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IMPACT FEES: ET TU, ILLINOIS?

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I. INTRODUCTION

Local governments became more active in the development and operation of capital facilities in the early 1900's. These governments began to assume the responsibility of providing capital facilities, which had been largely the province of the private sector. In part, the notion of public provision of infrastructure facilities was grounded in the belief that communities could collectively afford to provide safe and healthful infrastructures, and that everyone could share in the benefits of public convenience.[1]

This collective perspective on the provision and financing of "public" facilities was reinforced in the 1950's, 60's and 70's as federal road and water pollution projects provided billions of dollars of local capital facilities. Because general federal and state revenues financed needed infrastructure, however, the public and its elected officials did not appreciate the direct linkage between new growth and development and the cost of infrastructure needs. Many individuals believed then, and still do today, that municipalities have an "obligation" to provide water, sewer and roads in support of growth and development, no matter what the financial implications of that obligation.[2]

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1. *See generally Exactions: A Controversial New Source For Municipal Funds*, 50 LAW & CONTEMP. PROBS. 1 (R. Babcock ed. 1987).

2. Indeed, the courts accepted this perspective that local government is responsible for paying for needed additional public facilities in the infamous trial court decision in Construction Indus. Ass'n v. City of Petaluma, 375 F. Supp. 574 (N.D. Calif. 1974), *rev'd on other grounds*, 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 424 U.S. 934 (1976). In the late 1970's, many state courts similarly concluded that municipalities could not limit development simply because of the inadequacy of public facilities, though in most cases the courts found that adequate facilities could be made available and that the community's action was not justified. *See, e.g.*, Charles v. Diamond, 447 A.D.2d 426, 366 N.Y.S.2d 921 (1975) (court held that where the village had been subject to a long standing consent order to modify its public sewage system to meet minimum state standards and had not done so, a property owner would be permitted

The reality was, and is, that there are no "free lunches." Eventually, federal budget problems, deficit control measures, and the financial strain of supporting the capital facility needs of local government took their toll on federal willingness to devote federal revenues to local programs. In the late 1970's and early 1980's, as local government became responsible for funding its own needed improvements, it discovered the difficulty of accounting for the lag-time in the need for new growth and development and its ability to support that growth with tax revenues.[3]

Years of federal and state subsidies led the general public and the development community to believe that local government paid for capital facilities, *i.e.*, "someone else." The public and development community's resistance to property tax increases to finance the cost of needed improvements has resulted in both a lack of funding for needed facilities, and in the inability of local governments to build facilities in a timely fashion. Inevitably, public opinion in cities across the country concluded that because new growth and development creates the demand for new facilities, there should be no additional growth unless facilities are available to support such growth. Moreover, it is believed that new growth and development should not be permitted unless the new development pays for the needed facilities.[4]

As a result of these developments, many governments are now adopting alternative funding sources such as impact fees and other developer "fair share" programs, the so-called "innovative capital facilities financing devices," to address their financial situations.[5]

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to bring a taking claim against the village). In those cases where limits on growth were based on demonstrable natural or built environmental constraints, the programs were generally upheld. *See, e.g.*, Golden v. Planning Bd. of Town of Ramapo, 30 N.Y.2d 359, 334 N.Y.S.2d 138, 285 N.E.2d 291 (upholding constitutionality of subdivision development timing ordinance), *appeal dismissed*, 409 U.S. 1003 (1972).

3. Local government has traditionally relied on the *ad valorem* tax as its principal source of general revenue. *Ad valorem* taxes, however, generally create a lag between costs and revenues because infrastructure is needed many years before the additional value of property makes up for new capital facilities. Some states have reacted to the escalated cost of these taxes by enacting measures designed to cut property taxes. *See, e.g.*, California's Proposition 13, CAL. CONST. art. XIIIA (West 1978); Massachusett's Proposition 2-½, MASS. GEN. LAWS. ANN. ch. 59, § 21C (West Supp. 1986).

4. Many communities have recognized that the timing and location of new public facilities can be an effective growth management technique in that it tends to regulate, or control, development. *See* AMERICAN SOCIETY OF PLANNING OFFICIALS, *Local Capital Improvements and Development Management Synthesis* 19 (Wash. D.C., Office of Policy Development and Research, July, 1977); *see also* Harwell, *Impacts on Community Growth and Form*, in V MANAGEMENT AND CONTROL OF GROWTH 183 (F. Schnidman & J. Silverman ed. 1980).

5. The concept of innovative capital facilities financing devices includes: impact fees; special assessments; developer's agreements; user fees; connection fees; and tolls. These devices allocate the cost of capital improvements to those who need and benefit from the facilities—developers and their customers. *See* Keyes, *Innovative Fi-*

What was originally a method of guaranteeing installation of physical improvements needed on-site to meet the needs created by new development has evolved into a system for accumulating a "municipal kitty" with which to construct capital facilities in the future.[6]

Mandatory dedication of subdivision roads, utility easements and park lands as a condition of subdivision approval was probably the earliest form of exaction that courts accepted as a reasonable means of making development responsible for serving itself.[7] The dedication of facilities as a condition of development has subsequently evolved into a fine art, as developers negotiate with local governments by offering various amenities or improvements.[8] If the 1950's, 60's and 70's were the decades of "free lunches," as local governments looked to state and federal grants for capital facility financing, then the 80's have become the decade of the "impact fee."[9] Numerous communities have ignored the rhetoric that impact fees will destroy the local economy, and have adopted impact fees and other off-site exactions as conditions of development approval.[10]

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nancing for Highway Improvements in Real Estate Development, INST. TRANSP. ENG. J., March 1986, at 23. *See generally* DEVELOPMENT EXACTIONS APA PRESS (J. Frank & R. Rhodes ed. 1987); CAPITAL FINANCING STRATEGIES FOR LOCAL GOVERNMENT INTERNATIONAL CITY MANAGEMENT ASS'N (J. Matzer, Jr. ed. 1983); J. NICHOLAS, CHANGING STRUCTURE OF INFRASTRUCTURE FINANCE (1985); D. Porter & R. Peiser, *Financing Infrastructure to Support Community Growth*, URBAN LAND INSTITUTE (1984).

6. Smith, *From Subdivision Improvement Requirements to Community Benefit Assessments and Linkage Payments: A Brief History of Land Development Exactions*, 50 LAW & CONTEMP. PROBS. 5, 28 (R. Babcock ed. 1987). Critics state that the concept of exaction fees has evolved into a system by which local governments often exact payments from developers that are not directly attributable to the new development. *Id.* at 29; *see also* Collis v. City of Bloomington, 310 Minn. 5, 246 N.W.2d 19 (1976) (Minnesota Supreme Court referred to exaction fees as "grand theft").

7. *See generally* Ferguson & Rasnic, *Judicial Limitations of Mandatory Subdivision Dedications*, 13 REAL ESTATE L.J. 250 (1985); Heyman & Gilhool, *The Constitutionality of Imposing Increased Community Costs on New Suburban Residents Through Subdivision Exactions*, 73 YALE L.J. 1119 (1964); Lester, *Subdivision Exactions in Washington: The Controversy Over Imposing Fees on Developers*, 59 WASH. L. REV. 289 (1984).

8. *See* Porter, *Exactions, Extractions, and Extortions*, 44 URB. LAND 36 (1985).

9. Surveys of local governments that the National Association of Homebuilders and the Homer Hoyt Institute at Florida State University indicate that the use of innovative financing devices are widespread throughout the country, even in those states that are not known as "exotic" or growth states. *See* Bauman & Ethier, *Development Exactions and Impact Fees: A Survey of American Practices*, 50 LAW & CONTEMP. PROBS. 51 (1987); J. Frank, E. Lines & P. Downing, *Community Experience with Sewer Impact Fees: A National Study*. (Policy Sciences Program, Florida State University, 1985).

