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CHALLENGING AUTHORITY FOR MUNICIPAL SUBDIVISION EXACTIONS: THE ULTRA VIRES ATTACK

Frona M. Powell*

INTRODUCTION

The deteriorating public infrastructure and explosive suburban growth in most metropolitan areas today have created a fiscal crisis for many of the nation’s cities. Local governments must maintain and frequently expand existing capital improvements such as streets, water and sewage facilities, parks, and schools to accommodate rapid growth in suburban areas. Meanwhile, the costs for such capital improvements continue to increase. In addition, taxpayers expect their municipality to provide an ever-increasing array of services. However, they resist property tax increases to fund such expansion projects, even though the lack of adequate capital facilities may threaten economic progress. The reduction in available federal funds and difficulty in marketing traditional debt instruments in an uncertain economic climate further exacerbate the problem.

Cities have relatively few funding sources for necessary capital improvement and expansion projects. In most states, local governments can raise property taxes, increase debt financing, or decrease services, none of which are very attractive alternatives. For this reason, cities are increasingly looking to municipal exactions and a newer and more controversial form of exaction,

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1. For example, in 1967 the general cost of building a one lane mile of road was $100,000. In 1986, the cost to construct a one lane mile of road increased to $300,000. Nicholas, Impact Exactions: Economic Theory, Practice, and Incidence, 50 LAW & CONTEMP. PROBS. 85, 90 (1987).


3. Nicholas, supra note 1, at 85 (“The public capital stock [of local municipalities], commonly called infrastructure, has been allowed to deteriorate to the extent that its lack of availability frequently constitutes a serious impediment to economic progress.”)


5. In many jurisdictions, state mandated limitations on indebtedness restrict the amount of debt issued, and some states have constitutional limits on the amount of taxes permitted. See generally Frug, The City as a Legal Concept, 93 HARV. L. REV. 1059, 1064 (1980).


7. See infra notes 31-32 and accompanying text.
"impact fees," as sources of municipal funding for major off-site capital improvements and services.  

Today, municipal exactions for on-site needs such as streets, sidewalks and sewers are well accepted. More innovative methods of financing improvements such as "in-lieu fees," impact fees, and most recently "linkage," however, have been consistently challenged. In particular, developers argue that these are devices by which municipalities shift the cost of public facilities and social programs to private developers.  

One criticism of subdivision development fees is that they ultimately place the burden of providing public facilities on newcomers in the community because the cost is reflected in the price of new housing. This in turn results in higher costs and decreased housing opportunities which may ultimately deter business or industry. It is contended that impact fees may create a double taxation problem because new owners pay existing property taxes and the exaction fee reflected in the cost of their new home. It is also suggested that exaction fees deter rehabilitation and redevelopment of urban and older areas by burdening the project with additional costs. 

Some oppose the use of exaction and impact fees as alternative funding mechanisms for off-site municipal capital services and facilities because they appear antithetical to traditional planning principles. The "pay as you go" philosophy, they contend, creates the illusion that the character, location,
and magnitude of a particular land use is simply a matter of paying the cost of the project, rather than measuring the appropriateness of a particular land use at a particular location. Many see these off-site municipal exactions as a form of municipal extortion, a concrete example of Holmes' aphorism of the "petty larceny of the police power." Despite these criticisms, in recent years municipalities have increased the use of exactions and impact fees to defer capital improvement costs. Not surprisingly, the number of court challenges to such fees has also increased. This Article first explores the nature and history of subdivision exactions, beginning with on-site dedication of land to the newest and most controversial exaction form, linkage payments for low-income housing and municipal services such as transportation. The Article then addresses the legal issues developers raise in challenging off-site municipal exactions, in-lieu fees and impact fees. Specifically, this Article examines what is frequently the threshold issue addressed by the courts in such cases: whether the municipalities' exaction or fee requirement was ultra vires, or beyond its statutory authority under state enabling legislation. If the developer can succeed on the basis of this ultra vires attack, it is unnecessary to address the question of whether the exaction was constitutionally imposed under an appropriate reasonableness test, or whether it was an unconstitutional taking of property in violation of due process of law. Courts frequently treat the ultra vires argument as a simple exercise in statutory interpretation or interpretation of legislative intent. However, there are substantial policy questions involved in this determination, as well as unspoken assumptions about the appropriate relationship between the state

17. Siemon, supra note 9, at 122.
19. 1 HOLMES-LASKI LETTERS 457 (M. Howe ed. 1953).
20. Bauman & Ethier, supra note 4, at 59. According to the authors' survey, there has been a significant increase in the incidence of impact fees over the last few decades. 35% of all current impact fee policies were enacted between 1980 and 1985. An additional 36% were enacted in the 1970's and 18.7% in the 1960's. Only 10.3% of current impact fee policies existed before 1960. Id.
22. Smith, supra note 9, at 9; Pavelko, supra note 9, at 280-81. In the context of municipal exactions, ultra vires means that the municipality lacks the statutory or inherent authority to impose such an exaction. Smith, supra note 9, at 9.
23. See City of Montgomery v. Crossroads Land Co., 355 So. 2d 363, 364 (Ala. 1978) (dedication requirement was unconstitutional due to lack of specific legislative authority); Briar West, Inc. v. City of Lincoln, 206 Neb. 172, 176, 291 N.W.2d 730, 733 (1980) (city's imposition of costs of future paving upon developer was without authority).
and local government and the extent to which courts should intervene in local planning decisions. This Article explores those assumptions and concludes that the traditional legal standards for reviewing whether a local exaction ordinance is ultra vires are no longer appropriate. Rather than strictly construing the powers of local governments to require express authorization for off-site exactions and impact fees, courts should broadly construe state enabling legislation to permit local governments to assess appropriate exaction and/or impact fees which are rationally connected to new development, unless they are expressly prohibited from doing so by state statute.

I. THE NATURE AND HISTORY OF MUNICIPAL EXACTIONS AND DEVELOPMENT FEES

A. From On-Site Exactions To Linkage Fees

The evolution of subdivision exactions from on-site dedication of land to the newest concept, linkage, has occurred within a relatively short period of time.\(^\text{24}\) In just a few years, the idea of using development exactions to fund off-site capital facilities has grown from theory to full-blown fad.\(^\text{25}\) As cities continue to seek solutions to local capital development funding problems, the trend toward using exactions and development fees as a partial solution to those problems will surely continue. On the other hand, the same is true for developers' challenges to the legality of such requirements. In such a dynamic, growing area of law, it is no surprise that courts today are divided over the necessary authority for such exactions\(^\text{26}\) and the legal standards which should apply.\(^\text{27}\) This division results in different jurisdictions taking different positions on the legality of exaction fees and dedication require-

\(^{24}\) Municipalities first began requiring exactions in the Great Depression of the 1930's due to increased delinquencies in special assessment payments. See generally Smith, supra note 9, at 6.

\(^{25}\) Siemon, supra note 9, at 115 (noting that in a short period of time over forty local governments have employed exaction financing for projects such as roads, parks, potable water, libraries, sewer systems, solid waste disposal, police, fire, and other emergency services).

\(^{26}\) For example, some courts find the necessary authority either expressly or impliedly granted under state enabling legislation. See infra notes 77-103 and accompanying text. Other courts find authority for exactions through broadly interpreted home rule powers. See infra notes 104-23 and accompanying text. Still others find the necessary authority under a municipality's general police powers. See infra notes 140-54 and accompanying text.

\(^{27}\) Three different legal standards, in varying degrees of scrutiny, are applied. Some states require that in order for an exaction to withstand scrutiny it must be specifically and uniquely attributable to the development. See infra notes 161-67 and accompanying text. Some states require only that the exaction be reasonably related to the use of the development. See infra notes 168-77 and accompanying text. The majority employ a third standard and require that there be a rational nexus between the exaction and the use of the development. See infra notes 178-85 and accompanying text.
The terminology used in defining such exactions, such as development fees, in-lieu fees, and impact fees adds to the confusion because these terms may mean different things in different communities. And while most cities have established their subdivision approval policies through local ordinance, some local governments have no formal written policy, and instead impose exactions or impact fees on a project-by-project basis. Thus, in any given case, the terms used by the local government may mean slightly different things, and the procedures and requirements for implementing local policies may differ. With this caveat in mind, a few generalizations can be made.

An exaction can be defined as a traditional construction, dedication, or in-lieu fee payment for site-specific needs imposed by a municipality at the time of subdivision approval. The most common and accepted form of exaction is on-site dedication for site-specific improvements such as streets, sidewalks, and drainage. In some jurisdictions, the city may also require the developer to construct the on-site improvement before dedicating the land to the municipality. While somewhat more controversial, municipal requirements for on-site dedications of land for parks and educational purposes are usually upheld as well.

28. Juergensmeyer & Blake, supra note 9, at 416.
29. Bauman & Ethier, supra note 4, at 55 (noting that a survey of 1,000 communities resulted in a confusing mixture of meanings to the various terms).
30. Id. at 57.
31. Delaney, Gordon & Hess, supra note 9, at 139. "Exaction" has also been defined as describing municipal fees imposed upon the final approval of a developer's subdivision plan which shift capital development costs from the municipality to the developer. Pavelko, supra note 9, at 270 n.9. Exaction occurs when a developer receives the "privilege" of developing the land and the local government receives land or money to provide certain public services that the project requires. See Note, Nollan v. California Coastal Commission: Unprecedented Intrusion upon a State's Judgment of the Proper Means to be Applied in Land Use Regulation, 21 J. MARSHALL L. REV. 641, 641 n.3 (1988).
For purposes of this Article, the terms "city" and "municipality" are used to include other forms of regional local government which may include counties, towns, villages, and townships.
32. Juergensmeyer & Blake, supra note 9, at 418.
33. Delaney, Gordon & Hess, supra note 9, at 141.
34. See Billings Properties, Inc. v. Yellowstone Co., 144 Mont. 25, 34, 394 P.2d 182, 187 (1964) (upholding statute which required developer to donate land for parks and playgrounds as a condition to municipal approval of a subdivision plat). The court quoted with approval from Pioneer Trust & Savings Bank v. Village of Mount Prospect, 22 Ill. 2d 375, 380, 176 N.E.2d 799, 802 (1961) as follows: "[t]here can be no controversy about the obvious fact that the orderly development of a municipality must necessarily include a consideration of the present and future need for school and public recreational facilities." 144 Mont. at 34, 394 P.2d at 187. See Krughoff v. City of Naperville, 41 Ill. App. 3d 334, 339, 354 N.E.2d 489, 494 (2d Dist. 1976) (exaction requiring donation of land for park permitted); accord Associated Builders v. City of Walnut Creek, 4 Cal. 3d 633, 647, 484 P.2d 606, 610, 94 Cal. Rptr. 630, 616 (statute requiring fee for use in purchase or maintenance of parks upheld), appeal dismissed, 404 U.S. 878 (1971). See also Bayswater Realty Capital Corp. v. Planning Bd. of Lewisbaro, 149 A.D.2d 49, 55, 544 N.Y.S.2d 613, 616 (1989) (planning board possessed authority to require, as
In some instances, local government may condition subdivision approval upon dedication of land or construction of improvements off the development site. For example, a municipality may require a developer to bear his pro-rata share of the costs of installing an off-site water line as a condition to subdivision approval. Generally, municipalities have met with mixed results in cases challenging these off-site exactions. In one such case, a municipality required a developer to construct improvements to existing public highways that abutted the proposed subdivision plat. The Virginia Supreme Court held that this condition attached to plat approval was invalid because the municipality lacked statutory authority to require such a condition to approval of subdivision plat, fee in lieu of land dedication for park, playground, or other recreational purpose; Jordan v. Village of Menomonee Falls, 28 Wis. 2d 608, 618, 137 N.W.2d 442, 448 (1965) (equalization fee requirement for purpose of capital improvement of parks, schools, and recreation areas upheld), appeal dismissed, 385 U.S. 4 (1966).

