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# A Perspective: New York Communities and Impact Fees

Barnard V. Keenan

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**Bernard V. Keenan***

The New York Court of Appeals recently considered the legal authority of New York communities to enact impact fee legislation. The relevant judicial decisions[1] indicate that municipalities are authorized to adopt impact fee laws pursuant to home rule power unless state legislation preempts the subject matter of the local impact fees. Widespread adoption of impact fee laws by New York communities will likely trigger review of numerous legal issues previously considered in other jurisdictions. The following commentary focuses upon some of those issues so that New York communities may benefit from the experience of other municipalities and states.

## I. Introduction

Attorneys and land developers are generally familiar with

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* Professor of Law, Suffolk University Law School, B.A., 1970, College of the Holy Cross, J.D., 1973, Georgetown University Law Center, LL.M., 1981, Columbia University School of Law. Chairman, Subcommittee on Land Use Exactions and Impact Fees, The American Bar Association.

1. The New York Court of Appeals decision in Kamhi v. Town of Yorktown, 74 N.Y.2d 423, 547 N.E.2d 346, 548 N.Y.S.2d 144 (1989) invalidated a law conditioning site plan approval upon the provision of park land or its monetary equivalent. The opinion indicates that New York's Municipal Home Rule Law provides a sufficient "power base" for the enactment of impact fee laws. However, the local legislation was invalidated because it was not adopted in accordance with the procedural requirements of the State's Municipal Home Rule Law.

In Albany Area Builders Ass'n v. Town of Guilderland, 74 N.Y.2d 372, 546 N.E.2d 920, 547 N.Y.S.2d 627 (1989), the New York Court of Appeals determined that existing state statutes preempted a local road improvement impact fee ordinance. The court noted that "[t]he purpose, number and specificity of these statutes make clear that the State perceived no real distinction between the particular needs of any one locality and other parts of the State . . . and thus created a uniform scheme to regulate this subject matter." *Id.* at 378-79, 546 N.E.2d at 923, 547 N.Y.S.2d at 630.

the concept of traditional subdivision exactions whereby a developer is required by a community to set aside or dedicate certain land within a proposed subdivision to be used for streets, sidewalks, or recreational purposes. A developer is often required to construct these improvements in conformity with local standards.[2] The dedication of land and the need to construct streets and sidewalks is necessitated by the creation of the subdivision. The exaction obviously burdens the developer; however, this financial burden is directly related to the financial benefit derived by the sale of the developed property. Reasonable municipal land use exactions that affect land located within a subdivision represent a legitimate exercise of a community's police power.[3]

The "in-lieu fee" is another form of exaction arising under subdivision regulation. A small subdivision may not have sufficient land to set aside for recreational use and a municipality might be concerned about its legal authority to "pass on" the cost of acquiring land for park or recreational use. In this instance, a community may consider the imposition of a "fee in-lieu of dedication."[4] The municipality will likely assert that it could lawfully require the "set aside" of certain property *within* the subdivision *if* the subdivision were larger. Correspondingly, a fee in-lieu of dedication may lawfully be imposed upon the developer of a smaller subdivision.[5]

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2. "By 1958, the mandatory construction of subdivision improvements as a condition of subdivision plat approval had become the dominant method of securing such improvements. In that year, a survey . . . of 880 cities with populations over 10,000 revealed that 692 of the cities surveyed had subdivision regulations. Six hundred [and] fifteen of those cities imposing regulations required the subdivider to install one or more types of physical improvements in the subdivisions they were platting." Smith, *From Subdivision Improvement Requirements to Community Benefit Assessments and Linkage Payments: A Brief History of Land Development Exactions*, 50 LAW & CONTEMP. PROBS., 5, 6 (Winter 1987).

3. "In a short period of time, [beginning in the early 1950's] numerous courts sustained requirements for the construction of various public improvements on subdivision rights of way such as sewers, watermains, sidewalks, curbs and gutters, storm drains, and even landscaping." *Id.* at 7.

4. D. HAGMAN & J. JUERGENSMEYER, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW 277 (2d ed. 1986).

5. *E.g.*, Jordan v. Village of Menomonee Falls, 28 Wis. 2d 608, 137 N.W.2d 442 (1965), *appeal dismissed*, 385 U.S. 4 (1966).

