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IMPACT FEES: AN ANSWER TO LOCAL GOVERNMENTS' CAPITAL FUNDING DILEMMA

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The rapid, sprawling growth of modern suburbia[1] has exerted intense pressure on the financial capacity of local governments to provide schools, parks, roads, and other facilities required by new residents.[2] Municipalities and counties have lacked the capital funding resources to both accommodate suburban growth and maintain the quality of governmental services.[3] Some local governments have attempted to halt or retard growth,[4] but most have

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1. The rush to the suburbs over the past decade has been significant. Between 1970 and 1978 the white population of central cities in the United States decreased at an annual rate of 1.2 percent. The net central city decrease in white population over that period totalled almost 5 million residents. U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES: 1979 at 17 (100th ed. 1979).

2. During 1977, over 28 billion dollars were expended by local governments for capital outlays. This represents an increase of approximately 71 percent over the 1970 capital expenditures of 16 billion. In contrast, state and federal capital expenditures reflected smaller increases in capital outlay over the same period, 27 percent and 68 percent respectively. *Id.* at 288. *See also* C. HAAR, LAND USE PLANNING 3-47 (3d ed. 1976).

3. *See* FLORIDA BUREAU OF LAND AND WATER MANAGEMENT, CHARLOTTE HARBOR: A FLORIDA RESOURCE (1978). This report illustrates the complexity of environmental, economic, and municipal service delivery problems that growth imposes on local governments. In the case of the Charlotte Harbor area, the problem of furnishing adequate water supplies to accommodate projected growth has created an emergency situation of regional proportion. *Id.* at 31-35. *See also* C. HAAR, *supra* note 2, at 443-513.

4. State courts have demonstrated a growing tendency to invalidate various exclusionary zoning devices on various constitutional grounds. *See, e.g.*, City of Boca Raton v. Boca Villas Corp., 371 So. 2d 154 (Fla. 4th Dist. Ct. App. 1979) (population cap served no valid municipal purpose); Oakwood at Madison, Inc. v. Township of Madison, 283 A.2d 353 (N.J. Super. Ct. 1971) (municipality cannot ignore responsibility with respect to regional housing needs); Kit-Mar Builders, Inc. v. Township of Concord, 268 A.2d 765 (Pa. 1970) (violation of due process). *See generally* Bigham & Bostick, *Exclusionary Zoning Practices: An Examination of the Current Controversy*, 25 VAND. L. REV. 1111 (1972); Davidoff & Gold, *Exclusionary Zoning*, 1 YALE REV. L. & SOC. ACT. 56 (Winter 1970); Juergensmeyer & Gragg, *Limiting Population Growth in Florida and the Nation: The Constitutional Issues*, 26 U. FLA. L. REV. 758 (1974); Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN. L. REV. 767 (1969).

Courts have approved plans which seek to slow the rate of growth rather than stop growth

chosen to cope with growth-induced financial difficulties by employing a variety of means to shift the cost of providing capital improvements to the new residents who create the need for them.[5]

The development of capital cost shifting devices grounded in land use control regulations has been rapid and turbulent.[6] Despite the lack of enabling legislation,[7] the presence of powerful builder and developer lobbies,[8] and an uncertain response by the courts to the new land use control mechanisms, local governments have persisted in their attempts to shift the costs of growth.[9] In the years

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completely. *See* Golden v. Planning Board of Town of Ramapo, 334 N.Y.S.2d 138, *appeal dismissed* 409 U.S. 1003 (1972). For contrasting views on the *Ramapo* decision, see Bosselman, *Can the Town of Ramapo Pass a Law to Bind the Rights of the Whole World?* 1 FLA. ST. U.L. REV. 234 (1973) and Landman, *No, Mr. Bosselman, the Town of Ramapo Cannot Pass a Law to Bind the Rights of the Whole World: A Reply,* 10 TULSA L.J. 169 (1974).

5. The proposition that new residents should bear the capital expenses they create would not seem unfair. In the absence of capital cost shifting devices the developer reaps windfall profits. After all, the developer "sells" his customer the schools, recreational facilities, fire protection, etc., that are primarily paid for by the older residents of the community. *See generally* Jacobsen & Redding, *Impact Taxes: Making Development Pay its Way,* 55 N.C. L. REV. 407 (1977).

6. Courts have rarely found constitutional or statutory obstacles to ordinances requiring developers to provide interior streets, sidewalks, and sewers. *See, e.g.,* City of Buena Park v. Boyar, 8 Cal. Rptr. 674 (4th Dist. Ct. App. 1960) (developer may reasonably be required to provide sewers, water mains, sidewalks and the like); Ayres v. City Council, 34 Cal. 2d 31 (1949) (reasonable to require developer to dedicate land for boundary highway); Brous v. Smith, 304 N.Y. 164 (1952) (town can require developer to provide interior roads). But many state courts, at least initially, invalidated provisions requiring land dedication or fees for schools and parks. *See, e.g.,* Kelber v. City of Upland, 155 Cal. App. 2d 631 (4th Dist. Ct. App. 1957) ($30 per lot fee for school and park facilities invalid); Rosen v. Village of Downers Grove, 167 N.E.2d 230 (Ill. 1960) (fee for school facilities invalid); Coronado Dev. Co. v. City of McPherson, 368 P.2d 51 (Kan. 1962) (required dedication for park, playground, and other public purposes invalid). Many of these courts, however, have since changed their minds. *Compare* Gulest Assoc., Inc. v. Town of Newburgh, 209 N.Y.S.2d 729 (Sup. Ct. 1960) (fee for recreational purposes invalid) *with* Jenad, Inc. v. Village of Scarsdale, 271 N.Y.S.2d 955 (1966) (dedication and fee requirements for park and recreational purposes valid; *Gulest* expressly overruled), *and* Admiral Dev. Corp. v. City of Maitland, 267 So. 2d 860 (Fla. 4th Dist. Ct. App. 1972) (fee and dedication requirement for parks invalid) *with* Wald Corp. v. Metro. Dade County, 338 So. 2d 863 (Fla. 3d Dist. Ct. App. 1976) (dedication for canals for flood control permissible requirement). *See generally* Heyman & Gilhool, *The Constitutionality of Imposing Increased Community Costs on New Suburban Residents Through Subdivision Exactions,* 73 YALE L.J. 1119, 1122 (1964).

7. *See* Jacobsen & Redding, *supra* note 5, at 407, 414.

8. For instance, a bill specifically authorizing the imposition of impact fees was introduced in the Florida legislature in 1974. *See* Fla. HB 3126 (1974). It fell victim to aggressive development industry lobbying. Rhodes, *Impact Fees: The Cost Benefit Dilemma in Florida,* 27 LAND USE LAW & ZONING DIGEST no. 10 at 7 (1975).

9. For an analysis of how communities in Illinois improvised in the face of restrictive state court decisions, to extract some capital funding aid from developers, see Platt & Moloney-Merkle, *Municipal Improvisation: Open Space Exactions in the Land of Pioneer*

ahead, the need to use such devices will undoubtedly intensify.[10] Current economic and political developments such as high interest rates and diminished federal revenue sharing funds[11] will have harsh if not disastrous effects on capital financing by local governments.

Impact fees are charges levied by local governments against new development in order to generate revenue for capital funding necessitated by the new development. These fees are playing an increasing role in the efforts of local governments to cope with the economic burdens of population growth such as the need for new roads, schools, parks, and sewer and water treatment facilities.[12] Unfortunately for local governments, the use of impact fees has been subjected to numerous legal challenges. The purpose of this article is to analyze the case law relevant to those challenges and to propose criteria for determining the validity of impact fees. In Part I, the historical development of impact fees is examined as is their relationship to other capital cost shifting land use regulations. Part II provides a national perspective on constitutional and other legal challenges to impact fees.[13] Part III analyzes the status of impact

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Trust, 5 URB. LAW. 706 (1973).

Many communities have used the tactic of coercion to effectuate various capital cost shifting regulations. As a practical matter, most developers are forced to comply with the requirements laid down by local governments because of the prohibitively expensive financing and opportunity costs incurred as a result of protracted delay caused by litigation. D. HAGMAN, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW 253 (1975). Class action suits by builder and developer associations have been effective in remedying this disadvantage. *Id. See, e.g.*, Santa Clara County Contractors & Homebuilders Ass'n v. City of Santa Clara, 43 Cal. Rptr. 86 (1st Dist. Ct. App. 1965) (contractors association has right to sue on behalf of members); Contractors & Builders Ass'n v. City of Dunedin, 329 So. 2d 314 (Fla. 1976) (contractors association sued city challenging validity of impact fees).

10. *See* Small, *The Palm Beach County Experience*, 2 FLA. ENVT'L & URB. ISSUES 4 (Oct. 1974).

11. In a survey of cities receiving revenue sharing funds, the three top priorities for the use of the money were capital improvements, public safety, and maintenance. Freilich, *Current Developments in Local Government Law—A Review of Recent Decisions, Statutes and Events, and Their Impact in the Field of Urban Law*, 6 URB. LAW. 288, 292 n.12 (1974). This reflects both the paucity of locally generated funds available for capital improvements and the serious impact that a reduction of revenue sharing funds would have on local governments' abilities to provide capital funding to adequately accommodate subdivision growth.

12. *See* Jacobsen & Redding, *supra* note 5, at 407; Zimmerman, *Tax Planning for Land Use Control*, 5 URB. LAW. 639, 675-76; Note, *Subdivision Land Dedication: Objectives and Objections*, 27 STAN. L. REV. 419, 442-45 (1975).

13. The discussion in this article of constitutional challenges to impact fees is not intended to be exhaustive. *See, e.g.*, Associated Home Builders v. City of Walnut Creek, 94 Cal. Rptr. 630, 637, *appeal dismissed*, 404 U.S. 878 (1971); Ivy Steel & Wire Co. v. City of Jacksonville, 401 F. Supp. 701, 704 (M.D. Fla. 1975).

fees in Florida, with specific consideration given to (a) the special need for impact fees in Florida created by the pre-platted land problem, (b) statutory authorization of impact fees, (c) the tax versus regulation problem, (d) the emerging criteria for assessing the police power validity of impact fees, and (e) the post-*Dunedin* development of impact fees in Florida.

I. HISTORICAL DEVELOPMENT OF IMPACT FEES

The first land use regulation developed to shift the capital expense burden to the developer and new residents was the required dedication.[14] Local governments conditioned their approval of a subdivision plat upon the developer's agreement to provide and dedicate such improvements as streets and drainage ways.[15] Required dedications for these intradevelopment capital improvements is now a well accepted part of subdivision regulation[16] and is generally approved by the courts.[17]

The in lieu fee developed as a refinement of required dedications. To require each subdivision to dedicate land to educational purposes would not solve the problem of providing school facilities for developing suburban areas because the sites would often be inadequate in size and imperfectly located.[18] The in lieu fee solves this problem by substituting a money payment for dedication when the local government determines the latter is not feasible.