Dedication of land on-site for school and park purposes is generally approved because residents of the new development will benefit from their proximity to the facilities. Delaney, Gordon & Hess, supra note 9, at 142. See generally Juergensmeyer & Blake, supra note 9, at 418.

35. See, e.g., Divan Builders v. Planning Bd., 66 N.J. 582, 596, 334 A.2d 30, 37 (1975) (municipality could require installation of off-site improvement as condition of subdivision approval, but subdivider could be required only to bear the cost of such improvement bearing a rational nexus to the needs created by and benefits conferred upon the subdivision); cf. Hylton Enters. v. Board of Supervisors, 220 Va. 435, 441, 258 S.E.2d 577, 581 (1979) (holding there was no authority for county to require a developer to construct portions of routes that abutted the subdivision as a prerequisite to approval of his subdivision plat). Communities sometimes impose off-site exactions for schools, roads, parks and recreation, libraries, public safety and other purposes. Bauman & Ethier, supra note 9, at 58.

36. See Baltica Constr. v. Planning Bd., 222 N.J. Super. 428, 432, 537 A.2d 319, 322 (N.J. Super. Ct. App. Div. 1988) (condition to plat approval that developer bear entire cost of off-site waterline overturned because board failed to allocate pro rata share to developer). In similar cases, a developer may be required to dedicate land or grant an easement on land bordering the subdivision plat. For example, in Colborne v. Village of Corrales, 106 N.M. 103, 739 P.2d 972 (1987), a developer sought approval from the village for subdivision of land within its planning and platting jurisdiction. The village followed its policy requiring landowners to dedicate a sixty-foot easement along the Main Canal for a potential north-south road as a condition for subdivision approval. On appeal by the developer, the New Mexico Supreme Court upheld such condition as a valid exercise of the police power. Id. at 106, 739 P.2d at 973-74.

37. See C.P.W. Investments #2 v. City of Troy, 156 Mich. App. 577, 583, 401 N.W.2d 864, 867 (1987) (city had authority to require, as condition of final plat approval, that developer bear costs of paving portion of city road which abutted proposed subdivision tract); Divan Builders, 66 N.J. at 582, 334 A.2d at 30 (Planning Act empowers municipalities to require developers to install or contribute to the cost of off-site improvements). But see Baltica Constr. v. Planning Bd., 222 N.J. Super. 428, 432, 537 A.2d 319, 322 (N.J. Super. Ct. App. Div. 1988) (condition to plat approval that developer bear the entire cost of installing an off-site water line was overturned because the board failed to allocate its pro-rata share); Hylton Enters. v. Board of Supervisors, 220 Va. 435, 441, 258 S.E.2d 577, 581 (1979) (local government may not require, as a prerequisite to plat approval, that the developer construct improvements to existing public highways which abut the subdivision).

38. 220 Va. at 438, 258 S.E.2d at 579.
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In other instances, a municipality may permit or require a developer to pay a fee rather than dedicate land as a condition of subdivision approval. These fees, called in-lieu fees, generally have a narrow focus because they are a refinement of the dedication requirement. As such, they are tied to the type of use ordinarily associated with land dedication, such as open space for parks or land for schools. In-lieu fees are particularly useful when the development project is small, and the land available for dedication is inadequate or ill-suited for an on-site capital improvement. In cases where a number of small developments combine to create severe demands on a city’s infrastructure and services, each subdivision may not be wholly responsible for the expanding need for capital improvements, but each contributes in some way to that need. In such cases, payment of “equalization” fees or in-lieu fees to fund these off-site improvements may be a solution to the cumulative problems associated with rapid growth in a community.

Although some jurisdictions have declared in-lieu fee ordinances invalid for lack of statutory authority or because the fees constitute an impermissible tax, other jurisdictions have upheld such requirements. Courts upholding such fees generally recognize that explosive growth places a substantial demand upon a city’s ability to provide essential services such as water, sewer, and park facilities. An in-lieu fee ordinance, however, must specify

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39. Id. at 441, 258 S.E.2d at 581.
40. Conners & High, supra note 9, at 71-72.
41. This is especially true in the cases of schools or parks. Where smaller tracts of land are subdivided, it is usually impractical to require dedication of land within the subdivision. See Jordan v. Village of Menomonee Falls, 28 Wis. 2d 608, 621-22, 137 N.W.2d 442, 449 (1965) (court upheld an equalization fee required in lieu of dedicating land), appeal dismissed, 385 U.S. 4 (1966).
42. Id. at 162, 137 N.W.2d at 622; Coulter v. City of Rawlins, 662 P.2d 888, 898 (Wyo. 1983) (city may require a developer to pay a fee to connect developed property to city water and sewer lines).
43. Hollywood, Inc. v. Broward County, 431 So. 2d 606, 610-12 (Fla. Dist. Ct. App. 1983) (requirement that a developer dedicate land or pay a fee to the county as a condition of plat approval was permissible as long as the dedication or fee offsets the subdivision needs, and as long as the funds collected are sufficiently earmarked for the benefit of the subdivision residents); Jordan, 28 Wis. 2d at 622, 137 N.W.2d at 450 (upholding statute which required payment of an equalization fee which would be used for the capital improvement of parks, schools, and recreation areas); Coulter, 662 P.2d at 898 (upholding statute which allowed municipality to levy sewer and water connection charges). Contra City of Montgomery v. Crossroads Land Co., 355 So. 2d 363, 365 (Ala. 1978) (without legislative grant, municipality had no power to levy assessments for municipal improvements).
44. See Coulter, 662 P.2d at 890. The court in Coulter noted:
With the onslaught of energy development in Wyoming during the 1970’s, the population of Rawlins increased substantially and projections indicate that by 1990 the City’s total number of inhabitants will increase 148% over the 1970 population.
In response to these projections, the City Council reasoned that the demand for
that the use of the fees must primarily, although not exclusively, benefit the residents of the new development.\textsuperscript{45} It is a limited concept because in-lieu fees can only be used where a dedication of land would also be appropriate.\textsuperscript{46}

The impact fee is an expansion of the in-lieu fee requirement. Local governments levy impact fees against new developments to generate revenue for capital facilities, the need for which is created by the developments themselves.\textsuperscript{47} The impact fee is a more flexible concept than the in-lieu fee because its application is broader—it may be used to fund area-wide projects such as large-scale water and sewage facilities, parks, roads and schools.\textsuperscript{48} Some commentators favor the impact fee because it applies to a broader range of development projects\textsuperscript{49} and is a source of funding for facilities not normally subject to dedication requirements.\textsuperscript{50} Unlike in-lieu fees, local governments can assess impact fees against lands already platted because impact fees are usually paid when building permits or certificates of occupancy are issued, rather than at the time of subdivision platting.\textsuperscript{51} As a result, some suggest that impact fees more accurately correlate impacts and assessments than do dedication or in-lieu fees because the impact fee is assessed at the time the growth occurs and is generally based on the square footage or number of rooms in a development.\textsuperscript{52}

Not surprisingly, there has been strong resistance to local governments’ use of impact fees to generate revenue for off-site capital improvements. As a policy matter, it is argued that the price for these improvements ultimately falls on new residents, thereby deterring business and industry expansion in the community.\textsuperscript{53} Critics suggest that such fees essentially make development “for sale,” and that the appropriateness and quality of development is an

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City services such as water, sewer and park facilities would also increase and that there was a need to offset the projected impact. According to a plan developed by the City, it was estimated that approximately $36,000,000 in capital improvements would be needed to expand the sewer and water system in order to meet the 1990 population estimate.

\textit{Id.}

\textsuperscript{45} Conners & High, \textit{supra} note 9, at 71.

\textsuperscript{46} Taub, \textit{supra} note 9, at 522.

\textsuperscript{47} Conners & High, \textit{supra} note 9, at 71-72.

\textsuperscript{48} Juergensmeyer & Blake, \textit{supra} note 9, at 417.

\textsuperscript{49} Non-subdivision projects such as condominiums, apartments, and commercial developments which may not be subject to in-lieu fee requirements can be assessed impact fees. Taub, \textit{supra} note 9, at 522.

\textsuperscript{50} Juergensmeyer & Blake, \textit{supra} note 9, at 420. New forms of exactions such as impact fees and linkage may finance not only traditional improvements, but nontraditional improvements and services such as child day care, public art, historic artifacts, public transit systems, bookmobiles, jogging tracks, helicopter pads, recreational community gardening, job training, low or moderate-income housing, library sites, and police and fire stations. Taub, \textit{supra} note 9, at 517.

\textsuperscript{51} \textit{Id.} at 522.

\textsuperscript{52} \textit{Id.}

\textsuperscript{53} Bauman & Ethier, \textit{supra} note 4, at 53.
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issue separate from its impact on community facilities and services. Too often, it is argued, municipalities view the costs and benefits of development only in the short term, and overlook community-wide benefits of development at the time exactions are made. The rise of impact fees and other innovative forms of financing may be seen as an ultimate encroachment by government over private property rights.

Even an on-site dedication ordinance can be subject to this attack. In 1980, a Texas court of appeals held unconstitutional under the state constitution a city park dedication ordinance which required a developer to dedicate sites within a subdivision for park purposes, or pay a fee in-lieu thereof. The court said, “To permit municipalities and other governmental entities further to extend their encroachment over private property rights in this way under the guise of protecting the public’s safety, health, and general welfare, makes a mockery of the spirit as well as the letter of our Constitution.”

The most innovative extension of the exaction/impact fee concept has occurred in California and Massachusetts, where the cities of San Francisco and Boston have recently enacted ordinances which attempt to finance new housing and social programs in the same way public facilities are financed. This concept, called linkage, links the right to construct large downtown developments to the requirement of constructing or providing new residential housing, based upon the number of workers expected to occupy the proposed space. Linkage ordinances require the developer to pay a fee or actually build the new housing as a condition of development approval. These ordinances have met with mixed results, and some think recent Supreme Court decisions may dissuade similar projects in the future. This will be especially true if the only link between the proposed project and the fee is that the developer needs a permit and the government wants to fund an otherwise unfunded program.

