Privatization and the Providing of Public Facilities through Private Means

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I. SCOPE AND INTRODUCTION

The providing of services and infrastructure/public facilities for local government has long-since become too costly to be borne solely by local government. As a result, many mechanisms have been devised to provide alternate methods of financing such facilities.[1] The most obvious is simple "privatization" of services and facilities, by directly shifting the primary financial responsibility of providing such services to the private sector. Other prominent techniques include impact fees, dedications and exactions levied on private land development,[2] and the levying of association dues by homeowners associations in common-interest communities and developments (CIC's and CID's). This article summarizes the law associated with such techniques, together with legal issues involved in pure privatization generally. This article concludes that the aforementioned forms of privatization will, can, and should continue unabated considering the shrinking availability of public funds, but notes some troubling issues that such "privatization" raises.

II. FUNDING INFRASTRUCTURE/PUBLIC FACILITIES THROUGH SIMPLE PRIVATIZATION

A. Introduction

Simple privatization is defined as "any process aimed at shifting functions and responsibilities, in whole or in part, from the government to the private sector."[3] Three forms of simple privatization include: (1)

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[1] *See* DANIEL R. MANDELKER, DAWN CLARK NETSCH, PETER W. SALSICH, JR. & JUDITH WELCH WEGNER , STATE AND LOCAL GOVERNMENT IN A FEDERAL SYSTEM 225-26, (5th ed. 2002); DAVID L. CALLIES, ROBERT H. FREILICH & THOMAS E. ROBERTS, CASES AND MATERIALS ON LAND USE 232 (4th ed. 2004).

[2] *See* EXACTIONS, FEES AND DEDICATIONS (Robert H. Freilich & David W. Bushek eds., 1995); ROBERT H. FREILICH, FROM SPRAWL TO SMART GROWTH (1999); DAVID L. CALLIES, DANIEL R. CURTIN & JULIE A. TAPPENDORF, BARGAINING FOR DEVELOPMENT (2003).

[3] Donald G. Featherstun, D. Whitney Thornton II & J. Gregory Correnti, *State and Local Privatization: An Evolving Process*, 30 PUB. CONT. L.J. 643, 646 (2001) (citing GAO REPORT

contracting out, (2) asset transfer or government service shedding, and (3) managed competition.[4] Contracting out occurs when "a government entity uses a private contractor instead of public resources to provide a government service."[5] Asset transfer occurs when "a government entity sells or leases a revenue-producing asset to a private sector entity that undertakes to provide services to the public on a for-profit basis or converts the asset to private use."[6] Government service shedding occurs when "a government entity simply decides to stop providing a certain service or function, leaving it to the private sector to fill the need if a demand exists."[7] Finally, managed competition occurs when a government entity "allows public as well as private sources to compete in providing the service."[8]

B. A Survey of State Approaches to Privatization

The Hawai'i Supreme Court addressed the issue of privatization in *Konno v. County of Hawai'i*.[9] In this case, the County of Hawai'i entered into a contract with a private firm for the construction, operation, and eventual closure of a landfill.[10] Civil servants traditionally staffed County landfills.[11] The United Public Workers ("UPW") sought damages, injunctive relief, and a declaration that the contract contravened civil service laws and was therefore void.[12] The trial court granted a motion for summary judgment in favor of the County, and the UPW appealed.[13]

In exploring the issue of privatization, the court examined how other states have addressed the issue. It noted that there were three approaches used to assess the constitutionality of privatization through contracting out: (1) the "nature of the services" test[14]; (2) the "functional inquiry" test[15]; and (3) the "bad faith" test.[16] Under the "nature of the services" test,

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GAO/GGD-97-48, PRIVATIZATION: LESSONS LEARNED BY STATE AND LOCAL GOVERNMENTS 1 (1997)).

[4] *See id.*

[5] *Id.*

[6] *Id.* at 647.

[7] *Id.*

[8] *Id.*

[9] 937 P.2d 397 (Haw. 1997).

[10] *See id.* at 400-01.

[11] *See id.* at 401.

[12] *See id.*

[13] *See id.* at 402.

[14] *Id.* at 405.

[15] *Id.* The California courts call this test the "new state function test." Prof'l Eng'rs in Cal. Gov't v. Dep't of Transp., 13 Cal. App. 4th 585, 593 (1993).

[16] *Konno*, 937 P.2d at 406.

"services that have been 'customarily and historically provided by civil servants' cannot be privatized, absent a showing that civil servants cannot provide those services."[17] Under the "functional inquiry" test, "[n]ew state programs performing new functions are not constrained by civil service laws."[18] Under the "bad faith" test, "privatization violates civil service laws only if the employer acts in 'bad faith' or with intent to circumvent the civil service laws."[19]

In *Konno*, the court adopted the "nature of the services" test as the most consistent with Hawai`i's existing civil service statutes.[20] Moreover, the court weighed the competing goals served by both civil service and privatization, stating: "On the one hand, privatization purportedly can improve the efficiency of public services. On the other hand, privatization can interfere with the policies underlying the civil service as set forth by the legislature, i.e., elimination of the spoils system and the encouragement of openness, merit, and independence."[21] Because "the only unequivocal support in [Hawai`i's] statutes is in favor of civil service policies,"[22] the court declined to "usurp the legislature's role by making [its] own policy decision in favor of privatization."[23] Thus, the court held that privatizing the construction, operation, and eventual closure of a county landfill violated the Hawai`i Constitution and civil service statutes.[24] As the court noted, it is useful to examine other states' approaches to privatization, particularly how they've balanced competing public policies and applied the "nature of the services," "functional inquiry," and "bad faith" tests in cases involving the construction and maintenance of public infrastructure.

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[17] *Id.* at 405 (citing Wash. Fed'n of State Employees v. Spokane Cmty. Coll., 585 P.2d 474, 477 (Wash. 1978) (discussed *infra* notes 37-46 and accompanying text)).

[18] *Id.* (referring to Dep't. of Transp. v. Chavez, 7 Cal. App. 4th 407 (1992) (discussed *infra* notes 51-61 and accompanying text)).

[19] *Id.* at 406.

[20] *See id.* at 408. Hawai`i's civil service laws are codified at chapter 76 of the Hawai`i Revised Statutes. Hawai`i's Constitution also contains a civil service provision. *See* HAW. CONST. art. XVI, § 1.

[21] *Konno*, 937 P.2d at 410.

[22] *Id.* at 411.

[23] *Id.* Similarly, Colorado law on the civil service/privatization conflict does not reveal any policy in favor of privatization. For that reason, the court in Colo. Ass'n of Pub. Employees v. Dep't of Highways, 809 P.2d 988 (Colo. 1991) declined to permit the privatization of civil services. *See also, infra* notes 25-33 and accompanying text.

[24] *See Konno*, 937 P.2d at 412.

1. A Necessary Initial Inquiry: Balancing the Competing Policies behind Civil Service Protection versus Privatization

The Colorado Supreme Court balanced competing public policies in *Colorado Association of Public Employees v. Department of Highways*[25] before deciding that it would defer to its legislature for guidance on privatization. In this case, the Colorado Department of Highways privately contracted for highway custodial, maintenance, and utility workers.[26] State civil servants and their union and board of directors petitioned the Colorado State Personnel Board for a declaratory order that the private contracts violated Colorado constitutional and statutory provisions protecting the state personnel system.[27] The Board dismissed the civil servants' petition.[28] The Colorado Supreme Court reversed, holding that the private contracts were not authorized by state law.[29]

The court emphasized that such private contracts "so intimately implicate the integrity of the constitutionally established state personnel system that they cannot be entered into absent legislative or regulatory criteria governing their propriety."[30] At the very least, the legislature and regulatory bodies must balance the competing interests advanced by both the state personnel system and privatization. The goals behind the state personnel system include securing competent civil servants, curtailing political patronage, and protecting civil servants' employment rights.[31] The primary goal behind privatization is cost savings.[32] The court decided that the civil service interests trumped the privatization interests in this case, as there were no standards to guide the state's decisions to privatize custodial, maintenance, and utility services.[33] Colorado has since adhered to its decision to refuse to privatize services in the absence of legislative and regulatory guidelines.[34] Vermont has followed Colorado's lead.[35]

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[25] *Colo. Ass'n of Pub. Employees*, 809 P.2d 988.