10. Impact fees have principally evolved in California and Florida, termed the "megagrowth" states, where staggering growth has sorely pressed the capacity of local government to provide adequate public facilities. As a result, these are the states that have the most extensive practical and legal experience with the concept of impact fees and the states to which other states should look in evaluating the legal and practical implications of a program of innovative capital facilities financing devices. This is not to say that other states have not jumped on the impact fee bandwagon. Indeed, even non-growth states have faced the issue of funding public facilities through the

Illinois, known in the land use literature as a "developer state,"[11] has been more conservative about exacting fees or land from developers than have some of the high growth states. There have been some notable exceptions, however, in the Chicago metropolitan area. Many Illinois municipalities, presently searching for alternative sources of capital funding, view impact fees as a viable alternative to increasing property taxes.[12] Furthermore, a recent amendment to the Illinois Highway Code specifically empowers certain counties to adopt an impact fee program to assist in the funding of state and county roads.[13] Both DuPage County and Lake County have commenced studies pursuant to this new legislation.[14] It is clear, therefore, that impact fees have "come to Illinois." This article discusses the existing legal framework for impact fees and addresses the administrative issues relating to impact fees. The article projects the legal issues that are likely to be raised as fee programs mature in Illinois[15] and concludes that while local governments have the authority to adopt impact fee programs, these local governments will have to demonstrate the burden any new development imposes, and also ensure that new developments are not paying more than

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use of impact fees, and their courts have expressly confirmed the legality of the concept. *See, e.g.*, Call v. City of West Jordan, 606 P.2d 217 (Utah 1979) (court upheld in lieu fee for flood control, park, and recreational purposes); *see also Survey of Current Practice for Identifying and Mitigating Traffic Impacts*, INST. TRANSP. ENG. J., May 1987, at 38, 40. A survey by a committee of the Colorado/Wyoming Section of the Institute of Transportation Engineers reveals that 27% of the responding jurisdictions have a structure for exacting traffic impact fees as a funding source. *Id.*

11. 1 N. WILLIAMS, AMERICAN LAND PLANNING LAW § 6.17 (1974).

12. The transportation engineering firm of Barton-Aschman, Assoc., Inc., conducted a recent study in DuPage County, Illinois. The study revealed that a number of communities are using impact fees at the time of annexation, and that many municipalities are currently evaluating the prospect of collecting fees to fund capital improvements. The City of Naperville, Illinois, for example, has grown faster in the past 10 years than most communities of its size in the United States, and is in the process of developing an impact fee ordinance to fund off-site road improvements. Barton-Aschman Assoc., Inc., *DuPage County Impact Fee Study*, Feb. 1988, at 27.

13. ILL. REV. STAT. ch. 121, ¶ 5-608 (1987) (amended September 17, 1987, enacted as P.A. 85-464, effective January 1, 1988). This new amendment to the Illinois Highway Code provides that county boards of any county with a population between 400 thousand and 1 million persons may collect transportation impact fees. At the present time, DuPage and Lake Counties qualify under this legislation. See *infra* notes 42-45 for a discussion of the new amendment to the Illinois Highway Code.

14. *See, e.g.*, *DuPage County Impact Fee Study*, *supra* note 12.

15. In the land use arena, most "new" techniques eventually find their way to the court system, but the experience elsewhere has been that after a few initial skirmishes, impact fees have been designed in accordance with methodological principles accepted by the early decisions; accordingly, impact fee programs have had few subsequent challenges. See *infra* notes 76-78 and accompanying text for a discussion of legal challenges to impact fees in Florida. The authors believe that the development community for the most part will recognize the logic of well-conceived impact fees and other systems designed to ensure that the capital facilities needed by new growth and development are in place to serve that development by the time the development is completed.

their "fair share" of the costs of such improvements.

II. LEGAL FRAMEWORK

There are two significant issues that control the use of impact fees or exactions. The first is whether the local government has the authority to impose such a fee as a condition of development approval. Local governments are creatures of the state and operate within the spectrum of the state's police power as it is delegated to them by statute or state constitution.[16]

The second issue is whether the fee has been constitutionally employed.[17] From a due process of law perspective, the issue, ex-

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16. Depending on the nature of the delegation involved, it may be that a local government is not authorized to attach exactions as conditions for a development permit. For example, a Virginia statute expressly prohibits such exactions. *See* VA. CODE ANN. § 15.1-491.2 (1980 & Supp. 1986). Additionally, the New Jersey Supreme Court recently concluded that the New Jersey Municipal Land Use Law did not authorize local governments to raise needed revenues for capital facilities as a part of local land use controls. New Jersey Builders Ass'n & Mill Race, Ltd. v. Mayor & Township Comm. of Bernards Township, 108 N.J. 223, 528 A.2d 555 (1987).

17. While any regulation is subject to the constraints of the Illinois and United States Constitutions, substantive and procedural due process and the equal protection clauses are the principle applicable "constraints." While procedural due process may be a relevant factor in some instances, this article will focus upon substantive due process and equal protection considerations.

Substantive due process requires that governmental powers affecting private rights and interests be exercised in a fundamentally fair fashion. The concept of fundamental fairness has shaped modern land use controls both substantively and procedurally. In order for an ordinance to meet the standards of substantive due process, it must bear a "substantial relationship" to the public purpose, *i.e.*, the public health, safety and welfare sought to be achieved. *See* Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (Supreme Court upheld the constitutional validity of zoning as an appropriate exercise of the police power, provided the zoning was substantially related to the public health, safety and welfare). Substantive due process is a standard that has provided the substantive backbone of land use controls for over 50 years, and ensures that the police power is sufficiently broad to protect the public welfare from more than just "offensive and noxious" activities. *See* Siemon, *Who Bears The Cost?* 50 LAW & CONTEMP. PROBS. 115, 118-21 (1987). For additional discussion of substantive due process, see *infra* notes 66-78 and accompanying text.

The thrust of an equal protection challenge to a land use regulation is that a government regulation effectuated "invidious discrimination" against a class of individuals. *See, e.g.*, Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977) (exclusionary zoning invalidated); Clayton v. Village of Oak Park, 117 Ill. App. 3d 560, 453 N.E.2d 937 (1983) (upheld equity assurance program for single family residents). A municipal regulation will be constitutional under the equal protection clause only so long as it is supported by a "rational basis." *See, e.g.*, City of New Orleans v. Dukes, 427 U.S. 297 (1976).

Developers have often argued unsuccessfully that mandatory impact fees illegally discriminate against new development. *See, e.g.*, Krughoff v. City of Naperville, 68 Ill. 2d 352, 369 N.E.2d 892 (1977) (failure to apply exaction requirement to developers of subdivisions within school district, but outside municipality's jurisdiction, was not violation of equal protection). Equal protection claims have usually been rejected in the past because an impact fee program requires that new development only pay its "fair share" of the cost of capital improvements, and because all new development is treated equally under a formula or schedule of fees. *See* Heyman & Gilhool, *The*

pressed in its simplest form, is whether the fee is "reasonable." As subdivision and development regulations proliferated, the courts developed a variety of standards to ensure that, to varying degrees, a "substantial relationship" exists between the regulatory requirements and the public purposes for which they were imposed. The three standards that state courts have recently employed in determining the constitutionality of exactions ordinances examine whether an exaction is either: (1) specifically and uniquely attributable; (2) bears a reasonable relationship; or (3) has a rational nexus with the impact of the new development.[18]

A. *Authority to Impose Impact Fees*

1. *Home Rule Municipalities*

The authority of local government to regulate the use of land is derived from the state's police power to regulate the public health, safety, morals and welfare.[19] This power was traditionally delegated to local governments through specific enabling acts that authorized particular regulatory programs subject to specific requirements. In recent years, most states, in recognition of the sophistication of local government and the complexity of the issues local authorities faced, have granted "home rule" powers to local governments.[20]

The Illinois Constitution grants home rule units the authority to exercise any power and perform any function pertaining to its government and affairs, including, but not limited to, the power to regulate for the protection of the public health, safety, morals and welfare, *i.e.*, the police power, to license, to tax, and to incur debt.[21] This provision of the constitution establishes a presumption in favor of municipal home rule because any statute enacted after the adoption of the 1970 Constitution cannot limit home rule powers unless it falls within one of the preemption provisions of Article VII, sec-

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Constitutionality of Imposing Increased Community Costs on New Suburban Residents Through Subdivision Exactions, 73 YALE L.J. 1119, 1134 (1963); see also *infra* notes 86-89 for a discussion of equal protection and exemptions.

