PLANNING AND ZONING

Exactions, Dedications and Development Agreements Nationally and in California: When and How Do the *Dolan/Nollan* Rules Apply

Annual Institute on Planning, Zoning and Eminent Domain
Presented by the
Municipal Legal Studies Center of the
Center for American and International Law

San Francisco, California
April 9 - 11, 2003

April 10, 2003

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Mr. Curtin serves as Immediate Past Chair and on the Council, the governing body, of the State and Local Government Law Section of the American Bar Association. He was Past Chair of the Land Development, Planning & Zoning Section of the International Municipal Lawyers Association (formerly NIMLO). He is past Vice-Chair of the Executive Committee of the Real Property Law Section of the State Bar of California. Mr. Curtin has also served as President of the City Attorneys' Department of the League of California Cities, as a member of the Board of Directors of the League, and as Regional Vice President of the International Municipal Lawyers Association.

In recognition of his extensive contributions to NIMLO and to the entire municipal law community nationwide, as well as his years of leadership and service to the legal profession, Mr. Curtin was honored with NIMLO's Charles S. Rhyne Award for Lifetime Achievement in Municipal Law. He is the recipient of the American Planning Association's National Distinguished Leadership award for 20 years of writing, teaching, encouraging and supporting planning ideas. He also was named Honorary Life Member of the California Park and Recreation Society in recognition of his exceptional service to the field of parks and recreation.

Mr. Curtin is the author of numerous publications on California land use and subdivision law, which have been cited frequently by the California Courts, including "Curtin's California Land Use & Planning Law," published and revised annually by Solano Press, "Subdivision Map Act Manual," published by Solano Press and "Subdivision Map Act and the Development Process," published by California Continuing Education of the Bar, Berkeley, California. He is a frequent lecturer for the University of California Extension and Continuing Education of the Bar (CEB) and was an adjunct professor for the University of San Francisco Law School teaching Land Use Law.

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I. EXACTIONS: DEDICATIONS AND DEVELOPMENT FEES

A. Overview

In nearly all aspects of land use approval, significant controversies arise over the amount and type of exactions a city[1] may impose when approving a development, whether they require dedications of property or the imposition of development fees. The concept is simple in theory: The developer, in return for receiving the city's approval to develop the land and realize a profit, agrees to donate to the city an amount of land or money needed to provide certain services and amenities necessitated by the anticipated influx of new residents or employees into the community as a result of such development. *See Associated Home Builders, Inc. v. City of Walnut Creek*, 4 Cal. 3rd 633, 644 (1971).

Cities contend that this arrangement is only fair. Developers create new, sometimes overwhelming, burdens on city services; therefore, they should offset the additional responsibilities required of cities through dedication of land or the payment of fees. Developers, on the other hand, argue that these extra expenses drive up the cost of development and result in higher costs for the home buyer or commercial users, thus eliminating affordable housing and/or driving away needed commerce. In an effort to avoid such costs, developers have challenged such fees by claiming that they are special taxes illegally imposed without a vote of the people, or that the dedications are takings of property without just compensation. Through the exercise of its police power, however, a city has the authority to impose these exactions, so long as they are reasonable and have the required nexus to the proposed development.

B. The Proper Exercise of Police Power

A city relies on its authority to exercise its police power to impose conditions on a development project through the dedication of land or the payment of fees. The United States

[1] When the word "city" is used, it also means "county."

Supreme Court have long held that the regulation of land use does not effect a taking of property if the regulation substantially advances a legitimate governmental interest and does not deny the property owner economically viable use of the land. *See Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016 (1992); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 (1987); *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980).

C. Test of Reasonableness/Nexus Requirement

1. In General

There is no single, precise rule that is applied by the courts to determine whether or not a dedication or a fee condition is reasonable and thus valid. Rather, courts use an ad hoc analysis, examining the facts of each case. The determination depends on the size of the development, the demand for services, the burden that will be created by the development, and the development's overall effect on the city and the surrounding community. Courts use a balancing test that examines whether there has been a proper exercise of police power in a reasonable manner such that no taking of property has occurred. As the United States Supreme Court stated in determining what constitutes the required nexus, "no precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." *Dolan v. City of Tigard*, 512 U.S. at 391.

Thus, the major legal issue involving exactions is not whether the dedication or the payment of a fee as a condition precedent to development may be required, but to what extent the dedication or fee may be imposed.

As a general rule, for example, California courts have long required a nexus between project conditions and the impacts of development. *See Ayres v. City Council*, 34 Cal. 2nd 31, 42 (1949). In 1971, however, the California Supreme Court moved away from whatever direct nexus requirement previously existed in California. Instead, the Court held that, in the absence of a more restrictive statute, a dedication may be required based on broad public welfare concerns, although some nexus must be present. *See Associated Home Builders v. City of Walnut Creek*, 4 Cal. 3rd at 644. The *Associated Home Builders* test basically continues to be followed by the California courts. *See Ehrlich v. City of Culver City*, 12 Cal. 4th 854, 865 (1996).

The United States Supreme Court also has required a nexus in a line of cases culminating in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994). These two cases established the United States Supreme Court's current two-prong *Nollan/Dolan* nexus test, which was interpreted by California's high court in *Ehrlich v. City of Culver City*, 12 Cal. 4th 854, 881 (1996).

D. U.S. Supreme Court Case Law—The *Nollan* and *Dolan* Decisions

***Nollan v. California Coastal Comm'n*.** In *Nollan*, the California Coastal Commission approved the construction of a two-story beachfront house, subject to the condition that the owners dedicate a public access easement across a portion of their property along the beach. The easement purportedly was required to assist the public in viewing the beach and in overcoming a perceived "psychological barrier" to using the beach. The owners challenged the easement, claiming that the condition constituted a taking. The Court held that the dedication requirement constituted a taking. Although protection of the public's ability to see the beach was a legitimate governmental interest, no nexus existed between the identified impact of the project (obstruction of the ocean view) and the easement condition (physical access across the beach). *Id*. at 839.

The *Nollan* Court stressed the importance of a nexus between the dedication condition and the impact of the project. If there is no such connection, the decision to impose the condition would not be proper and could amount to a taking. 483 U.S. at 837.

However, *Nollan* left unanswered a key question: How close must the nexus be for a regulation to "substantially advance" a "legitimate state interest?"[2] Instead, the *Nollan* court simply said that its previous cases made clear "that a broad range of governmental purposes and regulations satisfies these requirements." *Nollan v. California Coastal Comm'n*, 483 U.S. at 834–35 (citing *Agins v. Tiburon*, 447 U.S. at 260–62 (scenic zoning); *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978) (landmark preservation); *Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (residential zoning)).

The Court suggested, however, that the constitutionally required nexus may be tighter where exactions include the actual conveyance of property as opposed to the imposition of fees. For example, this approach has been followed by California courts since *Nollan*. *See Blue Jeans Equities W. v. City and County of San Francisco*, 3 Cal. App. 4th 164 (1992).

Other cases have applied *Nollan's* nexus holding with varied results. For example, in one case, a city's requirement for a street widening was struck down since there was no nexus. There was no evidence in the record that the dedication was required to compensate for increased traffic produced by the project. *See Rohn v. City of Visalia*, 214 Cal. App. 3rd 1463, 1475 (1989). Citing *Associated Home Builders,* the Rohn court held that although the facilities to be dedicated need not solely benefit the project, they at least must serve it in some capacity, which was not the case here. *Id*. In this case there was no nexus between the dedication condition and the alleged traffic burden imposed by the project.

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[2] This issue was addressed seven years later by the United States Supreme Court's decision in *Dolan v. City of Tigard*, 512 U.S. at 386.

In another case, the court struck down an easement dedication allegedly required to prevent erosion, because there was no specific report or study to justify the dedication. *See Surfside Colony, Ltd. v. California Coastal Comm'n,* 226 Cal. App. 3rd 1260 (1991). The Coastal Commission had relied on general studies of other areas to justify the exaction, but the court found they were inadequate to provide a legal nexus. *Id*. at 1269.

However, in *Commercial Builders*, the court upheld a city's ordinance imposing a low-income housing fee on nonresidential development. *Commercial Builders of N. Cal. v. City of Sacramento*, 941 F.2nd 872 (1991). In so doing, the court applied the "reasonable relationship" test of *Associated Home Builders*, and stated that *Nollan* stands only for the proposition that if there is no nexus, there is a taking. *Id*. at 874. The court rejected the builder's argument that under *Nollan* an ordinance that imposes an exaction can be upheld only if it can be shown that the development in question is directly responsible for the social ill that the exaction is designed to alleviate. Rather, the court held that *Nollan* did not create a stricter standard than prior federal law for judging how close the nexus must be. *Id.* at 874; *see also Tahoe Reg'l Planning Agency v. King*, 233 Cal. App. 3rd 1365, 1400 (1991) (*Nollan* does not alter established law that aesthetic values are an appropriate subject of land use regulations; *Nollan* only requires that there be a nexus).

In *Blue Jeans*, the court held that the *Nollan* analysis was not applicable to any exaction that did not involve a physical invasion or "possessory taking." *Blue Jeans Equities W. v. City and County of San Francisco*, 3 Cal. App. 4th 164 (1992). In this case, the San Francisco Planning Commission in January 1979, approved a building permit for a five-building office, retail, and residential complex in the northeast waterfront section of San Francisco's Levi Plaza. The permit provided that the owner "make a good-faith effort to participate in future funding mechanisms to assure adequate transit service to the area of the city in which the project is located." *Id.* at 171. In May 1981, before issuance of a certificate of completion for the project, the Board of Supervisors enacted the Transit Impact Development Fee ordinance, which required developers of downtown buildings with new office space to pay a transit impact development fee not to exceed $5 per square foot as a condition to receiving a certificate of completion. The project owner argued that this ordinance could not be lawfully applied to its building project and sued claiming that the heightened scrutiny test alluded to in *Nollan* should be applied to the ordinance.

In upholding the fee, the court concluded that the strict scrutiny test required by *Nollan* to determine whether a government condition violated the takings clause of the Fifth Amendment did not apply to this ordinance, since *Nollan* was applicable only to possessory takings, not regulatory takings. *Id.* at 172.

Dolan v. City of Tigard. In 1994, the *Dolan* Court addressed the question left unanswered by *Nollan*, adding the second prong of the Court's nexus test. In *Dolan*, a sharply divided court held that cities must prove that development conditions placed on a discretionary permit have a "rough proportionality" to the development's impact. If not, this action may constitute a taking. *Dolan v. City of Tigard*, 512 U.S. 374 (1994). In this 5–4 decision, the Court held for the first time that, in making an adjudicative decision, a city must demonstrate a "required reasonable relationship" between the conditions to be imposed on a development permit and the development's impact. Even though the Court coined a new term ("rough proportionality") for the standard, it was basically the same reasonable relationship test that California and a majority of other states had followed for years.

Florence Dolan owned a plumbing and electrical supply store located in the business district of Tigard, Oregon, along Fanno Creek, which flows through the southwestern corner of the lot and along its western boundary. Dolan applied to the City for a building permit to develop the site. Her proposed plans called for nearly doubling the size of the store and paving a 39-space parking lot.

The planning commission granted Dolan's permit application subject to certain conditions, including the requirement that Dolan dedicate the portion of her property lying within the 100-year flood plain for improvement of a storm drainage system along Fanno Creek. In addition, she was required to dedicate an additional 15-foot strip of land adjacent to the flood plain as a pedestrian/bicycle pathway. In so doing, the City made a series of findings concerning the relationship between the dedicated conditions and the projected impacts on the Dolan property.

The United States Supreme Court granted certiorari "to resolve a question left open by its decision in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987): what is the required degree of connection between the exactions imposed by a city and the projected impacts of the proposed development. *Dolan v. City of Tigard*, 512 U.S. at 377. In *Dolan*, the Court acknowledged the standard rule that a land use regulation does not effect a taking if it "substantially advances legitimate state interest" and does not "deny an owner economically viable use of his land." *Id*. at 385 (citing *Agins v. Tiburon*, 447 U.S. 255, 260 (1980)). Significantly, the Court noted that in *Dolan*, it was not dealing with a legislative determination regarding land use regulations, but instead with a city having made "an adjudicative decision to condition an application for a building permit on an individual parcel." *Id*. Also, the Court noted that "the conditions imposed were not simply a limitation on the use that [the] petitioner might make of her own parcel but a requirement that she deed portions of the property to the city." *Id*.

In evaluating the takings claim, the Court stated that it first must determine whether an "essential nexus" exists between the "legitimate state interest" and the exaction imposed. If a nexus exists, the next step is to determine whether the degree of connection is sufficient. The Court noted that in *Nollan*, there had been no nexus; thus, the Court did not move beyond the first step in the analysis. In *Nollan*, the absence of a nexus between the easement and the ocean view left the California Coastal Commission in the position of simply trying to obtain an easement "through gimmickry," which converted a valid regulation of land use into an "out-and-out plan of extortion." 512 U.S. at 387. In the *Dolan* situation, however, the Court stated that no such "gimmickry" was evident. Rather, the Court found that the required nexus did, in fact, exist. Therefore, it was necessary for the Court to address the question left unanswered in *Nollan* -– whether the *degree of exaction* demanded by the City's permit conditions bore the *required relationship* to the projected impact of the development.

Since state courts had a long history of dealing with this question, the Court then reviewed several representative state court decisions. The Court noted that the decisions fell into three categories: first, a generalized nexus requirement, which the Court determined to be too lax; second, an exacting nexus described as the "specific and uniquely attributable test" (the so-called *Pioneer Trust* Rule from Illinois), which the Court rejected; and third, an intermediate position of a "reasonable relationship" nexus (highlighted in *Jordan v. Menomonee Falls*, 28 Wis. 2^{nd} 608, 137 N.W. 2^{nd} 442 (1965)).

