

**Denial of Municipal Services to Taxpaying Condominium and Homeowner Association  
Unit Owners**

Gerald Korngold

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## **Abstract**

While taxpayer demand for infrastructure and service funding have expanded over the years, municipal resources to deliver these services have become more difficult to access as a result of the current financial crisis and existing legislative limitations on tax increases. The consequent shortfalls in the revenue of the property tax have forced municipalities to cut services to certain types of homeowners. Common interest communities, such as condominiums and homeowner association (HOA) communities, are often singled out for these service cuts. This article analyzes the issue of this denial of municipal services to condominium and HOA owners from a public policy and legal perspective.

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## Table of Contents

<b>Introduction</b> .....	1
<b>The Debate Over Service Denial</b> .....	4
<i>The Owners’ Appealing Claim</i> .....	4
<b>The Competing Policies</b> .....	6
<i>Efficiency and Fairness</i> .....	6
<i>Notice</i> .....	11
<i>Local Initiative</i> .....	13
<i>Community Building</i> .....	15
<b>Legislative Responses to “No Taxation Without Sanitation”</b> .....	18
<b>Legal Challenges to No-Service Regulations</b> .....	19
<i>Legal Contests in Scenarios 1 and 1-A</i> .....	20
<i>Legal Challenges to Scenario 2</i> .....	23
<b>Substantive Due Process</b> .....	30
<b>Statutory Attacks</b> .....	30
<b>Conclusion</b> .....	31

## Introduction

Municipalities face pressure from taxpayers to deliver infrastructure and services, but have limited, and often declining, resources to achieve these goals.<sup>1</sup> Over recent years, citizens have sought, or federal or state government has mandated, increased education, health care, security, recreation, and other services from municipalities. Growing employee wages and salaries, pension obligations, and health care contributions have also burdened municipal spending. While demands for funding have expanded, resources have become more difficult to access. As a result of the property tax revolt by taxpayers begun in the 1970s, states enacted various limitations to increases in property tax revenues to municipalities.<sup>2</sup> Moreover, property tax revenues in many places are decreasing as a result of the current financial crisis and the drop in real estate values. Lower property values yield lower real estate valuations, so when the tax rate is applied revenues are decreased (unless the tax rate raised).<sup>3</sup> Shortfalls in property tax revenues, either due to recession or legislative limitations on tax increases, have a devastating effect on budgets as property tax receipts are the major source of state and local tax revenue.<sup>4</sup>

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<sup>1</sup> See Daniel R. Mandelker, Dawn Clark Netsch, Peter W. Salsich, Jr., Judith Welch Wegner & Janice C. Griffith, *State and Local Government in a Federal System* 284-85 (7<sup>th</sup> ed. 2010) (hereinafter “Mandelker et al”); Michael Cooper, *Going to Extremes, as the Downturn Wears On*, N.Y. Times, Aug. 7, 2010, A11 (describing teacher furlough days, reduction of street lights, and cessation of municipal bus service in various localities across the United States).

<sup>2</sup> See Alan A. Altshuler & Jose A Gomez-Ibanez, *Regulation for Revenue: The Political Economy of Land Use Exactions* 23-24 (1993).

<sup>3</sup> See Center for Responsible Lending, *Soaring Spillovers* (May 2009), <http://www.responsiblelending.org/mortgage-lending/research-analysis/soaring-spillover-3-09.pdf>; Jeff Green Tim Jones, *Tax Appeals Swamp U.S. Cities, Towns as Property Prices Plunge*, Bloomberg, Dec. 8, 2010, <http://www.bloomberg.com/news/2010-12-08/plunging-home-prices-fuel-property-tax-appeals-swamping-u-s-cities-towns.html>; Delen Goldberg, *County Struggles to Balance Budget as Property Tax Revenue Tanks*, Las Vegas Sun, Jan. 12, 2011, <http://www.lasvegassun.com/news/2011/jan/12/dont-get-too-excited/>; Ryan M. Maudin, *Property Tax Revenue Decline in the State of California and the Implications*, Martinen School of Public Policy, Univ. of Ky. (2008), [http://www.martin.uky.edu/Capstones\\_2008/Mauldin.pdf](http://www.martin.uky.edu/Capstones_2008/Mauldin.pdf); There is perhaps some lag in the tax decreases. One study showed that most owners paid more property tax for the fiscal year ending June 30, 2008 than the prior year, and nationally property tax collections increased 4%. This is while property values fell 16%. Aaron Merchak & Gail Padgitt, *Property Tax Revenue Increased As Property Values Fell*, The Tax Foundation, Fiscal Fact No. 243, Aug. 31, 2010, <http://www.taxfoundation.org/publications/show/26667.html>, last visited Aug. 31, 2010. This seeming anomaly has been explained, however, by the fact that in many jurisdictions tax assessments are phased in over time or reflect some type of average of prior years (where, in this case, values were still high). See Josh Barbanel, *Home Slump? Not on Tax Bill*, Wall St. J., Oct. 2-3, 2010, p. A17. Assuming decreased assessments, municipalities would have to increase tax rates to obtain the same revenue; increasing taxes during a recession has great political, and perhaps macroeconomic, risks. See Matthew Haggman & Martha Brannigan, *In Dramatic Revolt, Miami-Dade Voters Fire Mayor Carlos Alvarez Over Pay Hikes, Tax Increase*, The Miami Herald, Mar. 15, 2011.

<sup>4</sup> In 2008, state and local government collected over 30% of their tax revenue from property tax payments. Ryan Forester & Kail Padgitt, *Where Do State and Local Governments Get Their Tax Revenue?*, The Tax Foundation, Fiscal Fact No. 242, Aug. 27, 2010, <http://www.taxfoundation.org/news/show/26662.html>, last visited Aug. 30, 2010. Recession-caused decreases in sales taxes and state income taxes (for those states having them) also exacerbate current financial pressures on municipalities. For an excellent survey of property tax regimes in the fifty states, see *Significant Features of the Property Tax*, <http://www.lincolninst.edu/subcenters/significant-features-property-tax/>. Declines in state sales, income, and corporate taxes since 2007 has exacerbated state and local revenues. Donald J. Boyd & Luch Dadayan, *State Tax Decline in Early 2009 Was the Sharpest on Record*, The Nelson A. Rockefeller Institute of Government, State Revenue Report No. 76 (2009), <http://www.responsiblelending.org/mortgage-lending/research-analysis/soaring-spillover-3-09.pdf>.

State and local budgets are currently stretched, in many places to a crisis level.<sup>5</sup> In response, governments have slashed budgets, cut services, and increased taxes.<sup>6</sup> Some have forecast municipal bankruptcies under current conditions.<sup>7</sup>

To achieve a better result under the expenditure/revenue calculus, municipalities have whenever possible shifted costs of new infrastructure required for new developments to developers.<sup>8</sup> Many governments also have passed costs of services on to homeowners through various user fees rather than providing these services from out of general tax revenue.<sup>9</sup>

As another measure, governments have denied municipal services--that are usually available to all landowners and paid for out of general revenue—to certain types of owners. Thus, municipalities have withheld from owners in common interest communities, such as condominiums and homeowner association (HOA) communities,<sup>10</sup> services generally provided

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<sup>5</sup> See Michael Cooper & Mary Williams Walsh, Mounting Debts by States Stoke Fears of Crisis, *New York Times*, Dec. 5, 2010, [http://www.nytimes.com/2010/12/05/us/politics/05states.html?\\_r=1&hp](http://www.nytimes.com/2010/12/05/us/politics/05states.html?_r=1&hp).

<sup>6</sup> See Monica Davey & Steven Greenhouse, Big Budget Cuts Add Up to Rage in Wisconsin, *N.Y. Times*, Feb. 17, 2011, A1 (major protests against proposal requiring state employees to increase their pension and health insurance contributions); Connie Dougherty & Amy Merrick, Governors Chop Spending, *Wall Street J.*, Feb. 7, 2011, A1; Michael Cooper, Mayors See No End to Hard Choices for Cities, *N.Y. Times*, Jan. 22, 2011 (describing inter alia layoff of nearly one-half of police force in Camden, N.J.),

[http://www.nytimes.com/2011/01/22/us/22cities.html?\\_r=1&scp=3&sq=Camden%20police&st=cse](http://www.nytimes.com/2011/01/22/us/22cities.html?_r=1&scp=3&sq=Camden%20police&st=cse); Monica Davey, Questions Persisting as Illinois Raises Taxes, *N.Y. Times*, Jan. 12, 2011, <http://www.nytimes.com/2011/01/13/us/13illinois.html?scp=3&sq=Illinois%20taxes&st=Search>; Michael Powell, Higher State Taxes Would Not Fix Some Deficits, *N.Y. Times*, Jan. 20, 2011, <http://www.nytimes.com/2011/01/20/business/economy/20tax.html?scp=1&sq=Illinois%20taxes&st=Search> (questioning the wisdom of tax increases during a deficit).

<sup>7</sup> Mary Williams Walsh, A Path Is Sought for States To Escape Debts Burdens, *N.Y. Times*, Jan. 21, 2011, A1.

<sup>8</sup> Mandelker et al, *supra* note 1, at 378-79; see *Ariz. Rev. Stat. § 9-463.05* (permitting assessment of development fees “to offset costs to the municipality associated with providing necessary costs to a development, including the costs of infrastructure”)

<sup>9</sup> See, e.g., *Platt v. Town of Torrey*, 949 P.2d 325 (Utah 1997); Jen Lebron Kuhney, City Attorney Outlines Way To Charge For Trash Collection, *San Diego Union-Tribune*, July 17, 2010, B-3 (trash pickup fees); Ron Menchaca, Group of Condo Owners Calls Waste Fee Unfair, *Post & Courier* (Charleston, SC), Nov. 1, 2008, A1 (charge on all residential owners yields \$.5 mil. per year); but see Helen Gao, Discrepancies Fill 1919 Trash Pickup Law; Most Apartments, Condos Excluded, *San Diego Union-Tribune*, May 3, 2009, B-1 (trash pickup still funded from general revenues). See Laurie Reynolds, Taxes, Fees, Assessments, Dues and the “Get What You Pay For Model of Local Government,” 56 *Fla. L. Rev.* 373, 381-82, 392-95 (2004) (describing dues and fees techniques; the tax revolt of the 1970s and financial pressures contributed to the increased use of “fees” instead of tax increases). For an illustration of perverse incentives when an owner did not pay the firefighting fee, see Jason Hibbs, Firefighters Watch as Home Burns to the Ground, *WPSD-TV*, Paducah, Ky., Sept. 29, 2010, <http://www.wpsdlocal6.com/news/local/Firefighters-watch-as-home-burns-to-the-ground-104052668.html>, last visited Oct. 5, 2010.

<sup>10</sup> Condominiums are created pursuant to a state statute. See, e.g., *N.Y. Real Prop. Law § 339-d*. Homeowners association communities do not require statutory authorization; rather they are created by the developer imposing easements and covenants that prescribe reciprocal rights and obligations among the homeowners and set up an organization of owners to administer common facilities and services. See Gerald Korngold, *Resolving the Flaws of Residential Servitudes and Owners Associations: For Reformation Not Termination*, 1990 *Wis. L. Rev.* 513, 513-515. For examples in the no-service context, see *Goldstein v. City of Chicago*, 504 F.2d 989 (7<sup>th</sup> Cir. 1974) (condominium); *Hall Manor Owner’s Ass’n v. City of West Haven*, 561 A.2d 1373 (Conn. 1989) (covenant community with multiple multi-occupancy buildings); *Pheasant Run Condominium Homes Ass’n v. City of Brookfield*, 580 F.Supp.2d 735 (E.D. Wisc. 2008) (“subdivision-style condominiums”); *Landmark Colony at Oyster Bay Homeowners’ Ass’n, Inc. v. Town of Oyster Bay*, 145 A.D.2d 542, 536 N.Y.S.2d 96 (1988) (condominium

without extra charges to other residential owners.<sup>11</sup> Denied services often include trash pickup, recycling, and snow removal, but may also encompass maintenance of streets, street lighting, and fire hydrants.<sup>12</sup> Condominiums and homeowners associations must contract with private service providers and pass these costs on to their members in the form of association dues.<sup>13</sup> Condominium and HOA owners have felt that the denial of services has yielded a double-taxation or double-payment effect for them—they pay property tax based on the same valuation system and tax rates (i.e., “the same taxes”) as owners of single family homes but receive no governmental services and have to pay again to get them. Various legal challenges have been raised against the withholding of services by local government, with mixed results.

This article will analyze the issue of denial of municipal services to condominium and HOA owners from a public policy and legal perspective. My thesis is that various policies and commonly held values demonstrate that it is poor public policy for municipalities to place the pain of service cutbacks on only one segment of residential property taxpayers. Legislatures should reject service denial proposals because such programs compromise powerful societal goals including efficiency, fairness, notice to buyers, and community building. If government still does enact service denials, condo and HOA owners might challenge them in the courts under takings, equal protection, and substantive due process theories. While I offer what I believe to be a plausible equal protection argument against service denials, I do so reluctantly since I believe that courts should not generally intervene into state and local regulatory matters. Legislatures generally need the flexibility to enact programs and judicial intrusion will weaken goals of separation of powers, judicial economy, and experimentation under federalism. The case of service denials, however, where the majority is transferring all costs/burden of a cutback to a smaller segment of society and where there is no plausible distinction between the owners in the majority and minority, might be the rare case where judicial intervention is necessary. One would hope, though, that legislatures do not act unwisely in the first place by enacting no-service laws.

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comprised of thirty-four, single family units); *Applebaum v. Town of Oyster Bay*, 81 N.Y.2d 733, 609 N.E.2d 118 (1992) (development with homeowners association).

