

11-1-2018

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Suggested Citation

Lisa Harms Hartzler, The Stringent Takings Test for Impact Fees in Illinois: Its Origins and Implications for Home Rule Units and Legislation, 39 N. Ill. U. L. Rev. 92 (2018).

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The Stringent Takings Test for Impact Fees in Illinois:

Its Origins and Implications for Home Rule Units and Legislation

LISA HARMS HARTZLER*

Many Illinois municipalities impose exactions, or impact fees, on new housing developments. Appropriate impact fees offset the anticipated financial burdens on government created by a resulting increase in population, such as a need to build wider roads or add schools. The validity of these fees, however, is subject to a unique and especially stringent standard under the Illinois Constitution’s Takings Clause. Unlike the U.S. Supreme Court’s interpretation of the federal constitution and most other state court interpretations of their respective constitutions, an impact fee in Illinois must be “uniquely and specifically attributable” to the burdens it creates for a local government. This article traces the origin and the development of this stringent standard by Illinois courts and how it differs from the U.S. Supreme Court’s interpretations under the classic takings cases Nollan and Dolan. It argues that the stringent standard applies with equal force to non-home rule and home rule units, and that, in Illinois at least, municipal legislative acts must also meet the strict standard.

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I. INTRODUCTION

In recent years, cash-strapped municipalities have begun to exact greater cash contributions and land dedications from real estate developers seeking to build residential communities within municipal boundaries or to annex proposed subdivisions. These exactions from land owners are variously termed “dedications,” “contributions,” and “impact fees.”¹ The American Planning Association has adopted a policy guide on impact fees.² According to the policy:

Impact fees are payments required by local governments of new development for the purpose of providing new or expanded public capital facilities required to serve that development. The fees typically require cash payments in advance of the completion of development, are based on a methodology and calculation derived from the cost of the facility and the nature and size of the development, and are used to finance improvements offsite of, but to the benefit of the development.³

Impact fees are typically imposed when a developer seeks approval of a plat of subdivision, a zoning or comprehensive plan change, or building permits. The Illinois Municipal Code has long permitted local governments to exact land dedications for public uses, such as parks and school grounds, and Illinois courts have approved requiring cash in lieu of land dedications.⁴ Over time, fees have grown and have been used for many public purposes, particularly by Illinois home rule communities.

1. RONALD COPE, *IMPACT FEES* § 6.2 (Ill. Inst. for Continuing Legal Educ., 2010 & Supp. 2013).

2. AM. PLANNING ASS’N, *APA POLICY GUIDE ON IMPACT FEES* (1988), <https://www.planning.org/policy/guides/adopted/impactfees.htm> (1998), <https://www.planning.org/policy/guides/adopted/impactfees.htm> [<https://perma.cc/5UND-HLR6>].

3. *Id.*

4. *See* discussion *infra* Section II.B.

Impact fees can legitimately alleviate many fiscal consequences of new development.⁵ New subdivisions bring more people to the community. Those people drive on the roads, consume water, enroll their children in local public schools, and in general, place a greater burden on municipal infrastructures and services. Impact fees can also grow to surprisingly high levels and sometimes appear disproportionate to the development's actual impact on a community.⁶ In some cities, especially those with home rule authority in Illinois, the uses for impact fees extend over a broad range of facilities and services, which significantly add to the cost of development. For example, the City of Lake Forest, Illinois, imposes impact fees for schools, libraries, police services, fire and emergency services, the public works department, and park site improvements.⁷ Based on a land value of \$832,500 per acre, as provided in the city's code of ordinances,⁸ total impact fees calculated for a residential lot in Lake Forest can exceed \$40,000. These fees, even when on a lesser level, are passed on to the home buyer and result in less affordable housing.⁹ Individual home buyers are likely unaware of the magnitude of the costs impact fees add to their purchases. Most municipal exactions are also regressive and are typically not proportional to home value.¹⁰ Some argue that high impact fees result in fewer moderately priced homes, as builders need to "add size and amenities to new homes to justify" a higher sale price.¹¹

5. Ronald H. Rosenberg, *The Changing Culture of American Land Use Regulation: Paying for Growth with Impact Fees*, 59 SMU L. REV 177, 209-10 (2006) (enumerating seven benefits of impact fees).

6. Fernando Villa, *Koontz Curbs Government Power to Impose Development Fees*, L.A. LAW., Jan. 2014, at 14, <https://www.lacba.org/docs/default-source/lal-back-issues/2014-issues/january2014.pdf> [<https://perma.cc/XRU3-86L7>].

7. CITY OF LAKE FOREST, CODE OF ORDINANCES, §§ 9-287 to 292, <http://clerk-shq.com/default.ashx?clientsite=lakeforest-il> [<https://perma.cc/Y5FE-SUYA>]. See also *Plote, Inc. v. Minnesota Alden Co.*, 422 N.E.2d 231 (Ill. App. Ct. 1st Dist. 1981), in which a developer agreed to make per unit payments to the Village of Schaumburg, Illinois, for a cultural center.

8. See CITY OF LAKE FOREST, *supra* note 6, § 9-286(a).

9. Steven J. Eagle, *Koontz in the Mansion and the Gatehouse*, 46 URB. L. 1, 15 (2014) (Professional developers may treat high exactions as a cost of doing business, but the "economic incidence" of exactions "largely is passed on to housing purchasers and their tenants.").

10. COPE, *supra* note 1, § 6.27. For example, based on the number of people and school children estimated to be brought to the community by a new development, the owner of a three-bedroom house valued at \$100,000 would typically pay the same amount of school impact fees as the owner of a house valued at \$1,000,000.

11. *Id.*; see also Brett M. Baden, Don L. Coursey, & Jeannine M. Kannegiesser, "Effects of Impact Fees on the Suburban Chicago Housing Market," The Heartland Institute, Policy No. 93 (1999), <https://www.heartland.org/policy-documents/no-93-effects-impact-fees-suburban-chicago-housing-market> [<https://perma.cc/YB4H-SAY5>].

Developers in high impact fee communities hesitate to challenge such fees for fear of damaging their ability to do business there.¹² Even if willing to protest a municipality's fees, they often struggle to obtain redress in Illinois courts.¹³ Nevertheless, municipal impact fees imposed on development projects do have a long history of litigation on the federal and state levels. Developers have challenged them as violating the Takings Clauses of both the U.S. Constitution¹⁴ and the Illinois Constitution.¹⁵ To be valid under the federal Constitution, the U.S. Supreme Court requires an impact fee to have an essential nexus to a legitimate government interest¹⁶ and that there be a rough proportionality between the amount of the fee and that government interest.¹⁷ Although the Illinois Supreme Court also requires a similar essential nexus, it has crafted a higher standard. A rough proportionality is not adequate. To be valid in Illinois, the amount of an impact fee must be "specifically and uniquely attributable" to the needs created by that development.¹⁸

This higher standard theoretically should make it more difficult for municipalities to enact impact fees. To demonstrate compliance, a city or village should be required to justify any impact fee on the basis that the amount of

12. Eagle, *supra* note 9, at 14.

Most developers, such as homebuilders, tend to be small and operate in a limited geographical area. Numerous anecdotal accounts document the perceived need for such developers to get along well with the local officials who have the power to approve their applications, now and in the future, and who eventually must issue certificates of occupancy in order for projects to be completed.

Id. (footnote omitted).

13. Indeed, developers in Illinois who pass on impact fees to their customers face standing issues when filing suit in Illinois state courts. *Raintree Homes, Inc. v. Vill. of Long Grove*, 807 N.E.2d 439 (Ill. 2004) (developer did not have standing to sue for impact fee refund since the fees were actually passed on to the lot owner by the developer). The *Raintree* developer eventually got around that problem in *Raintree v. Vill. of Long Grove*, 906 N.E.2d 751, (Ill. App. Ct. 2d Dist. 2009), with testimony that the fees were not passed on to the customer.

14. U.S. CONST. amend. V. "[N]or shall private property be taken for public use, without just compensation."

15. ILL. CONST., art. I, § 15 (1970). "Private property shall not be taken or damaged for public use without just compensation as provided by law."

16. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 837 (1987) ("In short, unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but 'an out-and-out plan of extortion.'").

17. *Dolan v. City of Tigard*, 512 U.S. 374, 391 (1994) ("We think a term such as 'rough proportionality' best encapsulates what we hold to be the requirement of the *Fifth Amendment*. No precise mathematical calculation is required, but the city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.").

18. *Pioneer Tr. & Sav. Bank v. Vill. of Mount Prospect*, 176 N.E.2d 799, 802 (Ill. 1961); *see also* N. Ill. Home Builders Ass'n v. County of DuPage, 649 N.E.2d 384 (Ill. 1995).

the fees imposed can be “specifically and uniquely” attributed to the burdens on government anticipated from a proposed development. Whether the judicial standard has had that effect is debatable. Some communities have recognized the need for conducting studies to create a methodology supporting the amount of exactions imposed on new developments.¹⁹ Other local governments, however, particularly home rule municipalities, operate as though home rule authority negates the necessity to meet the “specifically and uniquely attributable” test.²⁰ Impact fees, however, need to be justified.²¹ There is also a controversy over whether constitutional takings analyses are applicable to legislative acts (i.e., that an ordinance generally applicable to all subdivisions and developers cannot constitute a taking of private property) within the meaning of the U.S. or Illinois Constitutions.²²

This article chronicles the history of the “specifically and uniquely attributable” test in Illinois, demonstrates that the test applies equally to home

19. Champaign County, Illinois, for example, published an explanatory paper outlining the basis for impact fees and recognizing the need for developing an appropriate methodology for the different types of infrastructure needed for new developments. *See generally* ANDREW LEVY, OVERVIEW OF IMPACT FEES IN ILLINOIS (Champaign Cty. Reg'l Planning Comm'n, 2010) http://www.impactfees.com/resource/state-local/IL_overview2010.pdf [<https://perma.cc/F35G-2U65>].

20. For example, the City of Edwardsville, Illinois, requires a developer to contribute a percentage of the total square footage in a proposed development to create “green space” or to contribute cash in lieu thereof in the amount of \$12,500 per acre. *See* CITY OF EDWARDSVILLE, CODE OF ORDINANCES, https://library.municode.com/il/edwardsville/codes/code_of_ordinances?no-deId=CD_ORD_APXALADECO_DIV1LASUCO_ART5DEIMST [<https://perma.cc/V9MM-F94S>]. A proposal made to a subcommittee of the city’s Plan Commission upped the cash contribution amount to \$41,000 per acre. *See* EDWARDSVILLE PLAN COMM’N MINUTES (April 16, 2018) https://www.cityofedwardsville.com/AgendaCenter/ViewFile/Agenda/_04162018-1214 [<https://perma.cc/ZZB6-8PFD>]; *see also* MINUTES OF THE ORDINANCE SUB-COMMITTEE (March 12, 2018) https://www.cityofedwardsville.com/AgendaCenter/ViewFile/Agenda/_03122018-1192 [<https://perma.cc/3Z24-8DTL>]. There was no apparent analysis of the current cost of building “green space” or the current amount of such amenities per capita provided by the city to its residents to justify such an increase.

21. Adequate impact fee calculations involve technical analyses of existing amenities, costs of accommodating new demands for those amenities, and the proper allocation of costs to meet those new demands. *See* ORANGE CTY., FL, ORANGE CTY. PARKS & RECREATION IMPACT FEE UPDATE STUDY (June 2017), <http://orangecountyfl.net/Portals/0/resource%20library/planning%20-%20development/2016%20Orange%20County%20Parks%20IF%20FINAL%20Report.pdf> [<https://perma.cc/AQ3P-E4KV>], and Scott Thorpe, *Development Impact Fee Calculation—Demystified*, COSTING IN THE CITY: COST ACCOUNTING IN LOCAL GOV’T (Jan. 17, 2016), <http://www.revenue-cost.com/blog/dif/development-calculation-demystified-546> [<https://perma.cc/3V8V-YY64>]. *See* AM. PLANNING ASS’N, *supra* note 2.

22. *See* discussion *infra* Section IV.

rule and non-home rule municipalities that impose impact fees, and argues that the test, at least in Illinois, applies to legislatively-imposed exactions.

II. HISTORY OF THE ILLINOIS “SPECIFICALLY AND UNIQUELY ATTRIBUTABLE TEST”

A. BACKGROUND

The phrase “specifically and uniquely attributable” first appeared in Illinois case law in 1960. In that pre-home rule era,²³ the Illinois Supreme Court upheld the power of a municipality to require land dedications from a developer for schools, parks, and other public grounds.²⁴ The court found authority for such power under state statutes authorizing municipalities to create plan commissions that could impose “reasonable requirements” for those specified purposes.²⁵ In the following year, the court crafted the standard for exactions that exists today:

If the requirement is within the statutory grant of power to the municipality and if the burden cast upon the subdivider is specifically and uniquely attributable to his activity, then the requirement is permissible; if not, it is forbidden and amounts to a confiscation of private property in contravention of the constitutional prohibitions rather than reasonable regulation under the police power.²⁶

Although the Illinois Supreme Court has been inconsistent over the years over some related issues, like whether cash contributions were permitted under plan commission statutes, it has been very consistent in using the “specifically and uniquely attributable” standard to determine when a developer can be required to pay for public improvements. When the United States Supreme Court addressed a Fifth Amendment takings challenge in *Dolan v. City of Tigard* in 1994, it noted the Illinois standard but chose to adopt a lower standard of “rough proportionality.”²⁷ Under the Illinois Constitution,

23. Home rule units were created under the 1970 Illinois Constitution, article VII, section 6. Prior to the adoption of the 1970 Constitution, Illinois followed “Dillon’s Rule,” under which the powers of municipal governments were limited to those expressly granted by the Illinois Legislature and were strictly construed by the courts. The 1970 Constitution flipped Dillon’s Rule. It gave home rule municipalities all of the powers of the State with respect to matters pertaining to their local government and affairs that are not specifically limited by the State Legislature as a denial of home rule power. ILL. CONST. art. VII, § 6.

24. *Rosen v. Vill. of Downers Grove*, 167 N.E.2d 230 (Ill. 1960).

25. *Id.* at 233-34.

26. *Pioneer Tr. & Sav. Bank*, 176 N.E.2d 799, 802 (Ill. 1961).

27. *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

however, this higher standard created by the Illinois Supreme Court must still be met in Illinois.

B. DEVELOPMENT OF THE “SPECIFICALLY AND UNIQUELY ATTRIBUTABLE” TEST

The following chronology traces the origins and development of the “specifically and uniquely attributable” standard through statutes and case law.

“In 1921 the General Assembly passed an act entitled, ‘An Act in relation to plan commissions in cities, villages and incorporated towns.’”²⁸ This Plan Commission Act provided that (1) every municipality may create a plan commission; (2) a plan commission has certain powers, including the preparation of a comprehensive plan of public improvements which, looking to the present and future development of the municipality, could demand reasonable requirements for “streets, alleys, and public grounds in unsubdivided lands within the corporate limits and in contiguous territory” not more than one and a half miles from corporate limits; and (3) a plat of subdivision would not be valid or entitled to be recorded unless it provided “for streets, alleys, and public grounds in conformity with the applicable requirements of the official plan.”²⁹ There was no reference to any “specifically and uniquely attributable” standard in this statute.

