January 1985

Mandatory Tithes: The Legality of Land Development Linkage (with N. Stroud)

Fred P. Bosselman
IIT Chicago-Kent College of Law, fbosselm@kentlaw.iit.edu

Mandatory Tithes: The Legality of Land Development Linkage

Fred P. Bosselman* and Nancy E. Stroud**

> At the end of every three years you shall bring forth all the tithe of your produce in the same year, and lay it up within your towns; and the . . . sojourner, the fatherless and the widow, who are within your towns, shall come and eat and be filled; that the Lord your God may bless you in all the work of your hands that you do.[1]

I. Introduction

The voluntary tithe, as a moral obligation designed to encourage successful people to contribute to charitable causes, has ancient roots in the Judeo-Christian tradition. In recent years, the idea of a mandatory tithe for land developers has appeared in the form of local regulations that condition the approval of certain types of land development on the developer's agreement to contribute to certain other types of development that further particular public purposes. For example, someone who wants to build a downtown office building is allowed to do so only by also contributing to the construction of new housing. These programs are often described as "linkage" programs.

This article will review the legal issues posed by linkage programs. To do so it will first look at the historical trends out of which linkage programs evolved. The article describes in more detail the linkage programs in a few communities and compares these programs to related regulatory schemes such as inclusionary zoning, incentive zoning and transfer of development rights. The article then examines federal con-

* B.A., University of Colorado; J.D., Harvard University. Partner - Burke, Bosselman & Weaver, Chicago, Illinois.

** B.A., Indiana University; M.R.P., J.D., University of North Carolina. Partner - Burke, Bosselman & Weaver, Boca Raton, Florida.

This article is prepared as a part of a more extensive study of development exactions, sponsored by the Homer Hoyt Institute at Florida State University.

1. Deuteronomy 14: 28-29 (Rev. Standard ed.).

stitutional issues raised by linkage programs in light of evolving Supreme Court doctrine. Finally, the article reviews the ways in which the courts of different states are likely to approach linkage.

In view of the concern expressed by most developers toward linkage programs, it is ironic that these programs have evolved out of two trends in land use regulation that have been strongly supported by the development industry: (1) the replacement of pre-set zoning regulations with flexible impact analysis techniques, and (2) the search for ways to avoid the exclusionary effect of traditional zoning policies.

II. The PUD Movement

In the 1950's and 1960's one of the most common complaints of the development industry was that traditional zoning regulations were too rigid. The regulations were designed to replicate the development patterns of the 1920's, the era when zoning was born and when the previous boom in land development took place. These regulations assumed that most residential development would take the form of single family houses on individual lots. Office buildings and retail stores would be located in the central business district radiating out from the "prime" corner. Apartments, which were sometimes thought of as a commercial rather than a residential use, were limited to the fringes of the central business district.[2]

The development industry quickly saw that the postwar auto-oriented society was seeking a different product. Inflated land costs were pricing the detached house out of the reach of most potential buyers and creating a demand for clustered housing. The new outlying shopping centers were only the first evidence of a demand for a wide range of commercial, office and light industrial development in areas far from traditional urban cores.[3] Zoning was not designed to encourage the type of development the market then demanded. Minimum lot size and yard requirements made housing expensive.[4] Standard commercial bulk

---

2. *See* Babcock & Bosselman, *Suburban Zoning and the Apartment Boom*, 111 U. PA. L. REV. 1040, 1060-61 (1963).

3. *See* TASK FORCE ON LAND USE AND URBAN GROWTH, THE USE OF LAND: A CITIZENS' POLICY GUIDE TO GROWTH 82-88 (1973) [hereinafter cited as Task Force]; G. FUQUITT, P. VOSS & J. DOHERTY, GROWTH AND CHANGE IN RURAL AMERICA 9-12 (1979); ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, URBAN AND RURAL AMERICA: POLICIES FOR FUTURE GROWTH (1968) [hereinafter cited as ADVISORY COMMISSION].

4. W. WHYTE, THE LAST LANSCAPE 201-02 (1968).

and layout rules gave little guidance for developments that were not tied to existing commercial districts, and rigid use-separation rules often prevented the type of mixed-use development that made the most sense.[5]

The development industry's response was to promote the planned unit development, or PUD, concept.[6] Its proponents argued that once developments achieved a certain size (often five acres) the interrelationship of the various parts of the development became of equal if not greater importance than the relationship to surrounding uses. Because the entire development was being planned as a whole it was possible to control the development through the approval of a master development plan. The availability of this control opportunity meant that traditional yard, lot, bulk and even use regulations could be abandoned, or at least relaxed, in favor of the more flexible evaluation of the proposed master plan in accordance with more general planning principles.[7]

As acceptance of the PUD concept grew, developments in rapidly growing areas increasingly took advantage of this technique.[8] In some instances the PUD concept swallowed up the zoning ordinance that gave it birth and regurgitated it in the form of standards for evaluating the impact of proposed PUDs. These standards carried names such as impact zoning or performance zoning and were designed to replace traditional zoning regulations.[9]

The key policy of the PUD concept was that each development of substantial size deserved to be evaluated on its own merits. The popularity of environmental and fiscal impact analysis during the 1970's led to the evaluation of new development not only on the basis of traditional zoning concerns, such as the impact on immediate neighbors, but on broader environmental policies and on the fiscal health of the community. Such regulatory techniques that use impact analysis as a major

---

5. 2 N. WILLIAMS, JR., AMERICAN LAND PLANNING LAW 229-34 (1974).

6. *See generally* Krasnowiecki, *Planned Unit Development: A Challenge To Established Theory and Practice of Land Use Control*, 114 U. PA. L. REV. 4 (1965); D. MANDELKER, CONTROLLING PLANNED RESIDENTIAL DEVELOPMENTS (American Society of Planning Officials Series 1967); FRONTIERS OF PLANNED UNIT DEVELOPMENT: A SYNTHESIS OF EXPERT OPINION (R. Burchell ed. 1973).

7. Vladeck, *Large Scale Developments and One House Zoning Controls*, 20 LAW & CONTEMP. PROBS. 255 (1955).

8. *See* R. ELLICKSON & A. TARLOCK, LAND USE CONTROLS 265-269 (1981).

9. *See, e.g.*, KENDIG, CONNER, BYRD & HEYMAN, PERFORMANCE ZONING (1980); Yannocone, Jr., Rahenkamp & Cerchione, *Impact Zoning: Altenative to Exclusion in the Suburbs*, 8 URB. LAW. 417 (1976).

component effectively delay the land use controls until the developer's intentions are known.[10]

This new "wait-and-see" type of regulation required a major change in the theory of land use regulation. As originally conceived, land use regulation was to be based on a map dividing the jurisdiction into zoning districts. An ordinance would set forth the criteria under which development could take place in each district. A developer would only need to read the map and ordinance to determine the rules applicable to any particular tract of land.[11] The proponents of this system of regulation justified it because the preparation of a map based on an overall plan of the entire community would provide a reciprocity of benefits to all property owners.[12] Even though use of a particular tract was restricted, the owner obtained the benefits of living in a more orderly and efficient community.[13]

The importance of an overall plan was such a significant element in defense of zoning regulations that the proponents of zoning vigorously opposed any efforts to encourage significant change in the plan through administrative variance.[14] Amendments to the map were permitted, but only under rules designed to discourage changes in small parcels.[15] And regulations devised in response to specific development proposals were prohibited under the label of "contract zoning."[16]

In practice, however, the creation of an "end-state plan" setting forth the future use of land proved extremely difficult.[17] Rapid changes in economic and social conditions forced planners to reevaluate plans regularly or see them become obsolete. It became popular to say that planning should be a process of controlling change rather than a map.[18]

---

10. Task Force, *supra* note 3, at 189.

11. E. BASSETT, ZONING: THE LAWS, ADMINISTRATION, AND COURT DECISIONS DURING THE FIRST TWENTY YEARS, 50 (2d ed. 1940).

12. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922)("[A]n average reciprocity of advantage . . . has been recognized as a justification for various laws"). *See* Lefcoe, *California's Land Planning Requirements: The Case for Deregulation*, 54 S. CAL. L. REV. 447, 457-58 (1981).

13. D. MANDELKER, LAND USE LAW 21-22 (1982). *See* S. TOLL, ZONED AMERICAN 124-26 (1969); R. BABCOCK, THE ZONING GAME 116-20 (1966).

14. *See* E. BASSETT, *supra* note 11, at 121.

15. 1 R. ANDERSON, AMERICAN LAW OF ZONING § 5.17 (2d ed. 1976).

16. *See* E. BASSETT, *supra* note 11, at 184.

17. *See* MODEL LAND DEV. CODE art. 3 commentary (Official Draft 1975).

