The Perspectives of Impacted Stakeholder Groups Toward Park and Recreation Exactions

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ABSTRACT: Three main forms of development exactions are used to acquire and develop recreation and park resources. They are land dedication, fees in lieu, and impact fees. Each of these is described and the bases for legal challenges to exactions are briefly reviewed. The focus is on articulating the perceived merits and demerits of exactions from the perspectives of each of the four major stakeholders impacted by an exaction decision: local government officials, developers, new residents moving into a community, and existing residents. Elucidation of the range of perspectives which may be adopted by each of the stakeholder groups may better equip administrators to respond to controversy that is frequently associated with exaction decisions.

KEYWORDS: Park and recreation exactions, mandatory dedication, fees in lieu, impact fees, stakeholders’ perspectives, development.

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In the context of park and recreation, an exaction is a governmental requirement, enforced as a condition for permitting development, that a developer dedicate or reserve park land for public use; provide a recreation facility or service; pay a fee in lieu of such dedication or provision; or pay a fee to a public fund for recreation and park facilities and services (Deakin 1988). The transfer of public sector costs to the private sector has become an increasingly attractive alternative to conventional methods of financing park and recreation amenities to many governmental officials. The types of exactions are growing, as are the various legislative bases from which agencies seek to derive legal authority to impose the new exactions. The focus of this paper is confined to the three types of exactions that are most commonly used to secure recreation and park resources. They are: mandatory dedication of land, fees paid in lieu of dedicating land, and impact fees.

Whenever exactions are proposed, implemented, or amended, they are controversial. Stevenson (1989, p.25) observed they “are now becoming an issue almost everywhere the needs of new residents clash with local fiscal
realities.” This paper first provides brief descriptions of the three alternative types of exaction primarily used in recreation and parks and their legal bases. Then it focuses upon articulating and analyzing the major arguments that may be advanced in support of and in opposition to exactions by each of the four major stakeholder groups impacted by an exaction decision: local government officials, developers, new residents moving into a community, and existing residents. The complexity of the issue militates against predictable outcomes, for there are no right or wrong perspectives, only different perspectives. Indeed, antithetical views often emerge from within the same stakeholder group, since for every argument offered there is a counterargument. By elucidating the range of perspectives that may be adopted by each of the stakeholder groups, it is hoped that recreation and park agency officials will be better equipped to respond to the inevitable controversy associated with exactions.

Exactions are a means of providing park and recreation facilities in newly developed areas of a jurisdiction without burdening established city or county residents. They may be conceptualized as a type of user fee, since the intent is that the cost of new facilities should be paid for by the landowner, developer, and/or new homeowners who are responsible for creating the demand for those new facilities. Under the terms of local ordinance, developers may be required to deed a portion of their land, pay a fee based on its equivalent value, or pay an impact fee to the municipality for recreation and park purposes without receiving any compensation, as a condition of approval for a permit to build. The thinking behind this requirement is that, since new housing generates a need for additional park and recreation amenities, the people responsible for constructing that new housing should bear the cost of providing those amenities.

The precedent for requiring similar provision of streets, sewers, water drainage, utility easements, and school sites has been established for over fifty years (Heyman and Gilhool 1965). However, the addition of parks, recreation areas, and open space to this list is a relatively recent happening. Such a requirement began to emerge extensively in the 1970s, and the stimulus of the tax revolt inhibiting the use of property taxes for acquisition and development contributed to its expansion in the 1980s.

Alternative Forms of Exactions

There are three principal forms of exactions, each with two alternate assessment methods. These are shown in Figure 1 and are briefly described in this section.

**Land Dedication**

If the exaction ordinance requires dedication of land, the amount to be dedicated may be determined in one of two ways. First, a population density formula may be used, requiring the developer to deed a specified acreage per 1,000 population, or to deed land according to the number of dwelling units per acre. For example:
Figure 1

Alternative Forms of Exaction

Exaction

Impact fees

Fees per bedroom

Fees per dwelling unit

Percentage of fair market value

The fair market value of land which would have been dedicated

Land dedication

Fixed percentage

Population density formula
<table>
<thead>
<tr>
<th>Density</th>
<th>Park land</th>
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<tbody>
<tr>
<td>1-5 dwelling units per acre</td>
<td>8% of subdivision area</td>
</tr>
<tr>
<td>6-10</td>
<td>13%</td>
</tr>
<tr>
<td>11-15</td>
<td>15%</td>
</tr>
<tr>
<td>16-20</td>
<td>17%</td>
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<tr>
<td>over 20</td>
<td>20%</td>
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This approach has the important advantage of relating park needs directly to the number of people in a given geographic area.

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

A minimum of 5 percent of the gross land area of subdivisions of more than 50 lots or 25 acres shall be dedicated for public parks or playgrounds.

The actual percentage specified varies widely, ranging from as low as 3 percent to as high as 10 percent. The 10 percent figure appears to be the upper range that the courts will accept (Kaiser and Mertes 1986). The major disadvantage of the fixed percentage approach is that the standard remains the same whether the subdivision is a single-family development or a multiple-family complex, although the park needs generated by the two will obviously be different.