The impact fee is functionally and conceptually similar to the in lieu fee in that both are required payments for capital facilities.[19] In fact, in certain situations the terms can be used virtually inter-

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14. *See* 1 J. JUERGENSMEYER & J. WADLEY, FLORIDA LAND USE RESTRICTIONS § 9.02 (1976). *See also* 3 R. ANDERSON, AMERICAN LAW OF ZONING §§ 19.24, 19.25 (1968).

15. Authority to impose these conditions was generally inferred from subdivision Maps and Plats Acts which were originally designed to facilitate the conveyance of land. Since it became customary to require a plat to be approved for accuracy before it was approved for recording, this afforded a convenient point of control when the need for more comprehensive regulation became apparent. Rosen v. Village of Downers Grove, 167 N.E.2d 230, 234 (Ill. 1960).

16. Required dedications for school and park purposes have met with increasing approval by the courts. See note 6 *supra*. Because the facilities will be located within the subdivision there is a clear benefit to the new residents. Also, these dedication requirements may actually improve the developer's profit from the subdivision, eliminating the taking issue. *See* Note, *supra* note 12, at 419-30. *See generally* Note, *Mandatory Dedication of Land by Land Developers*, 26 U. FLA. L. REV. 41 (1973).

17. *See* cases cited in note 6, *supra*.

18. R. ANDERSON, *supra* note 14, § 19.42.

19. In lieu payments are currently being assimilated into the impact fee concept. Both are fees used to fund schools, parks, and other facilities located outside the subdivision. J. JUERGENSMEYER & J. WADLEY, *supra* note 14, § 9.03.

changeably. The impact fee concept, however, is a much more flexible cost shifting tool. Because in lieu fees are predicated on dedication requirements, they can only be used where required dedications can be appropriately utilized. In the case of sewer and water facilities, public safety facilities, and similar capital outlays, required dedications are not an appropriate device to shift a portion of the capital costs to the development because one facility (and parcel of land) can service a very wide area and there is little need for additional land in extending these services.

Impact fees are usually collected at the time building permits are issued rather than when the land is platted.[20] In addition, impact fees typically are calculated on the basis of the number of bedrooms or living units in a development[21] rather than as a per-

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20. J. JUERGENSMEYER & J. WADLEY, *supra* note 14, § 17.01.

21. Jacobsen & Redding, *supra* note 5, at 408. In drafting an educational impact fee, Collier County used the following formula then used by the Collier County Board of Education to calculate its expansion needs based on new dwelling units in the community:

> The amount of fee to be paid shall be calculated according to the following formulae and shall be an amount equal to the sum of the educational facilities and acreage costs necessary to support the pupils generated by each new dwelling unit, less the estimated percentage of State Aid received for capital outlay.
>
> a. Acreage cost per dwelling unit shall be calculated thusly: $(a \times b \times c \times d) + (e \times b \times c \times f) + (g \times b \times c \times h) = x$
>
> b. Construction costs per dwelling unit shall be calculated thusly: $b \times j = w$
>
> c. Percentage of State Aid shall be determined by the estimates provided in the Five Year School Plant Survey conducted by the Florida Department of Education — y
>
> d. Total fee owed shall be calculated as the construction costs plus acreage cost less State Aid = $(1 - y)(x + w)$
>
> e. In the above formulae, the above used letters are given the following significance
>
> *a* represents the percentage of school age children in grades kindergarten-grade 5
>
> *b* represents the average school age children per household
>
> *c* represents the existing raw land prices per acre
>
> *d* represents the number of acres required per elementary school site divided by the number of pupils per elementary school
>
> *e* represents the percentage of school age children in grades 6-8
>
> *f* represents the number of acres required per middle school site divided by the number of pupils per middle school
>
> *g* represents the percentage of school age children in grades 9-12
>
> *h* represents the number of acres required per secondary school site divided by the number of pupils per secondary school
>
> *j* represents the current cost of facilities per pupil (excluding land costs)
>
> *w* represents the construction cost per dwelling expressed in dollars
>
> *x* represents the acreage cost per dwelling expressed in dollars
>
> *y* represents the percentage of State Aid available.

Collier County, Fla., Ordinance 78-36 (July 18, 1978).

centage of acreage or its equivalent value.[22] Finally, impact fees normally are collected for extradevelopment construction rather than intradevelopment facilities.

The distinctions between in lieu fees and impact fees result in several decided advantages for impact fees. First, impact fees can be utilized to fund types of facilities and capital expenses which are not normally the subject of dedication requirements and in lieu fees,[23] and can more easily be applied to facilities to be constructed outside the development (extradevelopment) as well as those inside the development (intradevelopment).[24] Second, as discussed in Part III, impact fees can be applied to developments platted before the advent of required dedications or in lieu fees and thus impose on incoming residents their fair share of these capital costs.[25] This advantage is particularly important in Florida where hundreds of thousands of vacant lots were platted prior to 1970. A third advantage is that impact fees can be applied to condominium, apartment, and commercial developments which create the need for extradevelopment capital expenditures, but generally escape dedication or in lieu fee requirements because of the small land area involved or the inapplicability of subdivision regulations.[26] Finally, impact fees can be collected at the time building permits are

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22. For example, in Admiral Dev. Corp. v. City of Maitland, 267 So. 2d 860, 861 (Fla. 4th Dist. Ct. App. 1972), the city code read as follows:

> Sec. 13-8. Dedication of park and recreation area—When land is subdivided within the city.
>
> (a) When lands are subdivided within the city, at least five per cent (5%) of the gross area of such lands shall be dedicated by the owner to the city for park and recreation purposes . . . .
>
> (b) If, in the judgment of the city council, the land to be subdivided is too small for a park or recreation area to be dedicated from such land, then the owner shall pay to the city a sum of money, equal to five per cent (5%) of the value of the gross area . . . .

MAITLAND, FLA., CODE § 13-8 (1972). In some ordinances the in lieu fee is not tied to land value but like the impact fee is stated in terms of a dollar amount per residential unit. *See* Jordan v. Village of Menomonee Falls, 137 N.W.2d 442, 444 (Wis. 1965) (in lieu fee for school, park, and recreation needs of $200 per residential lot), *appeal dismissed*, 385 U.S. 4 (1966).

23. *See* Jacobsen & Redding, *supra* note 5, at 408.

24. *See* Contractors & Builders Ass'n v. City of Dunedin, 329 So. 2d 314 (Fla. 1976) (impact fee funding expansion of sewer and water facilities).

25. Juergensmeyer, *Drafting Impact Fees to Alleviate Florida's Pre-Platted Lands Dilemma*, 7 FLA. ENVT'L & URB. ISSUES 7 (April 1980). In the absence of impact fees, residents moving into pre-platted subdivisions would not be making the same contribution to educational and recreational capital funding which are required of residents moving into recently platted subdivisions through dedications and in lieu fees. *Id.* at 8.

26. Note, *supra* note 12, at 443-44. *See also* Zimmerman, *supra* note 12, at 675-76.

issued and when growth creating a need for new services occurs, rather than at the time of platting.

II. Constitutional Challenges to Impact Fees

The validity of impact fees is generally subject to a two-tiered constitutional attack. The preliminary and often dispositive objection to required payments by developers for capital expenses is that they are not authorized by state statute or constitution[27] and therefore are void as ultra vires.[28] If statutory authority is found, the local ordinance is alternatively challenged as an unreasonable regulation exceeding the state's police power or as a disguised tax which violates various state constitutional strictures.[29]

A review of recent constitutional challenges to impact and in lieu fees discloses a changing judicial attitude towards these cost-shifting devices.[30] Despite earlier negative reaction to such payment requirements,[31] state courts currently tend to validate them as a

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27. *See, e.g.*, City of Montgomery v. Crossroads Land Co., 355 So. 2d 363 (Ala. 1978) (in lieu fees for recreational purposes not authorized by state statute); Admiral Dev. Corp. v. City of Maitland, 267 So. 2d 860 (Fla. 4th Dist. Ct. App. 1972) (dedication and in lieu fees for park and recreational purposes not authorized by city charter). *See also* Heyman & Gilhool, *supra* note 6, at 1134, n.66 (citing cases where issue of statutory authority was dispositive).

28. The power of a local government to exercise various subdivision controls, including impact fees, is derived from general state statutes, private acts, and municipal charters. E. Yokley, The Law of Subdivisions 7 (1963).

29. *See, e.g.*, Call v. City of West Jordan, 606 P.2d 217 (Utah 1979) (in lieu fees for flood control, park, and recreational purposes attacked as ultra vires, an unreasonable regulation, and as an unconstitutional tax); Jordan v. Village of Menomonee Falls, 137 N.W.2d 442 (Wis. 1965) (in lieu fees for school, park, and recreational purposes attacked as ultra vires, an unreasonable regulation and as an unconstitutional tax), *cert dismissed*, 385 U.S. 4 (1966). *See generally* Heyman & Gilhool, *supra* note 6, at 1122, 1146.

30. *See, e.g.*, Associated Home Builders, Inc. v. City of Walnut Creek, 94 Cal. Rptr. 630 (1971) (subdivision fees for recreation purposes approved), *cert. dismissed*, 404 U.S. 878 (1971), Billings Properties, Inc. v. Yellowstone County, 394 P.2d 182 (Mont. 1964) (required dedication for recreational purposes upheld); Jenad, Inc. v. Village of Scarsdale, 271 N.Y.S.2d 955 (1966) (in lieu fees for recreational purposes upheld); Call v. City of West Jordan, 606 P.2d 217 (Utah 1979) (in lieu fee for flood control, park, and recreational purposes upheld); Jordan v. Village of Menomonee Falls, 137 N.W.2d 442 (Wis. 1965) (in lieu fee for school, park, and recreational purposes upheld).

