PRIVATE SUPPLY OF PUBLIC SERVICES

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

Rachelle Alterman, editor
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Exactions American Style: The Context for Evaluation

by RACHELLE ALTERMAN

The evolution of exactions in the U.S. has been determined by the country’s distinct planning law, policy, and practice. A proper evaluation of these land-use tools requires an examination of their legal, political, social, and economic ramifications and an international comparison in the context of the broader question: the proper division of labor between the public and private sectors.

In the past decade, the proper division of labor between government and the private sector has become a contentious and at times ideological issue in many countries. Though very different in their starting-off points and their contexts, Reagan’s deregulation and cutbacks in federal funding, Thatcher’s privatization of pivotal national industries and enterprises, France’s large-scale decentralization of government, and the prospects for the USSR’s newborn glasnost all have some bearing on this division of labor. In the Third World’s highly centralized countries, this trend has taken different forms: attempted administrative decentralization to allow more local control, and increasing willingness to acknowledge the importance of the private informal sector in the construction of self-help housing and in economic development.¹

But whereas in these examples the issues have benefited from public awareness and exposure to political dialogue and media attention, similar concerns in the real-estate development area have remained the secluded domain of a small number of highly specialized professionals. The changing division of labor between government and developers in the supply of public facilities

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and services, though incremental in nature and less visible than the national policy changes, is no less tantalizing as a public-policy issue. As such, it is the starting ground for studying smaller-scale, local economic and political changes in action as the cumulative shapers of large-scale trends.

Exactions are requirements placed on developers through land-use planning controls to supply some public facility or amenity as a condition for permitting development. Although exactions probably exist in some form in every country where a private development sector and a development control system operate, the United States serves as an especially illuminating case study. In recent years in the U.S., public policy about the division of labor between government and the private real-estate development sector has been among the most fast evolving, innovative, and highly articulated in the world. New policies and tools are proposed in close pursuit of previous innovations. In this whirlpool there has been little time for retrospective and prospective evaluation. Yet because the stakes are high for all sides in the emergent division of labor, an evaluation is desirable.

This volume offers such an evaluation, highlighting the various public-policy perspectives by which exactions should be assessed and their likely impacts in the future. Since exactions are, after all, only one of several possible ways of securing public facilities through developer contributions, the volume presents other policy options that may at times prove to be useful alternatives. In a world where land-policy techniques are increasingly being exchanged cross-nationally as part of a widening international pool of alternatives, this volume places special attention on international exchange by making the American experience accessible to policymakers abroad and bringing the experience of select foreign countries (Britain, France, and Israel) to American readers.

To promote this exchange, this opening essay looks at the U.S. from the perspective of an outside observer seeking insight into some of the underlying forces that shape American land-use controls in general and exactions in particular and that create the rich capacity for innovation.

EVOLUTION OF U.S. EXACTIONS IN A COMPARATIVE PERSPECTIVE

Once upon a time—perhaps a half-century ago—there was a fairyland for developers in the United States, where the division of labor between local government and developers was clear-cut: Government was responsible for supplying all the necessary public services (minimal at that time), while developers could subdivide and sell land uninhibited, with only minimal registration requirements (Smith 1987). That time is long gone. During the last three decades at least, most cities have altered the traditional demarcation line, requiring developers to contribute to infrastructure and other public services (Smith 1987, Bauman and Ethier 1987). In the past two decades, the line has been shifting
at an accelerated pace. The legal aspects of this trend are surveyed elsewhere in this volume (Juergensmeyer and Marcus). This shift 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. The evolutionary process has several dimensions.

**From In-Kind Contributions to Fee Payments**

The earliest and still prevalent form of exactions in the United States is dedications required as a condition for subdivision approval. These are taken in kind, through actual transfer of land or through construction of a building, road, or utility. Because legal constraints restrict the "mobility" and service-areas of these facilities, the need to ensure an adequate level of service and appropriate location of facilities throughout a city has gradually led to the emergence of a payment substitute—fees in lieu (Juergensmeyer this volume, Connors and Meacham 1986). The acceptance of these by the courts opened the door to the emergence of a form of developer provision that is totally monetary—impact fees, whose use is increasing, especially in growth areas in the United States (Soble this volume, Bauman and Ethier 1987).