18. 1 N. WILLIAMS, JR., *supra* note 5, at at 26-27. *See* Rose, *Planning and Dealing: Piecemeal Land Controls As a Problem of Local Legitimacy*, 71 CALIF. L. REV. 837, 874-78 (1983).

Moreover, many elected local government officials learned that the map was a handicap. If all the rules were pre-established by the map and accompanying regulations, the developer would not need the approval of the local legislative body before undertaking a project. And if the project proved unpopular with the public the elected official would take the heat without having been able to stop the project.[19]

This handicap could be avoided, however, by preparing a map classifying most undeveloped land into some relatively restricted category, forcing each developer to seek an amendment from the legislative body. When the National Commission on Urban Problems studied the subject in the late 1960's, they discovered a dramatic shift toward this type of wait-and-see zoning.[20]

Because wait-and-see zoning was hard to square with the overall plan theory on which zoning was originally based,[21] new techniques such as planned unit development were devised to legitimize the process.[22] But many communities continued to rely on the process of rezoning in response to each major development, knowing that potential challenges to the legitimacy of the process would be difficult and time-consuming.[23]

Bargaining between developer and local government became the way the regulatory process worked. It evolved in that way because both sides get some benefits out of a bargaining process. The developer benefits by being able to buy land that is not predesignated for intensive development and thus does not command as high a price as it otherwise would. The elected official benefits by retaining legislative discretion to discourage development disliked by the voters and to obtain contributions from developers toward the construction of public facilities. The process of bargaining over the impact of each development proposal has become so common that some respected commentators have suggested that zoning be abolished and replaced with a more tightly regulated bargaining process.[24]

As bargaining became a way of life, however, the predictability of land use regulation obviously declined. From the perspective of the lo-

---

19. *See* R. ELLICKSON & A. TARLOCK, *supra* note 8, at 59.
20. ADVISORY COMMISSION, *supra* note 3, at 206-07.
21. *Id.* at 223-24.
22. *See supra* note 6 and accompanying text.
23. C. PETERSON & C. MCCARTHY, HANDLING ZONING AND LAND USE LITIGATION: A PRACTICAL GUIDE 234-45 (1982).
24. *See* Krasnowiecki, *Abolish Zoning*, 31 SYRACUSE L. REV. 719 (1980).

cal government, wait-and-see regulation would work only if the government retained legislative discretion to approve or deny the developer's request. Such discretion would give the government the flexibility to ask for an unlimited range of design changes, contributions or other "sweeteners" from the developer without being bound by any set of prearranged rules. The local governing body would merely need to suggest that the absence of such sweeteners would mean disapproval of the development proposal. The developer was left with the unenviable choice of complying or challenging on the basis of an abuse of legislative discretion.[25]

While some communities dealt with developers on a purely *ad hoc* basis, others took the initiative to define in advance the types of sweeteners they were looking for by names such as "incentive zoning." Incentive zoning is the term usually used to define those regulations that permit a developer to exceed the bulk or density standards otherwise controlling if the development is designed to include some specific feature that promotes a particular government policy.[26]

The desired feature that started the incentive zoning trend was the downtown plaza. Seeing a need for more open spaces in the "canyons" of Manhattan, New York City's planners allowed the developers of Lever House to exceed the height limitations in exchange for the installation of a plaza at street level.[27] A decade later windswept plazas at the base of Miesian slabs became the norm.[28] Dazzled by their success, New York City's planners began giving similar incentives or bonuses to developers who put shopping arcades, theaters, and a wide range of other uses in their buildings.[29]

An outgrowth of incentive zoning is transfer of development rights (TDR), a term used to describe a wide variety of programs. The more

---

25. Task Force, *supra* note 3, at 189-91. *See* J. JUERGENSMEYER & J. WADLEY, ZONING ATTACKS AND DEFENSES: THE LAW IN FLORIDA 31-33 (1980).

26. Mandelker, *The Basic Philosophy of Zoning: Incentive or Restraint*, in THE NEW ZONING: LEGAL, ADMINISTRATIVE AND ECONOMIC CONCEPTS AND TECHNIQUES 14 (N. Marcus & M. Groves eds. 1970).

27. Elliott & Marcus, *New Directions In Land Development Controls*, 1 HOFSTRA L. REV. 56 (1973).

28. *See* A. SPIRN, THE GRANITE GARDEN: URBAN NATURE AND HUMAN DESIGN 77-79, 247 (1984); C. WEAVER & R. BABCOCK, CITY ZONING: THE ONCE AND FUTURE FRONTIER 61-62 (1979).

29. Weaver & Babcock, *supra* note 28, at 300-02. *See* Weinstein, *How New York's Zoning Has Changed To Induce the Construction of Legitimate Theaters* in THE NEW ZONING, *supra* note 26, at 131.

sweeping TDR systems demand that developers seeking to build more than certain specified quantaities of development in a particular "transfer" area must buy up the equivalent rights to develop property from a "preservation" area that the government is trying to protect from development.[30] These TDR programs seek to make the development industry bear the cost of preserving landmarks or agricultural land by apportioning a relatively small share of those preservation costs to each developer who seeks to build at the density levels designed for the transfer areas.[31]

In many communities, the bargaining process is much more freewheeling than in these more structured systems, and the actual power wielded by the local government is much greater than the case law might lead one to believe.[32] This has led to a number of proposals for change in the system to reduce the extent of legislative discretion in reviewing individual development proposals.[33] The desire for change was stimulated in a large part by the exclusionary nature of many of these regulations.

III. Exclusionary Zoning

The highly discretionary land use controls encouraged by the PUD movement helped those who sought to keep minorities out of rapidly growing areas by making it extremely difficult to challenge the exclu-

---

30. D. HAGMAN & D. MISCZYNSKI, WINDFALLS FOR WIPEOUTS: LAND VALUE CAPTURE AND COMPENSATION 533-51 (1978); Costonis, *Development Rights Transfer: An Exploratory Essay*, 83 YALE L.J. 75 (1973); Carmichael, *Transferable Development Rights As a Basis for Land Use Control*, 2 FLA. ST. U.L. REV. 35 (1974); Bozung, *Transfer Development Rights: Compensation For Owners Of Restricted Property*, 6 ZONING & PLANNING L. REP. 129 (1983).

31. For a more critical evaluation of the TDR concept see Note, *The Unconstitutionality of Transferable Development Rights*, 84 YALE L.J. 1001, 1113-21 (1975); Gale, *The Transfer of Development Rights: Some Equity Considerations*, 14 URB. L. ANN. 81, 88, 96 (1977); R. ELLICKSON & A. TARLOCK, *supra* note 8, at 701. Professor Norman Williams suggests that such programs "clearly open up increased opportunities for either (a) carrying out a rational program on the allocation of density, or (b) graft and corruption on really large scale." WILLIAMS, *supra* note 5, at 376.

32. *See* R. ELLICKSON & A. TARLOCK, *supra* note 8, at 234-80.

33. *See, e.g.*, Fasano v. Bd. of Comm'rs of Washington County, 264 Or. 574, 507 P.2d 23 (1973); COUNCIL FOR DEVELOPMENT CHOICES IN THE '80S, THE AFFORDABLE COMMUNITY: GROWTH, CHANGE AND CHOICE IN THE '80S 88-90 (1981); HOUSING FOR ALL UNDER LAW 408-10 (R. Fishman ed. 1978) [hereinafter cited as HOUSING FOR ALL]; J. JUERGENSMEYER & J. WADLEY, *supra* note 25, at 77-79; MODEL LAND DEV. CODE §2-201-§2-212 (Proposed Official Draft 1975).

sionary aspect of the regulations. The standing hurdles, the problems of proof and the high cost of such cases has meant that exclusionary zoning can be proven only in cases where the violations were repeated and blatant,[34] despite the fact that the Supreme Court interpreted the Civil Rights Act of 1968 to permit actions against communities that employed a pattern of zoning practices designed to exclude minorities.[35]

As the issue of exclusionary zoning became a subject of general public discussion, some of the more rapidly growing local governments concluded that their exclusionary zoning policies were having an adverse effect on their own communities. When they discovered that they could not hire policemen, firemen and school teachers from within their own boundaries, some of the larger jurisdictions began to ask developers to reserve a specific, small fraction of new units in each development for federally subsidized housing. Such a policy became known as "inclusionary zoning."