The *Dolan* Court noted that the intermediate "reasonable relationship test" adopted by the majority of states (including California, *see Associated Home Builders*, 4 Cal. 3^{rd} 633) was closer to the federal constitutional norm than the other two tests. However, it stated, "we do not adopt [the reasonable relationship test] as such, partly because the term 'reasonable relationship' seems confusingly similar to the term 'rational basis' which describes the minimal level of scrutiny under the Equal Protection Clause of the Fourteenth Amendment." *Dolan v. City of Tigard*, 512 U.S. at 391. Instead, the Court coined the term "rough proportionality" to summarize what it holds to be required by the Fifth Amendment.[3] *Id*. It, then, attempted to provide some meaning to the phrase. "No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." *Id*.

With the rough proportionality requirement in mind, the Court then reviewed the two required dedications and found that the City had not met its burden of demonstrating the required relationship. After analyzing the findings upon which the City relied, the Court stated that the City had not shown the "required reasonable relationship" between the floodplain easement and the petitioner's proposed new building. 512 U.S. at 395.

Noting that Dolan's proposed development would have increased the amount of impervious surface — which in turn would increase the quantity and rate of storm water flowing from the property, the Court determined that the City could have required that Dolan simply keep the area open. But by requiring complete dedication of the land rather than simply restricting Dolan's ability to build on it, the City limited Dolan's ability to exclude others, which, the Court stated, is " 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.' " *Id*. at 393 (quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979)).

In addition, regarding the dedication of the pedestrian/bicycle pathway easement, the Court did not accept the City's conclusory statement that the creation of the pathway "could offset some of the traffic demand . . . and lessen increase in traffic congestion." 512 U.S. at 393. "No precise mathematical calculation is required," the Court repeated, "but a city must make some effort to quantify its findings in support of the dedication of the pedestrian/bicycle pathway

[3] Interestingly, after coining the term "rough proportionality," the Court, in its majority opinion, never used that term again in applying its analysis to the facts; instead it continued to use the words "required reasonable relationship" or "reasonably related."

beyond the conclusionary statement that it could offset some of the traffic demand generated." *Id*. at 395–96.

The Court concluded by stating:

> Cities have long engaged in the commendable task of land use planning, made necessary by increasing urbanization particularly in metropolitan areas such as Portland. The city's goals of reducing flooding hazards and traffic congestion, and providing for public greenways, are laudable, but there are outer limits to how this may be done. "A strong public desire to improve the public condition [will not] warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."

Id. at 396 (quoting *Pennsylvania Coal Co. v. Mahon,* 260 U.S. 393, 416 (1922)).

The dissenting justices stated that the majority had made a serious error by abandoning the traditional presumption of constitutionality, and imposing a novel burden of proof on a city implementing an admittedly valid comprehensive land use plan. "[H]aving assigned the burden, the court concludes that the city loses based on one word ('could' instead of 'would') and despite the fact that this record shows the connection the court looks for." *Id.* at 413 (Souter, J., dissenting).

Subsequent case law has clarified that the *Dolan* rough proportionality rule applies when a court is determining whether dedications demanded as a condition of development are proportional to the development's anticipated impacts and was not intended to address, and is not applicable to, an analysis of whether or not a complete denial of development is a taking. *See City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 703 (1999); *Breneric Assocs. v. City of Del Mar*, 69 Cal. App. 4th 166, 175-76 (1998).

What does *Dolan* mean? The United States Supreme Court has placed some limitations on a city's exercise of its police power to require dedication of land as a condition for issuing a development permit. *Dolan* requires a city to document the connection between the dedication and the projected impact of the proposed development. Not only must the required nexus exist, but findings must establish the required reasonable relationship between the required dedication and the impact. Thus, a two-part inquiry must be made to determine whether the essential nexus exists between the project and (1) the type of condition and (2) the burden created by of the condition. The "type of impact" nexus test requires that the type of condition imposed must address the same type of impact caused by the development (*Nollan*) and the "burden created" nexus test requires an assessment of whether this condition is in reasonable proportion to the burden created by the new development (*Dolan's* rough proportionality). *Dolan* reiterates the need for a reasonable relationship, but emphasizes that there must be something more than generalized or conclusory findings to support that connection.

As a result of *Dolan*, if a city seeks to require a dedication of land as a condition of approval (e.g., building permits, map approvals) as compared to legislative requirements (e.g., a determination applicable to all large development projects, where no individual bargaining is involved), the following rules should be followed:

- A city has the burden of proving a sufficient nexus exists between the required dedication and the impact of the proposed development.
- No precise mathematical calculation is necessary to show the required reasonable relationship, but a city must make some sort of individualized determination that the required dedication is related, both in nature and extent, to the impact of the proposed development (*i.e.*, it is roughly proportional).
- A city has the burden of proving why a dedication is necessary and why a land use regulation restricting the use of the property cannot suffice.
- A city must tailor the conditions it demands to counter only the types of impacts expected from the development.
- To meet the heightened *Nollan-Dolan* standard, a city should quantify its findings as much as possible, rather than relying on conclusory statements.

E. The Applicability of the *Nollan/Dolan* Test to Impact Fees: *Ehrlich v. Culver City*

In *Dolan*, the City of Tigard conditioned a development permit on the property owner's dedication of land. *See Dolan v. City of Tigard*, 512 U.S. at 379. However, *Dolan* did not address the question of whether the heightened standard enunciated applies to the situation when a city requires payment of an impact fee rather than a dedication of land. The California Supreme Court affirmatively answered that question in *Ehrlich v. City of Culver City*, 12 Cal. 4th 854 (1996), and then reaffirmed this position in *San Remo Hotel LP v. City and County of San Francisco*, 27 Cal. 4th 643 (2002). Prior to the decision in *Ehrlich*, courts had concluded that a higher level of scrutiny only applied in cases of possessory takings. *See Blue Jeans Equities W. v. City and County of San Francisco*, 3 Cal. App. 4th 164, 169 (1992).

Factual situation. In the early 1970s, Ehrlich acquired a vacant 2.4-acre lot in Culver City. At his request, the City amended its general plan and zoning, and adopted a specific plan to provide for the development of a privately operated tennis club and recreational facility. In 1981, in response to financial losses from operating the facility, Ehrlich applied to the City for a change in land use to construct an office building. The application was abandoned when the planning commission recommended against approval on the grounds that the existing club provided a needed commercial recreational facility within the City. Then, in 1988, Ehrlich closed the facility as a result of continuing financial losses and applied for an amendment to the general plan and the specific plan, as well as a zoning change, to allow construction of a 30-unit condominium complex valued at $10 million. At one point, the City expressed interest in acquiring the property for operation as a city-owned sports facility. However, this idea was later abandoned as infeasible. At the same time, the city council rejected Ehrlich's application based on concerns about the loss of a needed recreational facility. Ehrlich then tore down the existing improvements and donated the recreational equipment to the City.

After denial of his application, Ehrlich filed suit and then entered into discussions with the City to secure the necessary approvals to restructure the property. After a closed-door meeting, ostensibly to discuss the pending litigation, the city council voted to approve the project conditioned upon the payment of certain monetary exactions, including a $280,000 recreation mitigation fee for the loss of the private tennis facility, payment of $33,200 for art in public places and a $30,000 in lieu parkland dedication fee. The $280,000 fee was to be used "for partial replacement of the lost recreational facilities" occasioned by the specific plan amendment. The amount of the fee was based upon a city study that showed the replacement costs for the recreational facilities "lost" as a result of amending the specific plan. After formally filing a protest pursuant to Government Code sections 66020 and 66021, Ehrlich challenged the $280,000 recreation fee and the in lieu art fee, but not the parkland dedication fee.

Judicial proceedings. After the trial court struck down the conditions, the appellate court upheld them. *See Ehrlich v. City of Culver*, 15 Cal. App. 4th 1737 (1993). The United States Supreme Court, after granting a writ, then remanded the matter back to the court of appeal to be re-examined in light of its recent decision in *Dolan*. Following the remand, the court of appeal in an unpublished opinion in 1994, again upheld both fees. The California Supreme Court then granted a petition to consider the important and unsettled question concerning the extent to which *Nollan* and *Dolan* applied to development permits that exact a fee as a condition of issuance, as opposed to the possessory dedication of real property.

The decision: new distinction—legislatively formulated versus ad hoc development fees. Citing *Nollan*, the *Ehrlich* court expressed concern that adjudicative, ad hoc conditions on development presented "an inherent and heightened risk that local government will manipulate the police power to impose conditions unrelated to legitimate regulatory ends, thereby avoiding what would otherwise be an obligation to pay just compensation." *Ehrlich v.*

Culver City, 12 Cal. 4th at 869. The Court emphasized the "extortion[ary]" danger of this "form of regulatory 'leveraging.' " *Id*. at 867. In response to this concern, the Court drew a distinction between legislatively formulated development fees imposed on a class of property owners and individually imposed conditions.

The Court held that in the "relatively narrow class of land use cases" that involve individual "land use 'bargains' between property owners and regulatory bodies . . . where the individual property owner-developer seeks to negotiate approval of a planned development . . . the combined *Nollan*/*Dolan* test quintessentially applies." 12 Cal. 4th at 868. The discretionary aspect of conditioning an individual approval heightens the risk that a city may manipulate the police power to impose conditions unrelated to legitimate land use regulatory ends. On this point, the Court stated:

> It is the imposition of land use conditions in individual cases, authorized by a permit scheme which by its nature allows for both the discretionary deployment of the police power and an enhanced potential for its abuse, that constitutes the sine qua non for application of the . . . standard of scrutiny formulated by the court in *Nollan* and *Dolan.*

Id. at 869.

The Court next considered whether the *Nollan*/*Dolan* test applied to general development fees in addition to dedications. In grappling with the decisions of *Blue Jeans Equities W. v. City and County of San Francisco*, 3 Cal. App. 4th 164 (1992) (transit fees), and *Commercial Builders of N. Cal. v. City of Sacramento*, 941 F.2nd 872 (9th Cir. 1991) (affordable housing fees), which had limited the application of the heightened scrutiny standard to possessory takings cases, the *Ehrlich* Court reasoned that those cases involved "legislatively formulated development assessments imposed on a broad class of property owners," and therefore did not require heightened scrutiny. 12 Cal. 4th at 876. Based on this reasoning, the Court then rejected the City's argument that the *Nollan*/*Dolan* test only applies to possessory dedications and not to fees. Instead, it found that whether the *Nollan*/*Dolan* test applied to a fee depends upon whether the fee is an ad hoc or a legislative determination. *Id*. at 906. *See also Loyola Marymount Univ. v. Los Angeles Unified Sch. Dist.*, 45 Cal. App. 4th 1256, 1270-71 (1996) (applying *Ehrlich* to hold that the *Nollan/Dolan* test did not apply to a fee imposed pursuant to the Sterling Act (Educ. Code § 17620; Gov't Code § 65995)); *San Remo Hotel, L.P. v. City and County of San Francisco*, 27 Cal. 4th 643, 669-30 (2002) (relying on *Ehrlich*, court held an lieu fee for conversion of a residential hotel to tourist units was not subject to the *Nollan/Dolan* test).

The $280,000 recreational mitigation fee. In striking down the $280,000 recreational mitigation fee, the Court applied the strict scrutiny test of *Nollan*/*Dolan,* concluding that although there was an essential nexus, it was not roughly proportional to the impact. *Ehrlich v. Culver City*, 12 Cal. 4th at 864.

With respect to the existence of a nexus, the Court stated that "there was a potential basis *in logic* for a connection between a social need generated by plaintiff's condominium project and the $280,000 mitigation fee imposed by the city." 12 Cal. 4th at 879. The Court came to this conclusion even though the club was a privately operated facility, accessible only to dues-paying members, a zoning change withdrawing the parcel from such a private recreational use still had a public impact. The Court then stated that "[t]his principle -- that the discontinuation of a private land use may have distinctly *public* consequences — is well accepted in land use law." *Id*. at 879. The Court stated:

> [I]t is well accepted in both the case and statutory law that the discontinuance of a private land use can have a significant impact justifying a monetary exaction to alleviate it. We perceive no reason why the same cannot be said of the loss of land devoted for private recreational use through its withdrawal from such a use as a result of being "up zoned" to accommodate incompatible uses.

Id. at 879.

Having found a valid governmental interest, the Court then concluded that there was an essential nexus between this interest and the imposition of a development fee for park and recreational purposes, which substantially advanced that interest. However, despite the existence of an essential nexus, the $280,000 fee was not proper since the record was “devoid of any individualized findings to support the required ‘fit’ between the monetary exactions and the loss of the parcel zoned for commercial recreational use.” 12 Cal. 4th at 883. The Court then remanded the matter to the city council to reconsider the amount of the fee in light of the Court’s decision. In so doing, it observed this type of recreational fee could be proper as long as it was based on the additional administrative expenses incurred in redesignating other property within a city for recreational use or by the monetary incentives needed to induce private recreational development on other land.

Art in public places fee. Another important aspect of the *Ehrlich* decision is the Court’s holding on the public art fee. The City’s ordinance required that new residential projects of more than four units, as well as all commercial, industrial, and public building projects with a building valuation exceeding $500,000, provide “art work” for the project in an amount equal to one percent of the total building valuation or pay an equal amount in cash to the city’s art fund. In this case, Ehrlich was required to pay $33,200. The Court unanimously agreed that such a fee was not a development exaction of the kind subject to the heightened *Nollan*/*Dolan* standard since it was more akin to traditional land use regulations, such as imposing minimal building setbacks, parking and lighting conditions, landscaping requirements, and other design conditions. The Court reasoned that such aesthetic control has long been held to be a valid exercise of a city’s traditional police power, and does not amount to a taking merely because it might incidentally restrict a use, diminish the value, or impose a cost in connection with the property. 12 Cal. 4^{th} at 886.

