior to constitutional home rule

87. *See, e.g.*, Delaware's Quality of Life Act, 66 Del. Laws 207 (1988), requiring counties to adopt comprehensive plans including a 5-year capital improvements plan; FLA. STAT. ANN. § 163.3177(3)(a), requiring local governments to formulate comprehensive plans, including a capital improvements element, for maintaining an adequate level of service capacity for public facilities; N.J. STAT. ANN § 52:18A-196 to -208 (West 1986 & Supp. 1989).

88. *See infra* Subsection 3 (Authority to Regulate New Development Outside Corporate Limits).

amendments, municipal powers were strictly construed under what is known as "Dillon's Rule."[89] As local governments later sought to perform more functions, state legislatures became swamped with requests for local enabling legislation authorizing even day-to-day aspects of local government. In the late 1960s and early 1970s, many overworked legislatures enacted constitutional amendments giving larger municipalities the power to exercise any power and perform any function pertaining to their government and affairs, except subject areas in which state jurisdiction was expressly reserved as exclusive.[90] Only a few state legislatures refused to loosen tightly-held state control over local government powers.[91]

Whether or not a local government is acting in an area "pertaining to its local government and affairs" is a matter to be determined by the courts.[92] Likewise, whether the state legislature has retained exclusive power over a subject area is also usually a matter of judicial interpretation.[93]

State legislatures may expressly preempt local regulations by providing that the regulation of a particular subject is a "matter of statewide concern" or is exclusively reserved to the state.[94] The legislature may

89. Dillon's Rule, named after the judge who authored the rule, was first set forth in 1 J. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS § 237 (5th Ed. 1911), as follows:

> It is a general and undisputed proposition of law that a *municipal corporation possesses and can exercise the following powers, and not others*: First, those granted in *express words*; second, those *necessarily or fairly implied in* or *incident* to the powers expressly granted; third, those *essential* to the accomplishment of the declared objects and purposes of the corporation, —not simply convenient, but indispensable.

*Id.* (emphasis in original).

90. MD. CONST. art. XI-A, § 2; OHIO CONST. art. XVIII, § 3; ILL. CONST. art. 7, § 6(a).

91. *See* VA. CONST. art. VII, § 3.

92. *See, e.g.*, Note, *Home Rule and the New York Constitution*, 66 COLUM. L. REV. 1145, 1149 (1966) (noting strict judicial interpretation of local authority by New York courts); City of Highland Park v. County of Cook, 37 Ill. App. 3d 15, 344 N.E.2d 665 (1975) (holding that the approval of state-funded, county highways was not within matters of local concern to a home rule municipality under provisions of the Illinois Highway Code).

93. Ohio courts have held that the state's power over the public school system is unquestioned. *See* Vaubel, *Municipal Home Rule in Ohio*, 3 OHIO N.U.L. REV. 1, 24 (1975) (citing City of East Cleveland v. Board of Educ., 112 Ohio St. 607, 148 N.E. 350 (1925)).

94. For example, the Delaware Beach Preservation Act expressly states that "[a]uthority to enhance preserve and protect public and private beaches within the State

also impliedly preempt local regulations by providing for the "comprehensive regulation" of an activity.[95] In determining whether or not the state legislature intended to occupy a particular field to the exclusion of all local regulations, the following questions are relevant:

> Does the ordinance conflict with state law; is the state law, expressly or impliedly, to be exclusive; does the subject matter reflect a need for uniformity; is the state scheme so pervasive or comprehensive that it precludes coexistence of municipal regulation; and does the ordinance stand as an obstacle to the accomplishment and execution of the full purposes and objectives of the legislature?[96]

The fact that a state law contains detailed and comprehensive regulations on a subject does not, by itself, establish the intent of the legislature to occupy the entire field to the exclusion of local legislation.[97] If a statute regulating a particular subject does not expressly limit home rule powers to regulate the same subject, a home rule unit is usually authorized to adopt regulations concurrently with the state.[98]

The general principles set out above can be reduced to the proposition that home rule powers do not extend to matters over which a state legislature has clearly reserved control.[99] Local governments are only authorized to assess impact fees pursuant to home rule powers if it can

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shall be vested solely in the Department [of Natural Resources and Environmental Control]." DEL. CODE ANN. tit. 7, § 6803(a). *See also* State v. Putnam, 552 A.2d 1247 (Del. Super. Ct. 1989) (invalidating local beach erosion regulations on grounds of state preemption).

95. It has been suggested that Florida's comprehensive state system of regulating and financing schools may preempt local school impact fee regulations. *See* Bosselman & Stroud, *Pariah to Paragon: Developer Exactions in Florida 1975-85*, 14 STETSON L. REV. 527, 555 (1985).

96. 6 E. MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 20.34 (3d. ed. 1980).

97. *Id.*

98. *See* Boulder Builders Group v. City of Boulder, 759 P.2d 752 (Colo. Ct. App. 1988) (holding that Growth Ordinance, limiting number of building permits for new dwelling units issued each year was not preempted by state Population Advisory Council Act, but rather subject of population growth was matter of mixed state-local concern); Frew Run Gravel Products, Inc. v. Town of Carroll, 71 N.Y.2d 126, 518 N.E.2d 920, 524 N.Y.S.2d 25 (1987) (holding that state Mined Land Reclamation Law did not preempt town from enforcing its zoning law so as to bar extractive mining operations).

99. Thus, it would be incongruous for the state to reserve sole and exclusive authority to itself in general enabling statutes (e.g., planning, zoning and subdivision statutes), the very purpose of which is to delegate specific powers to certain units of local government.

be established that the financing of a particular type of facility or service is a matter of local concern, and not the exclusive jurisdiction of the state or other government unit. This is usually established by looking to statutory authority to plan and provide for the type of facilities in question, such as state highway codes, water and sewer district statutes, and the like. The types of facilities that are most vulnerable to attack on grounds of state preemption are state highways,[100] public schools[101] and environmentally-related facilities, such as erosion control facilities[102] or regional solid waste disposal facilities.[103] These are subject areas that have been extensively regulated through state constitutional provisions or statutes, and over which states have asserted strong control.

A sample of statutes relating to the planning and financing of specific types of facilities is provided below to illustrate the type of analysis that a court would likely apply to determine whether certain types of impact fees are matters of local concern subject to home rule authority.

### A. POWER OVER HIGHWAYS

Most states have enacted a body of laws pertaining to the planning, construction, maintenance and financing of roads and highways.[104] Road impact fee legislation may be included in state highway codes. In Illinois, the language and the legislative history of new road impact fee legislation reveals the intent of the state legislature to allow the continued existence of transportation impact fee ordinances adopted pursuant to home rule powers, provided that these ordinances comply with the

100. *See* Albany Area Builders Association v. Town of Guilderland, 74 N.Y.2d 372, 546 N.E.2d 920, 547 N.Y.S.2d 627 (1989) (invalidating transportation impact fees on preemption grounds).

101. This is due in part to requirements in many state constitutions and statutes that the state provide for a "uniform system" of free public schools. *See, e.g.*, FLA. CONST. art. IX, § 1; CAL. CONST. art. IX, § 5; COLO. CONST. art. IX, § 2; ILL. CONST. art. X, § 1 (1970); WIS. CONST. art. 10, § 3.

102. *See* State v. Putnam, 552 A.2d 1247 (Del. Super. Ct. 1989).

103. *See* Danne, *Applicability of Zoning Regulations to Waste Disposal Facilities of State or Local Governmental Entities*, 59 A.L.R.3d 1244, 1270-72 (1974) (characterizing the licensing of waste disposal facility licensing and permitting as increasingly a matter of statewide importance).

