Impact Fees for Conversion of Agricultural Land: A Resource-Based Development Policy for California's Cities and Counties

by

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INTRODUCTION

Between 1980 and 1987, the population of outlying rural counties in metropolitan areas of the United States increased by nearly 7.5 million, making these rural areas the fastest growing regions in the nation.[1] One consequence of this growth has been mounting development pressure on remaining agricultural land near urban centers, causing its rapid disappearance. The Greenbelt Alliance, a citizen's land conservation organization, estimates that between 1982 and 1987, 135,000 acres (twenty-eight percent) of the Bay Area's croplands were developed or idled. This five-year period saw the single greatest drop in acreage, both as a percentage of total cropland and in absolute terms, in the history of the region.[2]

The loss of agricultural land in California presents both environmental and economic concerns. From an environmental perspective, the maintenance of agricultural land applies a brake to urban sprawl and congestion by providing much needed open space and habitat. From an economic perspective, agricultural land provides California, and much of the nation, with food and fiber. Although California contains only three percent of the nation's agricultural acreage, it provides fifty percent of the nation's fruits, vegetables and nuts.[3] One in seven jobs in California is in the agricultural sector.[4] Thus, California, and the nation as a whole, have compelling interests in protecting California's agricultural land.

Local governments have achieved some protection of agricultural land through traditional zoning techniques, such as restrictions on use, imposition of minimum parcel sizes, and limitations on residential density. However, while traditional techniques purport to impose "permanent" controls, in practice they have protected farmland only until enough pressure has been exerted to rezone the land for urban uses. Land use restrictions can be lifted at any time by a vote of a city council or board of supervisors. Often, this rezoning occurs without consideration of the land's agricultural value.[5]

Although changes in zoning may reflect current political will and result from market forces, the ease with which agricultural rezoning can take place today fails to account for either the environmental or long

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1. DONALD E. STARSINIC & RICHARD L. FORSTALL, U.S. BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS, SERIES P-25, NO. 1039, PATTERNS OF METROPOLITAN AREA AND COUNTY POPULATION GROWTH: 1980 TO 1987, at 117 (1989).

2. JIM SAYER, THE BAY AREA'S FARMLANDS 17 (1991).

3. CALIFORNIA DEP'T OF FOOD & AGRIC., CALIFORNIA AGRICULTURE STATISTICAL REVIEW 1989, at 8, 11 (1990).

4. Telephone Interview with Frank Limacher, Agricultural Economist, California Department of Food and Agriculture (Apr. 5, 1991).

5. Prime agricultural land has been defined by California as, among other things, land which qualifies for rating as class I or class II in the Soil Conservation Service land use capability classifications. CAL. GOV'T CODE § 51201 (West 1983).

term economic costs of converting this limited resource. The environmental costs of agricultural land conversion include loss of open space as a visual resource and source of growth control, loss of wildlife habitat, loss of vegetation's potential to convert carbon dioxide to oxygen and increased urban run-off of rain water. The economic costs include long-term unavailability of land for the future production of food and fiber. Such costs, much like the costs of air pollution created by automobile use, are not reflected in the current price of using the resource. In economic terms, such costs become externalized. Thus, by failing to place conditions on the rezoning of agricultural land in order to protect its long term viability, it is all too easy to prematurely convert agricultural land under political pressure. Additionally, because some of the costs of conversion are externalized from the market price, the market does a poor job of making consistently rational conversion decisions.

The rate of conversion of agricultural land and its inadequate protection through traditional zoning techniques have encouraged local governments to consider new ways to address the problem.[6] One consideration is a new kind of impact fee levied on development. These innovative impact fees—sometimes called agricultural conversion or farmland mitigation fees—are intended to mitigate the environmental impacts of the loss of agricultural land, particularly prime agricultural land, near urban centers.

Like traditional agricultural zoning practices, farmland impact fee programs recognize that some conversion of agricultural land for urban purposes is both necessary and desirable to accommodate population growth. However, the advantage of agricultural impact fee programs in conjunction with zoning techniques is that they offer methods that compensate for the loss of the resource by permanently protecting agricultural land as an irreplaceable environmental resource. Once converted to urban uses, farmland is permanently lost. It can only be "replaced" by returning fallow land to active cultivation or by converting forests, meadows, and other open space to agricultural uses. Traditional zoning has failed to protect agricultural lands or compensate for their loss as a natural resource. The goal of such fee programs is to allow limited develop-

6. In California, certain innovative protection techniques have already been implemented. The Williamson Act or California Land Conservation Act of 1965 allows land to be placed under long-term contract in an agricultural preserve. CAL. GOV'T CODE §§ 51200-51295 (West 1983 & Supp. 1991). Under Williamson Act contracts, the landowner agrees not to develop the property for a period of at least 10 years in exchange for property tax based on the property's value as open space or agriculture, rather than its value as developable land. CAL. GOV'T CODE §§ 51243-51244 (Deering 1991); CAL. REV. & TAX. CODE §§ 421-423.3 (Deering Supp. 1991) (enumerating the tax consequences of Williamson Act contracts). Williamson Act contracts are useful for preserving agricultural land where property owners consent to maintaining large tracts of land in long-term agricultural production. However, agricultural preserve contracts may be cancelled by action of the public agency. CAL. GOV'T CODE §§ 51280-51286 (West 1983 & Supp. 1992).

ment of agricultural land while requiring that developers pay for the true environmental costs of the loss of agricultural land. The tradeoff inherent in such farmland mitigation fee programs is the permanent conversion of certain farmland in exchange for the permanent or at least long-term protection of other land.

Part I of this article introduces the basic theory of farmland mitigation fees. First, the article explains how farmland mitigation fees might operate. Then the article examines analogous development exactions that are currently employed to mitigate the loss of other important environmental resources. Part I concludes with a brief discussion of some existing farmland mitigation fees.

Part II examines the possible sources of authority in California for imposition of farmland mitigation fees. The article characterizes farmland mitigation fees as resource-based development conditions. It concludes that resource-based development conditions can be justified under the police power granted to cities and counties under article XI of the California Constitution. In addition, the Subdivision Map Act, California's central statute governing the development of land, arguably implies authority for such development conditions.

After determining that agricultural conversion fees are authorized under California law, the article addresses the constitutional hurdles that such exactions must clear. Part III first discusses whether such conditions would violate the takings prohibitions in the U.S. and California Constitutions. Next, the article explores the possibility that farmland mitigation fees might be characterized as the type of "special taxes" requiring a two-thirds vote of the electorate by article XIIIA of the California Constitution (Proposition 13).

This article concludes that, in California, carefully employed mitigation conditions, limited to prime agricultural land under significant development pressure, are authorized and would survive constitutional scrutiny.

I

FARMLAND MITIGATION FEES: BACKGROUND AND BASIC THEORY

Farmland mitigation fees are a relatively new idea. Thus, it is necessary to define a framework for such fees. This article first proposes a framework for establishing agricultural mitigation fees and then examines the broader field of existing resource-based development conditions. Finally, it discusses farmland mitigation fees in practice.

A. *Proposed Theory of Farmland Mitigation Fees*

Land use literature has only occasionally discussed agricultural mitigation fees, and only to a limited extent.[7] Only one state, Vermont, has enacted explicit enabling legislation for agricultural conversion fees.[8] However, to the author's knowledge, no Vermont township has yet taken advantage of the provision by levying such fees. Thus, no practical model currently exists. This article proposes that a successful fee program would adhere to the following three guidelines.

First, a levying agency must determine exactly what agricultural resource it seeks to protect: prime agricultural land, scenic agricultural land, agricultural land of special economic importance, or land exhibiting a combination of these characteristics.

Second, the agency must measure and quantify the impact of urban conversion on this resource. This is the most critical step in establishing a viable fee program, because quantification is necessary for determining the nexus between the development and its burden on the resources. Although local agencies could choose other methods, the most direct way to quantify impact is simply to measure acreage lost on a one-for-one basis—each acre converted to urban use is an acre lost to farming.

Third, an urbanizing development project would be required to pay into a fund the amount necessary to permanently protect an equal number of acres nearby, either through public acquisition of fee title to such lands or through the purchase of open space or conservation easements over such lands[9]. Because the goal of farmland mitigation fee pro-

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7. *See, e.g.*, Julian C. Juergensmeyer, *Implementing Agricultural Preservation Programs: A Time to Consider Some Radical Approaches*, 20 GONZ. L. REV. 701 (1985); Robert H. Freilich & Terry D. Morgan, *Municipal Strategies for Imposing Valid Development Exactions: Responding to* Nollan, 10 ZONING & PLAN. L. REP. 169 (1987). For articles discussing the purchase of development rights on farmland, see Anna L. Strong, *Buying Farmland Development Rights: The Chester County Program*, LAND USE AND ZONING DIG., May 1991, at 3; Edward Thompson, Jr., *Purchase of Development Rights: The Ultimate Tool for Farmland Preservation?* 12 ZONING & PLAN. L. REP., 153 (1989).

8. VT. STAT. ANN. tit. 24, §§ 5200-5203 (1990), discussed *infra* notes 31-36 and accompanying text.

9. California specifically authorizes local governments to acquire open space easements. CAL. GOV'T CODE § 6950 (West 1980). Rules concerning the creation and conveyance of open space easements are also located in the Government Code. Open Space Easement Act of 1974, CAL. GOV'T CODE §§ 51070-51097 (West 1983). Rules concerning the creation and conveyance of conservation easements are located in the Civil Code. CAL. CIV. CODE §§ 815-816 (West 1982 & Supp. 1991). Although Civil Code section 815.3 prohibits a local government from conditioning land use entitlements on the involuntary dedication of conservation easements, it does not prohibit local governments from purchasing conservation easements on other land using fees derived from conditions on development. *Id.* § 815.3. However, to forestall any challenge on § 815.3 grounds, local governments probably would be better off acting under the open space easement provisions of the Government Code, rather than the conservation easement provisions, since the former contain *no* restriction with respect to mandatory dedication. *Id.* § 815.3; CAL. GOV'T CODE §§ 51070-51097 (West 1983). For a further discussion of open space and conservation easements, see 3 KENNETH A. MANASTER & DANIEL

grams is to maintain prime land in agricultural production, easements rather than outright fee ownership probably are preferable. Not only are easements less expensive to acquire, but they are likely to sustain land in viable agricultural production for longer periods since local governments may not be eager, or competent, to be in the business of farming, even as lessors. The fund would be used exclusively for the outright purchase of agricultural land or the purchase of the land's development rights.

