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Pariah to Paragon: Developer Exactions in Florida 1975-85 (with N. Stroud)

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PARIAH TO PARAGON: DEVELOPER EXACTIONS IN FLORIDA 1975-85

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Florida local governments in the last ten years have experienced rapid population growth,[1] greater popular concern with the effects of that growth on the community,[2] and additional state mandates for planning and regulating that growth.[3] Many local governments have reacted by modernizing their growth management controls and, to some extent, modernizing and upgrading public services and facilities. At the same time, local governments have increasingly been forced to rely on their own resources to support regulation and construction needs, as federal grants-in-aid have decreased and the state revenue constraints have caused local governments to struggle to keep pace with local needs. Taxpayer unhappiness in Florida has dissuaded reliance on property taxes, while an inflationary economy has discouraged long term investments.[4]

Against this background, local governments have increasingly turned to the use of developer exactions to help pay for the cost of accommodating new growth.[5] In recent years, the Florida courts have reversed earlier trends by consistently upholding local government authority to charge development fees to assist in paying for capital facilities made necessary by the development. Developer exactions, in the form of mandatory subdivision dedications or the more sophisticated "impact fees," have found a secure place in the local govern-

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1. The state's population in 1975 was approximately 8.5 million, and by 1980 had grown by 14% to 9.7 million. FLORIDA DEPARTMENT OF COMMUNITY AFFAIRS, CENSUS OF LOCAL GOVERNMENTS, 14 (1982). By the year 1995, Florida is projected to grow by 40% from 1980, with 90% of that increase caused by immigration. EXECUTIVE OFFICE OF THE GOVERNOR, TRENDS AND CONDITIONS FOR FLORIDA 2 (1985). The state predicts that public facilities needs from 1982-2000 will cost $60 billion, with existing financing sources able to fund 59-66% of the need.

2. *See generally* J. DEGROVE, LAND GROWTH AND POLITICS 110-130 (1984).

3. Florida's major local planning legislation was enacted as the Local Government Comprehensive Planning Act of 1975, requiring all local governments to adopt comprehensive plans with specified contents. *See generally* DEGROVE, *supra* note 2; T. PELHAM, STATE LAND PLANNING AND REGULATION 151-90 (1979).

4. *See* FLORIDA ADVISORY COUNCIL ON INTERGOVERNMENTAL RELATIONS, STATE ACTION ON IMPACT FEES, 1-4 (January 1985).

5. *Id.* The ACIR report states that a recent survey indicates that 71% of all Florida municipalities use impact fees and counties indicate a growing interest in their use.

ment toolbox of financing techniques.[6] Once the pariah of the developers and the courts, impact fees, in the most recent Florida legislative session, were welcomed as a fair and useful means to assist in paying for and managing growth.

The gradual acceptance of impact fees and other developer exactions in Florida has been paralleled in other states, especially those experiencing high growth. This article traces the process of that acceptance in Florida and other states and the development of the rational nexus exactions test, which has emerged as the prevailing standard in Florida and throughout the country. Finally, the 1985 Growth Management Act, incorporating the rational nexus standard within its broad mandates, is analyzed for its impact on the future of developer exactions in Florida.

NATIONAL TREND 1960-1975: THE EMERGENCE OF THE RATIONAL NEXUS TEST

The period from 1960-1975 involved a pervasive suburbanization of America accompanied by a growing acceptance of developer fees and exactions in states throughout the country as a means to pay for suburban growth. The search for an appropriate judicial standard by which to allocate the costs of growth evolved out of the commonly-used device of subdivision regulation, which helped to form the basis for the later use of other development exactions such as impact fees.

By the early 1960s, many states had adopted statutes authorizing communities to adopt subdivision regulations that required the dedication of streets and other facilities to the public. The subdivision statutes were intended to eliminate the jumble of disconnected street systems resulting from earlier voluntary dedications and to avoid a future public debt like that experienced by subdivisions made defunct by the real estate crash of the 1920s.[7] Many courts upheld

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6. *See* Melli, *Subdivision Control in Wisconsin*, 1939 WIS. L. REV. 389, 455; Note, *An Analysis of Subdivision Control Legislation*, 28 IND. L.J. 544, 554 (1983); M. CHRISTINE BOYER, DREAMING THE RATIONAL CITY: THE MYTH OF AMERICAN CITY PLANNING 84-85 (1983); ROBERT H. FREILICH AND PETER S. LEVI, MODEL SUBDIVISION REGULATIONS: TEXT AND COMMENTARY 3 (Amer. Soc'y of Planning Officials, 1975).

7. NAT'L COMM'N ON URBAN PROBLEMS, BUILDING THE AMERICAN CITY 201 (1968). The courts had little difficulty upholding the modest requirements of the early plat laws. Highland Realty Co. Avondale Land Co., 174 Ala. 326, 56 So. 716 (1911); Halsell v. Ferguson, 109 Tex. 144, 202 S.W. 317 (1918); Hillman v. Seattle, 33 Wash. 14, 73 P. 791 (1903); Village of Lynnbrook v. Cadoo, 252 N.Y. 308, 169 N.E. 394 (1929). *See* Note, *Money Payment Requirements as Conditions to the Approval of Subdivision Maps: Analysis and Prognosis*, 9 VILL. L. REV. 294, 296 (1964).

mandatory subdivision dedications on the "privilege" theory, which postulates:

> [T]he owner of a subdivision voluntarily dedicates sufficient land for streets in return for the advantage and *privilege* of having his plat recorded.[8]

During the land development boom of the post-World War II period, many local governments suffered great economic pressure to provide facilities to serve the new development. They increasingly began to impose new requirements that developers dedicate park and school sites, widen off-site streets, or contibute to funds for public use for a wide variety of purposes.[9]

At the same time, the idea that most values created by government and received by citizens were "privileges" came under intense criticism.[10] In a widely quoted article, Professor Reich pointed out that for many people the expectation of or entitlement to government benefits was a new and important form of property.[11] Reich's ideas came to fruition when the Supreme Court gradually enlarged the concept of "property" to include the reasonable expectation of government grants, permits or benefits.[12] As the subdivision and platting of property began to be considered more like a right than a privilege, the rationale for mandatory dedication seemed more and more obsolete.

The combination of increased demands by governmental units for more contributions and the greater reluctance of the courts to

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8. Ridgefield Land Co. v. City of Detroit, 241 Mich. 468, ____, 217 N.W. 58, 59 (1928) (emphasis added). *See also* Newton v. Am. Sec. Co., 201 Ark. 943, 950-51, 148 S.W.2d 311, 314-15 (1941); Brous v. Smith, 304 N.Y. 164, 106 N.E.2d 503 (1952): Ayres v. City Council of Los Angeles, 34 Cal. 2d 31, 207 P.2d 1 (1949); Garvin v. Baker, 59 So.2d 360 (Fla. 1952); Maisen v. Maxey, 233 S.W.2d 309 (Tex. Civ. App. 1950). Pavelko, *Subdivision Exactions: A Review of Judicial Standards*, 25 WASH. U.J. OF URB. & CONT. L. 269, 283 (1983).

9. Blevens v. City of Manchester, 170 A.2d 121 (N.H. 1961); City of Buena Park v. Boyar, 186 Cal. App. 2d 61, 8 Cal. Rptr. 674 (1960); R. M. YEARWOOD, THE LAW AND ADMINISTRATION OF SUBDIVISION REGULATION: A STUDY IN LAND USE CONTROL 40, 152-62 (1966).

10. *See, e.g.*, Adler v. Bd. of Educ., 342 U.S. 485, 508 (1952) (Douglas, J., dissenting).

11. Reich, *The New Property*, 73 YALE L.J. 733 (1964). For a relatively current analysis see Van Alstyne, *Cracks in The New Property: Adjudicative Due Process in the Administrative State*, 62 CORNELL L. REV. 445 (1977).

12. *See* Bell v. Burson, 402 U.S. 535 (1971); Goldberg v. Kelly, 397 U.S. 254 (1970); Shapiro v. Thompson, 394 U.S. 618 (1969); Sherbert v. Verner, 374 U.S. 398 (1963); Fleming v. Nestor, 363 U.S. 603 (1960); Speiser v. Randall, 357 U.S. 513 (1958). In some of its more recent cases the Court has indicated that the pendulum may be beginning to swing back in the other direction. *See generally* Smolla, *The Reemergence of the Right-Privilege Distinction in Constitutional Law: The Price of Protesting Too Much*, 35 STAN. L. REV. 69 (1982).

characterize government permits as privileges led a number of courts to withdraw the approval they had formerly given to mandatory dedication. Based on these decisions, Reps and Smith concluded in 1968 that mandatory dedication should be permissible only for facilities that are of *exclusive* benefit to the residents of the new subdivision, such as local streets, sewers and neighborhood parks. Facilities whose benefits extended beyond the subdivision to the general public, such as arterial roads, sewage treatment plants and regional parks, were not proper subjects for mandatory dedication, even if the facilities were of substantial benefit to the subdivision residents as well.[13]

Reps and Smith argued that only improvements that could be legitimately financed by special assessment should be funded by subdivision exactions. With such an arrangement, the "special benefit" test used for special assessments could also be used as a bright and easily enforceable line between permissible and impermissible subdivision exactions. Reps and Smith, however, ignored the fact that the courts were at that time substantially expanding the concept of "special benefit" to allow incidental benefit to extend beyond the assessment area, thus making the test inapplicable to subdivision exactions.[14]

The year following the Reps and Smith article, an article on subdivision exactions was published in the Yale Law Journal by Ira Michael Heyman and Thomas K. Gilhool.[15] This article proposed a new way of evaluating the validity of subdivision exactions by applying cost-accounting methods: "Given a proper cost-accounting approach," said the authors, "it is possible to determine the costs generated by new residents and thus to avoid charging the newcomers more than a proportionate share."[16] The fact that the general public would also benefit from the exaction was immaterial "so long as there

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13. Reps & Smith, *Control of Urban Land Subdivision*, 14 SYRACUSE L. REV. 405 (1693). For cases consistent with this approach see State ex rel. Nowlind v. St. Louis County, 478 S.W.2d 363 (Mo. 1972); McKain v. Toledo City Planning Comm'n, 26 Ohio App. 2d 171, 270 N.E.2d 370 (1971); *see also* Pioneer Trust & Savings Bank v. Village of Mount Prospect, 22 Ill. 2d 375, 176 N.E.2d 789 (1961).

14. *See, e.g.*, City of Ft. Myers v. State, 95 Fla. 704, 117 So. 97 (1928); Haver v. Washington, 159 Ga. 568, 126 S.E. 464 (1925); Graham v. City of Grand Rapids, 179 Mich. 378, 146 N.W. 248 (1914). The United States Supreme Court consistently refused to reexamine those decisions. *See* Chesebro v. Los Angeles County Dist., 306 U.S. 459 (1939); Louisville N.R.R. v. Barber Asphalt Paving Co., 197 U.S. 430 (1904).

15. Heyman & Gilhool, *The Constitutionality of Imposing Increased Community Costs on New Suburban Residents Through Subdivision Exactions*, 73 YALE L.J. 1118 (1964).

16. *Id.* at 1136.