In 1956, the Illinois Supreme Court decided *Petterson v. City of Naperville*, the first case to interpret the Plan Commission Act.³⁰ In that case, the plaintiff land owners wanted to subdivide property contiguous to the City of Naperville, which had created a plan commission and adopted both a comprehensive plan of public improvements and a subdivision control ordinance. The city would not approve the proposed subdivision because the plaintiffs refused to install curbs and gutters along the proposed streets in accordance with the subdivision control ordinance. The plaintiffs asserted that, although the city could regulate “streets, alleys, and public grounds” pursuant to the Plan Commission Act, it had no authority to require curbs, gutters, storm

28. *Petterson v. City of Naperville*, 137 N.E.2d 371, 376 (Ill. 1956) (citing *Laws of 1921*, p. 260).

29. *Id.* This original Plan Commission Act was amended in 1949 to add a new paragraph applying to municipalities of more than 500,000 inhabitants or municipalities lying wholly or partly within a radius of 30 miles from the corporate limits of municipalities of more than 500,000 inhabitants. *Id.* Chicago would have been the only municipality to have more than 500,000 inhabitants. The Plat Act was also amended to add that plats of subdivision must be submitted to the municipal authorities for their approval if the land is located within the corporate limits of the municipality or within contiguous territory which is affected by an official plan; otherwise, the county must approve the plat. *Id.* (referencing Ill. Rev. Stat. 1949, chap. 109, par. 2).

30. *Petterson*, 137 N.E.2d at 371.

drainage and other improvements not mentioned in the statute. After all, statutes granting power to municipalities had to be construed strictly if there was any doubt as to the existence of the power.³¹ In this case, the court found no doubt that the power granted under the Plan Commission Act was more expansive than a literal reading.

The court first held that the legislature clearly intended to give all municipalities extraterritorial control over the subdivision of lands within one and a half miles beyond their corporate limits.³² It limited that power, however, by holding that such power “is, of course, always subject to the requirement that the ordinance passed pursuant to legislative authority constitutes a valid exercise of the police power, and bears a reasonable and substantial relation to the public health, safety or general welfare.”³³ The question then became whether the power the city was given to prescribe reasonable requirements for public streets under the Plan Commission Act, included “more than a mere designation of the location and width of streets.”³⁴ The court answered that question in the affirmative. It found that street, sewage, and drainage construction requirements contributed to the safe passage of the traveling public and the health of citizens.³⁵ The city’s requirements for curbs and gutters were, therefore, “within the powers conferred by the statute.”³⁶

It is notable that in this early case, the authority for the exactions was not challenged under a constitutional takings theory and was decided only on the basis of municipal police powers:

The fact alone that the ordinance may operate to impose burdens or restrictions on the property which would not have existed without the enactment of the ordinance is never determinative of the question of validity. The privilege of the individual to use his property as he pleases is subject always to a legitimate exercise of the police power under which new

31. *Id.* at 378. See discussion *supra* of Dillon’s Rule, note 23.

32. *Id.* at 376.

33. *Id.* at 377.

34. *Peterson*, 137 N.E.2d at 378.

35. *Id.* at 378. The court explained:

The legislature undoubtedly had in mind the complex problems connected with the development of territory contiguous to cities as bearing on the health and safety of all inhabitants within and without the municipality; that in such territory, in the interest of uniformity, continuity, and of public health and safety, the streets should be constructed in such a way as to afford reasonably safe passage to the traveling public and provide reasonable drainage in the interests of health.

Id.

36. *Id.* at 378.

burdens may be imposed upon property and new restrictions placed upon its use when the public welfare demands.³⁷

In fact, the court explicitly stated that “the validity of the ordinance is to be tested, neither by the principle of uniformity of taxation nor by the law of eminent domain, but rather by the settled rules of law applicable to cases involving the exercise of police powers.”³⁸ Nevertheless, *Petterson* set the stage for future exactions and impact fees.

A year after *Petterson*, the Illinois Supreme Court decided *Rosen v. Village of Downers Grove*.³⁹ In that case, the Village passed two ordinances under what was then Article 53 of the Revised Cities and Village Act, which had replaced the 1921 Plan Commission Act.⁴⁰ Article 53 was similar to the prior statute in authorizing municipalities to establish plan commissions and adopt an official plan establishing reasonable standards of design for subdivisions and unimproved land; however, the public improvements that could be mandated were expanded.⁴¹ No longer limited to streets, alleys, and public grounds, as in the 1921 statute, the official plan could also include “ways for public service facilities, parks, playgrounds, school grounds, and other public grounds.”⁴²

The Village of Downers Grove adopted an ordinance requiring developers to “dedicate for educational purposes” such areas deemed necessary by the plan commission, and it authorized the plan commission to impose such other requirements to meet the needs of educational facilities.⁴³ Under this ordinance, the Downers Grove Plan Commission required a subdivider to obtain a certificate of compliance from the school board in which the property was located. One plaintiff refused to obtain a certificate. Another plaintiff engaged in the business of subdividing property on a large scale obtained a certificate only after it executed an agreement which required it to deposit into escrow \$375 for each lot sold.

In its opinion, the court acknowledged that Article 53 granted the village powers to facilitate orderly growth.⁴⁴ This power, however, was not without limits. It is in this case that the court set out for the first time the “specifically and uniquely attributable” standard. This standard was not explicitly stated in the plan commission statute. The court *created* and applied

37. *Id.* at 379 (citation omitted).

38. *Petterson*, 137 N.E.2d at 380.

39. *Rosen v. Vill. of Downers Grove*, 167 N.E.2d 230 (Ill. 1960).

40. *Id.* at 232-33.

41. *Id.*

42. *Id.*

43. *Id.* at 233. The Village actually adopted two ordinances. One ordinance required developers to dedicate for public use at least one acre per each 75 building sites or family living units. The court determined that this ordinance was not involved in this litigation and refused to rule on its validity.

44. *Rosen*, 167 N.E.2d at 233.

the standard to determine the reasonableness of plan commission requirements:

The statutory requirement of plan-commission approval of a plat of subdivision was designed to assist the orderly growth of municipalities. The provisions of the statute with respect to reasonable requirements for public streets, school grounds and the like, appear to be based upon the theory that *the developer of a subdivision may be required to assume those costs which are specifically and uniquely attributable to his activity and which would otherwise be cast upon the public*. It is upon this theory that we sustained the requirement that a subdivider provide curbs and gutters in *Petterson v. City of Naperville*, 9 Ill. 2d 233.⁴⁵

The court agreed with the village that requiring plat approval did offer an appropriate point at which to collect the expenses that are necessitated by a new subdivision.⁴⁶ Nevertheless, it did “not follow that communities may use this point of control to solve all of the problems which they can foresee.”⁴⁷ A developer may be required to provide for the needs generated by its new subdivision, but a municipality may not demand that developer to be a cash cow to fund pre-existing or future needs of the whole community.

The court invalidated the land dedication and fees required under the village “educational purposes” ordinance for a number of reasons, including that the statute did not authorize monetary charges, and it authorized dedications only for “school grounds,” which is much narrower than “educational purposes.”⁴⁸ None of the reasons discussed by the court appeared to be based on the “specifically and uniquely” requirement. Nevertheless, the court’s discussion of the validity of impact fees in *Rosen* became the genesis of the Illinois standard.

45. *Id.* at 233-34 (emphasis added).

46. *Id.* at 234.

47. *Id.* (“[T]he municipality may require the developer to provide the streets which are required by the activity within the subdivision but can not [*sic*] require him to provide a major thoroughfare, the need for which stems from the total activity of the community.”) (citing *Ayres v. City Council of L.A.*, 207 P.2d 1 (1949)).

48. *Rosen*, 167 N.E.2d at 234. The court invalidated the land dedication and fees required under the village “educational purposes” ordinance because (1) the fee calculations were based on factors totally unrelated to the proposed subdivision (e.g., the time lag between the date when homes are occupied and the date when taxes upon the completed homes were collected); (2) neither the plan commission nor the Village board could abdicate its authority in favor of the local boards of education; (3) the statute did not authorize monetary charges; and (4) the statute referred to reasonable requirements only for “school grounds,” which is much narrower than “educational purposes.” *Id.*

In 1961, the Illinois Supreme Court decided *Pioneer Trust and Savings Bank v. Village of Mount Prospect*.⁴⁹ In that case, a land dedication question left undecided in *Rosen* was specifically at issue under the same statutory authorization. The village passed an ordinance requiring one acre per sixty family units to be dedicated, or given, to the village for public use. The court noted that *Rosen* set out some basic principles for distinguishing between permissible and forbidden requirements, and it quoted *Rosen*'s "specifically and uniquely attributable" language as the standard by which the village's dedication requirements should be judged:

If the requirement is within the statutory grant of power to the municipality and if the burden cast upon the subdivider is specifically and uniquely attributable to his activity, then the requirement is permissible; if not, it is forbidden and amounts to a confiscation of private property in contravention of the constitutional prohibitions rather than reasonable regulation under the police power.⁵⁰

The court found that school and public recreational facilities were obviously needed and that orderly municipal development must consider these needs.⁵¹ However, in characterizing the question in this case as one of determining who should pay for those necessities, the court (unlike in *Petersen*), framed that question as a potential constitutional takings challenge. "Is it reasonable that a subdivider should be required under the guise of a police power regulation to dedicate a portion of his property to public use; or does this amount to a veiled exercise of the power of eminent domain and a confiscation of private property behind the defense of police regulations?"⁵² In this

49. *Pioneer Tr. & Sav. Bank*, 176 N.E.2d 799 (1961).

50. *Id.* at 802.

51. *Id.*

52. *Id.* The Illinois Supreme Court did not specifically cite or refer to the Illinois Constitution of 1870, which was applicable at the time. Article II, Section 13 of that Constitution provided "Private property shall not be taken or damaged for public use without just compensation. Such compensation when not made by the State, shall be ascertained by a jury, as shall be prescribed by law. The fee of land taken for railroad tracks, without the consent of the owners thereof, shall remain in such owners, subject to use for which it is taken." CONSTITUTION OF THE STATE OF ILLINOIS (1897), <http://www.idaillinois.org/cdm/ref/collection/isl2/id/396> [<https://perma.cc/66FH-LBK9>]. The court did quote Justice Holmes, who referred to the Fifth Amendment's protection of property rights:

The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. A similar assumption is made in the decisions upon the Fourteenth Amendment. *Hairston v. Danvill & Western Ry. Co.*, 208 U.S. 598, 605. When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private

case, the court found that the need for additional schools was the result of total community development and was not “specifically and uniquely attributable” to the addition of the plaintiff’s proposed subdivision. As such, requiring the developer to pay the total cost of the remedy “would amount to an exercise of the power of eminent domain without compensation.”⁵³ The court invalidated the village’s land dedication requirements.

The Illinois Supreme Court decided *Pioneer* on May 19, 1961. On August 4, the legislature amended the Municipal Code to delete the existing sections comprising Article 11, Section 12: “Plan Commissions.”⁵⁴ New sections of the Illinois Municipal Code again expanded the powers of plan commissions and contained more specific language relating to requirements that could be placed on developers regarding needed public improvements.⁵⁵ A plan commission’s official plan could:

- (a) establish reasonable standards of design in subdivisions and for resubdivisions of unimproved land and of areas subject to redevelopment in respect to public improvements;
- (b) establish reasonable requirements governing the location, width, course, and surfacing of public streets and highways, alleys, ways for public service facilities, curbs, gutters, sidewalks, street lights, parks, playgrounds, schoolgrounds, size of lots to be used for residential purposes, storm water drainage, water supply and distribution, sanitary sewers, and sewage collection and treatment; and
- (c) may designate land suitable for annexation to the municipality and the recommended zoning classification for such land upon

property disappears. But that cannot be accomplished in this way under the Constitution of the United States.

Pioneer, 176 N.E.2d at 802 (quoting *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922)). *Pennsylvania Coal* was decided many years prior to *Pioneer* but it was the best precedent the Illinois court had. The Illinois court appears to take from the prior case that if a requirement of property owners is based on the police power, there must be a direct relation between the safety and welfare of the public and what the government is requiring.

53. *Pioneer*, 176 N.E.2d at 802.

54. 1961 Ill. Laws 2757. Prior to this amendment, on May 29, 1961, the Legislature generally amended and re-stated the laws relating to cities, villages and incorporated towns, naming it the “Illinois Municipal Code.” 1961 Ill. Laws 2756. The sections regarding plan commissions were essentially the same as the old laws, but municipalities with populations over 500,000 were given slightly expanded authority to establish reasonable standards of design for subdivisions regarding “public streets, alleys, ways for public service facilities, storm or flood water runoff channels and basins, parks, playgrounds, school grounds, and other public grounds.”

55. 1961 Ill. Laws 2757.

annexations, and to impose reasonable requirements for parks, playgrounds, school grounds, and lot sizes.⁵⁶

Nevertheless, even with these expanded powers, there was still no statutory reference to a “specifically and uniquely attributable” standard, as had been applied in *Rosen* and *Pioneer Bank*.

When the Illinois Supreme Court decided *People ex rel. Exchange National Bank of Chicago v. City of Lake Forest*⁵⁷ in 1968, it affirmed both *Rosen* and *Pioneer Trust* as formulating a test of the reasonableness of municipal action: if the city has the power to establish a requirement and if the burden on the developer “is specifically and uniquely attributable to his activity,” then the requirement is not a confiscation of private property and prohibited by the Constitution.⁵⁸ In this case, the city refused to approve a two-lot subdivision unless the owner conceded additional street dedications. The court could find nothing in the proposed subdivision necessitating new streets—except to provide access to two adjacent but land-locked parcels.⁵⁹ Since the burden of the requested street dedication was not “specifically and uniquely attributable” to the proposed subdivision, the court held that the city’s refusal to approve the developer’s plat “exceeded the bounds of permissible and reasonable regulation and would have constituted a taking of private property for public use without compensation.”⁶⁰

In *Brown v. City of Joliet*,⁶¹ an Illinois appellate court distinguished *Exchange National Bank* in upholding a plan commission’s denial of a developer’s plat until acceptable provisions were made for storm water runoff. A city ordinance required every subdivision to be provided with a storm water sewage or surface drainage system adequate to serve the area being platted and “in conformity with the master storm drainage plan of the water shed of which it is a part.”⁶² Plaintiff Brown’s assertion that she was being required to provide a storm sewer for the whole general area was not supported by the record, according to the court. Citing *Pioneer Trust & Savings Bank*, the court held that, unlike the additional but unnecessary street dedications

56. *Id.* Further, Section 8 seems to require a municipality to *purchase or condemn* lands designated for school or other public purposes. This issue was addressed in a dissent in Bd. of Educ. of School Dist. No. 68 v. Surety Developers, 347 N.E.2d 149 (Ill. 1975) and by the Illinois Supreme Court in Krughoff v. City of Naperville, 369 N.E.2d 892 (Ill. 1977), where the Illinois Supreme Court held that Section 8 was an *additional* power granted to municipalities, not a limitation.

57. *People ex rel. Exch. Nat. Bank of Chi. v. City of Lake Forrest*, 239 N.E.2d 819 (Ill. 1968).

58. *Id.* at 822.

59. *Id.* at 822-23.

60. *Id.* at 823.

61. *Brown v. City of Joliet*, 247 N.E.2d 47 (Ill. App. Ct. 3d Dist. 1969).