<sup>11</sup> See, e.g., *Hall Manor Owner’s Ass’n v. City of West Haven*, 212 Conn. 147, 561 A.2d 1373 (1989) (refuse collection); *Szcurek v. City of Park Ridge*, 97 Ill. App. 3d 649, 422 N.E.2d 907 (1981) (garbage removal); *Pheasant Run Condominium Homes Ass’n v. City of Brookfield*, 580 F.Supp.2d 735 (E.D. Wisc. 2008) (snow removal and street maintenance). Some municipalities also deny these services to multitenant rental apartments. See, e.g., Jonathan Phelps, *Multifamily Trash and Pickup Debate Continues*, June 18, 2010; Aaron Applegate, *Beach is Cracking Down on Trash; Some Will See the End of Free Service*, *Virginian-Pilot* (Norfolk, VA), July 16, 2009, B1; Helen Gao, *Discrepancies Fill 1919 Trash Pickup Law; Most Apartments, Condos Excluded*, *San Diego Union-Tribune*, May 3, 2009, B-1.

<sup>12</sup> See, e.g., *Beacon Hill Condominium Ass’n v. Town of Beacon Falls*, 675 A.2d 909 (Conn. App. 1996) (trash removal, snow plowing, street repair); *Pheasant Run Condominium Homes Ass’n v. City of Brookfield*, 580 F.Supp.2d 735 (E.D. Wisc. 2008) (roads); Jonathan Phelps, *Multifamily Trash and Pickup Debate Continues*, June 18, 2010; Helen Gao, *Discrepancies Fill 1919 Trash Pickup Law* (trash removal and recycling); *Most Apartments, Condos Excluded*, *San Diego Union-Tribune*, May 3, 2009, B-1 (trash pickup); Kevin Landrigan, *New Hampshire Residents Seek Property Tax Credit to Offset Maintenance Costs*, *The Telegraph* (Nashua, NH), Feb. 12, 2009 (snow plowing, fire hydrant and street light maintenance).; see Md. Code, Art. 23A, sec. 49(c) (snow removal, road lighting and maintenance of lighting, collection of leaves, recyclables, garbage, and roadway maintenance).

<sup>13</sup> See Joyce Miles, *Lockport Union-Sun & Journal* (NY), May 27, 2010 (street paving and plowing, water and sewer maintenance, groundskeeping included in dues). See generally Benjamin D. Lambert, Jr., *Municipal Services Equalization: Pot of Gold or Pandora’s Box*, 11 *Probate & Prop.* 58 (Mar.-Apr. 1997).

I further argue that my analysis of the issues invoked in condo and HOA service denials can inform policy makers and the courts during the current period of significant municipal fiscal crisis and ensuing service cuts. The fundamental questions in the condo and HOA service denial and the current fiscal cutbacks are the same: which citizens should have their services reduced, should the pain of cutbacks be shared equally, and who (legislatures or courts) should make these decisions? The clashing choices and resolutions in the case of denial of municipal services to condominium and HOA owners provide important guidance when redefining general fiscal goals and obligations of state and local governments.

### **The Debate Over Service Denial**

Cases challenging the denial of public services to condominium and HOA owners began appearing in significant numbers in the 1970s. There are likely two reasons for this: condominium ownership became widespread only during that time due to the passage of state statutes recognizing condominiums as a valid legal entity.<sup>14</sup> Additionally, the pressure on local governments to provide services in light of limited revenue caused by property tax limitations was increasing.<sup>15</sup> Service denial remains a current issue, evidence by news reports and litigation.

### **The Owners' Appealing Claim**

The discontent of the condominium and HOA owners resonate on a cursory examination. The basic argument is that condominium and HOA owners have to pay twice for services by paying property taxes for which they receive no services *and* condo/HOA fees to purchase the denied services.<sup>16</sup> One condominium president, describing the situation as “double taxation,” stated: “We pay taxes and we should have trash pickup.”<sup>17</sup> A unit owner recently explained that “[w]e are paying for a service that we are not receiving.”<sup>18</sup> Yet another opined that “if it’s free for one person, it should be free for everybody.”<sup>19</sup> These statements resonate with the fundamental American value of fair and equal treatment of people by government.

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<sup>14</sup> See Gerald Korngold & Paul Goldstein, *Real Estate Transactions: Cases and Materials on Land Transfer, Development and Finance* 589-590 (5<sup>th</sup> ed. 2009) (mortgages); Julia Lave-Johnston & Kimberly Johnston-Dodds, *Common Interest Developments: Housing At Risk?*, at 11 (Cal. Research Bureau, Aug. 2002), <http://www.library.ca.gov/crb/02/12/02-012.pdf> (last visited Sept. 6, 2010).

<sup>15</sup> See *supra* notes 1-5 & accompanying text. See Helen Gao, *Discrepancies Fill 1919 Trash Pickup Law; Most Apartments, Condos Excluded*, *San Diego Union-Tribune*, May 3, 2009, B-1 (discussing 1986 ballot measure that excluded new multitenant homes from free city trash pickup).

<sup>16</sup> See *Pheasant Run Condominium Homes Ass’n v. City of Brookfield*, 580 F.Supp.2d 735, 738-39 (E.D. Wisc. 2008).

<sup>17</sup> Aaron Applegate, *Beach is Cracking Down on Trash; Some Will See the End of Free Service*, *Virginian-Pilot* (Norfolk, VA), July 16, 2009, B1. See *Goldstein v. City of Chicago*, 504 F.2d 989, 990 (7<sup>th</sup> Cir. 1974) (the plaintiffs claimed that they “pay property tax to cover the expense of the garbage removal, but do not receive it [and] are forced to hire private scavengers); *Szczurek v. City of Park Ridge*, 422 N.E.2d 907, 911 (Ill. App. 1981) (“necessitating that she expend personal resources to provide her own” services).

<sup>18</sup> Ron Menchaca, *Group of Condo Owners Calls Waste Fee Unfair*, *Post & Courier* (Charleston, SC), Nov. 1, 2008, A1.

<sup>19</sup> Helen Gao, *Discrepancies Fill 1919 Trash Pickup Law, Most Apartments, Condos Excluded*, *San Diego Union-Tribune*, May 3, 2009, B-1.



The condominium and HOA owners also complain about the income redistribution aspect of the denial of municipal services to them as taxpayers. One owner stated that “the residents on these private roads pay the exact same portion of road maintenance taxes as their compatriots who do enjoy snowplowing and road maintenance. This cost shifting is not acceptable.”<sup>20</sup>

### Two Illustrative Scenarios

In order to determine to evaluate the owners’ claims and the underlying policy considerations that legislature and courts should consider with service denials, we must first determine whether the owners are truly losing any interests to which they had a legitimate claim. To help in this exploration, we can posit two standard scenarios that raise different factual, policy, and legal issues that will be further explored in this article:

*Scenario 1:* Fearing that the building of a proposed condominium or HOA project will increase ongoing service costs and headaches, the municipality conditions its approval (zoning, subdivision, permits, etc.) of the project on the developer’s execution of an agreement waiving the right for the developer and successor owners to receive city services.<sup>21</sup> This agreement is put in place before any unit owners purchase and may or may not be recorded. *Scenario 1-A* is a variation on this, where legislation (rather than an agreement) denying service to condos and HOAs is in effect when the (initial or subsequent) unit owner buys. Thus, both *Scenario 1* and *Scenario 1-A* deal address the case when the no-service protocol is already in place at the time that a purchaser or subsequent purchaser considers buying a unit in the development. In these scenarios, the assumption is that the unit owners are being charged property taxes equivalent to those of other residential owners who do receive the services.

*Scenario 2:* Facing revenue shortfalls and increasing service demands throughout the community, the municipality cuts costs by adopting legislation or a regulation denying services to condominium and HOA owners (including owners in existing projects).<sup>22</sup> This no-service regulation applies to current owners of units. Under the municipality’s

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<sup>20</sup> Kevin Landrigan, *New Hampshire Residents Seek Property Tax Credit to Offset Maintenance Costs*, The Telegraph (Nashua, NH), Feb. 12, 2009.

<sup>21</sup> See, e.g., *Applebaum v. Town of Oyster Bay*, 81 N.Y.2d 733, 609 N.E.2d 118 (1992); *Landmark Colony at Oyster Bay Homeowners’ Ass’n, Inc. v. Town of Oyster Bay*, 145 A.D.2d 542, 536 N.Y.S.2d 96 (1988); see *City of Mayfield Heights v. Woodhawk Club Condominium Owners Ass’n*, 2000 WL 101700 (6<sup>th</sup> Cir. 2000) (unpublished opinion); see also *Ramapo River Reserve Homeowners Ass’n v. Borough of Oakland*, 186 N.J. 439, 896 A.2d 459 (2006) (under statute requiring municipal services, agreement by developer with municipality to waive services was valid until developer was obligated to turn over the association to the owners).

<sup>22</sup> See, e.g., *Property Owners & Managers Ass’n v. Mayor & Town Council of Parsippany/Troy Hills*, 624 A.2d 1381 (App. Div. 1993) (city adopted policy ceasing trash collections to large apartment buildings); *City of Riviera Beach v. Martinique 2 Owners Ass’n*, 596 So.2d 1164 (Fla. App. 1992) (permitting city to adjust trash collection rates); *Carpenter v. Commr. of Public Works*, 115 Wis.2d 211, 339 N.W.2d 608 (App. 1983) (ordinance denying solid waste collection to buildings over five units); see generally Aaron Applegate, *Beach is Cracking Down on Trash; Some Will See the End of Free Service*, *Virginian-Pilot* (Norfolk, VA), July 16, 2009, B1 (city began enforcing existing ordinance). The conversion of a rental project to a planned unit development, including multifamily, owned by unit owners can also trigger a municipality’s enactment of an ordinance denying services. See, e.g., *Hall Manor Owner’s Ass’n v. City of West Haven*, 561 A.2d 1373 (Conn. 1989) (ordinance limiting trash pickup to “private dwelling units” passed one month after declaration of planned unit development filed).

plan, the unit owners would continue to pay the same property taxes as before the service reduction.

Caveat: unless specifically noted otherwise, I am assuming that (1) the payment required by the municipality from the condominium or HOA unit owner is part of the general property tax payment required of all real estate owners, rather than a specific user charge or fee for the service (e.g., a trash collection fee);<sup>23</sup> and (2) the municipality provides services to other homeowners with the exception of condominium and HOA unit owners.<sup>24</sup>

## The Competing Policies

*Scenarios 1, 1-A, and 2* invoke various conflicting policy considerations that must be understood and reconciled in order to determine how legislatures and courts should deal with the service deprivation model. These include efficiency and fairness, the effect of notice, the need to allow government flexibility to do its work, and community building. As developed below, this section concludes that service denials to condominium and HOA owners frustrate important public policies.

### Efficiency and Fairness

Legislation and judicial decisions respecting the denial of municipal services should effectuate, among other goals the efficient allocation of citizen and municipal resources as well as common notions of fairness.<sup>25</sup> Efficiency concerns are necessary to prevent skewing incentives toward development, and consideration of fairness prevents wealth transfers through hidden shifting of burdens. As will be shown, the case for denying property tax payments when there are no municipal services is far stronger in *Scenario 2* as opposed to *Scenario 1*.

### Infrastructure Exactions

A basic premise of efficiency theory is that people should internalize the costs of their activities and not project these costs on other unwilling participants. This provides the basic justification for infrastructure exactions from developers. A developer will increase the value of the developer's land by building a housing development and this added value will be monetized via sales of units to purchasers. Cost internalization requires that if the project will cause traffic

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<sup>23</sup> See *supra* note 4. Where a condo owner is denied services and yet is required to pay a trash collection fee, the policy of fair treatment argue strongly for the invalidity of the fee. See *Barclay Townhouse at Merrick II Corp. v. Town of Hempstead*, 289 A.D.2d 351, 734 N.Y.S.2d 870 (2001); *Landmark Colony at Oyster Bay Homeowner's Ass'n, Inc. v. Town of Oyster Bay*, 145 A.D.2d 542, 536 N.Y.S.2d 96 (1988) (striking garbage collection tax when condos were not given service). This article focuses on the (harder) situation of no-service agreements and legislation when there is one non-earmarked payment of property taxes by owners; in this situation, the town's failure to deliver on the "deal" is less clear than when an owner pays a special fee for a service but government does not provide it. For the distinction between user fees and general taxes, see Mandelker et al, *supra* note 1 at 370-71. Reynolds, *supra* note 4, at 379-383.

<sup>24</sup> If the town provides no trash services to any residents and all must purchase private service, for example, a condo owner is not receiving disparate treatment from other residential owners. The conflict that is the focus of this paper arises when some residences but not all receive municipal services.

<sup>25</sup> See Liam Murphy & Thomas Nagel, *The Myth of Ownership: Taxes and Justice* 12 (2002) ("apart from economic efficiency, the social value that has traditionally been given weight in tax design is fairness").

jams on the abutting public road, for example, the developer should be required to absorb that cost by building additional lanes for that road on the developer's property.<sup>26</sup> This model should apply as well with other negative externalities created by the project, such as school crowding and shortage of recreation areas, and the developer should build the needed infrastructure on the developer's land. This logic also justifies the alternative use of impact fees where the city requires the developer to pay the city a sum to defray the increased financial costs and crowding caused by the development and allow the city to build necessary infrastructure to remediate the problems.<sup>27</sup>

Without such an exaction, the rest of the community would have to pay for the acquisition and building of the addition to the road in the example. That would give the developer a windfall and place a burden on the other property owners. The other owners in town would be subsidizing the developer, essentially creating a wealth transfer from the owners to the developer. This would violate notions of fairness and also skew incentives toward overdevelopment.<sup>28</sup> There may be times where society decides to subsidize an activity, such as the building of affordable housing, by assuming costs that the developer normally would internalize; but that should be the result of a careful policy choice and transparent public action.

### Services

Property tax payments, while not a formal contract, represent a contribution by the landowner toward a bundle of services provided to that owner by the municipality.<sup>29</sup> Assuming that a municipality is acting rationally, it should be collecting sufficient revenue via property taxation and other sources to pay for the services that it provides to citizens. Unlike the federal government, state government cannot run deficits.<sup>30</sup> Thus, a municipality's expenses will have to match revenue. If they don't, the city will have to cut expenses (e.g., reduce services, lay-off employees, etc.) or increase revenue.<sup>31</sup>

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<sup>26</sup> See Richard A. Epstein, *How to Solve (Or Avoid) the Exactions Problem*, 72 *Mo. L. Rev.* 973, 986-87 (2007); see also *Upton v. Town of Hopkinton*, 945 A.2d 670 (N.H. 2008) (even if road needed improvement before development, assessing one-third of the cost of improvement was proper since residents and emergency vehicles required better access). On exactions generally, see Vicki Been, "Exit As a Constraint on Land Use Exactions: Rethinking the Unconstitutional Conditions Doctrine," 91 *Column L. Rev.* 473 (1991); David L. Callies & Glenn H. Sonoda, *Providing Infrastructure for Smart Growth: Land Development Conditions*, 43 *Idaho L. Rev.* 351 (2006-2007).

