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DEVELOPMENT IMPACT FEES: IS LIMITED COST INTERNALIZATION ACTUALLY SMART GROWTH?

NICK ROSENBERG*

Abstract: Sprawl has defined development in the United States for the past fifty years. As people have moved from the cities to the suburbs, communities have been faced with staggering infrastructure, social, and environmental costs. Many municipalities have attempted to recoup costs of this development by imposing impact fees—charges on development used to pay for necessary public services. Many environmental and smart growth advocates have embraced impact fees as a cost-internalizing approach to regulating growth. Federal and state courts, however, have placed substantial constraints on the scope of the costs that municipalities are able to recover through impact fees. Furthermore, because the most direct infrastructure costs are more readily recouped, development may occur in areas where the lack of these services would otherwise have been prohibitive, while remaining social costs are borne by society at large. This Comment cautions local governments to be wary of using impact fees as a tool to address the broader impacts of sprawl, and urges them to balance the benefits of limited cost recovery with the effect of accommodating growth that might otherwise not occur.

INTRODUCTION

Life in and around urbanized areas in the United States has changed dramatically, and at a staggering pace, in the last fifty years.¹ The distinction between urban and rural has been replaced by a suburban landscape that is nearly ubiquitous for much of the country’s population. People have been moving out of the dense inner cores of

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built-up cities and settling in outlying areas. This movement has been facilitated by many factors and has had profound consequences. "Sprawl development," as this pattern has been termed, necessitates the conversion of lands to residential use. It is characterized by suburban growth, occurs at relatively low densities, and consumes large amounts of land that are less valuable as open space or wildlife habitat than as subdivisions. It increases distances between people, their jobs, and other essentials like shopping and entertainment, and contributes to staggering increases in automobile travel and the associated impacts on traffic and air quality. Longer commutes, traffic, consumption of open spaces, and low-density development have brought high costs to the communities experiencing this growth.

The most visible and immediate costs are attributable to the provision of necessary services and infrastructure to support new development. In recent decades, communities have recognized that existing sewers, roads, and other infrastructure cannot support this new growth. This growth requires the construction of new facilities for which the general public has traditionally borne the cost. In addition, as the costs of sprawl have been studied more closely, many areas have identified other impacts on resources vital to a healthy community, such as, the capacity of schools, the availability of parks and recreation areas, air quality, wildlife habitat, and other less direct but significantly impacted community assets. In order to recover the monetary costs of providing these needed services, some local governments have imposed "impact fees" as a way to ensure that developers internalize these costs instead of allowing them to externalize them to the larger community.

This Comment addresses the constitutional and other legal limitations on the scope of impacts that such fees can address. Part I discusses the range of impacts that come with unbridled sprawl de-

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2 See discussion infra Part I.A.
3 Snyder & Byrd, supra note 1, at 3.
4 See discussion infra Part I.A.
5 Burchell & Shad, supra note 1, at 137; Snyder & Byrd, supra note 1, at 8.
6 See discussion infra Part I.B.
8 See Snyder & Byrd, supra note 1, at 11.
9 See discussion infra Part I.C.
10 See discussion infra Part I.B.
dev elopment. Part II identifies the major legal hurdles that valid impact fees must overcome, namely a body of jurisprudence that increasingly restricts the uses and subject matter for impacts fees. Part III compares these legal constraints and the impacts of sprawl to describe how fees will be unlikely to internalize the true costs effectively, or, for that matter, even a bare minimum of the actual costs, of sprawl. Finally, this Comment suggests that given these constraints, impact fees should be approached with caution. This is because fees may in fact enable sprawl to occur by accommodating development more than it is able to mitigate its actual impacts.

I. THE PROBLEM OF SPRAWL

The dominant pattern of development and growth in the United States over the last fifty years has been defined by a single word: sprawl.\(^\text{12}\) The manifestations of sprawl are apparent in most parts of the country: there has been, and continues to be, a dramatic shift in population from central cities outward.\(^\text{13}\) This migration of people is accompanied by new homes and other social, economic, and commercial markings of developed society, and characterizes much of the landscape around the once-dense central cities.\(^\text{14}\) Local governments have turned to impact fees to recover the costs associated with sprawl, and these fees face a number of restrictive constitutional limitations.\(^\text{15}\)

A. A Pattern of Outward Growth

The tremendous increase in population in the past fifty years around metropolitan areas has occurred predominantly in outlying suburbs.\(^\text{16}\) In 1950, sixty percent of the population living in metropolitan areas lived within the “central cities” of those areas.\(^\text{17}\) By 1990, the

\(^{12}\) See Burchell & Shad, supra note 1, at 139; Snyder & Byrd, supra note 1, at 3.

\(^{13}\) Snyder & Byrd, supra note 1, at 3.

\(^{14}\) Id.

\(^{15}\) See discussion supra Part I.

\(^{16}\) Burchell & Shad, supra note 1, at 139.

\(^{17}\) Snyder & Byrd, supra note 1, at 3. A central city is the largest place within a metropolitan area, as defined by the Office of Management and Budget. See U.S. Census Bureau, 2000 Census. Table A at 15 (2000). These can include: (1) census designated places (densely settled concentrations of population that are identifiable by name, but not legally incorporated places); (2) incorporated places (places reported in the 1990 Census and after, legally recognized under the laws of their respective states as cities, boroughs, towns, or villages); or (3) consolidated cities (units of local government for which the functions of an incorporated place and its county or minor civil division have merged). Id. Table A at 15–18.
population living in the same metropolitan areas nearly doubled, while the proportion of those living in the central cities fell to about one-third. By other estimates, the proportion of the population living in suburbs increased from fifteen percent in 1940, to roughly sixty percent in the late 1990s.

A major concern related to this pattern of sprawl is the distinction between the type of land in central cities and that outside of cities consumed by this growth. The land in cities is typically comprised of previously developed, densely populated areas characterized by the efficient use of resources. By contrast, areas outside of cities often have few public services, and are comprised of open space, agricultural land, critical wildlife habitat, or other minimally developed and undeveloped land.

Another concern is the form that development takes as it moves away from an urban core. Although environmental impacts are inherent in all development, they are exacerbated by the form that this growth has taken in suburban areas. "Sprawl" is an imprecise term. Commentators, however, have identified key elements of this growth that are common to many metropolitan areas and are important in describing the causes of, and potential cures for, the impacts of sprawl development. According to one definition, the defining characteristic of sprawl development is "low-density development outside city centers, usually on previously undeveloped land." In a view more critical of local government action, or, in this case, inaction, this development has been more cynically described as "the pattern that takes over when, with little coordinated planning, people and businesses desert established communities to develop the open country-side."

18 Snyder & Byrd, supra note 1, at 3.
19 Burchell & Shad, supra note 1, at 139.
21 See Burchell & Shad, supra note 1, at 140-41; Porter, supra note 20, at 711-13.
22 See Porter, supra note 20, at 711-13.
23 Id.
24 See id.
25 See, e.g., Burchell & Shad, supra note 1, at 140-41; Patricia E. Salkin, Smart Growth at Century's End: The State of the States, 31 URB. LAW. 601, 604 (1999); Snyder & Byrd, supra note 1, at 3.
26 Snyder & Byrd, supra note 1, at 3.
costs on the community at large.\textsuperscript{36} Construction of single-family homes on lesser-developed land demands levels of public service that often do not exist.\textsuperscript{37}

In addition, some contend that the impacts on the land itself, and on other resources, create secondary impacts on wildlife habitat and water quality.\textsuperscript{38} Sprawl development has also been recognized for its secondary impacts on the social, economic, and aesthetic welfare of surrounding communities.\textsuperscript{39} A major challenge in addressing these secondary costs is in identifying and quantifying them.\textsuperscript{40} The costs to natural resources and other remote costs are often ignored, under-valued, or camouflaged—their connection to suburban growth patterns hidden.\textsuperscript{41} They are also difficult to quantify, even where the causal connections are apparent and the burden on the community is significant.\textsuperscript{42}

1. Direct Costs of Services and Capital Improvements

The direct costs of services are perhaps the most easily recognized costs of sprawl. These include the sewers, roads, wastewater treatment, and other infrastructure that must be extended or enhanced to meet the needs of increased development beyond existing facilities or capacities.\textsuperscript{43} While the costs associated with modest growth have been reasonable in the past, and inexpensive to expand as needed, the costs are rising dramatically because of a combination of unbridled growth and the decline in federal investment and other support for public services.\textsuperscript{44}

2. Costs of Hard to Quantify and Non-Exclusive Amenities

In addition to the direct capital investments that a municipality must make to accommodate growth, communities often bear the costs

\textsuperscript{36} E.g., Burchell & Shad, \textit{supra} note 1, at 140–42 (noting that sprawl creates sizable effects on the consumption of agricultural and ecologically-sensitive land, automobile dependence, and quality of life); Snyder & Byrd, \textit{supra} note 1, at 3 (describing hidden costs of sprawl, such as traffic congestion and the loss of open space).

\textsuperscript{37} See Porter, \textit{supra} note 20, at 710–11; Snyder & Byrd, \textit{supra} note 1, at 8.

\textsuperscript{38} Porter, \textit{supra} note 20, at 710–11; Snyder & Byrd, \textit{supra} note 1, at 8.

\textsuperscript{39} See Porter, \textit{supra} note 20, at 711–12.

\textsuperscript{40} \textit{Id}.

\textsuperscript{41} \textit{Id}. at 712 (citing \textsc{Henry L. Diamond} \& \textsc{Patrick F. Noonan}, \textsc{Land Use in America} 1 (1996)).

\textsuperscript{42} Burchell & Shad, \textit{supra} note 1, at 146.

\textsuperscript{43} E.g., Snyder & Byrd, \textit{supra} note 1, at 10–11.

\textsuperscript{44} \textit{Id}. at 13.
Development outward from central cities is rarely contiguous, and often results in residential and non-residential uses being spatially segregated by long distances and divided into single-use districts. In addition, sprawl consumes open space, undeveloped land, and less-developed land, which is often environmentally sensitive or ecologically significant. This land at the margin of development is generally less expensive and is attractive due to proximity to otherwise developable tracts. Together, these characteristics describe a typical sprawling suburb that is the product of discontinuous development. This type of development "is primarily comprised of one- or two-story single-family residential development on lots ranging in size from one-third of an acre to one acre, . . . accompanied by strip commercial development and industrial parks." This increases the distance between homes and services, and creates an increasing dependence on the automobile. The overall result is a large population, demanding the services of the city, spread throughout a larger area.