This fee, combined with similar fees exacted from other developers, enables the municipality to purchase the land needed for park purposes. This practice is generally accepted when the regulation provides that the fee will be used to address a municipal need occasioned by the development. No proof is needed to show that the owners of the subdivision lots will derive a benefit from the property purchased with the in-lieu fees.[6]

Various communities across the nation are experiencing fast growth and a concomitant need to provide increased public services while attempting to maintain existing public facilities. Property owners are distressed when their tax rates soar in order to provide services to newly developed properties. The traditional practice of imposing narrowly-defined subdivision exactions and in-lieu fees cannot relieve the financial drain resulting from fast growth, municipal infrastructure deficiencies, and the enactment of restrictive fiscal measures such as California's Proposition 13. An increasing number of communities view the imposition of "impact fees" as a means or method of addressing these problems. Impact fees have been defined as "single payments required to be made by builders or developers at the time of development approval and calculated to be the proportionate share of the cost of providing trunk facilities (arterial roads, interceptor sewers, sewage treatment plants, regional parks, etc.) to [the] development."[7] Impact fee assessments should be directed toward satisfying the cost of municipal capital improvements necessitated by private construction projects. Moreover, municipalities favor the concept of impact fees because the fees may be imposed upon a wide array of development efforts including condominium, commercial, industrial, and institutional projects, as well as residential subdivisions.[8]

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6. *See* Jenad, Inc. v. Village of Scarsdale, 18 N.Y.2d 78, 218 N.E.2d 673, 271 N.Y.S.2d 955 (1966). The *Jenad* decision is discussed *infra* at notes 25-28 and accompanying text.

7. Weschler, Mushkatel & Frank, *Politics and Administration of Development Exactions*, in DEVELOPMENT EXACTIONS 19 (J. Frank & R. Rhodes eds. 1987) [hereinafter Weschler].

8. The fact that impact fees may be imposed upon varied types of land develop-

An impact fee is usually paid when a building permit is issued and the amount of the fee is often calculated by formulae based upon such factors as the gross floor area of a structure or the number of bedrooms in a residence.[9] An impact fee may be extremely costly and the imposition of the fee may result in a broad legal challenge or merely a dispute concerning the amount of the fee.[10]

Some confusion understandably arises when the terms "linkage fees" and "impact fees" are used interchangeably. Linkage programs generally deal with issues far different from municipal infrastructure concerns. A linkage regulation may address certain social concerns by establishing a link between proposed development and the need for a developer to contribute funds to support the desired societal goal. For example, the City of Boston's linkage ordinance exacts monetary payments from developers to assist in providing housing opportunities for financially disadvantaged families.[11]

## II. Statistical Information Concerning Impact Fees

National surveys, although limited in number and scope,[12] present certain information relative to the frequency

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ment is typified by a Florida county's ordinance requiring that impact fee payments be triggered by residential, commercial, and industrial land uses. ST. JOHNS COUNTY, FLA., PUBLIC CAPITAL FACILITIES IMPACT FEE ORDINANCE 87-59, § 7 (1987).

9. Bauman & Ethier, *Development Exactions and Impact Fees: A Survey of American Practices*, 50 LAW & CONTEMP. PROBS., 51, 56 (Winter 1987).

10. *See, e.g.*, Frisella v. Town of Farmington, 131 N.H. 78, 550 A.2d 102 (1988) (invalidating a planning board requirement that a developer pay the cost of improving a portion of roadway not located adjacent to the developer's property though the developer did not object to assuming the cost of improving the adjacent portion of roadway).

11. BOSTON, MASS., ZONING CODE art. 26A (1983), *as amended by* BOSTON, MASS., ZONING CODE art. 26A (1986). Pursuant to the provisions of Boston's linkage ordinance, a payment of $6.00 per square foot is imposed upon developers of new or renovated structures occupied by retail, business, institutional, and hotel/motel uses. The fee is based on each square foot of construction exceeding 100,000 square feet and the ordinance applies only to projects requiring some form of zoning relief (e.g., zoning map or text amendment, variance, or conditional use permit). *Id.* art. 26A, §§ 2(1), 3.