<sup>27</sup> See, e.g., *Home Builders Ass'n of Central Ariz. v. City of Goodyear*, 221 P.3d 384 (Ariz. App. 2009) (statute requires impact fee to be offset by the contributions towards future capital improvements included in property taxes).

<sup>28</sup> Developers have recently attempted to recover the cost of infrastructure installation by retaining a right to receive a portion of the price of resales of the units for an extended period of time, perhaps 99 years. See Janet Morrissey, *A Fee that Only Developers Could Love*, *N.Y. Times*, Sept. 12, 2010.

<sup>29</sup> Some municipalities have not shifted to an across the board trash pickup fee but continue to provide this and other services financed out of general revenues (with the bulk coming from property tax collection). Helen Gao, *Discrepancies Fill 1919 Trash Pickup Law; Most Apartments, Condos Excluded*, *San Diego Union-Tribune*, May 3, 2009, B-1 (trash pickup still funded from general revenues).

<sup>30</sup> Daniel R. Mandelker, *Dawn Clark Netsch*, Peter W. Salsich, Jr., Judith Welch Wegner & Janice C. Griffith, *State and Local Government in a Federal System* 284 (7<sup>th</sup> ed. 2010).

<sup>31</sup> See Joyce Miles, *Lockport Union-Sun & Journal* (NY), May 27, 2010 (quoting one alderman: "If we reduce taxes for [condominium owners], the cost is redistributed to everyone else; ... Those taxes need to be paid at the end of the day.").

## *Scenario 1*

If unit purchasers from developers and re-purchasers from unit owners have notice of a “no-service” agreement before committing to purchase, they should decrease their purchase price by an amount equal to the present value of the cost of private replacement services over the term of their ownership.<sup>32</sup> Moreover, unit owners in *Scenario 1* should pay full property tax even though they are not receiving public trash services—they are not “paying twice” since they are in essence not paying at all for their private trash collection (due to the price reduction).<sup>33</sup> Their choice to reside in a condominium or homeowners setting should not allow them to avoid contribution to the community via general property tax revenues when they are not being penalized in making that choice by double payment. Under *Scenario 1*, and given these assumptions, the unit owners are made whole. The result would be similar in *Scenario 1-A*, as the law presumes that all citizens have knowledge of existing governmental regulations before purchasing and so buyers should discount due to no-service legislation.<sup>34</sup>

The loss in *Scenarios 1* and *1-A* falls on the original developer who will receive a lower sales price from unit buyers because of the no service agreement. The developer will not be able to extract all of the value out of the property. This is a fate that developers typically suffer when faced by governmental regulations that limit the size, scope, density, etc. of a development.<sup>35</sup> As long as the restraints pass Constitutional muster, courts have sustained them.

When compared to exactions for infrastructure, however, the practice of requiring no-service agreements in exchange for approvals raises troubling questions. Infrastructure exactions are justifiable because they force the developer to internalize the costs of development. It is harder to justify no-service agreements based on cost internalization theory, however. Using trash collection as an example, it would be fine under exaction theory to require the developer to pay for expansion of the city recycling plant and landfill to accommodate the new unit owners. Assume, though, that there is no need for such (or other) capital investment. One would expect in a rational world that the annual property tax imposed on the unit owners should include adequate cash flow to pay for ongoing pickup (just as it does for traditional single family

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<sup>32</sup> The presence of notice is a key assumption in this analysis. See *infra* Sec. II.B.

<sup>33</sup> The replacement services might be contracted for by the association and passed on to the owners via association dues and fees. See *City of Mayfield Heights v. Woodhawk Club Condominium Owners Ass’n*, 2000 WL 101700 at pp. 2, 5 (6<sup>th</sup> Cir. 2000) (unpublished opinion) (emphasizing that documents given to owners before purchasing “show that garbage removal is part of the unit owners’ financial responsibility” and “acceptance of these items was part of the bargain that every unit owner struck with the developer”).

<sup>34</sup> If service is subsequently provided by the town, either by new ordinance or successful legal challenge by that buyer or others, that buyer will essentially receive a windfall: buying at a discounted price but now receiving services. Note that an owner can challenge the tax system even though it was in place at the time of purchase. Even retroactive taxes may be constitutional. See, e.g., *Tesoro Refining & Marketing Co. v. State*, 159 Wash. App. 104, 246 P.3d 211 (2010); *Moran Towing Corp. v. Urbach*, 1 A.D.3d 722, 768 N.Y.S.2d 33 (2003); *Alderson v. County of Allegheny*, 263 Va. 333 (2003). For the principle that buyers take title subject to existing ordinances and regulations, see *Josefowicz v. Porter*, 32 N.J. Super. 585, 108 A.2d 865 (App. Div. 1954).

<sup>35</sup> See *infra* Sec. III.A.1.

homeowners).<sup>36</sup> The developer is not causing any negative externality by putting in a condo or HOA project that has trash pickup—those unit owners would be using the service on a “pay as you go” basis through their tax payments.<sup>37</sup> Denying trash services to the development and forcing the developer to lower the sales price to unit buyers as a result, will cause an uncompensated loss to the developer. Whether that loss is tolerable under Constitutional analysis will be examined below.

In conclusion, denial of services to the first and subsequent unit buyers of condominium and HOA projects is consistent with efficiency and fairness considerations provided that these buyers had notice of the restriction before purchasing. The unit buyers can protect themselves for “paying twice” for the services. Any loss of denial of services will fall on the developer who cannot offer his land for sale with current municipal services included.

### *Scenario 2*

*Scenario 2* causes a loss in property value to the owners of condominium and HOA units at the time the decrease in services is implemented. The current condo and HOA owners when the service deprivation is imposed are forced to take on an additional cost and spend for outside services. This lowers the value and utility of the property to them.<sup>38</sup> When they sell their properties, their immediate successors will pay a lower price for the residence because these successors will be aware of the need to buy outside services, and they will discount the sales price accordingly. Thus, the current condominium and HOA owners at the time of imposition of the service cutback will suffer a loss of property value that they will not be able to recapture.<sup>39</sup>

### Tax Equity

When government reduces services to condominium and HOA owners but maintains their property tax levels, it is creating a wealth transfer from these owners to the rest of the community. If trash pickups at the condominium are made in the same manner as at other residence (e.g., using the same trucks and crews), then presumably the condo owners’ annual property taxes (along with other municipal revenues) would cover this service just as in the case of single family residence owners. If there is a budget shortfall for trash collections, the efficient and equitable result would be an across the board tax increase for all owners or a uniform service decrease. Power politics, however, may prevent these salutary solutions if legislators cave to majority demands and balance the budget by denying services only to condominium and HOA

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<sup>36</sup> Or perhaps property tax receipts are inadequate to pay for this service, and government is trying to shed as many consumers of public services as possible. That would explain a desire to deny services. See supra note \_\_, indicating the other sources of municipal tax revenue.

<sup>37</sup> This assumes that the trash collection costs for HOA and condo owners are the same as for single family residents. For a discussion of what happens if this is not the case, see infra Sec. II.A.3.

<sup>38</sup> There is an additional important caveat: legislation and regulation denying services to condo and HOA owners can always be amended by the legislature to grant such service. See, e.g. N.J. Stat. Ann. 40:66-1.3, 67-23.3. If the legislature does so, this will be a windfall to the unit owners whose property values will increase because of the service.

<sup>39</sup> Once the current owner (*A*) sells to the immediate successor (*B*) at a discounted price, when *B* resells to *C* it will be at the discounted price (assuming all other factors are stable). So *B* will not suffer a loss from the services deprivation.

owners. A failure of other owners to internalize the costs of their homes places an unfair burden on a small group, skews the market by reducing values of condominiums and increasing values of private residences, and thus creates inefficiencies in the housing market.

There have been conflicting views of local government and its use of taxation. A Tiebout approach would view consumers as choosing where to live as part of a market transaction, where they weigh a community's services and their cost in purchase decisions.<sup>40</sup> Others have criticized the "consumer-oriented vision" of local government where taxpayers view local government as providing services in exchange for tax payments because this ignores the redistributive goals and looks more like club dues.<sup>41</sup> In my view, both positions are correct: there is evidence that homebuyers do see a market-type exchange in their payment of taxes in return for services as a means of maximizing their welfare, and markets will become inefficient unless these expectations are considered.<sup>42</sup> At the same time, government does, and needs to, engage in redistribution for both ethical and practical reasons.<sup>43</sup> But the burden of redistribution should not be placed solely on one segment of society (here condominium and HOA unit owners) where there is no legitimate means to distinguish these units from other residential properties.

Consider a situation, though, where government provided services at the outset of the operation of the condominium or HOA project. Now, however, it seeks to cut service because it emerges that trash pickup, for example, is more expensive at such projects (e.g., different trucks are required at multistory buildings to load large containers or smaller trucks are needed to negotiate narrower lanes in HOAs).<sup>44</sup> This would require the city to expend additional funds to purchase new trucks (and replacements on an ongoing basis), pay to train collection and maintenance workers on their use, and suffer the loss of the benefit of a uniform fleet (for maintenance, parts, interchangeability of workforce, etc.). Forcing the condo owners to internalize these costs would be justified—their choice of living styles should not be projected on to the rest of the town.

Therefore, it would be rational under this analysis for municipalities to either increase tax charges on condominium and HOA properties by the amount necessary to offset this additional expense. Alternatively, it would be acceptable for the city to deny services to condominium or homeowners association owners, but only if it gave them a credit against their property taxes for the fair value of the lost services.<sup>45</sup> Complete denial of services in such a situation, however, is

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<sup>40</sup> See Charles M. Tiebout, A Pure Theory of Local Expenditures, 64 *J. of Political Economy* 416 (1956); Wallace E. Oates, Local Government: An Economic Perspective, 9-26, 10 in *The Property Tax and Local Autonomy* (Michael E. Bell, David Brunori & Joan Youngman, eds., 2010).

<sup>41</sup> See Gerald E. Frug, City Services, 73 *N.Y.U.L. Rev.* 23, 30-31 (1998). Reynolds refers to this as a "pay for play." Reynolds, *supra* note 4, at 376, n.14. For an excellent discussion of the conflicting views of local government, see Reynolds, *supra* note 4, at 374-76.

<sup>42</sup> See *supra* notes 1-5 & accompanying text discussing home purchaser concerns.

<sup>43</sup> Consider, for example, inclusionary zoning requirements. See Ngai Pindell, Developing Las Vegas: Creating Inclusionary Affordable Housing Requirements in Development Agreements, 42 *Wake Forest L. Rev.* 419 (2007).

<sup>44</sup> Planned unit developments, with closer siting of homes, could actually reduce fuel costs of trash collection. For a discussion of the benefits of "new urbanism" in planned unit developments, see Andres Duany, Elizabeth Plater-Zyberk & Jeff Speck, *Suburban Nation: The Rise of Sprawl and the Decline of the American Dream* 115-133 (paperback ed. 2001) (criticizing sprawling residential areas).

<sup>45</sup> See Jacob Lammers, Willowick, Ohio Condo Owners Will Still Receive Trash Reimbursement, *News-Herald* (Willoughby, OH), July 8, 2009 (retaining a reimbursement to condo owners for privately contracted trash services); Kevin Landrigan, New Hampshire Residents Seek Property Tax Credit to Offset Maintenance Costs, *The Telgraph*

an improper response as it forces a small group of homeowners to subsidize another segment of the population. This would not serve efficiency goals as it would underestimate the true cost of trash removal for single family homes. There also would be fairness issues as a no-service legislation would shift the cost of trash service of other residential properties to condominium and HOA properties.

To be sure, the calculation of the fair value of lost services may not always be easy and subject to debate, but some communities already do so.<sup>46</sup> In recognition of the potential administrative costs and the historical deference of courts to legislative and executive decisions, the judiciary should overrule fair value determinations only if they were not made in good faith or lack a reasonable basis.<sup>47</sup> The burden would be on the challenger to show that the government's calculation is improper.

In contrast to condo and HOA unit owners, owners of residential investment properties (such as a rental apartment building) will not likely be disadvantaged when a service cut is instituted as the individual condominium or HOA owner. If the municipality passes a service reduction to existing apartment buildings, the landlord, typically operating on short term leases, can increase the rents charged to new tenants after the service cut to pay for outside services.<sup>48</sup> The owner is thus made whole.

## Notice

The efficiency and fairness analysis hinges on the unit purchasers and subsequent re-purchasers having notice of existing municipal service restrictions at the time they buy their condominium and HOA units. This section will explore the importance of notice and how notice might be obtained in *Scenario 1* (where the developer signs a no-service agreement) and *Scenarios 1-A* and *2* (where service is denied by legislation or regulation).

## Agreements Waiving Services

A fundamental principle of real property law is that a subsequent purchaser of real estate is not bound by a prior interest in the property unless the subsequent purchaser had notice of the prior interest before entering into a binding agreement to buy.<sup>49</sup> Notice is essential as buyers will refuse to purchase if they learn that someone other than the seller has superior title to the

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(Nashua, NH), Feb. 12, 2009 (condominium owners seeking state legislation for \$500 property tax credit for maintenance fees).

<sup>46</sup> See, e.g., Aaron Applegate, *Beach is Cracking Down on Trash; Some Will See the End of Free Service*, *Virginian-Pilot* (Norfolk, VA), July 16, 2009, B1 (municipality calculating that trash pickup costs \$18 per month per household); Ron Menchaca, *Group of Condo Owners Calls Waste Fee Unfair*, *Post & Courier* (Charleston, SC), Nov. 1, 2008, A1 (\$99 fee for single family trash pickup). Frankly, it is hard to imagine an effective municipal budgeting process that did not calculate these costs.

