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Public and Private Land Development Conditions: An Overview, 52 UIC J. MARSHALL L. REV 747 (2019)

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PUBLIC AND PRIVATE LAND DEVELOPMENT CONDITIONS: AN OVERVIEW

DAVID L. CALLIES, FAICP*

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The American legal system provides for the regulation of land development through two principal means: government exercise of the police power for the health, safety, welfare and morals of the public (largely at the local government level), and the use of private covenants attached to the development of land by means of

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conditions, covenants and restrictions (CCR's) as agreements between private landowners. Both make use of so-called land development conditions to provide for public facilities, the need for which is generated by the relevant land development. This article addresses the principal legal requirements for public land development conditions imposed under the police power (nexus and proportionality) and the principle legal requirements for the enforcement of private restrictions on the use of land (notice and privity between the property owner enforcing the restriction and the property owner against whom the restriction is enforced). Common private land development conditions include construction or contributions to the cost and maintenance of streets, sidewalks and parks. Fulfilling such land development conditions – providing such facilities, whether public or private – substantially reduces the need for local government to provide for them using increasingly scarce tax revenues.

I. PRIVATE LAND DEVELOPMENT CONDITIONS

Private land use controls, in the form of the ubiquitous conditions, covenants and restrictions (CC&Rs), increasingly control the form, if not the pace, of development. Attached for decades to the plat of subdivision filed with local government authorities for public subdivision approval,¹ CC&Rs form the basis for the land use controls – indeed governance – of nearly all common interest communities, whose numbers grow exponentially with each passing year.² In many parts of the country, it is increasingly difficult for prospective homeowners to find housing outside such communities, severely limiting, if not destroying, the choice-of-location option that underlies the freedom to privately enforce the elements of such CC&Rs without public oversight.³

The covenanted community in the United States raises various concerns including exclusion, social fabric and the like.⁴ At bottom, it is a permutation and extension of the private covenant relationship between landowners, designed to ensure or, more commonly, guard against, certain uses of land that public land use controls (in the form of zoning, land development and building controls) fail to deal with. This results in a private contractual relationship affecting land between a promisor (usually a buyer of an interest in land) and a promisee (usually a seller of an interest

1. ROBERT H. FREILICH & MICHAEL M. SHULTZ, MODEL SUBDIVISION REGULATIONS 1-6 (2d ed. 1995).

2. EVAN MCKENZIE, PRIVATOPIA: HOMEOWNER ASSOCIATIONS AND THE RISE OF RESIDENTIAL PRIVATE GOVERNMENT 11 (1994).

3. Andrea Boyack, *Common Interest Community Covenants and the Freedom of Contract Myth*, 22 J. L. & POL'Y 767, 770-71 (2014).

4. EDWARD J. BLAKELY & MARY GAIL SNYDER, FORTRESS AMERICA: GATED COMMUNITIES IN THE UNITED STATES 1-3 (1997).

in land). The so-called "real" covenant lasts and is enforceable beyond the lives or ownership interests of the original parties to the covenant, "running with the land" on both the burden and benefit side, with the interests of the land as they are transferred by the original parties to subsequent buyers, devisees, and other transferees.⁵ Thus, for example, if A, the owner of a 2-acre parcel, sells 1 acre to B conditioned upon B building only a single-family residence not to exceed one story or 4 meters in height, colored only some shade of white and only with a red-tile roof, then that is the only use which B can make of that 1-acre parcel, unless prevented from doing so by public laws which may restrict the use even further. Moreover, anyone buying the 1-acre parcel so restricted is bound by B's promise, and anyone purchasing A's remaining 1-acre parcel may enforce it, even though neither of these parties so promised each other.

A major user of such real covenants is the property developer of large residential communities who wishes to guarantee a certain measure of uniformity, or difference, in the houses that make up the projected community. The land developer will attach a list of covenants dealing with homeowner assessments, design controls, and use and upkeep of common areas such as private roads, parks and recreational facilities both to whatever plan or plat of subdivision local government authorities require to be filed as a condition of land development, as well as to the deed to each lot or house sold. Some time following the selling of the last lot (or the construction of the last home if the developer is building them) the developer transfers the enforcement function to some sort of association of homeowners, thus forming a "homeowner's association," a variety of what the American Law Institute (ALI) calls a "common interest community" or CIC and others have called a "common interest development" or CID.⁶ The elected board of directors of that common interest community then maintains enforcement of the CC&Rs consistent with their terms and the bylaws of the association.

This trend does not necessarily portray a regional consumer preference, but represents a culmination of building in the Sunbelt during the past few decades.⁷ Many of the communities built in this region are "lifestyle communities," which include retirement communities as well as golf and leisure communities.⁸ While the retirement communities generally have homeowners who are closely involved in the internal politics and workings of the homeowner associations, the leisure communities often hire "outsiders" to take care of property management, security, and

5. GERALD KORNGOLD, PRIVATE LAND USE ARRANGEMENTS: EASEMENTS, REAL COVENANTS, AND EQUITABLE SERVITUDES 4 (3d ed. 2016).

6. Restatement (Third) of Property: Servitudes §1.8 (Am. Law. Inst. 1998).

7. *Id.*

8. BLAKELY & SNYDER, *supra* note 4, at 11.

maintenance so that they do not have to be bothered and can enjoy the facilities, - which is often part of the appeal of buying into the community.⁹

In all areas experiencing an increase in residential construction, CICs are increasing in number.¹⁰ The second tier of states with a large proportion of CICs includes Texas, Illinois, North Carolina, New York, Massachusetts, Georgia, Washington and Arizona.¹¹ Sixty-nine million Americans, or more than twenty-one percent of the country's population, live in approximately 342,000 CICs.¹² Of all developments built during the last half of the 1990s, one-third were gated and regulated by the equivalent of private governments: homeowner associations.¹³ As a form of common interest community, CIC's represent a type of residential development that also includes condominiums,¹⁴ cooperatives,¹⁵ and planned communities.¹⁶ They closely approximate in many ways, small municipal governments as they maintain private streets and parks, provide homeowner security, collect homeowner assessments for the purpose of financing the aforesaid activities, and often by means of walls and gates, keep all but homeowners and their invited guests from the precincts of the community.¹⁷ Once considered the domain only of the most affluent,¹⁸ CICs today represent the main staple of suburban and metropolitan residential development.¹⁹

The latter part of the twentieth century witnessed the growth of covenanted communities in record numbers.²⁰ Of the sixty-nine

9. *Id.* at 59-60.

10. MCKENZIE, *supra* note 2, at 11.

11. *Id.*

12. *Id.* at 12.

13. Michael Halberg, *Gated Communities: Do They Raise Residents' Expectations and Increase Liability for Associations?*, 4 J. COMMUNITY ASS'N. L. 5-6 (2001).

14. See WAYNE S. HYATT, *CONDOMINIUM AND HOMEOWNER ASSOCIATION PRACTICE: COMMUNITY ASSOCIATION LAW* 14 (2d ed. 1988) (illustrating that condominiums are a type of housing organized so that residents own their respective units in fee simple and own common areas as tenants in common).

15. See PATRICK ROHAN & MELVIN A. RESKIN, *COOPERATIVE HOUSING LAW AND PRACTICE* §9.01 (2001) (establishing the cooperative form of housing vests title in a corporate structure, with each resident owning stock in the corporation).

16. HYATT, *supra* note 14, at 6-14; see generally ROBERT FISHMAN, *BOURGEOIS UTOPIAS: THE RISE AND FALL OF SUBURBIA* (1987) (tracing origin of suburban housing trends).

17. MCKENZIE, *supra* note 2, at 122-49 (discussing the essential privatization of local government).

18. See James L. Winokur, *Critical Assessment: The Financial Role of Community Associations*, 38 SANTA CLARA L. REV. 1135, 1136 (1998).

19. *Id.* at 1138. ("In the largest United States metropolitan areas, a majority of all new housing sold is now in common interest communities.")

20. BLAKELY & SNYDER, *supra* note 4, at 4-7. See also MCKENZIE, *supra* note 2, at 11 (chronicling growth of privatized residential housing); see also *Facts About Community Associations*, COMMUNITY ASS'N. INST., www.caio.org/market-facts/ (last visited Aug. 21, 2019) (stating: "There are 231,000 community

million people living in CICs, more than eleven million (in 2009)²¹ of these Americans live in over twenty thousand gated communities.²² Safety, status, lifestyle enhancement and the preservation of property values are prime motivators for buying into these specific communities.²³ It is estimated that eight out of ten new residential housing developments in urban centers are “gated.”²⁴ They are proliferating in suburban areas as well, across all regions and price classes, from New York to California.²⁵ New homes in more than forty percent of planned developments are gated throughout the South, the West, and the Southeastern United States.²⁶

A. Covenanted Communities and the Phenomenon of Privatization: Constitutional Implications and Judicial Standards of Review

The phenomenon of “privatization” describes the “shift of government functions from the public to the private sector.”²⁷ In many ways, covenanted communities and their governing homeowners’ associations function as “private governments.”²⁸ Still,

associations in the United States. In 1965, there were only 500. Approximately 50% of all new homes built in major metropolitan areas fall within community associations.” It also notes that the Community Associations Institute, a national amalgam of developers, homeowners’ association leaders, residents and lawyers, takes as its self-declared aim the education and representation of America’s residential homeowners’ associations and service providers); See Robert C. Ellickson, *New Institutions for Old Neighborhoods*, 48 DUKE L.J. 75, 81 (1998) (explaining that “residential community associations . . . have been greeted with resounding approval in new real estate developments”); Michael A. Heller, *The Boundaries of Private Property*, 108 YALE L.J. 1163, 1183 (1999) (describing common interest communities as “perhaps the most significant form of social reorganization of late twentieth-century America”).

21. Laura Wojcik, *Gated Communities: The American Dream Behind Walls*, J. INT’L (Oct. 29, 2013) (noting that the original article was translated from French to English by Alice Robert).

22. Douglas S. Bible & Chengho Hsieh, *Gated Communities and Residential Property Values*, 69 APPRAISAL J. 140, 145 (2001) (stating: “It is estimated that eight million Americans are now living in over 20,000 gated communities that restrict access to residents and their guests.”); Lois M. Baron, *The Great Gate Debate*, 21 BUILDER 92 (Mar. 1998) (chronicling the rise of gated communities “everywhere.”).

23. Edward J. Blakely & Mary Gail Snyder, *Forting Up: Gated Communities in the United States*, 15 J. ARCHITECTURAL & PLAN. RES. 61 (1998); Edward J. Blakely & Mary Gail Snyder, *Places to Hide*, 19 DEMOGRAPHICS 22 (1997); Carol Tucker, *Gated Communities: The Barriers Go Up*, 80 PUB. MGMT. 5, 22 (1998).

24. BLAKELY & SNYDER, *supra* note 4, at 7.

25. *Id.* Baron, *supra* note 22, at 92-96.