F. National Treatment --- Applying *Nollan* and *Dolan* to Impact Fees[4]

The *Ehrlich* court found the middle ground in the application of the *Nollan/Dolan* test to impact fees. Since that ruling, California courts have enjoyed the luxury of a bright-line rule, shunning the heightened scrutiny of the *Nollan/Dolan* nexus test in the case of legislatively imposed fees, while invalidating individually imposed development fees that do not satisfy the requirements of a nexus and rough proportionality[5] Nationally, a trend has emerged favoring the *Ehrlich* approach as well. Some states have held that the test applies to both legislative and adjudicative determinations,[6] and a few have held that the test does not apply to fees at all.[7] However, a substantial number of states facing this issue have concurred in the *Ehrlich* court's conclusion that only the ad hoc imposition of development fees is characterized by the level of discretion and potential for extortionate abuse of police power that requires more than a generalized determination of reasonableness. Following is a brief overview of cases in which

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[4] *See* Taking Sides on Takings Issues, Public & Private Perspectives (Thomas E. Roberts, ed., Sec. of State & Local Gov't Law, ABA 2002). In particular Chapter VII, Applying *Nollan* and *Dolan* to Impact Fees.

[5] *See, e.g., San Remo Hotel LP v. City and County of San Francisco, supra* (hotel conversion fees not subject to *Nollan/Dolan* test); *Loyola Marymount Univ. v. Los Angeles Unified School Dist.*, 45 Cal. App. 4th 1256 (1996) (relying on *Ehrlich* in declining to apply *Nollan/Dolan* heightened scrutiny to legislatively imposed school development fees); *Breneric Associates v. City of Del Mar,* 69 Cal. App. 4th 166 (1998) (declining to apply *Nollan/Dolan* based on the *Ehrlich* court's admonition that such heightened scrutiny is inapplicable to traditional land use regulations that are legislatively imposed).

[6] *Benchmark Land Co. v. City of Battle Ground*, 14 P. 3rd 172 (2000) (holding *Nollan/Dolan* applicable to impact fees but failing to distinguish between legislatively determined and adjudicatively imposed fees). *Northern Illinois Homebuilders' Ass'n v. County of DuPage,* 165 Ill. 2nd 25 (1995) (holding that two legislatively imposed impact fees were valid under *Nollan/Dolan,* but that the second, more general fee failed to meet the higher standard of "specifically and uniquely attributable" that the Illinois Supreme Court had articulated in *Pioneer Trust v. Village of Mount Prospect*, 22 Ill. 2nd 375 (1961)); *Trimen Dev. Corp. v. King County*, 124 Wash. 2nd 261 (1994) (upholding legislatively imposed parkland development fees under the *Nollan/Dolan* test); *Home Builders Ass'n of Dayton and the Miami Valley v. City of Beaver Creek*, 89 Ohio St. 3rd 121 (2000) (applying *Nollan/Dolan* to invalidate a legislatively imposed impact fee). Also see discussion of *Town of Flower Mound v. Stafford Estates Limited Partnership*, 71 S.W. 3rd 18 (2002) (petition for review granted December 12, 2002; see discussion under Texas Case Law, *supra*.

[7] *McCarthy v. City of Leawood*, 257 Kan. 556 (1995) (holding that a traffic impact fee was subject to the "reasonable relationship" test and not the heightened scrutiny of *Nollan/Dolan* because it did not involve the dedication of land).

states other than California have adopted the *Ehrlich* approach or applied an *Ehrlich*-like approach:

- ***Home Builders Ass'n of Central Arizona v. City of Scottsdale***.[8] In this case, the Arizona Supreme Court cited *Ehrlich* in declining to apply *Dolan* to a legislatively imposed water resources development fee. In so doing, the court stated, "the California court suggested that the *Dolan* analysis applied to cases of regulatory leveraging that occur when the landowner must bargain for approval of a particular use of its land. The risk of that sort of leveraging does not exist when the exaction is embodied in a generally applicable legislative decision."

- ***Waters Landing Limited Partnership v. Montgomery County***.[9] Preceding *Ehrlich*, the Court of Appeals of Maryland concurred in the approach, declining to apply *Dolan* to a development impact fee that was imposed by legislative enactment and not by adjudication.

- ***Arcadia Development Corp. v. City of Bloomington***.[10] The Minnesota Court of Appeals held *Dolan's* rough proportionality test inapplicable to a requirement that landowners choosing to cease operation of a mobile home park compensate tenants with a relocation fee. The court stated that because such a fee was a citywide, legislative land-use regulation, *Dolan's* "rough proportionality" test did not apply.

- ***Henderson Homes v. City of Bothell***.[11] Although declining to cite *Nollan/Dolan* and preceding *Ehrlich*, the Washington court nevertheless declined to uphold development fees "voluntarily" paid by individual landowners as a condition of permit issuance, holding that the local government had failed to make a finding that the fees were reasonably necessary as a direct result of the proposed development.

- ***Krupp v. City of Breckenridge***.[12] The court refused to apply *Nollan/Dolan* to a legislatively imposed mandatory plant investment fee, holding that the case did not fall into the narrow class of exactions, such as that imposed by *Ehrlich*, in which the exactions stem from adjudications particular to the landowner and the parcel, and therefore was not subject to a takings analysis.

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[8] 930 P. 2nd 993 (1997).

[9] 650 A. 2nd 712 (1994)

[10] 552 N.W. 2nd 281 (1996).

[11] 124 Wash. 2nd 240 (1994).

[12] 19 P. 3rd 687 (2001).

- ***Rogers Machinery, Inv. v. Washington County and City of Tigard.***[13] The Oregon Court of Appeals, relying heavily on *Ehrlich*, *supra,* and *San Remo, supra*, held that a traffic impact fee imposed on new development by way of a legislative act imposing such a fee on a range of categories of property was not subject to *Dolan's* heightened scrutiny test. The court said it was persuaded by the reasoning of other state courts, representing a nearly unanimous view, that *Dolan's* higher scrutiny test was not applicable to such fees.

G. California Law on Exactions

1. Proper exercise of police power

A city relies on its authority to exercise its police power to impose conditions on a development project through the dedication of land or the payment of fees, Cal. Const. art. XI, § 7; *California Bldg. Indus. Ass'n v. Governing Bd. of the Newhall Sch. Dist.*, 206 Cal. App. 3rd 212, 234 (1988). The California Supreme Court and United States Supreme Court have long held that the regulation of land use does not effect a taking of property if the regulation substantially advances a legitimate governmental interest and does not deny the property owner economically viable use of the land. *See Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016 (1992); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 (1987); *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980).

2. Development: a privilege or a right?

Over the years, there has been a great deal of controversy over whether development is a privilege or a right. In California, courts repeatedly have held that there is no right to develop and that development is instead a privilege. Examples of such decisions are:

- No right to subdivide. (Associated Home Builders Inc. v. City of Walnut Creek, 4 Cal. 3rd 633).
- Development is a privilege. *(Trent Meredith, Inc. v. City of Oxnard*, 114 Cal. App. 3rd 317 (1981)).
- No right to go out of business. *(Nash v. City of Santa Monica*, 37 Cal. 3rd 97 (1984)).

[13] 181 Ore. App. 369; 45 P. 3rd 966 (2002); cert to U.S. Supeme Court denied March 10, 2002.

- No right to convert an apartment to a condominium. *(Norsco Enters. v. City of Fremont,* 54 Cal. App. 3[rd] 488 (1976); *Griffin Dev. Co. v. City of Oxnard,* 39 Cal. 3[rd] 256 (1985)).

- No right to convert residential hotel units to other uses; it is a "privilege". *(Terminal Plaza Corp. v. City and County of San Francisco,* 177 Cal. App. 3[rd] 892 (1986)).

- Transit fees are "exacted only if the developer voluntarily chooses to create new office space" and are "for the privilege of developing a particular parcel." *(Russ Bldg. Partnership v. City and County of San Francisco,* 199 Cal. App. 3[rd] 1496, 1506 (1987)).

However, the United States Supreme Court has sought to clarify this issue: "But the right to build on one's own property—even though its exercise can be subjected to legitimate permitting requirements—cannot remotely be described as a 'governmental benefit.' " *Nollan v. California Coastal Comm'n,* 483 U.S. at 833.

While the Court's decision in *Nollan* can be interpreted as stating a right to build *something* on one's own property, it cannot be read as recognizing any right to build a particular project:

> [Plaintiff] relies in particular on footnote 2 of *Nollan,* where the Court, in responding to Justice Brennan's dissent, said that "the right to build on one's own property—even though its exercise can be subject to legitimate permitting requirements—cannot remotely be described as a 'government benefit.' " [Plaintiff] argues that the reference to building on one's property as a "right" and not a "benefit" is somehow inconsistent with the doctrine that a "right" to build a *particular project* vests only after substantial work is performed in reliance on a government permit. (emphasis in original.)
>
> There are two difficulties with this argument. First, the *Nollan* case dealt only with a property owner's right to build a single-family house, traditionally among the most minimally regulated uses [footnote omitted]. Second, and more important, the *Nollan* court's reference to a landowner's abstract "right" to build in no way suggests that a landowner has an unconditional right under the taking or deprivation clauses of the federal Constitution to build any particular project he chooses. The sentence quoted from the *Nollan* footnote is qualified by its reference to "legitimate permitting requirements." The footnote

> does not imply that a permitting requirement is "illegitimate" simply because it disallows a previously permitted use. It is well established that there is no federal Constitutional right to be free from changes in land use laws.

Lakeview Dev. Corp. v. City of South Lake Tahoe, 915 F.2nd 1290, 1294–95 (9th Cir. 1990).

To date, notwithstanding *Nollan*, California courts have not changed their position that development is merely a privilege. For example, in *Saad*, the court rejected the property owner's "right to build" argument based on footnote 2 of *Nollan* when the City denied a use permit for a home on the grounds that it would impair views and have a towering effect on the neighborhood. *Saad v. City of Berkeley*, 24 Cal. App. 4th 1206 (1994). In another decision also rendered after *Nollan*, the court struck down a school district fee as being an invalid special tax. In so doing, it stated that "[t]ypically, a development fee is an exaction imposed as a precondition for the *privilege* of developing the land." *California Bldg. Indus. Ass'n v. Governing Bd. of the Newhall Sch. Dist.*, 206 Cal. App. 3rd 212, 235 (1988) (citing *Candid Enters. v. Grossmont Union High Sch. Dist.*, 39 Cal. 3rd 878 (1985) (emphasis added)); *Associated Home Builders v. City of Walnut Creek*, 4 Cal. 3rd 633). *See also California Bldg. Indus. Ass'n v. Governing Bd. of the Newhall Sch. Dist.*, 206 Cal. App. 3rd at 236 (the fee is "triggered by the voluntary decision of the developer [to proceed with his development]."); *Russ Bldg. Partnership v. City and County of San Francisco*, 199 Cal. App. 3rd at 1505); *Sinclair Paint Co. v. State Bd. of Equalization*, 15 Cal. 4th 866, 874 (1997) (it is a "voluntary decision to develop or seek other government benefits or privileges"); *Clark v. City of Hermosa Beach*, 48 Cal. App. 4th 1152, 1178-84 (1996) (a denial of a fair hearing on a development application did not violate the owners' procedural or substantive due process rights, since the owners had no protected property right or interest in an application for a specific residence).

Whether development is a privilege or a circumscribed limited right, it is clear from California cases, as well as from *Nollan* and *Dolan* that a dedication or impact fee condition will be upheld so long as it does not deny an owner economically viable use of the land, it substantially furthers a legitimate governmental interest and if the required nexus exists.

3. California's "nexus legislation"—the Mitigation Fee Act

In 1987, the Legislature adopted Assembly Bill 1600 (AB 1600), often referred to as the 1987 "nexus legislation." AB 1600 added Government Code sections 66000–66011, which set forth certain requirements that must be followed by a city in establishing or imposing fees. In 1996, the Legislature relabeled AB 1600 and other related sections (Gov't Code §§ 66000–66025) the "Mitigation Fee Act."

In 1996, in an apparent response to the California Supreme Court's decision in *Ehrlich*, the Legislature amended the definition of a "fee" to specifically include both fees established for a broad class of projects by legislation of general applicability and fees imposed on a specific project on an ad hoc basis. Gov't Code § 66000.

Section 66001(a) requires any city that establishes, increases, or imposes a fee as a condition of approval of a development project to do all of the following:

- Identify the purpose of the fee;
- Identify how the fee will be used;
- Demonstrate that a reasonable relationship exists between the purpose of the fee's use and the type of development project on which the fee is imposed; and
- Demonstrate that there is a reasonable relationship exists between the need for the public facility and the type of development project on which the fee is imposed.

Next, Government Code section 66001(b) requires that a city show that there is a "reasonable relationship" between the specific amount of the fee imposed as a condition of approval on a particular development project and the cost of the public facility attributable to that project. Note, however, that impact and development fees imposed pursuant to a development agreement are exempt from the Act. Gov't Code § 60000(b).

The Mitigation Fee Act also contains provisions requiring a city to deposit, invest, account for, and expend such fees (Gov't Code § 66006); to make findings once each fiscal year regarding any portion of the fee remaining unexpended or uncommitted (Gov't Code § 66001(d)); to identify, within 180 days of determining that sufficient funds have been collected, an approximate date of commencing construction of improvements, or else to refund unexpended fees (Gov't Code § 66001(e)); and to adopt capital improvement plans (Gov't Code § 66002). Within 180 days of the close of each fiscal year, a city must make available to the public the beginning and ending balance for the fiscal year, the description and amount of fees, interest, and other income, the identification of public improvements on which fees were expended, the amount of expenditure by city, and the amount of refunds made pursuant to section 66001 during the fiscal year. The city council is to review this information at the next regularly scheduled meeting, not less than 15 days after it becomes available. Gov't Code § 66006(b).