104. *See, e.g.*, FLA. STAT. ANN. chs. 37-39 (West 1968 & 1989 Supp.) (regarding highway construction budget and contracting); Illinois Highway Code, ILL. REV. STAT. ch. 121 (Smith-Hurd 1960 & Supp. 1989).

substantive and procedural standards set out in the statute.[105]

### B. SCHOOL FACILITIES

Several state courts have upheld local authority to require developers to contribute school sites or money-in-lieu as a condition to subdivision approval under statutes expressly authorizing school fees,[106] or under general planning and subdivision enabling statutes.[107] The issue of whether school impact fees may be validly adopted solely under the home rule powers of a local government has never been addressed. As previously discussed, constitutional requirement that states establish a "uniform system" of free public schools presents special significant problems for school impact fees.[108]

### C. PARKS AND RECREATIONAL FACILITIES

It is almost certain that a court would find that the provision (e.g., planning and financing) of neighborhood and municipal park and recreational facilities to serve new growth and development is a matter of local concern that is subject to the exercises of home rule power.[109] However, it is unlikely that the planning or financing of state parks or

105. *See* transcript of the Illinois House of Representatives debate on June 30, 1989, immediately preceding the vote to adopt the Illinois Road Improvement Impact Fee Law, described in, *supra* notes 58-79 and accompanying text.

106. *See* Candid Enterprises, Inc. v. Grossmont Union High School Dist., 29 Cal. 3d 878, 705 P.2d 876, 218 Cal. Rptr. 303 (1985) (en banc) (holding that School Facilities Act, CAL. GOVT CODE ANN. § 65974 *et seq.*, authorizing local jurisdictions to require the payment of school impact fees for the construction of temporary and permanent school facilities as a condition of subdivision approval, did not preempt local authority to impose additional fees for permanent school facilities).

107. *See* Cimmarron Corporation v. Board of County Commissioners of County of El Paso, 193 Colo. 164, 563 P.2d 946 (1977) (en banc), holding that a petitioner for approval of a subdivision plat may be required, under COLO. REV. STAT. §§ 30-28-133(4)(a) and 30-28-133(4)(a)(II) (1973), to dedicate land for school and park sites or pay a fee in lieu of such dedication, but not both.

108. The constitutional mandate for uniform, free public schools in Florida was successfully relied upon by homebuilders in Florida to defeat an educational facilities impact fee ordinance in Northeast Florida Builders Association v. St. Johns County, No. 88-728CA-P (Fla. Cir. Ct., April 17, 1989), *aff'd*, No. 89-861, Fla. Dist. Ct. of Appeals (5th Dist. April 5, 1990).

109. Note that statutory authority for park and recreational impact fees is potentially more limited than home rule authority. *See* Kamhi v. Town of Yorktown, 141 A.D.2d 607, 529 N.Y.S.2d 528 (1988) (invalidating recreation fee imposed as a condition of site plan approval, where local law was in direct contravention of state law authorizing fees as a condition of subdivision plan approval).

facilities owned by a special park district, would fall within the scope of home rule regulation.

### D. WATER AND SEWER FACILITIES

Water and sewer facilities are another type of public facility which a court would almost certainly find to be a matter of municipal concern subject to exercises of home rule power. Locally-imposed water and sewer connection fees or tap-in fees have been upheld in several states.[110]

### E. OTHER UTILITIES

Depending on the level of responsibility or control that local governments have over the planning and financing of other types of utilities, such as gas and electric utilities, a court might find some basis for the adoption of impact fees or some type of connection fees for these facilities. More commonly, however, courts have found that state laws governing public utilities, and rate-based financing of utility structures, preempt local governments from collecting fees to finance these facilities.[111]

### F. POLICE, FIRE AND EMERGENCY MEDICAL SERVICES

The planning, administration and financing of municipal police, fire and emergency medical services has traditionally been a matter of municipal, rather than county or statewide concern. It is therefore likely that a court would find that the financing of these services is within the scope of the home rule powers of municipalities.

In summary, as a general rule, home rule units of local government have broad powers to adopt regulations relating to the provision of public facilities and services *provided* that the provision of a particular

110. *See* Banberry Development Corp. v. South Jordan City, 631 P.2d 899 (Utah 1981); Amherst Builders Ass'n v. City of Amherst, 61 Ohio St. 2d 345, 402 N.E.2d 1181 (1980); Contractors & Builders Ass'n of Pinellas County v. City of Dunedin, 329 So. 2d 314 (Fla. 1976); Hartman v. Aurora Sanitary District, 23 Ill. 2d 109, 177 N.E.2d 214 (1961).

111. *See* Rowe v. Chesapeake and Potomac Telephone Company of Maryland, 56 Md. App. 23, 466 A.2d 538 (1983), upholding a declaratory judgment that Montgomery County charter amendment proposing to prohibit contracts for goods and services with telephone company unless outlying suburban rates were limited to the same rates charged to other ratepayers was unconstitutional, and in conflict with general public laws governing telephone rates.

facility or service is a matter of local concern, and not the concern of the state or another local government. The sample of statutes and related case law discussed above indicates that most of the "traditional" public facilities (e.g., roads, water and sewer) are matters over which local governments have some planning or financing responsibility, and therefore valid subjects for impact fee regulations imposed pursuant to home rule powers. Other types of public facilities, over which states have reserved greater control, such as public schools and public utilities, are weaker candidates for impact fee financing based on home rule authority.

### 3. Authority to Regulate New Development Outside Corporate Limits (Extraterritorial Jurisdiction)

A municipality's authority to collect impact fees from new developments located outside its corporate limits is another emerging issue as cities and counties begin to compete with one another for the right to assess fees. The issue is basically, whether the city or the county has the right to regulate new development within the extraterritorial zone surrounding a municipality.

Home rule powers to zone usually do not extend outside of the corporate limits of the municipality. As the Illinois Supreme Count concluded in *Krughoff v. City of Naperville*, "a home rule municipality possess[es] the same statutory powers to zone extraterritorially as non-home-rule municipalities."[112] Recognizing that home rule units have only statutory planning, zoning and subdivision powers within their extraterritorial zones, the *Krughoff* court upheld the statutory authority of a municipality to levy fees in lieu of land contributions for school and park sites required to serve the estimated population of a proposed extraterritorial subdivision. Thus, this case illustrates the potential strength of extraterritorial planning and subdivision power as a source of authority for the adoption of impact fees for both home rule and non-home rule municipalities.

With respect to new subdivisions or planned unit developments (PUDs) located just outside the corporate limits of a municipality, a court would be much more likely to uphold the authority of a municipality to adopt impact fees pursuant to its statutory subdivision powers

112. Krughoff v. City of Naperville, 68 Ill. 2d 352, 369 N.E.2d 892 (1977) (citing City of Carbondale v. Van Natta, 61 Ill. 2d 483, 338 N.E.2d 19 (1975)) (holding in part that the 1970 Constitution did not confer extraterritorial sovereign or governmental powers on home rule units of local government).

than it would be to uphold the authority of a county to adopt impact fees pursuant to its statutory zoning powers.[113]

## III. JUDICIAL RESPONSE TO DEVELOPER EXACTIONS

This part of the Article examines the impact of judicial decisions on the types of public facilities that may be funded through development exactions, the timing of the exactions, the development approval context in which they are imposed and the extent to which judicial standards have been incorporated in newly-adopted impact fee legislation.

### A. *Types, Location and Timing of Exactions*

The range of public facilities that have been either constructed or funded by developers through the development approval process has to some extent depended on the level of judicial scrutiny applied by state courts in specific types of development approval contexts and the stringency of the state's standards for constitutionally valid exactions.