To the author's knowledge, no fee program of exactly this description yet exists. This article will describe the kinds of mitigation fee programs for environmental resources that do exist and have been implemented. In parts II and III, the article explores the legal basis for a farmland mitigation fee following the guidelines enumerated above.

B. Precedents for Resource-Based Development Conditions

Although the idea of impact fees for the loss of farmland is relatively new, it grows out of an expanding body of precedent. Numerous measures already exist at all levels of government authorizing fees or requiring other mitigation as a condition of development, when the development damages environmental resources.[10] Such environmental regulation of land use has in some instances become so commonplace as to be accepted as an integral part of the price of development. The relatively widespread nature of environmental regulation of land use is illustrated by a number of examples.

1. Wetlands Mitigation

Perhaps the most familiar of all the resource-based conditions on development are the wetlands mitigation requirements under section 404 of the Federal Clean Water Act. Under regulations promulgated by the EPA and the Corps of Engineers pursuant to section 404, developers are required to take all appropriate steps to minimize impacts on wetlands.[11]

P. SELMI, CALIFORNIA ENVIRONMENTAL LAW AND LAND USE PRACTICE § 66.35 (Mark H. Wasserman ed., 1991).

10. It should be noted that courts have held that mitigation fees are generally interchangeable with outright dedication requirements if the fees are spent for the same purpose as a dedication requirement. *See, e.g.*, Remmenga v. California Coastal Comm'n, 209 Cal. Rptr. 628 (Ct. App. 1985) ($5000 fee in lieu of outright land dedication upheld as valid). Indeed, the courts often impose a lower standard on in-lieu fees than on outright dedication requirements since fees do not involve a physical invasion of property. *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435-36 (1982); Freilich & Morgan, *supra* note 7, at 174; Patricia A. Brooks, *The Future of Municipal Parks in a Post-Nollan World: A Survey of Taking Tests as Applied to Subdivision Exactions*, 8 VA. J. NAT. RESOURCES L. 141, 166 (1988). Whether a lower standard is in fact justifiable in the case of farmland impact fees is discussed *infra*, section III.A.1.

11. 40 C.F.R. § 230.10(d) (1991).

Recently, EPA and the Corps issued guidance interpreting the regulations to require a policy of "no net loss" of wetlands, or 1:1 mitigation.[12]

State legislatures have also considered and imposed mitigation requirements on the filling of wetlands.[13] Recently, a New Jersey Superior Court approved a statutorily mandated 2:1 mitigation ratio under state law as rationally related to the purpose of wetlands protection.[14] In California, Assemblyman Phil Isenberg's (D-Sacramento) 1990 bill on wetland's replacement (AB 4326) was narrowly defeated last year in the state Senate.[15] AB 4326 would have required a 2:1 onsite replacement ratio and a 3:1 offsite replacement ratio for all wetlands impacted by development.[16]

2. *Restoration of Polluted Wildlife Habitat.*

Another precedent for resource-based development exactions is the EPA's recent effort, under provisions of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)[17], to require industrial and commercial polluters of natural resources not only to clean up toxic spills, but also to restore the damaged environment to its natural state.[18] These kinds of "exactions" obviously occur after de-

12. Memorandum of Agreement Between EPA and Department of the Army Concerning the Determination of Mitigation Under the Clean Water Act, 55 Fed. Reg. 9210, 9211 (1990). It should be noted that mitigation is not the preferred protection scheme for wetlands. The Memorandum of Agreement emphasizes that avoidance and minimization of damage should be sought before compensatory mitigation techniques. Where compensatory mitigation is allowed, no less than 1:1 mitigation is usually required. Further, restoration of degraded wetlands rather than creation of manmade wetlands is preferable since there is continuing uncertainty regarding the success of wetland creation. *Id.*

Both avoidance and minimization of damage are clearly better techniques than mitigation for the protection of agricultural land. Thus, cities and counties should strive to steer development away from this resource in the first place. Where practicable alternative sites do not exist, however, 1:1 mitigation should be required for agricultural land. Since the mitigation would consist of placing development restrictions on functionally equivalent land elsewhere, rather than attempting to "restore" or "create" prime agricultural land, the biggest controversies associated with wetlands mitigation do not apply to farmland.

13. *See, e.g.*, WILLIAM L. WANT, LAW OF WETLANDS REGULATION §§ 13.01-13.02 (1991).

14. New Jersey Chapter of the Nat'l Ass'n of Indus. and Office Parks v. New Jersey Dept. of Envtl. Protection, 574 A.2d 514 (N.J. Super. Ct. App. Div. 1990). The court upheld the 2:1 ratio because the scientific evidence in the record demonstrated that natural wetlands have higher ecological value than artificially created wetlands. *Id.* at 523-24. On the same grounds, the court struck down the imposition of a 7:1 replacement ratio since "there [was] simply nothing in this record to indicate why or how the [government agency] chose that ratio for enhancement mitigation purposes." *Id.* at 525.

15. Virgil Meibert, *State Wetlands Bill Is Killed*, CONTRA COSTA TIMES, Aug. 16, 1990, at 18.

16. *Bill Mandates Replacement of Wetlands*, CONTRA COSTA TIMES, May 22, 1990.

17. 42 U.S.C. §§ 9601-9659 (1992). It is also known as the Superfund Law.

18. Michael Parrishi, *U.S. to Require Polluters to Restore Wildlife, Habitat*, L.A. TIMES, June 16, 1990, at A1; *see also* SUSAN M. COOKE, THE LAW OF HAZARDOUS WASTE § 12.05[2][m], at 12-103 (1991).

velopment has already taken place, rather than as a condition precedent to development, but the principle is the same—to mitigate damage to an environmental resource. To date, "natural-resource damages"[19] have been sought in Exxon's spill of 567,000 gallons of heating oil at Arthur Kill, New Jersey; in a marine toxins case in New Bedford, Massachusetts; and in a proposed settlement between six government trustees and Shell Oil Company over a 1988 spill near Martinez, California.[20] This new tactic "attempt[s] to fix what economists have been complaining about for years. That is, the failure of the market to realize that environmental quality is worth something."[21]

3. *Air Quality*

Recently enacted air quality regulations by regional air quality districts in California present some of the most ambitious, albeit untested, precedent for resource-based development exactions. Under the direction of the South Coast Air Quality Management District, the County of Riverside recently enacted an air pollution mitigation fee of twenty-five dollars per proposed lot for new residential development in order to implement programs to meet the requirements of the region's Air Quality Management Plan. The relatively modest fee will be used first to develop an air quality element for the county's general plan, which in turn will contain authorization for a more substantial mitigation fee to offset air quality impacts.[22]

The Bay Area Air Quality Management District is also contemplating "indirect source rules" to be implemented under the 1988 California Clean Air Act. These rules may include mitigation fees on development projects based upon the amount of air pollution the development creates and the costs of mitigating or offsetting that pollution.[23]

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19. 42 U.S.C. § 9607(f) (1992).

20. Parrishi, *supra* note 18, at A23.

21. *Id.* (quoting William Steele, Counsel to the House Subcommittee on Fisheries, Wildlife Conservation and the Environment).

22. Telephone Interview with Todd Beeler, Chief Deputy Planning Director, County of Riverside (May 1, 1991).

23. Interview with John Powell, General Counsel to the Bay Area Air Quality Management District, in San Francisco, Cal. (Nov. 14, 1990); *see also* CAL. HEALTH & SAFETY CODE § 40716(a)(1) (West Supp. 1991) (indirect source authority of California Clean Air Act of 1988). It should be noted that on January 24, 1992, the Legislative Counsel's Office of the California State Legislature issued an opinion letter upon the request of Assemblyman Cecil Green stating that in their opinion, air quality pollution districts could *not* require permits (and hence impact fees) for indirect sources. Letter from Bion M. Gregory, Legislative Counsel of California, to Sen. Cecil Green (Jan. 24, 1992) (on file with author). The Legislative Counsel's opinion, however, is not binding.

4. Coastal Access

The protection of coastal access as a dwindling environmental resource was upheld as a valid condition of development in *Remmenga v. California Coastal Commission*.[24] *Remmenga* upheld requiring the payment of a $5000 fee, in lieu of an outright dedication, for the protection of public access to the beach.[25] The court found that the fee of $5000 per residential building permit was rationally related to the government's purpose of providing "maximum access to the coast by all the people in this state,"[26] even though the impact fee produced no benefit to the property owner.

5. Linkage Fees

So-called "linkage fees" are another type of resource-based exaction gaining wider use by local agencies. Linkage fees refer to a variety of different programs that require developers to contribute toward new affordable housing, employment opportunities, child care facilities, transit systems and the like, in return for an agency's permission to build new development.[27] Both Boston and San Francisco have adopted affordable housing fees on commercial development based upon the theory that new development creates the need for more affordable housing and consumes land that could otherwise be used for housing.[28] The New Jersey Supreme Court has recently explicitly upheld such linkage fees on the ground that new developments possess and consume raw land, the primary resource for affordable housing.[29] The Ninth Circuit has also recently upheld the city of Sacramento's linkage fee for low income housing levied on commercial development.[30]

Thus, numerous examples of resource-based development exactions have already been implemented and have withstood challenge in the courts. Although the authority to impose such fees or dedication requirements may spring from a variety of statutory or common law sources, the underlying legal trend is the same—the protection of environmental resources as a condition of development is gaining ground.

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24. 209 Cal. Rptr. 628, 632-33 (Ct. App. 1985).

25. *Id.* at 631 (citing Georgia Pac. Corp. v. California Coastal Comm'n, 183 Cal. Rptr. 395, 407 (Ct. App. 1982)).

26. *Id.* at 629.

27. For a more detailed examination of linkage fee programs, see Christine I. Andrew & Dwight H. Merriam, *Defensible Linkage, in* DEVELOPMENT IMPACT FEES 227 (Arthur C. Nelson ed., 1988); DOWNTOWN LINKAGES (Douglas Porter ed., 1985).

28. *See* Douglass Muzzio & Robert W. Bailey, *Economic Development Housing and Zoning: A Tale of Two Cities*, 8 J. URB. AFF. 1 (1986).