18. *See, e.g.*, Bell, *California Opens the Door For Municipalities to Obtain Greater Revenue from Subdivision Exactions*, 22 REAL PROPERTY & PROB. TRUST J. 345, 346 (1987) (discussion of the three major tests that have developed to discern how attenuated an exaction may be).

19. 1 A. RATHKOPF, THE LAW OF ZONING & PLANNING, § 2.01(3) (1987). Municipalities have no police power *per se*. A municipality, however, may exercise police power that the state has specifically or impliedly delegated to it. *Id*; *see, e.g.*, Park Ridge Fuel & Material Co. v. City of Park Ridge, 335 Ill. 509, 167 N.E. 119 (1929).

20. In Illinois, any county that has a chief executive officer elected by the electors of the county, and any municipality that has a population of more than 25,000 people are home rule units. ILL. CONST. art. VII, § 6(a) (1970). Other municipalities may elect to become home rule units by referendum. *Id.*

21. *Id.*

tion 6(g), or section 6(h).[22]

While an argument might be made that because the legislature has "spoken" on the topic of road impact fees through the amendment to the Highway Code, the authority of home rule units to similarly legislate has been "preempted," Illinois courts have held that any preemption of home rule powers by the General Assembly must be explicitly set forth in the statute.[23] In the absence of such express preemption, Article VII, section 6(i) states that home rule units may exercise power "concurrently" with the State, to the extent that the General Assembly by law does not specifically limit the concurrent exercise or specifically declare the State's exercise to be exclusive.[24]

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22. ILL. CONST. art. VII, §§ 6(g)(h) (1970). The Illinois courts have consistently held that the autonomy of home rule governments, as granted by the 1970 Constitution, is limited only by the Constitution itself. In City of Urbana v. Houser, 67 Ill. 2d 268, 270, 367 N.E.2d 692, 694 (1977) (citing Kanellos v. County of Cook, 53 Ill. 2d 161, 290 N.E.2d 240 (1972)), the Illinois Supreme Court asserted that "[home] rule units . . . have the same powers as the sovereign except where such units are limited by the General Assembly . . . . Now, home rule units, under the 1970 Constitution, have an autonomy and independence limited only by restrictions imposed by the Constitution or authorized by it."

The court's assertion echoed the earlier statement of the Illinois Supreme Court in *Kanellos*, where the court stated:

> Under the home rule provisions of the 1970 Constitution . . . the power of the General Assembly to limit the actions of home rule units has been circumscribed and home rule units have been constitutionally delegated greater autonomy in the determination of their governmental affairs. To accomplish this independence the constitution conferred substantial powers upon home rule units subject only to those restrictions imposed or authorized therein.

Kanellos, 53 Ill. 2d at 166, 290 N.E.2d at 243.

Lower Illinois courts have followed the *Houser* and *Kanellos* decisions. *See* City of Carbondale v. Eckert, 76 Ill. App. 3d 881, 889, 395 N.E.2d 607, 612 (1979) ("home rule units have had an autonomy and independence limited only by the restriction imposed or authorized by the constitution"); Carlson v. Briceland, 61 Ill. App. 3d 247, 250, 377 N.E.2d 1138, 1140 (1978) (in adopting home rule, framers of the new constitution intended to reverse the presumption against local authorities and establish a new presumption in favor of municipal and county).

23. *See, e.g.*, Leck v. Michaelson, 129 Ill. App. 3d 593, 604 n.8, 472 N.E.2d 1166, 1174 n.8 (1984). In *Leck*, the court noted that the General Assembly's enactment of election statutes did not result in an implied preemption of home rule authority over local election laws since the Constitution requires that preemption of home rule powers must be explicit. *Id*; *see also* City of Evanston v. Create, Inc., 85 Ill. 2d 101, 116-17, 421 N.E.2d 196, 203 (1981) (Illinois Supreme Court upheld an ordinance regarding landlord-tenant relations in a home rule municipality). The court found that the Illinois Constitution had not limited a home rule unit's authority in this area. *Id.*; *see also* Rozner v. Korshak, 55 Ill. 2d 430, 433, 303 N.E.2d 389, 390-91 (1973) (Illinois Supreme Court held that the constitution did not limit the power of home rule governments to impose a wheel tax).

24. Peoples Gas Light & Coke Co. v. City of Chicago, 125 Ill. App. 3d 95, 465 N.E.2d 603, 605 (1984). In *Peoples Gas*, the court held that a city ordinance which prohibited a utility company from terminating gas service to residential consumers during the winter months was not an exercise of local government power that primarily pertained to the city's government and affairs, and was therefore beyond the scope of home rule powers envisioned by the state constitution. *Id.* at 97, 465 N.E.2d at 604-05. The court further held that the city did not enjoy concurrent power to regulate in this area because longstanding state-wide interest in the field of public utility

If the statute is silent, then there is an implied presumption that home rule powers can be exercised.[25]

If a home rule municipality were to enact an impact fee ordinance based on its police power authority granted under Article VII, paragraph 6 of the Illinois Constitution, the ordinance would not conflict, nor be preempted by, the State's general laws because Illinois does not have any statute other than the Highway Code amendment that either prohibits or authorizes the use of impact fees as a means of financing public improvements. Therefore, home rule powers should be sufficient to enable municipalities to enact impact fee ordinances, absent specific enabling legislation.[26]

2. *Non-Home Rule Municipalities*

Non-home rule municipalities only have powers that are either expressly granted to them by law, enumerated in Illinois Constitution Article VII, section 7, or, at a minimum implied by statute.[27] Under this limitation, known as Dillon's Rule, non-home rule units are strictly limited to those municipal powers that are expressly or impliedly authorized or necessarily incidental to the objectives for which the municipal corporation was created. Dillon's Rule provides that non-home rule municipal powers can only be exercised for "purely local affairs and generally only within the borders of a municipality."[28]

While home rule authority is most likely sufficient to provide home rule municipalities with the authority to adopt an impact fee program, non-home rule units may have to rely on other statutory

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regulation precluded consideration of utility regulations as a matter pertaining to local government and affairs as contemplated by the home rule provisions of the state constitution. *Id.* at 100-01, 465 N.E.2d at 607-08.

25. Stryker v. Village of Oak Park, 62 Ill. 2d 523, 528, 343 N.E.2d 919, 923 (1976). In *Stryker*, several police officers brought an action against the village seeking a declaratory judgment that certain ordinances were invalid because they conflicted with a preexisting state statute. *Id.* at 524, 343 N.E.2d at 920. The Illinois Supreme Court held that when a statute is silent regarding its applicability to home rule units, home rule units are empowered to enact ordinances that conflict with state statutes. *Id.* at 528-29, 343 N.E.2d at 922-23. Only specific state constitutional limitations can restrict the power of home rule units to enact ordinances. *Id.*

26. Because home rule units have broad powers to enact ordinances, and the Illinois Constitution is silent regarding impact fees, home rule units should be authorized to enact impact fee ordinances. See *supra* notes 19-25 and accompanying text for a discussion of home rule powers and constitutional limitations.

27. *See* 1 DILLON, MUNICIPAL CORPORATIONS 448 (5th ed. 1911); *see also* Village of Northbrook v. Village of Glenview, 88 Ill. App. 3d 288, 294, 410 N.E.2d 431, 435 (1980) (court cited the proposition that a municipal corporation may derive powers by implication from the state enabling statute, but chose not to determine if the power to enter into an agreement to limit its power to rezone unincorporated land upon annexation was among such powers).