#### 1. Types of Public Facilities Funded

Early developer exactions funded a limited array of public facilities, including road widening,[114] parks and schools,[115] and extension of water and sewer lines.[116] Second generation impact fees now fund a broader range of facilities, including intersection improvements and traffic signals,[117] public buildings,[118] and public services, such as po-

113. *See* City of Urbana v. County of Champaign, 76 Ill. 2d 63, 389 N.E.2d 1185 (1979), holding that within the City's 1-1/2 mile extra-territorial planning jurisdiction, the County's zoning authority preempts the City's; but, in pure subdivision matters, the City's authority preempts the County's authority.

114. *See, e.g.*, Ayres v. City Council of Los Angeles, 34 Cal. 2d 31, 207 P.2d 1 (1949) (upholding mandatory dedication of road widening improvements adjacent to proposed subdivision).

115. *See* M. BROOKS, MANDATORY DEDICATION OF LAND OR FEES-IN-LIEU OF LAND FOR PARKS AND SCHOOLS (American Society of Planning Officials, Planning Advisory Service Report No. 266, 1971).

116. Contractor & Builders Ass'n of Pinellas County v. Dunedin, 329 So. 2d 314 (Fla. 1976) (upholding connection fees for expansion of sewer facilities to new development.)

117. J. FRANK & R. RHODES, DEVELOPMENT EXACTIONS 127 (1987) (citing results of 1985 national survey of exactions use conducted by Homer Hoyt Center for Land Economics and Real Estate at Florida State University).

118. St. Johns County, Florida, is currently defending its impact fee ordinance, which assesses fees for "public capital facilities" including police and law enforcement buildings, motor vehicles, jails, communications equipment and any other equipment

lice, fire[119] and emergency medical services.[120]

2. Location

Early forms of developer exactions, such as dedication requirements, were limited to contributions of land or money for public facilities located *on the site* of the proposed new development. Recent surveys indicate that municipalities frequently rely on the use of fees imposed as conditions of development approval to finance *off-site* community-wide or regional facilities needed to serve new development.[121] While there are few judicial opinions that directly address the issue of the validity of exactions of land or money for off-site public improvements, it is apparent that some cases most probably involved fees for off-site facilities.[122]

One of the forces behind the genesis of second generation impact fees in some states was the need for a more flexible form of exaction that would allow for the planning and financing of large community-wide or regional public improvements and services. Most "first generation" impact fees adopted by local governments were designed to recover the full cost of infrastructure improvements by requiring that fees be expended within one of several designated "benefit zones" or "service areas" within their jurisdictions. However, the demand for multi-jurisdictional financing tools is apt to increase in the future. In many of the high growth areas of the country, such as Southern California, Northeastern Illinois, Central Florida and in corridors connecting major cities, such as Washington, D.C.-Baltimore and New York-Philadelphia, planning and financing of public infrastructure is increasingly

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related to police and law enforcement; fire protection and emergency medical buildings and capital equipment; other public buildings and capital equipment for public purposes, including but not limited to judicial facilities, county administration and operations facilities and offices for constitutional officers and their staffs, acquisition of sites for public buildings and building design and facility need studies.

119. *See* J. FRANK, E. LINES & P. DOWNING, COMMUNITY EXPERIENCE WITH FIRE IMPACT FEES: A NATIONAL STUDY (1985).

120. Citrus County, Florida, has adopted impact fees for a wide range of public facilities and services, including fees for roads, parks, schools, fire, police, public buildings and emergency medical services (EMS).

121. *See* Bauman & Ethier, *Development Exactions and Impact Fees: A Survey of American Practices*, 39 LAND USE L. & ZONING DIG. 3 (1987).

122. This is especially true in cases involving city-wide or regional facilities. *See, e.g.*, Plote, Inc. v. Minnesota Alden Company, 96 Ill. App. 3d 1001, 422 N.E.2d 231 (1981) (involving "per unit" cash contributions by an extraterritorial subdivison for a cultural center, though not reaching the issue of validity).

necessary on a regional level. Thus, second generation impact fee legislation frequently reflects an adaption to accommodate regional infrastructure financing needs.[123]

In addition to the imposition of impact fees on a multi-jurisdictional basis, second generation impact fee ordinances usually provide for *inter*-jurisdictional fees. This effort to collect impact fees in areas where more than one local government has some authority to plan or finance capital facilities is an issue which has prompted litigation. (See Part IV, Implementation Issues.)

### 3. Timing

The timing of exactions, or the point in the development process at which impact fees must be paid, is an important determinant of whether the impact fees may be passed on to consumers in the form of higher real estate prices or rents and, subsequently, whether the development community is supportive of impact fees.[124] Impact fees are imposed in two stages: assessment and collection. First generation impact fees have generally set both assessment and collection at the building permit or certificate of occupancy stage of the development process. However, in response to developers' needs to finance impact fees along with other development costs,[125] second generation impact fee legislation has provided for flexibility by assessing impact fees at an early stage in the development process, when a developer is seeking financing, and requiring collection of impact fees at the point at which construction is about to begin, that is, at the building permit or plat approval stage.[126]

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123. For example, the San Diego Association of Governments has recently completed a report containing recommendations on regional growth management and regional infrastructure financing, including consideration of regional development impact fees to pay for a variety of public facilities.

124. For a more complete analysis of the factors effecting the "elasticity" of impact fees, see SNYDER & STEGMAN, PAYING FOR GROWTH (1986).

125. In Georgia, for example, the Georgia Development Alliance has taken the position that impact fees must be assessed at a stage when financing is available, or when construction commences. *See* Position Paper in response to Georgia HB 796, proposed comprehensive statewide impact fee legislation, Nov. 1989.

126. *See* TEXAS LOCAL GOV'T CODE ANN. § 395.016 (Vernon Supp. 1990) (repealed Aug. 28, 1989), providing for assessment of impact fees at any time during the development approval and building process, and collection of fees at either the time of recordation of a subdivision plat, the time of connection to the water or sewer system or at the time of issuance of a building permit or certificate of occupancy.

### B. *The Development Approval Context*

As with other legal "innovations," it is typical for the courts to approach the unknown with caution until the technique is used more widely and state legislatures have addressed the issue. Exactions and impact fees have a greater chance of withstanding legal attack if imposed as a condition to traditional types of development approvals (e.g., subdivision plat approvals[127] or rezonings)[128] or if required by contract (e.g., preannexation or development agreements).[129] However, in the context of more discretionary, flexible development approval contexts, such as conditional or special use approvals, exactions and impact fees have in some cases failed to withstand heightened judicial scrutiny.[130]

### C. *Constitutional Validity*

The most common constitutional challenges to impact fees are the arguments that they are unfair, arbitrary, unreasonable or without any rational basis, in violation of developers' due process rights, or that they are discriminatory in violation of the equal protection clause of state and federal constitutions.

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127. *See, e.g.*, Mefford v. City of Tulare, 102 Cal. App. 2d. 919, 228 P.2d 847 (1951) (upholding mandatory dedication of sewers as condition of plat approval); Petterson v. City of Naperville, 9 Ill. 2d 233, 137 N.E.2d 371 (1956) (upholding requirement of curb and gutter installation as condition of subdivision approval); Zastrow v. Village of Brown Deer, 9 Wis. 2d 100, 100 N.W.2d 359 (1960) (upholding mandatory dedication of water mains as condition of plat approval).