Thus, resting upon the same legal foundation is a mixture of policies that in many countries would be founded on separate statutory bases: Taxation-like instruments would be established explicitly in a separate national statute or in a special clause in the planning legislation. This is the case in two of the three foreign countries discussed in this volume: France (Renard) and Israel (Alterman). In Britain, exactions (planning gain) do not have an explicit statutory basis (Kayden this volume) but other fiscal instruments (periodically introduced or repealed), such as betterment recapture taxes, have had a separate statutory track. In fact, in some countries a requirement of monetary payments as a condition for development permission would be regarded as inviting the corruption of planning and would be forbidden, as illustrated in the Israeli example. In Britain, where controversy has been raging since 1980 over the justification of planning gain, monetary payments (when they occur) are viewed with greater severity than other types of developer provisions (Property Advisory Group 1981). In those countries where they are authorized, monetary exactions hardly approach the level of articulation and the span of American impact fees.

**Expansion of Geographic Scale and Size of Facilities**

The evolutionary process has gradually freed exactions policies from their earlier dependence on provision on-site. Once the legal reasoning behind im-
pact fees became accepted, geographic restrictions were dissolved, allowing local authorities to require provision of major citywide or even regional facilities, whether in kind or by the use of the fees, off-site as well as on-site (Bosselman and Stroud 1986, Callies 1987).

While this "footlooseness" may not be unique to the United States, in countries where the supply of large public facilities is often in the hands of a central government agency or a nationally owned utility, reliance on developer contributions for major highways or water- or sewage-purification plants is less likely.

Expansion of Range of Facilities and Services

The evolutionary dimension of greatest current relevance—and controversy—is the dramatic expansion in the range of services that developers are being required to provide (Connors and High 1987). This is also the most interesting frontier for international comparison because it cuts closest to questions of ideology and social values, reflecting differences in public policy among countries. In the United States, the expansion of requirements highlights the urgency for a more overt discussion of the respective responsibilities of local, state, and federal government on the one hand, and the private sector on the other.

Developers were initially asked to contribute mostly to linear infrastructure (roads, utilities) and parks. Subsequently, schools were required. Today, in some states, there are examples of requirements for physical facilities ranging from fire stations to day-care centers (Marcus this volume). Perhaps the most controversial attempt at expansion is the technique that has come to be known as linkage, requiring developers of some burgeoning nonresidential land use to construct or finance lower- and moderate-income housing. In some cases—all within the realm of land-use controls—linkage requires developers to finance or deliver not only physical structures, but "software" social services as well, such as job training (Porter 1985).

Linkage is a clear example of what is special about the evolutionary process of developer contributions in the United States. The use of planning controls to expand developer contributions to include lower-income housing is less likely to occur in other countries in view of the larger role that central or local government plays in public housing. Furthermore, outside the U.S., the legal foundations for land-use controls often preclude the application of required contributions to what is essentially a private use (a family's dwelling unit). Similarly, crossing the line to the supply of social services such as job training or day care (not just the buildings for them), which has been carried out in several cities in the United States, would be even more difficult in countries where the boundaries of planning controls—usually limited to physical planning—are defined in a national statute.
Nor have most other countries been able to make the easy glide from
dedication of land to other in-kind requirements (construction, as well as
maintenance and operation), though Britain has done so through its discre-
tionary permit-granting system. Other countries may have legislation specifi-
cally addressing land dedication, as well as age-old traditional arrangements for
setting aside public land, but no formal arrangements for handling other in-
kind requirements.

**From Planning-less to Planning Dependent**

The first exactions were viewed as technical aspects of land platting and
mapping, untied to any broader urban planning policies (Smith 1987).
Although American planning controls (including exactions) are often
criticized—and rightly so—as being disconnected from planning policy
(Siemon 1987), the evolution of exactions is such that their survival will in-
creasingly depend on a link with planning.