Under the Mitigation Fee Act, a developer may challenge the imposition of a fee, dedication, or other exaction if the developer follows a specified procedure that includes protesting the fee in writing, "at the time of approval or conditional approval of the development or within 90 days after imposition of the . . . exactions." Gov't Code § 66020(d)(1). A city is required to provide written notice of the 90-day protest period to the developer at the time of project approval or imposition of the fees, though the statute is silent regarding any consequences of a city's failure to provide such notice. *Id*.

4. Documenting the nexus

In order to meet the constitutional and statutory nexus requirement, a city must have strong factual support. A good traffic fee study, for example, will anticipate development that is designated in the city's general plan, and estimate future traffic based upon that level of development. A strong study also will use established trip generation rates, or explain the rationale for deviating from those rates. A typical study then will project needed facilities based upon acceptable traffic levels and public transportation criteria set forth in the general plan, estimate the cost and schedule for building those facilities, then allocate the cost of constructing those facilities to new and existing development on a proportional basis.

Russ Bldg. Partnership v. City and County of San Francisco, 199 Cal. App. 3rd 1496 (1987), contains an example of a well-documented fee. In *Russ*, the court upheld a $5-per-square-foot fee imposed on new office development for the San Francisco Municipal Railway System, based on the City's detailed study that documented the need and cost of the facilities. This case was decided before *Nollan* and before the effective date of the Mitigation Fee Act, but follows the principles later enunciated by those authorities.

In contrast, *Bixel Assocs. v. City of Los Angeles*, 216 Cal. App. 3rd 1208 (1989), provides an example of a poorly-documented fee. In this case, the court invalidated the City of Los Angeles' fire hydrant fees because there was no evidence of a proper nexus. The court then cited the proper methodology to analyze such exactions, citing *Russ* 199 Cal. App. 3rd 1496, and *J.W. Jones Cos. v. City of San Diego*, 157 Cal. App. 3rd 745 (1984).

5. Summary of impacts of *Ehrlich* in California

- The *Nollan/Dolan* heightened scrutiny test applies only to development fees imposed on an individual, ad hoc basis in a discretionary permit granting process, and not to general legislatively formulated fees.

- *Nollan/Dolan* does not apply to legislative acts applicable to a general class, e.g., transit fees imposed on downtown office developers (*Blue*

Jeans), housing fees imposed on nonresidential developers (*Commercial Builders*), art fees (*Ehrlich*), nor or in lieu inclusionary housing fees *(Napa Home Builders Ass'n v. City of Napa,* 90 Cal. App. 4th 188 (2001)). Applying this standard, it is clear from *Ehrlich* that cities have the authority to impose fees for a wide range of services, including transit fees, housing, and art, and that so long as cities base development conditions on general legislative determinations, the conditions will almost always be within the police power.

- If a developer wants to challenge an individually applied fee either statutorily or constitutionally, it must follow the statutory framework of the Mitigation Fee Act (Gov't Code §§ 66000–66025). This means that the challenger must file a written protest, pay the fee under protest, and bring suit within a 180-day time frame.
- A city can legally charge a mitigation fee as a condition of a land use change if the discontinuation of the previous private use has public consequences, as long as the *Nollan/Dolan* test has been met.
- An ordinance enacted for aesthetic purposes alone is well within the scope of the city's police power.

6. ***San Remo Hotel* reaffirms *Ehrlich***

The California Supreme Court has reaffirmed the holding and rationale of *Ehrlich* in its recent decision, *San Remo Hotel L.P. v. City and County of San Francisco*, 27 Cal. 4th 643 (2002), wherein the Court said that the in-lieu fees required to pay for replacement housing in a hotel conversion from residential to tourist use were not subject to the heightened scrutiny test of *Nollan/Dolan*. Here, the San Remo Hotel ("Hotel") in San Francisco included both tourist units and residential units for low-income tenants. The Hotel sought to convert the residential rooms to rooms for tourists rather than to longer term residents. The Hotel eventually received approval but, in the process, was required to (1) comply with zoning laws by obtaining a conditional use permit for use of the property as a tourist hotel, and (2) help replace the residential units San Francisco claim that would be lost by the conversion pursuant to the City's Residential Hotel Unit Conversion and Demolition Ordinance ("HCO"), which the Hotel elected to do by paying an in lieu fee into a governmental fund for the construction of low- and moderate-income housing.

The Hotel challenged the conditional use permit requirement, as well as the housing replacement condition, alleging that these caused a taking of private property without just compensation in violation of article I, section 19 of the California Constitution. The trial court denied the writ petition and sustained a demurrer to the takings counts. The Court of Appeal reversed and ordered further findings regarding the need for a conditional use permit and rejected the fee as an unconstitutional taking.

In ruling for San Francisco, the California Supreme Court, in a 4-3 vote, reversed. The Court stated that the HCO's purpose was to "benefit the general public by minimizing adverse impact on the housing supply and on displaced low income, elderly, and disabled persons resulting from the loss of residential hotel units through their conversion and demolition." Accompanying the ordinance were findings that the City suffered from a severe shortage of affordable rental housing and that many elderly, disabled and low-income persons resided in residential hotel units. The HCO made it unlawful to eliminate a residential hotel unit without obtaining a conversion permit or to rent a residential unit for a term shorter than seven days. Violators were subject to civil penalties.

An application to convert residential units to tourist use must include, inter alia, a statement regarding how one-for-one replacement of the units to be converted would be accomplished. The applicant may satisfy the replacement requirement by constructing or bringing onto the market new residential units comparable to those converted; constructing or rehabilitating certain other types of housing for low-income, disabled or elderly persons; or paying to a public or nonprofit housing developer, or to the City's Residential Hotel Preservation

Fund Account, an in lieu fee equal to the replacement site acquisition costs plus a set portion of the replacement construction costs.

The California Supreme Court stated that because the Hotel allowed both residential and tourist rentals, a conditional use permit was required before it could convert to an exclusively tourist hotel. The fact that some of the units were already being used by tourists did not relieve the Hotel from the obligation to obtain a permit to convert the remaining units. Therefore, the City correctly determined that a conditional use permit was required.

Further, the Court held that the in lieu fee imposed on the Hotel did not violate the Takings Clause, and was not subject to the heightened scrutiny test laid down in *Nollan*, *Dolan* and *Ehrlich*. The Court discussed the takings issue under both state and federal law. [14] The Takings Clause of the California Constitution (art. I, § 19) provides: "Private property may be taken or damaged for public use only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner." The federal takings clause (U.S. Const., 5th Amend.) provides: "nor shall private property be taken for public use without just compensation."

The Court stated that by virtue of including "damage[s]" to property as well as its "tak[ing]," the California clause "protects a somewhat broader range of property values" than does the corresponding federal provision. But aside from that difference, not pertinent here, the Court stated that "we appear to have construed the clauses congruently."

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[14] In *San Remo Hotel*, the plaintiffs sought relief only for a violation of article I, section 19 of the California Constitution. However, while cognizant of this point, the California Supreme Court analyzed their takings challenge under the relevant decisions of both the California Supreme Court and the United States Supreme Court. Even though the California clause "protects a somewhat broader range of property values" than does the corresponding federal provision because of its inclusion of the term "damage" as well as "taking," the Court determined that this difference was not relevant in *San Remo Hotel*, and thus construed the clauses congruently. *San Remo Hotel L.P. v. the City and County of San Francisco*, 27 Cal. 4th at 664.

The Court noted that the appellate court held that housing replacement fees assessed under the HCO were subject to *Nollan/Dolan/Ehrlich* heightened scrutiny review because they were exacted discretionarily and applied only to a relatively small number of property owners rather than to "every other property in the City." The Hotel defended this analysis, while the City argued for the more deferential constitutional scrutiny applicable to land use regulations made generally applicable by legislative enactment to a class of property owners.

The Court agreed with the City. Contrary to the appellate court's assertion, and unlike *Ehrlich*, the HCO did not provide city staff or administrative bodies with any discretion as to the imposition or size of a housing replacement fee.

The Court declined the Hotel's invitation to extend heightened takings scrutiny to all development fees, adhering instead to the distinction it drew in *Ehrlich, supra*, between ad hoc exactions and legislatively mandated, formulaic mitigation fees. The Court noted that while legislatively mandated fees do present some danger to improper leveraging, such generally applicable legislation is subject to the ordinary restraints of the democratic political process. A city council that charged extortionate fees for all property development, unjustifiable by mitigation needs, would likely face widespread and well-financed opposition at the next election. Ad hoc individual monetary exactions deserve special judicial scrutiny mainly because, affecting fewer citizens and evading systematic assessment, they are more likely to escape such political controls.

Nor was the Hotel correct that without *Nollan/Dolan/Ehrlich* scrutiny, legislatively imposed development mitigation fees are subject to no meaningful means-ends review. As a matter of both statutory and constitutional law, such fees must bear a reasonable relationship, in both intended use and amount, to the deleterious public impact of the development. Gov't Code, § 66001; *Ehrlich v. Culver City, supra; Associated Home Builders Inc. v. City of Walnut Creek*, 4 Cal. 3rd 633, 640 (1971).

In addition, the Hotel attacked the housing replacement provisions of the HCO both on their face and as applied to the San Remo Hotel. Challenging the ordinance on its face, the Hotel asserted there was no connection between the housing replacement fees assessed and the housing lost by conversion to tourist use. The Court rejected this contention, concluding that the housing replacement fees bore a reasonable relationship to loss of housing based on the wording of the ordinance and its application.

The Court said that the Hotel failed to demonstrate from the face of the ordinance that fees assessed under the HCO bore no reasonable relationship to housing loss in the generality or great majority of cases, the minimum showing that is required for a facial challenge to the constitutionality of a statute. Here, the Hotel sought not merely a change in the zoning affecting the site of the Hotel, but permission to change the use of existing residential facilities on the property. A mitigation fee measured by the resulting loss of housing units was thus reasonably related to the impacts of the Hotel's proposed change in use.

In a strong dissent, Associate Justice Brown, in espousing the importance of private property ownership, stated private property, already an endangered species in California, is now entirely extinct in San Francisco. The City had implemented a neo-feudal regime where the nominal owner of property must use that property according to the preferences of the majorities that prevail in the political process — or worse, the political powerbrokers who often control the government independently of majoritarian preferences. Thus, "the lamb [has been] committed to the custody of the wolf." (6 The Works of John Adams, *Discourses on Davila* 280 (1851).) Justice Brown continued, stating that San Francisco has redefined the American dream. Where once government was closely constrained to increase the freedom of individuals, now property ownership is closely constrained to increase the power of government. Where once government was a necessary evil because it protected private property, now private property is a necessary evil because it funds government programs. Thus, Justice Brown said that the HCO was facially unconstitutional under the Takings Clause of the California Constitution.

H. Opportunities for Dedications or Fees[15]

1. In general

The land use approval process provides many opportunities for a city to require dedication of land and payment of fees as conditions of approval of a development project. Such occasions include, but are not limited to, general and specific plan adoption or amendment, zoning, use permit, variance, subdivision or building permit approval, and approval of property development agreements. Exactions and dedications can be required for a wide range of purposes, such as streets, sewers, drainage, parks, and off-site improvements, and might include fees for building child day care centers in commercial developments, public art, financing a municipal transit system, or providing library sites, police or fire stations, or affordable housing.

2. The general plan

Under the umbrella of its police power, a city can look to its zoning ordinance, subdivision ordinance, and use permit provisions for many of the standard types of dedications. However, more cities now are relying upon the general plan or applicable specific plan to support dedication or fee requirements. Given that the general plan is considered the constitution for development, it makes sense that dedication requirements can flow from goals and policies contained in such plans. *See J.W. Jones Cos. v. City of San Diego*, 157 Cal. App. 3rd 745, 749 (1984). Since all land use approvals must be consistent with the goals, policies, and objectives of the general plan, conditions can be attached to achieve these goals.

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[15] *See* Governor's Office of Planning and Research, A Planner's Guide to Financing Public Improvements (June 1997), for an excellent overview of various methods for processing public improvements, including impact fees, Mello-Roos taxes and school district financing.

For example, in *Soderling*, the court upheld the City's requirement that smoke detectors be installed in all units in a condominium conversion. In so doing, it reasoned that this requirement flowed from the City's general plan to "promote safe housing for all." *Soderling v. City of Santa Monica*, 142 Cal. App. 3rd 501, 506 (1983). This condition was seen as a valid means to achieve the goals of the city's general plan. Therefore, the power to impose the condition need not be expressed by the specific enactment of an ordinance or promulgation of a regulation, because the Subdivision Map Act requires consistency with the general plan.

Similarly, in *J.W. Jones*, the court ruled that the City of San Diego properly exercised use its police power to impose a facilities benefits assessment ("FBA") on developers in order to carry out its general development scheme as "sketched in the general plan" of the City. *See J.W. Jones Cos. v. City of San Diego*, 157 Cal. App. 3rd 745 (1984). An FBA would require the installation of a broad spectrum of public improvements by the developer, such as public libraries and fire stations, which in the past had been financed by general city revenues. The court stated, "[T]he ordinance is the key to implementing San Diego's controlled growth concept as formalized by the general plan and community plan . . . . The vision of San Diego's future as sketched in the general plan is attainable only through the comprehensive financing scheme contemplated by the FBA." *Id.* at 757–58.

Thus, given the propriety of tying exactions to general plan goals, some cities have amended their general plans to adopt goals and policies relating to the need for child day care centers, public libraries, and fire stations and have, in turn, adopted ordinances requiring developers to pay a fee for those purposes.

3. Subdivision process

Dedications and development fees are generated from three basic sources in the subdivision approval process:

- Specific conditions that may be imposed by local ordinance through the specific statutory authorization contained in the Subdivision Map Act (Gov't Code §§ 66410–66499.58) and related statutes.

- Environmental mitigations that may be imposed through the CEQA process (Pub. Res. Code §§ 21000–21177), and through Government Code section 66474(e), which requires denial of maps likely to cause substantial environmental damage.

- Conditions that may be imposed through the definitions of "design" and "improvement" in the Subdivision Map Act and reliance on the general plan.

