The Public Role in Establishing Private Residential Communities: Towards a New Formulation of Local Government Land Use Policies That Eliminates the Legal Requirements to Privatize New Communities in the United States

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I. Introduction

THIS ARTICLE EXAMINES THE CRITICAL AND INSUFFICIENTLY UNDERSTOOD role that *government* plays in the widespread and ever-growing establishment of private residential communities (also referred to here as "community associations") in the United States, particularly in the high-growth Sunbelt states.[1] I argue here that local governments,

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1. In 1960, there were an estimated 500 community associations in existence in the United States. *See* C. James Dowden, *Community Associations and Local Governments: The Need for Recognition and Reassessment*, at 27 (U.S. ADVISORY COMM'N ON INTERGOVERNMENTAL RELATIONS, RESIDENTIAL COMMUNITY ASSOCIATIONS: PRIVATE GOVERNMENTS IN THE INTERGOVERNMENTAL SYSTEM?, 1989) [hereinafter U.S. ADVISORY COMM'N]. Today, an estimated 286,000 community associations are in existence, which are home to one in five Americans. Community Associations Institute, Industry Data, http://www.caionline.org/about/facts.cfm (last visited Sept. 17, 2006).

Although the foregoing contemporary data reflect the existence of large numbers of nonterritorial community associations in high-rise buildings in urban areas, fully one-half of the number of community associations in the United States today consists of community associations that are territorial—i.e., private residential communities encompassing streets and open spaces and traditionally municipal functions and services. *See* Community Associations Institute, Industry Data, http://www.caionline.org/about/facts.cfm (last visited Sept. 17, 2006). For further discussion of the distinction between territorial and nonterritorial community associations, see U.S. ADVISORY COMM'N, *supra*, at 11–12.

on a broad scale and independent of market forces, effectively have *required* developers of new subdivisions to create community associations to operate and maintain the subdivision in lieu of the municipality providing traditionally municipal services to the subdivision, including such services as street maintenance, sewer service, water supply, drainage, curbside refuse collection, parks, and even traditional police patrols of public streets. Local governments have been able to achieve this purpose—with virtually unfettered discretion and in the absence of judicial review—through a robust application of their traditional land use powers: i.e., the power to zone and the power to approve the establishment of new subdivisions.

Viewed from the narrow economic perspective of a local government experiencing rapid growth, a regime of privatization of new communities constitutes an extremely attractive policy option. The establishment of community associations to operate and maintain traditionally public infrastructure represents a seemingly ideal response to countervailing pressures to accommodate development and to restrain the growth in municipal outlays.[2] Stated differently, the establishment of a community association allows local government to reap the benefit of an increased tax base without the need to provide certain traditionally municipal services that are instead provided by the community association.

The interest of municipal cost minimization, however, does not necessarily correspond to the public interest. Rather, there is an inherent conflict in the present dual role of the municipality as (on the one hand) the principal land use regulator and as (on the other hand) an entity engaged in a continuing search for expense-minimization through a regime of municipal-service load-shedding implemented by way of the land use approval process. At the very least, the municipality's search for expense-minimization must have its limits.

Importantly, municipal land use policy requiring the establishment of a community association is qualitatively different from long-standing municipal requirements—generally referred to as "exactions"—whereby a developer is compelled, as a condition of land use approval, to dedicate land to a municipality for use as a road, a utility, or other public facility. Sometimes these mandatory physical dedications of land are accompanied by the further requirement that the developer construct a public facility, and, upon completion of construction, transfer

2. EVAN MCKENZIE, PRIVATOPIA: HOMEOWNERS ASSOCIATIONS AND THE RISE OF RESIDENTIAL PRIVATE GOVERNMENT 178–79 (1994).

ownership of the facility and the attendant real property to the municipality. More recently, the concept of an "exaction" has been expanded to encompass fees that developers must pay to municipalities in lieu of dedicating facilities, with the fee set aside by the municipality to offset the capital cost of constructing the facilities.[3] The fundamental distinction between these traditional exactions and the municipal policy here at issue is that the former pertains only to a developer's one-time assumption of traditionally municipal capital costs and the latter pertains to a developer's assumption (by way of a developer-created entity, the community association) of *municipal operating costs in perpetuity*.

I term the latter policy a "public service exaction," in recognition of the fact that the effect of the municipal policy is to require a developer-created entity to assume responsibility for providing a traditionally public service. I adopt the "exaction" nomenclature, because, at least from the municipality's fiscal perspective, a public service exaction is a logical extension of the traditional exaction. But, as already noted, the public service exaction is fundamentally different from the traditional exaction—a difference that flows inexorably from the distinction between a municipality's recurring operating costs and a municipality's capital costs of constructing new infrastructure. Note also that the two forms of exactions differ not only as to ends but as to means: that is, the traditional exaction is the product of a municipal policy of mandatory *dedication* of a public facility, whereas a public service exaction is the product of precisely the inverse policy: i.e., what might be termed a municipal policy of mandatory *retention* by the developer of the required public facility.

Moreover, public service exactions bind not only the developer, but the future generations of homeowners that will be living in the community. The new community will be established in a certain way—with private functions and services—and, in most cases, the initial privatization decision will be permanent and binding. Thus, in those instances where the privatization decision is a direct product of municipal policy, local government is effectively creating a second tier of municipality—a privatized municipality—with no meaningful oversight of the privatization process and, indeed, virtually no public recognition of either the process or the policy choices that are leading to this result.

3. *See infra* text accompanying notes 65–81.

At the outset, I must emphasize that I am *not* arguing that government is the *sole cause* of the proliferation of private residential communities in the United States—a phenomenon that is obviously the product of a host of social, legal, economic, and demographic factors.[4] I am arguing, rather, that if a developer chooses to establish a community association to operate a subdivision—rather than the subdivision being subject to traditional municipal functions and services—then the developer generally should be permitted to do so. But the developer should not be *required* to establish a community association as a result of municipal law and policy. Presently, substantial evidence suggests that subdivision developers are often being required to establish a community association as a condition of subdivision approval—a fact that is not widely understood or the subject of any critical study.

Also at the outset, I emphasize that the aim of this article is *not* to require the de-privatization of existing private residential communities, nor to preclude the private establishment of such private residential communities in the future—an undesirable, as well as potentially unconstitutional, undertaking. Instead, the aim is, *first*, to place a spotlight on the insufficiently understood role of the public sector in facilitating the recent large-scale privatization of new communities in the United States and, *second*, to propose a new formulation of local-government land use policies—as well as judicial remedies—that serve to eliminate, or at least reduce, the legal requirements to privatize new communities in the United States.

4. Some of the market-driven factors include, but are not limited to, (1) the preference of some homebuyers for a package of private amenities that can be offered by community associations; and (2) the preference of some homebuyers for heightened private security for an entire neighborhood—including gates and guardhouses—a form of amenity that can only be offered in a private community. *See infra* notes 15–29 and accompanying text.

In Part I, *infra*, I will catalog these and other significant market-driven and demographic factors that have contributed to the phenomenon of explosive growth in the number of private communities in the United States. I will not, however, attempt to establish the relative significance, respectively, of private and public factors to this phenomenon, a methodological undertaking that would be exceedingly difficult to carry out, especially at the broad supra-regional level of inquiry that is the focus of this article.

In any event, as I have noted in the text above, the principal objectives of this inquiry are more modest: i.e., to analyze the insufficiently understood public role in the establishment of community associations, to identify specific municipal regulatory requirements pertinent to the establishment of community associations as a condition of subdivision approval, and to recommend that these public requirements be eliminated, so that the determination to establish a community association is a determination made by the developer alone based on market considerations.

Although a few scholars such as McKenzie[5] and Barton and Silverman[6] have put forward the proposition that the broad-based adoption of the community association as a privatized form of local government is, to some degree, a manifestation of certain policy choices made by state and local government, these scholars have not attempted to support this proposition through, for example, a detailed examination of the historical development of the planned unit development (PUD) zoning concept and exaction policy in state and local land use policymaking, and the practical application of these policy innovations in contemporary municipal land use decision making. Nor has there been any examination of the local land use legal regimes in effect in high-growth areas that are giving rise to unprecedented numbers of new private residential communities.

This article aims to partly fill this gap in the literature and in the scholarly commentary. In Part I, I catalog and assess the significant demographic, social, and economic factors that have contributed to the phenomenon of the explosive growth in the number of private communities in the United States. The purpose here is to place these factors in context and to lay the groundwork for the public policy analysis that follows. In Part II, I trace the history of the PUD zoning concept and how this concept evolved from a mechanism to interject greater design flexibility into the zoning approval of new subdivisions into a vehicle for municipal privatization decisions affecting traditionally public facilities and services. I also recount the evolution of the concept of the municipal exaction, which, as already noted, traditionally was understood to encompass certain conditions of subdivision approval, such as, for example, a gratuitous transfer of unimproved land to the municipality that is to be set aside for a public park or a required private construction of infrastructure that, upon completion, is to be turned over to the municipality. I argue that the exaction concept, when married to the PUD approval process, produced, almost inexorably, the public service exaction—a comprehensive new public policy that would enable municipalities to off-load not only public capital costs, but also public operating costs.

In Part III, I set forth substantial evidence of the active and direct role played by local governments, through the exercise of their plenary

5. MCKENZIE, *supra* note 2, at 11–12, 178.

6. COMMON INTEREST COMMUNITIES: PRIVATE GOVERNMENTS AND THE PUBLIC INTEREST (Stephen E. Barton & Carol J. Silverman eds., 1994), at 11 [hereinafter Barton & Silverman]. For an enumeration of other scholars and commentators who have noted in passing this proposition, *see infra* note 31.

regulation of new residential development, in the rise of the community association as the standard template for new community development in the fastest growing areas of the United States. *First*, I present relevant portions of illustrative municipal land use codes from high-growth areas of the United States. The quoted language from the codes sets forth express requirements that a developer establish a community association as a condition of land use approval. *Second*, recognizing that not all municipal requirements of this type are formal and codified, I present anecdotal accounts of individual homebuilders and local government officials concerning the existence of informal as well as formal municipal requirements to establish community associations as a condition of land use approval. Although neither of these data sources were the product of a survey—and thereby not susceptible to systematic and generalized conclusions—the assembled information and opinions *nevertheless* do suggest some important tentative conclusions. Certainly, the mandatory code language and the first-person-anecdotal accounts should give some pause to commentators who insist that the boom in the number and extent of community associations is essentially a market-driven phenomenon.

In Part IV, the focus of the inquiry shifts from the empirical to the normative. In particular, I identify the adverse effects of a municipal land use policy that effectuates the privatization of the operation and maintenance of traditionally municipal infrastructure by way of the *de facto* or *de jure* requirement that a subdivision developer establish a community association (to operate the infrastructure) as a condition of subdivision approval. Among the most important adverse effects of public service exactions are the following. *First*, public service exactions make the most affordable form of market-rate new housing development—i.e., cluster housing—more expensive by saddling home-owners with the cost of operating and maintaining traditionally municipal infrastructure. *Second*, public service exactions subject a large number of homeowners to a private land use regime that many neither desire nor understand and, related to this, deny homeowners the option of purchasing a home free of a complex private servitude regime and the obligations and conditions that are imposed by that regime. In many housing markets (particularly in the Sunbelt), housing consumers have no choice but to accept that regime because of the lack of alternatives. *Third*, public service exactions encourage the establishment of gated communities, which have been identified with adverse social and political effects on the body politic and civil society. *Fourth*, public service exactions give rise to many larger territorial community

associations that are the functional equivalent of municipalities, but courts generally do not recognize these community associations as "state actors," thereby depriving residents and nonresidents alike of a constitutional remedy for abridgment of fundamental rights by such associations.

In Part V, I explore potential judicial remedies as well as legislative policy recommendations aimed at reducing the future municipal imposition of public service exactions in new community development, as well as mitigating the effects of public service exactions in existing communities. Here, I argue that municipal land use policies that systematically impose public service exactions on all new subdivisions, or entire classes of subdivisions, run afoul of the long-standing and still-extant state law of dedication, because a municipality's *categorical* refusal of dedication, by ordinance or unwritten policy, is plainly inconsistent with the individualized determinations required by state-law principles governing the voluntary dedication of private property to the public. Of course, municipal action—to the extent inconsistent with state law—cannot stand. Moreover, the qualified right of voluntary dedication—long established as part of the background law of property in all of the states—is properly understood as a *property right* that is not to be casually abrogated by undue judicial deference to the exigencies of a municipal land use policy aimed at load-shedding traditionally municipal functions and services.

Turning to state legislative reform, I argue that such reform can properly and efficiently restore the balance between the valid exercise of municipal land use powers (including the power to impose traditional exactions and public service exactions under appropriate circumstances) and reasonable limitations on unrestrained across-the-board *de jure* or *de facto* privatization of traditionally municipal services in new subdivisions.

If the public role in enabling private residential communities were to be more clearly delineated and analyzed (as this article seeks to do), then the groundwork can be laid for serious public discussion of the future of new community development in the United States and for a thorough and public assessment of what has been called "the most significant privatization of local government responsibilities in recent times."[7] A public policy change of this magnitude and importance demands no less than this.

7. U.S. ADVISORY COMM'N, *supra* note 1, at 18.

II. The Rise of the Territorial Community Association Viewed as a Partial Response to the Demands of the Housing Market and Consumer Choice

In 1960, there were an estimated 500 community associations[8] in existence in the United States.[9] By 1970, there were 10,000 associations; by 1980, 36,000; by 1990, 130,000; by 2000, 222,500; and by 2006, there were an estimated *286,000* community associations in existence, which were home to 57 million people, or roughly one in five Americans.[10]

8. The term "community association" is generally used to refer to three distinct but closely related legal entities: i.e., planned single-family home developments, condominiums, and housing cooperatives.

In a planned single-family home development, a homeowner generally holds title to both the exterior and interior of a residential unit and the plot of land around it. The planned development association (often called a homeowners' association) owns and manages common properties, which may include streets, parking lots, open spaces, and recreational facilities.

In a condominium, a homeowner holds title to a residential unit (sometimes just the interior of an apartment) and to a proportional undivided interest in the common spaces of an entire condominium property. A condominium association manages the common spaces but does not hold title to any real property. A condominium property is usually situated in either a single high-rise apartment building or in attached housing units frequently known as "townhouses." In general, an owner of a condominium unit does not own, in individual fee, the ground under his or her unit, in contrast to the owner of a home in a planned single-family home development.

In a housing cooperative, the entire property is owned by a cooperative corporation, and the members of the cooperative own shares of stock in the corporation and hold leases that grant occupancy rights to their residential units. Housing cooperatives usually, but not always, are situated in apartment buildings. In the United States, the cooperative form of housing ownership is exceedingly rare, and is largely confined to owner-occupied apartment buildings in New York City.

The foregoing legal typology is made more complex by the fact that condominium units sometimes can be found in planned developments, wherein the development contains a mix of planned single-family detached homes and condominium multifamily units.

For purposes of this article, the typology of legal ownership of common-interest property is less important than a broad characterization of community associations as either "territorial" or "nonterritorial." *See* U.S. ADVISORY COMM'N, *supra* note 1, at 11–12 (adopting and explaining typology of "territorial" versus "nonterritorial" community associations). As noted above, some associations are geographically limited to a single high-rise apartment building. These are nonterritorial associations, which are owned either in the form of either a condominium or a housing cooperative. Other associations manage a significant amount of real estate. These *territorial* community associations most frequently encompass planned single-family home associations, but may include, in whole or in part, dwelling units subject to the condominium form of ownership. Territorial community associations exercise authority over a network of streets, parking lots, open space, and recreational facilities. Like municipalities, territorial community associations typically provide services such as street cleaning, trash collection, maintenance of open space, and security. Territorial community associations also exercise extensive land use powers traditionally associated with the municipal zoning and police-power authority, such as review of proposed home alterations and enforcement of rules governing home occupancy. *See id*.

As further described in the text above, this article is exclusively concerned with *territorial* community associations. *See infra* text accompanying notes 24–26.

9. U.S. ADVISORY COMM'N, *supra* note 1, at 27.

10. Community Associations Institute, *Community Associations Factbook 1988*; Community Associations Institute, *Community Associations Factbook 1993*; Community

In the largest metropolitan areas, more than 50 percent of new home sales are connected to a community association.[11] Most new residential development in the fastest growing southern and western states is subject to governance by a community association.[12] Indeed, "[i]n many rapidly growing areas, . . . *nearly all* new residential development is within the jurisdiction of residential community associations."[13] The number of community associations presently exceeds the number of municipalities by a factor of *eight* to one.[14]

As one might expect, any social change of this magnitude[15] cannot possibly be attributed to any one single causative factor. The transformation of United States housing and community development since 1960 is, without question, the product of the interplay of many significant forces within, and outside of, the housing marketplace.[16] Broadly speaking, these forces may be characterized as economic, demographic, and legal/political.

The economic and demographic factors shaping the United States housing market since 1960 are well-known. Land prices in the developing suburbs have skyrocketed, thereby placing the dream of a suburban

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Associations Institute, *Community Associations Factbook 1998*, www.caionline.org/about/facts.cfm (last visited Sept. 17, 2006). Because the U.S. Census Bureau does not maintain data on the number of individuals or housing units subject to community association governance, no authoritative and comprehensive database on the subject exists. The membership lists and estimates of the Community Associations Institute (CAI), an industry trade association, generally have been considered the most reliable sources of information on the extent of community associations in the United States. *See* ROBERT JAY DILGER, NEIGHBORHOOD POLITICS: RESIDENTIAL COMMUNITY ASSOCIATIONS IN AMERICAN GOVERNANCE 18 (1992).

11. *See* DILGER, *supra* note 10, at 18; *see also* TRACY M. GORDON, PLANNED DEVELOPMENTS IN CALIFORNIA: PRIVATE COMMUNITIES AND PUBLIC LIFE 3 (2004) (noting that, in California, association-related housing constituted 60 percent of housing starts in the 1990s).

12. *Id*. at 18; MCKENZIE, *supra* note 2, at 11.

13. U.S. ADVISORY COMM'N, *supra* note 1, at 3 (emphasis added).

14. As of 2002, there were 35,937 general-purpose local governments in the United States (excluding counties). U.S. Census Bureau, 2002 Census of Governments 2, *available at* http://ftp2.census.gov/govs/cog/2002cogprelim-report.pdf. As of 2006, there were an estimated *286,000* community associations in existence in the United States. Community Associations Institute, *Community Associations Factbook 2006*, www.caionline.org/about/facts.cfm (last visited Sept. 17, 2006).

15. In the following passage, Tracy Gordon provides another perspective of the potential magnitude of the social, economic, and political change effected by the recent explosive growth in the number of community associations in the United States:

> To put this trend in perspective, compare the growth of [community associations] to the trend of suburbanization more generally. Since 1970, common interest developments have grown faster than the suburbs as a share of all housing units in both California and the United States. This growth rate exceeds the pace of suburbanization during the peak years of 1940 to 1960 by a factor of five. Although a vast literature has explored the social, economic and political implications of suburbanization, the consequences of this most recent transformation are largely unknown.

GORDON, *supra* note 11, at 3.

16. *See infra* text accompanying notes 17–23.

home on an individual lot out of the reach of a substantial portion of the middle-class suburban homebuying market.[17] Thus, for many middle-class families, yesterday's "starter home" in the suburbs is today's condominium "townhouse," the latter a form of housing that, by definition, requires a community association.[18]

Then too, entirely new housing markets for retirees and "empty nesters" have arisen, and these classes of homebuyers frequently prefer a package of private amenities that are most commonly offered by private communities.[19] As to the traditional suburban homebuying market—families with young children—the average family size has decreased,[20] with the consequence that many of these homebuyers do not want, nor need, a traditional suburban single-family home on a large lot. Furthermore, many suburban homeowners today—even those who could otherwise afford a traditional home—may lack the time or inclination to undertake traditional home maintenance, and thereby perceive significant value if a portion of traditional maintenance is assumed by a community association.[21]

Finally, even before the events of September 11, 2001, heightened security concerns motivated some homebuyers to purchase homes in so-called "gated communities,"[22] a form of community that necessarily is managed by a community association. Although no conclusive social science data is available, it can be expected that, in the post-9/11 world, the market for gated communities will be robust into the foreseeable future.

Some of the foregoing economic and demographic factors are pertinent to the widespread conversion, in recent decades, of rental apartments to condominium apartments; to the contemporary construction of condominium apartment buildings that, in a previous era, might have taken the form of rental apartment buildings; to the construction of condominium "row houses" or "town houses" that, in a previous era, might have taken the form of either rental "garden apartments" or two or three-family homes (i.e., owner-occupied in one unit and the tenant-occupied in the remaining unit(s)). These new forms of medium- and

17. MCKENZIE, *supra* note 2, at 81–82.

18. As to a description of the condominium form of ownership—and the statutory requirement that the common areas of a condominium be subject to control by a property owners' association. *See supra* note 8 and *infra* text accompanying note 27.

19. *See* PATRICK J. ROHAN, HOME OWNER ASSOCIATIONS AND PLANNED UNIT DEVELOPMENTS—LAW AND PRACTICE FORMS § 3.02(1)(9a), at 3–27 (2005) [hereinafter ROHAN I].

20. *See id*.

21. *See id*.

22. As of 1997, there were an estimated 20,000 "gated" communities, which contained an estimated 3 million housing units and 8.4 million people. EDWARD J. BLAKELY & MARY GAIL SNYDER, FORTRESS AMERICA: GATED COMMUNITIES IN THE UNITED STATES 3 (1997).

high-density housing involving common interest forms of ownership were largely made possible by the broad enactment in the 1960s of statutes authorizing, for the first time, the condominium form of ownership, a form of ownership that was unknown at common law. [23]

But although the "condo-ization" of many sectors of the housing market that previously were exclusively rental (or were owner-occupied without benefit of a horizontal property regime) was a critical development in housing law and policy over the past fifty years, that phenomenon alone does not fully explain or define the explosive growth in the number of community associations. According to the most authoritative estimates, the condominium form of ownership (along with the closely related cooperative form of ownership) accounts for roughly 50 percent of the overall number of community associations.[24] The balance of community associations—that is, approximately 140,000 community associations in the United States as of 2006—is found in planned single-family tract housing developments, that is, developments that are spread over a substantial amount of real estate and which include networks of streets and open space.[25] This form of community association is variously known as territorial community associations, planned community associations, or private communities.[26] This form of community association—and its reasons for being—are the exclusive subject of this article.

It is instructive to contrast the factors influencing a decision to establish a community association in a planned single-family tract housing development with the factors influencing a decision to establish a community association in other forms of housing. By way of background, most *condominium* development, by definition, encompasses horizontal property regimes—that is, the condominium form of ownership arises by virtue of a decision to allocate fee ownership to spaces spread across three dimensions.[27] Examples include townhouse developments and high-rise apartment buildings. In these forms of development, the need for a community association arises as a necessary corollary to the horizontal

23. Before 1960, the condominium form of ownership was unknown in the United States. Beginning in the early 1960s, the states began enacting statues authorizing the condominium form of ownership, principally in response to the enactment of the National Housing Act of 1961, which extended Federal Housing Administration mortgage insurance to the condominium form of ownership. *See* McKENZIE, *supra* note 2, at 95. By 1967, all fifty states had enacted condominium statutes. *Id*. at 95–96.

24. Community Associations Institute, *Industry Data*, http://www.caionline.org/about/facts.cfm (last visited Sept. 17, 2006); *see also* DAVID A. KAHANE, A BILL OF RIGHTS FOR HOMEOWNERS ASSOCIATIONS 8 (2006) (noting that AARP's Public Policy Institute estimated that 58 percent of all association-related housing units are situated in planned single-family home developments).

25. *See id*.

26. U.S. ADVISORY COMM'N, *supra* note 1, at 11–12.

27. *See supra* note 8 and accompanying text.

property regime *itself* ; that is, the need for the condominium owners to collectively manage the "common elements" of the horizontal property regime, such as lobbies, stairways, building facades, and yards.

In contrast, the "need" for a community association in a single-family tract housing development does not arise implicitly from the form of the development itself. On the contrary: the weight of history and tradition in the United States militates strongly in favor of fee simple ownership of each single-family home,[28] unencumbered by a complex private servitude regime that establishes binding limitations and restrictions on the use and enjoyment of property and establishes a community association to, among other things, control and manage those restrictions and limitations.

Thus, the rapid growth in the number of territorial community associations in planned single-family housing developments cannot be explained by a decision to construct a particular form of housing where a community association is a necessary corollary to the form of housing itself. In this context, the establishment of a community association is undoubtedly driven by exogenous, not endogenous, factors.

The market and demographic factors affecting the enormous recent growth in the number of private residential communities encompass some, but not all, of the exogenous factors previously noted, including, most importantly, (1) the preference of some homebuyers for a package of private amenities that can be offered by community associations; and (2) the preference of some homebuyers for heightened private security for an entire neighborhood—including gates and guardhouses—a form of amenity that can only be offered in a private community.[29]

But, as argued herein, these market preferences (and the underlying social, economic and demographic trends that have produced these preferences)—vitally important as they are—cannot fully explain the transformation of American suburban single-family homebuilding in the space of the past two generations from almost exclusively traditional homes on separate individual lots owned in fee simple with frontage on a public street to homes in private communities subject to community associations and with frontage on private streets (the latter of which may be either open to the public or closed to the public behind gates and guardhouses). Most obviously, the role of the legal regime both before and during the transformation has to be considered in this context, if only because, in the pervasively regulated arena of land use and housing, a change in the homebuilding/homebuying "market" of this magnitude could not take place unless the legal regime was

28. As previously noted, association-related housing in the United States was exceedingly rare before 1960. *See* U.S. ADVISORY COMM'N, *supra* note 1, at 27.

29. *See supra* notes 17–23 and accompanying text.

altered so as to permit such change. For this reason alone, the interaction between the legal regime and the "market" can hardly be ignored.

But even this consideration—important as it is—does not exhaust the role of the legal and political system in bringing about the change. That is because substantial evidence[30]—including, quite literally, the text of laws and ordinances—supports the conclusion that government regulators of land use did not merely *permit* the change to occur by way of modification of existing land use rules. In fact, the role of government has been to *require* the change—in the special context of the development of new subdivisions—*for local government's own compelling reasons that have little to do with the "market" itself*. This phenomenon generally has received only passing reference in the scholarly literature.[31]

30. For a comprehensive discussion of the substantial evidence that supports this proposition, see *infra* text accompanying notes 35–81, wherein evidence is presented from an historical perspective, and see *infra* text accompanying notes 82–135, wherein contemporary evidence is presented in the form of actual language from selected municipal codes and in the form of first-hand accounts of subdivision developers and local government officials.