26. BLAKELY & SNYDER, *supra* note 4, at 7.

27. George L. Priest, *Introduction: The Aims of Privatization*, 6 YALE L. & POL’Y REV. 1, 5 (1988).

28. McKenzie, *supra* note 2, at 122; see also Robert H. Nelson, *Privatizing the Neighborhood: A Proposal to Replace Zoning with Private Collective Property*

in order to wage a constitutional challenge against a covenanted community for discrimination, exclusion or a violation of civil rights and liberties, the community must be deemed a "state actor." Some scholars have argued that, because such communities are virtual governments, they should qualify as *de facto* state actors.²⁹ In that case, they would be required to satisfy the Constitution's Due Process, Equal Protection and First and Fourth Amendment guarantees.³⁰

Although this contention has not been squarely litigated before the United States Supreme Court, lower courts have, for the most part, resisted applying constitutional safeguards to CICs and are ambivalent, if not somewhat confused, on the question of whether to characterize privately owned communities as the sort of state actors that would be subject to certain constitutional requirements.³¹ Overall, courts have yet to develop a cohesive jurisprudential framework in the larger setting of resolving conflicts between covenanted community members and nonmembers over the use of space and resources, exclusionary practices, and alleged deprivations of civil liberties.

A California appellate court, however, did set some guidelines for its jurisdiction. In *Cohen v. Kite Hill Community Ass'n*,³² a resident of a private community who had paid a premium price for his lot sued the homeowners' association because it had approved a non-conforming fence that would partially obstruct the resident's

Rights to Existing Neighborhoods, 7 GEO. MASON L. REV. 827, 828-29 (1999) (suggesting legislation to allow public neighborhood developments to be recast as private neighborhood associations); Harvey Rishikof & Alexander Wohl, *Private Communities or Public Governments: The State Will Make the Call*, 30 VAL. U. L. REV. 509, 511-16 (1996) (exploring propriety of state action designation to homeowners' associations); Wayne S. Hyatt & Jo Anne P. Stubblefield, *The Identity Crisis of Community Associations; In Search of the Appropriate Analogy*, 27 REAL PROP. PROB. & TR. 589, 634-41 (1993) (describing community association as quasi-government, with many of the powers and duties of municipal government).

29. See Steven Siegel, *The Constitution and Private Government: Toward the Recognition of Constitutional Rights in Private Residential Communities Fifty Years after Marsh v. Alabama*, 6 WM. & MARY B. RTS. J. 461, 462 (1998) (suggesting various theories as to why homeowners' associations should be viewed as state actors); see also David J. Kennedy, *Residential Associations as State Actors: Regulating the Impact of Gated Communities on Nonmembers*, 105 YALE L.J. 761, 767-68 (1995).

30. See Kennedy, *supra* note 29, at 778-93.

31. See *id.* at 764 (stating: "The question of whether to treat residential associations as state actors has been addressed by numerous state court decisions, producing little consensus. The difficulty of reconciling community with exclusion explains much of this ambivalence and confusion over how to treat these entities."); Siegel, *supra* note 29, at 466 (noting that although common interest communities possess many of the powers associated with local government, they are rarely recognized as "state actors").

32. *Cohen v. Kite Hill Cmty. Ass'n*, 142 Cal. App. 3d 642, 645 (1983).

view.³³ Plaintiff contended that the association had violated the CC&Rs, been negligent, and breached its fiduciary duty.³⁴ Plaintiff requested an injunction to stop the construction of the violating fence and damages.³⁵ The Declaration of the Homeowners' Association lists the association's duties and responsibilities and contains an absolution clause which states that the association has no affirmative duty to fulfill the CC&Rs.³⁶ The court held that the absolution clause was irrelevant because the association holds a position of power over the homeowners³⁷ and the decision to allow a non-conforming fence was an administrative decision equal to a zoning variance.³⁸ Therefore, the decision was reviewable "to protect neighboring property interests from arbitrary actions by homeowner associations."³⁹ The court also found that the association owes a duty of good faith to each individual member (not just to the group of homeowners as a whole)⁴⁰ because the association owes a duty of good faith to anyone affected by its decisions.⁴¹

The United States Supreme Court has long held in other contexts that the Constitution's Fourth Amendment protections are not triggered by private party searches.⁴² Presumably, then, the private security guards of covenanted communities are not subject to the constitutional constraints that would be imposed upon public police officers.⁴³ Similarly, the First Amendment would not seem to guarantee non-residents the right to speak on private community property.⁴⁴

Those who wish to maintain the rights of HOAs to self-govern without the interference of the government argue on the basis of

33. *Id.* at 645-46.

34. *Id.* at 647.

35. *Id.*

36. *Id.* at 649-50.

37. *Kite Hill Cmty. Ass'n*, 142 Cal. App. 3d at 655.

38. *Id.* at 652.

39. *Id.* (quoting *Topanga Ass'n for a Sci. Cmty. v. Cty. of L.A.*, 522 P.2d 12, 19 (Cal. 1973)).

40. *Id.* at 652-53.

41. *Id.* at 653.

42. *See, e.g.*, *United States v. Jacobsen*, 466 U.S. 109, 113 (1984) (finding that a Federal Express employee's search of package did not violate the Fourth Amendment because Federal Express is a private company); *see also* *Debroux v. Virginia*, 528 S.E.2d 151, 154-55 (Va. Ct. App. 2000) (reaffirming the rule that private security officers are not state actors).

43. *See* John B. Owens, *Westec Story: Gated Communities and the Fourth Amendment*, 34 AM. CRIM. L. REV. 1127, 1142-49 (1997) (proposing that the Fourth Amendment should apply to private security forces).

44. In *William G. Mulligan Found. v. Brooks*, 711 A.2d 961, 967 (N.J. Super. Ct. App. Div. 1998) (illustrating that New Jersey Superior Court held that a gated community does not have to afford a non-resident the opportunity to speak within its borders); *see* Frank Askin, *Free Speech, Private Space, and the Constitution*, 29 RUTGERS L. J. 947, 960-61 (1998) (arguing that First Amendment protections should apply to gated communities).

freedom to contract.⁴⁵ People choose to buy homes in covenanted communities and therefore they assent to all of the conditions of the contract. This argument presents some problems not only in that the availability of housing outside of covenanted communities is becoming more and more limited but also because many buyers are not afforded the opportunity to review all of an association's bylaws before the purchase of their home.⁴⁶ Many homeowners' associations will not disclose their full list of bylaws to non-members or, if they will, the potential buyer has to request and schedule their own meeting prior to closing on the house.⁴⁷ This presents potential problems where buying the property becomes an adherence to all of the terms of the homeowner's association and raises issues about the actual notice provided to those buying into the community.⁴⁸

In response, one prominent academic has suggested that common interest community residents should be afforded their own privately drafted bill of rights.⁴⁹ Two states have adopted a homeowners' bill of rights that imposes upon homeowners' associations some of the same mandates (such as open-meeting rules) that would apply to local governments.⁵⁰ Further, since homeowners' associations function, at the very least, as quasi-governments, the argument has been advanced that they ought to be subject to stricter judicial review.⁵¹ Courts continue to evolve guideposts for judicial review of association conduct.⁵² Borrowing

45. Boyack, *supra* note 3, at 782-87.

46. Mirah Riben, *Buyer Beware! HOA's Deny Your First Amendment Rights*, HUFFINGTON POST (Sept. 1, 2016), www.huffpost.com/entry/buyer-beware-hoas-deny_yo_b_11779814?guccounter=1&guce_referrer=aHR0cHM6Ly93d3cuZ29vZ2xILmNvbS8&guce_referrer_sig=AQAAAKjnMUT8rnLhO7uRTiVYViArCJC964BRGKmRrbUcEU4hrw5dTznISjw2kf16DMqg_6Fop3aAC4Xozb01ZYS98iCVFl19PaovQ5hwb8XGPougwdRwDH2gAmjMsaE242GXytTS66ujpPS11_tgp_9G_3wLpc9zjG62s_o-mQiMRdR.

47. *Id.*

48. *See* Boyack, *supra* note 3, at 770.

49. *See* Susan F. French, *The Constitution of a Private Residential Government Should Include a Bill of Rights*, 27 WAKE FOREST L. REV. 345, 350-52 (1992).

50. *See* Matthew Benjamin, *Hi, Neighbor, Want to Get Together? Let's Meet in Court!*, 129 U.S. NEWS & WORLD REP. 56, 56-57 (Oct. 30, 2000).

51. *See, e.g.*, David C. Drewes, *Putting the "Community" Back in Common Interest Communities: A Proposal for Participation-Enhancing Procedural Review*, 101 COLUM. L. REV. 314, 349-51 (2001) (proposing that the judiciary encourage participatory common interest community governance by varying standard of judicial review based upon presence or absence of participatory procedures in association's decision-making process); Todd Brower, *Communities Within the Community: Consent, Constitutionalism, and Other Failures of Legal Theory in Residential Associations*, 7 J. LAND USE & ENVTL. L. 203, 262-72 (1992) (arguing for stricter standard of judicial review).

52. Paula A. Franzese, *Common Interest Communities: Standards of Review and Review of Standards*, 3 WASH. U. J. L. & POL'Y 663, 666-71 (2000) (detailing standards of review adopted by courts to review common interest community rules and governing board actions, and proposing a multi-factored reasonableness test to honor resident expectations as well as best interests of

from models of corporate governance, some apply a “business judgment rule,” which imposes the duty to act in good faith within the scope of granted authority.⁵³ Most courts have cast association obligations in terms of reasonableness, requiring that the given restriction or action only be rationally related to some legitimate association purpose, such as the protection and preservation of the health and quiet enjoyment of its residents.⁵⁴ With varying degrees of success, courts seek to balance concerns for stability and predictability with the need to protect against association abuse of power.

As associations grow in numbers and popularity, whether or not covenanted communities are private actors providing a traditionally public function, remains to be seen. If they are, the U.S. Supreme Court’s ruling in *PruneYard Shopping Center v. Robins*⁵⁵ may apply to private streets much as it did to a shopping mall.⁵⁶ Presently, private communities tend to hinder, rather than foster, communication with and from those outside their jurisdiction.⁵⁷ For example, in *Laguna Publishing Co. v. Golden Rain Foundation*,⁵⁸ the California appellate court found that a non-resident newspaper cannot be refused if another newspaper company was allowed on the property. The private community attempted to prevent promotional distribution of a newspaper only because it was not the community’s “in-house” paper.⁵⁹ This case followed that of *Marsh v. Alabama*,⁶⁰ where the Supreme Court upheld a Jehovah Witness’s right to distribute leaflets in a company town.

However, in *William G. Mulligan Foundation v. Brooks*,⁶¹ the New Jersey Superior Court found that a covenanted community is not required to allow a non-resident to speak on the property, as long as that common property is only set aside for non-

collective).

53. See Hyatt & Stubblefield, *supra* note 28, at 694-704 (noting a discussion of the leading cases to apply the business judgment rule to common interest communities).

54. See, e.g., *Hidden Harbour Estates, Inc. v. Norman*, 309 So. 2d 180, 182 (Fla. Dist. Ct. App. 1975) (upholding challenged restriction as reasonable and in good faith); *Riss v. Angel*, 934 P.2d 669, 684 (Wash. 1997) (striking down association decision because it was unreasonable and it lacked sufficient factual basis).

