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# Real Cities, Ideal Cities: Proposing a Test of Intrinsic Fairness for Contested Development Exactions

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# NOTE

# REAL CITIES, IDEAL CITIES: PROPOSING A TEST OF INTRINSIC FAIRNESS FOR CONTESTED DEVELOPMENT EXACTIONS†

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*"From now on, I'll describe the cities to you," the Khan had said, "in your journeys you will see if they exist."*

*But the cities visited by Marco Polo were always different from those thought of by the emperor.*

*"And yet I have constructed in my mind a model city from which all possible cities can be deduced," Kublai said. "It contains everything corresponding to the norm. Since the cities that exist diverge in varying degree from the norm, I need only foresee the exceptions to the norm and calculate the most probable combinations."*

*"I have also thought of a model city from which I deduce all the others," Marco answered. "It is a city made only of exceptions, exclusions, incongruities, contradictions. If such a city is the most improbable, by reducing the number of abnormal elements, we increase the probability that the city really exists. So I have only to subtract exceptions from my model, and in whatever direction I proceed, I will arrive at one of the cities which, always as an exception, exist. But I cannot force my operation beyond a certain limit: I would achieve cities too probable to be real."*

—Italo Calvino[1]



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1 ITALO CALVINO, INVISIBLE CITIES 69 (William Weaver trans., Harcourt, Inc. 1974) (1972).

## INTRODUCTION

Across the country, local government control over land development has shifted focus from the naïve concerns of the 1920s with laying out streets and separating uses[2] to the current performance-based goals of reallocating fiscal burdens, optimizing revenue, and minimizing public costs.[3] Against this backdrop, exactions comprise all the conditions that municipalities—driven by need or greed—might impose on permit applicants before approving development projects ranging from construction of a residential subdivision to rehabilitation of a single commercial structure.[4]

Exactionary permit conditions may include: land or easement dedications for schools, parks, or trails; impact fees to defray the cost of increased traffic or facility usage; purchase or donation of equipment or off-site parcels for public use; and linkage fees to finance affordable housing for the employees of incoming commercial tenants.[5] Municipalities now justify development exactions through tenuous

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2 *See, e.g.*, NEWMAN F. BAKER, LEGAL ASPECTS OF ZONING 34 (1927) (emphasizing the need to ameliorate congestion, which causes vice and crime, disease and traffic accidents); *see also* Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 387, 389–90 (1926) (upholding the validity of zoning); Welch v. Swasey, 214 U.S. 91, 107 (1909) (upholding the validity of building height restrictions).

3 *See* RUTHERFORD H. PLATT, LAND USE AND SOCIETY: GEOGRAPHY, LAW, AND PUBLIC POLICY 277–78 (rev. ed. 2004).

4 *See generally* WILLIAM C. JOHNSON, URBAN PLANNING AND POLITICS 89–90 (1997) (explaining how general-purpose local governments combine revenue from property taxes, federal and state aid, improvement assessments, and development exactions); YI-FU TUAN, TOPOPHILIA: A STUDY OF ENVIRONMENTAL PERCEPTION, ATTITUDES, AND VALUES 151 (Morningside Ed. 1990) (1974) ("The essential requirement [for urbanization] is the existence of a central bureaucracy that has the power to command food and services from the people of the countryside."); Elizabeth D. Purdum & James E. Frank, *Community Use of Exactions: Results of a National Survey*, *in* DEVELOPMENT EXACTIONS 123, 124, 126 (James E. Frank & Robert M. Rhodes eds., 1987) (reporting the results of a 1984 study that found eighty-eight percent of American municipalities required land dedication for primarily on-site infrastructure: roads, water and sewer lines, and drainage).

5 *See* JOHN M. LEVY, CONTEMPORARY URBAN PLANNING 135 (6th ed. 2003); James A. Kushner, *Property and Mysticism: The Legality of Exactions as a Condition for Public Development Approval in the Time of the Rehnquist Court*, 8 J. LAND USE & ENVTL. L. 53, 79–144 (1992).

connections to remote effects occurring distantly from the development site.[6] These justifications lie far from "the explicit purpose of local land use control: to ensure efficient, equitable, and balanced use of available land in the community."[7]

When contesting permit conditions, subdividers and other developers frequently claim an uncompensated taking of property under the Fifth Amendment[8] or under a comparable state constitutional provision.[9] Current jurisprudence provides little practical guidance to either municipal planning staff or the development community—and their respective attorneys—in determining the prospective validity of a permit condition.[10] Through a one-set-of-standards-fits-all approach, this case law disregards the influence that the particularity of place has on the democratic process.

To address the constitutionality of contested development exactions, in *Dolan v. City of Tigard* a sharply divided Supreme Court established more than ten years ago a standard of "rough proportionality" between the nature and extent of the permit condition and the impact of the proposed development.[11] Put differently, while "[n]o precise mathematical calculation is necessary to show the required reasonable relationship, . . . an agency [or municipality] must make some sort of individualized determination that the required dedication is . . . roughly proportional."[12] In *Nollan v. California Coastal Com-*

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6 *See generally* ALAN A. ALTSHULER & JOSÉ A. GÓMEZ-IBÁÑEZ, REGULATION FOR REVENUE: THE POLITICAL ECONOMY OF LAND USE EXACTIONS 16, 42–46 (1993) (describing exactions predicated upon the supposed connection between a development and its negative socio-economic effects).

7 PLATT, *supra* note 3, at 278; *see, e.g.*, St. Johns River Water Mgmt. Dist. v. Koontz, 861 So. 2d 1267, 1272 (Fla. Dist. Ct. App. 2003) (Pleus, J., concurring) (characterizing alternate permit conditions, which required either replacing culverts 4.5 miles away from the proposed development site or plugging drainage canals seven miles away, as extortionate).

8 *See* Chi., Burlington & Quincy R.R. Co. v. City of Chicago, 166 U.S. 226, 235 (1897) (incorporating the Takings Clause through the Fourteenth Amendment).

9 *See, e.g.*, ALASKA CONST. art. 1, § 18 ("Private property shall not be taken or damaged for public use without just compensation."). The court then determines whether the state action constitutes an uncompensated takings under state law. *See, e.g.*, R & Y, Inc. v. Municipality of Anchorage, 34 P.3d 289, 293 (Alaska 2001).

10 *See infra* Part I.

11 *See* 512 U.S. 374, 391 (1994). Tigard, Oregon attempted to exact from an elderly widow and hardware store proprietor a dedication of roughly ten percent of her commercial parcel to combat flooding from the adjacent Fanno Creek and to extend a bikeway towards Main Street. *See id.* at 380; *see also* JOHNSON, *supra* note 4, at 8 (providing a map that locates A-Boy Electric and Plumbing Supply, the bike path, the hundred-year floodplain, and downtown Tigard); William Funk, *Reading* Dolan v. City of Tigard, 25 ENVTL. L. 127, 127–29 (1995) (telling the two stories of *Dolan*: that of the landowner and that of the city); James L. Huffman, Dolan v. City of Tigard*: Another Step in the Right Direction*, 25 ENVTL. L. 143, 145–46 ("The *Dolan* case illustrates that some governments are now even disinclined to compensate where tradition would have called for exercise of the eminent domain power.").

12 Daniel J. Curtin, Jr. & W. Andrew Gowder, Jr., *Recent Developments in Land Use, Planning and Zoning Law Relating to Exactions*, 36 URB. LAW. 519, 520 (2004); *see, e.g.*, Ehrlich v.

*mission*, decided seven years prior to *Dolan*, the Court had established the requirement of an "essential nexus" between the ends furthered by a permit condition and the official reason for the exaction.[13] Thus, essential nexus and rough proportionality have become the dual hallmarks of the *Nollan/Dolan* doctrine.

In 1995, the Supreme Court missed an opportunity to clarify the doctrine when it denied certiorari in *Parking Ass'n of Georgia, Inc. v. City of Atlanta*.[14] After reviewing an ordinance that called for landowners to install curbs, trees, and other landscaping in surface parking lots of over three hundred spaces, the Georgia Supreme Court determined that *Dolan* bore no relevance to the situation—and, moreover, that no taking had occurred—because the ordinance applied to many

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City of Culver City, 911 P.2d 429, 433 (Cal. 1996) (remanding to afford the municipality a postexaction opportunity to justify its permit condition under the rough proportionality standard); Lincoln City Chamber of Commerce v. City of Lincoln City, 991 P.2d 1080, 1081 (Or. Ct. App. 1999) (holding that a zoning ordinance, which required the applicant's qualified engineer to submit a "rough proportionality report," neither eliminated nor diminished the city's ultimate responsibility to demonstrate rough proportionality); *see also* Robert F. Brown, *Litigating the Subdivision Exactions Case: The True Meaning of Proportionality*, (June 2001), http://www.bhlaw.net/CM/Articles%20Presentations/articles%20presentations29.asp ("The ability to demonstrate rough proportionality will turn, in great part, on the nature of the exaction being analyzed. . . . [W]here a dedication is required solely to meet the needs of the residents of a proposed subdivision [such as streets, sewers, sidewalks, and—arguably—stub roads], the dedication is, by its very nature, roughly proportional to the impact of the proposed development.").

13 483 U.S. 825, 836–37 (1987); *see also* Pennell v. City of San Jose, 485 U.S. 1, 20 (1988) (Scalia, J., concurring in part and dissenting in part) ("Traditional land-use regulation . . . does not violate [the Fifth Amendment] because there is a cause-and-effect relationship between the property use restricted by the regulation and the social evil that the regulation seeks to remedy."). The California Coastal Commission conditioned replacement of a dilapidated bungalow on its owners' dedication of a public easement across their beachfront lot. *See* 483 U.S. at 827–28. *See generally* Timothy A. Bittle, Nollan v. California Coastal Commission*: You Can't Always Get What You Want, But Sometimes You Get What You Need*, 15 PEPP. L. REV. 345 (1988) (recounting the largely forgotten background of *Nollan*, authored by co-counsel to the Nollans).

*Agins v. City of Tiburon*, 447 U.S. 255 (1980), laid the foundation for the *Nollan/Dolan* doctrine by establishing a two-prong test to determine whether a taking has occurred: if the ordinance (1) "does not substantially advance legitimate state interests," or (2) "denies an owner economically viable use of his [or her] land." *See id.* at 260. Although *Nollan* applied a more focused form of the first prong of this test to development exactions, it did not clarify the degree of connection required between the exaction and the projected impact of the proposed development. *See* Mark W. Cordes, *Legal Limits on Development Exactions: Responding to* Nollan *and* Dolan, 15 N. ILL. U. L. REV. 513, 527 (1995) ("Because *Nollan* involved the unusual scenario where there is no connection between an exaction and development impact, the full import of the 'essential nexus' standard was left undeveloped."). In *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. __, 125 S. Ct. 2074 (2005), the Supreme Court renounced the "substantially advances" formula of *Agins* as unhelpful in comparison with the more pertinent inquiry into the magnitude or distribution of a regulatory burden. *See* 125 S. Ct. at 2084. A unanimous Court, however, explicitly upheld the precedential value of *Nollan* and *Dolan*. *See id.* at 2087.

14 515 U.S. 1116 (1995).

landowners equally and "simply limited" the use of the property.[15] Justice Thomas, joined by Justice O'Connor, dissented from the denial of certiorari, arguing that rough proportionality should apply regardless whether the exactions were imposed in a sweeping and legislative fashion or on a particularized and administrative basis:

> It is not clear why the existence of a taking should turn on the type of governmental entity responsible for the taking. A city council can take property just as well as a planning commission can. Moreover, the general applicability of the ordinance should not be relevant in a takings analysis. If Atlanta had seized several hundred homes in order to build a freeway, there would be no doubt that Atlanta had taken property.[16]

State courts today, however, are less likely to find a regulatory taking when the exaction takes the form of a fee, including an ad hoc fee in lieu of a dedication, or when an elected body calculates the fee amount.[17]

Two recent cases from the high-growth Northwest illustrate the latter trend and the structural problems it raises. In *Rogers Machinery, Inc. v. Washington County*, the Oregon Court of Appeals refused to ap-

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15 *See* Parking Ass'n of Ga., Inc. v. City of Atlanta, 450 S.E.2d 200, 203 n.3 (Ga. 1994) (noting, in dicta, rough proportionality between the ordinance requirements and its police power objectives).

16 515 U.S. at 1117–18 (Thomas, J., dissenting).