29. Holmdel Builders Ass'n v. Township of Holmdel, 583 A.2d 277, 288 (N.J. Sup. Ct. 1990).

30. Commercial Builders v. City of Sacramento, 941 F.2d 872, 873 (9th Cir. 1991).

C. Farmland Mitigation Fees in Practice

Farmland mitigation fees are not completely unknown in the real world of land use regulation. Vermont has passed a law explicitly authorizing farmland mitigation fees. Vermont Act No. 200[31] was enacted in 1988 to encourage consistent local, regional, and state agency planning.[32] The Act includes funding for a housing and conservation trust, consistency review provisions for municipal general plans, and adoption of regional general plans, as well as authority for the imposition of general municipal impact fees.[33] One of the major purposes of the Act is "to enable municipalities to require the beneficiaries of new development to pay their proportionate share of the cost of municipal . . . capital projects which benefit them *and to require them to pay for or mitigate the negative effects of construction*."[34]

The Act provides further that "a municipality may levy an impact fee . . . [or] may accept offsite mitigation in lieu of an impact fee or as compensation for damage to important land such as prime agricultural land or important wildlife habitat."[35] Municipalities are required to develop a reasonable formula to assess the amount of the impact fee, reflecting the impact associated with the development.[36]

Although no jurisdiction in Vermont has yet made use of this authority, it is significant that a state legislature has extended such explicit authority to local governments. Vermont Act No. 200 signals a growing recognition that funding long-term conservation of important agricultural land is in the public interest.

In California, agricultural conversion fees are not explicitly authorized on a statewide basis, as in Vermont. However, at least three conversion fee programs of different varieties are already in existence.

In June 1990, the city of Davis adopted a mitigation fee program for farmland conversion in order to purchase buffer or transition zones between new urban development and remaining agricultural land.[37] The resolution submitting the measure to the voters provided that the purpose of the program was to implement policies in the general plan to "[m]aintain Davis as a small University-oriented city surrounded by

31. VT. STAT. ANN. tit. 24, §§ 5200-5203 (1990).
32. *Id.* § 5200.
33. *Id.* §§ 5200-5203.
34. *Id.* § 5200 (emphasis added).
35. *Id.* § 5202.
36. *Id.* § 5203.
37. Lorena Natt, *Davis Council Approves Huge Open-Space Plan*, SACRAMENTO BEE, June 29, 1990, at B6; Telephone Interview with Harriet Steiner, City Attorney of Davis, Cal. (Sept. 11, 1990); Davis, Cal., City Council Resolution No. 6369 (Feb. 28, 1990). In May 1991, the Davis City Council temporarily suspended the program because of the potentially unfair impacts on developers. Telephone Interview with David Hazoff, Coordinator, Davis Open Space Program (Mar. 13, 1992).

farmland" and that "open space around Davis can be fostered by means of agreements with farmers to obtain open space easements, purchase of development rights, and, as needed, outright purchase of land for purposes of preserving open space."[38]

The "Davis Greenbelt" plan, as it has come to be known, is designed to create a buffer of 1500 feet between urban development and existing farmland, either through dedication of property by developers or payment of fees used to purchase such buffer lands. Large developments on the outskirts of Davis have recently been required to provide up to 250 feet of perimeter buffer space, the remainder to be acquired by Davis through other means. In conjunction with its Greenbelt plan, Davis has also been considering the adoption of 1:1 mitigation fees for the protection of the foraging habitat of Swainson's hawks, a threatened species under California law. Such habitat may include agricultural land.[39]

Similarly, Solano County and the city of Fairfield have recently adopted a farmland/open-space acquisition program through the creation of a Community Facilities District funded under the provisions of the Mello-Roos Act.[40]

Finally, the County of Alameda, as part of its "Fertile Crescent Plan" to protect the area's vineyards, will be charging fees ranging from $2500 to $30,000 per residential unit to be used to purchase development rights on nearby fertile land that is under development pressure.[41] The mitigation fees will be placed in a land conservation trust for the purpose of administering the fee program.[42]

Although such agricultural preservation techniques are new and still relatively rare in California, the foregoing discussion illustrates that more jurisdictions can be expected to turn to agricultural mitigation fees in order to mitigate the impacts of conversion on unique open space and prime agricultural land.

II

SOURCES OF AUTHORITY FOR FARMLAND MITIGATION FEES

Most existing resource-based mitigation requirements are based on express statutory authority or regulation, which are themselves promulgated under legislative grants of authority. The classic example is wet-

38. Davis, Cal., City Council Resolution No. 6369, at 1-2 (Feb. 28, 1990).

39. Telephone Interview with Robert Wolcott, Associate Planner, City of Davis (Nov. 12, 1991).

40. Telephone Interview with Neil Havlick, Executive Director of the Solano County Open Space District, Fairfield, Cal. (Sept. 12, 1990); *see also* Mello-Roos Community Facilities Act of 1982, CAL. GOV'T CODE §§ 53311-53365.7 (West Supp. 1991).

41. Telephone Interview with Lisa Maddingon, Assistant Director of Planning, Alameda County, Cal. (May 8, 1991).

42. Judy Ronningen, *Livermore Valley's Newest Plan Aims to Protect Vineyards*, OAKLAND TRIB., Jan. 8, 1991, at A-10.

land mitigation authorized under regulations pursuant to the Clean Water Act.[43] Another example is parkland dedication or in-lieu fee requirements under the Government Code.[44] However, there is no statutory authority for the imposition of farmland mitigation fees in California. Such authority can be inferred from the police power[45] and possibly from the Subdivision Map Act.[46]

A. Justification Under the Police Power

Even in the absence of statutory authority, farmland mitigation fees can be authorized on essentially the same grounds as the plethora of recently enacted development impact fees, such as fees for roads, libraries, sewer systems, and other infrastructure, primarily based on the police power.[47] However, since most existing impact fees have been levied to provide new development with public services or infrastructure, and not to compensate the community for the loss of environmental resources, the police power basis for agricultural mitigation fees requires some exploration.

The imposition of farmland mitigation fees cannot be justified by exactly the same arguments as fees for roads and sewers since the protection of agricultural lands is neither a governmental service nor a public facility in the strict sense. The argument in favor of service-based fees is that new development creates burdens on government to provide serv-

43. 40 C.F.R. § 230.10(d) (1991).

44. CAL. GOV'T CODE § 66477 (West Supp. 1992).

45. The police power of cities and counties derives from the California Constitution which provides that "[a] county or city may make or enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." CAL. CONST. art. XI, § 7. It is well established that cities and counties may enact land use and environmental regulations under the police power. *See, e.g.*, Berman v. Parker, 348 U.S. 26 (1954). Where there are no state laws in conflict with a local land use regulation, the police power grants cities and counties wide discretion to make regulations to meet existing conditions of modern life. Miller v. Board of Pub. Works, 234 P. 381, 383-84 (Cal. 1925).

46. CAL. GOV'T CODE §§ 66410-66499.37 (West 1983 & Supp. 1991)

47. *See, e.g.*, Associated Homebuilders v. City of Walnut Creek, 484 P.2d 606, 615 (Cal. 1971). California also authorizes and regulates certain development fees for public facilities by statute. *See, e.g.*, CAL. GOV'T CODE §§ 66000-66007, 66477, 66484, 66483 (West 1983 & Supp. 1991). Case law on the validity of service-based development impact fees includes: Russ Bldg. Partnership v. City and County of San Francisco, 750 P.2d 324 (Cal. 1988) (development fees for public transit purposes); California Bldg. Indus. Ass'n v. Governing Bd. of Newhall Sch. Dist., 253 Cal. Rptr. 497 (Ct. App. 1988) (school impact fees); Bixel Assocs. v. City of Los Angeles, 265 Cal. Rptr. 347 (Ct. App. 1989) (fire hydrant development fee); J.W. Jones Cos. v. City of San Diego, 203 Cal. Rptr. 580 (Ct. App. 1984) (facilities benefits assessment on development); *see also* Steven Schwanke, *Local Governments and Impact Fees: Public Need, Property Rights and Judicial Standards*, 4 J. LAND USE & ENVTL. L. 215 (1989); Brooks, *supra* note 10; James Sweeney, *The "Impact Fee," An Exciting and Troublesome Concept*, N.Y. ST. BAR J., Oct. 1988, at 52; Freilich & Morgan, *supra* note 7; James Karp, *Subdivision Exactions for Park and Open Space Needs*, 16 AM. BUS. L.J. 276 (1979). A comprehensive and useful compendium of articles on impact fees can be found in DEVELOPMENT IMPACT FEES: POLICY RATIONALE, PRACTICE, THEORY AND ISSUES (Arthur Nelson ed., 1988).

ices. It is only fair that development "pay its own way," since new development benefits directly from such services.[48] However, the traditional police power rationale for service- or infrastructure-based impact fees does not directly apply to farmland mitigation fees because new development does not need a given number of preserved agricultural acres in the same quantifiable way as it needs and directly benefits from sewer lines, libraries, and traffic signals.[49] Indeed, new development only indirectly benefits from the maintenance of surrounding lands in agriculture. Agricultural open space, however, clearly provides certain benefits to new development and the community as a whole, in terms of the preservation of visual resources, potential recreational areas, growth control, and provision of food and fiber. The difficulty lies in correlating this benefit to a particular development.

Despite these distinctions between fees for capital facilities and fees for farmland mitigation, the basic authority for the imposition of farmland mitigation fees must also be derived from the police power.[50] Case law on the police power often discusses the rationale for development exactions with regard to benefit to the developer.[51] However, there are several important cases which have determined that valid exactions under the police power are not limited to those which provide direct benefit to the developer, but extend also to exactions which are based solely on the burden created by the development.

In *Nollan v. California Coastal Commission*, the U.S. Supreme Court recognized that development burden alone can justify the imposition of an exaction, as long as there exists a logical nexus between the burden created and the type of condition imposed.[52] As noted above,[53]

48. *See, e.g.*, Trent Meredith, Inc. v. City of Oxnard, 170 Cal. Rptr. 685, 689 (Ct. App. 1981).

49. The closest analogy in established development fee law to agricultural mitigation fees in California is the dedication or in-lieu fee requirement for parks and recreation areas that may be imposed as part of the subdivision process. CAL. GOV'T CODE § 66477 (West Supp. 1991); *see also Associated Home Builders*, 484 P.2d at 606. Despite the similarity, parks and public open spaces are publicly owned facilities, and their needs can be quantified more easily than the need for open space in permanent agricultural production. In other words, one can correlate the number of park acres needed to provide recreational opportunities for each 1000 persons. In contrast, it is difficult to say that each 1000 persons needs "X" acres of agricultural land.

50. For a discussion of whether the protection of agricultural land is a valid exercise of the police power, *see infra* part II.A.2. Agricultural mitigation fees, like any other development exaction, must still pass the "nexus" test. *See infra* part II.A.2.b.

