Should Owners and Developers of Low-Performance Buildings Pay Impact or Mitigation Fees to Finance Green Building Incentive Programs and Other Sustainable Development Initiatives?

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I. Introduction

Will green design and construction techniques pay for themselves through the operating cost savings and premium values they generate? If they can pay for themselves, why have so many state and local governments decided to invest in programs to encourage private landowners and developers to adopt green, or sustainable, building and development practices? What if the future of a sustainable built environment depends on government’s ability to provide increasingly costly incentives? While optimists will undoubtedly argue otherwise, sustainability proponents should consider the dark possibility that the business case alone may never be sufficient to achieve an optimum level of sustainability throughout the construction and real estate industries.

True, life cycle cost analysis should ultimately prove beyond doubt that significant capital investment in energy efficiency will pay for itself over almost any building’s useful life.¹ And many other sustainable construction techniques will also return life cycle benefits in excess of their marginal increases in capital costs over conventional methods.² Modest upfront investments in efficient water systems and advanced landscaping designs, for example, may produce offsetting operating expense savings.³ These innovations, and others touted by the green building industry, can and will gain acceptance among cost-sensitive and profit-minded developers, building owners, real estate investors, and tenants, based on rigorous cost-benefit analysis.⁴

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³ See Kibert, supra note 1, 494-95.
⁴ The question whether the initial investment in sustainable design and construction practices will produce offsetting savings in operating costs is invariably part of the practical decision process on a project by project basis. This is true in the public as well as in the private sector. The City Council of Chandler, Arizona, for example, expressed this concern in a resolution that first specified certain city building projects to be designed and built to recognized

But will cost-effective measures, as determined on a project-by-project basis, be enough? And will even a dramatic increase in the number of green buildings transform the construction industry itself into an engine of sustainable development? Should society be satisfied with improved efficiencies in energy, natural resource consumption, and emissions? Should society demand more? Is the objective simply to have a growing number of green buildings, as that term is popularly understood, or is it to have a sustainable construction industry, or even a built environment that supports and enhances, rather than taxes, the natural environment?

The amount of waste that buildings generate on a life-cycle basis alone is enough to put the long-term challenge into sharp relief. New construction yields enormous quantities of debris, and renovations and demolitions of existing structures to make way for new development create even greater waste burdens for a sustainable society.\(^5\) Not only is construction and demolition waste overwhelming in quantity, it often includes hazardous material, and it accounts for mounds of unrecyclables in dumps and landfills. In other words, even if the current green building movement sufficiently addresses climate change concerns, construction practices will continue to threaten future generations unless the industry as a whole makes enormous, long-term investments in sustainability writ large.

Before we can achieve a fully sustainable construction industry in the broadest sense, we must envision buildings that will be as efficient and environmentally productive as are natural ecological systems. Can we routinely design and construct buildings that generate more energy than they consume, that incorporate recycled materials rather than newly expropriated natural resources, and that return to the environment only recyclables? And beyond even these near-utopian objectives, can we and should we use building design and construction to serve the social justice objectives of the global sustainability movement?\(^6\) As sustainable construction comes into its own, these are some of the questions that policy makers face as they adopt the green building programs and initiatives that will guide development and construction for the future.

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\(^{5}\) MARA BAUM, GREEN BUILDING RESEARCH FUNDING: AN ASSESSMENT OF CURRENT ACTIVITY IN THE UNITED STATES 1 (2007).

\(^{6}\) At the local land use level, popular approaches to green building incentives have not yet extended to the most costly and controversial objectives of the global sustainability movement, such as those that aim to redress inequity in the distribution and control of the earth’s resources. Nonetheless, the relevant background literature reflects a concern for these broader problems, especially global climate change. See U.S. CONFERENCE OF MAYORS CLIMATE PROTECTION AGREEMENT, available at http://www.usmayors.org/climateprotection/agreement.htm. A close reading of green building program literature occasionally even reveals some local empathy for the social justice motives of the worldwide sustainability movement. Portland, Oregon’s proposed plan, for example, includes among its goals the objective to “increase the number of local living wage jobs.” PortlandOnline.com, City of Portland Proposed High Performance Green Building Policy, http://www.portlandonline.com/bps/index.cfm?c=45879&a=220879 (last visited July, 29, 2009). A statement from the Santa Monica, California Office of Sustainability and the Environment includes human dignity among its guiding principles. And, along with the more customary concern for resource conservation and public health, it proclaims that “[w]e live in a time in which increased population growth, high levels of consumption and the desire to feed growing economies have created escalating demands on our resources—natural, human and social—on a local, regional, and global scale.” Santa Monica Office of Sustainability and the Environment, http://www.smgov.net/Departments/OSE/categories/sustainability.aspx (last visited July 29, 2009).
As Part II of this Article illustrates, state and local governments are intensely interested in promoting a sustainable building agenda for the private sector. Moreover, the evidence suggests that governments across the nation intend to play a proactive, interventionist role in assuring that the real estate development industry accommodates a sustainable future. One governmental route toward sustainable construction uses green building codes and other legally enforceable mandates to force the construction and real estate industries to conform to sustainable development standards. Given the influence of economic analysis on policy decisions, however, it is not surprising that command and control regulations of this type compete with more sophisticated, and arguably more effective and efficient, economic instruments to encourage the private development marketplace to turn green.7

A few of the economic approaches use negative incentives to discourage undesirable practices. These techniques include disclosure requirements and taxes and fees assessed against low performance projects and practices.8 What has become more common, however, is a wide array of positive incentives that governmental agencies adopt to encourage green building practices. The positive incentive programs range from simple informational and promotional campaigns, to development preferences for green projects, to financial support for the incremental costs of green building practices.9

As more states and local governments implement green building initiatives based on positive incentive models, and as sustainability proponents work to expand the scope of the available incentives, communities must decide how to fund or offset the costs of their programs. Even relatively modest steps, such as public recognition and expedited plan review for green developers, involve administrative costs. Rebate, reimbursement, and subsidized financing programs require increasingly larger economic commitments. Additionally, some jurisdictions may wish to finance programs specifically to offset the adverse impact of land uses that do not meet sustainable development standards, such as low-performance buildings. For example, a city might consider assessing a low-performance building fee to raise revenue for rebates to

8 For example, California requires public disclosure of energy efficiency ratings for nonresidential buildings. See CAL. PUB. RES. CODE § 25402.10 (2007) (becoming effective on January 1, 2010, and requiring that building owners disclose to prospective buyers, tenants, or lenders certain energy consumption data for nonresidential buildings). Also, California’s Environmental Quality Act arguably requires environmental impact studies to address the effect that a proposed project will have on global warming. See Dave Owen, Climate Change and Environmental Assessment Law, 33 COL. J. ENV'TL L. 57, 59-60 (2008). Construction waste disposal fees can be used as a negative incentive to help force projects to internalize some of the most significant social costs of building construction. See, e.g., SAN BERNARDINO COUNTY, CAL., CODE tit. 4 division 6 ch. 4 § 46.0401 (2009) (providing for separate solid waste facility fees for construction waste). More aggressive approaches that extend beyond new development appear in such programs as Boulder, Colorado’s energy tax on its residents to combat global warming, see BOULDER, COLO., CODE tit. 3 ch. 3-12 (effective April 1, 2007), and in the San Francisco’s Bay Area Air Quality Management District’s greenhouse gas emission fee, see SAN FRANCISCO, CAL., BAY AREA AIR QUALITY MANAGEMENT DISTRICT REG. 3 § 3-334 (adopted May 21, 2008). Even more sophisticated economic instruments that combine positive and negative incentives may be on the horizon in the fight for a sustainable built environment. For example, in the future, building owners may see cap and trade permitting systems for such externalities as greenhouse gas emissions. See Susan Linden & Meredith J. Klein, More of the Great Green Hope: California Carbon Trading for Climate Change Improvements, SP028 ALI-ABA 135 (2008).
9 See infra Part II.
offset qualifying costs that high-performance developers would otherwise reject as cost ineffective, or they may choose to establish a long-term capital reserve fund to cover the anticipated costs that future generations will incur when traditionally built structures are demolished and their unrecyclable debris must be handled.

As discussed in Part II of this Article, some programs already assess developer fees to support relatively modest green building initiatives. This Article argues that developer fees could be used more ambitiously to help finance the most progressive sustainability objectives. The idea of using developer fees more aggressively to fund sustainable construction incentives raises important legal questions. In particular, this Article examines the legal limits of developer funding devices for sustainability, such as impact and mitigation fees. The legal issues include constitutional limitations, questions about authority for developer fee programs under existing state enabling acts, home-rule authority and municipal charters, and fundamental principles of land use law. The highly developed body of state law governing traditional development exactions and impact and mitigation fees provides a framework for analyzing the issues involved.

This Article addresses only a relatively narrow band of potential solutions to the financing dilemma that sustainability presents. It is especially interested in analyzing the legal limits on developer funding programs pursuant to land use initiatives that rely on the police power, but it gives only scant attention to approaches based on the taxing power. While tax programs, especially those that take the form of excise taxes, special assessments, and benefit district assessments, along with the related power of government to charge user fees, represent viable alternative means to pay for sustainability, they also raise their own host of legal and political considerations. Although the immediate focus of this Article remains on developer funding devices in the nature of impact and mitigation fees, policy makers must ultimately consider a far broader array of potential funding mechanisms.

Part II of this Article reviews selected green building programs at the state and local government levels that highlight the most significant policy and legal issues of interest. Part III explores the constitutional doctrines and controlling state land use law principles that limit governmental alternatives for funding sustainable construction programs. Part IV offers a few concluding remarks for policy makers to consider as they craft effective, efficient, and legitimate programs.

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10 For this purpose, a progressive initiative reflects a broad perspective on the proper relationship between the built and natural environments, and it aggressively treats the effects of unsustainable design and construction as an externalized social cost that public policy requires to be internalized by project developers and owners.

11 At a conceptual level, the suggestion has recently been made that impact fees offer an especially promising mechanism for governments to provide incentives for real estate developers to embrace green building practices. See Benjamin S. Kingsley, Note, Making It Easy to Be Green: Using Impact Fees to Encourage Green Building, 83 N.Y.U. L. REV. 532, 542-55 (2008). This thoughtful proposal focuses extensively on the economic reasons that may make impact fees the funding device of choice. See id. at 542-54. The discussion of the potential legal barriers draws attention to constitutional issues to a greater extent than it considers the other principles that state courts apply to impact fees (and that are a principle concern of this Article). See id. at 556-66.

12 See, e.g., McCarthy v. City of Leawood, 894 P.2d 836, 843-850 (Kan. 1995) (declining to apply land use exaction limitations to a municipal fee to fund highway improvement costs, and also rejecting numerous related challenges to the city’s power to adopt the fee program).
II. Green Building Programs and the Potential to Finance Them Through Developer Fees

This is the central question: How will states and local governments pay for their green building incentive programs? With that problem in mind, this Part catalogues common program features based primarily on the potential demands they make on the public purse. Additionally, because this Article is also concerned with the popular and political support that green building initiatives will require, this overview notes with special interest certain factors that may make green developer funding devices more or less controversial.

One preliminary caution is critically important at this juncture. Governmental green building programs are still in an experimental stage. This is particularly true of the municipal approaches that are of primary interest here, which invoke local police power and land use control models to influence green building practices in the private sector. New programs and features appear regularly, and most of the programs discussed here continue to evolve. Additionally, there may be significant differences between how ordinances and resolutions describe certain features of a program and how administrative agencies and planning staff implement those features in practice. This Part does not attempt to provide a comprehensive survey or assessment of programs, nor even to cover all of the significant features of any one program. The modest objective of this Part is to identify some of the common features that best illustrate the important role that developer fees could play in financing some of the investment that sustainable real estate development requires. This Part covers specific programs and features on a selective basis for this purpose.

The lowest cost and least controversial approaches are those that merely draw positive attention to green building options. For example, an ordinance or resolution might direct that municipal building and land use regulations and codes should encourage use of the U.S. Green Building Council’s LEED standards. Another low key approach is to require that permit applications for new projects must include a green building checklist or must in some other way reflect consideration of sustainability. Similarly modest features use public awareness and educational campaigns to promote green building strategies. For example, as one component of their programs some cities disseminate green building information or sponsor educational

13 For detailed information on many programs, see U.S. Green Building Counsel, LEED Initiatives in Governments and Schools, http://www.usgbc.org/ShowFile.aspx?DocumentID=691 (last visited July 23, 2009). Many of the incentives mentioned in this Part to illustrate isolated approaches are in fact incorporated into more comprehensive green building programs that also include many other features. The mention of one aspect of a program does not imply that the program is limited to that feature alone.
15 See, e.g., Fayetteville, Ark., Resolution 176-07 (Oct. 2, 2007) (providing for use of a green building checklist). Checklists are also used to address compliance with mandated green building features. See e.g., GreenDallas.net, Ordinance No. 27131 Overview for Residential Housing, http://www.greendallas.net/pdfs/GreenBuilding_Residential.pdf. (announcing a Dallas, Texas requirement, effective October 1, 2009, for residential builders to submit a green building checklist covering such matters as water efficiency and energy performance standards).
websites or other resources to make information available.\textsuperscript{17} Others offer awards and public recognition to projects that meet specified green building standards.\textsuperscript{18}

These initiatives promote green alternatives at minimal cost, and they are so nonintrusive that they should not generate significant resistance from developers and landowners. Yet, even these programs require educational materials and resources, plaques and awards, or staff training, and they also impose some administrative costs for the time needed to assemble, manage, and disseminate information, verify compliance with a new step in the permitting process, or otherwise implement the program. Additionally, resources must be maintained and upgraded periodically to retain value. And public recognition, if it is to be meaningful, requires at least modest ongoing expenditures. Cities and other land use authorities operating under difficult economic circumstances might look to developer funding devices to support even these relatively inexpensive programs.\textsuperscript{19}

A potentially more expensive but equally gentle method of promoting green building practices is to offer technical assistance for those who wish to build green.\textsuperscript{20} Presumably, a useful level and quality of consulting services or technical advice contemplates adequately trained and qualified personnel who are available to answer questions or review specific projects. A municipality may need a dedicated funding source to pay for such specialized professional services. How would the development community react to a surcharge added to existing permitting fees to cover the salary and expenses of a local office of sustainability consultant?

A growing number of municipalities and development agencies have recently taken their green building programs to levels that may require substantial staff and administrative resources. One of the most common of these more costly approaches offers preferences in the project review and permitting processes to reward developers who voluntarily build to established green building standards. Currently, several programs, including some in major markets, provide

\textsuperscript{17} See, e.g., Green County San Bernardino, About Green County, http://www.sbcounty.gov/greencountysh/about_gc.htm (describing the “Green County San Bernardino” program adopted by San Bernardino County, California); Green Hillsborough, http://www.hillsboroughcounty.org/green/ (detailing the features of Hillsborough County, Florida’s “Green Hillsborough” program).


\textsuperscript{19} In Arlington County, Virginia projects pay a fee ($0.045 per square foot of gross floor area) to fund the county’s green building fund for educational purposes, and developers that achieve LEED certification are eligible for a refund of that fee. Arlington County, Va., Zoning Ordinance § 36.H.5.a.(1) (2009).