The policy basis for this approach grew out of the "critical mass" and "tipping point" theories that had been propounded by observers of racial and ethnic population movements. A modest number of minority group members could be integrated into a neighborhood without having substantial adverse effect, but if the numbers reached a "tipping point" the original residents would flee. When this theory was applied to housing there was an assumption that so long as the great majority of the housing stock could be maintained at a price and quality level sufficient to form a "critical mass" the introduction of a small percentage of subsidized housing for lower income groups would not cause a substantial decline in neighborhood property value.[36]

---

34. Warth v. Sedlin, 422 U.S. 490 (1975); Hope, Inc. v. County of Du Page, 738 F.2d 797 (7th Cir. 1984) (en banc); United States v. City of Parma, 494 F. Supp. 1049 (N.D. Ohio 1980), *modified*, 661 F.2d 562 (6th Cir. 1981), *cert. denied*, 456 U.S. 926 (1982). *Compare* HOUSING FOR ALL, *supra* note 33, at 126-31, *with* Silverman, *Housing for All Under Law: The Limits of Legalist Reform*, 27 U.C.L.A. L. REV. 99, 114-20 (1979). *See also* Lamb & Lustig, *The Burger Court, Exclusionary Zoning, and the Activist-Restraint Debate*, 4 U. PITT. L. REV. 169 (1978); Mandelker, *Racial Discrimination and Exclusionary Zoning: A Perspective on Arlington Heights*, 55 TEX. L. REV. 1217 (1977). *See generally* D. MOSKOWITZ, EXCLUSIONARY ZONING LITIGATION (1977).

35. Village of Arlington Heights v. Metropolitan Housing Development Corp., 429 U.S. 252 (1977).

36. *See* Kleven, *Inclusionary Ordinances—Policy and Legal Issues in Requiring Private Developers to Build Low Cost Housing*, 21 U.C.L.A. L. REV. 1432 (1974). A recent summary of local inclusionary ordinances is found in A. MALLACH, INCLUSIONARY HOUSING PROGRAMS: POLICIES AND PRACTICES 196-264 (1984).

Inclusionary zoning ordinances were adopted by a number of the larger local governments where substantial growth was taking place during the early 1970's. These ordinances required (or in some case, offered incentives for) the inclusion of a percentage of subsidized low income housing in each housing development. Among the communities adopting this type of ordinance were a number of the jurisdictions surrounding Washington, D.C. and a number the large and growing southern California communities.[37] Inclusionary zoning received a setback in 1973 when the Virginia Supreme Court found the Fairfax County ordinance to be invalid under the Virginia Constitution.[38] Because of the Virginia Supreme Court's long history of antipathy to local government regulation,[39] the decision wasn't treated very seriously in states like California where the state courts were at the opposite end of the spectrum.[40] But in more conservative states, the Virginia decision was viewed as a roadblock to experimentation with inclusionary zoning.[41]

The withdrawal of federal housing subsidies under the Reagan administration eliminated any pretense that inclusionary zoning could be accomplished in a cost-free manner.[42] In the absence of subsidies, inclusionary zoning would subject developers to a major financial burden.[43] Searching for a more satisfactory approach, local governments have begun the transformation of inclusionary zoning from a regulatory tool imposed on the residential development industry to an exaction imposed on non-residential development.

---

37. Kleven, *supra* note 36, at 1439-46.

38. Bd. of Supervisors of Fairfax Co. v. DeGroff Enter., 214 Va. 235, 198 S.E.2d 600 (1973).

39. Richards, *Zoning for Direct Social Control*, 1982 DUKE L.J. 761, 831.

40. Hagman, *Taking Care of One's Own through Inclusionary Zoning: Bootstrapping Low- and Moderate-Income Housing by Local Government* 5 URB. L. & POL. 169 (1982).

41. *See, e.g.*, Note, *Board of Supervisors v. DeGroff Enterprises, Inc.: A Case of Inclusionary Zoning*, 60 IOWA L. REV. 413, 418 (1974); H. FRANKLIN, D. FALK & A. LEVIN, INZONING: A GUIDE FOR POLICY-MAKERS ON INCLUSIONARY LAND USE PROGRAMS 33, 139 (1974); R. BURCHELL, MT. LAUREL II: CHALLENGE AND DELIVERY OF LOW COST HOUSING 351 (1984); J. JUERGENSMEYER & J. WADLEY, *supra* note 25, at 148-53 (1980).

42. *See* Baade, *Required Low-Income Housing in Residential Developments: Constitutional Challenges to a Community Imposed Quota*, 16 ARIZ. L. REV. 439, 445, 460 (1974).

43. *See* A. MALLACH, *supra* note 36, at 86-103; Muth, *Redistribution of Income Through Regulation in Housing*, 32 EMORY L.J. 691, 707-10 (1983).

IV. Linkage Programs

Job-generating facilities, such as office parks or industrial development, can more easily be shown to create a need for low-income housing than residential development does. If an exaction is to be imposed, should not commercial and industrial development pay rather than residential development?[44] Should communities be allowed to encourage development that would create jobs but forbid the housing needed by the workers?

In 1980 the City of San Francisco began implementing a linkage program to encourage office developers to build housing.[45] Specifically, under the Office Housing Production Program developers of office buildings containing more than 50,000 square feet are required to build or finance the amount of new housing in the City that will be needed to house the office workers generated by the development. The requirement is based on the following assumptions: office use generates one employee per two hundred and fifty square feet; forty percent of all office employees in San Francisco reside in San Francisco; and 1.8 working adults occupy each residential unit. This generates a requirement of approximately nine new dwelling units per 10,000 square feet of office space.[46]

The new housing can be for people of any income level, but the developers are given incentives to produce modestly priced housing by allowing them to provide fewer units if the units are for moderate income people. There are no restrictions on the location in San Francisco in which the housing must be built. As alternative to building housing, the developer may contribute to a municipal housing trust — known as the Shared Appreciation Mortgage Pool. The amount of contribution is 6,000 dollars for each housing unit required. The trust funds are used to reduce mortgage payments of low and middle income house buyers.[47] As of April 1984, the City of San Francisco states that its pro-

---

44. *See* Ellickson, *The Irony of Exclusionary Zoning*, 54 S. CAL. L. REV. 1167 (1981).

45. A. MALLACH, *supra* note 36, at 180-85; Tegeler, *Developer Payments and Downtown Housing Trust Funds*, 18 CLEARINGHOUSE REV. 679, 682-83 (1984); Diamond, *The San Francisco Office-Housing Program: Social Policy Underwritten by Private Enterprise*, 7 HARV. ENVTL. L. REV. 449 (1983).

46. D. MARINO, STRATEGIES FOR LINKED DEVELOPMENT: AN EXAMINATION OF APPROACHES IN OTHER CITIES 3 (Chicago Dept. of Planning Report, Dec. 6, 1984); Diamond, *supra* note 45, at 428.

47. For example, (a) two housing credits per affordable unit for moderate-in-

gram has generated almost 3000 units of housing, a majority of which were for low and moderate income families. In addition, the trust fund has accrued approximately five million dollars.[48] Despite its success, critics have continued to argue that San Francisco's program ought to be oriented exclusively toward moderately priced housing, and studies are currently underway that may lead to revision of the program.[49]

Boston has now adopted a linkage program based on a somewhat similar analysis. The Boston program applies to developers of office, retail, hotel and institutional facilities and to developers of any use which will reduce the amount of existing low and moderate income housing. The threshold for application of the program is 100,000 square feet of floor area. Each such developer must pay a fee of forty-two dollars per square foot of floor area at the time the certificate of occupancy is issued, and must contract to pay a similar fee in each of the subsequent eleven years.[50] The fee is to be turned over to a neighborhood housing trust to be used for the development of low and moderate income housing. The fee amounts to five dollars per square foot spread out over a twelve-year period in equal payments.[51] The first major project to which the fee is being applied is a 326 million dollar

---

come households built using governmental financial assistance, provided the developer contributes to the construction costs; (b) three housing credits per affordable unit for moderate-income households provided without government operating subsidies; and (c) four housing credits for low-income households provided without government operating subsidies. A. MALLACH, *supra* note 36, at 181-83; Diamond, *supra* note 45, at 458-59.

48. D. MARINO, *supra* note 46, at 4; Sedway, Inclusionary Zoning Conference Presentation on the San Francisco Office Housing Production Program (Oct. 4, 1983) (unpublished manuscript available from the authors). The impact of office development in downtown San Francisco has been a source of other litigation. *See* San Franciscans for Reasonable Growth v. City and County of San Francisco, 151 Cal. App. 3d 61, Cal. Rptr. 634 (1984). For a historical perspective see Svirsky, *San Francisco: The Downtown Development Bonus System* in THE NEW ZONING, *supra* note 26 at 139.

49. D. MARINO, *supra* note 46, at 5. In December 1983, the city of Santa Barbara adopted a housing mitigation policy with emphasis on low and moderate income housing. *See* Burch, Bozung, Miller & Hill, *Land Use Controversies: Public Use and Private Beneficiaries*, 16 URB. LAW. 713, 719-21 (1984).