12. "National" surveys are limited to studies of park, sewer, and fire facility impact fees. Broader surveys of development and impact fees have been conducted in limited geographic areas such as Florida cities and counties as well as communities within the San Francisco Bay Area. Weschler, *supra* note 7, at 23.

of impact fee enactment. Statistics indicate that California has the largest number of communities adopting impact fee laws. Other states with a significant number of local impact fee enactments are Florida, Washington, Oregon, Colorado, and Texas.[13]

It seems predictable that impact fee programs would be popular in fast-growth states because impact fees are imposed upon new construction. The surveys also indicate that a number of impact fee ordinances have been enacted in slow-growth states. However, the data ultimately reveal a consistent pattern because these impact fee laws were adopted in growing municipalities located within the slow-growth states.[14]

The most consistent data regarding impact fee costs relate to sewer and water impact fees. Average sewer impact fees are approximately $700 per single-family, detached dwelling and water impact fees amount to $525 per residential unit.[15] Some impact fee charges far exceed these amounts, with one reported sewer impact fee of approximately $6,000.[16] The average *total* impact fee payment in San Diego, California amounts to $9,500 per dwelling unit.[17]

Another survey estimates that 41.2% of cities and counties do not require developers to contribute cash payments for any type of capital facility.[18] The most common explanations

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13. The national fire facility, park, and sewer impact fee surveys indicate that seventy-three California communities have adopted impact fee legislation relating to one or more of the subject areas. In comparison, nine Texas municipalities have enacted such laws. Weschler, *supra* note 7, at 26.

The findings of the three national surveys were published in 1983 and 1985. It is probable that a more recent survey would reveal increased enactment of impact fee laws in numerous municipalities.

14. *Id.* at 25.

15. *Id.* at 24.

16. *Id.* at 25.

17. *Id.* In Tiburon and Fairfield, California, the total impact fees per dwelling amount to $8,568 and $8,269 respectively. *Id.*

18. The sample group for this 1985 survey (conducted by Florida State University) was drawn from all cities and counties in the United States. "A sufficient number of communities was randomly selected to ensure an overall level of statistical confidence of 95% . . . ." Purdum & Frank, *Community Use of Exaction: Results of a National Survey*, in DEVELOPMENT EXACTIONS 123, 124 (J. Frank & R. Rhodes eds. 1987). Although 41.2% of communities do not require developers to make cash exaction payments, the remaining 58.8% of municipalities require some form of cash ex-

for this practice concern a lack of land development in the municipality or county, a recognition that development approval rests with another level of government, and, to a significantly lesser extent, a belief that impact fees are legally prohibited.[19]

There is a reported trend toward increased municipal adoption of impact fee and in-lieu fee legislation.[20] As noted earlier, communities are reacting to rapid growth by imposing cash exactions to finance capital facilities. These statistics may also forecast a similar interest by New York communities in the adoption of impact fee laws. It will be interesting to observe the innovative legislative approaches that will inevitably result as additional municipalities enact impact fee ordinances.[21]

## III. Legal Challenges

A survey of national case law reveals that local impact fee legislation has been the object of various legal challenges. These complaints include allegations of inadequate enabling authority,[22] characterization of the fee as an invalid tax,[23] and assertions of takings claims and other constitutional

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action. *Id.* at 137.

19. *Id.*

20. "Many [governmental] respondents reported a move toward [impact] fees and in-lieu payments. Future fees were predicted for drainage facilities, transportation, schools, open space, parks, storm sewers, police and fire." *Id.* at 146.

21. "Santa Monica, California has told developers to go back and refit existing projects with water-saving toilets. At least one developer has called the measure unconstitutional," but a city council member stated "that developers will not contest the town's new ordinance because the developers recognize that it is the will of the community." Schwartz, Hutchinson & Wright, *Giving Something Back*, NEWSWEEK, Sept. 5, 1988, at 35.

22. *See, e.g.*, New Jersey Builders Ass'n v. Bernards Township, 108 N.J. 223, 528 A.2d 555 (1987) (New Jersey Supreme Court invalidates road improvement impact fee ordinance because the community lacked the necessary enabling authority to enact the ordinance).

*See supra* note 1 and accompanying text for commentary regarding the legal authority for impact fee enactment by New York communities.

23. *See, e.g.*, Brewster v. City of Pocatello, 115 Idaho 502, 768 P.2d 765 (1988) (Idaho Supreme Court invalidates street restoration and maintenance fees as an unauthorized tax); Prisk v. City of Poulsbo, 46 Wash. App. 793, 732 P.2d 1013 (1987) (invalidating a park fee ordinance as an invalid tax).

violations.[24]

### A. *Characterization of the Fee as an Invalid Tax*

The New York Court of Appeals' decision in *Jenad, Inc. v. Village of Scarsdale*[25] considered the "fee versus tax" debate in the context of an in-lieu fee regulation. As previously discussed, in-lieu fees are generally directed toward assisting a municipality in purchasing recreational or park land, whereas impact fees are designed to fund capital improvements of a broader scope. Nevertheless, the *Jenad* opinion offers instructive direction to communities contemplating the adoption of impact fee legislation.