\textsuperscript{20} OAKLAND, CAL., OAKLAND CODE tit. 15 § 15.35.046 (2008); D.C. STAT. tit. 6 ch. 14A § 6-1451.07 (2001) & D.C. STAT. tit. 6 ch. 14A § 6-1451.09 (2001). See also City of Issaquah http://www.ci.issaquah.wa.us/Page.asp?NavID=129 (last visited July 29, 2009) (stating that Issaquah, Washington’s sustainable building program features “free on-site assistance, staff training, recommendations, and media recognition”).
expedited plan review for green projects. These programs promise a developer who adopts specified standards or who commits to obtain a recognized green building certification that at least some aspect of the development permit application will be processed more quickly than those submitted by traditional developers. Because development preference programs typically reference technical design and construction standards, they require review and monitoring procedures managed by qualified professionals who can confirm compliance with the program requirements. Some jurisdictions require a developer who wishes to receive green building incentives to enter into an agreement covering the green features the developer promises, and they may also require the developer to provide a bond to assure performance. As an additional or alternative process, a jurisdiction may offer expedited inspection for the completed project. In other words, the program may provide expedited procedures at the certificate of occupancy stage rather than (or in addition to) at the plan review or permitting stage. Presumably, an advantage of expediting the process only at the certificate of occupancy stage is that it only provides an advantage to a developer who delivers the required green features. But in jurisdictions in which the most significant processing delays involve the initial project approval rather than final permitting, expediting the certificate of occupancy process will hold much less attraction for developers.

Expedited review programs present several challenges that may ultimately make them less effective, relatively expensive to administer, or impractical to maintain over time. First, they require adequately trained professionals to assure compliance with the program’s requirements. Second, they are only valuable to the extent that the reduced processing time has sufficient value to encourage developers to incur the additional costs of sustainable design and construction for the benefit of being placed in a special processing line. While the development approval (or certificate of occupancy) process in many places involves extensive delays, in others the normal process may be efficient enough to minimize the value of expedited review.


For example, the Los Angeles ordinance provides for administration by a “Green Building Team,” requires that applicants for expedited processing must provide special documentation for advance review, and provides that the Director for LEED compliance must review and approve the project’s plans before a building permit may be issued. LOS ANGELES, CAL., CODE ch. 1 § 1 art 6.1 (approved April 27, 2008). See also infra notes 23-27 and accompanying text.

For example, because LEED certification comes only after project completion, an expedited review program may require a careful, professional review of designs and construction plans to determine in advance that the completed project will satisfy the certification standards. To assure compliance or to implement any enforcement technique (such as forfeiture of a bond), some administrative process may be necessary after construction is complete, which may become part of the certificate of occupancy process.

See, e.g., D.C. STAT. tit. 6 ch. 14A § 6-1451.05 (2001) & D.C. STAT. tit. 6 ch. 16 § 6-1451.06(2001) (specifying that a bond is to be held to assure compliance with standards and that bond proceeds are to be applied to “Green Building Fund” if project fails standards).

It is impossible to judge the significance of expedited review without gathering empirical data. While many programs promise expedited review without indicating how much time the expedited process can save, the terms of one program demonstrate that the time saved will not necessarily create a powerful incentive in every instance. See
And for some projects, the complete permitting process may involve many different governmental agencies, not all of which participate in the expedited process. What is more important is that expedited processing may itself prove to be an unsustainable practice (or at least it may not be self-sustaining). The more effective expedited review is, the more projects will apply for the expedited process, which will either slow down the processing time or require investment in additional staff to keep the expedited projects moving significantly faster than the regular ones.27

Another extremely popular development preference is to reduce permitting fees or to offer rebates of certain development fees for green projects.28 These programs not only require resources for the additional staff time and professional expertise to administer them, but they also involve the additional financial costs of foregone or rebated fees. Because few municipalities and land use agencies can afford to give up revenue, reduced fees and rebates can only provide meaningful savings to developers if some alternative source replaces the lost revenue. One logical solution is to increase the fees that traditional projects must pay in an amount sufficient to offset the costs of the program. This cost-shifting weapon is already evident in the green initiatives arsenal. 29 To the extent that the fee increases are substantial, developers who choose not to participate in the incentive program are likely to challenge the legality of the approach.

27 The Chandler, Arizona program recognizes this limitation by reserving the right to the City’s Planning and Development Director to deny expedited plan review if the number of applications for expedited plan review overburden the staff’s ability to complete expedited reviews and to process other applications. Chandler Ariz., Resolution 4199 (June 26, 2008) & Exhibit A, at Exhibit A, 5-6
28 See, e.g., Arlington County, Va., Zoning Ordinance § 36.H.5.a.(1) (2009) (imposing a fee of $0.045 per square foot of gross floor area to fund the county’s green building fund for educational purposes, and providing that developers that achieve LEED certification are eligible for a refund of that fee); Babylon, N.Y., CODE ch. 89 art. VIII § 89-96 (Added Dec. 20, 2006) (offering a rebate for projects that achieve LEED certified status); Chandler Ariz., Resolution 4199 (June 26, 2008) & Exhibit A (providing that 100% of expedited fees that meet minimum LEED standards are refunded and up to 35% of regular permitting fees, based on achieving certain LEED levels); Burbank, Cal., CODE tit. ch.1 9 ch. Art. 10-1008 (Effective Dec. 21, 2007) (discounting permit and plan review fee for participating in the Green Building and Sustainable Architecture Program); Doylestown Borough, Pa., Resolution 2008-8 (April 21, 2008) (reducing permit fees based on Green Points program and meeting LEED requirements); Eagle County, Colo., Building Code art. 4 § division 4.8 § 4-820 (2008) & Eagle County, Colo., Building Code art. 4 division 4-9 § 4-920 (2008) (establishing building permit rebates based on “ECOBuild” points); Livermore, Cal., CODE tit. 15 ch. 76 § 070 (2009) (reducing applicable fees if LEED or GreenPoint standards are met).
29 To help fund its program, which includes permit fee rebates for residential projects that exceed threshold green building standards, Eagle County, Colorado imposes additional fees on other projects. Eagle County, Colo., Building Code art. 4 § division 4.8 § 4-820 (2008) & Eagle County, Colo., Building Code art. 4 division 4-9 § 4-920 (2008). The Town of Babylon, New York charges certain projects a fee of $0.03 per square foot, not to exceed $15,000, which is held in a Green Building Fund; applicants who achieve LEED certified status receive a refund of the fee. Babylon, N.Y., CODE ch. 89 art. VIII § 89-86 (Added Dec. 20, 2006). The proposed Portland, Oregon “feebate” system, discussed in the text, also uses this approach. See infra notes 47-48 and accompanying text.
One alternative development preference device has the intriguing potential to encourage green design and construction practices at little or no public cost. The tactic, which many municipalities now employ, offers green builders development bonuses—increased density ratios or more generous height restrictions. If these development bonuses can truly be given at no cost to society, this approach may be the ideal solution to the problem of financing green building incentives. The prospect of a cost-free solution probably explains why so many jurisdictions have already adopted this device.

But are development bonuses really free, and can they provide sufficient incentives to drive green development? A cost-benefit analysis of these programs requires an assessment of the infrastructure and social costs of the greater intensity growth that they permit, as well as a review of the financial projections for a particular project. The calculus here can be tricky. If, for example, the standard density and height restrictions reflect sound land use planning decisions, then the variances for green buildings may overtax existing public facilities, such as roads, utilities, and schools, or they may adversely affect the quality of life in the community. That may mean that even if development bonuses have no immediate budgetary impact for the community, a program that systematically relieves developers from established land use restrictions may become more controversial as more and more projects exceed the generally preferred density and height standards. And even if the sustainable features of the greener projects completely offset the disadvantages of the more intense land use, the community still may eventually need to raise significant revenue to cover any additional infrastructure costs that the higher intensity developments ultimately require. Perhaps in some cases more intense development will not add any significant public costs, but if so, that may indicate that the lower density and height restrictions were unnecessary, excessive regulation of development in the first place. Indeed, the most significant question that development bonus programs present is not whether communities should permit greater density to induce developers to build green, but whether they should broadly embrace denser development standards because they are intrinsically more sustainable.

While all of the incentive programs described to this point are relatively low cost approaches, they all suffer from one potentially fatal defect: the benefits they offer may be inadequate to induce developers to make optimum capital investments in design and construction.


31 The Arlington County, Virginia planning staff recently recommended reducing the level of bonus densities for the stated reason that “it is becoming more common for developers to design and construct buildings that meet the standards of the basic LEED Certified level.” Arlington County, Vir. County Board Agenda Item Meeting of March 14, 2009, Memorandum, February 27, 2009, at 6-7. From this comment alone, one cannot determine whether the original bonuses succeeded by helping developers begin to recognize the intrinsic value of green building practices or whether the bonuses were too generous (either because they gave developers a greater incentive than was required or because they inappropriately compromised the objectives of the county’s density controls). Whatever may be the full explanation, the point here is that density bonus programs require careful calibration.

practices to achieve truly sustainable development across the entire spectrum of real estate projects. A profit-driven developer will only spend so much for the promotional value of public recognition and admiration. Information and free consultation will only induce a rational investor to increase expenditures for the sake of sustainability if they demonstrate that the additional investment will generate a positive return through operating cost savings or premium returns on investment. Standard economic logic also indicates that fee reductions and rebates should normally produce no more than dollar-for-dollar investments in sustainability. Depending on the local circumstances, expedited review and development bonuses may have relatively high value to developers, but even those approaches will not induce a developer to spend more on sustainability than the projected value to the developer of the benefit offered. More importantly, by their nature, these benefits will have little impact on projects that are not significantly constrained by processing delays or density and height restrictions. Thus, even though the expedited review and development bonus programs may be exceptionally effective in certain heavily developed population centers (especially if offered by all of the agencies having approval authority over the project), they probably hold much less promise in cities that already permit relatively intense land uses, in many suburbs, and in communities with relatively streamlined and efficient permitting processes (or hopelessly complex processes that involve multiple, uncoordinated agencies).

Of course, even with these potential problems in mind, if public policy makers determine that the relatively inexpensive incentive programs already described are adequate for their sustainability objectives, then government may be able to avoid the most nettlesome funding issues discussed in this Article. That is, public incentives of the kind discussed above—especially those that require only modest processing and fee incentives and those that rely heavily on development bonuses—may provide all the encouragement that developers need to become sustainable. These programs may not require dedicated funding resources, and they probably can be operated in most jurisdictions without triggering protests from the development community or property rights advocates. But are these low-cost, low-controversy approaches adequate to achieve the desired level of sustainability?

Sustainability in a strong sense requires enormous capital expenditures at the design and construction stages of a project. If, for example, a growing community resolves that its overall greenhouse gas emissions must be significantly less tomorrow than they are today, it may be essential for new real estate projects to be designed and built to standards that require more capital investment than the present value of the future energy savings involved for a particular project. Similarly, if an entire state or region decides that it can no longer leave it to future generations to deal with the tremendous amounts of waste that the built environment generates, then recycling solutions must be implemented even when they involve costs that put significant pressure on the financial projections of a particular project. And a society that commits to economic development that promotes more equitable global patterns of resource consumption and distribution must require individual projects to internalize more of the global social costs of current development even though the social burdens involved have little or no immediate impact on the local economy.

Reflecting some of these more ambitious sustainability perspectives, several states and municipalities have decided to offer greater economic incentives—powerful market-based tools
that have the potential to induce investment that will pay off not simply in operating cost savings and premium market values for the specific project involved, but in truly long-term advancements in sustainability that will accrue to the local community as a whole, to the region, to the nation, and to the entire planet. In this category, several states offer, or authorize their political subdivisions to offer, green building incentives in the form of substantial tax benefits. These include state income or other tax credits or deductions based on the costs of capital expenditures for more sustainable building features and practices. Others offer property tax abatements or credits. Beyond these tax incentives, some programs contemplate low-cost public financing for qualifying expenditures, and others directly reimburse developers or homeowners for qualifying capital expenditures or provide grants to cover certain green building costs. Tax benefits and reimbursements and grants for green building costs are the incentives that have the greatest potential to revolutionize industry practices and to bring about a level of investment in green building design and construction practices that will assure true sustainability in the generational and global sense promoted by the international sustainability movement. And it is these programs that will require the most substantial public funding devices and that will incite the greatest political controversy.

35 See MAYOR MENINO’S GREEN BUILDING TASK FORCE REPORT, EXECUTIVE SUMMARY 9 (Fall 2004), http://www.bostongreenbuilding.org/ (follow “Click here to view the Executive Summary” hyperlink) (describing a proposal to establish a loan fund to help finance green building features). Several public financing devices could be used to provide funds for green building costs, including tax increment financing and municipal bond programs. See generally Julian Conrad Juergensmeyer, Infrastructure and the Law: Florida’s Past, Present and Future, 23 J. LAND USE 441, 449-50 (2008) (discussing the use of tax increment financing and other innovative devices to fund infrastructure programs). Berkeley, California offers an alternative approach that illustrates the potential to use municipal bonds to finance green building costs. It provides property owners an opportunity to borrow money from the City’s Sustainable Energy Financing District to install solar installations and energy efficiency improvements and allows the cost to be repaid over 20 years through an annual special tax on their property tax bills. See City of Berkeley, Ca., Action Calendar, April 22, 2008, http://www.ci.berkeley.ca.us/uploadedFiles/Planning_and_Development/Level_3_-_Energy_and_Sustainable_Development/2007-11-06%20Approval%20of%20Concept%20of%20Financing%20District.pdf. The project is funded through issuance of bonds. BERKELEY, CAL., CODE ch. 7.98 (2009). While the program does not target developers, and repayment of the bonds does not depend on developer fees, it might be possible to structure a program along similar lines that disburses municipal bond proceeds to fund investment in sustainable design and construction and that uses sustainability impact fees as a source for repaying the bonds. The principles and limitations concerning municipal bonds, however, are well beyond the scope of this Article. Green building incentives at the federal level are also beyond the scope of this Article. See, e.g., American Recovery and Reinvestment Act of 2009, H.R. 1, 111th Cong. (2009); Energy Improvement and Extension Act of 2008, H.R. 1424, 110th Cong. Tit. III § 307 (2008); American Jobs Creation Act of 2004, H.R. 4520, 108th Cong. § 701 (2004).
There are several early signs that these more potent and expensive programs will require dedicated funding devices. State tax credit programs, for example, may be funded by limited or temporary allocations set by the legislatures.\(^{37}\) Once projects have received aggregated credits equal to the pre-approved limit, no more credits will be available unless or until the legislature approves additional credits.\(^{38}\) And even without legislative appropriation limits, adequate funding sources will be critical if progressive green building programs are to survive fiscal analysis. Absent careful calculations, an incentive program may have unanticipated budgetary consequences. An overly generous Nevada property tax abatement formula, for example, had to be completely restructured to avoid perceived windfall benefits to large developments.\(^{39}\) Depending on how they are administered, other tax programs could also have significant adverse financial impacts on the communities and taxing districts that lose revenue.\(^{40}\)

Because so many of these programs are of relatively recent origin, it is difficult to judge how expensive they will be or whether developer funding mechanisms could contribute to their success. Reported dollar limits for grants and reimbursement amounts range from relatively small sums\(^{41}\) to figures that could potentially add up to significant total expenditures\(^{42}\) and even to amounts that seem too large to be practicable without significant funding even if they are used for only a few projects each year.\(^{43}\)

The prospect that land use authorities will turn to developer funding solutions to finance increasingly significant costs of green building incentives noticeably looms on the horizon.\(^{44}\) A few programs already use a form of “fee-bate,” which may be the most promising developer funding device. One example is Arlington County, Virginia’s green building fee, which supports its green building educational program, and that is rebated to qualifying LEED certified

\(^{37}\) See MD, CODE ANN, TAX-GEN. § 10-722(k)(1)(vi) (Lexis Nexis 2004); N.Y. TAX LAW § 19(c)(1)(a) & (b) (McKinney Supp. 2008)


\(^{39}\) See Darren A. Prum, Digest of Selected Articles, 36 REAL EST. L. J. 239, 150-51 (2007).

