Attachment "A"

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# Alternative Approaches to Securing Recreation and Park Amenities Through Exactions

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**Abstract:** A continuum of eight alternative exaction forms that may be used to secure public park and recreation amenities is proposed. It is suggested that there is an inexorable movement from minimalist approaches to exactions, toward comprehensive requirements that transfer to the private sector increasing proportions of what were traditionally public costs associated with park and recreation developments. The existing literature on exaction forms is synthesized to provide a state-of-the-art discussion of them. The advantages and disadvantages associated with each form are discussed.

**Keywords:** Recreation and parks, exactions, resource acquisition.

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An exaction is a local government requirement imposed on subdivision developers or builders mandating that they dedicate park land or specified amenities, or pay a fee to be used by the government entity to acquire and develop park and recreation facilities (Deakin, 1984). Exactions are a means of providing park and recreation facilities in newly developed areas of a jurisdiction without burdening established city or county residents. They may be conceptualized as a type of user fee since the intent is that the cost of new parks or amenities should be paid for by the landowner, developer, and/or new homeowners who are responsible for creating the demand for the new facilities.

The thinking behind this requirement is that since new development generates a need for additional park and recreation amenities, the people responsible for creating that need should bear the cost of providing amenities. In essence, the public sector is transferring the cost of providing public amenities to the private sector. This approach has become an attractive alternative to conventional methods of financing park and recreation amenities to many government officials.

The purpose of this paper is to describe and analyze eight alternative forms of exactions that may be used to acquire public park and recreation resources. These are shown in Figure 1. The paper is intended to make three contributions. First, a conceptualization of exaction forms is offered which suggests they can be arrayed on a continuum, and that there is an inexorable

movement along that continuum from minimalist to extensive requirements being imposed upon developers. Second, a synthesis of the extensive literature on exaction forms is provided that hopefully reflects the current state of the art. Third, the advantages and disadvantages associated with each form are discussed in depth (to the extent possible within the confines of a paper), to better equip park and recreation managers to offer informed input into the often controversial debate associated with exaction decisions.

## Historical Perspective

Exactions have a long history in the United States. Early charters issued by state legislatures for the establishment of new towns and villages required that a "common green" or "cultural plaza" be set aside for the good and use of all. The earliest enabling bill permitting local communities to mandate such provisions was passed by the state of Washington legislature in 1907 (although the governor vetoed it, so it did not become law). This bill stated that no plot of land of ten acres or more in area inside a city boundary, or within five miles of a large city and one mile of a small city, "shall be filed or recorded by any public official, unless a plot or plots of ground containing not less than one-tenth of the land in the plot, after deducting streets and alleys, shall be dedicated to the public for use as a park, common or playground, with the like effect that streets and alleys are dedicated to the public" (Weir, 1928).

The authority of municipalities to require amenities for recreation is derived from the subdivision control authority granted to local government entities by state legislation. Under these so-called "police" powers, when a municipality reviews a residential subdivision plat, which divides the subdivision into building lots, it may require the developer to construct and dedicate public facilities necessary to ensure the public's health, safety, and welfare (Kaiser, Fletcher & Groger, 1992). In approximately 20 states, this authority has been made explicit by enabling acts specifically authorizing such requirements as a precondition of subdivision or building approval (Rohan, 1994). In the remaining states, courts have inferred the authority to impose these obligations from a broad interpretation of legislation.

The nature of exactions is constantly evolving and a wide variety of forms have emerged. In Figure 1, these are arranged along a continuum ranging from no developer obligation to comprehensive and substantive exaction. The range of options available to a community is influenced by differences in state constitutions, laws, and court rulings, but these external factors have not resulted in wide discrepancies in the range of available options.

**Figure 1**
**A Continuum Showing the Evolution of Exaction Approaches for Acquiring Recreation and Park Amenities**

| 1 | 2 | 3 | 4 |
|---|---|---|---|
| No Developer Obligation | Ad hoc Negotiated Agreements | Incentive Zoning | Mandatory Land Dedication |
| 5 | 6 | 7 | 8 |
| Fees-in-Lieu of Land Dedication | Impact Fees | Recoupment Fees | Concept of Linkage |

Before the tax revolt in the late 1970s (Mikesell, 1991), the situation in most American communities was characterized by no developer obligation or by ad hoc negotiated agreements (Stages 1 and 2, Figure 1). What was secured was dependent on the economics of a development, local needs, and the aggressiveness of elected representatives and city officials in dealing with developers. When the tax revolt era emerged, it was characterized by a political climate and legislative actions that inhibited the use of taxes for acquisition and development of recreation facilities. This led to widespread adoption of exactions, and during the last two decades their growth has been exponential.

The first approach to replace negotiation with legal requirement was mandatory dedication of land (Stage 4, Figure 1). In response to limitations of this approach, fees-in-lieu were imposed (Howard & Crompton, 1980). More recently, impact fees have emerged, Most communities currently use fees-in-lieu, but the movement towards impact fees is rapid (Nelson, 1994). Stages 7 and 8 in Figure 1, recoupment fees and the concept of linkage, are perceived by some to be the next stages in the evolution of exactions, but at this time are enforced in only a handful of communities. Each of the approaches shown in Figure 1 is defined and discussed later in the paper. These exaction forms have evolved sequentially and represent an incremental broadening of the concept of exactions and the types of costs they are intended to cover:

> The current situation is the result of an evolutionary process whereby the policies that first gain legal and public acceptance provide the foundations for new policies, creating an archeological mound in which earlier layers are rarely abolished or amended; they continue to exist concurrently with the new forms (Alterman & Kayden, 1988, p. 23).