[26] *Id.* at 990.

[27] *See id.* (referring to COLO. CONST. art. XII, § 13; COLO. REV. STAT. § 24-50-128 (1988)).

[28] *See id.* at 991.

[29] *See id.*

[30] *Id.*

[31] *See id.* at 991-92.

[32] *See id.*

[33] *See id.* at 998.

[34] *See* Horell v. Dep't of Admin., 861 P.2d 1194 (Colo. 1993) (refusing to permit privatization of custodial and security services at state-owned buildings); Tising v. State Pers. Bd., 825 P.2d 1011 (Colo. 1991) (refusing to permit privatization of the University of Southern Colorado security service).

[35] *See* Vt. State Employees Ass'n v. Vt. Criminal Justice Training Council, 704 A.2d 769, 775 (Vt. 1997) (refusing to permit privatization of food services at police academy, because "definite and specific standards setting forth conditions and requirements for privatization of state jobs are sorely lacking in this state" and leaving the problem for legislative resolution).

Alaska, on the other hand, has allowed privatization of a regional airport under its constitution, after balancing pro- and anti-privatization interests.[36] The balancing of these competing interests leaves to courts the important decision of whether to rule on the issue of privatization themselves or defer to the judgment of elected officials.

2. The "Nature of the Services" Test

Under the "nature of the services" test, services that have been customarily and historically provided by civil servants cannot be privatized, absent a showing that civil servants cannot provide those services. The Washington Supreme Court applied the "nature of the services" test in *Washington Federation of State Employees v. Spokane Community College*.[37] In this case, the Washington State Community College District advertised its need for custodial services for a new community college administration building and awarded a contract to a private firm.[38] The College justified its action by projecting cost savings of more than $10,000 a year, which would be put towards student instruction.[39] The Washington Federation of State Employees sued to declare the contract null and void and have its performance enjoined.[40] The trial court issued an injunction, yet it later granted a motion for summary judgment in favor of the College.[41]

The Supreme Court of Washington reversed, holding that "as a matter of law, the College has no authority to enter into a contract for new services of a type which have regularly and historically been provided, and could continue to be provided, by civil service staff employees. . . ."[42] The court reached its holding by choosing between the provisions of two contradictory statutes: the first protecting the jobs of maintenance workers at community colleges through the civil service merit system, and the second permitting the state purchasing director to contract for college maintenance services.[43] Ultimately, the court adopted a "nature of the services"[44] test, stating that services "customarily and historically"[45]

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[36] *See* Moore v. State Dep't of Transp. and Public Facilities, 875 P.2d 765 (Alaska 1994).

[37] *See* Wash. Fed'n of State Employees v. Spokane Cmty. Coll., 585 P.2d 474 (Wash. 1978).

[38] *See id.* at 476.

[39] *See id.*

[40] *See id.*

[41] *See id.*

[42] *Id.*

[43] *See id.* (referring to WASH. REV. CODE § 28B.16.010 (repealed 1993); WASH. REV. CODE § 43.19.190 (2005)).

[44] *See id.* at 478.

[45] *Id.* at 477.

performed by civil service workers shall not be privately contracted for, absent a "showing that civil servants could not provide those services."[46] Like Washington State, Louisiana has adopted the "nature of the services" test.[47] The test is also still valid in California,[48] so long as the service rendered is a traditional state function. A key exception to the "nature of the services" test is impracticability. If there is a "showing that it is not practicable for civil servants to provide the necessary services," then privatization is permissible.[49] The "nature of the services" test, therefore, is the most protective of traditional civil service jobs. However, as government finds it increasingly cumbersome and costly to continue providing traditional services, civil service jobs may be displaced as impracticable.

3. The "Functional Inquiry" Test

California has created, by statute, another exception to the "nature of the services" test:[50] the "functional inquiry" test, which permits privatization of functions not traditionally fulfilled by civil servants. A California appellate court applied the "functional inquiry" test in *Department of Transportation v. Chavez*.[51] In this case, the court examined Cal. Govt. Code § 19130(b)(2), which allows private contracts where "the contract is for a new state function and the Legislature has specifically mandated or authorized the performance of the work by independent contractors."[52] The California Department of Transportation ("Caltrans") had contracted with private firms for the maintenance of roadside rest areas.[53] When the roadside rest areas were originally completed in 1963, civil service workers alone maintained them.[54] Throughout the next two

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[46] *Id.*

[47] *See* Jack A. Parker & Assoc., Inc. v. Louisiana, 454 So.2d 162, 167 (La. 1984) (holding that privatization of actuarial services contravened state statute requiring that public service contracts cannot displace jobs that "could and should be performed' by public employees").

[48] *See also* State Comp. Ins. Fund v. Riley, 69 P.2d 985 (Cal. 1937); Burum v. State Comp. Ins. Fund, 184 P.2d 505 (Cal. 1947).

[49] Joint Crafts Council v. King County, 881 P.2d 1059 (Wash. 1994) (allowing privatization of maintenance and repair services for fleet of police vehicles); *see also Burum*, 184 P.2d 505.

[50] *See* CAL. GOV'T CODE § 19130; Cal. State Employees' Ass'n v. State, 199 Cal. App. 3d 840, 847 (1988) (holding that section 19130 is facially constitutional and does not conflict with California's constitutional protection of the civil service system).

[51] 7 Cal. App. 4th 407 (1992).

[52] *Id.* at 409. Section 19130 was enacted in 1982 and provided a statutory exception to California's traditional constitutional prohibition on contracting out civil service jobs. *See id.* at 414. Case law before the enactment of section 19130 created the "nature of the services" test, which forbade private contracts for jobs customarily and historically filled by civil servants. *See id.*

[53] *See id.* at 409.

[54] *See id.* at 410.

decades, Caltrans gradually turned over maintenance of rest areas to private contractors until all of the rest areas were privately run.[55] The civil service employees who had previously maintained the rest areas were absorbed into highway crews.[56] When Caltrans, finding an increased need for rest area maintenance crews, entered into more private contracts, the California State Employees Association objected.[57] Ultimately the State Personnel Board declared the contracts void.[58]

In reviewing the Board's decision under section 19130, a California appeals court stated that it was undisputed that the Legislature had authorized the private contracts; the primary question was whether rest area maintenance was a "new state function."[59] The court held that, for purposes of section 19130, "the contract must be for a new state function *at the time the [private] contract is* executed."[60] Thus, the private contracts at issue in this case were void, because they covered maintenance jobs which were already in existence for two decades and therefore could no longer be considered part of a *new* state function.[61]

California has applied its "functional inquiry" test in other contexts to allow privatization, such as the privatization of administrative services under the state's Medicaid program[62] and an experimental program for funding the construction and operation of tollway facilities.[63] So long as the legislature continues to experiment with and expressly authorize new ways to deliver traditional services, privatization will continue to displace civil service workers.

4. The "Bad Faith" Test

Under the "bad faith" test, privatization violates civil service laws only if the government acts in bad faith, with the intent to circumvent the civil service laws. A Michigan appellate court applied the "bad faith" test in

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[55] *See id.*

[56] *Chavez*, 7 Cal. App. 4th 407, 410-11.