In *Jenad*, the court reviewed a local regulation imposing a $250 charge per subdivision lot to be collected by the village and " 'credited to a separate fund to be used for park, playground and recreational purposes . . . .' "[26] The court determined that the authority for this type of in-lieu fee was permissibly derived from a state statute. More importantly, the court recognized that subdivision developments contribute to the need for increased park land. The close connection between land development and the need for additional municipal recreational properties justified the imposition of the fee upon the subdivision developer. The court also held that the payments were not for general governmental purposes and concluded that "[t]his is not a tax at all but a reasonable form of village planning for the general community good."[27]

The court noted approvingly that the payments were placed in a separate fund and were to be used for a particular governmental purpose. The segregation of the funds (thereby avoiding the commingling of payments with general municipal revenues) was another indication to the court that the in-lieu

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24. *See, e.g.*, Warrenville Plaza, Inc. v. Warren Township Sewerage Auth., 230 N.J. Super. 461, 553 A.2d 874 (App. Div. 1989) (upholding sewer connection fee law despite claim of equal protection violation).

25. 18 N.Y.2d 78, 218 N.E.2d 673, 271 N.Y.S.2d 955.

26. *Id.* at 82, 218 N.E.2d at 675, 271 N.Y.S.2d at 956.

27. *Id.* at 84, 218 N.E.2d at 676, 271 N.Y.S.2d at 958.

payment was a valid fee rather than an unauthorized tax.[28] New York communities should heed the message of *Jenad* when drafting impact fee laws. However, an even more significant challenge to impact fee legislation focuses on claims of constitutional invalidity.

### B. *Constitutional Challenges and the Nollan Nexus*

There are a variety of reasons that may dissuade land developers from challenging the validity of impact fee laws. Developers might conclude that a successful challenge will result in only a Pyrrhic victory because they will encounter a hostile municipal attitude toward future land development efforts. Moreover, the inevitable delay associated with litigation may result in the loss of an attractive loan commitment. A developer may refrain from litigation, realizing that the cost of the impact fee may ultimately be redistributed to the purchasers of the developed property.[29]

Communities enacting impact fee legislation, and those developers deciding to challenge the constitutional validity of such laws, should consider the potential relevance of the Supreme Court's *Nollan v. California Coastal Commission*[30] decision. The *Nollan* opinion presents the Court's response to the takings claim of landowners objecting to the imposition of a land use exaction.

The Nollans sought a permit from the Coastal Commission enabling them to demolish their house and construct a new one on their land abutting the Pacific Ocean. The Commission granted the permit, but attached a condition requiring the applicants to grant an easement to the public over the sandy portion of their property. The land was bound on either side by the mean high tide line and the Nollan's seawall.[31]

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28. *Id.* at 83, 218 N.E.2d at 675, 271 N.Y.S.2d at 956.

29. Several commentators have concluded that, in certain real estate markets, impact fees can be a major factor in increasing housing costs. Delaney & Smith, *Development Exactions: Winners and Losers*, 41 LAND USE L. & ZONING DIG. 3 (1989). *See also* Katz & Rosen, *The Interjurisdictional Effects of Growth Controls on Housing Prices*, 30 J. L. & ECON. 149 (1987).

30. 483 U.S. 825 (1987).

31. *Id.* at 828.

The Coastal Commission asserted that the new house would block the ocean view from the highway and contribute to the expanding development of a "wall of residential structures" between the highway and the ocean.[32] The Commission required the Nollans to grant the easement to provide additional lateral access between the public beaches located to the north and south of their property.[33] Despite protests, a California appellate court sustained the permit condition by adopting a test tilted in favor of regulatory exactions. The state court followed the decision in *Grupe v. California Coastal Commission*[34] when it determined that an exaction was valid "so long as a project contributed to the need for public access, even if the project standing alone had not created the need for access, and even if there was only an indirect relationship between the access exacted and the need to which the project contributed."[35]

The Nollans appealed to the Supreme Court where they alleged that the exaction effected a taking of a portion of their property. An earlier Supreme Court decision held that an impermissible taking occurs if the challenged land use regulation does not "substantially advance legitimate state interests, or denies an owner economically viable use of his land."[36] The *Nollan* opinion directed attention to the first prong of this test[37] and determined that a taking had occurred.

