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ABSTRACT

Local governments increasingly are requiring developers to pay for street improvements, transit services, child care centers, schools and parks, sewer and water extensions, and a variety of other facilities and programs as conditions for development approval. This paper examines the politics of such exactions -- the reasons exactions are adopted, and how policies and practices vary with political attitudes toward development; the approaches used to formulate and implement the exactions; and the concerns exactions raise for developers, elected officials, city staff, and citizens.

Based on a review of exaction practices in some 60 cities and counties, three distinct motivations for exactions are identified. The most common reason for exactions is to support growth. In areas where pro-growth policies have not been seriously challenged, exactions tend to be focused on infrastructure finance, usually involve cost-sharing with local government, and are determined through technically-derived formulas and analysis procedures. They serve primarily to assure the delivery of needed facilities in a timely manner. In areas where growth policies are contested, exactions also support development, but in a different manner: exactions often are negotiated to include impact mitigation programs and community services as well as infrastructure, and are fashioned to attract citizen support or at least contain opposition. The more "extreme" or "exotic" exactions are imposed primarily when the developer requests rezoning or a variance in order to build a larger development than otherwise would be permitted. Finally, in some areas exactions act as a brake on growth, keeping out all but the most upscale or local-benefitting development. Communities that intentionally use exactions for exclusionary purposes appear to be relatively few, however.

There has been much concern about excessive and arbitrary exactions, as well as about the fairness of the procedures through which exactions are established. However, local governments most often impose, and developers accept, exactions beyond those strictly justifiable as cost internalization or impact mitigation when the alternative might be to have a rezoning or variance request denied, or to face the possibility of downzoning or other restrictions on development because of strenuous community opposition. In this sense, then, even the most sizeable and far-reaching exactions may offer development opportunities that would not exist should the exactions not be part of the bargain.

Improved procedures for relating exactions to costs and impacts will be useful but are unlikely to eliminate the use of exactions as quid pro quos for development approval. Legal action to prevent excessive exactions could eliminate abuses but also set off a wave of downzoning and restrictive development plans. A more promising direction might be to acknowledge the political dimensions of exactions and work toward policies and procedures that improve the bargaining abilities of both developers and the public sector.

INTRODUCTION

Local governments are increasingly imposing requirements on developers to help provide or pay for a variety of facilities and services. Whereas some years ago development exactions,[1] if they were imposed at all, were nearly always limited to improvements on the site or immediately adjacent to it, today both on-site and off-site requirements are common. Moreover, exactions are being imposed on downtown office buildings and suburban office parks, as well as residential subdivisions and highrise condominium projects. And the range of facilities and services being required has been rapidly expanding. In addition to the streets, sewer and water facilities, and sites for schools, parks, and fire and police stations required for some years, developers are now being asked as well for traffic mitigation programs, housing for low- and moderate-income households, job training and local hiring agreements, child care centers, and public art.[2]

The proliferation in the use of development exactions over the past decade has generated considerable academic attention, especially concerning issues of law and economics. A number of articles have been written about the legal foundations for exactions, defensible methods and procedures for establishing them, and their economic and financial impacts. Much of this work emphasizes procedural, "how to do it" issues: steps to take to avoid legal challenge, impact analysis and accounting procedures, fee calculation and collection methods, procedures for efficient administration. Other papers report on the particular experiences of cities and counties that have experimented with new forms of exactions, and still others critique exactions' equity and potential impact on development locational decisions.[3]

The casual reader of this literature might conclude that development exactions are a promising, though somewhat legally adventuresome and occasionally inequitable, method of financing infrastructure and services that otherwise would be paid for from local government coffers. And indeed, many exactions are explicitly that. A closer examination of exaction policies reveals differences, however, that cannot be explained in financial terms alone.

Since exactions depend, in the first instance, on the legal authority granted to local jurisdictions by the various states, it is not surprising that considerable variation from state to state is exhibited. Some states actually bar exactions, while permitting "voluntary contributions" by a developer. Some require that exactions respond to needs that are "specifically and uniquely attributable" to the development, while others require only that the exaction be "reasonably related" to the development. Legal distinctions between fees and taxes also influence the form that certain kinds of exactions may take.

Even after accounting for differences in legal context, however, a remarkable variety of formulations are in use:

- Some local jurisdictions impose exactions only when a variance, rezoning, or other exception or deviation from local land use plans is requested; some tie exactions to incentives (e.g., density bonuses); and others routinely apply exactions to all projects. Still others use all three approaches, depending on the development proposal and the type of exaction being considered.

- Exactions may be determined through case-by-case negotiations, or may be specified by ordinance or regulation.

- Exactions may apply to all types of development, or only housing, or only commercial development. Exemptions of certain uses (e.g., neighborhood retail, or low-income housing) or of developments under a certain size are permitted in some communities but not others.

