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Public and Private Partnerships for Financing Highway Improvements

A report prepared under NCHRP Project 2-14, "Public/Private Partnerships for Financing Highway Improvements," for which Kimley-Horn and Associates is the Agency conducting the Research. The principal investigator is Mr. Lawrence J. Meisner, and the primary author of this report is Ms. Judith W. Wegner, Associate Professor, University of North Carolina.

THE PROBLEM AND ITS SOLUTION

State highway departments and transportation agencies have a continuing need to keep abreast of operating practices and legal elements of specific problems in highway law. This report addresses the legal considerations related to alternative funding mechanisms being used for highway improvements. Various approaches have been used by different states and local agencies to develop funding strategies involving both the public and private sector, and the legal basis for each approach is the central focus of this report.

This paper will be included in a future addendum to a text entitled, "Selected Studies in Highway Law." Volumes 1 and 2, dealing primarily with the law of eminent domain, were published by the Transportation Research Board in 1976; and Volume 3 dealing with contracts, torts, environmental and other areas of highway law, was published in 1978. An addendum to "Selected Studies in Highway Law," consisting of five new papers and 15 supplements, was distributed early in 1981, and a third addendum consisting of eight new papers, seven supplements, and an expandable binder for Volume 4 was dist-

tributed in 1983. The text now totals more than 2,200 pages comprising 56 papers. Copies have been distributed to NCHRP sponsors, other offices of state and federal governments, and selected university and state law libraries. The officials receiving copies in each state are: the Attorney General, the Highway Department Chief Counsel, and the Right-of-Way Director. Beyond this initial distribution, the text is available through the TRB publications office at a cost of $90.00 per set.

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Public and Private Partnerships for Financing Highway Improvements*

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INTRODUCTION

This paper considers legal issues raised by recent efforts to develop alternative mechanisms for funding road improvements.[1] It is divided into four major sections. The first section provides a basic introduction to fundamental legal doctrine that affects the legality of each of these devices. The second major section considers both traditional and non-traditional special assessments. The third section addresses subdivision exactions and recently developed impact fees which build on the legal foundation provided by this more traditional mechanism. The final section discusses contract and conditional zoning (here referred to as contingent zoning) and development agreements, a closely related, but more recently developed, funding device. The text of this report seeks to present a legal framework that is understandable to nonlawyers, while providing supporting citations in extensive footnotes for the benefit of those interested in more detailed information.

OVERVIEW OF LEGAL DOCTRINE

Two basic principles undergird all of the discussion that follows: (1) local governments may not adopt alternative financing mechanisms without adequate supporting authority; and (2) local governments must comply with constraints included in both federal and state constitutions as a means of limiting governmental excesses. Each of these principles will be described in turn.

Authority

American local governments are creatures of the state in which they are located, and are not seen to possess inherent powers.[2] Instead, they must look to state statutes, constitutions, and municipal charters as sources of power to take desired action.

State statutes have traditionally been the most important vehicle through which local governments receive their authority from the state. A threshold question for local governments interested in undertaking innovative action is often whether necessary enabling legislation exists. Such legislation may take a variety of forms. It may be widely applicable general legislation, or, where permitted, special legislation applicable to a single, or small number of areas within a state.[3] It may be quite subject-specific, but may in some cases be very open-ended, perhaps affording broad powers to legislate as required by the general welfare of the town's population,[4] or to exercise home rule as described below.

Assuming that one or another possible source of statutory authority has been identified, the courts' interpretation of that authority must be assessed. In many states, courts have traditionally relied upon "Dillon's Rule," a nineteenth century formulation by a noted jurist and treatise writer, to guide their interpretation.[5] Briefly stated, that rule indicates that "a local government entity can possess and exercise those powers granted in express words; those powers necessarily or fairly implied in or incident to the powers expressly granted; and those powers essential to the accomplishment of the declared objects and purposes."[6] Some state courts continue to apply this rule in a very stringent fashion, denying local governments desired authority in cases of doubt.[7] Others, however, have taken a more generous view, either as a result of judicial understanding that expansive authority is needed by local governments faced with novel problems that demand action, or as a result of statutory or constitutional provisions modifying Dillon's Rule.[8] Additional problems are posed in certain subject areas. The courts have traditionally been very stringent in their interpretation of taxation legislation, believing that state legislatures should clearly and expressly authorize local governments to impose financial burdens of this type.[9] Problems also arise when local governments attempt to rely on statutes affording more open-ended powers in order to expand the limited authority provided by directly relevant subject-specific legislation. Uncertainty regarding local authority under these circumstances is generally resolved on a case-by-case basis under governing interpretative or preemption principles.[10]

Reliance on enabling legislation thus has a major shortcoming as well as a major advantage. When no specific legislation yet exists, or when existing legislation raises questions of interpretation, local governments may be stymied in their efforts to adopt innovative financing techniques. When specific enabling legislation has been adopted, however, it provides ample opportunity for innovative local action with the support and guidance of the state legislature.

Because of the difficulties that may be faced by local governments that must rely on specific state legislation as a source of power, many states in recent years have adopted constitutional and statutory "home rule" provisions designed to give local governments a broader, more permanent source of authority. These provisions may, in some states, serve as an alternative basis for adopting innovative road financing techniques, at least until the adoption of more specific enabling legislation.

Home rule provisions vary in significant respects from state to state, but are generally seen to fall within two broad categories, "imperio" and "legislative" home rule.[11] In "imperio" home rule states, constitutional or statutory provisions state that qualifying local governments

*Work was completed in June of 1986, and supplemental research may be required for those interested in more recent developments.

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may exercise a certain defined scope of power, typically power over "municipal" or "local affairs."[12] Such governments may not, however, regulate matters that are solely of state concern, or contradict governing state legislation in areas of overlapping state and local interest.[13] In "legislative" home rule states, qualifying local governments are not limited to powers over "municipal affairs," but are instead authorized to exercise all powers that the legislature is capable of conferring, subject only to legislatively adopted limitations and, in some cases, certain substantive restrictions.[14] Whichever type of provision may be in force, certain prerequisites must be satisfied before local governments may exercise home rule powers. In some states, additional action by the state legislature may be required to give effect to the constitutional authority.[15] More importantly, not all local governments are eligible to invoke home rule powers,[16] and even those that are eligible may generally not invoke such powers except to the extent authorized by an appropriate amendment to the governing charters.[17] While home rule provisions accordingly provide an important source of local government power, their limitations with regard to scope of coverage, possible state legislative preemption, and applicable prerequisites should also be borne in mind in evaluating their usefulness as a basis for undertaking public/private road financing partnerships.

Charters also pay an important role in establishing the authority available to local governments. Municipal charters are generally adopted at the time of incorporation, either by the state legislature or following a referendum.[18] They may be amended at a later date, consistent with a given state's requirements, for example, to take advantage of an opportunity to assert powers of home rule. Questions of interpretation may arise with regard to charters, as many states view them as grants which afford only those powers specified, while a minority of states interpret charter provisions as limitations on a broader array of municipal powers.[19] In either event, careful attention to charter provisions is needed to ensure compliance with possible constraints on local authority.[20]

Constitutional Constraints

Even if local governments possess adequate authority to implement one or another type of financing mechanism, they may do so only if consistent with applicable constitutional requirements.[21] The Federal Constitution includes provisions limiting the prerogatives of the states, and others acting under state auspices, such as local governments.[22] State constitutions contain provisions paralleling those in the Federal Constitution, as well as requirements that are uniquely part of state law. Three major constitutional requirements are of particular interest here: the due process, equal protection, and uniformity of taxation requirements.

The obligation of local governments to act in conformance with "due process" principles derives from both the federal and state constitutions. It has two major facets. First, its procedural facet requires that parties significantly affected by certain types of government decisions receive notice and an opportunity to be heard in connection with such decisions.[23] Courts will generally weigh a variety of factors in determining precisely what type of process is due.[24] Second, its substantive facet requires that government action have a legitimate purpose, be implemented by reasonably related means, and avoid extremely arbitrary effects on members of the public.[25] Courts interpreting the Federal Constitution have followed the United States Supreme Court's lead in overturning government action only very rarely in the name of substantive due process.[26] This is particularly true when economic or taxation legislation is concerned.[27] Substantive due process requirements imposed by state constitutions have at times been more stringently interpreted,[28] and tend more commonly to serve as the basis for judicial decisions in this area. Courts have also tended to develop specialized requirements designed to protect individuals from governmental action without necessarily acknowledging their derivation or close relationship to state or federal substantive due process principles. "Special benefit," "rational nexus," "taking," and "reserve powers" doctrine, discussed in greater detail in later sections of this paper, exemplify this trend.

Local governments must also comply with federal and state constitutional "equal protection" requirements. This means that statutes or local ordinances may not discriminate in an unreasonable way between different classes of individuals. Courts generally understand that legislative classifications are the necessary and inevitable results of many policy judgments, especially when budgetary issues are involved. They have accordingly tended to conclude that classifications of this sort are rational ones that do not run afoul of constitutional principles.[29] More stringent scrutiny is applied to certain other classifications such as those based on race and gender, however.[30]

Specialized state constitutional provisions dealing with taxation and other issues supplement these broad provisions designed to protect citizens against exceptionally arbitrary government action. Many state constitutions include requirements that these certain taxes be imposed only under specified circumstances and that taxes be uniformly imposed.[31] In recent years, several states have adopted additional constitutional or statutory limitations on the level of taxation or restricting the circumstances under which certain types of taxes may be imposed.[32] The legality of various financing mechanisms may therefore turn on a determination whether they fall within the terms of such taxation provisions.

In sum, successful use of public/private financing mechanisms can only occur when necessary legal authority for their use exists and governing legal constraints are observed. The complex interweaving of these principles is explored below, as applied to special assessments, subdivision exactions and impact fees, contingent zoning, and development agreements.

SPECIAL ASSESSMENTS

Examination of alternative road financing mechanisms can profitably begin with special assessments, in light of that device's long history and wide acceptance. A "special assessment" is a "charge imposed on prop-

erty owners within a limited area to help pay the cost of an improvement designed to enhance the value of property within that area."[33] The subtle nuances of this definition will become more apparent through systematic consideration of a number of subsidiary questions that arise with regard to each of the three major financing mechanisms: (1) the theoretical underpinnings of the device; (2) the availability and characteristics of governing authority; (3) the relative roles of the public and private sectors; (4) the division of responsibility within the private sector; and (5) the method of implementation. These issues will be considered first with regard to traditional, and then with regard to unconventional special assessments.

Traditional Special Assessments

Theoretical Underpinnings

The special assessment has been said to trace its roots to colonial practices in the United States and English practices of an even earlier period.[34] With the increasing need for alternative means of financing roads and other types of infrastructure, the device achieved particular prominence in the 19th century. At that time, American courts took considerable pains to develop a supportive theoretical framework that in large degree remains with us today.[35]

The special assessment is often characterized as a special use of the government's taxing or revenue-raising power.[36] As such, many legislative judgments concerning its use are entitled to great deference.[37] At the same time, it is regarded as sufficiently different from other forms of taxation to be free from constitutional uniformity of taxation requirements described above.[38]

More specifically, special assessments have traditionally been seen as a means of shifting associated costs to a small group of property owners in return for special benefit that accrues to their property as a result of nearby, publicly constructed, physical improvements. In essence, a special assessment is imposed as a quid pro quo for benefits in the form of increased property values.[39] Viewed another way, such assessments may in fact be compelled to ensure that public funds are not diverted to especially benefit a select few.[40]

This theoretical foundation has a variety of consequences. It both provides a fundamental rationale and delineates how far the government may go in imposing costs of infrastructure development on private citizens (it may shift costs only to the extent of benefit received[41] and, then, only to the extent that such benefit is "special" as described below). It also provides important flexibility for local governments, opening the way for use of the special assessment to fund many types of beneficial improvements,[42] in areas that need not correspond with the jurisdiction's territorial boundaries but only with the zone of benefit applicable in an individual case.[43] It also suggests the potential use of the special assessment in a variety of contexts, whether affected property is undeveloped, developing, or already developed,[44] at the initiative either of property owners or the government itself,[45] so long as demonstrable special benefit can be shown.

Authority

The early interest in special assessments led to widespread adoption of statutes authorizing and constraining its use.[46] The availability of express authorizing legislation has both an advantage and a disadvantage. It removes any doubt that local governments are permitted to rely on this device as a funding mechanism, but at the same time provides relatively restrictive guidelines for its application that are strictly enforced by the courts.[47]

These statutory guidelines vary widely from state to state. Statutes may authorize some, but not all, types or levels of government to employ special assessments.[48] They may also authorize only certain types of improvements using this device; for example, road construction may be authorized, but widening or repair and repaving may not.[49] Statutes may authorize municipalities to shift only part of improvement costs to property owners.[50] They may require that property owners initiate or consent to the levy of assessments.[51] Statutes may also specify a variety of procedural requirements with which the local government must comply.[52] In addition, states may authorize local governments to further limit or expand the circumstances in which special assessments may be used, through provisions in local charters or ordinances.[53]

Relative Role of Public and Private Sectors

The concept of public purpose, as well as that of special benefit outlined above, help define the respective roles of public and private partners involved in the use of the special assessment financing mechanism. The courts have recognized that each partner must be cast in an appropriate role. In order to protect the public, special assessments may only be used in furtherance of a public purpose which justifies government participation.[54] Use for purely private benefit, such as to cover costs of driveway aprons, may be prohibited. Private parties are protected by the rule that private individuals may be required to pay a special assessment to cover costs of improvements that provide special benefits. However, private parties may not be asked to carry costs that provide general benefits to the public as a whole, a task more appropriately undertaken by the public, collectively, through the use of general tax revenues. This special benefit/general benefit dichotomy is now so firmly engrained that its underpinnings are rarely explored or explained. It may, however, be seen to reflect constitutional concerns discussed above. Due process concerns may exist because government may legitimately seek to recoup funds expended to afford a distinctive benefit to a small number of property owners, but may not arbitrarily require those individuals to bear the cost of providing improvements for the public as a whole. Equal protection concerns may also arise if an irrational classification scheme is employed, for imposition of costs on a small group may be justified only when that group receives distinctive special benefits, rather than the same general benefits available to all. Uniformity of taxation concerns may also exist if financial burdens associated with the provision of public goods and services are focused on a small group of taxpayers rather than being evenly distributed. At this point, in any event, the special/general benefit dichotomy is fre-

quently incorporated into statutory provisions governing the use of special assessments; alternatively a dichotomy between "local" and general improvements may appear.[55]

However appealing these dichotomies may be in principle, they have proved more problematic in practice. Courts have tended to focus on the private or special benefit side of the question, examining both the type of improvement proposed and the degree to which benefits accrue to affected property owners. While roads have generally been viewed as a type of improvement that may at least in some circumstances afford special benefits, some other types of improvements, such as library and convention center facilities, have been treated as providing benefits that are intrinsically public in character.[56] More commonly, special assessments for road improvement purposes have failed because the proposed improvement is so distant from the property of the assessed individual that few benefits accrue to the property assessed,[57] or so harmful to the environment that negative effects offset benefits.[58] Courts have also limited the use of special assessments when the local government's desire for general benefits is an especially strong factor in the decision to undertake road improvements. For example, when improvements are part of a road system designed to serve regional needs, courts have reduced the assessments.[59] Courts will also look at the character and location of the improvement, such as intersection improvements undertaken to facilitate through traffic, to determine whether there is a particularly substantial benefit to the public.[60] Such decisions are extremely fact-dependent, and the results are often difficult to predict. Since the most realistic position is that facility improvements commonly give rise to both special and general benefits, the best approach to allocating responsibilities is often to require proportionate contributions which reflect benefit accrued.[61] Local governments may avoid such problems in many instances by assessing only part of the cost of road and other improvements to property owners nearby.

Division of Responsibility Within the Private Sector

Once it is clear which geographic area is specially benefited by a proposed improvement, an additional question must be faced: how should improvement costs be allocated among property owners within that area or district? Here again, benefit must be considered, but in this case, it is the relative benefit that is enjoyed by respective property owners. State statutes and cases generally establish one or more measures for determining relative benefit. Among the more common are front footage[62] or area[63] of adjacent lots, property value,[64] and increased property value attributable to the improvement.[65] Several subsidiary zones of benefit, with varying rates of assessment may also be employed.[66] While such formulas often provide a reasonable approximation of benefits received and local governments' decisions regarding their use are entitled to great deference, challenges alleging that a particular levy does not adequately reflect special benefits in an individual case may at times succeed.[67] Courts have been quite unreceptive to claims of unfavorable treatment in comparison to neighboring or nearby property owners, however.[68]

Method of Implementation

Special assessments are actually employed to finance road and other improvements by following the detailed implementation scheme set forth in state statutes and local charters and ordinances.[69] Use of the mechanism may be initiated by a local government governing board in many jurisdictions; in others, a petition of affected property owners may be required to initiate, or may serve to veto, a local government's proposal.[70] Notice and an opportunity for hearing is provided at appropriate points in the process.[71] Appointment of a special board may be required to draw assessment district lines and to determine individual property owners' assessments.[72] A variety of financing methods may be used to reduce the burden of the assessment on individual property owners. Commonly, an estimated project budget will be prepared, and one or another type of bonds will be issued by the local government undertaking the project in order to raise construction funds.[73] Liens will be filed against benefited property, and property owners are allowed to repay amounts due immediately, or on a staggered basis at relatively moderate rates of interest.[74] Special assessments generally do not give rise to personal liability on the part of the property owners because a secured interest in the land is seen as a sufficient repayment guarantee.[75]

Nontraditional Special Assessments

The previous discussion has suggested that special assessments are an effective financing tool, but one that has historically been used to raise funds for small, local road improvements, rather than to fund larger scale projects that benefit a more extensive area and a broader public. Although other financing mechanisms have become more readily available in the last 10 years, it remains important to determine whether expanded nontraditional special assessments may be used in those jurisdictions where alternative financing mechanisms are unavailable, and to ascertain whether this mechanism possesses uniquely attractive features that makes it a desirable type of public/private partnership even in those jurisdictions where other financing mechanisms may be employed. Important scholarly work that explored use of special assessments to finance large-scale road and transmit improvements was begun in 1978.[76] This part draws on that effort, and on more recent developments, in order to sketch issues that have arisen as the special assessment mechanism has begun to be given more novel application.

Theoretical Underpinnings

The theoretical underpinnings of special assessment law have been undergoing reexamination on several fronts in recent years. Three major issues deserve particular attention: the relationship between special assessments and the taxing power; the relationship between special assessments and the police power; and the relationship between cost and the pivotal concept of benefit.

California courts have been particularly active in probing the relationship between special assessments and the taxing power. In the wake

of a 1978 state constitutional amendment sharply limiting the use of the property tax and "special" taxes as sources of general revenue, California municipalities embraced special assessments as a less constraining revenue raising alternative. Several suits were subsequently brought urging the courts to conclude that the new constitutional amendments restricted the use of special assessments as well as the property tax, thereby modifying the traditional view that special assessments are a special form of tax not encompassed by the usual restrictions on the taxing power. The California appellate courts have now squarely rejected this assertion,[77] however, and novel special assessments continue to flower and to take up the burden earlier borne by the property tax. It remains to be seen, however, whether other state courts might interpret differently worded constitutional taxation restrictions in a similar fashion.

Another area of current interest is the relationship between special assessments and the police power. As described at greater length later, public/private partnerships based on the police power are not subject to the same exacting scrutiny as is traditionally applied to special assessments, at least insofar as the special benefit requirement is concerned. It is, accordingly, quite tempting to local governments to develop hybrid assessment mechanisms that combine the most attractive features of levies based on the police power with the most attractive features of traditional special assessments. For example, assessments could be applied to developed and undeveloped land as well as developing land and attachment of liens on assessed property could be used as an enforcement device. How amenable the courts may be to a blending of this sort remains to be seen, however. Some historical precedent exists for relying on the police power as a basis for imposing special assessments, both in the form of practice prior to the 19th century emergence of the taxing rationale, and in the form of statutes which currently permit reliance on the police power as a basis for imposing certain types of special assessments designed to foster public health and safety.[78] California has, once again, led the way with bolder experimentation in this area, as evidenced by its appellate courts' upholding a novel San Diego ordinance that combines features of special assessments and impact fees.[79] It remains unclear, however, whether other states would be amenable to similar hybrids absent more explicit authorizing legislation.

A final question of possible future interest concerns the ambiguous relationship between cost and benefit as those factors determine the charge to be assessed.[80] Clearly, as stated earlier, when project costs exceed benefit, property owners may be assessed no more than the benefit accrued, that is, benefit serves as a cap on costs assessed. Assuming, however, that benefit in the form of increased property values exceeds the cost of improvement, an issue arises whether property owners may be assessed up to the amount of benefit received, or whether assessments may instead not exceed cost; that is, whether cost serves as a cap on the amount assessed. Although this issue has not been the focus of substantial litigation in connection with special assessments, analogous case law suggests that an effort to recoup added value in this way is likely to be seen as an unauthorized tax.[81] In the event state policymakers might choose to adopt more expansive enabling legislation, further exploration of the concept of "special benefit" may be needed before this question can be finally put to rest.

Authority

Jurisdictions interested in expanding their use of nontraditional special assessments will be required to confront the question of authority in a somewhat unusual guise. They can, of course, argue that existing statutory provisions are flexible enough to permit modifications of traditional approaches.[82] On the other hand, they may have to identify alternative sources of authority to supplement that afforded by special assessment statutes to avoid the rule that special assessment statutes should be narrowly construed. The most likely source of such additional authority will be in the home rule provisions in effect in many jurisdictions.[83] While a state's specific statutory framework for special assessments will not generally preempt home rule governments afforded autonomy over municipal affairs from modifying their use of this device, some home rule provisions may be construed to narrow local governments' authority on these grounds.[84] The obvious solution to both non-home rule and home rule jurisdictions' authority dilemma is to seek legislative amendment of the special assessment statute.

Relative Role of Private and Public Sectors

Change is also underway in the definition of special benefit that is used to differentiate between private and public obligations. In assessing the obligations of property owners to pay for multifaceted improvement projects, courts and legislatures in a few states have begun to focus on aggregate system benefits, rather than individual segment benefits.[85] Thus, for example, property owners in an assessment district will be judged to have benefited by increased property values resulting from a package of several interrelated road improvements, rather than only from improvement of a single nearby street that is but one aspect of such a project. This change from earlier practice[86] reflects a more flexible and realistic attitude toward areawide road improvements, perhaps stimulated by increased experience with other types of areawide projects or emerging patterns of development on an areawide basis. A more expansive approach to defining special benefits also underlies recent Pennsylvania legislation which authorizes the use of special assessments to recoup both one-time improvements and recurrent costs including those associated with maintenance of transportation improvements.[87] Again, movement seems to be toward recognizing that benefit accrues from a functioning road system, one whose ongoing operation may benefit nearby property owners just as much as its initial construction.

Division of Responsibility Within the Private Sector

Methods for allocating costs among benefited property owners are likewise becoming increasingly sophisticated. Established standards, such as allocation based on increased property value, have been applied

with greater sensitivity. For example, at least some communities have used checkerboard assessment districts to impose improvement costs on undeveloped or developing properties whose property values will be significantly increased, while exempting developed properties that would not be so benefited.[88] A number of courts have also recently approved assessments against relatively undeveloped properties based on their highest and best developed use, in effect recognizing that introduction of an improvement can result in especially great incremental increase in value under these circumstances.[89]

New alternative methods for allocating cost have also been employed. For example, a recent Pennsylvania statute authorizes the allocation of costs based on the anticipated increase in vehicular traffic generated by the particular property.[90] Such a use-based standard appears to be one step away from traditional measures that focus more directly on land value and accrued benefit, reflecting a special assessment scheme that is characterized by the use of liens on land as an enforcement device. The use-based standard is also a step closer to a hybrid assessment that resembles impact fees based on the police power.[91] Arguably, such a standard is a more precise measure of benefit accrued than many of those that are more traditionally used.