The *Nollan* decision requires a regulatory authority to determine whether a legitimate police power objective prompted the authority's regulatory involvement. *If so*, the regulatory authority must then determine whether the permit application should be denied outright (*without such denial effecting a taking*), since the grant of the permit and the result-

32. *Id.*

33. *Id.* at 829.

34. 166 Cal. App. 3d 148, 212 Cal. Rptr. 578 (1985).

35. *Nollan*, 483 U.S. at 830.

36. Agins v. City of Tiburon, 447 U.S. 255, 260 (1987) (upholding large lot residential zoning).

37. The Nollans' occupancy of the existing structure located on their ocean front property precluded a claim that they were denied all economically viable use of land. Moreover, they sought to retain the same use while occupying a larger structure.

ing land use activity would substantially impede protection of the relevant legitimate state interest.[38]

*Nollan* announces that *if* a regulatory authority may lawfully deny a landowner's permit application without effecting a taking, then it is permissible for that authority to grant the permit and attach a condition designed to address the goal of the legitimate state interest.[39] The Coastal Commission failed the latter portion of this test. Although protecting the public's visual access to the beach may be a valid governmental concern, the exaction that required the Nollans to grant a lateral easement of public passage over the beach portion of their property was unrelated to the proffered state interest.[40]

The opinion indicates that a valid land use exaction must be premised upon a nexus between the subject matter of the exaction and the legitimate state interest promoted by the relevant land use regulation. The opinion does not expand upon the necessary degree of the relationship or the strength of the required nexus except to comment that the test adopted by the Coastal Commission did "not meet even the most untailored standards."[41]

Some commentators suggest that the *Nollan* decision is relevant only when examining exactions that require the physical dedication of land that result in a governmental acquisition of a private property interest.[42] Although *Nollan* centers upon a "taking" arising from the imposition of a public easement of passage over private property, many communities and courts ignore the principles of the decision when considering the validity of impact fee legislation. The expansive terminology of the majority opinion should deter regulatory bodies from concluding that the Supreme Court's nexus focus is

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38. *Nollan*, 483 U.S. at 834-37.

39. *Id.* at 836-37.

40. *Id.* at 837. "In short, unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but an 'out-and-out plan of extortion.' " *Id.* (quoting J.E.D. Assoc., Inc. v. Atkinson, 121 N.H. 581, 584, 432 A.2d 12, 14 (1981), *overruled sub nom.* Town of Auburn v. McEvoy, 131 N.H. 383, 553 A.2d 317 (1988).

41. *Nollan*, 483 U.S. at 838.

42. Freilich & Chinn, *Finetuning the Taking Equation: Applying It to Development Exactions, Part II*, 40 LAND USE L. & ZONING DIG. 3, 5 (1988).

solely directed toward traditional examples of regulatory land takings. One may concede that the conceptual application of the *Nollan* "takings" doctrine to impact fee issues seems uncertain. However, this uncertainty should not be interpreted to mean that less than a significant nexus will be required when courts evaluate challenged impact fee legislation.

Respect for the analytical content of *Nollan*, coupled with an awareness of its potential application to other forms of exactions, does not fully compensate for the failure of the opinion to announce the appropriate nexus test to be applied when reviewing challenged exactions.[43] Attention must be directed to the state judiciary, where courts have traditionally adopted one of three tests to assess the required nexus between a land use exaction and the permissible goal of state or local regulation. For example, California courts have repeatedly adopted the relaxed "reasonable relationship" test now seemingly repudiated by the *Nollan* decision.[44]

The Illinois judiciary authored a strict formula known as the "specifically and uniquely attributable" test whereby a land use exaction will be sustained only if the regulatory body demonstrates that the exaction imposed upon a developer is specifically and uniquely attributable to the developer's project.[45] This demanding test virtually denies municipal authority to impose any land use exaction requiring a developer to contribute money to fund an off-site capital improvement.[46]

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43. The decision of the majority to forego adopting a defined "review formula" prompted the observation that "land use planners . . . [will be] left guessing about how the Court will react to the next case, and the one after that." *Nollan*, 483 U.S. at 867 (Stevens, J., dissenting).