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

**Fees in Lieu**

For the reasons given in the previous two paragraphs, ordinances usually authorize a community to require developers to contribute cash instead of dedicating land. There are two methods of assessing these fees in lieu. First, the fee assessed is substantially equal to the fair-market value of the land which otherwise would have been dedicated using the population density approach. For example:

The subdivider shall pay to the municipality for the recreation fund a sum based on the fair market value of the land that otherwise would have been dedicated and in proportion to the density of population in the subdivision.
Second, the fee may be a percentage of the total fair market value of the land being developed. For example:

The fee in lieu shall be equal to 5 percent of the average fair market value of the land in the subdivision.

**Impact Fees**

Recreation impact fees (also known as capital recovery fees) are a direct outgrowth of mandatory land dedication requirements and fees in lieu. The courts’ acceptance of fees in lieu opened the door to the emergence of impact fees. They are adopted most commonly in cities that are growing rapidly, have expanding tax bases, and have a strong local economy. Impact fees may be assessed for development as well as acquisition, which is not authorized by land dedication or cash in lieu ordinances. This feature makes them an attractive alternative to bonds for financing new park development or major renovations. The movement to impose impact fees has been encouraged by a realization that the expense of developing a site for use as a park is substantially in excess of the land cost. Hence, some local governments have moved away from requiring an undeveloped site or an equivalent amount of cash, and begun to require a site fully developed with necessary facilities. This more demanding approach views a cash amount as the basic requirement and embraces the fundamental concept, as it has now emerged, of a recreation impact fee: a cash payment to cover the provision of additional facilities (land improvements) necessitated by a new development (Downing and Frank 1983).

An additional advantage of impact fees is that they can be applied to condominium, apartment, commercial, and industrial developments that create a need for recreation and park capital expenditures, but generally escape dedication or fee in lieu requirements because of the small land area involved or the inapplicability of subdivision regulations.

Conceptually, the amount of an impact fee should be determined by the marginal cost of providing recreation and park services for the new growth. Marginal cost “represents the sum of all immediate expenditures undertaken by a jurisdiction that otherwise would not have occurred” (Peiser 1988, p.38). Thus, if a new subdivision requires $5 million to acquire and develop parkland and recreational opportunities and there are 1,000 homes in the subdivision, then an impact fee of $5,000 per home would be assessed.

Resistance from developers, however, has meant that this goal of fully funding recreation and park amenities in new areas has been frustrated. For example, in Florida the cost per dwelling of providing water, sewerage, drainage, police, fire, library, school, park, recreation, and other community facilities to new development has been estimated to average more than $20,000 (Nelson 1988). However, impact fees for these services average between $3,700 and $4,700, according to the Home Builders Association of Mid-Florida (Stevenson 1989). In most cases, impact fees have not been set at a high enough level to cover the full capital costs of the recreation and park facilities demanded by new development.
The recreation and park impact fee is usually imposed as a fixed dollar amount per lot or dwelling unit. For example, subdividers may be required to pay a fee of $250 for each building site. Alternatively, this fixed dollar amount may be assessed on the number of bedrooms proposed in the dwelling units, for example, $100 for each one-bedroom dwelling unit, $200 for each two-bedroom dwelling unit, and so on.

Recreation and park impact fees are most prevalent in Colorado, Florida, and California. In Colorado they have been used for several decades, whereas in Florida they emerged as a response to the fiscal problems associated with the very rapid growth of the past decade. California’s impact fees were identified as a new revenue source after Proposition 13, and now two out of every three builders report that they pay them (Soble 1988). In California, impact fees differ from those levied elsewhere in the United States because they are enacted as taxes rather than as part of a city’s police power authority. The effect of this is that their use is less restrictive, and they are not required to meet the legal tests of reasonableness discussed in the following section. Thus, for example, the City of Ventura, California, was able to implement a recreation impact fee on all new residential, commercial, and industrial development in the city, to acquire and develop a 45-acre areawide park, estimated to cost $5 million, on the east end of the city. This fee was imposed in addition to existing mandatory dedication requirements for local park acquisition.

Legal Challenges

Developers in many states have challenged the legality of exaction ordinances, claiming they are unconstitutional because they break the Fifth Amendment to the U.S. constitution, which prohibits the taking of private property for public use without adequate compensation being made. Because the U.S. Supreme Court has not ruled directly on this issue, the legal limits of exactions for park and recreation purposes remain within the purview of state courts (Ellickson 1977).

State courts generally have upheld the legality of exaction ordinances. The focus of most legal challenges in recent years has been upon what constitutes a “reasonable” dedication requirement. The state courts initially interpreted and defined reasonableness in different ways. However, by the end of the 1970s, the “rational nexus” test, which was first enunciated by the the Supreme Court of Wisconsin, had become the prevailing standard throughout the country (Bosselman and Stroud 1987).

The “rational nexus” test is a kind of cost-accounting approach with which the costs of facilities to serve new residents are calculated. Using this test, the courts have required that dedications bear a reasonable relationship to the facility needs that can be attributed to the development and that what is dedicated be used to provide facilities to benefit the development. Further, the courts have consistently indicated that facility standards for new and existing residents should be the same. For example, new residents should not pay for parks on the basis of five acres per thousand, when the existing community standard is less. By limiting the amount that can be exacted from a developer to that which is
needed to serve the development’s occupants, local governments are prohibited from using new development as a source of financing for facilities beyond those attributable to the development. On the other hand, by not limiting the facilities for which dedications can be levied to those for the exclusive use of the development’s population, cities and counties can use dedication to require a proportionate financial participation in more than neighborhood-level facilities (Fernald and Snaman 1987).