50. Tegeler, *supra* note 45, at 684; D. CONNERS & E. WODLINER, DEVELOPMENT EXACTIONS: ATTACK AND DEFENSE 375-79 (Land Use Regulation and Litigation Course of Study Materials 1984); ADVISORY GROUP, LINKAGE BETWEEN DOWNTOWN DEVELOPMENT AND NEIGHBORHOOD HOUSING, (Report to the Mayor of Boston, Oct. 1983).

51. Werth, *Tapping Developers*, PLANNING, Jan. 1984, at 21, 23. Because the payments are spread out over such a long term no actual housing is expected to be built until 1986. D. MARINO, *supra* note 46, at 7.

International Place office complex built by the Chiofaro Company in downtown Boston.[52]

In both San Francisco and Boston there has been considerable concern about the extent to which state law authorizes these cities to undertake linkage programs. The contributions in San Francisco have been negotiated by the planning commission as part of the site plan review process; there do not appear to have been any cases testing the validity of this exercise of the power.[53] In Boston, the program was established by an ordinance creating a development impact district, but the advisory group recommended a number of state statutory changes to assure that the program has proper authorization. An earlier inclusionary program in a suburb of Boston was found to lack statutory authorization.[54]

V. Federal Law

Linkage programs and their close relatives all involve exactions imposed on developers for the purpose of solving problems far broader than any problems created by a particular development. As a vehicle for examining the federal law issues arising out of linkage programs it is appropriate to examine in detail a recent Ninth Circuit case arising out of the City of Klamath Falls, Oregon.

The plaintiff asked Klamath Falls to rezone his land to permit the construction of 214 garden apartments. Before the plaintiff could develop the property, however, the city needed to vacate some paper streets that had been dedicated to the city years ago. During negotiations with the city over the plaintiff's request for a street vacation, the city asked him to dedicate a strip of land for the widening of a city

---

52. According to an article in the New York Times, this project is expected to contribute $8.5 million over the next twelve years to the housing trust for neighborhood development. N.Y. Times, Mar. 21, 1984, at 16, col. 1.

53. *See* D. CONNERS & E. WODLINGER, *supra* note 50, at 377. The fact that the program may be used to construct housing at any price level means that the city must argue that the construction of any type of housing is a public purpose, even if the housing is for wealthy people, because of a filter-down process. *See* Diamond, *supra* note 45, at 470.

54. D. MARINO, *supra* note 46, at 8. *See* Middlesex of Boston St. Ry. Co. v. Bd. of Alderman of Newton, 371 Mass. 849, 359 N.E.2d 489 (1976). For a discussion of potential statutory authority in New York see Comment, *Zoning New York City To Provide Low and Moderate Income Housing: Can Commercial Developers Be Made To Help?*, 12 FORDHAM URB. L.J. 491 (1984).

street adjacent to his property. Located on this land was a geothermal well from which plaintiff hoped to obtain steam to heat the apartments he would be constructing. He offered to dedicate to the city an easement on the surface of the property which would allow the city to widen the street, but he refused to convey to the city the rights to the underground well. The city was attempting to set up a geothermal utility district to provide heat and power to the public generally, and the city refused to vacate the street unless plaintiff conveyed his geothermal well to the city.

The plaintiff brought a section 1983 action in the federal district court, which ruled in favor of the city on motion for summary judgment. The Ninth Circuit Court of Appeals reversed, remanding the case back for trial on all of the major issues. In the process, the court interpreted the relevant law in a manner quite favorable to the plaintiff, finding that he had stated a valid complaint under the constitutional clauses protecting against the taking of property without compensation, against violations of due process of law, and against denial of equal protection of the laws.[55]

The court treated the case as equivalent to a subdivison exactions case in which a developer is being asked to contribute land or money in exchange for needed governmental permission. Citing Supreme Court decisions on "unconstitutional conditions," the court stated that the government cannot condition a privilege on a requirement that the applicant give up constitutional rights. In this instance, said the court, the plaintiff was being asked to give up his property rights in a geothermal well in exchange for a street vacation. Such a condition would be acceptable only if there were some reasonably identifiable connection between the city's need for the geothermal well and the purpose underlying the law requiring permits for street vacations. Finding no such relationship, the court ruled that plaintiff had stated a valid claim under section 1983 of the Civil Rights Act of 1964 for violations of due process, equal protection and taking of property without just compensation.

The court's rationale effectively transforms every subdivision exaction case into a potential claim under section 1983, which can be used to obtain damages and attorney's fees for successful plaintiffs and can be brought in either the state or federal courts. The availability of damages and attorney's fees substantially increases the stakes for local

55. Parks v. Watson, 716 F.2d 646 (9th Cir. 1983).

governments in exactions cases. Formerly, if local governments incorrectly predicted which exactions a court would approve, the penalty was usually only the return to the developer of the property or money exacted. Moreover, in states like California, which is within the jurisdiction of the Ninth Circuit Court of Appeals, the state courts have been highly unreceptive to developers' complaints about the dramatic increases in development fees and taxes that have been instituted following Proposition 13. Under the logic of the Parks opinion, these cases can now be brought in the federal courts where the developer may find a more sympathetic ear.[56]

The majority's analysis in *Parks v. Watson*[57] is substantially identical under both the taking and equal protection clauses. In *Parks* a taking was found because the well donation requirement "had no rational relationship to any public purpose related to the vacation of the public streets,"[58] and a violation of equal protection was found because the well donation requirement "is totally unrelated to [the City's] statutorily defined interest in determining whether to . . . [vacate the streets]."[59]

Surpisingly perhaps, the court did not consider whether under the *Loretto* test a "permanent physical occupation" of the well was being demanded by the city.[60] Ironically, the application of such a test might have the effect of inhibiting some of the most traditional forms of exactions, including the dedication of internal streets in a subdivision, while leaving linkage programs untouched.[61] Instead, the court applied the taking clause indirectly, through the unconstitutional conditions doctrine, by analogizing the case to one involving subdivision exactions. The court discussed the older Illinois rule and, as its counterpart, a

---

56. *See also* Martino v. Santa Clara Valley Water Dist., 703 F.2d 1141 (9th Cir. 1983), *cert. denied*, ___ U.S. ___, 104 S. Ct. 151 (1983). In regard to potential abstention by the Ninth Circuit in land use cases, compare Playtime Theaters, Inc. v. City of Renton, 748 F.2d 527, 532-33 (9th Cir. 1984), *cert. granted*, ___ U.S. ___, 105 S. Ct. 2015 (1985), with Kollsman v. City of Los Angeles, 737 F.2d 830 (9th Cir. 1984).

57. 716 F.2d 646 (9th Cir. 1983).

58. *Id.* at 655.

59. *Id.* The dissenting judge viewed the street vacation as a conveyance of public property rather than the issuance of a permit, and would have upheld the city's actions under the broad discretion given to a public body to negotiate the price of property it sells. *Id.* at 665-69 (Wallace, J., concurring in part and dissenting in part).

60. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

61. *See* Costonis, *Presumptions and Per Se Takings: A Decisional Model For the Taking Issue*, 58 N.Y.U. L. REV. 465, 494 and n.120 (1983).

California case that requires only that the exaction have some relationship to the needs created by the subdivision. The court summarized its discussion by saying that "there is agreement among the states 'that the dedication should have some reasonable relationship to the needs created by the sub-division.' "[62] The court cited as examples of interests having at least some relationship to street vacation the "control of traffic, pollution or access."[63]

Whether the *Parks* opinion is part of an emerging trend toward more serious analysis of the rational relationship of governmental regulations to the purposes they purport to serve remains to be seen. Recent Supreme Court decisions, such as *Zobel v. Williams*,[64] in which the court found no rational basis for an Alaska law apportioning surplus mineral income among the state's residents on the basis of the length of time they have lived in the state, and *City of Cleburne v. Cleburne Living Center*,[65] in which the court found no rational basis for special restrictions on homes for retarded people, can be analyzed as cases in which the Court saw no adequate linkage between the government regulation and the public purpose to be served.[66] Professor John Costonis has also recently argued that the Supreme Court's taking clause decisions pay special attention to the linkage between the purpose of the regulation and the use of the affected property.[67] When such a linkage is absent, he argues, the Court is more likely to find a regulation invalid because it is "loading up on one individual more than his just share of the burdens of government. . . ."[68]

---

62. *Parks*, 716 F.2d at 653 (quoting Call v. City of West Jordan, 606 P.2d 217, 220 (Utah 1979)).

63. *Parks*, 716 F.2d at 651 n.1.

64. 457 U.S. 55 (1982). *See also* Logan v. Zimmerman Brush Co., 455 U.S. 422, 442 (1982)(Blackmun, J., concurring). *See also id.* at 444 (Powell, J., concurring).

65. 53 U.S.L.W. 5022, 105 S. Ct. ____ (1985).