44. In *Associated Home Builders v. City of Walnut Creek*, the California Supreme Court reasoned that a local law requiring a physical dedication or payment of an in-lieu fee "can be justified on the basis of a *general* public need for recreational facilities caused by present and future subdivisions." 4 Cal. 3d 633, 638, 484 P.2d 606, 610, 94 Cal. Rptr. 630, 634 (1971) (emphasis added). *See also* Grupe v. California Coastal Comm'n, 166 Cal. App. 3d 148, 212 Cal. Rptr. 578 (1985) (upholding permit condition imposing exaction upon ocean-front property).

45. *See* Pioneer Trust & Sav. Bank v. Village of Mount Prospect, 22 Ill. 2d 375, 176 N.E.2d 799 (1961) (invalidating an ordinance requiring the dedication of subdivision land for educational and park use).

46. "By applying the restrictive *Pioneer Trust* test to development exactions, courts imposed substantially the same requirements as a special assessment, thus ef-

The test is overly rigorous and has failed to attract significant judicial interest.

The most popular standard for validating land use exactions, including impact fees, is the "rational nexus" test.[47] This test, developed in a Florida opinion, requires that the imposition of a valid impact fee be dependent upon: a) a development creating a need for the creation or expansion of certain capital facilities; b) the amount of the fee not exceeding the cost to the municipality in the event that the community provided the facility; and c) the fee being designated to address the concerns that prompted its imposition.[48]

The New York judiciary applied the "rational nexus" test in *Weingarten v. Town of Lewisboro*.[49] The *Weingarten* litigation concerned the validity of a New York statute and a local planning board regulation that required a payment of $5,000 in lieu of reservation of park land as a condition of approving a subdivision plat. Plaintiffs asserted that the regulatory structure violated the takings clauses of the federal and state constitutions.

The Supreme Court of Westchester County reiterated the familiar *Nollan* message that "there must be a relationship between the purpose of the legislation and the methods employed . . . . [O]nce a genuinely valid purpose is established, a law can restrict the use of property [unless the restriction] 'would interfere so drastically as to constitute a taking.' "[50] The *Weingarten* opinion recognized that the earlier New York Court of Appeals' decision in *Jenad* had upheld the validity of an in-lieu fee imposition. However, the *Weingarten* court remarked that the "deferential-reasonable relationship-ap-

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fectively precluding their use for most extra-development capital funding purposes." Callies, *Review Essay: Impact Fees, Exactions and Paying for Growth in Hawaii*, 11 U. HAW. L. REV. 295, 307 (1989).

47. Stroud, *Legal Considerations of Development Impact Fees*, in DEVELOPMENT IMPACT FEES 83, 84 (A. Nelson ed. 1988).

48. Contractors & Builders Ass'n v. City of Dunedin, 329 So. 2d 314, 317-18 (Fla. 1976).

49. 144 Misc. 2d 849, 542 N.Y.S.2d 1012 (Sup. Ct., Westchester County 1989). The plaintiff in *Weingarten* did not challenge the community's authority to enact the in-lieu fee regulation pursuant to state statutory provisions. *See id.*

50. *Id.* at 855, 542 N.Y.S.2d at 1016.

proach of *Jenad* must give way to the more exacting standard set forth in *Nollan* for constitutional review."[51]

The court applied the *Nollan* rationale by initially concluding that the preservation, maintenance, and development of park facilities is a legitimate state interest and that the plaintiffs' development projects would contribute to the need for expanding the community's existing recreational facilities.[52] The court questioned whether the legislation *substantially advanced* that interest. It concluded that the required nexus was present because the legislation expressly provided for the reservation of park land or, in certain instances, the payment of a fee to be used for the purchase and development of parks and recreational areas.[53] The court interestingly noted that the benefits derived from this exaction need not accrue solely to the plaintiffs' subdivision due to the fact that the plaintiffs' individual needs could not be isolated from community-wide needs.[54]

The *Weingarten* decision also approved the amount of the fee imposed upon the landowners. The court reasoned that the upper limit of the valid park land fee should be measured by the value of the actual subdivision land that the municipality could require the developers to dedicate to the town for recreational purposes. The $5,000 fee per lot did not exceed the value of such property and was therefore upheld.[55]

The preceding opinions are of extreme relevance to any New York municipality considering the adoption of an impact fee ordinance. The Supreme Court, the New York state judiciary, and other appellate tribunals[56] direct that: a) local impact

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51. *Id.* at 857, 542 N.Y.S.2d at 1017.

52. *Id.*

53. *Id.*

54. *Id.* at 859, 542 N.Y.S.2d at 1018.

55. *Id.* at 858, 542 N.Y.S.2d at 1017-18.