The legality of exactions in the U.S. rests on proof of some rational link
(rational nexus) between the needs created by the new development and the
facility or service being exacted; a causal relation must be established and pro-
portionality in burden and benefit be proven. When exaction requirements
were mostly on-site and encompassed only a small range of facilities needed
for the development, establishment of this link did not require sophisticated
analysis. But as exactions expanded in geographic scale and in range of facilities,
and became increasingly fiscalized, the link became less self-evident. This has
required increasing reliance on a planning-based, often quantitative, rationale.
This process is likely to become even more sophisticated as the courts demand
convincing proofs of rational links in light of evermore-ambitious impact fees
and linkage requirements challenging the more remote ranges of relationship.
The planning connection is not just a legal necessity, but a normative avenue
for better policymaking (Kaiser and Burby this volume).

Ironically, though the United States is not a strong planning country, the
legal and professional infrastructure for sophisticated planning and policy-
making on the local level is more readily available than in many other coun-
tries. Even in those with strong traditions in local professional planning (Br-
tain, for example, where professional planning is stronger than the U.S.; France
and Israel are more middle-of-the-road examples), exactions or their equivalents
have not undergone the methodological sophistication evident in the United
States.

**From Negotiated to Formalized Exactions and Back**

The first subdivision ordinances authorizing exactions were probably at-
ttempts to codify and formalize arrangements previously made in an informal,
negotiated manner. Exactions in the U.S. have evolved along two streams: The major one seems to have been toward formal, even formulated, mandatory developer-provision requirements. Impact fees are the clearest case in point. But coincidently there have probably always been less formal, negotiated quasi-mandatory arrangements. We know little about these because they have not been documented and analyzed. Today, growing attention has been devoted to the role of negotiations (essays by Cowart, Susskind and McMahon, and Cuciti this volume). It is as yet difficult to assess which trend—toward formal or negotiated arrangements—will predominate; likely, they will continue to coexist.

This duality is also apparent in two of the three foreign countries discussed in this volume—France and Israel, where attempts to formalize exactions have invariably led to the reemergence of informal offshoots, each succeeding wave starting from a higher baseline derived from the formal requirements. Only Britain stands out as a country where exactions (planning gain) are usually negotiated case by case, with little attempt to formalize them (Kayden this volume, Heap 1987).³

EXACTIONS AS A PROCESS OF POLICY INNOVATION

The result of this evolutionary process in the U.S. has been a rich and flexible array of coexisting policies. To understand what accounts for this variety, one must crack the genetic code of the policymaking process that leads to exactions policies, and examine the context in which they operate.

The Makings of Innovation

The U.S. land-use field generates innovations with a vitality hardly rivaled anywhere. This capacity for inventiveness is stimulated and reinforced by the distinct attributes of the American context.

Decentralized Legal Structure

In most countries with planning controls, their legal basis is national legislation, which defines the bounds for the authority of local or regional planning bodies, spells out the goals that plans or schemes may fulfill, and identifies the specific tools that these bodies are empowered to use for implementation. Though there is some room for local initiative, the space for maneuvering is tight. This top-down structure means that a particular policy or tool is either adopted or rejected legislatively. In theory, at least, tools and policies are debated and evaluated in advance at the national level before adoption. If
adopted, the policy will meet either large-scale success or failure. At any given time, only a limited number of policy alternatives are set loose for implementation. Until repealed, circumvented, or ignored, the legislated policy reigns supreme.

By contrast, in the U.S., the constitutional division of authority between the federal government and the states has allocated responsibility for local land-use control to the states. Instead of a single statutory basis and one set of courts to interpret it, there are fifty (though often with considerable similarities among some states). This constitutional mandate has been the driving force behind the capacity to innovate. But on its own, the U.S. federal structure cannot account for the high degree of innovation that characterizes exactions.

Local Power and Initiative

In comparative terms, U.S. local governments, especially (but not only) those with home-rule powers, generally have more legal and financial elbowroom than those in other countries (though municipalities struggling under the current federal budget cuts may find little consolation in this observation). State legislation enabling planning, zoning, and subdivision control is usually cast in general terms, leaving the development of specific policies and implementation tools to local governments. Thus, local ordinances setting up exactions policies or case-by-case negotiated developer provisions may differ among municipalities, even within the same state. Throughout their history, exactions policies in the U.S. have been driven, for the most part, by local initiative, reflecting differing local values, economic conditions for development, and political contexts. This bottom-up creativity is as if not fifty but a thousand generators are puffing up new ideas for solving particular local needs.