31. For example, Professor Evan McKenzie, in the seminal work on the rise of homeowners associations, contended that it was "no accident" that community associations began to proliferate in the 1970s, a period in which local governments were contending with increased demands for services, reduced federal aid, and burgeoning tax revolts. It was "no accident," according to Professor McKenzie, because a local government land use policy encouraging (or even requiring) the establishment of community associations represents (from the perspective of the local government) a seemingly ideal response to countervailing pressures to accommodate development and to restrain the growth in municipal outlays. MCKENZIE, *supra* note 2, at 178; *see also* JAMES C. DOWDEN, A GUIDE FOR PUBLIC OFFICIALS 42 (1980) (noting that "[i]t is clear that in many instances homeowner associations have been created in cluster or PUD communities primarily for the purpose of meeting local government requirements to deliver services such as maintenance of private roads, streets and open areas"); Gregory Longhini & David Mosena, *Homeowners Associations: Problems and Remedies*, American Planning Association Advisory Service Report #337, at 2 (noting that "[l]ocal governments find private cluster subdivisions attractive because of lower public service and maintenance costs. Since the public will not assume ownership of streets and utilities, it is believed overall future maintenance costs will be reduced for local governments"); COMMON INTEREST COMMUNITIES: PRIVATE GOVERNMENTS AND THE PUBLIC INTEREST 11 (Stephen E. Barton & Carol J. Silverman eds., 1994) (noting that "[m]any local government responded [to increasing fiscal constraints] by *requiring* the developer to provide such infrastructure as streets, street lighting, water and sewer lines, parks, playgrounds and parking areas. Making these facilities remain privately owned, with a mandatory homeowners association that is responsible for maintenance, further reduces costs to local government") (emphasis added); JILIA LAVE JOHNSTON & KIMBERLY JOHNSTON-DODDS, COMMON INTEREST DEVELOPMENTS: HOUSING AT RISK? 11 (2002) (noting that "[l]ocal governments wanted to avoid the costs of new infrastructure. [The establishment of] CIDs effectively transferred these costs from [the local government] general fund to the developer").

To this list of distinguished scholars an additional, somewhat unlikely source, may be added: the Community Associations Institute (CAI), the industry trade association. On its website, CAI notes that "[c]ommunity associations have become increasingly popular because they . . . help meet increased demand for privatization of services as public officials off-load services that were traditionally provided by government, e.g., trash pick-up, snow removal, landscaping, street lighting, street and sidewalk maintenance." Community Associations Institute, *Data on U.S. Community Associations*, http://www.caionline.org/about/facts (last visited Sept. 17, 2006). I term CAI an "unlikely source," because, as documented by Professor McKenzie, CAI is well-known for protecting the

The critical and generally unrecognized role that local governments have played in the establishment of community associations derives from the plenary authority exercised by municipalities over the use and development of land within their jurisdictions. As more generally discussed in Part II, *infra*, municipalities have been accorded broad powers over land development through zoning, subdivision regulations, and the issuance of building permits. Under this broad authority, local governments, beginning in the 1960s, adopted planned unit development zoning amendments, commonly known as PUDs, in which subdivision developers were afforded greater flexibility in design and construction, including the right to construct higher densities of residential units than would otherwise be permitted under conventional zoning regulations.[32] Significantly, the regulatory flexibility available under the PUD approval process also serves as one basis for many municipalities to encourage or to require developers to establish community associations as a means of operating and maintaining infrastructure that otherwise would be the responsibility of the local government. Thus, for a developer to win PUD approval and its attendant economic benefits, the developer may have little choice but to acquiesce to a municipality's preference for community association control of subdivision infrastructure. In this way, local governments draw on their plenary authority over land use in order to transfer responsibility for municipal services and facilities, thereby minimizing their own cash outlays and maximizing their own net reserves from an expanded tax base.

As previously noted, a few scholars such as McKenzie[33] and Barton and Silverman[34] have put forward the proposition that the broad-based adoption of the community association as a privatized form of local government is, to some degree, a manifestation of certain policy choices made by state and local government. These scholars, however,

interests of the industry. *See* MCKENZIE, *supra* note 2, at 106–20. The interests of the industry are not necessarily furthered by a candid acknowledgement that the establishment of a community association is not an entirely market-driven phenomenon but rather is, to a great extent, the product of policy decisions made by local government officials. The above-quoted statement of CAI is particularly credible as a statement that, in a litigation context, might be characterized as a "declaration against interest."

32. ROHAN I, *supra* note 19, § 3.01[3], at 3-9 to 3-10, and n.26 ("Likewise, with the escalating cost of housing in recent years, . . . PUDs are seen as away of lowering the cost of development by providing economies of scale and density bonuses to developers. . . . From the standpoint of property owners and developers, PUDs generally allow a greater return on investment.").

33. MCKENZIE, *supra* note 2, at 11–12, 178.

34. Barton & Silverman, *supra* note 6, at 11. For an enumeration of other scholars and commentators who have noted in passing this proposition, *see supra* note 31.

have not attempted to support this proposition through a detailed examination of the historical development of the PUD concept or of exaction policy, and the practical application of these policy innovations in contemporary municipal land use decision making. Nor has there been any examination of the local land use legal regimes in effect in high-growth areas that are giving rise to unprecedented numbers of new private residential communities.

In an effort to partly fill this gap in the literature and in the scholarly commentary, I address, in Part II, the historical roots of the municipal authority to privatize new communities. In Part III, I consider substantial and direct evidence—i.e., the text of actual municipal ordinances—that lends further support to the proposition that the rise of the territorial community association as the standard template for new community development in the fastest growing areas of the United States is a partial consequence of local government land use policy and, in particular, of privatization decisions made by local government in the land use review process.

III. The Historical Roots of the Municipal Authority to Privatize New Communities

A. *Zoning and the Rise of the "Planned Unit Development" Concept*

In order to fully understand the public role in the broad-scale adoption of community associations as a form of privatized local government, it is necessary first to survey the history of zoning in the United States. As will be shown, the municipal power to transfer services and functions to private entities has, as its root, the plenary zoning powers granted to municipalities by state legislatures early in the last century.

The public classification of land use by geographic districts—and the regulation of the height and bulk of structures within those districts—is of relatively recent origin. Comprehensive municipal zoning was unknown in the nineteenth century. The first municipal zoning ordinance was adopted by New York City in 1916.[35] Six years later, the U.S. Department of Commerce published the highly influential Standard State Zoning Enabling Act ("the Model Act"),[36] which for decades thereafter served as the template for municipal zoning in the United States.

Zoning's transition from policy innovation to law, and from model law to universal law, was accomplished with extraordinary speed. By 1926,

35. William H. Nelson, Zoning and Property Rights 8 (1977).
36. Standard State Zoning Enabling Act (rev. ed. 1926), *reprinted in* Zoning and Land Use Controls § 53B.02 (Eric Kelly ed.).

every state had adopted the Model Act, almost all without substantial modification.[37] Also in 1926, the Supreme Court, in the seminal decision of *Village of Euclid v. Ambler Realty Co.*,[38] upheld the constitutionality of a zoning scheme based on the Model Act. The *Euclid* decision—together with the state enabling acts—cleared the way for widespread adoption and application of zoning by thousands of municipalities. That widespread adoption, in fact, occurred within a decade.[39]

The *Euclid* decision became the touchstone for zoning: to this day, the form of zoning that was embodied in the Model Enabling Act and that was before the Supreme Court in *Euclid* is known as Euclidean zoning, and remains a prevalent form of zoning in the United States.[40] It is instructive to consider the principal attributes of Euclidean zoning, because the conceptual limitations of those attributes laid the seeds for the planned unit development concept, which, in turn, made possible the rise of community associations.

Under Euclidean zoning, municipalities adopt precise requirements for land use, lot size, and structure placement within specified zoning districts, and mandate that all future developments adhere to these criteria. In general, Euclidean zoning did not contemplate the consideration of proposed complex developments in any way other than lot-by-lot application of rigid requirements of use, lot configuration, and structure replacement.[41]

After World War II and the rapid suburbanization that followed, Euclidean zoning was put to the test as never before. In the first twenty years of the post-war period, the basic precepts of Euclidean zoning remained remarkably unchanged. Writing in 1965, Professor Jan Krasnowieki, a leading land use scholar, observed that Euclidean zoning "offers the residential developer nothing better than the 'cookie cutter' with which to create a community."[42] The lot-by-lot approach of Euclidean zoning

37. JULIAN C. JUERGENSMEYER & THOMAS E. ROBERTS, LAND USE PLANNING AND CONTROL LAW 46 (1998) [hereinafter JUERGENSMEYER & ROBERTS].

38. 272 U.S. 365 (1926).

39. JUERGENSMEYER & ROBERTS, *supra* note 37, at 46.

40. *See generally* Michael Allan Wolf, *The Prescience and Centrality of* Euclid v. Ambler, ZONING AND THE AMERICAN DREAM, 253 (Charles M. Haar & Jerold S. Kayden, eds., 1989) ("Sixty years after the Court's approval of zoning, *Euclid* endures as substance and symbol, despite waves of demographic, economic and political change"); ROHAN I, *supra* note 19, § 2.02, at 2-6, 2-7 (2004) ("Zoning's origins have more than historical significance. This country's land use regulatory approach is fundamentally the same as it was when zoning regulations were conceived").

41. ROHAN I, *supra* note 19, § 2.02, at 2-6, 2-7.

42. Jan Z. Krasnowiecki, *Planned Unit Development: A Challenge to Established Theory and Practice of Land Use Control*, 114 U. PENN L. REV. 47 (1965).

resulted, for the most part, in barren and homogenous suburbs, such as Long Island's famous Leavittown, wherein homes, streets and supporting infrastructure were laid out in monotonous grids that were devoid of open space, or any variation in housing type or density.[43]

Then too, Euclidean zoning, by its very nature, is exceedingly wasteful of land, a fact which contributed, whether by intent or merely by effect, to the well-known exclusionary effect of zoning generally.[44] Land is typically the largest single cost component in the market price of a new suburban single-family home, particularly a home subject to the minimum lot requirements of Euclidean zoning.[45] Because the regulation of minimum lot size is a staple of Euclidean zoning and because many developing suburbs in the post-war era tended to entirely exclude apartment construction, the Euclidean model, as practiced in the mid-twentieth century, all

43. *See* KENNETH T. JACKSON, CRABGRASS FRONTIER: THE SUBURBANIZATION OF THE UNITED STATES 235–37 (1985).

44. The inherently exclusionary effect of traditional zoning was presciently recognized by the Supreme Court in the landmark *Euclid* decision that settled the constitutionality of zoning. *See* Vill. of Euclid v. Ambler Realty Co., 272 U.S. 365, 390 (1926) ("The serious question in this case arises over the provisions of the ordinance *excluding* from residential districts apartment houses, retail stores and shops, and other like establishments. This question involves the validity of what is really the crux of the most recent zoning legislation, namely, the creation and maintenance of residential districts from which business and trade of every sort, including hotels and apartment houses, are *excluded*." (Emphasis added.)).

Even more prescient with respect to the inherently exclusionary nature of traditional zoning is the following observation by the lower court in *Euclid*:

> The plain truth is that the true object of the ordinance in question is to place all the property in an undeveloped area of 16 square miles in a straight-jacket. The purpose to be accomplished is really to regulate the mode of living of persons who may hereafter inhabit it. In the last analysis, the result to be accomplished is to classify the population and segregate them according to their income or situation in life. The true reasons why some persons live in a mansion and others in a shack, why some live in a two-family dwelling and others in an apartment, or why some live in a well-kept apartment and others in a tenement, is primarily economic. It is a matter of income and wealth. . . .

Vill. of Euclid v. Ambler Realty Co., 2297 F. 307, 316 (N.D. Ohio 1924), *rev'd*, 72 U.S. 365 (1926). Fifty years after the lower court in *Euclid* bluntly stated—and accurately predicted—the exclusionary effects of exclusionary zoning, the New Jersey Supreme Court, in its famous *Mount Laurel* decision, endeavored to undo the worst exclusionary effects unleashed by the United Supreme Court in *Euclid*. *See* S. Burlington County NAACP v. Township of Mount Laurel, 336 A.2d 713 (1975). New Jersey's *Mount Laurel* experiment, although widely recognized, has not been followed in other states. *See* Joe R. Feagin, *Arenas of Conflict: Zoning and Land Use Reform in Critical Political-Economic Perspective*, ZONING AND THE AMERICAN DREAM 86 (Charles M. Haar & Jerold S. Kayden eds., 1989).

In any event, the replacement of Euclidean zoning with PUD zoning may have, in some cases, partly ameliorated these exclusionary effects (in that PUD zoning made available a greater variety of housing types, including cluster housing, than otherwise would be available as-of-right under many suburban zoning codes), but did not, by any means, resolve the inherently exclusionary effects of zoning generally.

45. *See* MARTIN MAYER, THE BUILDERS: HOUSES, PEOPLE, NEIGHBORHOODS, GOVERNMENTS, MONEY 13 (1978).

but ensured that a substantial portion of the population could not afford to live in the developing suburbs.

From the developer's perspective in the early post-war years, the shortcomings of Euclidean zoning were not a perceived problem. In those years, the relatively large amounts of vacant developable land in most metropolitan areas ensured that developers could build homes on large lots—consistent with the strictures of Euclidean zoning—and the resulting housing could be priced so as to be affordable to a large segment of the middle-class housing market while ensuring developers a substantial profit.[46] But, by 1960, skyrocketing prices for the remaining amounts of close-in developable land in suburban areas meant that both developer profitability and housing affordability for even the middle-class were at serious risk.[47]

The planned unit development concept provided one means to address some of the design and aesthetic shortcomings of Euclidean zoning, as well as the harsh realities of land economics that, as noted, by 1960 were pricing new suburban housing out of the reach of an increasingly larger portion of the middle class. In essence, the planned unit development concept is premised on a rejection of the lot-by-lot approach to zoning, and, in its place, the adoption of an approach based on a review and approval of an entire subdivision (or neighborhood or even town). Euclidean zoning's paramount concern over the issue of residential density would not be forsaken; instead, the focus of the limitation on density would shift from the individual lot to the entire development.

This shift in focus from the individual lot to the entire development effectively opened up planning and design options for new subdivisions that generally were not available under Euclidean zoning. For example, under a Euclidean zoning scheme, the inclusion of common open space in a proposed development would reduce the permissible lot count, meaning that the developer's profit thereby would be reduced. Under a Euclidean regime, then, it would be expected that a developer would seldom provide common open space,[48] unless such open space were otherwise required by the municipality. But, under a planned unit development approach, the assurance of a minimum residential density across the entire development makes possible a "clustering" of residences, thereby freeing-up acreage for common open space.[49]

46. McKenzie, *supra* note 2, at 85–88.
47. *Id*.
48. Juergensmeyer & Roberts, *supra* note 37, at 231.
49. Krasnowiecki, *supra* note 42, at 47–48.

Moreover, the planned unit development concept, at least in theory, permits a developer to arrange residences on a site in a manner that takes into account site-specific environmental conditions.[50] Whereas a Euclidean zoning regime—absent stringent environmental or site-planning controls—frequently creates a strong incentive for a developer to obliterate a site's unusual topographic features or existing vegetation as part of the developer's quest to maximize unit count and resulting profitability.[51]

The planned unit development concept can be understood as a form of "grand bargain" between developers and municipalities: *overall* densities under the Euclidean regime would be maintained—typically a key concern of the municipality—but site planning flexibility would be introduced that would enable the developer to, among other things, reduce the land cost per housing unit as a component of each unit's sale price.[52] The grand bargain offered the prospect that the monotonous "cookie-cutter" approach that characterized much of early post-war suburban development could be replaced by more site-specific community planning that would enable the developer to preserve environmental features of the site, to increase housing affordability through diverse housing types and densities, and to build-in community open space into the design of the community.

Although the 1960s-era grand bargain of the planned unit development concept appeared to offer a "win-win" for the suburban municipality and the subdivision developer (and, by extension, for the future homeowners of the subdivision), the planned-unit development concept also contained another significant element that would, as matters turned out, inure to the detriment of the developer and, ultimately, the homeowners. That additional element can be said to arise from the key premise of the grand bargain: that is, the fact that the increased density of individual residences made possible the freeing-up of open space

50. *See* Orinda Homeowners Comm'n v. Bd. of Supervisors, 11 Cal. App. 3d 768, 774–75 (Ct. App. 1970) (discussing the potential for the PUD concept to preserve natural features of the land, while still accommodating the same level of density as under traditional lot-by-lot zoning).

51. ROHAN I, *supra* note 19, § 3.02, at 3–29.

52. *See* E.C. YOKLEY, ZONING LAW AND PRACTICE § 6-1 (4th ed. 1978) ("Land owners generally like PUDs. They allow development of properties that under ordinary zoning would yield less density and therefore lower profits."); PATRICK J. ROHAN, ZONING AND LAND USE CONTROLS § 12.01(3)(ii) (Lori A. Hanser ed., Mathew Bender 1991) [hereinafter ROHAN II] ("Among the most significant benefits of the clustering device [i.e., PUDs] are the economic savings that can be generated for both the developer and the community"). For further discussion of the relationship of the PUD form of zoning to the promotion of affordable housing—and how public service exactions serve to undercut that relationship—*see* Part IV.C., *infra*.

within the subdivision. From this freeing-up of open space, the question arose: who (or, more precisely, what entity) would be responsible for maintaining the open space? There were only three possible answers: the municipality itself, the developer or an entity created by the developer and passed on, in some fashion, to the future homeowners.

At the inception of the planned unit development concept and continuing through to the present, it was—and remains—the developer-created entity that became the favored vehicle to assume responsibility for the operation and maintenance of the open space.[53] Thus, for example the Federal Housing Administration, in a highly influential publication released in 1963, recommended the establishment of a "homes association" in connection with a planned unit development.[54] Since the FHA's "recommendations" were backed by the promise of FHA mortgage insurance, developers and lenders took the "recommendations" very seriously. The FHA publication makes clear that a homes association is to be preferred over a public entity "because public maintenance of common properties may encourage heavy public use which can adversely affect the residents of the subdivision."[55]

In any event, the early and decisive movement towards the requirement that a developer-created entity—and not a public entity—be entrusted with the operation and maintenance of the open space in planned unit developments is only the beginning, and not the end, of the movement toward municipal privatization of traditionally municipal functions and services through the vehicle of the community association. In retrospect, the more important point is that the movement toward the establishment of community associations to operate and maintain the *open space* contained in planned unit developments became a springboard for a broader movement aimed at privatizing other traditionally municipal functions and services[56]—a movement that, it will be argued

53. McKENZIE, *supra* note 2, at 85–88.

54. U.S. FEDERAL HOUSING ADMINISTRATION, PLANNED UNIT DEVELOPMENT (1963). *But see* Stanley Scott, *The Homes Association: Will "Private Government" Serve the Public Interest?*, (1967), *reprinted in* BARTON & SILVERMAN, *supra* note 6, at 19–29 (questioning the assumptions underlying the influential FHA report recommending the establishment of community associations to maintain common property in planned unit developments); NORMAN WILLIAMS, JR. & JOHN M. TAYLOR, AMERICAN LAND USE PLANNING LAW § 48, at 230 (rev. ed. 2003) ("[T]raditionally, the provision of common open space has been a municipal function. Widespread use of cluster zoning [coupled with the resulting open space given over to developer-created community associations] would result in abdication of this important municipal function").

55. *Id*. at 4.

56. Examples of such other municipal functions and services include street maintenance, sewer service, water supply, drainage, curbside refuse collection, parks, and even traditional police patrols of public streets. *See* U.S. ADVISORY COMM'N, *supra* note 1, at 13.

here, was fueled as much by the municipalities themselves, in the exercise of their land use powers and in furtherance of their own cost-cutting objectives, as by so-called "market forces."

To understand why this is so, it is important to recognize just how radically the PUD concept altered the ground rules and the dynamics of traditional land use regulation.[57] In essence, the new PUD concept sent a powerful message to developers and lenders that the parameters—and hence the economics—of a medium or large subdivision development were open to negotiation with the municipality. Intrinsic to the PUD concept is a bargaining process where even the rules of bargaining were not fixed in advance. The PUD process is premised on a *tabla rosa* of community design, with the final "plan" of development to be determined jointly by the municipality and the developer. From the very inception of the PUD concept in the 1960s, it was widely recognized, by proponents and critics alike, that the PUD zoning model granted substantial, largely unfettered, discretion to municipalities.[58]

57. The "institutionalized bargaining" implicit in the PUD concept stands in stark contrast to the traditional Euclidean model of zoning, wherein the design of the future development was largely determined in advance by rigid and predetermined lot, bulk, and setback requirements. Although alteration of the Euclidean zoning scheme was always possible through mechanisms such as variances, special permits and amendments, those mechanisms were often cumbersome and the outcome of the process frequently uncertain. In many cases, that uncertainty precluded all but the most well-financed and established developers from seeking, for example, an amendment to a zoning ordinance. For smaller-scale developers seeking to build speculative housing using borrowed money, the delay associated with a zoning change could effectively make the proposed development project unfeasible.

58. *Compare* Krasnowiecki, *supra* note 42, at 77 (early influential advocate of the PUD concept; argued that "[c]ourts might simply stop worrying whether a relaxation of [land use] regulations [implicit in the PUD concept] represents a rational and honest judgment on the part of local authorities so long as nobody is individually and seriously injured thereby"); NORMAN WILLIAMS, JR., AMERICAN PLANNING LAW: LAND USE AND THE POLICE POWER § 48.02, at 228 (1974) (noting that "[t]he trouble" with the PUD concept is that "the actual decisions on land use and building forms in the district, and perhaps also on density, are explicitly to be made, not by a general public policy adopted in advance, but by negotiation between the municipality and the developer").

Some court decisions of the 1960s viewed with skepticism the nascent PUD concept as *ultra vires* under state law in the absence of express statutory authority, especially when the designation of a PUD was implemented by way of administrative action of a planning board, as distinct from a legislative amendment to the zoning ordinance. *See, e.g.*, Hiscox v. Levine, 216 N.Y.S.2d 801, 806 (N.Y. Sup. Ct. 1961) (holding that action of municipal planning board approving PUD-type development was *ultra vires* because Planning Board's action amounted to an impermissible exercise of legislative power as well as an exercise of standardless discretion); Eves v. Zoning Bd. of Adjustment, 164 A.2d 7, 11–13 (Pa. 1960) (holding that municipal rezoning that contemplated a PUD-like designation was *ultra vires* because not authorized by the enabling legislation). Some of the difficulties identified in the early court cases were largely resolved when state legislatures subsequently enacted PUD enabling acts and when courts began to take note of favorable law review commentary advocating the PUD concept. *See* Frankland v. City of Lake Oswego, 517 P.2d 1042, 1047 (Or. 1973) (upholding municipality's authority

For example, Professor Patrick Rohan, the author of a leading treatise on planned unit developments, has characterized the PUD process as a form of "institutionalized bargaining" between the municipality and the developer, wherein there may "exist an opportunity for governments to use their broad discretion in land use matters to extract overarching concessions in the negotiating process from PUD applicants."[59] Others have characterized the "bargaining" process implicit in the PUD concept even more broadly:

> The key to the operation of flexible [PUD] zoning is that very little is required in the way of specific standards for site layout. Gone are the detailed requirements for lot sizes, yard requirements, building spacing, and the like. What is now required instead is an open-ended process of review and negotiation with administrative bodies . . . having substantial discretionary authority to negotiate with developers over site design and related improvements. One effect of this new regulatory flexibility is to make land use decisions far more administrative in nature and characterized by greater amounts of bargaining. Whereas the development process was freed of the rigidity of the classical zoning regulations, *now virtually all of the details of the site design and required improvements became subjects for negotiation*.[60]

Because the PUD concept enabled "virtually all of the details of the site design and required improvements [to] become subjects for negotiation,"[61] municipalities effectively were empowered to use the PUD approval process to achieve objectives that were not necessarily limited to the traditional narrow concerns of zoning in respect to the use, bulk, and density of proposed development. Almost inevitably, other municipal concerns—such as municipal cost or burden sharing—became interwoven into the culture of the "institutionalized bargaining" process.

Against this background, the early and decisive trend in PUD planning that lead toward the establishment of community associations—as a mechanism to operate and maintain the PUD open space—should be assessed and placed in context. Even leaving aside the immediate question of whether community associations were, in many cases, the optimal mechanism to operate and maintain *open space* in new planned communities,[62]

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to employ PUD technique); Cheney v. Vill. 2 at New Hope, Inc., 241 A.2d 81, 87–88 (Pa. 1968) (same). Note, however, that PUD enabling acts resolved one aspect of the problem—the lack of express statutory authority to employ the PUD technique—but often left largely unresolved the separate issue of standardless discretion conferred on municipal officials.

59. ROHAN I, *supra* note 19, § 3.02(3)(a).

60. Louis F. Weschler, Alvin H. Mushkatel & James E Frank, *Politics and Administration of Development Exactions, in* DEVELOPMENT EXACTIONS 19 (James E. Frank & Robert M. Rhodes eds., 1987) (emphasis added).

61. *Id*.

62. *See, e.g*., NORMAN WILLIAMS, JR. & JOHN M. TAYLOR, AMERICAN LAND USE PLANNING LAW § 48, at 230 (rev. ed. 2003) ("[T]raditionally, the provision of common open space has been a municipal function. Widespread use of cluster zoning [coupled with the resulting open space given over to developer-created community associations] would result in abdication of this important municipal function.").

the much more important point is that, once the community association model became identified with the PUD concept, it was quickly realized that community associations could operate and maintain much more than open space. That is to say: the community association represented a new means to deliver a wide range of traditionally municipal services to residents of new communities. If a community association delivered those services, then the municipality need not deliver them. This basic insight initially was nowhere codified and, even at present, largely unreported;[63] but it became, beginning in the 1960s and continuing through until today, a basic organizing principle of municipal land use policy.

Stated differently, the available evidence[64] strongly supports the conclusion that once municipalities recognized that the creation of open space within a planned unit development presented the possibility of the establishment of a developer-entity to maintain the open space in the new subdivision, the establishment of the developer entity became a bargaining chip for the municipality in the PUD approval process—and a bargaining chip to be applied not just in the context of the operation and maintenance of open space, but applied, as well, in the context of other essential infrastructure, such as the construction of roads, sewers and utilities. Moreover, the widespread acceptance of the concept of the community association by the major actors in the development arena meant that the community association, in future development approvals, became a "vessel" to be filled as part of the zoning and subdivision approval process, with the "filling" to be done by parties other than those who would have a *direct* stake in the new community—that is, the future homeowners.

For a subdivision developer, the "bottom line," was simply this: to win PUD approval and its attendant economic benefits, the developer must acquiesce to a municipality's preference for community association control of subdivision infrastructure. If that meant creating a community association when the developer's original intent was not to do so, or if it meant creating a community association with far greater responsibilities over community infrastructure and services than was the developer's original intention, then the developer would have little

63. As previously noted, only a few commentators have acknowledged this critical development in land use law, and, even these commentators, for the most part, have noted the development only in passing. *See supra* note 31 and accompanying text.

64. In addition to the evidence discussed in the text above, *see also* Part III, *infra*, wherein I present examples of actual municipal codes that, by their terms, require the establishment of a community association as a condition of land use approval, and wherein I provide firsthand accounts of subdivision developers and locals government officials in respect to formal and informal municipal policies requiring the establishment of community associations as a condition of land use approval.

choice but to submit to the municipal preference for privatization of traditionally municipal infrastructure and services.