17 *See* Mark Fenster, *Takings Formalism and Regulatory Formulas: Exactions and the Consequences of Clarity*, 92 CAL. L. REV. 609, 645–48 (2004) (commenting that formulaic legislation, which appears fairly calculated and imposed, is persuasive to courts that lack expertise in land use planning). *But see* James E. Frank & Robert M. Rhodes, *Introduction* to DEVELOPMENT EXACTIONS, *supra* note 4, at 1–3 (clarifying that the term "exaction" presupposes neither "fixed and certain" conditions nor ones resulting from "open-ended negotiations").

It is important to emphasize that monetary exactions may be, but are not necessarily, more closely associated with generally applicable legislative enactments than ad hoc administrative ones. *Compare* San Remo Hotel v. City & County of S.F., 41 P.3d 87, 91, 104 (Cal. 2002) (upholding an ordinance, which required hotel owners seeking to convert long-term occupancy units to tourist use either to replace the units or to contribute funds for puhlic housing, because "no meaningful government discretion enter[ed] into either the imposition or the calculation of the in lieu fee" and the city did not "single out [the] plaintiffs"), *with Ehrlich*, 911 P.2d at 436, 450 (applying *Dolan* to validate a $280,000 recreational mitigation fee, which was imposed by the city council, but not applying *Dolan* to a $32,000 public art fee, which was mandated by ordinance at a flat one percent of total project value and consequently upheld).

The test of intrinsic fairness this Note proposes would apply both to legislative and administrative exactions, and is equally compelling with regard to monetary exactions as it is regarding easements or dedications of real property. *See infra* Part III; *cf.* Town of Flower Mound v. Stafford Estates Ltd. P'ship, 135 S.W.3d 620, 635 (Tex. 2004) (analyzing a permit condition that required the developer, at its own expense, to improve a public thoroughfare abutting a new subdivision and declaring, "We do not read *Dolan* even to hint that exactions should be analyzed differently than dedications in determining whether there has been a taking.").

ply *Dolan*'s heightened scrutiny to a traffic impact fee.[18] The court reasoned that particular owners would not be unduly subject to municipal discretion and the attendant increased likelihood of importune leveraging and gouging, because the contested exaction was calculated according to a legislatively determined formula and was imposed upon predetermined subcategories of property.[19]

In contrast, a different panel of the Oregon Court of Appeals found in *Dudek v. Umatilla County* that, although an ordinance affected a broad class of property owners, the county would need to assess the unique circumstances of the permit application before mandating an exactionary condition.[20] Applying *Dolan*, the court agreed with the land use board that exacting from one landowner the responsibility for widening an entire street and purchasing additional right-of-way, although required by local law, "would not be in [pro]portion to the estimated 15% impact of the development."[21] Thus, the Oregon Court of Appeals undertook a valuable level of inquiry that it had forgone in *Rogers Machinery*. Resisting the siren call of broad legislation, the *Dudek* court instead encouraged municipal restraint out of fairness to the individual property owner.[22]

This Note similarly asserts there is little or no principled basis for giving greater deference to exactions imposed through legislative enactment than to those imposed through adjudication. Part I contends that, because in all practicality legislative and adjudicative land use decisions are indistinguishable, any judicial attempt to rubber stamp ostensible legislative exactions is flawed. Even when a court has the opportunity to make an easy determination that an exaction is legislative, the case for its validity is in no way self-evident. By analyzing the structural deficiencies of local democracy, Part II directly addresses the fears of government misbehavior that underlie modern takings jurisprudence. Given these dissatisfactions, Part Ill proposes the test of intrinsic fairness, imported from corporate law, as a standard of judicial review to apply to all contested permit conditions.

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18 45 P.3d 966, 983 (Or. Ct. App. 2002), *rev. denied*, 52 P.3d 1057 (Or. 2002), *cert. denied*, 538 U.S. 906 (2003).

19 *See id.* at 977–78, 983. Appendix A of the ordinance set a fee of $124 per weekday trip generated by a newly constructed office and approximated the quantity of trips based on the development's square footage and the number of employees working there. *See id.* at 968–69.

20 *See* 69 P.3d 751, 756 (Or. Ct. App. 2003).

21 *See id.* at 753–54 (alteration in original) (citing Umatilla County's grant of the partitioning request).

22 *Cf.* BILL HIGGINS, INST. FOR LOCAL GOV'T, PROPERTY RIGHTS AND LAND USE REGULATION: A PRIMER FOR PUBLIC AGENCY STAFF 26 (rev. ed. 2005) ("Because takings law allows for so much flexibility, a court's perception of fairness to the property owner can strongly influence the final outcome."), http://www.cacities.org/resource_files/23045.takingsprimer5-05.pdf.

## I

## CONFUSION BETWEEN LEGISLATIVE AND ADJUDICATIVE EXACTIONS

In the past decade, during which local government officials and planning staff have grappled with the *Nollan/Dolan* doctrine, an observable trend has emerged in state courts nationwide, namely, "a continuum of exaction types that raise a different level of concern based on . . . two factors: whether the exaction is a monetary one, and whether it is based on a legislative versus an adjudicatory process."[23] That is, state courts today are less likely to find a regulatory taking when the exaction takes the form of a fee, as opposed to a dedication of a possessory interest in land (including easements).[24] They also typically fail to find a taking when an elected body has determined the amount of the in lieu fee or when the fee applies to many similarly situated landowners.[25]

The trend stems from a narrow reading of *Dolan,* in which the Court reasoned that the municipality must prove rough proportionality because "the city made an adjudicative decision to condition petitioner's application for a huilding permit on an individual parcel"[26] rather than a "legislative determination[ ] classifying entire areas of the city"[27] or a "generally applicable zoning regulation[ ]."[28] Justice Souter argued in dissent that the majority mischaracterized the situation as adjudicative: The planning commission imposed conditions as enumerated in the city's development code, which followed the State of Oregon's 1973 comprehensive land use management program.[29] The only "adjudication" that transpired was the commission's decision to deny the applicant an exemption from the legislative conditions.[30]

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23 Nancy E. Stroud, *Development Exactions and Regulatory Takings—Do Monetary and Legislative Exactions Get Less Takings Clause Scrutiny than Real Property and Ad Hoc Exactions?,* SJ052 ALI-ABA 881, 894 (2004).

24 *See, e.g.,* Daniel J. Curtin, Jr. et al., Nollan/Dollan: *The Emerging Wing in Regulatory Takings Analysis,* 28 URB. LAW. 789, 791–95 (1996).

25 *See, e.g.,* Home Builders Ass'n of Cent. Ariz. v. City of Scottsdale, 930 P.2d 993, 999–1000 (Ariz. 1997) (declining to apply *Dolan* to a legislatively imposed water service fee, but at the same time emphasizing that studies on consumer demand, methodologies for calculating fees, and a comprehensive resource management program all supported the ordinance).

26 Dolan v. City of Tigard, 512 U.S. 374, 385 (1994).

27 *Id.*

28 *Id.* at 391 n.8. State courts could engage in a more sophisticated analysis by distinguishing between traditional deference to state and local government authority to engage in land use planning under the police power and a more heightened form of scrutiny towards development exactions—which, admittedly, also find justification under the police power. *Cf.* City of Monterey v. Del Monte Dunes at Monterey, Ltd., 526 U.S. 687, 702 (1999) ("[W]e have not extended the rough-proportionality test of *Dolan* beyond the special context of exactions . . . .").

29 *See Dolan,* 512 U.S. at 413 n* (Souter, J., dissenting); *id.* at 374 (majority opinion).

30 *See id.* at 413 n* (Souter, J., dissenting).

The distinction between a legislative exaction and an adjudicative exaction is often simultaneously debatable[31] and weighty in its consequences: "Procedural due process in the land use context is required only for administrative or quasi-judicial decision-making [and] does not apply to legislative decision-making."[32] Because procedural due process necessitates an unbiased decision maker, adequate notice, the opportunity to introduce evidence (and sometimes to conduct cross-examination), and ultimately findings that reference the governing statute,[33] courts have the capacity to review many land use decisions by scrutinizing an administrative record and thus to agree with and uphold the adjudicative decision—or to disagree with and strike it.[34] Ju-

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31 *See, e.g.*, Town of Flower Mound v. Stafford Estates Ltd. P'ship, 135 S.W.3d 620, 641 (Tex. 2004) ("Nor are we convinced that a workable distinction can always be drawn between actions denominated adjudicative and legislative.").

32 BRIAN W. BLAESSER ET AL., LAND USE AND THE CONSTITUTION: PRINCIPLES FOR PLANNING PRACTICE 41 (Brian W. Blaesser & Alan C. Weinstein eds., 1989); *see also* Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441, 445 (1915) ("Where a rule of conduct applies to more than a few people, it is impracticable that everyone should have a direct voice in its adoption. . . . [The rights of affected individuals] are protected in the only way that they can be in a complex society, by their power, immediate or remote, over those who make the rule."). Within land use planning, quasi-judicial procedures—such as rezonings, variances, and assorted appeals—comprise a subset of administrative decisions and implicate extremely fact-specific inquiries. *See* Stephanie Hansen, *Quasi-Judicial Land-Use Decision Making in New Castle County*, 4 DEL. L. REV. 191, 194–95 (2001).

33 *See* BLAESSER ET AL., *supra* note 32, at 42–43; *see, e.g.*, Dodd v. Hood River County, 136 F.3d 1219, 1226 (9th Cir. 1998) (clarifying that an adjudicative land use proceeding provides a full and fair opportunity to be heard "'if the parties had both a full opportunity and the incentive to contest the point at issue on a record that also was subject to judicial review'" (quoting Chavez v. Boise Cascade Corp., 772 P.2d 409, 411 (Or. 1989))); Pro-Eco, Inc. v. Bd. of Comm'rs, 57 F.3d 505, 513 (7th Cir. 1995) (denying landowner's procedural due process challenge to a moratorium on landfills because it was given notice of a public hearing and its representative was not denied an opportunity to speak); Anderson v. Douglas County, 4 F.3d 574, 578 (8th Cir. 1993) (striking landowner's complaint of a procedural due process violation in a soil treatment permit application because he did not utilize available procedures); Chongris v. Bd. of Appeals, 811 F.2d 36, 41 (1st Cir. 1987) (determining that applicants for a building permit and victualler's license enjoyed an opportunity to be heard where an attorney argued on their behalf at a zoning hearing, even though no cross-examination took place); Rogin v. Bensalem Twp., 616 F.2d 680, 695 (3d Cir. 1980) (finding that a developer, contesting the passage of zoning amendments, received sufficient due process through a hearing and a decision on the merits by the Zoning Hearing Board and judicial review of that decision); Smith-Berch, Inc. v. Baltimore County, 68 F. Supp. 2d 602, 628 (D. Md. 1999) (striking procedural due process claim of the would-be operator of a methadone clinic, given that the decision maker in the zoning petition hearing held no extrajudicial bias despite knowing that other county officials opposed such clinics); Leverett v. Town of Limon, 567 F. Supp. 471, 475 (D. Colo. 1983) (upholding landowner's procedural due process claim because the town superintendent, who initiated the zoning citation and participated in its affirmation on appeal, was also an affected neighbor).

34 *Cf.* Coniston Corp. v. Village of Hoffman Estates, 844 F.2d 461, 468–469 (7th Cir. 1988) ("[E]ven modern courts hesitate to treat the decision-making process as a wide-open search for the result that is just in light of all possible considerations of distributive and corrective justice, while legislatures are free to range widely over ethical and political considerations in deciding what regulations to impose on society. The decision to make a

dicial capacity is weaker when land use legislation is attacked because the information-yielding incidents of procedural due process are not required for promulgating statutes or ordinances;[35] deferential restraint becomes the courts' logical approach.[36] Keeping these consequences in mind, section A presents a common taxonomy for the legislative/adjudicative distinction and discusses the competing rationales for its two dominant approaches. Sections B and C respectively contend that neither the formal nor the functional approach is helpful as applied to the undertakings of local government.

### A. The Legislative/Adjudicative Distinction

The two primary judicial approaches towards differentiating legislative and adjudicative exactions are the formal approach, followed by the majority of jurisdictions, and the functional approach, followed by fewer than fifteen jurisdictions.[37] The formal approach contends that elected officials (such as members of a state legislature, a county board of commissioners, or a city council) engage in legislative decision making, whereas local boards and commissions, often established by the same legislative bodies that appoint their members, engage in administrative decision making.[38] Under this approach, a local ordinance imposing a development exaction represents a legislative decision and thus is subject only to rational basis review.[39] The functional approach, on the other hand, examines the scope and subject of a contested municipal action through three inquiries: (1) whether the local government were making or applying policy (the latter denoting adjudication); (2) whether the action were owner-initiated; and (3) whether it affected a single parcel or a swath of properties (the latter denoting legislation).[40]

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judgment legislative is perforce a decision not to use judicial procedures, since they are geared to the making of more circumscribed, more 'reasoned' judgments.").