<sup>47</sup> See *infra* Sec. IV.B.

<sup>48</sup> See, e.g., Helen Gao, *Discrepancies Fill 1919 Trash Pickup Law; Most Apartments, Condos Excluded*, *San Diego Union-Tribune*, May 3, 2009, B-1 (landlord charging tenant \$6.87 per month to cover private trash hauling).

<sup>49</sup> See Korngold & Goldstein, *supra* note 14, at 256-57. These principles are currently reflected in the various recording acts applicable in the states. See, e.g., Mass. Gen. Stat. Ann. ch. 183, § 4 (a “notice” type statute); Cal. Civil Code § 1214 (a “race-notice” type statute); N.C. Gen. Stat. § 47-18 (a “race” type statute).

property.<sup>50</sup> Moreover, if the seller has title but the buyer has notice of an encumbrance limiting the value of the property (such as a restrictive covenant controlling building activities), the buyer can reduce the price accordingly.<sup>51</sup> If buyers were bound by interests without having notice of them, buyers would hesitate to enter into market transactions for fear of losing their investment. This would reduce the exchanges of land and development of property out of fear of prior unknown interests that will take priority. This would defeat the goal of having an efficient market of land where resources are allocated via market transactions to those that value them and will utilize them.<sup>52</sup>

As discussed in Section II.B., the binding of unit purchasers and re-purchasers to an agreement executed by the developer under *Scenario 1* is only rational if the purchasers and re-purchasers had notice before they bought so they could reduce their unit price to account for their need to acquire private services.<sup>53</sup> Such notice can be obtained if these buyers received actual notice by way of disclosure from their seller (either the developer or the unit owner above them in the chain)<sup>54</sup> or if the agreement is recorded before initial purchases in a declaration or restrictive covenant agreement.<sup>55</sup> There may be an argument for inquiry notice under certain facts as well; for example, a purchaser while viewing the property saw a private trash contractor serving the project might be found to have inquiry notice of no municipal services.

### Legislative Denial of Services

It is similarly important that purchasers know about no-service legislation or regulation in *Scenario 1-A* situations (prior to initial or subsequent purchasers buying their units). These purchasers also need to adjust their purchase prices down based on the lack of services. The issue is whether the seller violates a legal duty if the seller does not disclose no-service legislation binding the property.

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<sup>50</sup> See *Regan v. Lanze*, 40 N.Y.2d 475, 481, 354 N.E.2d 818 (1976) (“A marketable title has been defined as one that may freely be made the subject of resale.”).

<sup>51</sup> Courts sometimes operationalize this theory, when they award the buyer specific performance but abate the contract price for defects in the title. See, e.g., *Merritt v. Circelli*, 361 Pa. 239, 64 A.2d 796 (1949).

<sup>52</sup> A buyer can receive notice of a prior restriction or interest against the property in one of three ways. The buyer can receive “actual notice”, such as where the seller informs the buyer of the issue. See *Metropolitan National Bank v. United States*, 901 F.2d 1297 (5<sup>th</sup> Cir. 1990) (actual notice of improperly recorded deed actually found by title searcher); Gerald Korngold & Paul Goldstein, *Real Estate Transactions: Cases and Materials on Land Transfer, Development and Finance* 271-85 (5<sup>th</sup> ed. 2009). The buyer is considered to have “record notice” (aka “constructive notice”) of documents recorded by the holders of prior interests in the property; buyer will be attributed this knowledge whether or not the buyer actually searches the office of the recorder and discovers the documents. Johnson, *Purpose and Scope of Recording Statutes*, 47 Iowa L. Rev. 231, 238-243 (1962). Finally, the buyer is considered to have the knowledge about prior competing claims that would have been revealed by a reasonable inspection of the property and inquiry about outstanding property interests raised by the inspection; one might be attributed such “inquiry notice” of a prior transferee if that person was living on the property.<sup>52</sup> See *Sanborn v. McLean*, 233 Mich. 227, 206 N.W. 496 (1925) (inquiry notice from residential nature of other properties); *Kinch v. Fluke*, 311 Pa. 405, 166 A. 905 (1933) (inquiry notice from contract purchaser’s possession); Korngold & Goldstein, *supra* note 14, at 283-285.

<sup>53</sup> No-service agreements have been considered to be “restrictive covenants”—a recordable interest. See *Applebaum v. Town of Oyster Bay*, 609 N.E.2d at 120.

<sup>54</sup> A developer might include this in marketing materials.

<sup>55</sup> See, e.g., *Applebaum v. Town of Oyster Bay*, 81 N.Y.2d 733, 609 N.E.2d 118 (1992); *Landmark Colony at Oyster Bay Homeowners’ Ass’n, Inc. v. Town of Oyster Bay*, 145 A.D.2d 542, 536 N.Y.S.2d 96 (1988).



The implied warranty of marketable title will not help a buyer who takes subject to no service legislation since the warranty is not breached by the presence of a governmental regulation or legislation affecting the property.<sup>56</sup> This is because all citizens are expected to be cognizant of the law, all have equal access to information about governmental actions while the selling owner should know specific title matters about the seller's property, and the law of marketable title developed centuries before the advent of full-scale governmental regulation and so did not contemplate coverage of regulatory issues. Thus, the seller (whether the developer or re-seller) is not in breach of the marketable title obligation because of the existence of a no-services regulation.

New trends in seller disclosure also will not likely help the purchaser of a unit who did not know about no-service legislation. Over the past thirty years most jurisdictions have reversed the classical rule of *caveat emptor* in real estate transactions.<sup>57</sup> Courts now require sellers to disclose material defects in the property that the buyer could not have discovered in the course of a reasonable inspection. It is doubtful that failure to disclose a no-service regulation (or agreement as well) would be actionable, however. First, some legislature and courts limit the disclosure obligation to physical conditions or on-site issues only.<sup>58</sup> Moreover, a no-service agreement arguably causes a small financial loss and is thus likely not material.<sup>59</sup> Finally, the buyer should have discovered the regulation with a reasonable search of publicly available information.<sup>60</sup> These limitations on the disclosure duty are sensible—the seller is likely to remember information about material defects in the seller's own home, thus adding little or no cost to the seller to disclose it. Also, a seller is not likely to retain information about minor defects or matters outside of the property, so requiring seller to retain and disclose that information places undue costs on seller that should just as well be on buyer.<sup>61</sup>

Thus, while it is important for a condominium or HOA buyer to be aware of legislation or a regulation denying municipal services, there is likely no duty on the seller to provide this information nor liability for failure to do so. The buyer will have to perform due diligence to discover the state of governmental rules and make his offer accordingly.

## Local Initiative

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<sup>56</sup> See, e.g., *Dover Pool & Racquet Club, Inc. v. Brooking*, 366 Mass. 629, 322 N.E.2d 168 (1975); *Josefowicz v. Porter*, 32 N.J. Super. 585, 108 A.2d 865 (App. Div. 1954); see Michael J. Garrison & J. David Reitzel, *Zoning Restrictions and Marketability of Title*, 35 Real Est. L.J. 257 (2006).

<sup>57</sup> See, e.g., Cal. Civil Code § 1102 et seq.; *Ollerman v. O'Rourke*, 94 Wis.2d 17, 288 N.W.2d 95 (1980); Stephanie Stern, *Temporal Dynamics of Disclosure: The Example of Residential Real Estate Conveyancing*, 2005 Utah L. Rev. 57.

<sup>58</sup> See, e.g., N.J. Stat. Ann. 46:3C-1 to 12 (barring actions for off-site problems); *Nobrega v. Edison Glen Assocs.*, 167 N.J. 520, 772 A.2d 368 (2001) (off-site risk).

<sup>59</sup> See, e.g., *Thacker v. Tyree*, 171 W.Va. 110, 297 S.E.2d 885 (1982) (“substantially affect the value or the habitability of the property”).

<sup>60</sup> See *McMullen v. Joldersma*, 174 Mich. App. 207, 435 N.W.2d 428 (1988) (no duty to disclose that proposed highway project would divert traffic from store for several years).

<sup>61</sup> See Anthony Kronman, *Mistake, Disclosure, Information, and the Law of Contracts*, 7 J. Legal Studies 1 (1978).

There are over 85,000 local government entities across America.<sup>62</sup> These local governments provide public goods and services to the population. While there are strong factors supporting deference to local legislative decisions, there are negative ramifications at times that require attention.

### Benefits of Local Control

Our decentralized system of local government and fiscal operations allows local authorities to tailor the provision of public goods and services based on the particular tastes and costs of the specific town.<sup>63</sup> This localized system yields higher social welfare than a centralized system setting the goods and services required to be provided by all localities.<sup>64</sup> Moreover, the experiments of different localities in providing services are part of the “laboratory of federalism” where different ideas are attempted and the successful ones adopted by other jurisdictions.<sup>65</sup>

Local governments need freedom to develop and innovate successful means to provide public goods and services, especially in times of economic shortage. The democratic process of transparency, public hearings, and comment and the prospect of re-election campaigns help to keep the government responsive to the public, as it should be. It would be costly and inefficient if the government had to justify in a judicial proceeding the wisdom, efficacy and efficiency of every decision it made. Government would be distracted, funds would be dissipated on legal representation instead of services, and people would be less likely to serve as officials. Under our Constitutional system of separation of powers and judicial deference to other branches of government, second guessing should be through the ballot box, not the courts.<sup>66</sup>

Legislatures are faced with difficult choices in selecting a course of action, even in situations where all people supposedly agree on the principle that should guide the decision making.<sup>67</sup> Assume, for example, that all stakeholders believe that government should provide “equal” public services within its borders.<sup>68</sup> But equality can have numerous meanings: equal payment for equal services received, so that beneficiaries of a service should be equally charged; equal results for all in the community, such as assigning ambulances to neighborhoods to achieve the same response times throughout the city even though that means an unequal assignment of ambulances to different neighborhoods; equal inputs, where each neighborhood gets the same

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<sup>62</sup> United States Department of Commerce, Census Bureau, 2002 Census of Governments, <http://www.census.gov/prod/2003pubs/gc021x1.pdf>. This figure includes some 35,000 special governmental districts that are not general local governments but provide specific services.

<sup>63</sup> Wallace E. Oates, Local Government: An Economic Perspective, 9-26, 10 in *The Property Tax and Local Autonomy* (Michael E. Bell, David Brunori & Joan Youngman, eds., 2010).

<sup>64</sup> *Ibid.*

<sup>65</sup> Oates, *supra* note 63, at 20-21 (citing tax increment financing districts as an example).

<sup>66</sup> The exception is where fundamental rights or suspect classifications are involved. See *infra* Sec. IV.B.

<sup>67</sup> This is obviously not always the case, where localities are split on fundamental assumptions. The example chosen here, equity in provision of public services, is not universally agreed upon. See Alan A. Altshuler & Jose A Gomez-Ibanez, Regulation for Revenue: The Political Economy of Land Use Exactions 87-88, 132-36 (1993) (describing equity debate about imposing infrastructure obligations that might result in preventing the building of affordable housing).

<sup>68</sup> Analysts of public services focus not only on the efficiency and effectiveness of their delivery but also on the equity of service performance—the “fairness, impartiality, or equality of service.” E.S. Savas, On Equity in Providing Public Services, 24, *Management Science* 800, 802 (1978).

amount of services, even though some neighborhoods with smaller populations will be better off with the standard allocation of ambulances than other larger neighborhoods; or equal satisfaction of demand, such as assigning equal ambulances per numbers of ambulance calls.<sup>69</sup> It is even harder for legislatures to choose courses of actions where there are competing underlying visions, and their judgment should be generally respected by the judiciary.

### Occasional Concerns

There are, however, reasons to consider limitations on the latitude of local government decision makers in some situations. There is always the opportunity for the tyranny of the majority, where a larger group of citizens can use the governmental apparatus to its advantage over a smaller group. Rent seeking political power plays by the majority against the minority may push the burden of decreased municipal services or increased taxes on to a particular segment of the community (i.e., condominium and HOA unit owners). This result is odious when both the winners and the losers have the same interests and investment in the issue at hand. HOA and condominium owners resemble single family as residential owners in terms of their needs and desire for municipal services and as far as their contribution and cost to the municipality. The ballot box does not provide a solution for the protection of the minority interests. .

Moreover, while many public officials serve the public with great dedication and selflessness, public choice theory cautions that officials may be influenced in their actions by forces other than the public interest:

“The Public Choice School forcefully stresses that there was no empirical basis for assuming that governments would always and everywhere operate in a benevolent way. Instead, public choice argues that public sector officials, like all economic agents, respond to incentives associated with the environment they operate in.”<sup>70</sup>

Officials may make decisions about no-service legislation based on re-election considerations and the need to garner voter support rather than on maximizing social welfare.<sup>71</sup>

Finally, there is a risk that decisions that are in the best interest of the locality and its citizens might create negative externalities for other towns and people. For example, a city might wish to exclude people who will generate additional expenses for services when the tax revenue from newcomers will be insufficient to cover these demands.<sup>72</sup> Communities may attempt large-lot zoning to keep out denser, affordable housing developments that will strain demand on social services, libraries, recreational programs, etc.

### **Community Building**

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<sup>69</sup> Savas, *supra* note 68, at 803-06.

<sup>70</sup> Antonio Alfonso & Vitor Gaspar, Dupuit, Pigou and the Cost of Inefficiency in Public Services Provision, 132 *Public Choice* 485, 486 (2007).

<sup>71</sup> See James M. Buchanan, Constraints on Political Action, in *Public Finance and Public Choice* (James M. Buchanan & Richard Musgrave eds. 1999) (reviewing public choice theory and pressures on politicians).

<sup>72</sup> Altshuler & Gomez-Ibanez, *supra* note 67; H. Cherwick & A. Reschovsky, Lost in the Balance: How State Policies Affect the Fiscal Health of Cities 3 (2001).

In addition to the ethos of individualism in American history and culture, there has been a strong emphasis in our national experience on community and the voluntary, mutually beneficial coming together of citizens.<sup>73</sup> These important values can be compromised where community burdens are not equally shared and one subgroup is required to bear all of the cost in addressing a social challenge. This deserves consideration by legislatures contemplating no-service rules.