B. Rationales for Imposing Subdivision Exactions

The original rationale underlying judicial approval of subdivision exactions was the theory of “privilege”: a municipality could condition subdivision

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54. These benefits include growth in retail sales and sales tax collection as well as growth in employment which increases disposable income. Id. at 53-54.
55. Berg Dev. v. City of Missouri City, 603 S.W.2d 273, 275 (Tex. Ct. App. 1980). The court distinguished between municipal exaction requirements for parks and more traditional exaction requirements as follows:
   While government can clearly require the dedication of water mains and sewers as well as property for streets and alleys, we believe these to be distinguishable from the dedication of property for recreational purposes. The former bears a substantial relation to the safety and health of the community while the latter does not.
Id.
56. Id.
57. Conners & High, supra note 9, at 77-83; Delaney, Gordon & Hess, supra note 9, at 143-44.
approval on dedication requirements because the approval was granted at the municipality's discretion and because the developer "voluntarily" chose to subdivide and sell his land by plat.\textsuperscript{59} Under this rationale, courts traditionally granted broad discretion to the municipality to impose even arbitrary and unreasonable conditions, and for this reason it has since fallen from favor.\textsuperscript{60}

In \textit{Jordan v. Village of Menomonee Falls},\textsuperscript{61} the basis for upholding a compulsory land dedication exaction was the "benefit received" rationale, which the court explained as follows:

The municipality by approval of a proposed subdivision plat enables the subdivider to profit financially by selling the subdivision lots as home building sites and thus realizing a greater price than could have been obtained if he had sold his property as unplatted lands. In return for this benefit the municipality may require him to dedicate part of his platted land to meet a demand to which the municipality would not have not been put but for the influx of people into the community to occupy the subdivision lots.\textsuperscript{62}

Like the privilege test, the benefit test may be undermined by the Supreme Court's recent decision in \textit{Nollan v. California Coastal Commission},\textsuperscript{63} which seems to imply that property owners have a right to build on their property, subject only to reasonable regulation, and that development is not a governmentally conferred benefit.\textsuperscript{64} As a result of this decision, some suggest that a rethinking of the nature of exactions may be in order, because much of the law is based on the fiction of privilege and benefit to the property owner, rather than on the exercise of coercive power by the government.\textsuperscript{65}

Courts today generally uphold exactions, if at all, on the theory that a city's interest in planning and regulating the use of property is a substantial public interest and therefore permissible through the reasonable exercise of the police power.\textsuperscript{66} Courts have developed several "reasonableness" tests to

\textsuperscript{59.} Pavelko, \textit{supra} note 9, at 283.

\textsuperscript{60.} \textit{Id.} The notion of "voluntariness" was recently utilized in Russ Bldg. Partnership \textit{v. City of San Francisco}, 199 Cal. App. 3d 1496, 1505, 246 Cal. Rptr. 21, 25 (1987) (court, upholding transit fees imposed on new development, stated: "the fees imposed by this Ordinance are not compulsory but are exacted only if the developer voluntarily chooses to create new office space").

\textsuperscript{61.} 28 Wis. 2d 608, 137 N.W.2d 442 (1965), \textit{appeal dismissed}, 385 U.S. 4 (1966).

\textsuperscript{62.} \textit{Id.} at 615, 137 N.W.2d at 448.

\textsuperscript{63.} 483 U.S. 825 (1987). \textit{See infra} notes 165-71 and accompanying text.

\textsuperscript{64.} 483 U.S. at 833-34 & n.2 (stating that "the right to build on one's own property—even though its exercise can be subjected to legitimate permitting requirements—cannot remotely be described as a 'governmental benefit' ").

\textsuperscript{65.} Berger, \textit{supra} note 58, at 748.

\textsuperscript{66.} The city's interest in planning and regulating the use of property is a substantial public interest. Call \textit{v. City of West Jordan}, 606 P.2d 217 (Utah 1979), \textit{aff'd on rehearing}, 614 P.2d 1257 (Utah 1980), \textit{aff'd on other grounds}, 727 P.2d 180 (Utah 1986).

In \textit{Miller v. Board of Public Works}, 195 Cal. 477, 234 P. 381 (1925), the California Supreme
determine whether an exaction is reasonable, but a court must first determine whether the municipality’s action was authorized under a state enabling statute. If it was not, then the municipality’s action is ultra vires and the question whether the exaction is a valid exercise of the police power need not be addressed. A determination that a city has surpassed its state-delegated authority will be dispositive.

II. Legal Challenges To Municipal Subdivision Exactions

A. The Ultra Vires Attack: Traditional Approach

Whether a city has the express or implied power to impose a particular requirement under state enabling legislation will determine if the requirement is permissible. It is a well-established rule that cities are creatures of the state and as such can exercise only those powers that are expressly or impliedly conferred to them by the state. The rule that a municipal cor-

Court stated:
In short, the police power, as such is not confined within the narrow circumspection of precedents, resting upon past conditions which do not cover and control present day conditions obviously calling for revised regulations to promote the health, safety, morals, or general welfare of the public; that is to say, as a commonwealth develops politically, economically and socially, the police power likewise develops, within reason, to meet the changed and changing conditions.

\textit{Id.} at 484, 234 P. at 381. See generally Siemon, supra note 9, at 118 (to show that its interest is genuine and substantial, the city must show a “comprehensive commitment to making its physical environment in commercial and industrial areas more attractive”) (emphasis in original) (citing Metromedia, Inc. v. City of San Diego, 453 U.S. 490, 532 (1981) (Brennan, J., concurring)).

67. See infra notes 155-85 and accompanying text.
68. Juergensmeyer & Blake, supra note 9, at 421.
70. See Kamhi v. Town of Yorktown, 74 N.Y.2d 423, 427, 547 N.E.2d 346, 347, 548 N.Y.S.2d 144, 145 (1989) (towns have only lawmaking powers which the state legislatures have conferred upon them); accord Briar West, Inc. v. City of Lincoln, 206 Neb. 172, 175-76, 291 N.W.2d 730, 732 (1980) (same); Town of Barrington v. Blake, 532 A.2d 955, 956 (R.I. 1987) (police power is vested in the state and may be exercised by the several cities and counties only when authorized by the general assembly); Town of Clearfield v. Cushman, 150 Wis. 2d 10, 20, 440 N.W.2d 777, 781 (1989) (town has such powers which are necessarily implied from any power conferred upon it by statute); Coulter v. City of Rawlins, 662 P.2d 888, 894-95 (Wyo. 1983) (municipality is a creature of the state and may exercise only state-conferrered powers). See also Osborn v. Board of County Comm’rs, 764 P.2d 397, 400 (Colo. App. 1988) (Land Use Control Enabling Acts control and restricts county’s authority on land use regulation matters); Eastern Planned Communities at Lincroft, Inc. v. Middletown Township, 235 N.J. Super. 467, 470, 563 A.2d 81, 82 (1989) (municipality’s power to regulate land use law is delegated and defined by the state municipal land use law).
poration can only exercise powers granted to it by statute or those powers necessary to enable it to carry out the purposes of its creation is often referred to as "Dillon’s Rule," after the writer of the first and most important American treatise on municipal corporations.71 Dillon endorsed the notion that state power is "supreme and transcendent," and that the courts should require municipal corporations to show a plain and clear grant for any authority they exercise: "[w]ith firm hands, [courts have a duty] to hold them and their officers within chartered limits."72

The universal acceptance of Dillon’s Rule has substantially limited a city's ability to solve capital development problems through local legislation. One writer stated:

American cities today do not have the power to solve their current problems or to control their future development. Their impotence is expressed in their legal status. Under current law, cities have no "natural" or "inherent" power to do anything simply because they decide to do it. Cities have only those powers delegated to them by state government, and traditionally those delegated powers have been rigorously limited by judicial interpretation.73

Some recent decisions finding implied authority for local exaction or impact fee ordinances under planning statutes, home rule legislation,74 or general police powers, however, reflect a growing belief that city impotence under Dillon’s Rule is no longer politically or socially defensible. For example, under home rule, it may no longer be assumed that the municipality’s power to enact local legislation should be strictly construed against the municipality.75 However, the city must still demonstrate some basis for the power to enact local exaction or impact fee ordinances. That authority may be found under statutes expressly or impliedly granting such power, it may be implied under home rule powers, it may be inherent in the reasonable

71. Frug, supra note 5, at 1064.
72. J. Dillon, Commentaries on the Law of Municipal Corporations § 237 (5th ed. 1911). Dillon stated:
   It is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the accomplishment of the declared objects and purposes of the corporation—not simply convenient, but indispensable. Id.
73. Frug, supra note 5, at 1062.
74. See infra notes 103-06 and accompanying text.
exercise of the municipality's police powers, or it may be found in some combination of all the above.\textsuperscript{76}

1. \textit{Express and Implied Authority Under Planning Enabling Legislation: Two New Jersey Cases}

Most states today expressly authorize cities to require internal street and facility improvements as a condition of subdivision approval. However, most do not expressly authorize in-lieu fees, off-site user impact fees, or municipal exactions for parks and schools.\textsuperscript{77} Express enabling legislation may be advantageous for cities because an ordinance is more likely to withstand legal challenge if there is clear statutory authority for a city's actions. On the other hand, express enabling legislation may limit as well as confer such authority because any power not specifically included in the statute may be prohibited by inference and thus the municipality's ability to seek innovative solutions to unique local problems may be restricted.\textsuperscript{78}

Courts have recognized that the state legislative process would falter if the state legislature were constitutionally required specifically to address the myriad of situations to which a particular policy may be applied and to formulate specific rules for each situation.\textsuperscript{79} For this reason, a city has not only the powers which are expressly granted to it by statute, but also those powers necessary to enable it to discharge the duties and carry out the purposes of the statutory grant.\textsuperscript{80}

A city often relies on the powers granted by state planning or environmental statutes for the implied authority to require particular exaction fees not expressly granted by statute. Two New Jersey cases illustrate this approach. In 1974, in \textit{Divan Builders, Inc. v. Planning Board of Wayne},\textsuperscript{81} Divan Builders applied to the Wayne Township Planning Board for approval of a plan to construct thirty-one single family homes. A portion of the

\textsuperscript{76} The broad concept of the police power is used by courts to identify those state and local government regulations and prohibitions which are valid and may be invoked without the requirement of payment of compensation. \textit{Brooks, The Future of Municipal Parks in a Post-Nollan World: A Survey of Takings Tests as Applied to Subdivision Exactions}, \textit{8 VA. J. NAT. RESOURCES L.} 141 (1988).


\textsuperscript{78} \textit{Brooks, supra} note 76, at 169.


\textsuperscript{80} \textit{Aunt Hack Ridge Estates, Inc.}, 160 Conn. at 115, 273 A.2d at 883. \textit{See also} \textit{Call v. City of West Jordan}, 606 P.2d 217, 219 (Utah 1979) (cities have powers necessarily implied to carry out the responsibilities delegated by the state legislatures); \textit{Coulter v. City of Rawlins}, 662 P.2d 888, 895 (Wyo. 1983) (municipality may exercise implied powers from a legislative grant).

\textsuperscript{81} 66 N.J. 582, 334 A.2d 30 (1974).
building site was substantially covered by a pond, and the preliminary plan provided for draining the pond and constructing a conduit to pipe the water from its upstream source through the development and into an existing drainage facility downstream.82 Immediately before approval of the plan, the Township amended its subdivision ordinance to establish procedures for requiring off-site improvements as a condition of subdivision approval.83 Pursuant to this amendment, the planning board then included a condition in its recommendation for final approval of the plan that Divan contribute $20,000 to the Township as its share of improving the downstream conditions of the stream that would carry drainage from the subdivision.84 When Divan challenged the requirement, the trial court entered judgment for Divan and the appellate court affirmed.85

The question on appeal before the New Jersey Supreme Court was whether the planning board had the authority under the Municipal Planning Act of 1953 ("Planning Act") to require a developer to contribute to the cost of an off-site improvement, even though the Planning Act did not expressly authorize such exactions.86 The court reversed and held that the Planning

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82. Id. at 587, 334 A.2d at 32.
83. Id. The ordinance provided in part that:

Prior to the granting of final approval of all subdivisions hereafter submitted to the Planning Board, and prior to the issuance of any building permits for any land use, including land uses which require site plan approval . . . and any residence or other use of property on an unimproved street or where any off-site improvements have not then been installed, the subdivider or other named type of applicant . . . shall have installed, posted a performance bond, or made cash payments, in the manner provided in Section 5 below, with respect to the immediate or ultimate installation of any required off-site improvements.