35 *See id.* at 468; Daniel R. Mandelker & A. Dan Tarlock, *Shifting the Presumption of Constitutionality in Land-Use Law*, 24 URB. LAW. 1, 8–10 (1992).

36 *See* Jerold S. Kayden, *Land-Use Regulations, Rationality, and Judicial Review: The RSVP in the* Nollan *Invitation (Part I)*, 23 URB. LAW. 301, 304 (1991); *cf.* Donald C. Guy & James E. Holloway, *The Direction of Regulatory Takings Analysis in the Post-*Lochner *Era*, 102 DICK. L. REV. 327, 346 (1998) ("[T]he rough proportionality test represents the application of heightened scrutiny . . . to adjudicative actions.").

37 *See* Fasano v. Bd. of County Comm'rs, 507 P.2d 23, 26 (Or. 1973) (en banc); Charles L. Siemon & Julie P. Kendig, *Judicial Review of Local Government Decisions: "Midnight in the Garden of Good and Evil,"* 20 NOVA L. REV. 707, 729–32 (1996) (discussing *Fasano* and its functional approach); *see also* Hansen, *supra* note 32, at 196–98 (elaborating on the structural and the extant laws/new rules approaches).

38 *See* BLAESSER ET AL., *supra* note 32, at 11.

39 *See* Robert Lincoln, *Executive Decisionmaking by Local Legislatures in Florida: Justice, Judicial Review and the Need for Legislative Reform*, 25 STETSON L. REV. 627, 645 (1996).

40 *See, e.g.*, Bd. of County Comm'rs v. Snyder, 627 So. 2d 469, 474–75 (Fla. 1993) (holding that the board's decision to rezone a half-acre parcel was quasi-judicial because it applied policy and affected only a limited number of people).

As mentioned above, the majority of courts, local governments, and litigants—especially those with slim budgets—appreciate the bright-line efficiency of formalism.[41] One court's rationale for classifying a rezoning as a legislative act typifies the cut-and-dried nature of the formal approach:

> [A] decision on an application for rezoning is a legislative act. Rezoning is accomplished by amendment of a zoning ordinance and by the same procedure as the original enactment, and a city council's act in amending a zoning ordinance to exclude previously included property [of any size] is a legislative and not administrative act.[42]

Courts adopting the formal approach do not defer to special use permits or variances.[43] Although these land use planning tools are not distinguishable on the ground from rezonings that affect single parcels or smaller areas, they must be accompanied by administrative findings and are disconnected from legislation.[44] Therefore, the formal approach strengthens a court's inclination not to apply *Nollan/Dolan* analysis to an exaction established via ordinance and consequently to uphold the municipality's action against a developer's claim.[45]

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41 *See* Thomas G. Pelham, *Quasi-Judicial Rezonings: A Commentary on the* Snyder *Decision and the Consistency Requirement*, 9 J. LAND USE & ENVTL. L. 243, 278–79 (1994).

42 Toso v. City of Santa Barbara, 162 Cal. Rptr. 210, 214 (Cal. Ct. App. 1980) (citations omitted).

43 *See* Topanga Ass'n for a Scenic Cmty. v. County of L.A., 522 P.2d 12, 14–15 (Cal. 1974).

44 *See id.* at 16.

45 *Cf.* Todd W. Prall, Comment, *Dysfunctional Distinctions in Land Use: The Failure of Legislative/Adjudicative Distinctions in Utah and the Case for a Uniform Standard of Review*, 2004 BYU L. REV. 1049, 1062 ("[The formal] approach grants more deference to local government decisions because it allows local governments to determine whether a particular decision is adjudicative or legislative by choosing which process to employ to make the decision.").

The municipal code of Fayetteville, Tennessee exemplifies an exaction established via ordinance:

> Whenever a parcel of land is subdivided and the subdivision plat shows one or more lots containing more than one acre of land or double the minimum required area for any zoning district in which the lot is located, and *the planning commission has reason to believe* that any such lot(s) will be resubdivided into smaller building sites, the planning commission may require that the subdivision and development of such parcel of land allow for the future opening of public ways and the ultimate extension of adjacent public ways. The planning commission may also require that dedications providing for the future opening and extension of such public ways be indicated on the plat.

FAYETTEVILLE, TENN., SUBDIVISION REGULATIONS art. 1-108.2 (2005) (emphasis added), *available at* http://www.fayettevilletn.com/subdivision_regulations2.htm. Note that the ordinance allows the planning commission case-by-case discretion to determine whether resubdivision might occur. Practically speaking, a developer's successful application for an initial rezoning or variance could transform a parcel's relevant zoning district to one with a larger minimum lot size, thus eliminating the planning commission's right to seek an exac-

The functional approach is more likely than the formal approach to determine that a decision is adjudicative because it values the strong interest that property owners and other affected citizens have "in a rational local decision-making process that affords fair treatment and due process and produces decisions based on previously established policies and standards rather than the undue political influence of a particular applicant, industry or constituency."[46] Advocates of the functional approach contend that the more complete record of adjudicative proceedings enables courts—despite acting retrospectively and as outsiders—to evaluate the fairness and appropriateness of boards' and commissions' application of certain standards to individuals.[47] Because permit conditions seemingly impact a limited number of parties and interests, emerge from an administrative assessment of the facts and available options, and also implement policy, the functional approach would classify them as adjudicative and therefore trigger *Nollan/Dolan* analysis.[48]

### B. The Formal Approach Reaches Inconsistent Results

The formal approach reaches inconsistent results when applied to the decisions of local government because, unlike their federal and state counterparts, local legislative, executive, and judicial branches often overlap.[49] Dillon's Rule clarifies: Local governments possess no inherent powers, rather they are limited to those powers the state constitution or legislature expressly or implicitly grants to them, and to those powers absolutely necessary to implement the purposes of the municipal corporation.[50] Before a municipality may zone, levy exac-

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tionary condition (in the form of the mandatory dedication of a public right of way) when later faced with the developer's proposed subdivision plat for that parcel.

46 Pelham, *supra* note 41, at 279.

47 *See* Fasano v. Bd. of County Comm'rs, 507 P.2d 23, 26–27 (Or. 1973) (en banc).

48 *See, e.g.*, Snyder v. Bd. of County Comm'rs, 595 So. 2d 65, 80–82 (Fla. Dist. Ct. App. 1991), *quashed on other grounds*, 627 So. 2d 469 (Fla. 1993).

49 *See* OSBORNE M. REYNOLDS, JR., HANDBOOK OF LOCAL GOVERNMENT LAW § 65, at 195 (1982) ("The tripartite division of the federal and state governments into independent branches is not reflected in the set-up of a great many cities."); Carol M. Rose, *Planning and Dealing: Piecemeal Land Controls as Problem of Local Legitimacy*, 71 CAL. L. REV. 837, 846 (1983) ("[P]iecemeal local land decisions should not be classed as either 'legislative' or 'judicial'; these rubrics are drawn from a separation-of-powers doctrine more appropriate to larger governmental units.").

50 Merriam v. Moody's Ex'rs, 25 Iowa 163, 170 (1868) (Dillon, C.J.); *see also* Hunter v. City of Pittsburgh, 207 U.S. 161, 178 (1907) ("Municipal corporations are political subdivisions of the state, created as convenient agencies for exercising such of the governmental powers of the state as may be intrusted to them."); 2A EUGENE MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 10.03 (Dennis Jensen & Gail A. O'Gradney eds., 3d ed., rev. 1996) (sources of municipal power). *But see* State v. Hutchinson, 624 P.2d 1116, 1118–20 (Utah 1980) (rejecting strict construction of Dillon's Rule); PLATT, *supra* note 3, at 252 (noting that home rule, which is allowed by fifteen states, articulates frustration with Dillon's Rule).

tions, or impose other land use controls, the state must first delegate its police power to the local government and define the appropriate subject matter for its exercise.[51] In this way, even an appointed land use board's supposedly adjudicative decision bears legislative imprimatur.[52]

Three examples illustrate how the formal approach fails to draw meaningful boundaries between legislative and adjudicative decisions and the problem this causes in determining the proper standard of review for a particular exaction. First, land use boards and other unelected adjudicative bodies often negotiate development exactions pursuant to a comprehensive plan mandated by the state legislature and approved by the local legislative body.[53] Such plans may desig-

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51 *See, e.g.*, STANDARD CITY PLANNING ENABLING ACT (Advisory Comm. on City Planning and Zoning 1928), *reprinted in* 8 ZONING AND LAND USE CONTROLS § 53.01A (Patrick J. Rohan ed., 1991).

52 *See* Rose, *supra* note 49, at 853 (supporting the treatment of local government actions as legislative by raising the points that local governments exercise wide police powers, may enjoy the insulation of home rule, and are governed by elected representatives); *see, e.g.*, Curtis v. Town of S. Thomaston, 708 A.2d 657, 658–59 (Me. 1998) (finding that a planning board's conditioned approval of a subdivision on the construction of a fire pond and the grant of dedicated easement under the municipality's Fire Protection Ordinance did not constitute an unlawful taking).

53 *See, e.g.*, McCarthy v. City of Leawood, 894 P.2d 836, 838, 848 (Kan. 1995) (upholding impact fees that applied to the "K-150 Corridor" traffic artery as depicted in the city's Master Development Plan); Schultz v. City of Grants Pass, 884 P.2d 569, 570, 573 (Or. 1994) (striking down conditioned dedications for, *inter alia*, county and city rights-of-way, which would run along two streets designated in the Grants Pass and Urbanizing Area Comprehensive Community Development Plan and the City Master Transportation Plan, and rejecting the city's argument that given several implementing ordinances, the conditions are legislative and should be accorded deference); Home Builders Ass'n of Dayton v. City of Beavercreek, Nos. 97-CA-113, 97-CA-115, 1998 WL 735931, at *1, *6–7 (Ohio Ct. App. Oct. 23, 1998), *rev'd*, 729 N.E.2d 349 (Ohio 2000) (passing on the constitutionality of a municipal impact fee ordinance, which relied upon the Beavercreek Land Use Plan forecast of residential, office, and commercial growth within the impact fee district); *supra* note 29 and accompanying text; *see also* JOHNSON, *supra* note 4, at 71 (explaining that comprehensive plans incorporate maps of the community's projected land uses, thoroughfares, and sensitive areas); Brian W. Blaesser and Daniel R. Mandelker, *Official Maps*, *in* MODERNIZING STATE PLANNING STATUTES 153, 156 (American Planning Association, The Growing Smart Working Papers, vol. 2, 1996–98) ("[J]ustifying an exaction in an official map area should not be difficult if careful planning has preceded the designation of a transportation corridor and if the exaction is related to transportation needs."); *cf.* N. Ill. Home Builders Ass'n v. County of Du Page, 649 N.E.2d 384, 387–88 (Ill. 1995) (concerning constitutional challenges to two state enabling statutes and three county ordinances—the latter adopted under this delegated authority—that allowed county boards to impose transportation impact fees on new development at the time a huilding permit is issued). *See generally* CAL. GOV'T CODE § 65300 (LexisNexis 2005) (requiring that each planning agency prepare, and each county and city legislative body adopt, "a comprehensive, long-term general plan for the physical development of the county or city, and of any land outside its boundaries which in the planning agency's judgment bears relation to its planning"); FLA. STAT. ANN. § 163.3177, -.3194 (LexisNexis 2005) (requiring municipalities to adopt a comprehensive plan with certain mandatory elements, and specifying that "all land development regulations" be consistent with the comprehensive plan).

nate geographic and programmatic areas for public and private development, transportation and community facilities, historic preservation, urban renewal, or capital improvements.[54] Under the formal approach, for instance, a county that conditions a development permit on the construction of an emergency access road should be able to defend the exaction on the basis of the state's delegation of the police power as embodied in the comprehensive plan. Faced with this situation, the Colorado Supreme Court nonetheless focused on the due process requirements of the adjudicative permitting process and found that the jurisdiction failed to adopt regulations that were "sufficiently detailed to provide all users and potential users of land with notice of the particular standards and requirements."[55]

Second, the state power delegated to a local legislative or administrative body may be tightly restricted or, alternatively, may allow for significant discretion. Low-level and intermediate authorities are often forced to impose legislatively determined exactions in a discretionary fashion, for example in deciding whether a particular kind of land use belongs to a statutory classification that exempts the property owners from paying a school, traffic, or other impact fee.[56] Where the statute provides a dedication or fee schedule, the discretion of local authorities is typically limited in scope and the resulting exaction is only minimally adjudicative.[57] The formal approach, however, would declare both sets of exactions legislative and deserving of equal deference.