- The exactions may be directly based on, in excess of, or unrelated to fiscal and/or environmental impact. In some cases, the relationship between the development and the requirement being imposed is not obvious, or is contested.

- The exactions may require developer provision of land, facilities, and/or services; may permit or even encourage the payment of fees in lieu of specific performance; or may require cash contributions (usually termed impact fees).

- The developer may be held responsible for 100 percent of needed facilities and services (or full impact mitigation), or may be permitted cost-sharing with the local government or credits for future tax payments.

- Implementation procedures vary considerably: the timing and form of required action (or payment) can range from up-front investments to contractual performance agreements or bonds, and sometimes are even contingent on future occurrences, such as exceedances of traffic volume or level of service thresholds.

- Local government monitoring and enforcement mechanisms can range from none at all, to fines or forfeit of performance bonds or denial of approvals of later phases of a multiple-phase development for noncompliance.

Exaction policies thus exhibit wide differences in the degree of compulsion, uniformity of treatment, and predictability of requirements, among other things.

While many of these differences are simply happenstance, many others purposefully reflect local attitudes toward development, as well as judgments on where the balance should be between property rights and community control. The wide variation in practice reflects local policy and politics as well as local economics and finance.

This paper explores the politics of development exactions. It considers the political aspects of why local officials are choosing to impose exactions with such frequency and in such variety, and why certain exactions which seem to have little to do with the financial impacts of a development project are being imposed. It also reviews the processes through which exactions are devised and implemented, and the concerns exactions raise for various interest groups.

The paper is based on the findings of a three-year study of development exaction practices.[4] The study focused on transportation exactions but also collected information on other types of exactions in use. A literature review was carried out, and a telephone survey of development exaction practices in major metropolitan areas across the U.S. was conducted. Exaction policies in some 60 cities and counties then were examined in some detail, and case studies were carried out in 15 jurisdictions that have made extensive use of exaction requirements, as well as five jurisdictions that have not (Table 1). The case studies included site visits to recent development projects, review and

Table 1. Case Studies: Local Jurisdictions*

Contra Costa Co., California
Marin Co., California
Orange Co., California
Berkeley, California
Irvine, California
Los Angeles, California
Oakland, California
Palo Alto, California
Pleasanton, California
Redwood City, California
San Francisco, California
Tiburon, California
Tracy, California
Walnut Creek, California
Broward Co., Florida
Montgomery Co., Maryland
Stamford, Connecticut
Boston, Massachusetts
Bellevue, Washington
Seattle, Washington

*Included in-person and telephone interviews with elected officials, local agency staff, developers, and community leaders.

analysis of project documents and data, and in-person and telephone interviews with elected officials, developers, city staff, community activists, Chamber of Commerce representatives and other business leaders, members of environmental organizations, news reporters, and other key informants.

In the next section of the paper, three common motivations for imposing exactions are considered. The approaches through which exactions are applied are examined next. Issues raised by exactions are then considered from the varying perspectives of elected officials, developers, public agency staff, and citizens.

MOTIVATIONS FOR EXACTIONS

At least three factors have been involved in the rapid growth in the use of development exactions. By far the most common factor -- in fact, a nearly universal one -- is money: exactions permit local governments to avoid (or at least minimize) public outlays in support of growth. Even in pro-growth areas, taxpayers are usually in no mood to pay higher taxes to help enable new develop ment to occur. Exactions allow this development to proceed unopposed, since the new development is viewed as paying its own way.

But not all exactions are explained by a desire to force development to pay for itself. In a growing number of areas, the quality of life for existing residents has become a major consideration in decisions about development. Environmental concerns and doubts that additional growth will benefit existing residents fuel anti-development sentiments among vocal, and often politically effective, segments of the citizenry. Local governments, in response, adopt exactions which can offset the perceived adverse affects of a proposed development -- either by mitigating project impacts, or by providing other benefits (such as open space, housing for low- and moderate-income families, or in the case of commercial development, jobs programs, space for community events or cultural activities, or amenities such as public art or plazas.) In these cases, the exaction is a quid pro quo -- public support is garnered (or at least opposition is muted) by the additional benefits provided via the exaction.

Finally, in a relatively small number of jurisdictions, exactions are used to restrict development. These exactions operate much like the exclusionary zoning practices of the '60s and early '70s, to keep out all but particular types of development considered "suitable." The exactions may take the form of point systems, high fees, and/or very detailed and numerous performance. Local governments justify these exactions as protecting existing residents and businesses from development (whether residential or commercial) that would impose costs or change the character of the community, while opponents argue that these exactions are selfish, elitist, and unfair.

Each of these motivations for exactions is discussed in more detail below.