The analyses undertaken to refute or affirm this reasonable relationship are becoming increasingly sophisticated. The less sophisticated forms of dedication, such as ordinances using the “fixed percentage” formula, may fail to convince a court that the development is only paying its fair share of facility costs.

Developers have argued that such a formula does not relate needs to benefits and as such is not a reasonable measure to determine the dedication requirement. In contrast, challenges to the “population density” formula (based on the number of people) have generally been refuted in the courts, suggesting that this approach is superior in the eyes of the courts to the flat percentage approach (Kaiser and Mertes 1986).

Legal challenges to fees in lieu provisions have generally turned on the question of “where” the fees were to be spent. An ordinance that allows cash to be spent anywhere in a municipality for any type of park is likely to be challenged. An agency should have a parks master plan which divides the jurisdiction into geographical districts. To meet the courts’ general requirement that expenditure of funds be directed to the acquisition and development of park and recreation facilities that serve the people who occupy the land being subdivided, each district should have a separate fund to which to credit all dedication fees in lieu or recreation impact payments originating from that district. These revenues should be spent primarily within the originating district.

The case law suggests that fees be used to develop neighborhood parks, but this does not preclude expenditure of fees to acquire or develop community parks provided they substantially benefit the subdivision residents. The distance standard may be much more liberal in the case of county-level parks, for which exactions have also been legally upheld. For example, the courts sustained an ordinance passed by Broward County, Florida, that required that park fees be expended for county parks within a 15-mile distance of the new development (Kaiser and Mertes 1987).

The monies received from cash in lieu payments or impact fees must be expended within a reasonable time after the contributions and development take place. There is no hard-and-fast rule or court standard defining “reasonable time,” but a review of existing ordinances suggest that most jurisdictions have specified a period of time less than five years (Kaiser and Mertes 1987).

Perceptions of Exactions by Stakeholder Groups

Four main groups of stakeholders are impacted by a decision to impose an exaction ordinance. They are: local government officials, developers, new residents moving into a community, and existing residents in a community.
There is unlikely to be any consensus of views regarding exactions between the four groups. Indeed, there are frequently differences of opinion within each of the groups. An effective response to the controversy that exactions frequently provoke requires an understanding of the perceptions and values of the stakeholders. This section articulates the major arguments that may be advanced in support of or in opposition to exactions by each of the four groups impacted by the development process. The relative strength of these concerns is likely to be influenced by the fiscal strength of the local government and the economic health of the area. The potential arguments attributed to each group are not necessarily exclusive to those in it, but they are the group to whom those arguments appear to be most salient. To simplify the exposition, arguments cited in the context of one group are not reiterated in the discussion related to other stakeholder groups.

_Perspectives of Local Government Officials_

_The case for support:_

A basic and long-held principle of land-use planning and growth management is that development must be supported by adequate public facilities and services and that, in achieving that objective, private and public investment must be coordinated. Recreation and park exactions are intended to ensure that public leisure facilities are available when homeowners purchase their new homes:

By requiring that facilities needed to serve new developments be constructed and paid for at the time of development, this approach seeks to avoid the chronic congestion of facilities resulting from development approvals issued without regard to the availability of facility or service capacity. The support for this viewpoint is apt to come from those elements of the community interested in sound management of the municipal enterprise (Wescheler et al. 1987, p. 33).

The alternative approach to avoiding such congestion would be for the government jurisdiction to purchase land after development had been launched. The purchase price on the open market at that time is likely to be much higher than at the predevelopment stage.

Dedications and impact fees provide land or raise revenues for capital development without increasing taxes. This is especially important in those situations where local government's ability to raise taxes to increase revenue, assuming the political will to do so exists, is severely constrained by state constitutional provision and legislation restricting the taxing powers of government. Many local governments needing capital facilities are already taxing at or close to the limits of their authority (Currier 1984). In such situations, exactions may be one of very few alternatives available for acquiring and developing park and recreation facilities.

There are obvious advantages to developing parks and schools on adjacent sites. However, it is often difficult for school districts and municipalities to synchronize bond issues and capital budgets in the timely fashion necessary to acquire land in the dynamic market place. Exaction requirements for schools and parks in large developments makes possible their physical juxtaposition.
There is a widespread perception that the costs of exactions are ultimately borne by the new homeowner, and it is likely that these people are new residents to the community who are unlikely to notice or to object vociferously to the extra costs. Thus revenues raised, or facilities provided, in this way are less likely to stimulate political protest from residents. However, new developments and newcomers to the community are not necessarily synonymous. For example, the results of a market survey commissioned by a developer in Colorado Springs, Colorado, indicated:

Eighty percent of new houses are sold to people who already live in the community. So these dedication fees are charged not exclusively to newcomers to the community, but primarily to our brothers and sisters and our sons and daughters (Snyder and Stegman 1986, p. 249).

Finally, in some situations commentators have argued that local government officials in upper-income communities may impose very high exaction requirements as a mechanism through which exclusiveness or cultural homogeneity may be maintained or achieved. It may be hypothesized, for example, that this may be one of the effects in Seal Beach, California, which imposes a fee of over $22,000 per dwelling (Weschler et al. 1987). However, local officials in communities with especially stringent exactions typically characterize their policies as preserving the community’s quality of life, and argue that the high exactions reflect the total costs associated with the development (Deakin 1988).