31. *See notes* 71-81 and accompanying text, *infra*. Unlike zoning enactments, which since Euclid v. Ambler Realty Co. 272 U.S. 365 (1926), have received great deference from the courts, money payment requirements for extradevelopment capital funding initially received careful scrutiny. Ironically, zoning decisions have a much greater economic impact on the land owner or developer. *See* Johnston, *The Constitutionality of Subdivision Control Exactions: The Quest for a Rationale*, 52 Cornell L.Q. 871, 912 n. 189 (1967). *See, e.g.*, Rosen v. Village of Downers Grove, 167 N.E.2d 230 (Ill. 1960) (fees for educational purposes invalid under police power); Pioneer Trust and Savings Bank v. Village of Mt. Prospect, 176 N.E.2d 799 (Ill. 1961) (fees for educational purposes not authorized); Gulest Assoc., Inc. v.

proper and reasonable exercise of police power.[32] These decisions, however, have utilized different and inconsistent legal theories to circumvent the restrictive standards initially established.[33] The courts' reluctance to clearly characterize these payments as either land use regulations or taxes has aggravated the confusion.[34]

A. *Impact Fees: Land Use Regulations or Taxes*

The characterization of impact fees as land use regulations or taxes presents a complex problem.[35] Required dedications, which serve the same purpose as impact fees, are an acknowledged police power regulation.[36] Because impact fees are functionally similar to dedications and to other land use planning and growth management tools, the regulation tag appears appropriate.[37] Although commentators have generally adopted the regulation characterization,[38] the taxation rubric theoretically is equally appropriate, particularly when the positive nature of impact fees[39] and hornbook distinctions between a tax and a regulation are considered.[40]

The label applied in a particular case will depend on the speci-

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Town of Newburgh, 209 N.Y.S.2d 729 (1960) (fee for educational purposes unreasonable regulation and invalid), *aff'd*, 15 App. Div. 2d 815, 225 N.Y.S.2d 538 (1962).

32. See note 31 *supra*.

33. Johnston, *supra* note 32, at 913-14; Comment, *Subdivision Exactions: The Constitutional Issues, the Judicial Response, and the Pennsylvania Situation*, 19 VILL. L. REV. 782, 799-802 (1974).

34. *See* Jordan v. Village of Menomonee Falls, 137 N.W.2d 442, 450 (Wis. 1965) (court admitted it was unable to decide whether in lieu fee was a regulation or an excise tax).

35. In any problem of characterization, these words of Walter Wheeler Cook are relevant:

> The tendency to assume that a word which appears in two or more legal rules, and so in connection with more than one purpose, has and should have precisely the same scope in all of them runs through all legal discussions. It has the tenacity of original sin and must be constantly guarded against.

Hancock, *Fallacy of the Transplanted Category*, 37 CAN. B. REV. 535, 575 (1959) (footnote omitted).

36. *See* E. YOKLEY, 2 ZONING LAW AND PRACTICE § 14-3 (1978); notes 14-17 and accompanying text, *supra*. *But see* Note, *Subdivision Exactions: Where is the Limit?*, 42 NOTRE DAME LAW. 400, 404 (1967) (required dedications are taxes and not regulations).

37. Juergensmeyer, *supra* note 26, at 8. *But see* Note, *supra* note 36, at 404.

38. *See, e.g.*, Heyman & Gilhool, *supra* note 6, at 1134; Johnston, *supra* note 32, at 917; Juergensmeyer, *supra* note 26, at 8.

39. Heyman & Gilhool, *supra* note 6, at 1146.

40. According to Professor Cooley, a demand for money can be upheld under the police power only if its primary purpose is regulation. If its primary purpose is revenue, it is an exercise of the taxing power. 4 T. COOLEY, THE LAW OF TAXATION § 1784 (1924). According to those who argue that impact fees are taxes, such fees are primarily a revenue raising device regardless of whether they are spent inside or outside the development. *See* Note, *supra* note 36, at 408-09.

ficity and clarity of the enabling statute.[41] Either label could be effectively employed by state legislatures to delegate authority to impose properly constituted impact fees for extradevelopment funding;[42] however, in most cases neither the statutory authorization relied upon nor the local ordinance provides a clear guide to characterization by the courts.

The choice a court makes in tagging the impact fee will often be determinative of its validity. If the tax label is adopted, the impact fee will be invalidated unless express and specific statutory authorization for the tax exists.[43] Even if statutory authorization is present, constitutional limitations on taxation may still invalidate the statute.[44] Alternatively, if the impact fee is construed as a police power regulation, very broad legislative delegation will suffice.[45] Once past this statutory hurdle, the clear trend among state courts is to validate such extradevelopment capital funding payment requirements as a valid exercise of the police power.[46] Not surpris-

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41. Heyman & Gilhool, *supra* note 6, at 1146. Although the mere labeling of an impact fee as a regulation in an enabling statute should not be determinative, courts may be expected to give deference to the legislature's judgment. *Cf.* Associated Home Builders, Inc. v. City of Walnut Creek, 94 Cal. Rptr. 630 (1971) (court relied heavily on legislative report in sustaining validity of in lieu fee for recreation and open space), *appeal dismissed*, 404 U.S. 878 (1971).

42. *See* Doebele, *Improved State Enabling Legislation for the Nineteen-Sixties: New Proposals for the State of New Mexico*, 2 NAT. RESOURCE J. 321 (1962); Heyman & Gilhool, *supra* note 6, at 1146-54. Impact fees could successfully be authorized as an excise tax on the development business if a legislature chose to do so. *Id.* Under the taxing power, however, judicial supervision of the fees would be greatly diminished. *Id. Cf.* Wald Corp. v. Metropolitan Dade County, 338 So. 2d 863, 867 (Fla. 3d Dist. Ct. App. 1976) (suggesting that required dedication is in the nature of an excise tax). *But see* Note, *supra* note 36, at 409.

43. *See, e.g.*, City of Montgomery v. Crossroads Land Co., 355 So. 2d 363 (Ala. 1978) (in lieu fee is a tax and thus must have specific statutory authorization).

44. Many state constitutions contain prohibitions against uneven property taxation. *See, e.g.*, FLA. CONST. art. VII, § 2. Therefore, if impact fees are characterized as property taxes they would be invalidated by such provisions. *See* Venditti-Siravo, Inc. v. City of Hollywood, 39 Fla. Supp. 121, 122-23 (17th Cir. Ct. 1973) (impact fee is an invalid property tax). If impact fees are to be considered taxes, however, they are more properly characterized as excise taxes.

45. *See* Contractors & Builders Ass'n v. City of Dunedin, 329 So. 2d 314, 317-20 (Fla. 1976), *cert. denied*, 444 U.S. 867 (1979). (If fee is characterized as a tax then it is void for lack of specific statutory authorization, but because it is a regulation, the broader delegation will suffice).

46. *See, e.g.*, Contractors & Builders Ass'n v. City of Dunedin, 329 So. 2d 314 (Fla. 1976), *cert. denied*, 444 U.S. 867 (1979) (Impact fee a regulation, valid if proper limitations placed on amounts collected); Billings Properties, Inc. v. Yellowstone County, 394 P.2d 182 (Mont. 1964) (in lieu fee is a regulation which is valid under the police power); Jenad, Inc. v. Village of Scarsdale, 271 N.Y.S.2d 955 (1966) (in lieu fee is a regulation held valid under the police power).

ingly, therefore, most state courts have summarily labeled extradevelopment impact fees as either a tax or regulation in a result-oriented fashion that avoids an adequate theoretical or policy-directed explanation.[47]

There are two rationales either implicit or expressly cited in those decisions which apply the tax label to extradevelopment impact fees. The first is a simplistic observation that impact fees are a positive exaction of funds and are therefore a tax.[48] This criterion is an untenable basis for distinction because it exalts form over function.[49] It ignores similar police power regulations which mandate that the developer expend great amounts of funds for streets, sewers, and other capital improvements within the development.[50] Any distinction between impact fees and similar police power regulations made on the basis that impact fees are imposed prior to the issuance of building permits rather than after the approval of plats is a distinction without a difference.[51] In either case, funds must be expended by the developer prior to the development of the subdivision.[52]

The second rationale used to label extradevelopment impact fees as taxes is that funds for education, recreation, and public safety purposes cannot be raised under the police power.[53] This assertion

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47. *See* Jenad, Inc. v. Village of Scarsdale, 271 N.Y.S.2d 955, 958 (1966) (court bluntly stated that "[t]his is not a tax at all but a reasonable form of village planning"); Call v. City of West Jordan, 606 P.2d 217, 220-21 (Utah 1979) (labeling an exercise in semantics, in lieu fee not a tax but form of planning).

48. *See* Broward County v. Janis Dev. Corp., 311 So. 2d 371, 375 (Fla. 4th Dist. Ct. App. 1975) (prohibiting raising of revenue by a regulatory fee).

49. See text accompanying notes 37-39 *supra*.

50. *See* FLA. STAT. §§ 163.260-.270 authorizing the imposition of such requirement on the developer. See notes 14-17 and accompanying text, *supra*.

51. The Local Government Comprehensive Planning Act of 1975, FLA. STAT. §§ 163.3161-.3211 (1979), made no distinction on the basis of whether a regulation is imposed prior to plat approval or issuance of a building permit. Under the act, "development permit" is defined as any building permit, zoning permit, subdivision approval, rezoning, special exception, variance, or any official local government action having the effect of permitting the development of land. FLA. STAT. § 163.3164(6) (1979).

52. Another distinction which could be made is that expenditures for extradevelopment facilities are a tax but expenditures for intradevelopment facilities can be considered a regulation. But where the facilities are located and the degree of benefit the new residents receive from the facilities would seem to be an issue which goes to the reasonableness of the regulation, and not to the issue of whether the fee requirement is a tax or a regulation.

53. *See* Merrelli v. City of St. Clair Shores, 96 N.W.2d 144 (Mich. 1959) (police and fire protection are problems which should be financed by general community); Midtown Properties, Inc. v. Township of Madison, 172 A.2d 40, 47, *aff'd per curiam*, 189 A.2d 226 (N.J. Super. Ct. App. Div. 1963) (schools should be financed from general revenues of entire community) (dicta); Daniels v. Borough of Point Pleasant, 129 A.2d 265, 267-68 (N.J. 1957) (city could not raise funds for school costs under the police power).

is based on the conviction that such facilities should be financed solely from general revenues provided by the community as a whole.[54] There is no constitutional mandate, however, that educational, recreational, and other facilities be underwritten by the general population rather than the new residents creating the need for the additional improvements.[55] Furthermore, this rationale employs an unduly restrictive and inflexible conception of local regulatory power.[56] State courts have increasingly found fees which shift the burden of capital funding for these extradevelopment facilities to be within the police power.[57]

Unfortunately, the decisions adopting the "regulation" label in assessing the validity of impact fees and similar devices fail to provide an adequate explanation for their labeling conclusion.[58] Again, the choice of label in these cases often seems to have been result-oriented. A reasoned characterization of a particular impact fee as

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54. *See* Reps & Smith, *Control of Urban Land Subdivision*, 14 SYRACUSE L. REV. 405, 409-10 (1963); Comment, *Money Payment Requirements as Conditions to the Approval of Subdivision Maps: Analysis and Prognosis*, 9 VILL. L. REV. 294, 298-99 (1964); Note, *supra* note 36, at 406, 410. *But see* Heyman & Gilhool, *supra* note 6, at 1136-41, for a thorough refutation of the Reps and Smith position that education, recreation, and other facilities must be funded from general revenues.