[57] *See id.*

[58] *See id.*

[59] *Id.* at 414.

[60] *Id.* at 416.

[61] *See id.*

[62] *See* Cal. State Employees' Ass'n v. Williams, 7 Cal. App. 3d 390, 399 (1970) ("[T]he state civil service suffers no displacement and the underlying constitutional policy is not offended when a new state activity is conducted by contract with a separate public or private entity").

[63] *See* Prof'l Eng'rs in Cal. Gov't v. Dept. of Transp., 13 Cal. App. 4th 585, 593-94 (1993) (holding that, even though the design and construction of roads are traditional state functions, the novel way the state intended to fund and manage the project constituted a "new state function," and the project was properly privatized).

Michigan State Employees Association v. Civil Service Commission.[64] In this case, the Michigan Civil Service Commission amended its Procedure for Requesting Use of Contractual Personal Services to allow it to contract out for services that "would be performed at substantial long-term savings to the state."[65] Civil servants challenged the new amendment as facially unconstitutional, in that it violated the civil service protections embodied in the Michigan Constitution.[66]

The Michigan appellate court held that the amendment was constitutional, in no way undermining civil service protection.[67] Absent a showing of "bad faith or an attempt to reintroduce the 'spoils system,'"[68] the court found that contracting out civil service jobs, for reasons of efficiency and economy, is permissible.[69]

Other states permit good faith privatization of such areas as food services[70] and custodial services[71] at state colleges and data processing and communication services for state government.[72] The "bad faith" test allows economic justification of privatization, while the "nature of the services" test does not. In this way, review under the "bad faith" test is more likely to permit privatization, as privatization necessarily results in cost savings for the state.

So long as the provision of services continues to be too costly for government to bear, privatization of many of the jobs that civil servants perform will continue unabated. Some courts remain willing to usurp the legislative role in approving privatization plans. Others have adopted the more stringent "nature of the services" test, requiring a showing that civil servants can no longer perform services that government seeks to privatize. Increasingly, however, courts have struck a balance favoring privatization over civil service protection. Privatization easily passes state constitutional muster under lenient "bad faith," "functional inquiry," and "impracticability" reviews. The advantage to liberal privatization rules is that government is free to elicit private, innovative ways to efficiently

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[64] 367 N.W.2d 850, 852 (Mich. Ct. App. 1985).

[65] *Id.* at 851.

[66] *See id.* (citing MICH. CONST. art. XI, § 5).

[67] *See id.* at 852.

[68] *Id.*

[69] *See id.*

[70] *See* Ball v. Bd. of Trustees, 248 A.2d 650, 653 (Md. 1968); Conn. State Employees Ass'n v. Bd. of Trustees of the Univ. of Conn., 345 A.2d 36, 39 (Conn. 1974); Univ. of Nev. v. State Employees Ass'n, 520 P.2d 602, 606-07 (Nev. 1974).

[71] *See* State *ex rel.* Sigall v. Aetna Cleaning Contractors, 345 N.E.2d 61, 65 (Ohio 1976).

[72] *In re* Civil Serv. Employees Ass'n v. O'Rourke, 660 N.Y.S.2d 929, 935-36 (N.Y. Sup. Ct. 1997).

provide public services. Liberal privatization rules necessarily benefit governments struggling to provide as many services at as little expense as possible. But in striking this utilitarian balance, governments should guard against unintended consequences. Unchecked privatization could lead to the loss of qualified employees, government's abdication of its traditional role in meeting municipal needs, and perhaps the reintroduction of political patronage and the spoils system. The privatized state may come to resemble less of a social contract, the services under which are staffed by meritorious citizens, and more of a patchwork of privately contracted projects, staffed by private workers and sold to the lowest bidder. The privatization of municipal services is but one tool of effective government—one which should be used judiciously.

III. FUNDING INFRASTRUCTURE/PUBLIC FACILITIES THROUGH IMPACT FEES, DEDICATIONS AND EXACTIONS

As simple privatization has become widespread, so have other forms of privatization, including the use of impact fees and dedications to fund public facilities. Both types of exactions, or land development conditions, are contractual in nature; in exchange for permission to develop, a developer agrees to give the municipality money (an impact fee) or land (a dedication) to provide for the public facilities or resources necessitated by the new development. To the extent such exactions relieve local governments of the obligation to pay for such facilities, they are "privatized": the cost is borne by developer and purchaser.

The use of impact fees and dedications to pay for public facilities must follow the rules laid down by the U.S. Supreme Court in two landmark decisions. First, *Nollan v. California Coastal Comm'n*[73] requires an essential nexus between the exaction and the specific need driven by the new development.[74] Second, *Dolan v. City of Tigard*[75] requires that the exaction requested must also be roughly proportional to the impact upon public facilities and resources directly attributable to the new development.[76] A land development condition that lacks an essential nexus and is not roughly proportional to the need generated by the development is a type of regulatory taking, prohibited by the Fifth and Fourteenth Amendments to the Constitution.

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[73] 483 U.S. 825, 841 (1987).
[74] *See id.* at 838-39.
[75] 512 U.S. 374, 396 (1994).
[76] *See id.* at 388.

There is a growing trend to regard the *Nollan* and *Dolan* tests as requiring "heightened scrutiny" of the constitutionality of exactions. In California in particular, courts apply heightened scrutiny to exactions imposed through the administrative or quasi-judicial, as opposed to general legislative, process. There is also a growing sense that all land development conditions, be they impact fees or dedications, are subject to heightened scrutiny. As exactions have become a significant means of acquiring and funding public infrastructure and resources, local governments should become conversant with the constitutional requirements involved in conditioning land development.

A. Unconstitutional Land Development Regulations as Takings: Nexus and Proportionality Problem

Judges and commentators have long suggested that conditions, exactions, and dedications attached to land development permits must bear some proportionate relation to the land development upon which they are levied.[77] As the following analysis makes clear, such land development conditions (impact, mitigation and "in-lieu" fees and other exactions, and land dedication requirements) are development driven. This means that the dedication or exaction is justified because the contemplated land development project generates the need for the public facility or other infrastructure improvement. It follows from this requirement that levying or charging such exactions and dedications on the rezoning or boundary amendment process is always inappropriate, because neither boundary amendments nor zoning generates such needs. It also follows that the fee collected or the interest in land acquired by government must be spent or used – and soon – for the public facility or improvement for which it was collected. Failure to spend or use the fee or land renders the basis for charging it invalid. So does failure to use or spend it reasonably quickly, or spending the collected fees for general or different purposes (i.e., a road fee for school purposes).[78] While all of these are salient legal issues, most litigation over land development conditions arises because of questions about the relationship of the condition on a land development permit to

[77] *See, e.g.*, Ira M. Heyman & Thomas K. Gilhool, *The Constitutionality of Imposing Increased Community Costs on New Suburban Residents Through Subdivision Exactions*, 73 YALE L.J. 1119, 1134 (1964).

[78] *See* Webber Basin Home Builders Ass'n v. Roy City, 487 P.2d 866, 869 (Utah 1971).

problems or needs generated by the contemplated development justifying that condition.[79]

1. The Elements of Nexus and Proportionality

Together, the Supreme Court's holdings in *Nollan* and *Dolan* require that in order to pass constitutional muster, land development conditions imposed by government:

1. must seek to promote a legitimate state interest;
2. must be related to the land development project upon which they are being levied by means of a rational or essential nexus;
3. must be proportional to the need or problem which the land development project is expected to cause, and the project must accordingly benefit from the condition imposed.

Under the first requirement, legitimate state interest, an agency may only require a landowner to dedicate land (or interests in land) or contribute money for public projects and purposes, such as public facilities and, in most jurisdictions, public housing.