66. *See also* Hooper v. Bernalillo County Assessor, 53 U.S.L.W. 4827 105 S. Ct. ____ (1985); Williams v. Vermont, 53 U.S.L.W. 4659, 105 S. Ct. ____ (1985); Metropolitan Life Insurance Co. v. Ward, 53 U.S.L.W. 4399, 105 S. Ct. ____ (1985).

67. Costonis, *supra* note 61, at 486-88. *But see* Tarlock, *Regulatory Takings*, CHI. KENT L. REV. 23, 33 (1984). Professor John Humbach would find no taking whenever linkage-related affirmative obligations were imposed on a developer. Humbach, *A Unifying Theory For the Just-Compensation Cases: Takings, Regulation and Public Use*, 34 RUTGERS L. REV. 243, 278-79 (1982).

68. Monongahela Navigation Co. v. United States, 148 U.S. 313 (1893), *quoted in* Costonis, *supra* note 61, at 486. Professor Costonis cites Prune Yard Shopping Center v. Robins, 447 U.S. 74 (1980) and Penn Central Transport Co. v. City of New

Although neither of these trends can be described as well established, they suggest that it is at least worthwhile to examine developer exactions against a more rigorous standard of "reasonable relationship" to determine whether certain types of exactions are more likely to be at risk than others.

The conventional forms of developer exactions seem relatively safe under this type of scrutiny, assuming that the cost to the developer does not reach the degree of magnitude necessary to constitute a denial of all beneficial use of the land — a test not easily found to be violated.[69] Even exactions for less traditional public services might well be upheld if the services were in fact needed by the proposed development. If an impact fee for geothermal heat distribution were imposed at the time of development approval, and if the city were in fact proposing to supply geothermal heat to the development, a court might well find a reasonable relationship between the regulation and the exaction.[70]

In summary, more rigorous scrutiny of the rational relationship test may make it difficult to justify exactions designed to resolve broad public problems for which the specific development proposal of the particular developer bears no real blame in a cost accounting sense. And, whether by coincidence or otherwise, this construction of the constitutional standard seems to parallel a similar trend in the state courts toward putting some real teeth in the rational nexus standard.

VI. State Law

In a field such as land use law, where the courts of different states take widely varying positions, it is risky to generalize on the prospects of a new regulatory technique. Nevertheless, there do seem to be some common trends in the analysis of development exactions by the courts of a number of prominent states. An examination of these trends may yield some useful speculation on the way that state courts will deter-

---

York, 438 U.S. 104 (1978) as the only recent "affirmations of this principle.

69. Agins v. City of Tiburon, 447 U.S. 355 (1980); Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962). *But cf.* Hamilton Bank of Johnson County v. Williamson County Regional Planning Comm'n, 729 F.2d 402 (6th Cir. 1984), *cert. granted*, 53 U.S.L.W. 3235 (Oct. 1, 1984). If the court were to treat these exactions as permanent physical occupations, however, the result might not be the same. *See Loretto*, 458 U.S. at 419.

70. In *Parks v. Watson*, the city had granted the plaintiff's petition to rezone the property to allow more residential use, apparently without imposing any exactions at the time. 716 F.2d at 649.

mine the validity of linkage programs. In addition, recent decisions from Utah, Texas and Florida will be examined as precursors of a new level of analysis may have a significant impact on the validity of the various types of linkage programs.

Over the past twenty years the courts of virtually all of the states have come to use the term "rational nexus" to describe the test used to measure the validity of development exactions. The early court decisions adopting the rational nexus formulation were viewed by most commentators as a liberation of local governments from the strictures of earlier rules.[71] The scholars who first proposed the test saw it as a "cost-accounting approach" that would make it "possible to determine the costs generated by new residents and thus to avoid charging the newcomers more than a proportionate share."[72] The succeeding years witnessed a number of opinions, particularly in California, that applied the rational nexus test to uphold exactions using the loosest possible type of nexus.[73] This led some commentators to treat the rational nexus test much like the rational basis test for equal protection—as a test the government always passes.[74] At other times the court decisions incorporating the rational nexus test seemed to use it in such a widely varying manner that the term seems to represent nothing more than a loosening of the more restrictive standards used to evaluate the financing of local improvements through special assessments. More recently, however, courts have begun to put more meat on the rational nexus bones so that it becomes the basis for fairly rigorous analysis, in the manner that its original proponents intended, rather than a slogan used to justify any currently popular municipal policy.

The more rigorous version of the rational nexus test, as currently applied, requires a two-part analysis. First, it requires some real showing that the particular development will create a "need" and that the amount of the exaction bears some roughly proportional relationship to

---

71. *See* R. FREILICH & P. LEVI, MODEL SUPERVISION REGULATIONS: TEXT AND COMMENTARY 124-28 (1975).

72. Heyman & Gilhool, *The Constitutionality of Imposing Increased Costs on New Suburban Residents Through Subdivision Exactions*, 73 YALE L.J. 1118, 1137 (1964).

73. *See, e.g.*, Liberty v. Calif. Coastal Comm'n, 113 Cal. App. 3d 491, 170 Cal. Rptr. 247 (1981); J.W. Jones Co. v. City of San Diego, 157 Cal. App. 745, 203 Cal. Rptr. 580 (1984); Kalaydjian v. City of Los Angeles, 149 Cal. App. 3d 690, 197 Cal. Rptr. 149 (1983).

74. *See, e.g.*, Ellickson, *supra* note 44, at 1212-13; Williams, *Planning Law In the 1980's: What Do We Know About It?*, 7 VERMONT L. REV. 205, 228 (1982).

the share of the overall need that is contributed by this particular development.[75] The second part of the test requires that the funds or property exacted from the developer be earmarked to be used in a way that provides some degree of "benefit" to the development from which the exaction was received.[76] When the exaction relates to traditional public services and facilities usually provided to new residential development, the courts have generally accepted the proposition that the new development causes some need for new facilities such as streets, sewers, water, parks, and schools.[77] Where the exaction is for some more exotic service or facility, such as the geothermal well involved in *Parks*, the courts may conclude that no need exists and reject the validity of the exaction without going futher.[78]

If some need is found, however, the court proceeds to analyze the relationship between the amount of the exaction and the share of the overall need contributed by the particular development. Using this analysis, recent court decisions have tended to scrutinize closely one commonly-practiced type of development exaction: the demand that developers contribute right-of-way for major thoroughfares adjoining their developments. Thus, where the government seeks to build or widen a major highway through a developing area and the landowners are asked to contribute the right-of-way as a condition to receiving development approval, the courts are increasingly willing to measure the share of total traffic to be carried by the highway that is to be contributed by the proposed development. If there is not some reasonable degree of proportionality between the amount of land exacted for the

---

75. *See, e.g.*, Billings Properties Inc. v. Yellowstone County, 144 Mont. 25, 30-31, 394 P.2d 182, 187-88 (1964); Associated Home Builders of Greater East Bay Inc. v. City of Walnut Creek, 4 Cal. 3d 633, 484 P.2d 606, 94 Cal. Rptr. 630 (1971); Call v. City of West Jordan, 606 P.2d 217 (Utah 1979); Jordan v. Village of Menomonee Falls, 28 Wis. 2d 602, 137 N.W.2d 442 (1965).

76. Hayes v. City of Albany, 7 Or. App. 277, 280, 490 P.2d 1018, 1020 (1971); City of College Station v. Turtle Rock Corp., 680 S.W.2d 802 (Tex. 1984); Contractors and Builders Ass'n v. City of Dunedin, 329 So. 2d 314 (Fla. 1976); Call v. City of West Jordan, 606 P.2d 217, 220 (Utah 1979); Coulter v. City of Rawlins, 662 P.2d 888, 900 (Wyo. 1983). *See* Juergensmeyer & Blake, *Impact Fees: An Answer To Local Governments' Capital Funding Dilemma*, 9 FLA. ST. U.L. REV. 415, 432 (1981).

77. *City of West Jordan*, 606 P.2d at 217; *Billings Properties, Inc.*, 144 Mont. at 25, 394 P.2d at 182; *City of Dunedin*, 329 So. 2d at 314.

78. For background on the planning implications of geothermal energy, and in particular the resources of Klamath Falls, see Pasqualetti, *The Site Specific Nature of Geothermal Energy: The Primary Role of Land Use Planning in Nonelectric Development*, 23 NAT. RESOURCES J. 795, 802-03 (1983).

highway and the share of the traffic demand contributed by the proposed development the courts will invalidate the exaction.[79] One court recently adopted a rule-of-thumb that developers may be asked to contribute land for highways transsecting their development but not for highways on the fringes thereof, a test which would hardly withstand rigorous economic analysis but may bear some common-sense relationship to the type of distinction the court is seeking to draw.[80]

Although the demand for proportionality has resulted in the invalidation of some exactions, the widespread use of the rational nexus test as a means of evaluating all exactions has broadened the scope of facilities and services for which exactions can be used. Instead of applying a particular rule for streets and another rule for parks, courts have effectively held that an exaction can be levied for any service or facility for which a proportional share of need can be proven.[81] This broadening of the scope of exactions plays an important role in the development of linkage programs.