<u>Exactions as a Growth-Enabling Strategy</u>

The proliferation of development exactions is in large part due to today's crisis in public finance. Many sources of funding for public infrastructure and services -- the gas tax for streets and highways, for example -- have not kept pace with costs. Federal grants, for a time a major source of funding for new public works, are being discontinued or cut back sharply. Heavy competition for local general funds, along with taxpayer resistance to increases in the property tax or bond indebtedness, make it more and more difficult to finance new projects at the local level.

Taxpayers also are increasingly aware of the need to rebuild existing infrastructure and to assume financial responsibility for services once heavily subsidized via federal and state aid. This adds to their reluctance to take on the burden of financing new infrastructure and services in order to accommodate growth. At the same time, however, they know that the entire community can suffer if there is insufficient infrastructure and services in new developments -- sewer treatment facilities can be overburdened, schools get crowded, streets and highways become congested practically overnight. The public thus has come to insist on adequate public facilities and services as a condition of development approval.

In this context, exactions are a pragmatic way to support continued development while avoiding both new taxes and growing pains. Many Sunbelt cities use exactions as growth-enablers in this fashion. Growth itself is not at issue in these communities; it is seen as supporting the "good life," providing opportunities for social and economic advancement and greater freedom of choice. Experiences with poorly planned or executed growth, however, have led these communities to insist on a full complement of infrastructure to properly support proposed development projects. Exactions are used to assure that the needed infrastructure is in place.

Several characteristics are often exhibited when exactions are used primarily for fiscal reasons in a pro-growth environment. First, the exactions tend to be for basic infrastructure and services -- roads, water and sewer facilities, school and park sites. Exactions commonly considered amenity rather than necessity -- public art, for example -- are rare, as are social welfare exactions (such as child care centers, or jobs programs.)

Second, there usually is a straightforward technical basis for the exactions, both to support their imposition and to determine the magnitude of the needed exaction. A good example of this is Broward County, Florida's, analysis system for predicting the number of trips that would be generated by a new development, identifying what road improvements, if any, would be needed to handle those trips, and calculating the fee needed to pay for the necessary improvements.

Third, the exaction requirement (or the procedure for calculating it) is spelled out in a local ordinance or regulation, so that developers can easily estimate the impact of the requirement on their proposed projects. This allows the developer to include the costs of the exaction in project planning, and also tends to assure consistency of treatment from developer to developer.

Fourth, the exactions are nearly always designed to minimize their cost to the developer. Requirements are usually due at the latest possible moment, so that they need not be financed out of construction loans or cash on hand, but rather through permanent loans or as the development is sold or leased. For example, impact fees or off-site improvements can be made a condition of occupancy rather than a requirement for subdivision recordation or issuance of building permits.[5]

Finally, growth-enabling exactions often involve cost-sharing. The developer may be asked to bear only part of the cost of the infrastructure or services the proposed development is predicted to necessitate; the local government gives the development credit for future tax payments or assumes a portion of the cost (sometimes using state or local grants or subventions for these purposes). For example, Montgomery County, Maryland, picks up half the cost of road projects needed to handle new development.

Overall, when the issue is simply one of money, local governments' exaction policies tend to be technically rational, and to make the exaction as painless as possible for the developer.

Exactions as Quid Pro Quo: Fending Off Anti-Growth Sentiment

Very different motivations and political processes are found in communities where consensus about development policy has broken down and elected officials must contend with anti-growth factions. In these communities, even if a development will not impose direct monetary costs on existing residents, it may be seen as imposing costs of other kinds -- decreases in amenity and changes in the character of the community to the detriment of existing residents' interests. If the proposal is for housing, crowding in schools and loss of open space and views may be major issues; if it is for office development, complaints may emphasize traffic congestion, loss of light and air, and destruction of historic and architecturally significant buildings.

In the most extreme cases, challenges to development are expressed in broad, far-reaching terms that may threaten the entire pro-development stance of the city. For example, in the bitter campaigns about downtown development in San Francisco, highrise opponents forcefully argued that downtown development was benefitting only developers and their backers, including numerous overseas investors, and not the city as a whole; they also challenged the city's analyses which showed that downtown development generated new jobs and net revenues for the city, and produced their own analysis showing that the highrises were a drain on public resources.[6] In Boston, activists claimed that the jobs being created didn't match local employment needs, and argued that additional downtown development would exacerbate gentrification and displacement of existing low- and moderate-income residents, especially families.[7]

Under such circumstances, local officials -- and often developers themselves -- search for actions that respond to citizen concerns and thus can offset or ameliorate anti-development pressures. They usually focus on specific aspects of growth opponents' complaints in the search for ways of appeasing them. For example, the response to an argument that jobs in new office projects don't correspond to the needs of the unemployed might be a requirement that residents be given preference in hiring for a share of the entry-level positions. In response to complaints about mounting traffic congestion, the requirement might be for the developer and subsequent building owners and occupants to implement programs which reduce the number of trips generated. Housing linkage programs, in which office developers contribute to a fund for low- and moderate-income housing, might be the response to opponents who fear gentrification.