[was] a rational nexus between the exaction and the costs generated by the creation of the subdivision."[17]

Rarely have the authors of a law review article received such immediate satisfaction in seeing their views adopted. Within two years of publication of the article by Heyman and Gilhool, the Supreme Court of Wisconsin wrote influential opinions essentially adopting the rational nexus test proposed by the authors.[18] Even the Illinois Supreme Court, which had earlier used language implying the necessity of a "direct benefit,"[19] subsequently reinterpreted that language to incorporate the cost-accounting theories espoused by Heyman and Gilhool.[20] Moreover, the United States Supreme Court, although not deciding exactions cases in particular, seemed likely to support the use of a cost-benefit analysis to evaluate exactions, instead of the more formalistic analysis traditionally associated with eminent domain cases.[21]

The great appeal of the Heyman/Gilhool theory was its common sense approach. By applying a cost-benefit analysis, the transaction between developer and municipality was evaluated from an accounting standpoint in the same manner as any other business transaction. If it appeared that the costs were fairly apportioned between the affected parties, the transaction would survive judicial scrutiny. While such a theory liberated the developers from the fiction that they were

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17. *Id.* at 1137. Another commentator of about the same time saw the exaction process as the "newcomer . . . buying into the municipal corporation as a 'going concern.'" YEARWOOD, *supra* note 9, at 87.

18. Jenad, Inc. v. Village of Scarsdale, 18 N.Y.2d 78, 218 N.E.2d 673, 271 N.Y.S.2d 955 (1966); Jordan v. Village of Menomonee Falls, 28 Wis.2d 608, 137 N.W.2d 442 (1965), *appeal dismissed*, 385 U.S. 4 (1966). As Professor Williams puts it, "in the mid-60's the tide suddenly turned" in favor of mandatory dedication. 5 WILLIAMS, AMERICAN LAND PLANNING LAW 285 (1974).

19. Pioneer Trust and Savings Bank v. Village of Mount Prospect, 176 N.E.2d 799 (1961).

20. City of Carbondale v. Brewster, 78 Ill. 2d 111, 398 N.E.2d 829 (1979), *appeal dismissed*, 446 U.S. 931 (1980); Krughoff v. City of Naperville, 68 Ill. 2d 352, 358-59, 369 N.E.2d 892 (1977); Plote, Inc. v. Minnesota Alden Co., 96 Ill. App. 3d 1001, 422 N.E.2d 231, 235-36 (1981). Even prior to the *Krughoff* decision an empirical study showed that Illinois municipalities were not unduly restricted by the earlier decisions. *See* Platt & Moloney-Merkle, *Municipal Improvisation: Open Space Exactions in the Land of Pioneer Trust*, 5 URB. LAW. 76 (1973).

21. Although the United States Supreme Court did not have occasion to examine any cases directly involving development exactions, the Court's analysis in related property right cases involved the similar process of balancing all of the business aspects of the situation to determine whether the property owner got a fair deal. Ruckleshaus v. Monsanto Co., 104 S. Ct. 2862 (1984); Pruneyard Shopping Center, Inc. v. Robins, 447 U.S. 74 (1980); Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 135-39 (1978); *see also* American Savings & Loan Ass'n v. County of Marin, 653 F.2d 364 (9th Cir. 1981); Northern Westchester Professional Park Assocs. v. Town of Bedford, 60 N.Y.2d 492, 458 N.E.2d 809, 815 (1983).

obtaining some sort of privilege, it also provided local government with a flexible theory that could justify demands for payment of money as easily as for dedication of land.[22] Since the theory was not tied to the financing of any particular type of government facility or service, it could be broadly applied across the whole range of government activities.[23] In the years that followed the Heyman and Gilhool article, courts increasingly employed this theory as the rational nexus test became an accepted standard throughout the country.

The leading rational nexus cases, which were from Wisconsin and New York, applied the analysis to subdivision exactions of land dedication, or fees in lieu of land dedication, for schools and recreational purposes. A parallel use of the test developed in cases concerning required street improvements and water and sewer connections. With water and sewer connections cases particularly, the developing case law often made no reference to dedications required by subdivision statutes, but instead referred to specific utility statutes. As a result, illogically, a state court was able to use the rational nexus analysis for one type of capital facility fee, but not for another.[24] Nevertheless, the different lines of cases have begun to converge and borrow concepts and criteria from one another, particularly in Florida.[25]

By the mid-1970s, the parameters of the rational nexus analysis had taken shape in the various state courts. A common thread developed, with most courts deriving the authority to impose exactions from enumerated statutory and constitutional powers. The courts read that authority broadly, sometimes deferring to state legislative intent in planning for controlled community development. After finding sufficient authority to charge a fee, the courts commonly ad-

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22. Juergensmeyer & Blake, *Impact Fees: An Answer to Local Governments' Capital Funding Dilemma*, 9 FLA. ST. U. L. REV. 415 (1981). Note, *Subdivision Land Dedication: Objectives and Objections*, 27 STAN. L. REV. 419 (1975). Some earlier courts had imposed a more difficult test for mandatory payments than for mandatory dedication. *See* Note, *Money Payment Requirements as Conditions to the Approval of Subdivision Maps: Analysis and Prognosis*, 9 VILL. L. REV. 294, 300-05 (1964).

23. "In the 1950s suburbs began to exact sites for parks and schools. Today the frontier is moving toward fire stations and day care centers." R. ELLICKSON & D. TARLOCK, LAND USE CONTROLS 738 (1981).

24. For example, in Oregon the court has approved the use of sewer connection fees if the charges are "reasonably related to the costs fairly anticipated in the future construction and expansion" of the system. Hayes v. City of Albany, 7 Or. App. 277, 490 P.2d 1018 (1971). At the same time, an early case invalidating subdivision parks and open space fees applied the more restrictive "direct benefit" test. Haugen v. Gleason, 226 Or. 99, 359 P.2d 108 (1961).

25. *See* discussion *infra* at 539-48.

dressed the relationship between the development that was charged the fee and the amount and use planned for the fee. The reasonableness of that relationship determined whether there was a sufficient rational nexus to uphold the fee. Finally, the courts considered the way in which the collected fees were administered, preferring or requiring that the funds be specially earmarked to ensure reservation for the purposes for which they were collected. The rational nexus analysis has grown more sophisticated in the last decade, particularly in Utah, New Jersey and Florida. A majority of the states have adopted a well-delineated analysis, which is discussed further below and is referred to as the "mainstream" position.

STATUTORY AUTHORITY

The first obstacle to acceptance of development exactions has been the reluctance by the courts to interpret legislation to find authority for exactions. Courts have often struck down exactions, finding them fatally flawed by the absence of state or local enabling authority. On the other hand, finding sufficient authority is a subjective determination and, if a court is inclined to uphold a fee, the lack of specific authority or guidelines is no obstacle to its validity. As a result, most general enabling statutes providing authority for platting regulation have commonly been found sufficient for the exaction of school and park fees[26] or offsite road improvements.[27] Likewise, state statutes or constitutional provisions enabling local authorities to operate and regulate sewer and water facilities, and to enforce zoning regulations, have been broadly interpreted to permit the imposition of connection fees.[28]

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26. *See, e.g.*, Call v. City of W. Jordan, 606 P.2d 217 (Utah 1979) (land or fees for flood, parks and recreation purposes upheld under planning and enabling statutes viewed together); Jordan v. Village of Menomonee Falls, 28 Wis. 2d 608, 137 N.W.2d 442 (1965) (parks and school fees in lieu of land dedication authorized; *see also* Comment, *Development Fees: Standards to Determine Their Reasonableness*, 1982 UTAH L. REV. 549, 556. *Contra* Coronado Dev. Co. v. City of McPherson, 189 Kan. 174, 368 P.2d 51 (1962) (park in lieu of land dedication fees beyond the scope of enabling statute); West Park Ave., Inc. v. Township of Ocean, 48 N.J. 122, 224 A.2d 1 (1966) (enabling act authorizing school site reservation does not authorize school fee); Sanchez v. City of Santa Fe, 82 N.M. 322, 481 P.2d 401 (1971) (subdivision exactions).

27. *See, e.g.*, Garipay v. Town of Hanover, 116 N.H. 34, 351 A.2d 64 (1976) (state subdivision statutes enabling regulation of transportation safety allow consideration of offsite improvements); Longridge Builders, Inc. v. Planning Bd. of Princeton Township, 52 N.J. 348, 245 A.2d 336 (1968).

28. *See, e.g.*, City of Arvada v. City and County of Denver, 663 P.2d 611 (Colo. 1983); Airwick Indus., Inc. v. Carlstadt Sewerage Auth., 57 N.J. 107, 270 A.2d 18 (1970) (sewer authority enabling statute permits authority to recoup a fair contribution by connecting party toward

Most courts seem persuaded that the purpose for imposing impact fees is within the proper ambit of state and local police power, and often compare the imposition of fees to other zoning regulations such as minimum lot sizes, setbacks or more generally acceptable subdivision regulations such as standard street widths. For example, in an early New York case validating recreational fees-in-lieu, the court found the fee to be a "reasonable form of village planning for the general community good."[29] Similarly, the Montana Supreme Court twenty years ago in *Billings Properties, Inc. v. Yellowstone County*[30] refused to distinguish between subdivision regulations requiring the installation of roads and sewers and those requiring recreational fees in lieu of land dedication,[31] and thus presaged today's rational nexus approach.[32] The courts have fashioned public policy reasons for supporting such measures, derived from constitutions,[33] legislative reports and statements of intent,[34] or professional and scholarly reports.[35]

FAIR SHARE

The issue of statutory authority, under the rational nexus test as well as other tests, has less real significance than the critical issue of whether the development is paying its fair share of capital facility costs.[36] The mainstream states uniformly reject the proposition that

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debt service charges); Amherst Builders Ass'n v. City of Amherst, 61 Ohio St. 2d 345, 402 N.E.2d 1181 (Ohio 1980) (city's plenary powers under Ohio constitution authorized water system tap in fee); Coulter v. City of Rawlings, 662 P.2d 888 (Wyo. 1983) (state zoning enabling statutes provide authority to regulate sewer and water and thus to charge connection fees).

29. Jenad, Inc. v. Village of Scarsdale, 18 N.Y.2d 78, ____, 218 N.E.2d 673, 676, 271 N.Y.S.2d 955, 958 (1966).

30. 394 P.2d 182, 187-188 (Mont. 1964).

31. *Id.*

32. *See, e.g.*, City of College Station v. Turtle Rock Corp., 680 S.W.2d 802 (Tex. 1984), where the court compares a recreation fee requirement to valid street dedication requirements.

33. The California constitutional exhortion to maintain and preserve open space bolstered the argument for recreational fees in Associated Home Builders of the Greater E. Bay, Inc. v. City of Walnut Creek, 4 Cal. 3d 633, 94 Cal. Rptr. 630, 484 P.2d 606 (1971).

34. *Id.* at 639 n.4, 94 Cal. Rptr. at 635 n.4, 484 P.2d at 611 n.4.

35. For example, the courts have referred to the position taken by the American Law Institute Model Land Development Code § 2-103 (1976), approving park fees and other facility requirements to the extent that demand is reasonably allocable to the development. Board of School Dist. No. 68 v. Surety Dev., Inc., 63 Ill. 2d 193, 347 N.E.2d 149 (1975) (upholding school fee exaction as a condition of special use permit); City of College Station v. Turtle Rock Corp., 680 S.W.2d 802, 804 (Tex. 1984).

36. Some jurisdictions have dismissed exactions as not within statutory authority. *See* cases cited *supra* note 25. Those states using the more restrictive "specifically and uniquely

only the development that pays the fee should benefit from the use of the fee. These courts, however, have not developed a consistent defition of fair share. Some states, particularly California,[37] apply a very undemanding standard, prompting some commentators to compare the rational nexus test to the traditional "rational basis" test used in equal protection analysis where the government rarely loses.[38] Other courts have developed a more rigorous analysis that requires formal cost accounting. Under the more demanding standard, as Juergensmeyer and Blake have noted,[39] finding the requisite reasonable relationship between the development and the fee requires a two-part analysis. Generally, the first prong of the nexus test considers the relationship of the development and the need for additional facilities, while the second part views the relationship between the benefits accruing to the development and the expenditure of the funds collected. If both relationships are determined to be reasonable, courts following the mainstream position will uphold the exaction.