As the second part of the rational nexus test, the courts have been insisting that the local government demonstrate that the exacted funds or property will actually be used for the benefit of the development. In a recent case the Supreme Court of Arkansas declined to enforce an exaction for parks because the local government had not demonstrated that it had a plan to spend the funds. The Court, therefore, could not ascertain whether the funds would be spent for the benefit of the development.[82] Similarly, a Florida court approved an exaction for parks only after examining extensive evidence demonstrating that the funds would be allocated in a manner that would provide a reasonably proportional degree of benefit to all persons contributing to the fund.[83]

The test described above is a rough generalization which ignores nuances of state law even in those states that seem to conform to the rational nexus test—not to mention the peculiar legal rules that still may be applicable elsewhere. It is worthwhile, therefore, to look individually at a few states. Texas, Utah and Florida are each rapidly

---

79. Land/Vest Properties, Inc. v. Town of Plainfield, 117 N.H. 817, 821, 379 A.2d 200, 204 (1977).

80. Cupp v. Bd. of Supervisors of Fairfax County, ___ Va. ___, 318 S.E.2d 407, 414-15 (1984). *See* Howard County v. JJM Inc., ___ Md. ___, 482 A.2d 908, 920-21 (1984).

81. Juergensmeyer & Blake, *supra* note 76, at 419.

82. City of Fayetteville v. IBI, Inc., 280 Ark. 484, 659 S.W.2d 505 (1983).

83. Hollywood Inc. v. Broward County, 431 So.2d 606, 612 (Fla. 4th Dist. Ct. App. 1983).

growing Sun Belt states in which there have been a number of significant development exaction decisions in the last three years.

An intermediate Texas court of appeals attracted national attention in 1980 when it held that "parks are not necessarily beneficial to a community or neighborhood" and therefore struck down as invalid on its face an ordinance imposing an exaction for parks.[84] The case apparently eventually attracted the attention of the Supreme Court of Texas because, when in 1984 the court of appeals issued another similar opinion, the Supreme Court of Texas granted a writ of error and reversed the court of appeals.[85]

In its opinion the Texas Supreme Court upheld the general principle of development exactions and announced that it would use the rational nexus test in evaluating them. It remanded the case to the trial court to allow the developer to present evidence that the exaction created a disproportionate burden on its particular development. The court set out guidelines for the trial court in making that determination, saying that the developer must demonstrate that there is no reasonable connection between the increased population arising from the development and the increased park and recreational needs of the neighborhood.[86] In addition, the trial court was instructed to consider the benefit to the subdivision from the exactions in order to constrain the reach of the municipality and ensure that the subdivision receives relief from a perceived need. The court noted that "unless the court considers the benefit, a city could, with monetary exactions, place a park so far from the particular subdivision that the residents receive no benefit,"[87] citing as examples of the type of evidence that the trial court may consider "size of lots in the subdivision, the economic impact on the subdivision," and "the amount of open land consumed by the development."[88]

The Utah Supreme Court has recently gone even further in analyzing the factors that should be considered in evaluating the validity of a development exaction. In *Banberry Development Corp. v. South Jordan City*,[89] the court stated that the total depreciated value of the existing capital system for providing the particular service or facility

---

84. Berg Dev. Co. v. City of Missouri City, 603 S.W.2d 273 (Tex. Civ. App. 1980).

85. City of College Station v. Turtle Rock Corp., 680 S.W.2d 802 (Tex. 1984), *rev'g* 666 S.W.2d 318 (Tex. Ct. App.).

86. *City of College Station*, 680 S.W.2d at 806-07.

87. *Id.* at 807.

88. *Id.*

89. 631 P.2d 899 (Utah 1981).

should be the starting point in determining the validity of any exaction, whether for a centralized facility like a sewage treatment plant or for dispersed facilities like parks.[90] The exaction must bear some relationship to the size of the new development as a proportion of all developments served by the facilities, except that "extraordinary costs in serving the new development" may also be considered.[91] In a subsequent opinion the court emphasized that the methods of financing the existing capital facilities needed to be examined to ensure that new development would be credited with any other contributions that they would be making to the cost of the services or facilities, such as through tax revenue user charges or other payments collected from the entire municipality (including the new development).[92]

The Florida courts have also recently decided a series of important cases relating to development exactions. The Florida courts have adopted a rational nexus standard akin to that used now in the majority of states and have made it clear that they will examine the evidence in some detail to determine whether an appropriate nexus exists. A 1976 Florida Supreme Court decision involving a fee for a proportional share of the capital expansion costs of a sewage treatment plan, *Contractors and Builders Association of Pinellas County v. City of Dunedin*,[93] and a subsequent district court decision on remand,[94] set forth the tests that have subsequently been applied to uphold the validity of impact fees of Florida.[95]

In *Dunedin*, the city ordinance imposing an impact fee of $325 per dwelling unit for water facilities and $375 per dwelling unit for sewer facilities was challenged as an ultra vires attempt by the city to tax. In upholding the concept of impact fees, the Florida Supreme Court made clear that local government may require a new user of public facilities to pay a fair share of the costs imposed by new use of the system. More specifically, the Supreme Court established three standards for a valid impact fee ordinance:

1. New development must require that the present system of pub-

---

90. *Id.*

91. *Id.* at 904.

92. Lafferty v. Payson City, 642 P.2d 376, 379 (Utah 1982); *Banberry Dev. Corp.*, 642 P.2d at 904.

93. 329 So. 2d 314 (Fla. 1976).

94. Contractors and Builders Ass'n of Pinellas County v. City of Dunedin, 358 So. 2d 846 (Fla. 2d Dist. Ct. App. 1978).

95. *See generally* J. JUERGENSMEYER & J. WADLEY, FLORIDA LAND USE RESTRICTIONS ch. 17 (1984).

lic facilities be expanded;

2. The fees imposed on users must be no more than what the local government unit would incur in accommodating the new users of the system; and

3. The fees must be expressly earmarked for the purposes for which they were charged.[96]

The Supreme Court rejected older Florida cases, which had used a standard more appropriate to special assessments, by authorizing an impact fee for a proportionate share of public facilities that benefitted the public generally. Three district court of appeal opinions handed down in 1983 extended the permissible uses of local government impact fees and more clearly established the tests under which local impact fees in Florida will be held valid.

Hollywood, Inc. v. Broward County[97] involved a fee required to be paid to the county as a condition of plat approval, to be used for the capital costs of expanding the county-wide park system. Under the challenged ordinance, a subdivider has the option (with the agreement of the county) of dedicating land, a fee-in-lieu of land which otherwise would be dedicated, or a fee determined by a schedule based on the number and size of dwelling units to be built.

Under the standards established by *Dunedin*, the court found the ordinance to be a valid exercise of the police power. Impact fees or dedication requirements are permissible, the court found, if they show a "reasonable connection" or "rational nexus" in two ways: (1) the fees offset needs sufficiently attributable to the growth in population generated by the subdivision, and (2) the funds collected are sufficiently earmarked for the substantial benefit of the subdivision residents. By adhering to these two tests, "local governments can shift to new residents the reasonable capital costs incurred on their account."[98]

Town of Longboat Key v. Lands End, Ltd.[99] involved an ordinance requiring developers to deed land or pay a fee before final approval of development plans for the purpose of acquiring open space and park land. The Second District Court of Appeal remanded the case to the trial court to apply the tests established in *Hollywood, Inc.* The court specifically stated that the fees must be shown to offset, but not exceed,

---

96. *City of Dunedin*, 329 So. 2d at 317-18 (1976).

97. 431 So. 2d 606 (Fla. 4th Dist. Ct. App.), *petition for review denied*, 440 So. 2d 352 (Fla. 1983).

98. *Id.* at 611.

99. 433 So. 2d 574 (Fla. 2d Dist. Ct. App. 1983).

reasonable needs attributable to the new subdivision residents, and must be adequately earmarked for capital assets that will sufficiently benefit the new residents.[100]

Home Builders and Contractors Ass'n. of Palm Beach County v. Board of Palm Beach County Commissioners[101] was decided seven months after *Hollywood, Inc.* In this case the Fourth District upheld an impact fee for road improvements. The Palm Beach ordinance required new land development activity generating road traffic (including residential, commercial and industrial uses) to pay a fair share of the cost of expanding new roads attributable to the new development. The developer could pay according to a formula based on the costs of road construction and the number of motor vehicle trips generated by different types of land use. Alternatively, a developer could submit his own study of his fair share of the road costs. Funds collected were placed in a trust fund for expenditure in one of forty zones established throughout the county in which the development is located.