Since opposition-deflecting exactions are devised to respond to the specific issues raised by a particular development, they are usually negotiated case by case and tend to vary from development to development. Some of these exactions, especially the more unusual ones, are characterized by the local officials or developers who propose them as "interim" or "experimental". Interim measures can be applied to development projects seeking approval while a special study is carried out to determine the effects of development on the community and identify ways of managing these effects. Experimental programs, or demonstration projects, allow deferral of decisions on whether to apply the program to other developments until the effects of the demonstration can be reviewed (which, if the issue wanes, may end up being a low-priority activity.) For example, a housing linkage or traffic-management requirement may be applied to one major development, with application to other developments held off until the effects at the demonstration site can be evaluated and a staff report on the subject can be prepared.

Broader exaction policies often are produced in election years, when growth can become a campaign issue, as well as when a major development project requiring discretionary action by city officials is under consideration. In both situations development policy is highly visible, making it easier for interest groups to apply pressure.

Election-year exactions permit officials up for election to position themselves as supporting managed, but reasonable, growth, and, in cases where growth management candidates are elected, permit the new office holders to demonstrate that they are carrying through on their promises. Thus, challenges mounted by progressive/neighborhood council candidates led to the seated council's adoption of traffic mitigation requirements in Los Angeles; the threatened passage of growth control initiatives spurred the passage of housing linkage and transit fee requirements in San Francisco. Boston's housing and jobs training programs also reflected mayoral campaign issues and commitments.

Election-politics exactions are not necessarily the most onerous or far-reaching ones, however; exactions negotiated when a controversial project seeks a variance or rezoning probably claim that distinction. In Berkeley, for example, public outcry over a large office project needing special approvals (variances and rezoning) created the forum for the implementation of housing fees and traffic management programs which, when proposed earlier, had languished without council action. Exactions designed to meet citizen concerns may be more important as symbols of elected officials' and developers' responsiveness than as actual mitigation measures, however. Indeed, some politically responsive exactions appear to be only tenuously related to project impacts, and in any event seem unlikely to mitigate the complaints. This is arguably the case, for example, for Boston and San Francisco's housing linkage fees; they are well below what it would cost to offset the housing impact protested by community groups (an impact which is contested, not only by developers but by some academics as well), but they serve well as a concession to the groups' demands.

Exactions as Growth-Limiting Devices

A third motivation for the use of exactions is to intentionally slow or limit growth. By being costly, or adding time and uncertainty to the development process, these exactions can raise a barrier to development. They are used in some communities as a brake on housing construction, and in others as a hurdle to commercial (especially office) development.

Perhaps the best-known of the growth-limiting exactions are the point systems such as those used in Petaluma, California (recently modified), and Boulder, Colorado. Under these systems, developers compete for a limited number of annual development slots, and are rated and ranked based on the number of points their proposals receive for (among other things) amenities and community services. Less detailed and explicit exactions also can serve to restrict development, or at least price out all but the most upscale projects and determined developers, however -- for example, by making all development subject to discretionary review and thus lengthening and adding uncertainty to the approval process, and/or using worst-case analyses to estimate development impact and set fees.

Commentators have argued that stringent exaction requirements are frequently used by upper-income communities to preserve their exclusivity and protect their favorable financial status.[8] The number of such communities explicitly using exactions as a growth control strategy appears to be relatively small, however. Local government officials in communities with especially stringent or complex exactions characterize their policies as preserving the community's quality of life, and argue that their requirements and fees are higher than those of other communities principally because they have done more detailed and complete fiscal analyses. Local officials also point out that, were the use of exactions restricted significantly, downzoning or other actions limiting the rate and magnitude of development might be adopted in their place.

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Clearly, communities can have multiple, and even conflicting, motives in applying exactions to development projects. Moreover, community policies shift with development impacts and council majorities -- to more onerous ones following the approval of a project that congests a local intersection, for example, or to less onerous ones when the economy is weak and a business-oriented council is in office. Recognizing the political dimensions for exactions, however, should help us better understand the reasons that so many exactions don't conform to strict economic and financial logic.

Table 2. Use of Exactions vs Attitudes Toward Growth: Summary*

	Generally Pro-Growth	Growth Contro-versial	Favors Growth Management	TOTAL
Routinely use exactions -- nearly all developments**	5	11	6	22
Use exactions primarily for projects seeking variances/ exceptions/assistance	7	18	3	28
Rarely/never use exactions	10	2	-	12
TOTAL	22	31	9	62

* Based on 62 telephone surveys of city and county officials conducted in 1985 and 1986. Both attitudes toward growth and use of exactions are as reported by respondents.

