PRIVATE SUPPLY OF PUBLIC SERVICES

Evaluation of Real Estate Exactions, Linkage, and Alternative Land Policies

Rachelle Alterman, editor
# Contents

 Preface ix

## CONTEXT AND CONCEPTS

<table>
<thead>
<tr>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Exactions American Style: The Context for Evaluation / Rachelle Alterman</td>
<td>3</td>
</tr>
<tr>
<td>Developer Provisions of Public Benefits: Toward a Consensus Vocabulary / Rachelle Alterman and Jerold S. Kayden</td>
<td>22</td>
</tr>
</tbody>
</table>

## FACETS OF EVALUATION

<table>
<thead>
<tr>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Exactions in the Public Finance Context / Dick Netzer</td>
<td>35</td>
</tr>
<tr>
<td>The Legal Issues of Capital Facilities Funding / Julian Conrad Juergensmeyer</td>
<td>51</td>
</tr>
<tr>
<td>Development Exactions: The Emerging Law of New York State / Norman Marcus</td>
<td>66</td>
</tr>
<tr>
<td>Development Exactions and Social Justice / Timothy Beatley</td>
<td>83</td>
</tr>
<tr>
<td>The Politics of Exactions / Elizabeth A. Deakins</td>
<td>96</td>
</tr>
</tbody>
</table>

## THE PLANNING AND DESIGN PROCESS

<table>
<thead>
<tr>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Exactions in Managing Growth: The Land-Use Planning Perspective / Edward J. Kaiser and Raymond J. Burby</td>
<td>113</td>
</tr>
<tr>
<td>Designing Proportionate-Share Impact Fees / James C. Nicholas</td>
<td>127</td>
</tr>
</tbody>
</table>

## THE DEVELOPER'S PERSPECTIVE

<table>
<thead>
<tr>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Developers' Perspective on Impact Fees / Carol E. Soble</td>
<td>145</td>
</tr>
<tr>
<td>Pain before Gain: Developer Views on Housing Linkage Programs / Douglas R. Porter</td>
<td>153</td>
</tr>
</tbody>
</table>

## OVERSEAS COMPARISONS

<table>
<thead>
<tr>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Planning Gain: Developer Provision of Public Benefits in Britain / Jerold S. Kayden</td>
<td>163</td>
</tr>
<tr>
<td>Financing Public Facilities in France / Vincent Renard</td>
<td>173</td>
</tr>
<tr>
<td>Exactions Law and Social Policy in Israel / Rachelle Alterman</td>
<td>182</td>
</tr>
</tbody>
</table>

## ALTERNATIVES AND VARIATIONS

<table>
<thead>
<tr>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>Reframing the Rationale for Downtown Linkage Programs / Lawrence Susskind and Gerard McMahon</td>
<td>203</td>
</tr>
<tr>
<td>Negotiating Exactions through Development Agreements / Richard H. Cowart</td>
<td>219</td>
</tr>
<tr>
<td>Exactions through Annexation Agreements: A Case Study / Peggy L. Cuciti</td>
<td>234</td>
</tr>
<tr>
<td>Land Readjustment: An Alternative to Development Exactions / Frank Schmidtman</td>
<td>250</td>
</tr>
</tbody>
</table>

Index 265
Exactions Law and
Social Policy in Israel

by RACHELLE ALTERMAN

Exactions should not be viewed as contextless tools, but as mechanisms embedded within a country's social values, priorities, and demography. Israel's exactions policy functions in accordance with the country's legal heritage and accepted views about the appropriate domains of the public and private sectors.

The Israeli story is about a well-stocked arsenal of exactions that has been absorbed into the development market and integrated with social policy. It is a tale of opposites cohabiting peacefully: a highly institutionalized system of formal exactions focused on obtaining land for public facilities, alongside informal negotiations for other benefits. The context for exactions is also one of opposites: Israel is a country with both a centralized, publicly oriented system of planning and land policy, and a vibrant private sector. As a social democracy, its citizens expect government to supply a highly developed set of social services.

THE LAND POLICY CONTEXT

An estimated 92 to 94 percent of Israel's total land area is publicly owned, administered by the Israel Lands Administration. If so much of the land is public, why is there need for an exactions system at all? The answer lies both in the nature of the remaining 6 to 8 percent, and in the land administration's policies about public land.

Because much of the private land is in metropolitan areas, where Israel's

Rachelle Alterman is editor of this volume. The author thanks Norman Marcus for his helpful comments on the draft of this essay.
population is concentrated, this land plays a more important role in urban development than its size would suggest. In the quite urbanized Arab villages where demographic growth and development are especially intense, land is almost totally private. Still, most development takes place on public land—in development towns, and in semiurban and metropolitan areas where, despite the concentration of private land, public land usually constitutes more than one-half the area. Yet public landownership has not made exactions superfluous.