\(^{40}\) See, e.g., Cincinnati, Ohio, Ordinance 446-2007 (approved Dec. 12, 2007) (contemplating property tax exemptions of up to 100% for a maximum period of 15 years for certain projects based on LEED certification status); HOWARD COUNTY, MD. tit. 20 Subtitle 1 Part III § 20.130 (approved 2007) (allowing property tax credits to be effective from three to five years in amounts ranging from 10% to 75%).

\(^{41}\) See MIAMI-DADE COUNTY, Fla., CODE ch. 2 art. LXXXVI § 2-1258 (2009) (providing for an award bonus of up to $1,500 for certain projects that operate out of LEED certified buildings that incorporate qualifying alternative energy systems and that otherwise qualify for an award under the Targeted Jobs Incentive Fund Program).

\(^{42}\) A King County, Washington program provides grants for certain residential projects, in amounts ranging from $2,500 for single-family residences up to $20,000, for multifamily projects of 10 or more units. See Your.KingCounty.gov, Residential Green Building Incentives, http://your.kingcounty.gov/solidwaste/greenbuilding/incentives/residential.asp.

\(^{43}\) El Paso, Tex., Resolution (approved Sep. 11, 2007) (providing grants as high as $400,000 for LEED Platinum projects that also meet certain economic development criteria).

\(^{44}\) See MONTGOMERY COUNTY, Md., CODE ch. 8 § 8-50(e) (2008) (imposing an “Environmental Sustainability Fee” on owners of building that do not meet specified energy efficiency and environmental design criteria); MAYOR’S ENERGY ADVISORY COMMISSION, FINAL REPORT TO MAYOR HARRY KIM, http://www.co.hawaii.hi.us/bc/eac/Final%20Report%20to%20Mayor%20-%20Exec%20Summary.pdf, at 3-3 (recording a study for Hawai’i County, Hawaii to investigate the feasibility of imposing a sustainability impact fee on builders and developers who do not adhere to energy efficiency practices). See also Kingsley, supra note 11, at 542-55.
projects. Similarly, Eagle County, Colorado’s Efficient Building Code provides for rebates for residential projects that exceed minimum green building standards, and to defray some of the costs involved the program imposes additional fees on residential projects that do not meet those minimum standards. Portland, Oregon’s proposed High Performance Green Building Policy illustrates another progressive use of the feebate device. Under the Portland proposal, traditional projects would pay fees that the city would use to offset the lost revenue from reduced development fees charged to developers that implement “moderate” green building standards. The city would also use the fees collected from traditional projects to finance fee rebates for green projects that go beyond the “moderate” level. In effect, these rebates would reimburse for the costs of certain “high performance standards.”

One important practical question that these and similar approaches present is how effectively state and local governments can use developer fees to finance costly green building incentives within applicable legal limitations. This is the question that the balance of this Article addresses.

III. Limiting Principles

Over the past twenty-five years much attention has focused on the legality of developer fees imposed to finance infrastructure and other public costs associated with real estate development. In recognition of the fundamental role that the United States Supreme Court’s regulatory takings jurisprudence has played in that story, this Part first reviews the relevant constitutional issues. Next, this Part discusses the other principles that state courts have applied in developer fee cases. Because the Supreme Court’s recent takings cases may signal a willingness to leave land use controls largely to the states, this Article argues that the state law principles governing developer fees will likely take on the dominant role in determining the extent to which land use authorities may use developer fees to finance progressive green building programs.

A. Federal Constitutional Limits on Sustainability Exactions

In what ways does the U.S. Constitution limit how states and local governments may fund green building programs through developer exactions, such as land dedication requirements or impact and mitigation fees? To the extent that a program imposes an exaction as a condition to a development approval, the courts have resorted to several constitutional principles, but the dominant ones derive from the Fifth Amendment’s Takings Clause.

1. The Range of Potential Constitutional Restrictions

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46 Eagle County, Colo., Building Code art. 4 § division 4.8 § 4-820 (2008) & Eagle County, Colo., Building Code art. 4 division 4-9 § 4-920 (2008).
48 Id.
In addition to Takings Clause issues, the other constitutional limitations that most commonly bear on land use controls of all kinds entail due process, equal protection, First Amendment rights, and Commerce Clause principles.\textsuperscript{50} Land use regulations also sometimes implicate other constitutional considerations, such as rights of association, travel, and privacy.\textsuperscript{51} But practically speaking, aside from takings claims, the most common bases for challenging land use exactions, involve due process and equal protection claims.\textsuperscript{52} For that reason, before analyzing how the Supreme Court's takings jurisprudence should apply to sustainability fees, this Part briefly reviews the relatively modest limitations that due process and equal protection principles present in this context.

Land use cases sometimes present valid procedural due process claims, but these usually involve alleged flaws peculiar to the specific process by which a restriction or condition was imposed on the plaintiff. Examples include fundamental unfairness resulting from ex parte communications,\textsuperscript{53} inadequate notice of the matters to be taken up at a city council meeting,\textsuperscript{54} unusual delays,\textsuperscript{55} and a potentially biased hearing panel.\textsuperscript{56} Procedural due process claims, therefore, would not normally be appropriate to challenge an exaction program that follows customary procedures for making land use decisions.

Developers and property owners frequently invoke substantive due process and equal protection principles to challenge land use controls, including exaction conditions.\textsuperscript{57} Unless the government action implicates a fundamental right or affects a suspect or quasi-suspect class, however, a substantive due process or equal protection claim need only survive a highly deferential, rational basis review.\textsuperscript{58} And because land use regulations normally involve considerations of public health, safety, and welfare, rational basis review leaves little room for judicial second guessing, especially in the face of a legislative decision. "[A] legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data."\textsuperscript{59}

\textsuperscript{50} See generally id. at 580-81, 710-11.
\textsuperscript{51} See Vill. of Belle Terre v. Boraas, 416 U.S.1. 7 (1974).
\textsuperscript{53} Idaho Historic Preservation Council, Inc. v. City Council, 8 P.3d 646, 649-51 (Id. 2000) (determining that telephone communications with council members violated due process standards because the identities of the callers and the substance of the conversations were not disclosed).
\textsuperscript{54} Nasierowski Bros., Inv. Co. v. City of Sterling Heights, 949 F.2d 890, 892-96 (6th Cir. 1991) (involving a zoning change that was not included in the public notice for the meeting and that was made during an executive session).
\textsuperscript{55} Tri County Inds., Inc. v. District of Columbia, 104 F.3d 455, 460-62 (D.C. Cir. 1997) (holding that an oral order suspending a building permit indefinitely and made without a hearing violated due process principles).
\textsuperscript{56} Macene v. MJW, Inc., 951 F.2d 700, 704-06 (6th Cir. 1991) (recognizing that a biased decisionmaking process may violate procedural due process, but determining that the plaintiff failed to allege facts sufficient to withstand a motion for summary judgment).
\textsuperscript{58} See generally JUERGENSEMeyer & ROBERTS, supra note 49, at 651.
An especially common judicial analysis reasons that a land use regulation is valid as a matter of substantive due process unless it is “clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.” The Supreme Court has recently acknowledged the continuing relevance of the *Euclid* substantive due process analysis in the context of a significant economic regulation imposed on commercial property interests. See Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 540-41 (2005).

While it is possible to imagine a sustainable development program that could fail under the substantive due process standard, green building initiatives of the kind discussed in Part II should easily pass that test. And if carefully conceived green building programs should likewise be able to justify developer fees based on express legislative findings that the programs the fees support serve the public health and general welfare in the same way that environmental regulations do.

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61 Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 263 (1977). See also Nectow v. City of Cambridge, 277 U.S. 183, 187 (1928) (holding that a single-family zoning classification, as applied to the plaintiff’s specific tract, which could not feasibly be used for the permitted purpose, bore no substantial relation to the public health, safety, morals, or general welfare).

62 See, e.g., Cherokee County v. Greater Atlanta Homebuilders Ass’n, 566 S.E.2d 470, 473-74 (Ga. Ct. App. 2002); Home Builders Ass’n v. City of West Des Moines, 644 N.W.2d 339, 351 (Ia. 2002). In an unusual setting, the Court invoked a due process analysis to invalidate a land use regulation that defined “family” for purposes of a single-family zoning district in such a manner that it made “a crime of a grandmother’s choice to live with her grandson.” Moore v. City of East Cleveland, 431 U.S. 494, 499 (1977). While the Court did not characterize the ordinance as involving a fundamental right, the fact that the restriction interfered with basic personal liberties and family relationships heavily influenced the Court’s conclusion that “the usual judicial deference to the legislature is inappropriate.” Id. In a more common context, restrictive single-family zoning ordinances pass constitutional scrutiny. See Vill. of Belle Terre v. Boraas, 416 U.S. 1, 7-8 (1974).


64 For example, one might argue that a program primarily intended to implement a global social justice model of sustainability might not be rationally related to the public health, safety, morals, or general welfare as those terms are commonly used in substantive due process cases. See Carl J. Circo, *Does Sustainability Require a New Theory of Property Rights?*, 58 KAN. L. REV. ---- (2009).

65 See generally James C. Nicholas & Julian Conrad Juergensmeyer, *Market Based Approaches to Environmental Preservation: To Environmental Mitigation Fees and Beyond*, 43 NAT. RES. J. 837, 839-47 (2003). Language in some cases dealing with regulations that significantly burden property rights suggests the seemingly more demanding requirement that a challenged regulation must “substantially advance legitimate state interests.” Agins v. City of Tiburon, 447 U.S. 255, 260 (1980). See also Dolan v. City of Tigard, 512 U.S. 374, 385 (1994); Nollan v. California Coastal Comm’n, 483 U.S. 825, 834 (1987) (both quoting the *Agins* “substantially advances” standard in the context of land use exactions). The Supreme Court recently characterized that test as being “in the nature of a due process” standard. Lingle v. Chevron U.S.A. Inc., 544 U.S. 528, 540 (2005). But at the same time, the Court signaled that substantive due process does not incorporate the means-ends analysis that the “substantially advances” standard implies because “we have long eschewed such heightened scrutiny when addressing substantive due process challenges to government regulation.” Id. at 545.
Land use regulations also frequently foster distinct equal protection claims because land use controls typically rely on classifications to determine which landowners or projects are subject to particular restrictions or requirements. But a governmental classification or other distinction founded on a rational basis will withstand equal protection scrutiny unless the case involves a suspect class or a fundamental right, factors which are not often present in land use cases. In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.

Exaction cases involving equal protection claims especially arise when, as is frequently the case, government uses some kind of classification to determine whether to impose an exaction or in order to determine the nature of an exaction in any given situation. But because exaction classifications rarely involve any protected class of individuals or fundamental rights, rational basis analysis normally validates the distinctions that an exaction program uses. On this basis, county impact fees assessed against unincorporated areas but not against incorporated areas survived an equal protection attack because the county imposed the fees on all developments subject to its authority under applicable state law. The fact that the county had jurisdiction only over unincorporated areas provided the rational basis for the distinction.

Even using the highly deferential rational basis standard, however, courts can correct invidious discrimination. On that basis, the Supreme Court invalidated the application of a zoning ordinance that stemmed from an irrational prejudice against prospective mentally retarded residents of a proposed group home, and the Court did so despite its unwillingness to label mental retardation as a suspect or quasi-suspect class entitled to a heightened degree of scrutiny under the Equal Protection Clause. Additionally, even an individual landowner, as a class of one, has the right to be free from “intentional and arbitrary discrimination” in the manner in which otherwise nondiscriminatory laws are applied. The Supreme Court applied this principle to recognize that a landowner who requested municipal water service and who was required to dedicate a sewer easement wider than what was required of other landowners stated a valid equal protection claim by alleging that she had been “intentionally treated differently from others similarly situated and that there is no rational basis for the difference in treatment.” That holding, however, goes no further than to confirm the unremarkable notion that a complaint alleging discrimination for which no rational basis exists states a claim sufficient to survive a motion to dismiss.

66 See generally JUERGENSMEYER & ROBERTS, supra note 49, at 666-79.
69 See, e.g., id. at 292 (summarily dismissing an equal protection challenge to an affordable housing linkage fee by merely noting that the plaintiffs did not claim to be members of a suspect class).
70 Greater Atlanta Homebuilders Assoc., 566 S.E.2d at 473-75.
71 City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 446-50 (1985). The zoning district involved permitted apartments, boarding houses, and a variety of other multiple-occupant uses, including hospitals and nursing homes “other than for the insane or feeble-minded.”
73 Id.
In sum, due process and equal protection considerations impose only modest limitations on the ability of state and local governments to adopt green building programs and to finance some of the costs through developer fees. In general, due process and equal protection principles may restrict the way in which developer funding programs may be administered, but not whether they may be implemented at all. It is time, therefore, to turn attention to the Supreme Court’s takings jurisprudence, which historically has provided the most significant constitutional limitations affecting land use exactions.

2. **Takings Analysis**

Justice O’Connor’s opinion for a unanimous Court in *Lingle v. Chevron U.S.A. Inc.* provides a concise restatement of the Court’s complex approach to the regulatory takings issue. The specific question the case presented was whether Hawaii had taken Chevron’s property without just compensation by capping the rent that an oil company could charge its dealer-lessees. While the “paradigmatic taking” subject to the Takings Clause of the Fifth Amendment occurs when government directly appropriates or physically invades private property, regulation may also trigger the Takings Clause. The essential concept of a regulatory taking is that “government regulation of private property may, in some instances, be so onerous that its effect is tantamount to a direct appropriation or ouster . . . .” Chevron based its claim on the theory that government regulation of private property constitutes a taking if the regulation “does not substantially advance legitimate state interests.” Although the “substantially advances” principle had gained acceptance “through simple repetition” in several of the Court’s takings opinions, the Court used the *Lingle* case to “correct course” and hold that the “formula is not a valid takings test, and . . . has no proper place in our takings jurisprudence.”