The Search for Positive Planning Tools

In the U.S., intervention with the private development market is less acceptable ideologically and politically than in many other countries. Even negative planning controls (regulations about what one should not do on land) initially had to sneak in through the back door. Positive planning tools (those that are not satisfied with passive regulation, but actively seek to secure development or public facilities and to control their timing) have naturally had to tread very softly. The list of positive tools available to U.S. local governments is more limited than in many countries. Exactions, having won political and legal recognition and been accepted to a large extent by the development market, naturally figure highly on that list. With cutbacks in federal government programs and funds and the minimum-government and antitaxation politics of the 1980s, reliance on exactions has risen even more. This has reinforced the search for defensible new forms of exactions to meet new needs.
A Strong Private Development Sector

In a country with one of the strongest private development sectors in the world, local government can only achieve new public policies on land-use regulation (and particularly on exactions) through a give-and-take with this sector. Because the economics of development and the influence of developers vary among places and over time, the need to negotiate with developer interests acts to further stimulate creative local policies. The case study of Aurora, Colorado, illustrates this process (Cuciti this volume).

Shifts in Federal Policies

In a country where proper government limits is a subject of political contention, a new federal administration can bring about policy shifts that can directly affect the need for exactions. Recent examples abound in federal government cutbacks in infrastructure finance and subsidized housing (Netzer this volume). Local ingenuity must scurry for alternative solutions. Linkage was born of policy changes by the Reagan administration; the sudden boost in interest in impact fees is also associated with this shift.

Constitutional Imperatives

In the United States, where there is no mediating national legislation, a direct interface exists between land-use law and federal constitutional doctrines. Much of the legal evolution of exactions is explained by the constitutionally derived distinction between police power–based regulations on the one hand and the taking of private property for public use on the other. Since the latter requires just compensation but the former does not, the evolution of exactions has been driven by the need to formulate policies that will be sheltered by the regulative roof.

In each evolutionary generation, promoters of new exactions have sought to prove that they are closely related to already-recognized regulations. Thus, in-lieu fees were defended as close kin to mandatory dedications, which had been recognized in most states as legitimate exercises of regulatory powers; impact fees were presented as take-offs on in-lieu fees but with broader scope; and the latest-comers—linkage exactions—are argued to be legally similar to impact fees and to in-kind exactions, since they usually entail both a fee and a construction option (Bosselman and Stroud 1986, Merriam and Andrew 1987).

Judicially Shaped Law

American land-use law can be said to have operated almost in reverse of the law in many other countries. Elsewhere, the national legislative branch essentially specifies the law, while the courts largely play an interpretive role (essays
by Renard and Alterman this volume). In the United States, local land-use legislation and policy initiatives cannot be considered a solid part of the body of law until tested in the higher-level state or federal courts. Thus, not only specific exactions policies, but the very law of exactions, like many other areas of land-use law, have not been laid out in advance, but have developed through a complex interplay of bottom-up policy initiatives interacting with the views held by a variety of courts at different times. To date, crucial questions about exactions—most distinctly the point at which a mandatory requirement will be considered a taking—have not yet been clarified (Juergensmeyer this volume, Babcock 1987).

Marlin Smith has described the incremental development of exactions law—and its price:

The decisions with respect to land development exactions have proceeded step by step. No individual decision has represented a remarkable extension of prior law. But ... rarely, if ever, has a court stopped to reconsider fundamental constitutional and equitable issues presented by the latest innovation in exactions. If the leap from the most recent precedent is not too great, the courts have been willing to make it. Thus, the law has developed, albeit in relatively small increments, all the way from mandatory construction of on-site physical improvements to compulsory linkage payments. Not even the boldest partisan of the Ayres decision [a 1949 California seminal decision supporting a modest mandatory off-site dedication requirement] could have foreseen such a progression.... And what was originally a method of guaranteeing installation of physical improvements prior to, or contemporaneously with, the development of land has become a system for accumulating a municipal kitty with which to construct public facilities in the future (1987, pp. 28-29).