## Legal Parameters

Whenever exactions are proposed, implemented or amended, they are controversial. Stevenson (1989, p. 25) observed they "are now becoming an issue almost everywhere as the needs of new residents clash with local

fiscal realities." Four major stakeholder groups are impacted by an exaction decision: local government officials, developers, new residents moving into a community, and existing residents. The major arguments that may be advanced in support of and in opposition to exactions by each of these groups have been articulated and analyzed by Crompton (1990). He notes, "The complexity of the issue militates against predictable outcomes, for there are no right or wrong perspectives, only different perspectives" (p. 2).

The medieval torture connotations of the term "exactions" are indicative of the unpopularity of this practice among many developers who regard them as a kind of extortion (Juergensmeyer, 1988). A typical developer reaction to exactions is to term them "blackmail fees" since "You have to pay or you don't work" (Baca, 1989, p. 27). This is perhaps an unfair characterization because little coercion is actually involved. Developers are free to choose other localities in which to build if they find the rules unacceptable.

Initially, developers attacked the legality of exactions, claiming they were unconstitutional under the terms of the last twelve words of the Fifth Amendment to the U.S. Constitution: "nor shall private property be taken for public use, without fair compensation." However, the courts have generally upheld their legality. A typical finding was issued in *Hollywood Inc. vs. Broward County* where the courts declared, "open space, green parks and adequate recreational areas are vital to a community's mental and physical well-being" and, as such, an ordinance ensuring park and recreational facilities "falls squarely within the state's police powers."

Given the courts' general approval of the principle of exactions for parks, the focus of most legal challenges has now shifted to questions relating to what constitutes a "reasonable" dedication requirement. Several tests of reasonableness have been propounded by the courts (Nelson, 1994), but the prevailing standard throughout the country is now the "rational nexus" test. This test requires the following:

1. That there be a connection between demand enacted by a development and the park facilities being developed with exaction resources from it.
2. Identification of the cost of the park facilities needed to accommodate the new demand. This establishes the burden to the public of providing the new facilities and the rational basis on which to hold new development accountable for such costs.
3. Appropriate apportionment of that cost to the new development in relation to benefits it receives. This establishes the nexus between the fees being paid to finance new parks to accommodate the new demand and the benefit the new development receives from the new facilities (Nelson, 1994).

Using this test, the courts have required that dedications bear a reasonable relationship to the park and recreation needs that can be

attributed to the development, and that what is dedicated be used to provide facilities to benefit those who live in the development. This test does not preclude using exactions to finance park facilities that benefit *several* developments, so long as the relative financial participation of each development is in proportion to its attributed need.

A refinement to the rational nexus test emerged in a 1994 U.S. Supreme Court ruling in *Dolan vs. City of Tigard.* Ms. Dolan owned a 9,700 square foot store in Tigard's central business district. She wanted to double the size of the store and pave a 39-space parking lot. Tigard's land-use plan required new development to dedicate a permanent easement of land for bike/hike pathways. However, the court was not satisfied that the city had demonstrated the additional vehicle and bicycle trips generated by Dolan's development, reasonably related to the city's requirement for dedication of the easement. It ruled that the impact of the proposed development did not create a need for the paths. The court stated, "The city must make some sort of individualized determination that the required dedication is related both in nature and extent to the impact of the proposed development." In effect, the city was exercising leverage, without just cause, over the building permit application to expand its urban greenway system over private property without spending public funds (Kozlowski, 1994). Thus, the court established a "rough proportionality" as the standard required for the relationship between dedication requirements imposed on a developer and the increased demands on existing infrastructure attributable to the development.

The courts have consistently ruled that facility standards for new and existing residents should be the same; for example, new residents should not be required by an exaction ordinance to pay for parks on the basis of five acres per thousand when the existing community standard is less. Thus, deficiencies in facilities arising from demand generated by earlier development cannot be funded by exactions on new developments. By limiting the amount that can be exacted from a developer to that which is needed to serve the development's occupants, local governments are prohibited from using new development as a source of financing beyond those attributable to the development.

## No Developer Obligation

Despite the potential of exactions for acquiring recreation and park amenities, over half of U.S. communities do not impose any type of formal exactions for this purpose on developers. The literature suggests that they are most likely to be used in larger suburban cities experiencing rapid population growth (Kaiser, Fletcher & Groger, 1992).

Three reasons may account for why so many communities have not enforced exactions. First, in many areas of the U.S., particularly in relatively small rural communities, there is not much new growth or development. Hence, these approaches are not useful in providing additional resources. Second, although there is legal authority to enact them, exactions are still regarded as morally repugnant by many. A conservative land ownership

ethic and antipathy towards government may well be entrenched, particularly in some western states, and the idea of government having the right to "take" part of an individual's land is abhorrent. Third, some local governments, especially those that historically have enjoyed good relationships with developers, view formal exaction ordinances as being unnecessary and counterproductive. For example, the city of Dallas, Texas, historically opted not to pass an exaction ordinance because officials believed they could achieve more through negotiation:

> The city has in the past received gifts of parkland from developers which offers good public relations and serves as a tax write-off for the developer. The city primarily tries to work with developers on a case-by-case basis. Negotiations between developers and the city have proven to be effective (Azeka, 1985).

### Ad hoc Negotiated Agreements

A negotiated approach describes arrangements whereby developers agree to provide desired public benefits as part of their application for obtaining regulatory approval for projects. It is an alternative to a formal exaction ordinance and differs from it in that the agreed public benefits are not mandated through a formal ordinance. Rather, they emerge from negotiation between the developer and local government, without the guidance of an ordinance specifying the form and magnitude of public benefits. Thus, technically, the benefits offered by developers are voluntary donations rather than mandatory requirements. However, if sufficient gain in amenities to the community is not forthcoming, then planning permission for a project may not be granted. The approach may allow a community to secure significant public benefits without spending tax funds or imposing exactions.