While Justice O’Connor recognized that the Court’s “regulatory takings jurisprudence cannot be characterized as unified,” she distilled from the cases four distinct categories of regulatory takings, none of which were, in her view, founded on the “substantially advances” formula. Two categories involve property regulations that are generally *per se* takings. These are regulations that cause permanent physical invasion of private property, such as a requirement that a landlord must allow a cable television company to attach transmission cables and other communications facilities to the landlord’s building, and those that limit use of the property to such an extent that the owner loses all economic benefits of ownership, such as a prohibition against building permanent habitable structures on vacant property that has value only for its residential development potential. According to Justice O’Connor, these two circumstances

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75 *Id.* at 532.
76 *Id.* at 537-38.
77 *Id.* at 537.
78 *Id.* at 531 (quoting *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980)).
79 *Id.*
80 *Id.* at 548.
81 *Id.* at 539.
82 *Id.* at 538.
83 *See* *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 430 (1982).
represent “relatively narrow categories” of regulatory takings. Most other regulatory takings fall into a third category, governed imprecisely by the *ad hoc* balancing test of *Penn Central Transp. Co. v. New York City*. The fourth category involves regulatory takings in “the special context of land-use exactions.” Nollan v. California Coastal Commission and Dolan v. City of Tigard, the two Supreme Court cases that define this final category, involved land development permits conditioned on the dedication of portions of the land to public use.

When a property owner asserts that a regulation is a taking by physical invasion or by denial of economic use, as well as when the owner claims a *Penn Central* taking, the controlling inquiry, according to Justice O’Connor, is essentially the same: Is the regulation “functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain.” For each of these three varieties of regulatory takings the Court has developed a distinct test that “focuses directly upon the severity of the burden that government imposes upon private property rights.” A physical invasion involves a great burden because it prevents the owner from exercising the right to exclude others, which is one of the most fundamental rights of property ownership. Similarly, a regulation that prevents the owner from using the property for any economic benefit effectively appropriates the property in every sense other than physically. The *Penn Central* balancing test also focuses on the burden of regulation by expressly weighing as one of the key factors “the magnitude of a regulation’s economic impact and the degree to which it interferes with legitimate property interests.” None of these three categories support or derive from the “substantially advances” doctrine.

Only the exactions category of regulatory takings turns primarily on factors not directly tied to the burden the regulation imposes on property rights. In the exactions context, two inquiries in the nature of heightened scrutiny apply. First, there must be an “essential nexus” between the exaction required as a condition to the requested development approval and some legitimate public purpose that could be served by denying the development approval. Second, the exaction demanded must be roughly proportionate “both in nature and extent to the impact of the proposed development.” Justice O’Connor recognized that the “essential nexus” and “rough proportionality” principles seemed to flow from the “substantially advances” formula upon which Chevron relied but, as discussed below, she ultimately concluded that the Nollan and Dolan cases established an “entirely distinct” rule.

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85 Lingle, 544 U.S. at 538.
87 Lingle, 544 U.S. at 538.
90 Lingle, 544 U.S. at 539.
91 Id.
92 Id.
93 Id. at 539-40.
94 Id. at 540.
95 Id. at 542-43.
98 Lingle, 544 U.S. at 547.
To what extent may a sustainable development fee program be susceptible to a regulatory taking challenge under any of the four categories that Lingle identifies? Developer funding programs should not ordinarily trigger either of the per se categories. First, because they have purely economic impacts on the property owner, developer fees do not present instances of physical invasion by regulation. Second, no sustainable development fee program presently under consideration is so aggressive that it could be expected to preclude economically viable use of the affected property. The other two categories, however, merit much greater attention.

Because, prior to Lingle, many cases and commentators debated whether developer fees should be subject to the Court’s land use exaction analysis, the discussion that follows first analyzes that controversial category in light of Lingle before considering the more broadly applicable Penn Central balancing test.

a. Sustainable Development Fees under Nollan and Dolan

In Lingle, Justice O’Connor strongly implied that the heightened scrutiny principles of Nollan and Dolan apply only in the particular circumstances that gave rise to those cases. First, as explained above, she carefully divided the Supreme Court’s takings jurisprudence into three primarily groupings—the two “relatively narrow categories” that she placed under the heading of per se takings, and the much broader Penn Central category. In her initial overview, she gave Nollan and Dolan only a brief, parenthetical reference following her explanation of the two per se categories. “Outside of these two relatively narrow categories (and the special context of land-use exactions discussed below), regulatory takings challenges are governed by the standards set forth in Penn Central Transp. Co. v. New York City.”

This suggests that Nollan and Dolan define a specialized doctrine that also forms a relatively narrow classification, one that is at least as limited in its application as the two per se categories.

When Justice O’Connor eventually turned her attention explicitly to Nollan and Dolan, she reinforced this characterization. Those cases, she explained, applied the Takings Clause “to adjudicative land-use exactions—specifically, government demands that a landowner dedicate an easement allowing public access to her property as a condition of obtaining a development permit.” They presented instances of physical invasions via project-specific regulation. “[B]oth involved dedications of property so onerous that, outside the exactions context, they

\[99\] While this means that it should be difficult to mount a facial challenge to any of the funding programs discussed in Part II, the prospect for a viable as-applied challenge under particular facts always remains. See generally Nectow v. City of Cambridge, 277 U.S. 183, 187-88 (1928) (invalidated an otherwise constitutional zoning ordinance as applied to the particular circumstances of the landowner’s property).

\[100\] See infra notes 111 and accompanying text.

\[101\] Lingle, 544 U.S. at 538 (citations omitted).

\[102\] An interesting alternative reading is that Nollan and Dolan do not define a separate category at all, but involve a subset of the physical invasion category. See JUERGENSMYEYER & ROBERTS, supra note 49, at 596-97. The analysis is that Nollan and Dolan effectively create an exception to the general rule that a regulation that effects a physical invasion requires compensation. That is, a land dedication requirement will escape the per se rule of Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982) if the exaction satisfies the essential nexus and rough proportionality tests of Nollan and Dolan. While this rendering offers the advantage of logical coherence, it presents the disadvantage of conflicting with the Court’s less tidy analysis in Lingle, which emphasized the unconstitutional conditions doctrine. See infra notes 103-09 and accompanying text.

\[103\] Lingle, 544 U.S. at 538.
would be deemed *per se* physical takings.\textsuperscript{104} The required dedication in each case differed from a classic physical invasion, however, in that the governmental demand for an easement did not originate with government action directly intended to make public use of private property; rather, it was a governmental response, in the form of a condition, to the landowner’s request for discretionary development approval for the landowner’s proposed project. Moreover, the Court’s use of the adjective “adjudicative” indicates that it also may be relevant that in both cases the government imposed the exaction condition in the context of a land development approval proceeding for a specific project rather than under a legislative program imposing similar exactions on a legislatively defined class of property owners or projects. In this sense, the constitutional underpinnings of *Nollan* and *Dolan* go beyond the Takings Clause; they “involve a special application of the “doctrine of ‘unconstitutional conditions.”\textsuperscript{105} That doctrine “provides that ‘the government may not require a person to give up a constitutional right—here the right to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit conferred by the government where the benefit has little or no relationship to the property.”\textsuperscript{106} The doctrine protects against deprivation of constitutional rights through opportunistic, governmental extortion\textsuperscript{107} or gimmickry.\textsuperscript{108} “It reflects the triumph of the view that government may not do indirectly what it may not do directly over the view that the greater power to deny a benefit includes the lesser power to impose a condition on its receipt.”\textsuperscript{109} As explained by Justice O’Connor, the principles of *Nollan* and *Dolan* apparently should not apply to developer funding devices. While the Fifth Amendment prohibits the government from appropriating an easement without paying for it, no provision of the Constitution guarantees landowners the right to develop their property without paying fees.\textsuperscript{110} Put another way, from a constitutional law perspective, a governmental demand for a fee in exchange for development approval is not comparable to a governmental demand for a free easement in exchange for the same approval. Thus, so far as the doctrine of unconstitutional conditions is concerned, the government should be free to require a landowner to pay fees in exchange for a discretionary development approval. In Justice O’Connor’s taxonomy, therefore, a takings challenge to a developer fee (assuming that it does not threaten the economic viability of the property) calls for Penn Central’s balancing analysis and not the heightened judicial scrutiny of *Nollan* and *Dolan*.

\textsuperscript{104} Id. at 547.

\textsuperscript{105} Id. (quoting from *Dolan*, 512 U.S. at 385).

\textsuperscript{106} Id.

\textsuperscript{107} See *Nollan* v. California Coastal Comm’n, 483 U.S. 825, 838 (1987).


\textsuperscript{110} In the context of land use controls, the police power has long prevailed over any notion that a property owner has a constitutional right to use the property free from governmental regulation. See, e.g., *Penn Central Trans. Co. v. City of N.Y.*, 438 U.S. 104, 124-28 (1978); *Vill. of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). Advocates of strong property rights offer an alternative view by arguing that a landowner has a fundamental right to put the property to an economically beneficial use, albeit a right subject to limited governmental regulation to prevent harmful uses. From this perspective, there is no basis to distinguish between a condition in the form of a land dedication and one in the form of a monetary exaction. See James S. Burling, *Do Inclusionary Zoning Laws Violate Nollan, Dolan and the Doctrine of Unconstitutional Conditions?*, SM040 ALI-ABA 769 (2007). In *Lingle*, however, the Court made it clear that the constitutional right burdened by the unconstitutional conditions in *Nollan* and *Dolan* was the right to just compensation for property taken for public use and not the right to put property to an economically beneficial use. See 544 U.S. at 547.
Without the didactic benefit of Lingle, however, earlier courts and commentators disagreed about whether Nollan and Dolan limited the power of government to impose land use exactions in the form of monetary impositions. The precise issue presented in Lingle—whether the “substantially advances” formula established a proper takings test—motivated Justice O’Connor to place Nollan and Dolan outside of the Court’s mainstream takings jurisprudence. This was particularly important to the analysis in Lingle because much of the Court’s language in the exactions cases could otherwise support a far broader reading of the relevant constitutional principles. For example, one passage from Justice Scalia’s opinion in Nollan implies that any kind of land use exaction condition “not reasonably necessary to the effectuation of a substantial government purpose” might constitute a taking. Justice Scalia acknowledged that “a permit condition that serves the same legitimate police-power purpose as a refusal to issue the permit should not be found to be a taking if the refusal to issue the permit would not constitute a taking.” But a condition that “utterly fails to further the end advanced as the justification for the prohibition” lacks the “essential nexus” that the Constitution requires. Justice Scalia equated a condition of that ilk to “an out-and-out plan of extortion.” These statements suggested that any development approval condition must be analyzed rigorously for an essential nexus.

In Dolan, Chief Justice Rehnquist, in adding the “rough proportionality” test to Nollan’s essential nexus standard, also reflected a commitment to the “substantially advances” doctrine. Under the “rough proportionality” rule, even if an exaction condition advances the relevant governmental purpose in the sense required by Dolan, the Takings Clause still requires the government to establish “some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.” The second part of the exaction standard, therefore, concerns “the required degree of connection between the exactions and the projected impact of the proposed development.” The Court’s analysis in Dolan of the City of Tigard’s decision to condition development approval on the landowner’s agreement to dedicate a greenway for flood control purposes illustrates that this additional requirement calls for a relatively demanding means-ends review. The Court conceded that the additional impervious surface areas of the retail expansion that the landowner proposed would contribute to the risk of flooding in the area. But, at most, the record before the Court could only justify a simple restriction prohibiting the landowner from building in the floodplain. “The city has never said why a public greenway, as opposed to a private one, was required in the interest of flood control.” Even more telling was the Court’s basis for rejecting the city’s traffic congestion justification for requiring the landowner to dedicate a public pathway for pedestrians and bicyclists. While the city’s traffic studies and estimates provided support for the city’s

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112 Nollan, 483 U.S. at 834.
113 Id. at 836.
114 Id. at 837.
115 Id. (quoting from J.E.D. Assocs., Inc., v. Atkinson, 432 A.2d 12, 14-15 (N.H. 1981)).
116 Dolan, 512 U.S. at 385, 391.
117 Id. at 391.
118 Id. at 386.
119 Id. at 393.
finding that the pathway dedication could offset some of the increased traffic, they were inadequate to establish that the pathway in fact would, or at least was likely to, have that effect.\(^{120}\) The Court’s effort to clarify offered little more than judicial doublespeak: “No precise mathematical calculation is required, but the city must make some effort to quantify its findings in support of the dedication . . . .”\(^{121}\)

\textit{Nollan’s} and \textit{Dolan’s} broadly stated bases for heightened judicial scrutiny of land use approval conditions predictably led some courts and commentators to regard not only dedication requirements but other development exactions with suspicion.\(^{122}\) This continued to be so even after the 1999 decision in \textit{City of Monterey v. Del Monte Dunes at Monterey, Ltd.},\(^{123}\) in which the Court expressly signaled a much narrower application of the essential nexus and rough proportionality tests.\(^{124}\) But by completely discrediting the “substantially advances” means-ends formula and by emphasizing the unconstitutional conditions rationale, Justice O’Connor’s opinion in \textit{Lingle} all but forecloses the viability of \textit{Nollan} and \textit{Dolan} beyond those circumstances when “government demands that a landowner dedicate an easement allowing public access to her property as a condition of obtaining a development permit.”\(^{125}\)

Read in light of \textit{Lingle}, therefore, the Court’s dedication exactions opinions do not provide meaningful guidance concerning the constitutionality of other land use permit conditions, such as impact and mitigation fees. Yet, even after \textit{Lingle}, the debate about how the rationales of \textit{Nollan} and \textit{Dolan} might apply to developer fee programs continues. Indeed, a host of commentators have proposed alternative ways in which to understand \textit{Nollan} and \textit{Dolan} in the post \textit{Lingle} era.\(^{126}\) Perhaps the Court will someday directly address what constitutional limits apply to land use and development conditions that impose monetary exactions. The Court might hold that monetary exactions are not subject to takings analysis at all.\(^{127}\) Alternatively, the Court might develop a distinct takings analysis governing developer fees, or it might simply confirm that they are subject to the \textit{Penn Central} analysis (and other established constitutional principles, including equal protection and substantive due process, to the extent applicable in a particular

\(^{120}\) \textit{Id.} at 395.
\(^{121}\) \textit{Id.} at 395-96.
\(^{122}\) See Nicholas & Juergensmeyer, \textit{supra} note 65, at 841-47.
\(^{123}\) 526 U. S. 687, 702 (1999) (commenting that “we have not extended the test of \textit{Dolan} beyond the special context of exactions-land-use decisions conditioning approval of development on the dedication of property to public use”).
\(^{127}\) See Eastern Enter. v. Apfel, 524 U.S. 498, 539-47, 553-54 (1998) (Kennedy, concurring in the judgment and dissenting in part; Breyer, J., dissenting in an opinion joined by Souter, Ginsburg, and Breyer); Commonwealth Edison Co. v. United States, 271 F.3d 1327, 1338-40 (Fed. Cir. 2001) (holding that a legislative obligation to pay money, when not from a specifically identified source, does not constitute a Fifth Amendment taking.) See also Small Property Owners of San Francisco v. City and County of San Francisco, 47 Cal. Rptr.2d 121, 130 n.6 (Cal. App. 2006) (“Applying the Takings Clause to regulations that merely require the payment of money is like saying the government can take money, but only if it pays it back. It is far more logical to conclude that a regulation of this sort might be declared invalid as violative of due process . . . .”).
circumstance). If the Court ever takes up that task, it will certainly consult the extensive body of state law governing developer fees, just as it looked to state law in crafting Dolan’s “rough proportionality” test. 128 But before this Article turns in Part III.B. to an analysis of the state law principles relating to developer funding devices, the final subsection of this Part analyzes the constitutionality of sustainability fees under Penn Central.