The fluidity of judicially derived law was highlighted in summer 1987. Two major decisions by the Supreme Court with bearing on exactions—Nollan v. California Coastal Commission and (to a lesser extent) First English Evangelical Lutheran Church of Glendale v. County of Los Angeles—warn of a more severe judicial attitude toward exactions and related tools, though they do not resolve the basic questions. Thus, the evolving law interacts with innovation and promotes it. The chilly water poured over exactions will probably not drown them, but rather stimulate creative new forms of legal grounding, justification, and administration.

Furthermore, the inductively defined limits of the police power have often enabled fee-based exactions to dodge classification as taxes and the more stringent criteria that would apply to their enactment if thus classified. This is why the line between regulations and taxes in the U.S. can be more blurred than in many other countries, thus allowing greater room for creativity in conjuring up new forms of exactions. In other countries, the process of legislation through analogy is not a major generator of new policies.
The Need to Invent Planning-Based Methods

While in most countries the courts rarely delve directly into planning matters when judging the actions of planning authorities, in the U.S. the intimacy between the evolving law of exactions and other constitutional imperatives—due process and equal protection—have produced court decisions that at times read like sophisticated exercises in planning methods. ¹⁶

In the case of impact fees, translation of judicial tests into actual policies may require the construction of quantitative models and considerable background research (Nicholas this volume). Anticipating what the courts will say on linkage, some cities have commissioned sophisticated research to prove that a causal link actually exists between new office (or similar) development and a need for lower-income housing (Kayden and Pollard 1987, Merriam and Andrew 1987). The increasing dependence of new exactions policies on a sophisticated planning rationale requires professional capabilities that only a few countries possess and may pose a problem for many U.S. local governments as well.

Avenues for Information Exchange

Innovative policies and methods would remain local idiosyncracies if there were no media for information exchange. The United States—due to its size, legal structure, and relatively high degree of professionalism in public policymaking—has a well-developed system for disseminating information about local innovations in the land-use field. The quantity of publications is impressive. The editor of Land Use and Environmental Law Review noted in a recent issue that in a single year the journal reviewed over three hundred articles, about one-half in the land-use area. Such a crop is probably unsurpassed in any other country. On exactions alone, a special issue of Law and Contemporary Problems (Babcock, ed. 1987) lists some 180 articles and commentary notes devoted to the subject since 1949 and scores of monographs. For face-to-face transmission, there are more workshops, institutes, and courses specializing in land-use law in the U.S. than in most countries, focusing on current pace-setting innovations and recent court decisions. There are, of course, also the court decisions themselves. Despite the absence of a legally binding transfer from one state to another, exactions law has evolved with some cross-state borrowing.

The year this volume was prepared saw the innovation-exchange process in action. Information, analysis, and training on exactions expanded beyond its former concern solely with legal issues. The first book-length publications appeared, devoted to the economic, administrative, and legal aspects of exactions (Snyder and Stegman 1986; Frank and Rhodes, eds. 1987; Babcock, ed. 1987). A large crop of pamphlets, monographs, and how-to guidelines also appeared. These publications all helped to shape exactions into viable, transfer-
rable policies, extending them well beyond their humble origins as local experiments. Interest in exactions—especially the newer forms—expanded dramatically beyond the circle of land-use lawyers and specialists. At the 1987 annual conference of the American Planning Association, ten consecutive sessions, organized and moderated by Arthur C. Nelson, and all full-house, were devoted to a broad variety of topics relevant to impact fees and linkage.

Outcomes of Innovation

In shaping the form of exactions policies in the U.S., the innovation process has produced both positive and negative outcomes.

Quality Control and Flexibility

Through the process of bottom-up innovation and the dissemination effort, an exactions policy proposed in one municipality—even a remote one—has the potential of setting a national trend and, with time, of joining the arsenal of accepted land-use tools. A vivid example is linkage—an idea initiated in 1980 in San Francisco, which by 1987 had become a national policy issue. In a relatively short time, an intensive series of publications, conferences, and training sessions on linkage has enabled some two dozen cities, prominently Boston, to adopt some version of it; and many others, including Chicago and New York City, to consider it (Porter this volume, 1985; Keating 1986).

Over time, the evolutionary process can create a Darwinistic quality-control mechanism through selection of the fittest: Only policies resilient to legal attack and economically and politically viable can survive. To persevere, exactions must overcome legal challenges. Particular policies must also survive competition with other ideas.