The restructuring of zoning through the PUD concept was not the only policy innovation that laid the groundwork for a local government policy aimed at expanding the tax base while minimizing the government's own costs for such expansion. Just as important was the expanding and increasingly sophisticated use of so-called "exactions" by municipalities—a policy trend that coincided with the widespread adoption of PUD zoning. As discussed below, it is the marriage of the PUD concept and municipal exaction policy that forged the essential basis for the rise of community associations as an alternate provider of traditionally municipal functions and services, and, more broadly, for the privatization of new communities in the United States.

B. *Subdivision Regulation and the Rise of Exactions*

The term "exaction" traditionally has applied to a municipal requirement that a developer, as a condition of subdivision approval,[65] dedicate land to a municipality for use as a road, a utility, or other public facility. Sometimes these mandatory physical dedications of land are accompanied by the further requirement that the developer construct a public facility, and, upon completion of construction, transfer ownership of the facility and the attendant real property to the municipality.

More recently, the concept of an "exaction" has been expanded to encompass fees that developers must pay to municipalities in lieu of dedicating facilities and real property, with the fee set aside by the municipality for the construction of the facilities—and with a view toward eventual municipal operation and maintenance of the facilities. The latter form of exaction is known as "fees in lieu of dedication," "in-lieu fees," or "impact fees."[66] In any event, whichever form an exaction takes, its distinguishing feature is that it is mandatory: a developer may not build or may not receive final approval of a subdivision unless the developer satisfies the exaction.

65. In this section, when I refer to "exactions," I am employing the term in its traditional sense, as denoting a mandatory physical dedication of land, a mandatory construction of infrastructure, or the imposition of an in-lieu fee. Unless otherwise indicated, I am *not* referring to "public service exactions"—the term that, elsewhere in this article, I have employed to denote a municipal requirement for a developer to assume responsibility for traditionally municipal services.

66. *See* DEVELOPMENT IMPACT FEES: POLICY, RATIONALE, PRACTICE, THEORY AND ISSUES (Arthur Nielson ed., 1988); Louis F. Weschler, Alvin H. Mushkatel & James E. Frank, *Politics and Administration of Development Exactions*, in DEVELOPMENT EXACTIONS 19 (James E. Frank & Robert M. Rhodes eds., 1987).

As noted, the municipal power to impose exactions initially arose as an incident of the municipal power to control the subdivision of land, not as an incident of the municipal power to zone.[67] Zoning, it will be recalled, controls the use of land, and, as such, remains important *after* the development of the land, as well as before and during development. By contrast, subdivision regulation literally controls only the development of land, since the locus of this form of regulation is the granting of permission to an owner to divide a parcel of land into smaller parcels, usually with a view to transferring the ownership of each of the smaller parcels to individual purchasers. In the context of subdivision regulation, an exaction constitutes a condition that must be satisfied before an owner will be permitted to subdivide a parcel of land.

Unlike the power to zone, the municipal power of exaction is not of recent origin. The modern form of exaction is a variation on the centuries-old practice of imposing a "special assessment" on certain specially designated real property—as distinct from a tax on all municipal taxpayers—as a means to pay for certain public improvements that are deemed to be of direct and special benefit to the designated real property.[68] In theory, the municipal decision to impose a "special assessment" represents a policy judgment that the improvement is of such a localized nature that it is more appropriately paid by the particular owners of the benefited properties than by all taxpayers. The classic example of a subject of a special assessment is the pavement or re-pavement of a neighborhood street when the street does not carry through traffic and the street serves essentially as an access road to a handful of abutting properties.

The long-standing practice of special assessments, however, differs from a modern exaction in one important aspect: a special assessment constitutes a recoupment of a municipal investment already expended. By contrast, a modern exaction transforms the property owner's payment obligation from one that is a *post-hoc* reimbursement to one that is either (1) an "advance" to the municipality to undertake the improvement at some future date; or (2) an obligation on the part of the property owner to assume not just the cost but also the responsibility to undertake the improvement, with a view toward turning the improvement

67. JUERGENSMEYER & ROBERTS, *supra* note 37, at 305–06.

68. R. Marlin Smith, *From Subdivision Improvement Requirements to Community Benefit Assessments and Linkage Assessments: A Brief History of Land Development Exactions*, 50 LAW & CONTEMP. PROBS. 5, 6 (1987); Stephen Diamond, *The Death and Transfiguration of Benefit Taxation: Special Assessments in Nineteenth Century America*, 12 J. LEGAL STUD. 201(1983).

over—i.e., "dedicating" the improvement—to the municipality upon the completion of the undertaking.

The innovation of advancing the property owner's payment obligation was born of the Great Depression, when widespread developer bankruptcies left municipalities unable to recoup monies expended for public improvements that were to have been reimbursed by special assessments upon completion of the subdivision and its improvements.[69] The birth of the modern exaction was thus a means to shift the risk—as well as the cost—of the public improvement. That is to say: under a modern exaction scheme, if a developer were to become bankrupt at some point in the construction of a subdivision, the developer's up-front payment of the cost of the improvement (or the developer's actual physical completion of the improvement as part of the construction) served to minimize the risk of loss to the municipality.

By the late 1950s, "the mandatory construction of subdivision improvements as a condition of subdivision plat approval had become the dominant method of securing such improvements."[70] A 1958 survey of 880 municipalities in the United States found that nearly 70 percent of the surveyed municipalities had adopted ordinances or regulations requiring a developer of a subdivision to install one or more types of physical improvements as a condition of subdivision approval.[71]

The adoption of exaction policy continued apace in the 1960s, 1970s, and 1980s, when the confluence of accelerating suburban out-migration, local property tax revolts, and cutbacks in federal aid to localities placed unprecedented pressure on suburban municipalities to tap new sources of revenue to finance the cost of infrastructure in developing areas.[72] Both the traditional physical-dedication exaction and the imposition of "in-lieu fees" and "impact fees" offered municipalities a seemingly ideal revenue source that would enable expansion of the tax base and the provision of essential services to new subdivisions while, at the same time, avoiding the politically perilous undertaking of passing on municipal development costs to existing residents and taxpayers.

The widespread adoption of exaction policy did not go unnoticed. In 1987, the U.S. Supreme Court constitutionalized the law of exactions. In that year, the Court held that, under the Fifth Amendment's Takings

69. JUERGENSMEYER & ROBERTS, *supra* note 37, at 306, n.13.

70. R. Marlin Smith, *supra* note 68, at 6 (citing INTERNATIONAL CITY MANAGERS ASS'N, MUNICIPAL YEARBOOK 253–60 (1958)).

71. *Id*. (citing INTERNATIONAL CITY MANAGERS ASS'N, MUNICIPAL YEARBOOK 253–60 (1958)).

72. MCKENZIE, *supra* note 2, at 178.

Clause, a public agency's imposition of a physical-dedication exaction as a condition of an issuance of a building permit or other governmental approval is subject to the existence of an "essential nexus" between the enforced dedication and some cognizable "legitimate state interest."[73] Seven years later, the Court added that a physical-dedication exaction must be "roughly proportiona[te]," both in nature and extent, to the "impact of the proposed development" upon which the exaction is premised.[74]

Even before the U.S. Supreme Court, through what became known as the "*Nollan/Dolan*" doctrine, laid down a federal constitutional limit to the municipal authority to impose exactions, most state courts already had imposed limits to municipal exaction powers as a matter of state constitutional or common law. Thus, for example, as a matter of Illinois state law, if a municipality 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."[75] Other state courts adopted a less stringent "reasonable relationship" test,[76] a test that the Supreme Court, in *Dolan*, expressly adopted as the federal constitutional standard.[77]

The Supreme Court has not yet squarely addressed the closely related question of whether the federal constitutional law of exactions applies to the monetary form of exactions—i.e., "in-lieu fees," "impact fees," and the like—as distinguished from the traditional form of exactions involving the enforced physical dedication of land, to which the *Nollan* and *Dolan* decisions were addressed. In the absence of clear direction from the Supreme Court on this issue, federal courts applying federal law—as well as state courts applying federal law in addition to their own law—have fashioned various approaches and remedies with respect to the limitations of a municipality's power to impose monetary exactions.[78]

73. Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 837 (1987).

74. Dolan v. City of Tigard, 512 U.S. 374, 391 (1994).

75. Pioneer Trust & Savings Bank v. Mt. Prospect, 176 N.E.2d 799, 802 (Ill. 1961).

76. *See, e.g.*, Simpson v. N. Platte, 292 N.W.2d 297, 301 (Neb. 1980); Coll. Station v. Turtle Rock Corp., 680 S.W.2d 802, 805 (Tex. 1984); Collis v. Bloomington, 246 N.W.2d 19, 26 (Minn. 1976); Jordan v. Menomonee Falls, 137 N.W.2d 442, 450 (Wis. 1965).

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

78. A majority of federal and state courts appear to have concluded that the validity of an exaction should not depend upon whether it is in the form of land or money. *See, e.g.*, Ehrlich v. Culver City, 911 P.2d 429, 438 (Cal. 1996) (wherein the California Supreme Court, on remand from the Supreme Court, applied the *Nollan/Dolan* doctrine to certain forms of monetary exactions). *But see* Sarasota County v. Taylor Woodrow Homes, 652 So. 2d 1247 (Fla. Dist. Ct. App. 1995) (declining to apply *Nollan/Dolan* doctrine to monetary exaction); Vill. Pond, Inc. v. Town of Darien, 60 F.3d 1273 (7th Cir. 1995) (same). *See also* ROHAN I, *supra* note 19, § 9.02[4]; Brett Christopher Gerry, *Parity Revisited: An Empirical Comparison of State and Lower Federal Court Interpretation of* Nollan v. California Coastal Commission, 23 HARV. J.L. & PUB. POL'Y 233 (1999).

Against this background, municipalities, in their ever-present struggle to tap new forms of revenue and invent new types of expense reductions, have fashioned a new species of exaction—a species, I argue, that has not yet even been recognized as an "exaction." The new species of exaction extends the concept of a traditional exaction from a mere requirement that a developer construct traditionally municipal infrastructure and then dedicate the infrastructure to the municipality to a requirement (1) that the developer construct the infrastructure, but *retain* (instead of dedicate) the infrastructure; and (2) that the developer establish a community association to operate and maintain the infrastructure in lieu of municipal operation and maintenance, and/or that the community association provide other traditional municipal functions and services in the new community.

I term this a "public service exaction," in recognition of the fact that the effect of the municipal policy is to require a developer-created entity to assume responsibility for providing a traditionally public service. Stated simply, a "public service exaction" extends the concept of an exaction from enforced gratuitous land-transfers and capital construction of infrastructure to enforced *services* as a condition of subdivision approval.

The exaction concept, when married to the PUD approval process,[79] produced, almost inexorably, the public service exaction. Still, like the emperor's new clothes, few[80] have identified—let alone put a name on—a practice that seems all too clear for those who choose to observe it.

To date, a municipality's requirement that a subdivision developer establish a community association for the purpose of providing traditional municipal services in a subdivision has never been held to be an unconstitutional or illegal exaction. At first glance, the very notion of judicially imposed limits to a public service exaction seems to run directly counter to the *Nollan/Dolan* doctrine, which, after all, is premised on the Fifth

79. PUD zoning is a marriage of zoning and subdivision regulation, either as a practical matter or (in some jurisdictions) as a matter of law. As previously noted, the PUD concept, although a radical alteration of traditional Euclidean zoning, is nevertheless almost always legally classified and denominated *as zoning*, since, like traditional zoning, the PUD concept regulates the type and intensity of land use. *See supra* notes 47–51 and accompanying text. But the PUD concept also either "closely tracks the subdivision approval process," JUERGENSMEYER & ROBERTS, *supra* note 37, § 7.15, at 328, or supersedes and subsumes the subdivision approval process, in light of the fact that a condition precedent to the application of a PUD ordinance is the existence of a parcel of a certain minimum size as to which the owner seeks approval of a proposed subdivision. ROHAN II, *supra* note 52, §§ 12.01[3], [4]; 12.04[7][a].

Thus, in this marriage of zoning and subdivision leading to the PUD concept, it was perhaps inevitable that the municipal authority to impose exactions—born of subdivision regulation—would be imported into the zoning regime.

80. For an enumeration of those scholars and commentators that have noted in passing the linkage of municipal land use policy and the rise of the community association as an alternate provider of traditionally municipal services and functions, s*ee supra* note 31.

Amendment's core concern with the *taking* of property without just compensation, not the enforced *retention* of property by a subdivision developer.

Yet, in a very practical sense, a public service exaction is the functional equivalent of a traditional exaction, once one acknowledges the existence of long-standing state-law principles of property dedication and municipal responsibility for streets and other traditionally public infrastructure.[81] Moreover, when viewed from the municipal perspective, what a municipality seeks to accomplish by way of a public service exaction is precisely the same as what municipalities have accomplished by way of traditional exactions—i.e., a maximization of revenues from an expanded tax base and a minimization of cash outlays associated with expanding and servicing that expanded tax base. And, in both cases, the means by which the municipality achieves these objectives is precisely the same: the invocation of a municipality's plenary authority over land use approvals within its territorial borders.

There is surely an outer boundary to a public service exaction, just as there is an outer boundary to a traditional exaction. In Part V, *infra*, I further explore the contours of the outer boundary to a public service exaction, and propose judicial and legislative remedies aimed at (1) establishing a more clearly delineated outer boundary; and (2) reigning in municipalities that, in particular cases, are imposing conditions on land use approvals that are supported only by the municipal *corporate* interest rather than by a more fully informed conception of the *public* interest.

IV. Empirical Evidence That the Rise of the Territorial Community Association as the Standard Template for New Community Development in the Fastest Growing Areas of the United States Is a Partial Consequence of Local Government Land Use Policy and, in Particular, of Privatization Decisions Made by Local Government in the Land Use Review Process

In the preceding sections, I traced the history of the PUD zoning concept, and how this concept evolved from a mechanism to interject

81. For further discussion of this point, *see infra* notes 181–198 and accompanying text. Note, however, that although a traditional exaction and a public service exaction are virtually identical in purpose and effect from the narrow standpoint of a municipal land use and fiscal policy aimed at off-loading municipal costs on to newcomers, the two forms of exactions, *in other and broader policy contexts*, are quite distinct. Those distinctions are not relevant to the present analysis. For a detailed discussion of those distinctions, see Part IV.B., *infra*.

greater design flexibility into the zoning approval of new subdivisions into a vehicle for municipal privatization decisions affecting traditionally municipal facilities and services. I also recounted the evolution of the concept of a municipal exaction, which traditionally has been understood to encompass certain conditions of subdivision approval, such as a gratuitous land transfer to be set aside for the construction of public streets or infrastructure, or a required private construction of infrastructure that, upon completion, is to be dedicated to the municipality. I argued that a municipal requirement that a developer establish a community association as a condition of subdivision approval—and to thereafter operate and maintain traditionally municipal infrastructure and/or to provide services to residents that are traditionally provided by municipalities—is a further refinement and expansion of the traditional exaction.

As previously noted, only a few commentators have acknowledged that local governments, through their plenary land use powers, have played a decisive role in the widespread adoption of community associations as an alternate vehicle to deliver traditionally municipal services. However, even these commentators have noted this critical development in local government law only in passing.[82]

In this section, I present some empirical evidence that the rise of the territorial community association as the standard template for new community development in the fastest growing areas of the United States is a partial consequence of local government land use policy and, in particular, of

82. S*ee e.g.*, MCKENZIE, *supra* note 2, at 178 (noting that it was "no accident" that community associations began to proliferate in the 1970s, a period when local governments were contending with increased demands for services, reduced federal aid, and burgeoning tax revolts); DOWDEN, *supra* note 31, at 42 (1980) (noting that "[i]t is clear that in many instances homeowner associations have been created in cluster or PUD communities primarily for the purpose of meeting local government requirements to deliver services such as maintenance of private roads, streets and open areas"); Longhini & Mosena, *supra* note 31, at 2 (noting that "[l]ocal governments find private cluster subdivisions attractive because of lower public service and maintenance costs. Since the public will not assume ownership of streets and utilities, it is believed overall future maintenance costs will be reduced for local governments"); Barton & Silverman, *supra* note 6, at 11 (noting that "[m]any local government responded [to increasing fiscal constraints] by *requiring* the developer to provide such infrastructure as streets, street lighting, water and sewer lines, parks, playgrounds and parking areas. Making these facilities remain privately owned, with a mandatory homeowners association that is responsible for maintenance, further reduces costs to local government") (emphasis added); JOHNSTON & JOHNSTON-DODDS, *supra* note 31, at 11 (noting that "[l]ocal governments wanted to avoid the costs of new infrastructure. [The establishment of] CIDs effectively transferred these costs from [the local government] general fund to the developer").

privatization decisions made by local government in the land use review process. In Part A below, I present illustrative municipal land use codes from high-growth areas of the United States containing express requirements that a developer establish a community association as a condition of land use approval. Recognizing that not all municipal requirements of this type are codified, I present, in Part B, anecdotal accounts of individual homebuilders and local government officials concerning the existence of informal as well as formal municipal requirements to establish community associations as a condition of land use approval.

A. *Illustrative Municipal Land Use Codes Containing Express Requirements That a Developer Establish a Community Association as a Condition of Land Use Approval*

I am not aware of any published work that points to any land use ordinance[83] as support for the proposition that local governments require the establishment of community associations as a condition of land use approval. Perhaps this curious gap in the scholarly literature is a function of the difficulty, until recently, in conveniently accessing municipal codes.

In any event, the advent of online municipal code services,[84] and the decision by thousands of municipalities to post their codes on their own official websites, has, for the first time, made possible systematic examination of this previously difficult-to-access body of law. As I describe below, community association requirements of municipal development codes are there for all to see, now that the municipal codes may be easily and conveniently accessed.[85]

83. My research discloses that the requirement that a subdivision developer establish a community association as a condition of land use approval has been implemented by way of *municipal ordinance (or by way of informal municipal policy), not by way of state statute*. For a discussion of the question of local government authority to implement this requirement in the absence of express authorization under state law, *see infra* notes 180–287.

84. Among the largest online providers of municipal codes are LexisNexis Municipal Codes Web Library, Municode.com, Generalcode.com, Amlegal.com, and Sterling Codifiers, Inc. Each service offers full text and fully searchable versions of municipal codes. LexisNexis is particularly strong in California municipal codes; MuniCode is particularly strong in Texas and Florida municipal codes; Generalcode is particularly strong in New York and New Jersey municipal codes.

85. Once before in this article I used the analogy to the "emperor's new clothes." *See supra* text accompanying note 80. That analogy seems particularly apt in this context as well.

The following are some examples of pertinent municipal code language culled from the codes of high-growth jurisdictions in Arizona, Nevada, Florida, Texas, and New Jersey—places where community association related housing is the principal form of new residential development:

—*Arizona, Maricopa County (fastest growing county in Arizona), City of Surprise*.[86] The City of Surprise Zoning Code provides that "[t]he standards and requirements of Section 17.28.280, Design List A, are mandatory for all residential development projects."[87] In turn, the referenced "Design List A" provides, in pertinent part, that "[n]ot less than ten percent of the gross acreage of a residential development project shall be open space," a portion of which must be "owned and maintained by a homeowners association."[88]

—*Florida, Broward County (fastest growing county in Florida),*[89] *City of Dania Beach*. The City of Dania Beach Zoning Code contains a provision labeled "Cluster Single Family Housing,"[90] which is an alternate term for PUDs. The PUD regulation provides:

> Provisions shall be made to assure that areas and facilities which are to be commonly or jointly utilized by all project residents shall be maintained in a continuous and satisfactory manner *and without expense to the City of Dania Beach*. Such assurance may be provided by the requirement of homeownership association memberships for the purpose of holding joint title to, and assessing monthly maintenance fees for such areas and facilities.[91]

86. Maricopa County, Arizona, encompasses the Phoenix metropolitan area. In the decade between 1990 and 2000, Maricopa County was the fastest growing county in the United States (as measured by net increase in population). *See* U.S. Census Bureau, County and City Data Book: 2000, Table B-1, http://www.census.gov/prod/2002pubs/00ccdb/cc00_tabB1.pdf (last visited Sept. 19, 2006). In that decade, the county grew by nearly 1 million residents. *Id*. The county is the fourth most populous county in the United States. *Id*.

87. City of Surprise Zoning Code § 17.28.280(L), *available at* http://municipalcodes.lexisnexis.com/codes.

88. *Id*. § 17.28.280(L)(2).

89. Broward County encompasses the northern portion of the Miami metropolitan area, including the City of Fort Lauderdale. During the decade of the 1990s, Broward County was the fastest growing county in Florida and the seventh fastest growing county in the United States. In that decade, the population of the county increased by 29 percent to 1.6 million. *See* U.S. Census Bureau, County and City Data Book: 2000, Table B-1. The county's population is projected to increase another 22 percent by 2010. Broward County Department of Planning and Environmental Protection, *Broward by the Numbers: Population Projections for Broward County*, September 2002, *available at* http://www.co-broward.fl.us/planningservices/bbtn26.pdf.

90. DANIA BEACH, FLA., CODE OF ORDINANCES, ch. 28, art. 6, § 6.52, *available at* http://www.municode.com/resources/gateway.asp?pid=10626&sid9.

91. *Id*. § 6.52(a)(7) (emphasis added).

—*Nevada, Clark County (fastest growing county in Nevada)*.[92] The Clark County Unified Development Code ("Code") governs all development in the unincorporated areas of the county.[93] The population of the unincorporated area—over 800,000 as of 2003—exceeds the population of Las Vegas.[94] Under the terms of the Code, all PUDs must contain open space at a specified percentage of the overall development acreage and all such open space must be "private and common."[95] The Code further provides that "[t]he entire property proposed for development as a PUD shall be under "unified control to ensure unified development."[96]

—*Texas, City of Dallas (second fastest growing city in Texas)*.[97] The City of Dallas planned unit development process operates by way of amendment to the existing code for each planned unit development application proposed by a developer of a subdivision. Thus, unlike many general and *prescriptive* PUD ordinances in effect in other municipalities, the Dallas PUD ordinance is *descriptive* of the actual conditions and restrictions imposed by the city in connection with particular PUD applications.[98] Typical of codified conditions and restrictions memorialized in the Dallas PUD ordinance are the following pertaining to Zoning District S-11 and PD Subdistrict 11:

> Prior to final plat approval, the owner(s) of the Property must execute an instrument creating a homeowners association for the maintenance of common areas, screening walls, landscape areas (including perimeter landscape areas), private streets and

92. Clark County encompasses the metropolitan area of Las Vegas. During the decade of the 1990s, Clark County was the fastest growing county in the fastest growing state (as measured by percent population change). *See* U.S. Census Bureau, County and City Data Book: 2000, Table B-1. In that decade, Clark County's population increased by 86 percent to 1.4 million. The county grew by 600,000 persons, approximately the population of Boston or Seattle.

93. CLARK COUNTY UNIFIED DEV. CODE § 1.01.010, *available at* http://ordlink.com/codes/clarknu/index.htm.

94 Nevada State Demographer's Office, *Nevada County Population Estimates, July 1, 1986 to July 1, 2003*, *Including Cities and Towns* (undated).

95. CLARK COUNTY UNIFIED DEV. CODE § 30.24.070, *available at* http://ordlink.com/codes/clarknu/index.htm.

96. *Id*. § 30.24.020.

97. Dallas, located in north-central Texas, is the second largest city in Texas after Houston. During the decade of the 1990s, Dallas's population increased by 18 percent to 1.2 million. The population of the City of Dallas comprises 86 percent of the population of the County of Dallas. *See* Texas State Data Center and Office of the State Demographer, Tables 28 and 29. During the decade of the 1990s, the County of Dallas was the second fastest growing county in Texas (as measured by percent population change). *See* U.S. Census Bureau, County and City Data Book: 2000, Table B-1.

98. DALLAS, TEX. DEV. CODE, Planned Development District Regulations ch. 51P, *available at* http://www.dallascityhall.com/html/development_code.html.

for other functions. This instrument must be approved as to form by the city attorney, approved by the city planning commission and filed in the Dallas County Deed Records. (Ord. Nos. 22477; 25267)[99]

—New Jersey, Ocean County (fastest growing county in New Jersey, 2000–03 estimate[100]*);Township of Jackson*.[101] The Township of Jackson Zoning Code requires the establishment of a homeowners association in all residential developments in areas zoned as PUD districts, multifamily housing districts, and "planned retirement communities" districts.[102] Under the code, the homeowners association is responsible for, among other things, maintenance of common property, solid waste disposal, and "the replacement and repair of all private utilities, street lighting, sidewalks, landscaping, common open space and recreation facilities and equipment."[103]

As noted above, the above-referenced municipal codes are from jurisdictions experiencing among the fastest rates of growth in population[104] and new housing, as well as locations in which most new housing is subject to a community association.[105] The above-quoted municipal code language is, of course, merely *illustrative* of the municipal approaches to the delegation of traditionally public services to private

99. *Id*. art. 193, § 11.114. Similar language in the code may be found at Article 559, § 559.118; Article 560, § 560.117; and Article 562, § 562.117.

100. New Jersey Department of Labor, New Jersey State Data Center, *Cumulative Estimates of Population Change for Counties of New Jersey and County Rankings: April 1, 2000 to July 1, 2003 (2004), available at* http://www.census.gov/popest/counties/co-est/2004–02.html.

101. During the decade of the 1990s, the Township of Jackson was the eleventh fastest growing municipality in New Jersey—a state that contains over 500 municipalities. In that decade, Jackson's population increased by 29 percent to 42,816. New Jersey Department of Labor, New Jersey State Data Center, *Population for the Counties and Municipalities in New Jersey: 1990 and 2000*. In the year 2000, Jackson issued the highest number of residential building permits of any New Jersey municipality. New Jersey Department of Community Affairs, Press Release dated June 11, 2001. Population estimates through 2003 confirm that Jackson continues to experience rapid population growth. Between 2000 and 2003, the population of Jackson increased by 11 percent. New Jersey Department of Labor, New Jersey State Data Center, *Annual Estimates of the Population for Incorporated Places in New Jersey, Listed Alphabetically: April 1, 2000 to July 1, 2003 (2004)*.

102. JACKSON TWP., N.J., ZONING CODE ch. 109, art. VI, §§ 109-46J, 109-48L, 109-49N, *available at* http://gcp.esub.net/cgi-bin/om_isapi.dll?clientID=49255%infobase=jackson.nfo&softpage=browse_frame_pg42.

103. *Id*. § 109-46J(2).

104. *See supra* notes 84–103 and accompanying text.