The following vignette illustrates how a negotiated agreement may emerge:

> The Rancho Solano project in Fairfield, California illustrates how bargaining for exactions can produce a "win/win" solution. The developer initially proposed an 850-unit single-family luxury subdivision on 2,284 acres. The city bargained for dedication of a public golf course as part of the project's development agreement. The developer argued that such a major dedication would require increased project sales, so the parties agreed to increase the project to 1,200 units. The developer then agreed to dedicate the land for an eighteen-hole municipal golf course and to pay one-half the grading costs. But the city went a step further, calculating the increased land values accruing to the developer resulting from the golf course and bargained for the capture of that value. The developer made additional contributions to the city based on those calculations. The negotiations, then, led to increased housing in Fairfield, increased land values, creation of a public golf course, and substantial contributions to the city's infrastructure accounts (Cowart, 1988, p. 277).

Advocates of negotiated agreements suggest they have three advantages compared to formal exactions in that they are flexible, voluntary and legally secure. Their flexibility means that exaction requirements can be closely matched to needs and that adjustments can be made to be responsive to the peculiarities of a development project's unique circumstances. Moreover, since the agreements are voluntary, they are not constrained by the legal bases that mandatory exactions have to meet, such as the rational-nexus standard. However, from an ethical perspective, as the amenity gain becomes less related to possible impacts caused by a development, it becomes more difficult to justify the imposition of this cost solely on the developer. Finally, the voluntary nature of negotiated agreements means that exactions can be agreed, which would be open to legal and political attack if they were imposed on unwilling developers.

Disadvantages associated with a negotiated approach compared to a formal exaction ordinance include the additional time and expense involved; the introduction of uncertainty into the development process; the likelihood that negotiations involving similarly situated developers may result in differing outcomes, giving rise to charges of unfairness or special treatment; and the expertise needed to negotiate effectively.

Time costs may be substantial. For example, one study found that government costs associated with negotiation were four times higher than the costs associated with administering an impact fee exaction ordinance (Nelson, 1993).

Although some see an advantage of the negotiated approach as being its potential for ameliorating friction with developers, it may in fact be a source of friction. Developers sometimes point out that the uncertainties inherent in negotiated planning gains make it difficult to predict project costs and secure project financing, and that there is potential for inequitable treatment and abuse. Negotiated agreements mean that exaction provisions are determined on a case-by-case basis through negotiation and compromise, which may result in substantially different levels of exactions for similarly situated developers (Kirlin & Kirlin, 1982). This inherent level of uncertainty and potential for arbitrary actions by government officials leads many developers to prefer the certainty of formula-driven exaction ordinances.

Public officials engaged in these negotiations may not have the time, knowledge, experience, or inclination to fully analyze the trade-offs involved and make informed decisions. Thus, there may be suspicion by residents that developers are able to manipulate negotiated agreements to their advantage.

Some staffers report that they are outgunned by developers in negotiations:

> "You find yourself in meetings with three city staff members—somebody from planning, somebody from public works, and one of the attorneys—facing a roomful of the top lawyers and consultants in the state, all working for the developer." One city planner said, "They can do studies we can only dream about and we just don't have the resources to refute their arguments" (Deakin, 1984, p. 107).

Some jurisdictions have adopted an "official policy" toward planning obligations. This provides more standardization than an ad hoc negotiated agreement, but does not have the requirement status of a mandatory legal formula. For example, in Galveston County, Texas, the official policy of the county was to request developers to donate a portion of their land, or a monetary contribution, to be used for recreation and park purposes. The county found developers to be much more receptive to the requests and suggestions of county officials than they probably would have been to a legal requirement based on a mandatory exaction ordinance. As a result of this negotiated process, officials believe developers donated more land than they would have been required to dedicate under a formal ordinance. Although this official policy was ostensibly voluntary, developers were aware that the county had the ability to be uncooperative and delay a development if it so wished. Since delays are very expensive, developers had an additional incentive to concur with the official policy request.

In all cases where agreements are negotiated, the public agency has to weigh trade-offs of the costs and benefits that are likely to accrue. Clearly, decisions relating to negotiated agreements must take place within a coherent planning framework. While the incentives and trade-offs depend upon compromise, the compromise must not be of sufficient magnitude that it poses a threat to the locale's integrity. An argument has been made that the amenities available from a given project may become so attractive to decision makers that the prospect of receiving the amenities can divert attention from the merits of the project itself (Getzels & Jaffe, 1988). Thus, the integrity of the zoning and land regulation is eroded. The type of issues that arise are illustrated in the following scenario:

> Two development alternatives are presented for a given site, both of which require an amendment to existing zoning. In one, the developer proposes a 100,000-square-foot commercial project. In the other, the developer proposes a 150,000-square-foot project and a cash contribution for the construction of a community recreation center several miles away. The additional 50,000 square feet of the second alternative will cause traffic problems for the immediate area surrounding the site. The local jurisdiction must weigh the two possibilities and decide which most advances the public interest. In simplistic terms, the government is balancing the costs of the extra traffic against the benefits of the community center.