Under the second requirement, rational or essential nexus, an agency must find a close connection between the need or problem generated by the proposed development and the land or other exaction or fee required from the landowner/developer. Thus, for example, a residential development will in all probability generate a need for public schools and parks. A shopping center or hotel in all probability will not. Both, however, will generate additional traffic and therefore generate a need for more streets and roads.

Under the third requirement, proportionality, a residential development of a few hundred units may well generate a need for additional classroom space, but almost certainly not a new school or school site. On the other hand, such a residential development of several thousand units would, when constructed, likely generate a need for a new school and school site, depending upon the demographics of the new residents.

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[79] While the recently-decided U.S. Supreme Court case of *Lingle v. Chevron USA Inc.*, 125 S. Ct. 2074 (2005), eliminated the "substantially advances a legitimate state interest" from *Agins v. City of Tiburon*, 447 US 260 (1980), the Court nevertheless specifically noted that its decision left the Nollan-Dolan and its related takings jurisprudence intact.

2. The Nexus/Proportionality Tests Applied: Selected Examples

Many cases have struck down land development conditions for lack of nexus and/or proportionality. In *Homebuilders Ass'n of Dayton v. City of Beaver Creek*,[80] an Ohio Court of Appeals held *Dolan* inapplicable because the impact ordinance in this case was legislatively imposed rather than "adjudicative," but nonetheless applied a proportionality and nexus standard to invalidate a road impact fee for:

a. insufficient "quantification";
b. unreasonable traffic projections;
c. arbitrary and capricious application because "buildout," or full development, was too far away and there were too many exceptions;
d. failure to segregate administrative expenses or interest on the funds;
e. intent to deposit fee collected in general fund.

Land development conditions must be exacted during the appropriate stage of development in order to meet the above test. For example, a requirement that a developer construct school facilities at the boundary amendment stage would not meet the above tests because any contemplated build-out is years away, and there is no attempt whatsoever at quantification. Many cases undertake such an analysis.[81] There are also

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[80] Nos. 97-CA-113, 97-CA-115, 1998 WL 735931 (Ohio Ct. App. Oct. 23, 1998).

[81] *See* Isla Verde Int'l Holdings, Inc. v. City of Camas, 990 P.2d 429 (Wash. Ct. App. 1999) (striking down a 30% open space dedication requirement on a 51-lot subdivision approval, while upholding a road dedication requirement for emergency vehicles in the absence of evidence concerning the cost of the road and its effects on the subject property); Reynolds v. Inland Wetlands Comm'n, No. 309721, 1996 WL 383363 (Conn. Super. Ct. June 10, 1996) (striking down a requirement that the landowner grant a conservation easement over three of his lots as a condition of developing a fourth lot, in part on the ground that such a condition would not pass a "nexus" test); Amoco Oil Co. v. Vill. of Schaumburg, 661 N.E.2d 380, 391 (Ill. App. Ct. 1995) (striking down a road widening dedication, holding that the taking of 20% of Amoco's land for roadway widening purposes on the basis of a .4% increase in traffic caused by the proposed development "does not correspond with the slightest notions of rough proportionality"); Schultz v. City of Grants Pass, 884 P.2d 569 (Or. Ct. App. 1994) (striking down a road-widening dedication); Timber Trails Corp. v. Planning and Zoning Comm'n, No. 272170, 1992 WL 239100 (Conn. Super. Ct. Sept. 16, 1992) (striking down a road improvement dedication); Property Group, Inc. v. Planning and Zoning Comm'n, 628 A.2d 1277 (Conn. 1993) (striking down road widening dedication); Lexington-Fayette Urban County Gov't v. Schneider, 849 S.W.2d 557 (Ky. Ct. App. 1992) (striking down a bridge dedication requirement); Cobb v. Snohomish County, 829 P.2d 169 (Wash. Ct. App. 1991) (striking down a road improvement fee); Dellinger v. City of Charlotte, 441 S.E.2d 626 (N.C. Ct. App. 1994) (striking down a road dedication requirement); Castle Homes & Dev. v. City of Brier, 882 P.2d 1172 (Wash. Ct. App. 1994) (striking down a per-lot road impact fee); McClure v. City of Springfield, 28 P.3d 1222 (Or. Ct. App. 2001) (invalidating a sidewalk and "clipped corner" exaction in the absence of specific findings explaining how these exactions were relevant or proportional to the city's interest in safe streets at the location of the proposed development); St. Johns County v. Northeast Florida Builders Ass'n, 583 So. 2d 635 (Fla. 1991) (holding that a fee of $448 per

literally dozens of additional pre-*Nollan/Dolan* cases upholding various impact fees and exactions for roads, sewers, water, and housing where at least the nexus standard later imposed by the U.S. Supreme Court appears to have been met.[82]

3. Applicability of Nexus/Proportionality Test Beyond Dedications

Since both *Nollan* and *Dolan* involve impermissible land dedications, some commentators (and a few courts) have limited the three-part test above to land dedication conditions.[83] However, the California Supreme Court, in, *Ehrlich v. City of Culver City*,[84] when the case was remanded by the U.S. Supreme Court to be decided in light of *Dolan*, applied the nexus and proportionality test to a mitigation fee and held it unconstitutional, specifically rejecting the argument that heightened scrutiny applied only to dedications as in *Nollan* and *Dolan*. To the same effect is *Manocherian v. Lenox Hill Hospital*,[85] in which the New York Court of Appeals struck down a rent-stabilization statute. Citing both *Nollan* and *Dolan*, the court reasoned:

> [T]he Supreme Court refrained from placing any limitations or distinctions or classifications on the application of the 'essential nexus' test. This suggests and supports a uniform, clear and reasonably definitive standard of review in takings cases. Indeed, Justice Brennan, in dissent in *Nollan* expressly attributed to the

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single-family dwelling met the rational nexus test when applied to a 100-unit subdivision, but failed a proportionality standard because it was not clear that the money collected would necessarily benefit those who paid the fee); Volusia County v. Aberdeen at Ormond Beach LLP, 760 So. 2d 126 (Fla. 2000) (holding that a school impact fee as applied to a retirement community failed the rational nexus test because the community was subject to covenants prohibiting minors from residing there); Everett Sch. Dist. No. 2. v. Mastro, No. 42835-7-I, 1999 WL 674782 (Wash. Ct. App. Aug. 30, 1999) (upholding a school impact mitigation fee based on the average number of students in 869 apartments in 25 buildings as a condition for the issuing of a building permit for an apartment complex, because the fee calculation provided for no impact from studio apartments and was based on the exact number of one and two bedroom apartments in the complex); Steel v. Cape Corp., 677 A.2d 634 (Md. Ct. Spec. App. 1996) (striking down a school facilities requirement as a rezoning condition).

[82] *See* City of Annapolis v. Waterman, 745 A.2d 1000 (Md. 2000). Although the decision itself is badly flawed and demonstrates a misunderstanding of takings and exaction law, it sets forth a comprehensive list of cases upholding various exactions.

[83] *See* Bamber v. United States, 45 Fed. Cl. 162 (1999) (holding that neither case was applicable beyond property dedication situations); Krupp v. Breckenridge Sanitation Dist., 1 P.3d 178 (Colo. Ct. App. 1999); Montclair Parkowners Ass'n v. City of Montclair, 90 Cal. Rptr. 2d 598 (Cal. Ct. App. 1999).

[84] 911 P.2d 429 (Cal. 1996).

[85] 643 N.E.2d 479 (N.Y. 1994).