The first prong of the rational nexus test requires that the development being assessed create the need for the service or facility for which it pays. In most cases, the court will find as a matter of law or apparent fact that the development creates the need. While most courts favor finding the requisite relationship in the first prong, the extent of proof required varies from court to court. In Montana, for example, the state enactment authorizing park dedication requirements was found itself to establish the requisite need.[40] The Utah Supreme Court, in *Call v. City of West Jordan*,[41] found it "apparent"

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attributable" test of *Pioneer Trust*, however, may find sufficient statutory authority for the exaction but invalidate the method for assessing the fee as not specifically enough related to the development which pays. *See, e.g.*, J.E.D. Assocs., Inc. v. Atkinson, 432 A.2d 12 (N.H. 1981) (fixed percentage of subdivided land for parks and other town use an arbitrary blanket requirement); Frank Ansuini, Inc. v. City of Cranston, 107 R.I. 63, 264 A.2d 910 (1970) (fixed percentage of required land dedication for parks unreasonable).

37. *See, e.g.*, J.W. Jones Cos. v. City of San Diego, 157 Cal. App. 3d 745, 203 Cal. Rptr. 580 (Cal. Ct. App. 1984); Kalaydjian v. City of Los Angeles, 149 Cal. App. 3d 690, 197 Cal. Rptr. 149 (Cal. Ct. App. 1983); Liberty v. Cal. Coastal Comm'n, 113 Cal. App. 3d 491, 170 Cal. Rptr. 247 (Cal. Ct. App. 1980). *See also* Wald Corp. v. Metropolitan Dade County, 338 So. 2d 863, 865 (Fla. 3d DCA 1976).

38. *See* Williams, *Planning Law in the 1980's: What Do We do About It?* VT. L. REV. 205 (1982).

39. Juergensmeyer and Blake, *supra* note 22, at 443.

40. Billings Properties, Inc. v. Yellowstone County, 394 P.2d 182 (Mont. 1984). *See also* Associated Home Builders of Greater East Bay, Inc. v. City of Walnut Creek, 4 Cal. 3d 633, 94 Cal. Rptr. 630, 484 P.2d 606 (1971).

41. 606 P.2d 217 (Utah 1979).

that subdivision activity increased the need for flood control measures and recreational facilities, without examining any evidence of need. Wisconsin courts are somewhat more demanding. In one case it was suggested that "in the absence of contravening evidence" the cumulative effect over time from subdivision activity normally will create a need for new parks and schools, but evidence can show that new subdivisions currently meet existing local needs or normal growth needs.[42]

In some instances, the court's analysis goes deeper than merely measuring whether the development created the need for the new facilities. In circumstances involving roads or sewer and water facilities, for example, the courts many times determine the proportion of the need for new facilities that is directly attributable to the new development being charged the exaction. Accordingly, the Oregon Supreme Court upheld water and sewer connection fees only to the extent that they were proportionate to the burdens imposed by new development on the water and sewer facilities.[43] Moreover, in allocating costs, the courts consider both the extent of the burden imposed on the system and the benefits received by the new users.[44] In attempting to balance those burdens and benefits, a few later decisions developed a sophisticated fiscal analysis discussed more fully below.

The second prong of the rational nexus test demands that a reasonable relationship exist between the use of the funds and the benefits accruing to the development. At its simplest, the test requires only that the fees do not exceed the costs of providing the services. On this basis, the Wisconsin Supreme Court in *Jordan v. Village of Menomonee Falls*[45] upheld a subdivision exaction for schools and parks after examining the evidence of village school and park expenditures compared to needs caused by population growth. The cases are in general agreement that the capital facilities may be used

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42. Jordan v. Village of Menomonee Falls, 28 Wis. 2d 608, 137 N.W.2d 442 (1965). In this case the court also reviewed evidence of the yearly village population increase and expert testimony regarding standards for schools and parkland per population. A simlar approach was taken in College Park Station v. Turtle Rock Corp., 680 S.W.2d 802 (Tex. 1984), where the court placed the burden on the challenger of the parks fee to show there is no reasonable connection between the increased population from the subdivision and the increased park needs. The court further suggested types of evidence for consideration on remand.

43. Hayes v. City of Albany, 7 Or. App. 277, 490 P.2d 1018 (Or. Ct. App. 1971). *See also* Associated Homebuilders v. City of Livermore, 56 Cal. 2d 847, 17 Cal. Rptr. 5, 366 P.2d 448 (1961).

44. Comment, *supra* note 26, at 562-63.

45. 28 Wis. 2d 608, 137 N.W.2d 442 (1965).

by the general public, and thus not exclusively by the persons who pay for the facilities, without invalidating the exaction. Furthermore, the courts appear to be more inclined to uphold a fee if there is a definite plan as to how the money will be spent.[46]

The criteria for determining a reasonable relationship were not initially well established, and in most states each case was decided on its own facts. For example, in the early California case of *Associated Home Builders of the Greater East Bay, Inc. v. City of Walnut Creek*,[47] the court upheld a recreational fee on the basis that as long as the fee was used for recreational facilities available to the future inhabitants of the subdivision, the fee bore a reasonable relationship to the use by those residents. In one of its most comprehensive discussions of the "reasonable relationship" standard, the court rejected the arguments that the flat charge on 7% of the value of subdivided land unfairly burdened high density development and that the fee resulted in double taxation because residents outside the subdivision did not pay a similar fee. The court also rejected the argument that the developer should be credited for recreational improvements made within the subdivision, particularly where those improvements were not part of the city's recreational plan for development.[48]

EARMARKING

A final criterion used in determining the validity of an exaction scheme views whether funds collected were specially earmarked to a particular account within the local government fiscal structure. Although earmarking provides assurance that the fees or exactions will benefit the fee payer by limiting the fees' expenditure to the purpose for which they were collected, the courts are discordant as to the importance earmarking has in analyzing the validity of an exaction. For example, in *Amherst Builders Ass'n v. City of Amherst*,[49] the court

46. *See* City of Fayetteville v. IBI, Inc., 659 S.W.2d 505 (Ark. 1983), where the court invalidated a parks exaction because the city lacked a plan for spending the funds and thus could not demonstrate that the development would be sufficiently benefitted. In Miller v. City of Port Angeles, 691 P.2d 229 (Wash. Ct. App. 1984), the court found it unnecessary for the city to determine precisely when construction might occur, but remanded for the city to clarify that money not expended in a certain time would be refunded.

47. 4 Cal. 3d 633, 94 Cal. Rptr. 630, 484 P.2d 606 (1971).

48. *See also* Call v. City of W. Jordan, 606 P.2d 217 (Utah 1979), holding that the subdivider need not be given credit for flood or recreational improvements constructed independently of the assessed fee.

49. 61 Ohio St. 2d 345, 402 N.E.2d 1181 (Ohio 1980).

required sewer connection fees to be segregated into a specific sewer fund.[50] Some courts, on the other hand, mention earmarking with approval, but do not require special accounts.[51] Other courts do not address the issue at all.[52]

FLORIDA LAW PRIOR TO 1975: EXACTIONS UNAUTHORIZED

Prior to 1975, a number of local governments in Florida experimented with the use of different types of development exactions in an attempt to shift the costs of new growth to developers. The courts reacted unfavorably to these attempts and called upon the legislature to clarify the extent of authority the local governments had in making exactions. The emphasis on legislative authority in denying such fees, typically in Florida, as in other states, was apparent in distinctions made between charges that were labelled "fees" and those considered "taxes." By characterizing the charges as taxes, which require specific legislative authority, the courts were able to avoid addressing how such charges should be structured to fairly pay for the costs of growth.

The earliest exaction cases in Florida, as in many other states, addressed the question of whether a city could constitutionally require a subdivider to dedicate lands or charge fees-in-lieu for parks and recreation purposes. In the 1966 case of *Carlann Shores, Inc. v. City of Gulf Breeze*,[53] a developer challenged the city's required dedication of five percent of a subdivided area, or an alternate payment of money equal to the value of five percent of the gross area, for public parks and recreation purposes. The court struck down the cash payment provision as an unconstitutional taking of property without just compensation, thus adopting the restrictive approach to mandatory subdivision exactions applied in early New York and Illi-

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50. *Id. See also* Hayes v. City of Albany, 7 Or. App. 277, 490 P.2d 1018, 1020 (Or. Ct. App. 1971), where the existence of an earmarked account for sewer connection fees provided the necessary demonstration that the funds would be used for a purpose directly related to the activity being regulated, thereby distinguishing them from park fees found invalid in *Haugen v. Gleason.*

51. *See, e.g.*, Jenad, Inc. v. Village of Scarsdale, 18 N.Y.2d 78, 218 N.E.2d 673, 271 N.Y.S.2d 955 (1966) (recreational fees-in-lieu of land dedication earmarked to special fund).

52. *See, e.g.*, Call v. City of W. Jordan, 606 P.2d 217 (Utah 1979); *Home Builders Ass'n of Kansas City*, 555 S.W.2d 832 (Mo. 1977); City of College Station v. Turtle Rock Corp., 680 S.W.2d 802 (Tex. 1984).

53. 26 Fla. Supp. 94 (Santa Rosa Cir. Ct. 1966).

nois cases.[54] The *Carlann Shores* court reasoned that because the ordinance did not ensure that the use of funds would be of direct benefit to the subdivider, the developer would likely be required to pay more than its proportionate share.

Six years after *Carlann Shores*, in *Admiral Development Corp. v. City of Maitland*,[55] the Fourth District Court of Appeal found that subdivision provisions similar to those struck down in *Carlann Shores* went beyond the city's charter authority.[56] Relying on the line of cases representing the position taken by *Carlann Shores*, the court advised that the mandatory dedication regulation, even if authorized by charter, might not pass constitutional muster because it was based on a fixed percentage of the value of the subdivided area. The fixed percentage was impermissible because it did not ensure that the need for the dedicated land or fee payment resulted from the developer's specific and unique activity.[57]

Local government attempts to assess development fees for parks and roads, charged at the time of building permits, were similarly unsuccessful. In *Venditti-Siravo, Inc. v. City of Hollywood*,[58] the city charged a fee amounting to one percent of the estimated cost of construction to be reserved in a special fund for parks and recreation. The court found that the one percent charge was properly characterized as a "tax" on real or personal property, and could not be justified as a regulatory measure under the city's police power. As a tax, the charges failed to comply with statutory and constitutional requirements for uniform charges on real property, and were thus impermissible.

Likewise, a fee charged by Broward County to pay for road and bridge construction was fatally characterized by the Fourth District Court of Appeal as a tax in *Broward County v. Janis Development Corporation*,[59] even though the ordinance was more carefully drafted

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54. Gulest Assocs., Inc. v. Town of Newburgh, 25 Misc. 2d 1004, 209 N.Y.S.2d 729 (N.Y. Sup. Ct. 1960), *aff'd*, 15 A.D.2d 815, 225 N.Y.S.2d 538 (1962).

55. 267 So. 2d 860 (Fla. 4th DCA 1972).

56. *Id.* at 863, *citing* Aunt Hack Ridge Estates, Inc. v. Planning Comm'n, 160 Conn. 109, 273 A.2d 880 (1970); Coronado Dev. Co. v. City of McPherson, 189 Kan. 174, 368 P.2d 51 (1962); West Park Ave., Inc. v. Ocean Township, 48 N.J. 122, 222 A.2d 201 (1966), among others.

57. *Id.* at 863, *citing* Frank Ansuini, Inc. v. City of Cranston, 107 R.I. 63, 264 A.2d 910 (1970). The court left the door open, however, for revisions to the charter "by appropriate legal action." 267 So. 2d at 863.

58. 39 Fla. Supp. 121 (17th Cir. Ct. 1973).