When considering the trade-offs inherent in negotiated agreements, ethical questions emerge concerning how fairly the resulting public costs are distributed. Often it is the residents of particular neighborhoods who bear the costs of increased traffic congestion, air pollution, noise, visual blight and other adverse impacts, while benefits from the gained amenities are more widely distributed across a community (Beatley, 1988). This suggests that the elements in the agreement should be required to meet the same "rational nexus" tests that have evolved for measuring the legitimacy of more formal forms of development exaction.

## Incentive Zoning

Criticisms leveled at negotiated planning obligations tend to focus on uncertainty and inconsistency associated with their application and the time and expertise needed from public officials. Incentive zoning emerged in response to these criticisms (Stage 3, Figure 1). It attempts to retain the principles of the negotiated agreement, but to establish objective standards to guide implementation.

In an incentive zoning program, the items of the trade-off between the developer and public agency are stated in detail in the ordinance. Beginning in Chicago in the late 1950s, incentive or bonus zoning has been used by urban planners to encourage private developers to make cities more attractive and to provide increased public amenities (Rohan, 1994). Thus, some communities offer bonuses to developers in the form of increased building heights or square footage beyond what is permitted by a site's zoning, in return for a developer providing public plazas, open space, or public recreational facilities on the site.

Incentive zoning differs from formal mandatory exactions in that it usually benefits the landowner or developer, because the value of the bonus that accrues to the developer has to equal or exceed the cost to the developer of supplying the public benefit before the incentive becomes appealing. In contrast, an exaction ordinance may result in economic loss to developers by requiring them to provide land or various facilities for public use as a condition of project approval (Rohan, 1994).

New York City has the most comprehensive and complex system of incentive zoning in the U.S. It has over thirty special development districts where specific incentive ordinances apply to relatively small geographical areas deemed to be of special character (Rohan, 1994). A typical incentive plan covers the New York theater district. Theaters are not a good economic investment. They had become jeopardized by the influx of high-rise office buildings which were replacing the old and uneconomic two- and three-story theater buildings. For many people, New York City without theaters would be a much less attractive place in which to live, work, or visit. There were compelling findings linking New York's preeminence as a national corporate headquarters to its theaters around which so many related activities, such as radio and television, shopping, dining and tourism clustered. Hence, this ordinance permitted developers to increase the size of any building development in the area by up to 44 % of floor area, in return for providing a legitimate theater that met the planning commissioner's specifications. Five live theaters, which otherwise would not have come into being, were built under this innovative provision and all five are currently in active use (Marcus, 1992).

In other New York City incentive ordinances, developers were permitted to increase floor area by up to twenty percent in certain high density commercial and residential districts, if a public plaza was provided at ground level that met the qualifications specified in the ordinance. The

intent was to generate more open space in the "canyons" of Manhattan. In Denver, a similar incentive ordinance offers developers a premium of twelve square feet of floor area for each square foot of public plaza they contribute at street level (Rohan, 1994).

Incentive zoning has received three types of criticism. First, planners who are concerned with integrity of the cityscape point out that incentive zoning permits developers to circumvent design guidelines for building height and size. Second, it has been calculated that the value of bonuses granted to developers far exceeds the value of public amenities provided. Third, there is no guarantee that public amenities will emerge because, unlike exactions, participation in the program is at the developer's discretion.

**Mandatory Land Dedication**

The first type of formula-driven mandated exaction to emerge was mandatory land dedication. Its adoption marks a shift from negotiation, which permits some element of discretion and arbitrariness as to how an exaction will be enforced, to standardization, where a formula applicable to all developments is imposed. This approach requires a developer to deed a portion of the land to a local authority for recreation purposes as a condition of the approval of a permit to build.

The amount to be dedicated may be determined in one of two ways. First, a *population density formula* may be used, requiring the developer to deed a specified acreage per 1,000 population or to deed land according to the number of residents who live there. Density is usually expressed as the number of dwelling units per acre; for example:

| Density | Park Land |
|---|---|
| 1-5 dwelling units per acre | 8% of subdivision area |
| 6-10 | 13% |
| 11-15 | 15% |
| 16-20 | 17% |
| over 20 | 20 % |

This approach has the important advantage of relating park needs directly to the number of people in a given geographical area.

An alternative approach is to require a *fixed percentage* of the total land area to be dedicated. Its major advantages are simplicity and ease of computation. A typical ordinance might state the following:

> A minimum of five percent of the gross land area of subdivisions of more than 50 lots or 25 acres, shall be dedicated for public parks or playgrounds.

The actual percentage required varies widely and may range from as low as three percent to as high as ten percent. The ten percent figure appears to be the upper range that the courts will accept (Kaiser & Mertes, 1986). The

major disadvantage of the fixed percentage approach is that the standard remains the same whether the development consists of single-family homes or high-density apartments, although the park needs generated by the two obviously will be different. The courts are increasingly rejecting ordinances based on a percentage dedication of land because it places burdens on developers that are not necessarily commensurate to the park needs their houses will create, since their projects may be of very different densities.

The dedication of land has three major weaknesses. First, the size of the acquired land is limited by the size of the developer's project. Since most projects involve a relatively small acreage, and since most community ordinances require only a fraction of that acreage to be dedicated, only small fragmented spaces are provided. Such spaces offer limited potential for recreation and are relatively expensive to maintain. Second, the location of dedicated land is determined by the location of the development, which may not conform to the location designated in a city's park and recreation master plan. Third, the dedicated land may not be suitable for park development. The best residential land and the best park land are frequently characterized by well-drained soils, moderate slopes, and large tree vegetation cover. The developer often will seek to dedicate the land least suitable for building upon, which is also likely to be unsuitable for recreation use.