28. Hall & Wallack, *Intergovernmental Cooperation and the Transfer of Powers*, 1981 U. ILL. L. REV. 775, 778.

authority or police power case law to support an impact fee ordinance. To date, the only explicit statutory provision in Illinois that grants local governments the authority to impose impact fees to mitigate the fiscal impact of growth is the new amendment to the Illinois Highway Code.[29] Non-home rule municipalities that wish to fund street or highway improvements through impact fee type programs must look for implied statutory authority and supporting case law interpretation of the Illinois Municipal Code.[30] Nationwide, the pattern has been the adoption of impact fee programs without specific statutory authority. This pattern is being repeated in Illinois.[31] For example, a number of communities have already implemented "impact fee type" fee programs, while others charge per acre annexation fees, which are purportedly designed to offset the impact of newly annexed lands on village services.[32]

3. *Extraterritorial Authorization*

The issue of whether impact fees or other exactions can be imposed extraterritorially concerns Illinois municipalities because the Illinois courts have not addressed a challenge to a true impact fee. Furthermore, concern arises because the Illinois Supreme Court has held that the framers of the Constitution intended that home rule units exercise only those extraterritorial powers that the legislature[33] grants, despite the broad grant of authority by the Illinois Constitution to home rule units of government.[34] In other words, home rule

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29. ILL. REV. STAT. ch. 121, ¶ 5-608 (amended Sept. 17, 1987, enacted as P.A. 85-464, effective Jan. 1, 1988). See *infra* notes 42-45 and accompanying text for a discussion of Illinois Highway Code amendment.

30. There is specific statutory authority in the Illinois Municipal Code to pay for "local improvements." ILL. REV. STAT. ch. 24, art. IX. In addition, Article IX empowers municipal plan commissions and planning departments to prepare and recommend to the corporate authorities a comprehensive plan for the present and future development or redevelopment of a municipality. ILL. REV. STAT. ch. 24, ¶ 11-12-5 (1985 & Supp. 1987). These plans may include reasonable requirements with respect to streets, alleys, public grounds, or other public improvements. *Id.* The plan may be made applicable by its terms to land situated within the corporate limits and contiguous territory not more than 1-½ miles beyond the corporate limits and not included in any municipality. *Id.*

31. In Florida, for example, impact fees have long been judicially sustained even absent specific enabling legislation. *See, e.g.*, Contractors & Builders Ass'n of Pinellas County v. City of Dunedin, 329 So. 2d 314 (Fla. 1976), *cert. denied*, 444 U.S. 867 (1979). See also *infra* notes 76-78 and accompanying text for a discussion of this pattern.

32. The villages of Elk Grove, Bollingbrook and Roselle, Illinois, are among the municipalities that charge per acre annexation fees. Other municipalities in DuPage County collect fees through subdivision ordinances. *See DuPage County Impact Fee Study*, *supra* note 12.

33. ILL. CONST. art. VII, § 6 (1970). See *supra* notes 19-26 and accompanying text for a discussion of home rule authority.

34. City of Carbondale v. Van Natta, 61 Ill. 2d 483, 485-86, 338 N.E.2d 19, 21 (1975).

municipalities possess the same—not more—powers to impose extraterritorial land use regulations as non-home rule municipalities.[35] Consequently, all municipalities must look to the statutes as the source of power to exercise extraterritorial control over land use.

The Illinois Municipal Code authorizes a municipality to develop and adopt a comprehensive plan for its present and future development, and to implement the plan by ordinances.[36] The plan may be made applicable to both the territory within the municipality's corporate limits and contiguous territory within one and one-half miles of its corporate limits.[37] The implementation ordinances may: (1) establish subdivision design standards; (2) establish requirements regarding public infrastructure such as for streets, schools and parks; and (3) recommend zoning classifications for land designated as suitable for annexation to the municipality.[38] These extraterritorial powers are not limited to the actual division of land. In *City of Urbana v. County of Champaign*,[39] the Illinois Supreme Court held that because of the "developmental impact" on public facilities of a proposed planned unit development within the City's one and one-half mile jurisdiction, the development was within the contemplation of the statute granting subdivision authority beyond the corporate boundaries.[40]

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35. *See, e.g.*, Krughoff v. City of Naperville, 41 Ill. App. 3d 334, 354 N.E.2d 489, 495 (1976).

36. ILL. REV. STAT. ch. 24, ¶ 11-12-5 (1985 & Supp. 1987).

37. *Id.*

38. Id. ¶ 11-12-5(1). On its face, ILL. REV. STAT. ch. 24, ¶ 11-12-5 is not limited to subdivisions; municipalities also have the power to adopt regulations regarding streets that are not within subdivisions. ILL. REV. STAT. ch. 24, ¶¶ 11-12-5 to ¶ 12-8 have been interpreted to authorize municipal subdivision exactions both within the corporate limits and in the 1-½ miles zone. *Id.*

39. 76 Ill. 2d 63, 389 N.E.2d 1185 (1979).

40. *Id.* at 67, 389 N.E.2d at 1188. In *City of Urbana*, the Court stated:

> In our judgment the touchstone of a city's power to impose subdivision controls is not the division of a tract into two or more parcels but its developmental impact upon existing facilities protecting the health and safety of the municipal residents. We conclude therefore that the present development is a subdivision within the statutory meaning.

Id. In this case, however, the Urbana ordinance defined "subdivision" as the division of land so that the developer was not required to comply with the standards of the subdivision ordinance because the planned development did not involve the division of land. *See* Village of Lake Bluff v. Jacobson, 118 Ill. App. 3d 102, 454 N.E.2d 734 (1983). In *Lake Bluff*, the Village had amended its definition of "subdivision" to correct the error of *City of Urbana*. The court held that the subdivision power extended to planned developments within the one and one-half mile zone even though no division of land was involved. The court noted:

> The most reasonable reading of the statute, and the one most consistent with *Urbana*, seems to be that the statute gives municipalities the right to exercise their police power over extraterritorial developments in the same way that they exercise that power over developments within their territory, in recognition that a municipality's concerns do not end at its borders.

Id. at 110, 454 N.E.2d at 739.

The ordinance challenged in *Krughoff v. City of Naperville*,[41] which the Illinois Supreme Court upheld, required that both subdivisions and planned unit developments either inside the corporate limits or within the one and one-half mile zone make contributions of land or money in lieu of land. These contributions were to be used for school or park sites. The exactions involved were not called "impact fees," but the court's analysis of the Municipal Code and relevant case law leads to the conclusion that a provision which requires construction of roads or the payment of a fee for roads would be upheld.

4. *Amendment to Illinois Highway Code*

The Illinois legislature recently amended the Illinois Highway Code to allow a county board of any county with a population between 400,000 and 1,000,000 people to create transportation impact districts, to collect transportation impact fees, and to adopt reasonable regulations necessary to administer and enforce a fee program.[42]

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

42. Ill. Rev. Stat. ch. 121, ¶ 5-608 (amended Sept. 17, 1987, enacted as P.A. 85-464, effective Jan. 1, 1988). The legislature apparently intended to afford county boards the greatest possible flexibility in implementing impact fees. There was no floor debate in either the House or the Senate, and the bill was unanimously approved. According to the House Republican Staff Analysis, the reason for the amendment is to provide additional revenues to Lake and DuPage counties so that they may maintain their road systems "at a level adequate to handle the traffic created by new development." J. CROSS, HOUSE REPUBLICAN STAFF ANALYSIS (April 21, 1987). The law prior to this new amendment provided that the counties could levy their own special road taxes and expend their allotted Motor Fuel Tax funds for these same purposes. No such organization or program, however, was ever put into effect. *Id.*

Because the amendment to the Highway Code is specifically applicable to county boards of only those counties with a population between 400 thousand and 1 million people, one of the challenges to the law may be that the population classification renders it "special legislation." The Illinois Constitution prohibits special legislation and states that "the General Assembly shall pass no special or local law when a general law is or can be made applicable. Whether a general law is or can be made applicable shall be a matter for judicial determination." ILL. CONST. art. IV, § 13. A review of the case law, however, reveals that Illinois courts would not look favorably upon such a challenge to the new amendment since they have held that in the enactment of general laws, the legislature may classify counties and municipalities on the basis of population. *See* Alexander v. City of Chicago, 14 Ill. 2d 261, 151 N.E.2d 319 (1958) (upheld a statute providing for transfer of property and personnel between cities and park districts that contained a population classification which made the statute applicable only to the City of Chicago); *see also* People v. Clark, 71 Ill. App. 3d 381, 389 N.E.2d 911 (1979) (upheld County Treasurer's Act that applied criminal sanctions only to proscribed conduct in counties exceeding populations of 150,000 persons); DuBois v. Gibbons, 2 Ill. 2d 392, 118 N.E.2d 295 (1954) (upheld a statute that conferred investigatory and subpoena powers relative to law enforcement upon cities of over 500,000 population, although applicable only to the City of Chicago). In *In Re* Belmont Fire Protection Dist., 111 Ill. 2d 373, 489 N.E.2d 1385 (1986), however, the court invalidated a fire protection district transfer statute that applied to counties having a population between 600 thousand and 1 million as special legislation. *Id.* at