Had public lands in urban areas been a product of municipally initiated land assembly and banking, there might have been little need to apply regulative exactions. After all, one of the purposes of land banking is to ensure the adequate supply of public facilities when land is released for development. But municipal land banking is almost unheard of in Israel, reflecting the legal and financial weakness of the local authorities. Most development occurs on land centrally administered by the Israel Lands Administration, which is strictly limited by law in its powers to sell land. Rather, the administration leases land on a long-term basis either to public bodies or to private developers (Borukhov 1980). But because leased land is subject to only minimal restrictions on its transfer and because the leasing price is assessed up front, such land behaves in the marketplace much like private land. The authority generally does not use the leases to exert planning controls (including exactions).

Local authorities are responsible for land-use planning and the provision of land for public facilities. If within this division of labor the U.S. model had applied, whereby local zoning authority generally does not extend to development initiated by state or federal government (though these levels of government often comply voluntarily) municipal land-use regulation would have been a mockery. A way had to be found for local authorities to apply land-use regulations, including some form of exactions, to development occurring on national land. Such a system evolved with time.

THE PLANNING AND LEGAL CONTEXT

Israel’s land-use planning system operates under the Planning and Building Law of 1965, which repealed the legislation that the British had introduced in 1922 and 1936 during their Mandate over Palestine and remained in force after independence. Two important changes in 1965 pertain directly to exactions. Before then, planning controls had not applied to government bodies. The 1965 law, however, required all government jurisdictions to abide by land-use regulations and procedures, except for defense-related land use. The law also expanded the land-exactions system considerably. Some doubt was left regarding the authority to impose exactions on public land, but it has been
resolved through an agreement between the Israel Lands Administration and the municipalities that exactions be applied both to public and private land.\footnote{112}

The 1985 law added national-level planning over the two tiers that existed earlier. The result is a three-tier edifice of planning institutions with parallel sets of plans, in a system that combines centralized, top-down planning with bottom-up initiative.

At the lower level are mandatory Local Outline Plans and optional Detailed Plans. As in many other countries, the plans and the regulations are one and the same, providing legally binding directives on land use, bulk, height, and other aspects of physical planning. Americans can view outline plans as a cross between master plans and simplified zoning. Outline plans when first prepared cover the whole planning area, but amendments (and these are the prevalent form) can cover any area, from a single lot to a whole urban district. Detailed plans, if required, are expected to implement the outline plans. They can vary in detail and coverage and may be similar to site plans, subdivision plats, detailed zoning, or urban-design plans. Usually, building permits can only be issued on the basis of an approved plan. Exactions requirements may be stated in local outline plans, detailed plans, or as added conditions in building permits.

The second tier consists of District Outline Plans—ostensibly mandatory since 1965, though some are still in preparation—to cover each of the six administrative districts. These plans usually do not deal with specifics and thus have little to say about exactions policy (though legally they could). Finally, the top tier consists of national plans prepared for selected regions or functional areas (such as public facilities, transportation, population dispersal) by the National Planning Council. Lower-level plans must be strictly consistent with all higher-level plans.\footnote{113}

Parallel to this hierarchy of plans is a hierarchy of decision-making bodies. Local plans are administered by over one hundred local planning and building commissions. These bodies are usually composed of the elected municipal council, but when the minister of the interior delineates a multimunicipality local planning district, the commission's membership consists of both local representatives and representatives of several central-government offices.

The centralized character of the system is clearly embodied in the structure and authority of the six district planning commissions, most of whose members are representatives of central government. All major decisions of the local planning bodies, including acceptance of local plans and thus also exactions, require the approval of the district commissions. Local authorities nevertheless leverage their limited powers of initiating plans and issuing building permits. Exactions naturally figure high on the local authorities' list of powers because they enable a give-and-take with both private and public bodies, not only over questions of regulation, but also over assets of high economic value.
to the municipality. The National Planning Council, composed of representatives of all relevant government offices and environmental-protection agencies and a few professional and public-interest representatives, is the upper-level body in charge of national policy.

In Israel's legal system court decisions are an important source of law, as in other common law–based systems (but unlike Roman law systems such as France, see Renard this volume). The courts' role, however, is much more limited than that of U.S. courts, which are the major force shaping land-use law. Planning law in Israel—as in most countries—revolves around specific legislation, rather than the application of constitutional doctrines. (These exist in Israel, even though there is no written constitution.) Israeli courts are thus more reluctant than American courts to delve into substantive planning questions. Nevertheless, court decisions in land-use law have been important in clarifying the complex Planning and Building Law with its interwoven legal areas (property, torts, and administrative law).

THE WELL-STOCKED ARSENAL

The Israeli toolkit for financing public services provides a rich assortment of exactions and alternative instruments. Some, such as the land-readjustment mechanism and betterment recapture, are regarded as quite innovative (see Schnidman this volume). The total package is probably one of the most exacting in the Western world today (after the recent abolition of the British Development Land Tax), because several cumulative layers of demands are placed on the developer. The Israeli case provides a rare opportunity for studying how various forms of exactions and similar-purpose taxes interrelate, all under the same legal and public-policy roof, and how the marketplace reacts to these cumulative layers.