55. *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 80-88.

56. Richard Damstra, *Don't Fence Us Out: The Municipal Power to Ban Gated Communities and the Federal Takings Clause*, 35 VAL. U. L. REV. 525, 541-42 (2001).

57. *Id.* at 542.

58. *Laguna Publ'g Co. v. Golden Rain Found. of Laguna Hills*, 182 Cal. Rptr. 813, 815 (Ct. App. 1982).

59. *Id.* at 815.

60. *Marsh v. Alabama*, 326 U.S. 501, 502-10 (1946).

61. *William G. Mulligan Found. v. Brooks*, 711 A.2d 961, 961 (N.J. Super. Ct. App. Div. 1998).

discriminatory private use. The court came to this conclusion after finding that a private community newspaper was not included in the term "free press" in the U.S. Constitution and that advertising was not necessarily protected speech.⁶² Instead, the court relied on the New Jersey Constitution's protection of private property, and held that

Without considering the reasonableness of the restrictions or limitation defendants placed on plaintiffs' "advertisement," we conclude that the normal uses of the property, the absence of invitation for public use, and the type of the speech involved here do not compel us to limit defendants' rights as owners of private property.⁶³

States must develop their own methods of interpreting the difference between public and private issues and how to preserve individual rights as well as private contractual agreements.⁶⁴ State legislatures have done little to help their respective courts in this arena, and as a result, state courts are struggling to apply their state constitutions to national traditions and constitutional protections for free speech, private property rights, public access, equal rights, and limited search and seizure.⁶⁵

Surveying the states of California, Washington, Ohio and New Jersey alone, one scholar points out the divergent methods of constitutional interpretation.⁶⁶ In *Robins v. Pruneyard Shopping Center*,⁶⁷ California held that the private property rights of a shopping mall were not immune from the state constitution. The court went so far as to say, "As the interest of society justifies restraints upon individual conduct, so also does it justify restraints upon the use to which property may be devoted."⁶⁸ On the other hand, Washington courts have decided not to use the "public function" test of *Marsh v. Alabama*,⁶⁹ but instead have employed that of *Lloyd Corp. v. Tanner*,⁷⁰ which held that shopping malls are easily distinguishable from company towns.⁷¹ Ohio's Supreme Court has held that the state constitution's free speech provisions could be no broader than those of the U.S. Constitution, thereby holding that a shopping mall could expel someone collecting petition signatures.⁷² New Jersey uses a more flexible approach, allowing the state constitution to protect private persons demonstrating on

62. *Id.* at 964.

63. *Id.* at 967.

64. Rishikof & Wohl, *supra* note 28, at 549-50.

65. *Id.* at 550-51.

66. *Id.* at 542-49.

67. *Robins v. Pruneyard Shopping Ctr.*, 592 P.2d 341, 342 (Cal. 1979).

68. *Id.* at 345.

69. *Marsh*, 326 U.S. at 506.

70. *Lloyd Corp. v. Tanner*, 407 U.S. 551, 552 (1972).

71. Rishikof & Wohl, *supra* note 28, at 545.

72. *Id.* at 547 (citing *Eastwood Mall, Inc. v. Slanco*, 626 N.E.2d 59, 60 (Ohio 1994)).

private property.⁷³ The New Jersey Supreme Court's three-part test balances (1) the use and nature of the private property, (2) the purpose and method of the individual's expression, and (3) the level of apparent invitation to the public that the private property has made.⁷⁴ The court has found that private shopping malls must permit free speech because shopping malls are so similar to public property.⁷⁵

A common form of security provided by homeowners' associations is private guards and patrols. These private security forces now outnumber public ones, and it has not been definitively decided whether private guards are state actors and thus subject to the U.S. Constitution's Fourth Amendment protections against unlawful search and seizures.⁷⁶ Although the residents' act of buying into a private community may have consented to the private policing, guests and workers in the community have not so consented.⁷⁷

The main function of private security forces is the protection of property, not the assistance of the public police force by apprehending criminals.⁷⁸ Even so, those same private security forces advertise "as the solution to overburdened police departments with extremely slow response times."⁷⁹ Sometimes overburdened police departments will request assistance or collaboration from private agencies.⁸⁰ Some worry that the blurring of public and private law enforcement "may eviscerate the Fourth Amendment."⁸¹

In a recent survey of homeowners, researchers found that over twenty-four percent of CIC residents had experienced "significant personal issue or disagreement with their associations."⁸²

B. Covenanted Communities and Land Use Controls

Homeowners' association's use of covenants has been compared to local zoning.⁸³ Both include limitations on housing designs, densities, aesthetics and uses, (a source of considerable contention in their supervision by homeowners' association boards,

73. Rishikof & Wohl, *supra* note 28, at 547.

74. *Id.* at 548.

75. *Id.* (citing *Middle East v. JMB Realty Corp.*, 650 A.2d 757, 760 (N.J. 1994)).

76. Damstra, *supra* note 56, at 540-41.

77. *Id.* at 541.

78. Owens, *supra* note 43, at 1139-40.

79. *Id.* at 1140.

80. *Id.* at 1141.

81. *Id.* at 1142.

82. Gerald Korngold, *Private Regimes in the Public Sphere*, LINCOLN INST. LAND POLY, www.lincolninst.edu/publications/articles/private-regimes-public-sphere (last accessed Aug. 14, 2019).

83. Nelson, *supra* note 28, at 835.

particularly if still controlled by the project developer). Coupled with unlimited "variance" power, unbridled review and enforcement often leads to heated disputes pitting CICs against individual homeowners or small groups of homeowners over the conformance, or lack thereof, of a particular house design with those prevailing in the community. One scholar suggests that private community developers be allowed their own zoning powers, without any overlapping with the local zoning authorities or any role from people who will not be living in the community.⁸⁴ While zoning generally works as a planning tool for municipalities,⁸⁵ the purposes of a private community often include separation from the general municipality. Privatizing zoning would be yet another step for CICs to take toward privatizing government functions.⁸⁶

However, each community "zoning" itself results in uncoordinated land use planning of the area. One result may well be cumulative traffic impacts for all neighboring communities.⁸⁷ Air quality, property values, environmental preservation, efficient public services, and well-located schools are all better coordinated by a more regional government responsible for the region's public services.⁸⁸

C. Private Affirmative Covenants

As with public land use controls and exactions discussed in Part II, private covenants can be affirmative in nature, requiring the landowner to do something rather than refrain from doing something. A prime example is the payment of a special assessment or an annual fee for the upkeep of common elements like parks, playground tennis courts and golf clubs.⁸⁹ The most common of affirmative covenants, the requirement to pay fees, can be expressly agreed to in the CC&Rs or can often be an amendment adopted by a homeowner's association.⁹⁰ As long as the requirement is found to be reasonable, covenants requiring fees and assessments are frequently enforced by the courts.⁹¹

84. *Id.*

85. *Id.* at 837.

86. Evan McKenzie, *Reinventing Common Interest Developments: Reflections on a Policy Role for the Judiciary*, 31 J. MARSHALL L. REV. 397, 402 (1998).

87. Sheryll D. Cashin, *Localism, Self-Interest, and the Tyranny of the Favored Quarter: Addressing the Barriers to New Regionalism*, 88 GEO. L.J. 1985, 2043 (2000).

88. *Id.*

89. Edward J. Blakely & Mary Gail Snyder, *Forting Up: Gated Communities in the United States*, 15 J. ARCHITECTURAL & PLANNING RESEARCH 61, 68 (1998); Edward J. Blakely & Mary Gail Snyder, *Places to Hide*, 19 DEMOGRAPHICS 22, 23 (1997).

90. Restatement (Third) of Property: Servitudes §6.5 (Am. Law. Inst. 1998).

91. *Id.*

Other common affirmative covenants require a landowner to join a homeowner's association (which can then levy other requirements). A recent case in Georgia upheld such a covenant and found that even land that was given as a charitable donation was still burdened and the charity was required to become a member of the association.⁹² Similarly, state courts in Arkansas⁹³ and Texas⁹⁴ have upheld requirements that homeowners pay membership fees to a private golf club as well as a transfer fee to the original land developer every time the property was sold. A Utah court has upheld a covenant enforcing an oil company to pay a fee akin to a royalty to surface owners as a covenant running with the land.⁹⁵ A Maryland court upheld a covenant requiring payment of pro rata costs for public streets and utilities.⁹⁶ A Kentucky court upheld a covenant requiring that the exterior of dwelling units must be at masonry construction.⁹⁷ A court also upheld an amendment adopted by the HOA to force every homeowner to purchase a membership at a nearby swimming club, including those who had owned their homes for years before this decision was made and who did not wish to use the club.⁹⁸ A Louisiana court upheld a requirement that homeowners regularly cut their grass and otherwise maintain their house lots, and the homeowner's association was permitted to fine or penalize the homeowners if they did not comply. In a commercial setting, a New York court recently upheld a deed requirement for one building owner to provide steam heat to several adjacent buildings.⁹⁹ An Ohio court even ruled that a covenant to place a plaque with the architect's name on the building was valid and further held that a covenant to host children's movies on Saturday for no more than \$1 for a double feature would be enforceable had it not included a provision saying that it was only for as long as feasible, which it no longer was.¹⁰⁰ While less common than restrictive covenants, affirmative private covenants are prime examples of ways that property owners can exercise control over their neighbors' properties and increase (or sometimes decrease) both their own property value as well as the property value of those

92. *Lend a Hand Charity, Inc. v. The Ford Plantation Club, Inc.*, 791 S.E.2d 180 (Ga. Ct. App. 2016).

93. *Dye v. Diamente*, 510 S.W.3d 759, 761 (Ark. 2017).

94. *Twin Creek's Golf Group, L.P. v. Sunset Ridge Owners Ass'n*, 537 S.W.3d 535, 537 (Tex. App. 2017).

95. *Flying Diamond Oil Corp. v. Newton Sheep Co.*, 776 P.2d 618 (Utah 1989).

96. *Gallager v. Bell*, 516 A.2d 1028 (Md. Ct. Spec. App. 1986).

97. *Marshall v. Adams*, 447 S.W.2d 57 (Ky. Ct. App. 1969).

98. *Amberfield Homeowners Ass'n, Inc. v. Young*, 813 S.E.2d 618, 623-25 (Ga. Ct. App. 2018).

99. *Condor Funding LLC v. 176 Broadway Owners Corp.*, 147 A.D.3d 409, 410 (N.Y. App. Div. 2017).

100. *Capital City Cmty. Urban Redev. Corp. v. City of Columbus*, No. 15AP-943 WL 7494342 (Ohio Ct. App. 2016).

around them.