59. 311 So. 2d 371 (Fla. 4th DCA 1975), *aff'g*, Janis Dev. Corp. v. City of Sunrise, 40 Fla.

to include the type and location of the development charged. The county ordinance authorized a "land use fee" of $200 per dwelling unit, with proportionately higher charges for higher intensity developments. The funds collected were placed in a trust fund to be used for improvements in the vicinity of the project from which the charges were collected. Although the court admitted that the precedent it used in distinguishing the regulatory purposes of a "fee" from the revenue raising purposes of a "tax" was "the more conservative, though not archaic,"[60] it found that the lack of specificity in the ordinance properly characterized it as an unauthorized tax.[61]

While the court in *Janis Development* expressed sympathy for the plight of local governments in coping with the stress on public facilities caused by population growth, it explicitly declined to suggest criteria for acceptable local impact fees, and instead suggested an appeal to the legislature. In words expressed in a more hopeful, if not more innocent time, the court stated that it was:

> sanguine that future [legislative] Sessions will produce implementation in the form of specific authorizations and criteria in the area of land use and impact costs for use by local government.[62]

The court's hope was not without foundation. Because the phenomenal population growth of the seventies in Florida had produced considerable debate about regulating and paying for the costs of growth, both at the local and state levels, a number of Florida local governments tried to cope by limiting growth outrightly through population caps, such as in Boca Raton.[63] Other communities sought to protect their special qualities through environmentally sensitive land use regulation, as in Sanibel.[64] In 1974, State Representative Charles Boyd introduced legislation which would have enabled local governments to adopt impact fees.[65] The Florida Legislature failed to enact

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Supp. 41 (Broward Cir. Ct. 1973).

60. 311 So. 2d at 375.

61. *Id.*

62. *Id.* at 376.

63. City of Boca Raton v. Boca Villas Corp., 371 So. 2d 159 (Fla. 4th DCA 1979).

64. JOHN CLARK, THE SANIBEL PLAN (1976). *See also*, Juergensmeyer and Gragg, *Limiting Population Growth in Florida and the Nation—The Constitutional Issues*, 26 U. FLA. L. REV. 758 (1974).

65. H.B. 2705 and H.B. 3126, 1974 Sess. The proposed Florida Impact Fee Law provided that local governments could impose impact fees on new construction, and allowed exemptions for publically-assisted housing and credits for capital improvements contributed by developers. Bills presented to the 1975 session also failed. *See* Article, *Impact Fees: National Perspectives to Florida Practice; A Review of Mandatory Land Dedications and Impact Fees That Affect*

the bill after vigorous lobbying by the development industry, however, and the debate continued outside the legislative halls.[66] As a result, the *Janis Development* court's expectation did not materialize in 1975. In fact, it was not until a decade later when the Florida Legislature finally enacted impact fee legislation.

NATIONAL TREND 1975-1985: APPORTIONING THE COSTS OF GROWTH

In the years following the initial emergence of the rational nexus test, the courts continually developed more explicit criteria for properly allocating the costs of new growth to new development. The task of providing guidance for cost apportionment generally was left to the courts in the absence of legislative expression on the subject.[67] The national trend toward more exact apportionment has been pioneered by such states as Utah, New Jersey, and to some extent, Florida.[68]

In the last decade, the cases addressing the cost apportionment question have attended to two problems in particular.[69] First, exactions typically occur in situations in which a previously constructed capital facility has excess capacity, and a fee must be designed to reimburse, or recoup, a portion of the previously expended capital

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Land Developments, 4 NOVA L.J. 137, 140-41 (1980).

66. *See, e.g.*, Rhodes, *Impact Fees: The Cost Benefit Dilemma in Florida*, 27 LAND USE LAW & ZONING DIGEST No. 10 at 7 (1975).

67. The action of the legislature, when it does occur, has sometimes served not to clarify but to muddy the waters. In Washington, for example, the legislature amended the state taxing statutes to prohibit development fees absent a "voluntary agreement" between developer and municipality. This followed a Supreme Court case holding a mandatory subdivision school, fire and parks fee and invalid tax. Hillis Homes, Inc. v. Snohomish County, 97 Wash. 804, 650 P.2d 193 (1982). Because the legislature failed also to amend the subdivision statute, which expressly authorizes mandatory dedications, the effect of the new statute is uncertain. *See* Note, *Subdivisions Exactions in Washington: The Controversy Over Imposing Fees on Developers*, 59 WASH. L. REV. 289 (1984).

68. The trend of course is not universal, and some states continued to find exactions simply unauthorized. *See, e.g.*, Riegert Apartments Corp. v. Planning Bd., 57 N.Y.2d 206, 441 N.E.2d 1076 (1982) (dedication of park land or fees not authorized as condition for site plan approval); Hylton Enters., Inc. v. Board of Supervisors, 220 Va. 435 258 S.E.2d 577 (1979) (no express or implied authority to impose mandatory fees or dedication); Hillis Homes, Inc. v. Snohomish County, 97 Wash. 804, 650 P.2d 193 (1982).

69. This discussion of the fiscal questions addressed by more sophisticated analyses is suggested by JAMES E. FRANK, ANALYSIS OF THE IMPLICATIONS OF LAFFERTY V. PAYSON CITY IN RELATIONSHIP TO THE DUNEDIN STANDARD AND THE PALM BEACH COUNTY FAIR SHARE ROAD IMPACT FEE (unpublished paper, offices of Burke, Bosselman and Weaver, Boca Raton, Florida, September, 1982).

outlay, thus creating a "recoupment problem." Second, a "double charging" problem may arise where capital facilities are financed from a mix of revenue sources including, for example, ad valorem property taxes.

The Utah Supreme Court led the way in providing specific criteria to be used in addressing these two problems in the 1981 case of *Banberry Development Corporation v. South Jordan City*,[70] which involved water connection and park improvement fees. The court demonstrated that the criteria were required elements when it remanded a trial court's invalidation of connection fees for sewer, water and electrical services because not all of the *Banberry* factors had been considered.[71]

Banberry addressed the recoupment problem by requiring new developments to buy into the equity value of the existing capital system, instructing local governments to consider "the cost of existing capital facilities."[72] This process was further refined in the later case of *Lafferty v. Payson City*,[73] where the court suggested that the depreciated value of the system at the time of the buy-in should also be considered.[74]

Another *Banberry* factor, "extraordinary costs in serving the new development,"[75] requires considering how the development might unusually burden existing facilities. Considering unusual burdening is necessary in order to allocate the new development's contribution to the equity value of the facilities.

The remainder of the factors applied in *Banberry* concern the double charging problem. The court in *Banberry* required the city to deduct the costs of facilities contributed by the development and the present value of past and future revenue payments otherwise made to the city by the development from the fee. The city was also instructed to consider (1) the means by which facilities have been financed, (2) past and future contributions to the cost of existing facilities by the new development, (3) credit for contributed facilities

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70. 631 P.2d 899 (Utah 1981). The case provides considerably more specificity than the earlier holding regarding subdivision exactions in Call v. City of W. Jordan, 606 P.2d 217 (Utah 1979), demonstrating an increasing interest by the court in the apportionment problem.

71. Lafferty v. Payson City, 642 P.2d 376 (Utah 1982).

72. *Banberry*, 631 P.2d at 904.

73. 642 P.2d. 376 (Utah 1982).

74. *Id.* at 379 (The local government should appropriately discount for the age and condition of the existing system).

75. *Banberry*, 631 P.2d at 904.

otherwise provided by the municipality, and (4) the time value of amounts paid.[76] Collectively, all these considerations were designed to preclude a development from being overcharged for municipal utility fees.

The New Jersey courts have also tackled the cost allocation problems associated with municipal utilities fees. Three different methods for calculating sewer connection fees were applied in *White Birch Realty Corporation v. Gloucester Township Municipal Utilities Authority*,[77] where the court held that a municipal utility's authority is not limited to any one method of determining a fair share connection fee. Addressing the issue of recoupment, the *White Birch Realty* court mandated that new connectors to the town's sewer system pay a fair contribution to "debt services charges theretofore met by others."[78] Detailed examination of the various bond term requirements and the actual number of units connected in each previous year was used to determine the new connectors' equity share toward the system. The question of double charging, however, was not at issue in the case.

Other courts, while not approaching the recoupment and double charging problems in detail, have expressed concern about them. In *Amherst Builders Association v. City of Amherst*,[79] the Ohio Supreme Court adopted the solution to the recoupment problem applied in *Birch Realty*, requiring new users of a sewage system to assume a "fair share of the original construction costs, thereby reimbursing the community for the previous benefit received."[80] Under the Ohio court's theory, unimproved property receives a benefit from the mere existence of the system, and thus, should reimburse the community by helping fund the original capital outlay. The court suggested two methods for resolving the recoupment problem. The first, the "investment basis" calculation, estimates the replacement cost of the system and deducts depreciation and remaining debt on the system. The final figure is then calculated by dividing the latter

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76. *Id.*

77. 80 N.J. 165, 402 A.2d 927 (1979).

78. *Id.* at 932, *citing* Airwick Indus., Inc. v. Carlstadt Sewerage Auth., 57 N.J. 107, 122, 270 A.2d 18, 26 (1970). This may imply that new connectors should pay for the availability of system capacity from the time of initial construction, as opposed to capacity in the remaining life of the system. *See* FRANK, *supra* note 69, at 5.

79. 61 Ohio St. 2d 345, 402 N.E.2d 1181 (Ohio 1980).

80. *Id.* at ____, 402 N.E.2d at 1183.

sum by the present number of users.[81] Alternatively, the court accepted a less precise calculation based on sewage flow estimates by the Environmental Protection Agency which presumably would then be divided into the cost of the system.

THE TREND FOR THE FUTURE

Various courts have suggested factors to be considered when balancing benefits and burdens created by new development. For example, on remanding a park dedication case for evidence concerning the relationship between population growth in the subdivision and the fee charged, the Texas Supreme Court suggested that the court consider the size of subdivision lots, the amount of open land consumed, and the overall economic impact of the subdivision.[82] Regarding offsite road exactions, the New Hampshire Supreme Court has stated that "no single factor can be determinative of the appropriate mode of apportionment" of road costs to the subdivider.[83] Suggested factors, however, included: potential traffic increase from the subdivision, the subdivision frontage, the town's present maintenance standard for the road, and the potential for development and existing character of the neighborhood served by the road.[84] Furthermore, the New Hampshire court opined that costs may also be adjusted according to the town's ability to pay if the town otherwise would be faced with an excessive expenditure.[85]

The national trend toward greater use of development fees, spurred by increased judicial acceptance of local need and authority to enact such fees, has understandably resulted in closer scrutiny by the courts of the factors used in determining the fair share of the developer's cost participation in the new facilities. The same trend has been apparent in Florida within the last decade.

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81. *Id.*

82. City of College Station v. Turtle Rock Corp., 680 S.W.2d 802 (Tex. 1984). The case is also an example of the shift toward the rational nexus analysis that has gained momentum in the last decade. Earlier, the court had let stand an appellate decision that held mandatory subdivision exactions to be authorized. Berg Dev. Co. v. City of Missouri City, 603 S.W. 2d 273 (Tex. Ct. App. 1980).

83. Land/Vest Properties, Inc. v. Town of Plainfield, 117 N.H. 817, 379 A.2d 200 (1977).

84. *Id.*

85. *Id. See* Deerfield Estates, Inc. v. Township of E. Brunswick, 60 N.J. 115, 286 A.2d 498 (1972).

FLORIDA TREND 1975-1985: EMBRACING THE RATIONAL NEXUS TEST

In 1976, an important supreme court decision put Florida into the rational nexus mainstream, set the stage for rapid development of the rational nexus test in Florida, and resulted in the legislative adoption of the rational nexus standard in 1985 as an important component in local and growth management decisions.