105. Comprehensive and authoritative data of the number of community associations by state—as well as the prevalence of community associations as a percentage of new home development by jurisdiction—are generally not available. However, survey data from the late 1980s suggested that "nearly all new residential development in California, Florida . . . [and] Texas" is association-related housing. DILGER, *supra* note 10, at 18. Moreover, "more than 50 percent of all housing for sale in the fifty largest metropolitan areas of the country" is association-related housing. *Id*.

entities, and should not be understood as the product of a sample or survey.[106]

Although not a product of a survey—and thereby not susceptible to systematic and generalized conclusions concerning the prevalence of codified community association requirements throughout high-growth areas of the United States—the above-quoted code language nevertheless suggests some important tentative conclusions. *At the very least*, the code language clearly and unambiguously establishes that some municipalities in high-growth areas have essentially foreclosed the option of constructing residential subdivisions in which all traditionally municipal services are provided by the municipality, and in which homes are purchased free of private servitude regimes and community associations.[107] As such, the code language should give some pause to commentators who insist that the boom in the number and extent of community associations is essentially a market-driven phenomenon.[108]

The code language also carries some deeper and more far-reaching implications with respect to the scope and scale of municipal land use policy aimed at partially privatizing new communities. As more fully discussed in Part II.A., the very essence of the PUD review process as authorized by state statutes (and as consistently upheld by the courts) is a sort of informal "institutionalized bargaining" between the municipality and the subdivision developer, a process that most often is based on broad discretion on the part of the municipality.[109] The informal (and

106. It is beyond the scope of this article to undertake a survey of municipal codes in high-growth areas of the United States to determine the prevalence of codified community association requirements. For reasons to be described in the text above, however, such a survey of codified law would, in any event, be of limited utility in sizing up the true dimensions of municipal policy pertinent to the establishment of community associations as a condition of PUD approval. *See infra* notes 107–12 and accompanying text.

107. *See also infra* text accompanying notes 113–35, wherein I set forth various anecdotal accounts of developers and local government officials with respect to the existence of uncodified and informal municipal policies requiring the establishment of a community association as a condition of subdivision approval.

108. *See e.g.*, Laura T. Rahe, *The Right to Exclude: Preserving the Autonomy of the Homeowners' Association*, 34 URB. LAW. 521, 552 (2002) (arguing that "the homeowners association is properly viewed as 'the product of individual [consumer] choices'"); Robert H. Nelson, *Privatizing the Neighborhood: A Proposal to Replace Zoning with Private Collective Property Rights in Existing Neighborhoods*, 7 GEO. MASON L. REV. 827, 828 (1999) (opining that "economic forces . . . made private neighborhood associations the choice for millions of people for their residential property"); U.S. ADVISORY COMM'N, *supra* note 1, at 13 (noting that "strong proponents of [community associations] argue that these organizations provide a vehicle for greater consumer choices"); Uriel Reichman, *Residential Private Governments: An Introductory Survey*, 43 U. CHI. L. REV. 253, 255–56 (1976) (opining that community associations are "of a private nature" because they are "based on private initiative, private money, private property and private law concepts").

109. *See supra* notes 59–60 and accompanying text.

unrecorded) bargaining process between the municipality and the subdivision developer underlying the municipality's review of a PUD application affords the municipality the virtually unreviewable power to require the privatization of municipal services and functions, and it can be expected (but difficult to prove by evidence in the public record) that many municipalities exercise this power in reviewing and approving PUD applications.[110]

Viewed in this context, municipal codification of an informal privatization policy, in all likelihood, constitutes the evolution and maturation of the aforementioned informal policy to a point where municipal officials may have concluded that codification seemed appropriate and warranted. By codifying its policy, a municipality simply places developers on formal notice of the existence of such policy.[111] One consequence of this insight is that a comprehensive survey of *codified* municipal policy pertinent to the establishment of community associations necessarily would substantially underreport the existence of actual municipal policy—including *de facto* policy. Thus, such a survey of codified policy would be of limited utility.[112]

110. *See supra* notes 61–65 and accompanying text.

111. The above-quoted language from the City of Dallas Development Code reinforces this point. *See supra* notes 97–99 and accompanying text. As previously noted, the Dallas Planned Unit Development process operates by way of amendment to the existing code for each Planned Unit Development application proposed by a developer of a subdivision. Thus, unlike many general and *prescriptive* PUD ordinances in effect in other municipalities, the Dallas PUD ordinance is actually *descriptive* of the conditions and restrictions imposed by the City in connection with particular PUD applications. The operative language in the Code is instructive: "Prior to Final Plat Approval, the owner(s) of the Property must execute an instrument creating a homeowner association for the maintenance of common areas, screening walls, landscape areas (including perimeter landscape areas), private streets and for other functions." CITY OF DALLAS DEV. CODE, art. 193, § 11.114. This code language, being descriptive rather than prescriptive, may more accurately reflect the scope and extent of public service exactions imposed by municipalities as part of the institutionalized bargaining process that is characteristic of the PUD approval process.

112. By contrast, a survey of homebuilders engaged in constructing planned single-family home developments might well lead to a fuller and more accurate understanding of the nature and extent of municipal exaction policy, because such a survey would presumably report instances of *de facto*, as distinct from *de jure*, exaction policy. Note, however, that even a survey of homebuilders might not be fully accurate with respect to the existence of municipal public service exactions, because of the distinct possibility that some homebuilders would be reluctant to report—for business or public relations reasons—on the nature and extent of "institutional bargaining" implicit in the PUD approval process, as well as other informal noncodified municipal policy implemented through the land use review process.

Although it is beyond the scope of this article to undertake a survey of homebuilders, my research has included discussions and correspondence with some homebuilders with respect to the nature and extent of municipal requirements vis-à-vis the establishment of community associations as a condition of subdivision approval. *See* Part III.B., *infra*.

Stated succinctly, the existence of express codified municipal land use provisions requiring the establishment of a community association is an *indication* of the scope and scale of the municipal role in the establishment of community associations, but it is not *exhaustive* of the municipal role. It is nevertheless an important indication—one strongly suggesting that long-standing informal municipal community association policy has now evolved to the point that municipal officials are comfortable in codifying that policy and formally promulgating the policy to all who would seek to undertake a major residential development in the jurisdiction. That occurrence, in and of itself, strongly suggests that the public service exaction has become a common and well-established part of municipal land use regimes in high-growth areas of the United States.

B. *Anecdotal Accounts of Individual Homebuilders and Local Government Officials Concerning the Existence of Informal as Well as Formal Municipal Requirements to Establish Community Associations as a Condition of Land Use Approval*

My research activities for this article included informal discussions and correspondence with individual homebuilders and local government officials in high-growth areas of the United States concerning the existence of formal and informal municipal requirements for the establishment of community associations as a condition of land use approval. Pertinent information and opinions derived from these discussions are summarized in this section. As in the preceding section, the empirical data offered here should not be understood as the product of a survey, and thus are not susceptible to systematic or generalized conclusions with respect to the prevalence of the municipal policies that are reported here.[113] Rather, the information and opinions set forth in this section amount merely to first-person anecdotal accounts of the existence of informal (as well as formal) municipal requirements to establish community associations as a condition of land use approval.

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Larry Kush is the president of an Arizona-based homebuilding firm based in the fast-growing Phoenix metropolitan area. His firm

113. The author contacted a variety of homebuilders and builders associations situated in high-growth areas of the United States. Only a small fraction of builders responded. *Statements of every responding homebuilder are included in this article*. Because the contacts with homebuilders were not the result of a systematic survey design and because the "universe" of contacts is, in any event, insufficient to support generalized conclusions, I make no claim that the evidence here presented is anything more than anecdotal.

concentrates in building residential developments in the range of ten-to-thirty units.[114] In response to a question concerning his personal knowledge of formal and informal municipal requirements, Mr. Kush stated: "[C]ities throughout the metro Phoenix area generally require [homeowner associations]. [T]he builder is really not given much of a choice."[115] Mr. Kush further noted that, in his own experience, "the cities of Phoenix, Chandler and Scottsdale required private streets, water and sewer systems as well as park areas."[116]

Kris Hartman is another Arizona-based homebuilding executive. Mr. Hartman's firm typically constructs residential developments in excess of 100 homes.[117] Mr. Hartman offered the following view with respect to the formal and informal municipal requirements in the high-growth metropolitan Phoenix housing market:

> We have experienced many municipalities that have ordinances requiring the formation of HOAs [i.e., homeowner associations]. My perception of the intent of these ordinances is to shift certain costs [e.g., the maintenance of landscaping, open space, and parks] to the associations. Some municipalities have even more stringent requirements. For example, the City of Tucson's development code has specific requirements that HOAs be formed for a certain sized community and that the CC&Rs contain many provisions giving the City third-party beneficiary rights.[118]

Mr. Hartman further stated that municipal requirements to establish community associations are "[b]oth formal and informal."[119] As to informal requirements, Mr. Hartman noted that these requirements "are usually imposed by way of review comments on preliminary plats or improvement plans."[120]

David Lauletta is an executive in a homebuilding firm based in the northwestern suburbs of Los Angeles. Mr. Lauletta's firm typically constructs residential developments in the range of 50-to-150 dwelling units.[121] In response to a question concerning municipal requirements for the private provision of services in new subdivisions, Mr. Lauletta stated: "The Cities of Moorpark, Simi Valley and Oxnard required maintenance

114. Unpublished written statement dated July 6, 2006, of Larry Kush, President, Montevina Estate Homes, Scottsdale, Arizona (on file with the author).

115. Unpublished written statement dated May 22, 2006, of Larry Kush, President, Montevina Estate Homes, Scottsdale, Arizona (on file with the author).

116. *Id.*

117. Unpublished written statement dated July 25, 2006, of Kristopher L. Hartman, Senior Development Manager, Stardust Development, Inc., Scottsdale, Arizona (on file with the author).

118. *Id.*

119. *Id.*

120. *Id.*

121. Unpublished written statement dated July 9, 2006, of David Lauletta, Director of Forward Planning, Shea Homes of Southern California, Westlake Village, California (on file with the author).

of landscape and road maintenance."[122] He further noted that, in his opinion, "it would not have been legally possible" to build a single-family home development without a homeowners association in these municipalities.[123]

Kristine Thalman is an executive of the Orange County Chapter of a California homebuilders association. Ms. Thalman offered the view that, "in California specifically," the establishment of a community association generally operates as a form of municipal "exaction" against new home development.[124] She traced this municipal policy to the enactment of California's Proposition 13 in 1978—the California ballot initiative that sharply limited the ability of California local governments to rely on the property tax as a revenue source. She was of the opinion that Proposition 13 "was the beginning of the end of local government provision of municipal services."[125]

Steven Dahl is a New Jersey-based executive of K. Hovnanian Companies, one of the largest homebuilding firms in the United States.[126] Responding to a question concerning municipal requirements for private provision of services in new subdivisions, Mr. Dahl reported the existence, in certain New Jersey municipalities, of an "informal [municipal] requirement that a [community association] own and maintain detention basin and passive open space."[127] Mr. Dahl stated that "about one-half" of the municipalities in New Jersey impose requirements with respect to the establishment of a community association as a condition of land use approval.[128] That estimate carries considerable weight, because Mr. Dahl's employer is among the largest homebuilders in New Jersey.[129]

The author conducted a telephone interview with Brian James, the Director of Planning of McKinney, Texas, a fast-growing suburb of Dallas.[130]

122. Unpublished written statement dated July 5, 2006, of David Lauletta, Director of Forward Planning, Shea Homes of Southern California, Westlake Village, California (on file with the author).

123. *Id*.

124. Unpublished written statement dated May 22, 2006, of Kristine Thalman, Chief Executive Officer, Building Industry Association of Orange County, Irvine, California (on file with the author).

125. *Id*.

126 K. Hovnanian Homes, Home Page, www.khov.com (last visited Sept. 14, 2006).

127. Unpublished written statement dated July 31, 2006 of Steven Dahl, Vice President, K. Hovnanian Companies, Edison, New Jersey (on file with the author).

128. *Id*.

129. K. Hovnanian Homes, Home Page, www.khov.com (last visited Sept. 14, 2006).

130. McKinney is a city of 100,000 that is situated approximately thirty miles north of Dallas. On its website, the city bills itself as "the fastest growing city in America." McKinney, Texas, Home Page, www.mckinneytexas.org. (last visited Sept. 14, 2006).

In response to the question of the percentage of residential building permits issued in the past year relating to association-related units, Mr. James stated, "100 percent."[131] Mr. James explained that this was an effective consequence of the municipality's landscaping and buffering regulations, which apply to virtually all new residential subdivision development and which require the establishment of a community association.[132]

Mark L. Smith, a senior planner for the City of El Mirage, Arizona,[133] responded to the author's request for information on that municipality's formal and informal land use policies. Mr. Smith stated that the establishment of a community association is a requirement "in all new subdivisions."[134] He further stated that this policy was "uncodified."[135]

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The foregoing anecdotal accounts provide some tangible evidence that public service exactions in high-growth areas of the United States are the product of *informal* as well as *formal* municipal policies. Moreover, the information and opinions here presented—complementing the text of the municipal ordinances set forth in Point III.A., *supra*—constitute further empirical evidence tending to show that, in the fastest growing areas of the country, municipalities often require the establishment of community associations as a condition of land use approval and as a means to effect the privatization of traditionally municipal services.

As previously noted, I make no claim that the evidence here presented is anything more than anecdotal. It remains for others to conduct surveys of homebuilders and local government officials in order to gain a more complete understanding of the nature and extent of municipal requirements to establish a community association as a condition of land use approval, as well as to identify and catalogue those municipal requirements in the various high-growth housing markets of the United States. The information and opinions offered here suggest that there is an urgent need to conduct such empirical research, so as to provide an important further basis for a long-overdue policy discussion on the future of new community development in the United States.

131. Telephone interview with Brian James, July 24, 2006.
132. *Id*.
133. El Mirage is a municipality of 28,000 situated approximately 20 miles northwest of Phoenix. www.cityofelmirage.org (last visited Sept. 17, 2006).
134. Unpublished written statement dated July 26, 2006 of Mark L. Smith, Senior Planner, City of El Mirage (on file with the author).
135. *Id*.

V. Adverse Effects of a Municipal Land Use Policy That Effectuates, by Way of Public Service Exaction, the Privatization of the Operation and Maintenance of Traditionally Municipal Infrastructure

In the preceding section, I set forth substantial evidence that supports the proposition that local government land use policy has played—and continues to play—a critical role in the rise of the territorial community association as the standard template for new community development in the fastest growing areas of the United States. That role includes, most importantly, the widespread but largely unnoticed adoption of what I term, "public service exactions," that is, decisions made by local government in the land use review process to privatize the provision of traditionally municipal services, and to require the developer, as a condition of land use approval, to provide these services.

As I have noted, I do not mean to suggest that the phenomenon of the public service exaction is the *sole cause* of the proliferation of private residential communities in the United States—a phenomenon that is obviously the product of a host of social, legal, economic, and demographic factors.[136] But, by the same token, the available evidence plainly undercuts the position of those who maintain that the broad-scale adoption of the community association in new residential communities is nothing more than the vigorous and unfettered response of housing developers to the needs and wants of a new generation of housing consumers.[137]

Having found substantial evidence that local government policy plays an exceedingly important role in the broad-scale establishment of community associations, I presently turn my attention to certain normative concerns that are necessarily raised by such a finding. Stated succinctly, does a policy of compelled privatization of new communities constitute sound public policy? For many reasons, the question must be answered in the negative.

A. *Public Service Exactions Interfere with Housing Market Mechanisms by Imposing a Particular Form of Community When, Absent the Exaction, the Market Might Well Produce Another Form of Community*

On its face, a public service exaction constitutes a form of public policy that promotes the privatization of traditionally governmental functions

136. *See supra* notes 16–29 and accompanying text.
137. *See supra* note 108 and accompanying text.

and services. Thus, at one level, the policy plainly is appealing to those who favor a reduced role for government in the domestic social and economic sphere.

But, at another and deeper level, the policy runs counter to the apparent first principle of free-market economics: i.e., a presumption of non-interference by government in the private marketplace. What, after all, could constitute a more heavy-handed public interference in the private marketplace than a government rule that mandates a highly particularized form of community template on new community development, and that precludes, without so much as any public discussion or judicial review, alternate forms of community development that previously were available and that, until recently, were the dominant forms of suburban community development in the United States?

A public service exaction policy, then, has a coercive and limiting effect on housing consumers and producers. The policy mandates a private community, even when the market would otherwise favor a public community, with full public infrastructure and full public services, and homes *not* subject to a complex and constraining servitude regime that is the *sine qua non* of the private community.[138]

A healthy housing market offers a wide range of housing types, prices, tenures, and amenity packages for the broadest possible segment of housing consumers.[139] A requirement that all new housing be association-related housing with certain association-operated services and amenities places a crimp on available housing types, prices, tenures, and amenity packages. That "crimp" has many adverse secondary effects, including a reduction in housing affordability and the fostering of tax inequality as between new and old residents of the municipality.[140]

138. If the community association servitude regime were nothing more than a response by housing producers to consumer demand, as evidenced by the voluntary and informed consent to the regime by individuals who become subject to the regime, then the regime would, of course, be fully consistent with fundamental tenets of free-market economics, including the tenet that seemingly elevates contractual and property rights over other constitutional principles. But, as agued throughout this article, the regime fails all of these tests. For a discussion of the illusory nature of consumer "consent" to community association servitude regimes and of the lack of meaningful choice as between association-related housing and other housing in the high-growth areas of the United States, *see infra* notes 158–60 and accompanying text. For further discussion to the liberty-infringing characteristics of the typical community association servitude regime—surely a subject of concern for both traditional conservatives and liberals alike—see Part IV.F., *infra*.

139. This sentence, reformulated so as to represent the government policymaker's perspective, could instead read: "A just and equitable housing policy should produce a wide range of housing types, prices, tenures and amenity packages for the broadest possible segment of housing consumers."

140. These secondary effects are discussed at length in Part IV.C., *infra*.

But, secondary effects aside, a community association exaction, at its most basic level, interferes with housing market mechanisms by imposing a particular form of community when, absent the exaction, the market might well produce another form of community.

B. *The Equitable Arguments That Favor the Municipal Imposition of Traditional Exactions—Which Involve the Allocation of the Capital Cost of New Infrastructure as Between Existing Municipal Taxpayers and the Newcomers Who Directly Benefit from the New Infrastructure—Have No Application Whatsoever to the Municipal Imposition of Public Service Exactions*

Some may argue that the public service exaction is no more than a natural and logical extension of the traditional exaction, that the latter is a long-established and accepted part of land use law, and that the public service exaction should be sustained for the same reason that the traditional exaction is sustained.[141] In fact, the public service exaction is qualitatively different, in many critical ways, from the traditional exaction. *First*, the traditional exaction is the product of a municipal policy of mandatory dedication of a public facility, whereas the public service exaction is the product of precisely the inverse policy: i.e., what might be termed a municipal policy of mandatory retention by the developer of the required public facility. This crucial difference in the means of establishing the two forms of exactions points to the fundamental difference in ends: i.e., whereas a traditional exaction pertains only to a developer's (and, ultimately, a homeowner) one-time assumption of traditionally municipal capital costs, a public service exaction pertains to a developer's (and, ultimately, a homeowner) assumption of *municipal operating costs in perpetuity*.[142]

A traditional exaction has the effect of requiring new residents to bear a higher share of new infrastructure costs than the municipal taxpayer as

141. Under the Supreme Court's Fifth Amendment "takings" jurisprudence, so long as the traditional exaction is "roughly proportiona[te]," both in nature and extent, to the "impact of the proposed development" upon which the exaction is premised, the exaction is valid. Dolan v. City of Tigard, 512 U.S. 374, 391 (1994). *See also supra* notes 73–78 and accompanying text.

142. Note also that a public service exaction requires the establishment of a community association as the essential means to provide the service or function that is the subject of the public service exaction. By contrast, a traditional exaction does not require the establishment of a community association, because the payment of the capital cost of the infrastructure is entirely accomplished by the developer during the period of time in which the developer remains in control of the subdivision.

a whole, based on the quite reasonable premise that those who disproportionately benefit from the installation of new infrastructure should disproportionately pay for its cost. Stated differently, the existing taxpayers of a municipality should not be required to bear the entire cost of new development, but rather the newcomers, in the interests of fairness, should themselves directly bear some of the capital cost—even a substantial share of the capital cost—associated with the development of the residential subdivision in which the newcomers will reside.

These arguments put forth in the context of traditional exactions, however, have no application whatsoever to the quite different context of public service exactions, which, as noted, result in the newcomers effectively bearing a higher portion of municipal *operating* costs going forward, and in perpetuity.[143] There may be compelling political reasons why a municipality requires a newcomer to directly bear the cost of operating sewage service in the newcomer's subdivision or to directly bear the cost of maintaining a road in the newcomer's subdivision, but such political reasons do not comport with—*indeed they conflict with*—principles of equity.[144] Stated succinctly, although elemental principles of fairness and equity, in many cases, may favor the municipal imposition of traditional exactions, such principles do *not* favor the municipal imposition of public service exactions.

Moreover, the municipal land use approval process that places into effect the public service exaction directly involves only the developer and the municipality. Note, however, that municipal land use policy

143. Public service exactions lead to "double taxation" of community association residents, i.e., the circumstance whereby community association residents are required to pay real estate taxes for municipal services *as well as* community association fees for core municipal-like services that other taxpayers in the same municipality receive without additional cost to them. For further discussion of the double-taxation phenomenon, see *infra* notes 151–52 and accompanying text.

144. Of course, when I use the term "public service exactions," I am referring to municipal imposition of requirements to operate and maintain functions and services *that are traditionally provided by municipalities*—or, at the very least, functions and services which the municipality itself provides elsewhere within the municipality's jurisdiction but which the municipality, by operation of the public service exaction, will not be providing in the new subdivision.

Conversely, I am *not* referring to certain amenities that are sometimes provided in community associations—such as, for example, a golf course—which are not generally provided by municipalities. *See* U.S. ADVISORY COMM'N, *supra* note 1, at 12–13 (distinguishing between "public" and "private" services typically furnished by community associations). In any event, it is highly unlikely that a municipality would require that a developer establish a luxury amenity, such as a golf course, as a condition of land use approval. Rather, it is much more likely that such an amenity would be the product of market-driven decisions made by the developer. That being the case, such luxury amenities do not come within the ambit of public service exactions, and, consequently, the equitable arguments set forth in the text above would have no application whatsoever to such amenities.

requiring the establishment of a community association binds not only the developer, but future generations of homeowners that will be living in the community. The new community will be established in a certain way—with private functions and services—and, in most cases, the initial privatization decision will be permanent and binding. Thus, in those instances where the privatization decision is a direct product of municipal policy, local government is effectively creating a second tier of municipality—a privatized municipality—with no meaningful oversight of the privatization process and, indeed, virtually no public recognition of either the process or the policy choices that are leading to this result.

C. *Public Service Exactions Make the Most Affordable Form of Market-Rate New Housing Development—i.e., Cluster Housing—More Expensive by Saddling Homeowners with the Cost of Operating and Maintaining Traditionally Municipal Infrastructure*

As more fully discussed in Part II, *supra*, the rise of the territorial community association as the standard template for new community development can be traced to the widespread adoption of the planned unit development (PUD) concept in zoning law.[145] The PUD concept, it will be recalled, is premised on a rejection of Euclidean zoning's emphasis on minimum lot size for each new housing unit in a suburban subdivision in favor of an overall limitation on the number of the housing units permitted in the entire planned subdivision *without regard to the size of the individual housing lot*. Stated differently, the PUD concept shifted the focus from the individual lot to the entire development, thereby effectively opening up planning and design options for new subdivisions that generally were not available under Euclidean zoning.[146]

Implicit in the PUD concept is the opportunity for a developer to construct housing that is less expensive than otherwise would be possible under the standard (generally Euclidean) zoning in effect in a particular jurisdiction. In particular, the PUD concept made possible so-called "cluster housing," that is, higher-density housing that generally would not be permitted as-of-right under most traditional suburban ordinances.[147] As a rule, such higher-density PUD housing can be expected

145. *See supra* notes 35–64 and accompanying text.
146. *See supra* notes 47–49 and accompanying text.
147. *See* ROHAN I, *supra* note 19, § 3.01[3], at 3-9 to 3-10, and n.26 ("Likewise, with the escalating cost of housing in recent years, . . . PUDs are seen as a way of lowering the cost of development by providing economies of scale and density bonuses to developers. From the standpoint of property owners and developers, PUDs generally allow a

to be the most affordable new housing in the jurisdiction, in view of the fact that the cost of land in most suburban housing markets is the largest single factor in the cost of a new home,[148] and in view of the fact that such higher-density PUD housing generally cannot be built as-of-right under the traditional—that is, non-PUD—zoning of the jurisdiction. In many suburban jurisdictions, then, a developer wishing to build affordable housing for the middle or bottom of the housing market must build under a PUD regime and thereby be enabled to build cluster housing—or build not at all for that portion of the housing market.[149]

The term "PUD housing" has come to be regarded as synonymous with community association related housing, because virtually all PUD subdivisions result in housing subject to a community association.[150] As I have argued, a principal reason for the correlation between the PUD zoning concept and association-related housing built pursuant to the PUD concept is the advent of the public service exaction; that is, the requirement imposed by the municipality—as a condition of PUD approval—that a private entity be responsible for the operation and maintenance of traditionally municipal functions and services in the future PUD subdivision.

Under the authority of the PUD zoning regime, then, municipalities can be seen as broadly influencing housing affordability in both positive and negative ways. On the one hand, municipal PUD regimes overlaid over traditional Euclidean zoning have made possible higher housing densities—hence lower housing costs—than would otherwise be possible under the traditional zoning in effect in the jurisdiction. But, on the other hand, the municipal imposition of public service exactions has passed on to each PUD homeowner additional costs associated with the operation and maintenance of infrastructure and services that traditionally were borne by the municipal taxpayers as a whole. When these two transactions are viewed as one, the municipality can be seen as using its zoning power to permit more affordable housing units, but subject to the requirement that these new affordable units bear a higher share

greater return on investment."); YOKLEY, *supra* note 52, § 6-1 ("Land owners generally like PUDs. They allow development of properties that under ordinary zoning would yield less density and therefore lower profits"); ROHAN II, note 52, § 12.01[4][iii] ("Among the most significant benefits of the clustering device are the economics savings that can be generated for both the developer and the community").

148. MAYER, *supra* note 45, at 13.

149. *See* JOHNSTON & JOHNSTON-DODDS, *supra* note 31, at 13 (noting that "[s]o far, CIDs have been one of the few vehicles that have successfully increased density").

150. *See* ROHAN I, *supra* note 19, § 3A.01[3], at 3A-3 ("A distinguishing feature of PUDs is that they contain "common land" owned by a homes association . . . to which all homeowners must belong and to which they must pay lien-supported assessments'") (quoting Department of Veterans [Affairs] Benefits Circular 26–90–34, § 2a).

of the municipal tax burden. That is to say: public service exactions amount to a higher "tax" on affordable housing units that are effectively produced by way of a zoning "bonus."

The result, in many cases, is that the most affordable housing units in a jurisdiction have the highest tax burden, particularly in circumstances when the jurisdiction contains both older non-association related housing units that receive full municipal services and newer association-related units that receive a combination of municipal services and services delivered by the community association. In those circumstances, community association homeowners are frequently required to pay both real estate taxes for municipal services *and* community association fees for core municipal-like services[151] *that other taxpayers in the same municipality receive without additional cost to them*.[152]

A municipal policy premised on a higher "tax" on the most affordable new housing units in return for a zoning "bonus" is consistent with the immediate short-term interests of both the municipality and the developer. From the municipality's perspective, it is thereby able to "sell" additional density in return for the transfer of its responsibility for the cost of a portion of its services to the new development (but with no reduction in the municipal tax rate commensurate with the reduction in the municipal obligation to provide services). From the developer's perspective, it is able to build at a density that would make the housing affordable to an underserved but substantial (and potentially lucrative) portion of the housing market, with the added cost of privatized services reducing, but not eliminating, the margin of affordability produced by the extra permitted density.