128. Rezoning ordiannce are generally viewed as legislative acts of local government that are presumed to be valid. *See generally* MCQUILLIN MUN. CORP. §§ 18.27 (caution and respect for legislative determination) and 19.06 (presumption of constitutionality of ordinances) (3d ed. 1989). A formidable burden of proof is usually placed on the challenger of such an ordinance. *Id.* at § 18.23 (Proof; Presumption of Reasonableness and Burden of Proof on One Asserting Unreasonableness).

129. *See* Wegner, *Moving Toward the Bargaining Table: Contract Zoning, Development Agreements, and the Theoretical Foundations of Government Land Use Deals*, 65 N.C.L. REV. 957, 994-1038 (1987); Fulton, *Wheeling and Dealing in California*, 55 PLANNING 4-9 (Nov. 1989) (describing experiences under the nation's most widely used and sophisticated development agreement law).

130. *See* T. Lassar, *Zoning for Sale?*, 47 URB. LAND 34 (1988); Municipal Arts Society, et al. v. City of New York, et al., 137 Misc. 2d 832, 522 N.Y.S. 2d 800 (1987) (severely chastising New York City's attempt to exact $40 million in subway improvements and $57 million in cash in exchange for 20 percent density bonus and development approval); *cf.* Chrismon v. Guildford County, 354 S.E.2d 309 (N.C. App. 1988) (upholding conditional use zoning so long as the action is reasonable, nondiscriminatory and in the public interest).

State courts have developed various standards for determining when exactions and impact fees are constitutionally valid. In some states, new impact fee legislation has incorporated language from state court opinions establishing the constitutional requirements for valid exactions and impact fees.[131] This practice creates confusion as to which constitutional standard courts should apply—the standard which underlies the statutory limitations on the method of calculation and the amount of impact fees, or the standard established in judicial opinions.

For example, the new Illinois Road Improvement Impact Fee legislation contains many of the same requirements and procedures for the adoption of impact fee ordinances as the more comprehensive Texas impact fee legislation. Although the Illinois legislation prescribes an impact fee methodology that is similar to the methodology required by Florida cases under the "rational nexus" standard,[132] road improvement impact fees are expressly required to be "specifically and uniquely attributable" to the need for road improvements generated by new development.[133] Incorporation of the "rational nexus" methodology and the "specifically and uniquely attributable" language in the same statute exemplifies the confusion that continues to plague even "second generation" impact fees.

To a certain extent, second generation impact fees are a victim of the "inbreeding" of language from early cases and statutes. State courts and legislatures have borrowed and modified impact fee language and legislation from one another to such an extent that it is becoming impossible for even experts to agree on which constitutional standard applies in a given state.[134] Terms like "reasonably related,"[135]

131. *See, e.g.*, 1990 Ill. Legis. Serv. 968-77 (West) (to be codified at ILL. ANN. STAT. ch. 121, §§ 5-901 to 5-918) (requiring that an impact fee imposed be "specifically and uniquely attributable" to the traffic demands generated by the new development paying the fee).

132. For example, the Illinois legislation limits the amount of impact fees to the "proportionate share" of the cost of improvements incurred by the unit of local government in the provision of road improvements. 1990 Ill. Legis. Serv. 968-77 (West) (to be codified at ILL. ANN. STAT. ch. 121, § 5-901 to 5-918). It requires evaluation of needs and costs of road improvements within designated service areas (§ 5-906(b)), requires that fees be deposited in interest bearing accounts earmarked for each service area (§ 5-913), and to be expended only on road improvements within the service area (§ 5-914).

133. *Id.* at 5-906(a)(1).

134. In "Remarks to American Bar Association Panel on Development Exactions," distributed at August 9, 1987, ABA Symposium on "Property Rights Under the Constitution," local government lawyers were advised to "interdict interstate breeding." The remarks note that:

"reasonable connection,"[136] "subtantially related,"[137] "substantially advance,"[138] "specifically and uniquely attributable to,"[139] "uniquely attributable and fairly proportioned to,"[140] "necessitated by and attributable to"[141] and "attributable to"[142] needs created by new development, coexist in the case law and statutes of various states.

In the midst of the maddening mislabeling and lax use of similar terms to connote different standards, a uniform methodology for calcu-

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Local government officials have been deluged with articles, studies and books relating to various forms of development fees. A large percentage of local governments around the country are attempting to ascertain what other governments are doing in this field. Much of this work is by finance officers, engineers, planners and other people without legal training. They are trading ordinances from different parts of the country and are using the scissors and paste to patch together interbred conglomerates that may have mixed parentage from many states.

135. *See* ARIZ. REV. STAT. ANN. § 9-463.05(B)(4) (1989) (requiring that the "amount of any development fees assessed pursuant to this section must bear a *reasonable relationship* to the burden imposed upon the municipality to provide additional necessary public services to the development"); Ayres v. City Council of City of Los Angeles, 34 Cal. 2d 31, 207 P.2d 1, 7 (1949) (upholding dedication of streets adjacent to proposed subdivision as "reasonably related to potential traffic needs").

136. Jordan v. Village of Menomonee Falls, 28 Wis. 2d 608, 137 N.W.2d 442 (1965) (holding that the evidence in that case established a "*reasonable basis*" or a "*reasonable connection*" between the required dedication of land or fees-in-lieu for school, park or recreational sites and the need generated by the subdivision).

137. *See* City of College Station v. Turtle Rock Corp., 680 S.W.2d 802 (Tex. 1984) (upholding mandatory dedication of land or money in lieu of park land, as valid police power regulation "*substantially related*" to the health, safety or general welfare of the people).

138. Nollan v. California Coastal Commission, 483 U.S. 825 (1987) (affirming prior holding that land use regulations must "*substantially advance*" legitimate state interests).

139. *See* ILL. STAT. ANN. ch. 121, para. 5-903, defining "specifically and uniquely attributable," and para. 5-904, authorizing certain units of local government to impose road improvement impact fees, which "shall not exceed a *proportionate share* of costs incurred by a unit of local government which are *specifically and uniquely attributable* to the the new development paying the fee. . . ."

140. Krughoff v. City of Naperville, 68 Ill. 2d 352, 369 N.E.2d 892 (1977) (holding that required contributions of land or money in lieu of land for new school and park facilities as "*uniquely attributable to*" and "*fairly proportioned to*" the need for new school and park facilities created by the proposed developments).

141. This language is the hallmark of the Texas impact fee legislation. TEXAS LOCAL GOV'T CODE ANN. § 395.001 (Vernon 1988 & Supp. 1990); VA. CODE ANN., § 15.1-498.2 (effective July 1, 1990).

142. *See* VT. STAT. ANN. tit. 24, § 5201(3) (1975) (defining "impact fee" as a fee which will be used to cover "any portion of the costs of an existing or planned capital project that *will benefit or is attributable to* the users of the development . . . ").

lating impact fees, most commonly associated with the "rational nexus" standard, is emerging. This section of the Article describes this phenomenon and some of the "inbreeding" of the constitutional standards of different states.

### 1. The "Reasonable Relationship" Test

State courts in a few states, principally California, apply the deferential "reasonable relationship" or "rational basis" standard widely applicable to zoning regulations in most states. First articulated as early as 1949 by the California Supreme Court in *Ayres v. City Council of City of Los Angeles*,[143] this test requires that exactions bear some reasonable relationship to the needs generated by the new development. California courts have upheld fees based on general public need for facilities caused by present and future subdivisions, rather than requiring a closer link between particular subdivisions and the specific needs generated by those subdivisions.[144]

Ordinances imposing exactions or impact fees in "reasonable relationship" states are presumed to be constitutionally valid. The Texas Supreme Court's decision to uphold an ordinance requiring fees in lieu of dedication of park land, in *City of College Station v. Turtle Rock Corp.*,[145] was largely based on the principle that "[t]he presumption favors the reasonableness and validity of the ordinance. An 'extraordinary burden' rests on one attacking a city ordinance."[146] Despite the "extraordinary burden" which the court placed on the ordinance challengers, the opinion contains language which is associated with the more moderate "rational nexus" test, described in the following subsection.[147] Therefore, this case may signify a shift toward a stricter standard in exactions cases than the lenient "reasonable relationship" test applied to determine the validity of other types of police power regulations.