Finally, a few jurisdictions have moved to a multifactor system of allocating costs. For example, local governments in Oregon have used highly flexible local improvement district legislation to develop ordinances that allocate costs on the basis of several factors such as front footage, per-lot or per dwelling-unit land area's impact zones, and zoning use of the property.[92]

Method of Implementation

Communities interested in tailoring special assessments to meet present needs are faced with a variety of implementation issues. Some issues involve the process of initiating and implementing special assessments when several different governmental entities and levels of government are involved. Courts have had to determine whether local governments are obliged to reduce assessments levied against property owners in light of federal contributions to facility construction costs.[93] Questions may also arise whether local governments may assess property owners for work to be done by a cooperating governmental entity.[94] The best way to avoid problems such as these is to clearly resolve potential conflicts through express statutory guidance.[95]

Some states have also experimented with alternative approaches to levying and collecting assessments tailored to certain special circumstances. Oregon has enacted legislation that allows purchasers of homes or multifamily dwellings to opt for installment payment of assessments for development of street, water and sewage systems instead of absorbing such costs into the long term permanent financing of their homes.[96] The state also permits annual assessments for street lighting, maintenance and cleaning, when approved by the electors.[97] In other circumstances, assessments must be paid semiannually over a time period set by the local government.[98] Other states have experimented with special provisions delaying payback obligations of elderly residents,[99] and limiting the obligation of owners of undeveloped land to repay special assessment obligations until land is actually developed.[100] This latter strategy is especially helpful when a local government believes that savings may be realized through present-day construction of facilities with excess capacity in order to meet anticipated future demand.

Summary

In summary, special assessments provide an important public/private partnership mechanism for road financing. They have the following advantages and disadvantages:

1. Special assessments rest on a politically appealing theoretical base that treats charges levied as a mechanism for offsetting special benefits gained from various types of improvements.
2. Special assessments are a broadly applicable devise that can be used to allocate improvement costs to owners of developed, developing, and undeveloped property in areas of varying size, usually more than a single parcel but less than a whole jurisdiction.
3. Statutory authority already exists for use of special assessments. However, the very specific character of that authority may limit local governments' ability to depart from established practices in innovative ways.
4. Special assessments may be used to fund improvements that confer special benefits on private property owners; that is, a type or level of benefit that does not accrue to the public at large. The "special benefit" concept is an ambiguous one that has proved difficult to apply. As a result, the legality of proposed special assessments may at times be in doubt, except in cases where planned improvements are clearly very local in character or when courts and legislatures have adopted a relatively expansive interpretation of this concept. Local governments may also be obliged to contribute some proportion of project costs to ensure that costs of anticipated public or general benefits are not improperly allocated to assessed property owners.
5. Special assessments typically allocate costs of improvements among private property owners on the basis of front footage, area, or property value. Other novel formulas that more closely reflect benefit accrued are being introduced in some jurisdictions.
6. State statutes and local charters and ordinances provide for special checks on the imposition of special assessments. Affected property owners are at minimum given notice and an opportunity for a hearing. In some jurisdictions additional requirements must be met, such as consent to the assessment by a high proportion of property owners. When such requirements apply, they ensure that those most closely affected support funding a proposed improvement. On the other hand, they may encourage property owners to block needed action in hopes that public funds might ultimately be used to cover costs instead.
7. Special assessments commonly entail financing arrangements in which a local government initially issues bonds to raise funds for an

improvement, and is later reimbursed by periodic payments from property owners, secured by liens against the property. This mechanism may therefore provide a way of covering improvement costs at a lower interest rate than would apply if a developer were required to perform necessary work as part of the development process. It may also provide a useful method for making improvements with excess capacity in preparation for subsequent development, while stretching out repayment over a period of time in which that development is likely to take place.

EXACTIONS AND IMPACT FEES

Although special assessments have historically provided an important means for funding small-scale road improvements that benefits owners of developed as well as developing land, local governments have sought to identify supplemental funding mechanisms that serve slightly different policy objectives. Mechanisms that allocate costs of improvements more heavily to new developments that necessitate the construction of such improvements, and that elicit contributions toward costs of major areawide road facilities, have been of particular interest. The following discussion first concentrates on exactions in the form of individualized land dedication requirements and in lieu fees traditionally imposed on developers of residential subdivisions. It then focuses on impact or development fees.

Traditional Subdivision Exactions

While special assessments historically provided a mechanism for funding small-scale local improvements on an ad hoc basis, a separate legal mechanism gradually evolved to provide basic highway infrastructure routinely needed by new residential subdivisions. Although subdivision regulation began as a way of facilitating platting of new residential areas, other objectives soon assumed prominent roles. Developers and local government personnel mapped streets and roadways; developers were then required to construct and dedicate certain of those roadways to the local government.[101] Eventually, dedication requirements were extended to include park and school sites. "In lieu fees" have also been demanded by many states in recent years as a substitute for park and school land, when greater flexibility in locating sites is desired.[102] These dedication and limited in lieu fee requirements will be referred to, for present purposes, as traditional subdivision exactions.[103]

Theoretical Underpinnings

Subdivision exactions are generally justified on two basic grounds. First, it is sometimes said that subdividing land for residential development is a privilege, and that developers who wish to avail themselves of that privilege should satisfy whatever conditions a local government might choose to impose.[104] This theory has been severely criticized, however, for its circularity and its inability to limit overreaching by local governments.[105] The second justification, based on the police power, has achieved more prominence in recent years. Under this theory, local governments may rely on police power flowing from the state to protect the health, safety, and welfare of their residents. Developers can be required to take needed action, including the creation of a functional road system, to avoid burdening either the residents of the newly developed subdivision, or the public at large, with congestion and safety hazards stemming from the proposed development.[106] At times this rationale is framed in alternative terms, which emphasize a local government's ability to control its financial expenditures: developers have no right to dictate to municipalities where or when monies will be expended to provide needed infrastructure, but must instead wait a reasonable time for facilities to be provided, or provide desired improvements themselves.[107]

As was true with special assessments, this theoretical base has important consequences. Development plays a central defining role. From the perspective of citizens, the theory provides a basis for distinguishing public and private obligations, since development-related needs and burdens, but only those needs and burdens, must be addressed by the private sector, while other, more general public needs remain the obligation of local government. Moreover, this focus on development results in a simplified analysis of the allocation of responsibility within the private sector. Because developers are generally obliged to meet exaction obligations at the time of development, it is their prerogative to determine how related costs are passed on to later buyers of subdivided lots. Public supervision and debate over the choice and application of various allocation formulas, noted above with regard to special assessments, is therefore avoided, for good or ill.

From the viewpoint of local governments, subdivision exactions provide a tool especially shaped to deal with the problem of development-related infrastructure needs, but one that can only be applied in that context rather than used more generally to spread costs to owners of developed or undeveloped land. Governments may, therefore, need to be especially vigilent to ensure that this mechanism is not abused by shifting obligations for generally needed improvements from old-time residents to newcomers who are not yet part of the local political process. Moreover, while the linkage between development-related needs and facility improvements is a rational one theoretically, it raises a number of problems when put into practice. The methodology for projecting possibly unique future needs is less well developed and accepted than that for estimating benefits from conventional improvements. In addition, needs are not always readily translated into functioning improvements. Needs associated with an individual subdivision may justify dedication of a narrow, short road segment, but not road construction to a size and length that allows the road to contribute in a meaningful way to an areawide transportation system.

Authority

As with special assessments, statutory authority for traditional subdivision exactions is widely available. Jurisdictions do differ, in certain respects, however. Some statutes include language limiting the circumstances in which dedications may be required,[108] while others do not

specifically authorize off-site dedications or in lieu fees for parks and school sites, leaving courts to determine whether authority to require such contributions exists by implication.[109]

Relative Role of Private and Public Sectors

Although the same question of distinguishing the obligation of the private and public sectors is posed with regard to subdivision exactions as was the case with special assessments, the courts have offered a subtly different answer in this context. Three major tests have been developed in the various jurisdictions as a way of ensuring that substantive due process concerns are met.[110] Each examines the relationship between the exaction required and the purported basis for that exaction in the burdens and needs associated with a given subdivision, yet the tests vary as to how close that relationship must be. The most stringent test requires that exactions be imposed only to satisfy needs that are "specifically and uniquely attributable" to a particular subdivision, much as special assessments may only be imposed when unique special benefits accrue. This test has been applied in only a few jurisdictions such as Illinois, primarily where park and school land dedications are involved, but also in a handful of situations involving roads.[111] The most lax test, articulated some years ago by the California courts, allows exactions to be imposed whenever they are rationally related to subdivision-generated burdens or needs.[112] In effect, this "rational relationship" test allows the local government to require private participation whenever private development activity contributes to or precipitates certain infrastructure needs. A third, intermediate, "rational nexus" test has come to command much broader general acceptance.[113] Under this test, courts require that there be a reasonable basis for concluding that the need for the exaction resulted from the activity of the subdivider, and that the amount of the exaction bears some relationship to the share of the overall need that is contributed by the subdivision. Many courts add an additional requirement that the exaction be reasonably related to benefits that the subdivision will receive.[114]

In many instances, however, the strictness of the test adopted will be less evident from the court's characterizing language than from its approach to the test's application. Courts vary in their willingness to accept legislative judgments and are unwilling to assume that the required relationship between exactions and subdivision needs and benefits exists.[115] When road dedication requirements are concerned, courts have traditionally accepted requirements relating to internal subdivision roads at least when necessitated by development-related needs rather than general public needs.[116] Cases are divided concerning the legitimacy of requiring improvements to roads adjacent to subdivision developments.[117] Questions are especially apt to arise when statutes fail to authorize requirements of this sort, or when local governments attempt to require developers to make improvements whose length or design capacity exceeds subdivision needs.[118] Demands for more distant road improvements are even more problematic, because the more distant the improvement, the more nonsubdivision residents are likely to be served, undercutting the claimed relationship to subdivision needs and benefits. Even if it can be shown that the need for the more distant facility is attributable in some degree to the new subdivision, it may be practically impossible to apportion a dedication and improvement obligation measured in nonmonetary terms in a meaningful way to be passed on to the developer.

Division of Responsibility Within the Private Sector

As noted above, exactions are generally imposed on a given developer at the time subdivision approval is sought. Consequently, the issue of subsequent allocation of infrastructure costs is removed from the local government's control. The situation is no different when several different developments are proposed by various developers within a given jurisdiction, because the relationship of proposed exactions to needs and benefits must be individually considered in keeping with the analysis above.

Method of Implementation

Local governments are limited in their ability to initiate infrastructure improvements through traditional subdivision exactions. Only when a developer approaches the local government with a request for subdivision approval does a development-related need arise, thus triggering the government's authority to impose such requirements. The procedures for imposing subdivision exaction obligations likewise differ from those applicable to special assessments. The subdivision review process is, to a large extent, defined by local ordinances within the general framework set by state subdivision statutes. As a general rule, a standing local board, such as a local governing board or planning board, will review staff proposals prepared in collaboration with the developer and will reach a decision after the developer has been provided a hearing.[119] The problem of raising funds to cover costs of required improvements is left to the developer, rather than undertaken by the local community with the understanding that property owners will provide reimbursement at a later date. A variety of means are available to local governments to ensure that mandated improvements are completed once subdivision approval has been granted.[120]

Impact Fees

Impact fees, or development fees, are charges levied by local governments against new development to generate revenue for capital funding necessitated by the new development.[121] This part considers mandatory fees levied pursuant to an established fee schedule. Impact fees differ from special assessments in subtle ways that will be considered below. They also differ from monetary contributions that may be undertaken by a developer as part of a negotiated development agreement as will be discussed later. For present purposes, it may simply be noted that impact fees are based on the automatic application of a general formula to the circumstances of a given development, while development agreements

involve a more flexible determination of expected monetary or other contributions.

Impact fees take the concept of traditional subdivision exactions a step further: rather than require land dedication or fees calculated on the basis of otherwise applicable land dedication, local governments may require money payments to cover development-related needs. These fees also vary from traditional exactions in that they may be imposed for a wider variety of purposes. For example, impact fees may be imposed for water and sewer system expansion or for school facility improvements. Impact fees may encompass a broader range of development activities, including commercial and industrial development as well as residential subdivision development. Local governments may also require that private contributions be made at a different stage in the development process, typically when building permits are issued. Although traditional exactions provide an important context for understanding impact fees, additional issues are posed by this new approach, as discussed below.

Theoretical Underpinnings

The police power rationale discussed above has also been used to justify the imposition of impact fees.[122] As was true with subdivision exaction requirements, the boundary between proper and improper exercise of the police power in this context is often unclear. While excessive dedication requirements are often condemned as "takings" that fail to comply with constitutional constraints on the power of eminent domain, flawed impact fee ordinances are generally characterized as improper exercises of the taxing power.[123] A subsequent section includes a detailed discussion of the requirements that must be satisfied to avoid successful challenge on these grounds.

Authority

Because impact fees have only recently achieved prominence as an important infrastructure financing mechanism, they lack the widely available, well-established basis in statutory authority that characterized special assessments and subdivision exactions. Nonetheless, a few states have recently begun to place local impact fee ordinances on a firmer statutory footing.

Florida, one of the pioneers in impact fee financing, enacted new growth management legislation in 1985 that expressly sanctions municipal adoption of impact fee ordinances.[124] The "Local Government Comprehensive Planning and Land Development Regulation Act" requires, among other things, that municipalities adopt local comprehensive plans that identify appropriate levels of municipal services, specify municipal capital facility needs and ensure that development permits will be denied unless acceptable levels of service are maintained.[125] Local governments are encouraged to use innovative land development regulations, including impact fees, to achieve specified land use objectives.[126] The Florida legislature also amended requirements applicable to developments of regional impact (DRI's) (those developments that, because of their "character, magnitude or location would have a substantial effect upon the health, safety and welfare of citizens of more than one county").[127] Local governments must now decline approval of proposed DRI's unless the developer makes "adequate provision for public facilities needed to accommodate the impacts of proposed development" or unless the municipality itself agrees to provide such facilities.[128] The DRI statute specifically contemplates use of impact fees as a financing device in this context, but limits their use by requiring that certain conditions be met: fees may only be used when the need for fee-funded facilities is reasonably attributable to the proposed development; contributions are related to expected facility costs; funds are earmarked for use to benefit the affected development; local fee ordinances require that other developers contribute a proportionate share of funds necessary to accommodate development-related impacts; and, if additional fees are imposed, developers are given credit for impact fees already levied to meet the same development-related needs.[129]

Other states have also begun to experiment with explicit impact fee statutes. California has adopted legislation authorizing municipalities to require payment of fees for bridges and major thoroughfares as a condition of final map approval or building permit issuance.[130] The fees contemplated by the statute closely resemble nontraditional special assessments discussed above, insofar as they contemplate an area of benefit within which costs will be allocated, and also permit a significant proportion of property owners to block proposed improvements.[131] At the same time, they share characteristics of impact fees in their linkage to the development process and in their open-ended approach to cost allocation.[132] Orange County has already relied on parallel special legislation to adopt what has been described as the largest road impact fee program ever attempted in California.[133]

North Carolina has likewise adopted special local legislation that authorizes four municipalities in the high growth Research Triangle Park area to experiment with the impact fee technique, while allowing the state legislature to delay passage of more general authorizing legislation until a later date.[134] The legislation permits adoption of impact fee ordinances to help defray the cost of capital improvements, including road construction, but conditions municipal authority on (1) the development of long-range capital improvement plans and cost estimates; (2) determination of the proportion of costs fairly attributable to those charged taking into account, among other things, the number of trips per day generated by a particular development; and (3) creation of earmarked reserve funds to ensure that fees will be expended on road projects that benefit the developments charged.

New Jersey and Washington have also adopted legislation authorizing imposition of impact fees in some circumstances. New Jersey allows governing bodies to adopt regulations requiring developers, as a condition of subdivision or site plan approval, to pay a pro-rata share of the cost of providing reasonable and necessary street improvements, water, sewerage, and drainage facilities, and related elements located outside the

limits of the subdivision or development but necessitated or required by construction or improvements therein.[135] Regulations must be based on circulation and comprehensive utility service plans, and must establish "fair and reasonable standards" to determine the proportionate or pro-rata amount of the cost of such facilities that should be borne by each developer or owner within a related or common area.[136] Washington authorizes fees that resemble conventional impact fees in that they constitute payments to be made "in lieu of a dedication of land or to mitigate a direct impact that has been identified as a consequence of a proposed development, subdivision, or plat," but differ in that they are not imposed on a widespread basis, only in the event of voluntary agreement by a developer.[137] Conventional restrictions apply, however, such as the need to limit fees to payments reasonably necessary as a direct result of the proposed development or plat, the need to create a reserve fund, earmark expenditures, and refund any funds not spent in a 5-year period.[138]

When there is explicit enabling legislation, a local government will have passed the initial legal hurdle that stands in the way of adopting an impact fee ordinance with relative ease. A more difficult threshold problem exists, however, in those states or jurisdictions in which explicit legislative authority of these sorts is lacking.

In states and jurisdictions that lack explicit statutory authority for the imposition of impact fees, local governments interested in adopting such a financing mechanism must rely on alternative forms of authority. Some have looked to enabling legislation that authorizes the imposition of fees for building permits, while others have relied upon legislation authorizing local governments to require the dedication of roads as part of the subdivision approval process. These attempts have met with mixed success. A number of courts have refused to permit building permit fees that significantly exceed the cost of administering the building permit process.[139] Other courts have permitted these fees relying on subdivision or zoning enabling legislation for this purpose,[140] but not when the fee in question is for a purpose arguably not contemplated by the statute,[141] or when the fee is not demonstrably related to the infrastructure needs associated with a particular subdivision.[142] A court's analysis of this issue often reflects its more general view concerning the permissibility of inferring the existence of local government authority from nonexplicit state legislation,[143] and reflects the court's concern that local action to impose taxes or similar financial burdens be expressly authorized by state legislation.[144] An even more important potential source of authority is the home rule power afforded local governments in many states. Some states have already looked to relevant home rule provisions as a source of local government authority for the imposition of impact fees.[145] As noted above, however, questions may arise concerning the adequacy of that authority, for example, because of the precise language of the home rule provision,[146] the controlling significance of more specific state legislation that limits or preempts local government policy choices regarding the imposition of fees,[147] or the constraints contained in local governments' own charters.[148]

Although the existence of legal authority is a critical threshold issue which may impede the immediate adoption of impact fee ordinances in many jurisdictions, it is nonetheless one that has a ready solution: adoption of explicit general or special local legislation by the relevant state legislature. Adoption of such legislation, of course, does not force any or all local governments within a state to adopt a local ordinance actually implementing an impact fee scheme. Instead, it merely provides the local government with the requisite authority, should its governing board choose to use it.

Relative Role of Private and Public Sectors

The problem of allocating responsibility between the private and public sectors is both easier and more difficult with regard to impact fees than with regard to traditional subdivision exactions. It is easier in that obligations defined in monetary terms may be allocated and shared with greater flexibility than obligations to dedicate land or make improvements. It is more difficult because that very flexibility creates some risk of abuse and opens the door to much more complex allocation calculations. Courts faced with the problem of defining the respective roles of the private and public sectors have drawn upon precedent applicable to more traditional subdivision exactions, while adding a number of new analytical twists.

The preeminent legal issue that runs throughout the caselaw is whether a given impact fee ordinance represents a legitimate exercise of the police power, properly imposing obligations upon certain members of the private sector to offset public burdens resulting from private activities; or, conversely, whether the ordinance instead constitutes an illegal tax arbitrarily imposed the few for the benefit of the many. The rational nexus test continues to be the principal tool for resolving this dilemma.[149] That test has been applied with growing sophistication, however, especially in Florida, the State with the most extensive experience in the area of impact fees. In an early Florida case the court negated a Broward County impact fee ordinance on the ground that the ordinance failed to satisfy the traditional rational nexus test.[150] The ordinance was designed to enable the county to fund systemwide road improvements. Subsequently, in *Builders Association of Pinellas County v. City of Dunedin,* the Florida Supreme Court approved the concept of water and sewer impact fees, while finding correctable flaws in the underlying local ordinance.[151] The court articulated a three-part test which elaborates the traditional need-benefit rational nexus analysis: impact fees may be imposed where (1) new development requires that the present system of public facilities be expanded; (2) fees imposed are no more than what the local government unit would incur in accommodating the new users of a facilities system; and (3) fees are expressly earmarked for the proposal for which they were charged.[152] Subsequently, Florida appellate courts have upheld impact fees levied for park and recreation system improvements[153] and for road system improvements,[154] when the *Dunedin* standards were found to have been satisfied.

These and other cases raise as many questions as they answer, however. It is clear that the first step in defining the respective roles of the public and private sectors is to identify a baseline public obligation to provide adequate public facilities for the existing local population; this follows from the *Dunedin* ruling that only costs of expansion from that base may be passed on to developers. This critical baseline of public obligation may be evident in the relatively rare case in which the existing local road system has adequate capacity and is in good repair, or when a community has recently committed itself to a bond program to reach that objective.[155] It will be less so in other cases, although a community capital improvement plan or similar study that evaluates the adequacy of the existing road system and identifies projected expansion and upkeep needs should serve the important function of defining this baseline just as well. Again, however, only expansion needs, such as new road construction, widening of roads, and fundamental upgrading of facilities can be attributed to the private sector, while upkeep needs such as repair and routine resurfacing may not.[156]

The second step is to calculate the need for facilities that is properly attributable to the development in question. Despite the tendency in earlier dedication cases for courts to conclude that residential subdivisions do not generally create a need for comparatively distant offsite road improvements,[157] the impact fee case law to date has not followed that trend. Instead, at least in Florida, the courts have been willing to accept the fact that such need can be created, and that concurrent public need for and use of road facilities does not negate private obligations stemming from demonstrable private need.[158] The debate has accordingly progressed to the question of how need should be measured. Criteria clearly and directly linked to need, such as anticipated vehicle trips per residential unit in a given geographical area, have been approved for this purpose.[159] More sloppy approximations of need, such as intensity of land use, measured by comparing residential lot and floor area, without demonstrating the relationship between intensity and traffic generations in a given area, have been rejected.[160] Experimentation continues with the development of more complex need formulas and measurement strategies, including formulas based on number of trips generated by particular types of land use, and computer stimulations of anticipated traffic patterns.[161] Whatever formula is used, however, local governments should be prepared to demonstrate the basis for their need calculations,[162] and to allow developers to submit their own studies or similar evidence that may refute government calculations in a given case.[163]

One complication likely to arise in this need-defining process occurs in instances in which excess capacity facilities, such as those capable of meeting more than the present demand, have already been built, or need to be built in order to accommodate anticipated future needs in a cost-efficient manner.[164] Excess capacity issues can arise in two contexts: either when a local government has already improved its road system with an eye to future development (recoupment problem), or when it seeks to require a developer to fund a larger-than-needed facility to accommodate both his own and later development (reimbursement problem). In cases involving water and sewer charges, the courts have generally concluded that developers may be required to contribute toward preexisting facilities with excess capacity so that a government entity that has advanced funds for such facilities may recoup its investment.[165] The same approach might reasonably be applied to road improvements. In other instances, impact fees reflecting a development's immediate needs, together with appropriate government contributions, may be sufficient to fund only a small-scale road, or only part of a needed road system, at the time of initial development, despite the fact that anticipated future development will require, and can be expected to pay for, a larger or more complete system. At least one court that has touched on this situation has suggested that developers may not require local governments to provide more extensive improvements designed to facilitate their development, but may be expected to scale back a proposed project until adequate facilities are available. Alternatively, the developer may assume the obligation of providing excess capacity facilities needed for the start-up of a given project, subject to later reimbursement.[166] Another court has stated that a municipality may at least consider extraordinary costs triggered by an individual project in its calculation of impact fees.[167] Recent statutory amendments have attempted to facilitate resolution of this problem by expressly authorizing reimbursement in appropriate cases.[168]

A final requirement is that fees be earmarked to benefit the development being charged. This requirement is a multifaceted one which bears both on the administrative handling of funds and on their expenditure. The cases make clear that, as an administrative matter, fees must be reserved for use in the area charged, rather than treated interchangeably with general revenues; however, it has not always been clear whether a separate fund must be maintained for accounting purposes to achieve this end.[169] Courts have also imposed reasonably rigorous requirements concerning the expenditure of fees. Improvements must be made within a geographical area near the development charged,[170] a standard that can be met either by using a zone system,[171] or by otherwise demonstrating that funded facilities are located within a specified radius.[172] It is also important that funds be expended within a reasonably short period of time, perhaps 5 to 6 years, in order to ensure that benefit is in fact received.[173] Putting these requirements together, it is evident that if local governments hope to rely on impact fees as a source of funds for road improvements, they must develop specific plans describing the projects to be completed once fees are received.[174]

Division of Responsibility Within the Private Sector

It is doubtful that local governments will be willing to undertake such a project in situations involving scattered individual residential projects that can be more easily handled under the more traditional subdivisions exactions criteria, rather than only scattered individual residential projects reasonably handled through more traditional subdivision exactions. It is accordingly much more important in this context to focus on several issues that relate to the division of responsibility within the private sector.