For example, information about impact fees and linkage (which are currently drawing the most attention) is often enthusiastically exchanged at the same training sessions, but these exactions policies are at distinctly different stages in their evolutionary process. Impact fees, which have been practiced longer, can count to their credit legal recognition in several states and some well-developed legal tests that can guide their practical design (essays by Juergensmeyer and Nicholas this volume). The legality of linkage, however, has not been directly decided by a higher-level court (Boselman and Stroud 1986, Merriam and Andrew 1987). The actual impact of linkage can as yet only be surmised (essays by Susskind and Porter this volume, Alterman 1988).

The evolution of exactions policies in the U.S. has shown their remarkable flexibility to accommodate new fiscal needs and change the package of public services that the private market could legitimately be asked to bear. The legally blurred demarcation line between taxation and regulation has made fiscal flexibility possible. The absence of a nationally defined finite set of public ser-
vices required or permitted as developer provisions—a definition that exists elsewhere, as the Israeli example in this volume shows—has allowed the astounding expansion in the range of public services exacted in recent years. The flexibility in the definition of public services also reflects changing life styles and social trends, as the exactions imposed in recent years for day-care centers illustrate.

The Price of Innovation

But bottom-up policy formation and innovation exact a price. The enthusiasm with which local innovations are sold as transferrable policies sometimes precludes a critical look at their possible negative social or economic impacts. In the U.S., no custodian is charged with carrying out prospective evaluation before a local policy becomes a national trend. Research and evaluation usually occur only after a policy has already been installed in many municipalities.

PERSPECTIVES FOR EVALUATION

The purpose of this volume is to counterbalance the weakness of evaluation in the innovation process. Some of the evaluation is retrospective, but in the absence of empirical evidence on many issues relating to exactions, much of it is prospective and is intended to help in future policymaking.

The Rationale

A good evaluation of any public policy is multifaceted, reflecting the axiom that not one objective but many (often competing or conflicting) motivate public policymaking. A good evaluation should also represent not only the perspectives of the policymakers, but also of those groups affected by the policy (Hill 1968). In the complex policy area of exactions, such an evaluation can hardly be undertaken by a single author; it requires team effort. In this volume, each perspective for evaluation is offered by an expert in that particular field. There are two levels to the evaluation: evaluation of separate facets, and evaluation from an integrated perspective of the planning process. In addition, the volume presents a section evaluating the experiences of three other countries, and a special section that discusses some alternatives to exactions.

The Separate Facets

Public finance (Netzer): Exactions as alternatives to other forms of public finance (such as taxes and user fees), can be seen as part of a general move-
Exactions American Style

ment toward finance privatization. Netzer applies the theory of public goods
to various types of exactions and suggests how economic criteria of efficiency
and equity in incidence and benefit can be used to design better exactions
policies.

Legality—the national perspective (Juergensmeyer): Court challenges of
exactions have resulted in several tests for their legality as regulative exercises
of the police power. Although these tests vary to some extent from state to state,
common elements have emerged. Juergensmeyer addresses both traditional ex-
actions and the issues posed by linkage.

Legality—case study of state law (Marcus): Reflecting the special opera-
tion of law within a federal country, the volume includes an example of the
evolution of exactions law in one state—New York—as requirements expanded
from more traditional infrastructure to housing. Two Supreme Court cases of
summer 1987 highlight the interaction between state court and federal Supreme
Court decisions. Marcus discusses the implications of the new decisions and
extrapolates future forms of exactions.

Social and ethical criteria (Beatley): Claiming that exactions may have
far-reaching social implications, Beatley applies criteria derived from social
ethics to evaluate the various types of exactions: How do they fare in terms
of distributional justice and equity? Are they likely to affect social accessibility
or to have exclusionary effects? Can existing residents justly represent the
newcomers?

Political criteria (Deakin): Exactions, like other public policies, are born
of politics and must find a way of surviving politically. Deakin surveys the
significant variations in exactions policies and points out the political motiva-
tions from which they may arise, some with only an indirect relationship to
financial needs. She offers empirical research into the views and concerns of
various stakeholders in sample cities—one of the few empirical efforts on ex-
actions carried out to date.

Integration into the Planning and Design Processes

Evaluation should not end with the separate perspectives. An integrated
view is presented in a special section that deals with the planning process and
the detailed design of a particular exactions policy—impact fees.