B. The Impacts of Sprawl

What is it about this pattern of development that makes it such a challenge and concern for citizens, planners, and legislators? Although many Americans clearly enjoy and seek the lifestyle associated with sprawling patterns of residential development, one theme that regularly emerges is its cost. Identifying and defining the costs of sprawl in this country's metropolitan areas has formed a contentious backdrop to the challenge of shaping the development of those communities. Most commentators recognize that this low-density, spatially discontinuous, and segmented pattern of growth imposes

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28 See Burchell & Shad, supra note 1, at 141. Such development is also called "leapfrog" or "skipped-over" development because suburban areas closer to the central city are circumvented. Id. at 137, 139. Sprawl development, therefore, is not a mere expansion of the dense urban cores, but rather a discontinuous pattern of land uses broken up along an outward spatial path, which makes the provision of services and efficient land use more difficult. Id. at 137, 141.
29 Id.
30 Id.
31 Id. at 137.
32 Burchell & Shad, supra note 1, at 141, 150; Snyder & Byrd, supra note 1, at 11.
33 See Snyder & Byrd, supra note 1, at 11.
34 Burchell & Shad, supra note 1, at 138; Porter, supra note 20, at 711–13.
35 E.g., Burchell & Shad, supra note 1, at 138. Suburban areas have been described as a desirable location for retail stores and other amenities. Commentators have noted that many Americans value various aspects of suburban life, such as, safe gated communities, good schools, restaurants, and parks. See id.
associated with the indirect impacts of development on physical and infrastructure resources used by the general public.45 Lost open space and parks place a burden on the entire community.46 Recreation and visual amenities are vital, as is the function of open space as wildlife habitat.47 Wetlands and streams are directly affected by the increase in impervious surfaces attributable to development.48 This leads to altered water flow and increased runoff—representing a loss of flood control, threats to the water supply, and endangered natural habitat.49 Though difficult to quantify, and not exclusive to individual homes or developments, these resources are directly affected by growth and pose a significant resource cost to the surrounding communities.50

3. Costs of Secondary and Associated Impacts

Sprawl not only alters the physical landscape, but also has corresponding effects on the social and economic patterns of a community.51 These effects have been described by one commentator as the "insidious ... impacts on daily living."52 Suburbanization increases traffic and commuting distances,53 draws economic investment away from cities,54 and segregates classes of individuals within spatial, aesthetic, and even literal boundaries.55 These impacts create secondary costs, such as: (1) the blighting of inner cities and the associated reinvestment or subsidization needed to maintain the quality of life in those communities; (2) air quality problems and the necessary investment in health care for associated respiratory illnesses; and (3) the need to invest in public transit to offset increases in commuter transit.56 The lifestyles of those living in areas characterized by sprawl

45 See id. at 3.
46 Id.; see also Porter, supra note 20, at 711–12 (describing the burden of sprawl on the "diversity, beauty, and health of surrounding landscape").
47 See Porter, supra note 20, at 711; Snyder & Byrd, supra note 1, at 3.
48 Porter, supra note 20, at 710–11.
49 Id.
50 Id.
51 Id. at 711–12.
52 Id. at 711.
53 Id.
54 Snyder & Byrd, supra note 1, at 9–10.
55 Burchell & Shad, supra note 1, at 138–41. Gated communities are a literal example of such boundaries. See id.
create tangible social and quality of life costs, including lost productivity from traffic delays and longer commutes.

Although the pattern of developing suburban areas represents the "sensible choices of many individual households" and offers a lifestyle desired by many Americans, these choices "come at a collective price." The costs described above are generally externalized for the broader community to bear. Although the impacts of growth have been studied for decades, secondary costs have been largely ignored. It is only recently that total-cost accounting has played a role in growth policy.

In addressing the burden of these impacts, commentators, legislatures, planners, and courts have grappled with two key questions. First, how far can we, or should we, go in calculating the true costs and impacts of sprawl? Second, who should be responsible for these costs, the general public, or those profiting from, or living in, these developments? Underlying these concerns is whether the goal should be to recover identifiable costs, or to deter land uses that cause these impacts in the first place. In other words, should the so-called "polluter pays" principle be applied to discourage sprawl in areas less suited for it, or does it simply provide funding for services that allow more growth to occur by paying its way?

C. Addressing Sprawl: Fees as a Smart Growth Tool

Although the roots of sprawl are complex, many have argued that the existing land use policies used by local governments encourage sprawl. They contend that, in pursuit of a larger tax base and economic development, many municipalities devise policies that encourage growth, fostering land consumption and devaluing in-fill de-
velopment. These policies involve zoning for development beyond the carrying capacity of existing infrastructure, and requiring the provision of services necessary to accommodate the new growth.

However, as growth has continued at an unprecedented pace, municipalities have struggled to provide the additional services required and the hidden costs have become more apparent. Recognition that the economic costs of development may represent only a fraction of the total costs to the community has fueled the movement towards “smart growth”—a broad concept that ostensibly addresses suburban growth and its total costs. Smart growth policies are reflected in many state comprehensive plans that attempt to steer growth to the most suitable areas by, for example, limiting new development to existing infrastructure service areas. Despite the growing acceptance of smart growth principles, many communities continue to accommodate growth by providing the essential services and have used other tools to recoup costs. Many have turned to the use of impact fees—charges imposed on new development to recover the costs of necessary services—seeking to have developers internalize the costs of sprawl.

II. IMPACT FEES DEFINED AND CHALLENGED

The term impact fee has been broadly defined to include any “monetary charges imposed by local government on new development to recoup or offset a proportionate share of public capital costs required to accommodate such development with necessary public facilities.” Within this definition, an important distinction exists between those charges that are imposed adjudicatively by a local permitting authority and those identified and calculated legislatively by lo-

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68 See Porter, supra note 20, at 712.

69 See Snyder & Byrd, supra note 1, at 13.

70 See id.

71 Porter, supra note 20, at 720.

72 See id. at 714.

73 See Nicholas & Davidson, supra note 62, at 2; Juergensmeyer, supra note 11, at 417.

74 Nicholas & Davidson, supra note 62, at 2.

cal ordinance. The former are typically assessed on a case-by-case basis as a condition of a permit or other development approval. These are often referred to as "monetary exactions" or "in-lieu fees," and are similar to the dedications of real property municipalities traditionally require to allow for infrastructure improvements. Monetary exactions are simply a required financial dedication to provide for services similar to those dedications of real property provide. They allow for more flexibility by substituting a financial payment where a traditional dedication of land may not adequately address a particular impact.

Fees imposed by local ordinance, on the other hand, are not determined on an ad hoc basis, but rather are calculated to apportion the costs of additional capital facilities required for the new development. These fees are assessed upon all similar developments, often on a per unit or per square foot basis. They ostensibly have the advantage of being applicable to smaller developments where land dedication would not be practical. Moreover, impact fees provide greater flexibility to finance off-site facilities than monetary exactions assessed by an adjudicative body.

Local governments have found that the costs of accommodating rapid growth outweigh the revenue generated by new development. The ability of local governments to provide the necessary services required by new development is exacerbated by a general decline in federal and state financing of infrastructure, such as, roads and other growth-sensitive services. For decades, many communities around

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76 See Holloway & Guy, supra note 75, at 97; Juergensmeyer, supra note 11, at 418–20. In some cases, however, the term “impact fee” is applied only to those uniformly-applied, legislatively-identified costs. Fees assessed by adjudicative agencies are referred to as monetary exactions, non-possessory monetary exactions, or in-lieu fees. See Ehrlich v. City of Culver City, 911 P.2d 429, 436 (Cal. 1996); Juergensmeyer, supra note 11, at 418. In this Comment, the term “impact fee” is generally used to refer to legislatively enacted charges, and the distinction is noted where necessary. See Juergensmeyer, supra note 11, at 418–20.

77 Holloway & Guy, supra note 75, at 96.

78 See Juergensmeyer, supra note 11, at 418.

79 Id.

80 See id.

81 See id.

82 Id. at 419.

83 See id. at 420.

84 See Juergensmeyer, supra note 11, at 420.

85 See Nicholas & Davidson, supra note 62, at 2; Holloway & Guy, supra note 75, at 27.

86 See Nicholas & Davidson, supra note 62, at 2–3 (discussing the decline in road financing as an indicator of the general trend away from public financing of similar
the country have imposed impact fees or exactions on residential, commercial, and industrial developments.87

A. Scope and Applicability of Impact Fees

Currently, many local governments impose impact fees and exactions to recover the costs of a variety of services, including water and sewer infrastructure;88 road improvements to ease traffic congestion;89 parks and recreation facilities;90 and social welfare programs, such as employment and job training, child care, and affordable housing.91 However, as discussed in Part II.A.3 infra, the scope of costs that can be recovered by impact fees is restricted by several legal considerations, including the key regulatory takings tests articulated in Dolan v. City of Tigard92 and in state court decisions assessing the validity of impact fees.93 The case law discusses several tests and standards, but leaves many of the contours undefined. Specifically, the question of which types of improvements, facilities, or services can be covered by a fee is particularly important in addressing the impacts of growth and the issue of who can, and should, bear the cost of new development.94

1. Fees Versus Taxes

One of the primary challenges local governments face when imposing impact fees on new development is that the charges are not in fact fees, but invalid taxes.95 Fees commonly share two characteristics with taxes: (1) they are levied by government on developers as a monetary charge and (2) they are often assessed on a proportional basis, using the number of units built, total floor area, or assessed value of the property.96

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87 Holloway & Guy, supra note 75, at 31.


89 E.g., N. Ill. Home Builders Ass’n v. County of Du Page, 649 N.E.2d 384, 388 (Ill. 1995) (impact fee used to recoup costs of transportation improvements).


91 Holloway & Guy, supra note 75, at 32.

92 See 512 U.S. 374 (1994); discussion infra Part II.A.3.

93 See discussion infra Part II.A.3.

94 See discussion infra Part III.

95 See Nelson, supra note 86, at 544.

96 See supra notes 88–94 and accompanying text.
Whether an impact fee is truly a fee or a tax is significant because local governments do not have an inherent authority to impose taxes. Rather, the authority to tax resides in state government. Without a specific delegation of the taxing power by the state legislature, a local government exaction that has the functional characteristics of a tax will be invalid. When determining whether a particular exaction is a valid fee or an invalid tax, courts assess whether the charge is related to an impact caused by those paying the fee, and the degree to which the fee pays for a particular service used by fee payers, as opposed to a general public benefit.

Valid fees, however, may be distinguished from taxes in several ways. Generally, it is said that fees are used to provide a direct benefit to the fee payer, such as expanded school facilities to accommodate the children of residents in new development. Taxes, on the other hand, are characterized by an imposition of charges to be used for the benefit of the general public. This fee versus tax distinction attracts judicial scrutiny and presents a threshold challenge for impact fees.

For example, in a New Jersey case, Daniels v. Borough of Point Pleasant, the Borough amended an ordinance that imposed a fee for the issuance of building permits. The original ordinance assessed a fee, based on a sliding scale proportionate to the value of the building, which was, in principle, used to pay the salary of the building inspector. The Borough amended the ordinance by changing the as-

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97 E.g., Collier County v. State, 733 So. 2d 1012, 1014 (Fla. 1999); Daniels v. Borough of Point Pleasant, 129 A.2d 265, 266 (N.J. 1957).
98 Collier County, 733 So. 2d at 1014; Daniels, 129 A.2d at 269.
99 Collier County, 733 So. 2d at 1014; Daniels, 129 A.2d at 269.
100 Hollywood, Inc. v. Broward County, 431 So. 2d 606, 611 (Fla. Dist. Ct. App. 1983) (holding that "local governments can shift to new residents the reasonable capital costs incurred on their account").
101 See Collier County, 733 So. 2d at 1017; N. Ill. Home Builders Ass'n v. County of DuPage, 649 N.E.2d 384, 394 (Ill. 1995); see also Hollywood, 431 So. 2d at 611. The Hollywood Court noted:

[L]ocal governments can impose impact fees which do not exceed a pro rata share of the reasonably anticipated costs of capital expansion reasonably required because of the new development so long as the use of the money collected is limited by law to meeting the costs of that capital expansion.