FORMAL LAND EXACTIONS

If an Israeli planner or lawyer were asked whether there are provisions in the law for requiring developers to contribute to public facilities, the answer would immediately be: “Oh yes, of course. You mean the land-dedication requirement.” The Knesset in 1965 and professionals ever since have focused almost exclusively on how local authorities can obtain adequate land for public services, rather than on how to finance their construction or operation. The land-dedication requirement is one of the most highly utilized features of the Planning and Building Law. Why this fixation with the land component of public facilities?
The Concern with Obtaining Land

The emphasis on the exaction of land rather than of fees arises from Israel’s division of labor between local and central government in supplying public services. Local authorities are expected to provide the land, whereas the central government and national quasi-public bodies are in charge of the construction and finance of most social-service facilities for education, health, and welfare. Though local roads and sewage lines are the responsibility of local authorities, the capital outlay for construction—but not for the land—is provided in part or in full by central-government grants. In towns with a more affluent population, local taxes and levies cover part of the costs of constructing infrastructure and social facilities, but many towns have a weak tax base or an insufficient collection mechanism. There, central government picks up a greater share of the costs.

A welfare state like Israel offers a large dose of social services, which, along with the country’s relatively high birthrate and density of development, has created a need to devote a large proportion of land in any development to public services. The result, however, is hardly sites with ample open space. Because in little Israel land is a scarce resource, its use is tightly planned from the start, including the public slice. Sites for schools and parks are usually much smaller than in most urban areas in the United States.

Local authorities, with few financial resources of their own and no empowerment to float bonds, have needed a way to obtain sites for public services without financial outlay. The tool provided by statute is probably one of the highest land-dedication requirements in the world. The requirement can be applied both to new neighborhoods and old ones, where changing demographics or life-styles create a need to upgrade or alter services.

Provisions of the Statute

The Planning and Building Law empowers local planning commissions to exact land for public services according to the following conditions:

* Up to 40 percent of any contiguously owned tract of land can be taken without compensation (a cumulative total that takes into account any previous takings). This maximum applies to any type or density of residential, industrial, or commercial development. Under the British Mandate Ordinance the maximum was 25 percent.

* A local plan must designate the land for a public service from among the following finite list: playgrounds; roads; gardens or parks; recreational and sports areas; and buildings for educational, cultural, religious, or health services. Under the British ordinance the list included only roads, playgrounds, and parks.
The compulsory dedication is called "expropriation without compensation." Procedurally, the law is grafted onto the Lands Ordinance—Appropriation for Public Purposes, which is the general expropriation law (parallel to eminent domain in the United States). Notice must be served as in expropriation, but unlike "usual" expropriation, the notice states that no compensation or reduced compensation is granted.

The close link between expropriation through the state's powers and dedication of land in planning procedures is possible under Israeli law (and that of many countries) because there is no constitutional distinction between police power and eminent domain. Both regulative planning powers and powers for expropriation can be granted by one and the same statute. Therefore, Israeli law has never concerned itself with that all-pervasive concern of its American counterpart—whether a dedication is a "taking."

The Planning and Building Law introduced three protections to the landowner that did not exist under the British ordinance:

- Land will not be taken if the market value of the remaining tract is expected to decline in value. This protection is well known among developers and planning administrators and has been further interpreted through court decisions (see below).
- If the land designation is changed to one that does not allow taking without compensation, the local planning commission must pay compensation to the original owner or return the land taken, as the original owner chooses. This important protection, though clearly stated in a special clause, is not well known by developers or by planning administrators, and has rarely been raised in court.
- The minister of interior has the authority to instruct the local planning commission to pay compensation when, in his judgment, undue hardship has been caused. A landowner may petition the minister. Presumably the commission has no discretion to award compensation for any land taken under the conditions stated above, even in situations of hardship. (The law probably wished to ensure evenhandedness.) The minister, however, has rarely come to a positive decision.

Interpretation by the Courts

The seemingly onerous requirements for compulsory dedication suggest frequent court challenges. In practice, however, the extensive dedication requirement is well accepted by developers, planners, and politicians. Nevertheless, the subject of exactions has engaged the Supreme Court on several occasions—more than most other areas of planning. A recent case was given the rare treatment of an additional Supreme Court hearing with a fortified
number of judges—a discretionary procedure reserved only for thorny issues on which the usual three-judge court has been split.

In most cases, the courts defer to the judgment of the local and district planning commissions. The Supreme Court has not often elaborated on the protections provided to the landowner, but rather has eroded them somewhat. To date, court decisions have interpreted the legislation in the following ways:

- The exaction can be made even if there is no causal link between the new development and the public facility. There is no requirement that the need for the public facility be generated by the development on which the exaction is placed, nor that the exaction be reasonably proportionate to that need.