The types of development to be covered by an impact fee ordinance must be determined. So long as sufficient authority exists, in the form of a broadly interpreted zoning enabling statute, home rule provisions, or legislation expressly authorizing the development of impact fee ordinances, both residential and nonresidential developments that create substantial impacts on a local community may be required to comply with fee requirements.[175] Even if only residential developments are to be covered such as in a jurisdiction relying on authority implicit in a subdivision regulation enabling act, a decision must be made whether only large developments, or small subdivisions, should be covered. A determination to cover only large subdivisions will most probably be upheld as rationally related to the more substantial impacts they are likely to produce;[176] however, equity considerations, such as those that led the Florida legislature to require coverage of both large and small developments in at least some circumstances,[177] may dictate the adoption of a more all-encompassing scheme.

Information concerning needs attributable to a particular development project must also be translated into the fee to be imposed. At first blush, this might seem to entail a fairly simple process of calculating projected facility costs, then prorating that cost among various private developments based on a demonstration of the respective traffic burdens attributable to each one and the demand attributable to the general public. In reality, the calculation would be much more complex,[178] for at least two reasons. If an interconnected system of facilities is proposed, as is very likely the case, it may be reasonably difficult to devise a fair method for allocating individual facility costs. Another major factor must, moreover, be built into the calculus—any offsets against fees to which the developer may be entitled as a result of other payments made. At the very least, credit must be given for impact fees already paid, and for dedications for the very same facility for which a fee is later charged.[179] A question of growing importance is how property tax payments that contributed to general revenues and also used for the development of the same or similar facilities should be taken into account. Early cases tended to brush aside this issue quite readily, assuming that all that was involved was a change in the rules of the game that required newcomers after a certain date to comply with a different payment scheme.[180] More recently, however, the Utah courts, spurred by influential legal scholarship, have required that the following wide range of factors be taken into account in developing an impact fee scheme for funding of sewer, water, and park facilities: the manner of financing existing capital facilities; the relative extent to which the newly developed properties and other properties in the municipality have already contributed to the cost of existing capital facilities; the relative extent to which newly developed properties are entitled to a credit because the municipality is requiring their developer to provide common facilities that have been financed through general taxation or other means in other parts of the municipality; and the time-price element inherent in fair comparisons of amounts paid at different times.[181] While it is unclear whether courts in other jurisdictions will necessarily follow the Utah approach, policy considerations may well lead many decision-makers to take equity considerations of this sort into account in setting impact fees.

As a practical matter, it appears that jurisdictions that have experimented with impact fees to date have tended to avoid such complex individualized cost accounting when possible, by setting fees at a level considerably lower than the full cost arguably attributable to a given development's demands.[182] This approach allows a simplified standard fee schedule to be prepared, based on careful underlying analysis, while ensuring that developers are not unfairly overcharged. In the cases decided to date, the courts have commented favorably on such undercharging strategies.[183]

Once fees are set, an issue may also arise whether developers should be entitled to relief because of resulting hardship. One court has suggested as much, at least in the event that a fee was so burdensome as to preclude any reasonable development of the developer's property.[184] Such a judicially created safety valve may be recognized with regard to impact fee ordinances in order to avoid a constitutional challenge. However, alternative criteria and procedures for administrative variances may reasonably be included in impact fee enabling legislation, following or expanding the traditional model of zoning statutes.[185] Absent such authorization, at least in nonhome-rule jurisdictions, it may be unclear whether variances can be awarded, and if so, under what circumstances.[186]

Method of Implementation

Implementation of the impact fee financing mechanism should be fairly straightforward once the preliminary planning for existing and anticipated facility needs and the assessment of project demand are done. There is little precedent to date which addresses procedural issues that may arise. A recent California decision determined that an Irvine city council decision to adopt a road impact fee ordinance is a matter of statewide importance that is not subject to veto by citizen referendum.[187] Notice and a hearing, however, may be required prior to adoption of a general fee ordinance.[188] An administrative appeal may also be provided to allow developers to challenge the application of the fee ordinance to their individual property.[189] Fees must generally be paid at the time subdivision approvals are granted or building permits issued. However, if local governments wish to experiment with alternative financing arrangements, letters of credit or other surety arrangements might instead be used.[190] Finally, it is important to provide for appropriate remedies for the developer and future buyers, as well as for the local government, in the event of unforeseen eventualities. Cases to date have considered problems such as the disposition of fees in the event a development is not completed, or in the event a local government fails to complete pledged improvements.[191] While courts are prepared to address such issues in the absence of statutory guidance, it is preferable that problems be anticipated and resolved to protect the rights and expectations of all concerned.

Summary

In summary, traditional subdivision exactions and impact fees provide

additional public/private road financing mechanisms which, like special assessments, have their own unique advantages and disadvantages.

1. Traditional subdivision exactions and impact fees are rooted in the police power of local governments rather than in the taxing power. They are designed to ensure that necessary improvements will be made in public facilities likely to be overburdened by new development, and that developers, not just local governments, are obliged to cover an appropriate portion of attendant costs.

2. While, traditionally, dedication and in lieu fee requirements have been imposed on residential subdivisions, impact fees may be used for all types of developments, including industrial and commercial developments, so long as they are adequately authorized. Traditional subdivision exactions and impact fees are not used to impose facility costs on developed or undeveloped property that creates no additional need for public facilities. Careful cost accounting criteria may be necessary to adjust the fiscal burden imposed on new and old residents especially in connection with the imposition of in lieu or impact fees. While impact fees are generally implemented by adoption of an ordinance applicable throughout a local government's jurisdiction, exactions and fees are only in fact imposed when new development is about to take place and public facility improvements benefiting the area are, in fact, planned.

3. Although authority for traditional subdivision exactions is widely available, local governments interested in adopting a system of impact fees must carefully assess their legal authority to do so, for few jurisdictions have explicit enabling legislation at this time. A number of options, such as seeking special local legislation, relying on home rule authority (if available), and asserting power under zoning or subdivision legislation might be explored, pending adoption of a generally applicable impact fee statute.

4. Both traditional subdivision exactions and impact fees must be based on the burden or need attributable to new development. Care must be taken, especially when considering implementing a system of impact fees, that only costs of system expansion, not costs of remedying preexisting deficiencies, are passed on to developers. Appropriate criteria for measuring need, such as traffic generated over a particular area, must be used. Local governments may be allowed to recoup costs of excess capacity improvements at the time new developments prepare to draw on that capacity; conversely, developers may be required to fund excess capacity improvements and receive reimbursement from fees imposed subsequent developers at a later time.

5. Impact fees must be earmarked to benefit the development charged. Fees may not be used interchangeably with general revenues, but must be reserved for use for the purpose levied and, in some jurisdictions, retained in a separate fund. Fees must also be expended pursuant to a specific plan, within a reasonably short time, for improvements designed to benefit the areas assessed.

6. Impact fees are usually set on a per unit basis at a level significantly below the cost of anticipated improvements. This strategy allows local governments to take into account the public need for the proposed facilities, as well as equity concerns that dictate setoffs of taxes paid against fees imposed on new residents under some circumstances.

7. Impact fees are generally implemented by adoption of a general ordinance, establishing a fee schedule, and requiring developers to tender fees at the time a building permit is issued. Although there has been little litigation to date on procedural and remedial issues, it is advisable to afford developers an opportunity to submit evidence concerning the burden attributable to their proposed projects, and to establish clear ground rules concerning the disposition of fees in the event that a proposed development or planned public improvements are not completed.

CONTINGENT ZONING AND DEVELOPMENT AGREEMENTS

While impact fees have evolved as a means of imposing obligations to fund an appropriate share of development-related infrastructure on a systemwide basis, a competing trend has emerged as local governments have sought to identify methods that allow more flexible regulation of development projects, consistent with their individual characteristics, outside the subdivision context. Local governments, developers, and scholars[192] have hoped that creative solutions can be designed to development-related problems of incompatible land use and demand for public services through negotiations between the public sector and individual developers, or, at worst, through imposition of specialized conditions appropriate to particular development projects rather than through more general requirements that lack necessary sensitivity to individual circumstances. Two legal mechanisms have emerged in recent years as a means for accomplishing this end—contingent zoning (more commonly referred to as contract or conditional zoning), and development agreements. The more well-developed legal doctrine concerning contingent zoning will first be explored, before turning to a discussion of the largely untested development agreement mechanism.

Contingent Zoning

Contract and conditional zoning are terms generally used to describe exceptional requirements or obligations undertaken or imposed on a landowner in connection with a proposed revision of a zoning ordinance or zoning map amendment.[193] Such requirements or obligations can take numerous forms, such as limitations on the types of use that may be made of particular property, notwithstanding the wider range of uses otherwise permissible in a particular district; landscaping or buffering requirements; and dedication, construction, or monetary contribution requirements for road improvements or other purposes. They may also appear in different guises, often in separate amendments or recorded covenants, or in conditions incorporated into rezoning ordinances passed by local legislative bodies. Use of the two separate terms "contract zoning" and "conditional zoning" has resulted from scholars' and courts' efforts to distinguish, with varying degrees of success, between technically different types of arrangements, the first of which are likely to be struck down, and the second of which may be upheld as legal.[194]

For current purposes, the more neutral term "contingent zoning" is employed to refer to all types of arrangements more traditionally described as contract or conditional zoning. This term is intended to encompass both individualized arrangements that are agreed to by both a local government and an affected landowner, and those that may be imposed by a local government in the face of the landowner's objections.

Theoretical Underpinnings

Conflicting views concerning the basic theoretical framework for evaluating contingent zoning have fueled debate over that mechanism's legality. While it has long been agreed that zoning is an exercise of the police power,[195] it has been less clear whether contingent zoning should be treated as falling within the same regulatory framework, one that has traditionally received considerable deference from the courts.

The early judicial view, and one still forcefully maintained in many states, is that contingent zoning, at least in some circumstances, represents an effort to "contract" or "bargain away" the police power.[196] The "reserved powers doctrine," a phrase used by the United States Supreme Court to describe and invalidate patently illegal exercises of the police power, has accordingly been invoked.[197] Although the cases do not generally provide a very clear exposition of the constitutional roots of this doctrine, it appears closely allied to substantive due process considerations of the sort discussed above. Thus, local governments should not be permitted to abuse the police power by employing it for improper purposes such as granting individuals special favors in the form of land use opportunities that are unavailable to others,[198] or placing a premium price in the form of special conditions on rezoning to which a property owner may be otherwise entitled. Neither should such governments be permitted to employ impermissible means to attain what may be permissible land use objectives. For example, governments should observe the usual legislative process[199] rather than ceding the legislative power to a favored individual in return for special concessions. Also, governments should not be permitted to enter current agreements that restrict a future legislative body's power to modify land use regulations as may be required to meet community needs.[200]

A competing approach that treats contingent zoning as falling squarely within the police power of local governments has gradually emerged, however.[201] Under this view, conditions and requirements are portrayed as mitigating measures designed to foster compatible land use in the community's best interest.[202] Moreover, negotiation of individualized arrangements, subject to appropriate judicial review, is characterized not as an abdication of regulatory power under the police power, but instead as an exercise of that authority in light of carefully individualized assessment of property owners' and the communitys' needs.[203]

As a consequence of this debate, the state of the law in many jurisdictions is relatively unclear and difficult to predict.[204] Accordingly, local governments interested in experimenting with this highly functional tool are well advised to go beyond general theory and to identify technical features of various contingent zoning arrangements that have proved especially problematic or helpful in sustaining the legality of local ordinances.

The legality of contingent zoning in many cases has appeared to run on factors which demonstrate or undercut the integrity of the rezoning process. Compliance with generally applicable procedural requirements has been especially important. Courts have invalidated agreements to modify land use requirements, or related obligations, that conflict with the terms of applicable ordinance provisions on the ground that the government failed to follow the appropriate amendment process.[205] In several cases courts have also struck down rezoning arrangements that provide for reversion to an earlier zoning classification in the event of noncompliance with the agreement or ordinance terms, since such schemes fail to follow statutory procedures with regard to the reversion rezoning.[206] Reversions triggered by transfer of property or lapse of time before project completion have been especially problematic.[207]

Factors bearing on the independence of the legislative body's judgment in reaching a contingent zoning decision have also been extremely important. The character of express or implicit promises between the local government and the property owner often proves significant. A unilateral promise by the landowner, contingent, of course, on the rezoning's becoming effective, is much more likely to pass legal muster than bilateral promise in which the local government also agrees to take action, most probably to rezone.[208] At times courts have invalidated bilateral agreements outright; they may also preserve the agreement but reinterpret the local government's pledge more narrowly, for example, requiring only that rezoning be considered or that, once granted, it be subject to later change.[209]

The character of the mechanism by which obligations are imposed on the landowner may also have a bearing on the independence of the governing body's decision-making and has likewise played a role in a number of decisions. Both the imposition of conditions as part of the legislative process in the absence of evidence of any landowner-government agreement,[210] and obligations undertaken by the landowner as part of an agreement with private parties, such as neighboring property owners, or with government bodies other than the legislative board[211] have faced fairly well, for in such cases a court may feel reasonably confident that independent legislative judgment is being exercised. When an agreement does exist between the local government and the landowner, a stronger legal posture will exist if negotiation of that agreement has been clearly separated from the handling of the rezoning request.[212] If the agreement and rezoning request are clearly related, the agreement should be executed prior to the disposition of the rezoning proposal to avoid the inference that a final disposition has not been achieved at the time of the governing board's action, but is instead subject to resolution through private influence at a later time.[213] Even more fatal, in the view of one state's courts, is a governing board's assumption that restrictive conditions in the form of limitations on types of use will be observed based on the applicant landowner's representations and nothing more, for naive

reliance of this sort suggests that independent judgment and care has, or may be, compromised.[214]

Finally, the substantive terms of a rezoning arrangement have had a bearing on its legitimacy as a reasonable exercise of the police power and the zoning powers afforded by the state enabling act. The following sections discuss these substantive issues in greater detail.

Authority

Local governments interested in experimenting with contingent zoning as a means of acquiring rights-of-way, road improvements, or related funds generally have an obvious source of authority to which to turn—their state's zoning enabling legislation. Courts have been divided, however, in their opinions whether such legislation does in fact authorize such novel measures. An early Florida case, apparently applying Dillon's Rule, is representative of cases holding that such authority is not provided, based in large part on the policy considerations noted above and the zoning legislation's own requirements of uniform districts and comprehensive planning described below.[215] On the other hand, jurisdictions such as Massachusetts and New York have concluded that contingent zoning does not differ in any fundamental way from more traditional zoning regulation, and courts have found necessary authority implicit in the terms of traditional zoning legislation.[216]

A number of legislatures have recently taken steps to remove any uncertainty on this issue by adopting narrow, but specific authorizing legislation. For example, both Indiana[217] and Rhode Island[218] statutes now explicitly authorize contingent zoning at least in some circumstances. Virginia has adopted legislation that allows "proffer zoning"[219] as part of a rezoning ordinance or map amendment. A number of conditions must, however, be observed: the developer must voluntarily offer to allow imposition of conditions; terms must be in writing and be made part of the rezoning; rezoning must give rise to the need for conditions; the conditions must be reasonably related to rezoning; no cash contributions are allowed; no mandatory dedication of real or personal property can be made except to the extent permitted by subdivision legislation (allowing right-of-way dedications for internal streets, ingress and egress and public access streets); no payment or construction of off-site improvements other than as authorized by subdivision legislation is permitted; no conditions can be proffered that are unrelated to the physical development or operation of the property; and all conditions must be in conformity with the community's comprehensive plan.[220] Recent Iowa legislation likewise limits contingent zoning to circumstances in which it is proposed by the landowner.[221] Minnesota has adopted similar legislation that authorizes municipalities to condition approval of subdivisions on compliance with requirements reasonably related to the provisions of applicable regulations, and to execute development contracts embodying the terms and conditions of approval.[222] Massachusetts has also enacted legislation authorizing local governments to grant permits allowing increases in permissible density on condition that applicants provide extra open space, low or moderate income housing, traffic or pedestrian improvements, or other amenities.[223]

Despite the importance of home rule authority in other contexts, as discussed above, few cases have focused on such provisions as a basis for experimenting with contingent zoning.[224]

Relative Role of Public and Private Sectors

The concern to define an appropriate role for both the public and the private sectors that underlays each of the legal mechanisms described so far recurs, but in a somewhat different form, in the context of contingent zoning. While the courts remain sensitive to protecting property owners from overreaching by local governments who might be tempted to condition rezoning on excessive contributions to the public treasury, more prominent play has been given to the question whether contingent zoning tends too readily to favor private parties at the expense of the public good. Ironically, the concern that the public interest be protected is most often raised by neighboring landowners[225] who object to contingent zoning on grounds that it envisions a compromise arrangement designed to harmonize land uses, rather than preservation of the status quo which more closely reflects their legitimate or questionable personal preferences above area zoning.

In jurisdictions that have not condemned contingent zoning as per se invalid, a two-step process may be required to determine whether a rezoning arrangement fairly allocates opportunities and obligations in the interest of both the public and the affected landowner. In lawsuits brought by neighboring property owners, the courts have generally been obliged to review the local government's decision to rezone, using standards employed in other types of rezoning litigation, including litigation that challenges rezoning of individual parcels. To date courts have inquired whether contingent rezoning is consistent with a jurisdiction's comprehensive plan,[226] whether it is warranted in light of changed circumstances,[227] and whether other substantive factors relevant to legitimate land use decisions weigh in favor of the proposed rezoning.[228] The more procedurally oriented standards adopted in other jurisdictions might also conceivably be employed.[229] At a minimum, however, local governments interested in experimenting with contingent zoning should carefully evaluate and document whether the proposed rezoning does in fact make good sense in terms of land use policy. The more numerous and qualifying the conditions required to ensure the achievement of sound public policy, the more dubious a court is likely to be in evaluating the resulting arrangement.[230]

Neighbors, affected landowners (who wish to avoid resulting obligations), and local governments (who have had second thoughts about the wisdom of an earlier arrangement that has become undesirable) may also urge that particular conditions or obligations incorporated in a contingent zoning arrangement be overturned. In decisions to date, the courts have indicated that such conditions or obligations may only be imposed as a means of addressing public needs resulting from develop-

ment proposed in conjunction with the requested rezoning.[231] Need may be measured in terms of adverse land use effects that require mitigation, or demands for public services that must be addressed.[232] Benefit to the affected landowner will not suffice as an alternative justification.[233]

Perhaps not surprisingly, the cases appear to reflect subtly different approaches to the evaluation of need and the requisite relationship between need and conditions or obligations imposed. A few courts have emphasized the need to ensure that conditions require neither more nor less than steps that eliminate the adverse effects of a rezoning decision, thereby eliminating any opportunity of undue favoritism or overreaching.[234] Putting such a standard into practice is far from easy, however. Some courts have adopted a reasonably relaxed test that mirrors the reasonable relationship standard used in the context of subdivision exactions: "conditions imposed on the grant of land use applications are valid if reasonably conceived to fulfill public needs emanating from the landowner's proposed use."[235] Other cases have relied on what appears to be a rather undifferentiated reasonableness standard.[236] However, the test adopted seems to make little difference in result. At least one court purportedly applying a relaxed standard, authorized only conditions directly related to needs arising from a proposed rezoning, and rejected a requirement that road improvements be undertaken when only a small parcel of land was to be rezoned for shopping center use in conjunction with land in an area already zoned for commercial purposes.[237] Another, applying a simple reasonableness standard, held that road improvements might be required when directly necessitated by a new shopping center, even if the immediate need in part reflected an earlier, unmet demand for improved transportation facilities.[238] Other considerations may also influence the courts' assessment of reasonableness. They may be less sympathetic to challenges by neighbors for whose benefit conditions are included, or to landowners who have proposed or consented to requirements ultimately imposed.[239] There is also some evidence that mitigating requirements such as those addressed to landscaping and design will be received more warmly, while obligations to provide public services or to contribute funds to the public treasury will be more closely questioned on public policy grounds.[240]

Division of Responsibility Within the Private Sector

The allocation of obligations and opportunity within the private sector has also been an issue in the debate over contingent zoning, one raised most commonly by neighbors who seek to invalidate the whole approach as contrary to their interests or raised by landowners who object to conditions or obligations perceived as unduly onerous and discriminatory. Although the question has occasionally been posed in constitutional equal protection terms, such challenges in most instances have proved unsuccessful in view of the very limited scrutiny applied by the courts.[241] Challenges have enjoyed a greater measure of success by arguing that individual requirements contravene the uniformity requirements contained in state zoning enabling legislation: "All such [zoning] regulations shall be uniform for each class or kind of building throughout each district, but the regulations in one district may differ from those in other districts."[242] Nonetheless, more recent decisions have rejected this argument on the somewhat artificial grounds that "uniformity" does not require identity of regulations,[243] uniformity as to building requirements does not necessitate uniformity as to other types of obligations,[244] and uniformity of regulations does not prohibit reliance on nonuniform concomitant agreements.[245]

Method of Implementation

Implementation of contingent zoning must take place within the context of the general requirements imposed by zoning enabling legislation. The importance of following procedural requirements, including requirements regarding notice and hearing, has already been noted above.[246] In some states, legislative decisions are subject to popular referendum rights created by state constitution and statute, and this additional check on rezoning decisions that are deemed legislative in character may also come into play.[247]

A major issue that should be carefully considered by local governments interested in contingent zoning is the types of remedies that are likely to be available in the event a contingent rezoning arrangement is invalidated by court action or breached by either the landowner or local government. Courts that find contingent zoning arrangements invalid have most commonly struck down both a local government's rezoning decision (reintroducing whatever restrictions had previously applied) and any related concomitant agreements or conditions.[248] Occasionally, however, conditions have been invalidated while the basic zoning decision has been allowed to stand, or the courts have expressed doubts about the validity of contingent zoning, leaving a condition or other obligation intact.[249] Both a local government and landowner may prepare for such eventualities by specifying that rezoning and associated obligations are contingent on the validity of the overall arrangement. They should also anticipate situations in which the arrangement may be found to be legally valid, but may nevertheless have been violated. In the event of breach by the affected landowner, local government and neighbors who are parties to a concomitant agreement may find that their jurisdiction's courts will refuse to enforce ordinance provisions requiring the land's reversion to an earlier zoning classification, and should accordingly provide for alternative types of remedies.[250] Landowners should also be aware that in the rare case when a local government promises to rezone or to leave rezoning undisturbed for some future period, courts may adopt a more narrow interpretation of the local government's obligations on public policy grounds. While a court may order rescission and restitution, for example the return of a right-of-way or other interest in land conveyed in anticipation of rezoning,[251] this may not uniformly be the case, and the landowner would be better served by carefully timing any such transfers and including appropriate conditional language in the first instance.

Development Agreements

Development agreements have been defined as "agreements between local governments and developers, usually sanctioned by state statute, [that] set out ... various use limitations and infrastructure/public facility exactions sought by the former, and the freezing of land use controls for a fixed period together with service guarantees for the latter."[252] The previous section has considered agreements related to rezoning decisions; the focus in this section is on similar arrangements that arise in other contexts, particularly those involving issuance of land use permits and annexation. This section also emphasizes, in particular, the unique problems associated with bilateral agreements, but does not address other broad issues associated with permit issuance and annexation decisions, matters considered at length in various treatises on land use and local government law. Because of the absence of case law to date on development agreements other than those concerning rezoning and annexation, this section relies heavily on that analogous body of law, on development agreement legislation and on scholarly analysis.

Theoretical Underpinnings

The same tension between the police power and reserved power doctrines that was noted above exists with regard to nonrezoning development agreements, but is in some ways less problematic and in other ways more so. In order to understand this tension, it is helpful, first to examine each basic element of a typical development agreement separately.

Development agreement provisions restricting land use and imposing directly related exactions for such features as roads or parks would appear generally to be controlled by the typical analysis of contingent zoning conditions discussed earlier under "Contingent Zoning." Case law to date concerning annexation agreements has afforded local governments considerable flexibility in addressing zoning and related matters.[253]

More questions are likely to arise with regard to promises by local governments to provide infrastructure or to freeze regulatory controls. Local governments in several cases have agreed to extend sewer lines or provide sewer services. California courts have upheld such promises in the context of annexation agreements, when faced with local governments' decisions to renege on the deal.[254] They reasoned that the government had implied power to enter into contracts of this type, that it had not completely surrendered control over sewer functions, and that the terms of the agreement were fair, just, and reasonable; accordingly, they should be enforced. Courts that have traditionally been more reluctant to afford local governments broad powers have, however, refused to enforce promises to extend sewer lines or open public streets, and have instead asserted that such promises were unauthorized.[255]

Assuming that adequate statutory authority exists and that government promises to provide at least certain types of services are less likely than other sorts of promises to involve contracting away of fundamental legislative authority, developers may be able to look to yet another area of legal doctrine to strengthen their claim that such promises should be enforced. A number of scholars have suggested that contracts such as development agreements may be protected by the Contracts Clause of the United States Constitution, which provides that "No State shall ... pass any ... Law impairing the Obligation of Contracts."[256] Recent Supreme Court cases[257] have revived this provision from a relatively dormant period in its history, and require that governmental "impairments" of contracts that go beyond the level of mere breach[258] be backed by "reasonable and necessary"[259] justifications, a difficult standard to satisfy. Both developers and local governments should be aware of the possible application of this doctrine to development agreements, and should include alternative damage remedies to avoid contract impairment,[260] or be prepared for the possibility that such a provision will be specifically enforced.