**Fees-in-Lieu**

The limitations given in the previous two paragraphs resulted in the evolution of ordinances authorizing a community to require developers to contribute cash instead of dedicating land. These cash payments are termed fees-in-lieu. There are two methods of assessing these fees-in-lieu. First, the fee assessed is substantially *equal to the fair market value of the land which otherwise would have been dedicated using the population approach:*

> The developer shall pay to the municipality for the recreation fund, a sum based on the fair market value of the land that otherwise would have been dedicated and in proportion to the density of population in the development (Howard & Crompton, 1980).

Second, the fee may be *a percentage of the total fair market value of the land being developed.* For example:

> The fee-in-lieu shall be equal to five percent of the average fair market value of the land in the subdivision (Howard & Crompton, 1980).

In some cities where the dedication requirement is based on a fixed percentage rather than density, an additional exaction fee is charged developers whenever they receive an upgrade in zoning. A typical fee in California would be $2 per square foot. The fee typically goes into a trust fund for public improvements, and parks are a part of those improvements. This additional fee is imposed because a change to denser zoning or commercial zoning brings more people into the area who require extra services.

## Impact Fees

Recreation impact fees (also known as capital recovery fees) are a direct outgrowth of mandatory land dedication requirements and fees-in-lieu. They differ from land dedication and fees-in-lieu since they are collected at the building permit stage, rather than at the time of platting. Hence, they are paid by the builder rather than the developer. The courts' acceptance of fees-in-lieu opened the door to the emergence of impact fees. In areas of rapid growth, impact fees can generate substantial funds. For example, in recent years Metropolitan Dade County in Florida, which embraces both Miami and Miami Beach, has generated between $500,000 and $1 million each month from impact fees for park and open space acquisition and development. The impact fee may be imposed on a per-bedroom or a per-dwelling basis. Most agencies use the per-dwelling basis because it is easier to monitor than to keep track of the number of bedrooms, particularly in large agencies dealing with multiple developments simultaneously.

The impact fee has three major advantages over the fees-in-lieu approach. First, because they are collected when a building permit is issued, rather than when the land is platted, they can be applied to developments that were platted before an impact fee ordinance was passed. This is important in a state such as Florida, where hundreds of thousands of vacant lots were platted prior to the passing of dedication ordinances by local governments (Juergensmeyer, 1988). Without impact fees, these developments would not pay their fair share of parks and recreation amenities.

Second, the intent of land dedication and fees-in-lieu was for developers to provide park and open space land within or close to their developments, which met the close-to-home needs of their new homeowners. However, impact fees embrace a broader vision, including paying for needs that are met external to a particular subdivision that results from numerous developments, such as regional parks. In the past, these types of facilities were most likely to have been financed by general tax funds, but the public's resistance to tax increases has provided a powerful stimulus for the expanding use of impact fees (Nelson, 1994).

Third, impact fees may be assessed for development as well as acquisition, which is not authorized by mandatory land dedication or fees-in-lieu ordinances. This feature makes them an attractive alternative to general taxes for financing new park and recreation development or major renovations. The movement to impose impact fees has been encouraged by a realization that the expense of developing a site for use as a park is substantially in excess of the land cost. Hence, some local governments have moved away from requiring an undeveloped site or an equivalent amount of cash and begun to formulate the requirement as being a site fully developed with necessary facilities. This more demanding approach views a cash amount as the basic requirement and embraces the fundamental concept of a recreation impact fee as it has now emerged. That is, as a cash payment to cover the provision of additional facilities (land improvements) necessitated by a new development (Downing & Frank, 1983).

The mechanics for determining the appropriate impact fee are described in the Appendix to this paper. Agencies often negotiate for developers to construct the facilities for which their impact fees would be used. This is likely to be cost-efficient for both the parties, since rather than the agency having to request bids for the work, developers can use their labor and equipment which is already on site.

The tendency to move to a more comprehensive and inclusive recovery of costs is demonstrated in the following advice for establishing impact fees:

> To avoid shortfalls in their park development funds, communities, when calculating park impact fees, should be sure to include the value of planned facility improvements to be located on acquired parklands. Also, the costs of providing road access and utilities to the perimeter of the site can be legitimately added to the site acquisition cost in establishing park fees. Because land values can vary significantly across the city, it is also advisable to set park fee schedules by regions. This will not penalize lower land value areas where most affordable housing is constructed, and it will capture the value from higher land value areas where most luxury housing is usually located. Austin's (Texas) park fees, for example, are half as high in the eastern part of the city as they are in the west, while fees in central Austin are 25% lower than they are in the west (Snyder & Stegman, 1986, p. 295).

However, resistance from developers has meant that this goal of fully funding recreation and park amenities in new areas has been frustrated. For example, in Florida the cost per dwelling of providing water, sewage, drainage, police, fire, library, school, park, recreation and other community facilities to new development has been estimated to average more than $20,000 (Nelson, 1988, p. 3). However, average impact fees for these services average between $3,700 and $4,700, according to the Home Builders Association of Mid-Florida (Stevenson, 1989). In most cases, impact fees have not been set at a high enough level to cover the full capital costs of the recreation and park facilities demanded by new development.

Although impact fees are relatively new, they are diffusing rapidly across the United States, and by 1994, 19 states representing approximately half the country's population had adopted development impact fees, enabling legislation authorizing communities within the state to levy impact fees (Nelson, 1994). Further, the range of amenities they are being used to fund is expanding. Thus, for example, in some communities they are imposed for libraries or museums (Nelson, Nicholas & Juergensmeyer, 1988).