b. Sustainable Development Fees under Penn Central

According to Lingle, Penn Central governs any regulatory takings challenge that does not fall within one of the other three categories. 129 Therefore, a takings challenge to a sustainable development fee program must, at a minimum, be judged by the criteria of that case. In Penn Central, the Court drew on previous takings decisions characterized by “essentially ad hoc, factual inquires” that “identified several factors that have particular significance.” 130 The analysis, therefore, involves a balancing process rather than an objective test. Although the word “several” implies that at least three distinct factors must be involved, the Court specified only two independent factors, although one of them includes a related component. Those two factors are the “economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations” and the “character of the governmental action.” 131 In later cases, the Court has continued to describe the Penn Central principle simply by reference to those same factors. 132

The notion of economic impact requires little elaboration, especially given the Court’s emphasis on expectations based on investment. A regulation that does not significantly reduce the investment value of the property should yield relatively less weight on the property owner’s side of the scale. How should a court determine the counterbalancing weight attributable to the nature of the regulatory action? The Court’s explanation of that factor offers little beyond the observation that mere regulation is not the same thing as trespass. “A ‘taking’ may more readily be found when the interference with property can be characterized as a physical invasion by government, than when interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.” 133 Thus, a governmental regulation over land use that fits within the extremely broad concept of the police power without approximating physical occupancy may survive even if it imposes a relatively severe economic impact. 134

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128 “Since state courts have been dealing with this question a good deal longer than we have, we turn to representative decisions made by them.” Dolan v. City of Tigard, 512 U.S. 374, 389 (19994). See also infra notes 141-49 (discussing the implications of San Remo Hotel, L.P. v. City and County of San Francisco, 545 U.S. 323 (2005).
129 Lingle, 544 U.S. at 538.
131 Id.
133 Penn Central, 438 U.S. at 124.
134 Several early cases rejected takings claims in the face of evidence that the challenged government action caused a substantial diminution in the value of the property involved. See Miller v. Schoene, 276 U.S. 272, 279-80 (1928); Vill. Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); Hadacheck v. Sebastian, 239 U.S. 394 (1915).
The circumstances presented to the Court in *Penn Central* nicely illustrate the extent to which the balancing approach shelters a police power regulation that does not physically interfere with the property owner’s exclusive possession. Although New York City applied its landmarks preservation law in a way that severely restricted the use of the air rights above Grand Central Station, it still left the owner of the station with the ability to earn a reasonable return on its investment by continuing to use the property as it had been used for many years. Given that the Court held that this extraordinary economic impact did not constitute a taking when considered in light of the city’s historic preservation program, it seems unlikely that the Court would find that a simple developer fee program designed to finance sustainability objectives constitutes a regulatory taking under the *Penn Central* approach. In the latter case, no less than in the former, the “interference arises from some public program adjusting the benefits and burdens of economic life to promote the common good.” Courts applying *Penn Central* to developer funding devices are consistent with this view. It is, therefore, unlikely that any well-conceived developer fee program would constitute a taking under *Penn Central*.

3. **Does the Future of Developer Fees Rest with State Law?**

The *Lingle* opinion alone unravels a quarter century of tangled regulatory takings doctrine. The decision reflects the Court’s continuing reluctance to elevate the constitutional stature of property rights. But there is much more to the recent history of that story. In 2005, the Court handed down a trilogy of takings cases that powerfully limit the role federal courts play in overseeing state and local land use programs.

The most famous of the 2005 takings cases is *Kelo v. City of New London*, which held that a city could constitutionally take private property (upon payment of just compensation to the owner) purely for economic development purposes. *Kelo* unequivocally reiterated the Court’s policy of “affording legislatures broad latitude in determining what public needs justify the use of the takings power.” While the case did not involve a regulatory taking, the Court’s acceptance in *Kelo* of legislative policies affecting property interests fits hand-in-glove with the Court’s reaffirmation in *Lingle* that federal courts owe considerable deference to legislative exercises of the police power that infringe on property rights. Taken together, the 2005 decisions in *Kelo* and *Lingle* leave little doubt that federal courts will accede to legislative initiatives in a

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135 *Id.* at 136.
136 *Id.* at 124.
137 *See*, e.g., San Remo Hotel L.P. v. City and County of San Francisco, 41 P.3d 87, 108-10; (Cal. 2002); Ehrlich v. City of Culver City, 911 P.2d 429, 450 (Cal. 1996) (summarily approving of an “art in public places” fee based on *Penn Central*); Tapps Brewing Inc. v. City of Summer, 482 F. Supp.2d 1218, 1230-31 (W.D.Wash. 2007) (holding that a development permit condition requiring a developer to install a stormwater line was not a taking under *Penn Central*). The plurality opinion in the *Ehrlich* case also held that a recreational fee violated the *Dolan* rough proportionality test, but the analysis on that point is questionable in light of *Lingle*. *See supra* notes 101-28 and accompanying text.
139 545 U.S. 469 (2005).
140 *Id.* at 483.
wide array of state and local land use policies, including those supporting sustainable development. If the City of New London may take land from one private owner simply to transfer it to another private owner who promises an economically advantageous development, and if the State of Hawaii may impose a cap on the rent that Chevron may charge its lessees based on a controversial economic theory, then surely a local government may use simple economic instruments to encourage real estate developers to adopt green building practices.

The third takings opinion issued by the Court in 2005 even more directly weakens federal judicial limitations on land use exaction programs. In *San Remo Hotel, L.P. v. City and County of San Francisco*, the Court resolved a narrow procedural issue in a way that should effectively prevent most regulatory takings claims from ever being heard in any federal court.\(^{141}\) That result comes from combining federal principles of issue preclusion with the ripeness doctrine of *Williamson County Regional Planning Commission v. Hamilton Bank.*\(^{142}\) Under *Williamson County*, a claim that a state or local government entity has taken property without just compensation in violation of the Takings Clause is generally not ripe for adjudication in federal court until the claimant has been denied compensation by a final decision in a state inverse condemnation proceeding.\(^{143}\) In *San Remo Hotel*, the Court had before it landowners who, in compliance with the ripeness requirement of *Williamson County*, had prosecuted an inverse condemnation claim to final judgment in state court. Under that circumstance, the Court held that the issue preclusion doctrine barred the landowners from relitigating through a federal taking claim those issues that were resolved and necessary to the judgment in the state court proceeding.\(^{144}\) The net result is that in most instances in which a taking claim has become ripe under *Williamson County*, the issues essential to the federal taking claim will already have been finally determined against the claimant in the state inverse condemnation action.\(^{145}\) This means that, “as a practical matter, a significant number of plaintiffs will necessarily litigate their federal takings claims in state courts.”\(^{146}\) While the procedural disposition of the case made a detailed consideration of the substantive legal issues unnecessary, it is interesting that the plaintiffs filed the case to challenge a controversial San Francisco mitigation fee program.\(^{147}\)

In embracing a procedural rule that directs takings cases away from the federal district courts, the Court noted with approval that “state courts undoubtedly have more experience than federal courts do in resolving the complex factual, technical, and legal questions related to zoning and land-use regulations.”\(^{148}\) The opportunity for federal judicial oversight in this field

\(^{141}\) 545 U.S. 323 (2005).

\(^{142}\) 473 U.S. 172 (1985).

\(^{143}\) Id. at 194-97.

\(^{144}\) Id. at 340-43.

\(^{145}\) The Court explained that through careful litigation tactics, the petitioners could have effectively preserved their federal claims for litigation in federal court. This was most clearly so with respect to the petitioners’ central claim that the regulatory scheme was facially invalid as an uncompensated taking, because the ripeness of that claim did not require the petitioners to pursue a state court inverse condemnation proceeding. *Id.* at 338-41, 345. It is not clear, however, how realistic a bifurcated approach will be in practice in most instances. Nor would that tactic seem to avoid the procedural dilemma for a landowner making only an as-applied taking claim when, as was the case for the petitioners, the state constitutional principles governing the right to compensation for a regulatory taking are essentially congruent with those of the U.S. Constitution. *See id.* at 332-33.

\(^{146}\) Id. at 346.

\(^{147}\) *See infra* notes 244-52 and accompanying text for a discussion of the state court case.

\(^{148}\) Id. at 347.
will, therefore, primarily be reserved for those instances in which the Court itself reviews decisions of state high courts.\textsuperscript{149} This procedural nuance will, in turn, mean that state court opinions concerning the legality of land use exactions will generally determine whether state and local governments may finance green building programs through developer fees. With this prospect as background, Part III.B. explores the theories that state courts have applied to funding techniques designed to pass infrastructure and other social costs along to developers.

B. \textit{State Law Limits on Land Use Funding Devices for Sustainability}

1. \textit{Fundamental Principles}

At the state and local government levels, growth management strategies have long focused on how real estate development affects a community’s environment and the use of natural resources.\textsuperscript{150} Land use experts regularly call for new development to pay its fair share of the economic and social costs that growth imposes on society.\textsuperscript{151} As a result, land use law offers an established framework for judging the legitimacy of proposals to use developer funding techniques in support of land use policies.\textsuperscript{152} This is not to say that land use law is uniform from one jurisdiction to another, nor to suggest that the correct application of developer fee case law to the problem of financing green building programs is obvious. But the land use cases as a whole provide an important framework for analyzing the issues involved.

Whenever local government seeks to require landowners or developers to internalize costs of land use or development that would otherwise be externalities, two fundamental legal issues require attention. First, what authority does the governmental body have to impose the requirement?\textsuperscript{153} Second, what are the legal limits of that authority?\textsuperscript{154}

With respect to the first question, government’s inherent police power offers broad authority to impose land use regulations that serve the interests of public health, safety, or welfare.\textsuperscript{155} But the existence of the police power alone does not assure the breadth and depth of

\textsuperscript{149} The Court saw this state of affairs as continuing the status quo because “most of the cases in our takings jurisprudence... came to us on writs of certiorari from state courts of last resort.” Id.


\textsuperscript{152} See Nicholas & Juergensmeyer, note 65, 840-43.


\textsuperscript{154} See id.

\textsuperscript{155} See, e.g., Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 386-89 (1926) (relying on the police power to justify the constitutionality of zoning); Hadacheck v. Sebastian, 239 U.S. 394, 410 (1915) (commenting that the police power is “one of the most essential powers of government, one that is the least limitable”); Daddario v. Cape Cod Comm’n, 780 N.E.2d 124, 130-31 (Mass. App. Ct. 2002) (citing the police power as a basis for intrusive environmental regulations); Claridge v. N.H. Wetlands Bd., 485 A.2d 287, 290-91 (N.H. 1984) (holding that the
powers necessary to address effectively all sustainability objectives. If the governmental body is a political subdivision with home rule or extensive charter powers, questions of legal authority may be simplified. But if the governmental body is a political subdivision with only express powers, then the legal authority must stem from some enabling legislation that delegates the relevant police power functions from the state to the local governmental body. State constitutions and legislatures typically grant near plenary power over land use to one or more local authorities having jurisdiction over the location of the land in question. As a result, questions of authority in this sense primarily involve the interpretation of specific state constitutional or legislative provisions relating to public controls over land use. And, because the inherent police power of the state is so extensive, absent narrowly defined federal constitutional restrictions on the exercise of that power, a local government that finds itself without adequate authority to respond to an emerging land use problem only needs to gather sufficient political support to secure from the appropriate legislative body whatever specific authority may be missing from existing enabling acts. Thus, this first issue of basic authority will rarely preclude a governmental initiative to require internalization of the economic burdens of a perceived social cost associated with real estate development.

The second issue concerns the proper role of developer financing devices rather than the general scope of the police power. In land use terms, any developer financing device that takes the form of a development approval condition may be called an exaction. State land use law, either through legislative or judicial oversight, almost universally imposes limits on exactions based on notions of fairness and reasonableness. This simply reflects the fundamental principle that all exercises of the police power must be reasonable. In the context of land use controls, this generally means that the regulation must be reasonably related to one of the recognized purposes of the police power—public health, safety, morals, and general welfare.

The earliest exaction cases did not involve developer fees but land dedications required for subdivision plat approval. State law limitations on required dedications generally reflect the philosophy that if sound planning principles indicate that a proposed development requires

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156 See, e.g., Sintra v. City of Seattle, 829 P.2d 765, 775-77 (Wash. 1992) (holding that an ordinance requiring a developer either to replace low income housing that would be destroyed by the proposed development or pay a housing replacement fee violated substantive due process).

157 See Ziegler, 1 Rathkopf & Rathkopf, supra note 155, at §1:9.

158 See id. at §§ 1:11-12.

159 See id. at §§ 1:2-4.

160 See generally at §1:2 & 1:13.

161 As Part II discusses, however, important policy considerations may engender hotly contested political debates over the extent to which the police power should be used to promote particular sustainable development strategies.


165 See Ziegler, 1 Rathkopf & Rathkopf, supra note 155, at §1:2.

new or expanded public infrastructure, then the developer or landowner may be required to dedicate to the public sufficient land to meet that demand. In effect, if the local government could properly restrain the proposed development because of concerns over the lack of adequate land for on-site, public infrastructure, it may condition development approval on a requirement that the developer dedicate the necessary land to public use for those infrastructure purposes.

Thus, the first generation exaction cases established that a city may condition approval of a subdivision plat on the dedication of land needed to construct suitable public streets, water lines, and sewer improvements to serve the inhabitants of the subdivision. Similarly, many legislatures and courts eventually adopted the view that a residential development that requires additional street improvements, sewer facilities, or other infrastructure capacity may be required to dedicate the land needed for those facilities even if they are not for the exclusive use of residents of the development. In the environmental field, state legislatures and courts have also authorized required dedications for such purposes as preserving on-site green spaces, wetlands, timberlands, or other natural resources.

To what extent may development approval conditions exact contributions that go beyond the on-site infrastructure needs of the particular project? As exaction cases evolved during the middle of the 20th century, three more or less distinct tests emerged. The first test establishes a demanding standard that requires a direct causal connection between the specific development and a particular infrastructure need. This is a kind of rigid “but for” test that requires the government to show that the proposed development alone creates the need for the additional infrastructure expenditures. By logical extension, this approach may also mean that the additional infrastructure provided through the exaction must be used solely to benefit the proposed development. The most well-recognized articulation of this test comes from a 1961 case in which the Illinois Supreme Court held that a village could not require a subdivider to dedicate land for infrastructure facilities unless “the burden cast upon the subdivider is specifically and uniquely attributable” to the proposed development. Because so many infrastructure needs result from the aggregate impact of multiple projects over time, this analysis makes it impossible to require a project to internalize its proportionate share of the most significant social costs of new development.