Id. at 588, 334 A.2d at 33 (citing WAYNE TOWNSHIP, N.J. ORDINANCE No. 69-1972, § 14-26(a) (1975)).

84. Id. at 589, 334 A.2d at 33. The township then passed a bond ordinance authorizing the construction of the drainage basin improvement project as a general improvement. Id. at 590, 334 A.2d at 33.

85. Id. at 591, 334 A.2d at 34. While the trial court upheld the township’s right to require off-site improvement, it entered judgment for Divan because the developer could not be required to pay for improvements necessary to accommodate adjoining areas. Id. at 590, 334 A.2d at 34.

86. The court noted that the Planning Act authorized subdivision control and authorized approval requirements by the planning board, specifically mentioning drainage as a category of improvement, and empowering the municipality to impose particular improvements by ordinance. The court cited the following section of the Planning Act as authority for imposing specific improvements under N.J. STAT. ANN. § 40:55-1.21 (West 1974-75 & Supp. 1989):

Before final approval of plats the governing body may require, in accordance with the standards adopted by ordinance, the installation, or the furnishing of a performance guarantee in lieu thereof, of any or all of the following improvements it may deem to be necessary or appropriate; street grading, pavement, gutters, curbs, sidewalks, street lighting, shade trees, surveyor's monuments, water mains, culverts, storm sewers, sanitary sewers or other means of sewage disposal, drainage structures, and such other subdivision improvements as the municipal governing body may find necessary in the public interest.

Id. at 594-95, 334 A.2d at 36 (emphasis supplied by court).
Act authorized such improvements for two reasons. First, the state constitution required a liberal construction of any law which concerns a municipal corporation, and the Planning Act itself called for construction "most favorably to municipalities." Second, the language of the Planning Act empowered the municipality to condition subdivision approval on those improvements which the local governing body found necessary for the protection of the public interest. According to the court, the public interest is no less substantial in the case of an off-site exaction than on-site.

Twelve years later, in *New Jersey Builders Association v. Bernards Township*, the New Jersey Supreme Court addressed the question whether the newly revised Municipal Land Use Law ("MLUL"), which succeeded the Planning Act, authorized the Township to require new developers to pay their pro rata share of a long-term, twenty-million dollar Township road improvement plan. Bernards Township was a rapidly developing municipality which had undertaken a comprehensive transportation and traffic study in response to the impact of new and increased development in the county. As a result of the study, a Transportation Management Plan was incorporated into the Township's Master Plan and under the Master Plan the Township adopted an ordinance which allocated the cost of long-term roadway improvements between the Township and its residential and commercial developers. The premise underlying the ordinance was that all new development contributes to the need for Township-wide road improvements. Thus, the cost of improvements was allocated on a trip generation forecast to reflect the impact on existing development.

The New Jersey Supreme Court acknowledged that subdivision and development applications, in addition to their direct impact on municipal facilities in the surrounding area, also have a cumulative and wide-ranging impact on the entire community. However, the court held that the MLUL

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87. *Id.* at 595, 334 A.2d at 37 (citing N.J. STAT. ANN. § 40:55-1.3 (West 1974-75 & Supp. 1989)). The Planning Act's intention was "to give all municipalities the fullest and most complete powers possible concerning the subject matter hereof." *Id.*

88. *Id.* at 595, 334 A.2d at 37. The court went on to say that recognition that the expense for such required improvement may be imposed upon the developer under the Planning Act was only a preliminary step in determining whether a particular cost allocation was equitable. In this case, since the improvement was constructed as a general improvement, the judgment was reversed and the case remanded to trial court for a determination of the difference between the cost of the improvement and the total amount by which all properties served were specially benefited as a result. *Id.* at 604, 334 A.2d at 40-41.


90. *Id.* at 224, 528 A.2d at 555.

91. *Id.* at 225-26, 528 A.2d at 556-57.

92. A trip generation forecast is a cost allocation formula which computes an average number of vehicle arrivals and departures ("trips") of, for example, a single family residence or professional office, based upon the number of residents or office occupants. *Id.* at 225, 528 A.2d at 556.

93. *Id.* at 225, 528 A.2d at 556.

94. *Id.* at 237, 528 A.2d at 562.
did not authorize the Township to impose the indirect capital costs of its road improvement plan on new developers. The court said:

We cannot fault the logic or the foresight that induces a municipality such as Bernards Township to consider the long-term impact of permitted development on municipal resources and public facilities. But as yet the Legislature has not delegated to municipalities the far-reaching power to depart from traditionally authorized methods of financing public facilities so as to allocate the cost of substantial public projects among new developments on the basis of their anticipated impact.95

The court based its decision on traditional rules of statutory construction, including the “plain meaning” of the statute and its legislative purpose.96 The Township had argued that the MLUL empowered a planning agency to require contribution to its overall road improvement plan because the MLUL specifically authorized a developer “to pay his pro rata share of the cost of providing only reasonable and necessary street improvements and water, sewerage and drainage facilities, and easements therefor [sic], located outside the property limits of the subdivision or development but necessitated or required by construction or improvements within such subdivision or development.”97

In response, the court said this statutory provision actually limited municipal authority to those improvements required as a direct consequence of the particular subdivision or development under review.98 Even though the New Jersey Constitution and the MLUL itself required that the provisions of the MLUL be broadly construed in favor of municipal power,99 the court charged the legislature with knowledge of prior judicial interpretations of the Planning Act which had limited municipal authority under a “direct consequence” test.100 Because the state legislature failed to clearly and unequivocally depart from that judicial limitation of municipal power, the court held that the legislature had not authorized the municipality to exercise broader powers under this statute. The court’s narrow interpretation of the words “necessitated or required by construction” in the statute thus pre-

95. Id. at 237, 528 A.2d at 562.
96. Id. The court stated:
    We conclude that the plain meaning and obvious legislative intent was to limit municipal authority only to improvements the need for which arose as a direct consequence of the particular subdivision or development under review. The phrase necessitated or required by construction . . . within such subdivision or development precludes the more expansive statutory interpretation urged upon us by counsel for Bernards Township.

97. Id. at 237, 528 A.2d at 562 (citing N.J. STAT. ANN. § 40:55 D-42 (West 1967 & Supp. 1989)).
98. Id. at 237, 528 A.2d at 562.
99. See supra note 87 and accompanying text.
cluded pro rated fees imposed on developers in order to address the cumulative long-term impact of development in the community.101

In this case, the New Jersey Supreme Court was unwilling to permit the Township to develop new and innovative methods of financing public facilities absent express statutory authority for doing so, despite the fact that the MLUL instructed the court to construe liberally the law in favor of the municipality. Rather, the court followed the traditional view that municipal power should be narrowly construed, stating: "[h]ad [the legislature's] intent been to expand significantly municipal power to require contribution for off-site improvements, we are confident that this intention would have been manifested in the legislative history of the MLUL."102

In holding that Bernards Township lacked the statutory authority to impose pro rated development fees for its long-term road improvement plan, the court avoided the complex legal and policy issues involved in authorizing "impact fee" type ordinances and their sustainable limits in this particular case. In holding that such fees must be expressly authorized by the state legislature before being imposed by the municipality, the court favored a policy promoting uniformity and centralized authority under state-wide planning enabling legislation at the expense of a policy which would encourage local autonomy and innovation.103

2. Exactions and Impact Fees Under Home Rule Authority

In the late nineteenth century, increased urbanization and the belief that communities themselves are in the best position to understand and deal with local problems led cities to seek some autonomy from state government.104 Advocates of the movement for local autonomy, or "home rule," criticized the narrowly drawn concept of municipal power under Dillon's Rule because it failed to recognize local government's sophistication, its importance in the political process, and the variety and complexity of issues it faces.105

The home rule movement has met with some success. Today, most states grant some home rule powers to municipalities within their jurisdictions.106

101. Id. at 237, 528 A.2d at 562 (citing N.J. STAT. ANN. § 40:55 D-42 (West 1967 & Supp. 1989)).
102. Id. at 236, 528 A.2d at 562.
103. See Libonatti, supra note 75, at 68.
104. Note, Home Rule and the Pre-Emption Doctrine: The Relationship Between State and Local Government in Maine, 37 ME. L. REV. 313, 323 (1985). The first successful result of this movement was in 1875, when Missouri enacted a new constitution giving the city of St. Louis the right to charter its own government. Id. at 324.
105. Libonatti, supra note 75, at 52. In 1982 there were 82,341 total types of government in the United States. Of that total, 82,290 were described as local governments, either county, municipal, township, school district, or special district. Id.
106. Larsen & Zimet, supra note 2, at 494. Simply defined, home rule is a grant of power to the electorate of a local governmental unit. Politically, it means the freedom of a local unit of government to pursue self-determined goals without interference from the state legislature.
The concept of home rule is a dynamic concept and is best viewed as a flexible relationship permitting autonomy, interdependence and reciprocity between state and local governments. Grants of home rule authority generally are either constitutional or statutory, and may employ broad general language or enumerate specific powers delegated to the municipality. Under an imperium in imperior model, there is a constitutionally mandated division of responsibility between state and local government based on a distinction between statewide and local matters, and a sphere of local affairs which are beyond state legislative control. Under a “limitation approach” to home rule, the municipality may fully exercise the state’s police power unless a state statute limits the power of the municipality to act. The limitation

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or other agencies of state government. See generally Libonatti, supra note 75, at 53; Note, The Indiana Home Rule Act: A Second Chance for Local Self-Government, 16 Ind. L. Rev. 677 (1983) (home rule gives local governments authority to create solutions to individual problems and to experiment with new approaches to effective government without first seeking state authorization); Note, supra note 104, at 330 (home rule was designed to give city governments power to offer flexible solutions to diverse problems).

107. Libonatti, supra note 75, at 53.

108. Note, supra note 106, at 683. For example, state constitutional amendments grant home rule authority in Maine and Illinois. See Larsen & Zimet, supra note 2, at 494; Note, supra note 104, at 338. There are advantages and disadvantages with either a constitutional or statutory approach. A statutory grant of home rule authority lacks the ability to place home rule powers beyond legislative erosion, but permits greater responsiveness to change than a constitutional grant. Note, supra note 106, at 683.

109. Note, supra note 104, at 325. The Missouri constitution of 1875 is generally credited with creating this method for distributing a state’s police power between state and local government. Id. at 324 n.65.

110. Id. at 331. For example, Ind. Code § 36-1-3-4 (1981) provides:
(a) The rule of law that a unit has only:
(1) powers expressly granted by statute;
(2) powers necessarily or fairly implied in or incident to powers expressly granted;
and
(3) powers indispensable to the declared purposes of the unit;
is abrogated.
(b) A unit has:
(1) all powers granted it by statute; and
(2) all other powers necessary or desirable in the conduct of its affairs, even though not granted by statute.
(c) The powers that units have under subsection (b)(1) are listed in various statutes. However, these statutes do not list the powers that units have under subsection (b)(2); therefore, the omission of a power from such a list does not imply that units lack that power.