431 So. 2d at 611.
103 See id.
104 See discussion infra Part II.B.
105 Daniels, 129 A.2d at 265.
106 Id. at 265–66.
assessment formula to one based on the square footage of any new construction.\textsuperscript{107} Since the amended ordinance significantly increased the amount of fees assessed, the plaintiff, a homebuilder, challenged it as a form of an illegal tax.\textsuperscript{108} The plaintiff claimed that the purpose of the fee increase was to generate revenue to cover increasing school expenditures rather than offset increased inspection costs resulting from the new buildings.\textsuperscript{109}

The New Jersey Supreme Court held that although local government may impose fees to recoup the costs of its police power regulations and that this revenue may, to some extent, exceed the actual costs incurred, the fees at issue were assessed solely for the purpose of raising revenue.\textsuperscript{110} They were not assessed for the services of the building inspector, but for general revenue to fund school costs.\textsuperscript{111} Although school impact fees have been upheld in several communities, the court in Daniels found that because the fee was originally established for the purpose of defraying the costs of the building inspector, its amended use to generate school funds was inappropriate.\textsuperscript{112} Even though the increased school funding needs were attributable to new growth in the community, including the plaintiff's buildings, the actual costs of the building inspector's services remained the same, while the fees increased to more than 700\% of the actual cost of inspection services.\textsuperscript{113} The court stated that "[t]he philosophy of this ordinance ... that the tax rate of the Borough should remain the same and the new people coming into the municipality should bear the burden of the increased costs of their presence" is "totally contrary to tax philosophy."\textsuperscript{114} The court considered the Borough's alternate use of the increased fees to be an invalid tax because it had no relation to the ostensible purpose of the original fee.\textsuperscript{115}

Similarly, in Collier County v. State, the Florida Supreme Court invalidated a fee collected to offset a variety of basic municipal services because it provided no special benefit to the property owners paying the fees.\textsuperscript{116} The County claimed a shortfall due to an existing tax law

\begin{itemize}
\item \textsuperscript{107} Id. at 266.
\item \textsuperscript{108} Id.
\item \textsuperscript{109} Id.
\item \textsuperscript{110} Id. at 267–68.
\item \textsuperscript{111} Daniels, 129 A.2d at 267.
\item \textsuperscript{112} Id. at 267.
\item \textsuperscript{113} Id. at 266–67.
\item \textsuperscript{114} Id. at 267.
\item \textsuperscript{115} See id.
\item \textsuperscript{116} 733 So. 2d 1012, 1017 (Fla. 1999).
\end{itemize}
which provided that taxes on new improvements could not be assessed until the improvements were substantially completed.\textsuperscript{117} The County claimed that this tax structure meant that many new improvements substantially completed just after the end of the County's taxable year would place an increased burden on county services such as, code enforcement, animal control, libraries, parks, and public works, for the remainder of that year. At the same time, the County's regular \textit{ad valorem} taxes would not be assessed until the end of that year.\textsuperscript{118} The fee was enacted to recover the costs of providing services during the period between the completion of developments and assessment of the general property tax.\textsuperscript{119}

The test used by the court to differentiate between a fee and a tax was a two-part inquiry: (1) does the property paying the fee derive a "special benefit" from the service provided by the assessment?; and (2) was the fee "properly apportioned?"\textsuperscript{120} Because the services paid for with the fee were characteristic of the general services and functions "required for an organized society,"\textsuperscript{121} the court held that the fee payers derived no special benefit and that the fee "ha[d] all the indicia of a tax."\textsuperscript{122} In its holding, the court specifically noted that the first prong of the test is "not satisfied by establishing that the assessment is rationally related to an increased demand for county services," but rather requires a narrower showing that the services funded by the fee provide a "direct, special benefit" to the fee payers.\textsuperscript{123}

By contrast, some courts have adopted a more liberal view towards fees that resemble taxes.\textsuperscript{124} In \textit{Hollywood, Inc. v. Broward County}, the court upheld an ordinance requiring either the dedication of land for parks or the payment of an in-lieu fee.\textsuperscript{125} The ordinance in question gave developers the option of: (1) dedicating land according to a formula of three acres for every one thousand new residents; (2) paying a fee equal to the value of the land that would have otherwise been dedicated; or (3) paying a fee according to a schedule in the

\begin{footnotesize}
\begin{enumerate}
\item Id. at 1015–16.
\item Id.
\item Id.
\item Id. at 1017.
\item Id. (quoting \textit{Lake County v. Water Oaks Mgmt. Corp.}, 695 So. 2d. 667, 670 (Fla. 1997)).
\item \textit{Collier County}, 733 So. 2d at 1017.
\item Id.
\item Id. at 613.
\end{enumerate}
\end{footnotesize}
ordinance. The court found that because this fee was assessed on the basis of population growth, rather than a fixed rate based on land area developed, it was sufficiently tailored to ensure that fee payers only pay for the amount of parkland required to provide adequate services to the new development.

Like the court in Collier County, the Hollywood court used a two-prong standard requiring that a valid fee be reasonably attributable to the new development and that fee proceeds be sufficiently earmarked for the substantial benefit of the new residents. In applying this test, however, the Hollywood court stated that the local government need only demonstrate a "reasonable connection, or rational nexus, between the need for additional capital facilities and the growth in population generated by the subdivision." Because Broward County showed that new parks would be required and that the fees collected would cover only a portion of the total costs to acquire additional parks, the court found that the first prong was satisfied. The court also discerned a reasonable connection between the expenditures of the funds and the benefits accruing to the subdivision, in part, because the ordinance incorporated the requirement of providing a "substantial benefit" into the language of the law, and further required that the new parks paid for by the fee be located within fifteen miles of the platted land. The County supported the reasonableness of this distance by showing that residents travel relatively long distances to take advantage of county parks. The court considered this evidence sufficient in finding that the funds were adequately earmarked for the benefit of the new developments paying the fees.

2. Authority and Due Process

Under the Fifth Amendment to the United States Constitution, local governments must act under state authority to impose impact fees. This authority is usually grounded in one of the following

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126 Id. at 607-08.
127 Id. at 610 (citing Admiral Dev. Corp. v. City of Maitland, 267 So. 2d 860, 861-64 (Fla. Dist. Ct. App. 1972)).
128 Id. at 611.
129 Id.
130 Hollywood, 431 So. 2d at 612.
131 Id.
132 Id.
133 Id.
134 U.S. CONST. amend. V; Nelson, supra note 86, at 543. The Takings Clause of the Fifth Amendment is incorporated against the states through the Fourteenth Amendment.
bases. First, a local government may be granted explicit authority to assess impact fees by state enabling legislation. Enabling legislation authorizing localities to assess impact fees will often detail: (1) specific, growth-sensitive impacts for which a local government may establish fees; (2) the degree of precision required in assessing fees; and (3) the manner in which such fees may be spent. Without explicit enabling legislation, some local governments may find similar authority in broad home rule powers, which often include the authority to set fees and charges for the operation of local facilities. Finally, many local governments rely on their inherent police powers to provide for the health, safety, and welfare of the public as a rationale for imposing impact fees. If existing infrastructure, facilities, or services are maintained at the same levels and new development occurs, local governments argue that the health, safety, and welfare of the public will be jeopardized. Many local governments have identified the impact fee as a method to exercise their regulatory authority to provide additional services and facilities. This power has been successfully used as a justification for the extensive land use regulations employed by communities throughout the United States, from basic zoning to more controversial land use regulations, such as, real property dedications, monetary exactions, and impact fees.

The ability of local government to use the police power to regulate land use and impose impact fees to protect its citizens from the impacts of growth, however, is not absolute. In order to justify an impact fee, government must provide more than a generalized statement of the connection between the development and the exaction required. The question then becomes: what growth-induced im-


135 Nelson, supra note 86, at 543–44.


137 Nelson, supra note 86, at 544.

138 Id.; see, e.g., Tidewater Ass'n of Homebuilders v. City of Virginia Beach, 400 S.E.2d 523, 525 (Va. 1991) (holding that the City's imposition of a water resource impact fee was a proper exercise of the police power and noting that a city "has the right and the duty to protect its water supply").

139 See Holloway & Guy, supra note 77, at 28.

140 See Juergensmeyer, supra note 11, at 417; Nelson, supra note 86, at 541.

141 See Tidewater Ass'n, 400 S.E.2d at 525.


143 Id. at 841 (expressing the majority's lack of confidence that the Commission could "have little difficulty in the future in utilizing its expertise to demonstrate a specific connection between provisions for access and burdens on access" and holding that "the Fifth
pacts are sufficiently vital to the health, safety, and welfare of the public to justify an impact fee? While real property and monetary exactions have long been applied to a wide range of impacts, true fees have been more conservative in the services for which they are used to compensate.\textsuperscript{144}

For decades, exactions were applied to provide open space and other public amenities.\textsuperscript{145} Fees, on the other hand, have been used to provide basic infrastructure.\textsuperscript{146} One possible explanation for this difference is that traditional exactions necessarily relate to direct on-site impacts, whereas fees are appealing because they may be used to collect money for off-site improvements.\textsuperscript{147} In charging for off-site improvements, as opposed to on-site, government may find the ability to justify the fee regulation as a protection of health, safety, and welfare somewhat more tenuous than in the context of traditional exactions.\textsuperscript{148}

The \textit{Hollywood} court suggested that physical infrastructure, services, and facilities are as essential to the public's health, safety, and welfare as sewers, roads, and schools.\textsuperscript{149} As discussed earlier, the court in \textit{Hollywood} upheld an ordinance requiring new development to dedicate real property or pay an in-lieu fee to provide for necessary park space in the community.\textsuperscript{150} In its decision, the \textit{Hollywood} court distinguished a Texas case where an exaction for recreational facilities was invalidated.\textsuperscript{151} The Texas court in \textit{Berg Development Co. v. City of Missouri City} held:

\begin{quote}
While government can clearly require the dedication of water mains and sewers as well as property for streets and alleys, we believe these to be distinguishable from the dedication of property for recreational purposes. The former bears a sub-
\end{quote}


\textsuperscript{145} See Holloway & Gu\textsuperscript{y}, supra note 75, at 31.

\textsuperscript{146} Leitner & Shoettle, supra note 144, at 63-69.

\textsuperscript{147} See Juergensmeyer, supra note 11, at 418.

\textsuperscript{148} See Holloway & Gu\textsuperscript{y}, supra note 75, at 28.


\textsuperscript{150} See \textit{id}.

\textsuperscript{151} \textit{Id}., at 613 (citing Berg Dev. Co. v. City of Missouri City, 603 S.W.2d 273, 275 (Tex. Civ. App. 1980)).
stantial relation to the safety and health of the community while the latter does not.\textsuperscript{152}

In contrast, the \textit{Hollywood} court held:

Open space, green parks and adequate recreation areas are vital to a community's mental and physical well-being. As such, the ability to regulate subdivision development in order to ensure the adequate provision of parks and recreational facilities is a matter that falls squarely within the state's police powers to provide for the health, safety, and welfare of the community.\textsuperscript{153}

As discussed in Part I.B.2 \textit{infra}, the constitutional tests that have evolved to assess the validity of impact fees limit the exercise of the police power, when used to impose impact fees, to those impacts that truly threaten public health, safety, and welfare. Even when health, safety, and welfare are interpreted broadly enough to include a particular impact, a municipality is still required to establish a nexus between the development being regulated and the ostensible impact caused by it.

3. Regulatory Takings

The tension identified by the Florida court in \textit{Hollywood} highlights another limitation of the police power. Even when local government claims authority for a regulation under the police power, the regulation may still be challenged if there is not a proper nexus between the harm being addressed and the regulation imposed.\textsuperscript{154} An impact fee that is imposed with proper authority, and is not an invalid tax, may still be viewed as a regulatory taking.\textsuperscript{155}

Impact fees are generally considered a form of exaction.\textsuperscript{156} They require a monetary payment or real property dedication as a condition on the use of private property.\textsuperscript{157} The power of local government to impose these regulations on private property is qualified by the

\textsuperscript{152} \textit{Berg Dev. Co.}, 603 S.W.2d at 275.
\textsuperscript{153} \textit{Hollywood}, 431 So. 2d at 614.
\textsuperscript{154} See discussion \textit{infra} Part I.B.2.
\textsuperscript{156} See discussion \textit{supra} Part I.B.
\textsuperscript{157} \textit{Id.}. 
Takings Clause, which states that "private property [shall not] be
taken for public use, without just compensation."\textsuperscript{158} This works as a
limitation on the application of the police power to those land use
regulations that are "reasonably necessary to the effectuation of a sub­
stantial public purpose."\textsuperscript{159}

There was no distinct federal, regulatory takings standard ap­
p lied to exaction cases until the Supreme Court directly addressed
exactions in \textit{Nollan v. California Coastal Commission} in 1987, creating a
standard that was later refined in \textit{Dolan v. City of Tigard} in 1994.\textsuperscript{160} Be­
fore \textit{Nollan}, courts analyzed most exactions challenges under existing
takings precedent: employing the \textit{Penn Central} balancing test,\textsuperscript{161} the
two-pronged \textit{Agins} test,\textsuperscript{162} or the per se test of \textit{Loretto v. Teleprompter
Manhattan CATV Corp.}\textsuperscript{163} Although these various takings tests have
been commented on extensively,\textsuperscript{164} a brief summary of background
regulatory takings precedent is instructive.