Maximizing the confusion, the extent of adjudicative discretion enjoyed by a land use planning body at times depends on the interaction between the local built environment and the nature of the regulation.[58] Consider an appointed commission that, pursuant to an historic district ordinance, approves architectural plans for new con-

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54 *See, e.g.*, FLA. STAT. ANN. § 163.3177 (West 2005); MD. CODE. ANN. art. 66B, § 1.03 (LexisNexis 2003); S.D. CODIFIED LAWS § 11-6-14 (2005); *see also* JOHNSON, *supra* note 4, at 72 (table of contents for a typical comprehensive plan).

55 Beaver Meadows v. Bd. of County Comm'rs, 709 P.2d 928, 936 (Colo. 1985) (en banc).

56 *See, e.g.*, Volusia County v. Aberdeen at Ormond Beach, L.P., 760 So. 2d 126, 135 (Fla. 2000).

57 *See, e.g.*, FAIRBANKS NORTH STAR BOROUGH, ALASKA, CODE tit. 17, ch. 17.60.090 (2005), *available at* http://www.co.fairbanks.ak.us/Assembly/CodeofOrdinance.htm (calculating the width of a trail easement dedication based on a trail's historic category, its current nonmotorized or multipurpose use, and the average subdivision lot size); Krupp v. Breckenridge Sanitation Dist., 19 P.3d 687, 693–94, 697–98 (Colo. 2001) (en banc) (holding that a plant investment fee, levied on all building projects within the district, which derived from a single family equivalent unit schedule and comprised one aspect of comprehensive legislation, did not lend itself to constitutional analysis).

58 *Compare* Anderson v. City of Issaquah, 851 P.2d 744, 751 (Wash. Ct. App. 1993) (finding that an ordinance, which required buildings to be "harmonious," "interesting," and "compatible," was unconstitutionally vague), *with* Rolling Pines Ltd. P'ship v. City of Little Rock, 40 S.W.3d 828, 834–35 (Ark. Ct. App. 2001) (rejecting a void-for-vagueness

struction and exterior changes to extant structures.[59] Commissioners and their professional staff could then condition neighborhood development on such costly exactions as restoring façades, documenting or preserving a portion of the site, or maintaining a rhythmic cityscape despite inefficient siting.[60] If the district exhibits a very distinctive "look" (such as the Vieux Carré in New Orleans, or the Georgetown neighborhood in Washington, D.C.), the commission's discretion would be tightly bounded and its decisions more legislative. If the district displays only a traditional "feel" (such as a dilapidated New England village with much surface parking and infill), the commission would have much broader discretion and its decisions would arguably be more adjudicative.

The third example of the blurred boundary between legislative and adjudicative exactionary conditions is the most convincing: Local government may cycle among formal legislative, adjudicative, and judicial modes without violating state constitutional provisions or due process safeguards.[61] Moreover, local practice may tacitly condone elected representatives acting legislatively or adjudicatively in different exaction-levying contexts.[62] The following list of New Castle County, Delaware procedures depicts the tangle:

> County Council acts legislatively when conducting hearings (while incorporating aspects of quasi-judicial decision making) on the following subjects: (1) zoning text amendment, (2) zoning map amendment, (3) historic zoning district map amendment, (4) deed restriction change, (5) level-of-service waiver, and (6) zoning map correction. County Council acts in its purely quasi-judicial role when it (1) hears appeals from the Historic Review Board regarding historic permits, (2) consents to a use variance granted by the Board of Adjustment, (3) hears appeals regarding subdivision variances from the Planning Board, and (4) hears appeals regarding beneficial-use permits from the Board of Adjustment.[63]

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challenge to a compatibility standard when deciding whether to allow manufactured homes in a "residential" subdivision).

59 This example is based on BLAESSER ET AL., *supra* note 32, at 19–20.

60 *See* Lawrence A. McDermott, *Exactions, Infrastructure Enhancements, and Fees*, *in* LAND DEVELOPMENT HANDBOOK: PLANNING, ENGINEERING, AND SURVEYING 67, 69 (Sidney O. Dewberry ed., 2d ed. 2002) [hereinafter McDermott, *Exactions*].

61 *See, e.g.*, Londoner v. City of Denver, 210 U.S. 373, 386 (1908) (city council acting as board of equalization); Turner v. City of Mobile, 424 So. 2d 578, 580 (Ala. 1982) (mayor, administrative official, and local legislator to sit, per statute, on planning commission); Venhaus v. Pulaski County Quorum Court, 726 S.W.2d 668, 669–70 (Ark. 1987) (county judge acting as county chief administrative officer); Village of Covington v. Lyle, 433 N.E.2d 597, 599–600 (Ohio 1982) (mayor presiding over local court).

62 *See* Hansen, *supra* note 32, at 209.

63 *Id.* (footnotes omitted).

Evidently, attempts to categorize legislative and adjudicative exactions based on the nomenclature of the decision-making body often reach inconsistent results.[64]

### C. The Functional Approach Is Problematic

Commentators criticize the functional approach as fuzzy, particularly when courts utilize the approach to differentiate between legislative and adjudicative decision making when a development exaction is contested.[65] If legislative decisions apply to large groups of citizens, and adjudicative decisions are more individualized, the nature of an exaction may morph simply when the number of applicants increases or decreases or when numerous applicants apply as a group rather than as individuals—to the complete disregard of parcel size and on-the-ground effects on the community at large.[66] The puzzles only multiply. For example, it is unclear how a court utilizing the functional approach should categorize an exaction when one person owns a large parcel[67] or when many people, collectively, own comparatively little land.[68] Furthermore, development exactions that seem adjudicative by virtue of affecting only one parcel, one property owner, and one pocketbook inevitably affect many area residents (both those who own property and those who do not) through their property values, taxes, or rents; the public services and amenities available to them; or their overall satisfaction with the community they call home.[69]

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64 *Compare* Smith v. Skagit County, 453 P.2d 832, 835, 849 (Wash. 1969) (en banc) (declaring a zoning amendment that allowed an aluminum company to operate a plant on 470 acres of a 5,500-acre residential-recreational island to be legislative), *with* Davis County v. Clearfield City, 756 P.2d 704, 709–10, 712 (Utah Ct. App. 1988) (holding that the city council must ground its denial of a special use permit in an adjudicatory record because an administrative board usually makes this type of decision).

65 *See generally* Scott H. Parker & John E. Schwab, *Forecast: Cloudy but Clearing—Land Use Remedies in Oregon*, 15 WILLAMETTE L. REV. 245, 255–62 (1979) (claiming that the functional approach produces contentious litigation and highly inconsistent results); Siemon & Kendig, *supra* note 37, at 731–34 (positing additional reasons why few jurisdictions utilize the functional approach).

66 *See* Lincoln, *supra* note 39, at 646–47.

67 *Compare* Battaglia Props., Ltd. v. Fla. Land & Water Adjudicatory Comm'n, 629 So. 2d 161, 162, 165 (Fla. Dist. Ct. App. 1993) (adjudicative rezone of a 120-acre parcel), *and* Neuberger v. City of Portland, 603 P.2d 771, 772, 777 (Or. 1979) (adjudicative rezone of a 601-acre parcel), *with* Bd. of County Comm'rs v. Karp, 662 So. 2d 718, 719–20 (Fla. Dist. Ct. App. 1995) (legislative rezone of forty-eight separate lots constituting 179-acre parcel).

68 *Compare* Green v. Hayward, 552 P.2d 815, 816, 822 (Or. 1976) (adjudicative rezone of neighboring fifty-acre and ninety-acre parcels), *with* Parelius v. City of Lake Oswego, 539 P.2d 1123, 1124 (Or. Ct. App. 1975) (legislative rezone of a seventy-three-acre parcel "in widely diverse ownership").

69 *Cf.* Michael S. Holman, Comment, *Zoning Amendments—The Product of Judicial or Quasi-Judicial Action*, 33 OHIO ST. L.J. 130, 138 (1972) (observing that changes in the use of one parcel represent "existing but often unstated land use policies" that alter the legal uses of surrounding parcels (emphasis omitted)).

Another criticism of the functional approach centers on the inconsistencies that arise through its focus on the incidents of legislative and administrative action, rather than on the reason behind the particular feature.[70] For instance, some statutes require an agency or commission to make certain findings and conduct public hearings before designating an area as blighted, which may (under the right circumstances) attract redevelopment funding from the state or federal government and thereby provide incentives for private endeavors.[71] If a developer contests a permit condition that is imposed on a project within such a neighborhood, the reviewing court must first select its desired standard of review by deciding whether the existence of findings and a hearing (characterizing adjudication) outweigh the designation of urban renewal and the creation of a conduit for grant monies (characterizing legislation).[72] The functional approach provides no guidance for making this crucial decision; the number of people or square miles affected is hardly an adequate basis.[73]

Finally, the functional approach collapses when applied to development exactions due to the outlook of the civil servants who carry out the work of city councils, land use boards, planning commissions, and regional agencies.[74] Today's planners "tend to see themselves not as power wielders but as specialized problem solvers,"[75] and thus infuse discretion into site-specific decisions regardless whether the decisions fall within the scope of zoning or environmental ordinances, housing or building codes, judicial precedent, or local regulation.[76] At the same time, a perceived legislative mandate constrains adjudicative-like discretion: Public planners are conscious of the source of their paychecks and are unlikely to implement a progressive or postmodernist agenda through imaginative exactions.[77]

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70 *See* Lincoln, *supra* note 39, at 647.

71 *See, e.g.*, KY. REV. STAT. ANN. § 99.370 (West 2005); NY GEN. MUN. LAW §§ 504–05 (McKinney 2005).

72 *See* Lincoln, *supra* note 39, at 647.

73 *See supra* notes 67–69.

74 *See generally* Lawrence A. McDermott, *The Rezoning Process*, *in* LAND DEVELOPMENT HANDBOOK: PLANNING, ENGINEERING, AND SURVEYING, *supra* note 60, at 169, 173 [hereinafter McDermott, *Rezoning*] (advising developers not to underestimate the power of individual bureaucrats and to maintain good rapport with planning staff before, during, and after the review process for a specific project).

75 JOHNSON, *supra* note 4, at 81.

76 *See* CHARLES HOCH, WHAT PLANNERS DO: POWER, POLITICS, AND PERSUASION 149–50, 325–28 (1994) (interviewing a zoning administrator who chose to "drag [his] feet" in enforcing a parking ordinance in a Hispanic neighborhood despite pressure from the director of health, whom he suspected was racially motivated).

77 *See* MICHAEL P. BROOKS, PLANNING THEORY FOR PRACTITIONERS 41 (2002); *see also* American Institute of Certified Planners Code of Ethics and Professional Conduct (effective June 1, 2005), http://www.planning.org/ethics/conduct.html ("We shall accept the decisions of our client or employer concerning the objectives and nature of the professional services we perform unless the course of action is illegal or plainly inconsistent with

## II
## THE PLAYERS AND LEVEL OF GOVERNMENT ARE DISPOSITIVE

Because modern takings jurisprudence embodies a fear of government misbehavior, it frequently expresses the need for oversight "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[78] Ensconced within the trend favoring judicial deference to ostensibly legislative exactions (and the quest to differentiate them from adjudicative exactions) hides the assumption that a development exaction stemming from an ordinance or other local legislative action holds less potential for extortionate results than one-on-one bargaining over a permit condition between unequally matched parties.[79] Within a democracy, developers and applicant landowners should have the opportunity to influence the political process on an equal footing with local citizens (and perhaps resident noncitizens).[80] This Part argues, however, that due to structural deficiencies in local government, legislative exactions hold as much potential for overreaching as their adjudicative counterparts. Section A applies Madisonian considerations of "faction" to local politics, and section B evaluates whether municipal authority measures up to the antifederalist ideals of local competencies, local voices, and local loyalties.

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our primary obligation to the public interest."); *cf.* Oren Yiftachel, *Planning and Social Control: Exploring the Dark Side*, 12 J. PLAN. LITERATURE 395, 395 (1998) ("Far less attention is devoted to planning's advancement of regressive goals such as social oppression, economic inefficiency, male domination, or ethnic marginalization.").