51. *See, e.g.*, J.W. Jones Cos. v. city of San Diego, 203 Cal. Rptr. 580, 588 (Ct. App. 1984); Associated Home Builders, Inc. v. City of Walnut Creek, 484 P.2d 606, 610 (Cal. 1971); Trent Meredith, Inc. v. City of Oxnard, 170 Cal. Rptr. 685, 696 (Ct. App. 1981); Bixel Assocs. v. City of Los Angeles, 265 Cal. Rptr. 347, 353-54 (Ct. App. 1989).

52. 483 U.S. 825, 837 (1987). The infirmity in *Nollan* was not that the burden created on the coastal resource could not give rise to a development exaction, but rather that the exaction was not sufficiently related to the burden. *Id.* at 838-39.

53. *See supra* notes 10, 24-26 and accompanying text.

Remmenga v. California Coastal Commission upheld a $5000 fee in lieu of a dedication of a public access easement, to fund acquisition of public coastal access on nearby property, a condition which did not benefit the developer in any way.[54] In *Paoli v. California Coastal Commission*, the court used the police power to uphold a Coastal Commission condition requiring the dedication of a large, doughnut shaped open space easement surrounding coastal development on the sole ground that the condition "is directly related to the disappearance of open land in the coastal region—an exigency to which respondent's project definitely contributes."[55] The condition imposed in *Paoli* was clearly based on the burden placed on an environmental resource (open land in the coastal region) and not on any direct economic benefit received by the developer.[56]

The justification for farmland mitigation fees under the police power can therefore be derived from a recognition of the burden placed on an important environmental and economic resource by new urban development. This burden can be measured not only in terms of the direct loss of agricultural acreage but also in terms of the threat to surrounding farmland created by encroaching development. Encroaching development causes economic uncertainty for owners of farmland, because of the potential incompatibility of agriculture with adjacent residential or commercial uses.[57]

B. Implied Authority in the Subdivision Map Act

In addition to general police power authority discussed above, the Subdivision Map Act[58] contains two implied sources of authority for the imposition of farmland mitigation fees under certain circumstances. The first is through the interaction of the California Environmental Quality Act (CEQA)[59] with section 66474(e) of the Subdivision Map Act, which combine to require mitigation of adverse environmental impacts, unless it is not feasible.[60] The second source is through the power to deny subdivisions, under California Government Code sections 66474 and 66473.5, based upon inconsistency of a proposed development project with the adopted general plan.[61]

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54. 209 Cal. Rptr. 628 (Ct. App. 1985).

55. 223 Cal. Rptr. 792, 798 (Ct. App. 1986).

56. In *Commercial Builders v. City of Sacramento* the court justified the imposition of a fee based on the conclusion that commercial development is related to an increase in the need for low-income housing. 941 F.2d 872, 874 (9th Cir. 1991).

57. A recent Greenbelt Alliance publication observes: "Conflicts inevitably arise between farmers and homeowners because they have competing needs. Homeowners resent noises, smells and slow moving machinery necessary to farm operations. Farmers suffer from vandalism and harassment of their stock." JIM SAYER, THE BAY AREA'S FARMLANDS 15 (1991).

58. CAL. GOV'T CODE §§ 66410-66499.57 (West 1983 & Supp. 1991).

59. CAL. PUB. RES. CODE §§ 21000-21177 (West 1986 & Supp. 1991).

60. CAL. GOV'T CODE § 66474(e) (West 1983).

61. CAL. GOV'T CODE §§ 66474, 66473.5 (West 1983 & Supp. 1992).

1. Adverse Environmental Impacts

California Government Code section 66474(e) requires a local government to deny subdivision approval if it finds that the design of the subdivision or the proposed improvements are likely to cause "substantial environmental damage or substantial and avoidable injury to fish or wildlife or their habitat."[62] Where an environmental impact report (EIR) for a project has identified significant adverse environmental impacts of a project, or even where no EIR has been prepared, a public agency may invoke section 66474(e) to deny a subdivision altogether.[63]

The power to deny a subdivision based upon adverse environmental impacts also entails the power to impose lesser conditions in order to mitigate those impacts.[64] Under the foregoing rationale, if the loss of farmland is found to be an adverse environmental impact significant enough to preclude project approval under section 66474(e), a public agency should be authorized to approve the subdivision upon payment of mitigation fees as an alternative to denying the subdivision outright. As with any adjudicatory decision, the factual groundwork supporting the finding of significant adverse impact must be documented either in an EIR or other environmental document in order to withstand judicial scrutiny.[65]

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62. CAL. GOV'T CODE § 66474(e) (West 1983). "Substantial environmental damage" has been held to have the same meaning as "significant effect on the environment" under CEQA. Topanga Ass'n for a Scenic Community v. County of Los Angeles, 263 Cal. Rptr. 214, 217 (Ct. App. 1989).

63. CAL. GOV'T CODE § 66474(e) (West 1983). Section 66474(e) provides for an environmental impact review separate from and independent of the requirements of CEQA. *Topanga,* 263 Cal. Rptr. at 217. Thus, a subdivision denial based on adverse environmental impact can be made independently of the CEQA process.

64. City of Buena Park v. Boyar, 8 Cal. Rptr. 674, 679 (Dist. Ct. App. 1960) (permitting city to charge developer fee to construct necessary subdivision drainage facilities in lieu of requiring developer to construct improvements itself). Likewise, in *Nollan v. California Coastal Commission*, the Court found that "a permit condition that serves the same legitimate police-power purpose as a refusal to issue the permit should not be found to be a taking if the refusal to issue the permit would not constitute a taking." 483 U.S. 825, 836 (1986).

65. For a discussion of adequate findings, see *Topanga,* 263 Cal. Rptr. at 217.

The passage of California Assembly Bill 886 (Areias), introduced on February 28, 1991 (A.B. 886 is a two-year bill), would considerably aid a public agency in making the finding that a loss of farmland constitutes a significant environmental impact. A.B. 886, Cal. 1991-92 Reg. Sess. 1991. A.B. 886 would authorize a lead agency under CEQA to determine a threshold amount above which the conversion of agricultural land would be deemed to have a significant environmental impact. If no threshold were determined by January 1, 1993, a project resulting in the conversion of more than 100 acres would be deemed to have a significant impact on the environment. Factors to be considered in determining a threshold amount would include the total amount of agricultural land in the jurisdiction, economic viability of the agricultural land and the cumulative effects of agricultural land conversion in the jurisdiction. *Id.*

The significance of A.B. 886 for purposes of a farmland fee program is that a mandatory finding of environmental impact under CEQA *requires* a local agency either to impose mitigating measures sufficient to reduce the impact to a level of insignificance, or else, before it approves the project, to make findings that explain why such mitigation measures are not feasible. If the conversion of "X" acres of prime farmland is automatically deemed to have an

2. *Inconsistency with the General Plan*

The second implied authority for farmland mitigation fees within the Subdivision Map Act is the power, through California Government Code sections 66474 and 66473.5, to deny approval of a subdivision based on inconsistency with the general plan.[66] In *Soderling v. City of Santa Monica*,[67] a condition requiring a condominium conversion project to install smoke detectors was upheld as maintaining the objectives of, and consistency with, the city's general plan which called for the promotion of "safe housing for all."[68] Thus, even though the installation of smoke detectors was not based upon the explicit authority of the Map Act or even on explicit authority in the general plan, such a condition was allowed under the general plan consistency provisions of the Subdivision Map Act.[69] A 1976 Attorney General opinion has similarly concluded that the environmental and consistency provision of the Map Act could support the imposition of conditions on the subdivision process not specifically mentioned under the Map Act.[70]

Despite the apparently loose requirement of *Soderling v. City of Santa Monica*, other courts may require more explicit conflict with the general plan.[71] A municipality's general plan should include express provisions that the public interest requires preservation of farmland as part of the subdivision approval process. The loss of prime farmland through the subdivision process without adequate mitigation would therefore be inconsistent with these policies and would lay the basis for imposing adequate mitigation conditions under sections 66474 and 66473.5.

The foregoing discussion of the police power and Subdivision Map Act demonstrate that, in theory, California land use law provides ample,

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adverse environmental impact, such a finding would lay an important foundation for imposing mitigation fees under CEQA. Similarly, under the California Government Code a finding of significant environmental impact could form the basis for the imposition of mitigation measures in lieu of outright project denial. CAL. GOV'T CODE § 66474(e) (West 1983).

Even if A.B. 886 fails to become law, a local agency is, of course, in no way precluded from making the finding that the conversion of prime agricultural land is a significant impact on the environment.

66. CAL. GOV'T CODE §§ 66474(a)-(b), 66473.5 (West 1983 & Supp. 1991). Under California law, each city and county is required to adopt a comprehensive, long-term general plan for the physical development of the city or county and of any land outside its boundaries which bears relation to its planning. CAL. GOV'T CODE §§ 65300-65404 (West Supp. 1991). The general plan serves as the "constitution" for future development, and all other land use decisions, such as zoning and subdivisions, must be consistent with it. CAL. GOV'T CODE §§ 66474, 66473.5; O'Loane v. O'Rourke, 42 Cal. Rptr. 283, 288 (Dist. Ct. App. 1965); Bownds v. City of Glendale, 170 Cal. Rptr. 342, 345 (Ct. App. 1980).

67. 191 Cal. Rptr. 140 (Ct. App. 1983).

68. *Id.* at 143.

69. *Id.* at 144.

70. 59 Op. Cal. Att'y Gen. 129 (1976).

71. In *McMillan v. American Finance Corp.*, the court held that a city's decision under § 66473.5 that a subdivision was not in conflict with the general plan must be supported by substantial evidence. 131 Cal. Rptr. 462, 469-70 (Ct. App. 1976).

albeit implied, authority for agricultural conversion fees. However, a farmland mitigation program must be carefully conceived and executed in order to survive the potential challenges examined in the next part.

III
CONSTITUTIONAL CHALLENGES TO AGRICULTURAL CONVERSION FEES IN CALIFORNIA

Even if authorized under the police power or implicitly by statute, there are two constitutional hurdles that farmland mitigation fees must still clear to be successfully implemented. The first hurdle is the prohibition against the "taking" of property without compensation under both the federal and the California Constitutions.[72] The second hurdle is the prohibition against the imposition of illegal taxes under Proposition 13.[73] The remainder of this article discusses whether farmland mitigation fees can withstand attack on these grounds.

A. Farmland Mitigation Fees and Takings Law

Takings law as applied to development exactions has recently been the topic of many cases and law review articles, especially since the hallmark decision in 1987 by the United States Supreme Court in *Nollan v. California Coastal Commission*.[74] In brief, a taking has occurred where, first, the government fails to validly exercise the police power[75] and, second, denies a property owner of all economically viable use of his or her property.[76] This test is difficult to apply, and each case must turn on its specific facts.[77]

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72. U.S. CONST. amend. V; CAL. CONST. art. I, § 19.