In other words, no Israeli equivalent has emerged to the rational-nexus test of American exactions law and to the similar British variation guideline (see Juergensmeyer, Marcus, and Kayden this volume and Britain’s DOE Circulars). Since there is no proportionality requirement, the burden for a specific service could be placed on a single landowner. In most cases, however, several factors operate to achieve a de facto proportionality. First, the possibility of placing the whole burden of a major facility on one owner is theoretical, since 40 percent of most privately owned tracts of land is too small. Second, almost all development requires roads and ancillary infrastructure, and these usually consume over half the 40 percent. Third, the 40 percent maximum is usually taken wherever the layout permits; thus, the “harshness” is meted out even-handedly. In the final analysis, all development in the community benefits from the pool of land for public facilities. In the absence of a conscious policy for safeguarding proportionality, however, there are occasional cases of blatant inequity. This issue has not yet captured professional or public attention.

- Land can be taken whether or not the landowner or developer stands to benefit directly from the proposed service.

This issue was addressed in the Supreme Court decision of Feizer v. Ramat Gan that underwent the additional hearing procedure. The facts there undermined any possibility that the landowners would benefit since the plots were taken in their entirety for a school site. Though “regular” expropriation was involved, the municipality proposed to pay only 60 percent compensation, as if compulsory dedication had been made as well. The court seems to have misinterpreted the statute, not recognizing that compulsory dedication and expropriation are two separate legal powers and procedures. An August 1987 Supreme Court decision provides reason to expect that the court’s stand will soon be reversed. In that decision, which deals with the related matter
of compensation for "wipeouts" (see below), the court's president, Judge Shamgar, citing Alterman (1985), expressed his obiter dictum that where the entire plot is taken, there is no authority to deduct 40 percent from the compensation.\(^5\)

- Court decisions have not clarified whether the dedicated land must be used for a municipal- or government-run public service, or whether the land can be turned over to a quasi-public or even private organization for one of the designated land uses.

The question is, what constitutes a public service? Does "public" refer only to the type of land use (education, health, roads), or to the agency that runs the service? In Israel, where many services are operated by nonmunicipal bodies—central government and public nongovernmental agencies—this question could become controversial. For example, can dedicated land be used for a school run by the ultra-Orthodox, officially not part of the public school system? These schools are increasing in numbers. Or, can a site be taken for a health clinic operated by the Histadrut General Trade Union for a private clinic? A correct interpretation of the statute leads to the conclusion that land can be exacted only for services that are to be operated by local or central government bodies. This question, however, has never been directly addressed by the courts (nor has this question received much attention in the United States).

- The protection against taking a portion of a plot if the remainder will decline in value has been interpreted—to the chagrin of developers—to refer to a disproportionate, not an absolute, decline in the value of the remaining plot. (The rationale is similar to the notion of excess condemnation in the U.S.) This is a reasonable interpretation since otherwise the exaction would only be allowed when a significant betterment in value occurs, so as to offset the decline in value (in absolute terms) of the remaining tract.

- While the elaborate protection for the landowner in cases of land-use change does indeed stand, it is partially circumvented by planning authorities who designate general categories of land use or initiate long delays.

Many local planning authorities have adopted the loopholing habit of indicating the land-use purpose in overly general terms, such as "public buildings." Any public use other than infrastructure could be included under this rubric without requiring a change in designation. One court decision indirectly implied that the designations must be specific, but subsequent cases have weakened this decision.
Furthermore, the statute does not indicate whether an unreasonably long delay in undertaking the public works should be considered a change of designation—a protection the French have recently introduced (see Renard this volume). Israeli court decisions imply that delay is not in itself a change in use, but that unreasonably long delay (meaning many, many years) might make the landowner eligible for compensation.

In the United States, the problem of proportionality and equity in land dedications has been partially addressed by the mechanism of in-lieu fees (Connors and High 1987). Although in Israel there have been no court decisions on the subject of in-lieu fees, if ever practiced they would probably be ruled illegal for reasons explained later.

Integration into the Market and Planning Practice

In spite of its draconian appearance—and the real need for some reforms—the extensive land exactions system has been fully integrated into Israeli planning practice and the land market, for better or for worse. This tool has become almost a trademark of Israeli land-development practices and has generated its own momentum of “asking for more.”

One of the best tests of how planning controls affect the development market is to investigate land-appraisal practices. The statute says “up to 40 percent,” yet when land is appraised for private transactions, the valuers often assume that the maximum will be taken (even though in practice that does not always occur) and assess the land with a 40 percent reduction in size. Thus, by turning exactions into a constant, the bitter pill has been sweetened by the marketplace—at least for developers or speculators buying land for future sales. It is therefore unsurprising that local authorities have also absorbed this practice into their valuation of land for expropriation—as in the Feizer case—and assessment of compensation for land-value decline due to planning decisions. In several cases, the courts did not view these as irregular practices, despite the absence of legislative authorization. After all, the logic went, why should one landowner make a reverse windfall by being fully compensated while others, who have not had the “luck” of being expropriated, suffer a “wipeout” by contributing their 40 percent. Recently, however, the Supreme Court ruled—in my view, correctly—that this practice is illegal.14

Planning practice too has absorbed—nay, swallowed—the exactions rule with remarkable appetite, sometimes to the detriment of cerebral functions. All too often, in laying out a new area or a planned-unit development, planners regard the 40 percent as if it were a rationally based standard. They often settle for the amount of land available for public services through dedication, juggling around with the platting so as to obtain some reasonable configuration, rather than conjuring up additional ways of obtaining sites or floor area.