The court found that the draftsmen of the Palm Beach County ordinance had "*Dunedin*'s lessons in mind." The court adopted the principles set forth in the leading article by Juergensmeyer and Blake, and stated that it saw no reason why the same principles should not apply to roads.[102] The court held that the improvements paid for by the ordinance need not be used exclusively or overwhelmingly for those who pay so long as they bear a reasonable relationship to the needs created by the subdivision. The Palm Beach County expenditure zone system met this test.[103]

The validity of the fees, as recognized by Florida cases, is judged by methods of assessment and expenditure. The local government must demonstrate that the need for the fee is created by new growth (and the fee does not exceed the cost of the new growth) and that the funds collected are earmarked for the benefit of the new residents who pay. At the same time, the courts have accepted the use of a generalized methodology to meet these tests. For example, the Palm Beach County

---

100. *Id.* at 576 (case settled prior to a new trial).

101. 446 So. 2d 140 (Fla. 4th Dist. Ct. App. 1983).

102. *Id.* at 145 (quoting Juergensmeyer & Blake, *supra* note 76, at 440-41). The Florida Supreme Court had earlier held that both sewage treatment and county roads had countywide benefit for the purpose of interpreting a state constitutional provision allowing counties to use property taxes from incorporated areas only for services and facilities of countywide benefit. *See* City of St. Petersburg v. Briley, Wild & Assoc., 239 So.2d 817 (Fla. 1970); Burke v. Charlotte County, 286 So. 2d 199 (Fla. 1973).

103. *Home Builders*, 446 So.2d at 145.

zone system was sufficient, as was the Broward County proof of park usage patterns, to show that new residents would be sufficiently benefitted by the fees.

The Florida legislature has reinforced these court decisions with new legislation encouraging local governments to use development exactions to meet local facility needs. Local governments that seek to attract major developments will be required to exact from each new development its proportionate share of all facilities needed "to accomodate any impacts having a rational nexus" to the development.[104] Failure to impose such requirements on all developers will prevent local governments from approving developments of regional impact unless either the developer or the local government remedy all impacts themselves[105] — a condition unlikely to be feasible if major facilities are involved.

Texas, Utah and Florida have grown more rapidly between 1980 and 1983 than any other state having a population over one million.[106] Each of these states has recognized that development exactions can be a valid and effective means of coping with that growth, but that judicial supervision is needed to ensure that exactions remain within reasonable limits. The courts of these states have followed the modern trend of limiting exactions not by any arbitrary rules regarding the nature of the facilities or the type of development, but by requiring a showing that the exaction is proportionate to the share of need for new facilities created by the new development.

VII. The Nexus of Linkage

How will linkage programs fare under the more rigorous analysis required by the evolving test of rational nexus? Those local governments that merely see the development industry as a deep pocket for general government program are likely to be disappointed. But local governments which carefully analyze the development process and limit their demands to those that can be justified by that analysis should be able to expand exactions beyond their traditional usage for streets, sewers and parks to include housing-related programs. In determining whether the rationale of the exactions cases will support linkage pro-

---

104. FLA. STAT. § 380.06(15)(e)(1) (1985).

105. FLA. STAT. § 380.06(15)(e)(2) (1985).

106. U.S. CENSUS BUREAU, STATISTICAL ABSTRACT OF THE UNITED STATES (1985).

grams, it is first necessary to determine whether housing is for some reason an inappropriate public program for which an exaction may be levied. If not, the linkage programs need to be tested against the traditional nexus methodology.

Modern courts have suggested few limitations on the range of public facilities and services for which exactions may be used. The separate line of cases regarding parks, street and utilities have now fused into a single theory applied to all public services and facilities.[107] Although some types of public service, such as police and fire protection, are much less capital-intensive than streets and parks, and thus tend to generate only modest exactions, the capital component of even such "diffuse" services can be analyzed under the rational nexus test.[108] In any event, housing is as capital-intensive as the programs for which exactions have traditionally been used. Therefore, the underlying rational nexus theory itself poses no limitations on the range of public facilities and services to which it can be applied.

Even though the methodology can be applied, it can be argued that public policy or specific constitutional guarantees should limit the use of exactions for certain types of facilities. For example, some services such as police and fire protection are so basic or essential to public safety that too precise an apportionment of their cost might detract from a uniform commitment to protection.[109] Other services such as public education have traditionally been "free" to the users and state constitutional guarantees of free education may affect the validity of any fee or user charge for education.[110] It is clear, however, that there is no similar right to housing under the federal constitution[111] or under the constitutions of states other than New Jersey.[112] Thus a constitu-

---

107. Exactions cases originated in separate lines involving subdivision exactions and utility charges, but modern courts now regularly apply the same principles to both areas. *See, e.g., Billings Properties, Inc.*, 144 Mont. at 30-31, 394 P.2d at 187-88; *Lafferty*, 642 P.2d at 379; *Town of Longboat Key*, 433 So. 2d at 574.

108. In dicta the California Supreme Court has questioned whether exactions should be used to finance "the more general or diffuse need created for such areawide services as fire and police protection." *Associated Homebuilders of Greater East Bay, Inc.*, 4 Cal. 3d at 633, 484 P.2d at 606, 94 Cal. Rptr. at 630.

109. *See* Emerson College v. City of Boston, ___ Mass. ___, 462 N.E. 2d 1098, 1106 (1984).

110. *See, e.g.*, FLA. CONST. art. IX, § 1 ("Adequate provision shall be made by law for a uniform system of free public schools. . .").

111. J. NOVAK, R. ROTUNDA & J. N. YOUNG, CONSTITUTIONAL LAW 825-26 (1983).

112. The New Jersey Constitution has been interpreted to require local govern-

tional claim based on a right to have new housing constructed seems to have little chance of success.

Could it be argued that public policy requires that low-income housing be constructed with funds derived from general revenue sources? Public construction of housing for the poor is so recent a phenomenon that no such tradition exists. Some commentators suggest, in fact, that it is bad policy for the government to construct subsidized housing at all, arguing that such subsidies reduce the mobility that lower income families need in order to follow job opportunities.[113] The federal government is currently instituting a housing voucher program based on this rationale.[114] But state and local governments, with federal support, continue to subsidize housing through such programs as mortgage revenue bonds, which increasingly benefit the middle range of the market as well as the lower range.[115] Even the strongest opponents of the policy behind such housing programs would be unlikely to claim that they exceed government powers.[116] Given the wide range of sources from which housing is subsidized there seems to be no policy reason why exactions could not be used as another source.

On balance, although one may question the wisdom of subsidizing housing construction through linkage programs, the fact that the output is housing does not present any compelling legal reason why the tests used to evaluate other development exactions may not be applied to such programs.

---

ments to undertake "affirmative measures" to meet lower income housing needs. Southern Burlington County NAACP v. Twp of Mt. Laurel, 92 N.J. 158, 456 A.2d 390, 442 (1983). No other state seems to impose such a requirement. Although the California Supreme Court has expressed concern about the effect of land use controls on regional housing needs, Associated Home Builders of Greater Eastbay, Inc. v. City of Livermore, 4 Cal. 3d 633, 557 P.2d 473, 135 Cal. Rptr. 41 (1976), and the legislature of that state has mandated planning to meet housing needs. CALIFORNIA GOVERNMENT CODE §§ 65580 ff. (1983), the local governments of that state are under no real pressure to undertake affirmative measures to provide housing. *See* Building Industry Ass'n of Southern California v. City of Camarillo, 213 Cal. Rptr. 816 (1985). See also the New York judicial rhetoric most recently expressed in Blitz v. Town of New Castle, 463 N.Y.S. 2d 832 (1983).

113. *See generally* R. STRUYK & M. BENDICK, HOUSING VOUCHERS FOR THE POOR: LESSONS FROM A NATIONAL EXPERIMENT (1981).

114. 42 U.S.C. § 1437 f(o) (1984).

115. Peterson & Muller, *Housing Cost Reduction Through The Tax Exempt Market* in HOUSING SUPPLY & AFFORDABILITY 249, 251-53 (Urban Land Inst. 1983).

116. Ellickson, Inclusionary Housing Programs: Another Misguided Urban Policy (unpublished paper for CUNY Symposium, Nov. 14, 1983).

The extent to which exactions may be imposed for housing-related linkage programs should depend on the local government's ability to show (1) that there is a need for housing, (2) that the need is caused by new development, (3) that the exaction is proportional to the need caused, (4) that the exaction will be used to remedy the need, and (5) that the remedy will benefit the occupants of the new development.