62. *Id.* at 48.

requested for a re-subdivision in *Exchange National Bank*, the storm water problem that Brown's proposed subdivision would cause was, in fact, "uniquely attributable" to her development alone.⁶³

In 1975, the Illinois Supreme Court decided *Duggan v. County of Cook*,⁶⁴ involving the denial of a developer's request for a zoning change and special use permit for a mobile-home park. The Cook County Zoning Board of Appeals recommended approval of a special use permit with seven conditions.⁶⁵ One of those conditions required the developer to pay the school districts involved a total sum of \$43,000.⁶⁶ The Illinois Supreme Court invalidated the cash payment requirement, citing *Rosen* and *Pioneer Trust*, in holding that "there is no power under the guise of zoning authority to require the payment of a sum of money to a school district as a condition to the zoning."⁶⁷ However, the court in a later case repudiated this holding voiding cash payments.⁶⁸

In the same year as *Duggan*, an appellate court decided *Department of Public Works and Buildings v. Exchange National Bank*.⁶⁹ In this case, the plaintiff developer executed an annexation agreement with the Village of Addison, which provided that the village would install utilities and re-zone and annex 110 acres.⁷⁰ The developer agreed to donate land for public use, which was later changed to a cash contribution in lieu of land.⁷¹ At a meeting of the Village Board, the developer was asked also to agree to down-zone part of the property if the state decided to acquire it by eminent domain for a right-of-way.⁷² The developer orally agreed and the condition was included in an ordinance approving the annexation.⁷³ When the state started eminent

63. *Id.* at 51.

64. *Duggan v. Cty. of Cook*, 324 N.E.2d 406 (Ill. 1975).

65. *Id.* at 410. This case was decided after Illinois in 1970 adopted a new constitution granting home rule power to municipalities with populations exceeding 25,000 and certain forms of county government. Ill. Const. art. 6, § 7. Cook County was then and remains the only county with home rule authority, but that status was not an issue in *Duggan*. According to the lower appellate decision, the plaintiffs filed suit in 1972, after the advent of home rule. *Duggan v. Ct. of Cook*, 307 N.E.2d 782 (Ill. App. Ct. 1st Dist. 1974). However, the Illinois Supreme Court reviewed a county ordinance last amended in 1968. *Duggan*, 324 N.E.2d at 408.

66. *Duggan*, 324 N.E.2d 406 at 408. Another condition was that "not more than 25% of the home sites on the development could be made available to families with children. The court held that this condition violated public policy." *Id.* at 411.

67. *Id.*

68. *See Bd. of Educ. of School Dist. No. 68 v. Surety Developers, Inc.*, 347 N.E.2d 149 (Ill. 1975), discussed *infra* note 78.

69. *Dep't. of Pub. Works & Bldg. v. Exch. Nat. Bank*, 334 N.E.2d 810 (Ill. App. Ct. 2d Dist. 1975).

70. *Id.* at 814.

71. *Id.*

72. *Id.*

73. *Id.*

domain proceedings, however, the developer attacked the down-zoning because the value of his property significantly decreased when it reverted back to its original zoning classification.⁷⁴

To determine whether the ordinance was valid, the court reviewed the “specifically and uniquely attributable” standards set by *Pioneer Trust* for determining who should bear the cost of new facilities.⁷⁵ It found that the real purpose of the down-zoning provision in the ordinance was to depress or limit property values in order to minimize the costs of acquisition in anticipation of the condemnation proceedings. It invalidated the ordinance and said:

Landowners may make a contract which may be recognized as a motive for rezoning but such zoning must meet the test of all valid zoning as above. The direct and sole purpose of subsection 4 of the ordinance involved herein was to devalue land to be acquired for a public purpose. The public purpose sought to be advanced and the means taken to achieve it is in no way *specifically and uniquely attributable* to the activity of the owners. It is therefore forbidden and amounts to a confiscation of private property rather than reasonable regulation under the police power.⁷⁶

Thus, the court applied the Illinois Supreme Court’s “specifically and uniquely attributable” standard, which was developed under the land dedication provisions of the plan commission statute, to a down-zoning condition

74. The court noted that a void ordinance is subject to direct or collateral attack whenever its authority is invoked in a judicial process. Dep’t. of Pub. Works & Bldg., 334 N.E.2d at 818. It explained:

Although in most situations a collateral attack upon zoning is not permitted in an eminent domain proceeding (see Annot., 9 A.L.R.3d 291, 303 (1966), and cases there cited), that principle is inapplicable to the situation where the condemnor purporting to exercise its police power by enacting a zoning ordinance has in reality discriminated against a particular parcel or parcels of land in order to depress their value with a view to future takings in eminent domain. (4 Nichols on Eminent Domain § 12.322 (3d ed.); Annot., 9 A.L.R.3d 291, 304 (1966), section 5[b] and cases there cited, 53 Ill.B.J. 956, 973 (1965).) In such a situation such action has been vigorously condemned as confiscatory and the condemnee may attack the validity of the zoning ordinance in the eminent domain action and if successful require that his property be valued free of its restrictions.

Id.

75. *Id.* at 819. “In answering the question who is to bear the cost of the new facilities—the municipality or the developer—it is recognized that it is proper to make the developer assume the burdens or costs which are specifically and uniquely attributable to the addition of the subdivision.” *Id.*

76. *Id.* at 819-20 (emphasis added).

pursuant to an annexation agreement where that condition resulted in a developer contributing, in effect, to an improvement for the general public.

Also in 1975, the Illinois Supreme Court decided *Board of Education of School District No. 68, v. Surety Developers, Inc.*⁷⁷ In this case, a non-home-rule county board required a developer to contribute land or money for school facilities as a condition to obtaining a special use permit necessary for a new subdivision. The developer agreed to provide both money and land in two different agreements with the county. Again, the issue did not involve the powers of a county plan commission to exact dedications—rather, it concerned the power of the county board under special use provisions authorized by the county zoning statute to require contributions.⁷⁸ Nevertheless, the court discussed *Rosen*, *Pioneer*, and *Exchange National Bank* and held that those cases elevated the “specifically and uniquely attributable” standard to a constitutional basis in “land dedication requirements regardless of the legislation.”⁷⁹ Consequently, irrespective of the source of legislative authority for requiring an exaction tied to real property, the constitutional standard was applicable.

In *Surety Developers*, the court found that a need for new schools was “specifically and uniquely” (and probably solely) attributable to the proposed subdivisions, which created a whole town on previously unincorporated farmland.⁸⁰ As such, “the conditions were authorized by statute, were a reasonable regulation under the police power, and in conformity with the [specifically and uniquely attributable constitutional] tests enunciated in *Rosen* and *Pioneer Trust*.”⁸¹ The developer further argued that a local government cannot require cash contributions to a school district, quoting *Duggan v. County of Cook*.⁸² The court brushed aside the language of that case by noting that the issue had not been “briefed or presented” to the *Duggan* court and, surprisingly, proclaimed the case to have no precedential value.⁸³ The court failed, however, to distinguish *Rosen* or to offer any authority for its holding that the cash contributions were authorized by state statute. It simply became permissible under this case to exact cash contributions.

One justice dissented from the majority’s opinion: “The General Assembly has never authorized the sale of special use permits, nor has it ever authorized county or municipal governing bodies to exact cash contributions from real estate developers as the price of approval of plats of subdivision. If

77. Bd. of Educ. of School Dist. No. 68 v. Surety Developers, 347 N.E.2d 149 (Ill. 1975).

78. *Id.* at 153.

79. *Id.*

80. *Id.* at 154.

81. *Id.*

82. *Surety Developers*, 347 N.E.2d at 153.

83. *Id.* at 154.

such legislation should ever be adopted, it would give rise to serious constitutional questions. . . .”⁸⁴ The Illinois Supreme Court, however, has held fast to *Surety Developers* and has never adopted this dissenting viewpoint.

In *Krughoff v. City of Naperville*,⁸⁵ the Illinois Supreme Court appeared to try to reconcile prior cases with regard to cash contributions. In this case, a home rule municipality passed an ordinance requiring dedication of land or an “in lieu” payment of cash for parks and schools as a condition for subdivision plat approval.⁸⁶ The court noted the apparent inconsistencies between cases like *Rosen* and *Duggan*, which held that there was no statutory authority for requiring cash payments, and *Surety Developers*, which held that a developer could be required to contribute cash and land to a school district.⁸⁷ The court stated that, while the land dedications in *Rosen* and *Pioneer* were held invalid, it had never “held that land dedication requirements for school grounds are unauthorized by the Municipal Code.”⁸⁸ In fact, the court said, it had always upheld “land dedication requirements proportioned to the needs specifically and uniquely attributable to the developer’s activities.”⁸⁹ The court upheld *Surety Developers* and reasserted that required contributions of land, or money in lieu of land, that were “uniquely attributable to” the needs for new school and park facilities created by the developments were permissible under the plan commission statute.⁹⁰ The court, therefore, implicitly validated cash contributions when they were imposed or offered instead of land exactions. Left unsaid was whether money contributions, where no land

84. *Id.* at 157. Justice Schaefer also asserted that Section 8 of the 1961 amendments to the Municipal Code, passed shortly after *Pioneer Trust* was decided, required a municipality to purchase or condemn land designated as necessary for school and public park sites. *Id.*

85. *Krughoff v. City of Naperville*, 369 N.E.2d 892 (Ill. 1977).

86. *Id.* at 894. Naperville exemplifies the need for developers to contribute to the resulting costs of their projects to the government. According to the opinion, the population of Naperville “increased from 7,013 in 1950 to 12,933 in 1960, 22,417 in 1970, and 28,610 in 1973.” *Id.* As of a 2018 partial special census estimate, the population was 147,841. CITY OF NAPERVILLE, DEMOGRAPHICS AND KEY FACTS, <http://www.naperville.il.us/about-naperville/demographics-and-key-facts/> [<https://perma.cc/HL32-EA8H>].

87. *Krughoff*, 369 N.E.2d at 895.

88. *Surety Developers*, 347 N.E.2d at 154.

89. *Id.*

90. *Id.* (emphasis added). In 1989, the Illinois Legislature amended the Municipal Code (Par. 11-12-5) and the Counties Code (Sec. 25.09) regarding municipal plan commissions and similar county authority to regulate subdivisions. Act of Sept. 1, 1989, Pub. Act 86-614, 1989 Ill. Laws 3341. Public Act 86-614 required that school districts containing two or more municipalities be given an opportunity to participate in determining the amount of school grounds, or cash in lieu thereof, to be required of new subdivisions. *Id.* This is the first mention in the statute regarding cash contributions, but the Illinois Supreme Court in *Surety Developers* had already held such payments permissible. The general enabling language authorizing plan commissions to establish “reasonable standards” governing subdivisions and public improvements did not change.

was requested, would still be upheld. This was the state of Illinois law prior to the U.S. Supreme Court entering the field of exactions.

C. CASE LAW UNDER THE U.S. CONSTITUTION

Although this article focuses on Illinois, any discussion of takings analyses under the Illinois Constitution must include the United States Supreme Court's decisions under the Fifth Amendment that were handed down while the Illinois courts were grappling with similar issues.⁹¹ That court's first major decision on land use exactions was decided in the 1987 case of *Nollan v. California Coastal Commission*.⁹² In that case, the court invalidated an ordinance requiring an easement for passage to the beach in front of the plaintiff's home as a condition to granting a building permit for remodeling. The stated purpose of the requirement was to preserve ocean views from the road. In granting the plaintiff's claim that the requirement was a taking in violation of the Fifth Amendment, the Court said, "we must first determine whether the 'essential nexus' exists between the 'legitimate state interest' and the permit condition exacted by the city."⁹³ Without such a nexus, "[t]he purpose then becomes, quite simply, the obtaining of an easement to serve some valid governmental purpose, but without payment of compensation."⁹⁴ The court could find no nexus between preserving an ocean view and requiring the plaintiff to grant the city an easement for walking from the road to the beach.⁹⁵ The court cited Illinois' *Pioneer Trust & Savings Bank*, among many other cases, to support its nexus requirement.⁹⁶

In the 1994 case of *Dolan v. City of Tigard*, a landowner challenged the city's condition for approving her building permit application.⁹⁷ The condition required a dedication of a portion of her property for flood control and traffic improvements.⁹⁸ The Supreme Court repeated *Nollan's* requirement of an essential nexus between a legitimate state interest and the exactions.⁹⁹

91. It is worth noting that Illinois had a substantial body of precedent on exactions well before the U.S. Supreme Court took up its first exaction case.

92. *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987).

93. *Id.* at 837.

94. *Id.*

95. *Id.* at 838-39.

96. "Our conclusion on this point is consistent with the approach taken by every other court that has considered the question, with the exception of the California state courts." *Id.* at 839, (citing, among others, *Pioneer Tr. & Sav. Bank*, N.E. 2d at 802).

97. *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

98. *Id.* at 377.

99. *Id.* at 383-86. The court stated that, "under the well-settled doctrine of 'unconstitutional conditions,' the government may not require a person to give up a constitutional right—here the right to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit conferred by the government where the benefit sought has little or no relationship to the property." *Id.* at 385.

Finding that a sufficient nexus existed in this case, it then added a second part to its takings test. That part required that, “[i]f we find that a nexus exists, we must then decide the required degree of connection between the exactions and the projected impact of the proposed development.”¹⁰⁰ The Court engaged in a lengthy discussion of what degree of connection should be required. It noted that some states required only a very general connection, which it found to be “too lax.”¹⁰¹ It also noted that other state courts required “a very exacting correspondence,” which the Court described as the “specific and uniquely attributable” test.¹⁰² Crediting this test to Illinois, the court explained:

The Supreme Court of Illinois first developed this test in *Pioneer Trust* [citation omitted]. Under this standard, if the local government cannot demonstrate that its exaction is directly proportional to the specifically created need, the exaction becomes ‘a veiled exercise of the power of eminent domain and a confiscation of private property behind the defense of police regulations.’¹⁰³

The United States Supreme Court did not adopt this Illinois standard, holding that it did “not think the Federal Constitution requires such exacting scrutiny, given the nature of the interests involved.”¹⁰⁴ It did adopt a middle ground offered by other states employing a “reasonable relationship” test.¹⁰⁵ However, because it thought the name of that test was too confusingly similar to the minimal-scrutiny term “rational basis,” the Court decided to call its test a “rough proportionality” requirement.¹⁰⁶ That standard requires a local government to “make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development.”¹⁰⁷

Consequently, while more demanding than just a general connection, the necessary nexus required by the Supreme Court under the Fifth Amendment to the U.S. Constitution was lower than that what was necessary under the Illinois Constitution.

100. *Id.* at 386.

101. *Dolan*, 512 U.S. at 389.

102. *Id.* at 389.

103. *Id.* at 389-90.

104. *Id.* at 390.

105. *Id.* at 391.

106. *Dolan*, 512 U.S. at 391.

107. *Id.* at 391 (“No precise mathematical calculation is required, but the city must make some sort of individualized determination. . . .”).

D. ILLINOIS CASE LAW CONTINUES TO APPLY THE STRICT ILLINOIS TEST

The Illinois Supreme Court continued on its own path under the Illinois Constitution in its 1995 decision in *Northern Illinois Home Builders Ass'n, Inc. v. County of DuPage*.¹⁰⁸ This case involved takings challenges to two state enabling statutes and three county ordinances imposing transportation impact fees on new development.¹⁰⁹ The first state enabling statute authorized road impact fees “based on the amount of estimated traffic generated by various land uses and the amount of improvements needed to maintain a reasonable level of service on the existing and proposed highway systems in light of expected traffic growth.”¹¹⁰ Only one and a half years later, a second enabling statute repealed and replaced the first, requiring that “an impact fee payable by a developer shall not exceed a proportionate share of costs incurred by a unit of local government which are specifically and uniquely attributable to the new development paying the fee.”¹¹¹

The court in *Northern* first acknowledged the U.S. Supreme Court’s decisions in *Nollan* and *Dolan*, imposing the two-part test demanding (1) an “essential nexus” between a legitimate state interest and the exaction required and (2) the required degree of connection between the exactions and the projected impact of the proposed development.¹¹² The court declared a clear nexus existed between the legitimate state interest of preventing additional traffic congestion from new developments and providing for road improvements to address such congestion.¹¹³ It then, however, departed from the U.S. Supreme Court and re-affirmed the “specifically and uniquely attributable” test of *Pioneer Trust* as the applicable standard for determining whether the state enabling statutes passed constitutional muster.¹¹⁴ The court held that “the need for road improvement impact fees must be ‘specifically and uniquely attributable’ to the new development paying the fee.”¹¹⁵

108. N. Ill. Home Builders Ass’n, Inc. v. Cty. of DuPage, 649 N.E.2d 384 (1995).

109. *Id.* at 387.