73. CAL. CONST. art. XIIIA.

74. 483 U.S. 825 (1987). In *Nollan*, the California Supreme Court held that conditioning the issuance of a building permit for beach front property on the inclusion of a public access easement was unconstitutional because the exaction was not sufficiently related to the state's ostensible purpose of protecting visual access to the beach. *Id.* at 836.

75. *Id.* at 834-37.

76. Agins v. Tiburon, 447 U.S. 255, 260 (1980).

77. *See, e.g.*, Keystone Bituminous Coal Ass'n v. DeBenedictus, 480 U.S. 470, 473-74 (1987).

As will become apparent in the following sections, the takings inquiry involves a series of tests within tests. The headings of the sections and subsections provide an outline of the series of inquiries that a court must make to determine if there is a taking. The outline below is provided for ease of reference.

A. Takings Test
   1. Valid Exercise of the Police Power?
      a. Legitimate Government Purpose?
      b. Substantial Relationship Between Fee and Purpose (Nexus)?
         i. Consistency in Kind of Exaction to Kind of Purpose?
         ii. Proportionality of Exaction to Burden?
   2. Deprived of All Economically Viable Use?

1. *Possessory Versus Regulatory Takings*

Before turning to the mechanics of the takings analysis, however, we must first determine which takings test should be applied: a rational relationship test or a heightened strict scrutiny test. Two recent decisions, one from the Ninth Circuit and one from the California Court of Appeal, starkly distinguish between "possessory takings" on the one hand, and "regulatory takings" on the other—and hold that the "strict scrutiny" takings analysis in *Nollan*[78] was only intended to apply to possessory takings.[79] These courts apply a more relaxed "rational relationship" test to regulatory takings. This "rational relationship" test does not require as precise a nexus between the exaction and the government purpose as the strict scrutiny test.[80] As we shall see from the ensuing analysis, farmland mitigation fees could be argued to possess both possessory and regulatory characteristics. However, properly structured, such fees should be able to pass constitutional muster under either category.

A possessory taking results in the actual physical occupation of land by the government.[81] A regulatory taking, on the other hand, does not result in the physical encroachment of property,[82] but normally concerns the uses to which that land may be put.

The distinction between physical occupation and regulatory takings has been recognized for some time and was certainly recognized by *Nollan*. Thus, *Nollan*, with references to *Loretto v. Teleprompter Manhattan CATV Corp.*,[83] recognized that courts should be "*particularly* careful . . . when the *actual conveyance of property*" is involved.[84] However, until *Commercial Builders* and *Blue Jeans Equities*, it appears that courts have not had occasion to distinguish between possessory and regulatory takings in the context of development impact fees. In this regard, both cases held that the heightened scrutiny test contained in *Nollan* does not apply to development impact fees because fees do not constitute a physical encroachment on land.[85]

Commercial Builders upheld a low-income housing linkage fee levied against new commercial development on the theory that new development attracts a low-income workforce to the area, which then requires

78. The *Nollan* strict scrutiny test is described in detail. *See infra* section III.A.2.

79. Commercial Builders v. City of Sacramento, 941 F.2d 872, 874 (9th Cir. 1991); Blue Jeans Equities West v. City and County of San Francisco, 4 Cal. Rptr. 2d 114, 118 (Ct. App. 1992).

80. *Commercial Builders*, 941 F.2d at 873-74.

81. *Commercial Builders*, 941 F.2d at 874. An example would be the requirement in *Nollan* that the developer dedicate a beachfront easement in exchange for permission to build.

82. *Blue Jeans Equities*, 4 Cal. Rptr. 2d at 117.

83. 458 U.S. 419, 434-35 (1982).

84. *Nollan*, 483 U.S. at 831-32, 841 (emphasis added).

85. *Commercial Builders*, 941 F.2d at 874; *Blues Jeans Equities*, 4 Cal. Rptr. 2d at 118.

housing.[86] The court found that it was *not* necessary to show that the "exaction. . .in question is *directly responsible* for the social ill that the exaction is designed to alleviate."[87] Similarly, *Blues Jeans Equities* upheld San Francisco's Transit Development Impact Fee (TDIF) against a takings challenge on the ground that new development in the downtown area placed a burden on public transit facilities.[88] The court declined to find "that the regulation advance the *precise* state interest which avowedly motivated it."[89] Rather, the court found that as long as there is *some* rational nexus between the exaction and the state interest, the nexus test is fulfilled.[90] In sum, both cases involved a challenge to a development impact fee as a taking and both cases held that the *Nollan* strict scrutiny test is inapplicable.

For purposes of this analysis, the next question is whether a farmland impact fee is regulatory or possessory in nature. Arguably, farmland impact fees possess aspects of both. On the regulatory side of the scale, the court in *Commercial Builders* rejected plaintiffs' attempt to characterize *fees* in general as possessory.

> [Appellants] contend that the fee represents the transfer of property, i.e. the money paid over to the city. [Citations omitted]. In this respect, they argue, it more closely resembles a physical taking of property, which automatically falls within the purview of the fifth amendment, than a land use regulation, which is subject to the reasonableness analysis. Under appellant's theory, however, compensation would be required for every fee; therefore every fee would be unconstitutional. We see no valid basis for such a rule.[91]

The court then squarely rejected the argument that a money payment could be a possessory taking, reasoning that "[u]nlike real or personal property, money is fungible."[92] Thus, to the extent that farmland mitigation fees are simply the payment of money, they cannot be characterized as a possessory taking under the rationale of *Commercial Builders*.

On the possessory side of the scale, an impact fee for the purpose of purchasing off-site farmland to mitigate the impacts of the conversion to urban use is really an in-lieu fee, or, in other words, the *equivalent* of a dedication of an interest in land. Thus, a farmland impact fee is distinguishable from a transit fee, such as the one involved in *Blue Jeans Equities*, in that a developer could not easily provide a city with an in-kind dedication of half a trolley car or whatever constituted the developer's

86. *Commercial Builders*, 941 F.2d at 874.
87. *Id.* (emphasis added).
88. *Blue Jeans Equities*, 4 Cal. Rptr. 2d at 119.
89. *Id.* at 117 (emphasis added).
90. *Id.* at 117-19.
91. *Commercial Builders*, 941 F.2d at 875.
92. *Id.* at 875 (citing United States v. Sperry, 493 U.S. 52, 62 n.9 (1989)).

proportionate share of public transit services. The developer must, for all practical purposes, provide the city with money. In the case of farmland, on the other hand, the very resource the public agency is trying to protect is in the possession of the developer, and an in-kind dedication of an interest in that land would in most cases have an identical mitigating impact as the payment of fees to the agency. The fees would simply be used to purchase development rights over farmland elsewhere. Thus, the fee and the dedication are really equivalents. Indeed, the City of Davis' Greenbelt program[93] has so far *only* required the dedication of land and has not involved payment of any fees.

In further support for the "possessory" aspects of farmland impact fees, the Ninth Circuit recently applied the *Nollan* nexus test, albeit in dicta, to an off-site mitigation program for the protection of open space in *Leroy Land Development v. Tahoe Regional Planning Agency*.[94] In *Leroy*, the Tahoe Regional Planning Agency (the TRPA) reached a settlement agreement with a developer requiring the developer to acquire adjacent or nonadjacent lands for open-space as mitigation for the environmental impacts of building 185 condominium units near Lake Tahoe.[95] The court first found that the developer could not challenge as a taking a mitigation plan to which the developer had voluntarily agreed.[96] The court then went on to say, however, that even if the developer could belatedly challenge the plan, the offsite mitigation requirement met the *Nollan* test, finding that "the relationship between the mitigation provisions and the TRPA's regulations is quite clear."[97] Thus, the *Leroy* court assumed that the *Nollan* standard would apply to the constitutionality of requiring off-site acquisition of open space in mitigation for impacts of urban development.

The point of this discussion is that it would be unfair and irrational to apply *Nollan's* strict scrutiny test where the actual conveyance of property is required, as apparently was the case in *Leroy*, but not to apply a strict scrutiny test where fees of precisely the same value are paid in

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93. *See supra* part I.C.

94. 939 F.2d 696 (9th Cir. 1991). Oddly, the Ninth Circuit in *Commercial Builders* uses *Leroy* as an example of an instance when a precise nexus was *not* required. Referring to *Leroy*, the *Commercial Builders* case states:

> [W]e have recently reversed a district court's invalidation under *Nollan*, of a requirement that a developer undertake off-site mitigation measures to mitigate harm to the environment, finding that the court had inappropriately required too close a nexus between the regulation and the interest at stake.

Commercial Builders, 941 F.2d at 874.

However, it is clear that the Ninth Circuit in *Leroy* eschewed the application of *Nollan* only because of a voluntary agreement by the developer to undertake mitigation measures. The court went on to point out that, had *Nollan* been applicable, its requirements would have been met.

95. *Leroy*, 939 F.2d at 697-98.

96. *Id.* at 698-99.

97. *Id.* at 699.

lieu of a dedication. Such a dichotomy would be elevating form over substance and would allow an agency to get around the strict scrutiny test merely by requiring the payment of fees rather than the dedication of property. Thus, farmland impact fees may not merely be regulatory but may be infused with possessory elements as well.

Because of the potentially dual nature of farmland impact fees as both possessory and regulatory, this article first analyzes such fees under *Nollan's* strict scrutiny test. If such programs are able to pass the strict scrutiny test, they can certainly pass the less stringent reasonableness test set forth in *Commercial Builders* and in *Blue Jeans Equities*.[98]

2. *Valid Exercise of the Police Power*

The first part of the takings test—valid exercise of the police power—has two prongs: (1) is the government action for a legitimate government purpose and (2) is there a substantial relationship between the means employed and the stated purpose (the nexus requirement of *Nollan*)?[99]

a. *Protection of Agricultural Land and Open Space as a Legitimate Government Purpose*

The legislature and the courts have left little doubt that the protection and conservation of agricultural lands is a legitimate government purpose under California law. The legislature has expressly declared that the preservation of open space "is necessary not only for the maintenance of the economy of the state, but also for the assurance of the continued availability of land for the production of food and fiber, for the enjoyment of scenic beauty . . . [and] for the use of natural resources."[100] The Legislature has further declared that "discouraging premature and unnecessary conversion of open-space land to urban uses is a matter of public interest and will be of benefit to urban dwellers."[101] Additionally, the Legislature has implicitly declared that laws intended to address this problem achieve a legitimate government purpose by calling for the immediate enactment of new laws and regulations to protect open space:

> The anticipated increase in the population of the state demands that cities, counties, and the state at the earliest possible date make definite plans for the preservation of valuable open-space and take positive action to

98. It should be noted that the first part of the test—legitimate exercise of the police power—must also be satisfied under the less stringent reasonableness test. It is only the closeness of the nexus required which distinguishes the strict scrutiny test from the reasonableness test. *See supra* section III.A.2.