In *Contractors and Builders Association of Pinellas County v. City of Dunedin*,[86] the Florida Supreme Court considered the validity of sewer and water fees charged by Dunedin to pay for expanded sewer and water collection and treatment facilities. In upholding the concept of impact fees, the supreme court made clear that local governments may require a new user of public facilities to pay a fair share of the costs imposed by new use of the system. Although not expressly applying the rational nexus analysis, the court reviewed the fees on the basis of: whether the city had sufficient regulatory authority to charge such fees;[87] whether there was a rational relationship between the capital costs of expansion made necessary by new development and the fee charged;[88] and whether the fees were sufficiently earmarked for the benefit of those paying the fee.[89]

The fee charged by the city was not simply a connection fee[90] charged for the privilege of connecting to the sewage system, nor did it pay for the costs of sewers immediately serving the homes and businesses of the connecting developments.[91] Rather, the fee was used to pay for new additions to the common facilities used to transmit and treat the sewage of new and existing users.[92] This distinction

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86. 329 So. 2d 314 (Fla. 1976).

87. The court determined that the charges were not taxes, which would require specific enabling authority, but were regulatory fees. The court referred to regulatory powers granted under the broad constitutional municipal powers, as well as to the more specific powers under the state public utilities enabling statute, FLA. STAT. §§ 180.01-.26. 329 So. 2d at 318-19.

88. 329 So. 2d at 319-20. The fees were charged, the court found, to meet the increased demand the system that additional connections created. The fees must not exceed a pro rata share of reasonably anticipated costs of expansion, according to the court. Thus, the two rational nexus standards were implicitly addressed by the court. *Id.*

89. *Id.* at 320-321. The court found that the use of the money must be limited to meeting the cost of expansion. This includes necessary restrictions on the use of the funds through, for example, establishment in a capital reserve fund. *Id.*

90. Section 25-71(a) and (b) of the city ordinance established the "connection fee." 329 So. 2d at 316.

91. The costs of building and maintaining such connectors was assumed by the developer under § 25-52 of the ordinance. 329 So. 2d at 316.

92. Sewage systems typically consist of an interconnected network with small pipes con-

had significant precedential value for the application of the rational nexus analysis in other impact fee cases.

Florida's entry into the mainstream of states applying the rational nexus analysis was demonstrated further in the appellate decisions following *Dunedin*. Although some commentators argued that the analysis in *Dunedin* might be limited to water and sewer fees,[93] the Fourth District Court of Appeal expressly applied the *Dunedin* standards to affirm a trial court decision validating park impact fees. In *Hollywood, Incorporated v. Broward County*,[94] the court required that a local government that enacts a park impact fee must demonstrate that two rational nexus standards are met. First, that the need for additional capital facilities is generated by the growth in population caused by the development; and second that the funds are earmarked for new facilities to benefit new residents. The evidence that the court considered to be substantially competent to meet the rational nexus standards illustrates the particularity with which the Florida courts have begun to develop criteria to be used in the determining the legitimacy of impact fees.

The court in *Hollywood, Incorporated* found that Broward County met the first rational nexus standard by having adopted a reasonable park standard that required three acres of developed county parkland be dedicated for every one thousand new residents.[95]

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necting individual homes and businesses to collector sewers which then discharge into larger trunk sewers and other transmission facilities which transport the sewage to a central plant at which it is treated. Under the *Dunedin* ordinance, when a new subdivision was built, the developer would build sewers for each building and a system of collector sewers to tie them together, attaching the collector sewer to the existing system of transmission lines and treatment facilities. Thus, the developer builds, at its own expense, those facilities that are directly and solely attributable to the sewage generated by the development being constructed. When that sewage leaves the system built by the developer and enters the city's main transmission and treatment facilities, it becomes co-mingled with all of the sewage generated by other homes and businesses, both new and existing. The impact fee upheld in *Dunedin* paid for those common facilities that transmit and treat the sewage of both existing and new residents.

93. *See* Juergensmeyer & Blake, *supra* note 21, at 440.

94. 431 So. 2d 606 (Fla. 4th DCA), cert. denied, 440 So. 2d 352 (Fla. 1983).

95. *Id.* at 612. The population-based service standard distinguished the park impact fee from a park fee earlier held invalid in Admiral Dev. Corp. v. City of Maitland, 267 So. 2d 860 (Fla. 4th DCA 1972); Venditti-Siravo, Inc. v. City of Hollywood, 39 Fla. Supp. 121 (17th Cir. Ct. 1973). *But see* Town of Longboat Key v. Lands End, 433 So. 2d 574 (Fla. 2d DCA 1983), where the court remanded for evidence that five acres of land per thousand residents was a reasonable standard for parks and open space purposes. The case involved an ordinance requiring developers to deed land or pay a fee, before final approval of development plans, for the purpose of acquiring open space and park land. The ordinance originally provided that developers would dedicate 2½ acres per 1,000 residents of the development or an equivalent amount of money in lieu of the land for parks and open space, and 2½ acres for "other specified town purposes."

The court also pointed favorably to a county parks bond issue used to fund the needs of the current population, and to the provision in the ordinance that credited the fee payers for future taxes they would subsequently pay to retire the bond.[96] The court followed the mainstream approach by finding that the fee was reasonable[97] because it did not exceed the cost of providing new services.[98]

The Fourth District Court of Appeal, in a subsequent case, applied the rational nexus test to uphold a Palm Beach County impact fee for road and transportation improvements. The Palm Beach County ordinance in *Home Builders and Contractors Association v. Palm Beach County*[99] required that new land development activity

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After the complaint was filed, but before the trial, the Town amended its ordinance to require 5 acres of land or equivalent per 1,000 residents and deleted the reference to "other specified town purposes." The trial court invalidated the original ordinance, finding that it established an invalid tax because the reference to "other specified town purposes" meant that the fees were not properly restricted to park development. The case was settled after remand. 433 So. 2d at 575-76.

96. 431 So. 2d at 612. In doing so, the ordinance precluded the "double charging" problem discussed above.

97. *Dunedin* favorably cited a city ordinance in Oregon providing for a capital reserve fund which restricted expenditures on new additions to the sewer plant. 329 So. 2d at 321. *Dunedin* also suggests that the fees should be spent within a restricted time limit. *Id. See also* Howard County v. JJM, Inc., 301 Md. 256, 482 A.2d 908 (1984) (failure to show reasonable nexus between right of way reservation and needs of subdivision because restriction was of unlimited duration). The second part of the rational nexus test analyzes whether the funds collected are spent to benefit the fee payers. Following *Dunedin*, the Fourth District Court of Appeal insisted that the funds be earmarked as a means of ensuring that the payors adequately benefit from expenditure of the funds. The court favorably noted that the ordinance provided that the funds be spent "within a reasonable period of time." Moreover, the county ordinance provided that fees be expended for urban, subregional and regional parks not farther than fifteen miles from the perimeter of the development. The court found that this geographical relationship contributed to the evidence that the payors adequately benefit from the funds. 431 So. 2d at 613.

98. 431 So. 2d at 607 n.1. The court referred to county evidence establishing that residents travel widely to use county level parks. The geographical limitation appeared to provide the distinguishing factor between the present case and Broward County v. Janis Dev. Corp., 311 So. 2d 371 (Fla. 4th DCA 1975). The ordinance in *Janis* required that the fees be used to construct roads in the vicinity of the development, and thus was an "insufficient and nebulous limitation." 431 So. 2d at 613.

99. 446 So. 2d 140 (Fla. 4th DCA 1983). The court found sufficient non-charter county authority to enact road impact fees in the Florida Constitution and County Powers Act and, for the first time, in the Local Government Comprehensive Planning Act, *citing* FLA. STAT. § 163.3161 (1983). The Local Government Comprehensive Planning Act (LGCPA) contained, and contains as amended, a broad grant of power for local governments to plan and control future development. The court expressly refused to address the application of the LGCPA in *Hollywood, Inc.*, 431 So. 2d at 606, although it quoted favorably from it. The court's approval of impact fees for a non-charter county, with its reference to the LGCPA, indicates that the authority issue has been resolved in favor of a broad construction of local government

generating road traffic pay a fair share of the cost of expanding new roads attributable to the new development.[100] The developer could pay according to a formula in the ordinance, which calculated the fee according to the costs of road construction and the number of motor vehicle trips generated by different types of land use. The developer could submit its own study of its fair share of the road costs as an alternative. Funds received from developers were placed in an earmarked trust fund, and could be spent only in the area in which the development was located, as established by a system of zones throughout the county.

The state homebuilders association argued that impact fees should not be imposed for roads because, unlike sewers, roads were open for use by the public at large.[101] The county responded by asserting that the public road system, like a sewage or water system, is also an interconnected network consisting of smaller and larger roads, bridges and other facilities. The traffic generated by individual businesses and homes is similarly co-mingled in the larger system. New roads are used by both new and existing drivers. A road system must be built and maintained according to certain standards to provide adequate public safety, just as sewage and water systems must be maintained.[102]

In *Home Builders*, the county met the first part of the rational nexus test by showing that the cost of road construction needed by new development, a need specifically recognized in the ordinance, would far exceed (by eighty five percent) the fees imposed by the ordinance.[103] The court noted that the ordinance also provided the developer with the opportunity to furnish its own data instead of assuming the costs established in ordinance fee schedule, thereby providing a flexible method to ensure a fair allocation of costs. Consistent with the mainstream standard, the court rejected the homebuilders' argument that fees paid should exclusively or over-

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authority.

100. 446 So. 2d at 143. New land and development activity included residential, commercial and industrial uses. *Id.*

101. *Id.*

102. *Id.* The Florida Supreme Court had earlier held that both sewage treatment and county roads had countywide benefit for the purpose of interpreting a state constitutional provision allowing counties to use property taxes from incorporated areas only for services and facilities of countywide benefit. Burke v. Charlotte County, 286 So. 2d 199 (Fla. 1973); City of St. Petersburg v. Briley, Wild & Assocs., Inc., 239 So. 2d 817 (Fla. 1970).

103. 446 So. 2d at 145.

whelmingly benefit the payers.[104] The court specifically approved of the geographic relationship established by the "zone" system, which localized the expenditure of collected funds,[105] but did not explicitly require such a system.

The road impact fee in *Home Builders* was crafted, as the court recognized, "with *Dunedin*'s lessons in mind."[106] Those lessons, as further elaborated by the court, can be summarized as follows:

1. The local government should assess the needs created by the new development which are to be met by the expansion of capital facilities. The measurement of new needs should be carefully separated from those needs created by existing development. Needs may be measured according to locally adopted professional standards (as in the case of the *Hollywood* park standard), but in no instance should the fees exceed the costs of meeting those needs (as in *Home Builders*). The inclusion of an alternative method for the individual calculation of the fee will provide a "safety valve" against overcharging. Similarly, credits for payments that the fee payer would otherwise make toward the cost of the same capital facility also guard against overcharging.
2. The fees collected should be earmarked to pay for facilities that will directly benefit the fee payers. A time limit on the use of the funds to ensure that the funds are spent in a reasonable period of time should be specifically included. The court will also look favorably upon any geographical relationship that can be established between the fee payer and the location in which the fees will be spent. The ability of a municipality to "opt out" of a county ordinance is not an impediment to the establishment of the fee.

THE 1985 GROWTH MANAGEMENT ACT: LEGISLATING THE RATIONAL NEXUS STANDARD

The 1985 Florida Legislature enacted a complex and far reaching growth management act ("the 1985 Act") that substantially amended

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104. *Id.* at 143, *citing* Call v. City of W. Jordan, 606 P.2d 217 (Utah 1979); Assoc. Home Builders of the Greater E. Bay, Inc. v. City of Walnut Creek, 4 Cal. 3d 633, 94 Cal. Rptr. 630, 484 P.2d 606 (1971). The decision also rejected the argument that the ability of municipalities to "opt out" of the ordinance denied equal protection. 446 So. 2d at 144. The fee is not improper in this instance "where such legislation is otherwise a valid exercise of governmental power." *Id.*

105. *Id.* at 145.