Integration into land-use planning (Kaiser and Burby): Exactions should,
after all, be first and foremost tools for implementing a land-use planning pro-
gram. After outlining the planning objectives that exactions should fulfill, the
authors survey the various types of exactions and show how they should be in-
tegrated into a community-development guidance system through a well-
designed planning process.

The design of impact fees (Nicholas): Evaluation criteria must, in the final
analysis, be translated into an operative policy for a particular municipality. Nicholas formulates operational criteria from legally derived tests and economic considerations. Using hypothetical examples of a community's needs for roads, parks, and other infrastructure, he presents a step-by-step method for designing an impact-fee program.

The Developers' Perspective

Because developers are the direct partners in exactions policymaking, this section is devoted to their views, written by representatives of two major developer-based organizations.

Developers' concerns about impact fees (Soble): A researcher of the National Association for Home Builders represents developers' views on the effects of impact fees, especially the added costs imposed on development and their implications for higher housing prices.

Developers' concerns about linkage (Porter): A staff member of the Urban Land Institute presents an analysis of linkage policies, stressing developers' concerns, but pointing out wider policy implications—both positive and negative.

International Comparisons

The four countries whose exactions policies are evaluated in this volume—U.S.A., Britain (Kayden), France (Renard), and Israel (Alterman)—represent points on a continuum: The U.S. has the strongest private-development sector of the four and is the most decentralized. The rest have a stronger public-development sector, as evident in their housing and public services. On an increasing scale from Britain, to France, to Israel, government decisions (including planning) in these countries, as most others, are more centralized than in the U.S., despite recent moves toward decentralization.

Although these four countries do not represent developing and East bloc countries, they do provide a spectrum of background factors that affect exactions policies in Western countries. Despite some basic legal, economic, and political differences among the four countries, there is enough kinship to enable mutual exchange of tools and evaluation perspectives.

Land Policy Alternatives

In many countries, though not the U.S., the term "land policy" commonly covers land development issues that are broader than land use (Ratcliffe 1976, Lichfield and Darin-Drabkin 1980), including questions about land taxation, tenure, management, and—of direct relevance to exactions—the division of
responsibility between the public and private sectors in development. Because exactions policies deal with more than the use of land, they should be viewed more in the context of land policy rather than land-use policy, the latter perspective being more common in the U.S.

As part of a broader set of concerns about land development in society, exactions emerge as only one solution among several alternatives available under the rubric of land policy. Starting from the most public-interventionist possibilities and continuing toward the more private-reliant ones, land-policy alternatives to exactions include land nationalization, land banking and assembly, public preemption rights for land purchase, extensive leasehold systems, betterment taxes on the unearned increment, land-readjustment schemes, and negotiated and voluntary developer provisions as alternatives to compulsory exactions (Alterman 1982). Each of these options can be tailored to finance or supply public facilities and amenities in part or in full.

Only a few of these alternatives are discussed in this volume. Some, like land nationalization and preemption, are hardly feasible in the U.S. context. Others, which may be feasible on a small scale, such as betterment recapture and land banking, are touched upon in the discussions of France and Israel. One important alternative to exactions is presented in full: land readjustment—a method that calls for considerable public intervention yet is nevertheless currently practiced or on the agenda in several states in the U.S. (Schmidman this volume). Future discussions of exactions in the U.S. should explore other alternatives as well, especially land banking and betterment recapture.

In addition, three chapters are devoted to U.S. variations of exactions that are based on negotiated solutions: formal development agreements introduced in several states in the mid-1980s (analyzed and evaluated by Cowart), negotiated alternatives to linkage (proposed by Susskind and McMahon), and negotiated exactions through annexation agreements (the case study by Cutt). For these alternatives, the comparison with Britain—where negotiated exactions currently predominate—should be illuminating.

**Terms and Their Implications**

The American term “exactions” is by no means internationally accepted. A close equivalent in Great Britain is called “planning gain.” In most other countries exactions-like mechanisms (fees, special taxes, land expropriation or dedication, conditions on building permits, ad hoc agreements with developers) have not yet been well-enough articulated as general policy to merit a generic name. In the meantime, these tools are called by their separate names.