In \textit{Penn Central Transportation Co. v. City of New York}, a New York
City designation of Grand Central Station as a historic landmark lim­
ited the owner’s ability to alter the structure.\textsuperscript{165} When the city denied
an application to build an office building over the site, the owners
sued, alleging a taking without just compensation.\textsuperscript{166} Balancing several
factors, the Court found that the regulation did not go “too far” in its
purpose of protecting historic structures.\textsuperscript{167} In determining when a
government regulation goes too far, the Court balances the economic

\textsuperscript{158} \textit{U.S. Const. amend. V}; see \textit{Cruse, supra note 155, at 286.}
\textsuperscript{159} \textit{Penn Cent. Transp. Co. v. City of New York}, 438 U.S. 104, 127 (1978); see \textit{Cruse, supra note 155, at 287.}
\textsuperscript{160} Matthew S. Watson, Note & Comment, \textit{The Scope of the Supreme Court’s Heightened
\textsuperscript{161} \textit{Penn Cent.}, 438 U.S. at 136–38 (determining the constitutionality of government
regulation by balancing, among other factors, the legitimacy of the state objective, the
magnitude of the financial impact on the regulated property owner, and the investment­
backed expectations of the owner).
\textsuperscript{162} \textit{Agins v. City of Tiburon}, 447 U.S. 255, 260 (1980) (zoning regulation effects a
regulatory taking if it does not advance a legitimate state interest or denies the property owner
 economically viable use of his land); \textit{Watson, supra note 160, at 194.}
\textsuperscript{163} \textit{Loretto v. Teleprompter Manhattan CATV Corp.}, 458 U.S. 419, 427 (1982) (hold­
ing that a governmentally mandated physical invasion of private property is a per se tak­
ing).
\textsuperscript{164} \textit{See}, e.g., \textit{Watson, supra note 160, at 194.}
\textsuperscript{165} 438 U.S. at 109–12.
\textsuperscript{166} \textit{Id.} at 119.
\textsuperscript{167} \textit{See id.} at 138.
impact on the regulated party, in particular, its investment-backed expectations, against the character of the governmental action. In particular, the Court focuses on how much a regulation invades a particular property right.

Although *Penn Central* is still a valid test for when a regulation goes too far, the Supreme Court supplemented its regulatory takings analysis with an apparently alternative test in *Agins v. City of Tiburon*. In *Agins*, the plaintiffs purchased property that a local zoning ordinance subsequently restricted from intense development. The Court, applying a two-prong test, found that the Tiburon ordinance did not effect a regulatory taking of the plaintiff’s property. The Court stated that a regulatory taking would occur where the regulation “does not substantially advance legitimate state interests or denies an owner economically viable use of his land.” This test has been explained and refined in subsequent cases—the first prong in *Nollan v. California Coastal Commission*, and the second prong in *Lucas v. South Carolina Coastal Council* and subsequent cases.

In *Nollan*, the plaintiffs applied for a required “coastal development permit” from the California Coastal Commission in order to demolish a beachfront bungalow and replace it with a new house. The Commission recommended that the permit be granted on the condition that the Nollans provide a public easement for access across a portion of their property. The asserted purpose for the easement requirement was the Commission’s desire to protect the public’s ability to see the beach—“visual access”—and to prevent a “psychological barrier” to beach access. The Nollans argued that the requirement was unconstitutional.

The Supreme Court recognized that had the easement been required outright, rather than the subject of a permit condition, the

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168 See id. at 124, 129–37.
169 Id. at 130–31.
171 Agins, 447 U.S. at 257.
172 Id. at 260.
175 Nollan, 483 U.S. at 827–28.
176 Id. at 828.
177 Id.
178 Id. at 829.
Commission’s actions would clearly be an exercise of eminent domain, a physical occupation falling under the per se rule established in *Loretto*.\(^{179}\) Because the government demanded the easement as a condition of the permit, however, the Court viewed it as a land use regulation, recognizing that the Court has long held that a land use regulation "do[es] not effect a taking if it ‘substantially advance[s] a legitimate state interest’ and does not ‘den[y] an owner economically viable use of his land.’"\(^{180}\) Even so, the Court held that the easement condition constituted a regulatory taking.\(^{181}\)

The Court agreed that, consistent with its broad interpretation of legitimate state interests, protecting beach access was likely a valid exercise of regulation and that the requirement of a permit to build on the beach, standing alone, would be valid.\(^{182}\) The Court, however, focused more closely on the connection between the interest being protected and the actual conditions imposed.\(^{183}\) Here, the Court found that the Commission’s concern for “visual access” was not sufficiently related to the requirement of an easement.\(^{184}\) Particularly concerned by the government’s ability to extort conditions from a permit applicant, the Court required that the “permit condition serve[] the same governmental purpose as the development ban.”\(^{185}\) The easement condition was, therefore, invalid because it sought to gain for the public something different—direct access to the beach from the interest that gave rise to the condition—namely the Commission’s concern with visual access.\(^{186}\)

In *Dolan*, the Court reiterated the requirement of an “essential nexus” between the “[‘legitimate state interest’ and the permit condition]...”\(^{187}\) and expanded this analysis to include a requirement that the government’s regulation be “roughly proportional” to the impact of the development.\(^{188}\) In *Dolan*, the City of Tigard, Oregon, conditioned the grant of a building permit for the expansion of a hardware store and the paving of its adjacent parking lot on two re-

\(^{179}\) Id. at 831.

\(^{180}\) Id. at 834 (quoting Agins v. City of Tiburon, 447 U.S. 255, 260 (1980)).

\(^{181}\) *Nollan*, 483 U.S. at 841-42.

\(^{182}\) See id. at 834–35.

\(^{183}\) Id. at 838–39.

\(^{184}\) Id.

\(^{185}\) Id. at 837.

\(^{186}\) Id. at 837–39.


\(^{188}\) Id. at 386, 391.
quirements. First, the owner was required to dedicate to the city a strip of land within the 100-year floodplain of a creek bordering the property. Second, the city planning commission required that she grant an easement across part of the property to be used as a pedestrian and bicycle path. The Court found that the City’s interest in protecting the creek from increased storm-water runoff, due to the expansion of the store and pavement of the parking lot, was a legitimate state interest. It also found that there was an essential nexus between the City’s interests in protecting the creek from runoff and limiting development in the floodplain and the required land dedication. In addition, the Court found that “[i]n theory, a pedestrian/bicycle pathway provides a useful alternative means of transportation for workers and shoppers.” Therefore, the interest in reducing potential traffic congestion due to the expansion was also valid.

Although the Court agreed that there were essential nexuses between the development’s impacts on water and traffic and the permit conditions, it did not find that the “degree of . . . exactions demanded . . . [bore] the required relationship to the projected impact of [the] . . . proposed development.” In choosing a standard by which to evaluate this relationship, the Court examined a range of tests employed by state supreme courts in exaction cases. The Court noted that in some states, the only requirement is a “very generalized statement[ ] . . . as to the necessary connection between the required dedication and the proposed development.” At the other end of the spectrum, some states demand a “very exacting correspondence” between the degree of the projected impact and the government’s requirements. Under the latter “specific and uniquely attributable”
test, the exaction must be “directly proportional to the specifically created need” of the development, or it is invalid.200

After careful consideration, the Court found the generalized statement test “too lax”201 and the specifically and uniquely attributable test more stringent than required by the Constitution.202 The Court instead followed a middle ground, crafted by several other state courts, requiring that there be a “reasonable relationship” between the required dedication and the impact of the proposed development.203 To reduce any confusion with the similarly-termed “rational basis” test employed in Equal Protection Clause cases, the Court termed this requirement one of “rough proportionality.”204 The Court further explained that although “[n]o precise mathematical calculation is required[,] . . . the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.”205 While requiring more than a mere generalized link between the impact and the regulation, the Court did not choose a standard that requires an exact fit between the degree of regulation and the amount of impact.206

What is evident after Nollan and Dolan, is that exactions will be subject to a heightened regulatory takings scrutiny and assessed by a two-part inquiry. First, there must be an essential nexus between the legitimate state interest being protected and the regulation;207 and second, the regulation must be roughly proportional to the projected impacts being addressed.208 However, in the context of impact fees, two key characteristics of Nollan and Dolan raise the question of whether this heightened scrutiny is applicable. First, in both cases, the exaction at issue was one requiring a real property dedication, rather than a fee.209 Second, the permit conditions in these cases were determined on an adjudicative basis, rather than by generally applicable ordinances, which represent legislative determinations.210

200 Id. at 389–90.
201 Id. at 389.
202 Id. at 390.
203 Id. at 390–91.
204 Id. at 391.
205 Dolan, 512 U.S. at 389.
206 Id. at 391.
207 Id. at 386.
208 Id. at 391.
210 Dolan, 512 U.S. at 380; Nollan, 483 U.S. at 828.
Several subsequent state cases and a number of scholars have questioned whether the heightened two-prong test articulated in Nollan and Dolan is applicable where the exaction at issue is a true impact fee—a monetary payment required under an ordinance passed by the legislative body.211 Underlying these issues in Nollan and Dolan are the extent to which the governmental requirement threatens a developer's property interests and which costs are properly borne by the public, rather than developers.212

Some courts suggest that the two-prong test articulated in Nollan and Dolan applies to fees and property exactions alike.213 In Homebuilders Ass'n of Dayton & the Miami Valley v. City of Beavercreek, the Ohio Supreme Court addressed the validity of a fee assessed upon new developments in order to fund necessary roadway improvements.214 In finding that Nollan and Dolan applied to this fee ordinance, the court noted:

Although impact fees do not threaten property rights to the same degree as land use exactions or zoning laws, there are similarities. Just as forced easements or zoning reclassifications can inhibit the desired use of property, an unreasonable impact fee may affect the manner in which a parcel of land is developed.215

By contrast, in McCarthy v. City of Leawood, the Supreme Court of Kansas suggested in dicta that a traffic impact fee would not be subject to Nollan/Dolan scrutiny.216 The McCarthy court distinguished the traffic impact fee from the assessment invalidated by the Dolan Court based "on the required dedication of portions of Dolan's property to the city."217 Because there was "no authority for the critical leap which

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211 See, e.g., Watson, supra note 160, at 202 (concluding that the Supreme Court's disposition and the California Court's decision in Ehrlich v. City of Culver City "strongly suggest the proposition that heightened scrutiny applies to monetary as well as physical exactions," but that the courts "distinguished adjudicatively imposed fees from those legislatively enacted").