106. *Id.*

the state's major land development laws.[107] A recurrent theme in the various amendments was the necessity to accommodate anticipated growth by constructing new public facilities. Except for the local option of a two cent gas tax increase,[108] the state chose not to raise taxes, but to encourage local governments to rely on impact fees to finance public facilities. The legislation created explicit statutory authority for impact fees for the first time, and confirmed that the rational nexus standard is the appropriate method for judging the propriety of impact fees.

The 1985 Act requires local governments to choose a desired level of service capacity for public facilities and to formulate plans (local comprehensive plans) for maintaining an adequate level of service. The mandatory local comprehensive plans implemented by the statute will contain a capital improvement element, including "principles" for building new public facilities and for correcting existing deficiencies.[109] The plans, as contemplated by the statute, must identify the general location, cost, funding and timing of construction of all facilities to be built, and must set forth "standards to ensure the availability of public facilities and the adequacy of those facilities, including acceptable levels of service."[110] Only public facilities consistent with the plan may be built,[111] and the local government may not add new facilities to the plan or change the location of facilities in the plan except as part of an annual amendment process.[112]

Each local plan must contain a land use map based upon, among other things, the availability of public services.[113] The adoption of the

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107. Local Government Comprehensive Planning and Land Development Regulation Act, ch. 55, 1985 Fla. Sess. Law Serv. No. 3, at 251 (West) [hereinafter cited as LGCPLDRA].

108. Act of June 18, 1985, ch. 180, 1985 Fla. Sess. Law Serv. No. 6, at 719 (West).

109. LGCPLDRA, ch. 55, § 6, 1985 Fla. Sess. Law Serv. No. 3, at 251, 269 (West) (to be codified at FLA. STAT. § 163.3177(3)(a) (1985)). Public facilities include roads, sewers, solid waste, drainage, water, schools, parks and health systems. *Id.* at § 2, 1985 Fla. Sess. Law Serv. No. 3, at 251, 260 (West) (to be codified at FLA. STAT. § 163.3164(23) (1985)).

110. *Id.* at § 6, 1985 Fla. Sess. Law Serv. No. 3, at 251, 269 (West) (to be codified at FLA. STAT. § 163.3177(3)(a)(2,3) (1985)).

111. *See Id.* at §§ 6, 11, 1985 Fla. Sess. Law Serv. No. 3, at 251, 269-70, 295-96 (West) (to be codified at FLA. STAT. §§ 163.3177(3)(b), .3194(3)(b) (1985)).

112. FLA. STAT. § 163.3177(c) (1983). *Compare* LGCPLDRA, ch. 55, § 9, 1985 Fla. Sess. Law Serv. No. 3, at 251, 290 (West) (to be codified at FLA. STAT. § 163.3187(1) (1985)), which allows semi-annual amendment of comprehensive plans for other purposes, and more often with unanimous approval of the governing body. This section also provides that amendments directly related to developments of regional impact may be made at any time without regard to the statutory limit. *Id.*

113. LGCPLDRA, ch. 55, § 6, 1985 Fla. Sess. Law Serv. No. 3, at 251, 270 (West) (to be codified at FLA. STAT. § 163.3177(6)(a) (1985)).

land use map effectively invalidates any inconsistent local zoning and is binding on all private development.[114] Each local plan, including the local capital improvement program and land use map, must be reviewed by the state land planning agency[115] to determine compliance with the statute and rules adopted by the agency.[116] State funding to the local area can be cut off if the local plan is not in compliance.[117]

Standards established in the local plans must be carried forward in implementing regulations. Local land development regulations must be consistent with the comprehensive plan[118] and adopted in the form of a land development code.[119] After a period of time, the regulations will be required to provide that public facilities and services meet or exceed the standards established in the capital improvement element of the plan, and either (a) prohibit development that would reduce the established level of services, (b) condition approval of the development on the availability of such services, or (c) make the services available.[120] Local governments are encouraged to use impact fees as part of these regulations.[121]

Impact fees also received special attention in the 1985 amendments to the development of regional impact regulation process. Developments of regional impact (DRIs),[122] to be approved, must be consistent with the local plan and land use regulations.[123] Additionally, DRIs must not be approved by the local government unless the developer makes "adequate provision for the public facilities needed to accommodate the impacts of the proposed development," or unless

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114. *Id.* at § 11, 1985 Fla. Sess. Law Serv. No. 3, at 251, 294-95 (West) (to be codified at FLA. STAT. § 163.3194(1)(b), (3)(a) (1985)).

115. *Id.* at § 8, 1985 Fla. Sess. Law Serv. No. 3, at 251, 279 (West) (to be codified at FLA. STAT. § 163.3184(1)(a) (1985)).

116. *Id.*, 1985 Fla. Sess. Law Serv. No. 3, at 251, 283 (West) (to be codified at FLA. STAT. § 163.3184(4) (1985)).

117. *Id.*, 1985 Fla. Sess. Law Serv. No. 3, at 251, 285-86 (West) (to be codified at FLA. STAT. § 163.3184(8)(a) (1985)).

118. *Id.* at § 11, 1985 Fla. Sess. Law Serv. No. 3, at 251, 294 (West) (to be codified at FLA. STAT. § 163.3194(1)(a) (1985)).

119. *Id.* at § 13, 1985 Fla. Sess. Law Serv. No. 3, at 251, 296-97 (West) (to be codified at FLA. STAT. § 163.3201 (1985)).

120. *Id.* at § 14, 1985 Fla. Sess. Law Serv. No. 3, at 251, 297-98 (West) (to be codified at FLA. STAT. § 163.3202(2)(g) (1985)).

121. *Id.*, 1985 Fla. Sess. Law Serv. No. 3, at 251, 298 (West) (to be codified at FLA. STAT. § 163.3202(3) (1985)).

122. *See* FLA. STAT. § 380.06(1) (Supp. 1984).

123. LGCPLDRA § 43, 1985 Fla. Sess. Law Serv. No. 3, at 251, 372 (West) (to be codified at FLA. STAT. § 380.06(13,14) (1985)).

the local government itself commits to provide the facilities.[124] Furthermore, local governments have the power to condition approval of a DRI on its developer contributing funds for public facilities which are reasonably attributable to the proposed development.[125]This amendment responds to a frequently made complaint that developers of DRIs have been unfairly burdened with "conditions" on their development orders requiring fees or contributions that other, smaller, developers were not required to make under local regulations.[126]

The funds contributed by a development of regional impact must be used to "mitigate"[127] or "accomodate"[128] the impact of that particular development. The developer must be given credit against any "impact fee or exaction imposed by local ordinance for the same need. . . ,"[129] unless the contribution is for an "internal, on-site" facility required by local regulations or is for facilities "necessary to provide safe and adequate services to the development."[130]

The legislative endorsement of the use of impact fees combined with the mandate that local governments plan for assurance of adequate and available capital facilities is a powerful incentive for further adoption of impact fee ordinances by local governments. Local governments have been placed on a fairly tight schedule to develop and adopt plans and ordinances to carry out the legislative mandate. Specifically, county plans must be submitted to the Department of Community Affairs by December 1, 1985, coastal city plans are due December 1, 1988, and other cities must submit plans by December

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124. *Id.*, 1985 Fla. Sess. Law Serv. No. 3, at 251, 375-76 (West) (to be codified at FLA. STAT. § 380.06(15)(e)(2) (1985)).

125. *Id.*, 1985 Fla. Sess. Law Serv. No. 3, at 251, 375 (West) (to be codified at FLA. STAT. § 380.06(15)(e)(1) (1985)). Although the language appears to require local governments to be prepared to require fees for *all* impacts if it requires fees for *any* impact, the intent more likely was to require local governments to charge all developers for any type of fee they charge to a DRI. Interview with Linda Shelley, General Counsel, Dept. of Community Affairs, June 12, 1985. *See also* LGCPLDRA § 43, 1985 Fla. Sess. Law Serv. No. 3, at 251, 377-78 (West) (to be codified at FLA. STAT. § 380.06(16)(a) (1985)).

126. Interview with John M. DeGrove, Secretary, Department of Community Affairs, June 12, 1985.

127. LGCPLDRA § 43, 1985 Fla. Sess. Law Serv. No. 3, at 251, 375 (West) (to be codified at FLA. STAT. § 380.06(15)(d)(3) (1985)).

128. *Id.*, 1985 Fla. Sess. Law Serv. No. 3, at 251, 375 (West) (to be codified at FLA. STAT. § 380.06(15)(e)(2) (1985)).

129. *Id.*, 1985 Fla. Sess. Law Serv. No. 3, at 251, 377 (West) (to be codified at FLA. STAT. § 380.06(16)(a) (1985)).

130. *Id.*, 1985 Fla. Sess. Law Serv. No. 3, at 251, 378 (West) (to be codified at FLA. STAT. § 380.06(16)(b) (1985)).

1, 1989.[131] Consistent land development regulations are due one year from plan submission.[132]

FUTURE RULE OF DEVELOPER EXACTIONS IN FLORIDA

The legislative imprimatur of their legitimacy combined with the need for new capital facilities to keep pace with Florida's expected growth ensure that impact fees and other developer exactions will continue to play a major role in financing new local capital facilities in Florida. The character of that role will primarily be shaped by the courts and increasingly by state land development laws and regulations. A number of questions, however, remain unresolved. For example, what kinds of facilities are impact fees likely to finance in the future? Judicially, the trend in the rational nexus analysis appears to be towards allowing payment for almost any kind of facility by impact fees as long as the cost of that facility can be properly apportioned to development. The new legislation likewise makes no distinction among different types of capital facilities. Nevertheless, courts may still balk at allowing fees for certain facilities traditionally funded by the community in general. A second question is how will use of impact by local governments be affected by the new requirements of the 1985 Growth Management Act?[133] New and more stringent requirements that local governments plan for capital improvements will add more complexity to the preparation and use of impact fees.

Notwithstanding legislative endorsement of impact fees, the courts in Florida and throughout the nation are moving toward permitting a wider variety of developer exactions to be used to pay for local public facilities. Theoretically, as long as the impact fee is charged for a valid purpose, and a proper cost apportionment can be made, an impact fee can be assessed for any capital facility made necessary by new growth. Historically, the various types of exactions arise from different enabling authority. Subdivision exactions, for example, are authorized by state subdivision or platting acts, and sewer and water connection charges are based on state public utility legislation. Thus, since exactions typically have been challenged as *ultra*

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131. *Id.* at § 3, 1985 Fla. Sess. Law Serv. No. 3, at 251, 261 (West) (to be codified at FLA. STAT. § 163.3167(2) (1985)).

132. *Id.* at § 14, 1985 Fla. Sess. Law Serv. No. 3, at 251, 297 (West) (to be codified at FLA. STAT. § 163.3202(1) (1985)).

133. *See supra* note 107.

vires, or beyond municipal authority, the courts' analysis in early cases centered on the particular statute and precedent associated with either the subdivision statute or utilities statute, without reference to similar exactions made under other authority.

Once a state court has decided that a particular exaction is a legitimate exercise of police power, the analysis of the reasonableness of that exercise of police power follows similar logic for both subdivision exactions and water and sewer connection fees. As the rational nexus test has matured since the early 1970's, the courts have included explicit cross references between the two strands of cases.[134] As in *Home Builders*, where the court saw no reason why the *Dunedin* principles should not apply to roads,[135] one might ask if there is any reason why those principles should not equally apply to schools, fire and police protection, emergency medical services, and other public services.

Nevertheless, all proposed impact fees not heretofore approved by the Florida courts should be given careful consideration by local governments. In addition to the methodological issues that might be raised as local governments devise their cost-accounting studies, certain fees may raise unique legal questions. One such fee, for example, is a school impact fee.