78 Armstrong v. United States, 364 U.S. 40, 49 (1960). In this regard, it is helpful to make the connection that in modulating the invocation of the police power, the *Nollan/Dolan* doctrine either frees or saddles taxpayers as a class from or with the burden that would ensue were local government to compensate—with or without mucb resistance—individual property owners for their takings claims and then seek to replenish the public fisc through taxes. *Cf.* Roger Clegg, *Reclaiming the Text of the Takings Clause*, *in* REGULATORY TAKINGS: RESTORING PRIVATE PROPERTY RIGHTS 7, 31–32 (Roger Clegg ed., 1994) (suggesting that the *Nollan/Dolan* doctrine represents an attempt by the conservatives on the Supreme Court to limit the "zoning and 'land-use regulation' exception" to the Takings Clause).

79 *See* Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 837 (1987) (describing easement in exchange for development approval as "'an out-and-out plan of extortion'" (quoting J.E.D. Assocs., Inc. v. Town of Atkinson, 432 A.2d 12, 14–15 (N.H. 1981))); Ann E. Carlson & Daniel Pollak, *Takings on the Ground: How the Supreme Court's Takings Jurisprudence Affects Local Land Use Decisions*, 35 U.C. DAVIS L. REV. 103, 151 (2001) (noting use of the slogan "Exaction = Extortion" by opponents to a county's comprehensive plan, which called for trail easements); *see also* DOUGLAS T. KENDALL ET AL., TAKINGS LITIGATION HANDBOOK: DEFENDING TAKINGS CHALLENGES TO LAND USE REGULATIONS 305 n.147 (2000) ("We strongly recommend that government counsel use the [descriptive] terms 'dedications,' 'impact fees,' and, collectively, 'development charges' or 'permit conditions' rather than the [vague and sometimes pejorative] term 'exactions' . . . .").

80 *See* Daniel J.H. Greenwood, *Beyond the Counter-Majoritarian Difficulty: Judicial Decision-Making in a Polynomic World*, 53 RUTGERS L. REV. 781, 790 (2001).

### A. Local Government Fails Madisonian Considerations

Our country's system of land use controls is historically homegrown, that is, local in nature so as to meet the needs of individual communities.[81] Nevertheless, since the mid-1960s, practitioners and academics have become increasingly reluctant to trust local government to make land use decisions fairly (i.e., "with a reasonable distribution of burdens"[82] among residents or property owners) and rationally (i.e., "with the care and deliberation"[83] appropriate to the long-term effects of these decisions).[84] A look to America's early political building blocks—particularly James Madison's *The Federalist No. 10*—counterposed against the antifederalist tradition, makes these doubts both surprising and understandable, and underscores the need of developers, planners, and attorneys for a test of intrinsic fairness for contested development exactions.

In *The Federalist No. 10*, Madison asserts that the main obstacle to legislative fairness is "faction," or the tendency of one interest group to impose its will on others.[85] Only a constituency of sufficient size and variety could ensure that legislation emerges from a collaborative process.[86] Caught in negotiations among multiple parties, legislators would be forced to consider the long-term effects of their decisions on the public welfare and thus indirectly bolster a philosophy of judicial deference to legislative action.[87] Conversely, the legislative body of a too small or too homogenous constituency would never develop a beneficial multiplicity of interests.[88] Local corruption, domination by a few, and sweeping passion would silence minority concerns.[89]

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81 *See* Rose, *supra* note 49, at 839.

82 *Id.*

83 *Id.*

84 *See* Mandelker & Tarlock, *supra* note 35, at 5–7 (illustrating the tension between exclusionary purpose of zoning and jurisprudential fiction "that units of local government are the contemporary embodiment of the Greek polis").

85 *See* THE FEDERALIST NO. 10, at 56–57 (James Madison) (Jacob E. Cooke ed., 1961).

86 *See id.* at 63–65.

87 *Cf.* Frank H. Easterbrook, *The State of Madison's Vision of the State: A Public Choice Perspective*, 107 HARV. L. REV. 1328, 1346–47 (1994) (arguing that a decrease in the checks on the interest groups that affect governmental institutions means difficulty for a court in decipbering legislative intent).

88 *See* THE FEDERALIST NO. 10, *supra* note 85, at 61–63; *cf.* Cass R. Sunstein, *The Law of Group Polarization*, *in* DEBATING DELIBERATIVE DEMOCRACY 80, 90 (James S. Fishkin & Peter Laslett eds., Philosophy, Politics and Society No. 7, 2003) (offering "a plea for ensuring that deliberation occurs within a large and heterogeneous public sphere, and for guarding against a situation in which like-minded people are walling themselves off from alternative perspectives").

89 *See, e.g.*, City of Columbia v. Omni Outdoor Adver., Inc., 499 U.S. 365, 389 (1991) (Stevens, J., dissenting) (citing THE FEDERALIST NO. 10, *supra* note 85, for the proposition that it is the "greater tendency of smaller societies to promote oppressive and narrow interests above the common good"); *cf.* WILLIAM A. FISCHEL, REGULATORY TAKINGS: LAW, ECONOMICS, AND POLITICS 292–94 (1995) (recounting the lobbying success of billboard

Where the minority and the majority are evenly matched, their probable failure to find common ground would deadlock government on the issue at hand.[90]

Municipal faction is not a theoretical construct. Judicial deference to comprehensive plans and to the exactions they foster "beg[s] the question of the legitimacy of the plan itself; for even plan consistency requirements [that are intended to ensure the legality of an exactionary condition] leave the setting of goals to the same local governments whose other land use decisions are suspect."[91] Planners admit that they often zone large tracts unrealistically to create for themselves an artificially strong bargaining position.[92] For example, a municipality may knowingly situate capital investments, such as roads and public facilities, so as to foster development pressures in areas its comprehensive plan declares low density.[93] When developers and property owners seek to capitalize on the potential profit in these areas, the municipality may demand an ad hoc exaction under the guise of granting a zoning amendment.[94] Local government thus transforms overregulation into currency by receiving land, facilities, or money "in return for" development it wanted to begin with.[95]

Even where no impropriety is implicated, decision-making theory still undermines the rationality and efficacy of comprehensive plans.[96] In general, local land use planning processes are structured to collect, and then reflect, public participation, but absent a concrete problem or project under discussion, the public is not engaged.[97] Only imminent projects spark opposition, although comparable developments may have been equally foreseeable before the comprehensive plan was

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companies, on a national level, in securing compensation for signs removed under federal legislation).

90 *See, e.g.*, Carlson & Pollak, *supra* note 79, at 147–51 (detailing a battle, which lasted over a decade, between habitat preservationists and backers of economic development in a community that tried to amend its comprehensive plan).

91 Rose, *supra* note 49, at 874 (footnote omitted).

92 *See* LEVY, *supra* note 5, at 123.

93 *See id.* at 123, 125.

94 *See id.* at 125.

95 *See* Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1413, 1494–96 (1989); *see also* Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 837 n.5 (1987) ("Thus, the importance of the purpose underlying the [land use] prohibition not only does not *justify* the imposition of unrelated conditions for eliminating the prohibition, but positively militates against the practice.").

96 *See* Rose, *supra* note 49, at 874–75.

97 *See, e.g.*, DeSena v. Gulde, 265 N.Y.S.2d 239, 245–46 (App. Div. 1965) (foregrounding a neighborhood's protest against proposed development project in a residential area, although a recent comprebensive plan had zoned the site light industrial), *cited with approval in* Rose, *supra* note 49, at 875.

promulgated and could well have been addressed through earlier—and extensive—public debate.[98]

### B. Exit and Voice Do Not Save Antifederalist Conceptions

If federalist principles weaken against the reality of local politics, the next step is to examine whether the persistent antifederalist tradition supports local legislative decisions. Moderate opponents to constitutional ratification advocated decentralized local governments that were consensual and participatory; place-based impulses would replace federal arrangements.[99] Antifederalist thought is traceable through such varied examples as the mid-nineteenth century municipal reform movement (reacting, in part, to state legislative incursions into city affairs),[100] U.S. Department of Housing and Urban Development grant funding guidelines (requiring proof of constituent participation in project planning),[101] and the influence of advocacy planning on conventional practice (facilitating collaboration with low-income, grassroots, and special interest groups).[102]

In short, this strand of antifederalism holds that local competencies, local voices, and local loyalties ensure rationality in the design and governance of America's cities and suburbs.[103] The technical expertise of traditional bureaucrats and the competency of local governing bodies, however, differ considerably. Because an administrative agency justifies its power on the basis of staff expertise, its discretion is limited to a defined subject matter such as environmental protection or welfare benefits. A municipality exists, on the

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98 *See* Gerrit Knaap, *Land Use Politics in Oregon*, *in* PLANNING THE OREGON WAY: A TWENTY-YEAR EVALUATION 3, 14–16 (Carl Abbott et al. eds., 1994) (terming phenomenon an "implementation deficit" between land use plans and land use decisions); *cf.* McDermott, *Rezoning*, *supra* note 74, at 184–86 (offering tips for developers on keeping officials and citizens sufficiently focused during lengthy and uncomfortable evening public hearings).

99 *See* SAUL CORNELL, THE OTHER FOUNDERS: ANTI-FEDERALISM AND THE DISSENTING TRADITION IN AMERICA, 1788–1828, at 217–18 (1999).

100 *See* M. CHRISTINE BOYER, DREAMING THE RATIONAL CITY: THE MYTH OF AMERICAN CITY PLANNING 114–18 (1983).

101 *See, e.g.*, Municipality of Anchorage, Alaska, Cmty. Dev. Div., *Application for Certification as a Community Housing Development Organization (CHDO)*, 1, http://www.muni.org/iceimages/CDBG/CHDOApplicationSept04.pdf (last visited Jan. 20, 2006).

102 *See* BROOKS, *supra* note 77, at 114–17.

103 *Cf.* VINCENT OSTROM, THE INTELLECTUAL CRISIS IN AMERICAN PUBLIC ADMINISTRATION 97–99 (2d ed. 1989) ("Fragmentation of authority among diverse decision centers with multiple veto capabilities within any one jurisdiction and the development of multiple, overlapping jurisdictions of widely different scales are necessary conditions for maintaining a stable political order that can advance human welfare under rapidly changing conditions."). *But see* GORDON L. CLARK, JUDGES AND THE CITIES: INTERPRETING LOCAL AUTONOMY 196 (1985) (arguing that decentralized land use decisions are double-edged); *cf.* Richard Briffault, *Our Localism: Part I—The Structure of Local Government Law*, 90 COLUM. L. REV. 1, 1 (1990) ("Localism reflects territorial economic and social inequalities and reinforces them with political power.").

other hand, because the state has granted it powers (pursuing efficiency or following tradition), and its authority is limited solely by geographic area and the extent of statutory delegation.[104]

Although planning commissions, platting boards, and boards of equalization make many of the land use decisions of local government, only a percentage of those citizens who volunteer as commissioners or board members have relevant experience as architects, realtors, attorneys, civil engineers, developers, appraisers, surveyors, or property managers. The rest rely on civic commitment and staff guidance, when available.[105] The planner who fosters public participation must, however, operate within policy channels carved out by the strongest community faction.[106] Essentially, "good professional [planning] practice comes less from the application and display of expertise and more through the clarity, efficacy, and popularity of planning visions and arguments shaped through political deliberation."[107]

The second strand of the antifederalist argument for self-defined and self-governed communities concerns local voice,[108] that is, the ability to express oneself and promote one's interests within the political process.[109] With some exceptions, residents have voice in their local government, but the developers who bear the brunt of exaction policies seldom do.[110] Typically these developers are national or in-

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104 *See supra* notes 50–51 and accompanying text.

105 *See* HOCH, *supra* note 76, at 57 (interviewing a planning director who helped planning commission "learn to do planning" and "make useful and reasonable land use decisions").

106 *See id.* at 60–65 (narrating how an experienced planning director was fired because he was not as pro-development as the village trustees would have liked); *see also* JOE R. FEAGIN, FREE ENTERPRISE CITY: HOUSTON IN POLITICAL-ECONOMIC PERSPECTIVE 156–58, 161–62 (1988) (analyzing the repeated success of Houston's conservative business and real estate interests in quashing public and private initiatives to establish planning and zoning for the city); *cf.* Susan S. Fainstein, *The Changing World Economy and Urban Restructuring, in* LEADERSHIP AND URBAN REGENERATION 31, 43 (Dennis Judd & Michael Parkinson eds., 1990) ("Cities are limited in their autonomy not only by general economic forces but also by the national political system of which they form a part. Ideological, institutional, and fiscal factors constrain their ability to operate in political isolation from the rest of the nation.").