The case for opposition:

Development exactions are likely to create additional costs for a jurisdiction. If the exaction merely provides unimproved land, or the money to purchase such land, the agency will be required to invest additional capital funds to develop the land for park and recreation purposes. In addition, an increase in operating funds will be needed to maintain the developed facility when it is completed. Whenever land is dedicated to a public agency, there is an opportunity cost involved, since such an action removes it from the tax rolls. Thus, the city gives up the annual property tax revenue which the site would have yielded if it had remained in private ownership. However, it may be argued that this loss is more than compensated for by the increase in property values attributable to the proximity of open space.

There may be concern that exactions will cause developers to undertake their projects elsewhere and that this will damage the long-term economic health of a community. Deakin (1988, p. 105) reported: A major worry of elected officials is that exactions will drive away development, particularly office developments and retail complexes, as sources of tax revenues.

“Developers tell us that if we get too sticky about impact mitigation they won’t be able to get financing for their projects,” a Concord, California, Council member said. “They option the land, and can go elsewhere if we won’t go along with them. The worst situation is that they’ll simply move one town over. We’ll get the traffic and housing
demand but not the taxes.” Indeed, cities that have weak economies make little use of exactions, despite their financial difficulties, because their leaders fear exactions could undermine economic development efforts.

The implementation of exactions may lead to complacency by tempting local government officials to discontinue their efforts to seek out additional resources and other land acquisition or development procedures, and to redirect these energies to resolving other problems. Exactions provide primarily for acquisition of neighborhood park land, and alternative funding approaches frequently are needed to develop this land and to provide for other types of park and recreational opportunities in a jurisdiction.

Local government staff may express concerns about the difficulties of administering exaction programs and developing the analyses to justify exactions (which are becoming extremely complex). Elected officials who commit to the principle of exactions often fail to recognize the considerable staff work that is required to set up, monitor, and enforce them, especially those relating to impact fees.

Mandating dedication of private resources through exactions is likely to create friction and bad will with at least some members of the development and business fraternity. These people then tend to view the government entity as an antagonist, rather than as a partner. Such animosity militates against cooperation and partnership arrangements with these powerful groups, which the agency may wish to encourage and facilitate in a variety of other contexts. Further, when resources are contributed as part of an exaction requirement, they cannot be used as part of an agency’s 50 percent share for a matching grant under the terms of the Federal Land and Water Conservation Fund program or similar state programs. Only voluntary contributions are eligible to be used as matching contributions.

In some contexts, animosity from developers may endanger the personal political aspirations of local elected officials, because developers and real estate interests are influential in most communities and are major contributors to local election campaigns. Indeed, many elected officials are involved in real estate or associated professions. However, in other jurisdictions the citizenry is a more powerful force. For example, a Montgomery County, Maryland, official stated, “Here, politicians who don’t insist that developers satisfy public concerns are at risk of getting voted out of office and replaced by people who’ll say no to a development that isn’t what people want” (Deakin 1988, p. 106).

For these reasons, many local governments, especially those that historically have enjoyed good relationships with developers, view exactions as being unnecessary and counterproductive. Instead, they have adopted a strategy of negotiating agreements to determine what resources the developer should contribute. For example, Dallas, Texas, has a nationally acclaimed park and recreation system, but has opted not to pass an exaction ordinance because officials believe they can achieve more through negotiation:

The city has in the past received gifts of park land from developers, which offers good public relations and serves as a tax write-off for the developer. The city primarily tries
to work with developers on a case-by-case basis. Negotiations between the developers and the city have proven to be effective (Kaiser and Mertes 1986, p. 82).

Some jurisdictions have adopted an "official policy" toward dedication, rather than a formal exaction ordinance. For example, in Galveston County, Texas, the official policy of the county was to request developers to donate a portion of their land, or a monetary contribution, to be used for recreation and park purposes. The county found developers to be much more receptive to the requests and suggestions of county officials than they probably would have been to a legal requirement. Though this negotiated process, officials believe, developers donate more land than they would have been required to under a formal ordinance. Although this official policy was ostensibly voluntary, developers were aware that the county had the ability to be uncooperative and delay a development if it so wished. Since delays are very expensive, developers had an additional incentive to concur with the official policy request.

Advocates of negotiated agreements suggest they have three advantages compared to formal exactions: they are flexible, voluntary, and legally secure. Their flexibility means that exaction requirements can be closely matched to needs, and that adjustments can be made to account for peculiarities in a development project's circumstances. Moreover, since the agreements are voluntary, they are not required to meet the judicial national-nexus standard which would be required if a formal ordinance were enforced. This avoids exactions that otherwise might be vulnerable to legal and political attack if they were imposed on unwilling developers. However, those who are critical of negotiated agreements question the "voluntary and legally secure" argument. A practitioner reviewer of this paper, for example, commented, "Most developers I have dealt with have not wanted to volunteer anything. As far as 'legally secure' is concerned, I have the very opposite viewpoint and have often felt that we did not have a leg to stand on if we could not reach an acceptable compromise and ended up going to court. This very rationale lends strong support for an exaction ordinance, as everyone knows the rules of the game going into the deal."