Perhaps the most important element of typical development agreements from the viewpoint of major developers is a promise by the local government to freeze regulatory controls in the form they exist at the time the agreement is negotiated. The desirability of such provisions has in fact provided the impetus for adoption of California's development agreement statute,[261] described below. This strong desire for a regulatory freeze has stemmed from the conflicts that have arisen when developers, who have undertaken long-term, large-scale development projects in reliance on existing land use regulations, are faced with intervening state and local efforts to strengthen and tighten regulatory provisions in the interest of environmental protection.[262] Courts have developed the "vested rights" doctrine to deal with the problem of existing expectations and changing regulations. Jurisdictions differ, however, in their approach to this doctrine. For example, California courts adopted a "late, hard" vesting rule prior to the enactment of its development agreement legislation. Under this rule, vested rights are acquired that permit the developer to proceed notwithstanding regulatory change, only when work has been performed and the developer has incurred substantial liabilities in good faith reliance on a permit issued by the government.[263] Other states have adopted approaches that recognize vested rights at an earlier stage in the process,[264] or have relied upon the doctrine of equitable estoppel to reach a similar result.[265] An opportunity to remove the costly uncertainty associated with possible regulatory change and judicial application of vested rights rules may therefore serve as a major incentive for developers to enter into development agreements.

Clearly, however, a contract to freeze land use regulations raises reserved power questions in their starkest form, since it constitutes an agreement to decline to exercise regulatory power in any different way for a future period, notwithstanding policy considerations that may dictate regulatory change. Several responses may be available to minimize this significant potential legal problem. Development agreement legislation and development agreements themselves should maximize the extent to which the local government currently and in the future can assert its police power, consistent with the concern to deal fairly and reasonably with the issue of vested rights. Thus, a development agreement should

(1) specify applicable land use controls (for example restrictions on type of use and height of buildings); (2) be of limited duration; (3) provide for ongoing monitoring of compliance and modification or termination in appropriate circumstances; (4) recognize that changing state and federal law will continue to apply,[266] as well as local regulations of certain types (for example taxation and environmental requirements) and under certain circumstances (if significant health and safety concerns or significantly changed circumstances exist); and (5) state that other permits or approvals required in the course of development will be processed under generally applicable procedures.[267] Novel legal arguments may also have to be advanced. For example, it may be contended that the state plays a significant role in supporting the legality of agreements of this type,[268] or that negotiation is an appropriate tool for settling investment-backed expectations so as to avoid challenges under the "taking" doctrine and thus to facilitate effective police power regulation. Procedural requirements governing adoption of development agreements generally may also ensure that independent judgment is applied, thereby bolstering the argument that the police power has not been abused.[269] Finally, the parties can plan ahead for possible invalidation, perhaps including a liquidated damages clause, or establishing an approach to allocating or limiting added costs in the event that a regulatory freeze provision is invalidated or rendered ineffective by a court decision allowing regulatory change.[270]

A final theoretical question that warrants threshold consideration is whether the element-by-element analysis just proposed will generally be applied, or whether some alternative hybrid approach might be adopted. Some scholars, for example, have urged that the Contracts Clause may give added protection to developers with regard to all aspects of a development agreement, rather than primarily with regard to the service- or infrastructure-provision element that most closely resembles a traditional contract in subject matter and design.[271] It has also been suggested that because agreements operate as contracts, local governments may be able to exact more concessions from developers than would be the case for a more traditional police power exaction, when market principles and the doctrines of quid pro quo and tit for tat do not apply.[272] This issue is pursued in further detail below.

Authority

As was discussed earlier, the existence of adequate enabling legislation may be of critical importance in determining the legality of innovative financing mechanisms. This is especially true in the context of development agreements, in light of the legal questions concerning their enforceability just discussed. An increasing number of states have adopted such development agreement authorizing legislation, and their efforts provide helpful guidance for others interested in pioneering in this area.[273]

Illinois has adopted groundbreaking annexation agreement legislation[274] that has been upheld by its courts notwithstanding earlier hesitancy to approve conditional zoning in a number of cases. Annexation agreements lasting for up to 20 years may include provisions for the following: annexation to the affected municipality; freezing of zoning, building, housing, and related restrictions; limitation on increases in fees; contributions of either land or monies; granting of utility franchises; and other matters not inconsistent with law.[275] The statute also specifies that notice and public hearing must be provided, that successors of owners of record and successor government authorities will be bound, and that municipalities taking action in conflict with an agreement will be considered in breach.[276]

California's development agreement statute is even more far reaching.[277] It includes an extensive statement of purpose, citing a variety of justifications for enactment, including a desire to increase certainty in the development process to spur investment and keep housing costs low, to improve planning, and to facilitate financing of public facilities.[278] Cities and counties may enter agreements, and must establish procedures for considering agreements if requested by an applicant.[279] Government participants must review the status of development every 12 months, and developers must demonstrate good faith compliance or the agreement may be modified or terminated.[280] Agreements must specify their duration, and permitted uses of property including density or intensity, maximum building height and size, and reservation or dedication requirements.[281] They may only be approved consistent with applicable plans. They may contain conditions or terms concerning subsequent discretionary government action, commencement and completion dates, and "terms and conditions relating to applicant financing of necessary public facilities and subsequent reimbursement over time."[282] This last provision, and a companion provision included in the section reciting legislative findings and declarations ("The lack of public facilities, including, but not limited to, streets . . . is a serious impediment to the development of new housing [and] [w]henever possible, applicants and local governments may include provisions in agreements whereby applicants are reimbursed over time for financing public facilities"), were added in 1984.[283] They have raised unresolved questions whether requirements of this sort can be added only if local governments themselves reimburse developers over time for constructing such infrastructure, or whether reimbursement by other, subsequent developers is contemplated. Other key provisions specify that development agreements shall be enforceable notwithstanding subsequent changes in applicable plans, zoning, subdivision or building regulation, subject to the prerogative of participating governments to apply nonconflicting rules, regulations, or policies, and to provide to the contrary in the agreement itself.[284] Subsequent state and federal legislation is specifically said to apply, however, and development plans for land subject to coastal controls must be approved by appropriate authorities.[285] A public hearing must be held, and agreements must be approved by ordinance.[286] They may also be subject to challenge through the referendum process.[287]

After some years of consideration Hawaii in 1985 passed a development agreement statute that differs in certain respects from the California

model.[288] This statute, too, includes numerous legislative findings concerning problems resulting from challenging land use regulation, the need for certainty, and anticipated public benefits.[289] Counties are authorized to enter into agreements to be administered by their county executives,[290] but any other federal, state, or local government agency may also be included as a party if specified in the agreement.[291] Periodic review is required, and developers must be given notice and an opportunity to cure in the event of breach; but after appropriate findings, the county may unilaterally modify or terminate the agreement.[292] Agreements must describe the affected land, permitted uses (including density and intensity of use, and maximum building height and size), reservation or dedication of land "if required by statute or public policy," and termination date (that may be extended by mutual agreement).[293] Agreements may provide for commencement and completion dates, and for "any other matter not inconsistent with law."[294] Provisions must be in compliance with the county's general plan as of the date of agreement.[295] The statute states that laws in effect at the time of the agreement shall control, but creates a significant exception, not expressly included in the California statute, which provides that subsequent laws may apply if there is a need to alleviate a condition "perilous" to residents' health or safety.[296] A public hearing is required prior to entry into an agreement,[297] but unlike California, agreements are described as "administrative acts," seemingly to reduce the risk of their being overturned by referendum.[298]

These major, full-fledged statutory provisions have obviously been designed with a careful eye to the legal issues involved. They accordingly remove any doubt concerning the adequacy of authority to experiment with development agreements, and provide important guidance in the absence of extensive case law. Local governments in states that lack such comprehensive enabling statutes may be able to rely on home rule power or implicit authority under annexation statutes to support development agreements undertaken in that context.[299] Without clear authority, however, local governments and developers both run considerable risk of costly reliance on an agreement that may be subject to judicial invalidation.

Relative Role of Private and Public Sectors

There is little definitive guidance on the allocation of obligations between private and public sectors insofar as that issue is raised by development agreements. Contingent zoning precedent, discussed above, would suggest that private parties may not be required to contribute to the community more than is warranted in light of needs reasonably arising from their proposed development however loosely or stringently "reasonably" may be defined. The few annexation cases touching on comparable questions state that a local government can be held to "fair, just and reasonable" obligations.[300] A number of tantalizing questions are therefore posed. Does the bargaining context, in which a developer has agreed to certain exactions, mean that a need-based test no longer applies? If so, would a "just and reasonable" test, or some other standard, be imposed to protect developers against bad bargains? Assuming that this or some other test were developed, how would it be applied?

Without judicial precedent for guidance, it may be enough to note that the California experience to date has resulted in developers' agreeing to provide substantial and unusual public benefits that would at least raise questions if required to survive a traditional rational nexus exactions test. Examples include contributions of arts and social services fees, large park areas, day care centers, and affordable housing units—all in conjunction with large office or mixed use projects.[301]

Division of Responsibility Within the Private Sector

Again, the absence of judicial precedent limits the extent to which definitive guidance may be afforded. In the absence of statutory requirements such as the uniformity provision contained in standard zoning enabling legislation, local governments may be tempted to proceed to negotiate development agreements on a rather ad hoc basis. The wiser course, however, is to adopt uniform procedures setting a general framework within which such agreements might be reached. This approach has several benefits, including ensuring fair and even-handed treatment that can avoid equal protection problems,[302] strengthening the government's position that agreements are reached with sufficient integrity to undercut reserved powers concerns,[303] and addressing procedural due process problems that might otherwise arise as discussed below.[304]

Method of Implementation

A number of significant implementation issues have been touched on by the scholarly literature to date. More will undoubtedly surface in the course of case studies.

Careful thought should be given to those who should be made parties to development agreements. Both property owners with legal title and developers who hold options or equitable interest may need to be included.[305] Provision should also be made for binding assignees and other successors in interest.[306] Local governments would be advised to retain the right to approve assignments and to bind successors, to ensure that the community's interest is adequately protected, while recognizing that approval of assignments may not be unreasonably withheld under the law in some states.[307] On the other hand, developers may wish to involve specialized or state-level governmental entities along with local governments as parties to development agreements to avoid possible disagreements and changing regulatory postures at a later date.[308] Flexible statutory provisions can open the way for multiparty agreements without mandating such extensive participation in every case.[309]

Suitable procedures must also be provided. Procedural due process requirements vary depending on whether a government decision is legislative or adjudicatory.[310] Although the question is not free from doubt, a good case can be made for the proposition that development agreements are both adjudicatory and legislative in nature.[311] Accordingly, adequate notice and an opportunity for a meaningful hearing should generally be

afforded in connection with approval of individual agreements, as well as in connection with individual discretionary permits that may need to be sought at a later date.[312] The courts' view of the character of local decision-making also has a bearing on the character of judicial review to be applied.[313] Statutory specificity in identifying the avenues available and the nature of the courts' judicial review are therefore of considerable importance.

Generally available initiative and referendum opportunities may have a bearing on development agreements. Careful analysis of the law of individual states on this point is required. For example, the California constitution reserves the right of referendum to the people in connection with legislative acts, and the California development agreement statute characterizes development agreements as legislative in character so as to permit access to the referendum as a further check on possible arbitrary legislative action.[314] Nonetheless, recourse to the referendum may not be available if the courts determine that individual development agreements are best characterized as primarily adjudicatory in nature,[315] or if state enabling legislation is seen as demonstrating a sufficient state interest to limit recourse to this constitutional provision.[316] A similar question may be raised with respect to the initiative power. While it might be questionable whether this power could be used to block action under an individual development agreement once approved by the appropriate governmental authorities, recent precedent has established that an initiative limiting a community's growth rate could take effect to modify rights confirmed by an annexation agreement and consent judgment reserving the power to exercise police power relative to general subject matter.[317]

Finally, as noted above,[318] it is critical to provide for remedies in the event of invalidation or breach. The first law suit for breach has recently been filed under the California development agreement statute,[319] and resulting decisions may provide further insight into this matter.

Summary

Local governments interested in contingent zoning and development agreements as additional mechanisms for financing road improvements will find that these methods have considerable potential, but that care must also be taken to avoid a number of possible pitfalls.

1. Contingent zoning and many types of development agreements may be viewed as an exercise of the police power, but at the same time seen to possess contract characteristics. While courts may uphold such arrangements under the police power, they must carefully consider whether there has been a violation of the reserved powers doctrine which prohibits bargaining away of future regulatory power and legislative discretion for the benefit of favored individuals. When contingent zoning is concerned, it is possible to reduce the risk of invalidation under the reserved powers doctrine by observing generally applicable procedural requirements, relying on unilateral agreements or otherwise preserving an independent legislative stance in determining the conditions that should apply, and ensuring that substantive decisions are adequately justified. Development agreements are also likely to raise reserved powers questions, particularly when they include a provision for a regulatory freeze designed to allow completion of a particular development project under requirements in effect at the time of negotiation. Steps may also be taken to reduce the risk of invalidation of such development agreements by including provisions requiring periodic review and allowing for application of certain types of health and safety regulations.

2. Contingent zoning and development agreements post somewhat different questions of statutory authority. Local governments interested in experimenting with contingent zoning may look to state zoning legislation as a source of authority. They should, however, be aware that while some courts find implicit authority for their undertaking, others believe that current zoning legislation does not contemplate nonuniform regulation of this type. There may be more uncertainty whether adequate authority exists to sustain development agreements of various sorts. A few states recognize local authority to enter into annexation agreements under specific enabling legislation, or by implication under more general annexation statutes, or under home rule provisions. Development agreements that seek to modify court-made vested rights requirements have generally been undertaken only pursuant to express authorizing legislation.

3. To avoid overreaching by the public sector, and favored treatment of certain private individuals, the courts have generally required that obligations imposed on property owners through contingent zoning arrangements be reasonably related to needs associated with the proposed development. Different courts may take slightly different approaches in applying this need/relationship standard, considering, for example, whether a party challenging a particular requirement has benefited from or agreed to its imposition at an earlier date, and whether the requirement simply restricts the use or exacts an in-kind or monetary contribution. It remains to be seen whether similar standards may be applied to development agreements or whether more wide-ranging obligations may be legitimately undertaken in light of the contractual nature of the parties' relationship.

4. Local governments should make opportunities for contingent zoning and development agreements available to all comers, to avoid the charge that they have been afforded, on a discriminatory basis, a claim that may undermine the government's legal stance.

5. Procedural requirements must also be observed. Contingent zoning decisions should be made consistent with notice and hearing requirements and other procedural provisions contained in state zoning enabling legislation. Development agreement legislation has generally included similar provisions to protect the procedural due process rights of all those affected. Significant questions may exist as a matter of state law concerning the applicability of public rights to trigger initiative and referendum proceedings when development agreements are at issue.

6. Because of the risk of invalidation or breach, both local governments and developers should give careful attention to identifying available

remedies at the time they enter into contingent zoning arrangements or development agreements.

[1] Other innovative devices are also being developed. For example, alternative tax strategies have been proposed. In Colorado, a services expansion fee required to be paid as a precondition to receiving building permits for new construction, additions, or alterations has been upheld as an excise tax. *See* Cherry Hills Farm, Inc. v. City of Cherry Hills Village, 670 P.2d 779 (Colo. 1983). Tax increment financing (which would repay costs of infrastructure improvements from the resulting incremental increase in property or sale tax derived from nearby property) has also been suggested. *See* Porter & Smart, *Infrastructure Financing: The Local Experience,* in 1985 ZONING AND PLANNING LAW HANDBOOK 213, 218 (J.B. Bailey, ed.) (describing St. Louis, Missouri proposal). Joint equity venture projects, in which public and private partners contract to construct and jointly operate a particular improvement project might also be attempted for roads, bridges, mass transit, or other types of facilities. These other alternatives are not discussed in detail here, because excise taxes are rarely used; tax increment financing primarily earmarks funds rather than generates new revenues; and joint equity ventures generally involve very individualized application of contract principles.

[2] See 2 E. McQuillin, *Municipal Corporations,* § 10.11 n.13 (3d ed. 1979) (citing cases from 18 states); 3 C. Sands & M. Libonati, *Local Government Law,* § 13.02 (1982) (citing cases from 19 states).

[3] Many state constitutions include provisions prohibiting or limiting the use of "special legislation," at least when such legislation is not based on a reasonable and proper method of classification. C. Sands & M. Libonati, *supra* note 2, §§ 3.21–3.34 (1981). Such provisions vary in a number of ways from state to state, some limiting special legislation when a general law can be made applicable, others only when a general law already exists, still others applying only to legislation on particular subjects or to legislation enacted without the provision of notice to an affected community. *Id.* at § 3.21. For a list of pertinent state constitutional provisions, *see id.* at § 3.21 nn. 3–8.

[4] Some courts have interpreted "general welfare" legislation as providing an additional, expensive source of authority to local governments. *See, e.g.,* Inganamort v. Borough of Fort Lee, 62 N.J. 521, 303 A.2d 298 (1973); State v. Hutchinson, 624 P.2d 1116 (Utah 1981). Other courts have concluded that "general welfare" legislation does not add to powers provided under others specific enabling legislation. *See, e.g.,* City of Stuttgart v. Strait, 212 Ark. 126, 205 S.W.2d 35 (1947); Anderson v. City of Olivette, 518 S.W.2d 34 (Mo. 1975).

[5] *See* 2 E. McQuillin, *supra* note 2, § 10.09, n.7 (citing cases from 46 states).

[6] *See* 3 C. Sands & M. Libonati, *supra* note, 2, § 13.05.

[7] *See, e.g.,* City of Osceola v. Whistle, 241 Ark. 604, 410 S.W.2d 393 (1966); Early Estates, Inc. v. Housing Bd. of Review, 93 R.I. 227, 174 A.2d 117 (1961); Board of Supervisors v. Horne, 216 Va. 1131, 215 S.E.2d 453 (1975).

[8] *See, e.g.,* Liberati v. Briston Bay Borough, 584 P.2d 1115 (Alaska 1978); Osborne v. State, 439 N.E.2d 677 (Ind. App. 1982); Lipco Corp., Inc. v. Billings, 197 Mont. 339, 642 P.2d 1074 (Mont. 1982); State v. Hutchinson, 624 P.2d 1116 (Utah 1981). *See also* Iowa Const. art. III. § 38A (municipal power not limited to "only those powers granted in express words"); Mich. Const. art. VII, § 34 ("provisions in this constitution ... concerning counties [and] cities shall be liberally construed"); N.J. Const. art. IV, § 7.¶11 (municipal powers, include the express powers plus those powers that are incident and necessary to the express powers).

[9] *See, e.g.,* Commercial National Bank v. City of Chicago, 89 Ill.2d 45, 432 N.E.2d 227 (Ill. 1982). For an analysis of taxing authority in home rule jurisdictions, *see, e.g.,* D. Mandelker, D. Netsch, P. Salsich, *State and Local Government in a Federal System,* 119-121 (2d ed. 1983); Cohn, *Municipal Revenue Powers in the Context of Constitutional Home Rule,* 51 NW. U.L. REV. 27 (1956).

[10] Several subsidiary questions are posed under these circumstances. It is first necessary to determine whether the more open-ended statute is itself intended to authorize the desired local action, or whether it has a different, less expansive role. *See, e.g., supra* note 4. Even if the more open-ended statute is interpreted to provide requisite authority, local government action may be precluded if such action would conflict with other, more specific state legislation, or would intrude into a field already occupied by comprehensive state law. *See* D. Mandelker, D. Netsch, P. Salsich, *supra* note 9, at 131–144.

[11] *Id* at 101, 121. For a general discussion of home rule, *see* Vanlandingham. *Constitutional Municipal Home Rule Since the AMA (NLC),* 17 WM. & MARY L. REV. 1 (1975); Vanlandingham, *Municipal Home Rule in the United States,* 10 WM. & MARY L. REV. 269 (1968). Vanlandingham concludes that although 40 states have constitutional home rule provisions home rule powers have only been vigorously exercised in about a dozen. For a list of state constitutional and statutory provisions affording municipal or county home rule, *see* 1 C. Sands & M. Libonati, *supra* note 2, § 4.02 nn. 2–3 (constitutional provisions); *id.* at § 4.05, n.1 (statutory provisions). *See also* 2 E. McQuillin, *supra* note 2, § 4.28, n.1 (citing secondary sources describing home rule in individual states).

[12] *See e.g.,* Calif. Const. art. XI, § 13 (providing power to "make and enforce all ordinances and regulations in respect to municipal affairs"); Conn. Const. art. X, § 1 (legislature authorized to delegate "authority ... relative to the powers, organization, and form of government of political subdivisions"); New York Const. art 9. § 2 (delegating powers "including but not limited to those of local legislation"); Ohio Const. art. XVIII, § 3 (affording municipalities "all powers of local self-government"); Washington Const. art. XI, § 11 (authorizing counties, cities, and towns to "make and enforce ... local police, sanitary and other regulations").

[13] *See* D. Mandelker, D. Netsch, P. Salsich, *supra* note 9, at 108; 1 C. Sands & M. Libonati, *supra* note 2, § 4.06: *id.* at § 4.14, nn. 20–21.

[14] *See, e.g.,* Ill. Const. art. VII, § 6 (authorizing home rule units to "exercise any power or perform any function pertaining to its government and affairs"); Penn. Const. art. 9, § 2 (authorizing municipalities to "exercise any power or function not denied"); S.D. Const. art X, § 5 (authorizing municipalities which adopt home rule charters to "exercise any power or perform any function which the legislature has power to grant ...); [and that] is within such limitations as may be established by statute ... [but] not includ[ing] the power to enact private or civil law governing civil relationships except as an incident to exercise of an independent municipal power").

[15] *See, e.g.,* Conn. Const. art. X, § 1.

[16] See 1 C. Sands & M. Libonati, *supra* note 2, § 4.14, nn. 8–9 (citing cases from jurisdictions limiting home rule powers to cities of certain sizes and restricting county home rule under certain circumstances).

[17] *Id.* at § 4.14. Although this is the general rule, it is not always required. *Id.* at n.2 (citing Ohio Const. art. XVIII).

[18] See 2 E. McQuillin, *supra* note 2, § 9.07.

[19] *Id.* at § 9.03, nn. 9–10.

[20] *See Id.* at n.11; City of Miami Beach v. Fleetwood Hotel, Inc., 261 So. 2d 801 (Fla. 1972); D. Mandelker, D. Netsch, P. Salsich, *supra* note 9, at 112–113.

[21] For an overview of constitutional doctrine as applied in the land use area, see D. Mandelker, *Land use Law,* 15–48 (1982).

[22] *See* U.S. Const. amend. XIV, § 1 ("[n]or shall any State 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").

[23] *See, e.g.,* Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1 (1978) (notice and opportunity for hearing required prior to termination of utility service). Under federal law, these requirements apply to adjudicatory, but not legislative decisions. *See* Couf. v. De Blaker, 652 F.2d 585 (5th Cir. 1981), *cert. denied,* 455 U.S. 821 (1982). State courts, however, may conclude that procedural requirements must be satisfied in an even broader range of situations. *See e.g.,* Fasano v. Board of County Commissioners, 264 Or. 574, 507 P.2d 23 (1973).

[24] *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (factors to be controlled include private interest affected by official action, risk of erroneous deprivation through procedures used and value of additional or substitute procedural safeguards, and the government's interest in use of particular procedures, including fiscal and administrative burdens that would result from additional or substitute procedures).

[25] *See* Lawton v. Steele, 152 U.S. 133 (1894).

[26] *See, e.g.,* Moore v. City of E. Cleveland, 431 U.S. 494 (1977) (decision, to overturn zoning ordinance limiting right of family members to live together commands support of Court plurality, not majority).

[27] *See, e.g.,* City of New Orleans v. Dukes, 427 U.S. 297 (1976) (upholding ordinance regulating pushcart vendors); City of Pittsburgh v. Alco Parking Corp. (upholding gross receipts tax), 417 U.S. 369 (1974); Lincoln Federal Labor Union v. Northwestern Iron & Metal, 335 U.S. 525 (1949) (sustaining statute outlawing closed shops).

[28] *See, e.g.,* South Burlington County NAACP v. Township of Mt. Laurel, 67 N.J. 151, 336 A.2d 713 (exclusionary zoning barred pursuant to statee constitution's equal protection and due process provisions), *cert. denied.* 423 U.S. 808 (1975).