Community life in all cultures throughout history has included shared responsibility.<sup>74</sup> In the American experience, these community relationships may have been particularly important, perhaps reflecting the need of European settlers to come together as they established holdings in a large, unknown environment while often facing (understandable) resistance from indigenous people.<sup>75</sup> In the earlier American communities “[t]here was a strong belief in mutual support and community responsibility.”<sup>76</sup> The barn raising serves as a vivid example of the members of a community coming together to build a barn or home for a community member.<sup>77</sup>

This strong sense of community has weakened in a modernized, industrialized, and urbanized society.<sup>78</sup> But people still remain connected with their geographic community. Modern researchers maintain that even though other support relationships develop in urbanized, U.S. society, “sharing a common territory continues to be the most important basis of commonality” and that a city is a defined territory in which “the residents develop ties and attachment to places and they identify themselves with common myths and symbols.”<sup>79</sup>

Moreover, advocates have urged that Americans increase community relationships, to benefit both individuals and society at large.<sup>80</sup> Communal cooperation and responsibility remain important values today, with social scientists studying the factors that contribute to sense of community<sup>81</sup> and the benefits that emerge from such collaboration.<sup>82</sup> Thus, current proponents

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<sup>73</sup> See generally Helmut K. Anheier & Lester M. Salamon, “The Nonprofit Sector in Comparative Perspective” Walter W. Powell & Richard Steinberg (eds.), *The Non-Profit Sector*, pp. 89-114, at 96 (2d ed. Yale Univ. Press 2006) (describing the U.S. nonprofit sector as a particular blend of volunteerism and individual action).

<sup>74</sup> Robert M. Moroney, *Shared Responsibility: Families and Social Policy* 20 (1986).

<sup>75</sup> See Peter Silver, *Our Savage Neighbors: How Indian War Transformed Early America* xviii-xxv (2008) (how hatred and fear of native Americans served to unite European Americans from different countries and backgrounds).

<sup>76</sup> Moroney, *supra* note 74, at 20.

<sup>77</sup> *Ibid.*

<sup>78</sup> Moroney, *supra* note 74, at 17-24.

<sup>79</sup> Monica Colombo, Cristina Mosso & Norma De Piccoli, 11 *J. of Community & Applied Social Psychology* 457, 458, 459 (2001).

<sup>80</sup> Amitai Etzioni, *The Spirit of Community: The Reinvention of American Society* (1993). Etzioni and his fellow “communitarians” have provoked a spirited debate as to the nature of these communities, the rights of the individual vs. the community, etc. For a small sampling of the literature, see D. Bell (ed.), *Communitarianism and Its Critics* (1993); Amy Gutmann, *Communitarian Critics of Liberalism*, 14 *Philosophy and Public Affairs* 308 (1985); Stephen Mulhall & Adam Swift, *Liberals and Communitarians* (2d ed. 2005). See also Gerald E. Frug, *City Services*, 73 *N.Y.U.L. Rev.* 23 (1998) (arguing for equality in services within cities).

<sup>81</sup> See, e.g., N. Andrew Peterson, Paul W. Speer & David W. McMillan, *Validation of A Brief Sense of Community Scale: Confirmation of the Principal Theory of Sense of Community*, 36 *J. of Community Psychology* 61, 62 (2008); Sharon Kingston, Roger Mitchell, Paul Florin & John Stevenson, *Sense of Community in Neighborhoods as a Multi-Level Construct*, 27 *J. of Community Psychology* 681, 682-83 (1999) (summarizing literature).

<sup>82</sup> For example, sense of community for the place one lives has been postulated as a factor underlying a willingness to vote for local school (i.e., property) tax increases proposed for the municipality. William B. Davidson & Patrick R. Cotter, *Psychological Sense of Community and Support for Public School Taxes*, 21 *Amer. J. of Community Psychology* 59 (1993).

of shared responsibility in cities and towns have recommended the “barn raising” model of democratic governance, “where people focus...on what they can achieve collectively, both through government and by working together in their communities.”<sup>83</sup> This view has been reflected at times in the law, such as the prohibition against exclusionary zoning which can open the path for affordable housing within a town.<sup>84</sup>

To be successful, though, shared responsibility requires mutual interdependence and reciprocity, with both parties perceiving that the exchange goes two ways. “Resentment and stigma surface when givers begin to view the exchange as one-way, or when recipients feel they cannot reciprocate any time in the future.”<sup>85</sup> A sense of shared burden and equitable apportionment of responsibilities within communities are essential. Placing extra burdens on one subset of homeowners within a town is corrosive to a sense of communal cohesion, common purpose, and shared burden. Moreover, perceived unfairness in tax burdens can undermine support for taxation in general for community needs.<sup>86</sup>

Legislation in *Scenario 2* requiring all residential owners to pay the same property tax but now denying services to one subgroup (i.e., condominium and HOA owners) without any plausible justification<sup>87</sup> is, therefore, bad policy. Legislatures would be wise not to adopt such ordinances. Such statutes, if passed, might be struck by courts as violating enabling statutes and the federal Constitution in certain circumstances, as I suggest below.<sup>88</sup>

Several situations are distinguishable from the inequity of withholding services from condo and HOA owners. First, some residential owners may protest that a large portion of their property tax payments go to schools but they do not use the schools (as they have no children or send their children to private schools). But in this situation all owners have the opportunity and right to use the public schools that they support, which is not the case with condominium and HOA owners with respect trash and other similar services.

Second, commercial property owners may be denied municipal services such as trash collection. But there are reasons for differentiating between commercial and residential services because as a class commercial properties have different requirements and government can draw lines in planning for the community.<sup>89</sup> This is a distinction between two types of property, and there

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<sup>83</sup> Donald J. Borut, Melissa Geranese & William Barnes, *Governing Economies in the Twenty-First Century*, National Civic Review, 31-36, 32 (Summer 2009), <http://www.ncl.org/publications/ncr/98-2/Borut.pdf>.

<sup>84</sup> See *Southern Burlington County NAACP v. Township of Mt. Laurel*, 336 A.2d 713 (N.J. 1975); see also James S. Burling, *The Implications of Lingle on Inclusionary Zoning and Other Legislative and Monetary Exactions*, 28 *Stan. Envtl. L.J.* 397 (2009).

<sup>85</sup> Dennis L. Poole, *Beyond the Rhetoric: Shared Responsibility Versus the Social Contract*, 20 *Health & Social Work* 83 (1995).

<sup>86</sup> “[V]ariations in efficiency [of delivery of public services] may lead to unequal quality of services and a consequent perception of unfairness. Manifest inefficiency and unfairness may undermine the public’s support for tax funding of public services.” Peter C. Smith & Andrew Street, *Measuring the Efficiency of Public Services: The Limits of Analysis*, 168 *J. of the Royal Statistical Society* 401, 402 (2005).

<sup>87</sup> See *supra* Section IV.B.

<sup>88</sup> See *infra* Section IV.B.

<sup>89</sup> Lower taxes and incentives from other municipalities for businesses to relocate will create pressure on a town government to avoid excessive tax burdens on commercial property. William A. Fischel, *The Homevoter*

would be no corrosive effect on community cohesion as there would be if government singled out one segment of residential owners to subsidize other homeowners.

### **Legislative Responses to “No Taxation Without Sanitation”**

Policy considerations, therefore, compel legislatures to provide the same public services to condominium and HOA owners as they provide to other residential owners. Concerns over efficiency, fairness, and tyranny of the majority as well as the values of shared sacrifice and community building support such legislative rejection of a no-service regime. A legislature’s assertion of pure political power to place unequal burden on a small segment of the population will likely have a corrosive effect on the public fabric and cause an increase of cynicism about the political process. It is hard to reconcile the payment of the same property taxes but the receipt of fewer services with a notion of “fairness.”

Municipal and state governments daily face the difficulty of limited resources and strong demand for essential public services. This tension is heightened in the current environment of distressed state and local budgets. The resolution of the resources vs. demand equation should not, however, be resolved on the backs of one group in the community that looks like other segments of the population who are being given a free pass. For state and local entities making cutbacks on a variety of services (e.g., schools, recreation facilities), the story of unequal service denials to condominium and HOA owners provides a powerful lesson on how *not* to reduce government expenditures. In order to preserve the principles of legislative supremacy to enact regulations—necessary to preserve flexibility of local government to experiment, the system of representative democracy, and separations of power, this is an issue that responsible legislatures should tackle, rather than punting to the courts.

A small number of state and local<sup>90</sup> legislatures have enacted laws to prohibit or alleviate discrimination in services provided to condominium and HOA owners. There are different approaches to addressing the issue, with some framed in terms of “equality” notions<sup>91</sup> and others based on a concept that “if you pay for it, you are entitled to receive it.”<sup>92</sup> Some statutes require that the municipality provide condominiums and HOAs with the same level of services as other residences.<sup>93</sup> Other legislation requires a rebate to the unit owners for the cost of the services not

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Hypothesis: How Home Voters Influence Local Government Taxation, School Finance, and Land-Use Policies (paperback 2005).

<sup>90</sup> See, e.g., *Hall Manor Owner’s Ass’n v. City of West Haven*, 212 Conn. 147, 561 A.2d 1373 (1989) (describing local ordinance); *Council of City of Philadelphia v. Street*, 856 A.2d 893 (Pa. Cmwlth. 2004) (granting judgment for city council in mandamus action by against mayor, thus requiring mayor to order trash crews to remove trash from condominiums and cooperatives according to ordinance requiring service to such owners).

<sup>91</sup> See, e.g., Wis. Stat. Ann. sec. 703.27 (“No county, city, or other jurisdiction may enact any law ... that would ... provide a lower level of services to a condominium than would be ... provided if the condominium were under a different form of ownership.”).

<sup>92</sup> See, e.g., Miss. Code Ann 19-5-21 (“no property shall be subject to this [garbage collection] levy unless that property is within an areas served by a county’s garbage or rubbish collection”).

<sup>93</sup> See, e.g., Wis. Stat. Ann. sec. 703.27; *Hall Manor Owner’s Ass’n v. City of West Haven*, 212 Conn. 147, 561 A.2d 1373 (1989) (city ordinance limiting trash removal to “private dwellings” amended to include condominium units).

supplied by the locality<sup>94</sup> or gives a flat tax rebate if the municipality does not provide services.<sup>95</sup> There are also reports of governmental officials applying assessment rules to lower valuations for condominium units to reflect the lack of services.<sup>96</sup>

New Jersey has enacted legislation that provides that when solid waste and recyclables collection, snow removal, or road lighting are provided to the residents of a municipality, the governing body of that municipality shall either provide those services to a private community (i.e., condominiums and HOAs<sup>97</sup>) or reimburse the community for providing that service.<sup>98</sup> The municipality, however, does not have to reimburse more than the amount that the municipality would have paid for the services<sup>99</sup> and municipalities could choose not to provide such services to any resident.<sup>100</sup>

### **Legal Challenges to No-Service Regulations**

Before developing legal arguments that a court might adopt to assist owners who are hurt by no-service decisions, I must make an important caveat. I have argued in this article that legislatures should not discriminate in services against condominium and HOA units owners because that would run counter to fairness, efficiency, and other public policy concerns. Under our representative democracy, budget and service decisions are best made by an elected, accountable legislative body (which theoretically would then act wisely).

Still, if legislatures do adopt discriminatory no-service policies, owners could seek relief from the courts. Some courts might find that no-service rules violate the Fifth and the Fourteenth Amendments of the United States Constitution. Indeed, I make arguments to that effect below, and no doubt individual owners would benefit if an advocate can convince a court to adopt that position. At the same time, I have concerns about the “constitutionalization” of disputes over no-service legislation and agreements. Local legislatures need to be able to act based on their view of how to maximize the welfare of the community, without being trumped by courts challenging the wisdom of their decisions under expanded constitutional theory.<sup>101</sup> If the citizens do not like the legislature’s preference they can vote the representatives out of office. This in general is a

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<sup>94</sup> See, e.g., Md. Code, Art. 23A, sec. 50 (requiring services to be provided or reimbursement to the association equal to the cost that would be incurred by the municipality in providing the services).

<sup>95</sup> See, e.g., D.C. Stat. Ann. 47-871 et seq. (\$60 flat fee, to be increased via an escalator).

<sup>96</sup> See, e.g., *Beacon Hill Condominium Ass’n v. Town of Beacon Falls*, 675 A.2d 909 (Conn. App. 1996) (court finding statute does not permit this practice).

<sup>97</sup> N.J. Stat. Ann. 40:67-23.2(e) (definition).

<sup>98</sup> N.J. Stat. Ann. 40:67-23.3. See *N.J. State League of Municipalities v. N.J.*, 257 N.J. Super. 509, 608 A.2d 965 (1992) (upholding the statute in the face of challenges by group of cities raising equal protection challenges).

<sup>99</sup> N.J. Stat. Ann. 40:67-23.3, .5. Up to that cap, the municipality must reimburse the private community for 100% of its costs. *Id.* 23.6. See *Stonehill Prop. Owners Ass’n v. Township of Vernon*, 312 N.J. Super. 68, 711 A.2d 346 (1998) (applying the statute to require municipal reimbursement of private community, at a lower percentage as per earlier version of the statute).

<sup>100</sup> N.J. Stat. Ann. 40:67-23.1.

<sup>101</sup> See *Braunagel v. City of Devils Lake*, 629 N.W.2d 567, 572 (N.D. 2001) (a “[c]ity, acting through its police powers, has broad authority to enact land-use regulations without compensating the landowner for the restrictions place upon the use of the property”); *Berk Cohen Associates at Rustic Village, LLC v. Borough of Clayton*, 199 N.J. 432, 441, 972 A.2d 1141 (2009) (municipality may “provide trash removal services as a function of its policy power”).

superior solution than allowing federal courts and constitutional doctrine to intrude into routine local governance matters.<sup>102</sup>

As developed below, a condominium or HOA owner might prevail upon a judge to adopt a robust view of the takings, equal protection, or due process clauses to void a no-service rule. Despite my general preference for deference to the legislature (unless fundamental rights or suspect class discrimination is involved), there are special factors in no-service practices that make these cases particularly attractive to judicial intervention. But there is a risk that a successful challenge to no-service rules may open the door to constant supervision of local decisions by the courts, on a full range of municipal choices made by the elected government. The potential threat of such an outcome may temper the appetite for judicial relief in the no-service area and would at the minimum require careful opinions distinguishing no-service contests from the usual challenge to municipal action (where high deference to legislative action should continue).