Although a goal of the negotiated agreement approach is to prevent friction with developers, it can also create friction. Some developers argue that the uncertainties inherent in negotiated exactions make it difficult to predict project costs and secure project financing, and that there is potential for inequitable treatment and abuse. Negotiated agreements mean that exaction provisions are determined on a case-by-case basis through negotiation and compromise, resulting in substantially different levels of exactions for similarly situated developers (Kirlin and Kirlin 1982). The public officials engaged in these negotiations often exhibit a range of skill, knowledge, experience in dealing with developers, and personal political agendas. This inherent level of uncertainty and potential for arbitrary actions by government officials, leads many developers to prefer the certainty of formula-driven exaction ordinances.

At the same time, the citizenry may suspect that the developers are able to manipulate negotiated agreements to their advantage. Deakin (1988, p. 107) observed:
Some staffers report that they are outgunned by developers in negotiations. "You find yourself in meetings with three city staff members—somebody from planning, somebody from public works, and one of the attorneys—facing a roomful of the top lawyers and consultants in the state, all working for the developer," one city planner said. "They can do studies we can only dream about and we just don't have the resources to refute their arguments."

Perspectives of Developers

The case for support:

Developers may support an exaction ordinance because they recognize it protects a jurisdiction from poorer quality development. They may rationalize that ensuring a given level of park provision and recreational opportunities throughout the area may contribute to encouraging businesses to expand or relocate in the area, and thus enhance their own long-term sales prospects.

Exactions make available strategically located neighborhood parks and recreation facilities that enhance the saleability of property. Many real estate projects feature recreational amenities prominently in their promotional campaigns, because they have determined these are assets that new home buyers seek. Hence, the requirement to provide recreational amenities often is consistent with the developer's own inclinations and might be provided by the developer even if they were not required. However, developers probably would prefer to decide for themselves what facilities should be provided rather than be mandated to give resources to a public agency and have its officials make that decision for them.

Support from developers is more likely to be forthcoming if an exaction ordinance makes allowances for in-kind recreational amenities provided by developers, and is flexible enough to permit the agency and a developer to agree to an alternative exaction to that specified in the ordinance if it is in their mutual interest to do so. Thus, developers often will incorporate open space or facilities such as tennis courts and golf courses into a development, because they believe such amenities will assist sales. Since the existence of such amenities eases the burden placed on the public agency, it seems equitable that the exaction requirements imposed should be reduced accordingly. Jurisdictions that have incorporated this flexibility generally give up to 50 percent credit for private recreation amenities.

If flexibility is designed into an exaction ordinance, it may facilitate securing maximum recreation and park benefits. For example, in communities bordered by a body of water, a waterfront docking area may be more desirable than more land to both the public agency and the developer. Similarly, it may be more desirable to all concerned for a developer to give less land but make more recreation improvements on the property. The total package should represent a dollar value equal to what would have been received if only land had been obtained (Kershaw 1975).

Developers are frequently viewed with distrust and suspicion by at least some factions in a community. Enthusiastic endorsement of an exaction
ordinance may contribute to alleviating this by suggesting to residents that developers have a social conscience, are concerned for the general welfare as well as the bottom line, and are prepared to invest in community facilities. Thus, exactions may be viewed as an investment in good public relations and as a means of winning public support.

The case for opposition:

The medieval torture connotations of the term “exactions” are indicative of the unpopularity of this practice among many developers (Juergensmeyer). A typical reaction is cited by Baca (1989) who reports, “A long-time developer has termed these ‘blackmail fees,’ saying, ‘You have to pay or you don’t work’.”

The developer as owner of the land is very conscious of the “taking” issue. Although the courts have ruled that an exaction which meets a “reasonableness” standard is a legitimate requirement of municipalities under their “police powers” authority and does not constitute a taking of private land without adequate compensation, many developers resent the courts’ interpretations. They view it as an intrusion of their right to use all their land as they see fit, and find the principle of park land exaction to be anathema. It is this perspective that often causes discussions over dedication issues with developers to be highly emotional.

Ostensibly, it appears that developers will be required to pay the cost of the exactions. There has been little empirical evaluation of how the market responds to exactions, but in a vibrant economy it is unlikely that a developer will absorb the exaction costs in the long term. Rather, these costs are likely to be passed on to either the new homeowners or tenants or to the landowner from whom the land was bought.

Since the number of lots that may be developed is reduced, the developer passes the exaction costs along to new homeowners either by reducing the size of each lot or by raising the price. Developers sometimes argue that this erodes their competitive position in the market place, since developers in neighboring jurisdictions may not be subjected to these fees.

An alternative is that exaction costs may be passed on to the initial landowners, from whom the developer purchases the land, in the form of a lower sale price for their land. This is explained in the following scenario:

Suppose a builder is about to purchase a piece of land when the city announces the adoption of a dedication or impact fee ordinance. Prior to the ordinance, the builder could build 100 units on the land and sell them for $100,000 each. Based upon the cost of construction and required profit, she was willing to pay $2 million for the land. As a result of the new ordinance, the builder must now charge $105,000 per unit due to the increased cost. But if the developer can now sell the houses for $105,000, why did she not charge that price before the imposition of the fee? In fact, the market for comparable housing in surrounding communities which do not have such an ordinance limits her to selling the houses for $100,000; she will not be able to sell them for $105,000. As a result the developer is only willing to pay $1.5 million for the land so she is able to recover costs and maintain her profit margin (Bland 1986, p. 155).
However, those developers who have already acquired land for development at the time that the community decides to approve a dedication requirement will be unable to shift these costs back to the landowner. In such situations, the developers have to absorb this cost, or they have to accept some erosion of their competitive position and try to shift the costs forward to the homebuyer. However, the ability to pass exaction costs through to new homeowners assumes a vibrant economy. The economic recession of the 1980s in states such as Texas, brought about by the substantial fall in oil prices, led to large outmigrations of population from many cities. Developers and property owners involved in such economic downturns were suddenly in a market that was overbuilt, so house prices and rents dropped precipitously. Exaction costs could not be passed through to new homeowners and tenants, representing an additional burden that contributed to the financial bankruptcy of many developers in these areas.