Under the new amendment, persons who construct new developments that have either direct or indirect access to the county or state highway systems would be subject to an impact fee when the county board uses the enabling legislation.[43]

The Highway Code amendment provides that the impact fee is calculated based on both the amount of estimated traffic that the new development generates and the types of improvements needed to maintain a reasonable level of service on the existing and proposed highway system.[44] The amendment specifies that counties earmark all fees collected under such an ordinance in special funds established for each transportation district, and spend monies for improvements within, or in areas immediately adjacent to, the district from which the fees were collected.[45]

The amendment to the Illinois Highway Code is ground breaking in that it explicitly paves the way for transportation impact fee programs in DuPage and Lake counties, the two counties in Illinois that qualify under the legislation. The amendment is equally important, however, in that it reflects the state legislature's strong interest in fostering fair share fee programs as a means of accommodating new growth and development. The amendment establishes population categories that should not be interpreted to preclude those counties and municipalities that fall outside their ambit from imposing similar impact fees. Throughout the country, municipalities have implemented legally sustainable impact fee programs *without* specific enabling legislation. While an amendment of this sort may bolster the authority of those counties to which it applies, it should by no means preclude other Illinois counties and municipalities that could benefit from a ride on the impact fee bandwagon from imposing their own impact fees.

385-86, 489 N.E.2d at 1391. The court determined that there was no reasonable basis for the population classification since there was no reason why municipalities with similar needs in similar counties (with populations outside the classification) should not be allowed to consolidate fire protection services into a single fire protection district. The court explained that the classification was not based on the level of urbanization or the density of a county's population, and was therefore arbitrary and unreasonable. *Id.* at 384-85, 489 N.E.2d at 1388-89.

43. ILL. REV. STAT. ch. 121, ¶ 5-608 (1987) (amended Sept. 17, 1987, enacted as P.A. 85-464, effective Jan. 1, 1988).

44. *Id.*

45. The amendment is generally worded, but seems to anticipate the type of fee program that has been legally sustained in other states. In order to ensure that an impact fee will withstand legal challenges, it should be based on tight methodology that satisfies a needs-based standard, should contain administrative safeguards (including earmarking, time limits, refunds, and benefit districts), and should compute offsets and credits. See *infra* notes 79-89 and accompanying text for a discussion of administrative issues.

B. *Standards for Reviewing an Impact Fee Program*

1. *"Specifically and Uniquely Attributable"*

Exactions and development fees are not new concepts in Illinois. Indeed, for decades Illinois municipalities have tried to shift the cost of providing services to new growth and development to the developer and the new residents who create the costs. Nonetheless, Illinois has gained the reputation of being tough on exactions.[46] Unlike other states that have openly embraced the advent of impact fees as a means of funding off-site capital facilities, Illinois has traditionally been more conservative.

In order for a mandatory dedication to be a valid exercise of the police power, Illinois municipalities historically faced the difficult burden of proving that the need for the capital improvement was "specifically and uniquely" attributable to the development of the particular subdivision.[47] The landmark case of *Pioneer Trust & Savings Bank v. Village of Mount Prospect*[48] laid out the judicial criteria for assessing the constitutionality of developer exactions in Illinois.[49] In *Pioneer Trust*, a developer challenged the validity of an ordinance that required dedication of public grounds as a condition of plat approval.[50] The Illinois Supreme Court noted that while a municipality may require a developer to provide the streets that a subdivision requires, it cannot require the developer to provide a major thoroughfare—the need for which stems from the total activity of the community.[51] The court in *Pioneer Trust* determined that the mandatory dedication of land for educational purposes was unrelated to the developer's subdivision plat.[52] The court further explained that in Illinois an exaction will be held constitutional when it is within a municipality's statutory grant of power and is "specifically and uniquely attributable" to a developer's activity.[53]

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46. See *supra* note 11 and accompanying text for a discussion of exactions in Illinois.

47. *See generally* Pioneer Trust & Savings Bank v. Village of Mount Prospect, 22 Ill. 2d 375, 176 N.E.2d 799 (1961) (holding that municipality may require developer to dedicate some land to public use provided that use is specifically attributable to the development).

48. *Id.*

49. *Id.*

50. *Id.* at 375, 176 N.E.2d at 799.

51. *Id.* at 380, 176 N.E.2d at 801-02.

52. *Id.* at 380, 176 N.E.2d at 802.

53. The Illinois Supreme Court characterized the test for exactions in Illinois:

> If the requirement is within the statutory grant of power to the municipality and if the burden cast upon the subdivider is *specifically and uniquely attributable* to his activity, then the requirement is permissible; if not, it is forbidden and amounts to a confiscation of private property in contravention of the constitutional prohibitions rather than reasonable regulation under the police power.

By 1968, the Illinois Supreme Court considered it "unquestioned" in *People ex rel. Exchange National Bank of Chicago v. City of Lake Forest*,[54] that an appropriately authorized municipality could require compliance with reasonable regulatory conditions before approving and recording plats for the subdivision of land.[55] As in *Pioneer Trust*, however, the court in *Exchange National Bank* could not find that the need for the new public streets was "specifically and uniquely attributable" to any activity that would arise from the plaintiff's resubdivision of twenty-five acres into two lots.[56] The court held that the City's refusal to approve the plaintiff's plat of resubdivision because the plaintiff did not agree to dedicate land for new public roadways "exceeded the bounds of permissible and reasonable regulations," and would have constituted a taking of private property for public use without just compensation.[57] According to the court, if the City needed to acquire the land, it would have to do so by other means, such as through purchase or condemnation.[58]

Just nine years later, however, in *Krughoff v. City of Naperville*,[59] the Illinois Supreme Court upheld a regulation requiring dedication of land, or contribution of fees in lieu, for school and park purposes.[60] The city's ordinance required developers to make contributions of land or money in lieu of land as a condition of plat approval for a subdivision or planned unit development inside the corporate limits, or within its extraterritorial jurisdiction.[61] The money or land would be used for schools and park sites.[62] The court

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Id. at 380, 176 N.E.2d at 802 (emphasis added).

54. 40 Ill. 2d 281, 239 N.E.2d 819, 821 (1968).

55. *Id.*

56. *Id.* at 287, 239 N.E.2d at 822.

57. *Id.* at 288, 239 N.E.2d at 823.

58. *Id.*

59. 41 Ill. App. 3d 334, 354 N.E.2d 489 (1976), *aff'd*, 68 Ill. 2d 352, 369 N.E.2d 892 (1977).

60. *Id.* For earlier Illinois exaction cases that developed this standard, see Board of Educ. of School Dist. No. 68, DuPage County v. Surety Developers, Inc., 63 Ill. 2d 193, 347 N.E.2d 149 (1975); Duggan v. County of Cook, 60 Ill. 2d 107, 324 N.E.2d 406 (1975); Rosen v. Village of Downers Grove, 19 Ill. 2d 448, 167 N.E.2d 230 (1960); Petterson v. City of Naperville, 9 Ill. 2d 233, 137 N.E.2d 371 (1956). Many courts that have adopted the "specifically and uniquely attributable standard" have also applied an equally restrictive "direct benefit" test, by which the funds collected from mandatory dedications had to be specifically tied to a benefit conferred on homeowners within the subdivision. *See, e.g.*, Gulest Assocs., Inc. v. Town of Newburgh, 209 N.Y.S.2d 729 (Sup. Ct. 1960), *aff'd*, 225 N.Y.S.2d 538 (App. Div. 1962). In *Gulest*, developers challenged an ordinance that charged in lieu fees for "neighborhood park, playground or recreational purposes including the acquisition of property." *Id.* at 732. The court held that the ordinance amounted to an unconstitutional taking since the money the town collected would not be used for the direct benefit of the homeowners of the subdivision charged. Rather, the funds could be used in any section of town for any residential purposes. *Id.* at 732-33.