212 See Dolan, 512 U.S. at 386–87; Nollan, 483 U.S. at 837.


214 See id. at 353.

215 Id. at 355.


217 See id. at 846.
must be made from a fee to a taking," the McCarthy court stated that a fee was not subject to the Nollan/Dolan test.218

One of the most notable cases to address the applicability of the Nollan/Dolan test to impact fees is Ehrlich v. City of Culver City.219 In Ehrlich, the City assessed two fees to a developer seeking to tear down his failed tennis facility and replace it with a condominium development.220 The City conditioned the developer’s approval on his payment of $280,000, in lieu of constructing four tennis courts on the site, to help meet the City’s recreational needs and on the payment of a fee under an “art in public spaces” ordinance.221 The United States Supreme Court granted certiorari and vacated the California decision, remanding the case to the California Court of Appeal immediately following Dolan, for a determination consistent with its holding in that case.222 The appeals court split, and the case was decided by the California Supreme Court.223

In Ehrlich, the court explicitly “reject[ed] the proposition that Nollan and Dolan are entirely without application to monetary exactions,” suggesting that the requirement of fees as opposed to real property does not itself protect the City from Nollan/Dolan scrutiny.224 The court emphasized, however, the distinction between fees that are assessed “generally [or] ministerially” and those that are imposed “on

218 See id.; see also Home Builders Ass’n of Cent. Ariz. v. City of Scottsdale, 930 P.2d 993, 1000 (Ariz. 1997) (distinguishing a water resource development fee from the exaction in Dolan and holding that heightened scrutiny did not apply on the grounds that the City sought “to impose a fee, a considerably more benign form of regulation” than demand a real property dedication as in Dolan); Krupp v. Breckenridge Sanitation Dist., 19 P.3d 687, 692 (Colo. 2001) (distinguishing a “charge” to offset impacts of development from a “dedication of interest in real property” and holding that Nollan/Dolan does not apply to a sanitation plant impact fee).


220 Ehrlich, 911 P.2d at 434–35.

221 Id. The art in public spaces ordinance required new residential development of more than four units as well as all commercial, industrial, and public buildings with a value over $500,000 to provide art work for the project in an amount equal to one percent of the total building value or pay an equal amount in cash to the city art fund. See id. at 435.

222 Ehrlich v. City of Culver City, 512 U.S. 1231 (1994) (mem.).

223 Ehrlich, 911 P.2d at 433.

224 See id. at 444; see also Cruse, supra note 155, at 288 (reading Ehrlich to mean that “Nollan and Dolan not only apply to possessory dedication of real property, but also when local government seeks to exact a monetary fee as a condition of development permit issuance”). Some commentators suggest that the language in Nollan seems to limit the scope of its application to real property exactions, and indeed many lower courts have followed this view. Watson, supra note 131, at 202; see, e.g., McCarthy v. City of Leawood, 894 P.2d 836, 845 (Kan. 1995).
an individual and discretionary basis," stating that *Nollan/Dolan* will apply to the latter.\textsuperscript{225} The court further pointed out that "[i]t is the imposition of land use conditions in individual cases, authorized by a permit scheme which by its nature allows for both the discretionary deployment of the police power and an enhanced potential for its abuse, that constitutes the sine qua non for application of . . . *Nollan* and *Dolan*.\textsuperscript{226}

The court applied the *Nollan/Dolan* standard to invalidate the ad hoc monetary recreation exaction, but refused to apply the heightened scrutiny to the ordinance-driven arts fee.\textsuperscript{227} The California Supreme Court's decision in *Ehrlich* suggests that the application of the *Nollan/Dolan* test is not based on the fee versus property distinction, but on the need for higher scrutiny where the exaction is imposed adjudicatively rather than legislatively.\textsuperscript{228} Some courts have held that where an exaction takes the form of a generally applicable, ordinance-driven, monetary requirement, that the heightened scrutiny of the *Nollan/Dolan* standard does not apply.\textsuperscript{229}

B. The Nexus Requirements Applied in State Impact Fee Cases

A look at how these tests play out in several states helps illustrate the variety of elements and interpretations based on the taxation, authority, and regulatory takings analyses described above.

1. The Strict Taxation Test in Massachusetts: “Particularized Benefit”

In addressing the validity of impact fees, Massachusetts applies a three-pronged standard based on the distinction between a tax and a fee.\textsuperscript{230} The test was developed in 1983 in *Emerson College v. City of Boston*, and most recently applied in *Greater Franklin Developers Ass'n v.*

\textsuperscript{225} *Ehrlich*, 911 P.2d at 444.

\textsuperscript{226} Id. at 439.

\textsuperscript{227} See id. at 447, 450.

\textsuperscript{228} See id.; Davidson, *supra* note 219, at 686; Holloway & Guy, *supra* note 75, at 97–98.

\textsuperscript{229} See *Loyola Marymount Univ. v. L.A. Unified Sch. Dist.*, 53 Cal. Rptr. 2d 424, 434–35 (Ct. App. 1996) (distinguishing *Ehrlich* on the grounds that the legislative nature of a required school development fee put it “within the general category of development fees” for which “the heightened scrutiny standards articulated by the United States Supreme Court in takings clause cases have no application”).

Town of Franklin.\textsuperscript{231} It noted the factors that distinguish valid fees from invalid taxes:

[1] they are charged in exchange for a particular governmental service which benefits the party paying the fee in a manner "not shared by other members of society"; [2] they are paid by choice in that the party paying the fee has the option of not utilizing the governmental service and thereby avoiding the charge; [3] the charges are collected not to raise revenues, but to compensate the governmental entity providing the services for its expenses.\textsuperscript{232}

Applying this standard, the courts in Greater Franklin and Emerson College held that fees assessed by the cities were invalid taxes despite their description as fees.\textsuperscript{233}

In Emerson College, the court addressed a fee imposed by the City of Boston on Emerson College for "augmented fire services."\textsuperscript{234} The City was authorized by state legislation to impose a charge against owners of buildings that, because of size, construction, and other factors, required the City to "employ additional firefighters, deploy additional equipment and purchase equipment different in kind from that required to provide fire protection for the majority of structures."\textsuperscript{235} After explaining the standard discussed above, the court focused on the first prong.\textsuperscript{236}

It emphasized that fees charged to a limited group of individuals are legitimate where the services provided by the fees are "sufficiently particularized."\textsuperscript{237} The court was concerned with the fact that the fee would not only be used to provide resources necessary to protect those structures owned by payers of the fee, "but also the personnel and equipment necessary to safeguard the building's occupants and to prevent the spread of fire to adjacent buildings."\textsuperscript{238} Because the calculation of the fee included the costs of these additional services, the benefits of the fee were not limited to owners of the charged buildings, and this finding led the court to hold that the fee was an

\textsuperscript{231} Id. (citing Emerson Coll. v. City of Boston, 462 N.E.2d 1098, 1105 (Mass. 1984)).
\textsuperscript{232} Id. at 902 (quoting Emerson Coll., 462 N.E.2d at 1105) (brackets in original).
\textsuperscript{233} See Emerson Coll., 462 N.E.2d at 1106–07; Greater Franklin, 730 N.E.2d at 901–04.
\textsuperscript{234} Emerson Coll., 462 N.E.2d at 1100.
\textsuperscript{235} Id.
\textsuperscript{236} Id. at 1104–07.
\textsuperscript{237} Id. at 1106.
\textsuperscript{238} Id.
invalid tax. The court also examined the third prong of the standard, expressing some concern that the cost of fire protection was traditionally included in the property tax assessment, as a public service paid for by general revenues, and in this case was being applied as a special service.

*Greater Franklin* involved a town ordinance that imposed a school impact fee to "ensure[] that development bears a proportionate share of the cost of capital facilities necessary to accommodate such development and to promote and protect the public health, safety and welfare." The court found that the benefit provided by expanded school facilities was not particularized to the fee payers. The court noted that the fees, earmarked for capital improvements, could be used to build a new cafeteria in which students living in older homes not paying the fee would be allowed to eat. Because the fee did not "benefit the fee payer in a manner not shared by others," the court held it was better characterized as a tax. To support its argument, the Town of Franklin cited *St. Johns v. Northeast Florida Builders Ass’n*, in which the Florida Supreme Court found that under the benefits prong of its dual nexus standard, it was not required that every household paying the fee have a child benefiting from the school facilities. However, the court in *Greater Franklin* distinguished *Northeast Florida Builders*, pointing out that the test in that case "requires only that the town satisfy a 'rational nexus,'" and emphasized the heightened level of scrutiny of its own standard.

As in *Emerson College*, the court in *Greater Franklin* was also suspicious of the use of the fee as a "guise" for raising revenue for services that are public in nature, a concern addressed by the third prong of the *Emerson College* standard. Borrowing language from a similar New Jersey case, the court noted that "[t]he philosophy of this ordinance is that the tax rate . . . should remain the same and the new

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239 Id. at 1105–06.
240 See *Emerson Coll.*, 462 N.E.2d at 1107.
241 Id. at 901 (quoting Franklin By-Law § 83–2(2) (1995)).
242 Id. at 902.
243 Id.
244 Id. at 903.
245 Id. (citing *St. Johns County v. Northeast Fla. Builders Ass’n*, 583 So. 2d 635, 639 (Fla. 1991)).
246 *Greater Franklin*, 730 N.E.2d at 902 (quoting *Northeast Fla. Builders*, 583 So. 2d at 637).
247 Id. (citing *Emerson Coll. v. City of Boston*, 462 N.E.2d 1098, 1102 (Mass. 1984); *Daniels v. Borough of Point Pleasant*, 129 A.2d 265, 267 (N.J. 1952)).
people coming into the municipality should bear the . . . increased cost of their presence.'" The Greater Franklin court agreed with the New Jersey court that this approach was contrary to tax policy and an invalid use of the fee.

2. Florida Reaffirms a Strict Standard: Volusia County v. Aberdeen at Ormond Beach, L.P.

The Florida Supreme Court revisited school impact fees in May 2000 in Volusia County v. Aberdeen at Ormond Beach, L.P. In Aberdeen, the owners of a mobile home park with restrictive covenants prohibiting children from living there, challenged a school impact fee as applied to their property. The court cited its continued application of the dual nexus standard developed in Hollywood, Inc. v. Broward County in 1983. The standard requires that there be a "reasonable connection between (1) 'the need for additional facilities and growth in population generated by the subdivision' and (2) 'the expenditures of funds and benefits accruing to the subdivision.'" The court reinforced that fees must "be spent to benefit those who have paid the fees," and that in that case it invalidated the fee "because it did not provide a unique benefit to those paying." Relying on dicta in Northeast Florida Builders, Volusia County argued that, in applying the dual nexus test, the court was bound to assess needs and benefits based on countywide growth.