55. *See* note 73 *infra*. The most compelling of these arguments is that public education should be "free" and that all those who cannot pay the fee requirement are effectively excluded from an equal educational opportunity. *See* Midtown Properties, Inc. v. Township of Madison, 172 A.2d 40, 47 (N.J. Super. Ct. Law Div. 1961) (inconsistent with democratic principle to impose on parents any special charge for education of children) (dicta). This argument, however, ignores the fact that different communities spend varying amounts of money for education on the basis of tuition-like tax differentials. The Supreme Court has held that the resulting disparity in educational opportunity does not violate the Constitution. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1 (1973).

56. In Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 387 (1926), Justice Sutherland noted that

> [r]egulations, the wisdom, necessity and validity of which, as applied to existing conditions, are so apparent that they are now uniformly sustained, a century ago, or even half a century ago, probably would have been rejected as arbitrary and oppressive . . . . And in this there is no inconsistency, for while the meaning of constitutional guaranties [sic] never varies, the scope of their application must expand or contract to meet the new and different conditions which are constantly coming within the field of their operation. In a changing world, it is impossible that it should be otherwise.

57. *See, e.g.*, Billings Properties, Inc. v. Yellowstone County, 394 P.2d 182 (Mont. 1964) (required dedication for recreational purposes upheld); Jenad, Inc. v. Village of Scarsdale, 271 N.Y.S.2d 955 (1966) (in lieu fees for recreational purposes upheld); Call v. City of West Jordan, 606 P.2d 217 (Utah 1979) (in lieu fee for flood control, park, and recreational purposes upheld).

58. See note 48 *supra*. *Cf.* Jordan v. Village of Menomonee Falls, 137 N.W.2d 442, 450 (Wis. 1965) (court was unable to decide whether an in lieu fee was a tax or regulation), *appeal dismissed*, 385 U.S. 4 (1966).

a tax or regulation must be made with reference to policy considerations that lie beneath the definitional distinction.

The policy issue underlying the tax or regulation conundrum is whether general or specific statutory authority is an appropriate delegation of power for the imposition of the impact fee. Such a determination involves balancing the public policy favoring local government flexibility in land use planning and growth management against the policy of restricting local governments' ability to tax to those exactions specifically approved by state legislatures.[59] A number of factors should properly weigh in this balancing. These include the relative specificity of the statute upon which the impact fee is predicated,[60] whether the state confers home rule powers on local governments,[61] the limitations imposed on the impact fee by the particular ordinance,[62] whether the impact fee is being used to complement other land use control devices,[63] the types of capital improvements funded by the impact fee,[64] legislative indications of policy in the area,[65] and the particular problems of growth management faced by municipalities in the jurisdiction.[66]

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59. *See* Contractors & Builders Ass'n v. City of Dunedin, 329 So. 2d 314 (Fla. 1976), *cert. denied*, 444 U.S. 867 (1979). In *Dunedin* the Florida Supreme Court noted that although there were no express statutory provisions governing capital acquisition for sewer and water facilities other than those authorizing deficit financing, there was no reason to require that a municipality resort to deficit financing. The court stated that "[o]n the contrary, sound public policy militates against any such inflexibility." *Id.* at 319, 320 (footnote omitted).

60. For example, the Wisconsin Supreme Court in Jordan v. Village of Menomonee Falls, 137 N.W.2d 442 (Wis. 1965), in dicta stated that because in lieu fees had some attributes of a tax, home rule authority would be an insufficient basis for their imposition. Nevertheless, the general delegation under subdivision control statutes was considered adequate. *Id.* at 449.

61. The fact that home rule powers are granted local governments is indicative of state policies favoring flexibility and broad regulatory discretion in county and municipal self-government. *See* Contractors & Builders Ass'n v. City of Dunedin, 329 So. 2d 314, 320 n.9 (Fla. 1976) (construction of statute broadened by presence of home rule powers).

62. If an ordinance does not meet police power requirements of reasonableness, then the impact fee would be invalid under the police power. To be sustained, the impact fees would have to be valid under the taxing power, see notes 90-107 and accompanying text, *infra*.

63. Where impact fees are integrated with in lieu fees and required dedications as part of a total land use control system their character is clearly regulatory. *See* Juergensmeyer, *supra* note 26, at 8, 22-23.

64. The need for expansion of some types of facilities clearly correlates with residential growth, *e.g.*, schools, parks, sewer, and water facilities, and roads.

65. *See* Jordan v. Village of Menomonee Falls, 137 N.W.2d 442 (Wis. 1965). A broad legislative delegation of authority to regulate subdivisions indicated a legislative policy which sustained the imposition of in lieu fees for education and recreation. *Id.* at 449-50, *Accord*, Call v. City of West Jordan, 606 P.2d 217, 219 (Utah 1979) (municipal planning enabling act).

66. Florida, for instance, faces several peculiar problems. First, hundreds of thousands of

Recent decisions indicate that judicial conceptions of public policy favor a regulation characterization of fee requirements for extradevelopment capital funding.[67] In the absence of specific enabling legislation determinations must be made on an individual basis.[68] The massive financial problems created by suburban growth, combined with broad legislative delegations of authority in land use regulation favor the characterization of impact fees as regulations.[69] Given such a characterization, their validity should be determined under the police power.

B. Judicial Criteria for Assessing the Constitutionality of Impact Fees: Early Restrictions

Two landmark decisions placed an almost insurmountable burden on local governments seeking money payments for extradevelopment capital spending from developers whose activities necessitated such expenditures.[70] In *Pioneer Trust & Savings Bank v. Village of Mount Prospect*,[71] a developer challenged the validity of an ordinance requiring subdividers to dedicate one acre per sixty residential lots for schools, parks, and other public purposes. In determining whether required dedications or money payments for recreational or educational purposes represented a valid exercise of the police power, the Illinois Supreme Court propounded the "specifically and uniquely attributable" test. The court focused on the origin of the need for the new facilities and held that unless the village could prove that the demand for addi-

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existing subdivision lots were platted prior to the implementation of in lieu fees and required dedications for education and recreation. Thus, impact fees are the only vehicle available to exact capital contributions from incoming residents to those subdivisions. Also, many counties in Florida have a high percentage of retiree homeowners. Even though these older residents indirectly create the need for additional educational facilities and directly create the need for unique types of municipal facilities and services, a large homestead exemption minimizes their contribution to ad valorem tax revenues. Finally, Florida has experienced phenomenal population growth over the past several decades. Small communities are often faced with the prospect that their population will double in a relatively short period of time. Without capital contributions from the incoming residents, they are unable to provide adequate facilities and the quality of life desired by both the newer and older residents. *See* DEPARTMENT OF ADMINISTRATION, 1977 ECONOMIC REPORT OF THE GOVERNOR 31-41 (1977).

67. *See* note 32 *supra*.

68. No Florida statute deals specifically with impact fees; therefore, the determination of whether an impact fee in Florida is a tax or regulation must be made by the court without the benefit of explicit legislative characterization of such fees.

69. *See* notes 1-5 and accompanying text, *supra*.

70. *See* Johnston, *supra* note 32, at 911-13; Comment, *supra* note 34, at 800.

71. 176 N.E.2d 799 (Ill. 1961).

tional facilities was "specifically and uniquely attributable" to the particular subdivision, such requirements were an unreasonable regulation not authorized by the police power.[72] Thus, where schools had become overcrowded because of the "total development of the community" the subdivider could not be compelled to help fund new facilities which his activity would necessitate.

A related and equally restrictive test was delineated by the New York court in *Gulest Associates, Inc. v. Town of Newburgh*.[73] In that case developers attacked an ordinance which charged in lieu fees for recreational purposes. The amounts collected were to be used by the town for "*neighborhood park, playground or recreation purposes including the acquisition of property.*"[74] The court held that the money payment requirement was an unreasonable regulation tantamount to an unconstitutional taking because the funds collected were not used solely for the benefit of the residents of the particular subdivision charged, but rather could be used in any section of town for any recreational purposes. In essence, the *Gulest* "direct benefit" test required that funds collected from required payments for capital expenditures be specifically tied to a benefit directly conferred on the homeowners in the subdivision which was charged.[75] If recreational fees were used to purchase a park outside the subdivision, the direct benefit test was not met and the ordinance was invalid.

Perhaps the reason behind this initial restrictive approach was an underlying judicial suspicion that payment requirements for ex-

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72. 176 N.E.2d at 802. The constitutional standard posited by the *Pioneer Trust* court applied to dedications as well as money payment requirements for educational and recreational purposes. The court held that "if the burden cast upon the subdivider is specifically and uniquely attributable to his activity, then the requirement is permissible; if not, it is forbidden and amounts to a confiscation of private property in contravention of the constitutional prohibitions rather than reasonable regulation under the police power." *Id.*

73. 209 N.Y.S.2d 729 (Sup. Ct. 1960), *aff'd*, 225 N.Y.S.2d 538 (App. Div. 1962). The *Gulest* decision was overruled in Jenad, Inc. v. Village of Scarsdale, 271 N.Y.S.2d 955, 957 (1966).

74. 209 N.Y.S.2d at 732 (emphasis in original).

75. *See* Comment, *supra* note 34, at 797-99. The *Gulest* rationale was soundly criticized.

> The distinction between forced dedication of land and forced payment of fees seems unsupportable. If a developer can be compelled to dedicate land because future residents of his subdivision will need parks, there is no reason why those parks cannot be located outside the subdivision. The need generated by the subdivider's activity remains the same; so long as it is that need which is satisfied, nothing should stand in the way of improvements which incidentally will be more advantageous to the whole community.

Note, *Techniques for Preserving Open Spaces*, 75 HARV. L. REV. 1622, 1628 (1962).

tradevelopment capital expenditures were in reality a tax.[76] Unlike zoning, payment requirements did not fit neatly into traditional conceptions of police power regulations.[77] By applying the restrictive *Pioneer Trust* and *Gulest* tests, courts imposed the substantial requirements of a special assessment on such payment requirements.[78] This was consistent with perceiving them as a tax.[79] Unfortunately, it effectively precluded their use for most extradevelopment capital funding purposes, particularly for educational facilities.[80]

Despite this early trend, the *Pioneer Trust* and *Gulest* tests became difficult to reconcile with the planning and funding problems imposed on local governments by the constant acceleration of suburban growth.[81] This restrictiveness also became difficult to rationalize with the judicial view of zoning ordinances as presumptively valid. Consequently, courts were not convinced of the practical or legal necessity of such stringent standards for the validation of re-

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76. Note, *supra* note 36, at 408.

77. *Cf.* Call v. City of West Jordan, 606 P.2d 217, 226 (Utah 1979) (Wilkins, J., dissenting) (distinguishing subdivision regulations from zoning); Heyman & Gilhool, *supra* note 6, at 1146, 1155 (discussing applicability of both the taxing power and police power as bases for validity of money payment requirements).