99. Nollan v. California Coastal Comm'n, 483 U.S. 825, 834-37 (1987).

100. CAL. GOV'T CODE § 65561(a) (West Supp. 1991). An earlier section included within the definition of open space, "forest lands, rangeland, *agricultural lands and areas of economic importance for the production of food or fiber*." *Id.* § 65560(b)(2) (emphasis added).

101. *Id.* § 65561(b).

> carry out such plans by adoption and strict administration of laws, ordinances, rules and regulations as authorized by this chapter or by other appropriate methods.[102]

Additional statutory evidence of the legitimacy of agricultural protection as a governmental purpose is found in the California Public Resources Code, which authorizes the award of grants to local public agencies "for the purpose of acquiring fee title, development rights, easements, or other interests in land located in the coastal zone in order to prevent loss of agricultural land to other uses."[103]

Recent Ninth Circuit and California case law further affirms the importance and legitimacy of governmental protection of agricultural land.[104] Moreover, the California Supreme Court has explicitly recognized that conditions on development may be used to protect open land as a dwindling and irreplaceable resource. In *Associated Home Builders v. City of Walnut Creek*,[105] the court said:

> Undeveloped land in a community is a limited resource which is difficult to conserve in a period of increased population pressure. The development of a new subdivision in and of itself has the counterproductive effect of consuming a substantial supply of this precious commodity . . . . In terms of economics, subdivisions diminish supply and increase demand.[106]

Similarly, in *Barancik v. County of Marin*,[107] the Ninth Circuit upheld a county's plan to permanently protect agricultural lands through a program of transferable development rights. The court recognized the threat urban encroachment presents to agricultural uses: "The cowboy and the farmer may be friends as the song has it, but not the rancher and the urban commuter, at least not if commuters, with the roads they need and the cars they drive and the tastes they have, begin to predominate in the countryside."[108]

The statutes and cases sampled above illustrate that the protection of agricultural land and open space repeatedly has been declared by the

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102. *Id.* § 65561(c).

103. CAL. PUB. RES. CODE § 31156 (West 1986).

104. *See, e.g.*, Lake Nacimiento Ranch Co. v. County of San Luis Obispo, 841 F.2d 872, 877 (9th. Cir. 1987), *cert. denied*, 488 U.S. 827 (1988) (permitting restrictive zoning to protect rural lands, as substantially advancing legitimate state interests); Zilber v. Town of Moraga, 692 F. Supp. 1195, 1202 (N.D. Cal. 1988) (upholding plan to protect remaining open space resources within Moraga, as substantially advancing legitimate governmental interests); Twain Harte Assocs. v. County of Tuolumne, 265 Cal. Rptr. 737, 742 (Ct. App. 1990) (preservation of open space amidst populated areas is a valid exercise of the police power); Eldridge v. City of Palo Alto, 129 Cal. Rptr. 575, 586 (Ct. App. 1976) (preservation of open space, scenic and habitat uses is a valid exercise of the police power).

105. 484 P.2d 606 (1971).

106. *Id.* at 613.

107. 872 F.2d 834 (9th Cir. 1988), *cert. denied*, 493 U.S. 894 (1989).

108. *Id.* at 837.

courts and by the Legislature to be an important and legitimate public purpose.

b. *The Substantial Relationship Between Protecting and Conserving Agricultural Lands and Agricultural Conversion Fees*

The substantial relationship test constitutes the second step for determining whether there has been a valid exercise of the police power. The substantial relationship test requires that there be a direct connection between the condition exacted and the purpose of the regulation.[109] This test has come to be known as the "nexus" test and can itself be broken down into two inter-related parts.[110] The first requirement is that the *kind of exaction* imposed must be consistent with the *kind of purpose* to be achieved. The second requirement of the nexus test is that the exaction be proportional to the burden created by the development.

i. *Substantially Advancing a Stated Government Purpose*

The U.S. Supreme Court in the *Nollan* case has concluded that the nexus requirement is not met where "the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition."[111] Another way of stating this requirement is that the means must "substantially advance" the governmental purpose of the regulation.

> [T]he lack of nexus between the condition and the original purpose of the building restriction converts that purpose to something other than what it was . . . . In short, unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use, but "an out-and-out plan of extortion."[112]

However, the *Nollan* Court also found, as a general matter, that "a permit condition that serves the same legitimate police power purpose as a refusal to issue the permit should not be found to be a taking if the refusal to issue the permit would not constitute a taking."[113] Thus, a government agency's

> . . . assumed power to forbid [development] . . . must surely include the power to condition construction upon some concession by the owner, even a concession of property rights, *that serves the same end.* If a prohibition designed to accomplish that purpose would be a legitimate exercise of the police power rather than a taking, it would be strange to conclude

109. Nollan v. California Coastal Comm'n, 483 U.S. 825, 836-37 (1987).

110. *Id.* at 835 n.4.

111. *Id.* at 837.

112. *Id.* (quoting J.E.D. Assocs. v. Atkinson, 432 A.2d 12, 14-15 (N.H. 1981)) (emphasis added).

113. *Id.* at 836.

that providing the owner an alternative to that prohibition which accomplishes the same purpose is not.[114]

In *Nollan*, the Coastal Commission required a property owner to dedicate a pedestrian easement across his private beach in exchange for permission to construct a larger house on the lot. The Commission justified the condition with the argument that building a bigger house impaired visual access to the beach for those driving or walking by, requiring mitigation. The Court concluded, however, that the condition of an easement *along* the beach did not mitigate the impact of impaired visual access from the street, because once one was *on* the beach, no visual impairment existed. The court found that the dedication of a "viewing spot" from the street would have been more appropriate mitigation for this impact.[115] Hence, the kind of condition imposed did not match the kind of impact created by the development.

A California court of appeal has recently refined the first requirement of the nexus test in another beachfront easement case. In *Surfside Colony Ltd. v. California Coastal Commission*, the court held that there must be "close connection" between the public burden created and the necessity for the condition.[116] Additionally, the existence of this connection must be supported by site-specific studies.[117]

In *Surfside Colony*, the property owners were allowed to construct a revetment in front of their beachfront homes to protect against wave action on the condition that they dedicate a pedestrian easement across the beach. According to the Coastal Commission, revetments generally promote erosion of nearby beaches, requiring dedication of beach access to compensate the public for this loss. The court rejected the Commission's rationale, finding instead that the lack of site-specific studies showing that this particular revetment would promote erosion undermined any nexus between the condition imposed and the burden created.[118] General assertions that revetments caused erosion were not credible evidence of a "solid connection" between burden and condition so as to prevent a taking.[119]

While *Surfside Colony* applies a strict interpretation of the *Nollan* requirement of site-specific justification of the nexus between impact and condition, the general application of this requirement may be limited by the court's acknowledgement that "[t]he need for 'site-specific' evidence appears to be particularly important in this case. Surfside [Beach] is unusual if not unique. Most beaches do not have long jetties to their imme-

114. *Id.* at 836-37 (emphasis added).
115. *Id.* at 836.
116. 277 Cal. Rptr. 371, 373 (Ct. App. 1991).
117. *Id.* at 376-78.
118. *Id.* at 376.
119. *Id.* at 377-78.

diate north changing the normal direction of incoming waves."[120] Thus, the requirement of site-specific studies connecting a particular development exaction with a particular impact may be limited to situations where the nature of the burden created by the development is debatable due to unique or unusual features.[121]

In the case of farmland mitigation fees, meeting the strict scrutiny nexus test requires that the fees serve the same end as the state's interest in the conservation of agricultural land and that there be a precise connection between the development and the social ill. These tests would be met where agricultural mitigation fees are used exclusively to purchase development rights or fee title to preserve the agricultural, open space character of land similar to that converted. The purpose of the regulation—to preserve and protect an environmental resource—would clearly be advanced by the establishment of a fund used to purchase protective rights over that very resource. Finally, there is little question that there is a close nexus between development of the land and the loss of use of that land for agricultural purposes. One use directly precludes the other.

Other "substantial advancement" issues are not so easily answered. It is uncertain whether case law requires that the land protected be in the same vicinity, and of the same character as the land converted, to pass the substantial advancement test. Although there does not appear to be any authority on this point, it is probably essential that the agricultural land to be protected be of the same character as the land converted to meet the nexus test. In other words, the conversion of less than prime land should not require offsite protection of land of higher agricultural value. A requirement that the developer protect a resource of greater agricultural value in terms of yield per acre or soil quality than that converted would likely not provide evidence of a close nexus between the burden created and the condition exacted.

Legal guidance for determining the location of protected land in relation to the land converted is also limited. For instance, parkland dedication under the California Government Code requires that there be a "reasonable relationship" between the location of parkland and the use of the parkland by the future inhabitants of the subdivision.[122] Nonetheless, in *Associated Home Builders, Inc. v. City of Walnut Creek*, the court discounted the argument that the parklands to be purchased with the fees

120. *Id.* at 376.

121. In the case of lost farmland, site-specific impact studies will likely not be necessary. The general assertion that the development of farmland precludes agricultural use in the foreseeable future applies to virtually all farmland. It should not be necessary to specifically document that a particular conversion results in loss of the resource. In contrast, in *Surfside*, site-specific studies were necessary only because the unique configuration of the beach and jetty might have prevented the generally acknowledged erosive tendencies of revetments. *Id.* at 373, 376.

122. CAL. GOV'T CODE § 66477(e) (West Supp. 1991).

exacted must be immediately adjacent to the subdivision.[123] Similarly, in *J.W. Jones Cos. v. City of San Diego*, a capital facilities fee ordinance was upheld even though it did not consider the location of an assessed parcel vis-a-vis any particular improvement.[124] It is safe to propose, however, that the location of any permanently protected land should be close enough to the land converted to support the argument that the conversion of this particular agricultural land threatens the continued viability of the replacement land, thereby justifying its protection.

ii. Proportionality of Fee to Impact Under the Rational Relationship Test

The second requirement of the strict scrutiny nexus test, although not as refined as the substantial advancement test, requires that the exaction be proportional to the burden created by the development.[125] Courts have found that conditions on development may not be imposed where they are "not reasonably related to a landowner's proposed use but are imposed by a public entity to shift the burden of providing the cost of public benefit to one not responsible for . . . it."[126]

The *Nollan* court recognized in dicta that it would be unfair to place upon a single property owner a burden which should be apportioned among many:

> [I]f the Nollans were being singled out to bear the burden of California's attempt to remedy these problems, although they had not contributed to it more than other coastal landowners, the State's action, even if otherwise valid, might violate either the incorporated Takings Clause or the Equal Protection Clause. One of the principal purposes of the Takings Clause is to "bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[127]

Nollan can be interpreted to require that the amount of the fee "match" the burden created by the developer in scope as well as in kind. Under the proportionality test, a fee will fail this proportionality test if it overestimates the impact of the development or attributes the impact to a single developer when the burden should be spread among many.