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143. 34 Cal. 2d 31, 207 P.2d 1 (1949) (upholding mandatory dedication of road widening improvements adjacent to proposed subdivision).

144. *See* Associated Home Builders v. City of Walnut Creek, 4 Cal. 3d 633, 484 P.2d 606, 94 Cal. Rptr. 630 (1971) (upholding fees for recreational facilities).

145. 680 S.W.2d 802 (Tex. 1984).

146. *Id.* at 805.

147. *Id.* at 806. The *Turtle Rock* court directed the trial court to consider, on remand, both *needs and benefits*, as evidence of a "reasonable connection" between the increased population arising from the proposed subdivision and the increased park and recreation needs in the neighborhood. *Id.*

In 1987, the U.S. Supreme Court invalidated a beach access exaction, in *Nollan v. California Coastal Comm'n*,[148] based on its finding that the access requirement was not at all related to the purpose for which it was required.[149] The *Nollan* case, which affirms the Court's adherence to the principle that land use regulations must "substantially advance" a legitimate state purpose,[150] suggests that a heightened standard of review has replaced the less stringent standard applied by California and Texas courts in cases in which the challenger has alleged a regulatory taking of private property for public purposes without just compensation.

2. Emergence of the "Rational Nexus" Test

Most state courts apply some variation of the "reasonable connection" or "rational nexus" test to impact fees and other types of exactions. The roots of this test are frequently traced to the Wisconsin Supreme Court in the 1965 case of *Jordan v. Village of Menomonee Falls*.[151] In that case, the court held that fees-in-lieu of dedication for off-site educational and recreational purposes were a valid exercise of the town's police power because there was a "reasonable connection" between the need for additional facilities and the growth generated by the proposed subdivision. The phrase "rational nexus" did not appear until the 1983 Florida case of *Hollywood, Inc. v. Broward County*.[152] After a decade of impact fee litigation, Florida courts have refined the "rational nexus" test, whereby an impact fee will be upheld so long as the fee does not exceed the cost of the improvements required and the improvements adequately benefit the development that is the source of

148. 483 U.S. 825 (1987).

149. *Id.* at 8.

150. *Id.* at 8.

151. 28 Wis. 2d 608, 137 N.W.2d 442 (1965). *See* Delaney, et al., *The Needs-Nexus Analysis: A Unified Test for Validating Subdivision Exactions, User Impact Fees and Linkage*, 50 LAW & CONTEMP. PROBS. 139, 152 (1987) (citing *Jordan* as leading case establishing "the rational nexus test").

152. 431 So. 2d 606, 611 (Fla. Dist. Ct. App. 1983) ("In order to satisfy [dedication and impact fee requirements from earlier Florida cases], the local government must demonstrate a *reasonable connection, or rational nexus*, between the need for additional capital facilities and the growth in population generated by the subdivision. In addition, the government must show a *reasonable connection, or rational nexus*, between the expenditures of the funds collected and the benefits accruing to the subdivision. In order to satisfy this latter requirement, the ordinance must specifically earmark the funds collected for use in acquiring capital facilities to benefit the new residents.") (emphasis added).

the fee.[153] The fact that the general community might benefit incidentally from the improvements will not invalidate the fee.[154]

The underpinning concepts for the rational nexus test, the limitation of fees to an amount representing a "proportionate share" or "fair share" of the cost of the improvements required by new development, has been applied by courts and legislatures in several states. Need-benefit analysis, another aspect of the rational nexus test, has found its way into recent impact fee cases and statutes.[155] The "need" prong of the test requires a determination of whether there is some reasonable connection or rational nexus between the population growth generated by new development and the need for additional capital facilities.[156] The capital facilities needs of various types of new development are usually calculated using a sophisticated formula. In simplified terms, the formula usually multiplies the estimated demand for capital improvements by the cost of improvements, adjusted to subtract credits for in-kind contributions, taxes or other charges for the same facilities and the portion of the cost to be borne by the general public.

The benefit part of the test does not require that the fee payer be the exclusive recipient of the benefit. The new public facilities or services may also benefit the general public. However, the funds collected must be earmarked and placed in a special fund to ensure that they actually benefit the fee payer.[157] In addition, funds must be spent within a reasonable time or be refunded to the fee payer.[158] This needs-benefit analysis ensures that impact fees are charged proportionately to all new developments that contribute to the need for new public facilities, and

153. Home Builders and Contractors Association of Palm Beach County, Inc. v. Board of County Commissioners of Palm Beach County, 446 So. 2d 140, 143-44 (Fla. Dist. Ct. App. 1983) (upholding road impact fee ordinance.).

154. 446 So. 2d at 143-44.

155. *See, e.g.*, City of College Station v. Turtle Rock Corp., 680 S.W.2d 802 (Tex. 1984); *supra* notes 145-47 for a discussion of this case.

156. *See* Hollywood, Inc. v. Broward County, 431 So. 2d 606, 611 (Fla. Dist. Ct. App. 1983); Home Builders & Contractors Ass'n v. Board of Palm Beach County Comm'rs, 446 So. 2d 140 (Fla. Dist. Ct. App. 1983); Banberry Development Corp. v. South Jordan City, 631 P.2d 899 (Utah 1981); Amherst Builders Ass'n v. City of Amherst, 61 Ohio St. 2d 345, 402 N.E.2d 1181 (1980).

157. *See* City of College Station v. Turtle Rock Corp., 680 S.W.2d 802 (Tex. 1984); Contractors & Builders Ass'n of Pinellas County v. City of Dunedin, 329 So. 2d 314 (Fla. 1976); Coulter v. City of Rawlins, 662 P.2d 888 (Wyo. 1983).

158. Amherst Builders Ass'n v. City of Amherst, 61 Ohio St. 2d 345, 402 N.E.2d 1181 (1980).

that the fees benefit these developments in a fair and proportionate manner.

Since *Jordan v. Menomonee Falls*,[159] a growing number of courts, legislators and local government practitioners have recognized the reality that the need for new public facilities and services is rarely the result of a single new development. As large tracts of land with development potential have become rare, the days of mammoth, suburban tract developments are numbered. Today, new development more often takes the form of a large number of smaller developments and redevelopments. The fiscal blame is harder to trace to one source. Instead, consideration of a multiplicity of variables and factors has contributed to the infrastructure problem. The design of second generation impact fee legislation increasingly reflects this effort to weigh and consider these factors. For better or worse, the more recent impact fee formulas at least attempt to apportion fairly the cost of new capital facilities to all new development instead of unduly burdening a single development or requiring an increase in general taxes.

The rational nexus test is now the most prevalent of the standards which have emerged to date. Under a variety of labels, second generation impact fee statutes have already incorporated "proportionate share" and need-benefit aspects of the rational nexus test.[160]

### 3. The Illinois "Uniquely Attributable" and "Fairly Proportioned" Test

Illinois has earned a reputation as a "pro development" state[161]

159. 28 Wis. 2d 608, 137 N.W.2d 442 (1965).