If a dedication or fee is attached to the approval of a map based on the specific statutory authorization of the Subdivision Map Act, then that criteria set forth in the Map Act governs. However, a different rule applies if a dedication or fee is attached to a non-subdivision approval, e.g., a PUD or CUP. In these situations, the imposition of the requirement is governed by the city's general police power as interpreted under the nexus rules. For example, if a city wants to impose a condition requiring parkland dedication or payment of fees for park or recreational facilities, as part of the subdivision process, a city, by ordinance, may do so. Gov't Code § 66477; *see also Associated Home Builders, Inc. v. City of Walnut Creek*, 4 Cal. 3rd 633 (1971). Therefore, if the city attaches this condition to the approval of a map, it must adhere to the limitation of three to five acres per 1,000 residents set forth in the Map Act. But, if a city's general plan calls for six or seven acres per 1,000 residents, then a city may impose this higher standard under its general police power if this condition is attached to a non-subdivision approval, like a PUD or CUP, rather than the map approval and the city has adopted a regulation to that effect. *See* 73 Ops.Cal.Atty.Gen. 152, 156 (1990).

I. Special Requirements Relating to Imposition of Fees

1. Waiting period before fees become effective; public hearing required

State law requires a 60-day waiting period before new fees or increased fees on development can go into effect. Gov't Code § 66017(a). This waiting period applies not only to processing fees but to development fees, such as circulation and drainage fees. Also, properly noticed public hearing must be conducted pursuant to Government Code section 66016.

In addition, state law imposes a general 10-day newspaper notice and public hearing requirement with respect to the adoption or increase of any fee, if that fee would not otherwise be subject to other statutory notice requirements (*i.e.*, Government Code sections 66017 and 66016). Gov't Code § 66018.

2. When fees are required to be paid

In general, a city that "imposes fees or charges for the construction of public improvements or facilities on a residential development" cannot require payment of the fee until the date of the final inspection or the date the certificate of occupancy is issued, whichever is first. Gov't Code § 66007. However, there is an exception to this deferral requirement. Government Code section 66007 has two purposes: to require cities to defer payment of general development fees so that developers will no longer be required to pay the fees as early in the process, and to encourage cities to specify how money collected from fees will be spent prior to being able to collect it. A city may collect fees at an earlier time if the city determines prior to the final inspection or the issuance of a certificate of occupancy that:

- The fees will be collected for public improvements or facilities for which an account has been established and funds appropriated, and the local agency has adopted a proposed construction schedule or plan for the project; or
- The fees are to reimburse the local agency for expenditures previously made.

Id.

Cities may require applicants for building permits to enter into a contract to pay the required fees. Gov't Code § 66007. The contracts must be recorded, and are enforceable against successors in interest to the homebuilder. The contracts may require notification to the local agency when any escrow for sale of a unit is opened, and may also require the fees to be paid out of escrow before any sale proceeds are disbursed to the seller. *Id*.

Utility service fees also are exempt from the deferral requirement. Utility service fees may be collected at the time an application for utility service is received. *Id*.

In a 1990 case, the *RRLH* court held that Government Code section 66007 was not applicable to school impact fees. The court stated that the specific provision relating to payment of school development fees (former Gov't Code § 53080) prevailed over the general provisions of Government Code section 66007. Therefore, the fees had to be paid before obtaining a building permit. *See RRLH, Inc. v. Saddleback Valley Unified Sch. Dist.*, 222 Cal. App. 3rd 1602, 1611 (1990). The ruling in *RRLH* is probably also applicable to timing of fees specified in the Subdivision Map Act, such as fees for bridges and major thoroughfares. Gov't Code § 66484.

3. Reasonableness of development fee amount

As discussed previously regarding the Mitigation Fee Act, when a city imposes any fee or exaction as a condition of approval of a proposed development, those fees or exactions shall not exceed the estimated reasonable cost of providing the service or facility for which the fee or exaction is imposed. Gov't Code § 66005. Furthermore, cities are required to comply with certain fee-identification requirements and the like before establishing, increasing, or imposing a fee. Gov't Code § 66001.

4. Fees cannot be levied for maintenance and operation

Fees cannot be levied on development projects for the maintenance or operation of public capital facility improvements. Gov't Code § 65913.8. However, a maintenance and/or operation fee may be required if the improvement is designed and installed to serve only the specific development project on which the fee is imposed and the improvement serves 19 or fewer lots or units, so long as the city makes a finding based upon substantial evidence, that it is infeasible or impractical to form an assessment district or to annex into one. In addition, this type of fee can be required if the improvement is within a water, sewer maintenance, street lighting, or drainage district if an assessment district will be created. This section does not affect developer fees for the construction of capital improvements.

J. Dedication of Land—Reconveyance to Subdivider

Government Code section 66477.5 provides that if a subdivider is required to make a dedication of land in fee (not an easement) for public purposes (other than for open space, schools, or parks), the city to which the land is dedicated must record a certificate with the county recorder, identifying the subdivider and the land being dedicated, and stating that the land shall be reconveyed to the subdivider if the same public purpose for which it was dedicated no longer exists, or the land or a portion thereof is not needed for public utilities. The subdivider may request that the city make such a determination and reconvey the land to the subdivider as provided above, but the city may assess a fee for making the determination. The fee may not exceed the cost of making the determination. If land is to be reconveyed, it shall be reconveyed to the subdivider or its successor in interest. The law also provides that the city must give the subdivider whose name appears on the certificate 60 days' notice prior to vacating, leasing, selling, or otherwise disposing of the dedicated property, unless the dedicated property will be used for the same public purpose for which it was dedicated.

K. School District Facilities Fee

1. Background[16]

In 1985, the California Supreme Court held that a city could impose fees on new construction to mitigate impacts on school districts. *See Candid Enters., Inc. v. Grossmont Union High Sch. Dist.*, 39 Cal. 3rd 878, (1985). In 1986, the Legislature adopted the School Facilities Legislation in an attempt to moderate the effects of the *Candid Enters*. decision. Former Educ. Code § 17620; Gov't Code § 65995 ("Sterling Act"). The Sterling Act capped school fees at $1.50 per square foot for residential development and $0.25 per square foot for commercial/industrial development, subject to biennial adjustments for inflation. *Id*. The California Supreme Court held that Government Code section 65995, relating to school fees, preempted local agencies, including a school district, from imposing other development fees or special taxes on developers. *See Grupe Dev. Co. v. Superior Court*, 4 Cal. 4th 911, 919 (1993).

The Sterling Act declared that the financing of school facilities with development fees is a matter of statewide concern and that the Legislature occupied the subject matter to the exclusion of all local measures. Former Gov't Code § 65995(e). It also prohibited a public agency, acting under CEQA (Pub. Res. Code §§ 21000–21177) or the Subdivision Map Act (Gov't Code §§ 66410–66499.58), from denying approval of a project based on the adequacy of school facilities. Former Gov't Code § 65996; *see also Corona-Norco Unified Sch. Dist. v. City of Corona*, 13 Cal. App. 4th 1577 (1993).

At first it appeared that the Sterling Act strictly limited the power of a city and a school district to deal with impacts of development on schools. However, later judicial decisions

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16 For an excellent historical review of the legislative and judicial history of school development fees, *see Grupe Dev. Co. v. Superior Court,* 4 Cal. 4th 911 (1993). In *Grupe,* the court held that the 1986 Legislation preempted the field of school construction financing and declared invalid a special tax ($1,500 per unit) adopted after Proposition 13 and under its provisions by two-thirds vote. *See also* Sandra L. Silberstein, *Financing Schools in the 90's,* 2 CEB Land Use & Env. Forum 281 (Fall 1993); *Western/Cal. Ltd. v. Dry Creek Joint Elementary Sch. Dist.,* 58 Cal. App. 4th 1461 (1996).

interpreted the Act as allowing cities to consider the availability of school facilities when making "legislative" decisions, such as general and specific plan adoptions and amendments and zoning changes. *William S. Hart Union High Sch. Dist. v. Reg'l Planning Comm'n*, 226 Cal. App. 3rd 1612, 1624 (1991); *Murrieta Valley Unified Sch. Dist. v. County of Riverside*, 228 Cal. App. 3rd 1212, 1220, 1229, 1234 (1991); *Mira Dev. Corp. v. City of San Diego*, 205 Cal. App. 3d 1201, 1218 (1988). In *Mira*, *Hart*, and *Murrieta* the limitations of the Act were determined to apply only to "adjudicatory" project approvals (e.g., map approvals, conditional use permits). The courts held that cities therefore could deny or modify legislative approvals (despite the developer's willingness to pay the Act's school fees) based on inadequate school facilities.

Leroy F. Greene School Facilities Act Of 1998 (SB 50). In 1998, the Legislature made significant amendments to the statutory scheme for school fees. Most importantly, the legislation sought to override the rule of the *Mira-Hart-Murrieta* trilogy; i.e., the statutory limitations on school impact fees and mitigation apply only to adjudicative, not legislative, actions.

The express inclusion of "legislative" approvals in the statute evidences a clear legislative intent to overturn the *Mira-Hart-Murrieta* line of cases. The Legislature also included a clear statement of its intent to occupy the field:

> The Legislature finds and declares that the financing of school facilities and the mitigation of the impacts of land use approvals, whether legislative or adjudicative . . . on the need for school facilities are matters of statewide concern. For this reason, the Legislature hereby occupies the subject matter of requirements related to school facilities levied or imposed in connection with, or made a condition of, any land use approval, whether legislative or adjudicative act . . . and the mitigation of the impacts of land use approvals, whether legislative or adjudicative . . . on the need for school facilities, to the exclusion of all other measures, financial or nonfinancial, on the subjects. For purposes of the subdivision,

> "school facilities" means any school-related consideration relating to a school district's ability to accommodate enrollment.

Gov't Code § 65995(e).

Senate Bill 50 ("SB 50") included a $9.2 billion state bond measure that was approved by the voters as Proposition 1A in the November 3, 1998 general election. The approval of Proposition 1A, effective November 4, 1998, made operative other provisions of SB 50 that amended the laws governing school impact fees and other mitigation measures. SB 50 amended Government Code section 65995(a) to prohibit state or local agencies from imposing school impact mitigation fees, dedications, or other requirements in excess of those provided in the statute in connection with "any legislative or adjudicative act . . . by any state or local agency involving . . . the planning, use, or development of real property . . . ." Consistent with prior statutes, school districts are limited to imposing only the school impact fees authorized by statute. Educ. Code § 17620. *See Warmington Old Town Assoc. v. Tustin Unified School Dist.*, 101 Cal. App. 4th 840 (2002) (affirming refund of school fees paid by developer because the fees were in excess of those authorized under Education Code section 17620).

The legislation also amended Government Code section 65996(b) to prohibit local agencies from using the inadequacy of school facilities as a basis for denying or conditioning approvals of any "legislative or adjudicative act . . . involving . . . the planning, use, or development of real property . . . ." The former version of this statute extended only to approvals under the Subdivision Map Act or CEQA.

It also establishes the base amount of allowable developer fees at $2.14 per square foot for residential construction and $0.34 per square foot for commercial, as established by the State Allocation Board. Gov't Code § 65995(b). *See also* www.opsc.dgs.ca.gov/Programs (provides updated information regarding statutory developer fees). These base amounts are commonly called Level 1 fees and are the same caps that were set by the State Allocation Board in January 2000.

In certain circumstances, for residential construction, school districts can impose fees in excess of Level 1 fees. School districts can impose fees equal to 50 percent of land and construction costs (commonly called Level 2 fees) if they prepare and adopt a school facilities needs analysis, and the State Allocation Board determines the district to be eligible to impose Level 2 fees. In addition, as of January 1, 2000, the district must meet at least two of the following four conditions to impose Level 2 fees (Gov't Code § 65995.5):

- At least 30 percent of the district's students are on a multitrack year-round schedule.
- The district has placed on the ballot within the previous four years a local school bond that received at least 50 percent of the votes cast.
- The district has passed bonds equal to (a) 15 percent of its bonding capacity *prior* to November 4, 1998 or (b) 30 percent of its bonding capacity *after* November 4, 1998.
- At least 20 percent of the district's teaching stations are relocatable classrooms.

Also, if the state's bond funds are exhausted, a school district that is eligible to impose Level 2 fees will be authorized to impose even higher fees, which are commonly referred to as Level 3 fees, equal to 100 percent of land and construction costs of new schools required as a result of new developments.

Note that the legislation includes various "grandfathering" provisions for projects already underway:

- Residential projects subject to a pre-November 4, 1998 contract with a local agency requiring school mitigation are not affected. Gov't Code §§ 65995(c)(1), (2).
- Residential projects not subject to a contract, but approved in connection with a legislative act before November 4, 1998, with school impact mitigation conditions, remain subject to those conditions if building

permits were issued before January 1, 2000. Construction after that date, however, cannot be subject to a fee or other requirement that exceeds the limits established by SB 50. Gov't Code § 65995(c)(3).

- Projects not subject to contract or approval conditioned on mitigation may not be subjected to fees that exceed the limits established by SB 50 if both of the following conditions are met: (1) a tentative map, development permit, or conditional use permit was approved before November 4, 1998; and (2) a building permit was issued before January 1, 2000. Gov't Code § 65995(c)(4).

Nonprofit private university is not exempt from school fees. In *Loyola Marymount University*, the court held that a nonprofit, private university was not entitled to an exemption from school impact fees in connection with its construction of a new business school. *See Loyola Marymount Univ. v. Los Angeles Unified Sch. Dist.*, 45 Cal. App. 4th 1256 (1996).

Loyola Marymount University, a nonprofit Catholic institution, acquired vacant land adjacent to its Los Angeles campus. The university intended to construct a new building to house a postgraduate business school and a new parking structure. Loyola applied for a building permit, which would not be issued unless it paid the school development fees authorized by the Sterling Act. Loyola paid $37,483 in school development fees under protest and then petitioned for a writ of mandamus. The trial court ordered the Los Angeles Unified School District to refund the fees with interest.