The court, however, stated that the test in Florida was based not on countywide growth, but rather on the needs created by, and benefits accruing to, a specific subdivision or fee payer. Allowing countywide growth demands to satisfy the fee nexus would "eviscerate

248 Id. (quoting Daniels, 129 A.2d at 267).
249 Id.
250 Volusia County v. Aberdeen at Ormond Beach, L.P., 760 So. 2d 126, 128 (Fla. 2000) (decided just over a month before the Massachusetts Appeals Court's decision in Greater Franklin).
251 Id.
254 Id. (quoting St. Johns County v. Northeast Fla. Builders Ass'n, 583 So. 2d 635, 639 (Fla. 1991)).
255 Id. (quoting Collier County v. State, 733 So. 2d 1012, 1019 (Fla. 1999)).
256 See Aberdeen, 760 So. 2d at 134.
257 See id. at 134.
the substantial nexus requirement."258 It is this nexus requiring fees to "confer a special benefit on feepayers 'in a manner not shared by those not paying the fee,'" the court stated, that distinguishes fees from invalid taxes.259

Applying the nexus test in *Aberdeen*, the court held that the school impact fee was invalid as applied to the age-restricted mobile home park.260 The fee violated the first prong of the test because the court could not find any evidence that the homes would create a specific need for additional school facilities.261 Although Volusia County argued that there was a possibility that an adult in the park could attend school in some capacity, the court agreed with the trial court's conclusion that the rational nexus requires "more than a possible or incidental impact on the need for schools."262 With regard to the second prong, the court also found no nexus between the expenditure of fees and specific benefits to the fee payers.263 Because no children could live at the park, the fees would not be spent for their benefit, but rather for the benefit of children in other developments.264 The County also argued that the schools provided a benefit to the residents of the park as emergency shelters.265 However, the court found that the "tangential benefit of having places of refuge in natural disasters . . . [was] too attenuated to demonstrate a substantial nexus."266 Because the park neither contributed to the need for schools, nor benefited from their construction, the court held the fee invalid as applied.267

The strict nexus test, requiring a specific need rather than a countywide need, was also applied by the Illinois Supreme Court in *Northern Illinois Home Builders Ass'n v. County of Du Page*.268 The court applied the *Nollan/Dolan* test, but under the stricter "uniquely attributable" standard, the court held that a fee for services made necessary by the "total activity of the community" would be invalid.269 Similarly,

258 Id. at 135.
259 Id. (quoting Collier County v. State, 733 So. 2d 1012, 1019 (Fla. 1999)).
260 Id. at 136–37.
261 Id. at 136.
262 Aberdeen, 760 So. 2d at 136 (quoting the trial court's decision).
263 Id. at 136.
264 Id.
265 Id.
266 Id.
267 Id.
the court held that the fee in that case failed the second prong because the funds could be used for areas outside the district in which the fees were collected.\textsuperscript{270}

3. More Liberal Readings of the Nexus Requirements

Several states apply standards with elements similar to those in the strict taxation tests and \textit{Dolan}-based regulatory takings standards. However, in a number of these states, courts have allowed a more liberal application of the nexus requirements, in particular, loosening the requirement that the fees be used to provide direct benefits to those paying them. For example, in \textit{Home Builders Ass'n of Central Arizona v. City of Scottsdale}, the Supreme Court of Arizona addressed the use of impact fees to pay for future water needs.\textsuperscript{271} In that case, the City imposed on new developments a water resources fee to pay for additional water supplies necessitated by the area's unsustainable use of existing supplies.\textsuperscript{272} The trial court read into the enabling statute a requirement that the fee provide a direct benefit to the developers.\textsuperscript{273} In reversing the trial court's decision, the Arizona Supreme Court noted that the statute specifically refrained from requiring a direct benefit.\textsuperscript{274} It stated that such a requirement

\begin{quote}
would be incompatible with the nature of the development fee . . . . Development or impact fees are designed to assist in raising the capital necessary to meet needs that surely will arise in the foreseeable future but whose precise details may not at the outset be quite clear. To require more fixed and certain plans would make it difficult, if not impossible, to prepare in advance for the consequences of continued growth.\textsuperscript{275}
\end{quote}

The court did, however, find that the statute requires the fee to result in \textit{some} benefit to the developer.\textsuperscript{276}

Although it determined that \textit{Dolan} was inapplicable as a test for the fee, the court applied a dual-nexus test derived from "state cases [that] have produced a widely accepted standard for assessing the va-

\begin{footnotes}
\textsuperscript{270} \textit{Id.} at 390.
\textsuperscript{271} 930 P.2d 993, 997, 998 (Ariz. 1997).
\textsuperscript{272} \textit{Id.} at 994.
\textsuperscript{273} \textit{Id.} at 996–97.
\textsuperscript{274} \textit{Id.} at 997.
\textsuperscript{275} \textit{Id.}
\textsuperscript{276} \textit{Id.}
\end{footnotes}
lidity of these fees." The Arizona court adopted a dual-nexus standard that required: (1) a factual relationship between the fee and the need created by the development and (2) a reasonable relationship between the nature and extent of the fee and the portion of the public burden created by the development. The court found that the legislature adopted the water fee statute in light of this case law and held that the benefit standard only requires that the fee "bear a reasonable relationship 'to the community burden.'"

Applying the dual-nexus requirements, other states have also allowed a more flexible approach to the benefit criterion. New Jersey, for example, has applied a test "'grounded on considerations of fundamental fairness and constitutional doctrine.'" The test requires that services provided by a fee be a "direct consequence of the development" and that there be a nexus between the cost of services and benefits conferred on the subdivision. When applying this standard, however, the court has recognized that "land-use principles cannot be applied with exactitude" and that these prongs require a rational nexus, not a mathematical certainty. The court in F & W Associates v. County of Somerset emphasized that this standard was intended to ensure that developers did not pay a disproportionate share of the cost of improvements that benefit the general public. The mere presence of benefits for the general public, however, would not necessarily invalidate the fee.

III. THE UTILITY OF IMPACT FEES FOR GROWTH MANAGEMENT

A. What Can Fees Internalize? State Tests Generally

Consideration of impact fees over the past several decades has developed a robust and somewhat inconsistent body of case law. The

278 Id. at 997.
279 Id. at 998 (quoting ARIZ. REV. STAT. ANN. § 9-463.05 (West 2002)).
281 Id. (quoting Holmdel Builders Ass'n v. Township of Holmdel, 583 A.2d 277, 287 (N.J. 1990)).
282 Id.
283 Id. ("For example, the assessment should not be invalidated simply because there may be a residual benefit conferred to the general public in its use of the off-tract road improvements.").
284 Id. at 487.
doctrine that emerges from the existing state and federal cases illustrates the primary legal challenges faced by impact fees: (1) lack of authority; (2) illegal tax; and (3) uncompensated, regulatory takings.\textsuperscript{285} Where the Nollan/Dolan analysis is applied, the test requires a nexus between the impact and the fee demanded, and a rough proportionality between the fee and the impact.\textsuperscript{286} In a regulatory takings analysis, if the Nollan/Dolan test is inapplicable, the deferential Agins standard applies and most exactions would pass constitutional muster.\textsuperscript{287} However, as in the state cases discussed earlier, even where the Nollan/Dolan test is not applied, most state courts supplement their traditional analysis with a test based on the principles articulated in Nollan v. California Coastal Commission and Dolan v. City of Tigard: essential nexus and rough proportionality.\textsuperscript{288}

Although the various state tests used to assess the validity of impact fees often share almost identical elements, their application is far from uniform. The individual state's interpretation of the nexus requirements, and the degree of exactitude they require, has a profound affect on the range of impacts that are recoverable through impact fee ordinances.\textsuperscript{289} The needs and benefits tests often applied in impact fee jurisprudence reflect the nexus and proportionality elements of the combined Nollan/Dolan test, but with subtle and important differences.\textsuperscript{290}

1. The Nollan or "Needs" Prong

Nollan and Dolan articulate a two-pronged standard that requires an exaction to be related in purpose to the harm it is said to address, as well as be proportional to that harm.\textsuperscript{291} The first prong of the Nollan/Dolan analysis focuses on the essential nexus between the impact and the exaction—for example, between the building of a parking lot and the exaction of land to provide a buffer for the increased runoff.\textsuperscript{292} States that employ a needs prong similar to a Nollan analysis,

\textsuperscript{285} See discussion supra Part II.A.1-.3.


\textsuperscript{287} See Dolan, 512 U.S. at 385; Erhlich v. City of Culver City, 911 P.2d 429, 447 (Cal. 1996); discussion supra Part II.A.3.

\textsuperscript{288} See discussion supra Part II.B.

\textsuperscript{289} See id.

\textsuperscript{290} See id.

\textsuperscript{291} See Dolan, 512 U.S. at 391; Nollan, 483 U.S. at 837.

\textsuperscript{292} See Nollan, 483 U.S. at 837.
require the entity bearing the burden of an exaction to have created some need for the exaction. 293

The court's approach to school fees in Volusia County v. Aberdeen at Ormond Beach, L.P. represents perhaps the strictest application of the needs prong. 294 There the court held that the test was not met in the case of a mobile home park that did not allow child residents, because a fee was unnecessary to recover costs of children residing in the park attending local schools. 295 There, the County's argument that the development was part of a countywide growth boom, which necessitated additional school facilities, failed because the court still required that a particular development create a specific need. 296 It was possible, therefore, to distinguish the school issue from other impacts because, on the particular facts of Aberdeen, there was only a remote possibility that the school would be burdened by additional students from the plaintiff's development. 297 The main issue, then, was whether the generalized impact of countywide growth to which the development contributed could be the basis for satisfying the needs prong, and the court held that it could not. 298

Thus, under the Aberdeen interpretation of the needs prong, there must be more than a minor impact caused by the development. 299 This merely reaffirms, however, the established nexus test from Nollan; the fee must seek to recoup costs to provide for a need that the development played a role in creating. 300 In fact, as long as there is something more than a "possible or incidental impact," most courts appear to find a nexus sufficient to satisfy the first prong analysis. 301 The Florida Supreme Court made this clear in its earlier decision in St. Johns County v. Northeast Florida Builders Ass'n, finding that the school impact fee there did meet the first prong. 302 The distinction between Aberdeen and Northeast Florida Builders is that, in the latter, at least some of the new units in the subdivision might over time

293 See discussion supra Part II.A.3.
294 See 760 So. 2d 126, 134–35 (Fla. 2000).
295 Id. at 136.
296 See id. at 135.
297 See id. at 136.
298 See id. at 135–36.
299 See id. at 134–35.
300 See Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 837 (1987); discussion supra Part II.
house school-aged children, who would require the county to provide the needed increased school capacity.\textsuperscript{303}

In \textit{Northern Illinois Home Builders Ass' n v. County of Du Page}, an Illinois court pointed out that impact fees are valid in order to fund services that are required by a developer's activity, but that fees are an invalid mechanism for funding needs created by the "total activity of the community."\textsuperscript{304} This approach highlights a fundamental challenge in evaluating impact fees imposed by rapidly growing communities: the line between a developer's impacts and those of the community as a whole is rarely clear. One of the defining characteristics of sprawl is that the aggregate impact of many individual activities produces a profound effect on the needs of the community as a whole.\textsuperscript{305} Moreover, where a previously undeveloped area experiences rapid growth, it may be difficult to distinguish the impacts of individual development from a prevailing pattern of growth that defines the entire community.

2. The Dolan or "Benefits" Prong

Although the needs prong is generally deferential, so long as the fee seeks to address a legitimate governmental interest, the benefits prong is where most impact fees fail.\textsuperscript{306} Again, like the needs or Nollan prong, the benefit prong employed by many states closely parallels the test laid out by the Supreme Court in Dolan.\textsuperscript{307} Under Dolan an exaction must be roughly proportional to the projected impact of the development.\textsuperscript{308} The underlying premise is that if the exaction is proportionate to the impact, then the landowner is protected from paying more than his fair share of the costs.\textsuperscript{309} If the landowner pays only his share, then he is not being unfairly required to bear a private burden for the benefit of the general public.\textsuperscript{310} Thus, the benefit-side approach used by some states and Dolan's rough proportionality requirement both appeal to concepts of fundamental fairness.

\textsuperscript{303} See id. at 638.
\textsuperscript{304} See 649 N.E.2d 384, 390 (Ill. 1995).
\textsuperscript{305} See discussion supra Part I.B.
\textsuperscript{306} See discussion supra Part II.A.3.
\textsuperscript{307} Id.
\textsuperscript{308} See Dolan v. City of Tigard, 512 U.S. 374, 391 (1994); discussion supra Part I.B.
\textsuperscript{310} See id.
However, the two approaches do not necessarily lead to identical analyses or results. Under a Dolan rough proportionality analysis, a fee is valid where the amount charged reasonably corresponds to the impacts from the development it seeks to address. In contrast, in a benefit-side approach, courts are concerned not only with how much benefit is being extracted by the fee, but also to whom that benefit is being provided. It is at this point that the distinction between taxes and fees influences the analysis. Although Dolan does not address who benefits from a proportionate exaction, courts applying the benefits test to distinguish a fee from an invalid tax look to whether the benefit is provided to the payer of the fee rather than to the general public. This portion of the inquiry derives from the state taxation tests, not from Dolan. In a pure Dolan regulatory takings analysis, the benefit issue does not affect the rough proportionality prong.