160. For example, "proportionate share" language is pervasive in recent impact fee legislation, caselaw and literature. In addition, impact fee statutes enacted by Texas, Tennessee, Vermont, Virginia, Illinois and Georgia (proposed) incorporate capital facilities *needs analysis* by requiring that impact fees bear some relation to the need for capital improvements identified in an adopted capital improvements plan. These statutes also require that the fees *benefit* the fee payers by requiring that collected fees be deposited in earmarked accounts for the service area in which the proposed development is located.

161. Evidence to support this perception can be found in a 1979 statistical study of zoning amendment litigation in Illinois and other states which found that the Illinois trial court reversed the local zoning authority's decision in sixty-three percent of the cases; the appellate court reversed the trial court thirty-nine percent of the time and reversed the zoning authority decision in fifty-two percent of the cases. In only twenty percent of the cases was the local zoning authority's decision upheld by both the trial court and the appellate court. *See* HAAR, SAWYER & CUMMINGS, QUANTITATIVE ANALYSIS OF ZONING AMENDMENT LITIGATION: COMPUTER POWER AND LEGAL

where the attempts of local planners and government officials to employ innovative land use programs are frowned upon by strict Illinois courts. It has been nearly thirty years since the Illinois Supreme Court first laid down the requirement, in the landmark case of *Pioneer Trust & Savings Bank v. Village of Mount Prospect*,[162] that mandatory dedications and other types of conditions to development approval be "specifically and uniquely attributable" to the proposed development.[163] The unanswered questions which the test raises for local government planners and officials interested in imposing impact fees today are: (1) What methodology for measuring and assessing impact fees satisfies the test? and (2) Is there any indication that Illinois courts will abandon the test in favor of the more lenient "rational nexus" standard?

The Illinois Supreme Court answered the methodology question in part in the 1977 case of *Krughoff v. City of Naperville*.[164] Contrary to the views of some commentators that exactions are permissible only when a proposed development is the "sole cause" of the needed public facilities,[165] the *Krughoff* court held that the city had the power to require the dedication of land, or money in lieu of land, for school and park sites because the evidence showed that the required contributions were "uniquely attributable" and "fairly proportioned to" the need generated by the proposed development. The goal in designing a constitutionally valid impact fee methodology, under this new, second

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REASONING (Report to the National Science Foundation, Contract SOC 76-23721 1979) (sample size: N = 54 Illinois appellate court cases).

162. 22 Ill. 2d 375, 176 N.E.2d 799 (1961) (developer of a subdivision successfully challenged the validity of an ordinance that required dedication of public grounds as a condition of plat approval).

163. The test was first set out in Pioneer Trust & Savings Bank v. Village of Mount Prospect, 22 Ill. 2d 375, 176 N.E.2d 799 (1961) (striking down the Village's attempt to require the developer of a subdivision to dedicate land for educational purposes).

164. 41 Ill. App. 3d 334, 354 N.E.2d 489 (1976), *aff'd*, 68 Ill. 2d 352, 369 N.E.2d 892 (1977).

165. *See* Weinberg, *A Primer on Acceptable Development Fees*, ABA PROBATE & PROPERTY J. 6, 7 (1989) (interpreting the "specifically and unique attributes" test from *Pioneer Trust*, to require that the burden of exactions be borne by the developer "only if the new project is the *sole cause* of the need for additional public facilities.") (emphasis added); *see also* Alterman, *Evaluating Linkage, and Beyond*, 41 LAND USE LAW & ZONING DIG. 3, 6 (1989) (describing the Illinois "specifically and uniquely attributable" test as requiring "municipalities to prove that the need for the additional facilities to be provided or financed through exactions is attributable to the new development *alone*") (emphasis added); *supra* note 40.

prong of the test, then, is to measure the "fairly proportioned" impact of a given development on the type of public facility being funded.

The second question regarding the "specifically and uniquely attributable" test, as it was modified by the *Krughoff* case, is whether there is any indication that Illinois courts will construe the test to conform to the views expressed by the U.S. Supreme Court in *Nollan v. California Coastal Commission*.[166]

In the *Nollan* case, the Supreme Court, albeit somewhat ambiguously, appeared to endorse the application of a "rational nexus" standard. Although the Court was obliged to invalidate the exaction of a public beach access easement by the California Coastal Commission as a condition to development approval based on the specific facts of that case, the analysis employed was nonetheless consistent with the requirement of a "rational nexus" between the developer exaction and a legitimate public objective.[167]

Although a 1981 Illinois appellate court decision, *Plote, Inc. v. Minnesota Alden Co.*,[168] has often been heralded as an indication that Illinois courts may be leaning toward a more lenient constitutional standard, subsequent decisions have given no conclusive evidence of this. The *Plote* case involved a $100 per dwelling unit "contribution" imposed by the Village of Schaumburg for a community cultural center pursuant to an ordinance implementing a planned unit development agreement. The court hinted that it would have invalidated the fee had the developer not been estopped from challenging the validity of conditions in the ordinance. The *Plote* court acknowledged the movement of the Illinois Supreme Court toward a more liberal standard of construction of local power to impose conditions on development approval, but at the same time also emphasized that "the test in Illinois is more demanding than a cursory search for some connection, however tenuous, between the municipalities exaction and the public welfare."[169] Contrary to the expectations of some legal commentators, since the *Plote* decision, the Illinois courts have declined to take any cases involving conditions to any type of development approval which are not in the

166. 483 U.S. 825 (1987).

167. However, the Court affirmed in *Nollan* its earlier decisions requiring that conditions which abridge individual property rights through the police power must "substantially advance a legitimate State interest." *Id.* at 834.

168. 96 Ill. App. 3d 1001, 422 N.E.2d 231 (1981).

169. *Id.* at 1006, 422 N.E.2d at 235.

context of a preannexation agreement.[170]

Eight years after the Illinois court's statements in *Plote* and two years after the U.S. Supreme Court's nod toward the "rational nexus" standard in *Nollan*, the Illinois courts have not squarely addressed the proper constitutional standard applicable to impact fees. The definitions of the terms "specifically and uniquely attributable" and "proportionate share" in the new Illinois Road Improvement Impact Fee Law[171] are likely to increase the ambiguity in the courts regarding the continued viability of a strict construction of the "specifically and uniquely attributable" standard, rather than a more practical "rational nexus" approach for showing the link between impact fees and new development.

The Road Improvement Impact Fee Law adopted by the Illinois General Assembly in 1989 limits the amount of the fee to a "proportionate share" of the costs that will be incurred by the local government unit in the provision of road improvements to serve the new development.[172] The legislation defines the term "proportionate share" as "the cost of road improvements that are specifically and uniquely attributable to a new development" after consideration of certain factors listed in the definition.[173] Local government administrators may justifiably ask what the term "proportionate share" really means.

"Proportionate share" is defined in the new legislation as costs that are "specifically and uniquely attributable" to the total cost of road improvements. This suggests that "proportionate share" requires that fees are subject to the narrow and exacting interpretation of the "specifically and uniquely attributable" test as it was originally established by the Illinois courts.

As first used by the Illinois Supreme Court in the 1960 case of *Pioneer Trust & S. Bank v. Village of Mount Prospect*,[174] the phrase "specifically and uniquely attributable" was interpreted as a narrow test that effectively required a particular development to be the "sole

170. *See, e.g.*, The Village of Orland Park v. First Federal Savings, 135 Ill. App. 3d 520, 481 N.E.2d 946 (1985) (enforcing provisions of a preannexation agreement).