> majority's holding an impact on all regulatory takings cases.[86]

The trend toward applying such "heightened scrutiny" to monetary exactions as well as dedications appears to be growing. Not surprisingly, following the state supreme court's holding in *Ehrlich*, California courts are uniformly applying such scrutiny to monetary exactions.[87]

B. The Legislative/Administrative Distinction in Imposing Exactions

Another distinction that an increasing number of courts have made is characterizing the nexus/proportionality standards as a form of "heightened scrutiny," only applicable to administrative or quasi-judicial, as opposed to legislatively-imposed, land development conditions. The *Ehrlich* case, discussed in the preceding subsection, clearly makes that distinction, striking down a mitigation fee in part because it was "ad hoc" rather than

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[86] *Id.* at 483. *See also* Clark v. City of Albany, 904 P.2d 185, 189 (Or. Ct. App. 1995) ("[T]he fact that *Dolan* itself involved conditions that required a dedication of property interests does not mean that it applies only to conditions of that kind").

[87] *See, e.g.*, Valley Children's Hosp. v. County of Madera, No. E037474, 2002 WL 31484784 (Cal. Ct. App. Nov. 7, 2002); Abrams v. City of San Diego, No. D038402, 2002 WL 31421287 (Cal. Ct. App. Oct. 29, 2002) (applying the standard to a special assessment); Agencia La Esperanza Corp. v. Orange County Bd. of Supervisors, No. G027288, 2002 WL 681798, at *2 (Cal. Ct. App. April 24, 2002) ("As noted by our Supreme Court in *Ehrlich*, California law draws no distinction between the physical taking and the imposition of fees."); Benchmark Land Co. v. City of Battle Ground, 49 P.3d 860, 864 (Wash. 2002) (footnote omitted):

> [We] emphasize the similarity of exacting land and money. If the government in *Nollan* and *Dolan* had exacted money rather than land and then purchased land to solve the problems, the same questions would arise: was the money exacted for and used to solve a problem connected to the proposed development? (*Nollan.*) And was the amount of money exacted roughly proportional to the development's impact on the problem? (*Dolan.*) Surely if the issues for an exaction of money are the same as for an exaction of land, the test must be the same: a showing of "nexus" and "proportionality."

See also Town of Flower Mound v. Stafford Estates, 71 S.W.3d 18, 32 (Tex. App. 2002):

> The fact that the Supreme Court has not yet applied the *Dolan* test to a development exaction of fees or public improvements, as opposed to a dedication of land, does not mean that the *Dolan* test does not apply. Accordingly, we decline to globally limit the application of the *Dolan* test to only dedicatory exactions in the manner the Town urges based on the quoted statement from the *Del Monte Dunes* opinion.

See also Rogers Machinery, Inc. v. Wash. County, 45 P.3d 966 (Or. Ct. App. 2002). In *Del Monte Dunes*, 526 U.S. 687 (1999), the U.S. Supreme Court simply observed that it had never applied heightened scrutiny beyond dedications, and declined to apply it to a simple land reclassification or rezoning, which, of course, surprised no one.

part of a uniformly-imposed legislative exaction. It is therefore not surprising that a number of recent California decisions make the same distinction.[88]

Legislative deference notwithstanding, it is not easy to see the basis for such a distinction. As Justice Thomas observed in his dissent to a denial of a petition for certiorari to the U.S. Supreme Court in *Parking Ass'n of Georgia, Inc. v. City of Atlanta*:[89]

> It is not clear why the existence of a taking should turn on the type of governmental entity responsible for the taking. A city council can take property just as well as a planning commission can. Moreover, the general applicability of the ordinance should not be relevant in a takings analysis. . . . The distinction between sweeping legislative takings and particularized administrative takings appears to be a distinction without a constitutional difference.[90]

C. Categories and Timeliness of Imposing Fees as Land Development Conditions

Finally, it is worth noting that any impact fee or in-lieu fee collected for a particular kind of public facility must not only be used for that category of facilities alone (road fees for roads, water fees for water, and so forth), but must also be used in the area serving the proposed development, and within a reasonable length of time. This logically follows from the core

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[88] *See* Extra Space of Laguna Hills v. San Joaquin Hills Transp. Corridor Agency, No. G028469, 2002 WL 683825, at *2 (Cal. Ct. App. April 24, 2002)("Here, the calculation of development fees, imprecise as it may be, is applied uniformly, generally and ministerially. As a result, heightened scrutiny is not triggered"); San Remo Hotel v. City and County of San Francisco, 41 P.3d 87, 105 (Cal. 2002) ("We decline plaintiff's invitation to extend heightened takings scrutiny to all development fees, adhering instead to the distinction we drew in *Ehrlich* between ad hoc exactions and legislatively-mandated, formulaic mitigation fees"); Agencia La Esperanza Corp. v. Orange County Bd. of Supervisors, No. G027288, 2002 WL 681798, at *2 (Cal. Ct. App. April 24, 2002) (citing *Ehrlich*); Home Builders Ass'n. of Central Arizona v. City of Scottsdale, 902 P.2d 1347 (Ariz. Ct. App. 1995) (upholding a water resource development fee as a condition on the issuance of a building permit, on the ground that the fee involved a legislative, rather than an adjudicative, determination, and the *Krupp* case discussed in the immediately preceding section); Homebuilders Ass'n of Metropolitan Portland v. Tualatin Hills Park and Recreation Dist., 62 P.3d 404, 409 (Or. Ct. App. 2003) ("[T]he [fee] is 'a generally applicable development fee imposed on a broad range of specific, legislatively determined subcategories of property through a scheme that leaves no meaningful discretion either in the imposition or in the calculation of the fee" and so heightened scrutiny is not warranted); Rogers Machinery, Inc. v. Wash. County, 45 P.3d 966, 983 (Or. Ct. App. 2002) ("[W]e are persuaded by the reasoning of other state courts, representing a nearly unanimous view, that *Dolan*'s heightened scrutiny test does not extend to development fees of that [legislative] kind.").

[89] 515 U.S. 1116 (1995).

[90] *Id.* at 1117-1118.

requirement that fees and dedications be development-driven in order to be legally levied. Obviously the legal connection disappears if the fees are used for some other purpose, or in some other neighborhood, or are held for a substantial amount of time without use.[91]

In sum, the privatization of public facilities through impact fees, exactions, and dedications can raise serious constitutional questions concerning nexus and proportionality. One solution is to seek such contributions and dedications for facilities through the development agreement. Several states have adopted this solution by statute, and county and municipal governments in California have executed literally hundreds of these development agreements. Most courts appear to accept such agreements as long as they are part of a consistent legislative scheme despite claims by opponents that such agreements amount to illegal contract zoning.[92]

IV. COMMON-INTEREST COMMUNITIES AND THE LEVYING OF ASSESSMENTS FOR FUNDING INFRASTRUCTURE/PUBLIC FACILITIES

Common-interest communities (CICs) are also prominent participants in the privatization of infrastructure. Private CICs fund, provide, and maintain private infrastructure, such as roads and parks for the community's benefit, by levying assessments from their members. The power to assess is implied, based on the theory of quasi-contract or on the analogy of CIC as mini-government. With these assessments, CICs are able to provide the same, if not better, infrastructure and services than the surrounding municipality. In addition to privately provided infrastructure and services, CICs promise privacy, exclusivity, and the perception of safety. Those who can afford to wall themselves off from the rest of society can do so.

CICs tend to tempt the wealthy out of the cities, "siphoning off their tax dollars, their expertise and participation, and their sense of identification

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[91] *See, e.g.*, Home Builders and Contractors Ass'n v. Board of County Comm'rs, 446 So. 2d 140 (Fla. Dist. Ct. App. 1983); Weber Basin Home Builders Ass'n v. Roy City, 487 P.2d 866 (Utah 1971); Lafferty v. Payson City, 642 P.2d 376 (Utah 1982); State *ex rel.* Waterbury Dev. Co. v. Witten, 377 N.E.2d 505 (Ohio 1978).