Ind. Code Ann. § 36-1-3-8 (Burns Supp. 1988) further provides:
A unit does not have the following:
(1) the power to condition or limit its civil liability, except as expressly granted by statute.
(2) The power to prescribe the law governing civil actions between private persons.
(3) The power to impose duties on another political subdivision, except as expressly granted by statute.
approach essentially reverses Dillon's Rule that municipal government cannot act unless a state statute or charter provision grants that power to act, and converts a city's authority from a question of "why" into a question of "why not?"\textsuperscript{111}

Some states, such as California and Florida, have found authority for exactions and development fees through broadly interpreted home rule powers in their state constitutions.\textsuperscript{112} For example, in \textit{Hollywood, Inc. v. Broward County},\textsuperscript{113} a developer challenged a county commission's authority under the county charter to enact an ordinance requiring a dedication of land or in-lieu fees for parks as a condition of subdivision approval. The court noted that Broward County, as a Florida charter county, had broad home rule powers.\textsuperscript{114} Such power was limited only by preemption by the state government or provisions of the state and federal constitutions. Finding nothing in any state provision or charter that prohibited the county from enacting such an ordinance, the court found the developer's \textit{ultra vires} attack ineffective.\textsuperscript{115}

\begin{itemize}
  \item (4) The power to impose a tax, except as expressly granted by statute.
  \item (5) The power to impose a license or other fee greater than that reasonably related to the administrative cost of exercising a regulatory power.
  \item (6) The power to impose a service charge or user fee greater than that reasonably related to reasonable and just rates and charges for services as determined under IC 8-1-25-2.
  \item (7) The power to regulate conduct that is regulated by a state agency, except as expressly granted by statute.
  \item (8) The power to prescribe a penalty for conduct constituting a crime or infraction under statute.
  \item (9) The power to prescribe a penalty of imprisonment for an ordinance violation.
  \item (10) The power to prescribe a penalty of a fine of more than two thousand five hundred dollars ($2,500) for an ordinance violation.
  \item (11) The power to invest money, except as expressly granted by statute.
  \item (12) The power to order or conduct an election, except as expressly granted by statute.
\end{itemize}


114. \textit{Id}. at 609. Florida charter counties, such as Broward County, derive their sovereign powers from article VIII, section 1(g) of the Florida Constitution which provides in part:

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Counties operating under county charters shall have all powers of local self-government not inconsistent with general law, or with special law approved by the vote of the electors. The governing body of a county operating under a charter may enact county ordinances not inconsistent with general law.
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\textit{Id}. at 608.

115. \textit{Id}. at 610. As a result, the court found it unnecessary to address the county's argument that it was empowered to enact the ordinance by the Local Government Comprehensive Planning
Other states have taken a narrow view of home rule enabling legislation and invalidated impact fees not expressly authorized by a state statute or constitutional provision. Recently, in *Albany Area Builders v. Guilderland*, the town of Guilderland in Albany County, New York, adopted a local law called the Transportation Impact Fee Law (TIFL) requiring all applicants for building permits for land improvements, which would generate additional traffic, to pay a transportation impact fee at the time the permit was issued. The amount of the fee was determined by a schedule in the law. TIFL also established a Transportation Impact Fee Trust Fund and provided that the funds were to be used for capital improvements to and expansion of the town, county and state roadway network and transportation facilities within the town. Funds were not to be used for periodic or routine maintenance.

The Albany Area Builders Association and other developers challenged the town's authority to enact such a law, contending that the New York Municipal Home Rule Law, which permits local governments to adopt laws relating generally to their own "property, affairs, or government," did not permit local legislation in matters of substantial state concern. The Supreme Court Appellate Division agreed, explaining that local statutes are within constitutional home rule provisions when such legislation affects only the property, affairs, or government of the municipality involved. The court continued:

In the case at hand, it can hardly be disputed that TIFL has effects which go beyond the Town's boundaries. The imposition of a transportation impact fee certainly will inhibit new construction, particularly low-income housing, within the Town's boundaries and will thereby shift new development to surrounding localities.

The court decided that other provisions of the Home Rule Law which permitted local laws relating to the acquisition of transit facilities, or acquisition, care, management and use of highways and roads, did not permit a municipality to create new taxes to fund highway improvements. The court found TIFL inconsistent with and preempted by general state laws regulating highway funding and municipal finance.

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Act. *Id.* at 610 n.3. Applying a rational nexus test, the court went on to hold that subdivision exactions for county level parks are permissible so long as the exactions are shown to offset, but not exceed, reasonable needs sufficiently attributable to the new subdivision residents and the funds collected are adequately earmarked for the acquisition of capital assets that will sufficiently benefit those new residents. Under this test, the court affirmed the judgment of the trial court which had concluded that the Broward County ordinance was valid. *Id.* at 614.

117. *Id.* at 295, 534 N.Y.S.2d at 792.
118. *Id.*
119. *Id.* at 296-97, 534 N.Y.S.2d at 793.
120. *Id.* at 299, 534 N.Y.S.2d at 795. The court said, "[t]he means by which revenues are raised and expended for the purpose of improving transportation facilities are the subject of a comprehensive regulation by the legislature, primarily codified in Town Law article 8." *Id.* at
One can view the appellate court's decision in *Albany Area Builders* as a case illustrating the inherent limitation of state home rule legislation which confers upon local governments only the power to adopt local laws dealing with local concerns. In an increasingly complex and interdependent world, it is difficult to think of many issues which are solely of local concern and do not go beyond the boundaries of a municipality. This is especially true if local planning and development decisions are held to encompass matters of substantial state concern because they might inhibit construction or shift new development to surrounding localities. In most, if not all, cases, a restrictive planning or zoning decision or exaction requirement might have such an effect.

As the appellate court opinion in *Albany Area Builders* also illustrates, even in home rule states, courts often exhibit the tendency to strike a middle of the road course when balancing the powers of state and local governments and often uphold the interests of the state and the individual over those of the municipality. These courts appear reluctant to permit what they see as radical or innovative local financing initiatives by local government. Others zealously protect private property rights from what they see as encroachment by municipalities and other governmental entities under the guise of protecting the public safety, health, and general welfare. This judicial reluctance may in part be founded in the historical entrenchment of Dillon's rule which sees limits on city power as "natural," and the court's role to construe narrowly such power. Thus, even under home rule, where local self-determination is limited to matters "purely local" in nature, many states still treat cities as mere creatures of the state.

### 3. The Exaction Requirement: Fee or Tax?

Courts frequently address the legality of an in-lieu fee or impact fee by determining whether the ordinance imposes a "regulatory fee" or whether the fee actually constitutes a "tax." In such cases, the label is usually outcome-determinative. Once a court labels the fee a "tax," it will be invalidated unless there is express enabling legislation for imposing such a tax, and this rarely exists.
The distinction between a fee and a tax turns on a determination of the primary purpose of the legislation. If the primary purpose of legislation is regulation rather than raising revenue, the fee is not a tax. If, on the other hand, the primary purpose of the legislation is to raise money, the fees are not regulatory but fiscal, and they are taxes.\textsuperscript{124} One court called such labeling merely an "exercise in semantics" because an ordinance which raises revenue, if reasonably designed and carried out for its intended purpose, is a proper form of planning for the good of the community, and therefore not prohibited as a tax.\textsuperscript{125} The distinction between a fee and a tax has been criticized as a mere "formalism,"\textsuperscript{126} and as begging the question of public policy.\textsuperscript{127} Nevertheless, the choice the court makes is critical because a fee construed as a police power regulation requires only very broad legislative delegation,\textsuperscript{128} while a tax requires specific statutory authorization.\textsuperscript{129}

\textsuperscript{124} Haugen v. Gleason, 226 Or. 99, 104-05, 359 P.2d 108, 110-11 (1961) (exaction could be either a permissible regulatory device or impermissible revenue raising device based upon the purpose of the statute); Hillis Homes, Inc. v. Snohomish County, 97 Wash. 2d 804, 809-10, 650 P.2d 193, 195 (1982) (same).

\textsuperscript{125} Call v. City of West Jordan, 606 P.2d 217, 220-221 (Utah 1979). The Call court, in discussing the labeling of the ordinance as a taxing instrument or regulating instrument, stated: "this labeling is but an exercise in semantics which misconstrues the purpose of the ordinance to make another attack upon it." \textit{Id.}

\textsuperscript{126} Fischel, \textit{supra} note 9, at 106.

\textsuperscript{127} See generally Juergensmeyer & Blake, \textit{supra} note 9, at 423-24 (stating that "most courts have summarily labeled extradevelopment impact fees as either a tax or regulation in a result-oriented fashion that avoids an adequate theoretical or policy-directed explanation").

\textsuperscript{128} See Contractors & Builders Ass'n v. City of Dunedin, 329 So. 2d 314, 317-20 (Fla. 1976) (if fee is characterized as tax, then it is void for lack of specific statutory authorization, but because it is a regulation, the broader delegation will suffice), \textit{cert. denied}, 444 U.S. 667 (1979); Hillis Homes, Inc. v. Snohomish Co., 97 Wash. 2d at 807, 650 P.2d at 195 (noting that the subject fees were not regulatory, and therefore were not authorized by the broad police power "encompassing all those measures which bear a reasonable and substantial relation to promotion of the general welfare of the people") (quoting State v. Seattle, 94 Wash. 2d 162, 165, 615 P.2d 461, 463 (1980)).

A court may also look to the presence of specific enabling legislation and home rule powers in determining whether such development fees are permitted under general police powers. Jordan v. Village of Menomonee Falls, 28 Wis. 2d 608, 612, 137 N.W.2d 442, 447 (1965), \textit{appeal dismissed}, 385 U.S. 4 (1966).

\textsuperscript{129} See City of Montgomery v. Crossroads Land Co., 355 So. 2d 363, 365 (Ala. 1978) (held that in-lieu fee was a tax and required specific statutory authorization); Lafferty v. Payson City, 642 P.2d 376, 378 (Utah 1982) (same); Citizens for a Financially Responsible Gov't. v. Spokane, 99 Wash. 2d 339, 343, 662 P.2d 845, 848 (1983) (municipality requires specific legislative authority to levy taxes).
Most local governments which utilize development impact fees to finance capital improvements must rely on their general police powers, rather than taxing powers authorized by the state. This is so because in most states there is no legislation specifically authorizing such fees. As a result, the city must take the position that it has the authority to levy such fees under its general police powers.

Whether imposing such fees is permitted under local police powers as a regulatory fee rather than a tax requires a determination based on such factors as the presence of specific enabling legislation, home rule powers, and whether that power is necessarily implied from any general statutory grant of power. In most cases where the requirement is construed as a regulatory fee rather than a tax, the payment is upheld as a valid exercise of the police power; if it is construed as a tax, it is almost always invalid.

For example, in *Hillis Homes, Inc. v. Snohomish County,* developers challenged local ordinances which imposed fees on new residential subdivisions and housing proposals in two Washington counties. The counties adopted the ordinances in response to financial pressures caused by rapid residential growth and authorized imposing the fees on new subdivisions for parks, schools, roads, and fire protection. The fees were to be deposited in special accounts to benefit the geographic area from which the payment was made.

The Washington Supreme Court held that the payments the developers paid in order to receive final approval of their projects were not fees but actually taxes. Although the state constitution delegated broad power to each county to make and enforce local police, sanitary, and other regulations not in conflict with general laws, the extensive police power of the counties did...

130. Nicholas, *supra* note 1, at 88. A few states, such as California, however, have passed legislation authorizing impact fees. See Cal. Gov't Code §§ 65970-65979 (West Supp. 1989).

131. Police powers, including the power to regulate land development, are delegated to local governments by the states, but the extent to which governments may exercise those powers varies. Nicholas, *supra* note 1, at 86.