190
when a neighborhood’s population density, socioeconomic structure, or topography call for a more complex approach.

 Occasionally, in commercial, industrial, and Israel’s few low-density urban residential areas, 40 percent might be too much. Land is sometimes taken to the maximum nevertheless (recall that the ceiling is uniform across the board). Poor planning of the subsequent use of these excess sites might possibly lead to the mislocation of social services, such as a school for handicapped children in an industrial area where excess lands may have been taken.

 In short, a numeric ceiling supplied by statute should not become a substitute for a carefully designed planning standard, yet in practice it often is. It seems that developers and some planners prefer the uniformity, certainty, and perceived fairness of the 40 percent mark, over the more difficult road of tailor-made flexibility that adjusts downward if necessary, or draws creatively on other tools when dedications are insufficient.

**INFORMAL NEGOTIATED EXACTIONS**

Increasingly planners and officials have been going beyond what the formal exactions can yield. Through negotiations, they have sought to obtain either additional land or in-kind construction of public facilities such as kindergartens and sports centers (but not monetary payments). These emerging informal exactions are unarticulated as policy, barely recognized in court decisions, unresearched, and only reluctantly acknowledged by the parties concerned.

*Why Are Additional Dedications Necessary?*

To outsiders the thought that more than 40 percent of a land tract might be exacted for public facilities is outrageous. But Israel is a country with large average family-size (relative to other Western countries), a predominance of high-density multifamily housing with large concentrations of children who generate the need for land-consuming facilities, and a view that public responsibility extends to a wider range of services than is commonly accepted in the U.S. (that includes neighborhood health services, extensive preschool education, and cultural and religious facilities). Thus, by Israeli standards, higher-density residential areas need more than 40 percent. In practice, additional land is often allocated, though it rarely meets the planners’ assessment of needs in full.

The practice of requiring exactions in the form of constructed facilities—though still less frequent than land dedications—is the result of another factor. In the past, local authorities could rely on central government to build most facilities, but the sharp cuts recently in the national social budget have
led some municipalities to use some extracurricular ingenuity. At times, the
dedications are of land plus a whole building; at other times, they are of space
within a condominium (which leads to joint ownership of the land).

**Legality of Negotiated Exactions**

The additional land or dedicated facilities are obtained through negotiati-
tions prior to the approval of a detailed plan or issuance of a building permit.
The exaction would be stated in the plan's regulations or inserted as condi-
tions of the building permit. The advantage to the developer is obtaining some
planning relief that permits a more lucrative land use in the form of an amend-
ment to the plan or simply securing a building permit. (Even as-of-right land-
use designations often allow some discretion.)

There is no direct statutory authority for negotiated exactions, but case
law indicates that probably most types are legal (Alterman 1985). In several
negotiated land-dedication cases, the Supreme Court did not accept the argu-
ment that the planning authorities' powers of compulsory dedication or of
withholding permits were in effect a "sword over the developer's head." In other
words, Israeli courts are quite tolerant of what Americans would call "con-
tract zoning" (Mandelker 1982, pp. 179-182).

Also at issue in examining the legality of negotiated exactions is the bounds
of what the local authority can give away—the issue of fettering of powers.
Israel has no legislation that explicitly permits local authorities to undertake
planning agreements as does the innovative California legislation for developer
agreements (Callies 1984, Cowart this volume) or the Town and Country Plan-
ning Act for the British agreements (Jowell 1978, Henry 1984). Israel's case
law in various areas, not only planning, has generally held that local govern-
ments cannot negotiate away their right (and duty) to make new policies as
needed. Such contracts have been ruled void when citizens have brought
suits against local authorities to enforce their side of the agreement.

As for landowners, they should beware of giving away rights in a negotiated
agreement that the municipality is free to change, yet developers seem largely
incognizant of this. Research has shown that, ironically, much of the land ob-
tained through what the owners (and perhaps the municipality, too) thought
was the compulsory-dedication procedure, was in fact transferred voluntarily
(Murray 1985). Unknowingly, the landowners and their lawyers had forfeited
the protection accorded by law in cases of change to a nonpublic land use.
Lately, the Israel Lands Administration has become aware of these legal im-
lications, and is now demanding that the land it dedicates to local authorities
go through the formal expropriation-like process rather than be voluntarily
transferred.

Informal negotiations also occur between the lands administration and
local officials, particularly over the transfer of land over the 40 percent mark
for additional facilities needed in high-density areas. Naturally, a different balance of power dominates the negotiating table than when local officials face private developers. Agreements with the lands administration are likely to apply to land only. (Central government bodies do construct public facilities, of course, but this is regarded as part of their normal responsibilities.)