[92] *See, e.g.*, Santa Margarita Area Residents Together v. San Luis Obispo County Bd. of Supervisors, 84 100 Cal. Rptr. 2d 740 (Cal. Ct. App. 2000). *See generally* CALLIES ET AL., *supra* note 2, at 91-115.

with a community," in essence creating a "secession of the successful."[93] With enough of these communities, the surrounding cities and counties could find themselves bereft of much of their population and resources, so that "the city could become financially untenable for the many and socially unnecessary for the few."[94] Critics observe that by living in a gated community, residents are not supporting the public services that support the community at large.[95]

In response to some of these perceived problems, some cities have elected to pass ordinances banning such communities. Cary and Carrboro, North Carolina, passed their ordinances because citizens expressed concern that gated communities within their city boundaries could delay the response times of emergency vehicles.[96] One alderman explained the dislike for walls and gates by saying: "We're a community of interconnected neighborhoods. Walls are unfriendly."[97]

Homeowners in a community development still must pay local property taxes for local government services, whether or not they avail themselves of such services, and even though they already pay extra for their private community's services.[98] As a group, therefore, they are an easily mobilized voting bloc that will vote to protect property values, lower property taxes, and seek tax equity.[99] Considering that more than thirty million Americans live in private communities,[100] with eight million in gated communities,[101] these individuals can form a very large, local voting bloc.

Thus, members of homeowner associations have begun requesting tax deductions for their dues. They pay for their own public services and see no need to pay for others' as well, especially if they do not partake of those services elsewhere, such as garbage collection, street maintenance, security, and recreation.[102] However, people living in private communities

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[93] EVAN MCKENZIE, PRIVATOPIA: HOMEOWNER ASSOCIATIONS AND THE RISE OF RESIDENTIAL PRIVATE GOVERNMENT 23 (1994) (citing Robert Reich, *Secession of the Successful*, NEW YORK TIMES MAGAZINE, Jan. 20, 1991, at 42).

[94] *Id.* at 186.

[95] *See* Lois M. Baron, *The Great Gate Debate*, 21 Builder 92 (Mar. 1998).

[96] Alan Scher Zagier, *'Gated' Living Inspires Debate*, THE NEWS AND OBSERVER, June 7, 1998, at A1, *available at* 1998 WL 6141834.

[97] *Id.*

[98] MCKENZIE, *supra* note 93, at 188.

[99] *Id.* at 192-93.

[100] *See* Andrew Stark, *America, the Gated?*, 22 WILSON Q. 58 (1998), *available at* 1998 WLNR 5190555.

[101] *See* Richard Damstra, *Don't Fence Us Out: The Municipal Power to Ban Gated Communities and the Federal Takings Clause*, 35 VAL. U. L. REV. 525, 529 (2001).

[102] *See* Stark, *supra* note 100.

do use some public services and it would be difficult to determine exact percentages of what each homeowner uses.

In California, the reverse is also true, in that the public uses privately provided infrastructure and services. Where Proposition 13 effectively limited the amount of public services provided by local government, those who sought certain amenities felt compelled to provide their own.[103] Private developments began including their own streets, drainage, parks, recreation facilities, and streetlights.[104] Where the communities are not gated, the general public has access to these privately funded infrastructures, for which the public paid nothing. Meanwhile, the relevant municipality still taxes private community homeowners to provide the same infrastructures for the public as well. Obtaining a rebate for providing their own segment of public services is a major political goal of people living in planned communities.[105] The opposition argues that one rarely pays taxes for only what one uses or receives.[106] Further, they claim that when a private community provides some of its own public services, the municipality can withdraw from those areas in an effort to save money and manpower,[107] thereby effectively lowering everyone's costs.

A. Common-Interest Communities Defined

Aside from state statutes, other general sources such as the Restatement (Third) of Property (Servitudes) ("The Restatement") and the Uniform Common Interest Ownership Act ("UCIOA") define "common-interest community." According to the Restatement, a "common-interest community" is:

> a real-estate development or neighborhood in which individually owned lots or units are burdened by a servitude that imposes an obligation that cannot be avoided by nonuse or withdrawal: (a) to pay for the use of, or contribute to the maintenance of, property held or enjoyed in common by the individual owners, or; (b) to pay dues or assessments to an association that provides services or facilities to the common property or to the individually owned property, or that enforces other

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[103] *Id.*
[104] *Id.*
[105] *Id.*
[106] *Id.*
[107] *Id.*

> servitudes burdening the property in the development or neighborhood.[108]

Similarly, the UCIOA defines a CIC as "real estate with respect to which a person, by virtue of his ownership of a unit, is obligated to pay for real estate taxes, insurance premiums, maintenance, or improvement of other real estate described in a declaration."[109]

The comments accompanying section 6.2 of the Restatement further explain that a CIC is characterized by either commonly held property or a community association, although most common-interest properties have both.[110] Further, CICs are typically created by declaration.[111] The declaration imposes the servitude that obligates the individual homeowners to pay for common property usually through mandating membership in the community association.[112] A formal declaration that a community is a CIC is not necessary.[113] Instead, a CIC may arise by implication.[114] If homeowners are subject to a servitude that obligates them to pay for common property, they impliedly constitute a CIC.[115] Also, if a declaration establishes a community association to manage common property but neglects to provide means of funding such management, a CIC is implied.[116]

B. Community Associations' Power to Levy Assessments to Provide, Fund, and Maintain Infrastructure

CICs collect assessments from their residents in order to provide, fund, and maintain common infrastructure like roads, sewers, parks, and the like. The Restatement states:

> (1) Except as limited by statute or the declaration: (a) a common-interest community has the power to raise the funds reasonably necessary to carry out its functions by levying assessments against the individually owned property in the community and by charging fees for

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[108] RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 6.2 (2000).
[109] Uniform Common Interest Ownership Act § 1-103(7) (1994).
[110] *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 6.2 cmt. a (2000).
[111] *See id.*
[112] *See id.*
[113] *See id.*
[114] *See id.*
[115] *See id.*
[116] *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 6.2 cmt. a (2000).

> services or for the use of common property; (b) assessments may be allocated among the individually owned properties on any reasonable basis, and are secured by a lien against the individually owned properties.[117]

Similarly, the UCIOA lists the specific powers of community associations. Below are selected powers that pertain to providing, funding, and maintaining infrastructure:

> (6) regulate the use, maintenance, repair, replacement, and modification of common elements;[118] (7) cause additional improvements to be made as a part of the common elements;[119] (10) impose and receive any payments, fees, or charges for the use, rental, or operation of the common elements, other than limited common elements ... and for services provided to unit owners;[120] (11) impose charges for late payment of assessments, and, after notice and an opportunity to be heard, levy reasonable fines for violations of the declaration, bylaws, rules, and regulations of the association[.][121]

In addition to powers granted to them through their declarations and by statute, the Restatement would grant community associations those "powers reasonably necessary to manage the common property, administer the servitude regime, and carry out other functions set forth in the declaration."[122] The effect of reading into the declaration "reasonably necessary powers" is that community associations maintain wide-ranging and tight control over their members' financial obligations to the CIC.[123] Similarly, the UCIOA allows community associations to "exercise any other powers necessary or proper for the governance and operation of the association."[124]

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[117] RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 6.5 (2000).
[118] Uniform Common Interest Ownership Act § 3-102(a)(6) (1994).
[119] *Id.* § 3-102(a)(7).
[120] *Id.* § 3-102(a)(10).
[121] *Id.* § 3-102(a)(11).
[122] RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 6.4 (2000).
[123] *Id.* § 6.4, cmt. a ("[T]o the extent these powers are necessary for maintenance of common property, limitations on the powers should be narrowly construed.").
[124] Uniform Common Interest Ownership Act § 3-102(a)(17) (1994).