II. PUBLIC LAND DEVELOPMENT CONDITIONS: IMPACT FEES, EXACTIONS AND IN-LIEU FEES

The Fifth Amendment to the United States Constitution, via the Takings Clause, ensures that private property shall not be taken for public use unless just compensation is paid.¹⁰¹ The Takings Clause does not specify the precise type of governmental action that qualifies as a taking, but the Supreme Court of the United States has identified three types of actions that qualify.¹⁰² These actions include physical invasions, over-regulation, and land use development conditions like exactions.¹⁰³ This section will focus on the latter type of governmental action.¹⁰⁴ In *Nollan v. California Coastal Commission*, the Court held that land use exactions require an “essential nexus” between the nature of the condition and a public need generated by the proposed development.¹⁰⁵ The Court again considered the constitutionality of land use exactions in *Dolan v. City of Tigard*, adding an additional requirement that there be “rough proportionality” between the exaction and the harms caused by the regulated activity.¹⁰⁶

A. Application Beyond Interests in Property

After the Court formulated the heightened scrutiny of the *Nollan/Dolan* standard for exactions, courts have struggled with the application. Does the standard apply to all types of exactions or only to land based exactions? As noted above, the Court’s *Nollan* and *Dolan* opinions did not have any reason to address this ancillary question that might arise in other exaction cases. *Koontz v. St. Johns River Water Management District* directly answered that question in the affirmative.¹⁰⁷

Preliminarily, the Court decided whether the government must meet the *Nollan* essential nexus test and the *Dolan* rough proportionality standard in cases in which the permit applicant

101. U.S. CONST. amend. V.

102. Jai Keep-Barnes, *Inclusionary Zoning as a Taking: A Critical Look at Its Ability to Provide Affordable Housing*, 49 URB. LAW. 67, 86 (2017).

103. *Id.*

104. See *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 421 (1982) (illustrating physical invasions); *Penn Cent. Transp. Co. v. N.Y.C.*, 438 U.S. 104, 105 (1978) (illustrating over-regulation); *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825 (1987) (illustrating land use exactions); see also *Dolan v. City of Tigard*, 512 U.S. 374, 374 (1994) (illustrating land use exactions).

105. *Nollan*, 483 U.S. at 837.

106. *Dolan*, 512 U.S. at 391.

107. *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 612 (2013). [Note that Koontz Sr. died at some point and Koontz Jr. took over the litigation.]

rejects the proposed exaction rather than accepting it.¹⁰⁸ In both *Nollan* and *Dolan*, the government offered the applicant a deal, the applicant accepted it, and then the applicant brought a takings claim challenging the constitutionality of the exchange. In *Koontz*, by contrast, the owner rejected the government's offer. Initially, the Court observed that *Nollan* and *Dolan* allows the government to condition approval of a permit on a dedication of property to the public so long as there is a nexus and rough proportionality between the property that the government demands and the social costs of the applicant's proposal.¹⁰⁹ The Court then clearly stated: "The principles that undergird our decisions in *Nollan* and *Dolan* do not change depending on whether the government approves a permit on the condition that the applicant turn over property or denies a permit because the applicant refuses to do so."¹¹⁰ Further observing that it had often concluded the denials of governmental benefits were impermissible under the Unconstitutional Conditions Doctrine, the Court admonished:

A contrary rule would be especially untenable in this case because it would enable the government to evade the limitations of *Nollan* and *Dolan* simply by phrasing its demands for property as conditions precedent to permit approval. . . . Our unconstitutional conditions cases have long refused to attach significance to the distinction between conditions precedent and conditions subsequent.¹¹¹

The Court then addressed the most critical issue: whether the *Nollan* and *Dolan* standards apply in settings in which the government exacts money rather than an interest in real property.¹¹² In each of the two earlier cases, the government had asked the applicant to dedicate an interest in real property in return for receiving the desired permit.¹¹³ The St. Johns River Water Management District, by contrast, suggested to *Koontz* that he spend money, which would not have required him to give up any of the sticks in his real property bundle.¹¹⁴

Writing for a five-Justice majority, Associate Justice Alito held: (1) a government's demand for money or land from a land use permit applicant must satisfy the nexus and proportionality requirements from the Court's holding in *Nollan* and *Dolan*, even when it denies the permit, and (2) the government's demand for property from a land use permit applicant must satisfy the *Nollan/Dolan* requirements even if the demand is for money-like impact fees, in-lieu fees, and other money exactions—rather than a dedication of an

108. *Id.*

109. *Id.* at 606.

110. *Id.*

111. *Id.* at 606-08.

112. *Id.*

113. *Nollan*, 483 U.S. at 828; *Dolan*, 512 U.S. at 377.

114. *Koontz*, 570 U.S. at 611-12.

interest in real property, like an easement.¹¹⁵ In concluding that monetary exactions must satisfy the nexus and proportionality requirements of *Nollan* and *Dolan*, the Court explained the required direct link between the government's demand and a specific parcel of real property: the property interest is the landowner's parcel for which government development permission is sought, not the character of the exaction as an interest in real property, as many have urged and some lower courts have held.¹¹⁶ In this case,

[T]he monetary obligation burdened the petitioner's ownership of a specific parcel of land. . . . The fulcrum this case turns on is the direct link between the government's demand and a specific parcel of real property. Because of that direct link, this case implicates the central concern of *Nollan* and *Dolan*: the risk that the government may use its substantial power and discretion in land-use permitting to pursue governmental ends that lack an essential nexus and rough proportionality to the effects of the proposed new use of the specific property at issue, thereby diminishing without justification the value of the property.¹¹⁷

The Court then addressed the main question which caused the major split among lower state and federal courts: "We turn to the Florida Supreme Court's alternative holding that petitioner's claim fails because respondent asked him to spend money rather than give up an easement on his land."¹¹⁸ Noting that such an argument would render it easy for land use permitting officials to evade the *Nollan/Dolan* limitation by simply substituting an in-lieu fee for an exaction of an interest in real property like an easement, the Court held: "For that reason and those that follow, we reject respondent's argument and hold that so-called 'monetary exactions' must satisfy the nexus and proportionality requirements of *Nollan* and *Dolan*."¹¹⁹ The property interest necessary for cases such as these is not a required dedication of land itself but rather the effect of any exaction on the owner's subject parcel: "unlike *Eastern Enterprises*, the monetary obligation burdened petitioner's ownership of a specific parcel of land. . . . The fulcrum this case turns on is the direct link between the government's demand and a specific parcel of property."¹²⁰

While there has been much wringing of hands – particularly in the environmental community – over the supposedly cataclysmic change *Koontz* has caused in the law of exactions and unconstitutional conditions, "*Koontz* did not change the law so much

115. *Koontz*, 570 U.S. at 595-97.

116. *Id.* at 615.

117. *Id.* at 613.

118. *Id.* at 611-12.

119. *Id.* at 612.

120. *Id.* at 613.

as protect it against nonsensical loopholes.”¹²¹ Indeed, “it is difficult to imagine how the District’s proposed exactions did not go beyond what is roughly proportional to the impacts caused by *Koontz*’s proposal.”¹²² It is not judicial activism at its worst, but instead an attempt to rein in the deeply flawed notion that government may extract regulatory windfalls. The issues all boil down to one’s view of property development: a right of use of private land subject to government regulation under the police power, or a privilege conferred by government. The key is that government has at least as much a duty to protect private property rights – a constitutional obligation – as to protect the environment. Government is not supposed to promote development under the police power, but rather, permit it unless the health, safety and welfare of the people requires its reasonable regulation.

1. *Post-Koontz*

After *Koontz*, state and local governments will obviously be required to consider both nexus and proportionality when placing conditions on land development permits, whether or not such conditions require the dedication of interests in land or exactions of money. This is true whether the condition is precedent (agree to the condition or no permit) or subsequent (here’s your permit, but only on the following conditions).¹²³ This is the portion of the holding upon which the Court was unanimous. On this point, the Court clearly got it right. How this will play out in practice is not yet clear.¹²⁴ Some commentators suggest either that state and local governments will simply stop negotiating entirely on land use permitting matters or will leave it to a landowner to offer sweeteners like workforce housing, oversized water and sewer pipes, and community recreational facilities to facilitate their permitting and rezoning requests.¹²⁵ The latter opinion would

121. Amy Brigham Boulris, *Substance Prevails Over Form in Property Rights Case*, DAILY BUS. REV. (July 15, 2013), www.dailybusinessreview.com/PubArticleDBR.jsp?id=1202610781240&slreturn=20131013170230.

122. Jesse Souki, *No Permit for You! – How Denying a Permit Could be a Taking*, HAWAII LAND USE L. & POL’Y BLOG (June 28, 2014), www.hilanduselaw.com/2013/06/no-permit-for-you-how-denying-permit.html.

123. See James E. Holloway & Donald C. Guy, *Extending Regulatory Takings Theory by Applying Constitutional Doctrine and Elevating Takings Precedents to Justify Higher Standards of Review in Koontz*, 22 WIDENER L. REV. 33, 50 (2016).

124. See, Sean F. Nolon, *Bargaining for Development Post-Koontz: How the Supreme Court Invaded Local Government*, 67 FLA. L. REV. 171, 211-19 (2015) (explaining why *Koontz* makes land use negotiations less efficient and exploring the consequences of *Koontz* on future land use negotiations).

125. See Michael M. Berger, *Supreme Court Limits Land Development Permit Conditions*, MANATT (June 26, 2013), www.manatt.com/Insights/Newsletters/Real-Estate-and-Land-Use/Supreme-Court-Limits-Land-Development-Permit-Condi; John D. Echeverria, *A Legal Blow to Sustainable*

convert the land development permitting process into something akin to Virginia's infamous "proffer" system which virtually requires such offers.¹²⁶ However, others predict that the consequences of *Koontz* will have little impact on negotiations between state and local government and developers.¹²⁷

2. Mitigation Fees

As the facts in this case deal with a mitigation fee and the Court specifically rejected the distinction between money and real property interests in applying the *Nollan/Dolan* nexus and proportionality standards, the decision almost certainly applies to mitigation fees charged to ameliorate the environmental effects of a proposed land development project. Proportionality in particular will be important here. We can logically expect more use of such fees in place of land parcel requirements because the former will be more easily constitutionally-tailored to a development-driven need. Thus, for example, when a landowner is converting two acres to dry land, the fee should compensate for more than those two acres.¹²⁸ Requiring a fee for the creation of a multi-acre wetland park would almost certainly be disproportionate.

3. In-Lieu Fees

The nexus and proportionality requirements of *Nollan* and *Dolan* are now applicable to fees often charged by local government in lieu of a dedication of a property interest *per se*. The Court specifically singled out such in-lieu fees in its opinion.¹²⁹ Thus, for example, where local government charges a road-building fee as a condition for approving a residential subdivision rather than develop a dedication of roads generated by the subdivision, the fee will have to be proportional to that generated need as well.

Development, N.Y. TIMES (June 26, 2013), www.nytimes.com/2013/06/27/opinion/a-legal-blow-to-sustainable-development.html?_r=0; see also Christina M. Martin, *Nollan and Dolan and Koontz-Oh My! The Exactions Trilogy Requires Developers to Cover the Full Social Costs of Their Projects, but No More.*, 51 WILLAMETTE L. REV. 39, 41 (2014) (addressing some of the concerns held by commentators in the legal community about the impact of the *Koontz* decision).