In evaluating impact fees, most states, however, either apply a distinct taxation test, which does consider who benefits, or the aggregate, two-prong needs-benefit test, which incorporates elements of both the Nollan/Dolan and taxation tests. As the Supreme Court discussed in Dolan, states applying these tests have a history of wide-ranging interpretations of the proportionality or nexus required to establish a valid exaction.

In addressing the taxation issue, distinct from the regulatory takings issue, Massachusetts cases are among the strictest applications of the benefit analysis. The restrictive precedent established in Emerson College v. City of Boston suggests that a fee will not be valid in Massachusetts so long as it provides any possibility of a benefit running to those not paying the fee. Using language that appears in impact fee cases from other states, the Massachusetts courts demand that a fee provide a benefit “particularized” to the fee payers and “not shared by other

311 See Dolan, 512 U.S. at 391.
312 See, e.g., Volusia County v. Aberdeen at Ormond Beach, L.P., 760 So. 2d 126, 131, 135–36 (Fla. 2000); F & W Assocs., 648 A.2d at 487.
313 See Aberdeen, 760 So. 2d at 135.
314 See discussion supra Part II.A.1.
315 Dolan, 512 U.S. at 286 (demonstrating that the two tests are separate and distinct).
316 Compare Greater Franklin Developers Ass’n v. Town of Franklin, 730 N.E.2d 900, 901–02 (Mass. App. Ct. 2000) (applying an impact fee test based on the taxation limitations), with Aberdeen, 760 So. 2d at 131, 135 (applying a two-pronged standard based on need and benefits related to the Nollan and Dolan analyses).
318 See id. at 391.
319 See discussion supra Part II.B.1.
members of society." Applying this standard to the fire protection and school fees in *Emerson* and *Greater Franklin Developers Ass'n v. Town of Franklin* respectively, the court took a literal approach and invalidated both fees because of the possibility of a benefit accruing to general public.\(^{321}\)

The Florida Supreme Court used almost identical language in its impact fee cases that invalidated two different school fees and a general services fee.\(^{322}\) The fee in *Collier County v. State* was to be used for a variety of services identified by the county as "growth-sensitive." The court invalidated the fee, in part, because the county provided no evidence of a rational relation between the need for services and the new development, but also because the fees would provide no direct benefit to those paying the fee that would not be shared by others.\(^{324}\) The court in *Collier County* seemed particularly concerned by the general and public nature of the services for which the fee was imposed.\(^{325}\)

Because the services that are required by increased growth are often the same as, or similar to, those that are thought of as public rather than private services, courts may be reluctant to allow fees to fund them, particularly in states following a strict benefit approach. Along these lines, the court in *Northeast Florida Builders* reached a similar result as the Massachusetts court in *Greater Franklin*.\(^{326}\) The court in *Northeast Florida Builders* found that non-paying residents might send children to schools funded by the fee, and that no fee could be imposed for school funding until "substantially all of the population" in the county was subjected to paying it.\(^{327}\) In *Aberdeen*, the court reiter-

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\(^{321}\) See discussion supra II.B.1.

\(^{322}\) See Volusia County v. Aberdeen at Ormond Beach, L.P., 760 So. 2d 126, 136–37 (Fla. 2000); Collier County v. State, 733 So. 2d 1012, 1019 (Fla. 1999); St. Johns County v. Northeast Fla. Builders Ass'n, 583 So. 2d 635, 639 (Fla. 1991).

\(^{323}\) Collier County, 733 So. 2d at 1015–16. The fee funded certain "growth sensitive" services, including: the office of the sheriff, elections, code enforcement, courts and related agencies, animal control, libraries, parks and recreation, public health, medical examiner, public works, and support services. Id.

\(^{324}\) See id. at 1018–19.

\(^{325}\) See id.

\(^{326}\) See discussion supra Part II.B.

\(^{327}\) Northeast Fla. Builders, 583 So. 2d at 639. However, the court is not concerned that some of those paying the fee will not directly benefit from it—by not sending their children to the school for which they theoretically paid. In fact, the court suggests that this
ated that the substantial nexus element of the benefit prong requires that a fee provide a benefit to the payers that is not shared by others, otherwise the fee will be struck down as an invalid tax.328

The "specific and uniquely attributable" test applied in *Northern Illinois Home Builders v. County of Du Page*, is another limiting variation of the benefit prong, but one that is potentially less restrictive than the Massachusetts "particularized benefit" test.329 In order to satisfy the "specifically and uniquely attributable" test, the town can only: (1) "impose impact fees for the road improvements made necessary by the additional traffic generated by new development ..."; and (2) "the new development paying the impact fee must receive a direct and material benefit from the improvement financed by the impact fee."330 Thus, the specific and uniquely attributable test requires a precise proportionality, and requires that the fee be spent to provide improvements that are sure to benefit the payers, but does not seem to be violated if others may also benefit. On the other hand, fees cannot be used to provide any benefits that will not be enjoyed by the fee payers. In *Northern Illinois Home Builders*, the court upheld an ordinance that ensured fee funds would be spent on road improvements within the payer's district, but unlike in *Emerson, Franklin*, or the Florida cases, the possibility or even likelihood of other members of the public receiving some benefit—here the roads in the payer's district—did not render the fee invalid.331

Other states also allow the general public to derive some subsidiary benefit from the services provided by fee proceeds, so long as some benefit is provided to the fee payers.332 How much benefit, or how direct or material it must be, does vary. With respect to the proportionality question, most states recognize, as in *Dolan*, that mathematical precision is not feasible nor required, so long as the fee is

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328 See *Aberdeen*, 760 So. 2d at 135.

329 See discussion *N. Ill. Home Builders Ass'n v. County of Du Page*, 649 N.E.2d 384, 389–90 (Ill. 1995); see also *Pioneer Trust & Sav. Bank v. Vill. of Mount Prospect*, 176 N.E.2d 799, 802 (Ill. 1961) (establishing the rule that exactions are permissible where the developer is required to provide improvements necessitated by his own facility, but are not permissible for improvements made necessary by "the total activity of the community").


331 See discussion *supra* Part II.B.

332 See id.
roughly proportional to the impact. In F & W Associates v. County of Somerset, the New Jersey court acknowledged that fee payers should not pay for a disproportionate share of benefits that may be enjoyed by the general public, while acknowledging that this proportionality cannot be precisely computed. As the Northern Illinois Home Builders court implied, the court in F & W Associates stated explicitly that a fee "should not be invalidated simply because there may be a residual benefit conferred to the general public in its use of the off-tract road improvement." The F & W Associates and Northern Illinois Home Builders approaches are clearly more lenient than the tests used by the Massachusetts and Florida courts. In both cases, however, the service provided by the fee was primarily for the benefit of the fee payers, and the courts were willing to tolerate some "residual benefit," or incidental use, by the general public.

Surprisingly, this does not necessarily guarantee similar treatment of more general services, such as those addressed in Collier County. If the New Jersey or Illinois courts were faced with a fee to fund animal control, the sheriff's office, or other growth-sensitive services, it is unclear whether these would be upheld as providing a benefit to the fee payers, regardless of a "residual benefit" to non-payers, or if it would be invalid as a wholly public benefit—the cost of which falls disproportionately on the new development.

Although the middle path of rough proportionality chosen by the United States Supreme Court in Dolan is considered a heightened standard when compared with the highly deferential Agins, Penn Central, and Loretto tests, it is still substantially more deferential than the strict taxation tests. So long as fee proceeds are earmarked for a specific purpose, kept in a separate account, and spent on the thing that is reasonably related to the impact concerned, courts applying the Dolan standard will generally uphold the fee. However, the Dolan standard represents only the regulatory takings component of the impact fee tests applied in several states. When Dolan is merged with the strict taxation standard, used to distinguish fees from taxes, the

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334 Id.
335 Id.; see N. Ill. Home Builders, 649 N.E.2d at 390.
337 See discussion supra Part I.B.1.
339 See discussion supra Part III.A.2.
benefits prong is more restrictive. As applied in Massachusetts and Florida, the benefits prong restricts the use of impact fees to services that provide an exclusive benefit to those paying the fee, and effectively precludes all but the most basic growth-sensitive services. Most services that provide tangential benefits to the general public would require, as suggested by the court in Northeast Florida Builders, a fee to be applied county-wide, thus defeating the purpose of a development-specific fee.

Similarly, in a state following Illinois' "specifically and uniquely attributable" approach, the use of impact fees to address growth might also be severely limited. Indeed, if fees are established to address impacts of growth, then they will target impacts common to many developments that, in the aggregate, impose costs on the community. To insist that those impacts be uniquely attributable to an individual development may be logically inconsistent with the nature of sprawl—namely that it is the collective force of numerous developments that effects an external cost on society.

**B. Specific Costs**

Although the validity of impact fees will depend primarily on the standard applied in the particular state, some generalizations can be made about the legal challenges faced by certain types of impact fees. Different levels of scrutiny employed by state courts may affect the use of impact fees to address the different types of growth impacts.

1. Direct Infrastructure Costs: Sewers and Roads

The best candidates for successful impact fees are those that address the impacts of development on basic infrastructure and services. New developments require the provision and expansion of essential capital facilities, such as roads and wastewater treatment, which are necessary to prevent the new growth from creating detrimental

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340 See id.
341 See, e.g., Collier County v. State, 733 So. 2d 1012, 1015–16 (Fla. 1999); Emerson Coll. v. City of Boston, 462 N.E.2d 1098, 1105 (Mass. 1984).
344 See discussion supra Part I.
345 See discussion supra Part II.B.
impacts on public health, safety, and welfare. Charges for road improvements are a common target for impact fees. Generally, these are successful when some attempt is made to calculate the proportionate share attributable to each new development and where the fees are earmarked for specific road projects in or around the new development.

Thus, in *F & W Associates v. County of Somerset*, the court upheld the imposition of charges for off-tract road improvements, finding that they satisfied the required rational nexuses, largely because the ordinance included a formula for calculating each development's prorata share. Similarly, in *Northern Illinois Home Builders Ass'n v. County of Du Page*, the court upheld a traffic fee ordinance because it contained explicit language to ensure that funds were spent in the district in which the fees were collected, whereas it invalidated an earlier version of the ordinance, which did not have similar safeguards. Even where fees are used on a larger scale than merely to build the roads immediately adjacent to a new development, such as constructing a "new transportation infrastructure . . . to meet increased traffic needs," courts may uphold the fees. Applying the Nollan/Dolan test, the court in *Home Builders of Dayton & the Miami Valley v. City of Beavercreek* upheld a transportation fee, as the court did in *F & W Associates*, and *Northern Illinois*, because the defendant showed that it had done an analysis of the required road facilities in each of several transportation districts, and applied a methodology for allocating those costs to new developments.

A similar fee, however, was invalidated by the Minnesota Supreme Court in *Country Joe, Inc. v. City of Eagan*. In *Country Joe*, the court focused on the tax/fee distinction and held that the alleged fee was in reality a revenue-raising measure and, thus, making it an illegal tax. Like the fees in *Home Builders of Dayton*, the fees in *Country Joe* were to be used to improve the general transportation infrastructure. Unlike the facts in *Home Builders of Dayton*, however, the funds were col-

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350 See id. at 356–57.
352 See id. at 686.
353 See id. at 682.
lected from all new development in the city and placed in a general road improvement fund. Thus, there was no connection between the expenditure of impact fee proceeds from the general fund and the impacts attributable to the new developments. Most of the successful road fee cases involve the apportionment of fees based on impact districts, or specific developments, rather than a blanket citywide fee and corresponding fund.