** Includes cities and counties that routinely apply exactions to nearly all development of a certain type, e.g., housing or commercial.

APPROACHES TO EXACTIONS

Not surprisingly, the ways in which exactions are formulated and put into effect reflect the underlying motivations for their use; different styles of implementing exactions reflect different political pressures and policy concerns. These differences are especially visible in looking at communities that specify requirements in advance -- primarily ones where growth is not contested -- versus those that negotiate exactions on a case-by-case basis.

Specifying Exactions in Advance

Pro-growth communities, as noted earlier, try to make their exaction policies as rational, predictable, and palatable as possible. One way they do this is to specify their exaction policies in advance, usually through a local ordinance or in regulations.

Specifying development exactions in advance has several advantages. Developers can calculate the requirements that will apply to their projects; similar projects will end up with similar burdens; and local officials can reassure citizens that the policies they fought for in one development case will be applied in future developments. On the other hand, the "one size fits all" nature of exactions specified in advance can result in inappropriate requirements in some instances. Deviations from these requirements, however, can be very visible -- and can become controversial.

In order to give developers some degree of certainty about the requirements they will be expected to meet, while allowing flexibility to adjust to the particulars of the proposed project, some communities are replacing fixed exaction requirements with written, but less rigid, guidelines. These guidelines spell out the reasons for requiring exactions (the community objectives to be met and the standards to be applied), and list the kinds of exactions that normally would be sought in order to meet those objectives and standards. At the same time, procedures for waiving certain requirements, or for imposing additional requirements, are set forth. In this manner, both the local government and the developer know generally what to expect, but have a some freedom to negotiate.

Impact fees are also growing in popularity as a way of giving developers advance notice on exaction requirements while preserving flexibility for the local government. As long as the fees are reasonable, developers often prefer the simplicity of paying impact fees over requirements for specific performance. Local governments also like impact fees: both large and small developments can pay a fair share, without undue burden; the fees can be accumulated and used to fund a major public facility; fees also are easier to administer, because the developer either has paid the fee or not -- questions about quality of performance are avoided.

On the other hand, several local governments report that their fees initially were set too low, so that there wasn't enough money to deliver the projects for which the fees were paid. This created real credibility problems among both developers and citizens.

Negotiating Exactions

Exactions are negotiated by many communities when a variance or rezoning is sought, but some local governments routinely negotiate exactions for most projects. Sometimes a local ordinance or regulation provides guidance concerning the types of exactions that will be sought, the procedures that will be followed in determining the magnitude of the exactions, and so forth. In other cases, staff or a commission has broad authorization to place conditions on project approvals in order to ensure the adequacy of public facilities, mitigate impacts, and/or assure that the project will be in the overall public interest.

Jurisdictions that prefer to negotiate exactions argue that negotiation allows requirements to be closely matched to impacts, and that other adjustments can be made in order to account for peculiarities in a development project's circumstances. Local officials also point out that because a high percentage of development proposals involve a request for a variance or rezoning, some negotiation would be necessary even if exactions ordinarily were spelled out in regulations. Thus bargaining on the full set of exactions is only marginally more work, and increases the opportunities for reaching a mutually beneficial agreement.[9]

On the other hand, negotiations can be time-consuming and can require data and analyses that are beyond local government capabilities. Negotiated developments also may call for bargaining skills not all local governments have on staff. Consultants therefore are used in a growing number of cases, both by the city and by the developer.

In many localities, the process of exaction negotiations is becoming increasingly complex. In California, where many local governments negotiate conditions of development approval on a regular basis, it has become common to find competing plans, environmental studies, traffic analyses, and so on -- one set done for the developer, another set done for the local government, and at times, a third set done for citizen groups with a strong interest in the outcome. Major projects negotiated in this manner may take years to reach agreement. And as agreements accumulate, some cities have found that keeping track of the different development agreements is a major administrative task.

Some local officials with experience in negotiating exactions are skeptical that it is the best approach from the local jurisdiction's perspective. They think that developers often have the upper hand in the bargaining, and relate tales of local officials who agreed to conditions that later proved to be unenforceable, or too costly to monitor, or undesirable. They also express doubts about the fairness of having widely varying requirements on similar projects.

Not surprisingly, most developers dislike negotiated exactions. Developers argue that the uncertainties inherent in negotiations make it difficult to cost-out projects and can create problems with project financing. And like their public counterparts, developers also point out the potential for inequity and abuse.