56. *See, e.g.*, Batch v. Town of Chapel Hill, 92 N.C. App. 601, 376 S.E.2d 22 (1989). In *Batch*, the plaintiff challenged several bases for local denial of her subdivision application. The North Carolina Court of Appeals reviewed the *Nollan* opinion and concluded that a "heightened scrutiny 'remoteness test' is to be used if a regulation is alleged to violate the takings clause of the Fifth Amendment: the regulation must 'substantially advance' a 'legitimate state interest.' " *Id.* at 612, 376 S.E.2d at 29. The North Carolina Court of Appeals also adopted the "rational nexus" exaction

fee legislation must substantially advance a legitimate state interest; b) the exacted fee must similarly advance the same interest; and c) the fee imposed upon the land developer must also be proportionally related to the impact of the development upon the subject matter of the regulation (e.g., municipal infrastructure). The desired degree of proportionality is dependent upon the particular "exaction test" adopted by a court. The *Nollan* decision, and practical considerations, suggest that the "rational nexus" test is the viable standard if impact fee laws are to be judicially upheld and applied in a flexible manner.

## IV. Calculation of an Impact Fee

The preceding discussion of case law is relevant only if it can be meaningfully applied to the drafting of impact fee legislation. For this reason, the following section illustrates several legislative approaches that encompass the principles of *Nollan* and the rational nexus test.

Assume that a community desires to impose an impact fee upon new development to assist paying for the construction of new public library facilities. Charlotte County, Florida enacted this form of impact fee in 1986 and a report of that process is relevant to the present analysis.[57]

The initial procedure in Charlotte County involved a de-

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test, but *after* it has been shown that the exaction "substantially advances" a legitimate government interest. *Id.* at 615, 376 S.E.2d at 31 (emphasis added).

The court combined the reasoning of the *Nollan* decision, the rationale of the North Carolina subdivision enabling statute, and the policy underlying the State's Map Amendment to formulate the following test to "determine whether an exaction amounts to an unconstitutional taking." *Id.* at 621, 376 S.E.2d at 34. More precisely stated, a North Carolina trial court should:

> (1) identify the condition imposed; (2) identify the regulation which caused the condition to be imposed; (3) determine whether the regulation substantially advances a legitimate state interest. [The court shall then determine] (4) whether the condition imposed advances that interest; *and* (5) whether the condition imposed is proportionally related to the impact of the development.

*Id.* at 621, 376 S.E.2d at 34.

57. The Charlotte County Impact Fee calculations are detailed in J. NICHOLAS, THE CALCULATION OF PROPORTIONATE-SHARE IMPACT FEES 25 (1988) [hereinafter NICHOLAS].

termination of the *existing* level of available library service based upon the current number of buildings and books. The community determined that the current provision was 28,195 square feet of building space and 111,400 volumes. Coupled with a population of 79,000 persons, there was 0.35 square feet and 1.4 volumes per person.

The Charlotte County Comprehensive Plan indicated that the existing level of service should be imposed upon new development. The existing standard in Charlotte County was consistent with the State of Florida and American Library standards.

The drafters of the impact fee legislation received information concerning the existing standards in Charlotte County and were provided with cost data. The county had recently completed construction of a new library facility containing 7,000 square feet and costing $340,000. This resulted in a cost of $48.57 per foot. Records also revealed that the county's current acquisition cost was $20.00 per library volume.

Before imposing similar costs upon new development, it was necessary to determine whether the county's previous library construction and purchase costs had been subsidized. During the prior ten years, the State of Florida's library grants program had paid for 9.7% of the county's library costs. The county's proposed impact fee formula, anticipating that this subsidy would continue, correspondingly decreased the fee calculation by this percentage. This decrease is a critical factor in determining a valid impact fee and, if not included, may justifiably cause an aggrieved land developer to argue that a portion of the required impact fee payment constitutes an invalid tax. More specifically, the developer would be forced to pay for a cost not incurred by the county.

The county interpreted the preceding information and determined that the per capita cost of recent *library construction* was $17.00 ($48.57 x .35). The existing standard of 1.4 volumes per capita at a cost of $20.00 per volume resulted in a *book/volume* per capita cost of $28.00. The total cost of these capita charges was $45.00 ($17.00 plus $28.00). However, this cost was decreased by the relevant percentage of state subsidy (9.7%) resulting in a net cost of $40.62 per capita.