78. A special assessment is an amount charged to the owner of a parcel of land which is benefited by a service or improvement performed by the local government. State legislatures and courts have generally limited these assessments to the benefit accruing to landowners. Special assessments, however, are designed to charge existing residents for both services and capital improvements.

In contrast, impact and in lieu fees charge new residents solely for capital improvements. Because the date of construction and cost of facilities may be presently unascertainable, the precise measurement of "benefit" often required in the case of special assessment is not feasible. *See* J. JUERGENSMEYER & J. WADLEY, *supra* note 14, § 17.03.

Nevertheless, some commentators have approved the "special assessment" confines placed by early decisions upon money payments for extradevelopment capital expenditures. *See* Reps & Smith, *supra* note 54, at 408-12. *But see* Heyman & Gilhool, *supra* note 6, at 1136-41; Johnston, *supra* note 32, at 911.

79. There is also a superficial consistency between the *Gulest* and *Pioneer Trust* standard and exactions for streets, which usually are necessitated solely by the new residents and confer upon new residents the benefit of access to the existing street system. But compulsory dedications for streets have not been confined to that width and alignment necessary to accommodate traffic solely attributable to the new subdivision or to dedication within the confines of the subdivision. *See* Ayres v. City Council, 34 Cal. 2d 31, 39 (1949) (reasonable to require street width to accommodate general public traffic expected to traverse the subdivision). *See also* Johnston, *supra* note 32, at 888-96.

80. Comment, *supra* note 34, at 796, 800. See note 79 *supra*.

81. *See* Aunt Hack Ridge Estates, Inc. v. Planning Comm'n, 273 A.2d 880 (Conn. 1970). In *Aunt Hack* the Supreme Court of Connecticut observed that "[i]n these days of burgeoning populations, critical housing problems and the incentive which they create for the activity of land developers, the need for . . . open space for the welfare of people looms large." *Id.* at 883.

quired payments for extradevelopment capital funding.[82]

C. *Recent Decisional Criteria Favoring the Police Power Validity of Impact Fees: A Proposed Test*

In turning away from the restrictive standards of *Gulest* and *Pioneer Trust*, state courts developed divergent and conflicting police power criteria for assessing the constitutional validity of extradevelopment capital funding fees.[83] Some courts nominally retained the *Pioneer Trust* test but reached patently contrary results without any explanation of the discrepancy.[84] Other courts adopted a privilege theory, under which granting the privilege to subdivide entitles local governments to require payments for extradevelopment capital spending in return.[85] The imposition of these payment requirements is viewed more as part of a transaction than as an exercise of the police power.[86] Still other courts have deferred to legislative judgments and eschewed constitutional analysis of such payment requirements.[87] Both the disparity between test and result and the inconsistent scrutiny applied to these ordinances have been frequently criticized by commentators.[88]

In contrast to these result oriented techniques, a more disciplined constitutional standard was suggested by the Wisconsin Supreme Court in *Jordan v. Village of Menomonee Falls*.[89] A two part "rational nexus" test of reasonableness for judging the validity of extradevelopment impact and in lieu fees can be discerned in the decision. In response to a developer's attack upon the ordinance as both unauthorized by state statute and as an unconstitu-

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82. Comment, *supra* note 34, at 800. See also note 31 and accompanying text, *supra*.

83. Johnston, *supra* note 32, at 877-914; Comment, *supra* note 34, at 799-802. *Compare* Aunt Hack Ridge Estates, Inc. v. Planning Comm'n, 273 A.2d 880 (Conn. 1970) (applying *Pioneer Trust* test but reaching opposite conclusion on similar facts) *with* Billings Properties, Inc. v. Yellowstone County, 394 P.2d 182 (Mont. 1964) (the question whether the subdivision created the need for parks has been answered by state legislature).

84. *See* Aunt Hack Ridge Estates, Inc. v. Planning Comm'n, 273 A.2d 880 (Conn. 1970) (adopting the *Pioneer Trust* test but reaching opposite conclusion on similar facts).

85. *See* Billings Properties, Inc. v. Yellowstone County, 394 P.2d 182 (Mont. 1964) (act of developer purely voluntary, no requirement that he subdivide his land).

86. Most courts have rejected the privilege theory which ignores the concept of development rights. *See* Johnston, *supra* note 32, at 878. *Cf.* Marcus, *Mandatory Development Rights Transfer and the Taking Clause: The Case of Manhattan's Tudor City Parks*, 24 BUFFALO L. REV. 77 (1974) (discussing development rights as a transferrable "stick" in the bundle of rights held by a landowner).

87. *See* Jenad, Inc. v. Village of Scarsdale, 271 N.Y.S.2d 955 (1966) (overruling *Gulest*).

88. *See* Johnston, *supra* note 32, at 913-21.

89. 137 N.W.2d 442 (1965), *appeal dismissed*, 385 U.S. 4 (1966).

tional taking without just compensation, the *Jordan* court addressed the constitutionality of in lieu fees for educational and recreational purposes. After concluding that the fee payments were statutorily authorized,[90] the court focused first on the *Pioneer Trust* "specifically and uniquely attributable" test.

The Wisconsin Supreme Court expressed concern that it was virtually impossible for a municipality to prove that money payment or land dedication requirements were assessed to meet a need solely generated by a particular subdivision.[91] Suggesting a substitute test, the court held that money payment and dedication requirements for educational and recreational purposes were a valid exercise of the police power if there was a "reasonable connection" between the need for additional facilities and the growth generated by the subdivision.[92] This first "rational nexus"[93] was sufficiently established if the local government could demonstrate that a series of subdivisions had generated the need to provide educational and recreational facilities for the benefit of this stream of new residents.[94] In the absence of contrary evidence, such proof showed that the need for the facilities was sufficiently attributable to the activity of the particular developer to permit the collection of fees for financing required improvements.[95]

The *Jordan* court also rejected the *Gulest* direct benefit requirement, declining to treat the fees as a special assessment. Therefore, it imposed no requirement that the ordinance restrict the funds to the purchase of school and park facilities that would directly benefit the assessed subdivision. Instead, the court concluded that the relationship between the expenditure of funds and the benefits accruing to the subdivision providing the funds was a fact issue per-

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90. 137 N.W.2d at 449-50. The court found sufficient authority for the in lieu fees based on a general delegation of subdivision regulation powers. The in lieu fees were not specifically provided for by statute. *Id.*

91. 137 N.W.2d at 447. The court stated that:

> [i]n most instances it would be impossible for the municipality to prove that the land required to be dedicated [or in lieu fees assessed] for a park or a school site was to meet a need solely attributable to the anticipated influx of people into the community to occupy this particular subdivision.

Id.

92. *Id.* at 447-48.

93. The term "rational nexus" was coined by commentators to describe the "reasonable connection" required by the *Jordan* court. *See* Comment, *supra* note 34, at 802-07.

94. 137 N.W.2d at 447-48.

95. *Id.* According to the court, possible contravening evidence would include that the municipality had acquired, prior to the growth, sufficient land and capital facilities to accommodate the growth, or that the normal growth of the community would have necessitated the capital acquisitions irrespective of the growth. *Id.*

tinent to the reasonableness of the payment requirement under the police power.[96]

The *Jordan* court did not expressly define the "reasonableness" required in the expenditure of extradevelopment capital funds; however, a second "rational nexus" was impliedly required between the expenditure of the funds and benefits accruing to the subdivision. The court concluded that this second "rational nexus" was met where the fees were to be used exclusively for site acquisition[97] and the amount spent by the village in constructing additional school facilities was greater than the the amounts collected from the developments creating the need for additional facilities.[98]

This second "rational nexus" requirement inferred from *Jordan*, therefore, is met if a local government can demonstrate that its actual or projected extradevelopment capital expenditures earmarked for the substantial benefit[99] of a series of developments are greater than the capital payments required of those developments.[100] Such proof establishes a sufficient benefit to a particular

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96. *Id.* at 450.

97. This requirement can be inferred from the facts of the case and was not explicitly posited by the court. State courts often require that funds collected from impact and in lieu fees be held and allocated separately from the local government's general revenue funds. *See, e.g.*, Contractors & Builders Ass'n v. City of Dunedin, 329 So. 2d 314, 321 (Fla. 1976) (impact fee not valid without restriction on use of funds collected). *Cf.* Call v. City of West Jordan, 606 P.2d 217, 220 (Utah 1979) (in lieu fees may be deposited in city's general fund, but may not be used for other purposes and held in trust committed to carrying out purpose of fee).

98. 137 N.W.2d at 449. This criterion was used by the Supreme Court of Florida in distinguishing a regulation from a tax in the case of impact fees. *See* Contractors & Builders Ass'n v. City of Dunedin, 329 So. 2d 314, 317 (Fla. 1976).

99. The fact that the general public might incidentally benefit from the planned capital facilities does not affect the reasonableness of the fee requirement. Also, as long as the payment requirements are reasonably related to the needs created by the subdivision, the benefits accruing to the development need not be clearly divisible from those received by the general public.

On the other hand, when the capital improvements financed by the fee requirements are remote from the particular subdivision the "benefit" requirements would not be met. For example, if no parks or playgrounds have been constructed or planned to meet the needs of a particular subdivision, and none are contemplated, an impact fee for recreational facilities would not substantially benefit the development. The second rational nexus requirement would not be met. *But cf.* Associated Home Builders, Inc. v. City of Walnut Creek, 94 Cal. Rptr. 630, 636 n.6 (1971) (difficult to see why in lieu fee for recreational purposes might not be used to purchase or develop land some distance from the subdivision residents); Ayres v. City Council, 34 Cal. 2d 31, (1949) (required dedications for roads outside development which will also benefit general public are not unreasonable).

100. For instance, using modern cost accounting techniques, it is relatively easy for a local government to calculate its educational capital expansion costs on a per dwelling unit basis. By charging an impact fee based on this figure and demonstrating that facilities have been constructed or are planned to serve the educational needs in the vicinity of the devel-

subdivision in the stream of residential growth such that the extradevelopment payment requirements may be deemed to be reasonable under the police power.[101] Although most commentators have overlooked the requirement of a "sufficient benefit" nexus in analyzing the *Jordan* decision,[102] the concept of benefits received is clearly distinct from the concept of needs attributable. As the *Jordan* court recognized, the benefit accruing to the subdivision, although it need not be direct, is a necessary factor in analyzing the reasonableness of payment requirements for extradevelopment capital funding.[103]

The dual "rational nexus" requirements deducible from *Jordan* provide a balanced, juridically consistent and realistic test of money payment requirements for extradevelopment capital funding. This test properly focuses on and balances the legitimate interests of the developer and the general welfare concerns and power of the municipality. In addition, the "sufficiently attributable" and "sufficient benefit" proof requirements can be accurately and realistically met by local governments through the use of modern cost accounting techniques.[104] Finally, once these "rational nexi" are established, the burden to disprove the reasonableness of the payment requirement shifts to the developer, according the local government a semblance of the presumption of validity it enjoys in zoning and other land use regulation matters.[105] This dual nexi test therefore provides the proper analytical framework for constitutional evaluation of such payments under the police power.[106]

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opment, the local government would meet the "sufficient benefit" nexus requirement. See the formula developed by Collier County, note 22 *supra*.