**Recoupment Fees**

Recoupment fees are emerging as a potential extension of the basic impact fee (Stage 7, Figure 1). Their appropriateness and legality is receiving increased attention in the literature (Juergensmeyer & Nicholas, 1988), but they have been implemented in only a very small number of communities. Others are watching to see the outcome of the inevitable legal challenges from developers to these pioneer ordinances, before following their lead.

Recoupment means, "the proportionate share of the capital improvement costs of excess capacity in existing park and recreation areas where such capacity has been provided in anticipation of the needs of new development" (Juergensmeyer & Nicholas, 1988, p. 157).

It is often cost-efficient for a community to acquire, and in some cases develop, park and open space land or hike and bike trails in advance of its residents' needs. Negotiation with landowners at times when activity in the real estate market is slow, when a bargain sale opportunity becomes available, or when the land is beyond the community's existing developed areas, may result in good park and recreation land being purchased at a relatively low price. It is also likely to be easier to acquire substantial tracts of (say) 50-300 acres, than subsequently when development extends to these outlying areas.

In effect, these acquisitions represent excess capacity to the community's current needs. Similarly, community amenities such as libraries, auditoriums, or arenas may be constructed with excess capacity in order to accommodate future needs created by new homeowners. Providing this excess capacity is likely to be supported by developers, because it makes new developments more attractive to homeowners.

It is unreasonable to expect current residents to pay for this excess capacity through their local taxes when they are being acquired for future residents. One commentator observed the following:

> If new development is assessed its proportionate share of the cost of new parks that benefit new development, why not assess new development for its proportionate share of the costs of parks already built to accommodate new development but paid for by current taxpayers who do not benefit from excess capacity. In fact, it is politically unwise in these times of fiscal restraint to have current taxpayers generate benefits that only new development reaps (Nelson, Nicholas & Juergensmeyer, 1988).

Regular impact fees are reserved for the payment of new facilities and are generally designated for neighborhood and community level facilities. A few communities (e.g. Loveland, Colorado) have initiated recoupment fees that may be levied in addition to impact fees. These require new developments to buy into existing facilities, so the community can recoup its investment in the excess capacity.

## Concept of Linkage

While exactions require developers to supply or finance public facilities or amenities made necessary by their development, the concept of linkage extends this responsibility to provide for other public needs, such as social services (Stage 8, Figure 1). This is a quantum step, which is sure to generate a plethora of court cases. It is being pioneered by a few cities in California and, to this point, has not been adopted elsewhere. The intent is to link large-scale, downtown commercial development (office, mixed-use buildings, and hotels) with their effects on local social needs and amenities.

Proponents of linkage recognize that such large scale developments may produce jobs and additional tax revenues, but they point out that the new workers need places to live, transit systems, day care facilities, and the like. Supporters believe that developers who profit from constructing a new development, logically, should help pay for increases in municipal services and facilities which it creates. From a developer's perspective, provision of these amenities is likely to assist in gaining endorsement of neighborhood groups for a project, and these groups are the traditional opponents of new commercial development (Keating, 1986).

This type of linkage can only be enacted by a city if the real estate market is strong and if existing fees, taxes and the like have not already eroded the incentive to build in the area. Without these conditions, developers will simply move their projects elsewhere.

The author is unaware of any current examples of linkage in the public parks and recreation field. However, given the field's growing involvement with at-risk youth, after-school, and day camp programs, some indication of how it may be implemented in the future may be gleaned from current ordinances that have required developers to pay impact fees for public child-care centers, the need for which is created by the residents or workers who will occupy the property being built. Hence, for example, in 1988, San Ramon, California, imposed a fee of $210 a unit on new houses to build child care centers (Andrew & Merriam, 1988). The amount of linkage payment required varies according to the demands created for a particular project. For example, in Berkeley, California, the child care fee is calculated in the following way:

> We estimate the cost per child to construct a child care facility and multiply it by the total number of children needing care to establish a lump sum mitigation. We also analyze the difference between what lower income households could pay annually for child care (using state of California program guidelines) and the Berkeley market rate. We multiply this difference by the number of child-care-impacted lower income households for a given project to determine a permanent annual child care subsidy (Mayer & Lambert, 1988).

The developer can be required either to pay a linkage fee or to carry out mitigatory actions instead of paying fees, either on-site or at an approved off-site location. From the developer's perspective, it is often advantageous in leasing the property if such mitigation components as public art or child care are included as part of the overall project. As one developer commented, "We'd much rather invest the money in an enhanced project than turn it over to the city" (Mayer & Lambert, 1988).

## Concluding Comments

Exactions provide local governments with at least a partial solution to their park and recreation capital-funding problems. They may be conceptualized as a type of user fee, since the intent is that the cost of new

recreation amenities should be paid for by the landowner, developer, and/or new homeowners who are responsible for creating the demand for the new facilities. They represent one of the safest political options for paying for new infrastructure because, in general, they tax builders and new residents, neither of whom in many cases are existing local voters. The alternative to exactions is increased local taxes, which from a political perspective are more difficult to impose and likely to be more controversial than exactions.

Although the position of communities along the proposed continuum of exaction forms varies widely, the alternative methods of exaction do appear to have tended to follow a common pattern of evolution. First, a community begins to feel the adverse fiscal effects of rapid growth, higher borrowing costs, reduced federal and state grant aid, and higher construction and development costs. Second, as a result of these pressures the community shifts responsibility for acquisition of land for recreation from the general taxpayer to the developer by introducing mandatory land dedication and fees-in-lieu. Third, as the use of exaction is expanded, the city and developers find it to be administratively cumbersome. Finally, the city simplifies and expands the magnitude of the exactions process by adopting a system of impact fees, and subsequently recoupment and linkage fees (Snyder & Stegman, 1986).