Interestingly, while elected officials and city staff often argue that negotiating exactions allows them to better protect the public interest, neighborhood and environmental groups are often suspicious of these negotiations. In their view, negotiations are often the point at which local government makes concessions to developers -- allowing greater density in return for developer contributions of land or infrastructure financing, for example. Increasingly, citizen groups are demanding that negotiations be subject to public scrutiny and review. Berkeley has actually put citizen representatives on the negotiating teams for major development projects, and Boston has required that citizen groups have technical assistance in the deliberations over a major development project.

CONCERNS ABOUT EXACTIONS

As the above discussion suggests, even though local governments are increasing their use of exactions, all involved -- elected officials, developers, local staff, and community leaders -- express concerns about this policy direction. Their attitudes toward exactions reflect their varying concerns about balancing the local budget and maintaining a livable community, respecting property rights and harnessing growth for the benefit of the community.

Elected Officials' Concerns

A major worry expressed by elected officials is that exactions will drive away development, particularly tax ratables such as office developments and retail complexes. A Concord (California) council member said,

> Developers tell us that if we get too sticky about impact mitigation they won't be able to get financing for their projects. 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 the housing demand but not the taxes.

Indeed, cities that have weak economies make little use of exactions, despite their financial difficulties, largely because their leaders fear exactions could undermine economic development efforts.

Many elected officials also are concerned that exactions could give their community, or themselves personally, an anti-business reputation. Developers and real estate interests are influential in most communities, and they are major contributors to local election campaigns; indeed, many elected officials, particularly in the suburbs, are involved in real estate or allied professions themselves. Maintaining good relations with the development community is important to these officials.

On the other hand, politicians also must keep the voters happy, and increasingly they find themselves having to face constituents who are angry about traffic, crowded schools, and lost open space, and blame these problems on new development. One Marin County (California) supervisor admitted,

> Around here, ballot box downzoning is a real possibility. If developers won't provide the mitigations and amenities that the people want, they may find themselves stopped altogether.

A Montgomery County (Maryland) official had similar views:

> 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.

Some officials also complain that neighborhood groups are selfish and unreasonable in their attitudes toward development and developers. "I believe people have the right to develop their land," one Oakland council member stated. "That isn't a popular view with some of the neighborhood groups, who seem to think developers should [comply with] their every whim."

For politicians, then, exactions involve balancing citizen concerns and developer interests, pursuing revenue-generating development while avoiding adverse impacts likely to generate the wrath of the electorate.

Developers' Concerns

Developers obviously are concerned that the proliferation of exactions will force up costs, reduce profits, and in some markets drastically change the nature of development or stop it entirely. Nevertheless, many developers have been slow to challenge exactions, even when the exactions are not clearly justified. First, they point out, the cost of a challenge often outweighs the cost of simply acceding to the exaction demanded. One developer in California's Napa Valley related that he had been asked to pay for the replacement of a bridge that, by the local government's own admission, was already deficient and would have been replaced at public expense in a few years.

> I could have appealed this requirement, but it would have taken four to six months just to exhaust my administrative remedies. 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, too.

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.

Some developers also believe that exactions can help contain larger conflicts over growth. A Los Angeles developer said,

> A lot of these requirements are not really related to impacts of the project, but they're related to winning public support. So as long as they aren't excessive or actually harmful to the project concept, we try to go along. It's simply a cost of doing business.

Finally, some developers argue that exactions give them more leverage over local governments. As one developer put it,

> ... [S]ince we're mitigating all the social and environmental impacts and paying for all the public services, there's really no remaining legitimate right to challenge the project.

Other developers were less sanguine about "gratuitous" exactions, however, and expressed concerns that acceding to them would open the door to all manner of "extortion." To keep local governments from greedy, abusive practices, they felt, appeals to the state legislature would probably be necessary, as would lawsuits.

Concerns of Local Staff

Local government planners and engineers, along with staff attorneys and sometimes aides to the city manager or mayor, most often carry the administrative load imposed by exactions, and, when exactions are determined on a project basis, often do the negotiating as well. While a majority of those interviewed believe that most exactions are necessary and in the public's interest, they also have a number of complaints about exactions. First, staff are concerned about the difficulties of administering exaction programs. Many commented that analyses to justify exactions are becoming extremely complex, sometimes seeming more like a research project than professional practice. They also complain that elected officials rarely recognize that exactions, especially some of the newer ones for ongoing activities such as traffic mitigation and housing linkage programs, require considerable staff work to set up, monitor, and enforce.

Negotiated versus standard exactions were a matter of considerable disagreement. Some staff members prefer to negotiate exactions; they argue that negotiations allow exactions to be tailored to the specific impacts caused by the project, which are not always foreseeable in advance. Others, however, worry that negotiated exactions lead to a crazy quilt of widely varying requirements from development to development -- creating an administrative nightmare as well as equity issues. In addition, some staffers report that they are outgunned by developers in negotiations. One city planner said,

> 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. They can do studies we can only dream about [and] we just don't have the resources to refute their arguments.