126. VA. CODE ANN. § 15.2-2297 (West 2013).

127. See Daniel P. Selmi, *Negotiations in the Aftermath of Koontz*, 75 MD. L. REV. 743, 745 (2016) (arguing that the actual impact of the decision is likely to be relatively small); Shelley Ross Saxer, *To Bargain or not to Bargain? A Response to Bargaining for Development Post-Koontz*, 67 FLA. L. REV. 5, 8 (2015).

128. Jessica Owley, *Late to the Game: Koontz and Whether You Can Have a Takings Claim Without an Actual Takings*, LAND USE PROF BLOG (July 1, 2013), lawprofessors.typepad.com/land_use/2013/07/late-to-the-game-koontz-and-whether-you-can-have-a-takings-claim-without-an-actual-takings.html.

129. *Koontz*, 570 U.S. at 612.

4. Impact Fees

The decision by its terms also applies to impact fees imposed by the government to pay for public facilities such as schools, public parks, and wastewater treatment plants. There is no reasonable distinction among in-lieu fees, mitigation fees, and impact fees. All are fees charged by government as a condition for land development approval (as distinguished from charges such as user fees and taxes, discussed below). All are embraced by the Court's term "monetary exaction," and thus all are now subject to the nexus and proportionality requirements of *Nollan* and *Dolan*.¹³⁰

5. Other "Exactions" vs. Taxes and User Fees

The *Koontz* dissent makes much of the confusion between impact fees, on the one hand, and property taxes and user fees, on the other, that will become even more significant as a result of the decision.¹³¹ However, as the Court's majority rightly observes, the two are fundamentally different and based on fundamentally different legal theories.¹³² Land development conditions, such as impact fees and other monetary exactions, find their authority and roots in the government's exercise of the police power. Property taxes, however, are rooted in government authority to raise revenue—the power to tax, which requires no demonstration of nexus and proportionality to any activity by the taxpayer. User fees are merely charges levied on users for services rendered by the charging government, like building permit fees. Although the decision could conceivably be interpreted as an attempt to apply intermediate scrutiny to all public finance decisions, there has been no such broader scrutiny in the twenty-seven states that already use stricter, intermediate scrutiny for monetary exactions. The dissent is probably better read as a concern that the distinction is difficult to draw in practice and that confusion will reign about whether taxes and fees are also subject to stricter scrutiny. On the other hand, perhaps the dissent would like to subject all public finance to stricter scrutiny and uses the *Koontz* dissent as a vehicle for commencing just that.¹³³

130. See Carl J. Circo, *Land Use Impact Fees: Does Koontz v. St. Johns River Water Management District Echo an Arkansas Philosophy of Property Rights?*, 2014 ARK. L. NOTES 1626, 11 (2014) (predicating that "for the time being *Koontz* will deter state and local governments from experimenting with mitigation and linkage fee programs that they might otherwise explore to help finance solutions to some of the most important problems that real estate development, especially urban growth, present today").

131. *Koontz*, 570 U.S. at 615.

132. *Dolan*, 512 U.S. at 391.

133. Jonathan M. Zasloff, *Koontz and Exactions: Don't Worry, Be Happy*, LEGAL PLANET (June 27, 2013), www.legal-planet.org/2013/06/27/koontz-and-

B. Application to Legislative Exactions

While it is relatively well settled that the *Nollan/Dolan* analysis applies to exactions levied by adjudicative governmental agencies on an *ad hoc* basis, there is a split of authority on whether to apply the tests to legislative determinations.¹³⁴ In his dissent to the denial of certiorari, in *Parking Ass'n of Georgia, Inc. v. City of Atlanta*, Justice Thomas noted that “[t]he lower courts are in conflict over whether *Tigard*’s test for property regulation should be applied in cases where the alleged taking occurs through an act of the legislature.”¹³⁵

Recall that in *Dolan*, where the Court added a second requirement (proportionality) to evaluating the constitutionality of governmental exactions, it left unclear what distinction, if any, exists between adjudicative and legislative exactions.¹³⁶ Chief Justice Rehnquist distinguished the *Dolan* case from *Village of Euclid v. Ambler Realty Co.*: “[H]ere, by contrast, the city made an adjudicative decision to condition petitioner’s application for a building permit on an individual parcel.”¹³⁷ Another section of the opinion implies that the *Nollan/Dolan* analysis applies only to exactions arrived at by adjudicative decisions:

The sort of land use regulations discussed in the cases just cited, however, differ in two relevant particulars from the present case. First, they involved essentially legislative determinations classifying entire areas of the city, whereas here the city made an adjudicative decision to condition petitioner’s application for a building permit on an individual parcel.¹³⁸

The Court did not conclusively settle the issue of whether legislative exactions are subject to *Nollan/Dolan* analysis, but many courts have ruled that the *Dolan* test does not apply to legislative decisions.

exactions-dont-worry-be-happy/.

134. *Parking Ass’n of Georgia, Inc. v. City of Atlanta*, 515 U.S. 1116, 1117 (1995) (Thomas, J., dissenting); see also David L. Callies, *Regulatory Takings and the Supreme Court: How Perspectives on Property Rights have Changed from Penn Central to Dolan, and what State and Federal Courts are Doing About It*, 28 STETSON L. REV. 523, 572-73 (1999); David L. Callies & Glenn H. Sonoda, *Providing Infrastructure for Smart Growth: Land Development Conditions*, 43 IDAHO L. REV. 351, 367 (2007); Christopher T. Goodin, *Dolan v. City of Tigard and the Distinction Between Administrative and Legislative Exactions “A Distinction Without a Constitutional Difference”*, 28 U. HAW. L. REV. 139, 148 (2005); Jane C. Needleman, *Exactions: Exploring Exactly When Nollan and Dolan Should Be Triggered*, 28 CARDOZO L. REV. 1563, 1574 (2006).

135. *Parking Ass’n of Ga., Inc. v. City of Atlanta*, 450 S.E.2d 200, 203 (Ga. 1994), cert. denied, 515 U.S. 1116, 1117 (1995).

136. *Dolan*, 512 U.S. at 391.

137. *Id.* at 391 n.8.

138. *Id.* at 385.

For instance, in *Home Builders Ass'n v. City of Scottsdale*, the Supreme Court of Arizona held that “[b]ecause the Scottsdale case involves a generally applicable legislative decision by the city, the court of appeals thought *Dolan* did not apply. We agree, though the question has not been settled by the Supreme Court.”¹³⁹ Following *Scottsdale*, in *American Furniture Warehouse Co. v. Town of Gilbert*,¹⁴⁰ the Court of Appeals of Arizona affirmed the superior court’s finding that *Nollan/Dolan* did not apply to a traffic signal development fee which was a “generally applicable legislative act” and thus “carries a presumption of validity.”

The Supreme Court of Georgia adopted similar reasoning in rejecting a *Dolan* analysis of a legislatively enacted barrier and landscaping zoning requirement.¹⁴¹ Likewise, in *Dabbs v. Anne Arundel County*, the Court of Appeals of Maryland held that area-wide impact fees imposed by legislation applicable are not subject to *Nollan* and *Dolan* scrutiny.¹⁴² In *Krupp v. Breckenridge Sanitation District*, the Supreme Court of Colorado also held that the *Nollan/Dolan* test did not apply, because the impact fee exacted was based on legislation.¹⁴³ In *Ehrlich v. City of Culver City*, the Supreme Court of California noted that

It is not at all clear that the rationale (and the heightened standard of scrutiny) of *Nollan* and *Dolan* applies to cases in which the exaction takes the form of a generally applicable development fee or assessment --cases in which the courts have deferred to legislative and political processes to formulate “public programs adjusting the benefits and burdens of economic life to promote the common good.”¹⁴⁴

However, other jurisdictions have applied the *Nollan/Dolan* test in the context of legislative exactions, both physical and monetary. In *Schultz v. City of Grants Pass*, the Oregon Court of Appeals applied the *Dolan* test to a city ordinance requiring the dedication of rights-of-way for street widening purposes.¹⁴⁵ The court reasoned that the character of the restriction remains the type that is subject to the analysis in *Dolan*.¹⁴⁶ In drawing its distinction between the legislative land use decisions that are entitled to a presumption of

139. *Home Builders Ass'n v. City of Scottsdale*, 930 P.2d 993, 1000 (Ariz. 1997).

140. *Am. Furniture Warehouse Co. v. Town of Gilbert*, 425 P.3d 1099, 1106 (Ariz. Ct. App. 2018).

141. *Parking Ass'n of Georgia, Inc.*, 450 S.E.2d at 203; see also Shelley Ross Saxer, *When Local Government Misbehaves*, 2016 UTAH L. REV. 105 (2016) (arguing that “Koontz’s application should be limited to “the special context of land-use exactions” during a permitting process rather than be extended to all regulatory monetary obligations”).

142. *Dabbs v. Anne Arundel Co.*, 182 A.3d 798, 812-13 (Md. 2018).

143. *Krupp v. Breckenridge Sanitation Dist.*, 19 P.3d 687, 698 (Colo. 2001).

144. *Ehrlich v. City of Culver*, 911 P.2d 429, 446 (Cal. 1996).

145. *Schultz v. City of Grants Pass*, 884 P.2d 569 (Or. Ct. App. 1994); see also *J.C. Reeves Corp. v. Clackamas County*, 887 P.2d 360 (Or. Ct. App. 1994).

146. *Id.* at 573.

validity and the exactions that are not, the Supreme Court noted that what triggers the heightened scrutiny of exactions is the fact that they are "not simply a limitation on the use" to which an owner may put his or her property, but rather a requirement that the owner deed portions of the property to the local government.¹⁴⁷

The Oregon Court of Appeals has subsequently applied *Nollan/Dolan* to legislative exactions.¹⁴⁸ In *Dakota, Minnesota & Eastern Railroad v. South Dakota*, the United States District Court for the District of South Dakota considered a state statute that required railroad companies to dedicate an easement in order to obtain development permits.¹⁴⁹ The court held that the legislative nature of the exaction "does not mean that a regulatory taking analysis is the wrong framework for this case."¹⁵⁰ The Supreme Court of Washington and the Illinois Court of Appeals have also applied the *Nollan/Dolan* test to legislative exactions.¹⁵¹ See also *Town of Flower Mound v. Stafford Estates*, in which the Texas supreme court suggested, without holding, that it also favors applying the *Nollan/Dolan* test to legislatively-imposed exactions:

We think the Town's argument, and the few courts that have accepted it, make too much of the Supreme Court's distinction in *Dolan*. By the same token, we need not risk error in the opposite direction by undertaking to describe here in the abstract whether the *Dolan* standard should apply to all "legislative" exactions – whatever that really means - imposed as a condition of development.¹⁵²

Justice Thomas, in his aforementioned dissent to the Court's denial of certiorari in *Parking Ass'n of Georgia, Inc.*, questioned the legislative/adjudicative distinction in the context of exactions:

It is hardly surprising that some courts have applied Tigar's rough proportionality test even when considering a legislative enactment. It is not clear why the existence of a taking should turn on the type of governmental entity responsible for the taking. A city council can take property just as well as a planning commission can. Moreover, the general applicability of the ordinance should not be relevant in a takings analysis. . . . The distinction between sweeping legislative takings and particularized administrative takings appears to be a distinction without a constitutional difference.¹⁵³

147. *Id.*

148. *Id.* (citing *Dolan*, 512 U.S. at 383).