171. ILL. ANN. STAT. ch. 121, para. 5-903 (Smith-Hurd Supp. 1990) (definitions).

172. ILL. ANN. STAT. ch. 121, para. 5-906(a)(2) (Smith-Hurd Supp. 1990).

173. ILL. ANN. STAT. ch. 121, para. 5-903 (Smith-Hurd Supp. 1990).

174. 22 Ill. 2d 375, 176 N.E.2d 799 (1961) (invalidating requirement of contribution of cash and land for school and recreation purposes as condition to subdivision approval).

cause" of the need for the public improvements.[175] In 1978, in the case of *Krughoff v. City of Naperville*,[176] the Illinois Supreme Court liberalized the test to require that dedication of land or money in lieu of land be "uniquely attributable and fairly proportioned to" the need for new public facilities. The word "specifically" was dropped and the phrase "and fairly proportioned to" was added. The term "proportionate," in common dictionary parlance, is "the comparative relation in size, amount, etc., between things; a part, share, etc., especially in relation to the whole."[177] After *Krughoff*, the original meaning of the so-called "specifically and uniquely attributable" test can no longer be charaterized as an exacting, sole cause test after its marriage with the more moderate "and proportionate to" language. The equation of the terms "proportionate share" and "specifically and uniquely attributable" in the 1989 legislation, at worst, threatens to take the Illinois courts back to a very strict, "cause and effect" construction, which virtually guaranteed the invalidation of developer contributions for public facilities needed to serve more than one new development. At best, the new legislation confuses the issue of what is legally required to enact constitutionally valid road impact fees.

## IV. Implementation Issues

### A. *Impact Fee Methodology*

The reasonableness of impact fees and other types of land use controls depends upon good planning. The amount of an impact fee and the method used to arrive at that amount are critical to the legality of the fee. After a decade of impact fee litigation, planners in Florida communities have accepted the necessity of becoming conversant in the digitized language of population and household size projections, trip generation models, level of service standards, tax credits, exemptions and a host of other technical considerations that must be factored into the formula to satisfy constitutional requirements.

As discussed in Part III of this Article, Illinois courts require that mandatory contributions of land or money as conditions to development approval be "uniquely attributable and fairly proportioned to" the need for the new public facilities created by the proposed develop-

175. *Id.* at 381, 176 N.E.2d at 802.

176. 41 Ill. App. 3d 334, 354 N.E.2d 489 (1977).

177. Webster's New World Dictionary (Modern Desk Ed. 1979).

ments.[178] How does an Illinois planner ensure that impact fees are "uniquely attributable to" and "fairly proportioned to" the need for public facilities created by a proposed development? How one measures the "proportionate share" or "fair share" of the cost of public facilities attributable to an individual unit of development has been the subject of many planning conferences, workshops and publications.[179] Illinois municipalities that have adopted impact fee ordinances calculate the amount of the fee as a pro rata share of the total capital cost of improvements as set out in the city's capital improvements budget (an improvements driven impact fee) or as determined by a formula measuring the amount of needed improvements for various types of land uses (a needs driven impact fee).[180]

Du Page County employed "needs driven" methodology when it drafted its Fair Share Transportation Impact Fee Ordinance.[181] Recently adopted impact fee ordinances, such as Du Page County's transportation ordinance, illustrate the current level of planning and documentation that is used to justify the adoption of the impact fee. The County's transportation impact fee was based on approximately three years of planning, during which consultants were hired to analyze the engineering, planning and legal aspects of impact fees and to design a computerized transportation planning model to simulate travel patterns and traffic volumes. In addition, County planning staff engaged in the on-going process of updating the County's road improvements plan based on future projections of population and employment growth.

The Du Page County ordinance charges fees according to land use type (e.g., single-family residential detached, multi-family attached, re-

178. *Krughoff*, 369 N.E.2d at 895 (upholding land dedication requirement, or money in lieu of land, as a condition of plat approval, for school and park sites.)

179. *See, e.g.*, J. NICHOLAS, THE CALCULATION OF PROPORTIONATE-SHARE IMPACT FEES (APA, Planning Advisory Service Report No. 408, July 1988).

180. There are two general methods of calculating impact fees. A needs-driven methodology is derived from a quantification of the service demands and the cost of capital facilities needed to provide the demanded services. An *improvements-driven* methodology allocates the cost of a specified list of capital improvements regardless of an area's actual needs. The principal difference between the two systems is that the needs-driven methodology avoids the possibility that the portion of new facilities needed to overcome an existing deficiency will be allocated to new growth and development. *See also* J. NICHOLAS, *supra* note 180, at 10.

181. DU PAGE COUNTY ORDINANCE NO. DTO-016-88, effective January 1, 1989, repealed and replaced by DU PAGE COUNTY ORDINANCE NO. ODT-021-89, effective June 27, 1989.

tail or office use by size in square feet, etc.) and benefit district.[182] When the ordinance first took effect on January 1, 1989, discounted fees[183] ranged from a low of less than $200 per hotel room in one district, to a high of almost $7,000 for a "High Turnover Restaurant" in another district. Any person dissatisfied with the fee schedule may elect to provide an "Individual Assessment of Impact" for a particular development based on the formula provided in the ordinance.[184] The "individual assessment" formula incorporates a determination of the need for transportation improvements in number of "lane miles" generated by various types of land uses at specific times of the day.[185] It then multiplies this number by the cost per lane mile to arrive at a "total fee." This fee is then adjusted to subtract charges which the developer has already contributed toward highway construction, such as motor fuel taxes and the value of any highway improvements given by the developer pursuant to an Improvement Credit Agreement.

### B. *Exemptions*

Should impact fees be charged to *all* new developments? Although local governments naturally have been sensitive to the harshness of fees charged to public or quasi-public, not-for-profit landowners, the initial approach of most jurisdictions has been to apply the fee "across-the-board" with no exemptions, to avoid any claims of unfair or unequal treatment by those who would not be exempted. Some Florida communities have provided for exemptions for public schools, government buildings, affordable housing and not-for profit organizations. Though there are no judicial opinions[186] from any jurisdiction which address

182. The Original Illinois enabling legislation, ILL. ANN. STAT. ch. 121 § 5-608, required the creation of benefit districts known as "transportation impact fee districts." Pursuant to this requirement, Du Page County created ten transportation impact fee districts. Fees must be expended in the district they are collected.

183. The "discounted fee" is calculated by adjusting the "total fee" to reflect a "tax credit" (to safeguard against "double taxation" on account of gasoline and other taxes paid toward the construction of highway improvements), a "14% Municipal Discount" (to account for taxes paid to the municipality for highway improvements), and a "50% Incentive Discount" (based on a policy decision to share costs and encourage compliance).

184. DU PAGE COUNTY ORDINANCE NO. ODT-021-89, § 10.

185. Number of trips generated on a weekday during "peak hours," adjusted for "pass through" traffic, times average trip length in miles generated by a particular land use type divided by lane mile capacity.

186. A report issued by the National Council for Urban Economic Development, *Development Fees: Sharing the Costs of Growth* 12 (No. 43, March 1988), states that

the validity of impact fee exemptions, the legal issues that would likely be raised in a lawsuit challenging impact fee exemptions are whether the local government has the authority to exempt some land users from the impact fees and whether the exemption violates the state and federal equal protection clauses.