Citizens' Concerns

Neighborhood activists and environmentalists raise still other issues. Some are concerned that the exactions being obtained are not really sufficient to do the job. "Traffic mitigation programs in this town were a farce," one Walnut Creek, California, development foe claimed. "Developers said they'd support ridesharing programs, but all that anyone did was put up posters in the elevators, and the city couldn't do a thing about it." Housing advocates in Boston also expressed concerns about the linkage program. One activist put it,

> There has been a lot of talk about development bringing jobs and tax revenues, but Boston is becoming a place where working class people can't afford to live. The linkage program is just a drop in the bucket unless we can build on it. Unfortunately, a lot of people in power think, "Well, we've taken care of the housing problem, so we can put it aside for the time being." Maybe all we've done is made a gesture toward poor people.

Some activists are beginning to question whether exactions help or hurt their causes. "These infrastructure requirements and mitigation programs make it seem like everything's taken care of," said the representative of an environmental group that strenuously advocates open-space preservation. "But they're allowing growth to continue without the changes in basic direction we sought. People have been taken in by excessively optimistic projections and promises that can't be enforced after the development is in place and occupied." He worried that exactions might actually make it harder to get the business community to participate in future environmental programs or transit financing, because to do so would be seen as "double payment."

SUMMARY AND CONCLUSIONS

Development exactions are being used for a number of purposes. While some communities undoubtedly use development exactions for exclusionary purposes, most use exactions to support continued growth. In many local jurisdictions, particularly those where pro-growth policies are not at issue, exactions serve to assure taxpayers that new development will "pay its own way"; exactions are primarily a financial device. In a growing number of communities, however, exactions also serve to deflect or defuse citizen opposition to development, by mitigating impacts or offering public benefits that otherwise might be hard to come by. Many of these exactions would not be justifiable on strict economic grounds, and many might be difficult to support even using a broader impact mitigation approach. Political realities are nevertheless likely to continue to dictate their use; developers, moreover, are likely to tolerate these exactions and even propose them themselves, because the alternative may be to not develop at all.

Concerns about exactions are many. Public officials worry that exactions will scare away needed development; developers fear that exactions will raise their costs and reduce their profits. City and county staff members fret about mounting paperwork, increasingly intricate forecasts and calculations, and difficult negotiations. Citizen groups wonder if exactions are truly beneficial, or merely empty gestures. All are concerned about the fairness of exactions, although for somewhat different reasons.

Public policy responses to concerns of this sort often place constraints on local government discretion in order to prevent excessive or arbitrary actions. In the case of exactions, one such response might be to require a closer matching of requirements to fiscal impacts, and to insist on consistent treatment of similar development projects. While such rules for exactions might eliminate certain abuses, if imposed too strictly they also could eliminate negotiated exactions that, by winning public support or deflecting opposition, are key to continuing a relatively pro-growth environment.

Certainly, improved procedures for relating exactions to costs and impacts would be useful. But it may also be time to acknowledge the political dimensions of exactions (and of land development in general), and accept them as inevitable, legitimate, even desirable. A place to start might be with the substitution of the term "bargain" or "negotiation" for "exaction" -- a term which, as Kirlin has pointed out, suggests a shotgun to someone's head. Then, perhaps, we can work toward policies and procedures that assure that the agreements reached are indeed mutually acceptable and valuable bargains rather than extortion.

NOTES

[1] Here, the term "exaction" will be used broadly, to include any governmental requirement that a developer dedicate or reserve land for public use, provide a public facility or service, pay a fee in lieu of such dedication, reservation, or provision, or pay a fee to a public fund for public facilities and services. Exactions thus may be on-site or off-site and may include ongoing programs and expenditures as well as capital projects. Exactions may be imposed as part of the subdivision approval process, in rezoning or variance cases, or as conditions of approval of certain uses.

[2] Bauman and Ethier (1987) found in a survey of American practices that nearly two-thirds of the responding local jurisdictions had formal policies regarding on site exactions; about 58 percent had formal or informal off-site exaction policies. Dedications, reservations, and impact fees for roads, parks, schools, public safety, and libraries were commonly imposed. Surveys documenting the particular increase in the use of exactions for transportation purposes include Cervero (1987), who examined California practice, and Colman et al. (1987), who surveyed city and county traffic engineers nationwide.