149. *Dakota, Minn. & E. R.R. v. S.D.*, 236 F. Supp.2d 989 (D.S.D. 2002), *aff'd*, 362 F.3d 512 (8th Cir. 2004).

150. *Id.* at 1026.

151. *Amoco Oil Co. v. Vill. Of Schaumberg*, 661 N.E.2d 380, 380-90 (Ill. App. Ct. 1995) (applying *Nollan/Dolan* analysis to a legislative land dedication requirement); *Sparks v. Douglas Cty.*, 904 P.2d 738, 746 (Wash. 1995) (en banc) (holding a road dedication requirement reviewable under *Dolan*).

152. *Town of Flower Mound v. Stafford Ests. Ltd. P'ship*, 135 S.W.3d 620, 641 (Tex. 2004).

153. *Parking Ass'n of Ga., Inc. v. City of Atlanta*, *cert. denied*, 515 U.S. 1116, 1117-18 (1995); *see also*, *Cal. Bldg. Indus. Ass'n v. City of San Jose, Cal.*, 136 S.

Despite anticipation from practitioners and academics who wanted to see whether the Court would extend *Nollan* and *Dolan* to legislative enactments such as the one in *California Building Industry Association v. City of San Jose*,¹⁵⁴ the Court denied certiorari.¹⁵⁵ However, in a concurring certiorari petition opinion, Justice Thomas wrote:

I continue to doubt that the existence of a taking should turn on the type of governmental entity responsible for the taking. Until we decide this issue, property owners and local governments are left uncertain about what legal standard governs legislative ordinances and whether cities can legislatively impose exactions that would not pass muster if done administratively. These factors present compelling reasons for resolving this conflict at the earliest practicable opportunity.¹⁵⁶

The United States Supreme Court has yet to decide whether legislative exactions should be analyzed under *Dolan* and the lower courts remain in disagreement over the issue.¹⁵⁷

C. Application to Workforce/Affordable Housing Exactions

Unless local government can demonstrate a clear rational and proportional nexus between market price and the imposition of below-market cost housing set-asides, it may not require them at any stage in the land development process. What scant precedent exists for imposing such exactions on residential developments does so only when the local government requiring such exactions provides a series of meaningful bonuses to help offset the cost of the mandatory affordable housing set-asides. As to the imposition of such costs on non-residential development, local government must demonstrate that it generates a need for such housing, generally of the work-force variety, and that the amount to be set aside is proportionate to that need. As one commentator noted in the commercial housing set-aside context:

A number of cities have adopted exaction programs that require downtown office and commercial developers to provide housing for lower-income groups or to a municipal fund for the construction of

Ct. 928, 929 (2016) (noting Justice Thomas recognizing the division over whether the *Nollan/Dolan* test applies to alleged takings arising from a legislatively imposed condition).

154. Cal. Bldg. Indus. Ass'n v. City of San Jose, Cal., 351 P.3d 974, 1000 (Cal. 2015); W. Andrew Gowder, Jr., *Recent Developments in Exactions and Impact Fees: Do You Know the Way to San Jose?*, 48 URB L. 627, 636 (2016).

155. *Cal. Bldg. Ass'n*, 136 S. Ct. at 928.

156. *Id.* at 928-29.

157. See Glen Hansen, *Let's Be Reasonable: Why Neither Nollan/Dolan Nor Penn Central Should Govern Generally-Applied Legislative Exactions After Koontz*, 34 PACE ENVTL. L. REV. 237, 291 (2017).

such housing. [Such] programs satisfy the nexus test only if the municipality can show that downtown development *contributes to the housing problem the linkage exaction is intended to remedy*.¹⁵⁸

Mandatory affordable housing requirements or linkage fees in lieu of housing raise two basic takings issues. The first issue is whether such fees pass scrutiny under the Supreme Court's "essential nexus" test in *Nollan*.¹⁵⁹ The second issue is how the "rough proportionality" test in *Dolan* applies.¹⁶⁰ Indeed, as another treatise observes, "When the provision of lower-income housing is not linked to housing subsidies, *zoning incentives may be necessary to absorb losses incurred by the developer on the lower-income units. Density bonuses are a possibility, and the ordinance can also relax sited development requirements*."¹⁶¹

Turning then, to the first constitutional issue, because linkage fees are a form of exactions, they are subject to the "essential nexus" takings test under *Nollan*.¹⁶² Under *Nollan*, "a permit condition that serves the *same* legitimate police-power purpose as a refusal to issue the permit should not be found to be a taking if the refusal to issue the permit would not constitute a taking."¹⁶³ In addition, under *Nollan*, the government bears the burden of proving this nexus.¹⁶⁴ In the context of linkage fees in particular, one treatise explains that linkage fees satisfy this test "only if the municipality can show that downtown development contributes to the housing problem the linkage exaction is intended to remedy."¹⁶⁵

For example, in *Commercial Builders of Northern California v. City of Sacramento*,¹⁶⁶ the Ninth Circuit held that an ordinance which imposed a linkage "fee in connection with the issuance of permits for nonresidential development of the type that will generate jobs," (in other words, a workforce affordable housing requirement) was constitutional under *Nollan*.¹⁶⁷ Plaintiffs challenged the ordinance directly on *Nollan* grounds: lack of nexus or connection between the development and the affordable housing condition. First, the court addressed the holding of *Nollan* whereas *Nollan* holds that where there is no evidence of a nexus between the development and the problem that the exaction seeks to address,

158. DANIEL R. MANDELKER, LAND USE LAW § 9.23 (5th ed. 2003).

159. *Nollan*, 483 U.S. at 837.

160. *Dolan*, 512 U.S. at 391.

161. DANIEL R. MANDELKER & MICHAEL ALLAN WOLF, LAND USE LAW, § 7.27 (Matthew Bender & Co. 2006) (emphasis added).

162. *Nollan*, 483 U.S. at 837. See *Commercial Builders of N. Cal. v. Sacramento*, 941 F.2d 872, 874-75 (9th Cir. 1991) (discussing *Nolan* and how it applies to exaction ordinances).

163. *Nollan*, 483 U.S. at 836 (emphasis added).

164. *Dolan*, 512 U.S. 391 n.8 (citing *Nollan*, 483 U.S. at 836).

165. MANDELKER, *supra* note 158, at § 9.23.

166. *Com. Builders of N. Cal.*, 941 F.2d at 872.

167. *Id.* at 875.

the exaction cannot be upheld.¹⁶⁸ The court then explained that “the [o]rdinance was implemented only after a detailed study revealed a substantial connection between development and the problem to be addressed.”¹⁶⁹

The court related at some length what the City of Sacramento did to establish the “substantial connection between the development and the problem” of affordable housing. First, it commissioned a study of the need for low-income housing, the effect of nonresidential development on the demand for such housing, and the appropriateness of exacting fees in conjunction with such developments to pay for housing. The study:

[E]stimat[ed] the percentage of new workers in the developments that would qualify as low-income workers and would require housing. [The study] also calculated fees for development. . . . Also as instructed, however, in the interest of erring on the side of conservatism in exacting the fees, it reduced its final calculations by about one-half.

Based upon this study, the City of Sacramento enacted the Housing Trust Fund Ordinance . . . [which] includ[ed] the finding that *nonresidential* development is “a major factor in attracting new employees to the region” and that the influx of new employees “*create[s] a need for additional housing in the City.*” Pursuant to these findings, the Ordinance imposes a fee in connection with *the issuance of permits for nonresidential development of the type that will generate jobs.*¹⁷⁰

Consequently, the court found “that the nexus between the fee provision here at issue, designed to further the city’s legitimate interest in housing, and the burdens caused by commercial development is sufficient to pass constitutional muster.”¹⁷¹

Even courts that decline to apply heightened scrutiny to legislatively imposed fees nonetheless apply some form of *Nollan*’s essential nexus test. For instance, in *San Remo Hotel L.P. v. City & County of San Francisco*,¹⁷² although the California Supreme Court reaffirmed that legislatively imposed, ministerial impact fees are not subject to the tests in *Nollan* or *Dolan*, it nonetheless required that there “be a ‘reasonable relationship’ between the fee and the deleterious impacts for the mitigation of which the fee is collected.”¹⁷³

The second issue is, provided the regulation satisfies a nexus

168. *Id.*

169. *Id.*

170. *Id.* at 873 (emphasis added).

171. *Id.* at 875.

172. *San Remo Hotel L.P. v. City & Cty. of S.F.*, 41 P.3d 87, 87 (Cal. 2002).

173. *Id.* at 102-03 (citations omitted); *but see* 616 Croft Ave., LLC v. City of W. Hollywood, 3 Cal. App. 5th 621, 729 (2016), *reh’g denied*, (Dec. 21, 2016), *cert. denied*. 616 Croft Ave., LLC v. City of W. Hollywood, Cal., 138 S. Ct. 377, 377 (2017) (developer could not argue an “absence of a reasonable relationship” between the development project and the demand for affordable housing more than 90 days after establishment of the fee schedule).

requirement, what reasonable percentage of affordable or workforce housing will meet the constitutional proportionality test under *Dolan v. Tigard* or some similar proportionality requirement. As one recent commentator noted: “An inclusionary zoning ordinance deserves . . . judicial deference . . . provided that the program addresses a lack of affordable housing *at a level proportionate to each development and it can be defended through sufficient planning by each municipality.*”¹⁷⁴ Much is clearly dependent upon the circumstances in each case, but as one treatise on land use has observed, while “[s]et-aside percentages and development size requirements vary across the country, most set-asides range from ten to twenty percent.”¹⁷⁵

The handfuls of cases upholding inclusionary housing programs without nexus or proportionality are easily distinguishable. *Commercial Builders of Northern California v. City of Sacramento* is already discussed above where the Ninth Circuit held that a City of Sacramento ordinance was constitutional under *Nollan*. To reiterate:

We . . . agree with the City that *Nollan* does not stand for the proposition that an exaction ordinance will be upheld only where it can be shown that the development is directly responsible for the social ill question. Rather, *Nollan* holds that where there is no evidence of a nexus between the development and the problem that the exaction seeks to address, the exaction cannot be upheld. Where, as here, the Ordinance was implemented only after a detailed study revealed a substantial connection between development and the problem to be addressed, the Ordinance does not suffer from the infirmities that the Supreme Court disapproved in *Nollan*.¹⁷⁶

Recently, in *California Building Industry Ass’n. v. City of San Jose*, the city of San Jose enacted a housing ordinance that compels all developers of new residential development projects with twenty or more units to reserve a minimum of fifteen percent of for-sale units for low-income buyers.¹⁷⁷ The California Supreme Court, followed the *Erlich* decision and refused to apply a *Nollan/Dolan* analysis, stating:

[W]hen a municipality enacts a broad inclusionary housing ordinance to increase the amount of affordable housing in the community . . . the validity of the ordinance does not depend upon a showing that the restrictions are reasonably related to the impact of a particular

174. Brian R. Lerman, *Mandatory Inclusionary Zoning – The Answer to the Affordable Housing Problem*, 33 B.C. ENVTL. AFF. L. REV. 383, 398-99 (2006) (emphasis added).