61. *Krughoff*, 41 Ill. App. 3d at 354, 369 N.E.2d at 893.

62. *Id.*

held that the City had the power to require such dedication of land, or money in lieu of land because the evidence showed that the required contributions were "uniquely attributable to" and fairly proportionate with the need for new school and park facilities, which the proposed development created.[63]

Although the Illinois courts have yet to categorically denounce the "uniquely and specifically attributable" test, and because impact fee ordinances for facilities other than schools and parks are still relatively new to Illinois, it is too early to determine whether the Illinois courts will continue to utilize this highly restrictive standard if an impact fee ordinance is challenged on constitutional grounds. There are indications, however, that Illinois courts are leaning towards a more liberal interpretation of the validity of exaction ordinances.[64]

Indeed, in light of recent United States Supreme Court land use decisions, it is likely that Illinois courts may turn away from the thirty-year-old "specifically and uniquely attributable" standard and embrace the more modern "rational nexus" test discussed below.[65]

2. *"Reasonable Relationship" Standard*

Courts have liberally applied the due process "reasonableness" requirement for exercises of police power in other states construing impact fee ordinances under the "reasonable relationship" or "fairly debatable" standard.[66] Under this test, every reasonable presumption is indulged in favor of the constitutionality of the exaction, and if the ordinance bears any reasonable relation to the public welfare

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63. *Id.* at 359, 369 N.E.2d at 895.

64. *See, e.g.*, Plote, Inc. v. Minnesota Alden Co., 96 Ill. App. 3d 1001, 422 N.E.2d 231, 235 (1981). The appellate court noted in dicta that "[t]here has been a general movement by our supreme court away from an earlier position holding such conditions invalid. The more recent cases adopt a liberal construction of the right of a municipality to impose conditions in return for a grant of a variation or approval of a plat." In *Plote*, a developer was estopped from challenging the validity of the municipal ordinance that conditioned the issuance of a special use permit on his promise to contribute a "per unit" sum to the Village of Schaumburg cultural center. *Id.* at 1002, 422 N.E.2d at 236. Because the developer failed to show that his promise resulted from duress, the court never reached the issue of whether the dedication exaction was valid. *Id.*

65. See *infra* notes 68-78 and accompanying text for a discussion of the rational nexus standard.

66. *See, e.g.*, Ayres v. City Council of City of Los Angeles, 34 Cal. 2d 31, 207 P.2d 1 (1949) (upheld dedication requirement pertaining to off-state widening of roads); Lampton v. Pinaire, 610 S.W.2d. 915, 919 (Ky. App. 1980) (upheld subdivision regulations that required dedication of land for additional right-of-way as a condition precedent to plat approval); Jenad, Inc. v. Village of Scarsdale, 18 N.Y.2d 78, 218 N.E.2d 673, 271 N.Y.S.2d 955 (1966) (upheld dedication requirement, or payment of fee in lieu, for park and recreational purposes).

and morals the courts may not declare it invalid.[67] According to the reasonable relationship test, if the constitutionality of an ordinance is "fairly debatable," courts cannot substitute their judgment for that of the legislative authority.

The constitutional standard that a court will apply for an impact fee ordinance, however, is likely to be more restrictive than the "reasonable relationship" test. Although there is no direct holding to this effect, the United States Supreme Court in *Nollan v. California Coastal Commission*,[68] strongly suggests that a heightened level of judicial scrutiny is appropriate for development exactions and that mandatory permitting regulations must bear at least a rational relationship to the public interest.[69]

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67. *See, e.g., Ayres*, 34 Cal. 2d at 40, 207 P.2d at 11-12; *Lampton*, 610 S.W.2d at 919; *Jenad*, 18 N.Y.2d at 82, 218 N.E.2d at 676, 271 N.Y.S.2d at 958-59.

68. 107 S. Ct. 3141 (1987).

69. *Nollan*, the United States Supreme Court's most recent takings issue case, may have resulted in the blending of the distinctions between the three standards used to test the constitutionality of development exactions. In *Nollan*, a divided Supreme Court invalidated a beach access condition imposed on a building permit granted by the California Coastal Commission to homeowners who sought to replace a dilapidated bungalow with a large new home on their beachfront lot. *Nollan*, 107 S. Ct. 3143. The condition required the Nollans to convey an easement that would allow the public lateral access to the shorefront. *Id.* The Commission alleged that the purposes of the condition were to reduce any obstacles to viewing the beach created by the new house, to lower any "psychological barriers" to using the beach, and to remedy congestion along the beach. *Id.* at 3148-49.

The majority of the Court found that the condition was not sufficiently related to the public purposes set forth by the Commission, and that the condition therefore violated the takings clause of the fifth amendment. *Id.* at 3150. The Court believed the Commission's reasons for requiring dedication of the easement were a "legitimate state interest," but nonetheless held that the condition itself did not sufficiently advance those purposes. *Id.* at 3148. The Court suggested that a heightened standard of review should apply to land use regulations that involve the actual conveyance of property, and that go further than merely restricting specific uses. *Id.* at 3147 n.3, 3148. The Court stated:

> As indicated earlier, our cases describe the condition for abridgment of property rights through the police power as a "*substantial* advance[ing]" of a legitimate State interest. We are inclined to be particularly careful about the adjective where the actual conveyance of property is made a condition to the lifting of a land use restriction, since in that context there is heightened risk that the purpose is avoidance of the compensation requirements, rather than the stated police power objective.

Id. at 3150.

Although the *Nollan* Court did not expressly endorse the "rational nexus" standard, its analysis is nonetheless consistent with state courts' use of this standard in subdivision dedication cases. *See, e.g.*, Town of Longboat Keys v. Lands End, Ltd., 433 So. 2d 574 (Fla. App. 1983) (proper nexus must exist between the stated purposes of an ordinance and the amount of money or land to be set aside by developers for parks and open space purposes); Pioneer Trust & Sav. Bank v. Mount Prospect, 22 Ill. 2d 375, 176 N.E.2d 799 (1961) (held a subdivider was not required to dedicate land for educational and recreational facilities because they were unrelated to his subdivision plat); Jenad, Inc. v. Scarsdale, 18 N.Y.2d 78, 218 N.E.2d 673, 271 N.Y.S.2d 955 (upheld the constitutionality of village regulations which authorized the planning commission to require subdividers to pay a fee or allot some land as a condition precedent to the approval of a subdivision plat); and Jordan v. Village of Me-

3. *"Rational Nexus" Standard*

The "rational nexus" constitutional standard of reasonableness for fees in lieu of dedication for off-site improvements was introduced in Wisconsin in 1966. The Wisconsin Supreme Court, in *Jordan v. Village of Menomonee Falls*,[70] held that fees in lieu of dedication for off-site educational and recreational purposes were a valid exercise of the police power if there was a "reasonable connection between the need for additional facilities and the growth generated by the subdivision."[71] Funds earmarked for certain capital improvements were also required to "substantially benefit" the development that paid the fee.[72] Whether the general public would incidentally benefit from the planned capital facilities is not a factor that would affect the reasonableness of the fee requirement.[73]

The principles set forth in *Jordan* are now applied in many states, and have been broken down into a three part standard: (1) new development must create a demand for a new capital facility; (2) a "rational nexus" must exist between this new development and the need for these new facilities; and (3) there must be some assurance that sufficient benefit accrues to the particular development that pays the fee.[74] Once these "rational nexi" are established, a

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nomonee Falls, 28 Wis. 2d 608, 137 N.W.2d 442 (1965) (compulsory land dedication requirement is a constitutional exercise of the police power, so long as it is practicable for school, park, and recreation sites, and bears a reasonable connection to the municipality's increased need to accommodate the new development), *appeal dismissed*, 385 U.S. 4 (1966). The Supreme Court in *Nollan* determined that there must be some "fit" between the beach access condition imposed on the Nollans and the burden that their new house creates or to which it contributes. *Nollan*, 107 S. Ct. at 3150. The Court did not find it necessary, however, to discuss how close a "fit" is required since "the Justices found that this case does not even meet the most untailored standards." *Id.*

The practical lesson of *Nollan* is that local governments must be particularly careful when they impose land use regulations that require the actual conveyance of private property for public use without just compensation. Although the Supreme Court has not yet elaborated on how strong the nexus between the development condition and the public purpose must be to sustain an exaction, it seems likely that the regulations must bear at least a "rational" relationship to the public's interest. *See also* Siemon & Larsen, *Exactions and Takings After Nollan*, LAND USE LAW & ZON. DIG., Sept. 1987, at 3.