Thus, there is no generalizable answer to the question of who bears the cost of the exactions. Costs do not set prices; market forces of supply and demand set prices. When sellers substantially outnumber buyers, there is little opportunity to pass any cost increase on to the buyer. Hence, depending on the prevailing elasticity of demand for new housing, some or all of the burden may be borne by new homeowners, by the original landowner, or by the developer. Summarizing the empirical research on the issue of who pays, Nicholas (1988, p. 139) concludes:

Early research on exactions suggests that the ultimate burden of developer exactions falls upon the user/buyer (Elliott 1981; Weitz 1984; 1985). These studies were undertaken, however, in regions with rapid growth and at a time of high inflation. It is possible that the ability to shift costs forward may be more related to the growing demand for housing and to general inflation than to any other factor. Studies have not yet tested impact-fee systems during periods of lower inflation and across communities with varying rate of growth. A recent survey of builders, however, indicates that they continue to pass fees forward to the buyers rather than backward to the property owners (Bauman and Ethier 1987).

Developers can justifiably point out that it is more expensive for them to provide park and recreation amenities through exactions than it would be for a government agency to provide them using conventional government financing. The developer has to borrow money at private market rates to purchase his or her land. In contrast, if the government agency were to provide these facilities, it could finance them at much lower rates using tax-exempt bonds.

Enforcing dedication of the exaction when a subdivision plot is approved usually means a developer must provide cash well ahead of any income from sales of land. That cash may sit in an earmarked fund for months or years, earning interest for the jurisdiction but costing interest and opportunity costs to the developer (Porter 1987). To defuse this situation, a jurisdiction could consider delaying payment of the exaction fee until the project is occupied, or allowing payment of that fee over a five-year period at public-sector interest rates (Lillydahl et al. 1988).

Frequently, developers express concern that, if land is dedicated, there is no
guarantee that the agency will develop it. Similarly, if fees are set too low, there may be insufficient funds to deliver the planned project, which damages the credibility of the developer as well as the government agency. Even if a dedicated site is developed, the long-term resources necessary to maintain it a: a standard that enhances the subdivision may not be forthcoming. The exacton does not improve subdivision amenities, unless the municipality makes a commitment to develop and maintain improvements on that land. In some instances city representatives have instituted an exaction ordinance, but at the same time have refused to increase, and in some cases have even reduced, the operating budget of the agency. Thus, the end result may be unsightly, debilitating areas which become overrun with vegetation, garbage, and vermin.

Dedication or fee exactions usually amount to a relatively small percentage of total development costs, and they generally represent an irritant rather than a fatal blow to a development project. Opposition to them from the development fraternity stems from a belief that they add costs that will affect the bottom lines of projects in the pipeline when the exactions are imposed, and that in principle they are unnecessary, inequitable, and subject to limitless extension once introduced. However, the strength of the opposition mounted by developers to a particular ordinance in a given jurisdiction is likely to be a function of the prevailing popular and political climate towards development. For example, if there is widespread resistance to growth, or if a community is unable to finance any park and recreation acquisition and development from conventional sources, then developers may be the primary advocates for exactions, citing all the advantages of adopting them as a means of eroding opposition to development. Indeed, the National Association of Home Builders (NAHB), which is the national trade association representing developers and builders, stated, “Developers and builders are acknowledging that impact fee payments may mean the difference between undertaking a residential development project or not. For in the absence of needed infrastructure, residential development cannot occur.” (Soble 1988, p. 146).

Given this level of acceptance, opposition from developers increasingly revolves around what constitutes an equitable exaction. In this context, the focus of the debate shifts to the issues of double payment and differential exactions.

The double payment issue relates to the way in which existing facilities were financed. It may be argued that if property taxes were used to finance most existing facilities, then the land on which new development occurs has already paid for part of those facilities. Thus, as a quid pro quo, existing residents should contribute some proportion of the costs attributable to the new park and recreation developments, rather than setting impact fees to recover total costs. On the other hand, if existing park and recreation amenities were financed primarily from state sales and excise tax rebates, state and federal revenue sharing or block grants, or fees and charges, then the vacant land prior to development contributed nothing and impact fees could justifiably be set to recover total costs (Nicholas and Nelson 1988). An extension of this argument is that the magnitude of an exaction must be adjusted to reflect the value of state, federal, and other nonlocal government funds involved in financing the facilities
supported by fees. These external contributions effectively serve to reduce the resources needed from exactions.

When an exaction ordinance provides for differential impact fees to be imposed, there is sometimes concern that their distribution fairly represents the likely impact of the different kinds of development on park and recreation facilities. Differential fees may be imposed to reflect differences in the value of the land and the improvements being developed on it. Thus, for example, the city of Eden Prairie, a fast-growing suburb of Minneapolis, charges developers a park fee of $40 for a single-family house, $335 for each apartment or condominium, and $2,415 per acre for business projects (Maylan 1988).