### **Legal Contests in Scenarios 1 and 1-A**

The “loser” in *Scenario 1* is the developer who must sign a no-services agreement to obtain various governmental permits. The developer will likely have to sell the units at a discounted value because of the lack of municipal services. A developer could assert that the action of the government was an invalid taking of property rights under the Constitution.<sup>103</sup> The developer could raise analogous claims under *Scenario 1-A*, claiming that existing no-service legislation similarly reduced the value of the property and the sale price to purchasers.

### Takings Claim

Courts have found that a governmental regulation limiting the use of land can rise to the level of a regulatory taking under the Fifth Amendment.<sup>104</sup> The government must pay compensation to the landowner in such a situation or the regulation will be struck down by the courts. The courts have not articulated a bright line test for determining when a legislative act crosses the line from an acceptable exertion of the police power by government to a regulatory taking. Rather the Supreme Court has indicated that when government regulation “reaches a certain magnitude, in most if not all cases there must be an exercise of eminent domain and compensation paid.”<sup>105</sup>

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<sup>102</sup> In contrast, however, the courts should take an active role where fundamental constitutional rights are threatened by government action, such as decisions improperly based on race, religion, suppression of speech, and others. See, e.g., *Moore v. City of East Cleveland*, 348 U.S. 494 (1977) (striking ordinance restricting number of related individuals who could reside together).

<sup>103</sup> The fact that the developer “agreed” to the denial of service does not preclude the claim: parties can challenge unconstitutional conditions on their receipt of governmental actions. See *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 546-47 (2005); Daniel L. Siegel, *Exactions After Lingle: How Basing Nollan and Dolan on the Unconstitutional Conditions Doctrine Limits Their Scope*, 28 *Stan. Envtl. L.J.* 577 (2009).

<sup>104</sup> For an excellent discussion of regulatory takings of land, see Daniel R. Mandelker, *Land Use Law* §§ 2.01-2.38 (5<sup>th</sup> ed. 2003).

<sup>105</sup> *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922). Given that at most only a small portion of the owner’s use of the property is compromised by a denial of services, it seems that there could be no claim for a “per se” taking under *Lucas v. South Carolina Coastal Comm’n*, 505 U.S. 1003 (2002) (finding a “categorical” taking when all economically beneficial use of land is denied to the owner by regulation).



A developer would face several hurdles that make a regulatory taking challenge difficult and likely unsuccessful in *Scenarios 1* and *1-A*. First, most taking cases have involved regulations that limited the *use* of land for the owner. For example, in the *Penn Central* landmark designation barred the owner from fully developing airspace over Grand Central Station and in *Lucas* a regulation barred building on a lot.<sup>106</sup> In contrast, the developer in *Scenario 1* is only signing a contract waiving municipal services and *Scenario 1-A* only involves legislation denying services. The developer is losing not the right to use his land but only is deprived of certain conveniences that government might provide in connection with that use. Moreover, government is not compelled to provide services, such as trash pickup to its citizens, and could require all of them to seek private collections.<sup>107</sup> While there might be takings of property rights other than land, a landowner does not hold a “property right” in municipal services for the purposes of a takings challenge.<sup>108</sup>

Thus, it appears doubtful that a property right has been compromised when a no-service agreement has been signed. Indeed, many courts have refused to apply takings analysis to the situation of impact fees, where cities require cash payments from developers to help the city deal with infrastructure demands created by their new projects.<sup>109</sup> They have limited takings doctrine to land exactions only, such as where a portion of the developer’s land is actually used for required infrastructure, and not to a fee requirement.<sup>110</sup> If a court followed this analysis, it would be difficult to bring a takings claim for a no-service agreement.

Moreover, even if that hurdle can be overcome, the property deprivation to the developer will not likely be sufficiently large to rise to the level of a regulatory taking. Under the *Penn Central* test, restated in *Lingle*,<sup>111</sup> the court will weigh “the regulation’s economic effect on the landowner” and the extent to which the regulation interferes with reasonable investment-backed expectations.”<sup>112</sup> Courts have refused to find a sufficient deprivation to support a takings claim

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<sup>106</sup> *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992); *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104 (1978).

<sup>107</sup> See, e.g., *WHS Realty Co. v. Town of Morristown*, 323 N.J. Super. 553, 562, 733 A.2d 1206 (1999) (“a municipality is not mandated to provide for municipal garbage removal”).

<sup>108</sup> See, e.g., *Laidlaw Waste Systems, Inc. v. City of Phoenix*, 815 P.2d 932 (Ariz. App. 1991) (no taking of company’s trash collection contracts when city annexed area and required owners to use city trash collection); *Carroll Electric Cooperative Corp. v. City of Bentonville*, 306 Ark. 572, 815 S.W.2d 944 (1991) (no taking when annexing city required residents to switch to municipal power from private provider); *Murphy v. City of Detroit*, 201 Mich. App. 54, 506 N.W.2d 5 (1993) (no property right in customers re-routed by urban development project, so no taking); *Bingham v. Roosevelt City Corp.*, 235 P.3d 730 (Utah 2010) (no taking when city diverted groundwater beneath owner’s land since no property interest in soil saturation).

<sup>109</sup> See, e.g., *City of Monterey v. Del Monte Dunes, Ltd.*, 526 U.S. 687 (1999); *Krupp v. Breckenridge Sanitation Dist.*, 19 P.3d 687 (Colo. 2001); *Sea Cabins on the Ocean IV Homeowners Ass’n, Inc. v. City of North Myrtle Beach*, 548 S.E.2d 595 (S.C. 2001); but see *Ehrlich v. City of Culver*, 922 P.2d 429 (Cal. 1996); *Town of Flower Mound v. Stafford Estates Ltd. Partnership*, 135 S.W.3d (Tex. 2004). Impact fees must comply with statutory requirements. See, e.g., *Home Builders Ass’n of Central Ariz. v. City of Goodyear*, 221 P.3d 384 (Ariz. App. 2009) (statute required “reasonable relationship” of the burden of the development, and court has defined that as similar to “rough proportionality requirement” of *Dolan*); see Ariz. Rev. Stat. Ann. sec. 9-463.05.

<sup>110</sup> See supra note 109.

<sup>111</sup> *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005).

<sup>112</sup> *Penn Central*, supra note 106, at \_\_\_. As a third part of the test, the court is required to examine “the character of the government action.” *Id.* at \_\_\_.

even when the governmental action reduced the value of the property by 91 percent<sup>113</sup> or 95 percent.<sup>114</sup> The total loss to the developer due to the discounts by the unit buyers is likely to be a small fraction of the overall value of the property and the value increase that will inure to the developer due to the development. Unless a court adopts a position that *any* deprivation of property, no matter how little, works a regulatory taking, it is doubtful that a no-service agreement would meet the standard.<sup>115</sup>

## Nexus

The Supreme Court in *Nollan* and *Dolan* held that government may impose a land exaction only if it is designed to address an externality created by the development that negatively affects the community.<sup>116</sup> Government may not use zoning, subdivision, or the approval process to “extort” concessions from the developer that are unrelated to addressing harms caused by the project. Rather, *Nollan* requires a “nexus” between the regulation and the harm caused by the development and *Dolan* speaks that there be a “rough proportionality” between the harm and the exaction level.<sup>117</sup>

Government may have difficulty in showing the nexus between a no-services agreement and supposed negative community fallout when the municipality requires the agreement in exchange for granting the developer zoning or permit approval in *Scenario 1*. As discussed above, assuming that the municipality is not losing money on its trash collection activities, it is hard to see how adding additional taxpaying trash pickup “customers” causes a revenue loss to the town.<sup>118</sup> Thus, what is the harm caused by the development? Without the showing of a harm, it is difficult to even get to determining whether that harm has a nexus to the government’s no-service decision. Moreover, even if it could be shown that service to the new units would cost more than service to other citizens, it is illogical for the municipality to *totally* deny services or refuse a trash credit since the owners’ property tax payments include some component for regular trash collection. Therefore, there is no clear nexus between the presumed marginal increase in service costs for the new units (i.e., the harm) and a total denial of municipal services

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<sup>113</sup> *Rith Energy, Inc. v. United States*, 270 F.3d 1347 (Fed. Cir. 2001), cert. denied 536 U.S. 958 (2002) (no categorical taking when coal that could be taken was reduced to 9% of original amount).

<sup>114</sup> *Haas v. City of San Francisco*, 605 F.2d 1117 (9<sup>th</sup> Cir. 1979), cert. denied 445 U.S. 928, rehearing denied 446 U.S. 929 (1980) (diminution from \$2 million to \$100,000).

<sup>115</sup> In *Penn Central*, the court said the loss should be compared to the value of the whole property. *Penn Central*, supra note 106, at \_\_\_. *Accord Palm Beach Polo, Inc. v. Village of Wellington*, 918 So. 2d 988 (Fla. App. 2006). *Palazzolo*, however, raised the question of whether in future decisions any deprivation of property value should be considered a taking. *Palazzolo*, supra note 122, at \_\_\_.

<sup>116</sup> *Nollan v. California Coastal Comm’n*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); see Thomas W. Merrill, *Dolan v. City of Tigard: Constitutional Rights as Public Goods*, 72 *Denv. U.L. Rev.* 859 (1995); William A. Fischel, *Regulatory Takings: Law, Economics, and Politics* (1995); Lee Anne Fennell, *Hard Bargains and Real Steals: Land Use Exactions Revisited*, 86 *Iowa L. Rev.* 1 (2000); Mark Fenster, *Takings Formalism and Regulatory Formulas: Exaction and the Consequences of Clarity*, 92 *Cal. L. Rev.* 609 (2004).

<sup>117</sup> *Mandelker et al.*, supra note 1, at 380; see, e.g., *St. Clair County Home Builders Ass’n v. City of Pell City*, 2010 WL 3518657 (Ala.) (fees imposed on builder for improvements to municipal sewer and water systems not a taking since the builder received the benefit of water and sewage services and fee was not in excess of the benefit bestowed on the builders). For analyses of exactions under principles of Henry George, see Robert Ellickson & Vicki Been, *Land Use Controls* 652-56; *Nollan, Henry George, and Exactions*, 88 *Colum. L. Rev.* 1731 (1988); Carlos A. Ball & Laurie Reynolds, *Exactions and Burden Distribution in Takings Law*, 47 *Wm. & Mary L. Rev.* 1513 (2006).

<sup>118</sup> See Sec. II.A.3.

(i.e., the municipal “exaction”). One would expect that the solution to additional cost in the new development would be the requirement of a special assessment or fee on those units, not the total denial of service. Still, it is unclear that courts will find absence of nexus as long as the service denial is part of an overall trash removal regulatory program, rather than a burden placed randomly on one developer.<sup>119</sup>

### Dissonance with Efficiency and Fairness Concepts

As discussed earlier,<sup>120</sup> a purchaser of a condominium or HOA unit subject to a contractual or legislative no-service regime should reduce the price paid to the seller to compensate for the loss of public services but still pay full property taxes (which include payment for such services). If the no-service regime is ended under the law of covenants or pursuant to new legislation restoring services, the unit owner will receive a windfall—having received a discount for giving up services, the owner now has the services as well as the discount.<sup>121</sup> Windfalls are inefficient since they distort market incentives and smack of unfairness.

The Supreme Court, however, has indicated that a purchaser who buys in *Scenario 1-A* (and arguably by analogy in *Scenario 1*) may bring an action challenging a regulation, that was in effect before the sale, as an improper regulatory taking.<sup>122</sup> The Court explained that a contrary rule would prevent the courts from vindicating constitutional principles and insulate government from overreaching to the detriment of citizens merely because the property in question had been sold.<sup>123</sup> While this principle may be sensible as a constitutional and public policy, it does create the possibility of a windfall for a unit buyer in *Scenarios 1* and *1-A*.

### Conclusion

Therefore, a developer is likely to fail in a takings claim in *Scenario 1* or *Scenario 1-A*. This is because it is unclear that courts will recognize the denial of municipal services to be the taking of a property interest and, even if they find an infringement on a property interest, it is likely to be too small to rise to the level of a regulatory taking. Also, it is unclear that courts would be sympathetic to the developer’s best argument, i.e., lack of nexus.

### **Legal Challenges to Scenario 2**

When a municipality enacts legislation or a regulation that removes services from condominium or homeowner association unit owners while retaining them for other residential properties, the owners can bring two constitutional challenges—denial of equal protection under the law and

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<sup>119</sup> See *Leroy Land Co. v. Tahoe Regional Planning Agency*, 939 F.2d 696 (9<sup>th</sup> Cir. 1991) (exaction was part of overall environmental mitigation program)

<sup>120</sup> See supra section II.A.2.

<sup>121</sup> A covenant might not be enforceable, for example, if a subsequent buyer had no notice of it. See supra section II.B. For other defenses to covenant enforcement, see Gerald Korngold, *Private Land Use Arrangements: Easements, Real Covenants and Equitable Servitudes* §§ 11.01-11.13 (2004).

<sup>122</sup> *Palazzolo v. Rhode Island*, 533 U.S. 606, 631 (2001). Buying with knowledge of a restrictive land use regulation may, however, diminish investment backed expectations in the takings formula. *Id.*

<sup>123</sup> *Id.*

lack of substantive due process in the governmental action.<sup>124</sup> Depending on the language of state statutes enabling municipal police power, there may also be a statutory claim in no-service situations.

### Equal Protection

Condominium and HOA unit owners can raise an equal protection argument in *Scenario 2* by claiming that government's denial of service treats them differently than other homeowners. The unit owners would assert that they are similarly situated taxpayers to other residential owners and that government is creating a false classification to deny them services to which they are entitled.