School site dedications, like park site dedications, have commonly been mandated by subdivision ordinances and have survived judicial scrutiny in many states. The early Washington and New York cases,[136] applying the rational nexus test, upheld school as well as park dedication requirements. Even the states requiring the "uniquely and specifically attributable" test to be met validated school site dedication ordinances.[137] More recently, a California court approved a local ordinance which required that an interim school facilities fee, to be approved, "shall bear a reasonable relationship and will be limited to the needs of the community for interim . . . school facilities and shall be reasonably related and limited to the need for

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134. *See, e.g.*, Lafferty v. Payson City, 642 P.2d 376 (Utah 1982), (invalidated a city impact fee for water, sewer and electrical services on the basis that it did not meet the same reasonableness limitations established for connection fees or subdivision fees).

135. 446 So. 2d at 145, *quoting* Juergensmeyer & Blake, *supra* note 22, at 440-41.

136. Jenad, Inc. v. Village of Scarsdale, 18 N.Y.2d 78, 218 N.E.2d 673, 271 N.Y.S.2d 955 (1966); Jordan v. Village of Meonomonee Falls, 28 Wis. 2d 608, 137 N.W.2d 442, *appeal dismissed*, 385 U.S. 4 (1966).

137. Aunt Hack Ridge Estates, Inc. v. Planning Comm'n, 160 Conn. 109, 273 A.2d 880 (1970); Krughoff v. City of Naperville, 68 Ill. 2d 352, 369 N.E.2d 892 (1977).

schools caused by the residential development."[138] The court specifically found that the fee was not a constitutionally invalid tax, but was part of a regulatory scheme and system of exactions similar to that involving the parks fee held valid ten years earlier.[139] The court also found that the fee was specifically authorized by state legislation.[140]

In Florida, the comparison may not be as easily drawn. A persuasive argument can be made that the statewide system of public school education preempts local government attempts at planning and constructing school facilities. Unlike parks and road systems, the state regulates and finances public schools under pervasive state authority. The Florida Constitution expressly requires the Legislature to provide for a uniform system of public free schools,[141] and that the operation and control of the district schools is vested in the district school board, under the supervision of the State Board of Education.[142] The legislature has established, at the state level, an extensive system of school financing to provide an equal educational environment to all school children living in the state.[143]

Although statutorily urged to cooperate with local governments to assure compatibility of school board site plans with local government comprehensive plans, the extent of local control over decisions of the district school board concerning facilities is at best unclear, and recent legislative action has added to the uncertainty. While school districts have virtually autonomous power over construction decisions,[144] local governments in Florida also have strong planning

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138. Trent Meredith, Inc. v. City of Oxnard, 114 Cal. App. 3d 317, 170 Cal. Rptr. 685 (Cal. Ct. App. 1981).

139. *Id.* at 690, *citing* Assoc. Home Builders of the Greater E. Bay, Inc. v. City of Walnut Creek, 4 Cal. 3d 633, 94 Cal. Rptr. 630, 484 P.2d 606 (1971).

140. CAL. GOV'T CODE § 65970 (West 1983 & Supp. 1985). Other appellate decisions interpreted the legislation to provide only for construction of temporary school facilities and to thus preempt local governments from charging for permanent facilities. *See, e.g.*, Candid Enters., Inc. v. Grossmont Union High School Dist., 150 Cal. App. 3d 28, 197 Cal. Rptr. 429 (Cal. Ct. App. 1983).

141. FLA. CONST. art. IX, § 1.

142. FLA. CONST. art. IX, §§ 2, 4. *See also* Blake v. City of Tampa, 156 So. 97, 1100 (Fla. 1934) (free public school system is required to be operated and controlled independently of regular county government).

143. *See* Educational Facilities Act of 1981, FLA. STAT. §§ 235.01-.435 (1983).

144. *See* FLA. STAT. § 235.19 (1983). For example, school board educational facilities are exempt from local building codes, including local impact or service availability fees under FLA. STAT. § 235.195 (1983). *But see*, School Bd. of Pinellas County v. Pinellas County Comm'n, 404 So. 2d 1178 (Fla. 2d DCA 1981). (FLA. STAT. § 235.26(1) (1979) did not exempt school board from payment of water or sewage impact fees).

authority and responsibility. Prior to 1985, local governments had responsibility for planning for educational land uses,[145] and arguably for fiscal proposals concerning any capital improvements for education required by the plan.[146] Specific requirements in the 1985 Act for a capital improvements element, including standards to ensure adequacy of the facilities, and provisions that all public facilities and local government actions be "consistent" with the capital improvements element,[147] strengthen the duty of local governments to plan for adequate school facilities.

The 1985 amendments added similar language to the state educational facilities law,[148] generally requiring "coordination" of educational facilities planning between school districts and local governments.[149] At the same time, the legislature strengthened local government authority for capital facility planning. In another act, it repealed legislation which enabled local government to reject development plans:

> when public school facilities made necessary by the proposed development are not available in the area which is proposed for development or are not planned to be constructed in such area concurrently with development.[150]

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145. FLA. STAT. § 163.3177(6)(a) (1983). *See also* FLA. STAT. § 163.3177(7)(b) (1983), providing for a local government optional local comprehensive plan element for public buildings such as schools, which is to address the coordination between the local government and school boards "having public development and service responsibilities capabilities and potential but not having land development regulatory authority." Section 163.3194 also requires that development undertaken by governmental agencies shall be consistent with adopted local government plan. Section 163.3164(8)(d) defines "governmental agency" to include school boards.

146. FLA. STAT. § 163.3177(3) (1983).

147. LGCPLDRA § 6, 1985 Fla. Sess. Law Serv. No. 3, at 251, 269 (West) (to be codified at FLA. STAT. § 163.3177(3)(a), (b) (1985)). *See also id.* at § 11, 1985 Fla. Sess. Law Serv. No. 3 at 251, 294 (West) (to be codified at FLA. STAT. § 163.3194(1) (1985)).

148. *Id.* at § 25, 1985 Fla. Sess. Law Serv. No. 3, at 251, 314-15 (West) (to be codified at FLA. STAT. § 235.193 (1985)).

149. *Id.* The new Act provides:

> The general location of public educational facilities shall also be consistent with the capital improvements plan found in the comprehensive plan of the appropriate local governing body developed pursuant to § 163.3177(3) and in accordance with § 163.3194(1).

150. Educational Facilities Act, ch. 116, § 10, 1985 Fla. Sess. Law Serv. No. 6, at 43, 61 (West). The Eleventh Circuit had interpreted § 235.193(1) not to directly authorize local governments to reject subdivision plats, but to be enabling legislation only. Southern Co-op Dev. Fund v. Driggers, 696 F.2d 1347 (11th Cir.), *cert. denied*, 103 S. Ct. 3539 (1983). One might argue in the absence of the relevant adequate authority to so deny a development permit, especially in light of the LGCPLDRA.

In light of legislative approval of impact fees, it might be argued that the legislature intended by using impact fees to preclude outright denial of a planned development because of insufficient school facilities. At a minimum, local governments and school districts have the ability to enter into interlocal agreements, and thus, coordinate facility planning.[151]

Will the Florida courts attempt to impose impact fees for governmental facilities that are not subject to as extensive statewide legislation as schools, but are traditionally considered to be part of a governmental duty owed to the general public, such as fire or police facilities? The California courts, which in the past have applied an undemanding version of the rational nexus test to fees for parks and schools, have expressed concern about allowing subdivision exactions to be used for police and fire protection.[152] The only reported Florida case addressing fire facility fees, however, mostly involved analysis of the reasonableness of the relationship of the fee to its use, and included little discussion about the particular kind of facility financed by the fee. *City of Miami Beach v. Jacobs*,[153] decided prior to the *Dunedin* case,[154] invalidated "fire line charges" because they were not earmarked for the purpose of financing expansion of the water system and not related to the use of the fee.[155] Although the case involved water pipes used for fire protection, the logical step to include fire hoses, trucks or stations is not a large one, and a fee for such facilities that demonstrates the proper rational nexus should be better received in the future.[156]

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151. FLA. STAT. § 163.01(4) (1983) permits such agreements to exercise authority that each agency "might exercise separately." It has been suggested by a leading commentator that new state legislation may be advisable to clarify the authority of school boards to enter into interlocal agreements for impact fee purposes. Remarks by Julian C. Juergensmeyer, Growth Management Conference, January 24, 1985, Tallahassee, Florida (unpublished).

152. Assoc. Home Builders of the Greater E. Bay, Inc. v. City of Walnut Creek, 4 Cal. 3d 633, 94 Cal. Rptr. 630, 484 P.2d 606 (1971). *See also* West Park Ave., Inc. v. Township of Ocean, 48 N.J. 122, 224 A.2d 1 (1966).

153. 315 So. 2d 227 (Fla. 3d DCA 1975).

154. The case cites the appellate decision later upheld in relevant part by the Supreme Court, however, as authority. *Id.* at 228, *citing* City of Dunedin v. Contractors and Builders Ass'n, 312 So. 2d 763 (Fla. 2d DCA 1975).

155. 315 So. 2d at 228.

156. *But see* Emerson College v. City of Boston, 391 Mass. 415, 462 N.E.2d 1098 (1984), where the Massachusetts court struck down a fee for "augmented fire services availability" charged to buildings which require more than a capacity of 3500 gallons of water per minute. Although state statute authorized the charge, the court found that the fee did not sufficiently benefit those who paid. The court suggests that no matter what the formula for the fee, it was not possible in a densely populated city such as Boston to separate the interests of the payors

Some commentators have argued that the use of impact fees should be limited to funding facilities traditionally regarded as arising from local government proprietary activities, and not for facilities generally utilized for governmental activities.[157] According to this distinction, facilities such as county administration buildings or police stations should be funded only from general governmental revenues. The argument is very similar to the one made by Reps and Smith in 1963, and now generally rejected, that a distinction should be made between those improvements which should be financed by special assessments and those financed by subdivision exactions.[158] The distinction is based essentially on the policy that certain governmental functions are most appropriately financed when paid for by the public as a whole. For instance, in an early Michigan case the court struck down a building permit fee that was intended to finance fire and police protection as well as street maintenance, finding that those problems were "public problems of the community and the expenses incurred in their solution are to be defrayed . . . from the general revenues. . ."[159]

Such a distinction was argued and dismissed in the trial court decision in *Home Builders v. Board of County Commissioners of Palm Beach County*.[160] At trial, as well as on appeal, the plaintiff argued that road impact fees should be distinguished from water and sewage fees because roads are "governmental activity" while water and sewer systems are "proprietary activities."[161] The trial court pointed out that *Dunedin* did not suggest that the supreme court intended to limit its decision to public services that fulfill proprietary

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from the safety interests of the public at large. *Id.* at 426, 462 N.E.2d at 1105-06. *See also* 1982 ANN. REP. ATT'Y GEN. 20, opining that city user charges or fees on buildings over two stories in height to finance firefighting equipment were not permissible because of the city's governmental duty owed to the general public.

157. *See* STATE ACTION ON IMPACT FEES, *supra* note 4, at 22. *See also* 1982 ANN. REP. ATT'Y GEN. 20-23, concluding that impact fees for the purchase of fire equipment were not authorized because not imposed for any proprietary city facility.

158. *See supra* note 13.

159. Merelli v. City of St. Clair Shores, 355 Mich. 575, 586, 96 N.W.2d 144, 149 (1959). *See also* Midtown Properties, Inc. v. Township of Madison, 68 N.J. Super. 197, 172 A.2d 40 (N.J. Super. Ct. Law Div. 1961), *aff'd* 78 N.J. Super. 471, 189 A.2d 226 (N.J. Super. Ct. App. Div. 1963), concerning school site dedication requirements, the court said "it is the duty of the municipality to educate our citizenry; to build schools, and equip and maintain them for such purposes. The cost for public education, in a democratic society, must be borne by the public . . ." 68 N.J. Super. at 209-210, 172 A.2d at 47.