101. *But see* Jenad, Inc. v. Village of Scarsdale, 18 N.Y.2d 78 (1966) (no discussion of benefits accruing to the subdivision).

102. *See* Heyman & Gilhool, *supra* note 6; Johnston, *supra* note 32; Note, *Impact Fees: National Perspective to Florida Practice*, 4 NOVA L.J. 137 (1980); Comment, *supra* note 34.

103. 137 N.W.2d at 450.

104. *See generally* Burchell, Edelstein & Listokin, *Fiscal Impact Analysis as a Tool for Land Use Regulation*, 7 REAL EST. L.J. 132, 132-33 (1978); Heyman & Gilhool, *supra* note 6, at 1141-46; note 22 *supra*.

105. See note 83 and accompanying text, *supra*.

106. Compare the United States Supreme Court's distinction between a valid zoning ordinance and a taking in Agins v. City of Tiburon, 100 S. Ct. 2138 (1980): "The application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests, or denies an owner economically viable use of his land." *Id.* at 2141 (citations omitted).

III. Impact Fees in Florida

A. *Florida's Pre-platted Land Problem: An Additional Need for Impact Fees*

The rapid population growth which Florida has experienced in recent years has made it a prime jurisdiction for the use of impact fees to generate capital funds for growth burdened local governments. Florida, however, has a somewhat unique situation which compounds the appropriateness of such fees—the pre-platted lands problem.

In many states, land has been platted only after the demand for immediate or near-term development has encompassed it. Consequently, most lots are built upon soon after platting occurs. This has not been the case in Florida. One of the most important and infrequently discussed aspects of nearly a century of land "booms" and "busts" in Florida is that hundreds of thousands of lots have been platted but never developed.[107] Most of the platting which occurred before the 1970s did not involve exactions of any sort, with the possible exception of road and drainage easements, and when these "pre-platted" lots are built upon, no contribution toward public services will have been made on their behalf. In the case of land which was not pre-platted (perhaps even contiguous land), owners must make contributions in the form of required dedications or in lieu of payments toward public services as a condition for platting and development.

Thus, whether land being presently developed has contributed toward the capital costs of new public services will depend on *when* the land was platted. The most recently platted land is discriminated against because economically significant exactions in Florida are a recent phenomenon. It would seem that the best—and perhaps only—way to equalize this discrimination is via impact fees. Through the collection of impact fees at the building permit issuance stage of development, the required contribution to public services, recognized by the courts as proper in connection with platting, is imposed against land which has not made such a contribution at the time of platting.[108]

B. *Statutory Authorization for Impact Fees in Florida*

Florida does not have a specific statute authorizing the imposi-

107. *See* Juergensmeyer, *supra* note 26, at 7.
108. *Id.*

tion of impact fees for educational, recreational, and other capital funding purposes.[109] Rather, several broad grants of authority to counties and municipalities have been suggested as possible bases for the imposition of extradevelopment impact fees under the police power.

One such base of authority is the home rule power of Florida's counties and municipalities.[110] The home rule powers of municipalities and counties are derived from different sources. Municipalities receive home rule powers from the Florida Constitution[111] and the Municipal Home Rule Powers Act.[112] Under these provisions, municipalities are granted the "governmental, corporate and proprietary powers to enable them to conduct municipal government, perform municipal functions and render municipal services,"[113] including the authority to adopt land use planning measures. This home rule power is limited in that municipalities may not enact legislation which is expressly prohibited by the state constitution or which concerns any subject expressly preempted by state constitution or general law.

In granting home rule powers to counties, the constitution differentiates between charter and non-charter counties.[114] Article VIII, section 1(g) grants to charter counties all the powers of local gov-

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109. There have been four measures introduced in the state legislature in recent years but no specific enabling act has passed. Fla. HB 3126 (Reg. Sess. 1974, introduced by Rep. Boyd); Fla. HB 743 (Reg. Sess. 1975, introduced by Rep. Hawkins); Fla. HB 837 (Reg. Sess. 1975, introduced by Rep. Boyd); Fla. SB 1263 (Reg. Sess. 1975, introduced by Sen. MacKay). Builder lobbies have been instrumental in defeating these bills. See note 8 *supra*.

110. *See* FLA. CONST. art. VIII, §§ 1(f)-(g), 2(b); FLA. STAT. §§ 125.01, 166.021 (1979).

111. FLA. CONST. art. VIII, § 2(b). Section 2(b) provides that municipalities shall have broad home rule powers. The Florida Supreme Court in City of Miami Beach v. Fleetwood Hotel, Inc., 261 So. 2d 801 (Fla. 1972), however, narrowly construed the provision, invalidating a rent control ordinance on the ground that the constitutional provision did not alter the rule that the paramount law of the municipality is its charter which gives it all the power it possesses. In 1973, apparently in response to the *Fleetwood* decision, the legislature enacted the Municipal Home Rule Powers Act, FLA. STAT. § 166.021 (1979), which made clear that municipalities possessed broad home rule powers. The constitutionality of the act was approved in City of Miami Beach v. Forte Towers, Inc., 305 So. 2d 764 (Fla. 1975).

112. FLA. STAT. § 166.021 (1979). See note 110 *supra*.

113. FLA. CONST. art. VIII, § 2(b); FLA. STAT. § 166.021(1) (1979). The Municipal Home Rule Powers Act further provides that "[t]he Legislature recognizes that pursuant to the grant of power set forth in s. 2(b), Art. VIII of the State Constitution, the legislative body of each municipality has the power to enact legislation concerning any subject matter upon which the state Legislature may act." FLA. STAT. § 166.021(3) (1979).

114. The Florida constitution provides for two types of county government. All counties are empowered to adopt a county charter which allows them to establish a framework of county government different from that otherwise prescribed by the constitution. *See* FLA. CONST. art. VIII, §§ 1(c), (f)-(g). Most Florida counties have not elected to adopt a county charter.

ernment not inconsistent with general law.[115] This delegation of powers is equivalent to the broad home rule powers granted municipalities and would therefore presumably embrace the authority to impose land use regulations.[116] Non-charter counties were not granted the broad constitutional home rule powers enjoyed by municipalities and charter counties.[117] The legislature, however, provided a broad grant of statutory home rule powers to all counties in enacting section 125.01 of the Florida Statutes.[118] Although one district court of appeal has ruled that this statutory home rule power does not authorize the enactment of land use regulations,[119] a recent supreme court opinion appears to have overruled that decision.[120] Therefore, non-charter counties should be able to enact land use regulations based on this statutory delegation of home rule powers as long as they are not inconsistent with state law.

There is no case law concerning whether these home rule provisions provide adequate delegation of authority for the imposition of an impact fee for extradevelopment capital expenditures. These

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115. The provision states that "[c]ounties operating under county charters shall have all powers of local self-government not inconsistent with general law, or with special law approved by vote of the electors." FLA. CONST. art. VIII, § 1(g).

116. Jason v. Dade County, 37 Fla. Supp. 190 (Dade County Cir. Ct. 1972), *rev'd on other grounds*, 278 So. 2d 311 (Fla. 3d Dist. Ct. App. 1973). The *Jason* case raised the issue of statutory authority for a building moratorium. The court stated that the ordinance, as well as other zoning ordinances and regulations, was authorized by home rule powers. 37 Fla. Supp. at 192.

117. FLA. CONST. art. VIII, § 1(f). This section provides that "[c]ounties not operating under county charters shall have such power of self-government as is provided by general or special law." *Id.*

118. This statutory grant of power provides that:

> The legislative and governing body of a county shall have the power to carry on county government. To the extent not inconsistent with general or special law, this power shall include, but shall not be restricted to, the power to:
>
> . . . .
>
> (f) Provide parks, preserves, playgrounds, recreation areas, libraries, museums . . . and other recreation and cultural facilities . . . .
>
> (g) Prepare and enforce comprehensive plans for the development of the county.
>
> . . . .
>
> (w) Perform any other acts not inconsistent with law which are in the common interest of the people of the county, and exercise all powers and privileges not specifically prohibited by law.

FLA. STAT. § 125.01 (1979).

119. Townley v. Marion County, 343 So. 2d 1312 (Fla. 1st Dist. Ct. App. 1977), *cert. denied*, 354 So. 2d 982 (Fla. 1978). The decision has been soundly criticized in J. JUERGENSMEYER & J. WADLEY, *supra* note 14, § 3.03.

120. Speer v. Olson, 367 So. 2d 207 (Fla. 1978). Although it concerned taxing power and not land use control power, the Florida Supreme Court took a very liberal view of the governmental powers possessed by such counties. *Id.* at 211, 213. *See* J. JUERGENSMEYER & J. WADLEY, *supra* note 14, § 3.03 (concluding that *Speer* overrules *Townley*).

provisions, however, have been recognized as broad grants of authority which must be liberally construed.[121] Furthermore, a Florida Attorney General's opinion has concluded that home rule powers are sufficient authority for the imposition of required dedications for educational purposes.[122] The Florida Supreme Court, in a case involving sewer and water impact fees, at least partially based their authorization on municipal home rule powers.[123] The home rule powers of Florida's local governments are therefore likely to provide satisfactory authorization for the imposition of impact fees for extradevelopment capital facilities.[124]

Two additional possibilities for authority to impose impact fees for extradevelopment capital funding, available equally to municipalities and counties, are the optional County and Municipal Planning for Future Development Act (CMPFDA)[125] and the mandatory Local Government Comprehensive Planning Act of 1975 (LGCPA).[126] Both acts provide broad but non-specific grants of subdivision regulation power to local governments and appear to authorize impact fees for extradevelopment capital funding.[127] The

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121. City of Miami Beach v. Forte Towers, Inc., 305 So. 2d 764 (Fla. 1975). The supreme court stated that § 166.021(1) "is a broad grant of power to municipalities in recognition and implementation of Art. VIII, §2(b), Fla.Const. It should be so construed as to effectuate that purpose where possible." *Id.* at 766 (footnotes omitted).

122. OP. ATT'Y GEN. FLA. 076-199 (1976). The opinion concludes that:

> the City of North Miami Beach is authorized by s. 166.021, F.S., of the Municipal Home Rule Powers Act, to adopt an otherwise valid ordinance requiring land developers to dedicate to the public for park purposes a portion of the land they are developing within that city as a condition precedent to obtaining subdivision plat approval . . . .