107 HOCH, *supra* note 76, at 345.

108 The term "voice," frequently used in the legal literature on local government and land use planning, borrows from ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES (1970).

109 *Cf.* DAVID HARVEY, SPACES OF CAPITAL: TOWARDS A CRITICAL GEOGRAPHY 128–57 (2001) (providing examples of the 1956 formation of the Greater Baltimore Committee and its Charles Center urban renewal project, along with the gradual erosion of a broad-based civic coalition that arose after the riots of 1968 and 1970, to depict how voice was unavailable to "an underclass of impoverished blacks and marginalized whites" occupying inner-city Baltimore, "capture[d] by the narrower forces of commercialism, property development, and financial power").

110 *See* FISCHEL, *supra* note 89, at 133.

ternational companies, and neither their management nor their rank-and-file employees have the opportunity to vote in local elections or to integrate themselves into the politics of a small community.[111] Through permit conditions, insiders thereby oppress outsiders in a variation of "taxation without representation."[112] Some outsider developers are able to carve out for themselves a certain amount of voice—at least for a while, until their very success compels the community to impose exactions it originally thought advantageous to waive.[113]

Despite insider status or collectively large holdings, many owners of undeveloped land are hampered in combating confiscatory municipal regulatory behavior if only because homeowners, well-organized in common concern over property values, outnumber them.[114] After all, once the question of development changes from "should we charge" to "how much should we charge," homeowners (and voting renters) favor stiff exactions, which generate immediate returns through lower property taxes, stable rents, and expanded municipal services.[115] Additionally, small-town politicians rarely depend on political contributions from interest groups; consequently, if owners of undeveloped land were to try that route, homeowners could quickly punish the offending politicians at the polls.[116]

As the stable product of a specific "exit-voice" mix, local loyalties represent the third strand of the antifederalist argument. Where

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111 *See* JOHNSON, *supra* note 4, at 50–51. *But see* Soules v. Kauaians for Nukolii Campaign Comm., 849 F.2d 1176 (9th Cir. 1988) (involving a developer-landowner who financed a referendum that, by reinstating a zoning ordinance favorable to resorts, in end effect overturned the results of a grassroots referendum held some years earlier); JOHNSON, *supra* note 4, at 50 (describing the Irvine Company, which boasts historical roots in Orange County, California and close connections to local public officials).

112 *See* GENE BUNNELL, MAKING PLACES SPECIAL: STORIES OF REAL PLACES MADE BETTER BY PLANNING 462 (2002) ("'The real reason [the City of San Diego] impose[s] those high developer fees is because we have an aversion to taxing ourselves to pay for things.'" (quoting the executive director of the San Diego Housing Commission)).

113 *See, e.g.*, JAMES HOWARD KUNSTLER, THE GEOGRAPHY OF NOWHERE: THE RISE AND DECLINE OF AMERICA'S MAN-MADE LANDSCAPE 223 (1993) (recounting that Disney Corporation refused to pay transportation impact fees despite 80,000 visitors daily until county officials threatened to repeal the economic development legislation that exempted Disney World from land use controls); Carl Abbott, *The Oregon Planning Style*, *in* PLANNING THE OREGON WAY: A TWENTY-YEAR EVALUATION, *supra* note 98, at 205, 216–17 (relating how the founders of Rajneeshpuram, Oregon relied on money, legal savvy, and a sense of moral superiority to expand their initial holdings until county residents and an environmental advocacy group stopped the self-styled utopia's growth through building inspections and other administrative controls).

114 *See* FISCHEL, *supra* note 89, at 298–99.

115 *Cf.* Stewart E. Sterk, *Competition Among Municipalities as a Constraint on Land Use Exactions*, 45 VAND. L. REV. 831, 858 (1992) [hereinafter Sterk, *Competition*] ("[H]omeowners must wait until they sell their homes to realize the pecuniary gains associated with a restrictive zoning ordinance.").

116 *See* FISCHEL, *supra* note 89, at 297–98.

households and enterprises are completely mobile, loyalty refers to the satisfaction of consumers who have looked around, and have found, the particularly ideal place to live or operate.[117] Among municipalities competing for population, economic growth, and image, exit occurs when residents, homeowners, businesses, or developers move away because they are convinced their voices are not sufficiently strong to ensure a quality lifestyle or financial environment.[118] Because local governments rely on taxes to finance infrastructure and basic services such as education and law enforcement, public officials strive to prevent residential and commercial exit by assembling a desirable package of goods and services as inexpensively as possible.[119]

If competition enhances loyalty, structural policing mechanisms make the heightened judicial scrutiny of exactions unnecessary despite the flaws of local competencies and local voice. A developer, disappointed in the permit conditions that a municipality offered her, could bring the project proposal to a more welcoming jurisdiction.[120] Indeed, a recent survey of California planners revealed that growth-hungry communities set their impact fees to enhance competitiveness, even after their community development or legal departments have concluded that the municipality may lawfully increase its exaction levels.[121] The mayor of an expanding community northeast of San Francisco observed: "We have been working from a policy that development pays its own way, regardless. While that is a noble goal and something we should aim for, we are pricing ourselves into a situation where we will get nothing."[122]

Competition, however, does not effectively constrain local exaction policies when a developer or landowner's holdings predate the exactions policy; in these cases, cost-effective or easy exit is impossible because real estate is an immobile asset.[123] Similarly, municipalities gain a monopolistic advantage to levy "market-distorting exactions" where a particular parcel is unusually valuable due to its proximity to

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117 *Compare* Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. POL. ECON. 416, 419 (1956) ("Consumer-voters are fully mobile and will move to that community where their preference patterns, which are set, are best satisfied."), *with* HIRSCHMAN, *supra* note 108, at 82–83 ("[Loyalty] is helpful also because it implies the possibility of disloyalty, that is, exit. . . . In the absence of feelings of loyalty, exit per se is essentially costless . . . .").

118 *See* Tiebout, *supra* note 117, at 419–20.

119 *See id.*

120 *See* Vicki Been, *"Exit" as a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine*, 91 COLUM. L. REV. 473, 509–14 (1991).

121 *See* Carlson & Pollak, *supra* note 79, at 122–23.

122 *Id.* at 123. Here the city could have legally raised impact fees four or five times the current levels, but instead decided on a modest average increase of approximately $1,100 per residential unit and $1.43 per square foot of commercial new construction. *See id.*

123 *See* Been, *supra* note 120, at 539. Furthermore, a community's reputation for high exactions could conceivably depress property values or make property less marketable due to potential buyers' fears of higher development costs. *See id.* at 521.

transportation and other infrastructure.[124] Interjurisdictional competition also fails as a structural policing mechanism if the developer can pass on the full cost of the exaction to the homebuyer or to the selling landowner.[125] Also, antigrowth or exclusionary jurisdictions may simply not wish to discourage exit—and encourage loyalty—via reasonable exaction policies.[126] Conversely, older and built-out communities are highly sensitive to interjurisdictional competition given their precarious finances, and are forced to turn to exactions in providing the infrastructure and amenities the current tax base cannot afford.[127]

## III
## IMPORTING THE TEST OF INTRINSIC FAIRNESS

Municipalities, property owners, developers, and land use attorneys are in need of a new test for adjudicating contested development exactions. Neither the formal nor the functional approach used to differentiate legislative and adjudicative exactions provides solid guidance in selecting a proper standard of review.[128] Even if judges could consistently identify legislative exactions, structural concerns with the representative capacity of local governments counsel against deference.[129] Scholars have also observed that the *Nollan/Dolan* doctrine of "essential nexus" and "rough proportionality" is simultaneously under-[130] and over-regulatory.[131] Criticism of the Supreme

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124 *See* Sterk, *Competition*, *supra* note 115, at 859–60. *But see* Carlson & Pollak, *supra* note 79, at 121 (giving the example of a mall developer who successfully resisted a city's attempted dedication of three acres for building a new on-ramp to the adjacent freeway).

125 *See* Been, *supra* note 120, at 540–42. The scenario assumes two things: (1) the community is uniquely attractive and a price increase will not induce the homebuyer to look elsewhere, and (2) no uses for the land are exaction-free and would potentially attract a better offer from a developer with a different use in mind. *See id.*

126 *See* Sterk, *Competition*, *supra* note 115, at 842–44; *see also* Been, *supra* note 120, at 510, 513–14 ("States unwilling to lose a project to other states may strong-arm towns that balk at accepting a developer's terms or may impose limits upon local governments' abilities to block development or levy exactions.").

127 *See* Carlson & Pollak, *supra* note 79, at 107, 120–22.

128 *See supra* Part I. *Compare* Inna Reznik, Note, *The Distinction Between Legislative and Adjudicative Decisions in* Dolan v. City of Tigard, 75 N.Y.U. L. REV. 242, 252–54 (2000) (counting as many courts applying *Dolan*'s doctrine of rough proportionality to scheduled exactions as not applying it), *with* Ronald H. Rosenberg, *The Non-Impact of the United States Supreme Court Regulatory Takings Cases on the State Courts: Does the Supreme Court Really Matter?*, 6 FORDHAM ENVTL. L.J. 523, 555 (1995) (contending that state courts reference Supreme Court cases perfunctorily because they are unwilling to restrain state and local land use and environmental regulation).

129 *See supra* Part II.

130 Underregulation occurs when a municipality decides against imposing an exaction or imposes a smaller exaction than is permissible because it is concerned with the expense of findings or of future litigation and liability. *See* Fenster, *supra* note 17, at 654–55.

131 Overregulation occurs when a municipality denies a development proposal because it seeks to avoid the risk of litigating over a conditioned permit approval. *See* Lee Anne Fennell, *Hard Bargains and Real Steals: Land Use Exactions Revisited*, 86 IOWA L. REV. 1,

Court's approach to regulatory takings both for its "ad hocery"[132] and its formalism[133] abounds.

Although fraught with constitutional questions and other dissatisfactions, under the best of circumstances exactions nurture a community's sense of place, that is, a local identity rooted in the unique political and psychological panorama of an identifiable geographic area.[134] Just as the antifederalist vision of a country replete with self-defining communities obviates the need for an overly broad congressional mandate, "a view which suggests that a well-cultivated sense of place is an important dimension of human well-being"[135] would commend minimizing judicial power (a foreign element to the community) when courts examine the constitutionality of development exactions. Furthermore,

> one may discover [while reading a landscape] an implicit ideology that the individuality of places is a fundamental characteristic of subtle and immense importance to life on earth, that all human events *take place*, all problems are anchored in place, and ultimately can only be understood in such terms. Such a view insists that our individual lives are necessarily affected in myriad ways by the particular localities in which we live, that it is simply inconceivable that anyone could be the same person in a different place.[136]

Given the intersection of the particularity of place and the cry of "Unfair!" at the core of every contested development exaction, courts should examine the issue of fairness within a specific situation and territorial setting rather than applying abstract constitutional stan-

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4–5 (2000) (finding irony in the contrast between the sweeping regulatory powers of local government and the tight restrictions on regulatory bargaining); Fenster, *supra* note 17, at 661–65 (positing that the nexus requirement bars creative agreements that would substitute less costly and mutually acceptable—albeit unrelated—mitigation of development impacts). *But see* Fred P. Bosselman, Dolan *Works*, *in* TAKING SIDES ON TAKINGS ISSUES: PUBLIC AND PRIVATE PERSPECTIVES 345, 345, 351–52 (Thomas E. Roberts ed., 2002) (arguing rough proportionality is effective because developers accept that development should pay its own way and much state legislation now specifies constitutionally valid methodologies for calculating exactions).

132 *See, e.g.*, John E. Fee, *The Takings Clause as a Comparative Right*, 76 S. CAL. L. REV. 1003, 1006–07 (2003).

133 *See, e.g.*, Fenster, *supra* note 17, at 611.

134 *Cf.* Been, *supra* note 120, at 482–83 (offering reasons for exactions beyond the obvious goal of local government to shift traditionally public costs to the private sector: braking, facilitating, or accelerating growth; redistributing part of the developer's profit; or preventing the development of affordable housing). *See generally* BUNNELL, *supra* note 112, at 23–24, 33–35, 42 (proposing that Americans bridge their ideological differences through their common yearning for special places that reflect familiar values, exhibit drama and dignity, offer variety and whimsy, and provide spaces to gather and things to do).

135 D.W. Meinig, *The Beholding Eye: Ten Versions of the Same Scene*, *in* THE INTERPRETATION OF ORDINARY LANDSCAPES: GEOGRAPHICAL ESSAYS 33, 46 (D.W. Meinig ed., 1979).