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167 See, e.g., Ayres v. City Council of City of Los Angeles, 207 P.2d 1,-- (Cal. 1949); See generally JUERGENSMEYER & ROBERTS, supra note 49, at 414-22.
168 Id. at 415-19.
170 See, e.g., Colborne v. Vill. of Corrales, 739 P.2d 972, 973-74(N.M. 1987); Mefford v. City of Tulare, 228 P.2d 847, 848(Cal. App. 1951)
171 See, e.g., JUERGENSMEYER & ROBERTS, supra note 49, at 411-13 (summarizing the cluster subdivision technique, which requires dedication of open space to conserve such resources as green space and forests); Nicholas & Juergensmeyer, supra note 65, 854-57 (discussing wetland mitigation banking programs).
173 Id. at 802.
175 Vill. of Mount Prospect, 176 N.E.2d at 802.
In direct contrast to the “specifically and uniquely attributable” test, other cases during this same time period applied to exaction conditions the same highly deferential standard that courts have traditionally used to determine whether most routine exercises of the policy power are legal.\textsuperscript{176} This test, which invokes a simple reasonableness standard, merely requires a court to determine whether the governmental regulation has “any reasonable tendency to promote the public morals, health, or safety, or the public comfort, welfare, or prosperity.”\textsuperscript{177} The reasonableness test is reminiscent of, and is sometimes expressly categorized as, a substantive due process standard.\textsuperscript{178} In direct contrast to the “specifically and uniquely attributable” test, when a court applies the reasonableness standard, it will nearly always uphold the challenged exaction.

The most common test applied to exactions, however, is significantly more demanding than the reasonableness standard, yet it is decidedly less restrictive than the requirement that exactions must be limited only to those burdens that are specifically and uniquely attributable to the particular project. This third test, which is now generally followed in most jurisdictions, is sometimes called the dual rational nexus test or, more simply, the rational nexus test.\textsuperscript{179}

Rational nexus analysis requires not merely that the exaction be reasonably related to a valid policy power purpose but that the particular requirement must bear a demonstrable connection to an identified social cost that the proposed project imposes. Under this test, government cannot simply use the developer’s request for project approval as a convenient opportunity to fund general costs associated with growth.\textsuperscript{180} “The distinction . . . is whether the requirement has some reasonable relationship or nexus to the use to which the property is being made or is merely being used as an excuse for taking property simply because at that particular

\textsuperscript{176} See Jenad, Inc. v. Scarsdale, 218 N.E.2d 673, 676-77 (N.Y. 1966); Billings Properties, Inc. v. Yellowstone County, 394 P.2d 182, 186-87 (Mont. 1964). The course taken by the New York courts illustrates the sometimes tentative manner in which exaction analysis developed. Jenad, Inc. v. Scarsdale overruled Gulest Assocs., Inc. v. Town of Newburgh, which had temporarily placed New York in the “specifically and uniquely attributable” camp. See Jenad, Inc. v. Scarsdale, 218 N.E.2d at 675. Later, the New York Court of Appeals observed that Jenard was “partially abrogated” by Dolan v. City of Tigard, 512 U.S. 374, 387 (1994). Twin Lakes Dev. Corp. v. Town of Monroe, 801 N.E.2d 821, 826 (N.Y. 2003). This may mean that New York moved from the rigid “specifically and uniquely attributable” camp to the far more relaxed reasonable relationship standard and finally to the majority rule that applies the rational nexus test to all forms of exactions. But, as more fully developed later in this Article, after Lingle v. Chevron U.S.A Inc., 544 U.S. 528 (2005), it is more accurate to say that Dolan conflicts with the reasonable relationship test only as applied to land dedication exactions and not with respect to developer fees. See infra notes—and the accompanying text. The history of New York’s exactions analysis is made even more complex by the fact that Jenard cited with approval both the Montana Supreme Court’s “rational relationship” analysis in Billings Properties, Inc. and the Wisconsin Supreme Court’s opinion in Jordan v. Vill. of Menomonee Falls, 137 N.W.2d 442 (Wis. 1966), which is often considered to be the origin of rational nexus analysis. See infra notes—and the accompanying text.

\textsuperscript{177} State ex rel. Carter v.Harper, 196 N.W. 451, 454 (Wis. 1923).

\textsuperscript{178} See, e.g., Petterson v. City of Naperville, 137 N.E.2d 371, 378-79 (Ill. 1956).

\textsuperscript{179} See Dolan v. City of Tigard, 512 U.S. 374, 389-91 (1994) (reviewing the three principle tests that state courts had applied to land use exactions); James C. Nicholas & Julian Conrad Juergensmeyer, Market Based Approaches to Environmental Preservation: To Environmental Mitigation Fees and Beyond, 43 NAT’L RES. J. 837, 839-43 (2003).

\textsuperscript{180} Note the analogy here to the unconstitutional conditions doctrine. See supra notes 101-28 and accompanying text. But in the context of rational nexus analysis, there is no need to characterize the extortionate bargain as a burden on constitutionally protected rights; it is enough for the court to conclude more generally that the bargain is an unreasonable exercise of the police power.
moment the landowner is asking the city for some license or permit.”

Through its “essential nexus” and “rough proportionality” standards, the Supreme Court has effectively adopted a version of the dual rational nexus test as the standard that the Fifth Amendment imposes on land dedication exactions.

A key consequence of the rational nexus test is the development of a distinct rational nexus calculus, which requires government to account for the infrastructure needs to which the project contributes and to develop and apply a valid formula for determining the proportionate share of those needs that are properly attributable to that project. Under a rational nexus analysis, a local government typically must have legitimate costs studies and proportionate share formulae to back up the precise exactions demanded. In comparison to the vague reasonableness standard that applies to other exercises of the police power, the rational nexus test calls for heightened judicial scrutiny of exaction conditions.

While careful planning often leads to land dedication conditions that pass rational nexus scrutiny, the logical limitations of on-site land dedications are obvious. A particular development might independently accommodate needed water treatment facilities, a community park, or even a new school within the boundaries of the proposed development site, but another development, which also burdens the community’s existing infrastructure facilities, might not.

Faced with this reality, local governments rather quickly developed the alternative of charging a development fee in lieu of a land dedication.

At least to the extent that the fee is calculated on a formula that charges the developer a share of the costs proportionate to the benefit of the infrastructure to the new development, most courts faced with the question readily made the transition from required dedication to required payment in lieu.

But a fee literally paid in lieu of a dedication of land required to support the extra infrastructure demands created by a single development suffers from logical limits similar to those affecting an on-site dedication requirement. Additional public utility facilities, as well as new schools and parks, off-site traffic control enhancements, and many other infrastructure improvements, will in fact be added under many circumstances only because of the actual or projected aggregate demands of a series of developments as a community grows. Moreover, the costs of the required capital improvements for the infrastructure facilities often far exceed the land costs. Therefore, in due course, the development impact fee gained widespread acceptance across the nation to allow local government authorities to collect from developers the proportionate costs of the basic infrastructure demands of their developments.

Where enabling legislation proved insufficient for the purpose, legislatures have commonly expanded

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182 See supra notes 103-21 and the accompanying text. See also Skoro v. City of Portland, 544 F.Supp.2d 1128 (D. Ore. 2008) (applying the essential nexus and rough proportionality tests to an adjudicatory dedication exaction).
183 See, e.g., Nicholas & Juergensmeyer, supra note 65, at 843-45, 860-61.
184 See generally Rosenberg, supra note 163, at 201-03.
187 See JUERGENSMEYER & ROBERTS, supra note 49, at 414-16.
188 See Nicholas & Juergensmeyer, supra note 65, at 842.
the governing statutes, and many courts, at times with difficulty, have adopted statutory interpretations and police power analyses to match.\textsuperscript{189}

Impact fee programs, to a far greater extent than required dedications and payment-in-lieu systems, raise serious questions about the extent to which the land use regulation process may properly be used to fund public facilities. One of the main objections to the use of impact fees is that they can serve as disguised and discriminatory taxation against new development to pay for facilities that inure to the benefit of the public at large.\textsuperscript{190} The net result under modern land use law in many jurisdictions has been the adoption of a distinctly rigorous rational nexus analysis that requires a demonstrable connection between the fee charged and the impact that the development has on public infrastructure costs.\textsuperscript{191}

While the exact formulation and the degree of rigor in the application of the standard varies from one jurisdiction to another, the basic principle under this test for the legitimacy of an impact fee is that “(1) impact fees may be no more than the government’s infrastructure costs that are reasonably attributable to the new development and (2) the development required to pay the fee must derive some benefit from the use of the fees collected.”\textsuperscript{192} One of the most important aspects of the rational nexus test as applied in many jurisdictions is that it allows a land use authority to create a reasonable opportunity to distribute a wide range of infrastructure costs on a pro rata basis among developers.

In its most rigorous form, rational nexus analysis requires an impact fee program to satisfy at least three conditions that invite courts to engage in a demanding means-ends review. First, the government authority must undertake a comprehensive and empirically valid study to establish the true relationship between new development and the community’s infrastructure requirements and other public needs.\textsuperscript{193} Second, the impact fee program must establish a legitimate formula for determining the proportionate impact that a particular development has on those needs.\textsuperscript{194} And third, the program must have a system to account for fees collected that shows that the funds are actually used to address the particular needs involved.\textsuperscript{195} Additionally, in many jurisdictions, an impact fee program generally should be consistent with any comprehensive plan adopted by the jurisdiction.\textsuperscript{196} The net result of this approach is that land use authorities, anticipating that developers will aggressively challenge the methodology used,

\textsuperscript{189} See, e.g., City of Olympia v. Drebick, 126 P.3d 802, 804-807 (Wash. 2006) (upholding a traffic impact fee based on a state enabling act); Greater Atlanta Homebuilders Assoc. v. Cherokee County, 566 S.E.2d 470, (Ga. Ct. App. 2002) (approving impact fees for libraries, roads, and parks and recreation assessed pursuant to Georgia’s impact fee legislation).

\textsuperscript{190} See JUERGENSMeyer & ROBERTS, supra note 49, at 418.

\textsuperscript{191} See, e.g., City of Olympia v. Drebick, 126 P.3d 802, 809 (Wash. 2006) (summarizing the process and formula established under the city’s road impact fee ordinance).

\textsuperscript{192} Nichols & Juergensmeyer, supra note 65, at 843.

\textsuperscript{193} See Jordan v. Vill. of Menomonee Falls, 137 N.W.2d 442, 447-48 (Wis. 1965).

\textsuperscript{194} See JUERGENSMeyer & ROBERTS, supra note 49, at 526-27.

\textsuperscript{195} See id. at 538.

\textsuperscript{196} See id. at 518. See also Save Our Septic Systems Committee, Inc. v. Sarasota County, 957 So.2d 671, 673-75 (Fla. Dist. Ct App. 2007) (analyzing a challenge to a central sewer system capacity fee in light of Florida’s comprehensive planning requirement).
routinely engage in highly structured and thoroughly documented impact fee analysis in advance of adopting an impact fee scheme.\textsuperscript{197}

Because the social costs of land development are not limited to traditional infrastructure requirements, the primary developer funding devices of contemporary land use regulation also extend beyond land dedications, in-lieu fees, and impact fees to include two other common forms of developer funding—the linkage fee and the mitigation fee.\textsuperscript{198} As discussed in Part III.B.3, the conventional view is that rational nexus analysis applies to linkage and mitigation fees in generally the same way that it applies to impact fees.

A linkage fee reflects the public policy that because a well-planned community requires assets and resources in addition to traditional or hard infrastructure, a new development may also be required to contribute its fair share to fund what may be called soft infrastructure needs.\textsuperscript{199} The underlying notion is that growth impacts not only a community’s need for adequate streets and sewers, but also its legitimate desire for such amenities as open spaces and public artwork, and such social resources as decent housing for a growing workforce and accessible child care.\textsuperscript{200} Thus, in some states, municipalities may impose linkage fees to offset the costs of such community needs as low income housing that may be necessary to accommodate the workforce associated with land development, as well as amenities such as beautification programs for public places at a level that the community judges appropriate in light of population growth in general.\textsuperscript{201}

While a linkage fee helps to fund a community facility (soft infrastructure), a mitigation fee compensates for harm (social cost) attributable to development. Local government authorities use mitigation fees especially to fund environmental protection programs, such as wildlife and forestry preservation, thereby offsetting the adverse environmental impact of development.\textsuperscript{202} As is further considered in the discussion that follows, sustainable development initiatives may use any of the developer funding devices described here, but mitigation fees present the most promising alternative. They also raise the issues of greatest interest for purposes of this Article.

2. \textit{Using Developer Fees to Fund Sustainable Development Programs}


\textsuperscript{198}See Juergensmeyer \& Roberts, supra note 49, at 540-45.


\textsuperscript{201}See Ehrlich v. City of Culver City, 911 P.2d 429, 450 (Cal. 1996) (upholding a municipal ordinance requiring developers to contribute to the city’s fund for art in public places or to place art on site); John J. Delaney, et al., The Needs-Nexus Analysis: A Unified Test for Validating Subdivision Exactions, User Impact Fees and Linkage, 50 Law \& Contemp. Probs. 139, 143-44 (1987).

A community might require a developer to dedicate an interest in the project site for sustainability purposes, as occurs at least indirectly under an ordinance that mandates preservation of a portion of existing woodlands.\textsuperscript{203} Similarly, a community might find opportunities to fund its sustainability objectives through in-lieu payments, impact fees, or linkage fees. For example, a city that has adopted a tree preservation plan may offer developers the option to make a payment to the city’s tree preservation fund in lieu of dedicating a portion of the site to preserve existing trees.\textsuperscript{204} Likewise, a local government that wishes to preserve natural resources might charge an impact fee to every developer to fund a proportionate contribution to publicly owned facilities or programs for the preservation or protection of those resources.\textsuperscript{205} Or a community might charge linkage fees to office building and industrial park developers to pay for improvements to public transportation facilities in an effort to achieve reduced greenhouse gas emissions targets for private cars.\textsuperscript{206}

While dedications, in-lieu payments, impact fees, and linkage fees all can, therefore, address some significant sustainability objectives, they cannot serve as the main funding devices for public sustainability programs, at least not as long as land use controls are primarily local and many of the most important sustainability problems require regional and global solutions. Unless and until individual communities can assure local sustainability unaffected by global ecological circumstances—and then only if each geographic region is unconcerned with sustainability beyond its borders—required dedications, in-lieu payments, and impact and linkages fees will be inadequate to achieve some key sustainability objectives. The main function of a broadly conceived green building program should be to achieve sustainability rather than merely to provide for local infrastructure (whether hard or soft). Mitigation fees offer a promising mechanism for requiring real estate developers to compensate for much of the ecological harm that real estate development causes and that threatens to make construction activity as currently done unsustainable from a trans-generational and global perspective. As the next section suggests, mitigation fees may even offer an effective means to finance the most progressive sustainability initiatives that address the international social justice objectives of the sustainability movement.