In short, although the municipal policy of public service exactions is consistent with the immediate short-term interests of both the municipality and the developer, the policy does not serve the public interest. As noted, public service exactions make the most affordable form of

151. By way of example, a homebuilder in California estimated that the approximate cost (in the form of homeowners fees) of private streets and private open space in a subdivision of 50–150 homes is in the range of $2,000 to $3,000 per homeowner per year. Unpublished written statement dated July 9, 2006, of David Lauletta, Director of Forward Planning, Shea Homes of Southern California, Westlake, California (on file with the author). The estimate would be considerably higher if the homeowners association were also required to provide private water and sewer service. A New Jersey homebuilder estimated that the annual cost of on-site sewage treatment facility is $1,000 per homeowner per year. Unpublished written statement dated July 31, 2006 of Steven Dahl, Vice President, K. Kovnanian Companies, Edison, New Jersey (on file with the author).

152. Indeed, the system of "double taxation" described in the text above arguably would be unconstitutional under the "equal taxation" clauses found in most state constitutions, if courts were to hold that homeowner fees, as the functional equivalent of municipal real estate taxes, should be treated as taxes for constitutional purposes.

market-rate new housing development—i.e., cluster housing—more expensive by saddling homeowners with the cost of operating and maintaining traditionally municipal infrastructure. Then too, the policy often has the perverse effect of making the most affordable housing units in a jurisdiction bear the highest effective tax burden. Furthermore, the policy has seldom, if ever, been subject to public scrutiny or judicial review, perhaps because the immediately interested parties that benefit from the policy—the municipality and the developer—each have a substantial stake in the continuation of the policy and have no incentive to challenge it or subject it to public scrutiny.[153]

D. *Public Service Exactions Subject a Large Number of Homeowners to a Private Land Use Regime That Many Neither Desire Nor Understand and, Related to This, Deny Homeowners the Option of Purchasing a Home Free of a Complex Private Servitude Regime and the Obligations and Conditions That Are Imposed by That Regime. In Many Housing Markets (Particularly in the Sunbelt), Housing Consumers Have No Choice But to Accept That Regime, Because of the Lack of Alternatives*

As previously noted, a public service exaction policy has a coercive and limiting effect on housing consumers and producers.[154] The policy effectively subjects a large number of homeowners to a private land use regime than many neither desire nor understand,[155] and, related to this, deny homeowners the option of purchasing a home free of a complex private servitude regime and the obligations and conditions that are imposed by that regime.[156]

153. Of course, a developer might have an incentive to challenge a municipality's policy of public service exactions if the developer believed that such a challenge would have a reasonable chance of substantially lowering housing costs to the consumer *and* if the developer were convinced that it had an effective judicial remedy to accomplish this purpose. *Cf.* S. Burlington County NAACP v. Twp. of Mt. Laurel, 456 A.2d 390, 452–60 (N.J. 1983) (establishing, under the authority of the New Jersey Constitution, a "builder's remedy" aimed at requiring municipalities to adopt zoning provisions that permit affordable housing). Today, there appears to be no reported decisions that identify or apply a specific judicial remedy against public service exactions. For a discussion of a potential remedy involving a robust interpretation of the state common law and statutory law of dedication, see Part V.A., *infra*.

154. *See supra* notes 138–39 and accompanying text.

155. *See, e.g.*, Barton & Silverman, *supra* note 6, at 137 ("In a 12-county survey in California of resale buyers, we found that 84 percent of those who bought a home in a CID were not looking for a CID to buy in.").

156. *See id.*

The servitude regime contained in a typical private residential community is complex and all-encompassing. By virtue of the servitude regime, boards of community associations "exercise power over members and even nonmembers in vital areas of concern, in that their decisions govern what individuals do in the privacy of their own home and what they do with the physical structure of the house and its surroundings."[157] As a matter of public policy, the promulgation of these private servitude regimes may well be acceptable, but *only if*, at a minimum, it can be shown that the servitude regime is the product of consumer demand and there is some evidence of free choice and informed consent on the part of the housing consumer at the time of purchase.[158] Unfortunately, notions of free choice and informed consent to the servitude regime are attenuated for many reasons, not the least of which is that—as argued here—the *a priori* establishment of the community association arises from a regulatory decision of local government, and not from a developer responding to the demands of the housing marketplace.

The fact that *most* new housing units in the fastest growing regions of the United States are subject to private servitude regimes (i.e., are

157. McKENZIE, *supra* note 2, at 135. Some idea of the scope of a community association's power over the expressive and personal activities of residents of association-related housing is illustrated by the following summary contained in my article applying constitutional state-action theory to community associations:

> As private entities not [apparently] subject to the requirements of the Constitution's First and Fourteenth Amendments, RCAs are free to impose a ban on posting signs inside or outside a home, to restrict public assembly on their streets, to prohibit the distribution of newspapers on their streets, to restrict the number and ages of overnight visitors, to prohibit members of a homeowner immediate family (including the homeowner spouse) from cohabiting with the homeowner, and even to ban sexually explicit films, books, and magazines from a homeowner bedroom. Moreover, the RCA governing board, although elected by RCA homeowners, is the product of an electoral system that is at substantial variance from the one-person, one-vote principle guaranteed by the Fourteenth Amendment. The typical RCA electoral scheme employs a one-house, one-vote system, disenfranchises all renters, and employs weighted voting in favor of the developer.

Steven Siegel, *The Constitution and Private Government: Towards the Recognition of Constitutional Rights in Private Residential Communities Fifty Years After* Marsh v. Alabama, 6 WILLIAM & MARY BILL OF RIGHTS J., 461, 469–70 (1998).

158. Empirical research belies the theory that homebuyers provide "consent" to the community association servitude regime at the time buyers purchase their homes. For example, a study of California community association residents found a "widespread lack of understanding" on the part of homebuyers of the complex private law regime to which the homebuyers had become subject by virtue of purchasing their homes. Barton & Silverman, *supra* note 6, at 137. This lack of understanding was evident even though California law requires sellers of association-related housing units to provide buyers with a copy of the community association governing documents before the sale is closed. *See id.*; *see also* DILGER, *supra* note 10, at 38 ("[M]any consumers are not fully aware of the [community association's] powers or their own role in [community association] governance when they purchase their home. As a result, the homeowners' consent to the [association's] CC&Rs is often reduced to a purely theoretical premise and, unfortunately, often does not reflect their autonomous will").

situated in community associations)[159] further undercuts any notion of free choice with respect to a homebuyer's "decision" to live in housing subject to a servitude regime. Plainly, if a homebuyer could realistically choose between housing subject to a servitude regime and housing *not* subject to a servitude regime, then the choice to live in the former type of housing could be fairly characterized as a "free" choice. But, all too often (especially in fast-growing Sunbelt states), that is not the case,[160] and a prime reason for the lack of free choice is undoubtedly the existence of the widespread codified and uncodified municipal land use policy that requires the establishment of a community association as a condition of land use approval.

Stated differently, public service exactions may well be having the effect of forcing many housing consumers to buy homes that are subject to a private servitude regime that these consumers do not desire, and, conversely, denying these consumers the option of purchasing a home free of a complex private servitude regime and the obligations and conditions that are imposed by that regime. To the extent that those servitude regimes, as applied, would be unconstitutional if the regimes were directly administered by the government and to the extent these regimes can themselves be shown to be the product of government action—i.e., public service exactions—the regimes themselves may properly be subject to constitutional scrutiny.[161]

E. *Public Service Exactions Encourage the Establishment of Gated Communities, Which Have Been Identified with Adverse Social and Political Effects on the Body Politic and Civil Society*

As of 1997, there were an estimated 20,000 private residential communities that were "gated." These communities contain an estimated 3 million housing units and 8.4 million people.[162] Gated communities raise many of the same troubling issues that are raised by private residential communities generally, as well as raise other related social,

159. *See* DILGER, *supra* note 10, at 38 ("Although [community associations] do provide more consumer options in the abstract, in many areas of the country [association-related housing] now dominate the local housing market and are increasingly offering fairly uniform levels and types of services."); *id*. at 18. ("According to CAI, [association-related housing] govern nearly all new residential development in California, Florida and Texas"); JOEL GARREAU, EDGE CITY: LIFE ON THE NEW FRONTIER 189 (1991) ("If you want a new home, it is increasingly difficult to get one that doesn't come with a homeowners' association") (quoting Douglas Kleine).

160. *See supra* note 154.

161. Siegel, *supra* note 157, at 546–52. *See also* Part IV.F., *infra*.

162. BLAKELY & SNYDER, *supra* note 22, at 3.

economic, and political issues. Most obviously, the development of a gated community "affects members of a wider community who are compelled to forgo their rights to what was once public space."[163] Moreover, the establishment of a gated community, even more so than is the case with other forms of private communities, "is fraught with potential for discrimination on the basis of race and class."[164] Then too, and perhaps most troubling of all, gated communities are symptomatic of a "secessionist mentality," that may have profound implications for the future of the body politic and civic participation, and the willingness of all income groups to contribute to the cost of government through general taxation.[165]

Public service exaction policy does not literally require the establishment of *gated* communities by operation of law. But, by requiring the establishment of private communities—and in particular private communities delivering services that were traditionally delivered by the municipality—government policy may be said to provide a strong incentive for the developer of a private community to take the extra step of erecting gates and guardhouses. After all, if the community is itself required to "secede," in significant ways, from the municipal service-provider, then there is a certain superficial logic—and marketing rationale—to complete the "succession" by way of the erection of physical barriers.

Moreover, the barriers, in a very real sense, provide "value" that may be perceived as offsetting the loss of value arising from the double-taxation of community association residents for services that are provided "free" by the municipality to municipal residents who do not reside in association-related housing. The latter residents cannot erect barriers on *their* streets, unless they give up their right to various taxpayer-funded municipal services. The developer of a provisionally nongated private community, having given up its right to such services, is in a position to erect barriers—and may feel compelled to do so as a way of turning a net economic liability to future residents into a perceived net asset.

The political implications do not end there. The apparent unfairness of double-taxation is not lost on residents of community associations, or their leaders, or elected officials seeking to cultivate themselves with this rapidly growing constituency. The chain of causation from public

163. David J. Kennedy, Note, *Residential Associations as State Actors: Regulating the Impact of Gated Communities on Nonmembers*, 105 YALE L.J. 761, 767 (1995).

164. *Id*. at 768.

165. *See* BLAKELY & SNYDER, *supra* note 22; SETHA LOW, BEHIND THE GATES: LIFE, SECURITY AND THE PURSUIT OF HAPPINESS IN FORTRESS AMERICA (2003); Sheryl D. Cashin, *Privatized Communities and the "Secession of the Successful": Democracy and Fairness Beyond the Gate*, 28 FORDHAM URB. L.J. 1675 (2001).

service exactions borne by community associations to double-taxation to rapidly growing numbers of disaffected municipal constituents in gated communities may lead, in the long run, to mounting political pressure to subsidize gated communities with taxpayer funds for the operation and maintenance of traditionally municipal infrastructure, a contingency which, if it were to occur, would have serious social, economic, and political consequences.[166] It is bad enough that there is a widespread movement to "secede" from the local body politic by way of the creation of gated communities; it is considerably worse—for the preservation of our democratic civil society, among other considerations—if that succession were to become taxpayer-financed.

F. *Public Service Exactions Give Rise to Many Larger Territorial Community Associations Which Are the Functional Equivalent of Municipalities, But Courts Generally Do Not Recognize These Community Associations as "State Actors," Thereby Depriving Residents and Nonresidents Alike of a Constitutional Remedy for Abridgment of Fundamental Rights by Such Associations*

As previously noted, some larger territorial community associations manage a significant amount of real estate and operate an array of services that traditionally, in this country, were provided by a municipality. For example, some territorial community associations exercise authority over a network of streets, utilities, sewage treatment, open space, and recreational facilities. For those territorial community associations with dominion over streets, the association may provide services such as street cleaning, street maintenance, trash collection, and security.[167] Territorial community associations also typically exercise extensive land use powers traditionally associated with the municipal zoning and police-power authority, such as the review of proposed home alterations and enforcement of rules governing home occupancy.[168]

166. Unfortunately, a few jurisdictions already authorize or require taxpayer funding of the operations of gated communities. For example, New Jersey, by statute, requires all of its municipalities to furnish certain municipal services in private communities or, in the alternative, to reimburse the communities for the value of the services. *See* N.J. STAT. §§ 40:67-23.2 to -23.8 (West 2006). Covered services include refuse collection, snow removal, and street lighting. *Id*. § 40:67–23.3. Notably, gated communities are *not exempted* from the benefits of the statute. *See id*. For further discussion of this issue, *see infra* note 302.

167. *See* U.S. ADVISORY COMM'N, *supra* note 1, at 12–13.

168. *See* DILGER, *supra* note 10, at 23–24.

Territorial community associations "exercise power over members and even nonmembers in vital areas of concern, in that their decisions govern what individuals do in the privacy of their own home[s] [sic] and what they do with the physical structure of the house and its surroundings."[169] Community association rules sometimes restrict the age of those who may own homes in the community, the number and ages of overnight visitors, the color a homeowner may paint her house, whether a homeowner may build an addition to her house, whether residents may assemble in streets and open spaces, and whether a homeowner may display political signs on her home that are visible to the adjoining street. An infraction of the rules may lead to the imposition of a penalty against a homeowner or to the denial of the right to use the facilities backed by judicial injunction.[170]

Undoubtedly, if these same powers were exercised by public officials operating under the color of public law (as distinct from such powers exercised by community association officials operating under the authority of private servitudes backed by judicial enforcement), such powers would, under many circumstances, be held as an unconstitutional abridgement of rights. But, under current law, the nominal public-private distinction holds sway, meaning that constitutional strictures do not attach to the governance of territorial community associations.

Private actors are sometimes held to constitutional standards, if it can be shown that they are "state actors,"[171] such as, for example, when "[t]he state has so far insinuated itself into a position of interdependence with

169. McKENZIE, *supra* note 2, at 135.

170. Siegel, *supra* note 157, at 469–71.

171. In the Civil Rights Cases, 109 U.S. 3 (1883), decided fifteen years after the adoption of the Fourteenth Amendment, the Supreme Court determined that the guarantees of the Fourteenth Amendment apply only to actions taken by the government. *See* The Civil Rights Cases, 109 U.S. at 11. In general, private conduct, "however discriminatory or wrongful," does not come within the ambit of the Fourteenth Amendment. Shelley v. Kraemer, 334 U.S. 1, 13 (1948). However, the Court, beginning in the 1930s, has come to recognize that the distinction between public and private conduct is not always clearcut, and that, under some circumstances, the actions of private parties may be attributed to the state. *See, e.g.*, Georgia v. McCollum, 505 U.S. 42 (1992) (holding that state action was present in a defendant's use of a peremptory challenge in a criminal case); Lugar v. Edmondson Oil Co., Inc., 457 U.S. 922 (1982) (holding that state action was present when a creditor obtained a prejudgment writ of attachment of a debtor's property); Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961) (holding that state action was present in the conduct of a privately owned restaurant that leased space from a government agency); Shelley, 334 U.S. 1 (1948) (holding that state action was present in the judicial enforcement of a private restrictive covenant); Marsh v. Alabama, 326 U.S. 501 (1946) (holding that state action was present in the operation of a company town that was the functional equivalent of a municipality); Smith v. Allwright, 321 U.S. 649 (1944) (holding that state action was present in political party primary elections).

[the private party] that it must be recognized as a joint participant,"[172] or when a private entity "exercise[s] . . . powers traditionally exclusively reserved to the State."[173] In recent years, however, the federal state-action doctrine has become largely moribund.[174] Thus, although territorial community associations hold many of the powers traditionally associated with general units of local government, these associations rarely have been recognized as "state actors" and thereby subjected to the requirements of the Constitution. Instead, these entities have been viewed as wholly private associations that enforce a private set of rules on homeowners through the familiar common law mechanism of real estate servitudes.[175]

Although a community association servitude regime is nominally private, the regime nevertheless places the coercive power of the state behind private actors (i.e., the boards of community associations) whom, as noted, "exercise power over members and even nonmembers in vital areas of concern, in that their decisions govern what individuals do in the privacy of their own home and what they do with the physical structure of the house and its surroundings."[176] That power—whether it is ultimately characterized as "private" or "public"—unquestionably can be understood as liberty-infringing, especially when coupled with the further insight that homebuyer consent to the community association servitude regime is often illusory, because the purported "consent" is not truly informed and because the homebuyer, in "consenting" to an

172. Burton v. Wilmington Parking Auth., 365 U.S. 715, 725 (1961).

173. Jackson v. Metro. Edison Co., 419 U.S. 345, 352 (1974).

174. In a prior article, I argued for a new and expansive application of state-action theory to take account of the modern phenomenon of large-scale community associations, and the concomitant erosion of a public sphere where constitutional rights had once been vested but where those rights no longer exist by virtue of the privatization of that sphere. *See* Siegel, *supra* note 157, at 546–63. An expansive application of state-action theory has not been adopted by the federal courts, although a few state courts, most notably New Jersey, have discerned in their own state constitutions a basis to subject the private realm of community associations to a constitutional, or quasi-constitutional, regime. *See* Comm'n for a Better Twin Rivers v. Twin Rivers Homeowners Ass'n, 890 A.2d 947 (N.J. 2006) (holding that community is a "constitutional actor" under State Constitution with respect to association residents' right of free expression); *see also* Laguna Publ'g Co. v. Golden Rain Found., 182 Cal. Rptr. 813 (Ct. App. 1982) (holding that a community association is not a state actor for federal constitutional purposes but is a state actor under the California Constitution).

175. *See, e.g.*, Anelli v. Arrowhead Lakes Comty. Ass'n, No. 2450 C.D., Community Ass'n L. Rep., June 1997, at 3 (Pa. Commw. Ct. Feb. 13, 1997) (holding that a community association is not a state actor under the federal Constitution); Brock v. Watergate Mobile Home Park Ass'n, Inc., 502 So. 2d 1380 (Fla. 1987) (same); Ross v. Hatfield, 640 F. Supp. 708 (D. Kan. 1986) (same). *But see* Pitt v. Pine Valley Golf Club, 695 F. Supp. 778 (D.N. J. 1988) (holding that a community association restrictive covenant amounted to state action under the *Marsh* doctrine); State v. Kolcz, 276 A.2d 595 (N.J. Co. Ct. 1971) (holding that a community association may be analogized to the company town in *Marsh*).

176. MCKENZIE, *supra* note 2, at 135.

association-related servitude regime, often has no viable alternative to association-related housing in many regional housing markets.[177]

The phenomenon of the privatization of traditionally municipal functions and services through the establishment of community associations has been termed "the most significant privatization of local government responsibilities in recent times."[178] From a rights perspective, the effect of this phenomenon has been to erode substantially a public sphere where constitutional rights were vested. This "most significant privatization of local government responsibilities" means that, for many millions of Americans residing in territorial community associations, important constitutional rights have been deemed to no longer exist by virtue of the privatization of that formerly public sphere.[179]

It is against this background that the advent and use of public service exactions properly should be assessed. As has been argued here, these exactions effectively give rise to many larger territorial community associations that are the functional equivalent of municipalities. Yet, as noted above, courts in recent years have not generally shown any inclination to recognize these community associations as "state actors," thereby depriving residents and nonresidents alike of a constitutional remedy for abridgment of fundamental rights by such associations. Perhaps the increasing recognition that the *a priori* establishment of community associations is often the product of a regulatory decision of local government will *itself* lead to a change in the judicial approach to the standards of review governing the actions of community associations, and to the substantive rights afforded community association residents. However, such an outcome cannot be presumed.

In the absence of a broad extension of the state-action doctrine to territorial community associations, the *status quo* judicial treatment of territorial community associations is plainly unsatisfactory. The resulting public-policy conundrum is thus stated: Public service exactions

177. *See* U.S. ADVISORY COMM'N, *supra* note 1, at 3 ("In many rapidly growing areas, such as those in California, *nearly all* new residential development is within the jurisdiction of residential community associations.")

178. U.S. ADVISORY COMM'N, *supra* note 1, at 18.

179. For example, the branch of First Amendment jurisprudence known as the "public forum" doctrine is premised on the Supreme Court's recognition that speech conducted on certain types of *public* property—particularly streets and parks —is entitled to special protection and solicitude under the First Amendment. *See, e.g.*, Schneider v. New Jersey, 308 U.S. 147 (1939); Hague v. Comm. of Indus. Org., 307 U.S. 496, 515–16 (1939) (J. Roberts, concurring). When streets and parks are privately owned—as is the case in many territorial community associations—the special speech-protective functions of the public forum doctrine are generally not available to community association residents and nonresidents alike. In light of the fact that public streets and parks are fast becoming an endangered species in many high-growth areas of the United States, the Supreme Court's public-forum doctrine is increasingly becoming an anachronism in some areas of this country. For further discussion of this point, *see infra* note 197 and accompanying text.

give rise to many larger territorial community associations which are the functional equivalent of municipalities, but courts generally do not recognize these community associations as "state actors," thereby depriving residents and nonresidents alike of a constitutional remedy for abridgment of fundamental rights by such associations. *For this reason alone*, public service exactions constitute unsound public policy that warrants careful reconsideration.

VI. Judicial Remedies and Legislative Policy Recommendations Aimed at Reducing the Future Municipal Imposition of Public Service Exactions in New Community Development, as Well as Mitigating the Effects of Public Service Exactions in Existing Communities

In this section, I explore potential judicial remedies as well as legislative policy recommendations aimed at reducing the future municipal imposition of public service exactions in new community development, as well as mitigating the effects of public service exactions in existing communities. The aim here is to offer a practical strategy to increase and enhance housing and municipal-service options in connection with the next generation of American homebuilding.

As discussed below, one potential means to achieve that end is the re-discovery and recognition of the long-standing and still-extant law governing the dedication of private property to the public. That law, over time, has been abridged—arguably impermissibly so—by municipal land use policies effecting the *categorical* non-acceptance of dedication.

A. *Judicial Remedies: A Robust Interpretation of the State Common Law and Statutory Law of Dedication as (1) Circumscribing a Municipality's Power to Adopt an Ordinance Categorically Refusing Dedication with Respect to All New Subdivisions or Entire Classes of Subdivisions; and (2) as Limiting a Municipality's Unwritten Policy to Categorically Refuse Dedication with Respect to All New Subdivisions or Entire Classes of Subdivisions*

In this section, I propose a judicially recognized qualified "right" to dedicate property to a municipality for streets and public spaces.[180] The qualified "right" is perhaps more accurately stated as a limitation

180. The proposed "right" has not been judicially recognized in any state. My review of published case law discloses not a single decision that holds that a municipality has exceeded (or may exceed) its authority in imposing what I have termed "public service

on municipal power to categorically *preclude* dedication by ordinance or unwritten policy.

The law of individualized voluntary dedication, I argue, bars a municipality from *categorically* refusing to accept dedication in all new subdivisions or classes of subdivisions. This is so, because a categorical refusal to accept dedication, by ordinance or unwritten policy, is plainly inconsistent with the individualized determinations required by state-law principles governing the voluntary dedication of private property to the public. Of course, municipal action—to the extent inconsistent with state law—cannot stand. Moreover, the qualified right of voluntary dedication—long established as part of the background law of property in all of the states—is properly understood as a *property right* that is not to be casually abrogated by undue judicial deference to the exigencies of a municipal land use policy aimed at load-shedding traditionally municipal functions and services.

1. HISTORICAL OVERVIEW OF THE STATE LAW OF DEDICATION

For centuries, the law of dedication—which has roots in the English common law[181]—has enabled landowners to donate land to municipalities for public uses such as streets and parks. The law reflected a fundamental understanding embedded in the traditional development of private property: i.e., that certain functions and services incident to the development and use of private property were *public* functions and services to be furnished by a *public* entity.[182] For example, public access to an individual subdivided lot was part of the traditional understanding, and for this a *public* road was necessary. From the public road arose other public functions and services ancillary to the road, such as utilities, curbside trash-pick-up, and public police patrols of the street. Later, other neighborhood-related public amenities became the subject of dedication, such as public parks and schools.[183]

exactions"—or the equivalent of "public service exactions" by another name. Indeed, the issue apparently has not even been presented to a court.

181. *See infra* notes 188–212 and accompanying text.

182. *See* Friends of the Trails v. Blasius, 793 Cal. Rptr. 2d 193, 199 (Cal. Ct. App. 2000) (observing that "American courts have freely applied th[e] common law doctrine [of dedication] not only to streets, parks, squares, and commons, but to other places subject to public use").

183. *See e.g.*, City of Cincinnati v. Lessee of White, 31 U.S. 431 (1832) (holding that dedication of a common area rests on the same principle as the public's right to use streets); Seaway Co. v. Attorney Gen., 375 S.W.2d 923 (Tex. Civ. App. 1964) (finding that beach had been dedicated to the public).

To obtain the benefit of these public functions and services, a property owner dedicates a portion of his or her property for these public purposes. Dedication constitutes effectively a *quid pro quo*—in return for the public provision of functions and amenities ancillary to the development and use of property, the property owner transfers the necessary land at no cost to the acquiring public entity.[184]

Dedication has been defined as "the devotion of land to a public use by an unequivocal act of the owner of the fee manifesting an intention that it shall be accepted and used presently or in the future for such public use."[185] Thus, a dedication is a particular form of transfer of private land for public use. In contrast to the exercise of the power of eminent domain by government or its delegee, the act of *dedication* is, in its traditional usage, initiated by a private property owner seeking to secure the transfer of its property for public use. In contrast to the judicial procedure known as an "inverse condemnation"—which is initiated by the present or prior owner of private property with a view toward obtaining "just compensation" for the alleged "taking" of its property—the act of dedication, once complete, does not require the payment of "just compensation," nor is "just compensation" even sought by the property owner as consideration for the dedication. Because dedication, by definition, is a voluntary and gratuitous[186] transfer of private property for public use, no compensation is sought, nor is it required under the Fifth Amendment's Takings Clause.[187]

184. Although voluntary dedication is sometimes characterized as merely a "gratuitous" transfer made by the dedicator, that characterization is true only in the strict sense that monetary consideration is generally not received by the dedicator in exchange for the transfer of title (or the imposition of a public easement) in respect of the dedicated lot. As made clear in the text above, a voluntary dedication is seldom an act of public charity, but rather amounts to an in-kind exchange of land for public access, municipal services, and enhanced property values.

185. Note, *Public Ownership of Land Through Dedication*, 75 HARV. L. REV. 1406 (1962) (quoting 3 AMERICAN LAW OF PROPERTY § 12.32 (Casner ed., 1952)).