110. *Id.* at 388. The Illinois Legislature passed its first road impact fee law as Section 5-608(a) of the Illinois Highway Code. (Ill. Rev. Stat. 1987, ch. 121, ¶ 5-608(a)). It became effective January 1, 1988 but was repealed the next year by Pub. Act 86-97, Sec. 2, effective July 26, 1989. Illinois Highway Code, Pub. Act 86-97, 1989 Ill. Laws 1019. This first road impact fee statute authorized counties to collect transportation impact fees from persons constructing new developments. *Northern*, 649 N.E.2d at 388. It did not contain the “specifically and uniquely attributable” language developed by *Rosen* and *Pioneer Trust*.

111. *Id.* at 384.

112. *Id.* at 389 (citing *Nollan Cal. Coastal Comm’n*, 483 U.S. 825 at 837 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994)).

113. *Id.*

114. *Id.* at 389 (“The appellate court correctly found, and the parties agree, that *Pioneer Trust* sets forth the standard applicable in this case.”).

115. *Id.*

In this case, the court found that the first state enabling statute failed the second part of the test. It wrote that the statute:

Was not written with the specifically and uniquely attributable test in mind, where no such language is contained anywhere in its three-paragraph text. Indeed, the first act directs that the fees paid by new developments be used to fund *all* road improvements ‘needed to maintain a reasonable level of service,’ with the single proviso that ‘all expenditures must be made for improvements within, or in areas immediately adjacent to, the transportation impact district from which the expended monies were collected.’¹¹⁶

The court held that “the first enabling act [was] constitutionally flawed because [it failed] to meet the ‘specifically and uniquely attributable’ test set forth in *Pioneer Trust*.”¹¹⁷ Therefore, fees imposed under a county ordinance enacted pursuant to that statute were also invalid and had to be returned.¹¹⁸

The second enabling act fared better. When the Illinois Legislature repealed the first statute, it passed the Road Improvement Impact Fee Law.¹¹⁹

116. *N. Ill. Home Builders Ass’n.*, 649 N.E.2d at 390.

117. *Id.* at 389.

118. *Id.* at 390. In a later case, fees paid could not be refunded because they were barred by the applicable statute of limitations. In *Sundance Homes, Inc. v. County of DuPage*, 746 N.E.2d 254 (Ill. 2001), a developer sought a refund of impact fees paid to Du Page County, a non-home rule unit, under the first road improvement impact fee statute that was held unconstitutional in *Northern. Ill. Home Builders Ass’n*. The county argued that the developer’s suit was barred by a five-year statute of limitation period that began to run when the developer paid the fees more than five years prior to filing suit. The developer argued that the limitation period did not begin to run until the Illinois Supreme Court had invalidated the statute in *Northern Illinois Home Builders Ass’n*. “Although an impact fee is not a tax . . . the similarities between payment of a tax, and payment of an impact fee, are sufficient to render instructive tax cases addressing the issue of accrual.” *Id.* at 266. Based on those tax cases, the court held that the developer’s action accrued when the fee was paid and, therefore, was barred in that case.

119. 605 ILL. COMP. STAT. 5/5-901 *et seq.* The general purpose of the statute is stated as:

The General Assembly finds that the purpose of this legislation is to create the authority for units of local government to adopt and implement road improvement impact fee ordinances and resolutions. The General Assembly further recognizes that the imposition of such road improvement impact fees is designed to supplement other funding sources so that the burden of paying for road improvements can be allocated in a fair and equitable manner. It is the intent of the General Assembly to promote orderly economic growth throughout the State by assuring that new development bears its fair share of the cost of meeting the demand for road improvements through imposition of road improvement impact fees. It is also the intent of the General Assembly to preserve the authority of elected local

This statute applied to counties with a population over 400,000 and all home rule municipalities. Thus, it enabled counties with large populations to impose road impact fees, and it prescribed a specific procedure for them and home rule municipalities to follow. The statute contained the “specifically and uniquely attributable” language, developed by *Rosen* and *Pioneer Trust*. For purposes of road impact fees:

“Specifically and uniquely attributable” means that a new development creates the need, or an identifiable portion of the need, for additional capacity to be provided by a road improvement. Each new development paying impact fees used to fund a road improvement must receive a direct and material benefit from the road improvement constructed with the impact fees paid. The need for road improvements funded by impact fees shall be based upon generally accepted traffic engineering practices as assignable to the new development paying the fees.¹²⁰

The Illinois Supreme Court held that this second legislative attempt did comply with the constitutional requirements outlined in *Pioneer Trust* by including a mandate that “an impact fee payable by a developer shall not exceed a proportionate share of costs incurred by a unit of local government which are specifically and uniquely attributable to the new development paying the fee.”¹²¹ Consequently, fees imposed by the county under an ordinance passed pursuant to the second act were “not a confiscation of private property in violation of the takings clauses of the State and Federal Constitutions” but were “instead a reasonable regulation under the police power.”¹²² Remarkably, this is the court’s first explicit reference to the Illinois Constitution’s takings clause.

An interesting question in this case is why the court struck down the first enabling act on the grounds that it failed to include the “specifically and

government officials to adopt and implement road improvement impact fee ordinances or resolutions which adhere to the minimum standards and procedures adopted in this Division by the State.

605 ILL. COMP. STAT. 5/5/-902.

120. *N. Ill. Home Builders Ass’n*, 649 N.E.2d at 389-90; 605 ILL. COMP. STAT. 5/5-903.

121. “We believe that this language comports with the dictates of *Pioneer Trust*, wherein this court indicated that an exaction which required a developer to provide for improvements ‘which are required by [his] activity,’ would be permissible, but one which required him to provide for improvements made necessary by ‘the total activity of the community,’ would be forbidden.” *N. Ill. Home Builders Ass’n*, 649 N.E.2d at 390 (citing *Rosen*, 167 N.E.2d 230 (Ill. 1960); *Pioneer Tr. & Sav. Bank*, 176 N.E.2d 799, 802 (Ill. 1961)).

122. *Id.* at 390-91.

uniquely attributable” language in the statute.¹²³ In prior cases regarding school fees and land dedications, the court held that particular language to be a standard that the actual application of those fees needed to meet; it did not require the standard to be stated in the statute enabling the creation of local government plan commissions.¹²⁴ Indeed, the Illinois Municipal Code, granting municipalities the power to create plan commissions and to regulate, approve, and place conditions on the development of new subdivisions, did not contain a reference to those special words, but the court has never held that section of the Municipal Code invalid. It has ruled only that particular ordinances passed pursuant to the statute, or the application of particular ordinances, were unconstitutional if the exactions imposed did not meet the state “specifically and uniquely attributable” standard established by the court.¹²⁵ Nevertheless, this case firmly established the standard in Illinois’ takings jurisprudence.

After *Northern Illinois Home Builders*, an appellate court invalidated a municipal ordinance using the less stringent federal takings analysis. In *Amoco Oil Company v. Village of Schaumburg*,¹²⁶ a village conditioned approval of a special use permit on the dedication of land for street widening. The permit was necessary to begin a remodeling project on an existing gas station. The improvement was estimated to add a *de minimus* increase (0.4%) in traffic on the street, but the village asked for twenty percent of the plaintiff’s property as a condition for granting the building permit.¹²⁷ The appellate court first applied the *Dolan* constitutional standard of “rough proportionality” and determined that the exaction could not meet that test, making the required dedication an improper taking without just compensation.¹²⁸ The court concluded that if the exaction could not meet the lesser federal standard,

123. The appellate court did not discuss the constitutionality of the two enabling statutes but concluded in its opinion that both enabling acts were constitutional. *N. Ill. Home Builders Ass’n v. County of Du Page*, 621 N.E.2d 1012, 1026 (Ill. App. Ct. 2d Dist. 1993). The court upheld the county ordinances as meeting the judicial “specifically and uniquely attributable” standard because they were well-crafted and relied on a large amount of data on traffic needs of specific roads created by a computer model; the county also used county records and a study of land values. *Id.* at 1020.

124. See *Rosen*, 167 N.E.2d 230; *Pioneer Tr. & Sav. Bank*, 176 N.E.2d 799 at 802; *Dep’t. of Pub. Works & Bldg. v. Exch. Nat. Bank*, 334 N.E.2d 810 (2d Dist. 1975).

125. See discussion regarding home rule authority *infra* Part III. It is possible that the court required the “specifically and uniquely attributable” standard to be in the state statute because it was not an *enabling* statute for home rule units. Rather, it was a *limitation* on home rule units in that it specified certain procedures for imposing road impact fees. See *N. Ill. Home Builders Ass’n*, 649 N.E.2d at 387.

126. *Amoco Oil Co. v. Village of Schaumburg*, 661 N.E.2d 380 (Ill. App. Ct. 1st Dist. 1995).

127. *Id.* at 383.

128. *Id.* at 391.

it also clearly could not meet the higher “specifically and uniquely attributable” test under the Illinois Constitution.¹²⁹

In 2002, another Illinois appellate court held in *Thompson v. Village of Newark* that a non-home rule unit could not require a school impact fee for construction of school buildings.¹³⁰ The court stated that a non-home rule village could not impose any exactions or impact fees without legislative authority.¹³¹ It reviewed Section 11-12-5 of the Municipal Code as it was in effect in 1990, which authorized a comprehensive plan and ordinances establishing reasonable requirements governing, among other things, “school grounds.”¹³² As a non-home rule unit of government, the village had “only those powers expressly granted, powers incident to those expressly granted, and powers indispensable to accomplish the municipality’s purpose.”¹³³ Although the Municipal Code had long been construed to require a developer to provide basic improvements, such as sidewalks and curbs, such necessities directly benefited the development, while “[a] school, on the other hand, may inure to the benefit of others outside the development.”¹³⁴ In this case, because the enabling statute referred only to “school grounds,” the court concluded that impact fees for school building construction were not authorized.¹³⁵ Without legislative authority, the village’s ordinance was void.¹³⁶

In the wake of *Thompson*, the Illinois Legislature again amended the impact fee enabling provisions in the Illinois Municipal Code and the Counties Code in 2003 to expand the definition of school grounds.¹³⁷ The amendments added a new definition of “school grounds” to include “school buildings or other infrastructure necessitated and *specifically and uniquely attributable* to the development or subdivision in question.”¹³⁸ Note that this is the first mention of the “specifically and uniquely attributable” standard in the Illinois municipal and county government codes.¹³⁹ Under existing case

129. *Id.*

130. *Thompson v. Village of Newark*, 768 N.E.2d 856 (Ill. App. Ct. 2d Dist. 2002).

131. *Id.* at 542.

132. 65 ILL. COMP. STAT. 5/11-12-5 (2000).

133. *Thompson*, 768 N.E.2d at 858.

134. *Id.* at 859.

135. *Id.* at 860 (citing *Rosen*, 167 N.E.2d at 230); *Krughoff*, 369 N.E.2d at 892).

136. *Thompson*, 768 N.E.2d at 860.

137. Illinois Public Act 93-330.

138. Illinois Municipal Code, 65 ILL. COMP. STAT. 5/11-12-5(7) (emphasis added). The Illinois Counties Code, 55 ILL. COMP. STAT. 5/5-1042, contains the same definition with the exception that the word “municipality” is replaced with “county.”

139. The Road Improvement Impact Fee Law, discussed *supra* note 118, is in the Illinois Highway Code, Chapter 605, Division 9. It is not contained in the Illinois Municipal Code or the Counties Code, although it does authorize counties with a population over 400,000 and all home rule municipalities to enact road improvement impact fees and provides a method for doing so.

law, local governments were already subject to this standard for all authorized exactions.

In the 2008 case of *Empress Casino Joliet v. Giannoulis*,¹⁴⁰ the Illinois Supreme Court defined some limits on the application of the constitutional test described in *Rosen* and subsequent cases. In *Empress Casino*, the court upheld the constitutionality of a state statute that imposed a three percent surcharge on riverboat casinos having gross revenues over \$2,000,000.¹⁴¹ The plaintiff casino argued, among other things, that the surcharge was an unconstitutional taking under the federal and state constitutions and pointed for support to *Northern Illinois Home Builders*.¹⁴² The court held that a takings analysis was applicable only in cases involving fees imposed in connection with land.¹⁴³ The court distinguished the fee in *Northern Illinois Home Builders* as one that “was imposed on persons constructing new housing developments to fund road improvements made necessary in light of the expected traffic growth from the development.”¹⁴⁴ As such, that impact fee was “inextricably tied to real property,” making a takings analysis appropriate.¹⁴⁵ That monetary exactions are subject to *Nollan/Dolan* if there is a direct link between the demand and the property is exactly what the Illinois Supreme Court expressed in *Northern Illinois Home Builders* and *Empress Casino*.¹⁴⁶ In this regard, the Illinois Supreme Court presaged the U.S. Supreme Court’s 2013 decision in *Koontz v. St. Johns River Water Management District*.

140. *Empress Casino Joliet v. Giannoulis*, 896 N.E.2d 277 (Ill. 2008).

141. *Id.* at 282.

142. *Id.* at 292; see *N. Ill. Home Builders Ass’n.*, 649 N.E.2d at 388; *Dolan*, 512 U.S. at 391, where the court applied a state constitutional takings analysis to state enabling statutes and county ordinances imposing transportation impact fees.

143. *Empress Casino*, 896 N.E.2d at 292.

144. *Id.*

145. *Id.*

146. In reviewing *Eastern Enterprises*, the Illinois Supreme Court found Justice Kennedy’s separate opinion most persuasive:

The Coal Act imposes a staggering financial burden on the petitioner, Eastern Enterprises, but it regulates the former mine owner without regard to property. It does not operate upon or alter an identified property interest, and it is not applicable to or measured by a property interest. The Coal Act does not appropriate, transfer, or encumber an estate in land (*e.g.*, a line on a particular piece of property), a valuable interest in an intangible (*e.g.*, intellectual property), or even a bank account or accrued interest. The law simply imposes an obligation to perform an act, the payment of benefits. The statute is indifferent as to how the regulated entity elects to comply or the property it uses to do so.

Empress Casino, 896 N.E.2d at 292-93 (quoting *Eastern Enterprises v. Apfel*, 524 U.S. 498, 540 (1998) (Kennedy, J., concurring in judgment, dissenting in part)).