In the past, local planning bodies usually compensated landowners for land over the 40 percent taken as statutory dedications (and sometimes even for the 40 percent) by granting extra development rights without amending the plan. This meant piling on extra densities not indicated in the plan and thus unavailable for public review. This exercise required some mathematical acrobatics: The prescribed floor-area ratio would be calculated on the gross lot area, before dedication. In recent years, the courts have repeatedly expressed their discontent with this incentive zoning–like practice, and the national planning authorities have undertaken an educational campaign to eradicate it, emphasizing that it undermines the objectives of stated densities in plans.

**Legality of Monetary Payments and American-Style Fees**

Well outside legal bounds lie requirements by municipalities through planning controls for any monetary payments that are not authorized in a national statute. Such requirements, therefore, are nonexistent or rare. The fluidity in American land-use law between in-kind contributions and fees is not possible in a statute-based system like Israel's. The central concern of U.S. law about the proper classification of a particular exaction as a tax or a police power-based fee is much less relevant in Israel, where both types of developer contributions must have explicit authority. This is why American-style in-lieu fees—not to mention impact fees—could not emerge in Israel through local initiative. In-kind exactions and the betterment tax (see below) both exist through specific legislation (as it so happens, in the same law). Decision makers seem unaware of the advantages (much less the concept) of in-lieu fees and apparently do not sense the need for them.

**Public-Private Partnerships?**

Lately, some municipalities have exacted parts of commercially run facilities for public use, such as a public sports annex in a private club and public beds in a private nursing home. In these cases and in dedications of floors in condominiums, the private developer and the municipality often find themselves somewhat strange bedfellows jointly owning or leasing the plot of land on which the building stands. Economists or planners might tag these arrangements “public-private partnerships.” But in Israel—unlike in some other countries (Dowall 1987)—they are not articulated as a policy, but rather are
viewed as ad hoc deals. Local elected officials are presently uneasy, even apologetic about these deals, probably unaware of how in vogue public-private partnerships are in other countries.

Landowners’ Association for Infrastructure

A new type of initiative has recently appeared in scattered cases: the self-organization of landowners who plan to build their private dwellings and do not wish to wait for the local authority to install infrastructure. Planning commissions can legally freeze development almost indefinitely until they are satisfied that adequate facilities can be supplied. Since in Israel the concept of an adequate-facilities ordinance, as practiced in the U.S. (Kaiser and Burby this volume), is unknown, there are no rules or procedures stipulating what landowners should do to install infrastructure on their own.

So the landowners have created their own rules. In Haifa, the planning bodies approved a detailed plan, but the municipality did not intend to put in the infrastructure in the foreseeable future. With the help of the municipality, however, the landowners established a system whereby they put up the money and hire the contractors to build the infrastructure, while the municipality acts as a middleman for the finances. Upon requesting a building permit, non-participating owners will be required to reimburse the participants for their portion of the infrastructure (linked to the ever-rising cost-of-construction index, of course).

alternatives to exactions

The arsenal available to local authorities in Israel for obtaining land for public facilities or statutory-based finance for their construction does not end with exactions. Several other tools exist, some quite innovative from a comparative perspective. The Israeli case is special not only because of the co-existence of these tools in one country, but also because not only are all these tools on the books, but they are widely practiced.

Reparcellation (Land Readjustment)

As an alternative to land dedication, a sophisticated land-readjustment tool, popularly called “reparcellation,” is provided by the Planning and Building Law. Like equivalent tools in other countries (Doebele 1982), it is intended to enable the resubdivision of land where the existing subdivision is either technically impractical for development or development is frozen because of insufficient infrastructure and public services and inadequate environmental
conditions. Unlike its counterparts in other countries, the Israeli tool can be applied without the owners’ consent, provided that personal notifications are served. No majority vote of the owners is necessary (compare Benard and Schnidman this volume). Financial rights are ensured through a mechanism of payments among the owners to level out gains or losses resulting from the change in value of particular lots. By law, the municipality acts only as an intermediary, and does not have to spend any of its own funds for compensation. In addition, the municipality levies a betterment tax (see below) on the remaining added value after mutual compensations have been made.44

Reparcellation is an almost ideal tool for providing land for public services. Because readjustment usually results in an increase in overall land values that arises from lifting the freeze on development and from planning more intensive land uses, a portion of the tract can be taken for public facilities without loss to anyone. The law provides that under reparcellation, the 40 percent maximum on land dedications can be overridden, with ostensibly no upper limit. (Because a somewhat unclear clause about compensation for “wipeouts” appears in the law, there is a de facto limit: The planning authorities will try to assure that some margin of betterment in total land values will be left even after the exactions.) In Israel, unlike some other countries that practice readjustment, land is usually exacted for actual public use, rather than for resale to finance the construction of public services (compare Schnidman this volume; Kitay 1985, pp. 23-27; Nishiyama 1987).