175. ERIC DAMIAN KELLY, ZONING AND LAND USE CONTROLS, CH. 3, §3.07[3] (2007).

176. *Com. Builders of N. Cal.*, 941 F.2d at 875; CAL. GOV. CODE § 65915-65918 (1974) (amended 2018).

177. *Cal. Bldg. Indus. Ass’n. v. City of San Jose*, 351 P.3d 974, 1006 (Cal. 2015).

development. Rather, the restrictions must be reasonably related to the broad general welfare purposes for which the ordinance was enacted.¹⁷⁸

In considering how drastically *Koontz* expanded *Nollan* and *Dolan*, one commentator suggests that the California Supreme Court may be inconsistent with the precedent set by the Court in *Koontz*.¹⁷⁹ It is also critically important to note that California has a mandatory bonus statute which is triggered when a development provides affordable housing.

As recently amended and effective on January 1, 2005, the statute requires a 20% density bonus as soon as a developer reaches a set-aside threshold where 5% of its units are affordable to very low income households or 10% of its units are affordable to low income households, and increases in density bonus increments of 2.5% for each additional increase of 1% of very low income units, 1.5% for each additional 1% in low income units, and 1% for increases in moderate income units, up to a maximum density bonus of 35% when a project provides either 11% very low income units, 20% low income units, or 40% moderate income units.

D. *The Need for Proportionality*

The required need for proportionality has not changed much in the courts since *Dolan* called for and set out a vague standard on how to determine “rough proportionality” based on individual determinations. Some courts have relied on statute-determined proportions, while other courts have looked at any evidence showing the reasoning for the exaction as determining proportionality. Additionally, one court has created its own semi-mathematical analysis to determine proportionality.

1. *Statutorily Defined Proportionality*

The statute in *Kamaole Pointe Development LP v. County of Maui*,¹⁸⁰ provided that the exaction can be applied to “any development not involving water supply or service” or the developer can opt for a 30% in-lieu fee provided by Ordinance

178. *Id.* at 1000. See Stephen R. Miller, *A Ruling on Inclusionary Zoning with Impact Beyond California's Borders*, 45 No. 1 REAL EST. REV. J. ART 7 (2016) (discussing how the California Supreme Court's ruling may have a nation-wide impact).

179. See James D. O'Donnell, *Affordable Housing Ordinances: Exactions or Use Restrictions in the Post-Koontz Era? An Analysis of California Building Industry Association v. City of San Jose*, 48 URB. L. 899, 902-03, 921 (2016); But see Kristoffer James S. Jacob, *California Building Industry Association v. City of San Jose: The Constitutional Price for Affordable Housing*, 7 CAL. L. REV. CIRCUIT 20, 24-28 (2016) (arguing that the court decided the case correctly).

180. *Kamaole Pointe Dev. LP v. Cty. of Maui*, 573 F. Supp.2d 1354, 1364 (D. Haw. 2008).

§ 2.96.040(B)(4)(a)). In *Robson Ranch Quail Creek, LLC v. Pima County*,¹⁸¹ the statute requires that the exaction must “reasonably relate to the burden imposed on the county by the particular development.” The court concluded that there was reasonable doubt based on a water management audit that the exacted fees have been substantially more than necessary to offset development costs and that the fees could exceed the impact that the development had created.¹⁸² (FN with *Id.*) In *Home Builders Ass’n of Tulare/Kings Counties, Inc. v. City of Lemoore*,¹⁸³ the 5-acre standard dedication requirement was set out in a statute and the city’s plan.

2. Fact Specific Proportionality Inquiry

Based on an expanded traffic study in *Greenville Concerned Citizens, Inc. v. Floyd County Plan Commission*,¹⁸⁴ an uncapped quarter share of improvement costs for the road intersection was proportional because the study showed that the development would have a direct impact on road intersections. In *Toll Bros., Inc. v. Board of Chosen Freeholders of the County of Burlington*,¹⁸⁵ developers are only required to pay a pro rata share which is determined to be fair and equitable, ensuring that “other landowners do not enjoy a free ride at the expense of another's toil.” *Christison v. Lewis and Clark County*¹⁸⁶ exemplifies rough proportionality shown by traffic analysis indicating increased traffic on a poorly managed public road causing public safety concerns. *David Hill Development, LLC v. City of Forest Grove*¹⁸⁷ makes conclusory statements about proportionality without any other supporting evidence does not meet the “rough proportionality” test.

In *B.A.M. Development, L.L.C v. Salt Lake County*,¹⁸⁸ the court set out its own interpretation on what the Supreme Court really meant by “roughly proportional.” “[R]oughly proportional literally means to be roughly related, not necessarily roughly equivalent, which is the concept the Court seemed to be trying to describe.” To determine the rough equivalency, the court stated that the impact

181. *Robson Ranch Quail Creek, LLC v. Pima Cty.*, 161 P.3d 588, 593-94 (Ariz. Ct. App. 2007).

182. *Id.*

183. *Home Builders Ass’n of Tulare/Kings Ctys., Inc. v. City of Lemoore*, 112 Cal. Rptr. 3d 7, 20 (Ct. App. 2010).

184. *Greenville Concerned Citizens, Inc. v. Floyd Cty. Plan Comm’n*, 914 N.E.2d 866, 866 (Ind. Ct. App. 2009).

185. *Toll Bros., Inc. v. Bd. of Chosen Freeholders of the Cty. of Burlington*, 944 A.2d 1, 4-5 (N.J. 2008).

186. *Christison v. Lewis & Clark Cty. Comm.*, 2011 Mont. Dist. LEXIS 5, 10-12 (2011).

187. *David Hill Dev., LLC v. City of Forest Grove*, 688 F. Supp.2d 1193, 1210-11 (D. Or. 2010).

188. *B.A.M. Dev., L.L.C v. Salt Lake Cty.*, 196 P.3d 601, 603-04 (Utah 2008).

from the development and the exaction should both be reduced to actual cost. “The impact of the development can be measured as the cost to the municipality of assuaging the impact. Likewise, the exaction can be measured as the value of the land to be dedicated by the developer at the time of the exaction, along with any other costs required by the exaction.” The court further explained that if the two costs are “about the same,” then rough proportionality has been shown. However, the court declined to determine the scale of what is considered “about the same.”

E. Need for Fees to be Spent to Benefit the Development

There is general agreement that fees must not only be proportional to the problem or infrastructure needs generated by a development, but also to be spent or otherwise used for that development as well. However, the precise benefit of the fees on the development need not be determined at the time the fee is exacted. In *Home Builders Ass'n of Central Arizona v. City of Scottsdale*,¹⁸⁹ the Supreme Court of Arizona interpreted Arizona Revised Statutes Section 9-463.05 on development fees to require “that when a municipality, in its legislative discretion, decides that new developments will require additional public services, it need only develop such plans as will indicate a good faith intent to use development fees to provide those services within a reasonable time.”

Similarly, in *Home Builders Ass'n of Central Arizona v. City of Mesa*,¹⁹⁰ the Court of Appeals determined that a comprehensive study detailing the impact of new development on demand for cultural facility was sufficient to impose a cultural facility development fee. The developers argued that the new development is in the east end of the city and existing cultural facilities are located in the west end.¹⁹¹ They contended that the fee failed to comply with the beneficial use requirement of Arizona Revised Statutes Section 9-463.05(B)(1) because the city did not demonstrate how the fee would benefit the development.¹⁹² The Court of Appeals, however, followed *Scottsdale* in finding that “municipalities are entitled to deference concerning whether a development fee will result in a ‘beneficial use.’¹⁹³ If the municipality can show that its plans, calculations and predictions are not ‘clearly erroneous, arbitrary, and wholly unwarranted,’ we will defer to its judgment and uphold an ordinance as satisfying the

189. *Home Builders Ass'n of Cent. Ariz. v. City of Scottsdale*, 930 P.2d 993, 998 (Ariz. 1997).

190. *Home Builders Ass'n of Cent. Ariz. v. City of Mesa*, 243 P.3d 610, 618 (Ariz. Ct. App. 2010) *reh'g denied*, (Apr. 19, 2011).

191. *Id.*

192. *Id.* at 617.

193. *Id.*

broad requirements of section 9-463.05.”¹⁹⁴

In *Collier County v. State*,¹⁹⁵ the Supreme Court of Florida reaffirmed the specific-need/special-benefit standard. The court interpreted an earlier¹⁹⁶ decision to mean that the fee was invalid because “it did not provide a unique benefit to those paying the fee.”¹⁹⁷ In *Collier County*, the court “expressly repudiated a countywide standard for determining the constitutionality of impact fees” in finding that the “the services to be funded by the fee are the same general police-power services provided to all County residents.”¹⁹⁸

Following *Collier*, in *Volusia County v. Aberdeen at Ormond Beach, L.P.*,¹⁹⁹ the Supreme Court of Florida applied the dual rational nexus test and determined that Aberdeen, an age restricted community, did not need to pay impact fees for additional schools because “Aberdeen neither contributes to the need for additional schools nor benefits from their construction. Accordingly, the imposition of impact fees as applied to Aberdeen does not satisfy the dual rational nexus test.”²⁰⁰

In *Idaho Building Contractors Ass'n v. City of Coeur d'Alene*,²⁰¹ Idaho Building Contractors Association contended that a city ordinance imposing a development fee imposed at the time of the building permit issuance and used for general capital improvements was a revenue raising measure rather than a regulation. The Supreme Court of Idaho determined that the impact fees were “designed to generate revenues to be used for capital improvements throughout the City by all residents, and not solely for the benefit of those seeking the building permit” and held that the fee was a tax.²⁰²

In *Country Joe, Inc. v. City of Eagan*, the Supreme Court of Minnesota determined that a road unit connection charge to new developers was a tax and not a fee.²⁰³ The court determined that the charge was a revenue raising measure that benefitted the public as a whole.²⁰⁴ The court explained, “In reaching this conclusion, we find it significant that revenues collected from the road unit connection charge are not earmarked in any way to fund projects

194. *Id.* (internal citations omitted).

195. *Collier Cty. v. State*, 733 So. 2d 1012, 1014 (Fla. 1999).

196. *See St. Johns Cty. v. Ne. Florida Builders Ass'n, Inc.*, 583 So. 2d 635, 637 (Fla. 1991).

197. *Collier Cty.*, 733 So. 2d at 1019.

198. *Id.*

199. *Volusia Cty. v. Aberdeen at Ormond Beach, L.P.*, 760 So. 2d 126, 134-35 (Fla. 2000).