The principle of exactions has been upheld by the courts. Litigation is now primarily concerned with issues revolving around the issue of fairness in terms of who benefits and who pays. Legal challenges increasingly revolve around what constitutes a "reasonable" exaction requirement. The most widely adopted standard is the "rational nexus" test, which prohibits government from requiring more money or land than is necessary to serve the recreation and park needs attributable to that development and requires that the exaction resources be used to provide facilities that will proportionately benefit the paying development.

Exaction policies exhibit wide differences in their degree of compulsion, uniformity of treatment, and predictability of requirements. These variations reflect differences between local jurisdictions in philosophy, politics, and economic status. Thus, for example, ad hoc negotiated agreements are likely to be most successful in communities with the following criteria: (1) the prevailing value system recognizes the rights of individual landowners to be paramount; (2) there is an expectation, tradition and peer pressure for developers to exude *noblesse oblige*; (3) city officials are highly skilled in exaction negotiations; and (4) there is strong mutual respect and positive chemistry between city officials and developers, and they share a consensus vision on the nature of the community's future. In contrast, more extensive and comprehensive forms of exactions are likely to prevail in communities with the following criteria: (1) other resources for acquiring and developing public park and recreation resources are not available; (2) the prevailing value system stresses public benefits over private rights; (3) there is no tradition of *noblesse oblige*; (4) city officials and

developers are antagonistic and/or have different visions of the community's future growth; (5) city officials lack the time and/or expertise to engage successfully in extended negotiations with developers; and (6) the community is experiencing rapid growth.

Although the form of exactions currently enforced varies widely, all stakeholder groups appear to be increasingly willing to accept them philosophically. In communities where public resources for park and recreation acquisition and development continue to decline, there is likely to be a move further along the exactions continuum and a requirement that developers pay more of the costs. Since exactions are well entrenched in law, future legal challenges are likely to revolve around the acceptability of terms specified in an exaction, rather than around the principle of exaction. For this reason, their formulation is becoming increasingly crucial, and the courts and exaction opponents are becoming more sophisticated and demanding in their scrutiny of an exaction's acceptability.

## References


Alterman, R., & Kayden, J.S. (1988, Winter). Developer provisions of public benefits: Toward a consensus vocabulary. *New York Affairs, 10*(2&3), 22-32.

Andrew, C.I., & Merriam, D.H. (1988). Defensible linkage. In Arthur C. Nelson (Ed.), *Development impact fees.* Chicago: Planners Press, American Planning Association.

Azeka, M.T. (1985, May 28). Letter to James Duncan, Director, Office of Land Development Services, City of Austin, Texas. Cited in Kaiser & Mertes, 1986, 82-83.

Baca, M. (1989, Jan. 15). Impact fees: "Blackmail" or a fair sharing of costs? *New York Times,* Real Estate Section, p. 27.

Beatley, T. (1988). Ethical issues in the use of impact fees to finance community growth. In A. C. Nelson (Ed.), *Development impact fees* (pp. 339-361). Chicago: Planners Press, American Planning Association.

Cowart, R.H. (1988, Winter). Negotiating exactions through development agreements. *New York Affairs, 10*(2&3), 327.

Crompton, J.L. (1990). The perspectives of impacted stakeholder groups towards park and recreation exactions. *Journal of Park and Recreation Administration, 8*(4), 1-22.

Deakin, E. (1984). The politics of exactions. *New York Affairs, 10*(2&3), 96-110.

Dolan vs. City of Tigard, No. 93-518, US SCT (1994), 2309-2332.

Downing, P.B., & Frank, J.E. (1983). Recreation impact fees: Characteristics and current usage. *National Tax Journal, 36*(4), 478.

Getzels, J., & Jaffee, M. (1988). *Zoning bonuses in central cities* (p. 12). Chicago: American Planning Association.

Hollywood Inc. vs. Broward County, 431 Si, 2d 606 (Florida, 1983).

Howard, D.R., & Crompton, J.L. (*1980). Financing, managing and marketing recreation & park resources.* Dubuque, Iowa: William C. Brown.

Juergensmeyer, J.C. (1988). The development of impact fees: The legal issues. In A.C. Nelson (Ed.), *Development impact fees* (pp. 96-112). Chicago: Planners Press, American Planning Association.

Juergensmeyer, J.C. (1988, Winter). The legal issues of capital facilities funding. *New York Affairs, 10*(2&3), 51-65.

Juergensmeyer, J.C., & Nicholas, J.C. (1988). A model impact fee authorization statute. In A. C. Nelson (Ed.), *Development impact fees* (pp. 156-164). Chicago: Planners Press, American Planning Association.

Kaiser, R.A., & Mertes, J.D. (1986). *Acquiring parks and recreation facilities through mandatory dedication* (p. 66). State College, PA: Venture Press.

Kaiser, R.A., Fletcher, J.E., & Groger, S. (1992). Exacting land and fees from land developers for park purposes: A profile of municipal practices. *Journal of Park and Recreation Administration, 10*(1), 12-30.

Keating, W.D. (1986, Spring). Linking downtown development to broader community goals. *Journal of American Planning Association, 52.*

Kirlin, J.J., & Kirlin, A.M. (1982). *Public choice—private resources: Financing capital infrastructure for California's growth through public-private bargaining* (p. 69). Sacramento: California Tax Foundation.

Kozlowski, J.C. (1994, September). Constitutional greenway dedication requires "rough proportionality" to development's impact. *Parks and Recreation,* 29-35.