133. E.g., Lafferty v. Payson City, 642 P.2d 376, 378 (Utah 1982) (striking down a city ordinance requiring the payment of an "impact fee" of $1,000 per family dwelling prior to the issuance of any building permit). The court reaffirmed the distinction between a fee imposed to finance a specific municipal service or capital expenditure, and a fee which was deposited into the city's general fund. The court held that a reasonable charge for a specific service is permissible, whereas a general fee that amounts to a revenue measure is not. *Id.*

134. 97 Wash. 2d 804, 650 P.2d 193 (1982).

135. *Id.* at 806, 650 P.2d at 194. The use of the fees was restricted to capital improvements, such as solid waste disposal facilities, parks, roads, and sheriff's services. *Id.*
not include the power to tax.\textsuperscript{136} Although not all demands for payment by a governmental body are taxes, the court decided that if the primary purpose of legislation is regulation rather than raising revenue, it is not a tax, but if the primary purpose of the fees is to raise money, the fees are fiscal and thus taxes. Because both ordinances provided that the fees were to be used to offset the costs of providing specified services, and neither made any provision for regulating residential developments, the primary purpose of the ordinances was to raise revenue and thus to tax. Therefore, without express authority to impose taxes in the form of development fees, the ordinances were invalid.\textsuperscript{137}

In cases like Hillis Homes, a court must balance the policies favoring local government flexibility in land use planning against policies restricting local government exaction requirements. The Florida Supreme Court recognized these policy concerns as such in Contractors & Builders Association v. City of Dunedin.\textsuperscript{138} In Dunedin, building contractors and land owners challenged a municipal ordinance which required payment of impact fees for capital improvements upon the issuance of a building permit. The developers argued that the fees constituted taxes which the municipality was forbidden to impose in the absence of enabling legislation. The Florida Supreme Court disagreed and held that a city could raise money to expand its water and sewerage system to meet the increased demand of additional connections by imposing impact fees, despite the fact that no express statutory provision governed capital acquisition other than deficit financing. In explaining its decision, the court said:

\begin{quote}
We see no reason to require that a municipality resort to deficit financing, in order to raise capital by means of utility rates and charges. On the contrary, sound public policy militates against any such inflexibility. It may be a simpler technical task to amortize a known outlay, than to predict population trends and the other variables necessary to arrive at an accurate forecast of future capital needs. But raising capital for future use by means of rates and charges may permit a municipality to take advantage of favorable conditions, which would alter before money could be raised through issuance of debt securities; and the day may not be far distant when municipalities cannot compete successfully with other borrowers for needed capital.\textsuperscript{139}
\end{quote}

\textsuperscript{136} Id. The court recognized that a county’s police powers are extensive: Municipal police power is as extensive as that of the legislature, so long as the subject matter is local and the regulation does not conflict with general laws . . . . The scope of police power is broad, encompassing all those measures which bear a reasonable and substantial relation to promotion of the general welfare of the people.

\textsuperscript{137} Id. at 810, 650 P.2d at 196.

\textsuperscript{138} 329 So. 2d 314 (Fla. 1976).

\textsuperscript{139} Id. at 319-20.
4. Implied Authority Under General Police Powers

Because it is impractical for a legislature to spell out all the things that city governments must do to perform their functions, enabling statutes frequently grant cities broad authority to promote the public safety and welfare under their general police powers. The police power is a flexible concept which develops and grows to meet changing conditions, and it includes the power to reasonably regulate for the public safety, public health, morality, peace and quiet, and law and order.\[140\] Some courts have found that a municipality is authorized to impose subdivision exactions under its general police powers because the orderly development of a municipality must necessarily include the present and future need for such things as streets, sewers, schools, and public recreational facilities.\[141\]

For example, in *Call v. City of West Jordan,*\[142\] developers challenged a city ordinance requiring them to dedicate seven percent of their land to the city, or pay a fee in-lieu thereof, to be used for flood control or park and recreation facilities or both. The developers argued, among other things, that the ordinance was invalid because the city lacked the power to require such a fee. The Utah Supreme Court disagreed, holding that the ordinance was within the scope of authority and responsibility of the city in promoting the “health, safety, morals and general welfare” of the community under a

\[140\] The police power is elastic and capable of expansion to meet existing conditions of modern life and to keep pace with the social, economic, moral and intellectual evolution of the human race. Miller v. Board of Public Works, 195 Cal. 477, 484, 234 P. 381, 383 (1925). Under the authority of police powers a state may regulate activities which pose a threat or hindrance to the public safety, health, or morals. See Bayou Cane Volunteer Fire Dept. v. Terrebonne Parish Consol. Gov’t, 548 So. 2d 915, 918 (La. 1989) (state may permit local authorities to create independent fire protection districts); State v. Comeau, 233 Neb. 907, 912, 448 N.W.2d 595, 597-98 (1989) (state may reasonably regulate the use of weapons); Cima v. Elliot, 224 N.J. Super. 436, 439-40, 540 A.2d 918, 919 (1988) (state may enact statute which allows an owner of a rental unit to summarily evict a tenant when the owner seeks to personally occupy the unit); State v. Batsch, 44 Ohio App. 3d 81, 82, 541 N.E.2d 475, 476 (1988) (state may require automobile drivers to wear safety belt); Nuttall v. Nuttall, 562 A.2d 841, 845 (Pa. Super. 1989) (state may enact statute which provides for a mandatory equitable distribution of marital property subsequent to divorce); Blanco v. State, 761 S.W.2d 38, 40 (Tex. App. 1988) (state may protect the tranquility, quiet enjoyment, and well-being of a community from unreasonable noise in a public place or near a private residence).


\[142\] 606 P.2d 217 (Utah 1979).
The court held that planning for adequate parks and play-
grounds was desirable and essential under this authority, stating:

In modern times of ever-increasing population and congestion, real estate
developers buy land at high prices. From the combined pressures of
competition and desire for gain, they often squeeze every lot they can into
some labyrinthine plan, with only the barest minimum for tortious and
circuitous streets, without any arterial ways through such subdivisions, and
with little or no provision for parks, recreation areas, or even for reasonable
"elbow room." The need for some general planning and control is
apparent, and makes manifest the wisdom underlying the delegation of
powers to the cities, as is done in the statutes above referred to.\textsuperscript{144}

The court dismissed the argument that the ordinance was revenue-raising
and thus a tax, because it found the ordinance was a proper planning
ordinance and necessary for the good of the community. Similarly, there
was no compensable taking under the city's power of eminent domain,
because the regulations on subdivision approval were reasonable.\textsuperscript{145}

The general power to control land use for health, safety, and general
welfare of the public, however, does not authorize a municipality to act in
a manner which is arbitrary or unreasonable. A court should balance the
interests in granting a municipality flexibility under its broad police powers
to impose reasonable requirements with the need to limit that authority to
prevent "free-wheeling" exactions by local authorities. The problem is illus-
trated in a recent New Jersey case, \textit{Nunziato v. Edgewater Planning Board},\textsuperscript{146}
where the plaintiffs challenged a planning board's grant of site plan approval
for construction of a high-rise condominium apartment building. The de-
veloper had agreed to contribute $203,000 for affordable housing in the
town as an "unconditional gift," and did not object to doing so.\textsuperscript{147} The idea
of such a contribution was first proposed by the board chairman who said
he was "sure" that it would be considered by the board in connection with
the application.\textsuperscript{148} Even though the board maintained throughout the pro-
cedings that the amount contributed would have no bearing on its decision,
the appellate court disagreed, finding the developer's promise to pay $203,000
was a material factor in the application process.\textsuperscript{149} The court believed the

\textsuperscript{143} \textit{Id.} at 219. Utah law provided that "[f]or the purpose of promoting health, safety,
morals and the general welfare of the community the legislative body of cities and towns is
empowered to regulate and restrict . . . the location and use of buildings, structures and land
for trade, industry, residence or other purposes." \textit{Id.} Furthermore, a section of the state's
Municipal Planning Enabling Act granted a planning commission "such powers as may be
necessary to enable it to perform its functions and promote municipal planning." \textit{Id.}

\textsuperscript{144} \textit{Id.} at 219.

\textsuperscript{145} \textit{Id.} at 220 (stating that "as a prerequisite for permitting the creation of the subdivision,
the City, under the powers conferred upon it, can and does impose reasonable regulations").


\textsuperscript{147} \textit{Id.} at 134, 541 A.2d at 1110.

\textsuperscript{148} \textit{Id.} at 133, 541 A.2d at 1110.

\textsuperscript{149} \textit{Id.}
bidding process was "grossly inimical to the goals of sound land use regulation," and "the intolerable spectacle of a planning board haggling with an applicant over money too strongly suggests that variances are up for sale." 5

In Nunziato, the court found the local planning board's action to be arbitrary, capricious, and unreasonable, and vacated the action on that basis. The court also expressed its concern that without legislated standards the possibilities for abuse in such negotiations between an applicant and a regulatory body, no matter how worthy the cause, were unlimited. 5 Although agreeing that state and municipal bodies have the power to control land use for the health, safety, and general welfare of the public, the court left open the question of whether this power authorizes municipalities to solicit and accept money as in the present case. 152 But because the municipality had not enacted an ordinance which authorized such solicitation, the exaction was held to be invalid. 153

As Nunziato illustrates, even if the municipality has the power to condition plat approval on a particular exaction requirement, the municipality may not act in an arbitrary or capricious manner in exercising that power. In addition, any exercise of police power by a municipality must be reasonable. It is on this basis—the requirement that an exaction or fee be reasonable—that the constitutionality of impact fee ordinances and off-site municipal exactions are most frequently challenged. 154

B. Constitutional Issues: The Reasonableness Tests

The due process clauses of the United States Constitution's fifth and fourteenth amendments require that any exercise of a state's police power

151. Id. at 133, 541 A.2d at 1110.
152. Id. at 132, 541 A.2d at 1109.
153. Nunziato v. Edgewater Planning Bd., 225 N.J. Super. at 132, 541 A.2d at 1109. The court stated that:
   Whether [police power] authorizes a municipality to provide for the solicitation and acceptance of money in the manner that was done here is a question we do not decide. Assuming that it does provide such authority, it is clear that an implementing
ordinance was never enacted and without that the exaction is impermissible.

Id.

155. The fifth amendment provides, in part, that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

The fourteenth amendment provides, in part, that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1.

Substantive due process is a standard that has effectively limited land use control for over
must be reasonably related to the achievement of a legitimate governmental objective. If reasonable, a municipal exaction is a valid exercise of the police power. If unreasonable and onerous, it fails as an improper exercise of the police power and gives rise to the claim that it is an unconstitutional taking.

Until recently, the Supreme Court has interpreted the takings clause of the fifth amendment, which guarantees that private property shall not be taken for public use without just compensation, to require judicial deference to local government decisions concerning land use. The states in turn have developed divergent tests to determine whether an exaction requirement or fee was a reasonable exercise of the state and local police power. These tests range from standards which give great deference to local government decisions to more stringent requirements which impose tests almost impossible to satisfy. State courts have used at least three different tests to determine whether an exaction or impact fee is a reasonable exercise of the state's police power. Generally, each test is employed without distinction between

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156. The requirement of reasonableness under the due process clauses of the United States Constitution defines the rights of the individual and limits the powers which the state may exercise. In re Gault, 387 U.S. 1, 20 (1967). Reasonableness is not an absolute concept but depends on the circumstances of each case. The inquiry focuses on the relationship between the regulation and the needs generated by the proposed development. Delaney, Gordon & Hess, supra note 9, at 147.