In ruling for the school district, the appellate court reversed. In doing so, it stated that to offset the burden imposed on school districts by new development, Education Code section 17620 (former Gov't Code § 53080(a)(1)) authorizes school districts to levy a fee against all residential, commercial, and industrial development projects that are not subject to exemption to fund the construction of school facilities. *Id*. at 1261. Loyola's proposed project qualified as commercial use since the school offered services in exchange for money. *Id*. at 1264. Moreover, Loyola did not qualify for an exemption from school facilities fees for state entities or facilities used exclusively for religious purposes. *Id*. at 1267.

Redevelopment construction is not exempt from school fees. In *Warmington,* a case of first impression, the court held that redevelopment construction is not exempt from the imposition of school-impact fees. *Warmington Old Town Assoc. v. Tustin Unified Sch. Dist.*, 101 Cal. App. 4th 840 (2002).

In this case, as part of a redevelopment project, the developer demolished 56 apartment units in the City of Tustin and replaced them with 38 single-family homes. The school district then imposed $122,080 in school impact fees, based on the total square footage of the 38 single-family homes, considering them "new residential construction" within the meaning of Education Code section 17620(a)(1)(B). The developer paid the fees under protest, then filed a petition for a writ of mandate, claiming that he was owed a "credit" with respect to the 56 units that were replaced, and the district failed to establish a sufficient nexus between the fee and the purported impact.

With respect to the developer's first contention, the court held that Education Code section 17620 permits school districts to impose school-impact fees on "new residential construction." These fees also apply to the resulting increase in space of "other residential construction." The court acknowledged that including an exemption for redevelopment projects would be consistent with the purpose of the statutory scheme, i.e., to address the impact on the affected school district related to the increase in students generated by the development. However, it rejected this argument because it would render section 17626 (exemption for remodeling projects) superfluous. Therefore, to harmonize the exemptions provided in sections 17620 and 17626, the court concluded that the demolition of apartments and replacement with houses does not fall within the scope of "other residential construction" entitled to a credit. 101 Cal. App. 4th at 850-51.

The court also addressed the question of whether the Fee Study presented by the district in support of the imposition of school fees established the reasonable relationship required under Government Code section 66001. The Fee Study evaluated the impact of building new homes, which would generate new students, thereby impacting the district. However, the court held that the Fee Study was not sufficient to establish the required nexus between the amount of the fee imposed and the burden created. 101 Cal. App. 4th at 851. In so holding, the court pointed out the flaws in this study as applied to redevelopment projects:

> [T]he Fee Study gives no thought to the extent of the impact of a tract of homes that are newly constructed in the place of older residential housing previously existing on the same site. It gives no consideration to whether those newly constructed replacement homes in fact generate additional numbers of students over and above those who occupied the previous homes at the site . . . . It suggests no method for estimating the impact of new construction in the redevelopment context, in which new homes may generate no more students than replaced homes did previously or may even generate fewer students."

Id. at 859.

Level of scrutiny for school fees. Loyola also argued that due process requires that fees be imposed only where there is a nexus between the state interest served by the fees and the proposed project. *Loyola*, 45 Cal. App. 4th at 1270 (citing *Dolan v. City of Tigard*, 512 U.S. 374 (1994)). Relying on *Ehrlich*, however, the court rejected this argument since *Nollan/Dolan* test is not applicable to legislatively formulated development fees imposed on a class of property owners, but was applicable to individually applied ad hoc fees. The court then stated:

> Unlike *Ehrlich*, the present case falls within the general category of development fees. In light of *Ehrlich's* discussion, we conclude that the heightened scrutiny standards articulated by the United States Supreme Court in takings clause cases have no application in California cases involving development fees.

Loyola is consistent with other cases that have held that the action of imposing a school fee was a legislative act reviewable under ordinary mandate (Civ. Proc. Code § 1085), therefore the fee need only meet the "reasonable relationship" test. *See Garrick Dev. Co. v. Hayward Unified Sch. Dist.,* 3 Cal. App. 4th 320, 327-28 (1992); *Western/Cal. Ltd. v. Dry Creek Joint Elementary Sch. Dist.,* 50 Cal. App. 4th 1461, 1492 (1996).

L. CEQA

Although CEQA does not independently authorize a city to impose dedications or exactions, the statute is intended to be used in conjunction with the police powers or other discretionary powers granted to public agencies by other laws. Cal. Code Regs. tit. 14, § 15040. Therefore, so long as a dedication or exaction is carried out under some other authority, CEQA provides a basis for analyzing and considering the effects of a particular exaction. The CEQA Guidelines provide that "a lead agency for a project has the authority to require feasible changes in any or all activities involved in the project in order to substantially lessen or avoid significant effects on the environment, consistent with applicable constitutional requirements such as the 'nexus' and 'rough proportionality' standards established by case law." Cal. Code Regs. tit. 14, § 15041 (citing *Nollan v. California Coastal Comm'n*, 438 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994)).

M. Conclusion

The application of the *Nollan/Dolan* test to impact fees, like the totality of takings jurisprudence, is an ever-evolving area of the law. As local governments increasingly rely on impact fees to mitigate the effects of burgeoning development, many states will face the challenge of resolving disputes alleging the constitutional invalidity of such fees. California has set a worthy example of a reasoned interpretation of the *Nollan/Dolan* test to impact fees that will continue to resonate nationally. Hopefully, states facing this issue will continue to look to the *Ehrlich* court for guidance, thereby facilitating the development of a consistent and cohesive body of takings law.

II. DEVELOPMENT AGREEMENTS

A. Introduction

One of the most important goals a developer must achieve is to protect its ability to complete the project once all land use and discretionary approvals have been obtained. For example, in many states, after the developer has received a general plan amendment, rezoning, tentative and final map approval, and then has obtained all other various discretionary land use permits in order to develop over a period of time, the developer should try to guarantee its rights to complete the project as approved. Land use laws affecting the project might change while the project is underway either because of switch in local government legislative policy or due to revisions made by the people through the initiative process. This is becoming more common in very recent years because city, county, state and national governmental leaders have jumped on the anti-sprawl bandwagon. Today, many local governments have adopted strict land use regulations under banners such as "Smart Growth," "Sustainable Growth," "Livable Communities, "New Urbanism" and "Stopping Sprawl." When this occurs, a developer many times cannot rely on common law vested rights. The development agreement, when available, provides the developer with another option to obtain vested rights, while at the same time benefiting the local government by enabling it to obtain exactions and impose other land use conditions that are not authorized by local laws or might not be legal under the *Nollan* "nexus" test and *Dolan* "rough proportionality" test. *Dolan v. City of Tigard*, 512 U.S. 374 (1994); *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987).

Thirteen states so far have adopted legislation enabling local governments to enter into development agreements with property owners/developers. This section primarily focuses on development agreements in California, where they are used extensively.[17]

B. Vested Rights: California's Experience

On occasion, at planning commission and city council meetings, a property owner will speak in opposition to a proposed general plan and/or zoning change and claim that the city[18] has no right to change the law governing his project, because he has done significant planning and construction work on the project. The property owner raises the issue of vested rights.

1. The *Avco* rule

The basic rule is that if a city changes its land use regulations, a property owner cannot claim a vested right to build out a project unless it has obtained a building permit, and performed substantial work and incurred substantial liabilities in good faith reliance upon the permit. This common law vested rights rule in California was reaffirmed when the California Supreme Court stated:

> It has long been the rule in this state and in other jurisdictions that if a property owner has performed substantial work and incurred substantial liabilities in good faith reliance upon a permit issued by the government, he acquires a vested right to complete construction in accordance with the terms of the permit. [Citations omitted.] Once a landowner has secured a vested right the government may not, by virtue of a change in the zoning laws,

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[17] See Ariz. Rev. Stat. Ann. § 9-500.05 (West 1996 & Supp. 2000) (amended 1997); Cal. Gov't Code § 65864 (West 1997); Colo. Rev. Stat. § 24-68-101 to –106 (2000); Fla. Stat. Ann. § 163.3220 (West 2000); Haw. Rev. Stat. § 46-123 (1993); Idaho Code § 67-6511A (1995 & Supp. 2000) (amended 1999); La. Rev. Stat. Ann. § 33:4780.22 (West 1988 & Supp. 2000); Nev. Rev. Stat. § 278.0201 (1997); N.J. Stat. Ann. § 40:55D-45.2 (West 1991); Or. Rev. Stat. § 94.504 (1999) (enacted into law in 1993 by the Legislative Authority but not made a part of the Oregon Revised Statutes until much later); S.C. Code Ann. § 6-31-10 (Law. Co-op. Supp. 2000); Va. Code Ann. § 15.2-2303.1 (Michie 1997) (applies only to counties with a population between 10,300 and 11,000 and developments consisting of more than 1000 acres); Wash. Rev. Code Ann. § 36.70B.170 (West 1991 & Supp. 2000).

[18] When the word "city" is used herein, it also means "county;" "city council" also means "board of supervisors."

> prohibit construction authorized by the permit upon which he relied.

Avco Community Developers, Inc. v. South Coast Reg'l Comm'n, 17 Cal. 3rd 785, 791 (1976).

The *Avco* court stated further, however, that:

> [N]either the existence of a particular zoning nor work undertaken pursuant to governmental approvals preparatory to construction of buildings can form the basis of a vested right to build a structure which does not comply with the laws applicable at the time the building permit is issued.

Id. at 793.

Plaintiff Avco owned approximately 8,000 acres of land in Orange County, a small portion of which was located within the coastal zone. Prior to February 1, 1973, the date on which the coastal zoning permit requirement became effective, Avco had obtained zoning, tentative, and final subdivision map approval and had completed or was in the process of constructing storm drains, improvements of utilities, and similar facilities for the subdivision tract. However, no building permits had been issued for unit construction. The company had spent $2,000,000 and had incurred additional liabilities of $750,000 for the development of the subdivision tract. Avco argued that it was not required to obtain a coastal zoning permit because it had a vested right to proceed with its development based upon the fact that it had obtained all discretionary entitlements and had installed extensive utility improvements. The California Supreme Court held that Avco had no vested right to proceed:

> By zoning the property or issuing approvals for work preliminary to construction the government makes no representation to a landowner that he will be exempt from the zoning laws in effect at the subsequent time he applies for a building permit or that he may construct particular structures on the property, and thus the government cannot be estopped to enforce the laws in effect when the permit is issued.

Id. at 793.

In summarizing the policy behind the vested right rule, the Court stated:

> Our conclusion that Avco has not acquired a vested right under the common law to proceed with its development absent a permit from the commission is not founded upon an obdurate adherence to archaic concepts inappropriate in the context of modern development practices or upon a blind insistence on an instrument entitled "building permit."
>
> If we were to accept the premise that the construction of subdivision improvements or the zoning of the land for a planned community are sufficient to afford a developer a vested right to construct buildings on the land in accordance with the laws in effect at the time the improvements are made or the zoning enacted, there could be serious impairment of the government's right to control land use policy. In some cases the inevitable consequence would be to freeze the zoning laws applicable to a subdivision or a planned unit development as of the time these events occurred.
>
> Thus tracts or lots in tracts which had been subdivided decades ago, but upon which no buildings have been constructed could be free of all zoning laws enacted subsequent to the time of the subdivision improvement, unless facts constituting waiver, abandonment, or opportunity for amortization of the original vested right could be shown. In such situations, the result would be that these lots, as well as others in similar subdivisions created more recently or lots established in future subdivisions, would be impressed with an exemption of indeterminate duration from the requirements of any future zoning laws.

Id. at 797–98.

Other cases have applied the same principle. *See Hill v. City of Manhattan Beach*, 6 Cal. 3rd 279, 286–87 (1971) (application of a subsequent zoning ordinance to a previously divided parcel, that prohibited development or sale of one of the lots unless a variance was obtained was proper); *Oceanic Cal., Inc. v. North Cent. Coast Reg'l Comm'n*, 63 Cal. App. 3rd 57, 70 (1976) (although a county repeatedly had approved developer's concept of a planned community development, such general approval was not sufficient basis for a claim of vested rights without securing the necessary coastal permit). *See also Hermosa Beach Stop Oil Coalition v. City of Hermosa Beach*, 86 Cal. App. 4th 534, 552 (2001) (no right to develop vests until all final discretionary permits have been authorized and significant "hard costs" have been expended in reliance on those permits, *i.e.*, until substantial construction has occurred in reliance on a building permit).

In *Morehart*, the California Supreme Court stated that the Subdivision Map Act merger provisions (Gov't Code § 66451.10 *et seq.*) do not affect the applicability of zoning ordinances requiring minimal parcel size for development as long as the requirements are not conditioned upon parcel merger. *Morehart v. County of Santa Barbara*, 7 Cal. 4th 725, 748-49 (1994); *see also Golden State Homebuilding Assocs. v. City of Modesto*, 26 Cal. App. 4th 601, 612 (1994) (a city that had no established fee policy when a map application was completed could not have conditioned its approval of the map on payment of impact fees, and therefore subsequently could require payment of the fees as a condition of issuance of building permits).

In summary, as a general rule, a developer must comply with the laws in effect at the time the building permit is issued. *See Hazon-Iny Dev., Inc. v. City of Santa Monica*, 128 Cal. App. 3rd 1, 10–11 (1982).

2. Refinements of the *Avco* rule

Courts subsequently have refined and limited the *Avco* rule. First, the rights that may vest upon reliance on a governmental permit are no greater than those specifically granted by the permit itself. *See Santa Monica Pines, Ltd. v. Rent Control Bd.*, 35 Cal. 3rd 858, 866 (1984). This rule was applied in *Powers*, where the court held a city was not estopped from imposing a later-enacted ordinance restricting the resale price of units on a previously approved condominium conversion. *See People v. Thomas Shelton Powers, M.D., Inc.*, 2 Cal. App. 4th 330, 337-38 (1992). Noting that the developer's right to convert the apartment was unaffected by the city's code amendments, the court held that no vested rights were affected. Therefore, the rule in *City of W. Hollywood v. Beverly Towers, Inc.*, which states that a city may not impose conditions on condominium conversion after a developer secures all necessary discretionary approvals and satisfies all the requirements established by the state law, did not apply. 52 Cal. 3rd 1184 (1991).