Reparcellation is structured as a “win/win” tool to make everyone happy. With its built-in equity criteria, reparcellation is both a powerful and a just method for obtaining land for public facilities. There are, however, various administrative and legal problems. For example, serving notice is sometimes complicated by Israel’s lingering predicaments, such as tracing the owners of land purchased in the 1920s and 1930s by Jews residing in Europe, where no descendants survived the Nazi Holocaust. Despite such time-consuming administrative problems, reparcellation in recent years has been applied on a large scale, especially along the coast where population pressures are intense and thousands of plots need readjustment. Reparcellation should also be considered to deal with the difficult shortage of public land in Arab villages where there is special sensitivity to private land ownership. There, application of the usual 40 percent dedication has encountered resistance; reparcellation, with its visible interowner equity, may be a more palatable alternative.

The Betterment Tax

In 1981 Israel revamped its betterment tax, transferring it from a British Mandate ordinance to the Planning and Building Law (Alterman 1979, 1982). The tax provides local authorities with a highly cherished financial resource.

195
Local authorities are required to levy 50 percent of all betterment in land value arising directly from public planning decisions. The tax is collected when a building permit or nonconforming-use permit is issued or at time of sale. All the proceeds remain with the municipality. The tax applies to all development, except those kinds enumerated by statute (not left to local discretion). The exceptions reflect national social and development policy: Some development towns are exempt, as are poor neighborhoods included in Israel’s large-scale revitalization program. All housing below a certain unit size is exempt. What is left is mostly nonresidential and luxury residential development in nonexempt cities.

The tax is additional to exactions; mandatory land dedications cannot be offset against it. The tax’s status relative to informal exactions, however, is uncertain. Cursory research shows little adverse effect of the tax on planning discretion or the development market. With high real estate prices, the tax is an important financial source in many towns and cities.

The proceeds from the tax have not made exactions superfluous. The earmarking provisions in the law are very general, allowing expenditure of the funds for any “planning or implementation-related purposes.” Most local authorities would have no trouble showing that their capital expenditures are more than the tax funds. There is no rational-nexus or linkage requirement. The rationale for the tax is not impact mitigation, but rather the public’s right to claim part of the unearned increment (Hagman 1978).

**Extensive Land Expropriation Powers**

There are also virtually boundless powers of expropriation (called “eminent domain” in the U.S.), additional to those in the Planning and Building Law. These are based on an unrepealed British-period Appropriation for Public Purposes Ordinance and reside with the minister of finance but can be delegated to local authorities on a case-by-case basis. In the country’s formative years these powers were used for obtaining land for large-scale developments; this controversial practice has almost ceased in recent years both on the national and local levels. Local authorities must now rely on their more limited powers of expropriation in the Planning and Building Law. But since they have little money for paying compensation, we are back to square one—exactions.

**Special Levies**

Local authorities can pass bylaws to levy charges (similar to U.S. special assessments) for specifically authorized purposes such as roads, sewers, and a variety of service-connection charges for water, sewerage, fire protection, and electricity. In poorer towns and neighborhoods, however, these levies are
often waived or reduced. In addition, there are various exotic odds-and-ends such as a "parking ransom," which is imposed by some local authorities when new development falls short of the parking requirements stated in the plan. A small "tree ransom" is usually levied when trees are cut for clearing a lot, reflecting Israel's long-standing concern with replenishing its lean forests.

**SOCIAL POLICY AND STANDARDS FOR PUBLIC SERVICES**

The standards a society sets for its public services reflect public-policy priorities and, over time, mirror changing social values. The supply of adequate sites for infrastructure and social services is a well-supported policy in Israel. The accepted standards for public services in neighborhoods have changed with time, increasing in quantity and improving in quality. This trend is viewed as a positive expression of the rise in quality of life as the country has moved from being a poor developing country to a semi-Western one. It has also served as a welcome correction to the low status that public services endured during the country's formative years when the pressures of immigrant absorption placed the emphasis on the quantity rather than the quality of housing produced.

The extent to which the supply of public services in Israel is driven by social policy is reflected linguistically: Whereas in the U.S. the dominant term in the legal evolution of exactions has been "infrastructure," with "facilities for social services" evolving as a recent tag-on, in Israel the dominant term is "public services." Education, health, and community services have always been equals to roads and sewers. Furthermore, the geographic terms of reference are always a "neighborhood," instead of the impersonal "development" or "subdivision" used in the United States.

The layers of exactions in Israel may appear excessive, yet developers generally seem to accept them. They have never organized against them and have cooperated in drafting legislation such as the betterment tax. Furthermore, planners and policymakers generally feel that the formal mechanism for exacting land—high though the 40 percent seems—does not ensure adequate land for public services in a typical neighborhood, and that municipalities are justified in attempting to negotiate for more.

The national planning authorities have periodically commissioned research to study the changing needs for public services and to design appropriate standards. At one point, the National Planning Council discussed, but did not adopt, a document that showed that 40 percent currently suffices only for a floor-area ratio (FAR) of .6, and proposed an additional 1 percent for every .06 FAR above that and a conversion of the 40 percent to a minimum standard. Though formal legislative change is unlikely (and undesirable as a substitute for a planning-based approach of determining needs in each case), exactions
have in practice been increasing through the informal methods. More controversial are exactions for in-kind construction.