70. 28 Wis. 2d 608, 137 N.W.2d 442 (1965), *appeal dismissed*, 385 U.S. 4 (1966).

71. *Id.* at 614, 137 N.W.2d at 448.

72. *Id.*

73. Juergensmeyer & Blake, *Impact Fees: An Answer To Local Governments' Capital Funding Dilemma*, 9 FLA. ST. U.L. REV. 415, 432-33 n.99 (1981). The authors add that as long as the fee requirements are reasonably related to the needs that the subdivision creates, the benefits to development need not be distinguishable from the benefits to the general public. *Id.*

74. *See, e.g.*, Associated Homebuilders of Greater East Bay, Inc. v. City of Walnut Creek, 4 Cal. 3d 633, 484 P.2d 606, 94 Cal. Rptr. 630, (1971); Home Builders Ass'n of Greater K.C. v. City of Kansas City, 555 S.W.2d 832 (Mo. 1977); Call v. City of West Jordan, 606 P.2d 217 (Utah 1979). These cases follow the standard established in Jordan v. Village of Menomonee Falls, 28 Wis. 2d 608, 137 N.W.2d 442

payment requirement authorized by the local government has the same presumption of validity under the police power as other zoning and land use regulations, and the developer has the burden of disproving its reasonableness.[75] In Florida, where impact fees are an accepted "fact of life" for new development, such ordinances have survived legal challenges for over a decade, even though there is no specific enabling legislation that grants such authority to local municipalities. For this reason, local governments in other states look to Florida impact fees. The landmark decision in Florida, upholding the concept of impact fees, is *Contractors and Builders Association of Pinellas County v. City of Dunedin.*[76] In reaching its judgment upholding impact fees for water and sewers, the Florida Supreme Court established the principles that have become the hallmarks of other impact fee cases involving roads and other public facilities.[77]

(1965), *appeal dismissed*, 385 U.S. 4 (1966).

75. Juergensmeyer & Blake, *supra* note 73, at 433. The two-pronged "rational nexus" test, therefore, provides a framework for analyzing the constitutional validity of impact fee payments under the police power. *Id.*

76. 329 So. 2d 314 (Fla. 1976), *cert. denied*, 444 U.S. 867 (1979). In *Dunedin*, the City of Dunedin enacted an ordinance that imposed an impact fee of $325 for each residential water connection and $375 for each residential sewer connection to pay for costs the city would incur for the expansion of capital facilities to provide water and sewer services. *Id.* at 316-17 n.1. The Home Builders Association in Pinellas County brought an action for declaratory judgment against the city, claiming the ordinance was an *ultra vires* attempt by the city to tax and an unconstitutional discrimination against "newcomers." *Id.* at 316-17.

77. Due to unfavorable case law prior to the court's decision in *Dunedin*, many people in Florida argued that the effect of the court's decision was limited to water and sewers. In 1983, two cases from the Florida appellate courts put to rest any further argument on this point. The first decision, Hollywood, Inc. v. Broward County, 431 So. 2d 606 (Fla. Dist. Ct. App. 1983), reviewed a Broward County ordinance that required a subdivider, as a condition of plat approval, to dedicate land or pay a fee to be used to expand a county-wide park system so that new park facilities could accommodate the new residents of the platted development. *Id.* The court determined that the ordinance would meet federal and state constitutional challenges so long as the funds offset needs sufficiently attributable to the subdivision and were specifically earmarked for the substantial benefit of the subdivision residents. *Id.* at 611. The court applied a "rational nexus" test to determine whether a fee benefit correlation existed, and held that the government must show a "reasonable connection, or *rational nexus*, between the expenditures of the funds collected and the benefits accruing to the subdivision." *Id.* at 611-12 (emphasis added).

In the second case, Home Builders and Contractors Ass'n of Palm Beach County, Inc. v. Board of County Comm'rs of Palm Beach County, 446 So. 2d 140 (Fla. Dist. Ct. App. 1983), the local Home Builders Association challenged Palm Beach County's "Fair Share Contribution For Road Improvements" ordinance. *Id.* at 141. The County Commission enacted the ordinance because an unusual growth rate was being experienced in the county and because extensive road improvements would be necessary in order to maintain a consistent level of road service and quality of life. *Id.* The ordinance was intended to finance the necessary capital road improvements and to regulate increases in traffic levels. *Id.* Any new land development activity that generated road traffic would be required to pay its "fair share" of the reasonably anticipated cost of expansion of new roads that was sufficiently attributable to the new development. *Id.*

The court determined that the ordinance was valid even though the benefits ac-

In Florida, it now appears clear that an impact fee would be sustained if the following tests are met:

(1) new development requires additional capacity for a particular public facility;
(2) the fees imposed do not exceed a *pro rata* share of the reasonably anticipated costs of capital expansion and are exacted only to accommodate new development; and
(3) the funds are specifically earmarked and delineated so that there is a reasonable connection between the expenditure of funds collected and the benefits accruing to the development.[78]

III. Administrative Issues: How and When to Collect and Spend the Fee

Illinois municipalities that decide to implement an impact fee program will have to consider a host of administrative issues to ensure that their fee will be legally defensible if challenged in court. While impact fee programs may be new to these municipalities, they can fortunately take advantage of both the wisdom and mistakes of local governments elsewhere that have survived the first generation of such fees.[79] The backbone of an impact fee ordinance is not just the population or trip generation data used to compute the fee schedule. Rather, a defensible ordinance must accommodate due process, equal protection, and other equity limitations.[80]

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cruing from roads constructed with the impact fees did not inure exclusively or overwhelmingly to those who paid for them. *Id.* at 143. The court adopted the principle established in other state courts, including Ayres v. City Council of Los Angeles, 34 Cal. 2d 31, 207 P.2d 1 (1949); and *Call*, 606 P.2d 217 (Utah 1979), and held that the "benefit accruing to the community generally does not adversely affect the validity of a development regulation ordinance as long as the fee does not exceed the cost of improvements required by the new development and the improvements adequately benefit the development which is the source of the fee." *Home Builders & Contractors Ass'n of Palm Beach County Inc.*, 446 So. 2d at 143-44. The court noted that the ordinance would only generate 20% of the cost of providing the facilities, and that the formula was not rigid since it allowed an independent calculation to be made. *Id.* If the independent calculations showed that the new use would have a less impact on roads than anticipated, the fee would be reduced. *Id.*

78. *Dunedin*, 329 So. 2d at 321. In *Dunedin*, the court dismissed an equal protection claim and noted that the ordinance at issue did not unconstitutionally discriminate against "newcomers" in that the "fees are payable by every person who hereafter connects into the city's water or sewer system, even if he has lived in the city all of his life and his property is in the heart of the city." City of Dunedin v. Contractors and Builders Ass'n of Pinellas County, 312 So. 2d 763, 767 (Fla. Dist. Ct. App. 1975), *rev'd*, 329 So. 2d 314 (Fla. 1976).

79. As local governments have become more familiar with impact fees, and as impact fees have gone through several rounds of court battles, the "second generation" of impact fees is currently emerging. This second generation of fees considers more sophisticated traffic engineering methodology and more closely ties the relationship of the impact of new development to the fee payor.

80. See *supra* note 17 and accompanying text for a discussion of constitutional limitations.

Under the rational nexus standard for assessing the constitutional validity of an impact fee ordinance, a fee program will pass legal muster if: (1) new development creates a demand for new capital facilities; (2) a nexus exists between this new development and the need for these new facilities; and (3) sufficient benefit accrues to the fee payor.[81] Impact fee ordinances reflect this standard by setting up fairly rigid administrative procedures. The typical impact fee ordinance allows for fee agreements, individual assessment of impact, refunds, and credits and exemptions to ensure that no developer is assessed more than his or her "fair share" of the cost of capital facilities, which the fee targets.