In *Raintree Homes, Inc. v. Village of Long Grove*,¹⁴⁷ an appellate court delved into the limits of the fees that were authorized by the Illinois Municipal Code. In that case, a developer sued the village for a refund of impact fees for school operations and open space on the basis that the required fees exceeded the non-home rule village's statutory and constitutional authority.¹⁴⁸ An Illinois appellate court agreed with the developer. First, even though the Municipal Code's definition of school grounds had been expanded to include building construction, it still did not authorize a non-home rule village to impose exactions for school *operations*, which are necessary ongoing costs required to educate all local students, not merely students from a new subdivision.¹⁴⁹ The court again reiterated the basic Illinois requirement under *Rosen* and *Pioneer Trust* that the statutes permitting "reasonable requirements for streets and public grounds are based upon the theory that 'the developer of a subdivision may be required to assume those costs which are specifically and uniquely attributable to [the developer's] activity and which would otherwise be cast upon the public.'"¹⁵⁰ The court apparently determined that ongoing school operations should be funded by all those taxpayers residing in each local school district in accordance with Illinois' scheme for funding public education.¹⁵¹

Second, the village's impact fees included payment to enable the village to "acquire, maintain, and preserve open space," including an allocation to the village park district for general operational expenses.¹⁵² The developer

147. *Raintree Homes, Inc. v. Vill. of Long Grove*, 906 N.E.2d 751 (Ill. App. Ct. 2d 2009). This case followed an initial unsuccessful attempt by Raintree Developers to challenge the Village of Long Grove's impact fees. In the first case, *Raintree Homes, Inc. v. Vill. of Long Grove*, 807 N.E.2d 439 (Ill. 2004), the developer testified that he increased the cost of each lot sold by \$7300, the amount of the impact fees. Because the developer passed on the cost of the fees and did not dispute that fact, the court ruled that the fees were actually paid by the lot owner and not the developer. Therefore, the developer lacked standing to sue for a refund of fees paid by someone else. *Id.* at 448. The merits of the case were not reached and the basis for the developer's constitutional claim was not explored. The developer apparently overcame this standing problem five years later in this case, where the developer testified that the amount of the impact fees was not passed on to the ultimate buyers of homes built on the developed lots. *Raintree Homes*, 906 N.E.2d at 779-80.

148. *Id.* The court also held that the one-year statute of limitations under the Governmental Tort Immunity Act applied to tort actions only and was not applicable to plaintiff's constitutional claim.

149. *Id.* at 766-67 ("The plain meaning of the term 'school grounds,' even under its more expansive definition effective as of 2003, is not, in our view, so broad as to encompass a 'general operation fund.'").

150. *Id.* at 766.

151. Local property tax levies for school funding are authorized at 105 ILL. COMP. STAT. 5/17-2. See Allen D. Schwartz, *Illinois School Finance - A Primer*, 56 Chi.-Kent L. Rev. 831, 841-46 (1980). Available at: <https://scholarship.kentlaw.iit.edu/cklawreview/vol56/iss3/5> [https://perma.cc/KB8Z-8V7N] (last visited Sept. 17, 2018).

152. *Raintree Homes*, 906 N.E.2d at 768.

argued that under the Illinois Municipal Code, impact fees were authorized for reasonable requirements governing parks and playgrounds but did not mention open space.¹⁵³ The appellate court assumed, without deciding, that open space could be considered a park or playground under the Municipal Code. Making this assumption, it concluded the village impermissibly exceeded its authority by failing to “limit the use of impact fees to only newly acquired open space.”¹⁵⁴ Thus, an ordinance requiring impact fees that would be used to maintain and preserve *existing* open space would not pass the “specifically and uniquely attributable” test because a developer could be asked to assume costs not attributable solely to the developer’s activities.¹⁵⁵ The court then invalidated the village ordinances as lacking statutory authority.¹⁵⁶

To some extent, the *Raintree Homes* opinion muddied the water surrounding the Illinois takings test as created under *Rosen* and *Pioneer Homes*. The court recognized that there are two parts to the test and got it right when it concluded that the Municipal Code authorized impact fees for school grounds but did not authorize impact fees for school operations. “As the supreme court has explained, to satisfy the *Rosen* test, the requirements must be: (1) within the statutory grant of power to the municipality; and (2) specifically and uniquely attributable to the developer’s activity. Here, the Village’s ordinances [regarding school impact fees] fail[ed] the first part of the supreme court’s test.”¹⁵⁷ As to the open space issue, however, the court jumped over the first part of the test by assuming that impact fees for open spaces were authorized as parks under the Municipal Code. It then held under the second part of the test that fees for acquiring, maintaining, and preserving open space must encompass existing open space and, therefore, could not be specifically and uniquely attributable to the developer’s activity.¹⁵⁸ Yet, the court explicitly, and wrongly, invalidated the ordinance imposing impact fees for open space because the village exceeded its statutory authority—the first part of the test. It should have concluded that the ordinance was invalid because preserving existing open space could not pass the second part of the test requiring that the need for an open space impact fee was specifically and uniquely attributable to the developer’s new subdivision. One can understand why the court was unwilling to wade into the semantics of what is a park versus an open space, but deciding whether the Municipal Code actually authorized fees for open space would have been the only way to conclude that the village exceeded its authority. The result was correct. The ordinance was

153. *Id.* at 766 (citing 65 ILL. COMP. STAT. 5/11-12-5).

154. *Id.* at 769.

155. *Id.*

156. *Id.*

157. *Raintree Homes*, 906 N.E.2d at 767-68 (citing *Pioneer Tr. & Sav. Bank*, 176 N.E.2d 799).

158. *Id.* at 769.

invalid, but the reasoning was confused. Under the court's explanation, the authority was assumed—the term “parks” included open space and, therefore was authorized—but it was the “specifically and uniquely attributable” second part of the *Rosen* test that the court concluded the ordinance failed.¹⁵⁹

The 2009 appellate court decision in *Raintree Homes* is the most recent Illinois case to discuss the “specifically and uniquely” standard for land dedications and exactions. Despite the muddled conclusion of that case, the law in Illinois has remained relatively steady since the Illinois Supreme Court advanced the standard in 1960 under *Rosen v. Vill. of Downers Grove*. Understandably, developers have had greater success in challenging municipal impact fees when they have focused on non-home rule governments. The authority of a non-home rule municipality or county to impose impact fees is constrained by the enabling statutes found in the Illinois Municipal Code and the Counties Code. Those enabling acts are limited and strictly construed. Consequently, when a landowner or developer was willing to take on a non-home rule municipality over school impact fees or land dedications beyond the specific purposes enumerated in the statute, several such challenges have been successful over the years.¹⁶⁰

Challenging home rule units is more difficult, however, because of the broad authority the 1970 Illinois constitution granted to them. Unless the Legislature specifically restrains the power of a home rule municipality or county, such as under the Road Impact Fee statute, it will possess wide

159. The United States District Court for the Northern District of Illinois provided its interpretation of the “specifically and uniquely attributable test.” *Chicago Title Insurance Co. v. Vill. of Bolingbrook*, 1999 WL 65054 (N.D. Ill. 1999), (vacated on jurisdictional grounds and dismissed without prejudice, *Chicago Title*, 1999 WL 259952 (N.D. Ill. 1999)). In this case, the home rule Village of Bolingbrook required developers to pay recapture fees for previously improved roads abutting a proposed subdivision. The court noted that home rule municipalities have the authority under Illinois law to impose recapture or impact fees that pertain to its government and affairs. *Id.* (citing *Beneficial Dev. Corp. v. City of Highland Park*, 641 N.E.2d 435 (Ill. 1994)). “Such municipalities, however, are bound to exact fees that satisfy the ‘exacting’ and ‘stringent requirements’ of the ‘specifically and uniquely attributable’ test.” *Id.* (citing *Northern Illinois Home Builders Ass’n*, *supra* note 108). Because Bolingbrook failed to present any evidence that it considered or forecasted the amount of traffic to be generated by the development prior to imposing its recapture fee, it could not, therefore, demonstrate that the fee met the specifically and uniquely attributable test. The court held that the recapture fee ordinance violated the Illinois Constitution, but subsequently vacated that ruling because it should not have exercised jurisdiction over the state constitutional issue when it dismissed all of the federal claims.

160. *Raintree Homes v. Village of Long Grove*, 906 N.E.2d 751 (Ill. App. Ct. 2d Dist. 2009) (Municipal Code authorized exactions to fund school grounds and buildings, but not school operations; court did not decide whether “open space” was authorized under parks and playgrounds); *Thompson v. Vill. of Newark*, 768 N.E.2d 856 (Ill. App. Ct. 2d Dist. 2002), (Municipal Code authorized exactions for purchase of school grounds but not construction of school buildings); *Rosen*, 167 N.E.2d at 230 (statute authorized dedications for school grounds but not general educational purposes).

authority to impose dedications and other exactions. Challenges to home rule units, therefore, are effectively limited to the “specifically and uniquely attributable” part of the Illinois takings test. A home rule unit’s responsibility to comply with this part of the constitutional takings test is discussed in Section III.

E. ADDITIONAL DEVELOPMENT IN FEDERAL TAKINGS ANALYSES

As Illinois courts continued to apply the stringent “specifically and uniquely attributable” standard to exactions, the U.S. Supreme Court also further developed its body of law under the Fifth Amendment Takings Clause. In the 2005 case of *Lingle v. Chevron U.S.A. Inc.*,¹⁶¹ the court categorized the various types of takings challenges it had recognized.¹⁶² “The paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of private property.”¹⁶³ Over time, however, the Court recognized that government regulations could be so onerous as to be compensable.¹⁶⁴ Two categories of regulation are deemed *per se takings*: (1) where there is a permanent physical invasion of property as in *Loretto v. Teleprompter Manhattan CATV Corp.*,¹⁶⁵ in which a state law required landlords to allow cable companies to install cable boxes in apartments, and (2) where regulations completely deprive an owner of *all* economically beneficial use of property, as in *Lucas v. S.C. Coastal Council*.¹⁶⁶ Other regulatory takings claims must be analyzed by the factors set out in *Penn Cent. Transp. Co. v. N.Y.C.*¹⁶⁷ Those factors include “the economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations” and “the character of the government action.”¹⁶⁸ Outside of these three categories, there is a “special context of land-use exactions.”¹⁶⁹ *Nollan* and *Dolan* embody this special context. As the court explained, those cases “involved dedications of property so onerous that, outside the exactions context, they would be deemed *per*

161. *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005).

162. *Id.* at 540. The Court also corrected a misapplication many lower courts had made determining whether a regulation effected a Fifth Amendment taking. It found the “the application of a general zoning law to particular property effects a taking if the ordinance does not substantially advance legitimate state interests,” which had “been read to announce a stand-alone regulatory takings test” independent of *Penn Central*, was incorrect. *Id.* “We conclude that this formula prescribes an inquiry in the nature of a due process, not a takings, test, and that it has no proper place in our takings jurisprudence.” *Id.*

163. *Id.* at 537.

164. *Lingle*, 544 U.S. at 537.

165. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

166. *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992).

167. *Penn Cent. Transp. Co. v. N.Y.C.*, 438 U.S. 104 (1978).

168. *Id.*

169. *Lingle*, 544 U.S. at 538.

se physical takings.”¹⁷⁰ According to the court in *Lingle*, the interests the government was promoting through exactions in those cases were not challenged as illegitimate:

Rather, the issue was whether the exactions substantially advanced the *same* interests that land-use authorities asserted would allow them to deny the permit altogether. As the Court explained in *Dolan*, these cases involve a special application of the “doctrine of ‘unconstitutional conditions,’” which provides that “the government may not require a person to give up a constitutional right—here the right to receive just compensation when property is taken for a public use—in exchange for a discretionary benefit conferred by the government where the benefit has little or no relationship to the property.”¹⁷¹

This concept of unconstitutional conditions as applied in land use exactions was further amplified in the 2013 case of *Koontz v. St. Johns River Water Mgmt. District*,¹⁷² a case of great import in the field of exactions. In this case, a Florida landowner who wanted to develop his property challenged a water management district’s denial of his request for land use permits unless he funded offsite mitigation projects on public lands. The landowner alleged the denial was a taking without just compensation in violation of the Fifth Amendment. This case expanded the doctrine of unconstitutional conditions to include “extortionate demands for property” even when no property of any kind has been taken:

Extortionate demands for property in the land-use permitting context run afoul of the Takings Clause not because they take property but because they impermissibly burden the right not to have property taken without just compensation. As in other unconstitutional conditions cases in which someone refuses to cede a constitutional right in the face of coercive pressure, the impermissible denial of a governmental benefit is a constitutionally cognizable injury.¹⁷³

Writing for the majority in the five-to-four decision, Justice Alito noted that the *Nollan/Dolan* cases reflected “two realities” co-existing in the land use permitting process.¹⁷⁴ First, “permit applicants are especially vulnerable

170. *Id.* at 547.

171. *Id.*

172. *Koontz v. St. Johns River Water Mgmt. District*, 570 U.S. 595 (2013).

173. *Id.* at 607.

174. *Id.* at 604.

to the type of coercion that the unconstitutional conditions doctrine prohibits because the government often has broad discretion to deny a permit that is worth far more than property it would like to take.¹⁷⁵ As long as the permit is more valuable than the property the government wants to take, a landowner will agree to the taking, “no matter how unreasonable.”¹⁷⁶ The unconstitutional conditions doctrine prohibits such government demands that run counter to the Fifth Amendment right to just compensation.¹⁷⁷ The second co-existing reality is that many proposed land uses impose real costs on the public that can be justifiably borne by the proposer.¹⁷⁸ For example, a projected increase in traffic can be offset by widening public roads.¹⁷⁹ Justice Alito remarked that, “[i]nsisting that landowners internalize the negative externalities of their conduct is a hallmark of responsible land-use policy, and we have long sustained such regulations against constitutional attack.”¹⁸⁰ The *Nollan/Dolan* tests balance these two realities by allowing the government to mitigate negative impacts of a proposed development as long as they require mitigation that has an essential nexus and rough proportionality to those impacts.¹⁸¹

A key holding of *Koontz* was that “so-called ‘in lieu of’ fees . . . are functionally equivalent to other types of land use exactions.”¹⁸² As such, those monetary exactions must satisfy the nexus and rough proportionality requirements if they burden a specific parcel of land.¹⁸³ If a monetary exaction was not subject to *Nollan/Dolan*, it would be easy for a government to side-step the Fifth Amendment’s requirement in a land-use permitting situation—it would simply require a payment of money if a permit applicant did not acquiesce to a land dedication request.¹⁸⁴ What is important here is that *Koontz* makes clear that *in lieu* monetary requests do not amount to a regulatory taking that would be subject to a *Penn Central*-type factual analysis. Instead:

When the government commands the relinquishment of funds linked to a specific, identifiable property interest such as a bank account or parcel of real property, a “*per se* [takings] approach” is the proper mode of analysis under the

175. *Id.* at 605.

176. *Id.*

177. *Koontz*, 570 U.S. at 605.

178. *Id.*

179. *Id.*

180. *Id.* (citing *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926) (upholding zoning regulation)).

181. *Id.* at 605-06.

182. *Koontz*, 570 U.S. at 6012.

183. *Id.* at 613-14.

184. *Id.* at 612.

Court's precedent. *Brown v. Legal Found. of Wash.*, 538 U.S. 216, 235, 123 S.Ct. 1406, 155 L.E.2d 376 (2003).¹⁸⁵

The court distinguished its 1998 holding in *Eastern Enterprises v. Apfel*.¹⁸⁶ In that case a plurality of Justices “applied a takings analysis to a monetary obligation” imposed under the federal Coal Act, “but a majority of Justices rejected the theory that an obligation to pay money constitutes a taking.”¹⁸⁷ The Supreme Court found that *Eastern Enterprises* did not control *Koontz* because in *Koontz* the demand for money burdened the ownership of a specific parcel of land.¹⁸⁸ There was a direct link between the government's demand and a specific parcel of real property for which a developer was seeking a permit.¹⁸⁹ Consequently, the exaction required in *Koontz* implicated “the central concern of *Nollan* and *Dolan*: the risk that the government may use its substantial power and discretion in land-use permitting to pursue governmental ends that lack an essential nexus and rough proportionality to the effects of the proposed new use of the specific property at issue, thereby diminishing without justification the value of the property.”¹⁹⁰ In sum, the court found that a *per se* taking occurs “when the government commands the relinquishment of funds linked to a specific, identifiable property interest such as a bank account or parcel of real property.”¹⁹¹

In *Horne v. United States Department of Agric.*, a 2015 case, the U.S. Supreme Court again found the *Nollan/Dolan* takings test to be applicable.¹⁹² In that case, Federal Department of Agriculture regulations imposed in an effort to help maintain stable markets required raisin growers to set aside a certain percentage of their raisin crop for the account of the government without payment.¹⁹³ The court found that “a governmental mandate to relinquish

185. *Id.* at 614.