Id.

123. Contractors & Builders Ass'n v. City of Dunedin, 329 So. 2d 314, 319-20 (Fla. 1976), *cert. denied*, 444 U.S. 867 (1979). The court distinguished several foreign state decisions because municipalities in those states did not possess home rule powers. *Id.* at 320 n.9.

124. This assumes that a particular impact fee is construed as a regulation and not a tax. If characterized as a tax, home rule powers might not be sufficiently specific to authorize it. *See* notes 134-35 and accompanying text, *infra*.

125. FLA. STAT. §§ 163.160-.315 (1979). The CMPFDA was designed to authorize and encourage counties and municipalities to develop and adopt comprehensive plans to guide future development. Its purpose is now somewhat obsolete because the LGCPA requires planning of all units of local government. See note 127 *infra*.

126. FLA. STAT. §§ 163.3161-.3211 (1979). The LGCPA mandates comprehensive planning for all local governments. Once a comprehensive plan has been adopted all development actions must be consistent with the plan. FLA. STAT. § 163.3194(1) (1979).

127. The acts clearly evince a legislative policy that mandates and authorizes extensive planning and management of growth by local governments. The LGCPA, in FLA. STAT. § 163.3194(2)(b) (1979), defines land development regulation as "any local government zoning, subdivision, building and construction, or other regulations controlling the development of land."

LGCPA empowers local governments to impose regulations in accordance with their comprehensive plans to, among other things, "facilitate the adequate and efficient provision of . . . schools, parks, [and] recreational facilities."[128] Significantly both acts expressly provide for liberal construction by the courts.[129]

Florida courts have yet to decide whether these broad delegations of subdivision control powers authorize the imposition of impact fees for extradevelopment capital funding.[130] Other state courts have held that similar broad and non-specific delegations of subdivision control power authorize in lieu fees for education.[131] Commentators have also suggested that these planning and subdivision control acts provide adequate delegation of power for impact fees for educational and recreational purposes.[132] Provided the particular impact fee is construed by the courts as a land use regulation and not a tax, the home rule powers of local governments and subdivision control powers granted them by the CMPFDA and LGCPA offer independent, sufficient statutory authorization for the imposition of impact fees for extradevelopment capital funding.

C. *The Tax Versus Regulation Problem in Florida*

If an impact fee for extradevelopment capital expenditures is construed as a tax, the broad regulatory authority conferred by home rule provisions and subdivision control statutes will be insufficient to sustain its validity.[133] In Florida, a tax must be specifi-

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128. FLA. STAT. § 163.3161(3) (1979).

129. FLA. STAT. §§ 163.310, .3194(3)(b) (1979).

130. The Florida Supreme Court has on at least one occasion appeared willing to broadly construe other statutes as authorizing the imposition of impact fees. Contractors & Builders Ass'n v. City of Dunedin, 329 So. 2d 314 (Fla. 1976), *cert. denied*, 444 U.S. 867 (1979). There was no explicit statutory authority for impact fees to fund sewer and water facilities. Nevertheless, the court held that FLA. STAT. § 180.13(2) (1973), which permitted charging just and equitable fees for water and sewer *services*, provided sufficient statutory authorization for a "use fee" which shifted the cost of additional facilities to the new user. *Id.* at 319-20.

131. *See* Jordan v. Village of Menomonee Falls, 137 N.W.2d 442 (Wis. 1965). The *Jordan* court inferred the power to apply in lieu fees from a broad subdivision regulation enabling act. *Id.* at 449-50. The Wisconsin legislation was very similar to the subdivision regulation provisions of the CMPFDA. *See also* Call v. City of West Jordan, 606 P.2d 217, 219 (Utah 1979) (finding authority for flood control and recreation in lieu fee based in broad comprehensive planning enabling statute).

132. *See* J. JUERGENSMEYER & J. WADLEY, *supra* note 14, § 17.03; Note, *supra* note 103, at 162-74. *But see* Note, *Municipalities: Validity of Subdivision Fees for Schools and Parks*, 66 COLUM. L. REV. 974 (1966).

133. Janis Dev. Corp. v. City of Sunrise, 40 Fla. Supp. 41, 59 (Broward County Cir. Ct. 1973), *aff'd sub nom.* Broward County v. Janis Dev. Corp., 311 So. 2d 371 (Fla. 4th Dist. Ct.

cally authorized by statute and will not be inferred from broad delegations of authority.[134] Several Florida district courts addressing the validity of impact fees for extradevelopment capital funding have held that such fees were taxes and therefore unauthorized and invalid.[135]

In *Broward County v. Janis Development Corp.*,[136] the Fourth District Court of Appeal reviewed an impact fee of $200 per dwelling unit to fund road and bridge construction. An increased fee was imposed on higher density developments because they imposed a greater traffic burden on the community. The *Janis* court found that the impact fee was a tax because the ordinance failed to specify where and when the monies collected were to be used.[137] The court so held even though the particular ordinance specified that the funds were to be expended solely for roads and bridges in or near the municipality from which they were collected.[138] In essence, the court held that the fee was a tax rather than a regulation because it failed the "direct benefit" test of *Gulest*.[139]

App. 1975).

134. *See, e.g.*, Contractors & Builders Ass'n v. City of Dunedin, 329 So. 2d 314, 319 (Fla. 1976), *cert. denied*, 444 U.S. 869 (1979) (municipality cannot impose a tax, other than an ad valorem tax, unless authorized by state statute); City of Tampa v. Birdsong Motors, Inc., 261 So. 2d 1, 3 (Fla. 1972) (taxation by a city must be expressly authorized by either the constitution or the legislature; statutes authorizing taxation are to be strictly construed); Janis Dev. Corp. v. City of Sunrise, 40 Fla. Supp. 41, 59 (Broward County Cir. Ct. 1973) (the power to tax should be strictly construed and specifically authorized).

135. *See* Janis Dev. Corp. v. City of Sunrise, 40 Fla. Supp. 41 (Broward County Cir. Ct. 1973), *aff'd sub nom.* Broward County v. Janis Dev. Corp., 311 So. 2d 371 (Fla. 4th Dist. Ct. App. 1975) (impact fee for road and bridge construction an invalid tax); Venditti-Siravo, Inc. v. City of Hollywood, 39 Fla. Supp. 121 (17th Cir. Ct. 1973) (impact fee for recreation an invalid tax).

136. 311 So. 2d 371 (Fla. 4th Dist. Ct. App. 1975).

137. *Id.* at 375. The court also relied on some rather archaic distinctions between a tax and a regulation, stating that "[t]he only purpose for which a city might impose a fee is for offsetting the necessary expense of regulation". *Id.* This contention was clearly rejected by the Florida Supreme Court in Contractors & Builders Ass'n v. City of Dunedin, 329 So. 2d 314, 318 (Fla. 1976), *cert. denied*, 444 U.S. 869 (1979).

138. 311 So. 2d at 374-75. The county ordinance provided that the fees and charges collected pursuant to the ordinance shall be used "solely for the purpose of constructing or improving roads, streets, highways and bridges . . . serving the vicinity of the project in which the charges are collected." Broward County, Fla., Ordinance No. 73-2 (May 7, 1973).

139. As noted previously, the *Gulest* decision was overruled in New York, and along with the *Pioneer Trust* test has been increasingly rejected by state courts. The court in *Janis* cited the *Jenad* decision (which overruled *Gulest*). 311 So. 2d at 375. The court distinguished *Jenad* partly on the basis that Florida had yet to adopt a more liberal view towards required dedication and in lieu fees. Recent Florida cases which seem to adopt a more flexible approach to capital cost shifting devices would seem to thoroughly discredit the *Janis* decision. *See* Wald Corp. v. Metro Dade County, 338 So. 2d 863, 868-69 (Fla. 3d Dist. Ct. App. 1976).

Despite these restrictive decisions, the Florida Supreme Court in *Contractors & Builders Association v. City of Dunedin*[140] held that a properly restricted impact fee which shifts the burden of extradevelopment capital expenditures to new residents need not be considered a tax. The Builders Association attacked the validity of an impact fee for sewer and water capital funding, claiming that the money collected for capital improvements to the system was an invalid tax. Expressly distinguishing *Janis*, the court stated that "[i]n contrast, evidence was adduced here that the connection fees were less than costs Dunedin was destined to incur in accommodating new users of its water and sewer systems."[141] Because the appropriate nexus had been established between the fee charged and the capital costs of expansion necessitated by the new users,[142] the impact fee was held not to be a tax.[143] The *Dunedin* decision indicates that an impact fee which meets the dual rational nexi criteria should not summarily be labeled a tax. Although a distinction could be made between sewer and water facilities and educational and recreational facilities, all are necessary services normally provided by local governments.[144]

The appropriate framework for determining whether an impact fee is a regulation or a tax is one of public policy in which a number of factors should be weighed.[145] The home rule powers granted local governments in Florida,[146] the legislative mandate that local governments must plan comprehensively for future growth,[147] and the additional broad powers given them to make those plans work effectively,[148] indicate that properly limited impact fees for educational or recreational purposes should be construed as regulations.

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140. 329 So. 2d 314 (Fla. 1976).

141. *Id.* at 318.

142. See text accompanying notes 93-96 *supra*. *See also* Jordan v. Village of Menomonee Falls, 137 N.W.2d 442, 450 (Wis. 1965) (court unable to decide whether in lieu fee a regulation or an excise tax).

143. 329 So. 2d at 318. Policy considerations were also evident in the court determination that the fee was not a tax. See note 60 *supra*.

144. Education and recreation as well as sewer and water planning are all required elements of the comprehensive plan mandated by the LGCPA. *See* FLA. STAT. § 163.3177(6)(a), (c) (1979). Also fiscal planning and proposals are required in the plan with respect to all these types of capital facilities. *See* FLA. STAT. § 163.3177(3) (1979).

145. See text accompanying notes 60-68 *supra*.

146. See note 62 and accompanying text, *supra;* notes 108-25 and accompanying text, *supra*.

147. See note 66 and accompanying text, *supra;* notes 126-33 and accompanying text, *supra*.

148. See note 61 and accompanying text, *supra;* notes 127-29 and accompanying text, *supra*.

Characterization as a regulation is particularly appropriate where an impact fee is used to complement other land use measures such as in lieu fees or dedications.[149] If an impact fee is characterized as a regulation, its validity should then be determined by reference to the dual rational nexi police power standard.[150]

D. *Emerging Criteria for Assessing the Police Power Validity of Impact Fees in Florida*

Early Florida decisions adopted a restrictive approach in assessing the police power validity of land use regulations designed to shift the burden of capital expenditures for extradevelopment facilities and improvements to new residents. Both the *Gulest* "direct benefit" and the *Pioneer Trust* "specifically and uniquely attributable" tests were used by courts to invalidate ordinances requiring mandatory dedications or fees for educational and recreational capital funding purposes.[151] This restrictive approach, however, seems to have been abandoned[152] in accordance with the national trend.[153]

This trend toward a less restrictive analysis is apparent in several recent decisions. One Florida court has expressly adopted the *Jordan* "rational nexus" test for assessing the validity of required dedications under the police power.[154] Although the validity of im-

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149. See note 65 and accompanying text, *supra*.