Second, an owner of undeveloped land has no vested right in existing zoning, more valuable zoning that may have been anticipated, or zoning for the highest and best use of the property. *See Gilliland v. County of Los Angeles*, 126 Cal. App. 3rd 610, 617 (1981).

Third, an invalid permit vests no rights. The California Supreme Court held that a developer could not claim a vested right in reliance upon a permit he had reason to know might be defective. *See Strong v. County of Santa Cruz*, 15 Cal. 3rd 720, 725 (1975). Another court further held that a property owner who had constructed improvements in reliance upon an invalid building permit could be required to remove the structure, even though the permit was regular on its face and the property owner acted without actual knowledge of any defect in it. *See Pettitt v. City of Fresno*, 34 Cal. App. 3rd 813, 823 (1973). The following year, in *People v. County of Kern*, the court held that a property owner could not obtain vested rights in reliance upon an approval obtained in accordance with the requirements of the county where the rules and practices adopted by the county did not conform strictly to the requirements of state law. 39 Cal. App. 3rd 830 (1974).

A property owner also cannot rely on written statements made by a public official unless the official is authorized to make those statements. *See Burchett v. City of Newport Beach*, 33 Cal. App. 4th 1472 (1995). In *Burchett*, the property owners alleged a breach of a written agreement with the City of Newport Beach, claiming that the City agreed to allow the property owners to improve real property with a two story condominium structure. The allegation was based on a letter from the property owners to the planning department asking for a permit to use an existing, nonconforming driveway, on which letter an assistant planner had marked a notation that the facts were "correct."

The court first noted that the city's charter provided that it could not be bound by any contract unless it was in writing, approved by the city council and signed on behalf of the city by the mayor and the city clerk or by another designated officer. 33 Cal. App. 4th at 1479. Second, the assistant planner was neither the person to contact for an "encroachment permit" nor a member of the correct department. The court cited *Horsemen's Benevolent & Protective Ass'n v. Valley Racing Ass'n*, 4 Cal. App. 4th 1538, 1563–64 (1992), for the proposition that "no government, whether state or local, is bound to any extent by an officer's acts in excess of his authority." *Id*. Based on this reasoning, it then held that any purported right to develop was invalid. 33 Cal. App. 4th at 1480. "[O]ne who deals with a public officer stands presumptively charged with a full knowledge of that officer's powers, and is bound at his peril to ascertain the extent of his powers to bind the government for which he is an officer, and any act of an officer to be valid must find express authority in the law or be necessarily incidental to a power expressly granted." *Id*. *See also G.L. Mezzetta, Inc. v. City of America Canyon*, 78 Cal. App. 4th 1087, 1093 (2000) (general law city was not bound by oral contract because it did not comply with Government Code section 40602 and relevant city code provisions).

Fourth, a vested right may be restricted or revoked if the use would be a menace to the public health and safety or a public nuisance. *See Davidson v. County of San Diego*, 49 Cal. App. 4th 639, 648 (1996) (a county's major use permit and 650-foot setback requirements to build a crematorium were sufficiently necessary to the public welfare to justify impairment of vested rights).

Fifth, a city-promulgated administrative regulation relied on by an owner in proceeding with a condominium conversion may be a valid basis for estoppel against the city, even though the city later enacts an ordinance that would have prevented the conversion. *See Hock Inv. Co. v. City and County of San Francisco*, 215 Cal. App. 3rd 438, 449 (1989); *see also City of W. Hollywood v. Beverly Towers, Inc.*, 52 Cal. 3rd 1184 (1991). In *Beverly Towers*, several apartment building owners had obtained final map approval from Los Angeles County to convert their rental units into condominiums. The owners also had obtained permission to sell individual units as condominiums from the California Department of Real Estate. The owners did not need any further permits to complete the conversion. The California Supreme Court held that a newly incorporated city could not enforce new condominium regulations after final map and Department of Real Estate approval. The Court further held that it made no difference that the owners had not sold any units. *Id*. at 1190.

While these decisions have created some limits on the *Avco* rule, California courts continue to rely on *Avco* to define what constitutes a vested right. For example, subdivision approval for condominium conversions does not give a developer a vested right against later-enacted police power ordinances. *See Santa Monica Pines*, 35 Cal. 3rd 858, 866 (1984) (converter had to obtain a permit from the rent control board since reliance upon tentative map approval was inadequate to establish vested rights); *Consaul v. City of San Diego*, 6 Cal. App. 4th 1781, 1794 (1992) (reaffirming *Avco*). In *H & H Properties*, the developer was required to comply with the county's later enacted rent control ordinance even though he already had obtained tentative and final map approval. *People v. H & H Properties*, 154 Cal. App. 3rd 894, 900 (1984). "Vested rights is not the question here. H & H is free to proceed. It simply must pay somewhat more than it expected for the privilege of engaging in a condominium conversion in Los Angeles County in the 1980's." *Id*. at 902.

In a California Supreme Court case, developers were ordered to comply with a transit impact development fee even though they had acted on building permits and had begun construction before the fee ordinance went into effect. *See Russ Bldg. Partnership v. City and County of San Francisco*, 44 Cal. 3rd 839, 847 (1988). The fee was imposed pursuant to a generally worded condition of approval requiring the developer's participation in some type of transportation funding. The Court held that the developers did not have a vested right to develop free of imposition of the transit impact fee under the *Avco* rule because of the "open ended" condition attached to the earlier approval. *Id*. *See also Blue Jeans Equities W. v. City and County of San Francisco*, 3 Cal. App. 4th 164, 172 (1992).

In summary, a developer acts at its peril if it relies solely on a building permit to define what actions are valid. This is true even after the building has been erected. If this reliance proves to have been misplaced, the city can require the developer to remove the building.

C. Development Agreements -- The California Statute[19]

In 1979, in an attempt to soften the impact of the *Avco* decision, the California Legislature enacted a statute establishing a property development agreement procedure. Gov't Code § 65864 *et seq.*

The principal provisions of the legislation governing development agreements are as follows:

- Cities are given express authorization to enter into a development agreement and may adopt procedures to do so by resolution or ordinance. Gov't Code § 65865.

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[19] (*See* Daniel J. Curtin, Jr., *Effectively Using Development Agreements to Protect Land Use Entitlements*: *Lessons from California*, 25 Zoning and Planning Law Report, no. 5 (West Group, May 2002); *also see* Development Agreement Manual: Collaboration in Pursuit of Community Interest (Institute for Local Self Government, 2002)). *See also Development Agreements: Contracting for Vested Rights*, 28 Boston College Envtl. Affairs L. Rev., ch. 4 (Summer 2001); David L. Callies and Julie A. Tappendorf, *Annexation Agreements and Development Agreements*, Trends in Land Use Law From A to Z, ch. 14 (Sect. of State and Local Gov't Law, ABA, 2001); David L. Callies, *Development Agreements*, Zoning and Land Use Controls, ch. 9 (Matthew Bender, 1997); Daniel J. Curtin, Jr., *Protecting Developers' Permits to Build: Development Agreement Practice in California and Other States*, 18 Zoning and Planning Law Report 85 (1995); Daniel J. Curtin, Jr. & Scott A. Edelstein, *Development Agreement Practice in California and Other States*, 22 Stetson Law Review 761 (1993); *reprinted in* 1994 Zoning and Planning Handbook 491 (Kenneth H. Young, ed., Clark, Boardman, and Callaghan).

- The development agreement is enforceable by any party to the agreement, notwithstanding a change in any applicable general or specific plan, zoning, subdivision, or building regulation adopted by the city. Gov't Code § 65865.4. *See also Beverly Towers,* 52 Cal. 3rd at 1193 n.6; *Native Sun,* 15 Cal. App. 4th 892, 910 (1993); *Midway Orchards,* 220 Cal. App. 3rd 765, 773 (1990); 76 Ops. Cal. Atty. Gen. 227 (1994).

- Unless otherwise provided by the development agreement, the applicable rules, regulations, and policies are those that are in force at the time of the execution of the agreement. Gov't Code § 65866.

- A city's exercise of its power to enter into a development agreement is a legislative act. *SMART,* 84 Cal. App. 4th 221, 227-28 (2000). It must be approved by ordinance, be consistent with the general plan and any specific plan, and is subject to repeal by referendum. Gov't Code § 65867.5.

- There is a 90-day statute of limitation to challenge the adoption or amendment of a development agreement approved on or after January 1, 1996. Gov't Code § 65009 (c)(1)(d).

- A city may terminate or modify a development agreement if it finds, on the basis of substantial evidence, that the applicant or successor in interest thereto has not complied in good faith with its terms or conditions. Gov't Code § 65865.1.

- A city is authorized to enter into a development agreement for property outside the city limits but within its sphere of influence; the development agreement, however, does not become operative until annexation proceedings are completed within the period of time specified by the agreement. Gov't Code § 65865(b).

- A city shall not approve a development agreement that includes a residential subdivision of more than 500 dwelling units, unless the agreement provides that any tentative map prepared for the subdivision will comply with Government Code section 66473.7 relating to the availability of water supply. Gov't Code § 65867.5(c).

- If, prior to incorporation of a new city (or annexation to a city), a county has entered into a development agreement with the developer, that development agreement shall remain valid for the duration of the agreement, or for eight years from the effective date of the incorporation or annexation, whichever is earlier, or for up to 15 years upon agreement between the developer and the city. Gov't Code § 65865.3. This statute applies to incorporations where the development agreement was applied for prior to circulation of the incorporation petition and entered into between the county and the developer prior to the date of the incorporation election. The statute also allows the newly incorporated or annexed city to

> modify or suspend the provisions of the development agreement if it finds an adverse impact on public health or safety in the jurisdiction. However, as to annexations, if the proposal for annexation is initiated by a petitioner other than a city, the development agreement is valid unless the city adopts written findings that implementation of the development would create a condition injurious to the public health, safety, or welfare of the city's residents.

The California Supreme Court described the rights that may be vested pursuant to a development agreement as follows:

> [D]evelopment agreements . . . between a developer and a local government limit the power of that government to apply newly enacted ordinances to ongoing developments. Unless otherwise provided in the agreement, the rules, regulations, and official policies governing permitted uses, density, design, improvements, and construction are those in effect when the agreement is executed.

City of W. Hollywood v. Beverly Towers, Inc., 52 Cal. 3rd 1184, 1193 n.6 (1991).

Highlighting the reasons for vesting tentative maps and development agreements, the Court in *Beverly Towers* noted that their purpose is "to allow a developer who needs additional discretionary approvals to complete a long-term development project as approved, regardless of any intervening changes in local regulations." 52 Cal .3rd at 1194.

A development agreement may be entered into early in the planning process. *See Santa Margarita Area Residents Together* ("*SMART*") *v. San Luis Obispo County,* 84 Cal. App. 4th 221 (2000). In *SMART,* an association comprised of area residents contended that a development agreement entered into by San Luis Obispo County was invalid because the project at issue had not been approved for actual construction. In rejecting this contention, the court stated that the development agreement statute should be liberally construed to permit "local government to make commitments to developers at the time the developer makes a substantial investment in the project." *Id*. at 228.

In finding the agreement valid, the court noted that it conformed to the statute; by focusing on the planning stage of the project, the agreement fulfilled rather than evaded the statute's purpose. The County's agreement maximized the public's role in final development, increased control over the inclusion of public facilities and benefits, and permitted the County to monitor the planning of the project to ensure compliance with its existing land use regulations.

Also, the court stated that a development agreement is a legislative act (Gov't Code § 65867.5) and the County's Board of Supervisors had the discretion to determine what legislation is necessary and appropriate. The court further stated that a reviewing court will not set aside a legislative act unless it is arbitrary, capricious, or unlawful.

Since a city's decision to enter into a development agreement is a legislative act, it is subject to repeal by referendum. Gov't Code § 65867.5. However, the opportunity for such referendum expires 30 days after the city's adoption of the ordinance approving the agreement, and thereafter the project is immune to subsequent changes in zoning ordinances and land use regulations that are inconsistent with those provided for in the agreement. Elec. Code § 9141. In *Midway Orchards,* the court held a development agreement was invalid because the general plan amendment relied on for consistency was timely referended. *Midway Orchards v. County of Butte*, 220 Cal. App. 3rd 765 (1990). The court stated:

> The development agreement was therefore unlawfully approved and executed. A contract entered into by a local government without legal authority is "wholly void," ultra vires and unenforceable. [Citations]. Such a contract can create no valid rights. Therefore, Midway can claim no right to develop its property based on a development agreement void from the beginning."

Id. at 783. *See also 216 Sutter Bay Assocs. v. County of Sutter,* 58 Cal. App. 4th 860, 872-74 (1997) (an interim urgency zoning ordinance and a parallel "ordinary" urgency ordinance, adopted by a newly elected board of supervisors within the 30-day "referendum period," successfully stopped a development agreement adopted by the preceding, lame-duck board).

A "fully negotiated" development agreement is a "project" under CEQA (Pub. Res. Code § 21000 *et seq*.), which is subject to environmental review. This is true even when the development agreement is not directly approved by a city but instead is submitted by the city to the electorate for approval. *See Citizens for Responsible Gov't v. City of Albany*, 56 Cal. App. 4th 1199, 1215 (1997).

Since entering into a development agreement is a legislative act, a city's decision not to enter into a development agreement need not be supported by findings. *See Native Sun/Lyon Communities v. City of Escondido*, 15 Cal. App. 4th 892, 910 (1993); *but see* 78 Ops. Cal. Atty. Gen. 230 (1995) (concluding that a development agreement was a contract for the purposes of Government Code section 1090, concerning contractual conflict of interest for officials (although the opinion did not refer to the *Native Sun* case or to Government Code section 65867.5, which states that such an agreement is a legislative act)).