[29] *See, e.g.,* Dandridge v. Williams, 397 U.S. 471 (1970) (upholding formula for distribution of welfare benefits); Tax Commissioners v. Jackson, 283 U.S. 527 (1931) (upholding privilege tax graduated according to number of chain stores maintained).

[30] *See, e.g.,* Loving v. Virginia, 388 U.S. 1 (1967) (statute forbidding interracial marriage invalidated using strict scrutiny test); Craig v. Boren, 429 U.S. 190 (1976) (state law imposing different gender-specific age limits on sale of alcohol invalidated using intermediate scrutiny test which is less strict than strict scrutiny, but more stringent than rational basis).

[31] *See, e.g.,* N.C. Const. art. V, § 2 (5) (legislature may not authorize local governments to levy property taxes, except for purposes authorized by general law uniformly imposed, unless approved by majority vote); W. Newhouse, *Constitutional Uniformity and Equality in State Taxation* (2d ed. 1984).

[32] *See, e.g.,* Cal. Const. art. XIIIA (limiting rate and increases in property taxation and imposing additional limitations upon level of "special taxes").

[33] Regents of University of California v. Los Angeles, 100 Cal. App. 3d 547, 549, 160 Cal. Rptr. 925, 926 (1979). For general discussions of legal issues relating to the use of special assessments, *see* 14 McQuillin, *supra* note 2, §§ 38.01–38.388; D. Mandelker, D. Netsch, P. Salsich, *supra* note 9, 238–258; Miscznski, "Special Assessments" in *Windfalls for Wipeouts* (D. Hagman and D. Miscznski, eds. 1978); 4 C. Sands & M. Libonati, *supra* note 2, §§ 24.01–24.64; Diamond, *The Death and Transfiguration of Benefit Taxation: Special Assessments in Nineteenth-Century America,* 12 J. Leg. Stud. 201 (1983) [hereinafter cited as Diamond, *Death and Transfiguration*]; Diamond, *Constitutional Limits on the Growth of Special Assessments,* 6 Urban L. & Policy 311 (1984) [hereinafter cited as Diamond, *Constitutional Limits*]; Ellickson, *Suburban Growth Controls: An Economic and Legal Analysis,* 86 Yale L. J. 385, 450 (1977); Heyman & Gillhool, *The Constitutionality of Imposing Increased Community Costs on New Suburban Residents Through Subdivision Exactions,* 73 Yale L. J. 1119 (1964); Snyder, *The Legal Issues of Serving New Development,* 11 Carolina Planning 12 (No. 2, Winter 1985).

[34] *See* Diamond, *Death and Transfiguration, supra* note 33, at 203, n.5. Diamond disagrees with this characterization, believing early English precedents did not qualify as special assessments, or were not actually applied. *Id.* at 203–206.

[35] *Id.* at 214–239.

[36] *See* 14 E. McQuillin, *supra* note 2, § 38.01 (special assessments are sustained under exercise of power of taxation; 4 C. Sands & M. Libonati, *supra* note 2, § 4.05, n.1 (citing cases sustaining power to levy special assessment under rubric of taxation from 19 jurisdictions).

[37] *See e.g.,* Yencing Realty Co. v. City of Concord, 116 N.H. 580, 364 A.2d 875 (1976) (assessments presumed fair in absence of malice, bad faith or arbitrariness; burden on property owner to demonstrate them to be improper). *See generally* 14 E. McQuillin, *supra* note 2, §§ 38.55 to 38.56. Patterson v. Bismarck, 212 N.W.2d 374 (N.D. 1973) (deference regarding size and form of assessment district).

[38] *See, e.g.,* Eaton v. McCuen, 273 Ark. 154, 617 S.W.2d 341 (1981); Lake Howell Water & Reclamation Dist. v. State, 268 So. 2d 897 (Fla. 1972); Martin v. Ben Davis Conservancy Dist. 238 Ind. 502, 153 N.E.2d 125 (1958); McNally v. Township of Teaneck, 75 N.J. 33, 379 A.2d 446 (1977); Berglund v. Tacoma, 70 Wash. 2d 475, 423 P.2d 922 (1967).

[39] *See e.g.,* American River Flood Control Dist. v. Sayre, 146 Cal. App. 3d 347, 186 Cal. Rptr. 202 (1982) (special assessment represents equivalent compensation for enhanced value derived from improvement); Southern Railway Co. v. City of Raleigh, 277 N.C. 709, 178 S.E.2d 422 (1971) (dominant purpose of a street assessment is not to require property owner to pay cost of improvement, but rather to require owner to reimburse the city for an expenditure that enhanced the value of his property).

[40] *See, e.g.,* Solvang Mun. Improvement Dist. v. Board of Supervisors, 112 Cal. App. 3d 545, 552, 169 Cal Rptr. 391, 395 (1980) ("The rationale of special assessment is that the assessed property has received a special benefit over and above that received by the general public. The general public should not be required to pay for special benefits for the few, and the few specially benefited should not be subsidized by the general public").

[41] *See, e.g.,* Norwood v. Baker, 172 U.S. 269 (1898); Event v. City of Winthrop, 278 N.W.2d 545 (Minn. 1979); Briar West, Inc. v. City of Lincoln, 206 Neb. 172, 291 N.W.2d 730 (1980). *See also* 14 E. McQuillin, *supra* note 2, § 38.02.

[42] Special assessments have traditionally been used for streets, sidewalks, and water and sewer facilities. In recent years they have been proposed as a mechanism for funding such diverse services and improvements as fire protection, convention centers, and libraries.

[43] *See, e.g.,* Lifteau v. Metropolitan Sports Facilities Comm'n, 270 N.W.2d 749 (Minn. 1978) (assessment district need not be identical to political subdivision).

[44] *See, e.g.,* Konfal v. Charter Township of Delhi, 91 Mich. App. 71, 283 N.W. 2d 677 (1979) (farmland could be assessed for sewer project based on potential residential land use value); McNally v. Township of Teaneck, 75 N.J. 33, 379 A.2d 446 (1977) (property owners in residential areas could be assessed for new paving and curb installation). *See also* Mullen, *The Use of Special Assessment Districts and Independent Private Land Development,* 53 Calif. L. Rev. 364 (1965).

[45] *See, e.g.,* N.J. Stat. Ann. § 40-56-3 (West 1967) (municipality may undertake improvement at request of petitioners who agree to pay cost).

[46] Detailed statutes are in effect in all the 50 states. *See, e.g.,* Cal. Sts. & Hy. Code § 5101 *et seq.* (West 1969); Colo. Rev. Stat. § 31-25-501 *et seq.* (1977); Wis. Stat. § 66.60 (Supp. 1985).

[47] *See, e.g.,* Tocci v. City of Three Forks, 700 P.2d 171 (Mont. 1985). *See also* 14 E. McQuillin, *supra* note 2, § 38.07, nn. 2–3 (citing cases from 28 states).

[48] *See, e.g.,* Trump Plaza v. Atlantic City Mun. Util. Auth., 192 N.J. Super. 376, 470 A.2d 31 (1983) (statute authorizing municipalities to levy special assessments does not afford such power to municipal utility authorities).

[49] *See, e.g.,* Morrison v. City of Washington, 332 N.W.2d 125 (Iowa App. 1983) (cost of improvements and reconstruction work such as resurfacing, but not cost of keeping street in repair, may be subject to special assessment). See also 14 E. McQuillin, *supra* note 2, §§ 38.16 (citing numerous cases regarding repair and construction); *id.* at §§ 38.12, and 38.18 (road widening); 4 C. Sands & M. Libonati, *supra* note 2, § 24.12 (citing numerous cases); Annot., 41 A.L.R.2d 613 (1955) (repair and reconstruction); Annot., 46 A.L.R.3d 127 (1972) (road widening).

[50] *See, e.g.,* N.J. Stat. Ann. § 40:56-12 (West 1967). *See also* Iowa Code § 384.62 (1979) maximum assessment may not exceed 25% of value of lot).

[51] *See e.g.,* Fla. Stat. Ann. § 170.01 (West Supp. 1985) (assessments for off-street parking facilities, parking garages, and mass transportation on systems may not be levied without prior consent by affected property owners).

[52] *See, e.g.,* Colo. Rev. Stat. § 31-25-503 (1977).

[53] *See, e.g.,* Or. Rev. Stat. § 223.399 (1985) (local governing board may impose additional procedural requirements).

[54] *See, e.g.,* Irish v. Hahn, 208 Cal. 339, 281 P. 385 (1929).

[55] *See, e.g.,* Or. Rev. Stat. §§ 223.387 and 223.389 (1985) (authorized assessments for defined local improvements.)

[56] *See* Ruel v. Rapid City, 84 S.D. 79, 167 N.W.2d 541 (1969) (special assessment could not be used for convention center); Heavens v. King County Rural Library District, 66 Wash. 2d 558, 404 P.2d 453 (1965) (special assessment could not be used to fund library facility).

[57] *See e.g.,* Clive v. Iowa Concrete Block & Material Co., 298 N.W.2d 585 (Iowa 1980) (nonabutting properties with alternative access derived no benefit from improvements to major road); Johnson v. City of Inkster, 401 Mich. 263, 258 N.W.2d 24 (1977) (nonabutting properties derived

no benefit from improvements to major road).

[58] *See, e.g.*, Fluckey v. City of Plymouth, 358 Mich. 447, 100 N.W.2d 486 (1960) (widening of road resulted in detriment, not benefit, to residential property owners); Neighborhood Presentation Ass'n of Detroit Lakes v. City of Detroit Lakes, 354 N.W.2d 74 (Minn. App. 1984) (loss of trees resulting from street improvement must be considered in determining special benefits); DeFraties V. City of Kansas City, 521 S.W.2d 385 (Mo. 1975) (improvement to four-lane roadway resulted in detriment not benefit to property); Haynes v. City of Abilene, 659 S.W.2d 638 (Tex. 1983) (no presumption of special benefit from street improvement since improvement may cause decline in value).

[59] *See, e.g.*, Clive v. Iowa Concrete Block & Materials Co., 298 N.W.2d 585 (Iowa 1980) (assessments for purpose of widening street in order to serve regional transportation needs were reduced so as not to exceed special benefits that would have been provided by two-lane road); DeFraties v. Kansas City, 521 S.W.2d 385, 387 (Mo. 1975) (assessments for purpose of improving dead end street to four-lane traffic way invalid) D'Antuono v. City of Springfield, 140 Ohio App. 102 180 N.E.2d 607, 610 (1960) (when sidewalk's immediate purpose was to provide for safety of school children, agricultural land could not be specially assessed).

[60] *See, e.g.*, Bell v. Topeka, 220 Kan. 284, 553 P.2d 331 (1976) (assessments for intersection improvements designed to facilitate use by through traffic invalidated).

[61] *See, e.g.*, Goodell v. City of Clinton, 193 N.W.2d 91 (Iowa 1971) (allocating cost of road widening between city and property owners when improvement was part of master plan to deal with growth area); Stybel Plumbing, Inc. v. City of Oak Park, 40 Mich. App. 108, 198 N.W.2d 782 (1972) (when property owners received special benefits of road construction, but general public also benefited, proportionate public contribution is required). Some effort has been made to codify contribution expectations based on size and character of streets. See HAWAII REV. STAT. § 67-2 (1976) (specifying proportion of public and private contribution on this basis).

[62] *See, e.g.*, COLO. REV. STAT. § 1-25-513 (1977) (cost of street improvement may be assessed "on a frontage, zone, or other equitable basis in accordance with benefits"); McNelly v. Township of Teaneck, 75 N.J. 33, 379 A.2d 1977 (applying front footage standard). *But see* North Star Lodge No. 227 v. Lincoln, 212 Neb. 236, 322 N.W.2d 419 (1982) (front foot method not constitutionally permitted under Neb. Const. art. III, § 6).

[63] *See, e.g.*, HAWAII REV. STAT. § 67-2 (1976); Beh v. West Des Moines, 257 Iowa. 211, 131 N.W.2d 488 (1964), *cert. denied*, 381 U.S. 935 (1965).

[64] *See, e.g.*, Dodson v. City of Ulysses, 219 Kan. 418, 549 P.2d 430 (1976).

[65] *See, e.g.*, Clayton v. City of Farmington, 102 N.M. 340, 695 P.2d 490 (1985).

[66] *See, e.g.*, COLO. REV. STAT. § 31-25-513 (1977); Bitter v. City of Lincoln, 165 Neb. 201, 85 N.W.2d 302 (1957).

[67] *See, e.g.*, McNally v. Township of Teaneck, 75 N.J. 33, 379 A.2d 446 (1977) (certain property owners demonstrated assessment based on front footage exceeded special benefit received).

[68] *See, e.g.*, Cook v. City of Addison, 656 S.W.2d 650 (Tex. Ct. App. 1983) (rejecting assignment that distinctions in size, shape, square footage, or present use of abutting tracts invalidated assessments). *Cf.* Vail v. City of Bondon, 53 Or. App. 133, 630 P.2d 1339 (1981) (upholding higher sewer assessment for unimproved, as compared to improved lots).

[69] For detailed discussion of individual states' law, *see, e.g.*, Hayes, *Special Assessments for Public Improvements in Iowa: Part I—From Birth of the Idea to Soliciting Bids*, 12 DRAKE L. REV. 3 (1962); Hayes, *Special Assessments for Public Improvements in Iowa: Part II—Further Pre-Assessment Procedure*, 13 DRAKE L. REV. 25 (1963); Hayes, *Special Assessments for Public Improvements in Iowa: Part III—Making the Assessment*, A DRAKE L. REV. 3 (1964); Hayes, *Special Assessments for Public Improvements in Iowa: Part IV—Judicial Review*, 15 DRAKE L. REV. (1965); Hayes, *Special Assessments for Public Improvements in Iowa: Part V—Reassessment, Collection, Liability, and Conclusion*, 16 DRAKE L. REV. 3(1965); Klitzke & Edgar, *Wisconsin Special Assessments*, 52 MARQ. L. REV. 171 (1978); Laxson, *Improvements by Assessment in Hawaii*, 14 HAWAII B.J. 139 (1979).

[70] *See, e.g.*, ALASKA STAT. § 29.46.050(b) (1985) ("If objections are made in writing during the period set for objections by the owners of property bearing 50 percent or more of the estimated total cost of the improvement, the governing body may not proceed with the improvement unless it revises the plan to meet the objections and the objections are reduced to less than 50 percent."); COLO. REV. STAT. § 31-25-503(1)(a)(1977) ("No improvement, except . . . [where initiated by the ordering authority] and except for sidewalks, water mains, sewers, and sewage disposal shall be ordered under this part . . . unless a petition for the same is first presented."). Absent contrary provisions in the applicable enabling legislation or charter, however, assessment districts may be created by a local legislative body without the consent of the affected residents. *See* Farley v. Beaver-Elkhorn Water Dist., 257 S.W.2d 536 (Ky. 1953).

[71] *See, e.g.*, HAWAII REV. STAT. §§ 67-10, 67-16 (1976) (describing requirements of investigation and report of preliminary data, adoption of preliminary resolution, notice, hearing, and determination by governing body). Although constitutional requirements provide an impetus for development of statutory procedural guarantees, such guarantees are often more generous than those dictated by federal constitutional requirements. *See* Utey v. St. Petersburg 292 U.S. 106, 109 (1934) (property owner has no right to be heard in opposition to launching of project that may end in assessment, but only to hearing upon amount to be paid); St. Louis Land Co. v. Kansas City, 241 U.S. 419 430 (1916) (property owner is entitled to be heard as to the amount of his assessments and upon all questions properly entering into their determination); Detroit v. Parker, 181 U.S. 399 (1901) (failure to provide fast hearing and review of assessments based on front foot rule do not violate due process requirements).

[72] *See, e.g.*, N.J. STAT. ANN §§ 40: 56-21 & 56-26 (West 1977).

[73] *See* Misczynski, *supra* note 33, at 333–34.

[74] *See, e.g.*, ALASKA STAT. § 29-46.080 (1985) ("Assessments are liens on property and are prior and paramount to all liens except municipal tax lien"; governing body to fix times of payment, penalties, and rate of interest; payment in lump sum or by installments permitted).

[75] There has also been some doubt whether personal liability could in fact be imposed. Many early cases invalidated efforts to impose personal liability on grounds that statutory authority for such a remedy was lacking or that legislation authorizing personal liability was unconstitutional. *See* Annot., Personal Liability of Property Owner to Pay Assessments for Local Improvements, 127 A.L.R. 551 (1940). However, a growing number of cases have approved personal liability of resident owners. *See* Werninger v. Stephenson, 82 W. Va. 367, 95 S.E. 1035 (1918). Personal liability for nonresident owners may also be imposed where express statutory authorization and an adequate jurisdictional basis can be cited. *See* Rubin, *Collection of Delinquent Real Property Taxes by Action in Personam*, 3 Law & Contemp. Probs. 410, 422 (1936).

[76] *See* Misczinski, *supra* note 33. *See also* Diamond, *Constitutional Limits, supra* note 33; Note, *Rapid Transit Financing: Use of the Special Assessment*, 29 STAN. L. REV. 795 (1977). *Cf.* Note, *Police and Fire Service Special Assessments Under Proposition 13*, 16 U.S.F.L. REV. 781 (1982).

[77] *See* City of San Diego v. Holodnak, 157 Cal. App. 3d. 759, 203 Cal. Rptr. 797 (1984); J.W. Jones Co. v. City of San Diego, 157 Cal. App. 3d 745, 203 Cal. Rptr. 580 (1982); County of Placer v. Corin, 113 Cal. App. 3d 443, 170 Cal. Rptr. 232 (1980); Solvang Municipal Improv. Dist. v. Board of Supervisors, 112 Cal. App. 3d 545, 169 Cal. Rptr. 391 (1980); Fresno County v. Malstrom, 94 Cal. App. 3d 974, 156 Cal. Rptr. 777 (1979). *But see* Diamond, *Constitutional Limitations, supra* note 33, at 323–24 (suggesting that it may be difficult to determine whether novel types of special assessments fall within the limits of exempt special assessment financing at the time of Proposition 13).

[78] See Snyder, *supra* note 33, at 13; WIS. STAT. § 66.60 (Supp. 1985) (including provisions that distinguish between special assessments which represent an exercise of the taxing power and those which represent an exercise of the police power).

[79] *See* City of San Diego v. Holodnak, 157 Cal. App. 3d 759, 203 Cal. Rptr. 797 (1984); J.W. Jones Co. v. City of San Diego, 157 Cal. App.3d 745, 203 Cal. Rptr. 580 (1984).

[80] *See* Diamond, *Constitutional Limits, supra* note 33, at 319–320; Misczinski, *supra* note 33, at 320.

[81] *See* Reams v. City of Grand Junction, 676 P.2d 1189 (Colo. 1984) (special assessment funds may not be diverted for use

for general improvements in event that receipts exceed costs of planned improvements); City of Brookings v. Assoc. Developers, Inc., 280 N.W.2d 97 (S.D. 1979) (city must reduce special assessment levy in light of federal funds received when only "costs" were permissibly recovered). *See also* Diamond, *Constitutional Limits, supra* note 33, at 320, n.53 (suggesting that recapture efforts may run afoul of state constitutional requirements relating to taxation); 14 E. McQuillin, *supra* note 2, § 38.134 (noting that constitutional, statutory, or charter provisions in many states limit assessments to reimbursement of costs). *Cf.* State v. Witten, 54 Ohio St. 2d 412, 377 N.E.2d 505 (1978) (invalidating water tap fee that attempted to recoup "equity value" as an unauthorized tax).

[82] *See, e.g.,* Bern Township Auth. v. Hartman, 60 Pa. Commw. 420, 451 A.2d 567 1982) (upholding use of combined approach to assessment, which incorporated use of front footage formula for some properties and alternative approach for others).

[83] *See* City Council of San Jose v. South, 146 Cal. App. 3d 320, 194 Cal. Rptr. 110 (1983) (upholding use of home rule power as alternative basis for novel special assessment); Moore Funeral Homes, Inc. v. City of Tulsa, 552 P.2d 702 (Okla. 1976) (formation of street improvement district, levy of special assessment, and procedure in doing so were "municipal affairs" not subject to state preemption); Cook v. City of Addison, 656 S.W.2d 650 (Tex. Ct. App. 1983) (upholding reliance on home rule provisions and city charter as basis for novel special assessment procedures).

[84] *Compare* cases cited *supra* note 83 *with* Berry v. Columbus, 104 Ohio St. 607, 136 N.E. 824 (1922) (state legislation governing special assessments controls, notwithstanding contrary provisions of municipal charter). Resolution of this issue is likely to turn on the specific terms of relevant state constitutional provisions. *Cf.* Cohn, *supra,* note 9.

[85] *See, e.g.,* J.W. Jones Co. v. City of San Diego, 157 Cal. App. 3d 745, 203 Cal. Rptr. 580 (1984); 1985 Pa. Laws 1985-47 (authorizing establishment of transportation development districts to undertake development of systems of public highways); TEXAS STAT. ANN. art. 1269j-4.12 (Vernon 1986 Supp.) (authorizing creation of public improvement districts, and commencement of improvement projects including those involving two or more streets or two or more types of improvements in, on, or adjacent to the same street or streets).

[86] *See* City of Ft. Myers v. State, 95 Fla. 704, 117 So. 97 (1928); Quality Homes, Inc. v. Village of New Brighton, 289 Minn. 274, 183 N.W.2d 555 (1971) (several projects permitted, but only if constructed in single year); 14 E. McQuillin, *supra* note 33, § 38.118 (in absence of charter or statutory authority, assessment cannot include two or more separate and distinct improvements).

[87] *See* 1985 Pa. Laws 1985-47 § 2(c) (authorizing assessments for transportation services including the provision of public highway services and salaries and costs associated therewith, and any method by which a municipality maintains public transportation facilities). *See also* OR. REV. STAT. § 223.851 (1985) (assessments for street maintenance, lighting, and cleaning). *But cf.* Barber v. Commn'r of Revenue, 674 S.W.2d 18 (Ky. App. 1984) (fire protection service charge based on flat fee per residence is not special assessment when not a one-time charge).

[88] *See* J.W. Jones Co. v. City of San Diego, 157 Cal. App.3d 745, 203 Cal. Rptr. 580 (1984); Vail v. City of Bandon, 53 Or. App. 133, 630 P.2d 1339 (1981) (upholding higher sewer assessment on unimproved property). *Cf.* Oregon State Homebuilders v. City of Tiganl, 43 Oreg. App. 791, 604 P.2d 586 (1979) (upholding "system development charge" levied on developing property where characterized as a tax).

[89] *See e.g.,* Clayton v. City of Farmington, 102 N.M. 340, 695 P.2d 490 (1985) (may consider reasonable future use). *But see In re* Village of Burnsville Assessments, 287 N.W.2d 375 (Minn. 1979) (holding that municipality may not currently assess for sewer improvements when benefit not likely to be received for 15 to 20 years if at all, but reserving question whether municipality may be able to assess at later date).

[90] *See* 1985 Pa. Laws 1985-47 § 3(a)(2) (authorizing financing of transportation facilities and services by "[i]mposing an assessment on each benefited property within the district using a formula adopted by the governing body of the municipality based upon actual or projected usage of the transportation facilities or services to be financed").

[91] See *infra* at notes 121–185 and accompanying text.

[92] Porter & Smart, *supra* note 1, at 221–222 (describing local practices).

[93] *See e.g.,* City of Brookings v. Associate Developers, Inc., 280 N.W. 2d 97 (S.D. 1979) (city required to reduce total assessment by federal funds received in light of statutory requirement that assessments reflect "cost").

[94] See Misczynski, *supra* note 33, at 329–331 (discussing situations in which local government might wish to assess property owners for benefits accruing from state-federal highway).

[95] *See* 1985 Pa. Laws 1985-47 § 6 ("governing body of any municipality ... may participate in and contribute to the planning, financing, development or improvement of any State highway located within a transportation development district upon terms and conditions agreed upon between the municipality or municipal authority and the Secretary of Transportation").

[96] *See* OR. REV. STAT. §§ 223.207 to .215 (1985).

[97] *Id.* § 223.851.

[98] *Id.* § 223.265.

[99] *See e.g.,* ALASKA STAT. § 29.46.090 (authorizing applications by certain residents, including those 65 years of age or over, for exemption from special water and sewer assessments until property is transferred to party other than spouse, widow, widower, or minor heir, and providing for state payment of assessment and later recoupment of funds at time of nonexempt transfer).