### 1. Affordable Housing

Because impact fees may increase the cost of new housing beyond levels which are affordable to even middle-income residents, some jurisdictions have exempted affordable housing from the payment of impact fees. Vermont is one state which expressly authorizes the exemption of affordable housing in its impact fee enabling legislation.[187] In other jurisdictions, which do not expressly authorize impact fee exemptions, the exemption of affordable housing developments would have to be based upon the local government's overall objective of planning comprehensively for the orderly growth and development of the community, including the encouragement of a variety of housing types.[188]

An affordable housing exemption would likely withstand a constitutional equal protection challenge as long as the local government can demonstrate that exemption of that particular class of development is rationally related to some legitimate government purpose, such as planning objectives, rather than for the sole purpose of creating a financial subsidy for the exempt land use. The U.S. Supreme Court and Illinois Supreme Court have emphasized that where no "suspect class" (e.g., race, nationality) or fundamental right is at stake, a government need only show that its classification is rationally related to a legitimate gov-

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"[s]ome courts have ruled that a locality's fee is not a fee when it exempts certain types of development, but rather a discretionary tax—unless the locality in question has had a consistent history of providing exemptions for certain types of developments." However, no cases are cited in support of this statement.

187. VT. STAT. ANN. tit. 24, para. 5205, provides:

> A municipality may exempt certain types of development from any part or all of the impact fee assessed, provided that the exemption achieves other policies or objectives clearly stated in the municipal plan. The policies or objectives may include, but are not limited to, the provision of *affordable housing* and the retention of existing employment or the generation of new employment. (emphasis added)

188. *See, e.g.*, ILL. REV. STAT. ch., para. 3001, regarding the comprehensive planning powers of Illinois counties.

ernment interest.[189] To date, neither the federal nor the state courts have held affordable housing to be a fundamental right. Thus, a court would apply the same constitutional analysis that would be applied to determine the validity of many other types of police power or economic regulations. The only role of the courts would be to determine whether the governing body enacting the impact fee ordinance "could rationally have decided" that the exemption of affordable housing development would achieve a legitimate public purpose.[190]

2. Public Buildings and Private Non-Profit Organizations

Public schools, other public buildings and non-profit organizations have sometimes been exempt from impact fees. The long-standing practice of exempting these uses from taxation has perhaps served as the impetus for exempting them from impact fees. As discussed in Part I, impact fees, if properly defined, are distinguishable from taxes in their purpose and source of authority. Taxes are imposed for the purpose of raising general revenue and are strictly limited by statutory requirements. Impact fees, however, are intended to recoup costs expended by the local government in providing capital improvements to new development. The tax-exempt status of not-for-profit institutions does not require local governments to provide any special treatment under land use regulations.

There is no difference in the legal requirements for the exemption of not-for-profit organizations and other types of exemptions. Unless a statute infringes on a fundamental right or discriminates against a suspect class, differential treatment of a regulated class is judged under the less stringent "rational basis" equal protection standard.

The exemption of public buildings and private non-profit organizations is constitutionally valid if reasonably related to comprehensive land use planning objectives. Further, as in the case of affordable housing, a local government must be able to demonstrate that non-exempt land uses are not subsidizing the exempt land uses. It is important to note, however, that many not-for-profit institutions have at least as great an impact on road systems and other public facilities as other

189. Pennell v. City of San Jose, 485 U.S. 1, 14 (1988); New Orleans v. Dukes, 427 U.S. 297, 303 (1976).

190. For discussion of the equal protection standard applied in cases not involving a suspect class or fundamental right, see Hawaii Housing Authority v. Midkiff, 467 U.S 229, 242 (1984); Minnesota v. Clover Leaf Creamery, 449 U.S. 456, 466 (1981); Kujawinski v. Kujawinski, 71 Ill. 2d 563, 376 N.E.2d 1382 (1978).

land uses and it may therefore be difficult to provide the necessary "reasonable relationship" which would be required to justify the exemption. Furthermore, because the U.S. Constitution mandates "separation of church and state,"[191] the exemption of religious institutions only, without any similar exemption for other institutions, from the payment of impact fees is likely to be strictly scrutinized by the courts.[192] However, if some non-religious institutions were exempt as well, the claim of government favoritism of churches is weakened.

3. "Vested" Developments

The understandable impulse, once developers hear of a proposed impact fee ordinance, is to race to the local planning office to file applications for building permits before the proposed ordinance takes effect. One of the issues that arises in adopting an impact fee ordinance, is whether the vesting rules which apply to changes in zoning laws apply to the adoption of impact fees. Under the most common type of vested rights case, a court would be asked to determine the point at which a developer's right to proceed under an old zoning ordinance, which is superseded by new zoning regulations, becomes vested. The rule in most states is that a developer does not acquire any vested rights to proceed under the rules in effect at the time the development was approved unless a building permit was issued and the developer made "substantial expenditures" in reliance on the permit.[193]

Though it has never been established that traditional vesting rules apply to impact fees, a recent Florida case, *Key West, Fla. v. R.L.J.S. Corp.*,[194] upheld the city's right to require a developer to pay development fees pursuant to an ordinance adopted *after* a building permit had been issued and a substantial number of units had been constructed. This case illustrates the developer's potential liability for impact fees even after their developments have been approved.

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191. U.S. CONST. amend. I.

192. *See* Texas Monthly v. Bullock, 109 S. Ct. 890 (1989) (holding that the exemption of religious periodicals from a sales tax statute violated the establishment clause of the First Amendment).

193. Note that in Illinois the actual issuance of a building permit may not be necessary. In American National Bank and Trust Company of Chicago v. City of Chicago, 19 Ill. App. 3d 30, 311 N.E.2d 325 (1974), and Mattson v. City of Chicago, 89 Ill. App. 3d 378, 411 N.E.2d 1002 (1980), the court held that an applicant for a building permit had a vested right to the issuance of the permit because of substantial expenditures made in reliance on the probability of issuance of the building permit.

194. 57 U.S.L.W. 2406 (Fla. Dist. Ct. App., No. 87-2810, Jan. 3, 1989).

## V. CONCLUSION

Impact fees have undergone significant changes since they were first introduced in a number of states in the 1970s. After a decade of experience in implementing fees, courts and legislatures have ventured to proclaim more definite standards and procedures for impact fees in an effort to respond to some of the realities of real estate development and to address questions of fairness. In general, these "second generation" impact fees have attempted to accommodate developers' needs for predictability, local government needs for guidelines and consistency and the special needs of some types of development through exemptions.

Second generation fees are typically assessed pursuant to complex formulas and sophisticated ordinances that incorporate substantial administrative, procedural and substantive requirements. The complexity of the ordinances has increased, in large part, as a response to pressures for less local discretion in the adoption of fees and greater equity among fee payers. Modern impact fee ordinances may require governing bodies to conduct public hearings on the assumptions which underlie the impact fee formulas in addition to hearings on the proposed impact fee ordinance itself. Ordinances which once applied across-the-board, are now being "fine-tuned" to exempt certain land uses (e.g., public buildings, non-profit organizations and affordable housing).

On the negative side, the second generation impact fee legislation may exacerbate, rather than resolve, the existing ambiguities in the interpretation of constitutional tests for valid impact fees. This is particularly evident in states like Illinois, where the new legislation incorporates language from older judicial opinions that may no longer be viable in the modern context of land use and development. From a more positive perspective, broad or ambiguous legislation provides an opportunity for forward-thinking judicial opinions that hopefully move the the majority of states to evaluate impact fees under a more practical standard, whatever its formulation. Meanwhile, courts and legislatures are likely to continue to amend and refine the law governing impact fees.

In sum, "second generation" impact fee ordinances attempt to be more equitable, provide more public input, and measure the amount of fees as fairly as possible. These improvements have perhaps taken place at the expense of more practical considerations, such as administrative cost and technical complexity. Whether or not all of the "sound and fury" that has been expended in the design of more scientific and

equitable impact fees will ultimately signify anything is uncertain. What is certain, however, is that the use and acceptance of impact fees in states that have reached "the second generation" is becoming more widespread. Like it or not, the new generation of impact fees is here to stay and they are sure to play a prominent role in capital facilities financing in the 1990s.