157. Pavelko, supra note 9, at 282. Recent Supreme Court decisions indicate that the traditional tests for whether a land use control is a taking requiring compensation or a regulation which requires nothing are changing. In Nollan v. California Coastal Commission, 107 S. Ct. 3141 (1987), by a 5-4 majority, the Supreme Court defined new standards which appear less deferential to state and local governments than many existing standards. See infra notes 172-77 and accompanying text.

158. See Note, supra note 31, at 641.

159. If, for example, the words "specifically and uniquely attributable" in a particular test mean that the municipality must prove that the land to be dedicated for a park or school site is necessary to meet a need solely attributable to the anticipated influx of people into the community to occupy that particular subdivision, then it would be impossible for the municipality to satisfy such a requirement in most instances. Jordan v. Village of Menomonee Falls, 28 Wis. 2d 608, 617, 137 N.W.2d 442, 447 (1965), appeal dismissed, 385 U.S. 4 (1966).
traditional exactions and the more innovative and controversial user impact fees. 160

1. The “Specifically and Uniquely Attributable” Test

The “specifically and uniquely attributable” test places an almost insurmountable burden on local governments seeking capital development payments from developers as a condition of development approval. 161 This test, first articulated in a 1961 Illinois case, 162 requires a subdivision developer to assume only those costs which are specifically and uniquely attributable to the development. 163 As a result, where capital facilities such as schools are overcrowded because of cumulative development in the community, a developer can not be required to fund new facilities because the need for such is not specifically and uniquely attributable to the new development. 164 The test is based on the principle of special assessment, which serves as an alternative form of exaction in many states. 165 A minority of states, including

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160. Some writers have argued that a different degree of burden on the municipality should exist based on the type of exaction involved, and the courts should distinguish between traditional exactions and user impact fees. See Delaney, Gordon & Hess, supra note 9, at 145. There are also different variations on these tests such as the “judicial deference” test used in Montana, and the “direct benefit test” based on the doctrine of special assessments. Id. at 154-55.

The “judicial deference” test, created by the Montana Supreme Court in Billings Properties, Inc. v. Yellowstone County, 144 Mont. 25, 394 P.2d 182 (1964), provides for automatic acceptance of a legislative determination in favor of an exaction, unless the developer produces evidence demonstrating that the exaction was unreasonable. Id. at 35-36, 394 P.2d at 188. The “direct benefit” test, set forth in Gulest Assoc. v. Town of Newburgh, 25 Misc. 2d 1004, 209 N.Y.S.2d 729 (N.Y. Sup. Ct. 1960), requires a showing that the regulation would directly benefit the subdivision. Id. at 1007-08, 209 N.Y.S.2d at 733. The direct benefit test is based on the special assessment doctrine, a tax law principle that provides that the costs of a service or improvement performed by the local government may be levied against real property if the benefits of the improvement will accrue directly to the assessed property. See Delaney, Gordon & Hess, supra note 9, at 154-56.

161. Juergensmeyer & Blake, supra note 9, at 427.


163. Id. at 380, 176 N.E.2d at 802. The Pioneer court stated:

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

164. In Pioneer, the developer submitted a subdivision plat for approval of 250 residential units to the village planning commission. The planning commission, pursuant to ordinance, had required dedication of 6.7 acres of land for an elementary school and playground. Id. at 378, 176 N.E.2d at 801. The court found that this ordinance requirement imposed an unreasonable condition precedent for approval of the plat, and thus constituted a taking of private property for public use without compensation. Id. at 382, 176 N.E.2d at 803.

165. Special assessments are charges used to finance municipal development which are levied against surrounding real property which is directly benefitted by the local improvement. Smith,
Illinois, follow this test, but the majority have rejected it because it appears impossible for the municipality to meet and prohibits a municipality from addressing the cumulative strain on a city’s infrastructure as a result of new smaller developments.

2. The "Reasonable Relationship" Test

Almost diametrically opposed to the specifically and uniquely attributable test is the "reasonable relationship" test, which some have called the "anything goes" test. This test exerts a strong presumption in favor of the municipality, and requires the municipality only to show that the amount and location of land or fees bear some reasonable relationship to the use of the facilities by the future inhabitants of the subdivision. In 1949, California first adopted the flexible reasonable relationship test in Ayres v. City Council of Los Angeles, when it held that a subdivider who seeks to acquire the advantages of development has a duty to comply with reasonable conditions for dedication.

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supra note 9, at 19-24; Taub, supra note 9, at 522-24 Special assessments, however, cannot be used to finance facilities which benefit the general public, and municipalities may only assess the property owner for the cost of such facilities in proportion to the benefits he receives from such facilities. Taub, supra note 9, at 523. For example, if a municipality wishes to construct new curbs and drainage facilities throughout a residential area, the houses directly benefitted by the curbs may be charged with a special assessment, but only in proportion to the benefit the property receives by having the curbs. Smith, supra note 9, at 19-20. In most states special assessments must be explicitly authorized by statute or state constitution, and without such authorization they are treated as an illegal tax. Taub, supra note 9, at 523.

However, there is a recent trend to liberalize the definition of "special assessment," and in California the courts have recently held that a fixed benefit assessment is not a tax despite the lack of any statutory or constitutional authority. E.g., Jones v. City of San Diego, 157 Cal. App. 3d 745, 203 Cal. Rptr. 580 (1984).

166. See Jordan v. Village of Menomonee Falls, 28 Wis. 2d 608, 617, 137 N.W.2d 442, 447 (1965) (specifically and uniquely attributable test should not be restrictively applied so that it puts an insurmountable burden upon the municipality), appeal dismissed, 385 U.S. 4 (1966).

167. Conners & High, supra note 9, at 76.

168. Taub, supra note 9, at 523.

169. See Associated Home Builders v. City of Walnut Creek, 4 Cal. 3d 633, 484 P.2d 606, 94 Cal. Rptr. 630, appeal dismissed, 404 U.S. 878 (1971). The California Supreme Court stated:

We see no persuasive reason in the fact of these urgent needs caused by present and anticipated future population growth on the one hand and the disappearance of open land on the other to hold that a statute requiring the dedication of land by a subdivider may be justified only upon the ground that the particular subdivider upon whom an exaction has been imposed will, solely by the development of his subdivision, increase the need for recreational facilities to such an extent that additional land for such facilities will be required.

Id. at 639-40, 484 P.2d at 611, 94 Cal. Rptr. at 635.

170. 34 Cal. 2d 31, 207 P.2d 1, (1949).

171. Id. at 42, 207 P.2d at 7. The leading California case on the constitutionality of exactions is Associated Home Builders v. City of Walnut Creek, 4 Cal. 3d 633, 484 P.2d 606, 94 Cal. Rptr. 630 (1971). In that case, the California Supreme Court upheld a statute which granted
The Supreme Court’s recent decision in *Nollan v. California Coastal Commission*\(^{172}\) raises doubts about the current validity of this test. In *Nollan*, the California Coastal Commission granted a permit to the Nollans to replace a bungalow on their beachfront lot with a house, on the condition that they grant the public an easement to cross a portion of their property, which was located between two public beaches. The house was to be a three bedroom house, keeping up with the residential buildings along the coastline. The commission argued that the Nollans were adding to a “wall” of residential structures preventing the public’s ability to see the ocean, and that the construction of the house, along with other developments, was burdening the public’s ability to use the shorefront. They argued that assisting the public in overcoming the “psychological barrier” to using the public beach, and preventing congestion on the public beaches was a legitimate public purpose. The Court assumed for purposes of argument that this was true.\(^{171}\) However, a majority of the Court found that the commission’s imposition of the permit condition constituted an unconstitutional taking because the condition imposed did not serve the public purposes related to the permit requirement. The court, by a 5-4 majority, found the permit was an improper land use regulation, because there was no direct, or even rational, relationship between the public’s ability to see the ocean and securing an easement for the public to walk on the beach.\(^{174}\)

municipalities the power to require dedications of land or payment of in-lieu fees for park and recreational purposes as a condition precedent to subdivision approval. *Id.* at 648, 484 P.2d at 618, 94 Cal. Rptr. at 642.

In *Grupe v. California Coastal Comm’n*, 166 Cal. App. 3d 148, 212 Cal. Rptr. 578 (1985), the California Court of Appeals held that so long as a project contributed to the need for public access, even if the project standing alone had not created the need for access, and even if there was only an indirect relationship between the access exacted and the need to which the project contributed, the imposition of an access condition on a development permit was sufficiently related to burdens created by the project to be constitutional. *Id.* at 167, 212 Cal. Rptr. at 589-90.


173. 483 U.S. at 838-39. The dissent by Justices Brennan and Marshall contains this strong criticism of the majority test of rationality:

> The Nollan’s development blocks visual access, the Court tells us, while the Commission seeks to preserve the lateral access along the coastline. Thus, it concludes, the State acted irrationally. Such a narrow conception of rationality, however, has long since been discredited as a judicial arrogation of legislative authority. “To make scientific precision a criterion of constitutional power would be to subject the State to an intolerable supervision hostile to the basic principles of our Government.”

*Id.* at 846 (Brennan, J., dissenting) (quoting *Sproles v. Binford*, 286 U.S. 374, 388 (1932)).
Prior to Nollan, some commentators had criticized the reasonable relationship test as permitting exactions to become "judicially sanctioned extortion," because under a generous definition of reasonable relationship, municipalities have almost unlimited discretion to impose development exactions. The Supreme Court's decision in Nollan has clearly tightened the requirements of permissible regulation by indicating increased scrutiny of governmental actions in land use decisions and by requiring that there be an "essential nexus" between the need for the exaction and the development. As a result, the reasonable relationship test, employing a standard extremely deferential to local governments, may no longer be good law.

3. The "Rational Nexus" Test

A majority of states today employ a third test, the "rational nexus" test, first adopted by the Wisconsin Supreme Court in Jordan v. Village of Menomonee Falls. This test adopts a more moderate standard for reviewing exactions. It retains a presumption of validity in favor of the municipality, but it is similar to the specifically and uniquely attributable test in that it requires there be a reasonable connection between the exaction and the needs created by or benefits conferred upon the new development. Under a rational nexus test, an exaction is not unreasonable simply because the general public might also benefit from the improvement. However, a developer can be required to bear only that portion of the cost of an improvement that bears a rational nexus to the needs created by or special benefits conferred upon the development.

The rational nexus test has been considered the best framework for addressing the validity of an exaction scheme because it considers the needs of the community and is at the same time fair to the developer. The reasonable relationship test gives unlimited discretion to the municipality, and the uniquely attributable test shifts an insurmountable burden of proof to the municipality. The rational nexus test, on the other hand, requires only that the municipality show that the residents of the development would receive benefits in reasonable proportion to their contribution to the facility's construction. The test thus ties the developer's contribution to the costs that are attributable to the development but also permits the municipality to address the problems of cumulative growth.

175. Smith, supra note 9, at 13.
176. Berger, supra note 58, at 751.
177. Brooks, supra note 76, at 163.
179. Delaney, Gordon & Hess, supra note 9, at 152.
181. Conners & High, supra note 9, at 77.
The effect of the recent Supreme Court decision in *Nollan v. California Coastal Commission* on the rational nexus test is somewhat uncertain. Some writers have suggested that the decision decreases the amount of deference courts can grant municipalities under a rational nexus test, and that the flexibility this test allows for considering future needs may undermine its own validity under the Court's "essential nexus" standard. Others view *Nollan* as a decision where the Supreme Court actually adopted the rational nexus test for exactions, in-lieu fees, and impact fees over the broader California reasonable relationship test. In any event, after *Nollan*, courts employing a rational nexus or reasonable relationship test will likely tighten the standards by which they examine the validity of land use regulations in general.