136 *Id.*

dards.[137] Accordingly, this Note imports the test of intrinsic fairness from corporate law, modifies it, and proposes its application to all contested exactions.[138] The consideration of relative equity has flowed as a distinct subcurrent through the past eleven years' jurisprudence regarding contested development exactions—and the test of intrinsic fairness brings this fundamental concern to the surface.[139]

The Delaware Court of Chancery formulated the test of intrinsic fairness in *Levien v. Sinclair Oil Corporation*, in which a minority stockholder alleged that the parent corporation treated its subsidiary unfairly by forcing it to pay dividends and by stifling its growth.[140] Upon review, the Delaware Supreme Court did not apply the test, but did note that the test could be appropriately applied in other situations.[141] Section A offers theoretical and practical considerations for the cross-fertilization from business organizations to land use planning, including a summary of the test of intrinsic fairness. Section B modifies the test for contested development exactions.

### A. Practical and Theoretical Considerations

Several theoretical justifications for importing the test of intrinsic fairness from business organizations to land use planning suggest themselves. Most fundamentally, the modern metropolis and its more

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137 *Cf.* Compassion in Dying v. Washington, 79 F.3d 790, 858 (9th Cir. 1996) (en banc) (Kleinfeld, J., dissenting) ("The Founding Fathers did not establish the United States as a democratic republic so that elected officials would decide trivia, while all great questions would be decided by the judiciary."), *rev'd sub nom.* Washington v. Glucksberg, 521 U.S. 702 (1997).

138 *Cf.* Laurie Reynolds, *Rethinking Municipal Annexation Powers*, 24 URB. LAW. 247, 251 (1992) (arguing for an objective test, comparable to the test of intrinsic fairness, for passing on the legality of municipal annexations). Annexation is a good counterpoint to development exactions because, in tapping private economic growth for municipal benefit, this growth strategy of local government may similarly infringe on individual property rights.

139 *See, e.g.*, Spinell Homes, Inc. v. Municipality of Anchorage, 78 P.3d 692, 703 (Alaska 2003) (finding that a developer who was mandated to plant one or two trees on each lot did not "suffer[ ] an impact of the kind or maguitude" that would necessitate *Nollan/Dolan* analysis); KMST, LLC v. County of Ada, 67 P.3d 56, 61–62 (Idaho 2003) (holding there was no taking where a developer voluntarily agreed to a public road dedication in order to speed project approval); Town of Flower Mound v. Stafford Estates Ltd. P'ship, 135 S.W.3d 620, 644–45 (Tex. 2004) (striking a municipal requirement that a developer tear up a two-lane asphalt road, still in good repair, and replace it with a two-lane concrete surface); Grogan v. Zoning Bd. of Appeals, 221 A.D.2d 441, 442 (N.Y. App. Div. 1995) (validating a scenic-and-conservation easement that barred development on part of plaintiff's property but did not grant public access to it); J.C. Reeves Corp. v. Clackamas County, 887 P.2d 360, 365 (Or. Ct. App. 1994) (holding that a developer was required to eliminate a proposed "spite strip" that would impair legal access to an adjacent property, and instead construct a road abutting the new subdivision's boundary).

140 *See* 261 A.2d 911, 916–17, 918–919 (Del. Ch. 1969), *aff'd in part and rev'd in part*, 280 A.2d 717 (Del. 1971).

141 *See* Sinclair Oil Corp. v. Levien, 280 A.2d 717, 721–22 (Del. 1971) (determining that the business judgment standard applies when no disproportionate treatment of minority shareholders has occurred).

comic or perhaps tragic forms, such as edge cities, chicken farming megaplants, networked rural townships, and festival marketplaces, are the physical manifestations of surplus corporate capital.[142] Second, local governments increasingly view their rezoning and long-term comprehensive planning as a form of business strategy, often favoring solutions that promise to eliminate vacant or underperforming properties to ensure a community's future solvency.[143] Likewise, if exiting a jurisdiction is an option for residents or businesses, then municipal as well as private corporations represent voluntary arrangements that bind one set of parties to another party's actions.[144]

Third, the expanding concept of corporate fiduciary obligation—within which the test of intrinsic fairness is rooted—is a desirable model for local government behavior. Paradigmatic fiduciaries, including agent-principal, director-corporation, and guardian-ward,

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142 *See* DAVID HARVEY, JUSTICE, NATURE AND THE GEOGRAPHY OF DIFFERENCE 295–99 (1996); *see also* JAMES HOWARD KUNSTLER, THE CITY IN MIND: MEDITATIONS ON THE URBAN CONDITION 41–75 (2001) ("In Atlanta's case . . . the whole overblown metropolitan area, including downtown, had become a galaxy of Edge City projects tied together by the freeways and the gruesome multilane 'collector' streets. . . . The definitive statement was left to an ambitious Atlanta architect-turned-developer named John Portman who, during the 'go-go' years of *urban renewal*, designed a particular new kind of heroically grandiose anti-urban hotel that became the darling of bigtime commercial developers and *visionary* municipal planning officials all over the nation."). *Compare* JONATHAN BARNETT, REDESIGNING CITIES: PRINCIPLES, PRACTICE, IMPLEMENTATION 32 (2003) ("Le Corbusier speculated [in the 1930s] that 'sooner or later' his ideas for Manhattan will be carried out by corporations, 'the land-owning syndicates,' or 'strong, well-directed legislative measures.'"), *with* Charles V. Bagli, *U.S. Jury Limits Payout of Trade Center's Biggest Insurer*, N.Y. TIMES, May 4, 2004, at B1 (opining that the redevelopment of Ground Zero exemplifies public desires and government needs as steered by the financial and organizational capacity of a single economic dominant).

143 *See* BARNETT, *supra* note 142, at 153–55; *see, e.g.*, Dolan v. City of Tigard, 512 U.S. 374, 401–02 (1994) (Stevens, J., dissenting) (equating exactions that arise from commercial development with business regulations). *See generally* Fred P. Bosselman, *Land as a Privileged Form of Property*, *in* TAKINGS: LAND-DEVELOPMENT CONDITIONS AND REGULATORY TAKINGS AFTER *Dolan* and *Lucas* 29 (David L. Callies ed., 1996) (arguing that recent Supreme Court decisions ignore the reality that "interests in land have become more like securities and often resemble other forms of investment capital"); Eduardo Moisès Peñalver, *Is Land Special? The Unjustified Preference for Landownership in Regulatory Takings Law*, 31 ECOLOGY L.Q. 227 (2004) (critiquing the jurisprudential distinction between real and personal property).

144 *Cf.* Stewart E. Sterk, *Minority Protection in Residential Private Governments*, 77 B.U. L. REV. 273, 306–07 (1997) (stating that corporate law provides background principles to assess governance problems in common interest groups such as residential community associations). *But see* FISCHEL, *supra* note 89, at 271 (noting that dissatisfied individuals can leave a community despite owning immobile assets, but they cannot leave the universe of rule by local government altogether). *See generally id.* at 267–69 (comparing municipal and private corporations).

must exercise their legally recognized discretion on their beneficiary's behalf.[145] That said,

> [t]he scope of the fiduciary's obligation, as well as the obligation's precise formulation, necessarily varies with the context of the relationship.
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> . . . Many courts are obviously willing to consider applying fiduciary obligation in situations beyond the conventional categories, including, in recent years, commercial franchises, distributorship relationships, a bank's relationship with its borrowers and its depositors, and the relationship between holders of executive and nonexecutive interests in oil and gas estates. . . . [C]ourts impose fiduciary constraints whenever one person's discretion ought to be controlled because of characteristics of that person's relationship with another.[146]

A public planner or municipal executive logically holds a type of fiduciary obligation towards the permit-seeking developer or landowner because the local government is "entrusted" with the property (in the form of its use interest) for the duration of the permitting process. In occupying both sides of the transaction, a bureaucrat may not act purely in the best interest of her principal, the municipality.[147] The presence of self-interest as a determinative factor in the final decision on a development application erodes the protection of the business judgment rule, and obligates judges to thoroughly analyze the contested transaction.[148]

Situations calling for the test of intrinsic fairness thus exhibit three characteristics: fiduciary duty by the more powerful party, self-dealing by that party, and exclusion of (or detriment to) the other party.[149] "[S]ubject to careful judicial scrutiny," a defendant carries the burden to prove that its transactions with the weaker party were objectively fair.[150] For the test to apply, a plaintiff need not prove it was entitled to the tangible or intangible asset that was transferred or withheld.[151]

In analyzing a contested transaction under the test of intrinsic fairness, a court inquires whether the transaction were (1) undertaken

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145 *See* Deborah A. DeMott, *Beyond Metaphor: An Analysis of Fiduciary Obligation*, 1988 DUKE L.J. 879, 908.

146 *Id.* at 908–10 (footnotes omitted).

147 *See id.* at 912.

148 *See, e.g.*, Cinerama, Inc. v. Technicolor, Inc., 663 A.2d 1156, 1168 (Del. 1995).

149 *See* Sinclair Oil Corp. v. Levien, 280 A.2d 717, 720 (Del. 1971); *see also* Trans World Airlines, Inc. v. Summa Corp., 374 A.2d 5, 13 (Del. Ch. 1977) (collapsing second and third requirements). *See generally* Lawrence E. Mitchell, *Fairness and Trust in Corporate Law*, 43 DUKE L.J. 425, 436–44 (1993) (reviewing case law).

150 *Sinclair Oil*, 280 A.2d at 720.

151 *See* Burton v. Exxon Corp., 583 F. Supp. 405, 416 (S.D.N.Y. 1984).

through a fair process, and (2) concluded with a fair price.[152] The fair-process analysis asks how the parties reached the terms of the transaction.[153] The fair-price analysis examines the substantive terms of the transaction and demands proof they fall within a range that would have been acceptable to unrelated parties.[154] Taken together, the two inquiries constitute the test of intrinsic fairness. In sum, a fair bargaining process should ensure fair price, even where a powerful fiduciary gratifies its financial interests in a weaker corporation.[155] The test of intrinsic fairness is therefore more than a commentary on fiduciary duty, but rather contemplates that all parties to a transaction conform their behavior to a concept of social responsibility and internalize a sense of balance and proportion.[156]

### B. Modification for Contested Development Exactions

The first part of the test of intrinsic fairness as modified for contested development exactions revolves around fair process and incorporates a concern with voice and exit.[157] A judge may inquire: Did the applicant-beneficiary suspect that a permit would have been conditioned by an exaction of this kind? If so, the court might find that instead of litigating, the developer should have protected her interests by exit, or perhaps by timely voice. The community's patterns of change and accommodation towards its comprehensive plan give an indication of predictability, as do the accessibility and transparency of its planning processes to the public.

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152 *See* Sandra K. Miller, *The Role of the Court in Balancing Contractual Freedom with the Need for Mandatory Constraints on Opportunistic and Abusive Conduct in the LLC*, 152 U. PA. L. REV. 1609, 1642 (2004).

153 *See, e.g.*, Pepper v. Litton, 308 U.S. 295, 306–07 (1939) ("The essence of the test is whether or not under all the circumstances the transaction carries the earmarks of an arm's length bargain."); *Cinerama*, 663 A.2d at 1162 ("[Fair dealing] embraces questions of when the transaction was timed, how it was initiated, structured, negotiated, disclosed to the directors, and how the approvals of the directors and the stockholders were obtained." (quoting Weinberger v. UOP, Inc., 457 A.2d 701, 711 (Del. 1983))); Levien v. Sinclair Oil Corp., 261 A.2d 911, 919 (Del. Ch. 1969) (understanding the idea of fair dealing as prohibiting majority shareholders' "use [of] power to gain undue advantage . . . at the expense of the minority [shareholders]" (quoting Case v. N.Y. Cent. R.R. Co., 204 N.E.2d 643, 646 (N.Y. 1965))).

154 *See, e.g.*, Shlensky v. S. Parkway Bldg. Corp., 166 N.E.2d 793, 801–02 (Ill. 1960) (stating that fairness includes considerations such as "whether the transaction was at the market price, or below, or constituted a better bargain than the corporation could have otherwise obtained in dealings with others"); *cf.* Geddes v. Anaconda Copper Mining Co., 254 U.S. 590, 601–602 (1921) ("[S]ale 'under the hammer' is synonymous with a sale at a sacrifice, and prices obtained at such sales have usually been rejected by courts when tendered as evidence of value.").