186. As to the specific limited meaning of "gratuitous" that is employed here, see *supra* note 184.

187. Note, however, that when the state *requires* dedication (also known as an "exaction") as a condition of a land use approval, the Fifth Amendment may be implicated, unless the mandatory dedication is "roughly proportionat[e]," both in nature and extent, to the ("impact of the proposed development" upon which the mandatory dedication is premised. Dolan v. City of Tigard, 512 U.S. 374, 391 (1994). This species of dedication—i.e., "mandatory dedication"—is not to be confused with traditional dedication, which is premised on a voluntary act of the landowner in offering up her property to the state. In the discussion that follows, whenever I employ the term "dedication," I shall be referring to voluntary dedication. For further discussion of the distinction between voluntary dedication and mandatory dedication, see *infra* notes 229–33 and accompanying text.

Note also that dedication is not to be confused with the common law doctrine of prescription (also known as adverse possession), which fixes a right to real property based upon the passage of a prescribed period of years and the satisfaction of other conditions precedent, but without regard to the intent of the pre-existing landowner. By contrast,

Dedication has "ancient" roots in the common law.[188] According to one court, "no one can doubt that there were . . . [at the time of William the Conqueror], innumerable thoroughfares, and many squares and open spaces which had been dedicated to the use of the people at large."[189] Blackstone, in his influential *Commentaries on the Law of England*, recognized dedication as "arising from the necessities of the thing or of the public."[190] Similarly, an English decision from the early eighteenth century, applying the doctrine of dedication, stated, "If a vill be erected and a way laid out to it, if there be no other way but that to the vill . . . it shall be deemed a public way."[191]

In general, the states of the United States, at the time of the Revolution, adopted the common law of England as that law existed in 1776.[192] Although the states' "reception" of the common law was not universal or uniform,[193] the states unquestionably adopted the fundamental English common law principles of real property, including the law of dedication. Thus, for example, the U.S. Supreme Court, in an 1836 decision captioned *Mayor of New Orleans v. United States*,[194] described dedication as "a well-established principle of the common law . . . sanctioned by the experience of the ages."[195]

The Court in *Mayor of New Orleans* further noted:

> That property may be dedicated to public use is a well established principle of the common law. It is founded in public convenience, and has been sanctioned by the experience of ages. Indeed, without such a principle, it would be difficult, if not impracticable, for society in an advanced state of civilization, to enjoy those advantages which belong to its condition, and which are essential to its accommodation.
>
> The importance of this principle may not always be appreciated, but we are in a great degree dependent on it for our highways, the streets of our cities and towns, and the grounds appropriated as places of music or of public business, which are found in all our towns, and especially in our populous cities.[196]

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intent on the part of the landowner to transfer the property is the *sine qua non* of dedication. EUGENE MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 33.02 (3d ed. 2000). Note, however, that common law dedication, like prescription, may convey an interest in real property even in the absence of an express writing by and between the parties to the conveyance.

188. Friends of the Trails v. Blasius, 824; 93 Cal. Rptr. 2d 193, 201 (Ct. App. 2000).

189. Appleton v. City of N.Y., 114 N.E. 73 (N.Y. 1916) (quoting Post v. Pearsall, 22 Wend. 425, 433 (N.Y. 1839)).

190. WILLIAM BLACKSTONE, 2 COMMENTARIES 33 (1768).

191. The Queen v. Inhabitants of Hornsey, 88 Eng. Rep. 670 (1713).

192. As to common law reception generally, see 15A C.J.S. *Common Law* § 5 ("[T]he greater part of the common law in the United States is derived from the common or unwritten law of England."); Ford W. Hall, *The Common Law: An Account of Its Reception in the United States*, 4 VAND. L. REV. 791 (1951).

193. *See id*.

194. Mayor of New Orleans v. United States, 35 U.S. 662, 712 (1836).

195. *Id*. at 712.

196. *Id*.

Although the Supreme Court may have employed a bit of rhetorical license to regard our "advanced state of civilization" as founded on the common law right of dedication, the essential kernel of truth recognized by the Court in 1836 remains valid even today: i.e., that the balance of "public" and "private" in community development is important and, more particularly, that the character of life in our urban and suburban communities is due in no small measure to the availability and use of dedication as a means to transfer private property into the public domain.[197] If there be any doubt as to the truth of this proposition in the contemporary United States, one need only compare the experience of living in a traditional suburban community (containing public streets and parks) with the experience of living in a gated community.[198]

• • •

The common law doctrine of dedication, as it developed in the United States, appropriated the familiar contract-law principles of "offer" and

197. For example, as previously noted, the branch of First Amendment jurisprudence known as the "public forum" doctrine is premised on the Supreme Court's recognition that speech conducted on certain types of *public* property—particularly streets and parks —is entitled to special protection and solicitude under the First Amendment. *See, e.g.*, Schneider v. New Jersey, 308 U.S. 147 (1939); Hague v. Comm. of Indus. Org., 307 U.S. 496, 515–16 (1939) (Roberts, J., concurring). *Importantly, the real estate upon which the traditional public forum doctrine is grounded (quite literally) is real estate owned by the state and obtained principally, one surmises, through acts of dedication by landowners*.

As to the constitutional significance of publicly owned streets and parks, it is well to recall Justice Roberts' famous concurring opinion that laid the groundwork for the Court's recognition of the public forum doctrine:

> Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thought between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.

Hague v. Comm. of Indus. Org., 307 U.S. 496, 515–16 (1939) (Roberts, J., concurring).

To the extent that some municipalities have elected to categorically refuse to accept dedication of land for street or park purposes, *see supra* notes 82–135 and accompanying text, Justice Roberts' vision—and traditional First Amendment values—will suffer.

It is, of course, true that some state courts, applying the free speech guarantees of their own state constitutions, have recognized a limited right to engage in expressive activity on certain forms of *private* property, including—in a recent and important case in New Jersey—community association property. *See* Comm. for a Better Twin Rivers v. Twin Rivers Homeowners Association, 890 A.2d 947 (N.J. Super. Ct. App. Div. 2006). But this state-by-state protection is limited and piecemeal, and, even in individual states, cannot hope to replicate the robust protections of the public-forum doctrine of the First Amendment.

198. *See* BLAKELY & SNYDER, *supra* note 22; SETHA LOW, *supra* note 165; Cashin, *supra* note 165.

"acceptance"—that is, the landowner "offers" up its property to the municipality and the municipality "accepts" the dedication.[199] What constitutes an "offer" and an "acceptance" of dedication gave rise to an enormous body of state-by-state case law, which is by no means uniform in approach or result.[200]

Depending on the jurisdiction, a developer's offer to dedicate may be effected in a number of ways. Under prevailing common law principles that remain effective in most states, an offer of dedication may be by express or implied act of the landowner.[201] Express acts include dedication by deed,[202] by recordation of a plat,[203] by sales of lots with reference to a plat,[204] or even by oral declaration of the owner.[205] Dedications also can be implied "from circumstances or by acts or conduct of the owner that clearly indicate an intention to devote land to public use or from which a reasonable inference can be drawn."[206]

Similarly, depending on the jurisdiction, a municipality's mode of acceptance can be accomplished in many ways. Acceptance of dedication

199. "A definite intention to dedicate on the part of the land owner and an acceptance by the public are essential elements of common law dedication." Jefferson v. Doody, 167 So. 2d 489 (La. Ct. App. 1964). Note, however, that neither the offer nor the acceptance need be "formally expressed, but both must be sufficiently clear so as to exclude any rational hypothesis other than dedication." ANTIEAU ON LOCAL GOVERNMENT LAW § 24.12 (2d ed. 2005).

200. *See* surveying the law of dedication: E.C. YOKLEY, LAW OF SUBDIVISIONS §§ 30–36 (2d ed. 1981); MCQUILLIN, *supra* note 187, §§ 33.01–33.80; AM. JUR. 2D, DEDICATION §§ 1–72 (2002) (rev. 2004); 38 AM. JUR. PROOF OF FACTS 2d 633, DEDICATION OF LAND TO PUBLIC USE §§ 1–27 (1984) (rev. 2004); 26 C.J.S., DEDICATION §§ 1–45 (2001) (rev. 2005); Note, *Public Ownership of Land Through Dedication*, 75 HARV. L. REV. 1406 (1962).

201. E.C. YOKLEY, *supra* note 52, § 33; MCQUILLIN, *supra* note 187, § 33.03; AM. JUR. 2D, DEDICATION §§ 1, 18–33.

202. *See, e.g.*, Carlson v. Burkhart, 27 P.3d 27 (Kan. 2001); St. Charles Parish School Bd. v. P & L Investment Corp., 674 So. 2d 218 (La. 1996); Hale v. City of Statham, 504 S.E.2d 691(1998); *In re* .88 Acres of Property, 676 A.2d 778 (Vt. 1996); Helsel v. City of N. Myrtle Beach, 413 S.E.2d 821 (S.C. 1992); Volco, Inc. v. Lickley, 889 P.2d 1099 (Idaho 1995).

203. *See, e.g.*, Vallone v. City of Cranston, 197 A.2d 310 (R.I. 1964); Bauer Enters., Inc. v. City of Elkins, 317 N.E. 2d 798 (1984); Davenport v. Buffington, 97 F. 234 (8th Cir. 1899); City of Peoria v. Cent. Nat'l Bank, 79 N.E. 296 (Ill. 1906); Carroll v. Vill. of Elmswood, 129 N.W. 537 (1911); People v. Reed, 22 P. 473 (Cal. 1889)

204. *See, e.g.*, Richards v. Colusa County, 16 Cal. Rptr. 232 (Ct. App. 1961); Gowers v. City of Van Buren, 197 S.W. 2d 741, 780 (Ark. 1946); Whitaker v. Town of Tipton, 426 P.2d 336, 338 (Okla. 1966); City of Molalla v. Coover, 235 P.2d 142, 146 (Or. 1951); Henderson v. Young, 103 A. 719, 720 (Pa. 1918); Copeland v. City of Dallas, 454 S.W.2d 279, 284 (Tex. 1970); Highway Holding Co. v. Yara Eng'g Corp., 22 N.J. 119, 125–26 (N.J. 1956); Vill. of Benld v. Dorsey, 142 N.E. 563, 565 (Ill. 1924).

205. *See, e.g.*, Irwin v. Dixion, 50 U.S. 10, 9 How. 10 (1850); City of Hollywood v. Zinkil, 283 So. 2d 581 (Fla. 1973); Gutierrez v. County of Zapata, 951 S.W. 2d 831 (Tex. 1997).

206. 77 AM. JUR. PROOF OF FACTS 3d § 6; *see also* AM. JUR. DEDICATION §§ 24–34 (2004).

can occur by express or implied act of the municipality.[207] Express acts include adoption of the offer of dedication by ordinance or formal resolution.[208] Implied acts include opening up or improving a street,[209] repairing a street,[210] snow removal,[211] or assignment of police patrols.[212]

Recognizing that the common law of dedication may leave open substantial uncertainty in particular circumstances as to whether a valid dedication has been accomplished, many states have codified the law of dedication.[213] Statutory dedication typically lays down procedural prerequisites which, when satisfied, constitute a valid dedication.[214] Statutory treatments of dedication essentially "follow the existing common law, but add a degree of certainty to the process by setting forth specific procedures for carrying out a dedication of a plat."[215] Thus, statutory dedication adopts the common law principles of "offer" and "acceptance," and specifically defines, but in a way that the common law does not, the specific events constituting "offer" and "acceptance."

Unlike most other statutory codifications of the common law, however, statutory enactments of dedication did *not* abrogate the pre-existing common law.[216] Rather, where states have enacted dedication statutes, the

207. *See, e.g.*, Horn v. Crest Hill Homes, Inc., 164 N.E.2d 150 (Mass. 1960); Allen v. Vill. of Savage, 112 N.W.2d 807 (Minn. 1961); Luter v. Crawford, 92 So. 2d 348 (Miss. 1957).

208. *See, e.g.*, Martin v. Redmond, 638 N.W.2d 142 (Mich. Ct. App. 2001); Hooper v. Haas, 64 N.E. 23 (Ill. 1928); Barber Asphalt Paving Co. v. Jurgens, 149 P. 560 (Cal. 1915); Riley v. Buchanan, 76 S.W. 527 (Ky. 1903).

209. *See, e.g.*, Brown v. Moore, 500 S.E.2d 797 (Va. 1998); Tupper v. Dorchester County, 487 S.E.2d 187 (S.C. 1997); Foster v. Bergstrom, 515 N.W.2d 581 (Minn. 1994); Thornton v. City of Colo. Springs, 478 P.2d 665 (Colo. 1970).

210. *See, e.g.*, Ross v. Hall County, 219 S.E.2d 380 (Ga. 1975); Ackley v. City of San Francisco, 89 Cal. Rptr. 480 (Cal. 1970); Pulleyblank v. Mason County, 86 N.W.2d 309 (Mich. 1957).

211. *See, e.g.*, A & H Corp. v. City of Bridgeport, 430 A.2d 25 (Conn. 1980); Pepin v. City of Manchester, 231 A.2d 481 (N.H. 1967).

212. *See, e.g.*, S. Ry. Co. v. Caplinger, 152 S.W. 947 (Ky. 1913).

213. *See, e.g.*, IDAHO CODE §§ 50-1309, 50-1312 (Michie 2006); IOWA CODE § 354.19 (2005); KAN. STAT. ANN. § 12-752 (2006); KY. REV. STAT. ANN. § 82.400 (2006); LA. REV. STAT. ANN. §§ 33:813, 33:5051 (West 2006); MISS. CODE. ANN. § 17-1-23 (2006); MINN. STAT. ANN. § 505.03 (West 2005); MO. REV. STAT. § 445.010 (2006); N.C. GEN. STAT. § 136-66.10 (2006); OHIO REV. CODE §§ 723.03, 5553.31 (2006); OKLA. STAT. ANN. tit. 11, § 41-109 (West 2000); UTAH CODE ANN. § 10-9a-607 (2006); WIS. STAT. ANN. § 236.29 (West 2006).

214. YOKLEY, *supra* note 52, § 31.

215. 77 AM. JUR. PROOF OF FACTS 3d at § 1, PROOF OF OFFER AND ACCEPTANCE OF LAND TO PUBLIC USE § 3 (rev. 2004).

216. *See, e.g.*, MCQUILLIN, *supra* note 187, at § 33.03 ("The authorization of statutory dedication does not in any way restrict the common law power of the owner to devote his or her land . . . to public use."); 38 AM. JUR. PROOF OF FACTS 2d 633, § 2 ("Within the same jurisdiction a dedication of land to public use may be statutory *or pursuant to common law.*") (Emphasis added.)

common law has survived as an alternate method of dedication, usually available when the putative conveyance of property has failed to satisfy the statutory prerequisites.[217] Thus, in virtually all states, the common law of dedication remains in full force and effect, supplemented and augmented, in some states, by the statutory law of dedication.[218]

It is beyond the scope of this article to offer a comprehensive survey of the particularized aspects of the law of dedication in each of the fifty states. Others have undertaken this task, albeit incompletely.[219] Suffice it to say that, although the law of dedication is not homogenous among the states, the essential common law principles of "offer" and "acceptance" may be found in the law of each state, although these elements are described or applied in somewhat different ways.

Thus, the common law and statutory law of dedication can be said to constitute part of the "background" law[220] of property in each state. Such background law necessarily bears on the judicial inquiry—in the context of the contemporary, and more complex, statutory land use regime to be described below—of the residual authority of municipalities to exercise their land use powers in the review of new subdivisions.

2. HISTORICAL OVERVIEW OF THE ENACTMENT OF MODERN SUBDIVISION STATUTES AUTHORIZING MUNICIPALITIES TO ENGAGE IN "MANDATORY DEDICATION"

As discussed in the preceding section, the municipal authority to accept or reject a landowner's offer of dedication remains—even today—subject to the underlying state law of dedication. As we shall see, however, the underlying law of dedication is not the *exclusive* source and limitation on the municipality's authority and discretion in this sphere. Beginning in the 1920s, states began enacting subdivision enabling statutes that were designed to grant broad new authority to municipalities to undertake

217. *See, e.g.*, Holmes v. Parish of St. Charles, 653 So. 2d 653 (La. 1995); First Ill. Bank of Wilmette v. Valentine, 619 N.E.2d 834 (Ill. 1993); Town of Moorcroft v. Lang, 779 P.2d 1180 (Wyo. 1989); Las Vegas Pecan & Cattle Co., Inc. v. Zavala County, 682 S.W.2d 254 (Tex. 1984); Thornton v. City of Colo. Springs, 478 P.2d 665 (Colo. 1970); Tuccio v. Lincoln Dev. Corp., 239 A.2d 69 (Conn. 1967); Weakly v. State Highway Comm'n, 364 S.W.2d 608 (Mo. 1963); Ginter v. City of Webster Groves, 349 S.W.2d 895 (Mo. 1961); Neill v. Hake, 93 N.W.2d 821 (Minn. 1958); Witherall v. Strane, 90 So. 2d 251 (Ala. 1956); Galewski v. Noe, 62 N.W.2d 703 (Wis. 1954).

218. *See* MCQUILLIN, *supra* note 187, § 33.03; 38 AM. JUR. PROOF OF FACTS 2d 633, § 2.

219. *See supra* note 200.

220. *Cf.* Lucas v. S.C. Coastal Comm'n, 505 U.S. 1003, 1029 (1992) (observing that, as a general proposition, ownership in real property necessarily encompasses "background principles of the State's law of property[,] . . . which inhere in the title itself"). For further discussion of this point see Part V.A.4., *infra.*

comprehensive community planning and subdivision control.[221] The statutory law of subdivision regulation also bears on the scope of a municipality's exercise of authority to accept or reject dedication.

As previously noted, the decade of the 1920s was a period of ferment in the history of United States land use regulation.[222] In 1922, the U.S. Department of Commerce published the highly influential Standard State Zoning Enabling Act (hereafter "Model Zoning Act"),[223] which for decades thereafter served as the template for municipal zoning in the United States. In 1926, the Supreme Court, in *Village of Euclid v. Ambler Realty Co.*,[224] removed any lingering doubt with respect to the facial constitutionality of comprehensive municipal zoning. In 1928, the Commerce Department published another model land use code entitled the Standard City Planning Enabling Act (hereafter "Model Subdivision Act"),[225] which, like the Model Zoning Act, gave rise to a flurry of legislative activity in succeeding years.[226]

The enactment of new comprehensive subdivision enabling statutes, patterned after the Model Subdivision Act, was to transform the scope of subdivision regulation from a mere devise to simplify the conveyancing and recording of subdivided land into an entirely new regulatory regime intended to implement comprehensive community planning. Prior to the enactment of this legislation, subdivision regulation, where it existed, was largely confined to "mapping" or "platting" provisions that merely required land developers to record a subdivision map in the local land records office prior to commencing the sale of the subdivided lots.[227] The new state enabling legislation authorized municipalities to adopt a broad range of regulation incident to land subdivision, including platting procedures and controls; design regulations pertaining to the layout of streets, street grading and surfacing, drainage, water mains and sidewalks; and subdivision improvement requirements.[228]

221. *See infra* text accompanying notes 225–28.
222. *See supra* notes 36–39 and the accompanying text.
223. Standard State Zoning Enabling Act (rev. ed. 1926), *reprinted in* ZONING AND LAND USE CONTROLS § 53B.01 (Eric Kelly, ed.).
224. 272 U.S. 365 (1926).
225. Standard City Planning Enabling Act (1928), *reprinted in* ZONING AND LAND USE CONTROLS § 53B.02 (Eric Kelly ed.).
226. JUERGENSMEYER & ROBERTS, *supra* note 37, § 7.2, at 305.
227. The purpose of these "mapping" statutes was strictly to simplify the legal description of subdivided property by reference to a recorded subdivision map.
228. Today, all fifty states have enacted subdivision enabling statues. *See* YOKLEY, *supra* note 52, §§ 71–122 (summarizing the statutory enactments of the fifty states governing subdivision regulation).

Of particular relevance here, modern subdivision enabling statutes authorized a new species of dedication: *mandatory* dedication.[229] Mandatory dedication is distinct from the traditional principles of dedication long recognized in the common law and authorized in many statutes.[230] Mandatory dedication, as its name implies, requires landowners to "dedicate" streets and public facilities as a condition of subdivision approval.

Stated differently, mandatory dedication is, in a sense, not a "dedication" at all, since, up until the time of the enactment of the modern statutes, the term "dedication" was universally understood to arise from a voluntary act of the landowner.[231] Recognizing the inherently coercive nature of mandatory dedication, the Supreme Court, in 1987, held that, under the Fifth Amendment, mandatory dedications may constitute a "taking," just as surely as a taking would arise if the municipality had *directly* appropriated the exacted property, without the property owner's consent and without payment of just compensation.[232] In general, however, so long as the mandatory dedication is "roughly proportiona[te]," both in nature and extent, to the "impact of the proposed development" upon which the mandatory dedication is premised, the compelled dedication is valid.[233]

Left unanswered by the enactment of statutes authorizing mandatory dedications—and statutes authorizing municipal subdivision regulation generally—is whether the municipality has authority to engage in what might be termed the *inverse* of mandatory dedication: that is,

229. *See* MCQUILLIN, *supra* note 187, § 33.05.10 (characterizing form of exaction requiring that developer turn over a portion of its land to municipality as a "mandatory dedication").

Note that the Model Subdivision Act expressly recommended that the states adopt a provision authorizing mandatory dedication in the context of subdivision review:

> Both to protect persons who buy the lots and to assure that the materials and locations of the improvements and utilities will conform to the proper standards, as well as to protect the city from incurring the costs which should be borne by the original subdivider, the time of the approval of the plan is the best one at which to require these features. This includes not only the paving, but also such items as sidewalks, curbs, gutters, and service connections to various utility mains placed in the streets.

Model Subdivision Act, part of Note 72 to Section 14, reproduced as § 53B.02, sect. 14.

230. *See supra* text accompanying notes 181–212.

231. The term "exaction"—also used to describe compelled transfers of land to municipalities as a condition of subdivision approval—more accurately describes the practice, although note that the term "exaction" encompasses many more conditions in the subdivision approval process than the compelled transfer of land that is specifically described by the term, "mandatory dedication." *See supra* text accompanying notes 65–66.

232. *See* Nollan v. Cal. Coastal Comm'n, 483 U.S. 825, 837 (1987).

233. Dolan v. City of Tigard, 512 U.S. 374, 389 (1994).

a municipality's authority to *refuse* traditional voluntary dedications *with respect to all new subdivisions or entire classes of subdivisions*, particularly if the municipality adopts an ordinance categorically refusing dedications with respect to all new subdivisions or entire classes of subdivisions.

To place the matter in its proper perspective: just as municipalities discovered, in recent decades, that they could *require* dedication as a condition of subdivision approval, they also discovered that they were apparently free to *prohibit* dedication as a condition of subdivision approval. That is to say: the municipal exaction concept, in its most highly evolved form, could be used to compel acquisition of land—i.e., mandatory dedication—or it could be used to require a subdivision developer to *retain* all of its land (in lieu of dedication) and to establish a mechanism to provide municipal-like services on the land once the land is fully developed and sold—i.e., what I have termed the "public service exaction."[234]

As more fully discussed in Part II of this article, the rise of the community association in recent decades as the standard template of new community development is a direct consequence of the *uncoupling* of the traditional exaction concept from the mandatory-dedication concept, and, in its place, the extension and modification of the public service exaction concept. This uncoupling permitted municipalities to continue to require the developer to assume the capital costs of public infrastructure incidental to the new development (i.e., the traditional exaction), and—taking the municipal cost-shedding concept to its logical conclusion—to repudiate the traditional municipal role in operating and maintaining the infrastructure (i.e., the preclusion of dedication).[235]

Stated differently, the exaction concept was revised and extended so as to nullify the developer's option of dedicating land or a completed "public" facility to the municipality at the completion of construction of the subdivision. The resulting exaction (here termed a "public service exaction") thus encompassed a requirement that the developer *retain*—rather than dedicate—the infrastructure constructed on its land as a condition of subdivision approval.

In light of the long-standing history and tradition of voluntary dedication recognized in most states by the still-extant common law as well as statutory law, the rise of the public service exaction thus raises a series

234. For further discussion of this point, see *supra* notes 78–80 and accompanying text.

235. *See supra* notes 78–80 and accompanying text.

of questions that have not yet been addressed by courts—let alone raised by practitioners or commentators. Does a landowner, or landowners generally, have some form of inchoate *right* to dedicate under the existing state common law (or statutory law, in some states) of dedication? If so, did such a right survive the enactment of state subdivision statutes that granted concededly broad authority to municipalities to regulate the subdivision of land in the public interest and in furtherance of sound community planning?

The same questions, stated in terms of the limitations on a municipality's *powers* rather than in terms of an affirmative grant of a landowner's rights, might be reformulated as follows: Could the state common law and statutory law of voluntary dedication be construed as (1) circumscribing a municipality's power to adopt an ordinance categorically refusing dedication with respect to all new subdivisions or entire classes of subdivisions; or (2) as limiting a municipality's unwritten policy to categorically refuse dedication with respect to all new subdivisions or entire classes of subdivisions? If this is so, could this implied limitation of municipal power be construed as *not* abrogated by, but rather incorporated by reference into, state subdivision enabling statutes? If so, can that implied limitation on the power of municipalities be used to defeat public service exactions, and thereby allow a developer the option of dedicating traditional public infrastructure to the municipality—as distinct from retaining the infrastructure and thereafter turning it over to a community association? These questions are addressed in the sections that follow.

3. THE SCOPE OF A MUNICIPALITY'S POWER TO REFUSE DEDICATION UNDER (A) THE COMMON LAW OF VOLUNTARY DEDICATION AND STATE STATUTORY REGIMES AUTHORIZING VOLUNTARY DEDICATION; AND (B) STATE SUBDIVISION ENABLING STATUTES

In this section, I consider the scope of a municipality's power to categorically refuse dedication of new subdivisions—by ordinance or otherwise—under existing state law. I apply first the long-established underlying state law of voluntary dedication. Next, I consider a municipality's putative power to categorically refuse dedication in light of the concededly broad authority granted to municipalities under state subdivision enabling acts.

As to the underlying law of voluntary dedication, it is important to note, at the outset, that municipalities, in most states, have the authority to refuse *an individual offer* of dedication.[236] There are, however, exceptions to this majority rule. In at least seven states, statutes have been enacted that

236. *See supra* notes 207–20 and accompanying text.

provide, in substance, that the mere filing and recordation of a subdivision plat constitutes both an "offer" and "acceptance" of dedication.[237] Stated differently, "in states where a statute provides that the title to land vests immediately to the public for the uses specified upon the filing of a plat, no acceptance [by the municipality] is necessary [to effect dedication]."[238] Thus, for example, the Minnesota Supreme Court has construed that state's dedication statute as authorizing "[t]he filing of [a] plat . . . *[which] operates as a conveyance to the public* of such estate or interest in the streets as is necessary to accomplish the purpose of the dedication and no acceptance by the governing body is necessary."[239]

Furthermore, in at least six states, the state common law holds that municipal acceptance of dedication arises by operation of law when a subdivision plat is filed and lots are thereafter sold with reference to the subdivision.[240] Under this principle of common law, "dedication of property for use as a public way by a recorded plat is deemed perfected

237. *See* IDAHO CODE § 50-1312 (Michie 2006); IOWA CODE ANN. § 354.19 (West 2005); MINN. STAT. § 505.01 (2005); OKLA. STAT. tit 11, § 41-109 (2006); PA. STAT. ANN. tit. 53, § 10508 (West 2006); UTAH CODE ANN. § 10-9a-607 (2006); WIS. STAT. § 236.29 (2006).