3. \textit{Using Mitigation Fees to Fund Sustainable Development Programs}

While the precise limits of mitigation fees under state land use law remain to be tested, and the status of environmental mitigation fees is unclear or undeveloped in many jurisdictions,

\begin{footnotes}
\footnote{203 See Ziegler, 2 Rathkopf & Rathkopf, supra note 155, at §20:27.}
\footnote{204 See id. at §20:60.}
\footnote{205 Green building programs that use the feebate device implicitly adopt this approach. See supra notes 45-48 and accompanying text. See also Kingsley, supra note 11, at 549-55 (proposing impact fees based on a project’s level of LEED certification or some measure of costs associated with the use of specific resources). Cf. Board of Trustees of Washington County Water Conservancy Dist. v. Keystone Conversions, LLC, 103 P.3d 686, 687-92 (Utah 2004) (addressing whether a water district’s “water availability fee” was subject to statutory requirements applicable to impact fees).}
\footnote{206 Cf. Michael B. Gerrad, \textit{Climate Change and the Environmental Impact Review Process}, NAT. RESOURCES AND ENV’T. Winter 2008, at 20, 22 (discussing a settlement of a lawsuit against San Bernardino County, California that mentions consideration for the county to include in its general growth plan “transportation impact fees on developments that fund public transit”).}
\end{footnotes}
one common view maintains that all mitigation fee programs must satisfy roughly the same rational nexus test that applies to impact fees.\textsuperscript{207} In 2003, Professors Nicholas and Juergensmeyer asserted that, for purposes of exaction analysis, “[t]oday the weight of opinion is that there are no fundamental differences between”\textsuperscript{208} traditional impact fees and developer fees used to finance “‘green’ infrastructure items.”\textsuperscript{209} In keeping with this framework, they concluded that “any environmental mitigation fees would need very careful impact analysis in order to make them feasible and defensible.”\textsuperscript{210} Thus, they observed that under an environmental mitigation fee program developers “can be charged a proportionate share of the impact cost of the development on the environment or the preservation of the environment” but “cannot be charged any more than their demonstrated proportionate share.”\textsuperscript{211}

In their article, Nicholas and Juergensmeyer focused primarily on how environmental mitigation fees and tradeable emissions and wetlands mitigation programs might serve as models for market-based alternatives for achieving more broadly conceived environmental protection objectives. They did not discuss sustainability or green building programs specifically. Assuming, however, that the rational nexus analysis of the leading impact fee cases also applies to environmental mitigation fees, Professors Nicholas’s and Juergensmeyer’s concise recipe should be equally valid to assure legality of sustainable construction and green building fees:

Any effective regulatory program will require three things:

- First, the specification of a level of service;
- Second, incorporation into a comprehensive plan; and
- Third, the adoption of regulations that maintain the level of service in accordance with that comprehensive plan.\textsuperscript{212}

In this context, “level of service” refers to quantifiable environmental objectives (or for present purposes, sustainability objectives) that the community establishes. Because Professors Nicholas and Juergensmeyer were writing in the pre-\textit{Lingle} era, they had no occasion to consider whether \textit{Lingle} has now freed state courts from constitutionally dictated bondage to a rigid rational nexus analysis. That question is the subject of Part III.B.3 of this Article.

Reserving that larger question for the time being, this section proceeds from the perspective outlined by Professors Nicholas and Juergensmeyer, to analyze how and to what extent mitigation fees imposed on developers might fund public sustainability initiatives in accordance with a rigorous rational nexus standard. This section also considers unique policy questions involved in financing sustainable development objectives through developer fees. The

\textsuperscript{207} \textit{See} Nichols & Juergensmeyer, \textit{supra} note 65, at 861.
\textsuperscript{208} \textit{Id.} at 846.
\textsuperscript{209} \textit{Id.} at 847.
\textsuperscript{210} \textit{Id.} at 860.
\textsuperscript{211} \textit{Id.} at 861. As explained in the text accompanying notes 163-83 \textit{supra}, the rational nexus test requires both that an impact fee cannot exceed the cost reasonably attributable to the project and that the project must derive a benefit from the fee. A mitigation fee presumably satisfies the second prong of the test because the mitigation program makes it possible for the development to proceed even though it will cause environmental harm that, without mitigation, would be a sufficient basis for denial of development approval.
\textsuperscript{212} \textit{Id.} at 859.
discussion moves from programs that involve relatively low costs and little controversy to those that are increasingly expensive, and finally to those that are both expensive and controversial. Throughout the discussion, it is important to keep in mind that mitigation fees are not merely sources of funds, but they can and frequently will operate as economic instruments to influence the market behavior of real estate developers.

As explained in Part II, among the lowest cost and least controversial green building initiatives are those that merely advocate and promote sustainable design and construction standards through public awareness and educational programs or through recognition and awards to green projects. Even these programs, however, require some minimal level of funding for administrative purposes, informational brochures, announcements, and public meetings and ceremonies. Can and should government authorities fund programs of this type by charging mitigation fees to developers? Of course, in some jurisdictions mitigation fees for such novel purposes might require enabling legislation. But assuming the necessary authority, is there any other reason why a municipality could not legitimately fund these minimal expenses through a sustainable construction mitigation fee that presumes that all projects in the community will benefit from a public program to promote sustainability? After all, given the evolving state of sustainable construction technology, even the most sophisticated developer can probably use a sustainability resource, and it should be feasible to devise a simple assessment formula to assure that each development bears only a modest share of the costs involved.

As a matter of public policy, an economic basis for using mitigation fees for these purposes probably exists. But a rigorous rational nexus review may suggest that assessments made under these circumstances are more in the nature of taxes for the general welfare than legitimate development fees. Recall that rational nexus analysis requires that the authority collecting the developer fees is accountable to use the funds for purposes that benefit in some proportionate way the developers who pay them. Under environmental mitigation fee logic, the implicit assumption is that the benefit to the developer comes from the fact that, by offsetting the environmental harm that the project causes, the mitigation program allows the developer to proceed with the project without having to avoid that harm. In what sense do programs promoting and recognizing green building projects benefit developers who choose not to adopt green building techniques? Moreover, what formula could be devised to show that the fee charged to a specific developer bears an acceptable relationship to any adverse effects that the developer’s project causes? To the extent that programs of this nature primarily benefit the public at large and do not offset quantifiable burdens imposed on the community by new development, under a rigorous rational nexus analysis it may be inappropriate to use mitigation fees to finance broad-based green building promotional activities. Furthermore, programs of

213 See generally Rosenberg, supra note 163, at 220-21.
214 See generally Rosenberg, supra note 163, at 219-20. Cf. Emerson Coll. v. City of Boston, 462 N.E.2d 1098, 1102-06 (Mass. 1984) (holding that a special fire service availability fee charged to the owners of certain buildings was more in the nature of an unauthorized tax than a permissable fee).
215 See supra notes 192-96 and accompanying text.
216 See supra note 211.
such limited scope are unlikely to be supported by the kind of empirical data and precise calculus that conventional impact analysis requires.\textsuperscript{218}

A number of somewhat more costly green building programs that directly benefit the development community may be far better candidates for funding through mitigation fees. In this category we may include a wide range of development preferences for green projects, such as expedited plan review and processing, reduced application fees or fee rebates, and development concessions in the form of height or density bonuses. Even the least expensive of these initiatives, such as expedited plan review and modest development bonus programs, involve some administrative costs, and the others either require the government authority to forego revenue or to incur potentially increased social costs associated with more intense development for green projects. While conventional developers who choose not to participate in these preference programs do not benefit directly from them, under environmental harm mitigation logic the program could assess fees against those developers based on calculations of (1) social costs associated with specific design and construction practices that the conventional developers follow that are less sustainable than the preferred, green practices and (2) the costs of mitigating those social costs through sustainable design and construction practices on other projects. For example, with the help of appropriate environmental cost accounting, a sustainability mitigation program could conceivably establish a unit social cost associated with greenhouse gas emissions or life-cycle waste from particular building types that could be mitigated by specific sustainable design and construction techniques for which studies could also determine costs. The policy judgment involved would be that conventional developments can legitimately be required to offset the social costs of their less sustainable practices by providing funding for more sustainable projects. Conceptually, this is the same rationale that many wetlands mitigation programs follow, and it parallels similar mitigation fee proposals for other ecological objectives.\textsuperscript{219}

This approach not only may make it financially feasible for more communities to implement development incentives for sustainable construction, but it may also point the way toward more efficient decisions by developers with respect to green building practices. Rational economic analysis suggests that developers who can incorporate the desired green features into their projects for less than the cost of the mitigation fee will do so, while those who cannot, may choose to avoid sustainable construction practices that are inefficient for their projects by paying to incentivize the more sustainable practices of developers in the first category.\textsuperscript{220} In theory, thorough industry research and economic calculus could ultimately achieve an optimal reallocation of the costs of sustainable construction practices to the group of developers best able to bear them. But if courts adhering to rational nexus analysis require too much precision in quantifying the adverse effects of a particular development that threaten sustainability objectives, it may be extremely difficult for a community to prove that a proposed mitigation fee is no greater than that project’s proportionate contribution to the social costs of unsustainability.

\textsuperscript{218} Of course, assuming that the land use authority gathers some minimal supporting data, a rational nexus approach might permit at least some portion of the costs of such programs to be financed in this way.


\textsuperscript{220} See generally Nicholas & Juergensmeyer, \textit{supra} note 65, at 855 (discussing the economic efficiency advantages of offsite wetland mitigation).
A recent case involving a traditional dedication exaction provides a helpful framework for considering just how demanding rational nexus analysis might be when applied to a sustainable development mitigation fee. In applying the proportionality prong of the standard to a county road dedication requirement, the Utah Supreme Court held that the exaction could be lawful only if the cost that the exaction imposed on the developer was “roughly equivalent” to the cost of the related impact that the development imposed on the county.\(^{221}\) Using this concept of proportionality, the court explained that a “proportion of 1 to 1.01 is roughly equivalent, while the proportion of 1 to 3 is not.”\(^{222}\) While the court did not say precisely how low the ratio must be, the opinion required the trial court to make a determination that the costs of the exaction and the impact would be “about the same.”\(^{223}\) The court remanded the case to the trial court for a two part impact analysis. The first step would be to “determine whether the exaction and impact are related in nature—whether the solution (the exaction) directly addresses the specific problem (the impact).”\(^{224}\) Because the case involved a conventional requirement for an on-site road dedication to address the proposed development’s anticipated traffic impact, this part of the analysis presented no special challenge. The second part of the trial court’s task, however, would require precise evidentiary development to “determine what the cost of dealing with the impact would be to the County, absent any exaction; what the cost of the exaction would be to the developer; and whether the two costs are roughly equivalent.”\(^{225}\)

In the unremarkable context of the Utah case—a simple road dedication exaction—the task was demanding but entirely feasible. Market forces continually confirm land values, and traffic engineers routinely determine the costs associated with accommodating increased traffic associated with new development.\(^{226}\) Given the current state of environmental economics, however, this kind of mathematical precision may be impractical for purposes of requiring a particular real estate development to shoulder a reasonably proportionate share of the adverse effects of unsustainable design and construction practices. In theory, however, land use authorities might be able to develop this kind of impact analysis in support of some of the most popular green building incentives, such as expedited plan review, reduced fees, or density bonuses for green projects, which require relatively modest and easily calculated expenditures to cover additional administrative costs.

Assuming the feasibility of the necessary impact studies and calculations, a similar legal and economic analysis might also support the use of mitigation fees for more costly green building programs, such as reimbursements for the costs of green building certifications, tax credits or grants to offset costs of energy efficient systems and other capital expenditures to meet

\(^{221}\) B.A.M Dev., L.L.C. v. Salt Lake County, 196 P.3d 601, 603 (Utah 2008). While the court was expressly referring to Dolan’s “rough proportionality” requirement, which therefore concerned the constitutionality of the exaction under the Fifth Amendment’s Takings Clause, the court noted that the Dolan formula was in substance the same as “the ‘reasonable relationship’ test, then being used in Utah and the majority of other states” to determine whether a dedication exaction was legal under state law. \textit{Id.}

\(^{222}\) \textit{Id.}

\(^{223}\) \textit{Id.} at 604.

\(^{224}\) \textit{Id.}

\(^{225}\) \textit{Id.}

\(^{226}\) See, e.g., NICHOLAS, NELSON, & JUERGENSMEYER, supra note 197, 175-88 (offering a model road impact fee ordinance).
green building standards, or subsidized financing for such expenditures. For economic reasons already suggested, using mitigation fees in this way may prove preferable to command and control regulations that mandate green building standards for all projects. Some development types or sites may be less able to incorporate green building standards than others. If, for example, a city decides (as many have) to set a targeted level of greenhouse gas emissions for the entire city for a future date that is significantly below currently projected levels for that date, projects for which emissions reductions may be relatively costly or even infeasible need not incur inefficient costs for that purpose because they will pay offsetting mitigation fees that fund resources for projects that can achieve significant emissions reductions for lower costs.

Mitigation fees determined in this way might even provide a local solution to the substantial and challenging global problem of preserving natural capital indefinitely for remote future generations. For this purpose, natural capital refers to: “non-renewable resources, such as mineral resources; the finite capacity of the natural system to produce ‘renewable resources’ such as food crops and water supply; and the capacity of natural systems to absorb the emissions and pollutants that arise from human actions without side effects that imply heavy costs passed onto future generations.” Just as every real estate development, no matter how well planned and executed, imposes some social costs by increasing the demands on public infrastructure, so too do all contemporary real estate developments threaten global sustainability to some extent by contributing to the exhaustion of the earth’s natural capital. The most advanced green building standards currently in use merely contemplate development that is more sustainable—construction practices that do significantly less harm than conventional techniques; these standards do not yet conceive of real estate development that literally has no adverse effect on the ability of future generations to meet their needs. Moreover, even an ideally green project that generates all of its own energy and uses the most efficient techniques currently imaginable in such diverse matters as efficient water systems, sustainable landscaping, and natural habitat preservation, would inevitably use some non-renewable natural resources, generate some amount of construction debris, and would eventually make demands on disposal facilities at the end of its useful life. If, as some would argue, the concepts of ever-expanding economic development and sustainability are ultimately inconsistent with one another because economic development is approaching the limits of the earth’s carrying capacity, one possible solution may be to assess a sustainability mitigation fee against virtually every new real estate development project to fund a long-term natural capital replacement reserve. Environmentalists and environmental economists will, however, hotly debate whether or to what extent human investment can replace natural capital. Under a rational nexus analysis, therefore, a land use authority aiming at these lofty goals would face the daunting task of placing a credible monetary value on the long-term ecological harm attributable to specific projects.