Available statistical information indicated that the average size of a Charlotte County household was 2.23 persons. Thus, the impact fee per household was $90.58 ($40.62 x 2.23). The formula properly focused on the cost of the capital improvements and did not include operational or maintenance costs. These expenses are not a portion of the capital improvements cost and must be borne by the community rather than imposed upon individual property owners. The Charlotte County Library Impact Fee Ordinance represents a relatively straight forward legislative effort, and a similar fact-gathering approach could be adopted when drafting road, park, sewer, water, or other impact fee laws.

The drafting of impact fee legislation becomes more detailed if a regulatory body, unlike Charlotte County, desires to increase the existing public facility standards. For example, assume that a community is aware of the current amount of public park land per resident and desires to increase the existing standard. The existing deficiency cannot be incorporated within the impact fee formula. The community must address and satisfy the differential between the existing and desired park land standards.[58] New development is validly subject to an impact fee based upon the new standard so long as the impact fees are not directed toward rectifying existing deficiencies and the community has undertaken efforts to remedy the deficit.

Legislators must also be aware of the relevance of "past contributions" when drafting impact fee legislation.[59] Owners of undeveloped land are required to pay property taxes and past property tax payments have likely been used by the municipality to satisfy the cost of capital improvements. As an example, a community contemplating the adoption of a road impact fee ordinance should determine the amount of property taxes derived from undeveloped land and the extent to which property taxes have been used to satisfy road construction expenses. Owners of undeveloped land will likely assert

58. Nicholas & Nelson, *The Rational Nexus Test and Appropriate Development Impact Fees*, in DEVELOPMENT IMPACT FEES 172 (A. Nelson ed. 1988).

59. *Id.* at 174.

that their past tax contributions assisted the community in constructing new roads, however, their undeveloped land did not generate any vehicles traveling on the roadways. Consequently, the owner of the undeveloped property did not receive any benefit from the past tax payments and the developer will maintain that the impact fee formula should offer a credit to reflect this fact.[60] This is a legitimate suggestion and one commentator has observed that "common sense should be relied upon to determine whether new development has paid for various services and facilities and whether any benefit was derived."[61]

The discussion of library and road impact fee legislation illustrates the application of the rational nexus test. The test requires that a regulatory body equalize the burden of *new* development upon *existing* development while avoiding any subsidy of the *existing* development by the *new* development. This sentiment is reflected in *Banberry v. South Jordan City* wherein a probing analysis of impact fee calculation is offered.[62]

In *Banberry*, the Utah Supreme Court set forth various factors to guide a regulatory body when determining the legitimate proportion of capital improvement costs to be borne by new development via impact fee payments. These factors include an awareness of the cost of existing capital facilities, the method previously adopted to finance existing capital improvements, and any past contributions by new development to fund existing capital improvements.[63] This analytical ap-

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60. In Lafferty v. Payson City, 642 P.2d 376, 379 (Utah 1982), the Utah Supreme Court stresses the need to analyze the method adopted to finance existing facilities in order "to assure that a property owner involved in a new home development is not required to buy into the capital value of existing municipal services and then pay for . . . the same capital value a second time by future tax payments against the bonded indebtedness used to construct them originally." *Id.*; *See* Downey v. Wells Sanitary Dist., 561 A.2d 174, 176 (Me. 1989) (upholding sewer impact fee legislation offering a credit to property owners for earlier monetary contributions to existing facilities).

61. NICHOLAS, *supra* note 57, at 13.

62. 631 P.2d 899 (Utah 1981) (establishing standards for determining the reasonableness of water connection and park improvement fees).

63. *Id.* at 903-05. The *Banberry* court also required investigation of the degree to which new development: will pay for existing capital improvements by future debt

proach will likely lead to municipal compliance with the rational nexus test as well as the dictates of the *Nollan* decision and thereby result in the enactment of valid impact fee formulae.

## V. Conclusion

Municipal interest in impact fee legislation is understandable, and a model impact fee ordinance represents an adroit blending of legal, political, and practical considerations. The preceding commentary set forth several of the attendant legal concerns with the hope of alerting interested parties to the potential strengths and weaknesses of such legislation.

Enactment of equitable impact fee laws in New York seems largely dependent upon communities approaching the topic with an awareness of the proper nexus that must exist between the fee and the impact of new development upon relevant public facilities. New York municipalities will undoubtedly be well served by impact fee laws adhering to this standard.

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service payments, will be required to construct capital improvements or dedicate land for such improvements, and will require extraordinary municipal infrastructure costs. *Id.*