155 *See Cinerama*, 663 A.2d at 1163; *see also Shlensky*, 166 N.E.2d at 801–02 (remarking that the concept of entire fairness eludes precise definition, despite availability of several indicators).

156 *See* Mitchell, *supra* note 149, at 426.

157 *See supra* notes 108–27 and accompanying text.

Normalcy, as a behavioral standard, strongly relates to predictability: If a municipal fiduciary imposes exactions that are not "normal," the permit conditions are neither predictable nor commensurate with the social responsibility of the transacting parties. Normalcy may be described as the "kinds of regulations people would willingly impose on themselves if they were outsiders to their own community."[158] The application of a broad, normalcy-based standard, however, is likely to grant more insight into a judge's personal sense of decency than into the total fairness of a contested exaction. The more appropriate inquiry narrows the focus to whether the proposed activity is consistent with recognizable standards, that is, the extent to which the regulations underlying the exactions are compatible with the physical qualities and public usage of the area's built and unbuilt environment.[159] Because inquiry into normalcy creates the quagmire of demarcating community sentiment from actual community standards (a problem that is particularly acute in times of social or economic flux),[160] courts should evaluate characteristics of normalcy concurrently with indicators of predictability.

By promoting the opposite of the arms-length dealing glorified in the corporate context, voice functions as an important component of fair process when applied to contested development exactions. Here the inquiry illuminates whether the applicant had the chance either to shape the political context giving rise to the permit condition or to participate meaningfully in the bargaining process.[161] Against the infinite permutations of voice, a court must decide as a threshold matter whether the applicant is a community resident or is aligned with a coalition of insiders. In either case, the court may conclude that the

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158 FISCHEL, *supra* note 89, at 62.

159 *See generally* DONLYN LYNDON & CHARLES W. MOORE, CHAMBERS FOR A MEMORY PALACE (1994) (providing a personal set of observations on the composition of places, including the elements of paths, walls, light and shadow, gardens, and memory); DAVID SUCHER, CITY COMFORTS: HOW TO BUILD AN URBAN VILLAGE 15 (1995) ("The comfortable city and the urban village are both built and experienced as a series of details, which may appear seamless and coherent, if things work well, but in fact were created over a lengthy period of time and by a variety of minds.").

160 *Cf.* J. David Breemer & R. S. Radford, *The (Less?) Murky Doctrine of Investment-Backed Expectations After* Palazzolo, *and the Lower Courts' Disturbing Insistence on Wallowing in the Pre-*Palazzolo *Muck*, 34 SW. U. L. REV. 351, 417–25 (2005) (explaining how "rational irrationality" molds community expectations for the development of private land); R.S. Radford, *Land Use Regulation and Legal Rhetoric: Broadening the Terms of Debate*, 21 FORDHAM URB. L.J. 413, 419–23 (1994) (reviewing DENNIS J. COYLE, PROPERTY RIGHTS AND THE CONSTITUTION: SHAPING SOCIETY THROUGH LAND USE REGULATION (1993)) (questioning the authenticity of land use preferences articulated in terms of costless decisions regarding the use of others' property).

161 *Cf.* Erin Ryan, Student Article, *Zoning, Taking, and Dealing: The Problems and Promise of Bargaining in Land Use Planning Conflicts*, 7 HARV. NEGOT. L. REV. 337, 347–59 (2002) (discussing how land use planning practice historically has relied upon the negotiations process).

applicant was able to influence local elections or appointments. Additional considerations as to the applicant's bargaining strength include whether her economic clout materially affected the negotiations and whether the municipality could have made a better bargain with a more equally matched partner under otherwise identical circumstances. To obtain relief, the dissatisfied applicant must plead the unfair nature of the contested exaction with specificity, and indeed the multifactor approach of the intrinsic fairness test ensures detailed pleadings.

Along with evaluating opportunities for voice, the reviewing court must determine whether the applicant had opportunity to exit the transaction or the community around the time the municipality imposed the exaction. If she did not, and reasonably chose to litigate, the court should be receptive to her complaint. To weigh the opportunity for exit, a court should consider: whether the applicant owned her property or held an option on it, whether the parcel were unique or ordinary,[162] whether the applicant could have relocated the proposed project to another municipality given her finances and expertise and current market trends, and finally, whether the municipal fiduciaries misled the applicant about the likelihood of a permit condition or its likely scope, thereby obscuring the need for exit.

In examining the totality of a negotiated permitting process, a reviewing court's understanding of exit must embrace the range of options available to the exacting jurisdiction at the time it offered the conditioned approval.[163] A municipality that concluded it had no choice but to impose a comprehensive program of exactions would leave a dissatisfied applicant no course of action other than exit. The gravamen of an applicant's complaint in this situation might be the following: The municipality did not impose the permit condition to mitigate any specific burden the proposed development would impose on the community, but instead hoped to place on an outsider the burden to resolve preexisting local problems. Under the test of intrinsic fairness, a developer could allege nonfrivolously that the jurisdiction turned to exactions as a politically easier revenue source than taxes, adopted an antigrowth stance leading to a policy of substantial exactions regardless of the contours of a particular proposal, knowingly raised exactions excessively yet competitively below those of its antigrowth neighbors, or, upon reaching build-out, decided to lay the

162 *But cf.* Van Wagner Adver. Corp. v. S & M Enters., 492 N.E.2d 756, 759 (N.Y. 1986) (holding that because each parcel is unique in some way, uniqueness in and of itself does not mandate equitable relief).

163 *Cf.* Levien v. Sinclair Oil Corp., 261 A.2d 911, 920 (Del. Ch. 1969) (assessing the sufficiency of a subsidiary's complaint, namely, that its parent company forced it to pay dividends because the parent needed cash, required the court to examine the parent's motives in light of its alternatives).

bulk of its unmet infrastructure needs on the "last developer in line."[164]

Newspaper articles, comparative studies, and a community's past impact reviews of other proposed developments may substantiate such allegations. The primary objection to this further dimension is that it undermines legitimate municipal choices—an objection that rests upon the problematic assumption that local government is capable of representing both majority and minority interests.[165] The deeper philosophical issue concerns whether courts operate within a world of permit conditions that strictly mitigate only those externalities generated by the instant project (thereby implementing a community's vision for itself piece-by-piece) or within a world of permit conditions that loosely refract a general land use policy for the jurisdiction. The Supreme Court has espoused the former view through the *Nollan/Dolan* doctrine,[166] and the proposed test of intrinsic fairness promotes an open-ended and nonpartisan review consistent with that jurisprudence.

Complementing judicial inquiry into fair process, the second half of the modified test of intrinsic fairness comprises the concept of fair price. This requirement constrains redistribution by ensuring that a local government does not compel a developer to pay more in exactions than the cost of ameliorating the short- or long-term harm to the community caused by her project. The corporate standard, based on the acquisition of goods and services, is inapposite;[167] rough proportionality substitutes for it.

A reviewing court should place on one side of the equation the scope of certain public harm, rather than the value the public could have theoretically exacted from the project through permit conditions. The other side of the equation consists of the dedication value or the cash payment demanded from the applicant, plus her imminent debit in the form of other development costs that would escalate were the municipality to impose the exaction.[168] Ensuring an accurate calculation of proportionality, a court measures the applicant's loss—not what the applicant would gain from permission to complete

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164 *See* Carlson & Pollak, *supra* note 79, at 120–22. Ailing inner cities and older suburbs paradoxically make strong cases for standards of normalcy that favor certain settlement patterns and thus indirectly support certain kinds of exactions.

165 *See supra* notes 91–98 and accompanying text.

166 *See supra* notes 11–13 and accompanying text.

167 *See* Mitchell, *supra* note 149, at 446.

168 *See* McDermott, *Exactions*, *supra* note 60, at 68 ("Exactions add hoth direct and indirect costs . . . . Direct costs include those costs associated with design and engineering, hard construction, direct cash payments, operating, and plan review. Indirect costs may include lost project yield and interest-carrying cbarges incurred in review and delay of approval.").

her project unobstructed.[169] Moreover, an emphasis on proportionality to the disregard of essential nexus keeps both the regulators and the courts honest.[170] Under the test of intrinsic fairness, a court may not take an impact into account as a harm solely because it transgresses a regulation or fails to follow constitutional doctrine, but rather when it negatively affects the community in a serious and measurable way.[171]

Harm and loss are relative and subjective occurrences. As such, a fatal circularity arises when the same entity establishing the relative weight of these negativities (be it a municipality or a reviewing court) also determines their rough proportionality by setting exaction levels or by passing on their fairness. Insights from corporate law on the intertwined nature of fair price and fair process provide escape from the conundrum; a jurisprudence that utilizes the standards of normalcy to measure barm to the community and loss to the developer performs similarly. As importantly, the approach presents a sensible way to grapple with municipal diversity and the simultaneous fertility and futility of localness.[172]

## CONCLUSION

Over ten years ago, the Supreme Court formulated a position on contested development exactions in the form of the *Nollan/Dolan* doctrine. State courts, municipalities, and developers still struggle to define the contours of the doctrine: Does it apply exclusively to dedications of land (and possibly to easements) or to monetary fees as well? Does it apply to exactions that are scheduled within an ordinance (regardless how poorly reasoned) or only to negotiated permit conditions? To the extent that certain judicial trends have emerged nationwide, this Note has shown they reflect the allure of bright-line rules rather than represent a thoughtful response to the structure of local decision making. The test of intrinsic fairness, guided by the ideals of fair price and fair process, seeks to harness the vitality of local

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169 *But cf.* Andrew W. Schwartz, *Reciprocity of Advantage: The Antidote to the Antidemocratic Trend in Regulatory Takings*, 22 UCLA J. ENVTL. L. & POL'Y 1, 68–76 (2003/04) (discussing the theory of average reciprocity of advantage, which contends that reductions in property values caused by regulatory takings are offset by increases in property values caused by regulatory givings).

170 *See generally* FISCHEL, *supra* note 89, at 349 (fallacy of essential nexus); Fenster, *supra* note 17, at 663–64 (same).

171 *Cf.* Durand v. IDC Bellingham, LLC, 793 N.E.2d 359, 363–64 (Mass. 2003) (abandoning the state's reasonable relationship test to uphold legality of a "voluntary offer of public benefits beyond what might be necessary to mitigate the development").

172 *Cf.* KENNETH KOLSON, BIG PLANS: THE ALLURE AND FOLLY OF URBAN DESIGN (2001) (claiming that large-scale urban plans tend to overstate the role of rationality in public life). No facile right-left divide characterizes the issues; pro-growth policies affect the property rights of established owners as much as anti-growth policies do.

government while acknowledging its capacity to stifle minority and unpopular interests.

The regulatory takings issues that development exactions raise are neither esoteric nor constitutionally rarified. The process and substance of these permit conditions affect the layout of our homes and yards, wbere we shop and where we go to school, how we commute and how we cleanse our sewage—in other words, the sum quality of our interactions with the built and unbuilt environment around us. Highly localized exactions become the stuff of our day-to-day and emotional lives.[173] By influencing our commitment as citizens "to particular visions of the good life, specific cultural heritages, or understandings of justice or morality," they support "the continuing efforts to create, maintain, change, and challenge a collective identity [which] surely are a legitimate and common subject of democratic politics."[174] For these reasons, the test of intrinsic fairness looks to safeguard the legitimate interests of both individual property owners and developers as well as other community residents. The virtues of local democracy may best be served by institutional constraints that prevent process failures from undermining the fundamental fairness owed to all its constituents.

> *In the center of Fedora, that gray stone metropolis, stands a metal building with a crystal globe in every room. Looking into each globe, you see a blue city, the model of a different Fedora. These are the forms the city could have taken if, for one reason or another, it had not become what we see today. In every age someone, looking at Fedora as it was, imagined a way of making it the ideal city, but while he constructed his miniature model, Fedora was already no longer the same as before, and what had been until yesterday a possible future became only a toy in a glass globe.*
>
> *. . . On the map of your empire, O Great Khan, there must be room both for the big, stone Fedora and the little Fedoras in glass globes. Not because they are all equally real, but because all are only assumptions. The one contains what is accepted as necessary when it is not yet so; the others, what is imagined as possible and, a moment later, is possible no longer.*
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> —Italo Calvino[175]

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173 *See* David M. Hummon, *Community Attachment: Local Sentiment and Sense of Place, in* PLACE ATTACHMENT 253, 260–62 (Irwin Altman & Setha M. Low eds., 1992).

174 Greenwood, *supra* note 80, at 795–96.

175 CALVINO, *supra* note 1, at 32–33.