186. *Eastern Enters. v. Apfel*, 524 U.S. 498 (1998).

187. *Koontz*, 570 U.S. at 613. On due process grounds (not a takings analysis), Justice Kennedy concurred with the four justices who invalidated the retroactive imposition on a former mining company an obligation to pay for the medical benefits of retired miners and families as a Takings Clause violation but joined the dissenting justices in concluding that the Takings Clause was not applicable to financial obligations not operating upon an identified property interest. *Id.*

188. *Id.* (“Unlike the financial obligation in *Eastern Enterprises*, the demand for money at issue here did ‘operate upon . . . an identified property interest’ by directing the owner of a particular piece of property to make a monetary payment.”).

189. *Id.* at 614.

190. *Id.*

191. *Koontz*, 570 U.S. at 614. Well before the Supreme Court in *Koontz* held that monetary obligations had to have a direct link to a specific piece of property in order to bring the Takings Clause into play, the Illinois Supreme Court came to the same decision. *Empress Casino Joliet v. Giannoulis*, 869 N.E.2d 277 (Ill. 2008).

192. *Horne v. United States Dep’t of Agric.*, 135 S.Ct. 2419, 2424 (2015).

193. *Id.*

specific, identifiable property as a ‘condition’ on permission to engage in commerce effects a per se taking.”¹⁹⁴

There is much in *Koontz* and *Horne*, including the unconstitutional conditions doctrine, that may support further scrutiny of government exactions under the Fifth Amendment’s Takings Clause.¹⁹⁵ The Supreme Court in both cases has signaled that *Nollan/Dolan* requirements are alive and well.¹⁹⁶

This concludes the description of the history of Illinois’ “specifically and uniquely attributable” test created by the Illinois Supreme Court to analyze takings challenges under the Illinois Constitution. As a test for whether a government exaction “goes too far,” the Illinois requirement is more stringent than that imposed under the federal Constitution. When it should be applied, however, is consistent with the Supreme Court’s interpretation of how the Constitution protects property owners from exactions that have little connection to a valid government interest or are not proportional to the needs a proposed land use creates. The next sections will argue that the test is applicable to Illinois home rule units and to legislative acts.

III. THE “SPECIFICALLY AND UNIQUELY ATTRIBUTABLE” TEST IS APPLICABLE TO HOME RULE MUNICIPALITIES AND COUNTIES

As crafted by the Illinois Supreme Court, the constitutional test to be applied to fees imposed on developers by local governments comprises two parts. The “specifically and uniquely attributable” standard is actually the second step when a court determines whether impact fees pass muster under the Illinois Constitution. The first step only requires determining whether a local government has the authority to impose those fees.¹⁹⁷ Regardless of how

194. *Id.* at 2430. The court also held that the Fifth Amendment protects personal property equally as well as real property. *Id.* at 2425-26.

195. Peter A. Clodfelter & Edward J. Sullivan, *Substantive Due Process through the Just Compensation Clause: Understanding Koontz’s ‘Special Application’ of the Doctrine of Unconstitutional Conditions by Tracing the Doctrine’s History*, 46 THE URB. LAW. 569, 622-23 (2014).

196. In a contrary opinion, a federal district court in Illinois missed the boat in dismissing a takings challenge to the City of Chicago’s Affordable Housing Ordinance, which required developers of ten or more housing units to sell or lease ten percent of those units as affordable housing or pay \$100,000 per unit that was not so restricted. The court misread the import of *Koontz* and found no per se or regulatory taking that would allow the case to proceed.

197. *Pioneer Tr. and Sav. Bank*, 176 N.E.2d at 802, in which the court stated:

If the requirement is within the statutory grant of power to the municipality *and* if the burden cast upon the subdivider is specifically and uniquely attributable to his activity, then the requirement is permissible; if not, it is forbidden and amounts to a confiscation of private property in contravention of the constitutional prohibitions rather than reasonable regulation under the police power.

Id. (emphasis added).

home rule municipalities and counties perceive the breadth of their authority, the second step of the Illinois takings test still applies to home rule units. This section will explore the difference between home rule and non-home rule authority under the Illinois Constitution and conclude that, while home rule units have constitutional authority to impose impact fees for a variety of purposes relating to their own government, that authority provides a basis for meeting only the first part of the takings test.

When Illinois adopted a new constitution in 1970, it gave home rule powers to all municipalities with populations exceeding 25,000 and those whose residents adopted home rule by a referendum.¹⁹⁸ Counties with a certain type of government structure were also given home rule power.¹⁹⁹ Under home rule authority, a governmental unit (unless *limited* by the General Assembly as stated in the Constitution) may exercise any power and perform any function pertaining to its government and affairs including, but not limited to, the power to regulate for the protection of the public health, safety, morals, and welfare; to license; to tax; and to incur debt.²⁰⁰ Home rule power has been interpreted as being co-extensive with the powers of the State.²⁰¹

Non-home rule municipalities have only the enumerated powers granted to them by the Illinois Constitution or other “powers granted to [them] by law,” that is, powers conferred on them either expressly or impliedly by statute.²⁰² In sum, non-home rule municipalities “possess only those powers

198. ILL. CONST. art. VI, § 6. Residents of municipalities may also vote by referendum to remove home rule power from their local government. *Id.* There are currently 215 municipalities with home rule powers. *See, e.g., Home Rule Municipalities*, ILL. MUN. LEAGUE, <http://legal.iml.org/page.cfm?key=2> [<https://perma.cc/X8B3-W4RD>].

199. *Id.* Cook County, Illinois was the only county qualifying for home rule status in 1970 and remains the only county out of Illinois’ 102 counties with home rule power.

200. ILL. CONST. art. VI, § 6.

201. *Blanchard v. Berrios*, 72 N.E.3d 309, 317-18, 322 (Ill. 2016) (Cook County is a home rule unit “invested with the same sovereign power as the state government, except where explicitly limited by the legislature” and may establish an independent inspector general who may require an elected county assessor to respond to subpoenas just as the State may do); *City of Chicago v. StubHub, Inc.*, 979 N.E.2d 844, 851-52 (Ill. 2011); *Schillerstrom Homes, Inc. v. City of Naperville*, 762 N.E.2d 494, 497 (Ill. 2001); *Bremen Cmty. High School Dist. No. 228 v. Cook Cty. Comm’n on Human Rights*, 981 N.E.2d 369, 380-81 (Ill. App. Ct. 1st Dist. 2012).

202. *Pesticide Pub. Policy Found. v. Vill. of Wauconda*, 510 N.E.2d 858, 860-61 (Ill. 1987). Powers granted to non-home rule units are limited. ILL. CONST. art. VII, § 7. This section provides:

Counties and municipalities which are not home rule units shall have only powers granted to them by law and the powers (1) to make local improvements by special assessment and to exercise this power jointly with other counties and municipalities, and other classes of units of local government having that power on the effective date of this Constitution unless that power is subsequently denied by law to any such other units of local government; (2) by referendum, to adopt, alter or repeal their forms of

expressly granted [by the Legislature], powers incident to those expressly granted, and powers indispensable to the accomplishment of the declared objects and purposes of the municipal corporation."²⁰³ Grants of powers to municipalities are to be strictly construed, and where there is doubt as to the existence of a power, the doubt must be resolved against the municipality.²⁰⁴ Ordinances enacted without authority are *ultra vires* and void.²⁰⁵ As discussed above, the courts have strictly construed the ability of non-home rule units of government to impose impact fees. Where, for example, the state enabling statute authorized reasonable requirements for "school grounds," fees for school building construction was deemed to be *ultra vires*.²⁰⁶ Similarly, when the statute's definition of school grounds was expanded to include building construction, a court found that it still did not authorize a non-home rule village to impose exactions for school operations.²⁰⁷

The 1970 Illinois Constitution, creating home rule units, was a revolutionary change for local government.²⁰⁸ It generated much litigation on the extent of home rule power that was granted to municipalities and how such power could be curtailed. In general, Illinois courts over the years upheld the broad powers of a home rule government to enact any ordinance pertaining to its government and affairs.²⁰⁹ As long as the General Assembly had not invoked one of the limitations on home rule authority allowed by the Constitution,²¹⁰ the ordinance did not infringe on another constitutional branch of

government provided by law; (3) in the case of municipalities, to provide by referendum for their officers, manner of selection and terms of office; (4) in the case of counties, to provide for their officers, manner of selection and terms of office as provided in Section 4 of this Article; (5) to incur debt except as limited by law and except that debt payable from ad valorem property tax receipts shall mature within 40 years from the time it is incurred; and (6) to levy or impose additional taxes upon areas within their boundaries in the manner provided by law for the provision of special services to those areas and for the payment of debt incurred in order to provide those special services.

Id.

203. *Pesticide Pub. Policy Found.*, 510 N.E.2d at 861.

204. *Id.*; *Osborn v. Vill. of River Forest*, 171 N.E.2d 579 (Ill. 1961).

205. *McGovern v. City of Chicago*, 118 N.E. 3 (Ill. 1917).

206. *Thompson v. Vill. of Newark*, 768 N.E.2d at 860.

207. *Raintree Homes*, 906 N.E.2d at 766-67.

208. Joan G. Anderson & Ann Lousin, *From Bone Gap to Chicago: A History of the Local Government Article of the 1970 Illinois Constitution*, 9 J. MARSHALL PRAC. & PROC. 697, 742 (1976).

209. *E.g.*, *S. Bloom, Inc. v. Korshak*, 284 N.E.2d 257 (Ill. 1972); *Cain v. American Nat'l Bank and Tr. Co. of Chicago*, 325 N.E.2d 799 (Ill. App. Ct. 1st Dist. 1975) (state zoning enabling statute did not apply because a home rule unit gets its authority to zone from the Constitution).

210. *E.g.*, *United Private Detective & Sec. Ass'n v. City of Chicago*, 343 N.E.2d 453 (Ill. 1976) (General Assembly used Section 6(i) of Article VII to declare exclusive State

government,²¹¹ or the ordinance governed a matter that was clearly one that required exclusive state control;²¹² the courts would not void a home rule ordinance on the basis that it lacked authority. The Illinois Constitution, therefore, appeared to give home rule units vast powers.

With respect to impact fees, the expanded power of home rule governments was confirmed in *Northern Illinois Home Builders*, where the Illinois Supreme Court stated that the state Road Impact Fee statute did not grant home rule municipalities the *authority* to impose impact fees; home rule governments already possessed the authority to enact such fees under the 1970 Constitution and did not need an enabling statute.²¹³ According to the court, the Road Impact Fee Act merely curtailed that existing power by imposing minimum standards and procedures.²¹⁴ If a home rule municipality derives

control over private detective licensing and regulation); *Andruss v. City of Evanston*, 369 N.E.2d 1258 (Ill. 1977), *cert. denied*, 435 U.S. 952 (1978) (General Assembly used Sections 6(h) and (i) of Article VII to declare exclusive control over real estate brokers and salesmen licensing and regulation); *Prudential Ins. Co. of Am. v. City of Chicago*, 362 N.E.2d 1021 (Ill. 1977) (using Art. VII, Sec. 6(g), Illinois insurance code preempted home rule ordinance imposing taxes pertaining to business of insurance companies).

211. *E.g.*, *Ampersand, Inc. v. Finley*, 338 N.E.2d 15 (Ill. 1975) (home rule county could not impose filing fees on civil cases to fund a county library because judicial system in Illinois statewide concern and not for local regulation); *Village of Glenview v. Zwick*, 826 N.E.2d 1171 (Ill. App. Ct. 1st Dist. 2005) (fee-shifting ordinance invalidated because it burdened access to courts by imposing attorney fees on person challenging ordinance); *City of Carbondale v. Yehling*, 451 N.E.2d 837 (Ill. 1983) (city ordinance may not dictate procedures for court to follow).

212. *E.g.*, *People ex rel. Lignoul v. City of Chicago*, 368 N.E.2d 100 (Ill. 1977) (branch banking is a state-wide concern and does not pertain to local government and affairs); *Peoples Gas Light and Coke Co. v. City of Chicago*, 465 N.E.2d 603 (Ill. App. Ct. 1st Dist. 1984) (utility regulation was always a matter of state concern and not appropriate for home rule); *Village of Dolton v. CSX Transp., Inc.*, 554 N.E.2d 440 (Ill. App. Ct. 1st Dist. 1990) (Illinois Commerce Commission has exclusive control over railroad regulation).

213. *N. Ill. Home Builders*, 649 N.E.2d at 392:

Indeed, home rule units had the power under Section 6 of Article VII of the Illinois Constitution (ILL. CONST. ART. VII, § 6) to implement impact fees *prior* to the passage of the second enabling act. Rather, instead of creating special powers for home rule units which they did not already possess, the second enabling act curtailed that power by setting forth ‘minimum standards and procedures’ for the imposition of impact fees, ‘so that the burden of paying for road improvements can be allocated in a fair and equitable manner.’

Id.

214. *Id.* In *Krughoff*, 369 N.E.2d at 892, the city had asserted that it passed the ordinance pursuant to its home rule powers granted under the 1970 Illinois Constitution, but court declined to determine whether the ordinance was authorized by home rule powers, deciding instead that if the city could pass the ordinance under existing statutes granting municipalities the authority to control and plan subdivisions, then it certainly had authority to do so under its home rule powers. *Id.* at 896. The court also addressed Justice Schaefer’s concern in *Surety Developers* that Section 8 of the plan commission statute required a municipality to purchase

its authority from the Illinois Constitution and is not dependent upon State enabling legislation, then its ability to impose impact fees is not limited to streets, sewers, schools, and the other items authorized by the Plan Commission sections in the Municipal Code and the Counties Code. It could, theoretically, impose impact fees on new developments for libraries, fire stations, open space, cultural centers, or any other amenity the municipal government determines is needed to secure the public welfare.²¹⁵

Although a home rule municipality possesses the authority to impose impact fees, that authority only satisfies the first part of a takings analysis under the Illinois Constitution. Under *Northern Illinois Home Builders*, state legislation imposing or authorizing property exactions must comply with the “specifically and uniquely attributable” standard in order to pass constitutional muster in Illinois. If the State must comply with this standard, then home rule municipalities most certainly should also be held to the same standard when they enact impact fees and other exactions under their police powers. Illinois courts have confirmed as much by implication, if not by explicit rulings, in cases involving home rule municipalities.²¹⁶

or condemn property for school and park sites without regard to the proportioned need created by the particular development. The court held that Section 8 authorized purchase or condemnation of land designated for schools and parks but that it was *not a limitation* on municipal power. Rather, it was a power *in addition to* a municipality’s power to require the dedication of land, or money in lieu of land, proportioned to the need for new school and park facilities uniquely attributable to the new subdivision. *Id.* at 895.