227 See supra notes 219-20 and accompanying text.
228 See Irma S. Russell & Jeffery S. Dennis, State and Local Governments Address the Twin Challenges of Climate Change and Energy Alternatives, NAT’L RESOURCES & ENV’T, Summer 2008, at 9, 10 (discussing the U.S. Conference of Mayors Climate Protection Agreement).
Perhaps the final—and potentially the most expensive and controversial—frontier for sustainable development that mitigation fees might address involves the global social justice objectives of the international sustainability movement. Whether land use controls can or should be used in service of these progressive—some would say radical—objectives, either as a matter of state land use law or the Federal Constitution, is a question outside the scope of this Article.\(^{231}\) What is pertinent here, however, is to suggest that to the extent local communities, regions, and states within the United States, or the nation as a whole, may ever wish to work toward future economic development, including real estate development, that achieves a more equitable distribution of wealth across the globe and that assures that even the most remote future generations will have the opportunity to enjoy an equitable level of social welfare, it will be necessary somehow to finance an enormous capital resource for the benefit of the poorest regions of the earth and the most remote generations. At least in theory, mitigation fees assessed against all new development (and even all real estate use and occupancy) could help establish the magnitude of capital required for that extraordinary purpose.

To have a truly global effect, however, a mitigation fee program of this scope would presumably require legislation and treaties at national and international levels. Furthermore, whenever mitigation fees are proposed to address broad social problems, the scent of illegal, discriminatory taxes on real estate developers may be noted.\(^{232}\) Even giving these significant legal problems their due, however, it may not be entirely fanciful to imagine a sustainable development strategy that effectively incorporates locally administered sustainability mitigation fees into a much broader solution.

In summary, mitigation fee programs hold definite promise as practical devices to finance progressive green building programs designed to provide potent incentives to move the real estate industry toward more sustainable design and construction practices. But if these programs must satisfy the same rigorous rational nexus analysis that currently applies to impact fees in many jurisdictions, government must overcome substantial technical hurdles. A critical question remains to be considered at this point: Is an alternative legal analysis available to legitimize mitigation fees for sustainability purposes even if it is not feasible to establish a “rational nexus”—as that term is used for impact fee purposes—between a community’s sustainability objectives and the quantifiable adverse impacts that new development has on sustainability?

4. **Is a Reasonable Relationship Sufficient to Justify Sustainable Development Fees?**

As explained in Part III.B.1, prior to the development of the Supreme Court’s exaction jurisprudence, under certain circumstances some state courts judged the legality of development exactions under a simple reasonable relationship standard. That standard reflects the most common judicial restriction on the exercise of the police power for land use regulation purposes, and it is a far more relaxed standard than the rational nexus test that most courts currently apply to impact fees. The fact that many pre-\textit{Lingle} commentators and courts favored the more precise calculations of a rigorous rational nexus analysis for purely monetary exactions may, at least to some extent, reflect the influence of the sweeping language of the Supreme Court’s \textit{Nollan} and

\(^{231}\) See Circo, \textit{supra} note 64.
\(^{232}\) See note 190 and accompanying text.
Dolan decisions in the context of land dedication exactions.\textsuperscript{233} Part III.A.2.a, however, shows that this expansive reading of Nollan and Dolan is belied by the Court’s reasoning in Lingle.

As land use authorities and state courts begin to absorb the retrenchment of Nollan and Dolan as takings doctrine, they should also reconsider whether a rigorous rational nexus analysis is the most appropriate framework for validating developer fees that finance incentives for green design and construction practices and other sustainable development programs. These fees are not traditional impact fees because they do not finance infrastructure costs attributable to new development. Rather, they are primarily economic instruments intended to serve the public welfare by encouraging more sustainable development practices. The fundamental purpose of a green building incentive program should be to provide market-based incentives to drive the real estate industry to adopt sustainable design and construction practices. Courts should view a land use program with that objective as a presumptively benign and valid exercise of the police power. Green building programs financed through developer fees, especially those assessed pursuant to a legislative scheme of general application, simply do not raise the risk of improper opportunism that courts frequently suspect when government requires the dedication of an interest in land as a condition to development approval.\textsuperscript{234} In particular, a program that uses green building fee rebates to marshal market forces in favor of sustainability provide no basis to insist on heightened judicial scrutiny.

In Holmdel Builders Association v. Township of Holmdel,\textsuperscript{235} the New Jersey Supreme Court offered an analysis that may, by analogy, point the way to a more appropriate judicial response to sustainability fees. The court held that the rational nexus standard applicable under New Jersey law to impact fees was not appropriate to judge the validity of an affordable housing fee assessed against nonresidential projects—a social program far more controversial than any green building incentive programs currently in evidence.\textsuperscript{236} Rather, the court subjected the affordable housing fee programs to a far less demanding standard similar to the one that courts

\textsuperscript{233} See, e.g., Ehrlich v. City of Culver City, 911 P.2d 429, 443-47 (Cal. 1996) (holding that Nollan and Dolan applied to a recreational fee imposed as a discretionary permit condition); Steven A. Haskins, Closing the Dolan Deal—Bridging the Legislative/Adjudicative Divide, 38 URB. LAW. 487, 488-91, 501-21 (arguing for a broad reading of Nollan and Dolan and criticizing courts that have hesitated to apply a consistent takings analysis to legislative as well as adjudicative exactions) (2006); Rosenberg, supra note 163, at 251-59 (discussing how state courts have applied the Nollan and Dolan cases to monetary exactions). But see ROBERT H. FREILICH & DAVID W. BUSHEK, Public Improvements and the Nexus Factor: The Takings Equation after Dolan v. City of Tigard, in EXACTIONS, IMPACT FEES AND DEDICATIONS: SHAPING LAND-USE DEVELOPMENT AND FUNDING INFRASTRUCTURE IN THE DOLAN ERA 3, 11-13 (Robert H. Freilich and David W. Bushek, eds. 1995) (arguing that there is “a fairly compelling basis to narrowly interpret Dolan and limit its application to exaction cases in which the property owner is required to dedicate land as a condition of permit approval”).


\textsuperscript{235} 583 A.2d 277 (1990).

\textsuperscript{236} Id. 287-88. The case involved affordable housing fees assessed under several different township programs devised to implement the landmark holdings of Southern Burlington County NAACP v. Mount Laurel Twp., 336 A.2d 713 (N.J. 1975) (Mt. Laurel I) and Southern Burlington County NAACP v. Mount Laurel Twp., 456 A.2d 390 (N.J. 1983) (Mt. Laurel II), in which the court recognized that New Jersey municipalities have an affirmative obligation to provide affordable housing. A principal factor in the case was that all of the challenged programs provided for nonresidential developers to pay affordable housing fees into trust funds dedicated to the counties’ Mt. Laurel obligations, although some of the programs also assessed fees against non-inclusionary residential projects. Holmdel Builders Assoc., 583 A.2d at 280-83.
traditionally apply when developers or landowners challenge an exercise of the police power. The court held that an affordable housing fee was one of several acceptable inclusionary-zoning devices that could help local governments meet their obligations under New Jersey law to provide affordable housing. As such, the fee bore “a real and substantial relationship to the regulation of land and the zoning power.”

The court rejected the argument that the fees were illegal because they violated both prongs of the rational nexus test by requiring “developers to provide for off-site public needs that have not been caused by their developments and furnish them no benefits.” The court acknowledged that it had “traditionally required a strong, almost but-for causal nexus between off-site public facilities and private development in order to justify exactions.” In language consistent with the deferential attitude that courts commonly use with reference to the police power in other circumstances, the court found “a sound basis to support a legislative judgment that there is a reasonable relationship between unrestrained nonresidential development and the need for affordable residential development.” Most importantly, the court declined to “equate such a reasonable relationship with the strict rational-nexus standard that demands a but-for causal connection or direct consequential relationship between the private activity that gives rise to the exaction and the public activity to which it is applied.”

The court held that the governmental program involved was “not analogous to specific off-site infrastructure improvements occasioned by a particular development” and that the required reasonable relationship was “founded on the actual, albeit indirect and general, impact that such nonresidential development has on both the need for lower-income residential development and on the opportunity and capacity of municipalities to meet that need.” In logic that could easily transfer to sustainability objectives, the court’s reasonable relationship determination rested in large part on an implicit recognition that nonresidential development uses scarce natural capital. “[I]t is fair and reasonable to impose such fee requirements on private developers when they possess, enjoy, and consume land which constitutes the primary resource for housing.”

The California Supreme Court has also used a reasonable relationship standard to uphold certain land use permitting fees. The plaintiffs applied for a conditional use permit to convert their existing project to use as a tourist hotel. The property had been used, at least at times and to some extent, as a residential hotel for long-term residents. San Francisco’s Residential Hotel Unit Conversion and Demolition Ordinance and the city’s planning code required the plaintiffs to obtain a conditional use permit. The city granted the permit but, in accordance with the ordinance, conditioned the approval on a requirement that the plaintiffs mitigate the loss of

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237 Id. at 286.
238 Id. at 287.
239 Id.
240 Id. at 288.
241 Id.
242 Id.
243 Id.
244 San Remo Hotel L.P. v. City and County of San Francisco, 41 P.3d 87, 100-06(Cal. 2002). Ironically, the California Supreme Court’s decision in this case precluded the U.S. Supreme Court from deciding the issue in the subsequent action that the plaintiffs brought in federal court. See supra notes 141-49 and accompanying text.
245 Id. at 91-94.
residential units attributable to the conversion. The ordinance allowed the plaintiffs either to replace units or to pay a mitigation fee in the amount of $567,000, as calculated by the Bureau of Building Inspection in accordance with the provisions of the ordinance. The plaintiffs paid the fee and filed an action that challenged certain administrative determinations and that also asserted that the ordinance effected a taking under the California Constitution. The court held that the appropriate standard to apply was California’s “reasonable relationship” test rather than the heightened scrutiny standard that both California law and the Nollan and Dolan cases require for certain exactions.

The court reasoned that heighten scrutiny is appropriate when a land use authority demands a land dedication or when it imposes an ad hoc condition that a developer must pay a fee that is not imposed on others. But the less demanding “reasonable relationship” test should apply when the exaction is a fee required under a legislative scheme generally applicable to all similarly situated projects. Because the San Francisco ordinance did “not provide City staff or administrative bodies with any discretion as to the imposition or size of a housing replacement fee,” the court did not perceive the “same potential for illegitimate leveraging of private property” that justifies heightened scrutiny. The court held that the same higher degree of scrutiny that applies under Nollan and Dolan to land dedication exactions also should apply “to development fees imposed on an individualized basis as a condition for development. . . But a different standard of scrutiny would apply to development fees that are generally applicable through legislative action.” Courts and commentators sometimes characterize this distinction as one that differentiates between an adjudicative exaction condition and a legislative one.

Thus, both the New Jersey Supreme Court and the California Supreme Court have held that different kinds of developer fee programs require different standards. In neither case did the court use the demanding calculus of a rigorous rational nexus test. There was no inquiry into baseline studies of the externalized costs involved and no need for the court to assess a particularized determination of the developer’s proportionate share of those costs. While the New Jersey court called for “a real and substantial” relationship to land use control and the California court used the more customary “reasonable” relationship formula, both cases returned to the customary, flexible, and highly deferential principle that reasonable land use regulations will normally survive judicial scrutiny. A key benefit of this approach is that it accommodates context-based distinctions in the land use policies of different jurisdictions. A New Jersey township’s method of implementing that state’s affordable housing policy, and San Francisco’s program for retaining residential hotel capacity, may not be appropriate (or even relevant) for other communities. That, however, is not the issue. How to frame and analyze the question in

246 Id. at 92.
247 Id. at 95.
248 Id. at 105-06.
249 Id. at 101-03. The court relied both on the Nollan and Dolan cases and on the related California precedent established by Santa Monica Beach, Ltd. v. Superior Court, 968 P.2d 993 (Cal. 1999) and Ehrlich v. City of Culver City, 911 P.2d 429 (Cal. 1996).
250 41 P.3d at 103-04.
251 Id. at 102-03.
252 Id. at 103 (quoting from Santa Monica Beach, Ltd. v. Superior Court, 968 P.2d 993, 1002 (Cal. 1999)).
each instance is best committed to the sound discretion of state policy, as determined by the legislative bodies and courts of each state.

When there is no unconstitutional condition in the form of a land grab, and no other peculiar need to guard against the specific risk of governmental extortion or gimmickry, courts should be free to use a deferential standard to determine whether a developer fee program is legal. It should be sufficient to require simply that sustainability fee programs bear a reasonable relationship to the public health, safety, and general welfare, which is the touchstone courts normally use to determine the legality of other exercises of the police power in the land use context. There is no basis for a constitutionally mandated, nationwide, rigorous rational nexus test in these instances. It would go too far to speculate that this very consideration of contextual nuance motivated the U.S. Supreme Court to preclude relitigation of the San Remo case in federal court;²⁵⁴ it is not too much, however, to suggest the wisdom of leaving it primarily to state courts to address “the complex factual, technical, and legal questions related to zoning and land-use regulations.”²⁵⁵

Developer fees assessed to fund green building incentives should be judged under the simple reasonable relationship test that courts use to determine the legality of most other land use regulations adopted pursuant to the police power. Absent special considerations, such as those that arise when government seeks to appropriate specific property (e.g., an easement or title to land), the traditional standard for judging the legality of an exercise of the police power in the land use regulation context is, and should remain, a highly deferential and generalized one. This is not to say that all green building incentive programs are wise, or that any specific market-based fee will be efficacious, but merely that courts should defer to a legislative judgment to adopt a particular green building incentive program unless it is “clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.”²⁵⁶

IV. Conclusion: The Effective Use of Developer Funding Devices for Sustainability

Given the prevailing view that environmental mitigation fees should conform to a conventional rational nexus framework, a conservative approach counsels land use authorities to structure their green building and sustainable construction fee programs cautiously within the context of comprehensive land use planning. That approach should be sufficient to withstand the inevitable challenges that the development community will mount whenever the fees involved are substantial. But some more progressive jurisdictions may prefer a less formulaic tactic that aggressively uses a developer fee program as an economic instrument to create a powerful incentive for developers to internalize social costs that threaten sustainability in ways that are not easy to quantify. These communities must boldly challenge the authority of the rigorous rational nexus analysis for sustainability mitigation purposes, seeking to substitute a standard more akin to the reasonable relationship standard that courts apply to many other police power exercises in the land use context.

²⁵⁴ See supra notes 141-49 and accompanying text.
Finally, it must be recognized that the exaction route is not the only way to justify developer fees that finance green building programs. In those jurisdictions that have, or can secure, the necessary taxing power, excise taxes assessed against new development may prove to be an especially effective means to finance progressive programs.257 Alternatively, but again subject to the possible need for express enabling legislation, development agreements may provide an efficient mechanism for funding the social costs of development while avoiding the most troublesome legal issues that exactions raise.258

257 While the legality of excise taxes in this context is a topic for another day, one particularly interesting parallel exists with respect to challenges to developer fees in the form of excise taxes and challenges to land use exactions. In both instances, a constitutional claim must overcome substantial hurdles both because of the deference courts give to the legislative policy decisions involved and the jurisdictional impediments to bringing a claim in federal court. See San Remo Hotel, L.P. v. City and County of San Francisco, 545 U.S. 323, 347 (2005); Home Builders Assoc. v. City of Madison, 10 F.Supp.2d 617, 621-27 (1997).
258 See Callies & Sonoda, supra note 151, at 381-408 (explaining the advantages of providing for infrastructure costs through development agreements).