Thus, the community association exercises great power in its ability to assess funds for common infrastructure from its residents. Even if no such fundraising power exists in the declaration or by statute, the power may nevertheless be implied.[125]

1. The Quasi-Contract Rationale

Implying a right of community associations to levy assessments on their members serves two key public policy purposes. First, the maintenance of common property affects the property values and personal wealth of the CIC members.[126] Second, the maintenance of common property also affects surrounding municipalities, which do not want the burden of maintaining such property.[127] For these reasons, courts have readily granted community associations the power to assess their members in order to provide, fund, and maintain common infrastructure. Courts typically imply such power based on a quasi-contract rationale. For example, in *Perry v. Bridgetown Community Ass'n, Inc.*,[128] the Supreme Court of Mississippi held that "in a community association, the members enjoy the benefits of the development; the landowners thereby imply consent to the assessment for reasonable maintenance common to all other members."[129]

Courts have found that property owners impliedly consented to pay assessments for common infrastructure even if their properties were not included on the CIC's subdivision maps or when express covenants obligating them to pay had expired. In *Patchogue Properties, Inc. v. Saccio*,[130] defendants' property did not appear on the CIC's subdivision maps.[131] The defendants' only means of ingress and egress to their property, however, was on the community's private road, marked by signs, and manned by a security guard.[132] The court held that the defendants "had knowledge or notice at the time of purchase of the private nature of the community, and are therefore liable for their pro rata share of the assessments on a theory of implied contract."[133] In *Miles v. Carolina Forest Ass'n*,[134] a North Carolina Court of Appeals held that property

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[125] THE RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 6.5 cmt. B (2000).
[126] *See id.*
[127] *See id.*
[128] 486 So. 2d 1230 (Miss. 1986).
[129] *Id.* at 1234 (citation omitted).
[130] 712 N.Y.S.2d 737 (N.Y. Sup. Ct. 2000).
[131] *See id.* at 739.
[132] *Id.*
[133] *Id.*
[134] 604 S.E.2d 327 (N.C. Ct. App. 2004).

owners impliedly consented to pay assessments for the maintenance of roads, common areas, and recreational facilities,[135] even though the express covenant governing such assessments had expired.[136] The court determined that their obligation arose through an implied-in-fact contract.[137]

Finally, citing Colorado's version of the Uniform Common Interest Ownership Act and The Restatement, the Colorado Supreme Court in *Evergreen Highlands Ass'n v. West*,[138] held that a CIC has the implied power to, among other things, levy assessments in order to fund the maintenance of common areas.[139] In this case, West had bought property in the Evergreen Highlands subdivision because payment of assessments was voluntary, as there was no covenant mandating assessments.[140] While the majority of the members of the association later voted to "modify" the covenants, which effectively created new covenants that made assessments mandatory, West did not, and he refused to pay assessments after the new covenants took effect.[141] The court held that the "modification" of the covenants to create a new covenant was valid and binding.[142] Furthermore, it held that the obligation to pay for the maintenance of common areas was implied, even if West's deed contained no such provision.[143] In short, courts' use of the quasi-contract theory ensures that those homeowners benefiting from a community association's provision and maintenance of common infrastructure are obligated to pay for their share, regardless of the language of their deeds.

2. The Mini-Government Analogy

Another rationale for implying the power of assessment to community associations is emerging. Commentators have now begun to liken the community association to miniature governments. The community association, like a government, requires the ability to tax its residents in the form of assessments in order to provide for and maintain common infrastructure:

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[135] *Id.* at 330.
[136] *Id.* at 330-31.
[137] *Id.* at 333-34.
[138] 73 P.3d 1 (Colo. 2003).
[139] *Id.* at 7.
[140] *Id.* at 3.
[141] *Id.*
[142] *Id.* at 7.
[143] *Id.*

> The other essential role directly relates to the association's regulatory powers; and upon analysis of the association's functions, one clearly sees the association as a quasi-government entity paralleling in almost every case the powers, duties, and responsibilities of a municipal government. As a 'mini-government,' the association provides to its members, in almost every case, utility services, road maintenance, street and common area lighting, and refuse removal. In many cases, it also provides security services and various forms of communication within the community. There is, moreover, a clear analogy to the municipal police and public safety functions. All of these functions are financed through assessments or taxes levied upon the members of the community, with powers vested in the board of directors, council of co-owners, board of managers, or other similar body clearly analogous to the governing body of a municipality.[144]

Pennsylvania courts in particular have relied upon this analogy to further justify the community association's implied right to levy assessments. For example, in *Holiday Pocono Civic Ass'n., Inc. v. Benick,*[145] the court stated:

> Privately developed residential communities such as Holiday Poconos are in many respects analogous to mini-governments and are totally dependent upon collection of such assessments in order to maintain and clear roads and provide other essential facilities and services, as well as recreational amenities which benefit all property owners in the development.[146]

The court then explained the public policy supporting the community association's implied power to assess: holding private communities

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[144] Wayne S. Hyatt & James B. Rhoads, *Concepts of Liability in the Development and Administration of Condominium and Home Owners Associations*, 12 WAKE FOREST L. REV. 915, 918 (1976) (citations omitted).

[145] 7 Pa. D. & C.3d 378 (Pa. C. P. Ct. 1978).

[146] *Id.* at 385.

themselves – not municipal governments – responsible for their infrastructure needs:

> Without assessments, property owners' associations would be powerless to operate. The unmaintained roads and recreational facilities would undoubtedly fall into disrepair and then be abandoned by associations. Property owners would ultimately be looking to already overburdened township and county governments for the rehabilitation and take-over of the roads and recreational facilities.[147]

Citing *Holiday Poconos*, a Pennsylvania Superior Court in *Meadow Run* and *Mountain Lake Park Ass'n v. Berkel*[148] held that a community association was analogous to a mini-government.[149] In this case, lot owners had purchased their properties when there was no covenant on assessments, but they were subject to a covenant that stated that in the event that a community association was formed, they would be bound by the rules and regulations promulgated by it.[150] A community association was subsequently formed, and it assessed these lot-owners an annual fee for maintenance of community lakes, dams, and roads.[151] The court legitimized the association's implied power to levy these assessments on the theory that the association was a mini-government, and "as such [is] dependent on the collection of assessments to maintain and provide essential and recreational facilities."[152]

Similarly, *Spinnler Point Colony Ass'n., Inc. v. Nash*[153] cited *Meadow Run*'s "mini-government" language to hold that a lot-owner whose deed makes no mention of a community association is still liable to pay assessments for the maintenance of common areas.[154] The court in *Hess v. Barton Glen Club, Inc.*[155] also cited *Meadow Run*'s "mini-government" language.[156] It held that the community association had the implied power to levy proportionate assessments for the maintenance of all common

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[147] *Id.* at 385-86.
[148] 598 A.2d 1024 (Pa. Super. Ct. 1991).
[149] *Id.* at 1026.
[150] *Id.*
[151] *Id.* at 1025.
[152] *Id.* at 1026 (citing Holiday Pocono Civic Ass'n v. Benick, 7 Pa. D. & C.3d 378 (1978)).
[153] 689 A.2d 1026, 1028 (Pa. Commw. Ct. 1997).
[154] *Id.* at 1028-29.
[155] 718 A.2d 908 (Pa. Cmwlth. Ct. 1998).
[156] *See id.* at 912.

areas, even though the lot-owners' covenants mention a $30 annual fee to maintain only the lake and park, and even though one lot-owner's deed made mention of neither the community association nor the $30 fee.[157] In short, the mini-government analogy serves just as effectively as the quasi-contract rationale in holding lot-owners responsible for paying their share for the maintenance of common areas in the community, regardless of whether their deeds impose such an obligation.