In some contexts, differential impact fees may be imposed to reflect the different impact made by residents and outsiders. Where this is not done, developers may protest. For example, in San Clemente, California, the city wanted to raise $6 million through fees of $1,250 on each new home to help pay for new beachside parking structures. The parking was to be used by current residents and tourists as well as buyers of new homes, but builders thought the fees were out of proportion to the additional demand for parking likely to be created by new residents (Stevenson 1989). To counter similar charges of inequity, Manatee County, Florida, used a survey to ascertain how much use of specific park and recreation facilities was attributable to residents and how much was accounted for by tourists. It found, for example, that residents accounted for only 18 percent of the use of beach facilities, but for more than 90 percent of the use of swimming pools and baseball fields. Using these data, the county established one impact fee for new residential units and a different impact fee for hotel/motel room and recreational vehicle spaces (Barney et al. 1988).

A final complaint of developers is that frequently it is financially expedient for them to accept exactions even when they believe the requirements to be inequitable, because the cost of a challenge often outweighs that of simply acceding to the exaction demand. Deakin (1988, p. 106) quotes a developer in California's Napa Valley who illustrates this point:

"I could have appealed this requirement, but it would have taken four to six months to exhaust my administrative remedies," he said. "Had I then had to go to court, we'd be looking at a year to two years. I probably would have won, but by then my project would have been dead." The local staff were well aware, he claimed, that the payment they were asking for was about the same as the costs of a six-month delay in the project.

However, a 1987 ruling in First English Evangelical Church vs. Los Angeles County may contribute to rectifying this situation. In this case, the court recognized the right to compensation for a temporary regulatory taking; defined as the period between enactment of the exaction and its invalidation (Marcus 1988). Before this ruling, the remedy was limited to declaring an exaction invalid, with the victorious developer having nothing but a sense of inner satisfaction to show for several years of land-use restraint by an invalid regulation. If the developer now sees that compensation for economic losses incurred while proving an unfair exaction suit can be awarded by the courts, then this becomes a more feasible course of action.
Perspectives of New Residents

The case for support:

Exactions are designed to ensure that park and recreation opportunities are available at the time, or soon after, a new resident moves into the area. The alternatives may be to wait many years before the jurisdiction invests in such amenities in the neighborhood, or accept that those amenities may never be developed nearby. Their availability is likely to enhance the area’s quality of life, which will probably lead to an increase in the property value of the new home. As park facilities mature, they generally become more attractive, and their presence is likely to facilitate easier resale of a home.

The case for opposition:

If the value of property is raised because of the increased amenity value of the dedicated facilities, then property taxes also will be higher. At the same time, some new residents may not regard park and recreation amenities in close proximity as being positive attributes. They may not want a park or recreation facility close to their property, because of concerns that it may be accompanied by noise, trash, increased vehicular traffic, and undesirable elements from other neighborhoods who don’t have satisfactory facilities of their own.

The negatives that may be identified by developers that were discussed earlier—increasing the cost of homes and the risk that dedicated land would not be developed or maintained well—may also be cited by new residents. If the exaction costs are passed on to the new homeowner, their magnitude may be just great enough to push the selling price of a new home beyond the financial reach of some individuals who could otherwise afford it. This situation may be of particular concern in the context of low-income housing. It could be partially addressed by designing flexibility into an exaction ordinance based on ability to pay, so low-income housing would be exempt from, or subject to reduced, exactions.

In addition to the absolute dollar increase in home purchase prices, impact fees drive up the cost of home financing. If the fee amounts are incorporated into the selling price of a new home, then homeowners must bear the cost of amortizing the fee amounts over the life of the mortgage. A comparison between an impact fee of $1,000 and one of $3,476 over the life of a thirty-year mortgage financed at 12.5 percent, shows that the $2,476 fee increase results in a total cost to the homeowner of $13,878 over the lifetime of the mortgage—almost six times the original fee amount (Soble 1988).

New residents may consider it inequitable to be required to pay the full price of acquiring and developing their recreational amenities, for two reasons. First, if residents of new subdivisions must finance new parks for which they generate a need, then they should not have to help retrieve outstanding debt in existing neighborhood parks, which frequently they are required to do since it is incorporated into their ad valorem tax. If the rest of the community does not share the cost of their parks, residents of new developments should not have to pay for the rest of the community’s parks. In the past, this concern has not been
very great, since the exaction requirement has usually been intended to finance only the land acquisition cost while development costs were paid for by the whole community. However, with the trend to use impact fees to also recover development costs, this equity concern is likely to emerge.

Second, most development in the past, particularly residential development, has not “paid its own way.” Rather, there has been a traditional pattern of one generation of residents providing for the park and recreation opportunities of the next generation. Hence, new homeowners may legitimately ask, “Why do we have a primary responsibility to provide these new facilities, since most of the facilities used by existing residents were inherited by them from previous generations? Don’t they have an obligation to provide for us as others previously provided for them?”