Not infrequently, those who challenge projects governed by development agreements will argue that such agreements are invalid because the city is "contracting away" its police power. The courts have not been persuaded by this argument.

For example, in *SMART*, an area residents' association contended that because San Luis Obispo County had entered into a development agreement freezing zoning for a five-year period for a project before the project was ready for construction, the County improperly contracted away its zoning authority. *Santa Margarita Area Residents Together* ("*SMART*") *v. San Luis Obispo County*, 84 Cal. App. 4th 221, 232-33 (2000). In holding for the County, the court noted that land use regulation is an established function of local government, providing the authority for a locality to enter into contracts to carry out the function. The County's development agreement required that the project be developed in accordance with the County's general plan, did not permit construction until the County had approved detailed building plans, retained the county's discretionary authority in the future, and allowed a zoning freeze of limited duration only. The court found that the zoning freeze in the County's development agreement was not a surrender of the police power but instead "advance[d] the public interest by preserving future options."

In another case, the property owners purchased property in 1973 to develop an apartment complex of approximately 140 to 150 units. *Stephens v. City of Vista*, 994 F.2nd 650 (9th Cir. 1993). Subsequently, the City of Vista lowered the access street to the property, frustrating the owners' contemplated use, and downzoned the property. The owners sued. They and the City eventually entered into a settlement agreement providing for a specific plan and zoning that permitted construction of a maximum of 140 units. After rezoning the property, the City denied a site development plan, in part because it wanted the owners to reduce the density. The owners then renewed their lawsuit against the City.

The City argued that the settlement agreement unlawfully contracted away its police power. The court disagreed. It first noted that when the City entered into the settlement agreement, it understood it was obligated to approve 140 units. Further, relying on *Morrison Homes Corp. v. City of Pleasanton*, 58 Cal. App. 3rd 724, 734 (1976), in upholding an annexation agreement, the court held that while generally a city cannot contract away its legislative and governmental functions, this rule only applies to void a contract that amounts to a city's "surrender" of its control of a municipal function. 994 F.2nd at 655. Simply contracting for a guaranteed density and exercising its discretion in the site development process does not constitute surrendering control of all of its land use authority.

In *Glendale*, the court held that in entering into a fixed-term lease as a lessor, a city did not contract away its eminent domain power to take back the property by condemning the lessee's leasehold interest. *City of Glendale v. Superior Court*, 18 Cal. App. 4th 1768, 1780 (1993). Unlike the *Stephens* case, where the City agreed to approval of 140 units as part of a settlement, in *Glendale*, the issue of possible condemnation was not raised in either the contract or in closing negotiations. Accordingly, the court could not imply a waiver of the eminent domain power.

Development agreements are adopted as a result of negotiations between a city and a developer; therefore, they are not subject to the *Dolan/Nollan* heightened scrutiny standard. *See Leroy Land Dev. Corp. v. Tahoe Reg'l Planning Agency*, 939 F.2nd 696, 697 (9th Cir. 1991). For further discussion on this issue, see David L. Callies and Julie A. Tappendorf, *Unconstitutional Land Development Conditions and the Development Agreement Solution: Bargaining for Public Facilities After Nollan and Dolan*, 51 Case Western Reserve L. Rev., no. 4 (Summer 2001).

In *Leroy*, the court held that a developer who voluntarily enters into an agreement with a public agency cannot subsequently challenge a mitigation obligation of the agreement as a "taking." Here, the developer entered into a settlement agreement under which it agreed to certain restrictions on development. After the United States Supreme Court decided *Nollan*, the developer sought to challenge the restriction as a taking. The Ninth Circuit rejected the challenge, holding that regardless of whether the restriction would have violated the Fifth Amendment Takings Clause if imposed as a condition of development, it could not be bound invalid because the developer had voluntarily agreed to the condition. 939 F.2nd at 697.

The court stated:

> The threshold issue is whether, assuming arguendo that the mitigation provisions would constitute a taking under *Nollan* if

> imposed unilaterally by TRPA, they can be viewed as a "taking" when consented to as a part of a settlement agreement. We hold that they cannot. The mitigation provisions at issue here were a negotiated condition of Leroy's settlement agreement with TRPA in which benefits and obligations were incurred by both parties. Such a contractual promise which operates to restrict a property owner's use of land cannot result in a "taking" because the promise is entered into voluntarily, in good faith and is supported by consideration. Indeed we have found only one case in which an agreement negotiated before *Nollan* was challenged as a "taking" after *Nollan,* and it reached the same conclusion we reach. See *Xenia Rural Water Ass'n v. Dallas County* [citation omitted.] To allow Leroy to challenge the settlement agreement five years after its execution, based on a subsequent change in the law, would inject needless uncertainty and an utter lack of finality to settlement agreements of this kind. We therefore hold that a takings analysis as articulated in *Nollan* is inapplicable where, as here, parties choose to terminate or avoid litigation by executing a settlement agreement supported by consideration.

Id. at 698.

These decisions, coupled with the express exemption in the Mitigation Fee Act for fees imposed under a development agreement (Gov't Code § 66000 *et seq*.), make it difficult to argue that fees imposed under a development agreement must meet statutory requirements. Commentators almost uniformly reject the proposition that such fees can later be challenged as excessive, and one of the main attractions of a development agreement for a city is that it can negotiate for mitigation it could not otherwise exact.

There is a further problem with attempting to challenge a development agreement fee. Under a line of cases starting with *Pfeiffer v. City of La Mesa*, acceptance and use of a land use approval waives any right to challenge the condition. 69 Cal. App. 3rd 74 (1977). In response, the Legislature enacted the pay-under-protest statute, Government Code section 66020, which allows a developer to protest and challenge a fee or condition without waiving the benefit of the permit. However, this provision is part of the Mitigation Fee Act and only applies to development fees as defined in Government Code section 66000. Because fees imposed under a development agreement are expressly excluded from that definition, they are not subject to the protection of Government Code section 66020.

In light of *Nollan* and *Dolan*, more cities are interested in using development agreements to obtain exactions that might not be valid under the heightened *Nollan*/*Dolan* standard.

In *Hermosa Beach Stop Oil Coalition v. City of Hermosa Beach*, the court held that the developer, who had failed to establish entitlement to vested rights to develop an oil business on property leased from the City of Hermosa Beach, could have protected itself from subsequent regulatory changes by insisting that the City enter into a development agreement. 86 Cal. App. 4th 534 (2001). The court noted that it was likely that the City would have demanded additional consideration for either a risk-adjustment provision in the existing lease or a separate development agreement, and that having at least implicitly decided to forego such protection against future regulatory changes, the developer must accept the consequences of this decision. *Id*. at 558.

In summary, a development agreement offers a developer substantial assurance that its project can be completed "in accordance with existing policies, rules and regulations, and subject to conditions of approval." Gov't Code § 65864(b). Since the vested rights continue for some time, from a practical standpoint it is advisable for the developer to retain a complete set of the local ordinances, policies, and standards in effect when the development agreement becomes effective. Otherwise, should a dispute arise years after the agreement has been executed, it may be difficult to piece together the operative law.

D. Annexation Agreements

In California, cities are not statutorily authorized to enter into annexation agreements like they are for development agreements. However, the California courts have upheld the validity of such agreements. The leading case is *Morrison Homes Corp. v. City of Pleasanton*, 58 Cal. App. 3rd 724 (1976), where the court upheld annexation agreements containing commitments by the City to provide sewer connections for homes to be built in subdivisions to be annexed. The court held that the City had implied authority to enter into such agreements. The court rejected the City's arguments that such agreements violated the rule that a city may not contract away its legislative and governmental functions, especially where there was substantial evidence that the agreements were just, reasonable, fair and equitable as approved by the City at the times of their execution.

E. Vesting Tentative Maps -- California Statute

In 1984, in another legislative response to *Avco*, the California Legislature adopted Chapter 4.5 (Development Rights) of the Subdivision Map Act, which established a new form of tentative map for subdivisions in California -— the "Vesting Tentative Map." Gov't Code § 66498.1 *et seq*. The rights accruing to a subdivider upon approval of a vesting tentative map are expressly deemed to constitute "vested rights" to proceed with the development in substantial compliance with the local ordinances, policies, and standards in effect at the time the application for approval of the vesting tentative map is accepted as complete or is deemed complete. Gov't Code § 66498.1. These vested rights extend for a substantial period of time, and therefore add a critical dimension to the approval process connected with such maps.

The purpose of the vesting tentative map statute is to give a statutory vested right that will be effective earlier than a vested right established pursuant to *Avco*. The vesting tentative map process starts when the subdivider files a tentative or parcel map with the words "Vesting Tentative Map" presented conspicuously on the face of the map. Gov't Code § 66452(c). For a general discussion of the legislative history of the statute and its application, see *Bright Dev. v. City of Tracy*, 20 Cal. App. 4th 783, 788-89 (1993) and *Kaufman & Broad Cent. Valley, Inc. v. City of Modesto*, 25 Cal. App. 4th 1577, 1587-88 (1994).

A vesting tentative map differs in some respects from a development agreement. In particular, a vesting tentative map approval is unilateral, and a development agreement approval is bilateral. This means that cities must process a properly submitted vesting tentative map application and approve or deny it based on statutory criteria, whereas a development agreement is the result of negotiation. A vesting tentative map will vest rights earlier than a development agreement, by vesting rights as of the date the application is found complete. In comparison, development agreement rights, which vest on the date the agreement is executed, can be significantly later in the process. Finally, as a legislative act, a development agreement is subject to referendum, while approval of a vesting tentative map is not.

A vesting tentative map does not provide a mechanism for controlling a city's future exercise of discretionary approvals. For example, if a subdivider needs a discretionary approval, such as a use permit, after the subdivider's tentative map vests, there is no guarantee of such approval. In approving or denying the use permit, however, a city will be governed by the ordinances, policies, and standards in effect at the time the tentative map application was complete. Gov't Code § 66498.1(b).

A development agreement, in contrast, may provide conditions and requirements that will govern the processing of future discretionary approvals. Gov't Code § 65865.2. Thus, its use is likely to provide a broader range of benefits than those obtained solely through the use of a vesting tentative map.

A city's general plan, local ordinances, or policies may impose additional exactions or development conditions (e.g., increased inclusionary affordable housing), as a condition to entering into a development agreement. Such local laws should be reviewed carefully before proceeding. Additionally, as is the case with many land use laws, local ordinances may provide additional requirements necessary to obtain approval of a vesting tentative map.

As with a development agreement, when a vesting tentative map is approved, it is advisable for the subdivider to retain a complete set of the local ordinances, policies, and standards in effect when the vesting tentative map application was deemed complete since the rights vested continue for some time. Otherwise, if a dispute should arise years after the vesting tentative map application was deemed complete, the operative law may be extremely difficult to determine.

Table 1. Comparison of California's Vested Rights Statutes

VESTING TENTATIVE MAP **Gov't Code §§ 66498.1-66498.9**	**DEVELOPMENT AGREEMENT** **Gov't Code §§ 65864-65869.5**
1. Processing mandatory: city cannot refuse application	1. Processing elective: city's discretion whether to enter
2. Exactions subject to statutory and case law restrictions (e.g., "nexus")	2. Ad hoc negotiation-exempt from development project fees requirements (Mitigation Fee Act, Gov't Code §§ 66000-66025); waiver potential
3. Permits are discretionary, subject to vested current law	3. May seek to alter future permit process; have city commit to future issuance of entitlements
4. Locks in rules when application "complete"	4. Locks in rules at execution of agreement unless agreement provides otherwise
5. Subdivision Map Act limits vesting life of tentative and final maps; incorporation exception	5. Longer life for agreement; tentative (or vesting tentative) map and certain permits may be extended for life of agreement
6. Does not limit other agencies (e.g., school districts)	6. Does not limit agencies that are not parties (incorporation/annexation exception)
7. Voters cannot referend (adjudicatory act)	7. Subject to referendum (legislative act)
8. No contrary future rules unless needed to prevent situation "dangerous" to health/safety or changes in state/federal law	8. No contrary rules unless consistent with agreement
9. City must have implementing regulations (if not, Subdivision Map Act governs)	9. Local procedural regulations needed if requested by applicant, otherwise use statute
10. Generally, 90-day statute of limitation after approval to file suit challenging	10. Generally, 90-day statute of limitation to challenge adoption, amendment, or modifications occurring on or after January 1, 1996
11. Incorporating city is subject to county-approved vesting tentative map; annexing city is *not* subject	11. With certain exceptions, both incorporating city and annexing city are subject to county-approved agreement

F. Summary

In summary, a development agreement offers a developer substantial assurance that its project can be completed "in accordance with existing policies, rules and regulations, and subject to conditions of approval." Gov't Code § 65864(b) A vesting tentative map confers on a subdivider a vested right to proceed with a development in substantial compliance with the ordinance, policies, and standards in effect at the time the application for approval of the vesting tentative map is deemed complete. Gov't Code § 664981.1(b).

1. Summary of advantages and disadvantages of a development agreement

Advantages for developer:

- Assurance that project may proceed as approved over the term of the agreement.
- "Freezes" land use rules, regulations, policies pursuant to terms of the agreement on the effective date of the agreement.
- Protects developer if community's attitude changes toward project; e.g., new planning commissioners, new councilmembers, voter initiatives.
- Assists developer in securing financing; makes project "marketable" if needed.

Disadvantages for developer and advantages for local agencies:

- Local agency can impose more regulations than permitted by law.
- Exactions (dedications; impact fees); mitigation conditions.
- Land use conditions not set forth in local laws.
- No need for nexus study.
- No need for legislative authorization for the exaction.
- No guarantee that city council will approve agreement after lengthy negotiations.
- In some states, including California, agreement is subject to referendum.