3. *Potential Pitfalls of Using Private Assessments in CIC's: Double Taxation*

It is well settled that the community association has the power, whether expressly or impliedly, based on a theory of quasi-contract or on the analogy to mini-governments, to assess its members for infrastructure. Some commentators argue that it is unfair for municipalities to further tax CIC residents for common property or services that are within the community.[158] Specifically, the argument against taxing common areas and services in addition to individual property within the CIC proceeds as follows:

> The general contention is that common property is so burdened with covenants that it has no fair market value and therefore it should not be subject to property tax. This argument is reinforced with the valid contention that the individual property owners' units, lots, or homes are assessed at a higher value than normal because of the availability of the common property. Assessing both the unit and the common property constitutes double taxation because the tax assessor includes the value of common property in the value of all the individually owned property.[159]

Some courts have responded favorably to this theory. In *Saw Creek Estates Community Ass'n, Inc. v. County of Pike*,[160] a Pennsylvania court held that by Pennsylvania statute, common areas within a CIC are not

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[157] *See id.* at 913.

[158] *See, e.g.*, James L. Winokur, *Critical Assessment: The Financial Role of Community Associations*, 38 SANTA CLARA L. REV. 1135, 1176 (1998).

[159] Wayne S. Hyatt & Jo Anne P. Stubblefield, *The Identity Crisis of Community Associations: In Search of the Appropriate Analogy*, 27 REAL PROP. PROB. & TR. J. 589, 617 (1993) (footnote omitted).

[160] 808 A.2d 322 (Pa. Commw. Ct. 2002).

subject to separate county property taxes.[161] In *Applebaum v. Town of Oyster Bay*,[162] a CIC had previously entered into an agreement with the town to provide its own garbage services to its residents.[163] The town subsequently assessed a special ad valorem tax against the CIC residents for garbage services.[164] Because the residents were not receiving the benefit of the services for which they were taxed, the court invalidated the tax.[165]

Other courts have not been as responsive to the theory. In *Ex parte Lake Forest Property Owners Ass'n, Inc.*,[166] the Alabama Supreme Court held that a county tax assessor could levy ad valorem taxes on the common areas of a CIC.[167] The court did not accept the property owners association's contention that the common areas were so encumbered that they had no value.[168] The court also did not accept the association's argument that the value of the common areas is already taken into account in the value of the individual lots, so that valuation of the common areas results in double taxation.[169] Also, in *Long Cove Home Owners' Ass'n. v. Beaufort County Tax Equalization Bd.*,[170] the South Carolina Supreme Court held that common areas retain value, their value is not subsumed in the value of community residences, and taxing the common areas does not constitute double taxation.[171]

In response to double taxation concerns, New Jersey was the first state to pass legislation allocating the respective responsibilities of CIC homeowners and municipalities for the cost of services like garbage collection, electricity for street lights, and snow removal.[172] This legislation, the Municipal Services Act ("MSA"),[173] was passed in 1991 and mandates that municipalities provide garbage, electricity, and snow removal services for CIC homeowners or reimburse them for the cost of each service that the CIC provides for itself.[174] Several other states,

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[161] *See id.* at 326.
[162] 609 N.E.2d 118 (N.Y. 1992).
[163] *See id.* at 119.
[164] *See id.*
[165] *See id.* at 120.
[166] 659 So. 2d 607 (Ala. 1995).
[167] *See id.* at 612.
[168] *See id.* at 609.
[169] *Id.*
[170] 488 S.E.2d 857 (S.C. 1997).
[171] *See id.* at 862.
[172] *See* Benjamin D. Lambert, Jr., *Municipal Services Equalization: Pot of Gold or Pandora's Box?*, 11-APR PROB. & PROP. 58, 1997.
[173] N.J. REV. STAT. § 40:67-23.2 to -23.8(2005).
[174] *See id.* § 23.3.

including Maryland, Missouri, and Texas, also allow tax adjustments for CIC residents already paying assessments for CIC services.[175]

V. CONCLUSION

That government is unable to foot the bill for much of the public facilities needs generated by private development is pretty much a given. The three most prevalent and successful methods of funding such facilities privately are simple privatization; land development exactions, dedications, and fees; and assessments on member homeowners in CICs. Each solution, however, is not a panacea.

The first, simple privatization, pits substantial cost savings to government against traditional civil service protection. Simple privatization is attractive to cash-strapped governments interested in contracting out for innovative, efficient, and cost-effective public service providers. However, simple privatization often results in the loss of civil service jobs and hastens the potential return of the spoils system. Simple privatization is difficult to reconcile with government's traditional role as provider of essential services for its people. As difficult as the decision to privatize should be, there is a growing trend toward liberal judicial review of state plans for simple privatization. Courts support privatization efforts upon a showing that it is impracticable for civil servants to provide necessary public services, upon a showing that the service provided is a "new state function," or upon a showing that the government undertook privatization in good faith. Simple privatization efforts are likely to increase in the future.

The second solution, land development exactions, dedications, and fees, presents constitutional problems associated with regulatory takings when government attempts to exact a greater toll from private development than a particular land development project can be expected to generate. Such developments are responsible for a fair share of the needs generated across the spectrum of public facilities such as streets, roads, water, sewer, schools, and sanitary landfills. However, there is a temptation for government to attempt to redress past deficiencies, and this it may not do, lest the exaction or fee be labeled a tax, and thus require enabling legislation, which is seldom met with local support. However, as demonstrated by studies of exactions and fees, it is not unusual for a new

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[175] *See* Sheryll D. Cashin, *Privatized Communities and the "Secession of the Successful": Democracy and Fairness Beyond the Gate*, 28 FORDHAM URB. L.J. 1675, 1677 (2001).

single-family residence to be contributing as much as $30,000 toward public facilities as a condition for development.

The last solution, CIC assessments on private infrastructure, is also a successful technique for shifting the financial burden to new and existing homeowners by means of privatization of infrastructure. Such common infrastructure is used and useable only by members of the association in the CIC. Of course, government is then relieved of the need to provide facilities to this segment of its citizenry. Courts increasingly uphold such assessments, whether or not specifically provided for in the applicable conditions, covenants, and restrictions filed as part of the CIC development, on a variety of grounds as discussed above in section III.E. This privatization technique therefore represents a viable alternative to government funding of such facilities, but arguably at the social price of exclusivity. Several commentators have noted at length the various repercussions.[176] Moreover, there is a growing reluctance among members of such communities to be "double taxed" for both public and private facilities such as parks. In response to such concerns, some jurisdictions such as Hawaii and New Jersey provide a measure of statutory relief. Whether this is a fundamentally fair solution is debatable.

In deciding how best to provide infrastructure and services for their citizens, local governments should weigh the advantages and disadvantages of the aforementioned options available to them. When opting for pure privatization, local governments should guard against selling out the civil service merit system to the lowest bidder. When conditioning land development, local governments must not force private developers and homeowners alone to bear public burdens which, in all fairness and justice, should be borne by the community as a whole. Finally, in encouraging the development of CICs, because they provide their own infrastructure and services, local governments should be mindful of the social consequences flowing literally and figuratively from the walking off of vital parts of a community. At stake with all of these forms of privatization are fundamental community values that should not lightly be bargained away.

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[176] *See, e.g.*, EDWARD J. BLAKELY & MARY GAIL SNYDER, FORTRESS AMERICA: GATED COMMUNITIES IN THE UNITED STATES (1997); David L. Callies, Paul A. Frankese & Heidi Kai Guth, *Gated Communities, Covenants and Concerns*, 35 URB. LAW. 177 (2003).