238. MCQUILLIN, *supra* note 187, § 33.44; *see also* 23 AM. JUR. 2d § 41 ("In some jurisdictions where land has been dedicated by the owner to public use in conformity with a statute, no formal acceptance is necessary to complete the dedication.")

239. *In re* Maintenance of Road Areas, 250 N.W. 2d 827, 831 (Minn. 1977) (emphasis added).

240. *See, e.g.*, City of Molalla v. Coover, 235 P.2d 142, 146 (Or. 1951) (holding that "an irrevocable dedication results from the filing of a plat and the sale of lots with reference thereto and that the purchase of such lots constitutes a sufficient acceptance by the public"); Henderson v. Young, 103 A.719, 720 (Pa. 1918) (noting that "[i]f anything is to be regarded as settled, it is that, when one who is the owner of a tract of land in a municipality cuts it up into lots and sells them as laid out on a plan which he has adopted, showing streets and alleys thereon, there is not only an implied covenant by him to the owner of each lot that the streets and alleys, as they appear upon his plan, shall be forever open to the use of the public, but a dedication by him of the same as highways to the use of the public forever, *and the municipality itself cannot extinguish the easement which each lot owner thus acquires*") (emphasis added); Copeland v. City of Dallas, 454 S.W.2d 279, 284 (Tex. 1970) (observing that "[i]t is well settled in Texas that a dedication once made, coupled with sales of lots, said sales having been made with reference to the map or plat constituting dedication, becomes binding and irrevocable" and further noting that "[t]here was no necessity for [municipal] . . . acceptance [of dedication], for the right which vested in the purchasers of the different lots, and through them to the public, was irrevocable"); Highway Holding Co. v. Yara Eng'g Corp., 22 N.J. 119, 125–26 (N.J. 1956) (holding that "[w]hen lands are sold with reference to a map upon which lots and streets are delineated, there is a dedication of such streets to the public"); Vill. of Benld v. Dorsey, 142 N.E. 563, 565 (Ill. 1924) (holding that "where the owner of the land sells lots with reference to a plat or map on which a portion indicates a public use, he thereby dedicates such lands to the use of the public for the specified purpose"); Gowers v. City of Van Buren, 197 S.W.2d 741, 780 (Ark. 1946) (holding that "[w]here lots have been sold with reference to the plat, no formal acceptance by the city or town is necessary"); Whitaker v. Town of Tipton, 426 P.2d 336, 338 (Okla. 1966) (holding that "dedication of property to a municipality for use as a public way by a recorded plat is deemed perfected by the sale of lots with reference to the plat, without any affirmative official or other action on the part of the municipality").

by the sale of lots with reference to the plat, without any affirmative official or other action on the part of the municipality."[241] Thus, in at least some states, the landowner's act of dedication may be deemed complete without any express municipal "acceptance" of the dedicated land.

In other states subject to common law dedication, the common law distinguishes between acceptance of the dedication by the general public as distinguished from acceptance by the municipality itself. In these states, acceptance by public use may be deemed to perfect the dedication even in the absence of formal acceptance by municipal officials.[242]

As previously noted, however, the prevailing rule of voluntary dedication in most states is that municipal "acceptance" of a landowner's particular offer to dedicate is a condition precedent to completing the act of dedication, either by virtue of an express statute or by operation of the common law.[243] Thus, in these states, municipalities are given discretion to accept or not to accept dedication. The rationale underlying the majority rule is that "the place offered to be dedicated may be one in which, because of location or other reasons would be a burden rather than a benefit to the municipality or else the benefits would be slight in comparison to the burden. In such a case, the imposition of liability on the municipality without its consent is apparently unjust."[244]

Still, although the majority rule pertaining to voluntary dedication is that municipalities have the authority to accept or reject a landowner's particular offer of dedication, it does not follow from this that municipalities *may categorically refuse* dedication for all new subdivisions, whether by ordinance or otherwise. A municipality's refusal of dedication, like all municipal actions and decisions, must be reasonable and non-arbitrary[245] and consistent with state law.[246]

241. Whitaker v. Town of Tipton, 426 P.2d 336, 338 (Okla. 1966).

242. MCQUILLIN, *supra* note 187, § 33.45, at 437–38.

243. *See, e.g.*, Brumbaugh v. County of Imperial, 184 Cal. Rptr. 11 (Ct. App. 1982); City of Louisville v. Louisville Scrap Material Co., Inc. 932 S.W. 2d 352 (Ky. 1996); Broussard v. Jablecki, 792 S.W.2d 535 (Tex. Ct. App. 1990); Easton v. Koch, 31 A.2d 747 (Pa. 1943); Bd. of County Comm'rs v. Lavington, 14 P.2d 493 (Colo. 1932).

244. MCQUILLIN, *supra* note 187,§ 33.45.

245. As to the general proposition that all municipal actions and decisions must be reasonable and non-arbitrary, see, e.g., City of Kansas City v. Jordan, 174 S.W.2d 25 (Mo. 2005); State v. Reinke, 702 N.W.2d 308 (Minn. 2005); Bal Harbor Vill. v. Welsh, 870 So. 2d 1265 (Fla. 2004); State v. Teach, 418 S.E.2d 585 (W.Va. 1992); Adrian v. Vill. of St. Paris, 465 N.E. 2d 1356 (Ohio 1983); Simkins v. Davenport, 232 N.W.2d 561 (Iowa 1975); Bartlett v. Zoning Comm'n of Town of Old Lyme, 282 A.2d 907 (Conn. 1971); Gabe Collins Realty, Inc. v. City of Margate City, 271 A.2d 430 (N.J. 1970); Lewis v. Mayor of Cumberland, 54 A.2d 319 (Md. 1947); Snow v. Johnston, 28 S.E.2d 270 (Ga. 1943); Vill. of W. Springs v. Bernhagen, 156 N.E. 753 (Ill. 1927); Miller v. Bd. of Public Works, 234 P. 381 (Cal. 1925); *see also* MCQUILLIN, *supra* note 187, §§ 18.1–18.7.

246. As to the self-evident and fundamental proposition that all municipal actions and decisions must not be in conflict with state law, see, e.g., American Financial Serv.

A municipality's categorical refusal to accept dedication, by ordinance or otherwise, does not satisfy these standards. *Such an action is necessarily arbitrary, because it amounts to a nullification of the background law of voluntary dedication. That law, at the very least, presupposes individualized municipal consideration of an offer to dedicate*.[247]

Under the law of voluntary dedication, the residual power of the municipality to refuse to accept dedication is properly understood as a reasonable power to be exercised when the facility offered for dedication was not truly "public." For example, a municipality might refuse to accept a roadway for dedication when the roadway is more in the nature of a driveway than a public street.[248] Moreover, an offer of dedication might be properly refused when the facility is not built in conformance with reasonable design or construction standards that the municipality imposes on itself when the municipality constructs the facility.[249] Plainly, a municipality retains discretion to refuse dedication of a facility if either the design or the construction of the facility is substandard.

Ass'n v . City of Oakland, 104 P.3d 813 (Cal. 2005); Boston Edison Co. v. Town of Bedford, 831 N.E.2d 282 (Mass. 2005); Entm't Indus. Coalition v. Tacoma-Pierce County Health Dept., 105 P.3d 985 (Wash. 2005); Smith v. Town of Pittston, 820 A.2d 1200 (Me. 2003); Mich. Coalition for Responsible Gun Owners v. City of Ferndale, 662 N.W.2d 864 (Mich. 2003); Craig v. County of Chatham, 565 S.E.2d 172 (N.C. 2002); City of Atlanta v. McKinney, 454 S.E.2d 517 (Ga. 1995); Gillis v. City of Madison, 540 N.W.2d 114 (Neb. 1995); Cincinnati v. Thompson, 643 N.E.2d 1157 (Ohio 1994); Pac. Intern. Serv. Corp. v. Hurip, 873 P.2d 88 (Haw. 1994); Inst. for Evaluation & Planning Inc. v. Bd. of Adjustment, 637 A.2d 235 (N.J. 1993); Ling Ling Yung v. County of Nassau, 571 N.E.2d 669 (N.Y. 1991); City of Richardson v. Responsible Dog Owners of Tex., 794 S.W.2d 17 (Tex. 1990); Laborers' Int'l Union of N. Am., Local 478 v. Burroughs, 541 So. 2d 1160 (Fla. 1989); Duff v. Twp. of Northhampton, 532 A.2d 500 (Pa. 1987); *see also* MCQUILLIN, *supra* note 187, § 15:18.

247. More particularly, as the foregoing analysis in the preceding text makes clear, the precise modes of municipal acceptance of dedication vary considerably among the states. Although the modes of acceptance may vary, the law of dedication in effect in all of the states uniformly requires individualized consideration by the municipality of an offer to dedicate. This individualized consideration is intrinsic to the still-extant common law of dedication, as well as to the statutory law of dedication that has been adopted in many states. *See supra* notes 183–220, 237–46 and accompanying text; *see also* MCQUILLIN, *supra* note 187, §§ 33:43, 44, 45 (noting that "[i]t is elementary that . . . an [individual] offer to dedicate must be accepted either by [individual] public user or formal act," although further noting that, in some states, the enactment of a dedication statute often has the effect of making individual acceptance of dedication effective by operation of law without the need for formal municipal action).

248. *See, e.g.*, Grabnic v. Doskocil, 2005 Ohio 2887 (Ohio Ct. App. 2005) (noting that dedication of driveway would "no[t] . . . make sense," in view of the fact that driveway "would be a dead end road leading up to a single street address" and "would be nothing more than a private drive maintained at the municipality's expense.").

249. *See* Loghini & Mosena, *supra* note 31, at 9 (noting that "[m]ost cities will not accept for dedication any [private] facilities that were not built to public [design and construction] standards").

But a municipality's particularized discretion to refuse dedication in certain circumstances is qualitatively different from a municipality's categorical refusal to accept dedication in new subdivisions. In the first case, the municipal decision to refuse dedication is based on endogenous considerations: that is, the decision arises from a condition on the land itself. In the second case, the decision is instead based on a generalized policy of cost-shedding. This is not a proper exercise of discretion; it is rather a repudiation of municipal responsibility to perform core public-service functions in new subdivisions, a repudiation that is especially unjust and contrary to the public interest when the municipality is performing those very same functions *in other areas within its territorial limits*.

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As previously noted, the state law of voluntary dedication is not the only authority bearing on the question here presented. Still to be considered is a municipality's putative power to categorically refuse dedication in light of the concededly broad authority granted to municipalities under state subdivision enabling acts.

As noted, modern subdivision enabling legislation, enacted beginning in the 1920s, was intended to permit municipalities to use the subdivision approval procedure as a means to implement comprehensive community planning.[250] The grant of statutory authority generally includes express provisions authorizing municipal regulation of street arrangement, layout and improvements; access for fire and other emergency equipment; open space for recreation, light, and air; and installation of drainage and utility improvements.[251] Notably, the statutes are invariably silent on what entity—private or public—is ultimately to own the streets and open spaces in the new subdivision.

To be sure, subdivision enabling statutes commonly authorize mandatory dedication, meaning that municipalities may, as a condition of subdivision approval, require that the landowner transfer to the municipality either unimproved land or land with improvements (such as streets or parks) that are constructed to municipal specifications.[252] In this regard, the subdivision enabling statutes, expressly or impliedly, abrogated the common law of dedication or—where applicable—the state statutory law of voluntary dedication, which, by definition, requires a landowner's "offer" to dedicate as a condition precedent to dedication.

250. *See supra* notes 227–28 and accompanying text.
251. *See* ROHAN I, *supra* note 19, § 45.01.
252. *See supra* note 249 and accompanying text.

At issue here is the inverse of mandatory dedication—i.e., a municipality's authority *to prohibit* dedication by ordinance or practice. The enabling statues are silent as to this point. The questions thus presented pertain to the proper judicial treatment of this legislative silence. Should courts construe state subdivision enabling statutes—concededly broad in their delegation of authority to municipalities—as an implicit grant of authority to permit municipalities to categorically prohibit dedication, notwithstanding the existing state law of voluntary dedication that is to the contrary? Or should courts find as controlling the specific mandate of countervailing existing law, especially in the face of the legislative silence of the subsequently enacted subdivision enabling statutes with respect to the precise issue here presented?

Under established principles of statutory construction, the latter question—and the answer it suggests—properly frames this issue of interpretation. A statute is to be construed "in conjunction with other statutes to the end that they may be a harmonious and consistent body of law."[253] Moreover, where a specific statutory provision conflicts with a general one, the specific governs.[254] Because subdivision enabling statutes are *silent* with respect to a municipality's authority to prohibit dedication by ordinance or practice and because the existing law of almost all states expressly authorizes a voluntary dedication scheme grounded on individualized "offers" and "acceptances" of dedication, no conflict arguably *even exists* between the two legal regimes.[255]

Rather, the aforementioned legislative "silence" in subdivision enabling statutes must be construed in light of the existing law of voluntary dedication. So construed, the legislative "silence" in subdivision enabling statutes with respect to a municipality's authority to prohibit dedication by ordinance or practice must give way to the express treatment of this issue of individualized "offers" and "acceptances" of dedication in the existing law of voluntary dedication.

253. 82 C.J.S. STAT. § 351 (2005); *see also* N. Natural Gas Co. v. Grounds, 441 F. 2d 704 (10th Cir. 1971); Merrill v. Dep't of Motor Vehicles, 458 P.2d 549 (Cal. 1969); *In re* A.W., 230 So. 2d 200 (Fla. 1970); State v. Newman, 469 N.W.2d 394 (Wis. 1991).

254. *See e.g.*, Edmond v. United States, 520 U.S. 651, 657 (1997); Bowens v. Superior Court, 820 P.2d 600 (Cal. 1991).

255. In any event, assume that there were indeed an implicit conflict between, on the one hand, state subdivision enabling statutes—concededly broad in their delegation of authority to municipalities—as an implicit grant of authority to permit municipalities to categorically prohibit dedication, and, on the other hand, the existing state law of voluntary dedication that expressly authorizes a voluntary dedication scheme grounded on individualized "offers" and "acceptances" of dedication. Assuming such a conflict were to exist, then, in that event, the conflict must be resolved in favor of the specific law and against the general law, i.e., in favor of the narrowly focused voluntary dedication law and against the generalized state subdivision enabling act. *See* Edmond v. United States, 520 U.S. 651, 657 (1997); Bowens v. Superior Court, 820 P.2d 600 (Cal. 1991).

It will be recalled that in a minority of states, the state law of voluntary dedication has never been codified and remains exclusively an attribute of the common law.[256] Even in these purely common law states, the enactment of subdivision enabling legislation—concededly broad in scope and application—should not, and need not, be construed as amounting to an abrogation of the long-standing common law tradition of individualized "offers" and "acceptances" of dedication. Applicable to this analysis is the long-standing maxim of statutory construction that "statutes in derogation of the common law are to be strictly construed."[257] Under this rule of interpretation, a legislature is "presumed to know the common law before the statute was enacted."[258] In this context, a legislature's enactment of a subdivision enabling statute granting municipalities broad but unspecified powers with respect to subdivision regulation, including mandatory dedication, properly should not be construed as abrogating the long-standing common law of voluntary dedication. Indeed, not a single published decision so holds. Rather, the scope of the legislature's grant of authority to municipalities to regulate subdivisions, to the extent ambiguous with respect to the scope of derogation of the common law of voluntary dedication, should, under long-standing principles of statutory construction, be strictly construed in favor of the continuing vitality of the common law of voluntary dedication.

Moreover, as previously noted, the common law of voluntary dedication remains viable in virtually all fifty states, and has been held not to have been abrogated or modified *even where states have enacted statutes addressing the identical subject matter*—i.e., the procedures and prerequisites of voluntary dedication—and even when the statutory law's treatment of voluntary dedication is at variance with the common law's treatment.[259] That is powerful evidence that the common law of voluntary dedication deserves special respect when applied in the separate but related interpretive context of the common law's interpretive effect on the scope of authority granted to municipalities under subdivision enabling statutes.

256. *See supra* note 213 and accompanying text.

257. *See, e.g.*, Thompson v. Thompson, 218 U.S. 611 (1910); Haven v. Polska, 215 F.3d 727 (7th Cir. 2000), *cert. denied*, 121 S. Ct. 573 (2000); Books-A-Million, Inc. v. Ark. Painting and Specialties Co., 10 S.W.3d 857 (Ark. 2000); *In re* Water Use Permit Applications, 9 P.3d 409 (Haw. 2000); Thibodeau v. Slaney, 755 A.2d 1051 (Me. 2000); Barnard v. Rowland, 512 S.E.2d 458 (N.C. Ct. App. 1999).

258. NORMAN J. SINGER, 2B SUTHERLAND ON STATUTORY CONSTRUCTION § 50.01, at 140 (6th ed. 2000) (2006 supp.).

259. *See supra* notes 216–18 and accompanying text.

In short, modern subdivision enabling statutes—although constituting a broad grant of power to municipalities in connection with the use and development of land—cannot be understood as a grant of authority to municipalities to *categorically* prohibit dedication, in light of the continuing vitality of the common law and statutory law of voluntary dedication in virtually every state that continues to prescribe the methods and means by which dedication is to be effected.

4. CONSTITUTIONAL CONSIDERATIONS

In the preceding sections, I have argued that the law of voluntary dedication requires, at the very least, an individualized determination by the municipality of an offer to dedicate.[260] A municipal ordinance or informal policy that *categorically* precludes dedication runs counter to this requirement, and, as such, is properly adjudged as invalid on the grounds that it is arbitrary, unreasonable, and in conflict with state law. To these arguments grounded in principles of statutory interpretation and state-law preemption I would add the following arguments founded on constitutional considerations.[261]

a. The *Lucas* Constitutional Doctrine of "Background [State Law] Principles" as Applied to Municipal Imposition of Public Service Exactions

In *Lucas v. South Carolina Coastal Commission*, the Supreme Court observed that, as a general proposition, ownership in real property necessarily encompasses "background principles of the State's law of property" which "inhere in the title itself."[262] The *Lucas* formulation—admittedly recognized in an entirely different substantive-law context[263]—nevertheless

260. As previously noted, in some states the municipal power to refuse dedication is circumscribed by existing law, in that such law deems municipal acceptance of dedication to have occurred upon the completion of certain acts by the dedicator. *See supra* text accompanying notes 237–41.

261. Note that the constitutional theories set forth here are offered in addition to—and not necessarily as an integral or essential part of—the principal state law arguments offered in the preceding section.

262. Lucas v. S.C. Coastal Comm'n, 505 U.S. 1003, 1029 (1992)(observing that, as a general proposition, ownership in real property necessarily encompasses "background principles of the State's law of property[,] . . . which inhere in the title itself").

263. In *Lucas*, the Court held that the state's deprivation, by way of regulation, of all economically viable uses of real property constitutes a *per se* compensable taking under the Fifth Amendment. *Lucas*, 505 U.S. at 1027–29. Of relevance here, the Court's "regulatory taking" analysis was informed by, and made subject to, state law principles of property and nuisance. *Id.* at 1029. Under *Lucas*, even if a regulation were to have the effect of prohibiting all economically beneficial use of a particular parcel of land, the owner of the parcel nevertheless would not be entitled to compensation, provided the regulation were in accord with "background principles of the State's law of property." *Id.*

may suggest that the "ancient"[264] law of voluntary dedication is properly understood as a *property right*, which, in the words of the *Lucas* Court, "inhere[s] in the title itself."[265]

Stated differently, the common law and statutory law of voluntary dedication can be fairly said to constitute part of the "background" law of property. That being so, a qualified right to dedicate—or a qualified limitation on the authority of municipalities to categorically refuse dedication—might well be of a constitutional dimension.

The import of this is *not* to eviscerate a municipality's well-settled right to individually consider and individually reject a proposed voluntary dedication. It is, instead, to subject the municipal decision to a somewhat higher degree of judicial scrutiny. It is to suggest that an owner's qualified right to dedicate is not to be abrogated by undue deference to the exigencies of a municipal land use policy aimed at load-shedding traditionally municipal functions and services.

b. The Constitutional Theory of "Representation-Reinforcememt" as Applied to Municipal Imposition of Public Service Actions

Another potential approach to constitutionalizing the law governing municipal imposition of public service exactions (and the municipality's concomitant categorical rejection of traditional voluntary dedication by the developer) proceeds from an entirely different premise. A leading constitutional theorist, John Hart Ely, has championed the theory of "representation-reinforcement," which holds that "unblocking stoppages in the democratic process is what judicial review ought preeminently to be about."[266] As Hart explains, such stoppages in the

Thus, in the context of a claimed regulatory taking based on a total deprivation of economically viable use, the *Lucas* doctrine of "background principles" operates as a *defense* against such a "takings" claim.

In the present context, the invocation of the *Lucas* "background principles" doctrine is admittedly somewhat paradoxical. Public service exactions—at issue here—constitute a sort of "mirror image" of the regulatory taking at issue in *Lucas*. Put simply, the right at issue here is *not* the right to avoid an uncompensated taking but rather the right to have property *taken* for public use under the state law doctrine of dedication. In this context, the *Lucas* doctrine of "background principles" is properly understood as a "sword," rather than as a "shield."

The mirror-image of *Lucas*, although perhaps alluring, is a distraction. The import of *Lucas* is that it establishes that, as a general proposition, ownership in real property necessarily encompasses "background principles of the State's law of property[,] . . . which inhere in the title itself." *Id*. As described in the text above, it is *this* general proposition of constitutional law, standing alone, that is readily applicable to the issues here presented.

264. Friends of the Trails v. Blasius, 78 Cal. App. 4th 810, 824 (2000).

265. *Lucas*, 505 U.S. at 1029.

266. JOHN HART ELY, DEMOCRACY AND DISTRUST 117 (1980).

democratic process typically occur "when . . . the ins are choking off channels of political change to ensure that they will stay in and the outs will stay out."[267]

Hart's theory of representation-reinforcement has obvious application to municipal imposition of public service exactions and to municipal nullification of the state law of voluntary dedication. As previously noted, the municipal land use approval process that places into effect the public service exaction directly involves only the developer and the municipality.[268] Yet a municipal land use policy requiring the establishment of a community association—and rejecting a developer's offer of dedication—binds not only the developer, but also future generations of homeowners who will be living in the community. The new community will be established in a certain way—with private functions and services—and, in most cases, the initial privatization decision will be permanent and binding.[269]

The future residents of the community association, of course, play no direct role in this critical decision-making process,[270] but will be bound by an intricate system of rules that are fashioned in the course of the process—rules that, once implemented, typically may be modified only by a supermajority vote of the residents.[271] Nor can it be fairly

267. *Id*. at 103.

268. *See supra* text accompanying notes 64–65 and 143–146.

269. *See id*.

270. Of course, future residents of any community play no direct role in the establishment or ratification of a community's legal regime. To cite only the most obvious example: none of us were alive when the Constitution was ratified. But there exists a critical distinction between (on the one hand) the establishment of a legal regime by what may be fairly characterized as the future residents' *predecessors-in-interest* and (on the other hand) the circumstances here presented.

As previously noted, a municipality, under present law, has virtually unfettered discretion to impose public service exactions and to categorically deny dedication. *See supra* notes 57–65 and 82–135 and accompanying text. Thus, even assuming the developer could be said to be the future residents' predecessor-in-interest (a problematic formulation, in any event), the developer is in no position, under current law, to overcome the municipality's interests, which are to minimize its own expenditures (through public service exactions, and to maximize its revenues. *See* Parts II and III, *supra*. Those interests are antithetical to the interests of the future residents of the subdivision.

In short, the future residents of a community association (that is established as a consequence of the municipal imposition of a public service exaction) presently *have no effective predecessor-in-interest* within the context of the land use approval process that gave rise to the public service exaction.

271. *See* MCKENZIE, *supra* note 2, at 21, 127; U.S. ADVISORY COMM'N, *supra* note 1, at 16. As Professor McKenzie notes, changes to community-association rules are rendered particularly difficult because the governing documents typically require a supermajority not just of those who have cast a vote, but rather of all who are eligible to vote by virtue of ownership in the community association. MCKENZIE, *supra* note 2, at 21. For this reason, among others, "The developer's idea of how people should live is, to a large extent, cast in concrete." *Id*.

said that these residents "voted with their feet," in light of the dearth of non-association related housing—particularly affordable housing—in many major regional housing markets of the United States, especially in fast-growing areas of the Sunbelt.[272]

Then too, public service exactions often establish an unequal system of taxation as between the newcomer and the existing residents.[273] Typically, the newcomers shoulder a greater effective tax burden consisting of ordinary real estate taxes *plus* community association fees to cover the cost of privatized services (that elsewhere in the same municipality may well be provided by the municipality itself at no further cost to those residents).[274] Surely, this is a powerful indicia of a failure of the ordinary democratic processes of government.[275]

Viewed broadly, local governments, by imposing public service exactions, are effectively creating a second tier of municipality—*with no meaningful oversight of the process*[276] *and, indeed, virtually no public recognition of either the process or the policy choices that are leading to this result*.[277] Moreover, those individuals who are most directly affected by the exaction policy—i.e., the residents of the new community—are unrepresented in the process. Indeed, this constituency literally does not even exist at the time that the process is occurring.

For all of these reasons, heightened judicial review of public service exactions—consistent with the principles underlying the constitutional theory of representation-reinforcement—would appear both appropriate

272. See supra ntoes 159–160, 177 and accompanying text.

273. *See supra* ntoes 151–152 and accompanying text.

274. See *id*.

275. Indeed, it should not be forgotten that the American Revolution was fought in part because of the colonists' revulsion with a regime of "taxation without representation."

276. As previously noted, municipalities imposing public service exactions do so with seemingly unfettered discretion. *See supra notes* 57-65 and 82-135 and accompanying text. I have not found a single published decision challenging a municipality's authority to require a subdivision developer to establish a community association as a condition of land use approval or to assume responsibility for traditionally municipal services as a condition of land use approval.

277. The phenomenon of the privatization of traditionally municipal functions and services through the establishment of community associations has been termed "the most significant privatization of local government responsibilities in recent times." U.S. ADVISORY COMM'N, *supra* note 1, at 18. Consider other privatization initiatives, such as, for example, periodic proposals to privatize Social Security. Whatever the merits of privatizing Social Security, one would hope that such a far reaching privatization proposal would be subjected to rigorous scrutiny and review by all interested parties. The point here is that "the most significant privatization of local government responsibilities in recent times" has *not* only been *not* subject to rigorous scrutiny or review, the process has been largely invisible.

and warranted.[278] If, as Professor Ely contended, "unblocking stoppages in the democratic process is what judicial review ought preeminently to be about,"[279] then courts properly should scruntinize carefully, in each case, the various "stoppages" intrinsic to the municipal land use approval process that places into effect the public service exaction.[280]

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The foregoing constitutional theories are offered in addition to—and not necessarily as an integral or essential part of—the prinicipal state-law arguments in support of judicial review of municipal nullification of the state law of dedication and municipal imposition of public service exactions. The robust interpretation of the state common law and statutory law of dedication in no way depends on a substantive constitutional dimension to a limitation on a municipality's power to categorically refuse dedication or to impose public service exactions.