This sense of inequity and injustice may be exacerbated by the realization that new residents who will be most impacted by an exaction ordinance are excluded from having any input into decisions related to that ordinance (Butler and Myers 1984). Consumers of new housing are typically a geographically dispersed, and thus unorganized, constituency. For this reason, they are unable to voice their objections to such exactions. Three responses have been suggested to counter this line of argument (Beattey 1988). The first concerns free choice. Though the locality sets up the exactions system, the homeowner chooses to assume the encumbrance of buying the new home. Second, it can be argued that the interests of future residents are already being represented by proxies in the community through the activism of the real estate and development industries. However, it seems unreasonable to assume the interests of real estate and future residents are always identical. The third response is that once they are part of the community, new homeowners can engage in retrospective voting and evaluation to remove elected officials and change ordinances.

*Perspectives of Existing Residents*

*The case for support:*

Exactions mean that existing residents will be required to pay lower taxes than would otherwise be necessary to acquire park and recreation resources in newly developed areas of a jurisdiction. Further, the provision of these facilities may forestall overcrowding of existing park and recreation facilities which may otherwise occur, if new residents went to existing amenities because such amenities were not available in their area of a jurisdiction.

Although the “rational nexus” test requires that exactions bear a reasonable relationship to the facility needs that can be attributed to a development, the courts do allow existing development to benefit incidentally from exactions assessed against new development (Callies 1986). Hence, it is possible that existing residents in areas with deficient park and recreation amenities may benefit from exactions.

When an exaction ordinance is introduced, or when the terms of an existing ordinance are made more onerous, there is likely to be a ripple effect throughout the entire housing market. All existing owners of comparable real estate in the
jurisdiction are likely to receive a windfall benefit (and existing tenants are likely to face paying higher rents). At least some of the new exaction costs are likely to be passed on to new homeowners or tenants in the form of increasing the cost of a house purchase or rental prices. Thus, owners of existing holdings that are competitive with the new or more expensive buildings that must pay the new fees, are likely to be able to obtain a higher selling price and increased rents for their property (Huffman et al. 1988).

The case for opposition:
It has been argued that the higher cost of new development will increase the taxable value of all property because assessments of new construction are the basis for assessing existing buildings (Nicholas 1988). However, if the tax base of all properties increases then a lower tax rate can be imposed to generate the same amount of revenue from property taxes, so individuals’ tax bills are unlikely to be impacted by across-the-board increases on taxable value.

Higher property taxes may be required in order to support both the costs of developing facilities, if the exaction does not cover total acquisition and development costs, and the costs associated with operating and maintaining a developed facility. However, when a subdivision is fully developed, this may be offset by the additional taxes brought in to a jurisdiction by residences in the new subdivision.

The existing business community may oppose exactions because of a fear that they will stunt growth, thereby restricting business expansion. This fear rests on the assumption that exactions will increase the cost of housing, which, as was pointed out earlier, may be fallacious depending on local conditions.

Concluding Comments

The use of exactions is evolving incrementally. Altermann’s (1988, p. 5) description of this evolution applies to the three forms of exactions discussed in this paper:

[The current situation] is the result of an evolutionary process whereby the policies that first gain legal and public acceptance provide the foundations for new policies creating an archaeological mound, in which earlier layers are rarely abolished or amended; they continue to exist concurrently with the new forms.

Exactions are becoming more substantial in magnitude and broader in purpose. This paper has focused on land dedication, fees in lieu, and impact fees, since these are the three types of exactions that have been most commonly used to acquire recreation and park resources. However, in many jurisdictions the role of impact fees has been extended to embrace other social services through the concept of linkage.

Linkage is a generic term used to describe a variety of programs, especially those implemented in central cities, which require that developers contribute towards low-cost housing, employment opportunities, childcare facilities, transit
systems, and the like, in return for a jurisdiction allowing new development (Merriam and Andrew 1987). It is argued, for example, that if developers build office properties, they should be required to contribute funds to a housing trust which builds low-income houses, since low-income housing is often squeezed out by new office development. In the broad context of recreation and parks, this concept of linkage has required developers to pay impact fees for public childcare centers, the need for which is created by the residents or workers who will occupy the property being built. Hence, for example, in 1988 San Ramon, California (near San Francisco), imposed a fee of $210 a unit on new houses to build childcare centers (Stevenson 1989).

Exactions provide local governments with at least a partial solution to their park and recreation capital-funding problems. They represent one of the safest political options for paying for new infrastructure, because in general they tax builders and new residents, neither of whom in many cases are presently local voters. The alternative to exactions is property or sales taxes, which from a political perspective are more difficult to impose and likely to be more controversial than exactions.

Exaction policies exhibit wide differences in the degree of compulsion, uniformity of treatment, and predictability of requirements. These variations reflect differences between local jurisdictions in philosophy, politics, and economic status. Nevertheless, all stakeholder groups appear to be increasingly willing to accept them and they are well entrenched in law. Future legal challenges are likely to revolve around the equitability of terms specified in an exaction, rather than around the principle of exaction. For this reason, their formulation is becoming increasingly crucial, and the courts and exaction opponents are becoming more sophisticated and demanding in their scrutiny of an exaction’s equitability.

This paper has sought to view exactions through the eyes of members of the four stakeholder groups impacted by them, and to articulate the range of perspectives likely to be found within each group. The intent has been to heighten the awareness of public park and recreation managers of the concerns of the other stakeholders, and of the nuances associated with exactions which might not be immediately apparent, so managers are better equipped to anticipate and respond to controversy that may arise when an exaction ordinance is discussed.

References