200. *Id.* at 136.

201. *Idaho Bldg. Contractors Ass'n v. City of Coeur d'Alene*, 890 P.2d 326, 330 (Idaho 1995).

202. *Id.* at 330.

203. *Country Joe Inc. v. City of Eagan*, 560 N.W.2d 681, 686 (Minn. 1997).

204. *Id.*

necessitated by new development, but instead fund all major street construction, as well as repairs of existing streets.”²⁰⁵

In *Home Builders Ass'n of Dayton & the Miami Valley v. Beavercreek*,²⁰⁶ the Supreme Court of Ohio adopted a dual rational nexus test in finding constitutional an ordinance imposing impact fees on new developers for roadway improvements. Under this dual rational nexus test, based on *Nolan*, *Dolan*, and *Hollywood*, the burden of proof falls on the city.²⁰⁷ In demonstrating the constitutionality of the ordinance, the city “must first demonstrate that there is a reasonable relationship between the city's interest in constructing new roadways and the increase in traffic generated by new developments.”²⁰⁸ Second, “if a reasonable relationship exists, it must then be demonstrated that there is a reasonable relationship between the impact fee imposed by Beavercreek and the benefits accruing to the developer from the construction of new roadways.”²⁰⁹ The court explained that when evaluating the second prong, the court should consider:

the actual costs of constructing new roadways, the formula used to determine the fee, the fee paid by a particular developer, the city's contribution, road improvements made directly by developers, the length of time between the payment of the fee and new roadway construction projects, whether the roadway projects are site-specific to the new development, and any other criterion that bears on the reasonableness of the fee.²¹⁰

By contrast, in *Dabbs v. Anne Arundel County*, the Court of Appeals of Maryland held *Nollan*, *Dolan*, and *Koontz* inapplicable to the subject impact fee ordinance.²¹¹ The court explained that the legislatively-imposed development impact fee is predetermined, based on specific monetary schedule, and applies to any person wishing to develop property in the district.²¹² Thus, the court found that the ordinance fell “within *Dolan*'s recognition that impact fees imposed on a generally applicable basis are not subject to a rough proportionality or nexus analysis.”²¹³

In *J.K. Construction, Inc. v. Western Carolina Regional Sewer Authority*,²¹⁴ the Supreme Court of South Carolina held that a new “sewer service” fee imposed on new or upgrading customers for the purposes of paying for future improvements was a charge not a tax.

205. *Id.* at 686.

206. *Home Builders Ass'n of Dayton v. Beavercreek*, 729 N.E.2d 349, 357 (Ohio 2000).

207. *Id.* at 356.

208. *Id.*

209. *Id.*

210. *Id.*

211. *Dabbs v. Anne Arundel Cty.*, 182 A.3d 798, 800 (Md. 2018).

212. *Id.* at 811.

213. *Id.*

214. *J.K. Const., Inc. v. W. Carolina Reg'l Sewer Auth.*, 519 S.E.2D 561, 564 (S.C. 1999).

Among other factors cited for its decision, the court emphasized:

the required payment primarily benefits those who must pay it because they receive a special benefit or service as a result of improvements made with the proceeds. That special benefit is the proper treatment and disposal of sewage. . . . [P]roceeds from the required payments are dedicated solely to capital improvement projects.²¹⁵

Furthermore, “the proceeds are not placed in a general fund to be spent on Authority's ongoing expenses and maintenance, which is a hallmark of a tax.”²¹⁶

In *City of Olympia v. Drebeck*,²¹⁷ the Supreme Court of Washington held that that the state's impact fee statutes did not require the city of Olympia and other local governments to “calculate an impact fee by making individualized assessments of the new development's direct impact on each improvement planned in a service area.” The court examined the legislative intent behind the requirement that “the facilities funded by impact fees be reasonably related and beneficial to the particular development seeking approval.”²¹⁸ The court concluded “the GMA impact fee statutes permit local governments to base impact fees on area-wide infrastructure improvements reasonably related and beneficial to the particular development seeking approval.”²¹⁹

Finally, in *North Idaho Building Contractors Ass'n v. City of Hayden*,²²⁰ the Supreme Court of Idaho held that a capitalization fee was an unconstitutional tax because it did not represent any attempt to approximate actual use.²²¹ The city of Hayden nearly tripled the capitalization fee for new users on the local sewer system to upgrade the sewer system and “extend the sewer system to the entire area of city impact and provide sewer service to anticipated new residents. . . .”²²² While the court recognized that any excess of money lawfully collected could be used to extend the sewage system, it clarified that “[t]he power to spend money lawfully collected in order to extend the system is not the power to base a fee on the cost to extend the system to whatever size is desired.”²²³

215. *Id.*

216. *Id.*

217. *City of Olympia v. Drebeck*, 126 P.3d 802, 803 (Wash. 2006).

218. *Id.* at 806.

219. *Id.* at 811.

220. *N. Idaho Bldg. Contractors Ass'n v. City of Hayden*, 343 P.3d 1086, 1087 (2015).

221. *Id.* at 1088-92.

222. *Id.*

223. *Id.* at 1090.

F. Creation of a Special Fund for Depositing the Fees/No Transfer Between Funds

In the *Homebuilders Ass'n of Tulare/Kings Counties, Inc. v. City of Lemoore*,²²⁴ the Homebuilders Association, in part, questioned the City's collection and administration of impact fees, arguing "the City did not adequately identify the public facilities and improvements to be financed as part of enacting the fee resolutions."²²⁵ The Court of Appeal determined that this argument lacked merit as the City adequately identified the public facilities and improvements when it enacted the development impact fees and met the statutory requirement that the fees be deposited into a separate capital facilities account to avoid commingling with the local agency's other revenues and funds."²²⁶

In *St. Johns County v. Northeast Florida Builders Ass'n, Inc.*,²²⁷ the Supreme Court of Florida upheld an ordinance imposing an impact fee on new residential developments for new school facilities finding that the ordinance "does not create an unlawful delegation of power. The county determines the amount of the fees and collects them. The money is placed in a separate trust fund. The school board may only spend the funds for the new educational facilities prescribed by the ordinance."²²⁸

In *Clare v. Town of Hudson*,²²⁹ the Supreme Court of New Hampshire explained that "the legislature has established that towns are not entitled to collect and expend impact fees for purposes other than those for which they were collected."²³⁰ The court stated,

"Any impact fee shall be accounted for separately, shall be segregated from the municipality's general fund, may be spent upon order of the municipal governing body, [and] shall be exempt from all provisions of RSA 32 relative to limitation and expenditure of town moneys." This provision makes clear that the impact fee funds and Town funds are not fungible.²³¹

The court determined that the Town's transfer of \$89,153.95 from an account that contained development fees collected for improvements to Bush Hill Road to Brox Industries for its pavement work on the road was not authorized because only \$75,437.05 was

224. *Homebuilders Ass'n of Tulare/Kings Counties, Inc.*, 112 Cal. Rptr. 3d 7, 25 (Ct. App. 2010), *reh'g denied*, (Sept. 22, 2010).

225. *Id.* at 24.

226. *Id.* at 25. *See also* *City of San Marcos v. Loma San Marcos, LLC*, 234 Cal. App. 4th 1045, 1059 (2015), *reh'g denied*, (June 10, 2015) (holding that current impact mitigation fee was not subject to offset for amounts paid by the prior owners when property was permitted as a recycling center).

227. *St. Johns Cty.*, 583 So. 2d at 642.

228. *Id.*

229. *Clare v. Town of Hudson*, 999 A.2d 348, 355 (N.H. 2010).

230. *Id.*

231. *Id.* (citing to RSA 674:21, V(c)).

attributable to the purposes for which the fee was collected.²³²

*G. Fees Not Spent Within a Reasonable Time of
Collection Must be Refunded.*

In *St. Johns County v. Northeast Florida Builders Ass'n, Inc.*,²³³ the Supreme Court of Florida upheld an ordinance that included a provision that says, “Any funds not expended within six years, together with interest, will be returned to the current landowner upon application.” In *Anne Arundel County v. Halle Development, Inc.*,²³⁴ the Court of Appeals reaffirmed the circuit court order for the county to refund impact fees collected between 1988 and 1991 that were not expended. Anne Arundel County Code section 17-11-210 provides that collected development fees must be expended six years from the time of collection, after which time eligible property owners may apply for a refund.²³⁵ The Court of Appeals held that the current property owners had remedy in assumpsit to a refund because the county failed to follow the ordinances notice requirements and eligible property owners did not receive notice of the refund.²³⁶

In *Tommy Davis Construction, Inc. v. Cape Fear Public Utility Authority*,²³⁷ the Court of Appeals held that the collection of water and sewer fees has been impermissible as beyond the county’s authority where there was no plan to actually use the collected fees, within a reasonable time.²³⁸ Likewise, in *Quality Built Homes Inc. v. Town of Carthage*,²³⁹ the Supreme Court of North Carolina reversed and invalidated sewer and water impact fee ordinances aimed at funding future expansion of sewer and water systems.²⁴⁰ The court held that the state’s Public Enterprise Statute does not authorize a locality to collect fees for future discretionary spending.²⁴¹ In *Robes v. Town of Hartford*,²⁴² the Supreme Court of Vermont upheld the trial court’s conclusion that the Plant Impact

232. *Clare*, 999 A.2d at 355.

233. *St. Johns Cty.*, 583 So. 2d at 637.

234. *Anne Arundel Cty. v. Halle Dev., Inc.*, 971 A.2d 214, 230 (Md. 2009).

235. *Id.* at 226.

236. *Id.* at 216.

237. *Tommy Davis Const., Inc. v. Cape Fear Pub. Util. Auth.*, 807 F.3d 62, 64 (4th Cir. 2015).

238. *Id.* at 69.

239. *Quality Built Homes Inc. v. Town of Carthage*, 789 S.E.2d 454, 455 (N.C. 2016).

240. *Id.* at 459.

241. *Id.* See also *Walker v. City of San Clemente*, 239 Cal. App. 4th 1350, 1357 (2015) (noting the city's five-year report did not show that the city needed the unexpended fees to achieve the purpose for which they were originally imposed or that it had a plan on how to use the unexpended balance to achieve that purpose; the city was required to sell the vacant lot it purchased and refund the sale proceeds to the affected property owners).

242. *Robes v. Town of Hartford*, 636 A.2d 342, 349 (Vt. 1993).

Fee for sewage was a valid ordinance. The trial court's decision upheld the ordinance, but ordered the town to amend it to require "the refund of monies not expended within six years of collection."²⁴³ In *Cresta Bella, LP v. Poway Unified Sch. Dist.*,²⁴⁴ the court of appeal found "no reasonable relationship between the school impact fee and the burden posed by the development activity" and ordered a refund based on the portion of fees derived from the preexisting square footage in the development project.²⁴⁵

243. *Id.* at 344.

244. *Cresta Bella, LP v. Poway Unified Sch. Dist.*, 218 Cal. App. 4th 438, 442 (2013).

245. *Id.* at 454.