The Israeli story transmits the lesson that exactions are not merely a technical or financial tool; they are a reflection of changing social structures and public preferences. The need for exactions cannot easily be bottled up in static formulae. Israel highlights a reality that is probably shared by many countries: Extensive formal exactions, and even the more drastic alternative of a betterment tax, are not likely to put a full stop to informal negotiations. The informal methods will always be there to act as corrective mechanisms either to lower or raise exactions. Informal exactions reflect changing social views and needs, current politics, and the state of the development market. Formal and informal exactions are linked vessels: The magnitude of the informal exactions depends on the degree to which formal exactions are perceived to approximate social needs, and the size of both depends on the strength of the market.

Footnotes
1. The Israel Lands Administration does not publish official figures on the extent of public land. In the past, 94 percent was the commonly cited estimate. There is some doubt as to how sales of public land and annexion of East Jerusalem and the Golan Heights have affected this estimate. The lands administration will not officially confirm these figures, but acknowledge that they can still be used as estimates.
2. The Basic Law: State Lands (basic laws have quasi-constitutional status) dictates a fixed cumulative total of ten thousand hectares that the lands administration is allowed to sell. The administration indicates that it is not sure whether to consider the land transferred to the municipalities as included in this total, but in any case, the amount of transfers is not yet close to the total.
3. Planning controls are under different legislation and institutional responsibility than national land leasing.
4. This arises from the constitutional supremacy of higher levels of government in the U.S. Some of the federal or state laws, such as in the area of environmental control, however, do apply to state and federal government.
5. Laws of the State of Israel, 1965 (available in English).
6. Some argue that the concept of expropriation does not apply to state land, but others see no reason why expropriation cannot imply a statutory requirement that one government jurisdiction transfer land to another, especially given the specific case that subordinates government authorities to the planning law. In the agreement, the lands administration has in fact been somewhat more generous than the law requires.
8. The British Development Land Tax, instituted in 1976, was a hefty betterment-recapture tax on up to 60 percent of appreciated land value. It was reduced gradually by British Prime Minister Thatcher, and was finally abolished in the mid-1980s.
9. The masculine is used here because, sadly, there is little chance of a woman becoming minister of interior in the foreseeable future—the position is usually given to one of the Orthodox parties.
10. For a detailed legal discussion, including criticism of several key decisions, see Alterman 1985.
11. Though it can be argued that a modified rational-nexus test could have been teased out of the language of the legislation about the list of services permitted for compulsory dedication (Alterman 1985), court decisions have indirectly implied a literal interpretation of that list—so that, for example, educational facilities can refer to anything from a kindergarten to a high school or even a college campus.
12. Civil Appeal 377/79, Edith Feiker et al. v The Ramat Gan Local Planning and Building Committee et al., Piskel Din (Rulings of the Supreme Court) 35 (3), 645 (1983). (Hebrew; English translations of Supreme Court decisions are published by the Ministry of Justice.)
13. Civil Appeal 473/83, Rishon Lezion Local Authority v E. Hamami et al., delivered August 1987 (Hebrew); not yet published.

15. In Britain also, despite the statutory format for planning agreements, the courts are often reluctant to allow local authorities to fetter their powers. See Young and Rowan-Boinson 1982.

16. The question of whether the betterment tax applies to reparation, despite mutual compensation among the owners, has been a contentious legal issue. The Supreme Court, in a case that required an added hearing because the court was split on major issues in the first hearing, decided that the betterment tax is to be levied on top of the mutual payments. See Added Procedure 4/80, Tor v. Ramat Hasharon Local Planning and Building Commission, Piskel Din 34 (4), 600 (1980).

17. Who gets the proceeds is an important question in the design of betterment recapture tools (Alteman 1983). In Britain, the recently repealed development land tax passed the proceeds on to the central government, and only part of them came back to local authorities. The difficulties encountered in implementing that tax may reflect the weak interest of the local authorities in it. Over all, the Israeli tax seems more successful, perhaps due to this difference.

18. A ten-year study of public services has recently been completed aimed at developing a method for calculating needs based on national norms yet tailored to each particular context. The series of seven Guidebooks to Planning Public Services was commissioned by the Ministry of the Interior (in charge of planning) and are to be used as guidelines by planners and government bodies (Alteman and Hill 1977-1987).

References


Callies, David L. 1985. Developers’ agreements and planning gain. The Urban Lawyer 17 (3): 599.


Increasingly, private developers are asked nowadays to bear a greater share of the burden for the provision of public facilities and services in order to offset the perceived impact of their development on the local community. These “exactions” as they are known are requirements placed on developers as a condition for project approval. The range of community benefits being exacted is expanding beyond traditional requirements such as, for example, the upgrading of frontage roads or the provision of open areas to include broader social services such as the building of lower-income housing.

In Private Supply of Public Services leading experts in land-use law, urban planning, economics, real estate, and social policy from both the United States and Europe provide in-depth evaluation of the development of this new policy. The book primarily concerns current policies in the United States that are not nationally systematized. Comparisons are also made with experiences in other countries, particularly Israel and Western Europe.


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