While this may be an appealing, populist argument,<sup>125</sup> courts require more to strike a government regulation on equal protection grounds. Government makes classifications all of the time, distinguishing between groups of people. The Supreme Court has explained, however, that being a member of the less optimal group does not in itself violate the equal protection clause of the Constitution:

[M]ost laws differentiate in some fashion between classes of persons. The Equal Protection Clause does not forbid classifications. It simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike.<sup>126</sup>

Denial of service to condominium and HOA unit owners will be scrutinized by the courts under the "rational basis" test, unless a fundamental right or suspect class discrimination is involved.<sup>127</sup> The Supreme Court has explained that "state action subject to rational-basis scrutiny does not violate the Fourteenth Amendment when it 'rationally furthers the purpose identified by the State.'"<sup>128</sup> The Court explained the rational basis test and how courts should apply it:

A statute ... comes to us bearing a strong presumption of validity, and those attacking the rationality of the legislative classification have the burden "to negative every conceivable basis" which might support it. Moreover, because we

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<sup>124</sup> The developer might also challenge the municipality's *Scenario 1* and *Scenario 1-A* actions as violations of equal protection and substantive due process. See supra note \_\_\_ describing the unconstitutional condition doctrine which the owner would have to assert in *Scenario 1*.

<sup>125</sup> See supra Sec. I.A.

<sup>126</sup> Nordlinger v. Hahn, 505 U.S. 1, 10 (1992). For a discussion of the theories of equal protection, see Robert C. Farrell, Classes, Persons, Equal Protection and *Village of Willowbrook v. Olech*, 78 Wash. L. Rev. 367 (2003).

<sup>127</sup> See, e.g., Goldstein v. City of Chicago, 504 F.2d 989, 991-92 (7<sup>th</sup> Cir. 1974) (no fundamental right or suspect class is involved in denial of trash collection, making rational basis the proper test); accord Rubin v. City of Wauwatosa, 116 Wis.2d 305, 342 N.W.2d 451 (1983). If there is evidence, for example, of a racial intent in the legislation, the court will apply a "strict scrutiny" test which requires that government meet a higher standard; or government's action may be subject to "intermediate scrutiny" if gender discrimination is involved. See Erwin Chemerinsky, Constitutional Law: Principles and Policies 671-72 (3d ed. 2006). For an excellent discussion of the different equal protection standards in the land use context, see Mandelker et al, supra note 1, at 40-42; see *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977) (applying strict scrutiny with alleged racial motivation in refusal to rezone); *Hayes v. City of Miami*, 52 F.3d 918 (11<sup>th</sup> Cir. 1995) (applying and explaining rational relationship test); *Barone v. Department of Human Servs.*, 107 N.J. 355, 364, 526 A.2d 1055 (1987).

<sup>128</sup> *Bd. of Trustees v. Garrett*, 531, U.S. 356, 367 (2001) quoting *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 314, 96 S.Ct. 2562, 49 L.Ed.2d 520 (1976).

never require a legislature to articulate its reasons for enacting a statute, it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature. Thus, the absence of “legislative facts” explaining the distinction “[o]n the record,” has no significance in rational-basis analysis. In other words, a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data.<sup>129</sup>

There are various constitutional and policy imperatives supporting the rational basis test and judicial deference to legislative decisions. Under our constitutional system of separation of powers, the judicial branch should defer to the legislature’s judgment on health, safety, and welfare regulation unless an individual right is being infringed. Legislatures are subject to control by the citizenry through the election process and poor judgments will be punished via the ballot box.<sup>130</sup> The legislature theoretically also has the resources to make a careful study of issues and to take public testimony before acting.

Moreover, the legislature needs flexibility to experiment with different approaches to maximize the general welfare.<sup>131</sup> Some judgments may be better than others, but it must be able to proceed without the courts second guessing the wisdom of its decisions, as long as the process is not defective process or does not cause an impermissible violation of individual rights.<sup>132</sup> The public purse would be dissipated if the legislature had to constantly defend its actions in lawsuits brought by citizens who think they have a better idea. Especially given current budget pressures for municipal and state governments,<sup>133</sup> legislatures need flexibility to make spending choices for their limited dollars.

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<sup>129</sup> *F.C.C. v. Branch Communications, Inc.*, 508 U.S. 307, 315 (1993) (finding a rational relationship in FCC regulation). See Chemerinsky, *supra* note 127, at 672 (“Government’s objective need not be compelling or important, but just something that the government legitimately may do. The means chosen only need to be a rational way to accomplish this end.”). Accord *Szczurek v. City of Park Ridge*, 97 Ill. App.3d 649, 422 N.E.2d 907 (1981) (applying both the U.S. and Illinois equal protection clauses); *Gertsma v. Berea*, 135 Ohio App.3d 655, 735 N.E.2d 459 (1999) (applying U.S. and Ohio constitutions).

<sup>130</sup> See *Vance v. Bradley*, 440 U.S. 93, 97 (“The Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely we may think a political branch has acted.”) (1979) In addressing alleged discrimination in the setting of trash removal rates, one court stated: “The law in this state has long been that if the city has acted unfairly or unwisely in adopting this kind of ordinance, the remedy is action by the legislative body of the city, not legislative action by the courts.” *City of Riviera Beach v. Martinique 2 Owners Ass’n*, 596 So.2d 1166 (Fla. App. 1992).

<sup>131</sup> See *Haves v. City of Miami*, 52 F.3d 918, 923-924 (“the leniency of rational-basis scrutiny provides the political branches the flexibility to address problems incrementally and to engage in the delicate line-drawing process of legislation without undue interference from the judicial branch”) (11<sup>th</sup> Cir. 1995).

<sup>132</sup> *Branch Communications*, at 313 (“Whether embodied in the Fourteenth Amendment or inferred from the Fifth, equal protection is not a license for courts to judge the wisdom, fairness, or logic of legislative choices. In areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification.”).

<sup>133</sup> See *supra* notes 1-5 & accompanying text.

Despite the deference of the rational basis test and the comparatively few cases that hold that the legislature has not met its burden,<sup>134</sup> the test has been applied at times to protect people from baseless and illogical governmental decisions. For example, in *City of Cleburn v. Cleburne Living Center*, the Supreme Court held that the denial of a special use permit for a group home for the mentally retarded was not linked to a legitimate public interest as other multiple dwellings were permitted in the area and negative attitudes toward the mentally retarded was not an adequate basis for denial.<sup>135</sup>

There is a two-step inquiry in applying the rational basis equal protection test: first, does the regulation serve a legitimate governmental end? Second, is there a rational basis to believe that the legislation would further the hypothesized purpose?<sup>136</sup> How would this two-step test apply in *Scenario 2* where regulation is imposed denying municipal services (e.g., trash pickup) to condominium and HOA unit owners while other residential owners retain such services, and where the unit owners continue to pay the same property taxes (or otherwise receive no “credit” for the portion of their taxes attributable to trash collection)? As to step one, the government can argue that it is a legitimate governmental end to increase the efficiency and decrease the cost of municipal services. However, it is arguably not a *legitimate* government end if that burden is placed entirely on one class of people who are entirely the same as others with respect to the issue at hand.<sup>137</sup> Denial of services to tall people, for example, would save the municipality money but there is no basis to place that burden on tall people alone. Wealth can be an appropriate reason for line drawing if there is some plausible logic behind it. For example, when government allocates a limited pool of scholarship dollars only to students from low income households, wealthier families are indeed denied a benefit. But that wealth distinction itself serves a legitimate policy goal, i.e., providing educational opportunities to a greater number of citizens. In contrast, granting scholarships to every other home on a street is a way to allocate limited dollars but is not based on a legitimate distinction.

Thus, assuming that condominium and HOA unit owners are paying the same tax rate as single family homes and operating costs for trash removal are the same, there is arguably no *legitimate* basis to place the burden of municipal savings and efficiency entirely on condo and HOA

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<sup>134</sup> For cases rejecting claims of lack of rational relationship, see *Clark v. Boscher*, 514 F.3d 107 (1<sup>st</sup> Cir. 2008); *County Concrete Corp. v. Town of Roxbury*, 442 F.3d 159 (3d Cir. 2006); *Front Royal and Warren County Indus. Park Corp. v. Town of Front Royal, Va.*, 135 F.3d 275 (4th Cir. 1998). For a collection of cases, see James A. Kushner, 1 *Subdivision Law & Growth Management* §3:26 (available on Westlaw).

<sup>135</sup> *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432 (1985). Arguably *Cleburne* involved a somewhat higher level of scrutiny than pure rational relationship, although the Court in *Bd. of Trustees v. Garrett*, 531, U.S. 356, 367 (2001) insisted that it had indeed applied rational relationship in *Cleburne*. See *Allegheny Pittsburgh Coal Co. v. County Comm’n*, 488 U.S. 336 (1989) (striking the valuation process used by the county assessor for property taxes based on sales price since properties with the same market value would have different assessments because of the timing of sales).

<sup>136</sup> *Haves v. City of Miami*, 52 F.3d 918, 921, 922 (11<sup>th</sup> Cir. 1995). See Chemerinsky, *supra* note 127, at 674-89.

<sup>137</sup> See *Village of Wildwood v. Olech*, 528 U.S. 562 (2002) (a town intentionally refused to supply water to the plaintiff’s home unless plaintiff granted an easement not required of other owners; basis of decision was to retaliate against plaintiff for previously bringing a successful suit against the town; the Court stated that it will recognize equal protection claims “brought by a ‘class of one,’ where the plaintiff alleges there is no rational basis for the different treatment”); *Campbell v. Rainbow City*, 434 F.3d 1306 (6<sup>th</sup> Cir. 2006) (some courts do not require showing of bias against plaintiff but will sustain “class of one” by countering all possible reasons that support the town’s actions).

owners.<sup>138</sup> Even if the recurring expense for services to condominiums and HOAs is higher than with single family homes, it is not legitimate for government to both deny services and yet continue to collect full property taxes including the portion for trash removal.

There are, however, few municipal government/land use cases where owners have been successful in equal protection challenges.<sup>139</sup> While owners face a tough road in challenging denial of services, there is some support for their position. For example, in an analogous situation, one court held that it was a violation of the rational basis test when a municipality imposed a sewer tap-in fee for buildings constructed after the enactment of the ordinance but exempted existing buildings that were not yet tied in to the sewer system.<sup>140</sup> The court observed:

In the case before us no reasonable or rational foundation has been submitted to support the exemption and classification created by the ordinance. The date January 13, 1959, seems to have been chosen simply because it was the date defendant city decided to begin raising additional revenues. It certainly was not chosen because it formed a reasonable or rational date for establishing a division of a class.<sup>141</sup>

Just as the court rejected a city imposing costs randomly on new builders, a court might not permit a municipality to reduce overall budget expenditures by denying services to condo and HOA owners alone rather than sharing this reduction or cost across similarly situated persons.<sup>142</sup> Such a result would also serve the public policy goals of efficiency, fairness, and community building.<sup>143</sup>

### Equal Protection Cases on Service Denial

Various courts have rejected equal protection challenges to denials of services to condo and HOA owners.<sup>144</sup> One leading case, *Beauclerc Lakes*, decided by the United States Court of

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<sup>138</sup> See supra section II.A.1 for discussion of absorption of capital costs.

<sup>139</sup> See supra note 134.

<sup>140</sup> *Beauty Built Construction Co. v. City of Warren*, 134 N.W.2d 214 (Mich. 1965); see *Home Builders Ass'n of Central Arizona v. City of Scottsdale*, 569 P.2d 282 (Ariz. App. 1977); *Kreifels v. So. Panorama Sanitary Dist.*, 474 N.W.2d 567 (Iowa 1991).

<sup>141</sup> 134 N.W.2d at \_\_\_.

<sup>142</sup> Additional support may be found in cases rejecting a differential in sewer hookup fees between new homes in a development project and other new homes, see, e.g., *S.S. & O. Corp. v. Township of Bernards Sewerage Auth.*, 301 A.2d 738 (N.J. 1973), and in decisions striking "school facilities fees" that exceed the school costs generated by the new development, see, e.g., *Shapell Industries, Inc. v. Governing Bd. of the Milpitas Unified School Dist.*, 1 Cal. Rptr.2d 818 (App. 1992); see *Homebuilders Ass'n of Tulare/Kings Counties v. City of Lemoore*, 112 Cal. Rptr.3d 7 (2010); *Grupe Development Co. v. Super. Ct.*, 844 P.2d 545 (Cal. 1993). For other successful equal protection challenges, see *Berger v. City of Mayfield Heights*, 254 F.3d 621 (6<sup>th</sup> Cir. 1998) (ordinance requiring lots with less than 100 feet frontage to be clear cut of vegetation violated rational basis test since the same dangers and problems of overgrowth were present in larger lots); *Begin v. Inhabitants of Town of Sabattus*, 409 A.2d 1269 (Me. 1979) (challenging cap on mobile home permits that did not apply to other types of residences); *Kirsch v. Prince George's County*, 626 A.2d 372 (Md. 1993) (special permit requirement for student dormitories violated rational relationship test as it distinguished between occupants' occupations away from the site).

<sup>143</sup> See supra Sec. II.

<sup>144</sup> See, e.g., *City of Mayfield Heights v. Woodhawk Club Condominium Owners Ass'n*, 2000 WL 101700 (6<sup>th</sup> Cir. 2000) (unpublished opinion) (reversing lower court); *Goldstein v. City of Chicago*, 504 F.2d 989 (7<sup>th</sup> Cir. 1974); *Pheasant Run Condominium Homes Ass'n v. City of Brookfield*, 580 F.Supp.2d 735 (E.D. Wisc. 2008).