Wastewater treatment is another essential and direct service to development. With few exceptions, new homes produce additional wastewater. Because wastewater treatment facilities have finite capacity, overburdened treatment plants pass on effluent to receiving bodies of water with detrimental results. In Krupp v. Breckenridge Sanitation District, for example, the Colorado Supreme Court upheld a fee charged to new homes for the expansion of wastewater infrastructure because the fee was “reasonably related” to the impacts of the new development. Unlike many other impact fee cases, the court in Krupp determined that the Nollan/Dolan test was inapplicable. Even though the fee was used for general wastewater infrastructure, the District’s use of a study to identify the capacity required by the new development helped convince the court that the fee was related to the legitimate interest of providing adequate wastewater treatment.

In City of Tarpon Springs v. Tarpon Springs Arcade Ltd., a Florida court invalidated a similar wastewater and sewer fee, but only because the ordinance provided no guidance for the building official to adjust the fee based on the particular impacts of a renovated home or to provide credits where sewer impacts have been reduced. Tarpon Springs Arcade again shows Florida’s heightened concern with the particularization and proportionality element of an impact fee. This case, however, suggests a greater willingness to uphold a fee where a formula or some individual assessment can be applied to ensure that there is, in fact, an impact that warrants the fee.
2. Non-Exclusive Costs: Parks, Water Supply, and Schools

Impact fees imposed to mitigate the costs of second-tier services face tougher challenges and are less likely to meet the needs/benefit tests applied in several states. These services are characteristically more "public" in nature. Moreover, second-tier services, such as, school expansion, park facilities, and water supply infrastructure, are more attenuated from traditional notions of services required to maintain the health, safety, and welfare of the community. The application of the particularized benefit analysis to the school fee in *Greater Franklin Developers Ass’n v. Town of Franklin*, illustrates the largely insurmountable standard used in Massachusetts. Unlike *Volusia County v. Aberdeen at Ormond Beach, L.P.*, it was clear in *Greater Franklin* that new development was creating a need for new school facilities. Nonetheless, the Massachusetts court invalidated the school impact fee because non-fee payers’ children would use the same facilities. In *Aberdeen*, the court rationalized that, because the plaintiffs represented an age-restricted mobile home park where no school-aged children could live, the park should not be held to pay for the new facilities. But, in *Greater Franklin*, the Massachusetts court instead looked to the benefits prong and emphasized that the new development should not bear the cost of a service from which some members of the general public might benefit.

The school issue illustrates the challenge of imposing impact fees to pay for second-tier services; namely, the greater difficulty in identifying precisely who benefits. In the case of roads and sewers, it is easy to see the direct benefit to the new developments for which they are provided. As the services provided by the fee become more generalized, however, the chance of a public benefit increases. Although

the elements are guaranteed to be satisfied. It is where costs of services must be generalized from the impacts of development that the court is reluctant to uphold the fee ordinance. See id.

363 For example, in *Northeast Florida Builders*, the court noted: "[A]n impact fee to be used to fund new schools is different from one required to build water and sewer facilities or even roads. Many of the new residents who will bear the burden of the fee will not have children who will benefit from the new schools." *St. Johns County v. Northeast Fla. Builders Ass’n*, 583 So. 2d 635, 638 (Fla. 1991).

364 See discussion *supra* Part I.B.2.


366 See id. at 902.

367 See discussion *supra* Part I.B.2.

368 See *Greater Franklin*, 730 N.E.2d at 902.

369 See id.
some courts have allowed a “residual benefit,” others state courts, like those in Massachusetts, have severely limited the scope of impact fees by requiring the benefit to be completely exclusive to fee payers.\textsuperscript{370} In \textit{Collier County v. State}, the Florida Supreme Court similarly invalidated an attempt to recover fees for more generalized services like police, animal control, and recreation.\textsuperscript{371} In \textit{Collier County}, as in \textit{Greater Franklin}, whether the growth created the shortfall in funding was not at issue; rather, the fee was invalidated because the services did not provide a direct benefit to the new development in a manner not shared by others in the community.\textsuperscript{372} Even where the pressures of new development created a need for increased services, the developers could not be held to pay for services that were not exclusive to their development.\textsuperscript{373}

Surprisingly, in an earlier Florida case, \textit{Hollywood, Inc. v. Broward County}, the court did uphold an impact fee used to expand a countywide park system to accommodate new development.\textsuperscript{374} This case was decided in 1983, before \textit{Nollan v. California Coastal Commission} or \textit{Dolan v. City of Tigard}, but applied a similar regulatory takings analysis.\textsuperscript{375} In an impressive move, the court explicitly disagreed with the notion that sewers and roads are directly related to health, safety, and welfare, but park lands are not.\textsuperscript{376} Moreover, the court upheld the fee because the County’s method of collecting the fee was based on a “reasonable” standard of a certain amount of parkland per capita.\textsuperscript{377} The park facilities financed by the fee thus directly corresponded to the number of new residents.\textsuperscript{378} In addition, the court was persuaded by evidence that the fees collected would be less than the total expense for new parks.\textsuperscript{379} Unlike the court in the later \textit{Collier County} case, the court in \textit{Hollywood}, a case decided sixteen years earlier, had evidence that the funds would be earmarked for the needed parks.\textsuperscript{380} The \textit{Hollywood} court, perhaps applying a more lenient standard, found that

\begin{itemize}
\item \textsuperscript{370} See id.
\item \textsuperscript{371} See discussion \textit{supra} Part II.A.2.
\item \textsuperscript{372} See id.
\item \textsuperscript{373} See id.
\item \textsuperscript{375} See id. at 611–12.
\item \textsuperscript{376} Id. at 613–14.
\item \textsuperscript{377} Id. at 612–13.
\item \textsuperscript{378} Id. at 612.
\item \textsuperscript{379} See id.
\item \textsuperscript{380} Hollywood, 431 So. 2d at 612.
\end{itemize}
the need for new parks was a direct consequence, and necessary benefit to, the new development.

More recent cases in some states, however, suggest that more general infrastructure can be provided through the use of fees charged to new development. Unlike specific sewers or roads serving a new subdivision, the water source fee upheld by the Arizona Supreme Court in *Home Builders of Central Arizona v. City of Scottsdale*, was imposed to fund future development of water sources in Scottsdale.381 The court explicitly declined to “plunge into the thicket of the levels of scrutiny [of a Nollan/Dolan analysis],”382 and was “reluctant to deprive the city of the flexibility needed to deal with these projects.”383 It is difficult to compare the holding in this case with the holdings under a Dolan or needs/benefit analysis, but it does suggest a willingness of some courts to apply less scrutiny to legislatively adopted fees than adjudicative exactions. It also suggests that the scrutiny of the Nollan/Dolan analysis is, in fact, heightened, and that the challenge this analysis poses to impact fees is not insignificant.384

3. Indirect Costs: Community Development, Environmental Quality, and Social Services

There are few examples of impact fees used to internalize the costs at the furthest ripples of development’s impact on society. This perhaps is a conscious reflection of the legal challenges that state legislatures and municipalities would face, the inability of municipalities to recognize the full costs of new development, or even a level of constitutional recognition that, balanced against the perceived value of growth, some costs are so diffuse as to be only justifiably borne by the community as a whole. Nevertheless, evidence suggests that these costs do exist and that development continues to externalize them without much recognition.385

Although the case law on a broad range of impact fees is informative, the court’s treatment of recreation fees in *Ehrlich v. City of Culver City*—among the more indirect costs of sprawl addressed by a

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382 Id. at 997.
383 See id. at 1000.
385 See discussion supra Part I.B.3.
fee—is problematic. The *Ehrlich* court invalidated the recreation fee because the fee was not "tied more closely to the actual impact of the land use change . . . ." Although the court was sympathetic to the notion that the city would have to go through some expense to create new recreational facilities, it found that the services provided by the fee were a type that "should be paid for either by the public as a whole . . . ." Under the *Nollan/Dolan* analysis, the court remanded the case for a revaluation of the fee, suggesting that a fee more closely tailored to the impact of a particular project might be acceptable.

**CONCLUSION**

Several constraints significantly prevent local governments from effectively internalizing the true costs of sprawl. Constitutional limitations—particularly protections against illegal taxes and uncompensated, regulatory takings—ensure that private developers do not pay for public benefits. By taking a strict approach to the particularized benefit question, some courts have precluded fees that address anything more than the most immediate and direct infrastructure needed to facilitate development. Courts and municipalities have been slow to recognize that more indirect services and costs incurred by the community as a result of sprawl development are necessary and, in fact beneficial, to new development. Where courts require that the collected fees be used exclusively for the benefit of new development without any subsidiary benefit to the general public, these costs will continue to be borne by the public through taxes, passed on to state or federal programs, or spread among individuals in the form of lost amenities, private health costs, and other private social costs. Thus, fees will continue to provide the bare minimum of the facilities necessary for development, while continuing to support the externalization of the full costs of sprawl.

Where courts take a more liberal approach to the impact fee analysis, and allow benefits from fee spending to run to the larger community, there is a greater ability to account for the broader cost of sprawl. For this to occur, courts and legislatures will need to recognize the substantial evidence of the costs of sprawl and the growing body of literature on the full-cost accounting of development. In the aggre-

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386 *See Ehrlich*, 911 P.2d at 445–46.
387 *Id.* at 449.
388 *Id.*
389 *See id.* at 449–50.
gate, developments that contribute to sprawl impose costs on the larger community. Internalizing these more diffuse costs will inevitably require communities to provide services that address the impacts felt by individuals, neighborhoods, and natural areas beyond the subdivisions that create them. To limit fee spending to the exclusive benefit of the payers is antithetical to the nature of the costs created by development. Only by recognizing that these costs have a nexus with new development and requiring government spending and services that will address them on a community-wide scale, will states be able to increase the effectiveness of impact fees as a growth-management tool.

Regardless of how broadly based fees can recoup costs, communities should be aware of just what costs are not being internalized by their fees. They should also recognize the extent to which the fees are accommodating and promoting growth that otherwise would not be able to occur without the necessary infrastructure. Although local government will not often have the luxury, in the short-term, of deciding whether or not a particular development is built, long-term planning efforts and legislation, such as measures encouraging in-fill development and building within existing infrastructure, may be able to reduce development in areas unsupported by local services.

Because many of these costs have been externalized as cities have sought to accommodate growth, a laudable approach in the name of smart growth is to force the internalization these costs. In other words, municipalities have sought to make those responsible for new development bear the costs associated with it. In an effort to reduce sprawl and its effects, however, impact fees might not be the cost recovery panacea. Indeed, impact fees have been used with varying success around the country. Given the jurisprudential constraints discussed in this Comment, in many cases impact fees are unlikely to withstand judicial challenges when they attempt to recover the full costs of sprawl, or even any costs in excess of the most direct infrastructure impacts. This may not seem like a reason to abandon the use of impact fees—is not recovering some costs better than recovering none at all?

If the fees could offset all of the negative impacts of growth, then accommodating growth would not be a problem. Although more research is necessary to quantify the full costs of growth, it is clear that the impacts on open spaces, habitat, traffic, and the social fabric of communities are not perfectly fungible. Even if they were, the limitations on impact fees would never permit the full recovery of these costs. The use of impact fees, however, may have an obvious side ef-
fect. By allowing developers to pay for services that are not available, and could not be extended otherwise, municipalities run the risk of accommodating growth where it otherwise might not occur. When seeking to use fees as a growth management tool, local governments should carefully balance the costs of the long-term impacts of growth borne by the community against the short-term and limited costs recovered by the fees.