[100] *See* J.W. Jones Co. v. City of San Diego, 157 Cal. App. 3d 745, 203 Cal. Rptr. 580 (1984) (upholding assessment scheme imposing lien on undeveloped property to be paid prior to issuance of building permit); Association of Community Org. for Reform Now (ACORN) v. Florida City, 444 So. 2d 37 (Fla. Dist. Ct. App. 1983) (upholding phased sewer assessment scheme which imposed higher assessment on property owners using sewer system than on those not yet doing so); *In re* Village of Burnsville Assessments, 287 N.W.2d 375 (Minn. 1978) (invalidating sewer assessments on land that would not receive benefit for 15 to 20 years, but reserving question whether assessment could be collected at time of hookup).

[101] *See* Standard City Planning Enabling Act, § 14 (U.S. Dep't of Commerce, 1928) ("Before exercising ... [subdivision control] powers ... the planning commission shall adopt regulations governing the subdivision of land within its jurisdiction.... Such regulations may include provisions as to the extent to which streets and other ways may be graded and improved and to which water and sewer and other utility mains, piping or other facilities shall be installed as a condition precedent to the approval of the plat."); N.C. GEN. STAT. § 160A-372 (Supp. 1985) ("A subdivision control ordinance may provide for the orderly growth and development of the city; for the coordination of streets and highways within proposed subdivision with existing or planned streets and highways and other public facilities; for the dedication or reservation of recreation areas serving residents of the immediate neighborhood within the subdivision or, alternatively for funds to be used to acquire recreation areas serving residents of the development or subdivision or more than one subdivision or development within the immediate area, and rights-of-way or easements for street and utility purposes...."). *See generally* Note, *Platting, Planning and Protection: A Summary of Subdivision Statutes,* 36 N.Y.U. L. REV. 1205 (1961).

[102] For useful general discussions of the legality of subdivision exactions, *see* D. Mandelker, *Land Use Law* 267–272 (1982); D. Mandelker & R. Cunningham, *Planning and Control of Land Development* 512–526 (2d ed. 1985); Bosselman & Stroud, *Mandatory Tithes: The Legality of Land Development Linkage,* 9 NOVA L. J. 381 (1985) [hereinafter cited as Bosselman & Stroud, *Mandatory Tithes*]; Bosselman & Stroud, *Pariah to Paragon: Developer Exactions in Florida 1975-85,* 24 STETSON L. REV. 527 (1985) [hereinafter cited as Bosselman & Stroud, *Developer Exactions*]; Ellickson, *supra* note 33; Heyman & Gilhool, *supra* note 33; Johnston, *Constitutionality of Subdivision Exactions: The Quest for a Rationale,* 52 CORNELL L. Q. 871 (1967) [hereinafter cited as *Subdivision Exactions*]; Note, *Subdivision Exactions: A Review of Judicial Standards,* 25 WASH. U. J. URB & CONTEMP. L. 235 (1983). See also sources cited at note 121 *infra.*

[103] *See e.g.,* N.C. GEN. STAT. § 160A-372 (Supp. 1985), *supra* note 101.

[104] *See e.g.,* Spalding v. Granite City, 415 Ill. 274, 113 N.E.2d 567 (1953); Billings Properties Inc. v. Yellowstone County, 44 Mont. 25, 394 P.2d 182 (1964); Mid-Continent Builders, Inc. v. Midwest City, 539 P.2d 1377 (Okla. 1975); Jordan v. Menomonee Falls, 28 Wis.2d 608, 137 N.W.2d 442 (1965), *appeal dismissed,* 385 U.S. 4 (1966). *See generally* Johnston, *supra* note 102, at 876–85 (discussing "privi-

lege" and related "voluntariness" rationales).

[105] *See* Mandelker, *supra* note 21, at 273; Bedford Township v. Bates, 62 Mich. App. 715, 233 N.W.2d 706 (1975).

[106] *See e.g.,* Petterson v. City of Naperville, 9 Ill.2d 233, 247, 137 N.E.2d 371, 379 (1956) (upholding street paving requirement); Ridgefield Land Co. v. City of Detroit, 241 Mich. 468, 472, 217 N.W. 58, 59 (1928) (upholding street dedication requirement).

[107] *See e.g.,* Lampton v. Pinaire, 610 S.W.2d 915 (Ky. Ct. App. 1981) ("Public policy nevertheless requires that the one who develops his land for a profit also be required to bear the cost of additional public facilities made necessary by the development. Local governments are not obligated to develop private property, and indeed, developers must construct streets and other public improvements in a proper manner in order to hold the local governments maintenance costs to a minimum once the dedicated property has been accepted for public purposes.").

[108] *See e.g.,* N.C. GEN. STAT. § 160A-372 (Supp. 1985) (authorizing local governments to require dedication of recreation areas "serving residents of the immediate area within the subdivision," and specifying that in rem fees for such purposes "be based on the value of the development or subdivision for property tax purposes"); Va. Code tit. 24, § 4417(5) (dedication limited to 15 percent of plat; fees to be used to serve needs of areas surrounding subdivision).

[109] *Compare* Board of Education v. Surety Devel., Inc., 63 Ill.2d 193, 347 N.E.2d 149 (1975) (school dedication and in lieu fee requirements upheld when specifically and uniquely attributable to subdivision); Jenad, Inc. v. Village of Scarsdale, 18 N.Y.2d 78, 218 N.E.2d 673, 271 N.Y.S.2d 955 (1966) (authority for in lieu park fees implied under subdivision statute); Call v. City of West Jordan, 606 P.2d 217 (Utah 1979) (authority for parkland dedication and in lieu fee requirements provided by zoning enabling legislation), *on rehearing* 614 P.2d 1257 (Utah 1980); *and* Jordan v. Village of Menomonee Falls, 28 Wis.2d 608, 137 N.W.2d 442 (1965), *appeal dismissed,* 385 U.S. 4 (1966) *with* City of Montgomery v. Crossroads Land Co., 355 So. 2d 363 (Ala. 1978) (in lieu fees for recreation not authorized by subdivision statute authorizing land dedication requirement); Rosen v. Village of Downers Grove, 19 Ill. 2d 448, 167 N.E.2d 230 (1960) (no authority under subdivision control statute for fee to cover school construction costs); Coronado Development Co., Inc. v. City of McPherson, 189 Kan. 174, 368 P.2d 51 (1962) (parkland dedication requirement not authorized by planning and zoning enabling statutes); Komhi v. Planning Bd. of Yorktown, 59 N.Y.2d 385, 452 N.E.2d 1193, 465 N.Y.S.2d 865 (1983) (parkland dedication not authorized under cluster development statute); *and* West Part Ave., Inc. v. Township of Ocean, 48 N.J. 122, 224 A.2d 1 (1966) (no authority under subdivision control statute for fee to be used for educational purposes).

[110] Many commentators have suggested that three different approaches exist: (1) uniquely and specifically attributable, (2) reasonable relationship, and (3) rational nexus tests. *See, e.g.,* Gougelman, *Impact Fees: National Perspectives to Florida Practice: A Review of Mandatory Land Dedications and Impact Fees that Affect Land Developments,* 4 Nova L.J. 137 (1980); Juergensmeyer & Blake, *Impact Fees: An Answer to Local Governments' Capital Funding Dilemma,* 9 FLA. ST. U. L. REV. 415 (1981). Other commentators have primarily focused on the rational nexus approach which has achieved dominance in this area. *See* Bosselman & Stroud, *Mandatory Tithes, supra* note 102, at 397.

[111] *See* Pioneer Trust and Sav. Bank v. Village of Mount Prospect, 22 Ill. 2d 375 176 N.E.2d 799 (1961) (parkland and school site dedication requirements). *See also* Aunt Hack Ridge Estates, Inc. v. Planning Comm'n of Danbury, 27 Conn. Supp. 74, 230 A.2d 45 (1967) (park dedication requirements); Krughoff v. City of Naperville, 68 Ill. 2d 352, 369 N.E.2d 892 (1977) (park and school site dedication requirements); Schwing v. City of Baton Rouge, 240 So. 2d 304 (La. App.) (road widening), *cert. denied,* 252 So.2d 667 (La. 1971); Frank Ansuini v. City of Cranston, 107 R.I. 63, 264 A.2d 910 (1970) (recreation land dedication requirements).

[112] *See* Ayres v. City Council of Los Angeles, 34 Cal. 2d 31, 207 P.2d 1 (1949). Some scholars have described *Ayres* as adopting a rational nexus approach. *See* Mandelker, *supra* note 21, at 269.

[113] *See, e.g.,* Associated Home Builders of Greater East Bay v. City of Walnut Creek, 4 Cal. 3d 633, 484 P.2d 606, 94 Cal. Rptr. 630 (1971) Billings Properties, Inc. v. Yellowstone County, 144 Mont. 25, 394 P.2d 182 (1964); Land/Vest Properties, Inc. v. Town of Plainfield, 117 N.H. 817, 379 A.2d 200 (1977); City of College Station v. Turtle Rock Corp. 680 S.W.2d 802 (Tex. 1984); Call v. City of West Jordan, 606 P.2d 217 (Utah 1979); Jordan v. Village of Menomonee Falls, 28 Wis. 2d 602, 137 N.W.2d 442 (1965). *See generally* Bosselman & Stroud, *Mandatory Tithes, supra* note 102, at 397–404.

[114] *See, e.g.,* Land/Vest Properties, Inc. v. Town of Plainfield, 117 N.H. 817, 379 A.2d 200 (1977); City of College Station v. Turtle Rock Corp., 680 S.W.2d 802 (Tex. 1984); Jordan v. Village of Menomonee Falls, 28 Wis. 2d 602, 137 N.W.2d 442 (1965).

[115] *See e.g.,* Billings Properties, Inc. v. Yellowstone County, 144 Mont. 25, 394 P.2d 182, 187–88 (1964); Divan Builders, Inc. v. Planning Board, 66 N.J. 582, 334 A.2d 30 (1975); Call v. City of West Jordan, 606 P.2d 217 (Utah 1979), *on rehearing,* 614 P.2d 1257 (Utah 1980).

[116] *See, e.g.,* Los Angeles County v. Margulis, 6 Cal. App. 2d 57, 44 P.2d 608 (1935) (improvement of dedicated roads required); Ridgefield Land Co. v. City of Detroit, 241 Mich. 468, 217 N.W. 58 (1928) (road improvements and dedication required); City of Bellfontaine Neighbors v. J.J. Kelly Realty & Bldg. Co., 460 S.W.2d 298 (Mo. App. 1970) (road improvements required); Brous v. Smith, 304 N.Y. 164, 106 N.E.2d 503 (1952) (access improvements required); Township of Hampden v. Tenny, 32 Pa. Commw. 301, 379 A.2d 635 (1977) (road improvements required). *But see* Schwing v. City of Baton Rouge, 249 So.2d 304 (La. App. 1971) (requirement of 50-ft on-site right-of-way constitutes an unconstitutional taking); Howard County v. JJM, Inc., 301 Md. 256, 482 A.2d 908 (1984) (requirement of right-of-way for state highway failed to satisfy rational nexus test).

[117] *Compare* Ayres v. City Council of Los Angeles, 34 Cal. 2d 31, 207 P.2d 1 (1949) (requiring dedication of right-of-way) *and* Lampton v. Pinaire, 610 S.W.2d 915 (Ky. Ct. App. 1980) (approving street dedication requirement in principle but remanding for determination whether anticipated future traffic burden necessitated dedication of added right-of-way along existing abutting street) *with* 181 Inc. v. Salem County Planning Bd., 133 N.J. Super. 315, 336 A.2d 501 (insufficient nexus between widening of adjacent road and anticipated traffic demand generated by subdivision), *affirmed,* 140 N.J. Super. 247, 356 A.2d § 4 (1976); Coates v. Planning Board, 58 N.Y.2d 800, 445 N.E.2d 642, 459 N.Y.S.2d 259 (N.Y.1983) (no nexus found).

[118] *Compare* Land/Vest Properties, Inc. v. Town of Plainfield, 117 N.H. 817, 379 A.2d 200 (1977) in which the court upheld the requirement that off-site access roads be improved to extent of developer's proportionate share, *with* cases in which the courts found no authority under subdivision control statute for requirement that off-site roads be improved, *see, e.g.,* Arrowhead Development Co. v. Livingston County Rd. Comm'n. 413 Mich. 505, 322 N.W.2d 702 (1982); Briar West Inc. v. City of Lincoln, 206 Neb. 172, 291 N.W.2d 730 (1980); McKain v. Toledo City Plan Comm'n, 26 Ohio App. 2d 171, 270 N.E.2d 370 (1971); Cupp v. Bd. of Supervisors, 227 Va. 580, 318 S.E.2d 407 (1984); Hylton Enterprises v. Bd. of Supervisors, 220 Va. 435, 258 S.E.2d 577 (1979).

[119] *See generally* Schultz & Kelley, *Subdivision Improvement Requirements and Guarantees: A Primer,* 28 WASH. U. J. URB & CONTEMP. L. 3, 33–38 (1985).

[120] *Id.* at 42-106.

[121] *See* Juergensmeyer & Blake, *Impact Fees: An Answer to Local Governments Capital Funding Dilemma,* 9 FLA. ST. U. L. REV. 415, 417 (1981). For useful general discussions of the legality of impact fees, *see* D. Mandelker, *Land Use Law,* 272–273 (1982); D. Mandelker & R. Cunningham, *Planning and Control of Land Development,* 526–532 (2d ed. 1985); T. Snyder & M. Stegman, *Paying for Growth: Using Development Fees to Finance Infrastructure* (1986); Bosselman & Stroud, *Pariah to Paragon, supra* note 103; Connelly, *Road Impact Fees Upheld in Noncharter County,* 58 FLA. B. J. 54 (1984); Currier, *Legal and Practical Problems Associated with Drafting Impact Fee Ordinances,* Inst. for Plan., Zoning & Eminent Domain 273 (1984); Gougelman, *Impact Fees: National Perspectives to Florida Practice: A Review of Mandatory Land Dedications and Impact Fees that Affect Land Developments,* 4 NOVA L.J. 137 (1980); Sheen, *Development Fees: Standards to Deter-*

mine Their Reasonableness, 1982 UTAH L. REV. 549; Snyder, *The Legal Issues of Serving New Development,* 11 Carolina Planning 12 (No. 2, Winter 1985); Jacobsen & Redding, *Impact Taxes: Making Development Pay Its Way,* 55 N.C.L. REV. 407 (1977).

[122] *See, e.g.,* Homebuilders & Contractors Ass'n of Palm Beach County, Inc. v. Board of County Comm'rs. 446 So. 2d 140 (Fla. Dist. Ct. App. 1984) (upholding road impact fee as regulatory fee rather than tax, after applying police power standards).

[123] *See, e.g.,* City of Montgomery v. Crossroads Land Co., 355 So. 2d 363 (Ala. 1978); Town of Longboat Key v. Lands End, Ltd; 433 So. 2d 574 (Fla. Ct. App. 1983); Broward County v. Janis Development Corp., 311 So. 2d 371 (Fla. Ct. App. 1975); Strahan v. Aurora, 38 Ohio Misc. 37, 311 N.E.2d 876 (1973); Hillis Homes, Inc. v. Snohomish County, 97 Wash. 2d 804, 650 P.2d 193 (1982) (superceded by statute discussed at notes 137 and 138, as discussed in Ivy Club Investors v. City of Kennewick, 40 Wash. App. 524, 699 P. 2d 782 (1985).

[124] *See* Bosselman & Stroud, *Developer Exactions, supra* note 102, at 540–553. *See generally* Pelham, Hyde & Banks, *Managing Florida's Growth: Toward an Integrated State, Regional and Local Comprehensive Planning Process,* 13 FLA. ST. U.L. REV. 515 (1985). Prior to the enactment of this legislation, local governments had relied on home rule authority to levy impact fees. *See* Home Builders & Contractors Ass'n of Palm Beach v. Board of County Comm'rs, 446 So. 2d 140 (Fla. Ct. App. 1984) (non-charter county has power to levy road impact fees under state planning and development control statutes); Hollywood, Inc. v. Broward County, 431 So. 2d 606 (Fla. Dist. Ct. App. 1983) (home rule county with charter had power to levy park impact fees); *cert denied,* 440 So. 2d 352 (Fla. 1983). *See generally* Jergensmeyer & Blake, *supra* note 121.

[125] *See* FLA. STAT. §§ 163.3177, 163.3202(g) (Supp. 1985).

[126] Id. § 163.3202(3).

[127] Id. § 380.06.

[128] *Id.* § 380.06(15).

[129] *Id.* §§ 380.06(15)(d), 380.06(16).

[130] CAL. GOVT. CODE § 66484 (West 1985). California has also adopted legislation authorizing the creation of community facilities districts as a means of financing various facilities (including those for recreation, school, library, and utility purposes) and services (including those for police, fire, recreation and flood and storm protection purposes). *See, e.g.,* CAL. GOVT. CODE § 53311–27 (West Supp. 1985) (Mello-Ross Community Facilities Act of 1982, as amended). Although these statutory provisions more closely resemble a special tax district scheme than an impact fee scheme, certain features might be adopted for incorporation into impact fee legislation.

[131] *Id.* at § 66484(a)(3), (a)(6). *See also supra* note 79 and accompanying text for a discussion of the San Diego ordinance.

[132] *See* CAL. GOVT. CODE § 66484.3 (West Supp. 1985).

[133] American Planning Association, *Zoning News* 3 (July 1985).

[134] *See* Law of July 8, 1986, ch. 936, 1986 N.C. Sess. Laws __ (Chapel Hill and Hillsborough); Law of June 28, 1985, ch. 498, 1985 N.C. Sess. Laws 555–60 (Raleigh), Law of June 7, 1985, ch. 357, 1985 N.C. Sess. Laws 294, 294–97 (Carrboro).

[135] *See* N. J. REV. STAT. § 40:55D–42.

[136] *Id.*

[137] *See* WASH. REV. CODE § 82.02.020.

[138] *Id.*

[139] *See* Marrelli v. City of St. Clair Shores, 355 Mich. 575, 96 N.W. 2d 144 (1959) (excessive building permit fee not authorized); Daniels v. Borough of Point Pleasant, 23 N.J. 357, 129 A.2d 265 (1957); Weber Basin Home Builders Ass'n v. Roy City, 26 Utah 2d 215, 487 P. 2d 866 (1971) (same).

[140] *See* Divan Builders, Inc. v. Planning Board, 66 N. J. 582, 334 A.2d 30 (1975) (implied authority existed under subdivision statute to levy charge to cover drainage improvements); Home Builders Association of Greater Salt Lake City v. Provo, 28 Utah 2d 402, 503 P.2d 451 (1972) (sewer connection fee authorized under statute empowering local governments to make sewer charge); Coulter v. City of Rawlins, 662 P.2d 888 (Wyo. 1983) (authority for water and sewer impact fee provided by statute empowering local government to regulate system of water and sewer, and under zoning enabling legislation authorizing efforts to facilitate adequate provision for transportation, water, sewage, and other needs).

[141] *See* City of Montgomery v. Crossroads Land Co., 355 So. 2d 363 (Ala. 1978) (in lieu fees for recreation not authorized by subdivision statute authorizing land dedication requirement); Rosen v. Village of Downers Grove, 19 Ill. 2d 448, 167 N.E.2d 230 (1960) (no authority under subdivision control statute for fee to cover school construction costs); Coronado Development Co. v. City of McPherson, 189 Kan. 174, 368 P.2d 51 (1962) (subdivision control and zoning statutes did not authorize in lieu fees for parks); West Part Ave., Inc. v. Township of Ocean, 48 N.J. 122, 224 A.2d 1 (1966) (no authority under subdivision control statute for requirement that off-site roads be improved); Komhi v. Planning Bd. of Yorktown, 59 N.Y.2d 385, 452 N.E.2d 1193, 465 N.Y.S.2d 865 (1983) (park land dedication not authorized under cluster development statute).

[142] *See* Arrowhead Development Co. v. Livingston County Rd. Comm'n 413 Mich. 505, 322 N.W.2d 702 (1982) (no authority under subdivision control statute for requirement that off-site roads be improved); Briar West Inc. v. City of Lincoln, 206 Neb. 172, 291 N.W.2d 730 (1980); McKain v. Toledo City Plan Comm'n, 26 Ohio App. 2d 171, 270 N.E.2d 370 (1971); Hylton Enterprises v. Bd. of Supervision, 220 Va. 435, 258 S.E.2d 579 (1979).

[143] *See, e.g.,* Sanchez v. City of Santa Fe, 82 N.M. 322, 481 P.2d 401 (1971) (no authority under subdivision control statute for per lot fee when fee not expressly authorized).

[144] *See, e.g.,* City of Montgomery v. Crossroads Land Co., 355 So. 2d 363 (Ala. 1978) (in lieu fee is tax that requires specific statutory authority); Home Builders' Ass'n v. Riddell, 109 Ariz. 404, 510 P.2d 376 (1973) (no authority for parks and recreation facility tax ordinance absent express enabling legislation; Hillis Homes, Inc. v. Snohomish County, 97 Wash. 2d 804, 650 P.2d 193 (1983) (no authority for parks, schools and fire protection fee absent express enabling legislation) (superceded by WASH. REV. CODE § 82.02.020).

[145] *See* Home Builders and Contractors Ass'n of Palm Beach County, Inc. v. Board of County Comm'rs, 446 So. 2d 180 (Fla. Dist. Ct. App. 1984) (home rule authority of non-charter county enables government to adopt impact fee for road construction purposes); Contractors and Builders Ass'n of Pinellas County v. City of Dunedin, 329 So. 2d 314 (Fla. 1976) (authority to impose municipal water and sewer connection fee implied from home rule authority); *cert. denied,* 444 U.S. 867 (1979). *Cf.* City of College Station v. Turtle Rock Corp., 680 S.W.2d 802 (Tex. 1984) (authority to impose park system in lieu fee available under home rule provision. *But cf.* Middlesex & Boston State R. Co. v. Board of Alderman of Newton, 371 Mass. 849, 359 N.E.2d 1279 (1977) (requirement that developer include set number of low income units in apartment project invalidated as unauthorized by home rule provision or zoning enabling legislation; zoning legislation was later amended to permit density bonuses to be given in return for including such units, *see* Mass. Gen. Laws Ann., ch. 40A, § 9 (1985)).

[146] *See, e.g.,* Coulter v. City of Rawlins, 662 P.2d 888 (Wyo. 1983) (clause in Wyoming home rule provision states that the legislature shall prescribe "levying of taxes, excises, fees, or any other changes"; city therefore required to rely upon statutory authority to support water and sewer impact fees).

[147] *See* Note, *Subdivision Exactions in Washington: The Controversy Over Imposing Fees on Developers,* 59 WASH. L. REV. 289,300 (1984) (Washington legislation authorizing imposition of development fees under certain circumstances affords municipalities only limited powers despite constitutional home rule provision). *Cf.* Pines v. City of Santa Monica, 29 Cal. 3d 656, 630 P.2d 521, 175 Cal. Rptr. 336 (1981) (municipal tax on condominium conversion was not preempted by state subdivision map act).

[148] *Compare* Hollywood, Inc. v. Broward County, 431 So. 2d 606 (Fla. Dist. Ct. App.) (charter provides authority for park dedication or in lieu fee ordinance), *cert. denied,* 440 So. 2d 352 (Fla. 1983) *with* Admiral Development Corp. v. City of Maitland, 267 So.2d 860 (Fla. Dist. Ct. App. 1972) (charter did not authorize park and recreation dedication requirement).

[149] *See e.g.,* Call v. City of West Jordan, 606 P.2d 217 (Utah 1979) *on rehearing* 614 P.2d 1257 (Utah 1980) (applying rational nexus test to park and drainage fees, but remanding so that developer could submit evidence on applicability under specific facts). *But see* McLain Western No. 1 v. County of San Diego, 146 Cal. App. 3d 772, 194 Cal. Rptr. 594 (1983) (applying very lax test to uphold interim school facilities fee to adult recreational and retirement complex which included only three children).

[150] *See* Broward v. Janis Development Co., 311 So. 2d 371 (Fla. Dist. Ct. App. 1975) (road impact fee failed to satisfy rational nexus test).

[151] 329 So.2d 314 (Fla. 1976), *cert. denied,* 444 U.S. 867 (1979).

[152] *Id.* at 317–20.

[153] Hollywood, Inc. v. Broward County, 431 So. 2d 606 (Fla. Dist. Ct. App.), *cert. denied,* 440 So.2d 352 (Fla. 1983).

[154] Homebuilders and Contractors Ass'n v. Palm Beach County, 446 So.2d 140 (Fla. Dist. Ct. App. 1983).

[155] *See* Hollywood, Inc. v. Broward County, 431 So. 2d 606 (Fla. Dist. Ct. App.) (upholding park fee requirements when needs of current population were being met pursuant to recent bond issue), *cert denied,* 440 So.2d 352 (Fla. 1983).