Appeals for the Eleventh Circuit, involved a class action challenge by condominium owners to an ordinance that provided solid waste collection service to residential premises except condominiums.<sup>145</sup> The court correctly noted that no “suspect” classification or “fundamental right” was involved which would require a higher level of scrutiny, and applied the rational basis test.<sup>146</sup> The court found that “[e]fficient sanitation is a legitimate goal; the provision of free waste collection service to residential premises consisting of four or fewer units is rationally related to that goal.”<sup>147</sup> If sanitation is a legitimate goal, though, why draw the line at condominiums? The court offered this strange explanation:

If we assume, as Condominium contents, that all condominiums are excluded, a legislature still could believe that—because of the benefits of a larger scale—condominium owners (through their representative condominium association) generally enjoy greater bargaining power with private waste removal services. That the legislature did not articulate this presumed goal—sanitation—or the rationale for its classification—scale and bargaining power—is not important.<sup>148</sup>

This reasoning is not convincing. The court does not question whether the line drawn by the city can achieve its goal of better sanitation while omitting a significant segment of the population. Instead the court inquires whether the condo owners are being hurt by the denial of services and if they can get substitute services. Under this approach, it would seemingly have to sustain an ordinance that denied services based on wealth of individuals or neighborhoods (since the wealthy could afford more services), ownership of a pickup truck (since the owner could haul trash to a landfill), etc. One district court ventured down this path by upholding the denial of road services to condominiums because they “come with associations with *the means* to provide their own services.”<sup>149</sup>

Moreover, while the *Beauclerc Lakes* court recognized that the city provided the trash service “at no cost”<sup>150</sup> to the other residences, it apparently was not concerned that the unit owners are still paying full property taxes but not receiving the same services (or reimbursement) as other residential owners.<sup>151</sup> The legislative classification results in one smaller group of citizens subsidizing the rest of the residences’ trash collection. This makes the legislature’s classification

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<sup>145</sup> *Beauclerc Lakes Condominium Ass’n v. City of Jacksonville*, 115 F.3d 934 (1997).

<sup>146</sup> *Accord City of Mayfield Heights v. Woodhawk Club Condominium Owners Ass’n*, 2000 WL 101700 (6<sup>th</sup> Cir. 2000) (unpublished opinion).

<sup>147</sup> *Id.* at 935. Some courts have found that saving money and “conserving tax dollars” by denial of services is a legitimate governmental interest. See, e.g., *City of Mayfield Heights v. Woodhawk Club Condominium Owners Ass’n*, 2000 WL 101700 (6<sup>th</sup> Cir. 2000) (unpublished opinion); *Pheasant Run Condominium Homes Ass’n v. City of Brookfield*, 580 F.Supp.2d 735, 739-40 (E.D. Wisc. 2008). If that is an acceptable goal, then it is hard to imagine that any governmental decision would fail to meet that.

<sup>148</sup> *Id.* *Accord* See, e.g., *Goldstein v. City of Chicago*, 504 F.2d 989, 992 (7<sup>th</sup> Cir. 1974) (“the reason for this distinction is that the owner(s) of large residential buildings with a great amount of garbage have more effective bargaining power with private scavenger services than the owner of a single unit”); *Carpenter v. Commr. of Public Works*, 115 Wis.2d 211, 339 N.W.2d 608 (1983); *Szczurek v. City of Park Ridge*, 97 Ill. App.3d 649, 422 N.E.2d 907 (1981).

<sup>149</sup> *Pheasant Run Condominium Homes Ass’n v. City of Brookfield*, 580 F.Supp.2d 735, 740 (E.D. Wisc. 2008) (emphasis added).

<sup>150</sup> *Goldstein*, at 936.

<sup>151</sup> From 1988 through 1989, the city rebated unit owners \$50 from taxes in lieu of garbage collection. However, the city stopped this practice as of January 1, 1990 pursuant to a new ordinance. See Reply Brief for Appellant *Beauclerc Lakes Condominium Ass’n*, 1997 WL 33621696, at 3 (11<sup>th</sup> Cir.)



in *Beauclerc Lakes* all the more unjustifiable, resembling the impermissible random line drawing of the sewer tap-in fees of *Beauty Built*.<sup>152</sup> The city in *Beauclerc Lakes* should either provide trash services or a tax credit to the unit owners equal to the cost of the services rendered to other residences. It is true that the legislators who passed the existing rule could be thrown out of office in an election, but it is unclear that the benefitted majority of citizens would be motivated to do so. Because the ballot box is an inadequate protection, the equal protection clause should be available to reinforce economically efficient behavior, prevent cost shifting by the majority to the minority, and preserve community cohesion.<sup>153</sup>

*Ramsgate Court Townhome Association v. West Chester Borough*<sup>154</sup> reached a similar conclusion to *Beauclerc* on the merits by using similar reasoning. The *Ramsgate* court recognized that “members of the class are assessed real estate taxes on the same basis as other residential property owners in the Borough, but they receive no waste removal services from the Borough.”<sup>155</sup> The court, moreover, found that this did not violate the equal protection clause:

The district court recognized that the Borough’s limits on waste removal are based on economic considerations. As the district court stated, “[t]he challenged classifications ... are based on the quantity of waste and nothing else....The difference in the way property owners are treated under the ordinance are clearly based on economic considerations. Providing free trash collection costs money.” ... [The district court] noted that the Borough is forced to divide its finite budget among various expenditures. By limiting this service, the Borough is able to spend its tax dollars elsewhere.”<sup>156</sup>

This reasoning also is subject to question. First, while the district court is correct that there is a difference in the “quantity of waste” between a multi-tenant building (rental or condominium), there is usually no difference between condominium and single family *units*. The court’s explanation is illogical and thus irrational—the comparison must be between residential units as far as quantity of refuse. Moreover, the court seems to ignore the belief of taxpayers that their payments are somehow (albeit imperfectly) to the reciprocal provision of municipal services. The court sanctions placing economic burdens unequally across residential owners, by having condo unit owners subsidize (wealthier?) single family properties. Under that theory of majoritarian dictatorship, why not also deprive some residential taxpayers access to recreation facilities or other municipal goods?

Condo and HOA unit owners may be able to convince a court to accept this critique of the equal protection theory of *Beauclerc Lakes* and provide relief. Yet, as noted above,<sup>157</sup> such a decision is a potential Pandora’s Box if it would lead to court intervention in the wide range of municipal

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<sup>152</sup> See supra notes 140-41 & accompanying text.

<sup>153</sup> In *City of Houston v. Glenshannon Townhouse Community Association*, 607 S.W.2d 930 (Tex. Civ. App. 1980), owners of single family, attached townhouses challenged an ordinance that provided reimbursement program for trash pickup to owners of detached, single family homes but denied the program to the attached townhomes. The court applied the rational relationship test to this equal protection claim but avoided the issue of whether the classification was proper. Instead it found that the classification was improperly applied as the governmental authority permitted two other attached townhouse communities to join the program.

<sup>154</sup> 313 F.3d 157 (3d Cir. 2002).

<sup>155</sup> Id. at 159.

<sup>156</sup> Id. at 160.

<sup>157</sup> See supra Sec. IV. (on the dangers of subjecting routine legislative decisions to judicial review).

decisions through the rational basis test. Indeed, the rational basis test and its usual deference to legislatures can be viewed as necessary restraint on the judiciary and prevention of second guessing by the courts as to the wisdom of particular statutes.

## **Substantive Due Process**

Legislation can be challenged under the Fourteenth Amendment of the United States Constitution based on a deprivation of substantive due process.<sup>158</sup> Legislation will survive a substantive due process challenge as long as it serves a legitimate governmental purpose.<sup>159</sup> As interpreted by the Supreme Court since the 1930's, there is not much bite in substantive due process scrutiny.<sup>160</sup> As long as there is "*any* conceivable purpose" to the statute, the legislature will be upheld even if the legislature had not relied on that purpose in enacting the legislation.<sup>161</sup> The Supreme Court has been indulgent of legislation in the economic and commercial areas, intervening only when a specific constitutional right is impacted by the statute.<sup>162</sup> Some state courts, though, have applied a more rigorous review under the due process clauses of their respective state constitutions, leading to the striking down of some commercial regulation.<sup>163</sup>

Given the deference principle, the courts have generally rejected challenges to no-service legislation based on substantive due process.<sup>164</sup> There may be some comfort in a case involving a related matter.<sup>165</sup> The New Jersey Supreme Court found a violation of the due process clause where a municipality, operating under legislation requiring equal treatment of condo and HOA owners, attempted to require condominium owners to place their refuse at curbside just as owners of single family dwellings, rather than using dumpsters. The court relied on the trial court's finding that the curbside pickup in the condominium's case was "unhealthful, unsanitary, utterly inefficient, unsightly and unreasonable" to conclude that the municipal scheme undermined the goals that it was designed to serve (i.e., the public health and welfare) and was thus unreasonable.

## **Statutory Attacks**

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<sup>158</sup> See Chemerinsky, *supra* note 127, at 608-29.

<sup>159</sup> Mandelker et. al, *supra* note 1, at 42-43. Accord *West Coast Hotel v. Parrish*, 300 U.S. 379, 391 (1937); *Berk Cohen Associates at Rustic Village, LLC v. Borough of Clayton*, 199 N.J. 432, 441, 972 A.2d 1141, 1146 (2009) (requiring only a rational relationship between the legislative object and means).

<sup>160</sup> See, e.g., *U.S. v. Carolene Products Co.*, 304 U.S. 144, 152 (1938) ("existence of facts supporting the legislative judgment is to be presumed").

<sup>161</sup> Chemerinsky, *supra* note 127, at 625 (emphasis added).

<sup>162</sup> Mandelker et. al, *supra* note 1, at 43, quoting *Lincoln Federal Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525 (1949); see Chemerinsky, *supra* note 127, at 624; see also *Upton v. Town of Hopkinton*, 945 A.2d 670 (N.H. 2008) (assessing one-third of municipality's cost to improve a road to a new subdivision was reasonably related to the subdivision as residents and emergency vehicles would require improved access).

<sup>163</sup> Mandelker et. al, *supra* note 1, at 43-44.

<sup>164</sup> See, e.g., *Goldstein v. City of Chicago*, 504 F.2d 989 (7<sup>th</sup> Cir. 1974); *Pheasant Run Condominium Homes Ass'n v. City of Brookfield*, 580 F.Supp.2d 735 (E.D. Wisc. 2008). But see *Berk Cohen Associates at Rustic Village, LLC v. Borough of Clayton*, 199 N.J. 432, 972 A.2d 1141 (2009) (invalidating ordinance because means increased rather than decreased health and safety goals).

<sup>165</sup> *Berk Cohen Assocs. at Rustic Village v. Borough of Clayton*, 199 N.J. 432, 972 A.2d 1141 (2009).

Owners have challenged denial of municipal services based on the language of state enabling acts and local no-service ordinances, with mixed results.<sup>166</sup> These cases are of limited precedential value because of the statutes' idiosyncratic language, but they may indicate a jurisdiction's general judicial attitude toward refusal of service to taxpaying residents. For example, in one case an ordinance required trash pickup for "condominiums" and "private dwellings."<sup>167</sup> The court strictly construed these terms to deny service to a multi-structure, privately owned, multifamily planned unit development that did not fully comply with the state's condominium statute. By using strict construction, rather than a broader interpretative method, the court favored the municipality's budget over the individual owners.

Other courts, however, have relied upon state tax legislation to strike down certain local denials of service.<sup>168</sup> New York courts, for example, have held that special ad valorem levies for garbage collection are invalid if the condo owner does not receive the services.<sup>169</sup> The New York Court of Appeals noted that "because the plaintiffs do not receive the pertinent benefit, no basis exists in these circumstances for the imposition of this ad valorem garbage levy."<sup>170</sup> This statement begs the question of whether that same reasoning applies when government sets property tax rates based on budgeted residential trash expenses but denies services to taxpaying condo and HOA unit owners. Why should the fact that government breaks out its general tax revenue levies to support services into separate levies for particular services matter on the issue of whether plaintiffs received "the pertinent benefit?" To uphold that distinction appears to favor form over substance.

### Conclusion

State and local governments currently face tough expenditure and taxation choices that will have significant social, economic, and political ramifications. The case of condominium and HOA service denials provide a cautionary tale for municipalities attempting to balance current revenue declines with increased demand for civic services. Strong public policies—efficiency, fairness, shared sacrifice, and community building—are eroded by legislation denying services to condo and HOA unit owners because these owners are indistinguishable for service purposes from other taxpaying homeowners. Legislatures should not adopt laws that make such meaningless and pernicious distinctions, both in the condo/HOA service situation and other cutbacks in goods and services that governments are currently forced to make. Moreover, there are theories that might support a judicial finding that condominium and HOA service denials are impermissible,

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<sup>166</sup> See, e.g., *Pheasant Run Condominium Homes Ass'n v. City of Brookfield*, 580 F.Supp.2d 735 (E.D. Wisc. 2008) (federal court refused to exercise supplemental jurisdiction over statutory claim as it presented novel state law issue); *Berk Cohen Associates at Rustic Village, LLC v. Borough of Clayton*, 199 N.J. 432, 972 A.2d 1141 (2009) (under statute requiring city to provide equivalent trash services or reimbursement, the city's requiring the complex to place refuse for pickup in manner that created eyesore and health hazard was not equivalent to service that other residences received).

<sup>167</sup> *Hall Manor Owner's Ass'n v. City of West Haven*, 561 A.2d 1373 (Conn. 1989).

<sup>168</sup> Cf. *Szczurek v. City of Park Ridge*, 97 Ill. App.3d 649, 422 N.E.2d 907 (1981) (refusing to decide whether statute requiring that condominiums be "assessed on the same basis as single-family residences" barred discrimination in services since the issue was not raised below).

<sup>169</sup> See, e.g., *Applebaum v. Town of Oyster Bay*, 81 N.Y.2d 733, 609 N.E.2d 118 (1992); *Barclay Townhouse at Merrick II v. Town of Hempstead*, 289 A.D.2d 351, 734 N.Y.S.2d 870 (2001); *Landmark Colony at Oyster Bay Homeowners' Ass'n v. Town of Oyster Bay*, 536 N.Y.S.2d 96 (App. Div. 1988); *Harbor View at Port Washington Homes Ass'n v. Town of North Hempstead*, 2008 WL 3982696 (Sup. 2008).

<sup>170</sup> *Applebaum*, 81 N.Y.2d at 736, 609 N.E.2d at 120.

on constitutional or statutory grounds. There is considerable risk, however, in advocating judicial intervention as it undermines the values of local control and experimentation, representative democracy, and separation of powers. The best course of action is for legislatures to see the wisdom of shared sacrifice and thus refuse to balance the books on the back of a minority of homeowners.