[3] The law of exactions is discussed in Vance (1986) and Morgan et al. (1986). Snyder and Stegman (1986) and Nicholas (1985) are representative of the literature on economic and financial issues. Duncan et al. (1986) discuss implementation and administrative issues. Policy issues are discussed by (among many others) Porter (1983, 1986); Draper (1986); Stegman (1986, 1987). For discussions of particular types of exactions, see, e.g., Keating (1986), Merriam et al. (1985), and Porter (1985) (housing linkage programs); and Cervero (1986) and Deakin (1984, 1987) (transportation requirements). Numerous articles and reports discuss specific jurisdictions' exactions; see, e.g., the cases in Transportation Research Circular (1986), Porter (1983, 1986), Deakin (1987), Huff (1981), and Knack (1984).

[4] See Deakin (1987).

[5] For many infrastructure projects, setting the exaction due date later may mean that the projects aren't ready when needed. Nevertheless, local governments are often reluctant to force a developer to finance an improvement in the early stages of the development because of the costs it adds to the project.

[6] See Hartman (1984).

[7] See Keating (1986.)

[8] See Frieden (1980).

[9] See Kirlin (1985.)

BIBLIOGRAPHY

1. Bauman, Gus, and William H. Ethier. "Development Exactions and Impact Fees: A Survey of American Practices". Law and Contemporary Problems, Vol. 50, No. 1, Winter 1987, pp. 51-67.

2. Cervero, Robert. Suburban Gridlock. New Brunswick: Center for Urban Policy Research, Rutgers University, 1986.

3. Cervero, Robert. "Paying for Off-Site Road Improvements through Exactions and Special Assessments: Lessons From California". Paper presented at the Annual Meeting of the American Planning Association, New York City, April 1987.

4. Colman, Steven B., et al. "A Survey and Analysis of Traffic Impact Fee Experience in the U.S." Institute of Transportation Engineers District 6, 1987.

5. Deakin, Elizabeth. "Transportation and Land Development: Planning, Politics, and Policy" (forthcoming). Berkeley: University of California, 1987.

6. Deakin, Elizabeth A. "Private Sector Roles in Urban Transportation." ITS Review, v. 8:1, November 1984, pp. 4-8.

7. Draper, Robert. "Impact Fees: A Closer Look". Washington: Federal Highway Administration, 1986.

8. Duncan, James B., et al., "Drafting Impact Fee Ordinances: 30. Implementation and Administration". Zoning and Planning Law Report, Vol. 9, No. 8, September 1986, pp. 57-63.

9. Frieden, Bernard J. "Allocating the Public Service Costs of New Housing". Urban Land, January 1980, pp. 12-16.

10. Hartman, Chester B. The Transformation of San Francisco. Chapter 12, "Highrises and the Anti-Highrise Movement", San Francisco: Rowman & Allanheld, 1984, pp. 261-292.

11. Huff, Nadine. "Negotiating Rezoning Conditions in Fairfax County, Virginia." Urban Land, November 1981, pp. 13-15.

12. Keating, W. Dennis. "Linking Downtown Development to Broader Community Goals: An Analysis of Linkage Policy in Three Cities." APA Journal, Spring 1986, pp. 133-141.

13. Kirlin, John J. "Bargaining for Development Approval." Urban Land, December 1985.

14. Knack, Ruth. "How Impact Fees are Working in Broward County". Planning, June 1984, pp. 24-25.

15. Merriam, Dwight, David J. Brower, and Philip D. Tegeler, eds. Inclusionary Zoning Moves Downtown. Chicago: APA Planners Press, 1985, 240 pp.

16. Morgan, Terry D., et al., "Drafting Impact Fee Ordinances: A Legal Foundation for Exactions." Zoning and Planning Law Report, Vol. 9, No. 7, July-August, 1986, pp. 49-56.

17. Nicholas, James C., ed. Changing Structure of Infrastructure Finance. Cambridge, Massachusetts: Lincoln Institute of Land Policy, 1985.

18. Porter, Douglas R. "The Office/Housing Linkage Issue." Urban Land, September 1985, pp. 16-21.

19. Porter, Douglas R. "Exactions -- An Inexact Science". Urban Land, January 1983.

20. Porter, Douglas R. "Boston's Linkage Program: Sharing or Shackling Downtown Development?" Urban Land, January 1985, pp. 34-35.

21. Snyder, Thomas P., and Michael A. Stegman. Paying for Growth: Using Development Fees to Finance Infrastructure. Washington, D.C.: ULI -- The Urban Land Institute, 1986.

22. Stegman, Michael A. "Development Fees in Theory and Practice". Urban Land, April 1987, pp. 2-26.

23. Stegman, Michael A. "Development Fees for Infrastructure", Urban Land, May 1986, pp. 3-5.

24. Transportation Research Circular No. 311. Development Impact Fees for Financing Transportation Infrastructure. Washington, D.C.: Transportation Research Board, December 1986.

25. Vance, John. "Exaction of Right-of-Way by Exercise of Police Power." National Cooperative Highway Research Program Research Results Digest No. 149, Transportation Research Board, Washington, D.C., January 1986.