III. Determining The Validity Of Subdivision Exactions Under An Ultra Vires Attack

In most cases, the threshold question raised by those who challenge municipal exactions is not whether the required payment was reasonable, but whether the municipal action was authorized by state statute or constitutional provision. In addressing the *ultra vires* issue, courts should weigh the policies favoring municipal autonomy against the policies underlying traditional limitations on municipal power. The traditional view that the power of local government to legislate should be narrowly construed by the courts conflicts with the policies underlying the movement toward local autonomy and home rule for the nation's municipalities.

The principle of local autonomy is a fundamental principle of American democracy, and the history of American thought supports the belief that decentralized political systems are better than centralized. Advocates of local autonomy believe local government is the most politically responsive branch of government, and thus the best level at which to implement policy.

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183. See supra notes 172-77, and accompanying text.
184. Brooks, supra note 76 at 162-63.
185. Callies, supra note 172, at 639.
186. The *ultra vires* challenge is the primary attack because if the municipality has exceeded its authority, then there is no need to investigate the reasonableness of its actions. See Call v. City of West Jordan, 606 P.2d 217 (Utah 1979) (in-lieu fees for flood control, park, and recreational purposes attacked primarily as *ultra vires*, secondarily as an unreasonable regulation). See also Heym & Gilhool, *The Constitutionality of Imposing Increased Community Costs on New Suburban Residents Through Subdivision Exactions*, 73 YALE L.J. 1119, 1134 n.66 (1964) (listing of cases where issue of statutory authority was dispositive); Juergensmeyer & Blake, supra note 9, at 421.
187. See G. Clark, *Judges and the Cities* 195 (1985) (believing that one foundation of historical American social thought is local authority).
188. Id. at 20 (discussing how noted political theorists Manuel Castells, J.J. Mansbridge, David Miller, and Robert Nozick, while having different societal views, "all would agree that local democracy enables change, ponders social cohesion, and provides a way of facilitating the voice of the people," and indicating that all would agree that "local autonomy and decentralized democracy are *good* from many different perspectives") (emphasis added).
They believe decentralized political systems are the best way to protect individual freedom, and recognize the importance of vesting certain regulatory powers to those at the local level who are especially competent to address local concerns. The policies that justify administrative agencies also support local government autonomy. Local government provides a mechanism for continuous, often expert supervision of local programs and facilities, permits local officials with special knowledge to address specialized needs in the community, and relieves state legislatures from the day-to-day responsibilities of local management.

There are, of course, legitimate concerns about the extent to which local government decisionmaking should be free from state and federal control. Despite such concerns, however, it is fair to say that principles of local autonomy and the home rule movement have become an integral part of our social and political thinking today. Local autonomy is especially appropriate where decisions involve local planning, zoning, and development issues, because addressing these issues necessarily involves the accommodation of various and competing local interests which a state legislative process may fail to adequately represent.

In cases challenging municipal authority to impose development fees or exactions as ultra vires, courts not only resolve disputes, they also provide determinate interpretations of the limits of municipal power. In that role, courts have great discretion in interpreting state enabling legislation because that legislation is usually broadly conceived. In addition, state-level legislation which details the scope of local government power is often ambiguous because general legislation frequently treats specific local governments according to their general class; “consequently, any one local government has

189. Id.
190. Whatever the virtues of local autonomy, intervention by the courts and state and federal legislatures is sometimes necessary to ensure that local governments operate fairly and act reasonably. Local responsiveness to a zoning problem, for example, can address local concerns and encourage local development opportunities, but zoning ordinances may be used to preserve racial homogeneity in a community. Furthermore, local development policies which directly involve local officials in long-term development decisions may be seen as an unwarranted invasion of private property rights by those who presume that local government should facilitate growth, not direct or control it. See G. Clark, supra note 187, at 21. Furthermore, some argue that local governments lack the protection of federal and state separation of powers doctrine and that few procedural codes restrict local government actions. Local governments, they suggest, are the “true wilderness of administrative law,” and serious problems of fairness often attend their actions. G. Robinson, E. Gelhorn & H. Bruff, The Administrative Process 698 (3d ed. 1986).
191. The principle of local autonomy has also been justified on empirical notions of scale, efficiency and size. Some suggest that national life is simply too complex, too large and too impersonal to create social communities of like-minded people with the power to structure social life. See G. Clark, supra note 187, at 196-98.
only those powers granted its class, which may or may not be finely detailed enough to be relevant in many different possible circumstances.  

A state may choose to expressly prohibit development impact fees, off-site exactions, or linkage ordinances because of state-wide policy concerns about the extent to which new development should bear the costs of community expansion and the impact of local development on adjacent governments and municipalities. In the absence of specific statutory prohibition, however, courts should encourage local government innovation, initiative, and the values of local autonomy in cases challenging municipal authority under an *ultra vires* attack. These concerns today generally outweigh the need for state-wide uniform standards governing exactions and development fees.

Rather than regarding cities as mere instrumentalities of the state for the convenient administration of government within their limits, courts should encourage local officials, who are most directly responsible to the local citizenry, to address issues of local development and to evolve solutions to their long-term capital financing problems without the constant need to seek express authorization from the state. The courts can continue to protect individuals from unreasonable or arbitrary municipal actions on a case-by-case basis by applying a constitutionally mandated reasonableness test, such as the rational nexus test, and by requiring municipalities to meet the requirements of procedural due process and equal protection. But it is

194. *Id.*

195. Some states prohibit certain conditions as a part of rezoning. For example, VA. CODE ANN. § 15.1-491.2 (1989) provides, in part, as follows:

A zoning ordinance may include and provide for the voluntary proffering in writing, by the owner, of reasonable conditions, prior to a public hearing before the governing body, in addition to the regulations provided for the zoning district or zone by the ordinance, as a part of a rezoning or amendment to a zoning map; provided that (i) the rezoning itself must give rise for the need for the conditions; (ii) such conditions shall have a reasonable relation to the rezoning; (iii) such conditions shall not include a cash contribution to the county or municipality; (iv) such conditions shall not include mandatory dedication of real or personal property for open space, parks, schools, fire departments or other public facilities not otherwise provided for in subdivision A (f) of sec. 15.1-466; (v) such conditions shall not include payment for or construction of off-site improvements except those provided for in subdivision A (j) of sec. 15.1-466; (vi) no condition shall be proffered that is not related to the physical development or physical operation of the property; and (vii) all such conditions shall be in conformity with the comprehensive plan as defined in sec. 15.1-446.1.

196. See *Louisiana ex rel. Folsom v. Mayor of New Orleans*, 109 U.S. 285, 287 (1883) (stating that municipal corporations were merely instrumentalities of the state for the convenient administration of state government).

197. See Note, *supra* note 106, at 679 (stating that, ideally, under home rule, a "locality would possess the authority to evolve solutions to its individual problems and to experiment with new approaches to effective government without first seeking authorization from the state legislature").

198. Due process requirements limit the manner in which government may exercise its power,
time to loosen the grip of state control on local decisionmaking. As financial pressure increases and available resources continue to shrink in our highly urbanized nation, city impotence under traditional doctrines of state control is no longer justified. The policies underlying the movement toward local autonomy and home rule require a rethinking by the courts of their role in determining the extent of municipal power. Courts should support local governments' attempts to address their cumulative capital development problems through reasonably proportioned off-site exactions or development fees by broadly construing their power to do so unless such exactions or fees are expressly prohibited by statute.

V. CONCLUSION

It is the responsibility of local governments to provide and maintain general public improvements such as streets and roads, parks, schools, and water and sewage facilities within their jurisdictions. As municipalities grow, so grow the costs of maintaining and providing those improvements. In the face of rapid suburban growth and often seriously deteriorating infrastructure, municipalities must now address the need for major capital improvement and expansion projects while resources to fund those projects are limited. While cities deal with a declining ability to generate income and stringent restraints on their ability to borrow money, their fiscal problems are exacerbated by inaction and under-appropriation by federal and state governments.201

As municipalities search for creative ways to allocate the capital costs of explosive suburban growth, it is virtually certain that they will continue to

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199. Delaney, Gordon & Hess, supra note 9, at 140.
200. Frug, supra note 5, at 1064. Frug notes that city income is largely dependent on something cities cannot control—the willingness of taxpayers to locate or do business within city boundaries:

The problem of increasing exodus of wealthier taxpayers, including businesses, from the nation's major cities is notorious. Even if cities could ensure that taxpayers remained within their borders, however, current law does not allow cities to tax them. Generally, every city decision to increase taxes must be expressly approved by the state, and some states even have a constitutional limitation on the amount of taxes permitted.

Id.

201. Nicholas, supra note 1, at 85 (stating that federal and state inaction and under-appropriation have "forced" local governments to "direct available fiscal resources toward operating and maintaining the facilities that state and federal grants originally paid for").
turn to subdivision off-site exactions and fees as a potential source of funding. Traditionally, subdivision exactions were limited to requirements for construction or dedication for site-specific needs such as roads and streets. Today, however, an increasing number of cities are turning to off-site exactions, in-lieu fees, and impact fees as an alternative source of funds for major capital improvements such as parks and schools or thoroughfare improvements.

Not surprisingly, the use of off-site exactions and fees has generated controversy. Proponents point to the municipality's obligation to provide services while the costs for those services continue to increase and the sources of municipal funding decrease. Opponents counter that such exactions are really a form of municipal extortion and are inherently unfair because the ultimate costs of such projects fall unequally on new residents to the community. As the debate continues, courts must address the legality of exaction and impact fees on a case-by-case basis, first determining whether the municipality had statutory authority to impose the exaction, and if so, whether the exaction was valid as a reasonable police power regulation.\(^{202}\)

If the municipality's action is not authorized by state enabling legislation, then the action is ultra vires and thus void. Most states today have adopted some form of home rule legislation for local governments and all states have adopted planning and subdivision control legislation.\(^{203}\) Yet many courts refuse to find municipal authority for imposing off-site exactions and development fees in such broad grants of statutory authority and require express enabling legislation authorizing such exactions.

If municipalities are to solve the capital expansion problems associated with rapid growth, courts should broadly construe a city's implied powers, under home rule or other enabling legislation, to grant local governments the authority to impose such exactions and fees unless expressly prohibited by statute. Whether a particular exaction is a reasonable exercise of police power should be determined on a case-by-case basis under a rational nexus test which requires proof of a rational connection between the exaction required and the needs created by or benefits conferred upon the new development.\(^{204}\) By granting local governments the implied power to address cumulative capital development needs through reasonable off-site exactions and fees, courts will encourage flexibility and innovation in finding solutions to the needs generated by rapid suburban growth. At the same time, the courts can ensure that new development will bear only its fair and reasonable share of the capital development costs it generates.

\(^{202}\) Different states require a municipality to meet different burdens of proof in validating its exercise of the police power, but recent Supreme Court decisions indicate a trend toward greater scrutiny of local land use control decisions. See supra notes 178-80, and accompanying text.

\(^{203}\) Pavelko, supra note 9, at 280 (citing list of several state subdivision control legislation provisions).

\(^{204}\) See supra notes 177-84 and accompanying text.