[156] *See* CAL. GOVT. CODE § 66484(a)(4) (West Supp. 1985) (requiring that ordinance imposing fees provide that payment not be required "unless the major thoroughfares are in addition to, or a reconstruction of, any existing major thoroughfares serving the area at the time of the adoption of the boundaries of the area of benefit"); *Dunedin,* 329 So. 2d 314 (Fla. 1976) (invalidating water and sewer impact fee where filed to earmark funds for new facilities), *cert. denied,* 444 U.S. 867 (1979).

[157] *See supra* note 118.

[158] Home Builders & Contractors Ass'n of Palm Beach v. Palm Beach County, 446 So. 2d 140 (Fla. Dist. Ct. App. 1983).

[159] *Id.*

[160] *See* Broward County v. Janis Development Co., 311 So. 2d 371 (Fla. Dist. Ct. App. 1975).

[161] American Planning Association, *Zoning News* 3 (Oct. 1985) (describing Los Angeles traffic impact fees based on trip generation notes associated with various types of uses); American Planning Association, *Zoning News* 3 (July 1985) (describing Orange County, California, ordinance based on computer simulations).

[162] *See* Banberry Development Corp. v. South Jordan City, 631 P.2d 899 (Utah 1981).

[163] *Id.;* Hollywood, Inc. v. Broward County, 431 So. 2d 606 (Fla. Dist. Ct. App.), *cert. denied,* 440 So. 2d 352 (Fla. 1983).

[164] *See,* T. Snyder & M. Stegman, *supra* note 121, at 104–115.

[165] *See* City of Arvada v. City and County of Denver, 663 P.2d 611 (Colo. 1983); White Birch Realty Corp. v. Gloucester Township Mun. Util. Auth., 80 N.J. 165, 402 A.2d 927 (1979); Coulter v. City of Rawlins, 662 P.2d 888 (Wyo. 1983).

[166] Land/Vest Properties, Inc. v. Town of Plainfield, 117 N.H. 817, 379 A.2 200 (1977) (discussing off-site road improvement requirements).

[167] Banberry Development Corp. v. South Jordan City, 631 P.2d 899 (Utah 1981).

[168] *See* CAL. GOVT. CODE §§ 66485–66486. (West Supp. 1985) (authorizing excess capacity subdivision exaction requirements and appropriate reimbursement by local government); Fla. Stat. § 380.06 (16)(c) (Supp. 1985) (authorizing local governments and developers to enter into "front-ending" agreements as part of development-of-regional-impact development order, in order to reimburse developer or successor in interest for contributions paid in excess of fair share).

[169] *Compare* Lafferty v. Payson City, 642 P.2d 376 (Utah 1982) (impact fee illegal tax when deposited in general fund) *and* Amherst Builders Ass'n v. City of Amherst, 61 Ohio St.2d 345, 402 N.E.2d 1181 (1980) (sewer tap-in charge must be segregated into separate fund) *with* Call v. City of West Jordan, 606 P.2d 217, *on rehearing,* 614 P.2d 1257 (Utah 1980) (parkland and flood control fees deposited in general fund effectively held in trust for purposes for which collected) *and* City of Arvada v. City and County of Denver, 663 P.2d 611 (Colo. 1983) (water system fees permissible when "obviously intended for use in connection with water system").

[170] Town of Longboat Key v. Lands End, Ltd., 433 So. 2d 574 (Fla. Dist. Ct. App. 1983) (fee system invalidated when no clear restrictions on use of fees).

[171] Home Builders & Contractors Ass'n of Palm Beach v. Commissioners of Palm Beach County, 446 So. 2d 140 (Fla. Dist. Ct. App. 1984).

[172] Hollywood, Inc. v. Broward County, 431 So. 2d 606 (Fla. Ct. App.), *cert denied,* 440 So. 2d 352 (Fla. 1983).

[173] City of Fayetteville v. IBI, Inc., 280 Ark. 484, 659 S.W.2d 505 (1983) (park fee invalidated where no clear plan for when park developments would occur); Broward County v. Janis Dev. Co., 311 So. 2d 371 (Fla. Dist. Ct. App. 1975) (invalidating road fee where no specifics on where or when funds would be expended); WASH. REV. CODE § 82.02.020 (in lieu fee to be expended or repaid within 5 years).

[174] City of Fayetteville v. IBI, Inc., 280 Ark. 484, 659 S.W.2d 505 (1983) (park fee invalidated when no clear plans for park development).

[175] Sewer impact fees are generally levied on all developments seeking connection. *See, e.g.,* White Birch Realty Corp v. Gloucester Township Mun. Util. Auth., 80 N.J. 165, 402 A.2d 927 (1979); Hayes v. City of Albany, Or. App. 277, 490 P.2d 1018 (1971).

[176] *Cf.* Wald Corp. v. Metropolitan Dade County, 338 So. 2d 863, 867 (Fla. Dist. Ct. App. 1976) (upholding dedication requirement imposed on subdividers but not on owners of single tracts).

[177] Fla. Stat. § 380.06 (15)(e)(1) (Supp. 1985). Even when all developments are covered, however, it is necessary to take into account individual differences in impact. *See* Bldg Ind. Ass'n of S. Cal. v. City of Oxnard, 198 Cal. Rptr. 63 (1984) (invalidating growth requirement capital fee levied on all new developments based on property value, on grounds that fee was tax which failed to consider relative impact each new project had on need for additional public facilities).

[178] *See* T. Snyder & M. Stegman, *supra* note 121, at 206–215 (discussing procedure for setting road impact fees).

[179] *See* Call v. City of West Jordan, 606 P.2d 217 (Utah 1979), *on rehearing,* 614 P.2d 1257 (Utah 1980) (cannot require both payment of in lieu fee and dedication for park facilities, but may require specific on-site drainage improvements as well as fee for drainage control that may be undertaken off-site).

[180] *See* City of Arvada v. City and County of Denver, 663 P.2d 611 (Colo. 1983) (upholding sewer connection fee imposed only on new users); Ivy Steel and Wire Co. v. City of Jacksonville, 401 F. Supp. 701 (M.D. Fla. 1975) (no equal protection violation when water pollution control charge imposed only on those connecting to city sewer system after a set date); Winney v. Board of Comm'rs, 174 Ind. App. 624 369 N.E.2d 661 (1977) (sewer tap-in fees may vary over time); Hayes v. City of Albany, 490 P.2d 1018 (Or. 1971) (upholding sewer connection fee when proceeds used for development and maintenance of sewer system used by both old and new users).

[181] *See* Banberry Developer Corp. v. South Jordan City, 631 P.2d 899, (Utah 1981). *See e.g.,* T. Snyder & M. Stegman, *supra* note 121, at 53–60, 87–121; Ellickson, *supra* note 33, at 454; Heyman & Gilhool, *supra* note 33 at 1142; Snyder, *supra* note 121, at 18–20.

[182] *See, e.g.,* American Planning Association, *Zoning News* 3 (July 1985) (Orange County, California, road impact fees impose between 54 and 67 percent of highway costs on developers).

[183] Home Builders & Contractors Ass'n of Palm Beach v. Board of County Comm'rs of Palm Beach County, 446 So. 2d 140 (Fla. Dist. Ct. App. 1984) (cost of roads to exceed fees by more than 85 percent); Hollywood, Inc. v. Broward County, 431 So.2d 606 (Fla. Dist. Ct. App. 1983) (park fees much less than required to maintain parkland standard), *cert. denied,* 440 So. 2d 352 (Fla. 1983).

[184] Hollywood, Inc v. Broward County, 431 So.2d 606, 611, n.6 (Fla. Dist. Ct. 1983), *cert. denied,* 440 So. 2d 352 (Fla. 1983).

[185] *See* Standard Zoning Enabling Act § 7 (U.S. Dept of Commerce 1926), reprinted in *American Land Institute Model Land Development Code,* Tentative Draft No.1 at 210 (1968).

[186] *Cf.* South East Property Owners & Residents Ass'n v. City Plan Comm'n, 156 Conn. 587, 244 A.2d 394 (1968) (variance relief from subdivision control requirements invalid in absence of statutory authority); Garden State Homes, Inc. v. Heusner, 60 A.D.2d 703, 400 N.Y.S.2d 598 (1977) (rules governing zoning area variances not applicable to subdivision control area variances); Arrigo v. Planning Board, 12 Mass. App. 802, 429 N.E.2d 355 (1981) (variance in frontage requirements permissible under subdivision law); D. Mandelker, *supra* note 21, at 267 (1982).

[187] *See* Committee of Seven Thousand (C.O.S.T.) v. City of Irvine, 176 Cal. App. 3d 275, 221 Cal. Rptr. 616 (1985), *review granted* (1986).

[188] Legislation authorizing the adopting of local fee ordinances may specifically mandate pre-adoption notice and hearing opportunities. *See, e.g.,* CAL. GOVT. CODE § 66484 (West Supp. 1985).

[189] Administrative appeals may also be authorized in connection with the application of general ordinance requirements to an individual developer. *See* Law of June 7, 1985, ch. 357, 1985 N.C. Sess. Laws 294.

[190] *See* American Planning Association, ***Zoning News*** 3 (Oct. 1985) (discussing

Los Angeles traffic impact fee system that allows alternative financing arrangements). *See generally* Shultz & Kelley, *supra* note 119.

[191] *See e.g.*, Wright Development v. City of Mountain View, 53 Cal. App.3d 274, 125 Cal. Rptr. 723 (1975) (refund of recreation facility fees paid when condominium project never completed); S. S. & O. Corp. v. Township of Bernard Sewage Auth., 62 N.J. 369, 301 A.2d 738 (1973) (sewage assessment may need to be refunded when development fails before significant expenditures commenced); City of Arvada v. City and County of Denver, 663 P.2d 611 (Colo. 1983) (illegal fee to be refunded to payers, absent evidence that costs passed on); Ves Carpenter Contractors Inc. v. City of Dania, 422 So. 2d 342 (Fla. Dist. Ct. App. 1982) (restitution may be granted when illegal impact fees were paid under coercion).

[192] *See* Rose, *Planning and Dealing: Piecemeal Land Controls as a Problem of Local Legitimacy*, 71 CALIF. L. REV. 839 (1983). For a recent and comprehensive analysis of the legal issues raised by the types of land use deals considered in this section, see Wegner, *Moving Toward the Bargaining Table-Contract Zoning, Development Agreements, and the Theoretical Foundations of Government Land Use Deals*, 65 N.C. L. REV. (June 1987).

[193] See Lieberman, *Contract and Conditional Zoning: A Judicial and Legislative Review*, 40 Urban Land 10 (Nov. 1981). For general discussions of contract and conditional zoning, *see, e.g.*, R. Anderson, 2 American Law of Zoning §§ 9.20–9.21 (1976); D. Mandelker, *supra* note 21 at 179–182 (1982); D. Mandelker & R. Cunningham, *Planning and Control of Land Development*, 448–451 (2d ed. 1985); N. Williams, *American Land Planning Law* §§ 29.01–29.04; Frelich & Quinn, *Effectiveness of Flexible and Conditional Zoning—What They Can and Cannot Do For Our Cities*, Inst. on Plan. Zoning, and Eminent Domain 167 (1978); Kramer, *Contract Zoning—Old Myths and New Realities*, 34 LAND USE L. & ZONING DIG. 4 (Aug. 1982); Rhodes, Lewis, & Houser, *Contract & Conditional Zoning: The Not So Dubious Distinction*, 56 FLA. BAR J. 263 (1982); Sharpiro, *The Case for Conditional Zoning*, 41 TEMPLE L.Q. 267 (1968); Comment, *The Use and Abuse of Contract Zoning*, 12 UCLA L. REV. 897 (1965); Note, *Contract and Conditional Zoning: A Tool for Zoning Flexibility*, 23 HASTINGS L.Q. 825 (1972) [hereafter cited as Note, *A Tool for Zoning Flexibility*] Note, *Concomitant Agreement Zoning: An Economic Analysis*, 1985 U. ILL. L. REV. 89 (1985) [hereinafter cited as Note, *Concomitant Agreement*]. A recent device, the conditional variance, has been used to impose especially tailored requirements in connection with the grant of a variance from land use ordinance requirements. *See* Mandelker, *supra* note 21, at 172.

[194] The term "contract zoning" has been variously defined as including those situations "in which the property owner provides consideration to the local governing body in the form of an enforceable promise to do or not to do a certain thing in regard to his property in return for the zoning legislation which he seeks or an enforceable promise by the city for such legislation," Note, *A Tool for Zoning Flexibility, supra* note 193, at 831, or as "the undertaking of reciprocal obligations with respect to a zoning amendment of a property owner and the zoning authority," Note, *The Validity of Conditional Zoning: A Florida Perspective*, 31 U. FLA. L. REV. 968, 971 (1979) [hereinafter cited as Note, A Florida Perceptive]. "Conditional zoning" has been defined as including "situations[s] in which a zoning ordinance is passed upon condition that a landowner perform a certain act prior to, simultaneously with, or after the passage of the zoning ordinance," Note, *A Tool for Zoning Flexibility, supra* note 193, at 831, or as those "in which the zoning authority obtains the property owner's commitment to subject the property to certain regulations as a prerequisite to approval of a rezoning petition," Note, *A Florida Perceptive, supra*, at 971. Some commentators have objected to this type of classification system as involving "little more than a semantic game" that "sheds more heat than light." Kramer, *supra* note 193, at 4. Others have described the cases as involving bilateral and unilateral contracts, rather than relying on the contract/conditional zoning dichotomy. *See* Mandelker, *supra* note 21, at 179–182.

[195] *See* Village of Euclid v. Ambler Realty, 272 U.S. 365 (1926).

[196] *See e.g.*, Hartnett v. Austin, 93 So.2d 86 (Fla. 1956); V.H. Vahodiakin Engineering Corp. v. Zoning Board of Adjustment, 8 N.J. 386, 86 A.2d 127 (1952); Baylis v. City of Baltimore, 219 Md. 164. 148 A.2d 429 (1959).

[197] *See* Stone v. Mississippi, 101 U.S. 814 (1880).

[198] *See* Nolan v. City of Taylorville, 95 Ill. App.3d 1099, 420 N.E.2d 1037 (1981) (special favors); Andrus v. Village of Flossmoor, 15 Ill. App.3d 655, 304 N.E.2d 700 (1973) (same); Allred v. City of Raleigh, 277 N.C. 530, 178 S.E.2d 432 (1971) (same); Oury v. Greany, 107 R.I. 427, 267 A.2d 700 (1970) (same); City of Redmond v. Keyner, 10 Wash. App. 332, 517 P.2d 625 (1973) (upholding arrangement but expressing concern regarding potential overreaching).

[199] *See* Hartman v. Buckson, 467 A.2d 694 (Chanc. Ct. Del. 1983); City of Knoxville v. Ambrister, 196 Tenn. 1, 263 S.W.2d 528 (1953); City of Farmers Branch v. Harvnco, Inc. 435 S.W.2d 288 (Tex. Civ. App. 1968).

[200] *See* Midtown Properties, Inc. v. Madison, 68 N.J. Super. 197, 172 A.2d 40, *aff'd per curiam*, 78 N.J. Super. 471, 189 A.2d 226 (1963).

[201] *See e.g.*, Transamerica Title Ins. Co. v. City of Tuscon, 23 Ariz. App. 385, 533 P.2d 693 (1975) (conditional zoning legitimate so long as conditions reasonably conceived, but invalid where excess requirements imposed); Scrutton v. County of Sacramento, 275 Cal. App.2d 412, 79 Cal. Rptr. 872 (1969) (upholding rezoning agreement imposing road improvement obligations); King's Mill Homeowners' Ass'n v. City of Westminster, 192 Colo. 306, P.2d 1186 (1976) (upholding contingent zoning); Cross v. Hall County, 235 S.E.2d 379 (Ga. 1977) (upholding contingent zoning which included road improvement condition); Collard v. Incorporated Village of Flower Hill, 52 N.Y.2d 594, 421 N.E. 2d 818, 439 N.Y.S.2d 326 (1981) (upholding contingent zoning).

[202] *See* Scrutton v. County of Sacramento, 275 Cal. App.2d 412, 79 Cal. Rptr. 872 (1969); Cross v. Hall County, 238 Ga. 709, 235 S.E.2d 379 (1977). McClain v. City of Hazel Park, 357 Mich. 459, 98 N.W.2d 560 (1959); Collard v. Incorporated Village of Flower Hill, 52 N.Y.2d 594, 421 N.E.2d 818, 439 N.Y.S.2d 326 (1981); Church v. Town of Islip, 168 N.E.2d 680 203 N.Y.S.2d 866 (1960); State ex rel Zupaniac v. Schimenz, 46 Wis.2d 22, 174 N.W.2d 533 (1970).

[203] *See* Sweetman v. Town of Cumberland, 117 R. I. 134, 364 A.2d 1277 (R.T. 1976).

[204] *See* Kramer, *supra* note 193. Writing in 1982, the author cited 10 states as following a per se rule of validity or invalidity, although the majority of the states cited had cases both upholding and invalidating contingent zoning given particular facts; the remaining states were described as "schizophrenic" (with cases viewed as inconsistent), or "muddy waters" states (with cases that had not "definitively" upheld conditional zoning), or were found not yet to have addressed the issue.

[205] *See* Suski v. Maynor of Beach Haven, 132 N.J. Super. 158, 333 A.2d 25 (1975) (per curiam); County of Ada v. Walter, 96 Idaho 630, 533 P.2d 1199 (1975).

[206] *See* Scrutton v. County of Sacramento, 275 Cal. App.2d 412, 79 Cal. Rptr. 872 (1969); Baylis v. City of Baltimore, 219 Md. 164, 148 A.2d 429 (1954); Hausmann & Johnson, Inc. v. Berea Bd. of Bldg. Code App., 40 Ohio App.2d 432, 320 N.E.2d 685 (1974). *But see*, Konkel v. Common Council, 68 Wis. 2d 574, 229 N.W.2d 606 (1975) (reserving question); Colwell v. Howard County, 31 Md. App. 8, 354 A.2d 210 (1976) (permitting reversion feature where generally applicable).

[207] *See* Michem v. City of Santa Fe, 96 N.M. 668, 634 P.2d 690 (1981) (invalidating special use permit limited in duration to particular party's time of ownership); Lewis v. City of Jackson, 184 So. 2d 384 (Miss. 1966) (in dicta, suggesting that condition limiting time period for which zoning would be valid prior to reversion would undercut legitimacy of contingent rezoning).

[208] *See* Mandelker, *supra* note 21 at 179–182; Harnett v. Austin, 93 So. 2d 86 (Fla. 1956) (criticizing bilateral contract); State ex rel Zupaniac v. Schimenz, 46 Wis. 2d 22, 174 N.W.2d 533 (1970) (upholding unilateral conditional zoning but stating, in dicta, that a bilateral agreement between a landowner and a municipality would be invalid). *But see* State ex rel Myhre v. City of Spokane, 7 Wash.2d 207, 422 P.2d 790 (1967) (upholding bilateral agreement). The distinction between bilateral and unilateral contracts appears problematic as a policy matter, however, since even unilateral agreements can serve as an incentive to government action. *See* Scrutton v. County of Sacramento, 275 Cal. App.2d 412, 79 Cal. Rptr. 872 (1969).

[209] *See* Scrutton v. County of Sacramento, 275 Cal. App.2d 412, 79 Cal. Rptr. 872 (1969) (in dicta, stating that zoning,

as an exercise of police power, is subject to future change); State ex rel Myhre v. City of Spokane, 7 Wash.2d 207, 422 P.2d 790 (1967) (construing government agreement as simply one to consider vacating streets); Collard v. Incorporated Village of Flower Hill, 52 N.Y.2d 594, 421 N.E.2d 818, 439 N.Y.S.2d 326 (1981) (stating, in dicta, that a municipality would not be precluded from later changing zoning in contravention of conditions imposed by contingent zoning).

[210] *See* Haas v. City of Mobile, 289 Ala. 16, 265 So. 2d 564 (1972): Broward County v. Guffey, 366 So. 2d 869 (Fla. Dist. Ct. App. 1979) *cert. denied,* 385 So. 2d (Fla. 1980).

[211] City of Greenbelt v. Bresler, 248 Md. 210, 236 A.2d 1 (1967) (permitting agreement between developer and city officials so long as the city officials were not the ones with authority to approve rezoning); Bucholz v. City of Omaha, 174 Neb. 862, 120 N.W.2d 270 (1963) (upholding agreement between developer and other private parties, where city was also beneficiary); State ex rel Zupaniac v. Schimenz, 46 Wis. 2d 22, 174 N.W.2d 533 (1970) (same).

[212] *See* City of Marietta v. Traton Corp., 253 Ga. 64, 316 S.E.2d 461 (1984); Sylvania Electric Products v. City of Newton, 344 Mass. 428, 183 N.E.2d 118 (1962).

[213] *See* Hartnett v. Austin, 93 So. 2d 86 (Fla. 1956) (invalidating contingent zoning where tied to agreement to be executed at a later date).

[214] *See* Blades v. City of Raleigh, 280 N.C. 531, 187 S.E.3d 35 (1972); Allred v. City of Raleigh, 277 N.C. 530, 178 S.E.2d 432 (1971).

[215] *See* Hartnett v. Austin, 93 So. 2d 86 (Fla. 1956). For discussion of the applicability of the uniformity requirement, see *infra* notes 242–244 and accompanying text.

[216] *See* Sylvania Elec. Prods. v. City of Newton, 344 Mass. 428, 183 N.E.2d 118 (1962); Collard v. Incorporated Village of Flower Hill, 52 N.Y.2d 594, 421 N.E.2d 818, 439 N.Y.S.2d 326 (1981).

[217] *See* IND. STAT. ANN. §§ 36-7-4-613-614 (Supp. 1986) (plan commission may permit or require the owner of a parcel of property to make a written commitment concerning the use or development of a parcel for which a development plan must be prepared as a condition of development).

[218] *See* R.I. GEN. LAWS § 45-24-4.1 (1980).

[219] *See* VA. CODE § 15.1-4-91.2 (Supp. 1986).

[220] *Id.*

[221] *See* IOWA CODE ANN. § 358A.7 (West Supp. 1986).

[222] *See* MINN. STAT. ANN. § 462.358, Subd.2a (West Supp. 1986).

[223] *See* MASS. GEN. LAWS ANN., ch. 40A, § 9 (1985).

[224] *See* Scrutton v. County of Sacramento, 275 Cal. App.2d 412, 79 Cal. Rptr. 872 (1969) (noting that police power authority to zone is granted under state home rule provision, but limited by state laws on county and city zoning); Hausmann & Johnson, Inc. v. Berea Bd. of Bldg. Code App., 40 Ohio App.2d 432, 320 N.E.2d 685 (1974) (noting in passing that city was operating under home rule charter, but invalidating ordinance including reversionary provision without discussion of significance of home rule status); City of Farmers Branch v. Harvnco, Inc., 435 S.W.2d 288 (Tex. Civ. App. 1968) (noting that city was home rule city, and without further comment, finding no evidence of contract to rezone, although noting that contract zoning would have been invalid).

[225] *See* Hartnett v. Austin, 93 So. 2d 86 (Fla. 1956) (neighbors have standing and an important interest in uniformity of zoning scheme); City of Marietta v. Traton Corp., 253 Ga. 64, 316 S.E.2d 461 (1984) (nearby developer has standing when suffered special damage); Sylvania Elec. Prods. v. City of Newton, 344 Mass. 428, 183 N.E.2d 118 (1962) (assumes neighbors have standing although noting that it is somewhat anomalous for them to challenge conditions designed for their benefit).

[226] *See* King's Mill Homeowner's Ass'n v. City of Westminster, 192 Colo. 306, 557 P.2d 1186 (1976); Herr v. City of St. Petersburg, 114 So. 2d 171 (Fla. 1959); Goffinet v. County of Christian, 65 Ill. 2d 40, 357 N.E.2d 442 (1976); Arkenberg v. City of Topeka, 197 Kan. 731, 421 P.2d 213 (1966); Collard v. Incorporated City of Flower Hill, 52 N.Y.2d 594, 421 N.E.2d 818, 439 N.Y.S.2d 326 (1981); Blades v. City of Raleigh, 280 N.C. 531, 187 S.E.2d 35 (1972).

[227] *See* Kings Mill Homeowner's Ass'n v. City of Westminster,192 Colo. 306, 557 P.2d 1186 (1976); Lewis v. City of Jackson, 184 So. 2d 384 (Miss. 1966). Cloverleaf Mall v. Conlerly, 387 So. 2d 736 (Miss. 1980).