Individual assessment of development impact allows any developer to challenge the impact fee schedule by providing an individual impact assessment.[82] Individual assessments are usually used to determine whether a fair share of the capital expansion costs, which the proposed development necessitates, should be less than the fee established in the ordinance's schedule. In addition, any person who initiates development may be able to apply for a credit against the impact fee for any contribution, payment, construction or dedication of land that the municipality accepts and receives for the targeted capital facilities improvements. The credit would be equal to the dollar value of the cost of off-site improvements the developer (or his or her predecessor in interest) previously contributed, paid for, or committed to in conjunction with any development permit the municipality issues.

Additionally, an impact fee ordinance usually provides that the municipality earmark and segregate the fee into trust accounts that

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81. See *supra* notes 70-78 and accompanying text for a discussion of the rational nexus standard of determining the constitutional validity of impact fees; *see also* Associated Homebuilders of Greater East Bay, Inc., v. City of Walnut Creek, 4 Cal. 3d 633, 484 P.2d 606, 94 Cal. Rptr. 630 (1971), *appeal dismissed*, 404 U.S. 878 (1971); Kansas City v. City of Kansas City, 555 S.W.2d 832 (Mo. 1977); *Call*, 606 P.2d 217 (Utah 1979) (examples of practical applications of the rational nexus test). Because impact fees may not be used to finance *existing* deficiencies, in order for a municipality that decides to implement an impact fee program to establish the requisite nexus, it will have to show that the development condition substantially advances a legitimate public purpose. The municipality will have to precisely document the costs to the public that are generated by the new development, and the manner in which a mandatory dedication requirement or an impact fee would alleviate those costs. If the exactions do not relate to the stated purpose, the development condition will not pass the rational nexus test.

82. The proposed interim road impact fee ordinance for the City of Peoria, Illinois, for example, provides for individual assessment of road impacts as follows:

> Any person who initiates any development may choose to provide an individual assessment of the road impacts of the proposed development. The individual assessment may be used to determine whether a fair share of the capital expansion costs necessitated by the proposed development should be less than the fee established in [the fee schedule] . . . .

PEORIA, ILL., PROPOSED INTERIM FAIR SHARE ROAD IMPACT FEE ORDINANCE § 11 (1988).

are kept separate from the other funds of the municipality.[83] Proceeds from the trust accounts are used exclusively for capital expansion of the facilities in the impact district from which they were collected.[84] Furthermore, as an additional assurance that the development only pay its "fair share" of the cost of capital facilities construction or expansion, most ordinances allow for the refund of the monies collected if the fees have not been spent on targeted capital improvements within a specified time frame or if the approved development is cancelled before construction has commenced.[85]

Some ordinances also exempt certain new development from payment of its fair share of the impact fee.[86] These exempted developments often include government buildings and affordable housing thus encouraging certain housing development that ensures both the long-term integrity of an area, and accommodating regional growth influences.[87] Other ordinances exempt developments when alteration or expansion of an existing dwelling unit does not anticipate the creation of additional units and the use has not changed, when a destroyed or partially destroyed building is replaced by a new building

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83. *Dunedin*, 312 So. 2d at 763.

84. Impact fee ordinances often provide for the establishment of "impact districts" to ensure that the fees collected are expended for the benefit of the geographical area from which they were collected. *See, e.g.*, ILL. REV. STAT. ch. 121, ¶ 5-608 (amended Sept. 17, 1987, enacted as P.A. 85-464, effective Jan. 1, 1988), the new amendment to the Illinois Highway Code, which provides that the county boards may establish transportation impact districts. *Id.* The design of such districts do not have to be narrowly drawn. Especially with large development, roads which are some distance from a particular development may be affected; therefore, fees collected may be used to construct additional improvements. Funds collected pursuant to a transportation impact fee ordinance can be used for the purpose of acquisition, expansion and development of the roads, streets, highways, and bridges necessary to serve a new development. A likely expenditure of funds collected pursuant to a transportation impact fee ordinance would include: design and construction plan preparation; right-of-way acquisition; construction of new through lanes; construction of new turn lanes; construction of new bridges; construction of new drainage facilities in conjunction with new roadway construction; purchase and installation of traffic signalization; construction of new curbs; medians and shoulders; and landscaping of medians and sidewalks.

85. *See, e.g.*, Home Builders & Contractors Ass'n of Palm Beach County, Inc. v. Board of County Comm'rs of Palm Beach County, 446 So. 2d 140 (Fla. Dist. Ct. App. 1983), which implicitly approves the administrative procedures for the refund of impact fees.

86. The United States Supreme Court and the Illinois Supreme Court have held that a government may differentiate between persons similarly situated as long as the classification bears a reasonable relationship to a legitimate legislative purpose. *See, e.g.*, Vance v. Bradley, 440 U.S. 93 (1979); Kujawinski v. Kujawinski, 71 Ill. 2d 563, 376 N.E.2d 1382 (1978).

87. For example, in Monroe County, Florida, developers are exempt from paying impact fees if they construct affordable housing units. MONROE COUNTY, FLA., COMPREHENSIVE PLAN LAND DEVELOPMENT REGULATIONS, vol. III, ch. 12, § 101-05 (1986). Public governmental buildings are also exempt. *Id.* Other exemptions have also been provided for single family dwelling units in the Pinelands, New Jersey, when municipal ordinances would otherwise have interfered with a community's development objectives. N.J. ADMIN. CODE, tit. 7.50, § 5.22 (1982).

or structure of the same size and use, or when development is proposed for a downtown redevelopment area.[88] Exemption regulations imply a municipality's willingness to decrease the amount of funds collected on behalf of the capital facility in order to provide adequate housing stock or building space for the targeted group. The impact of exemption policies must be clearly articulated so that the purpose of the compromise is clearly understood.[89] Also, it is important to calculate exemptions with caution to ensure that the deficit exemptions created will not be absorbed by other developers who remain subject to the fee.

IV. CONCLUSION

The adoption of the recent amendment to the Illinois Highway Code presently authorizing two counties to adopt impact fee programs to assist in the financing of the county and state road system symbolizes a state-level recognition of the need for managed growth. The General Assembly now recognizes that impact fees can fund the improvement and expansion of capital facilities and that impact fees are a viable and equitable means of generating revenues to ensure that those facilities will adequately serve new growth and development. This recognition brings Illinois officially into the national mainstream. Many municipalities in the state are either in the process of developing or have already developed similar programs for roads and other facilities, and it is to be expected that more will follow. Home rule municipalities clearly have the authority to adopt impact fee programs, and a strong argument can be made that non-home rule municipalities possess the same authority.

The question left open for the moment is which standard the Illinois courts will use to measure the constitutionality of this next generation of such regulatory fee programs. In recent years, the Illinois courts have indicated that they may be relaxing the "uniquely and specifically attributable" standard that has been routinely cited as the "Illinois test."[90] The United States Supreme Court decision in *Nollan v. California Coastal Commission*[91] is being heralded as establishing a new expression of the constitutional standard for exactions, and it is likely that Illinois will turn to this characterization of

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88. *See, e.g.*, MONROE COUNTY, FLA. COMPREHENSIVE PLAN LAND DEVELOPMENT REGULATION, vol. III, ch. 12, § 105(H)(1986); PEORIA, ILL., PROPOSED INTERIM FAIR SHARE ROAD IMPACT FEE ORDINANCE § 11 (1988).

89. See Siemon, *supra* note 17, at 126, for a discussion of the impact of exaction schemes on the cost of housing and the potential for discrimination against the poor. *Id.*

90. See *supra* notes 47-65 and accompanying text for a discussion of the "specifically and uniquely attributable" test.

91. 107 S. Ct. 3141 (1987).

the standard if a challenge is presented. The elements the courts will look for are straightforward. A municipality, county, or other unit of government that decides to implement an impact fee program will have to demonstrate the burden the new development imposes, and also establish procedures to ensure that the new development is paying no more than its "fair share" of the cost of improvements. Properly designed and managed, impact fees have their place . . . even in Illinois.