Following *Nollan*, a California court of appeal recently struck down a dedication requirement because the exaction was not proportional to the actual burden created by the development. In *Rohn v. City of Visalia*, the court invalidated a requirement that a developer dedicate fourteen

123. 484 P.2d 606, 612, n.6 (Cal. 1971).

124. 203 Cal. Rptr. 580, 587 (Ct. App. 1984).

125. Nollan v. California Coastal Comm'n, 483 U.S. 825 834 n.4 (1987).

126. Whaler's Village Club v. California Coastal Comm'n., 220 Cal. Rptr. 2, 13 (Ct. App. 1985).

127. *Nollan*, 483 U.S. at 835 n.4 (quoting Armstrong v. United States, 364 U.S. 40, 49 (1960)).

percent of his property for traffic improvements in order to receive a conditional use permit.[128] The court found that the "proposed dedication bears absolutely no relationship, either direct or indirect, to the present or future use of the property," since it had been determined that neither the present nor the proposed use of the property would create *any* effects on traffic.[129] Thus, *no* percentage of the property could be required to be dedicated because there was *no* burden placed on traffic by the proposed project.

Unfortunately, the *Rohn* court failed to determine the percentage of the property that would have been proper if the development had, in fact, affected traffic levels. The city argued that "as long as there is some nexus, the amount of property required for dedication is unlimited."[130] The city's argument would appear to have some validity in light of *Nollan's* general statement that an alternative to a prohibition on development that serves the same purpose as the prohibition is valid. However, the exaction cannot be limitless in relation to the burden if it is to withstand scrutiny under the economic viability test and the illegal tax test discussed below. Moreover, footnote four of the *Nollan* decision, questioning the fairness of placing responsibility on a single property owner's shoulders, also discredits a theory of limitless exactions.[131]

In the case of agricultural mitigation fees, to meet a proportionality test, one must find a way to quantify the impact of development. Robert Freilich and Terry Morgan comment briefly on this problem and its possible solution in their article, *Municipal Strategies For Imposing Valid Development Exactions: Responding to Nollan*:

> The problem with imposing exactions for . . . purposes [of mitigating environmental damage] lies in the difficulty of quantifying the adverse impacts resulting from development projects on the resource base. The solution lies in documenting the relationship between such development and the need for conditions which mitigate the resulting harms. When such documentation is incorporated into standards which govern the conditioning of development permits, the *Nollan* remoteness test should be satisfied.[132]

This article's proposed measurement—the payment of fees in an amount necessary to purchase development rights over *acreage equal to the amount of land developed*[133]—would likely satisfy a proportionality requirement between the impact generated and the exaction imposed. Such a one-for-one "replacement" standard simply recognizes that each

128. 263 Cal. Rptr. 319 (Ct. App. 1989).
129. *Id.* at 327.
130. *Id.*
131. *Nollan*, 483 U.S. at 835, n.4.
132. Freilich & Morgan, *supra* note 7, at 174.
133. *See* discussion *infra* part I.A.

acre of prime agricultural land developed is an acre of agricultural land lost.

In terms of the proportionality test, the one-for-one method of ensuring proportionality is even more direct than the method approved in *J.W. Jones Cos. v. City of San Diego*.[134] There, the court upheld an ordinance authorizing the City Council to determine the total need for infrastructure created by development and then apportion the cost of that infrastructure among new developments.[135] In the case of a one-for-one, acre-for-acre method, there is even less attenuation than in the system approved in *J.W. Jones Cos.* A one-for-one approach recognizes an obvious and direct connection between the urban development of an acre and that acre's inability thereafter to support agricultural uses. It is not necessary to calculate the total number of acres "needed" to protect the health and welfare of the community and then to apportion the cost among new developments. Instead, the amount of resources consumed serves as the guideline for the amount of mitigation required. Furthermore, a one-for-one standard for agricultural land either mirrors, or is *less* stringent than, similar mitigation schemes for other environmental resources such as wetlands restoration or historic oak tree replacement.[136]

Two arguments can be made against one-for-one agricultural mitigation fees under a proportionality theory. First, it can be argued that the loss of a particular number of acres of farmland does not require the preservation of an equal number of acres elsewhere, because sufficient agricultural acreage may remain in an area to protect the viability of agriculture for the time being.

The response to this argument is that government agencies may base fees and exactions on the cumulative impact of development rather than on merely the isolated impact of a particular development.[137] In *Associated Home Builders*, the California Supreme Court explicitly stated that the cumulative impact of a development may justify an exaction which is greater than would be required if the development were viewed in isolation:

> We see no persuasive reason in the face of [the] urgent needs caused by present and anticipated future population growth on the one hand and the disappearance of open land on the other to hold that a statute requir-

134. 203 Cal. Rptr. 580 (Ct. App. 1984).

135. *Id.* at 583, 587.

136. *See, e.g.*, Topanga Ass'n for a Scenic Community v. County of Los Angeles, 263 Cal. Rptr. 214, 220 (Ct. App. 1989) (discussing Los Angeles County Code §§ 22.56.2060, .2100, .2180, requiring a two-for-one replacement of oak trees lost to development); New Jersey Chapter of the Nat'l Ass'n of Indus. and Office Parks v. New Jersey Dep't of Envtl. Protection, 574 A.2d 514 (N.J. 1990) (upholding a two-for-one replacement ratio for wetlands mitigation purposes).

137. *See* Nollan v. California Coastal Comm'n, 483 U.S. 825, 835, n.4.

> ing the dedication of land by a subdivider may be justified only upon the ground that the particular subdivision upon whom an exaction has been imposed will, solely by the development of his subdivision, increase the need for [resources] to such an extent that additional land for such [resources] will be required.[138]

Likewise, in *Remmenga v. California Coastal Commission*, the court relied on the cumulative impact of similar access-blocking projects in upholding a fee program for the acquisition of public easements to the beach.[139]

A second argument against a one-for-one mitigation fee recognizes the unfairness of imposing fees on new development which were not imposed on existing development, even though existing development clearly contributed to the loss and resultant threat to prime agricultural land.

A similar argument was rejected in *Liberty v. California Coastal Commission.*[140] In *Liberty*, the Coastal Commission conditioned the issuance of a restaurant development permit on the provision of one parking space per fifty square feet of development, a much higher ratio than had been imposed on any other existing restaurant in the vicinity.[141] Liberty argued that this requirement denied him substantive due process and was a taking without compensation.[142] The Court of Appeal disagreed. It held that as long as there was a reasonable basis to support the condition, the fact that Liberty was the first restaurant to bear the brunt of past inadequacies did not render the condition unconstitutional:

> The . . . Commission can impose reasonable terms and conditions in order to ensure development will be in accordance with the provisions of the law . . . and parking for the area is a matter of appropriate concern . . . . Liberty concedes there is a serious parking problem in the area and the record reveals the parking requirements imposed on other restaurants in the area have been inadequate . . . . *[W]e know of no authority which requires [the Commission] to pursue a course shown to be inadequate, thus compounding an existing condition.* The power granted under the [Coastal] Act is not confined to the narrow circumspection of precedents, resting on past conditions which do not cover and control present day conditions obviously calling for revised regulations to promote the health, safety, morals or general welfare of the public.[143]

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138. Associated Home Builders, Inc. v. City of Walnut Creek, 484 P.2d 606, 611 (Cal. 1971).

139. 209 Cal. Rptr. 628, 631 (Ct. App. 1985).

140. 170 Cal. Rptr. 247 (Ct. App. 1980).

141. *Id.* at 251.

142. *Id.*

143. *Liberty*, 170 Cal. Rptr. at 251-52 (emphasis added) (citing Candlestick Properties, Inc. v. San Francisco Bay Conservation and Dev. Comm'n, 89 Cal. Rptr. 897 (Ct. App. 1970); *see also* Norsco Enter. v. City of Fremont, 126 Cal. Rptr. 659, 664 (Ct. App. 1976) (exaction of park land fees not imposed on existing but similar development not unconstitutional).

Likewise, incidental benefit to the rest of the community will not impair the constitutionality of an exaction. In *Associated Home Builders*, the Court found that the conditions imposed (dedication of land for open space and park use) "were not improper because their fulfillment would incidentally benefit the city as a whole or because future as well as immediate needs were taken into consideration . . . ."[144]

The problem of disappearing farmland is obviously not caused by any single new development, but rather by continuous development of prime agricultural land over time. The *Liberty*, *Norsco*, and *Associated Home Builders* cases demonstrate that government may levy conditions on new development—conditions not levied on existing development—in the interests of tailoring a mitigation program to meet today's protection requirements.

3. *Economically Viable Use*

The foregoing discussion has analyzed the validity of agricultural conversion fees in light of the first major part of the takings test, which asks whether the regulation is a valid exercise of the police power. As illustrated by the preceding analysis, an exaction which promotes a legitimate governmental purpose and substantially advances that purpose should be considered a valid exercise of the police power. An exaction must still meet a second test, however, in order to avoid the takings prohibition. Under this second test, the exaction must not deprive a property owner of all economically viable use of his or her property. The argument against fees to mitigate agricultural conversion on a one-for-one basis is that such fees could be so onerous as to constitute outright dedication of the entire property. This would effectively deny a landowner all economically viable use of the property.

When is a dedication requirement so onerous that it deprives a property owner of all economically viable use? It has been established that even a very substantial diminution in the value of property due to a land use regulation or condition will not be considered a taking as long as *some* economic use can still be made of the property.[145] In other words, courts will consider the value remaining in the property rather than the value allegedly "taken."[146] Courts have refused to find a taking in cases where the diminution in value of a property has been almost total, either temporarily or permanently. For example, in *William C. Haas v. City*

144. 484 P.2d 606, 611 (Cal. 1971) (discussing Ayers v. City Council of Los Angeles, 207 P.2d 1 (Cal. 1949)).