150. The particularly intense pressure that growth has placed on local governments in Florida should also be a factor which favors construing impact fees as regulations. *See* Boyd, *Florida Needs a Statewide Impact Fee*, 2 FLA. ENVT'L & URBAN ISSUES 3 (no. 1 1974); note 68 and accompanying text, *supra*.

151. *See* Admiral Dev. Corp. v. City of Maitland, 267 So. 2d 860 (Fla. 4th Dist. Ct. App. 1972) (dictum) (applied *Pioneer Trust* test to in lieu fees for recreational funding); Carlann Shores, Inc. v. City of Gulf Breeze, 26 Fla. Supp. 94 (Santa Rosa County Cir. Ct. 1966) (applied *Pioneer Trust* and *Gulest* tests to in lieu fee for park purposes). Other courts used the tax label to invalidate similar fees.

152. The *Pioneer Trust* "specifically and uniquely attributable" test was rejected by the Third District Court of Appeal in Wald Corp. v. Metropolitan Dade County, 338 So. 2d 863 (Fla. 3d Dist. Ct. App. 1976), as unduly restrictive of local exercises of the police power. The court cited the earlier Florida cases but refused to follow them. *Id.* at 866-67.

153. See note 32 and accompanying text, *supra*.

154. *Wald, supra*, note 153. The *Wald* court upheld the constitutionality of a Dade County ordinance requiring the mandatory dedication of land for canals as a prerequisite to plat approval. The case is of particular importance because, in determining the proper standard to apply, it examined and evaluated the highly deferential "reasonable relation" test, the *Jordan* "rational nexus" approach, and the restrictive *Pioneer Trust* "specifically and uniquely attributable" standard. *Id.* at 865-868. Out of concern for private property rights the court rejected the "reasonable relation" test because it provided an unsatisfactory check on the power of local governments to require dedication. *Id.* at 866. It also found the *Pioneer Trust* test unduly restrictive because it invalidates subdivision controls necessary for

pact fees for education and recreation has not been directly addressed by Florida courts, the supreme court in *Dunedin*[155] developed guidelines of reasonableness for sewer and water impact fees, thus, implicitly adopting the "rational nexus" test of validity.[156]

The *Dunedin* court held that it was permissible to shift the cost of new facilities to users who generated the need for those improvements,[157] thus approving the impact fee concept. Although the court made clear that requirements of reasonableness[158] dictated that the fees be limited to expansion costs necessitated by the new users, it did not insist on the "specifically and uniquely attributable" burden of proof required in *Pioneer Trust*. Instead, the court recognized that the "costs of expansion" and the timing of certain types of capital expenditures would be difficult to identify precisely, and stated that "perfection is not the standard" of a city's duty in establishing a nexus between the fees charged and the capital improvements required by the new users.[159] Consequently, the supreme court's standard in *Dunedin* would seem to be equivalent to the "sufficiently attributable" rational nexus proposed in *Jordan*.

Because of the tangible relationship between the new users connecting with the system and the new facilities required to provide service to them, the limitation of the fees to those facilities likewise established a nexus between the fees charged and the benefits received from the fees.[160] In the case of impact fees for intangibly

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the implementation of comprehensive planning. *Id.* at 866-67. The court held that the *Jordan* "rational nexus" approach was the proper standard to apply because "[i]t allows the local authorities to implement future-oriented comprehensive planning without according undue deference to legislative judgments." *Id.* at 868.

155. 329 So. 2d 314 (Fla. 1976).

156. *But see* Rhodes, *supra* note 8, at 8. Rhodes argued that the lower court in *Dunedin* adopted the "specifically and uniquely attributable" test. This analysis seems faulty because the *Pioneer Trust* test would invalidate a fee for capital facilities that were required by the overall growth of the community.

157. 329 So. 2d at 320. The court stated that "[r]aising expansion capital by setting connection charges, which do not exceed a *pro rata* share of reasonably anticipated costs of expansion, is permissible where expansion is reasonably required, *if use of the money collected is limited to meeting the costs of expansion*" (emphasis in original) (footnote omitted). *Id.* The court invalidated the ordinance because the funds collected were not restricted to a separate fund from general revenues, but it allowed the city to amend its ordinance to properly restrict funds which had already been collected. *Id.* at 321-22.

158. The court used the term "just and equitable" as well as "reasonable" because that phrase was used in the enabling statute. *See* 329 So. 2d at 317.

159. *Id.* at 320 n.10.

160. The court was obviously concerned that a benefit nexus should be unequivocably established because it required that the fees collected be deposited in a separate fund limited to use in constructing additional facilities. *Id.* at 321-22.

connected extradevelopment facilities such as schools and parks, the flexible approach exhibited by the *Dunedin* decision indicates the court would require only a "sufficient benefit" nexus between the fee and capital improvements which benefit new residents charged, rather than impose the "direct benefit" requirement of *Gulest*.[161] Thus, despite early Florida decisions adopting the restrictive *Gulest* and *Pioneer Trust* tests, recent decisions indicate that the dual rational nexus criteria is the proper standard to apply in assessing the police power validity of an impact fee for funding of educational, recreational, and other facilities.

*E. Florida Impact Fees in the Post-*Dunedin *Era*

Since the Supreme Court of Florida handed down its decision in *Dunedin*, the pressures which created the interest of local governments in enacting such fees has greatly increased and more local governments have pursued and embraced the concept. The most recent activity of local governments is their extension of the impact fee from the specifically sanctioned *Dunedin* sewer and water hook-up charges to other key growth affected local governmental services such as school, road, and park construction.

In 1977, Broward County enacted an ordinance requiring developers to dedicate land, or pay an in lieu fee, *or* pay an impact fee for park construction purposes. If the developer chooses to pay the impact fee, it is collected at the building permit issuance stage of development.[162]

In 1979, Broward County enacted a similar ordinance designed to raise capital funds for school sites. Again, there can be a dedica-

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161. *See* Call v. City of West Jordan, 606 P.2d 217 (Utah 1979). The Utah Supreme Court remarked that:

> the plaintiffs attack the ordinance on the ground that the land dedicated (or the money in lieu thereof) is not to be used solely and exclusively for the benefit of the created subdivision. They point to the provision that the land is received 'for the benefit and use of the citizens of the City of West Jordan' and the money is used for 'its [West Jordan's] flood control and/or parks and recreation facilities.'
>
> We agree that the dedication should have some reasonable relationship to the needs created by the subdivision . . . . But it is so plain as to hardly require expression that if the purpose of the ordinance is properly carried out, it will redound to the benefit of the subdivision as well as to the general welfare of the whole community. The fact that it does so, rather than solely benefiting the individual subdivision, does not impair the validity of the ordinance.

Id. at 220 (footnote omitted).

162. BROWARD COUNTY, FLA., CODE § 5-192(e)(2) (1977). The constitutionality of this provision was recently affirmed in a circuit court decision. Hollywood, Inc. v. Broward County No. 80-2909 (17th Cir. Ct. March 20, 1981).

tion of land, and an in lieu payment or the payment of an impact fee calculated on a dwelling unit basis. This fee, however, is collected as a precondition to plat approval.[163]

In 1978, Collier County enacted an impact fee to obtain school contruction funds. The fee is calculated on a dwelling unit basis and its payment is made a precondition to building permit issuance.[164] In 1979, Palm Beach County enacted a road impact fee which, following the traditional mold, is collected when the building permit is issued.[165]

Although litigation has been filed in regard to several of these recently enacted impact fees, the only reported Florida case directly relevant to impact fees decided since the supreme court's decision in *Dunedin* is a "relitigation" of the *Dunedin* case itself.[166] Although the trial court on remand held that the "earmarking" defects found by the supreme court had been cured, it nevertheless ordered a refund of the fees paid prior to the time the city of Dunedin had satisfied the supreme court's earmarking requirements. The Second District Court of Appeal reversed. The refund aspect of this decision would seem to add little of significance to Florida's body of impact fee law. The decision, however, does seem significant in that the court took the opportunity to enthusiastically endorse the impact fee concept.

CONCLUSION

Impact fees for intradevelopment and extradevelopment capital funding will continue to emerge as an important tool enabling local governments to cope with the environmental, service delivery, and financial problems brought about by accelerating suburban growth. Legislation specifically authorizing such impact fees is needed to clarify their status.[167] Despite the absence of specific legislative authorization and definition of impact fees, properly drawn impact fees for capital funding may nevertheless be validly enacted in Florida pursuant to the home rule and subdivision control powers

163. Broward County, Fla., Ordinance 79-1 (January 24, 1979).

164. Collier County, Fla., Ordinance 78-36 (July 18, 1978).

165. Palm Beach County, Fla., Ordinance 79-7 (July 9, 1979).

166. City of Dunedin v. Contractors & Builders Ass'n, 358 So. 2d 846 (Fla. 2d Dist. Ct. App. 1978). The district court in Village of Royal Palm Beach v. Home Builders & Contractors Ass'n, 386 So. 2d 1304 (Fla. 4th Dist. Ct. App. 1980), referred approvingly to the *Janis* decision in a one sentence *per curiam* opinion, but it is unclear what issue the court was using *Janis* to resolve.

167. *See* Heyman & Gilhool, *supra* note 6, at 1155-57.

granted local governments.[168]

The recent increase of impact fees in Florida will certainly accelerate as the financial problems posed for local governments by urban growth become more acute. Courts may not receive all aspects of impact fees with enthusiasm but general approval would seem inescapable in view of the less desirable alternatives—exclusionary growth restrictions or a significant decrease in the quality of life available to residents of growing communities.

168. In concluding their analysis of the constitutionalvalidity of required dedications and fees for extradevelopment capital funding, Heyman & Gilhool stated:

> We have chosen to challenge the emerging rule that would prohibit exactions for a full range of municipal capital expenditures, particularly for schools and recreation. It seems important to us to free so imprecise and troublesome an area as municipal finance, haunted so often by necessity, from inflexible constitutional strictures . . . . [M]unicipalities must meet the demands of the day as best they can, finding a few hundred thousand dollars here and there wherever they can. So long as our sense of fairness is not seriously affronted—and exactions of the sort we have discussed here fall within that limit—municipalities must be left to find their salvation.

Heyman & Gilhool, *supra* note 6, at 1157.