[228] *See* Nolan v. City of Taylorville, 95 Ill. App.3d 1099, 420 N.E.2d 1037 (1981) (factors generally considered in determining legality of rezoning decision to be applied); Arkenberg v. City of Topeka, 197 Kan. 731, 421 P.2d 213 (1966) (same); State ex rel Zupaniac v. Schimernz, 46 Wis. 2d 22, 174 N.W.2d 533 (1970) (same); Ziemer v. County of Peoria, 33 Ill. App.3d 612, 338 N.E.2d 145 (1975) (special circumstances such as fuel shortage needed to justify contingent zoning); Person Trapp Co. v. Peak, 340 S.W.2d 456 (Ky. 1960) (allowing only one type of use, rather than reasonable general classification, was problematic); Houston Petroleum v. Automative Credit Ass'n, 9 N.J. 122, 87 A.2d 319 (1952) (anticompetitive restriction invalidated); Sweetman v. Town of Cumberland, 117 R.I. 134, 364 A.2d 1277 (1976) (failure to develop land under prior zoning classification opened way for reclassification); State ex rel Myhre v. City of Spokane, 70 Wash.2d 207, 422 P.2d 790 (1967) (study demonstrating need for shopping center helped justify reclassification for that purpose).

[229] *See* Fasano v. Board of County Comm'rs, 264 Or. 574, 507 P.2d 23 (1973).

[230] *See* Hartnett v. Austin, 93 So. 2d 86 (Fla. 1956); Lewis v. City of Jackson, 184 So. 2d 384 (Miss. 1966).

[231] *See, e.g.,* Haas v. City of Mobile, 289 Ala. 16, 265 So. 2d 564 (1972) (conditions may be imposed to alleviate traffic problems caused by development); Scrutton v. County of Sacramento, 275 Cal. App.2d 412, 79 Cal. Rptr. 872 (1969) (conditions valid if reasonably conceived to fulfill public needs stemming from landowner's proposed use); Kings Mill Homeowner's Ass'n v. City of Westminster, 192 Colo. 306 557 P.2d 1186 (1976) (conditions may be imposed to meet increasing needs caused by population expansion); Treme v. St. Louis County, 609 S.W.2d 706 (Mo. App. 1980) (where development increases needs of county or municipality, costs of meeting needs may be passed to developer).

[232] *See* Scrutton v. County of Sacramento, 275 Cal. App.2d 412, 79 Cal. Rptr. 872 (1969).

[233] *Id.*

[234] *See* Cross v. Hall County, 238 Ga. 709, 235 S.E.2d 379 (1977) (conditions may be upheld when imposed pursuant to police power for protection of neighbors or to ameliorate the effects of zoning change, but not when zoning board is motivated to allow the change by the conditions offered or proposed); Hedrick v. Village of Niles, 112 Ill. App.2d 68, 250 N.E.2d 791 (1969) (impermissible to enter into agreements for emoluments that had no bearing on the merits of the requested zoning amendments); Treme v. St. Louis County, 609 S.W.2d 706 (Mo. App. 1980) (offer or exaction appropriate to meet development-related needs, but not if there is no reasonable relationship to activities of developer); City of Redmond v. Keyner, 10 Wash. App. 332, 517 P.2d 625 (1973) (discussing interpretation of earlier decision as permitting agreements to neutralize any expected negative impact of property use, but not to seek collateral benefit from property owner).

[235] *See* Scrutton v. County of Sacramento, 275 Cal. App.2d 412, 79 Cal. Rptr. 872 (1969) (quoting *Ayres* test, discussed *supra* at note 112); King's Mill Homeowner's Ass'n v. City of Westminster, 192 Colo. 306, 557 P.2d 1186 (1976) (citing *Ayres* and voicing agreement).

[236] *See* Arkenberg v. City of Topeka, 197 Kan. 731, 421 P.2d 213 (upholding right-of-way dedication requirement) (1966), Hudson Oil Co. of Missouri v. City of Wichita, 193 Kan. 623, 396 P.2d 271 (1964) (same); Noland v. St. Louis County, 478 S.W.2d 363 (Mo. 1972) (invalidating road improvement requirements where need not created by subdivision); Collard v. Incorporated Village of Flower Hill, 52 N.Y.2d 594, 421 N.E.2d 818, 439 N.Y.S.2d 326 (1981) (upholding use, landscaping, and other requirements); Church v. Town of Islip, 8 N.Y.2d 254, 168 N.E.2d 680 203 N.Y.S.2d 866 (1960) (same); State ex rel Myhre v. City of Spokane, 70 Wash.2d 207, 422 P.2d 790 (1967) (upholding requirement for contribution to cover cost of street improvements).

[237] *See* Transamerica Title Ins. Co. v. City of Tuscon, 23 Ariz. App. 385, 533 P.2d 693 (1975) (citing and agreeing with Scrutton v. County of Sacramento, 275 Cal. App. 2d 412, 79 Cal. Rptr. 872 (1969) and *Ayres,* but refusing to require street improvements under these circumstances despite government's contention that any rezoning necessarily triggered potential increases in traffic flow).

[238] *See* Treme v. St. Louis County, 609 S.W.2d 706 (Mo. App. 1980). *See also* City of Redmond v. Keyner, 10 Wash. App. 332, 517 P.2d 625 (1973) (upholding plan and agreement for comprehensive system of

street improvements in area to be rezoned commercial).

[239] *See* Cross v. Hall County, 238 Ga. 709 235 S.E.2d 379 (1977) (stating that the determination of the validity of the conditions will vary depending on who challenges them; when neighbors who challenge conditions are also benefited, their challenge may be unsuccessful; when owner of affected land has proposed or consented to conditions, he may be estopped to object).

[240] *See* Andres v. Village of Flossmoor, 15 Ill. App. 3d 655, 304 N.E.2d 700 (1973) (invalidating cash contribution requirement); Hedrick v. Village of Niles, 112 Ill. App.2d 68, 250 N.E.2d 791 (1969) (same); Midtown Properties, Inc. v. Madison, 68 N.J. Super. 197, 172 A.2d 40 (invalidating cash contribution requirement for schools when public should bear cost of public education), *aff'd per curiam*, 78 N.J. Super. 471, 189 A.2d 226 (1963).

[241] *See* Sweetman v. Town of Cumberland, 117 R.I. 134, 364 A.2d 1277 (1976) (rejecting equal protection challenge to contingent zoning arrangement which potentially imposed different obligations on different property owners). *But see* County of Ada v. Walter, 96 Idaho 630, 533 P.2d 1199 (1975) (Bakes, J. concurring) (selective application of zoning ordinance may result in equal protection violation).

[242] *See* Hartnett v. Austin, 93 So. 2d 86 (Fla. 1956); Carole Highlands Citizens Ass'n v. Board of County Comm'rs, 222 Md. 44, 158 A.2d 663 (1960); V. H. Vaholdiakin Engineering Corp. v. Zoning Bd. of Adjustment, 8 N.J. 386, 86 A.2d 127 (1952).

[243] *See* Sylvania Elec. Prods. v. City of Newton, 344 Mass. 428, 183 N.E.2d 118 (1962); Treme v. St. Louis County, 609 S.W.2d 706 (Mo. App. 1980); Sweetman v. Town of Cumberland, 117 R. I. 134, 364 A.2d 1277 (1976); State ex rel Zupaniac v. Schimenz, 46 Wis.2d 22, 174 N.W.2d 533 (1970).

[244] *See* Scrutton v. County of Sacramento, 275 A.2d 412, 79 Cal. Rptr. 872 (1969). *But see* Vesekis v. Bristol Zoning Comm'n, 168 Conn. 358, 362 A.2d 538 (1975) (discussing legislative amendment that invalidated distinction that had been drawn in earlier case between uniformity with respect to use and uniformity with respect to building regulation).

[245] *See* J-Marion Co., v. County of Sacramento, 76 Cal. App. 3d 517, 142 Cal. Rptr. 723 (1978).

[246] *See supra* notes 203–204. *See also* City of Homer v. Campbell, __ Alaska __, __ P.2d __ (1986) (slip opinion) (landowner's interest in contract zoning is sufficient to trigger constitutional due process requirements necessitating clear notice and opportunity for hearing before finding of violation that would trigger right to rescission). *But see* Sylvania Elec. Prods. v. City of Newton, 344 Mass. 428, 183 N.E.2d 118 (1962) (notice and hearing not required where restrictions voluntarily imposed by affected landowner prior to consideration of proposed rezoning).

[247] *See* City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668 (1976) (upholding referendum procedure as matter of federal law). *But see* Township of Sparta v. Spillane, 125 N.J. Super. 519, 312 A.2d 154 (1973), (invalidating application of referendum provisions as matter of state law); *petition for cert. denied*, 64 N.J. 493, 317 A.2d 706 (1974). *See generally* D. Mandelker & R. Cunningham, *supra* note 193, at 473–475.

[248] *See e.g.*, Haymon v. City of Chattanooga, 513 S.W.2d 185 (Tenn. App. 1973). *See also* Collard v. Incorporated Village of Flower Hill, 52 N.Y.2d 594, 421 N.E.2d 818, 439 N.Y.S.2d 326 (1981) (proper remedy is invalidation and return to earlier zoning) (dicta).

[249] *See* City of Knoxville v. Ambrister, 196 Tenn. 1, 263, S.W.2d 528 (1953) (although city had rezoned, it could not enforce developer's obligation to convey parkland); Carlino v. Whitpain Investors, 499 Pa. 71, 453 A.2d 1385 (1982) (although city had permitted shopping center to be constructed, neighbors could not enforce restriction on construction of access road); Borough of Point Pleasant v. J. C. Williams Co., 57 N.J. 147, 270 A.2d 275 (1970) (per curiam) (applying estoppel approach to require property owner to comply with condition and refusing to reach question of validity of billboard restrictions on the merits); Sandenburgh v. Michigamme Oil Co., 249 Mich. 372, 228 N.W. 707 (1930) (city estopped from changing zoning in violation of agreement to rezone).

[250] *See supra* notes 206–207 and accompanying text.

[251] *See* Funger v. Town of Somerset, 249 Md. 311, 239 A.2d 748 (1968).

[252] *See* Callies, *Developers' Agreements and Planning Gain*, 17 URB. LAW 599 (1985). For general discussions of development agreements, see Fulton, *Building and Bargaining in California*, 4 CALIFORNIA LAWYER 36 (Dec. 1984); Hagman, *Development Agreements* in 1982 ZONING AND PLANNING LAW 173 [hereinafter cited as Hagman, *Development Agreements*]; Holliman, *Development Agreements and Vested Rights in California*, 13 URB. LAW 44 (1981); Kramer, *Development Agreements: To What Extent Are They Enforceable?*, 10 REAL EST. L.J. 29 (1981); Sigg, *California's Development Agreement Statute*, 15 SW. U.L. REV. 695 (1985); Silvern, *Negotiating the Public Interest—California's Development Agreement Statute*, 37 LAND USE LAW & ZONING DIGEST 3 (Oct. 1985); Stone & Sierra, *Case Law on Public/Private Written Agreements*, in MANAGING DEVELOPMENT THROUGH PUBLIC/PRIVATE NEGOTIATIONS 99–125 (R. Levitt & J. Kirlin, eds. 1985). *See also* Hagman, *Estoppel and Vesting in the Age of Multi-Land Use Permits*, 11 SW. U.L. REV. 549 (1979) (including proposed statute) [hereinafter cited as Hagman, *Multi-Land Use Permits*].

[253] *See, e.g.*, Geralnes, B.V. v. City of Greenwood Village, 583 F. Supp. 830 (D. Colo. 1984) (zoning); M.J. Brock & Sonz Inc. v. City of Davis, 401 F. Supp. 354 (N.D. Cal. 1975) (dicta); Union National Bank v. Village of Glenwood, 38 Ill. App. 3d 469, 348 N.E.2d 226 (1976) (same); Beshore v. Town of Bel Air, 237 Md. 398, 206 A.2d 678 (1965) (same); City of San Springs v. Colliver, 434 P.2d 186 (Okla. 1967) (same); City of Shelbyville v. Shelbyville Restorium, Inc., 96 Ill. 2d 457, 451 N.E. 2d 874 (1983) (street installation); Clark v. Marian Park, Inc., 80 Ill. App. 3d 1010, 400 N.E.2d 661 (1980) (tax status). *Cf.* Housing Authority of Melbourne v. Richardson, 196 So. 2d 489 (Fla. Dist. Ct. App. 1967) (cooperative agreement between city and housing authority concerning zoning).

[254] *See* Carruth v. City of Madera, 233 Cal. App. 688, 43 Cal. Rptr. 855 (1965); Morrison Homes Corp. v. City of Pleasanton, 58 Cal. App.3d 724, 130 Cal. Rptr. 196 (1976).

[255] *See* Byrd v. Martin, Hopkins, Lemon & Carter, P.C., 564 F. Supp. 1425 (D. Va. 1983), *aff'd* 740 F.2d 961 (4th Cir. 1984) (agreement to extend sewer lines was ultra vires and unenforceable); Rockingham Square Shopping Center, Inc. v. Town of Madison, 45 N.C. App. 249, 262 S.E.2d 705 (1980) (government promise to open road was ultra vires and unenforceable; shopping center developer not entitled to recover funds expended in performing related promise to pave street).

[256] U.S. CONST. art. I, § 10. *See generally* Hagman, *Development Agreements, supra* note 252, at 188–195; Holliman, *supra* note 252, at 49–53; Kramer, *supra* note 252, at 31–45; Stone & Sierra, *supra* note 252, at 115–118.

[257] *See* Allied Structural Steel Co. v. Spannaus, 438 U.S. 234 (1978); United States Trust Co. v. New Jersey, 431 U.S. 1 (1977).

[258] *See* E & E Hauling, Inc. v. Forest Preservation District, 613 F.2d 675 (7th Cir. 1980) (discussing distinction between breach of contract where remedy is available and impairment of contract when remedy is unavailable).

[259] United States Trust Co. v. New Jersey, 431 U.S. 1 (1977), the Court indicated that analysis should proceed by inquiring (1) whether the contract affected was one to which the state was itself a party; (2) if so, whether it involved an essential attribute of sovereignty and was therefore subject to invalidation under the reserved powers doctrine; and (3) if not, whether the state's action was reasonable and necessary to serve an important public purpose. *Id.* at 22–23. Allied Structural Steel Co. v. Spannus, 438 U.S. 234 (1978), later expanded on this approach by stating that the "severity of the impairment measures the height of the hurdle the state legislation must clear," so that the more substantial the impairment, the more careful the examination of the nature and purpose of the state legislation. *Id.* at 244.

[260] *See* Hagman, *Development Agreements, supra* note 252, at 190.

[261] *See* Holliman, *supra* note 252, at 45.

[262] *See* Hagman, *Development Agreements, supra* note 252, at 174–75.

[263] Avco Community Developers, Inc. v. South Coast Regional Comm'n, 17 Cal.3d 785, 553 P.2d 546, 132 Cal. Rptr. 386 (1976), *cert. denied*, 429 U.S. 1083 (1977).

[264] *See* Hagman, *Multi-Land Use Permits, supra* note 252. *See generally*, Cunningham & Kremer, *Vested Rights, Estoppel, and the Land Development Process*, 29 HASTINGS L.J. 625 (1978); C. Siemon & W. Larson, *Vested Rights: Balancing Public and Private Development Expectations* (1982).

[265] *See* sources cited *supra* at note 264. Estoppel analysis differs from vested rights analysis in that the party to be estopped must be apprised of the facts, and must intend that his conduct be acted upon or act so that the other party has a right to believe he so intended. The other party must be ignorant of the true facts and must rely on the first party's conduct to his injury. Holliman, *supra* note 252, at 58–60. Before the estoppel doctrine is applied, the harm to the adversely affected individual must also be balanced against the public interest. *Id.*

[266] *Cf., e.g.,* Maywood Proviso State Bank v. City of Oakbrook Terrace, 67 Ill. App.2d 280, 214 N.E.2d 582 (1966) (state law concerning hours of establishments serving liquor superceded annexation agreement permitting longer hours).

[267] *See* cases cited *supra* notes 203–204. *See generally* Stone & Sierra, *supra* note 252.

[268] *See* Holliman, *supra* note 249, at 58.

[269] *See* Hagman, *Development Agreements, supra* note 252 (noting that California statute leaves it unclear whether procedures must be adopted).

[270] *See* Stone & Sierra, *supra* note 252, at 118 (suggesting inclusion of liquidated damages clause). The status of court-made remedies is unclear. *Compare* Scrutton v. County of Sacramento, 275 Cal. App.2d 412, 79 Cal. Rptr. 872 (1969) (invalidating reversion provision in contract zoning agreement, but noting that alternative remedies for breach of contract, and breach of restrictive convenants and equitable servitudes, were available) *and* City of Shelbyville v. Shelbyville Restorium, Inc., 96 Ill. 2d 457, 451 N.E.2d 874 (1983) (city could enforce annexation agreement by seeking specific performance and monetary damages in connection with developer breach) *with* Miller v. City of Port Angeles, 38 Wash. App. 904, 691 P.2d 229 (1984) (damages would not be available for breach of annexation agreement where city was acting under explicit statutory authority and had carefully balanced risks and advantages) (dicta).

[271] *See e.g.,* Kramer, *supra* note 252, at 31–45.

[272] *See,* Stone & Sierra, *supra* note 249, at 112 ("[T]he parties must remember that [a development agreement] is a contract. Consideration flowing to the public body should be more than could be exacted under the police power"). Fulton, *supra* note 252, also cites a recent lower court decision limiting the breadth of exactions that may be imposed upon developers to provide for day care centers and other unconventional public goods, but notes that the judge in question refused to broaden his injunction to prohibit these same exactions when negotiated as part of a development agreement. *Id.* at 100 (discussing United Bld. of Carpenters and Joiners v. City of Santa Monica (L.A. Super. Ct. WEC 069227)).

[273] Some states have chosen to address the vested rights question directly, without authorizing development agreements. *See e.g.,* IDAHO CODE § 67-6511(d) (1986 Supp.) ("If a governing board adopts a zoning classification pursuant to a request by a property owner based upon a valid, existing comprehensive plan and zoning ordinance, the governing board shall not subsequently reverse its action or otherwise change the zoning classification of said property without the consent in writing of the current property owner for a period of four (4) years from the date the governing board adopted said individual property owner's request for a zoning classification scheme"); N.J. REV. STAT. 40:55D-49 (West Supp. 1986) (preliminary approval for major subdivision or site plan confers rights for 3-year period; for subdivisions or city site for an area of 50 acres or more, rights may be conferred for a longer period, upon approval by the planning board, taking into account the number of dwelling units and nonresidential floor area permissible, economic conditions, and comprehensiveness of development).

[274] ILL. REV. STAT. §§ 11-15.1 to -15.1-5 (Smith-Hurd 1986).

[275] *Id.* § 11-15.1-2.

[276] *Id.* §§ 11-15.1-2 & 11-15.1-4.

[277] CAL. GOVT. CODE §§ 65864 to 65869.5 (West Supp. 1986 & West 1983). For general discussion of the California statute; see secondary sources cited *supra* at note 252.

[278] CAL. GOVT. CODE § 65864 (West Supp. 1986).

[279] *Id.* § 65865.

[280] *Id.* § 65865.1 (West 1983).

[281] *Id.* § 65865.2 (West Supp. 1986).

[282] *Id.*

[283] *Id.* § 65864(c).

[284] *Id.* §§ 65865.4 and 65866 (West 1983).

[285] *Id.* §§ 65869.5 and 65869.

[286] *Id.* §§ 65867 (West Supp. 1986).

[287] *Id.* §§ 65867.5 (West 1983).

[288] *See* Act 48, 1985 HAWAII SESS. LAWS 78–82 (to be codified at ch. 46, Hawaii Revised Stat.). For a discussion of proposals preceding that finally adopted, see Comment, *Development Agreement Legislation in Hawaii: An Answer to the Bested Rights Uncertainty,* 7 U. HAWAII L. REV. 173 (1985).

[289] Act 48, 1985 HAWAII SESS. LAWS 78–82.

[290] *Id.* (findings and purpose).

[291] *Id.* (development agreement).

[292] *Id.* (periodic review).

[293] *Id.* (development agreement).

[294] *Id.* (development agreement).

[295] *Id.* (county general plan and development plan).

[296] *Id.* (enforceability).

[297] *Id.* (public hearing).

[298] *Id.* (administrative act).

[299] *See, e.g.,* Morrison Homes Corp. v. City of Pleasanton, 58 Cal. App.3d 724, 130 Cal. Rptr. 196 (1976) (upholding authority to undertake annexation agreement dealing with sewer services under state statute and state's constitutional home rule provision).

[300] *See* Carruth v. City of Madera, 233 Cal. App.3d 688, 43 Cal. Rpt. 855 (1965); Morrison Homes Corp. v. City of Pleasanton, 58 Cal. App.3d 724, 130 Cal. Rptr. 855 (1965). These cases recognize that a city may be held to a fair, just, and reasonable service provision contract, but do not actually reach the issue whether a city would be excused from a contract that does not fall within the description.

[301] *See* Fulton, *supra* note 252; Silvern, *supra* note 252.

[302] *Cf.* County of Ada v. Walter, 96 Idaho 630, 533 P.2d 1199 (1975) (Bakes, J. concurring) (selective application of zoning ordinance may result in equal protection violation if not based on standards fixed by ordinance).

[303] *Cf.* Major & City of Baltimore v. Crane, 277 Md. 198, 352 A.2d 786 (1976) (upholding ordinance, conferring added density on developer in return for conveyance of land to city, against contract zoning challenge on grounds that opportunity for added density was an open-ended offer to any developer wishing to take advantage of similar arrangement).

[304] *See infra* notes 310–311 accompanying text.

[305] *See* Hagman, *Development Agreements, supra* note 252, at 177–78.

[306] *Id.* at 179.

[307] *Id.*

[308] *Id.* at 178.

[309] *See e.g.,* Act 48, 1985 HAWAII SESS. LAWS 78–82.

[310] *See, generally* Hagman, *Development Agreements, supra* note 252, at 184–186; Holliman, *supra* note 252, at 60–62; Stone & Sierra, *supra* note 252, at 111–114 (legislative acts are generally subject to lesser judicial scrutiny, and notice and hearing is not required).

[311] *See* Holliman, *supra* note 252, at 61–62, discussing Horn v. County of Ventura, 24 Cal.3d 605, 596 P.2d 1134, 156 Cal. Rptr. 718 (1979). A debate has raged in recent years over whether rezoning decisions should be characterized as legislative or quasi-judicial/adjudicatory in nature. *See* Mandelker, *supra* note 21, at 160–161 (discussing Fasano v. Board of County Comm'rs, 264 Or. 574, 507 P.2d 23 (1973) and subsequent developments). *See also* Arnel Development Co. v. City of Costa Mesa, 28 Cal.3d 514, 169 Cal. Rptr. 904 (1980).

[312] *See* Horn v. County of Ventura, 24 Cal.3d 605, 596 P.2d 1134, 156 Cal. Rptr. 718 (1979). *See generally,* Stone & Sierra, *supra* note 252, at 112–114.

[313] *See* Holliman, *supra* note 252, at 62–63 (discussing review of legislative acts, which includes determination whether the action taken was arbitrary, capricious, or lacking in evidentiary support, or failed to follow statutory procedures; and review of quasi-judicial, or adjudicatory acts, which includes determination whether there is substantial evidence in support of the decision).

[314] CAL. GOVT. CODE § 65867.5 (West 1985).

[315] *See* Hagman, *Development Agreements, supra* note 252, at 185 (noting due process problems likely to arise in the event of referendum review of adjudicatory measures).

[316] *See* Ferrini v. City of San Luis Obispo, 150 Cal. App.3d 239 197 Cal. Rptr. 694 (1983) when state legislation forbids annexation subject to voter approval referendum and initiative provisions are not available.

[317] *See* Pardee Construction Co. v. City of Camarillo, 37 Cal.3d 465, 690 P.2d 701, 208 Cal. Rptr. 228 (1984).

[318] *See supra* note 270.

[319] *See* Sigg, *supra* note 252, at 712 n.109 (discussing City of Torrance v. Torrance Inc. Co., No. C577962 (L.A. Super. Ct. filed Dec. 6, 1985)).

APPLICATIONS

The forgoing research should prove helpful to state and local highway administrators, their legal counsel, private development firms, and others involved in the application of public-private funding alternatives. Research under NCHRP Project 2-14 is continuing with the development of case studies to illustrate the legal and implementation issues involved with the various alternatives, and this additional work will be published at a later date.

The paper presented in this Digest was prepared initially under Project 2-14 and was subsequently reviewed by NCHRP Project Committee SP20-6, which has oversight over the development of papers for inclusion in Selected Studies in Highway Law (SSHL). Committee SP20-6 has decided to include this paper in the next update of SSHL.

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