215. In *Plote, Inc. v. Minn. Alden Co.*, 422 N.E.2d 231 (Ill. App. Ct. 1st Dist. 1981), a developer obtained a zoning change from the Village of Schaumburg by voluntarily agreeing to make per unit payments to the village for a cultural center. The Appellate Court held that the developer could not challenge the validity of the ordinance after it had accepted the benefits of the agreement. The court did not reach the issue as to whether the purpose of the exaction was authorized by statute or home rule authority. The court did note (in dicta), however, that the payment requirement was suspect under the “attributability and proportionality tests” created by the Illinois Supreme Court because a cultural center was “an amalgam of educational and recreational functions, without the element of public necessity accorded to either one.” *Id.* at 236. “A cultural center is not a recreational facility in the more usual sense of a park or a playground, nor is it an educational necessity, in the manner of a school.” *Id.* Schaumburg is a home rule unit now, but its status in 1972 when the ordinance was passed is unclear. According to Wikipedia, its population in 1970 was 18,730. In 1980, it was 53,305. Correspondence with village employees indicated that the village became a home rule unit at the time its population exceeded 25,000, probably around 1974. This distinction is important for determining whether the village had home rule authority to require an impact fee for something not specifically mentioned in the plan commission statute authorizing dedications and reasonable standards for streets, schools, *etc.* Thus, the court implied that municipal exactions for a community cultural center might be invalid, but it declined “further comment until the issue is properly before this court.” *Id.*

216. *Amoco Oil Co. v. Village of Schaumburg*, 661 N.E.2d 380 (Ill. App. 1st Dist., 1995). According to Wikipedia, Schaumburg’s population as of 1980 exceeded 25,000, so it likely was a home-rule municipality at the time this litigation started. The court did not engage in any discussion regarding the home rule unit status of the village origin of the village’s power

Consequently, a home rule municipality that wants to impose impact fees on new subdivisions for things like libraries, cultural centers, swimming pools, low-income housing, police and fire fighting facilities, and other amenities should face a high standard to show how the need for those facilities is “specifically and uniquely attributable” to each new development. Over the years, local governments have developed formulas for analyzing traffic and population increases to justify road improvements and new schools.²¹⁷ Fees for other public amenities should be justified by the same types of rigorous analysis in order to prove that they are “specifically and uniquely attributable” to a new subdivision. Even the federal standard of “rough proportionality” requires findings that quantify government needs beyond conclusory statements.²¹⁸ Home rule entities are not immune from complying with constitutional requirements.

Further, impact fee calculations need to be updated periodically,²¹⁹ especially as Illinois continues to lose population.²²⁰ Impact fees in many Illinois municipalities that have funded new schools, parks, and other amenities may no longer be needed and could be subject to successful challenges on this basis. This is an important point, a new development should pay its fair share of the additional needs it generates, but it should not pay for *improving*

to place conditions on special use permits. Instead, it applied the Supreme Court’s Fifth Amendment rough proportionality standard to invalidate the dedication of land requested by the village as a condition to approving a special use permit and did not need to apply Illinois’ stricter test. *Amoco Oil Co.*, 661 N.E.2d at 391. “Clearly, because we find that the dedication requirement does not satisfy the more lenient rough proportionality test for the Federal Constitution, it follows that it also did not satisfy the specifically and uniquely attributable approach with respect to the State Constitution.” *Id.*

217. See, e.g., WILL COUNTY, ILLINOIS, *Plans & Studies: 2009 Transportation Plan*, <http://www.willcountyillinois.com/County-Offices/Economic-Development/Land-Use/Administration-Planning/Long-Range-Planning-Projects> [<https://perma.cc/J3CA-QBBN>].

218. *Dolan*, 512 U.S. at 395-96. “No precise mathematical calculation is required, but the city must make some effort to quantify its findings in support of the dedication for the pedestrian/bicycle pathway beyond the conclusory statement that it could offset some of the traffic demand generated.” *Id.*

219. AM. PLANNING ASS’N, *supra* note 2 (fees “should be reviewed at least every two years”).

220. Marwa Eltagouri, *Illinois loses more residents in 2016 than any other state*, CHI. TRIB., (Dec. 21, 2016), <http://www.chicagotribune.com/news/local/breaking/ct-illinois-population-decline-met-20161220-story.html> [<https://perma.cc/EV3N-D3RJ>] (“For the third consecutive year, Illinois has lost more residents than any other state, losing 37,508 people in 2016, which puts its population at the lowest it has been in nearly a decade, according to U.S. census data released Tuesday.”); Cole Lauterbach, *Census: Southern Illinois losing population faster than rest of state*, ILL. NEWS NETWORK, (Mar. 23, 2018), https://www.ilnews.org/news/statewide/census-southern-illinois-losing-population-faster-than-rest-of-state/article_951bc358-2d53-11e8-ab7d-1b120cd75a52.html [<https://perma.cc/H6CS-KRA2>] (With a total population of about 5.2 million people, Cook County lost more than 45,000 people from July of 2016 to July of 2017; but “the largest percentage of the locals are leaving downstate counties.”).

what is currently provided for the whole community, regardless of whether it is located in a home rule or a non-home rule municipality or county. That would be neither fair nor justifiable under Illinois law.

IV. THE “SPECIFICALLY AND UNIQUELY ATTRIBUTABLE” STANDARD APPLIES TO LEGISLATIVE ACTION IN ILLINOIS

A number of state and federal courts have decided that legislative acts like city ordinances cannot be subject to takings analyses because they apply to all similarly-situated property owners and are not individual administrative decisions like those involved in *Nollan* and *Dolan*.²²¹ Other courts have willingly applied a takings analysis to local legislation.²²² In 2016 Justice Thomas wrote that “[f]or at least two decades . . . lower courts have divided over whether the *Nollan/Dolan* test applies in cases where the alleged taking arises from a legislatively imposed condition rather than an administrative one.”²²³ The controversy with regard to legislative actions was first noted by Justices Thomas and O’Connor in their dissent to the denial of *certiorari* in *Parking Ass’n of Georgia, Inc. v. City of Atlanta*.²²⁴ In the state court case, the Georgia Supreme Court upheld a city ordinance requiring certain existing surface parking lots to include landscaped areas equal to at least 10 percent of the paved area and to have at least one tree for every eight parking spaces.²²⁵ The Georgia court refused to apply a *Nollan/Dolan* analysis because the ordinance was a legislative act that applied to many landowners.²²⁶ When the United States Supreme Court denied the Parking Association’s petition for *certiorari*, Justice Thomas wrote a dissent in which he noted that some courts

221. Inna Reznik, *The Distinction Between Legislative and Adjudicative Decisions in Dolan v. City of Tigard*, 75 N.Y.U. L. REV. 242, 252-57 (2000).

222. David L. Callies, *Through a Glass Clearly: Predicting the Future in Land Use Takings Law*, 54 WASHBURN L.J. 43, 48-53 (2014); Marc J. Herman, *The Continuing Struggle Against Government Extortion, and Why the Time Is Now Right to Employ Heightened Scrutiny to All Exactions*, 46 URB. LAW. 655 (2014).

223. *California Bldg. Indus. Ass’n v. City of San Jose*, 136 S.Ct. 928 (2016) (Thomas, J., concurring in the denial of certiorari). This case involved a housing ordinance that compelled new residential developments of twenty or more units to reserve at least 15% of them for low income buyers. Justice Thomas concurred that the case did not present an opportunity to decide the legislative/adjudicative controversy because the petitioner did not rely on *Nollan* or *Dolan* in the court below. *See also* *Garneau v. City of Seattle*, 147 F.3d 802, 811 (9th Cir. 1998) (“The scope of Dolan’s rough proportionality test in takings cases is in considerable doubt. For example, the Supreme Court has left unsettled the question whether Dolan’s rough proportionality test applies to legislative, as opposed to administrative exactions.”).

224. *Parking Ass’n of Ga., Inc. v. City of Atlanta*, 515 U.S. 1116 (1995).

225. *Parking Ass’n of Ga., Inc. v. City of Atlanta*, 450 S.E.2d 200 (Ga. 1994), *cert. denied*, 515 U.S. 1116 (1995).

226. *Id.* at 203, n.3.

had indeed applied *Nollan/Dolan* to legislative acts, creating a conflict among the courts.²²⁷ He remarked:

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 free-way, there would be no doubt that Atlanta had taken property. The distinction between sweeping legislative takings and particularized administrative takings appears to be a distinction without a constitutional difference.²²⁸

Thus, in the opinion of Justices Thomas and O'Connor, whether an exaction was extracted by legislation or administrative action was not relevant to whether a takings analysis could be applied.

Indeed, wherever the power to command exactions from landowners arises—from legislation or adjudication—the U.S. Constitution provides a valuable and essential limitation on extortionate behavior. For example, as one commentator has asserted, without an available constitutional check, the legislative process could be used to impose exactions on a minority group.²²⁹ The legislative process in the local government setting may be particularly vulnerable to “majoritarianism,” as many smaller communities are less diverse and have fewer distinct constituencies that are able to influence elections and legislative enactments.²³⁰ Using *Nollan/Dolan*, a court can offer protection by invalidating statutes and ordinances that do not stand up to scrutiny. Furthermore, on the local level, the distinction between legislation and adjudication is often less than clear.²³¹

227. *Parking Ass'n of Ga., Inc. v. City of Atlanta*, 515 U.S. at 1117 (Thomas, J., dissenting).

228. *Id.* at 1117-18 (Thomas, J., dissenting).

229. David L. Callies & Glenn H. Sonoda, *Providing Infrastructure for Smart Growth: Land Development Conditions*, 43 IDAHO L. REV. 351, 369 (2007) (“[I]t is entirely possible that the government could ‘gang up’ on particular groups to force exactions that a majority of constituents would not only tolerate but applaud”); see also Jane C. Needleman, *Note: Exactions: Exploring Exactly when Nollan and Dolan Should be Triggered*, 28 CARDOZO L. REV. 1563, 1588-90 (December, 2006); David L. Callies & Adrienne I. Suarez, *Symposium: Democracy in Action: The Law & Politics of Local Governance: Privatization and the Providing of Public Facilities through Private Means*, 21 J.L. & POL. 477, 491 (2005).

230. See Reznik, 75 N.Y.U. L. REV. at 271; Herman, 46 URB. LAW. at 680.

231. Reznik, 75 N.Y.U. L. REV. at 266; *B.A.M. Dev., L.L.C. v. Salt Lake Cty.*, 128 P.3d 1161, 1170 (Utah 2006).

Nevertheless, whether the federal takings analysis is applicable to exactions imposed under state or local legislation is an unanswered question.²³² Courts around the country are divided on the answer. Even courts within the same federal districts have reached contrary conclusions.²³³

San Remo Hotel L.P. v. City and County of San Francisco,²³⁴ involved a city ordinance that required a single resident occupancy (“SRO”) building owner to replace the resident hotel rooms or pay an *in lieu* fee to a housing fund before converting the property into a tourist hotel. The California Supreme Court held that the ordinance was valid and refused to apply a *Nolan/Dolan* heightened scrutiny takings analysis to a monetary exaction imposed as a legislative mandate without administrative discretion.²³⁵ “While legislatively mandated fees do present some danger of improper leveraging, such generally applicable legislation is subject to the ordinary restraints of the democratic political process.”²³⁶ The court in this case was confident that a truly extortionate scheme would cause voters to change the composition of the city council at the next election.²³⁷ Further, the city ordinance was still subject to both statutory and constitutional law, which required the court to find that the city ordinance seeking to preserve the supply of low income housing had a reasonable relationship to the requirements imposed on the SRO building owners.²³⁸ Even this court, however, was not unanimous as to whether legislative and adjudicative actions should be distinguished. Dissenting Justice Brown wrote that in this case, the city government’s ordinances were tantamount to extortion and were obviously unconstitutional.²³⁹ Relying on the California Supreme Court decision in *Ehrlich v. City of Culver*, in which the court applied *Nolan’s* heightened scrutiny test, Justice Brown reasoned:

A public agency can just as easily extort unfair fees legislatively from a class of property owners as it can adjudicatively from a single property owner. The nature of the wrong

232. *Washington Townhomes, LLC v. Washington Cnty. Water Conservancy Dist.*, 388 P.3d 753, 757-58 (Utah 2016) (the case was dismissed on jurisdictional grounds as not properly certified and remanded for further proceedings).

233. *Compare Levin v. City & Cty. of San Francisco*, 71 F.Supp.3d 1072 (N.D. Cal. 2014) (under *Koontz*, 5th Amendment takings analysis applied to ordinance requiring exorbitant payments to tenants when owner terminates tenancy) *with* *Bldg. Indus. Ass’n – Bay Area v. City of Oakland*, 289 F. Supp. 3d 1056 (N.D. Cal. 2018) (*Koontz* did not expand doctrine to reach legislative acts, such as ordinance requiring developers to fund public art installations).

234. *San Remo Hotel L.P. v. City & Cty. of S.F.*, 41 P.3d 87 (Cal. 2002).

235. *Id.* at 105-06.

236. *Id.* at 105.

237. *Id.*

238. *Id.* at 105-06.

239. *San Remo Hotel*, 41 P.3d at 124 (Brown, J., dissenting).

is not different or less abusive to its victims, but the scope of the wrong is multiplied many times over. Therefore, I believe *Ehrlich* should apply whenever the risk is great that greed for public revenues has driven public regulatory policy. In other words, where a legislative scheme imposes a burdensome fee on a small class of property owners as a condition to buying relief from a regulation, I believe careful judicial scrutiny is appropriate, including finding a close link between the fee and the purpose of the regulation. In light of the majority's decision, however, we can be sure that agencies will now act legislatively, rather than adjudicatively, and thereby insulate their actions from close judicial scrutiny.²⁴⁰

The California Supreme Court more recently reiterated this conclusion in *California Building Industry Ass'n v. City of San Jose*,²⁴¹ when it held that an inclusionary housing ordinance was a land use restriction, not a taking subject to scrutiny beyond the rational relationship test.

In *Greater Atlanta Homebuilders Ass'n v. DeKalb County*,²⁴² the Supreme Court of Georgia upheld a county tree ordinance applying uniformly to all unincorporated land and regulating the removal and/or replacement of trees as part of land development. Citing its own decision in *Parking Ass'n v. City of Atlanta*, the court held that a takings analysis was inapplicable to a generally-applicable legislation.²⁴³

240. *Id.* Justice Brown first asserted that the majority misread the city's ordinance as leaving no discretion to the planning commission and that its actions were actually adjudicative; however, he also concluded that "the majority's exception for legislatively created permit fees is mere sophism, particularly where the legislation affects a relatively powerless group and therefore the restraints inherent in the political process can hardly be said to have worked." *Id.*

241. *California Bldg. Indus. Ass'n*, 351 P.3d 974, cert. denied, 136 S. Ct. 928 (2016).

242. *Greater Atlanta Homebuilders Ass'n v. DeKalb Cty.*, 588 S.E.2d 694 (Ga. 2003).

243. *Id.* at 697 (citing *Parking Ass'n*, 450 S.E.2d 200 (1994)). See also *Garneau*, 147 F.3d at 811 ("The scope of *Dolan's* rough proportionality test in takings case is in considerable doubt. For example, the Supreme Court has left unsettled the question whether *Dolan's* rough proportionality tests applies to legislative, as opposed to administrative exactions."); *Homebuilders Ass'n v. City of Scottsdale*, 930 P.2d 993, 1000 (Ariz. 1997) (there may be good reasons to distinguish an adjudicative decision from a legislative one); *Golf Course Ass'n v. New Castle Cty.*, 2016 WL 1425367, *aff'd* 152 A.3d 581 ("many courts have held that general statutory restrictions, evenly applied, do not constitute an unconstitutional exaction under [*Nollan/Dolan/Koontz*].") (In this case, there is a statutory scheme applicable to all property owners).