Marcus, N. (1992). New York City zoning—1961-1991: Turning back the clock—but with an up-to-the-minute social agenda. *The Fordham Urban Law Journal, Vol. 18.*

Mayer, N.S., & Lambert, B. (1988). Flexible linkage in Berkeley: Development mitigation fees. In A.C. Nelson (Ed.), *Development impact fees.* Chicago: Planners Press, American Planning Association,

Mikesell, J. L. (1991). *Fiscal administration: Analysis and applications for the public sector* (3rd. ed.). Pacific Grove, CA: Brooks/Cole.

Nelson, A.C. (1988, Winter). Development impact fees. *Journal of the American Planning Association, 54*(1), 3.

Nelson, A.C. (1993). Development impact fee feasibility analysis for Cobb County, Georgia. City Planning Program, Georgia Institute of Technology.

Nelson, A.C. (1994). Development of impact fees: The next generation. *The Urban Lawyer, 26*(3), 541-562.

Nelson, A.C., Nicholas, J.C., & Juergensmeyer, J.C. (1988). "Development impact fee policy and administration." Unpublished manuscript prepared for Metropolitan Dade County Parks and Recreation Department, Miami.

Rohan, P.J. (1994). *Zoning and land use controls. Vol. 2.* New York: Matthew Bender.

Snyder, T.P., & Stegman, M.A. (1986). *Paying for growth: Using development fees to finance infrastructure* (p. 295). Chapel Hill: University of North Carolina.

Stevenson, R.W. (1989, Feb. 16). Debate grows on development of fees. *New York Times,* sec. 2, p. 25, C3.

Weir, L.H. (1928). *Parks: A manual of municipal and county parks* (p. 490). New York: A.S. Barnes and Co.

## Appendix

*Calculating An Impact Fee For Parks and Recreation*

To withstand a challenge in the courts, an impact fee must (1) meet the criterion of rational-nexus and (2) be consistent with the existing level of parks' provision in the community. The recommended formula for calculating an impact fee for park land is as follows: Average Parkland Value X Acres per Person Service Level X People per Dwelling Unit.

In the jurisdiction from which this example was derived*, the community was divided into nine geographically defined Park Benefit Districts, in order to meet the rational-nexus criterion. Thus, all impact fees collected within each Benefit District must be spent within that District. In this jurisdiction, the impact fees were designed only to pay for neighborhood and community parks. They did not extend to regional facilities.

The land in each Park Benefit District was assessed using current values. The average cost of acquiring an acre of land in each Benefit District is shown in Table A.

**Table A**
**Average Cost of Acquiring an Acre of Land in Each Benefit District**

| Park Benefit District | Average Park Land Value Per Acre |
|---|---|
| 1 | $518,988 |
| 2 | $518,988 |
| 3 | $111,750 |
| 4 | $260,780 |
| 5 | $139,533 |
| 6 | $128,668 |
| 7 | $ 64,090 |
| 8 | $ 58,000 |
| 9 | $109,364 |

The agency undertook a study to identify the existing service level of publicly provided neighborhood and community parks in the jurisdiction. This indicated that they were provided at the rate of 2.75 acres per 1000 population (i.e., .00275 acres per person). Hence, this was the level of service for new provisions that the impact fees were designed to retain.

Census data were used to project the number of people currently living in different types of dwelling units in each Benefit District. The numbers are shown in Table B.

* This example is based on Ordinance #90-59 administered by Metropolitan Dade County Park and Recreation Department in Florida. The ordinance has been adapted here for illustrative purposes. The author has omitted and changed some details in order to facilitate an easier understanding of the general procedure used.

**Table B**
**Persons Per Dwelling Unit By Type in Each Park Benefit District**

| Park Benefit District | PPU Single-Family Detached House | PPU Single-Family Attached | PPU Mutli-Family Unit Structures |
|---|---|---|---|
| 1 | 2.651 | 2.415 | 1.614 |
| 2 | 2.710 | 1.740 | 1.790 |
| 3 | 2.907 | 2.483 | 1.817 |
| 4 | 3.175 | 2.830 | 2.460 |
| 5 | 3.285 | 2.369 | 2.143 |
| 6 | 3.244 | 2.333 | 2.227 |
| 7 | 3.160 | 2.770 | 2.502 |
| 8 | 2.892 | 3.046 | 2.204 |
| 9 | 2.570 | 2.560 | 2.840 |

Thus, for example, the required impact fee for a single-family detached house in District 5 would be as follows:

$$\$139,533 \text{ X } .00275 \text{ acres X } 3.285 = \$1,262$$

In addition to *acquiring* park land, impact fees are intended to pay for the cost of *improving* the new land into a usable park. The agency's data from recent construction of neighborhood and community parks showed this cost to average $42,000 per acre. Thus, the required impact fee required for a single-family detached house for park *improvements* in District 5 would be as follows:

$$\$42,000 \text{ X } .00275 \text{ X } 3.285 = \$379$$

Hence, the total impact fee required (land acquisition plus cost of improvements) is as follows:

$$\$1,262 + \$379 = \$1,641$$

Data for the formulas used to compute the impact fees are revised periodically:

- each year to reflect increases or decreases in land costs (Table A)
- every five years to reflect changes in number of people residing in different types of dwelling structures (Table B)
- every five years to reflect changes in the jurisdiction's minimum service level (currently 2.75 acres per 1000 population)
- every three years to reflect increases or decreases in the cost of park construction (currently $42,000 per acre)

With the approval of the agency's director, a fee payer may provide land and/or improvements in lieu of, or in combination with, a monetary fee. The director has to be convinced that this is in the best public interest. In major developments, it is often most cost-efficient for the development company to provide land and construct a park, than for the company to pay impact fees for others to do this work.