145. *See* First English Evangelical Lutheran Church v. County of Los Angeles, 258 Cal. Rptr. 893, 905 (Ct. App. 1989) (no taking where owners "are still left with permissible uses of the property").

146. *See* Keystone Bituminous Coal Ass'n v. DeBenedictus, 480 U.S. 470, 480-81 (1987); Terminals Equip. Co. v. City and County of San Francisco, 270 Cal. Rptr. 329, 343 (Ct. App. 1990).

and County of San Francisco, a ninety-five percent diminution in the value of the property was found not to constitute a taking where some development, albeit of lesser intensity, could occur.[147] In *Guinnane v. City and County of San Francisco*, the mere fact that the landowner could sell the property was sufficient to prevent a taking.[148]

In the case of farmland mitigation fees, it may be conceded that a fee equal to 100% of the value of total area of the property to be developed would be problematic, since it would be tantamount to 100% outright dedication requirement without compensation. To be constitutional, a one-for-one mitigation fee has two viable options. It may focus on merely a *portion* of total area to be converted even if the area to be converted is entirely prime agricultural land. Such a fee would not be on a one-for-one basis. The program in Davis, California, which focuses only on providing buffers to protect prime or unique agricultural land, offers one example of this approach. Alternatively, one could require payment of only the amount necessary to purchase a conservation easement or other development rights over an equivalent amount of property, an amount which has been calculated to range between one-third and one-half of the fee title value of property.[149] Limiting targeted acreage to prime agricultural land (or even focusing only on buffers) or requiring acquisition of only easements or development rights, rather than fee title, should allow the fee program to reflect the environmental cost of conversion without resulting in the loss of all "economically viable use" of property.

Properly structured, farmland impact fees should be able to withstand challenge as a taking without compensation. It is well established that the protection of farmland is a legitimate state interest that can be regulated under the police power.[150] Further, there is a direct connection between the conversion of the resource and the loss of that resource, since urban and agricultural uses are mutually exclusive on the same plot of land. Finally, if the fees are limited to only a portion of the cost of permanently protecting equivalent farmland, there should be no basis for a challenge on grounds of proportionality or loss of all economic viability.

As mentioned above, if farmland mitigation fees can withstand the strict scrutiny nexus test, they can certainly withstand the rational relationship test as set forth in the two recent impact fee cases from the

147. 605 F.2d 1117 (9th Cir. 1979).

148. 241 Cal. Rptr. 787, 790 (Ct. App. 1987), *cert. denied*, 488 U.S. 823 (1988). *But cf.* Florida Rock Indus. v. United States, 21 Cl. Ct. 161 (1990) (finding that a 98% diminution in value of the property constituted a taking); Loveladies Harbor Inc. v. United States, 21 Cl. Ct. 153 (1990) (finding that a 99% diminution in value "goes too far").

149. CALIFORNIA STATE COASTAL CONSERVANCY, EVALUATION OF AGRICULTURAL LAND TRUSTS 51 (1989).

150. *See supra* part III.A.

Ninth Circuit and California Court of Appeal, *Commercial Builders* and *Blue Jeans Equities*. These cases indicate that to pass constitutional muster, a new development need not be "directly responsible for the social ill" the exaction is meant to address.[151] Since, as discussed in the foregoing sections, it appears that development is indeed directly responsible for the loss of farmland, an exaction designed to address this environmental loss should pass the nexus test whether characterized as a possessory or a regulatory taking.[152]

B. Farmland Mitigation Fees as an Illegal Tax

The final constitutional hurdle facing farmland mitigation fee programs in California is the prohibition against the imposition of certain special taxes under Proposition 13. Proposition 13, which added Article XIIIA to the California Constitution in 1978, prohibits local agencies from adopting special taxes without a two-thirds vote of the electorate.[153] Special taxes have been defined by the courts as taxes earmarked for a particular purpose, as opposed to general taxes which may be used for any purpose.[154] If imposed without a vote of the electorate, a farmland mitigation fee is likely to be challenged as an illegal "special tax" by those unwilling to support the fee program.

The classification of fees as "fees" or "taxes" has been litigated throughout California.[155] According to the *Alamo Rent-a-Car, Inc. v.*

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151. Commercial Builders v. City of Sacramento, 941 F.2d 872, 875 (9th Cir. 1991).

152. Since the decision in *Nollan*, but before the clarification between possessory takings and regulatory takings with respect to development impact fees in *Commercial Builders* and *Blue Jeans Equities*, the California Legislature enacted Government Code §§ 66000-66007 which require agencies to make "nexus test" findings when they impose certain development impact fees. The sections apply to all fees "charged by a local agency . . . in connection with the approval of a development project for the purpose of defraying all or a portion of the cost of public facilities related to the development project." CAL. GOV'T CODE § 66000(b) (West Supp. 1992). "Public facilities" are defined as including "public improvements, public services and community amenities." *Id.* § 66000(d). To the extent farmland mitigation fees can be construed as fees for "public facilities" within the meaning of § 66000(d), any local agency imposing such fees must comply with the findings requirements of § 66001. Section 66001 requires the local agency to make findings explaining (1) the "reasonable relationship between the fee's use and the type of development project on which the fee is imposed"; (2) the "reasonable relationship between the need for the public facility and the type of development project on which the fee is imposed;" and (3) the "reasonable relationship between the amount of the fee and the cost of the public facility or portion of the public facility attributable to the development on which the fee is imposed." *Id.* § 66001(a)(3)-(5). While these findings requirements are quite similar in scope to the "substantial advancement" tests set forth by *Nollan*, they do not appear to require the same precise connection but merely require demonstration of a "reasonable relationship."

153. CAL. CONST. art. XIIIA.

154. City of San Francisco v. Farrell, 648 P.2d 935, 940 (Cal. 1982).

155. *See, e.g.*, Alamo Rent-a-Car, Inc. v. Board of Supervisors of Orange County, 272 Cal. Rptr. 19 (Ct. App. 1990) (deciding an airport fee based on percentage of gross receipts of off-site rental car company is not a special tax); Russ Bldg. Partnership v. City of San Francisco, 246 Cal. Rptr. 21 (Ct. App. 1987) (deciding a fee per square foot of new office development for

Board of Supervisors of Orange County[156] and *Russ Building Partnership v. City and County of San Francisco*[157] decisions, the test for determining whether a fee is a special tax begins with an inquiry into the type of exaction which article XIIIA was designed to cover. If the exaction is not covered by article XIIIA, the inquiry ends. If the fee falls within the ambit of article XIIIA, it may still be exempt under the California Government Code. Section 50076 provides that a "special tax shall not include any fee which does not exceed the reasonable cost of providing the service or regulatory activity for which the fee is charged and which is not levied for general revenue purposes."[158]

Article XIIIA restricts the imposition of fees which exhibit certain characteristics: (1) the fee is imposed to replace monies lost after the enactment of Proposition 13;[159] (2) the fee is compulsory and is not triggered by the voluntary action of the person to be taxed;[160] (3) the fee is imposed on all voters, rather than a particular subset of voters.[161] If these tests are met, the fee is a special tax and is void unless approved by a two-thirds vote of the electorate.

If a farmland mitigation fee is properly conceived and administered, a court should not find it to be an illegal tax. First, farmland mitigation fees are not likely to be seen as replacing money lost by the passage of Proposition 13 because they do not relate to general municipal functions. Instead, the fees are meant to address a specific environmental problem—loss of agricultural land. Second, a farmland mitigation fee, unlike most taxes, would not be compulsory. The fee would be triggered only by a developer's decision to convert agricultural land to another use.[162] Third, the fee would not affect all taxpayers, but only a small subset of voters—those wishing to convert prime agricultural land into urban uses. Hence, persuasive arguments exist that farmland mitigation fees are not the kinds of taxes article XIIIA was intended to reach.

Farmland mitigation fees could still be exempt under section 50076 even if they were within the reach of article XIIIA. An agricultural fee

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improvement of public transportation services is not a special tax); Beaumont Investors v. Beaumont Cherry Valley Water Dist., 211 Cal. Rptr. 567 (Ct. App. 1985) (deciding a "facilities fee" for connection to water system was a tax because it exceeded reasonable cost of providing the service); Trent Meredith, Inc. v. City of Oxnard, 170 Cal. Rptr. 685 (Ct. App. 1981) (deciding fees on development to relieve local school district overcrowding are not a special tax).

156. 272 Cal. Rptr. at 19.

157. 246 Cal. Rptr. at 21.

158. CAL. GOV'T CODE § 50076 (West 1983).

159. *Russ Bldg. Partnership*, 246 Cal. Rptr. at 25 (Ct. App. 1987).

160. California Bldg. Indus. Assoc. v. Governing Bd., 253 Cal. Rptr. 497 (Ct. App. 1988).

161. *Alamo Rent-A-Car*, 272 Cal. Rptr. at 22-24 (citing *Russ Bldg. Partnership*, 246 Cal. Rptr. at 25).

162. *See Russ Bldg. Partnership*, 246 Cal. Rptr. at 25 (finding that the imposition of conditions on development is not mandatory because developer may choose not to develop).

would clearly be for a "regulatory activity," environmental protection. A fee which was carefully structured so as not to exceed the administrative and land value costs of carrying out the regulatory activity would also fall under the section 50076 exemption. Finally, if farmland impact fees were sequestered in a special fund to be spent solely on the preservation of agricultural land, they would be less prone to Proposition 13 challenges. If all these requirements were satisfied, farmland impact fees would likely withstand an attack on the grounds of "illegal" taxation.

CONCLUSION

In early 1991, the United States Census Bureau revealed a fact, the full implications of which we do not yet know—most Americans now live in the suburbs.[163] However, it suggests that the suburbs and the urban fringe will continue to be the focus of urban development. Suburban communities such as Fairfield and Davis, California, are beginning to assert new control over disappearing agricultural land as they experience the serious economic and environmental impacts of its conversion.

Nevertheless, the pressure to develop vacant land at the edge of metropolitan centers continues to be very strong. Recognizing that *some* conversion of agricultural land is essential to accommodate expanding populations, fee programs allow such conversion in exchange for permanent, or at least long term, protection of other prime land. Properly administered, such fee programs should be justifiable under the police power and/or implied powers in the Subdivision Map Act, and they should be able to withstand attack on both takings and illegal taxation grounds. As more communities place increasing value in raw land suitable for cultivation, farmland mitigation fees, like wetland mitigation requirements, should come to be viewed as an integral cost of development in urbanizing areas.

163. STARSINIC & FORSTALL, *supra* note 1, at 19.