5. SUMMARY AND CONCLUSION

The mechanism of dedication is a traditional means to transfer private land to the public to ensure public access of landlocked private property and to ensure a landowner's right to certain public services, such as street maintenance, street lighting, snowplowing, police patrols, curbside refuse collection, and open space maintenance.[281] I have proposed a robust interpretation of the long-standing and still extant law of voluntary dedication,

278. As a practical matter, only the developer could be expected to have standing to bring suit against a municipality to overturn a public-service exaction at the time of its imposition. Thus, although the representation-reinforcement theory would, in this context, be intended to ultimately benefit the future residents of the community, the successful application of the theory would require the developer to, in effect, "stand in the shoes" of the future residents. For further discussion of this point, see *infra* notes 287–88 and accompanying text.

279. ELY, *supra* note 267, at 117.

280. Representation-reinforcement, of course, is a theory of constitutional interpretation, not an independent source of constitutional authority. The theory provides a rationale for an expansive and stringent application of the Constitution's equal protection and due process guarantees to the municipal decision-making process here at issue, including a municipality's categorical rejection of the state law of voluntary dedication and a municipality's imposition of public service exactions.

281. As previously noted, there is a strong historical correlation between (on the one hand) municipal ownership of streets and (on the other hand) municipal responsibility or obligation to provide services directly related to, or ancillary to, the public street, i.e., street maintenance, street lighting, snow removal, utilities, curbside refuse removal, and

as a means to counteract municipal imposition of public service exactions—which amounts to a repudiation of the common law (and, in many states, the statutory law) of dedication.[282]

The robust interpretation of the existing law of voluntary dedication requires, at the very least, an individualized determination by the municipality of an offer to dedicate.[283] Because a municipal ordinance or informal policy that *categorically* precludes dedication runs counter to this requirement, the ordinance or policy is properly adjudged as invalid on the grounds that it is arbitrary, unreasonable, and in conflict with state law.[284] Other arguments—grounded in constitutional law—further buttress this conclusion.[285]

The robust interpretation of dedication may serve as a bulwark against widespread municipal land use policies that systematically impose public-service exactions on all new subdivisions, or entire classes of subdivisions, by categorically refusing dedication in new subdivision development. Properly applied, the principle that I propose will not impair a municipality's authority to refuse dedication when, in particular circumstances, dedication is not warranted, such as, for example, when a facility offered for dedication is not truly "public" (such as when the roadway is more in the nature of a driveway than a public street) or when the facility for which dedication is sought is not built in conformance with reasonable design or construction standards that the municipality imposes on itself when the municipality constructs the facility. In these circumstances, a municipality properly would retain discretion to refuse dedication.[286]

The robust interpretation of dedication is intended principally to be applied in the context of a developer's application for land use approval, when a developer seeks to build a new residential subdivision in a municipality that, by ordinance or written policy, categorically

public police patrols. *See supra* notes 182–184 and accompanying text. In most states, it is likely that, once a street is dedicated to a municipality, most or all of the aforementioned services become a municipal responsibility by operation of law. Thus, it is unlikely that, if the remedy here proposed were to be adopted by courts, a municipality could—on its own initiative and without a change in underlying state law—uncouple the obligation to provide the full complement of municipal services on dedicated property from the acceptance of the dedicated property.

282. *See supra* notes 207–220 and 237–241 and accompanying text.

283. As previously noted, in some states the municipal power to refuse dedication is circumscribed by existing law, in that such law deems municipal acceptance of dedication to have occurred upon the completion of certain acts by the dedicator. *See supra* text accompanying notes 237–241.

284. *See supra* notes 246–249 and accompanying text.

285. *See supra* notes 262–280 and accompanying text.

286. *See supra* notes 248–249 and accompanying text.

refuses dedication.[287] The availability of the remedy—or the mere threat of invocation of the remedy—may induce the municipality to revoke its categorical "no-dedication" policy and give proper consideration to the developer's proposal to construct a traditional subdivision with traditionally public infrastructure. Of course, the promise of individualized consideration of a developer's proposal to dedicate is no guarantee that a developer's proposal will be accepted by the municipality.

Importantly, my proposed remedy contemplates that a municipality's rejection of dedication must be accompanied by a statement of reasons. The municipality's rejection—together with municipality's reasoning—would form the basis of judicial review. The ultimate outcome of judicial review, of course, would depend, to a great extent, on the standard of review to be applied. I have argued here for a heightened standard of review, based in part on policy considerations and in part on constitutional considerations.

Whether the proposed remedy, even if judicially recognized, would actually be used by developers would, of course, depend upon many practical considerations. Plainly, the ultimate beneficiaries of the remedy are the homeowners who will be living in the new subdivision. But, as a practical matter, only the developer could be expected to have standing to bring suit against a municipality to overturn a public-service exaction at the time of its imposition. Whether a developer actually would take advantage of the availability of a legal right and remedy to challenge a municipality's policy of public-service exactions would depend on such practical considerations as whether such a challenge would have a reasonable chance of substantially lowering housing costs to the consumer—and thus be in the developer's own interest.

If the financial stakes were high enough, presumably the larger well-financed developers might perceive an advantage in using the blunt instrument of litigation in an effort to lower ultimate housing costs.[288] In

287. Although the judicial remedy here proposed is principally intended to be applied in the context of a developer's application for land use approval, the remedy could be made applicable, as well, as a means for *an existing community association* to effect dedication of private infrastructure to a municipality. In particular, the remedy might be applicable when a community association desires a municipal takeover of its private infrastructure, such as roads or sewers, as a means to reduce homeowner fees or to alleviate financial distress of the association. For a discussion of the special considerations that apply in this context—including the requirement that the private infrastructure conform to municipal construction standards prior to municipal takeover—see *infra* notes 298–301 and accompanying text.

288. Of course, many developers might not wish to antagonize municipal officials through aggressive litigation, particularly in light of municipal officials' substantially unfettered discretion—under the PUD zoning regime—to impose various requirements

this regard, the *Mount Laurel* "builders' remedy"[289]—devised by the New Jersey Supreme Court to implement its *Mount Laurel* affordable housing mandate on municipalities—serves as a model for using the economic interests of the developer as a surrogate for the public interest.

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Over 150 years ago the Supreme Court underscored the importance of the "well-established principle" of dedication as a device to ensure the orderly development of cities and towns.[290] The Court observed that the importance of dedication "may not always be appreciated, but we are in a great degree dependent on it for our highways, the streets of our cities and towns, and the grounds appropriated as places of music or of public business, which are found in all our towns, and especially in our popular cities."[291] The large-scale privatization of new community development through public-service exactions (and the establishment of community associations to provide the formerly public services) is, in no small measure, a result of a shortsighted municipal fiscal policy that, in the interest of municipal expense minimization, is permanently altering the new suburban landscape. It is time for the courts to restore the traditional understanding of voluntary dedication as a means to ensure that new development will be in the public interest (and will thereby provide an abundance of housing choices and community options), and not merely in the narrowly defined fiscal interest of municipalities in their exercise of their land use regulatory powers.[292]

B. *Legislative Policy Recommendations*

Although the proposed judicial remedy would provide an important means to address the worst aspects of public service exactions, legislative reform in this area is preferable. Only state legislative reform can properly and efficiently restore the balance between the valid exercise of municipal land use powers (including the power to impose traditional

on developers as a condition of land use approval. That is to say: an aggressive litigation strategy on the part of the developer may not be consistent with the "institutionalized bargaining" implicit in the PUD zoning regime. *See supra* notes 57–65 and accompanying text.

289. Southern Burlington County NAACP v. Township of Mount Laurel, 456 A.2d 390, 452–60 (1983) (establishing, under the authority of the New Jersey Constitution, a "builder's remedy" aimed at requiring municipalities to adopt zoning provisions that permit affordable housing for the benefit of moderate- and middle-income households).

290. Mayor of New Orleans v. United States, 35 U.S. (10 Pet.) 662, 712 (1836).

291. *Id.* at 712.

292. As to the many reasons that the public interest and the narrowly defined fiscal interest of municipalities do not coincide, see Points IV.A.-F., *supra.*

exactions and public service exactions under appropriate circumstances) and reasonable limitations on unrestrained across-the-board *de jure* or *de facto* privatization of traditionally municipal services in new subdivisions.

As more fully discussed in Part IV, public service exactions have many adverse primary and secondary effects on regional housing markets and on the fabric of new communities. Among other effects, public service exactions make the most affordable form of market-rate new housing development—i.e., cluster housing—more expensive by saddling homeowners with the cost of operating and maintaining traditionally municipal infrastructure.[293] Then too, the policy often has the perverse effect of making the most affordable housing units in a jurisdiction bear the highest effective tax burden.[294] Furthermore, the policy has seldom, if ever, been subject to public scrutiny or judicial review, because the immediately interested parties that benefit from the policy—the municipality and the developer—each have a substantial stake in the continuation of the policy and have no incentive to challenge it or subject it to public scrutiny.[295]

Recognizing that public service exactions have many adverse primary and secondary effects on regional housing markets and on the fabric of new communities, legislative reform would seek to reign in the unbridled municipal discretion to nullify the prior (and, as argued here, still extant) law of voluntary dedication. Legislation should generally establish a presumption in favor of municipal acceptance of dedication of streets and sewers in new subdivisions, unless the municipality can show that acceptance of dedication would not be in the public interest, as in, for example, a truly private roadway more in the nature of a private driveway or parking lot rather than a thoroughfare.

Of course, the foregoing presumption assumes that the landowner is, in the first instance, *offering* the facilities for dedication. Voluntary dedication, it will be recalled, requires an offer as well as an acceptance.[296] It is perhaps unnecessary to state that the proposed legislation places no *new* obligation on the landowner to offer a facility for dedication. Related to this, recall that, under existing law, a municipality may impose exactions, including *mandatory* dedication, subject to constitutional and statutory limitations.[297] The proposed legislation would not alter the law of mandatory dedication.

293. *See supra* notes 148–53 and accompanying text.
294. *See supra* notes 152–53 and accompanying text.
295. *See supra* notes 153–54 and accompanying text.
296. *See supra* notes 200–12 and accompanying text.
297. *See supra* notes 229–33 and accompanying text.

Municipalities derive a substantial amount of their land use regulatory power from the vast discretion accorded them in certain land use decision making, including, for example, the review and approval of PUDs and variances. Legislation should make clear that when a municipality and a developer enter into a "development agreement" in connection with the PUD approval process whereby the developer is required to waive the right to dedicate streets, sewers, or open spaces, that supposed "waiver" should not necessarily end the judicial inquiry, in light of the municipality's vastly superior bargaining position. In other words, municipalities should not be permitted to nullify the law of dedication—and, as well, to nullify the aforementioned presumption in favor of dedication that I have proposed—under the guise of a "waiver" in a development agreement entered into between the municipality and the developer. If it were otherwise, then the aforementioned presumption, as a practical matter, would be illusory.

Legislation also should upend the *status quo* whereby municipalities often allow developers to build streets and sewers to lower design and construction standards than comparable infrastructure deemed eligible for dedication.[298] This circumstance plainly provides a perverse incentive for the developer *not* to dedicate facilities that it might otherwise prefer to dedicate, since the developer stands to save substantial construction costs if it builds to the lower standards, then, in lieu of dedication, turns over the completed facility to a newly created community association.[299]

True, the developer's lower construction cost might well be passed onto the future homeowners, thereby moderating house prices in the new subdivision. But, for a number of reasons, the "savings" represent a false economy to the future homeowners. *First*, the "savings" ensures that the homeowners will be saddled with the direct cost of operating and maintaining the infrastructure, a cost that the homeowners would

298. "Flexibility in design standards [of subdivision infrastructure], although allowing local governments bargaining power, has led, in many cases, to design and construction deficiencies in some of the private facilities owned and operated by [community associations]. . . . *The reason these facilities did not have to meet public standards is because the facilities remain private.*" Loghini & Mosena, *supra* note 31, at 3 (emphasis added).

299. At least one commentator has characterized local governments' two-tiered construction standards for public streets and private streets as more than merely an incentive to privatize the streets. James Dowden states: "Local governments which are not willing to relax their design and construction standards for streets and roads, but which permit lesser standards for private roads, *literally force* the developer of a cluster development to rely on a homeowners association." DOWDEN, *supra* note 31, at 11 (emphasis added).

not have had to directly bear (to the exclusion of all the other municipal taxpayers) if the infrastructure had been dedicated to the municipality. *Second*, the "savings" ensures that if the homeowners, at some future time, were to attempt to seek dedication of the private infrastructure in order to relieve themselves of the maintenance burden, the municipality unquestionably would refuse to accept dedication, on the ground that the substandard design or construction standard, by itself, precludes acceptance of dedication.[300]

For these reasons, proposed legislation should preclude municipalities from permitting developers to build streets and sewers to lower design and construction standards than comparable infrastructure deemed eligible for dedication. This legislative reform removes the "false economy" that induces developers to establish community associations (when they might not otherwise) and saddles future homeowners with operating and maintenance expenses that they need not directly and exclusively bear.

At the very least, this aspect of the legislation serves to further "level the playing field" with respect to the critical decision by a developer of whether or not to establish a community association in connection with a new subdivision development—and related to this, assuming an association were to be established, the proper scope of operating authority and maintenance responsibility of the association.

Put simply, the aim here is to make a developer's decision of *whether* to establish a community association (and, again, the related decision, assuming a community association were to be established, of *the scope of operating responsibility* of the association) a decision deriving simply from the demands of the housing marketplace, and not from primarily (or even exclusively) the perceived fiscal interests of the municipality as implemented through its plenary land use powers. In this sense, the policies do not contemplate a new program of heavy-handed government intervention. On the contrary, the policies seek to reduce the role of the municipality in making critical decisions at the inception

300. *See* Loghini & Mosena, *supra* note 31, at 9 (noting that "[t]he most serious barrier to [municipal acceptance] of public dedication [of private facilities owned by community associations] is that the facilities are often not built to public standards," and further noting that "[t]he problem is that many [community associations] cannot afford to bring the facilities up to public standards"); ROHAN II, *supra* note 52, § 12.02(2) (noting that many community associations are placed in a difficult financial position by reason of a developer's decision to build private roads to lower design or construction standards, thereby greatly complicating and making more expensive any future efforts by the community association to gain municipal acceptance of dedication of the private roads).

of new subdivision development that will shape the course of the new community for decades to come.[301]

Finally, the proposed legislation might well also address the particular circumstances of existing association-run communities that have been subject to public service exactions and that are currently struggling with the economic consequences of those exactions. As to these communities, I offer the following recommendations and policy guidelines aimed at facilitating the public takeover of existing public service exactions *when such takeover is desired by the community association's residents as a means to reduce homeowner fees or to alleviate financial distress of the community association*:

—**Municipal takeovers of association infrastructure are to be preferred over taxpayer funding of infrastructure that remains under private ownership and control.** Some jurisdictions have enacted legislation that authorizes taxpayer-financing of private property owned by community associations.[302] But this strategy has drawbacks for both the municipality and the community association. As to the municipality, the taxpaying authority would be required to fund the maintenance of private property, but perhaps without the economies of scale that would prevail if the municipality were to provide the service itself.[303] As to the

301. Note that these legislative proposals do *not* affect a municipality's authority to impose traditional exactions, as distinct from public service exactions. As previously noted, traditional exactions commonly take the form of compelled dedication of land and/or a requirement that a developer construct subdivision infrastructure and, upon completion of construction, turn over the infrastructure to the municipality. Traditional exactions also take the form of fees paid by the developer to the municipality in lieu of mandatory dedication or mandatory capital construction by the developer. *See supra* notes 68–69 and accompanying text. Traditional exactions serve to reduce a municipality's capital costs; public service exactions reduce the municipality's operating costs.

302. In 1990, New Jersey became the first state to require all of its municipalities to provide certain municipal services to qualifying community associations, or, in the alternative, to require municipalities to reimburse community associations for the value of the services furnished by the associations themselves. N.J. STAT. ANN. §§ 40:67-23.2 to -23.8 (West 2006). Covered services include refuse collection, snow removal, and street lighting. *See id*. § 40:67-23.3. The annual cost to all New Jersey municipalities of complying with this state mandate was estimated, at the inception of the legislative program, at $62 million. *See* SENATE REVENUE, FINANCE AND APPROPRIATIONS COMMITTEE STATEMENT, S. REP. NO. 2869, c. 299 (1989), *reprinted in* N.J. STAT. ANN. § 40:67–23.2 (West 2006). Although no other state has yet followed New Jersey's lead, certain local governments, such as Houston and Montgomery County in Maryland, have adopted similar measures in which direct government aid is provided to community associations. *See* DOWDEN, *supra* note 31, at 46; U.S. ADVISORY COMM'N, *supra* note 1, at 12–14.

303. If, on the other hand, the municipality were *itself* to furnish municipal services on the association's property (i.e., street maintenance, snow removal, curbside trash collection), issues might well arise concerning whether the association's streets were built to the requisite standards that the municipality imposes upon its own public streets.

community association, the taxpayer funding might come as welcome fiscal relief, but might come at the price of a partial loss of autonomy that often occurs with the receipt of public funds: i.e., the need for governmental oversight, inspections, and fiscal auditing that inevitably arise when taxpayer funds are involved.[304]

In any event, a municipal takeover of the private facility by way of voluntary dedication would be the fairest way to provide the association's homeowners with fiscal relief while protecting the interests of the remaining taxpayers of the municipality, particularly when the local government already provides the same services to other non-association residences in the municipality. In this way, the association homeowners and non-association homeowners will be placed in the same position vis-à-vis the payment of municipal taxes and the receipt of municipal services. Also, both parties will gain the presumed efficiency of the economies of scale resulting from the combined service delivery to both association and non-association residents.[305]

—Under no circumstances should taxpayer funding of private infrastructure be available to infrastructure situated in gated communities. Those who live in most territorial community associations, including gated communities, are often subject to "double taxation," that is, the residents pay fees to their association for the provision

Such standards typically pertain to design and construction specifications deemed necessary for the safety of municipal vehicles.

304. It is even possible that a community association's entanglement with government arising from its acceptance of taxpayer funds might—together with the fact that larger territorial community associations are, in some respects, the functional equivalent of a municipality—trigger a finding that the community association is a quasi-municipal entity or state actor under federal or state constitutional law. *See* Siegel, *supra* note 157, at 524–29. Many, if not most, boards of community associations probably would not view this as a favorable development, in that such a judicial finding inevitably would subject the association board's decision-making to a more stringent standard than is presently the case.

305. Some might object to this analysis by reason of the fact that it would enlarge the "public sector." These same objectors also would no doubt put forth the widely held view that the public sector is inherently more inefficient than the private sector, thereby undercutting any possible cost advantage that might be gained from the economies of scale of consolidating municipal and association services under municipal control. But even if this view were to be correct, the view is largely irrelevant to what is being proposed here. The mere fact that the services would be consolidated under municipal control does not mean that the persons actually performing the services would be government employees. It is quite typical, particularly in the Sunbelt (where most community associations are situated), that municipal services, such as curbside refuse collection, are contracted-out by government to private companies. Indeed, it would not be surprising if the same company that provided the service under contract to the community association would, after municipal takeover, perform the service on behalf of the municipality.

of certain services—such as, for example, refuse collection or street maintenance—that residents elsewhere in the municipality may receive from the municipality itself without additional charge beyond the payment of basic real estate taxes. At the same time, association residents are generally assessed real estate taxes without regard to the fact that the municipality is providing fewer services to these residents than are being provided to non-association residents. As discussed above, some or all of this tax disparity can be cured—if the association residents so desire—by municipal takeover of the association's infrastructure and the resulting municipal assumption of services to association residents.

I have argued that municipal takeover of association infrastructure is preferable to a taxpayer subsidy of association services. But to the extent that public subsidy of association services were to be considered a viable policy option, then, in that context, public funding should, in all events, not be provided for association services in *gated* communities.

As I have said, the apparent unfairness of double-taxation is not lost on residents of community associations, their leaders, or elected officials seeking to cultivate themselves with this rapidly growing constituency. The chain of causation from public service exactions borne by community associations to double-taxation to rapidly growing numbers of disaffected municipal constituents in gated communities may lead, in the long run, to mounting political pressure to subsidize gated communities with taxpayer funds for the operation and maintenance of traditionally municipal infrastructure, a contingency which, if it were to occur, would have serious social, economic, and political consequences. It is bad enough that there is a widespread movement to "secede" from the local body politic by way of the creation of gated communities; it would be considerably worse—for the preservation of our democratic civil society, among other considerations—if that succession were to become taxpayer-financed.

The better approach is that public policy should be directed toward creating strong financial incentives for existing gated communities to remove the gates as a condition precedent to taxpayer subsidy or public takeover of infrastructure.

—Establishment of state or municipal funded low-interest loan programs to permit eligible community associations to upgrade private infrastructure prior to municipal takeover. As earlier noted, municipalities often allow developers to build *private* streets and other *private* infrastructure to lower design and construction standards than

comparable infrastructure deemed eligible for dedication, thereby creating a perverse incentive for developers to reject the option of dedicating these facilities so that the developer may save the incremental construction cost associated with building the facilities to the higher standard. Years later, when the successor community association begins to explore the option of dedication, it typically discovers that the option of dedication is absolutely foreclosed because the municipality will not (and, in fact, may be barred by state law) from accepting dedication of facilities that do not conform to the municipality's standards for its own facilities.[306] Thus, if the community association were to seriously pursue the option of dedication, it is faced, as a threshold matter, with the capital cost of upgrading its facilities in order to satisfy the higher municipal standards. Even if the community association were determined to pursue the option of dedication and even if the municipality were prepared to accept dedication of a facility that conformed to its own construction standards, the cost of facility upgrading may present a difficult, or insurmountable, obstacle to accomplishing the objective.

These circumstances suggest that the various public policy considerations discussed above would be well served if states (or even municipalities) were to enact legislation establishing state or municipal funded low-interest loan programs to permit eligible community associations to upgrade private infrastructure prior to municipal takeover. The availability of low-interest loan funds for eligible community associations would remedy the problem of substandard association-owned facilities (caused in part, in the first instance, by lax municipal standards) and thereby provide a means to permit dedication of these facilities.[307] In light of the rising political power of the association-based movement opposing "double taxation," and the consequent political will for a political solution to the problem of "double taxation," this policy response, for reasons that I have argued above, is preferable to direct taxpayer subsidy of community associations.

Also, as noted above, the low-interest loan funds would provide a tangible incentive for gated communities to remove their gates, since such removal would be a condition of eligibility for the funds. That incentive—in and of itself—would serve a salutary public purpose.

306. *See supra* note 300 and accompanying text.

307. At least one municipality is reported to have adopted such a financing program. The City of Gaithersburg, Maryland, established a zero-interest loan program to finance the upgrade of association-owned water and sewer systems so as to enable associations to satisfy municipal standards for these systems prior to dedication. Loghini & Mosena, *supra* note 31, at 9.

VII. Conclusion

This article has examined the insufficiently understood role of the public sector in facilitating the recent large-scale privatization of new communities in high-growth areas of the United States. In an effort to place the matter in historical perspective, I have described the development and widespread adoption of the PUD zoning concept, and how this concept evolved from a mechanism to interject greater design flexibility into the zoning approval of new subdivisions into a vehicle for municipal privatization decisions affecting traditionally municipal facilities and services. I also have recounted the evolution of the concept of a municipal exaction, which traditionally was understood to encompass certain conditions of subdivision approval, such as, for example, a gratuitous transfer of unimproved land to the municipality that is to be set aside for a public park, or a required private construction of infrastructure that, upon completion, is to be turned over to the municipality. I have argued that a municipal requirement that a developer establish a community association as a condition of subdivision approval—and to thereafter operate and maintain traditionally municipal infrastructure and/or to provide services to residents that are traditionally provided by municipalities—is a further refinement and expansion of the traditional exaction. I have termed this refinement a "public service exaction."

Public service exactions requiring the establishment of a community association binds not only the developer, but future generations of homeowners who will be living in the community. The new community will be established in a certain way—with private functions and services—probably for all time. Local government is thus creating a second tier of municipality—a privatized municipality—with no meaningful oversight of the process and, indeed, virtually no public recognition of the process and policy choices that are leading to this result. It is time for meaningful public debate and public oversight of this critical but overlooked development in United States urban policy.

Public service exactions have many adverse primary and secondary effects on regional housing markets, and on the fabric of new communities. Among other effects, public service exactions make the most affordable form of market-rate new housing development—i.e., cluster housing—more expensive by saddling homeowners with the cost of operating and maintaining traditionally municipal infrastructure and providing traditionally municipal services, including such services as street maintenance, sewer service, water supply, drainage, curbside refuse collection, parks, and even traditional police patrols of public streets. Then

too, the policy often has the perverse effect of making the most affordable housing units in a jurisdiction bear the highest effective tax burden. Furthermore, as already mentioned, the policy has seldom, if ever, been subject to proper public scrutiny or judicial review, because the immediately interested parties that benefit from the policy—the municipality and the developer—each have a substantial stake in the continuation of the policy and have no incentive to challenge it or subject it to public scrutiny.

Recognizing that public service exactions have many adverse primary and secondary effects on regional housing markets and on the fabric of new communities, courts and legislatures should seek to reign in the unbridled municipal discretion to nullify the prior (and, as argued here, still extant) law of voluntary dedication. As to a judicial remedy under existing law, I have argued for a robust interpretation of the state common law and statutory law of dedication as (1) circumscribing a municipality's power to adopt an ordinance categorically refusing dedication with respect to all new subdivisions or entire classes of subdivisions; and (2) as limiting a municipality's unwritten policy to categorically refuse dedication with respect to all new subdivisions or entire classes of subdivisions.

Although the proposed judicial remedy would provide an important means to address the worst aspects of public service exactions, legislative reform in this area is preferable. Legislation can properly and efficiently restore the balance between the valid exercise of municipal land use powers (including the power to impose traditional exactions and public service exactions under appropriate circumstances) and reasonable limitations on unrestrained across-the-board *de jure* or *de facto* privatization of traditionally municipal services in new subdivisions. Legislation should generally establish a presumption in favor of the municipal acceptance of dedications of streets and sewers in new subdivisions, unless the municipality can show that acceptance of such dedications would not be in the public interest, as in, for example, a truly private roadway more in the nature of a private driveway or parking lot rather than a thoroughfare.

If the public role in enabling private residential communities were to be more clearly delineated and analyzed, then the groundwork can be laid for serious public discussion of the future of new community development in the United States, and for possible reform of state and local land use policies. In this article, I have attempted to undertake this process of initial delineation and analysis, so that the vital public policy debate may begin.