160. 4 Fla. Supp. 2d 82 (Fla. Cir. Ct. 1982).

161. *Id.* at 87.

functions and stated:

> Except for their discussion of the city's statutory authority to act as a corporate proprietor of its water and sewerage systems, one could easily substitute "government" for "proprietor" throughout the opinion and it would not lose its logic and continuity. Furthermore, the court distinguished cases invalidating "fees" collected for road and park purposes with no reference whatsoever to the distinction between "fees" for proprietary purposes. . .[162]

Indeed, to attempt such a distinction would lead the court into a quagmire of legal analysis that would not likely in the end prove fruitful. The distinction can be confusing, and, as the United States Supreme Court has pointed out, "so finespun and capricious as to be almost incapable of being held in the mind for adequate formulation."[163]

CONCLUSION

The clear implication of Florida case law is that if local government exercises a valid police power function, otherwise within local government jurisdiction, the subject matter of the impact fee will be a minor consideration. While there may be legitimate policy reasons not to use impact fees to finance certain types of public facilities, there appears to be no compelling legal reason under the prevailing rational nexus analysis. Instead, the court will look critically, and with increasing scrutiny, at the manner in which the local ordinance apportions the cost of the fee between old and new users to ensure sufficient benefit to the fee payers.[164]

The provisions in the 1985 Act requiring capital improvement planning promise to substantially change the manner in which local governments plan for and carry out public capital facility decisions.

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162. *Id. See also* the court of appeal's explanation that impact fees and roads are not compatible, but rather the features of the ordinance itself are controlling. Home Builders and Contractors Assoc. of Palm Beach County v. Board of County Comm'rs of Palm Beach county, 446 So. 2d 140, 144 (Fla. 4th DCA 1983).

163. Indian Towing v. United States, 350 U.S. 61, 68 (1955). *See also* City of Lafayette v. Louisiana Power and Light Co., 435 U.S. 389, 433 (1978) (Stewart, J., dissenting).

164. The increasing concern about cost apportionment is evidenced in cases concerning other regulatory fees not properly considered impact fees. *See, e.g.*, City of Daytona Beach Shores v. State, 454 So. 2d 651 (Fla. 5th DCA 1984) (beach toll invalid where monies spent for services not sufficiently related to purpose for which toll is charged); Warren v. Dade County, 432 So. 2d 725 (Fla. 3d DCA 1983) (amount of fees collected for costs of environmental services, including monitoring enforcement and evaluation, must bear a legitimate relationship to costs incurred in providing the services).

Capital improvement programming has long been accepted as a local government budgeting device, but has rarely been viewed as more than a wish list for any planned expenditures past the yearly budget.[165] Under the new Act, however, capital improvement "elements" will have the legal status of the other elements of the comprehensive plan. Thus, all private and governmental action, including development permissions and government expenditures, must be consistent with the element.[166] The adoption of capital improvement elements will have the most effect on impact fees by setting a standard for acceptable levels of service.

While projections regarding costs, revenues, and timing may be modified simply by local ordinance,[167] decisions concerning level of service may only be changed once a year as a plan amendment.[168] The result of the rigid level of service requirements is to make explicit, in advance and for all capital facilities, the basis for expenditure decisions that heretofore, for impact fees, needed only be justified on a case by case basis before the court. For the developer, a fairly static level of service requirement will provide additional predictability for costs of development; while for the community in general, it may force more realistic decisions about the quality and costs of growth, including the need for additional taxes or other revenues other than fees.

The pressure for private financing of capital facilities will be felt particularly in high hazard areas of coastal regions. The Act specifies that newly required coastal elements limit public expenditures which subsidize development in high hazard areas,[169] and also requires financial assurances be made that necessary public facilities will be in place to meet demands imposed by development.[170] Coastal commu-

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165. For a critique of the ability of long range planning to guide capital improvement expenditures, see Corwin & Getzels, *Capital Expenditures: Causes and Controls*, in CITIES UNDER STRESS (Burchell & Listokin ed. 1981).

166. *See* LGCPLDRA, § 11, 1985 Fla. Sess. Law Serv. No. 3, at 251, 294 (West) (to be codified at FLA. STAT. § 163.3194(1) (1985)).

167. *Id.* at § 6, 1985 Fla. Sess. Law Serv. No. 3, at 251, 269-70 (West) (to be codified at FLA. STAT. § 163.3177(3)(b) (1985)). The plan for the location of facilities, however, cannot be changed by ordinance, except perhaps as a result of dedications.

168. The procedural requirements of plan amendments themselves would be a disincentive to modify the standard.

169. LGCPLDRA § 6, 1985 Fla. Sess. Law Serv. No. 3, at 251, 273 (West) (to be codified at FLA. STAT. § 163.3177(3)(g)(7) (1985)).

170. *Id.* at § 7, 1985 Fla. Sess. Law Serv. No. 3, at 251, 278 (West) (to be codified at FLA. STAT. § 163.3178(2)(i) (1985)).

nities may presumably build capital facilities to remedy existing deficiencies, under their capital improvements responsibilities, but they will not be able to turn to the state for constructing new bridges on causeways to barrier islands,[171] and cannot contribute capital funding in high hazard areas that would be inconsistent with the local plan.[172]

In the past, some local governments may have been reluctant to impose impact fees due to a concern that the fees might place them at a competitive disadvantage with neighboring jurisdictions in attracting new development. The incentives contained in the 1985 Act for adopting fees should decrease this concern. Local governments, however, are provided with a new and unique method for challenging the comprehensive plans of adjoining local governments and can thereby "watchdog" their capital improvements elements and related fees. The Act specifically grants adjoining local governments standing to challenge a proposed comprehensive plan that would produce substantial impacts on the increased need for publicly funded infrastructure.[173] The local government may file a petition with the state land planning agency, and a quasi-judicial proceeding before a state hearing officer will be held to determine the adjoining government's compliance with the statute and rules governing the planning process.[174] A finding of noncompliance must be made finally by the Governor and Cabinet as the Administration Commission.[175] The state land planning agency is responsible for the review and approval of local comprehensive plans.[176]

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171. *Id.* at § 38, 1985 Fla. Sess. Law Serv. No. 3, at 251, 344 (West) (to be codified at FLA. STAT. § 380.27(1) (1985)).

172. *Id.*, 1985 Fla. Sess. Law Serv. No. 3, at 251, 344 (West) (to be codified at FLA. STAT. § 380.27(2) (1985)) provides that no state funds to increase infrastructure capacity can be spent inconsistently with the local coastal element. The plan cannot allow a subsidy for development in high hazard areas, so any state expenditure there would be inconsistent, therefore illegal. *Id.*

173. *See id.* at § 8, 1985 Fla. Sess. Law Serv. No. 3, at 251, 282 (West) (to be codified at FLA. STAT. § 163.3184(3)(a) (1985)).

174. *Id.*, 1985 Fla. Sess. Law Serv. No. 3, at 251, 283-84 (West) (to be codified at FLA. STAT. § 163.3184(5) (1985)). Although the proceeding is quasi-judicial, the local government's determination is to be considered under the "fairly debatable" standard normally reserved for legislative decisions. *Id.*

175. *Id.*, 1985 Fla. Sess. Law Serv. No. 3, at 251, 285 (West) (to be codified at FLA. STAT. § 163.3184(7)(b) (1985)).

176. *See supra* note 116. The state land planning agency may also review a local impact fee ordinance as a land development regulation, but only upon the initiation of an administrative proceeding by a substantially affected person. LGCPLDRA § 15, 1985 Fla. Sess. Law Serv. No. 3, at 251, 305 (West) (to be codified at FLA. STAT. § 163.3213 (1985)). The agency is limited to a determination of consistency with the local adopted plan, under the review process may be a less exacting review than that adopted by the court under the rational nexus test.

The statute requires the Department of Community Affairs and other agencies to provide assistance to local governments in adopting impact fees and other developer exaction ordinances. The Act further provides the standard for such ordinances:

> [a development can be made to] . . . contribute its proportionate share of funds, land or public facilities necessary to accomodate any impacts having a rational nexus to the proposed development, and the need to construct new facilities or add to the present system of facilities must be reasonably attributable to the proposed development.[177]

The language is easily recognizable as the two-part rational nexus test. However, in regard to non-DRI impact fees, the statute does not address all subjects touched upon by the courts, such as earmarking fees in a special trust fund, or refunding fees not expended in a reasonable time. Arguably, should the courts defer to the new legislative criteria for impact fees, such provisions may not be required in the future.

Perhaps the most significant direct effect of the 1985 Act on the use of impact fees and other exactions by local governments arises from the amendments to the DRI process. The 1985 Act provides further encouragement to local governments to enact impact fee ordinances by prohibiting developer exactions as conditions for DRI approval, unless the government applies such exactions to all other developments.[178] Combined with the requirement that a DRI cannot be approved if there are not adequate provisions for needed new public facilities,[179] local governments after July 1, 1986 have two choices: provide the facilities themselves,[180] or reject the development. Neither may be attractive, but the statute provides an "out" for a willing developer. The developer can make contributions to help fund needed facilities subject to standards similar to the rational nexus standard applied by the courts. Namely, the contribution must be earmarked, or "designated," and must accomodate impacts "reasonably attributable" to the proposed development.[181]

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177. *Id.* at § 43, 1985 Fla. Sess. Law Serv. No. 3, at 251, 375 (West) (to be codified at FLA. STAT. § 380.06(15)(e)(1) (1985)).

178. *Id.*

179. *Id.*, 1985 Fla. Sess. Law Serv. No. 3, at 251, 376-76 (West) (to be codified at FLA. STAT. § 380.06(15)(e)(2) (1983)).

180. The local government must include in the development order a local government commitment to provide facilities on the same development schedule in the development order. *Id.*

181. Specifically, any funds or lands contributed must be so designated and used. Argua-

The amended DRI statute provides against double charging by requiring that a developer be credited for contributions made as part of a DRI order, and for contributions otherwise required by local ordinance, if the DRI contribution meets the same need that the local ordinance addresses.[182] The determination of whether contributions meet the same need is certain to be subject to interpretation, and thus, very dependent on the quality and specificity of the impact fee ordinance and its supporting documentation. The Act provides that certain facilities, regardless of the needs analysis, are exempt from the crediting process, including internal, onsite facilities required by local regulations.[183] This provision is consistent with the court's distinctions in other cases between system-wide improvements and those necessary to serve the development.[184] A more problematic exemption is made for offsite facilities "necessary to provide safe and adequate services to the development."[185] While local capital improvements elements should provide a standard for adequacy, the question of when certain facilities are necessary to satisfy that standard will undoubtedly be the subject of future interpretation.

Florida has rapidly infused the rational nexus standard into case law and, most recently, legislation. At the same time it has increasingly attempted to accommodate rapid population growth. Now firmly established as legislative and judicial principle, new growth's proportionate contribution to the costs of capital facilities can be considered a down payment and investment in a quality future. Local governments in Florida now have better ability and more specific guidelines to ensure that the costs of that growth are fairly shared and that adequate public facilities will be available to meet the future growth needs of their communities.

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bly, the plan language of the statutes would exclude contributed facilities from this test. *Id.*

182. *Id.*

183. *Id.*, 1985 Fla. Sess. Law Serv. No. 3, at 251, 378 (West) (to be codified at FLA. STAT. § 380.06(16)(d) (1985)).

184. *See, e.g.*, Contractors and Builders Ass'n of Pinellas County v. City of Dunedin, 329 So. 2d 314 (Fla. 1976) and discussion accompanying notes 86-106.

185. *See supra* note 183.