On the other side of the issue, in *Levin v. City and County of San Francisco*,²⁴⁴ the Northern District of California held that an ordinance requiring property owners who wanted to withdraw their rent-controlled property from the rental market to pay a lump sum to displaced tenants effected “an unconstitutional taking by conditioning property owners’ right to withdraw their property on a monetary exaction not sufficiently related to the impact of the withdrawal.”²⁴⁵ The court carefully analyzed *Nollan*, *Dolan*, and *Koontz* to conclude that, although the city’s housing shortage and high rental costs were significant, it could not achieve its goal of ameliorating its housing problem by forcing “some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.”²⁴⁶ The court did not even address the city’s argument that the ordinance could not be subject to a takings claim because the exactions were legislatively imposed on all landlords except in a footnote.²⁴⁷ The court wrote:

The City’s reliance on *McClung v. City of Sumner*, 548 F.3d 1219 (9th Cir. 2008) for the argument that *Nollan/Dolan* does not apply to legislative conditions also is misplaced. *Koontz* abrogated *McClung*’s holding that *Nollan/Dolan* does not apply to monetary exactions, which is intertwined with and underlies *McClung*’s assumptions about legislative conditions. And a very recent Ninth Circuit case reinforces the applicability of the *Nollan/Dolan* framework to facial reviews of legislative exactions. In *Horne*, 750 F.3d 1128, the Ninth Circuit reviewed and rejected a takings challenge to a Marketing Order that required raisin producers to hold back a certain amount of their crop from the market. There, the Ninth Circuit reviewed whether the Order satisfied the *Nollan/Dolan* essential nexus and rough proportionality tests. In so doing, the court explained that *Dolan*’s individualized

244. *Levin*, 71 F. Supp. 3d at 1072, *appeal dismissed as moot and remanded*, 680 Fed. Appx. 610 (N.D. Cal. 2017), *on remand, motion to vacate denied*, 257 F. Supp. 3d 1092 (N.D. Cal. 2017).

245. *Levin*, 71 F. Supp. 3d at 1074.

246. *Id.* at 1089 (quoting *Armstrong v. U.S.*, 364 U.S. 40, 48 (1960)).

247. *Id.* at 1083, n. 4. The City also relied on *Garneau*, 147 F.3d 802, to assert that *Nollan/Dolan* could not be applied in a facial takings claim, but the court noted that:

Garneau was decided before *Koontz* explicitly extended the *Nollan/Dolan* framework to monetary exactions, and much of *Garneau*’s analysis relies on an assumed limitation to physical exactions that *Koontz* repudiated. After *Koontz* broadened the scope of *Nollan/Dolan* to monetary exactions, it opened up the applicability of the rough proportionality test to the nature and terms, in addition to the amount, of the enhanced payments the Ordinance requires here.

Id.

review of a particular land-permit condition made sense there, because “in the land use context . . . the development of each parcel is considered on a case-by-case basis. But here, the [raisin] use restriction is imposed evenly across the industry; all producers must contribute an equal percentage of their overall crop to the reserve pool.” The court went on to conclude that the Marketing Order was tailored to the government interests under *Nollan/Dolan* because it varied the reserve requirement annually in accordance with market conditions.²⁴⁸

Although relegated to a footnote, the court’s dismissal of the legislative-adjudication dispute is well-reasoned and ties *Koontz*’s expansion of *Nollan/Dolan* to monetary exactions with *Horne*’s application of *Nollan/Dolan* to legislation.²⁴⁹

Remarkably, another judge in the Northern District of California criticized Judge Breyer’s opinion in *Levin* as wrongly expanding federal takings analyses to legislative acts. In *Building Industry Ass’n – Bay Area v. City of Oakland*,²⁵⁰ a city ordinance required new developments to purchase and display art works on site or pay an “in lieu of” fee to the city’s public art fund. Judge Chhabria held that Judge Breyer’s interpretation of *Koontz* was incorrect and that applying a takings analysis to legislative acts was wrong:

The exactions doctrine, in other words, has historically been understood as a means to protect against abuse of discretion by land-use officials with respect to an individual’s parcels of land, and *Koontz* itself spoke of it in those terms, undermining Judge Breyer’s argument that *Koontz* displaced the Ninth Circuit’s rule that the exactions doctrine is unavailable

248. *Id.* (quoting *Horne*, 750 F.3d at 1144) (citations omitted).

249. Another example is the New York State court case of *Seawall Assocs. v. City of New York*, 542 N.E.2d 1059 (N.Y. 1989). In that case, a city ordinance prohibited conversion/demolition of single resident occupancy housing and required restoration of all units and leasing at controlled rents. The court held that the ordinance was facially invalid as an unconstitutional taking under the 5th Amendment as applied to the States: (1) forcing owners to rent was a physical occupation; and (2) all provisions of the ordinance were a regulatory taking that denied economically viable use without substantial advancement of a legitimate State interest. The ordinance’s buyouts (“in lieu of fees”) and hardship exemptions could not save an unconstitutional ordinance because one cannot pay the city not to violate the Constitution. *Id.* at 1070. “Indeed, the stark alternatives offered by Local Law No. 9—either submit to an uncompensated and, therefore, unconstitutional appropriation of your properties or pay the price (in cash or in replacement units)—amount to just the sort of exaction which could be classified, not as ‘a valid regulation of land use but ‘an out-and-out plan of extortion.’” *Id.* (quoting *J.E.D. Assocs., Inc. v. Atkinson*, 432 A.2d 12, 14-15 (N.H. 1981).

250. *Bldg. Indus. Ass’n v. City of Oakland*, 289 F. Supp. 3d 1056 (N.D. Cal. 2018).

to a plaintiff making a facial challenge to a generally applicable land-use regulation.

Perhaps reasonable arguments could be made for expanding the reach of the exactions doctrine so that it can be invoked in facial challenges to a generally applicable regulations, rather than merely discretionary decisions regarding an individual property by land-use officials. But the point, for purposes of this motion, is that it would be an expansion of the doctrine. If that occurs, it should be in the Supreme Court, not the Northern District of California.²⁵¹

Judge Chhabria might have been literally right—*Koontz* did not explicitly expand *Nollan/Dolan* application to legislative acts, as it involved denial of an individual land use permit request—but Judge Breyer appeared to have the more nuanced take on the issue. In *Horne*, the Ninth Circuit reasoned that personal property (raisins) was afforded less Fifth Amendment protection than real property,²⁵² but that court did not categorically oppose applying *Nollan/Dolan* to legislative acts. In fact, the Ninth Circuit demonstrated that *Nollan/Dolan* provided an appropriate framework for analyzing whether the generally applicable Market Order issued by the government confiscating a percentage of raisin growers' crops constituted a taking.²⁵³ The Ninth Circuit found that the Market Order, which each year varied the percentage of raisins to be appropriated, was adequately “individualized” and, therefore, satisfied *Dolan*'s requirement of rough proportionality to the government's goal of assuring a stable market.²⁵⁴ The court did not discuss whether *Nollan/Dolan* was inapplicable because the Market Order was legislation rather than an adjudicative act. Neither did the U.S. Supreme Court discuss the generally-applicable nature of the Market Order to all raisin growers when it reversed *Horne*. However, because the Supreme Court concluded that the Market Order resulted in a physical *per se* taking, the issue of whether the Supreme

251. *Id.* at 1058-59 (citation omitted).

252. *Horne*, 750 F.3d at 1128, *rev'd* 135 S.Ct. 2419 (2015).

253. *Id.* at 1142-43.

254. *Id.* at 1144. The opinion states:

At bottom, *Dolan*'s individualized review ensures the government's implementation of the regulations is tailored to the interest the government seeks to protect. The Marketing Order accomplishes this goal by varying the reserve requirement annually in accordance with market and industry conditions. Given that raisins are fungible (as opposed to land), we think this is enough to ensure the means of the Marketing Order's diversion program is at least roughly proportional to its goals.

Id.

Court would apply a *Nollan/Dolan* analysis to a legislative act is still unknown.²⁵⁵

That legislative acts can be subject to Illinois' "specifically and uniquely attributable" test, however, is not unknown. The Illinois Supreme Court's decision in *Northern Home Builders* stands out as an example of applying a takings analysis to legislation.²⁵⁶ In that case the Illinois Supreme Court held a legislative act—a state statute—to be subject to the stringent Illinois takings test and invalidated that state statute because it did not meet the "specifically and uniquely attributable" standard required under the Illinois Constitution.²⁵⁷ Similarly, *Pioneer Trust and Savings Bank*, decided more than 30 years prior to *Northern Home Builders*, invalidated a non-home rule ordinance requiring developers to contribute one acre per sixty family units to the village for public use.²⁵⁸ The Illinois Supreme Court invalidated the ordinance, not because the village did not have the authority to require a land dedication, but because "this record did not establish that the need for recreational and educational facilities" was uniquely and specifically attributable to the proposed subdivision; rather the need for more schools was a result of the continued growth of the whole community.²⁵⁹ To construe the statute as requiring a developer to bear the total cost of an additional school "would amount to an exercise of the power of eminent domain without compensation."²⁶⁰

An Illinois appellate court went even further in discussing the issue. In *Amoco Oil Co. v. Village of Schaumburg*,²⁶¹ the court reviewed an ordinance passed by the Village Board of Trustees. That ordinance required a dedication of land as a condition to approval of the owner's application for a special use permit for improvements to a gas station located at a busy intersection.²⁶² The village contended that a takings analysis was inapplicable because "its

255. It also adamantly held that personal property was subject to Fifth Amendment protections equal to those historically granted to real property. Thus, Judge Chharbri's "historical" understanding of the exactions doctrine as applicable only to land use now appears to be out-of-date.

256. *N. Ill. Home Builders Ass'n*, 649 N.E.2d 384 (1995).

257. *Id.* at 388-89 (ordinance required one acre per sixty family units to be dedicated to the village for public use).

258. *Pioneer*, 176 N.E.2d at 799.

259. *Id.* at 802. The parties agreed that there was a need for additional schools and playgrounds, but the fact that existing schools were near capacity was "the result of the total development of the community." *Id.* The next developer in line should not have to shoulder the total cost of remedying the school problem.

260. *Id.*

261. *Amoco Oil Co.*, 661 N.E.2d at 380, *appeal denied*, 667 N.E.2d 1055 (1996), *cert. denied*, 519 U.S. 976 (1996).

262. The landowner met all of the requirements for a special use permit, but the Village Board of Trustees required an additional land dedication as a condition to granting the permit. *Id.* at 383.

actions were purely legislative in nature rather than adjudicative.²⁶³ The court characterized this argument as one that would allow the village to “skirt its obligation to pay compensation when taking private property for public use merely by having the Village Board of trustees pass an ‘ordinance’ rather than having a planning commission issue a permit.”²⁶⁴ The Appellate Court discussed *Parking Ass’n of Georgia*, quoted Justice’s Thomas’ dissent, and concluded that “[a]lthough not binding as precedent, we find Justice Thomas’ comments particularly persuasive and consonant with the rationale underlying *Dolan* and similar cases. Certainly, a municipality should not be able to insulate itself from a takings challenge merely by utilizing a different bureaucratic vehicle when expropriating its citizen’s property.”²⁶⁵ In Illinois, at least, there is clear precedent that a legislative act can be subject to a takings analysis.

In addition, although the U.S. Supreme Court in the *Koontz* case did not decide whether *Nollan/Dolan* requirements should apply to legislative acts, it did cite with approval *Northern Illinois Home Builders* as an illustration of a state court that applied a takings analysis to monetary exactions.²⁶⁶ Presumably, if the court did not approve of Illinois’ application of a takings analysis to a legislative act, it would not have cited the case. At any rate, the “specifically and uniquely attributable” test in Illinois is clearly a takings standard under the Illinois Constitution that has been applied to legislative acts in *Pioneer Trust and Savings Bank*, *Northern Illinois Home Builders*, and *Amoco Oil*.²⁶⁷ Should the U.S. Supreme Court ever decide that *Nollan/Dolan* is not

263. *Id.* at 389.

264. *Id.*

265. *Id.* at 390. The court added that, even if it had recognized a difference between legislative and adjudicative action, which it did not, the ordinance “did not itself reflect a uniformly applied legislative policy. Indeed, the dedication requirement was clearly site-specific and adjudicative in character.” *Amoco Oil Co.*, 661 N.E.2d at 390.

266. *Koontz*, 570 U.S. at 618. “Numerous courts—including courts in many of our Nation’s most populous States—have confronted constitutional challenges to monetary exactions over the last two decades and applied the standard from *Nollan* and *Dolan* or something like it.” *Id.*, citing *N. Ill. Home Builders Ass’n*, 649 N.E.2d at 388-89.

267. A 2011 case decided by the Illinois Appellate Court, Third District, headed in the wrong direction, relying on early decisions and ignoring the existing body of case law under the Illinois Constitution regarding the “specifically and uniquely attributable” standard. *Shore Dev. Co. v. City of Joliet*, 2011 IL App (3d) 100911-U, *app. denied*, 968 N.E.2d (Ill. 2012). In this Rule 23 Order, the court refused to apply a takings analysis to road improvement fees required for plat approval that were required under an annexation agreement. *Id.* The agreement was negotiated by the original owner of a one-hundred-acre tract of farm land that apparently bordered approximately 1,600 feet of Caton Farm Road. It provided that the owner would pay for public improvements as required by the city’s subdivision regulations. The original tract was sold in separate parcels to a series of other developers. A church purchased seventeen acres that bordered Caton Farm Road for 600 feet. As a condition to approving the church’s subdivision plat, the city required it to assume responsibility for making improvements for the 600 feet of the road. Shore Development, the plaintiff in the case, purchased

applicable to exaction legislation, it will be interesting to see the fate of the “specifically and uniquely attributable” standard in Illinois.

V. CONCLUSION

The “specifically and uniquely attributable” takings test under the Illinois Constitution has a long history that remains a viable standard today. Stricter than the “nexus and rough proportionality” test the U.S. Supreme Court imposed in the seminal cases of *Nollan* and *Dolan*, the Illinois test has shaped the development of impact fees for both home rule and non-home rule local governments. When an exaction is required from a landowner and that exaction is directly tied to a particular land parcel, the “specifically and uniquely attributable” test must be applied to determine the validity of the exaction. The home rule status of a municipality or county is relevant only to determining the authority of the local government to impose impact fees for streets, schools, parks, and other amenities not enumerated in the enabling statutes found in the Municipal Code or the Counties Codes. Finally, whether impact fees are imposed by legislation or adjudication is also not determinative. In Illinois, statutes, ordinances, and adjudicative decisions are all subject to the Illinois Constitutional requirement that private property not be taken for public purposes without just compensation.

some lots not previously developed in the first and second phases of development. Altima Land Group purchased a portion of the lots remaining in the third phase. The city conditioned approval of Shore Development and Altima’s plats on their assuming responsibility for expanding the remaining 1000 feet of Caton Farm Road to two west bound lanes and for 25% of the cost of a light signal. *Id.* at ¶ 12. Shore Development contended that it should not be responsible for the road improvement costs because, among other things, the need for the improvements was not specifically attributable to its development. The appellate court stated that a takings analysis was applicable only when a proceeding was initiated by the municipality for the construction of a local improvement or to take property under the law of eminent domain. *Id.* at ¶ 38. According to the court, the validity of an ordinance was to be evaluated only under the exercise of police powers. *Id.* In other words, when a legislative act imposes the condition, the takings clause is not applicable. This interpretation, however, is clearly not the law in Illinois and is probably not the law under the federal Constitution. Whether Shore Development’s argument failed because of the annexation agreement negotiated by the prior owner was determinative (*see Dep’t. of Pub. Works & Bldg. v. Exch. Nat. Bank*, 31 Ill. App. 3d 88 (2d Dist. 1975)), but the exercise of police powers alone was not determinative. Authority under the police power supports only the first part of the takings analysis expounded by the Illinois Supreme Court in *Pioneer* and *Northern Illinois Home Builders*.