Nor is “exactions” a value-neutral term. Both exactions and planning gain refer approximately to the same policy: requiring developers to contribute to
public services as a condition for allowing development to proceed. But exactions and planning gain conjure up almost opposite perspectives. "Exactions" has an unsavory taint, alluding to the use of coercion in demanding something that is not due as of right. The term takes the developer's point of view, emphasizing the manner in which provisions are obtained. "Planning gain" focuses on what is obtained—the gain to the public derived from the additional facilities or amenities provided by the developer. This difference in perspective reflects each country's views of planning and the role of public facilities and social services—currently hotly debated issues in both countries.

In the United States, the term "exactions," originated by land-use law professionals and court decisions, has found increasing currency. In recent years, usage of the term has expanded beyond this narrow group to other professionals specializing in land-use planning and control. The term, however, is by no means au courant among other groups related to land development: Many developers do not recognize the term (though they are very well acquainted with its meaning), nor do many professionals in the somewhat wider fields of urban planning and policy. Yet, interest in exactions and their practical applications is accelerating. This is therefore a good time to propose a set of appropriate terms suitable for the expanding tools and concepts.

Noting that at present there is no accepted term to encompass the range of tools for obtaining public services from developers, the second essay in this volume (Alterman and Kayden) proposes a more neutral and internationally applicable general term—"developer provisions." More specifically for the U.S. context, the essay also clarifies distinctions among various types of exactions and related policies and proposes appropriate terms. The vocabulary is proposed for future discussion; it has not been imposed on the authors in this volume. In the absence of an accepted generic term, some authors have used "exactions" generically, and have relied on various adjectives and qualifiers to denote particular subtypes. The somewhat uneven usage of terms by the authors in this volume—though clearly nearing a convergence—indicates that exactions policies in the U.S. are, indeed, at a midway stage in their development: no longer the domain of a narrow group of legal professionals, but not yet properly articulated and evaluated as public policy.

Footnotes

1. The trend of attempted decentralization in many developing countries is discussed by Conyers (1983) and by Rondinelli, Nellis, and Cheema (1984). For a description of the emergent land policy for developing countries sanctioned by United Nations' experts see Oberlander 1983.

2. For a discussion of possible legal limits to this trend see Callies 1987.

3. In fact, in Britain as well there have usually been formal methods for planning-based financing, through the various versions of betterment-recapture taxes that have been periodically enacted and repealed.

4. The role of the courts is even more restricted in countries with a Roman-law tradition, as in France.

8. A striking example is *Banberry Development Corporation v. South Jordan City*, 631 F.2d 899 (Utah 1981), which specifies a series of demanding criteria for proving proportionality of benefit and for making complex adjustments for credits due for payments made in other forms.

7. The ground-breaking book by Snyder and Stegman (1986) sets out criteria derived largely from public finance and economics, and analyzes them in depth. In the symposium issue of *Law and Contemporary Problems* (Babcock, ed. 1987), four of the ten contributions deal with other than legal issues, and an additional one is about Britain. The edited book by Frank and Rhodes (1987) presents empirical evidence on the use of exactions and deals with economic, legal, political, and administrative aspects. In addition, many practical guides appeared, especially on impact fees (Duncan, Standerfer, and McClendon 1986; Morgan, Duncan, and McClendon 1986; Duncan, Morgan, and Standerfer 1986; and McKay, Millman, and Shoemyn 1989a and b.)

8. In observing innovation dissemination in the making at the sessions devoted to impact fees and linkage, I noticed the uneasy atmosphere in the packed hall when Charles E. Connerly of Florida State University delivered a strong criticism of impact fees and linkage, pointing to their anticipated long-term social impacts and policy implications. The audience, mostly practicing planners from across the country, apparently came to learn how to implement impact fees and what to watch out for in the short term, not to question their very basis. The organizer’s summation reflected this uneasiness when he sidestepped the main import of the paper, saying that even the speaker acknowledged that impact fees are necessary in the short term.

9. Land banking in America is discussed in Strong (1979). Betterment recapture has not been widely accepted in the U.S. despite the able efforts of the late Donald Hagman, but it has been applied on a modest scale (Hagman and Mieszewski, eds. 1978; and Alterman, 1982).

References


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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