Both Boston and San Francisco experience a high demand for housing, and few would argue that these cities meet any objective test for housing need.[117] Other cities, however, may have a difficult time meeting such a test, particularly if they are experiencing a net outflow of population.[118]

Assuming that a need for housing exists, what is its cause? Proof of causation in the development process is no simple matter and can be the source of endless debate. The key issue is the determination of what causes a need for new housing. San Francisco and Boston both believe that the need for housing is stimulated by the new employment that results from the construction of new office buildings.[119] This argument has been challenged at both tiers of its logic. Does the construction of office buildings create jobs? Do jobs create a need for housing?

San Francisco economist Claude Gruen argues that "additions to the supply of office space don't make office employment any more than cribs made babies."[120] Any private developer of speculative facilities,

---

117. *See* Griffin, Jr., Inclusionary Housing and Linkage in Boston and Cambridge, Mass. 12 (unpublished paper presented at Urban Land Institute conference on "Downtown Linkage," New York City, April 11, 1985); Gruen, A Case History of the San Francisco Office-Housing Linkage Program 2-4 (unpublished paper presented at Urban Land Institute conference on "Downtown Linkage," New York City, April 11, 1985).

118. The Chicago planning department, in exploring the advantages and disadvantages of an exactions program, reported that between 1970 and 1980 the City of Chicago lost roughly 6,100 dwelling units per year to fire and demolition and gained 5034 units per year of new construction, for a net loss of 1066 units per year, while population declined at the rate of about 36,500 people per year. CITY OF CHICAGO DEPARTMENT OF PLANNING, STAFF REPORT ON EXACTIONS 13-14 (June, 1985).

119. *See* Agnost, Conditioning Approval of Commercial Development on the Construction of Affordable Housing — The San Francisco Experiment (unpublished paper for the National Institute of Municipal Law Officers Conference, October 30, 1984).

120. Gruen, The Economics of Requiring Office Space Development to Contribute to the Productgion and/or Rehabilitation of Housing, 8 (unpublished paper presented at Urban Land Institute conference on "Downtown Linkage," New York City, April 11, 1985).

whether office or retail or housing, can argue that the facilities themselves do not create the demand — they are only responding to a demand caused by overall economic conditions. The argument is reminiscent of the slogan "guns don't kill people, people kill people," which suggests that an instrumentality is being forced unfairly to bear the blame that should be attached to the operator. The equivalent of the trigger-puller is the in-migrant. Is it the in-migrant who causes the impact? If so, should he or she bear the burden directly?

In a chain of causation it is always possible to argue that the preceding link should bear responsibility. An argument that development does not cause economic impact, however, would also undermine the public purpose behind such programs for subsidizing development as industrial revenue bonds and tax increment financing. Whatever philosophical merits this argument may or may not have, it has garnered little judicial support.[121] The Supreme Court has exhibited increasing concern about discrimination against out-of-state residents, but has thus far restricted its concern to regulations having a direct rather than an indirect impact on outsiders.[122] Should the court begin to examine the indirect effect of development financing methods on interstate migration it will be necessary to re-examine not only linkage programs but other well accepted types of user charges and development exactions.[123]

If the argument that development creates new jobs is accepted, one reaches the issue of whether the new jobs create a need for new housing. The answer is not as simple as it appears. Jobs come and go in a never-ending stream as businesses open and close, expand and contract. The peculiar value of cities may stem from the very flexibility with which their job market can respond to constant change.[124] In such an environment, the addition of any new job does not necessarily mean that the net number of jobs is increased because the job may have been transferred from another location in the community. If the business is moving to promote efficiency in operation, on balance more jobs may have been lost than gained, which would suggest that future out-migra-

---

121. *See, e.g.*, Loup-Miller Constr. Co. v. City and County of Denver, 676 P.2d 1170, 1173-75 (Colo. 1984); J. W. Jones Co. v. City of San Diego, 203 Cal. Rptr. at 588; *Home Builders*, 446 So. 2d at 144. *See generally* J. NOWACK, R. ROTUNDA & J. N. YOUNG, *supra* note 111, at 812-16.

122. *See supra* notes 64-66 and accompanying text.

123. See Juergensmeyer & Gregg, *Limiting Population Growth in Florida and the Nation: The Constitutional Issues*, 26 U. FLA. L. REV. 758, 778-83 (1974).

124. JACOBS, THE ECONOMY OF CITIES 91-100 (1969).

tion might cause a decline in housing demand.

Even if the total number of jobs does increase, the demand for housing does not necessarily increase along with it. A city's population is constantly changing through in-migration and out-migration, birth and death. Recent years have seen dramatic decreases in average household size, which has to some extent been accompanied by the splitting up of larger dwelling units.[125] The existing housing stock is constantly changing as people build additions or convert housing to non-residential use or vice versa. New housing units are built while others are demolished. Few large cities have trustworthy statistical measures that keep tract of such small-scale changes in the housing supply as conversions and abandonments.

The complexity of the housing market does not mean that a relationship between jobs and housing cannot be shown, but it does mean that a fairly sophisticated analysis will be needed to meet the emerging tests in states like Utah, Texas and Florida. Whether the office-housing linkage in cities like San Francisco or Boston would be able to pass the causation element of a modern rational nexus test will depend on whether the documentation by the planning department of the relationship between office development and the need for housing can survive the scrutiny of litigation.

The causal connection needed to justify inclusionary zoning programs — that new housing creates a need for new low income housing — is even less clear. Its proponents argue that if developers can be required to provide streets, sewers and other facilities needed to service their development they should also be required to provide housing for the workers who would be needed to operate these facilities and services? If a state accepts even the loosest causal connection as a basis for development exactions this argument may be satisfactory,[126] so it is

---

125. For example, the average household size in Chicago went from 2.91 people in 1970 to 2.70 people in 1980 and is projected to go to 2.15 people in 1990. CITY OF CHICAGO DEPT. OF PLANNING, *supra* note 118, at 13.

126. Fox & Davis, *Density Bonus Zoning to Provide Low and Moderate Cost Housing*, 3 HASTINGS CONST. L.Q. 1015, 1033 (1976); Kleven, *supra* note 36, at 1497-98; Hill, *Governmental Manipulation of Land Values to Build Affordable Housing: The Issue of Compensating Benefits*, 13 REAL ESTATE L.J. 3, 25-26 (1984). *But see* King, *Inclusionary Zoning: Unfair Response To the Need for Low Cost Housing* 4 W. NEW ENG. L. REV. 597, 615-28 (1982); Ellickson, *The Irony of Inclusionary Zoning*, 54 SO. CAL. L. REV. 1167 (1981); A. MALLACH, *supra* note 36, at 36-37; Costonis, *supra* note 61, at 489-90. The fact that a "bonus" is offered in connection with the exaction may be of some value in supporting its validity. *See* Willams, Jr., On the

not surprising to find that California is the site of many inclusionary zoning programs.[127] Other states might find it harder to accept the argument that new housing causes a need for jobs for lower income people.[128]

If a causal relation between the development and the need for housing is established, the next step is to measure the proportional share of the need attributed to the particular development. Would the linkage programs in Boston and San Francisco meet a test of proportionality? Neither program explicitly credits the new development with any of the property tax or other revenue it will generate toward potential housing programs. On the other hand, the city may be able to argue that the exaction is so small in relation to the need that even with

---

Inclination of Developers to Help the Poor: Designing Affirmative Measures to Induce the Construction of Lower Income Housing after Mt. Laurel II 17-19 (unpublished paper for Nov. 14, 1983, CUNY Graduate School Symposium); Kleven, Inclusionary Zoning and the Nexus Issue 8-9 (unpublished paper, CUNY Graduate School Symposium, Nov. 14, 1983).

127. *See* S. SCHWARTZ & R. JOHNSTON, LOCAL GOVERNMENT INITIATIVES FOR AFFORDABLE HOUSING: AN EVALUATION OF INCLUSIONARY HOUSING PROGRAMS IN CALIFORNIA (Inst. of Governmental Affairs, Univ. of California at Davis, Environmental Quality Services No. 35, December, 1981). The inclusionary program in Orange County, California, has been frequently cited as an effective one. *See* Burton, *California Legislature Prohibits Exclusionary Zoning, Mandates Fair Share*, SAN FERN. VALLEY L. REV. 19, 34-37 (1981); Bozung, *A Positive Response to Growth Control Plans: The Orange County Inclusionary Housing Program*, 9 PEPPERDINE L. REV. 819 (1982). In 1983, however, the county board voted to phase out the program. *See* R. ELLICKSON & A. TARLOCK, *supra* note 8, at 141 (Supp. 1984), A. MALLACH, *supra* note 36, at 251.

128. *See* Costonis, *supra* note 61, at 489-91; Ellickson, *supra* note 44, at 1212; Tegeler, *supra* note 45, at 694. Some states, however, have justified inclusionary programs not as an exaction but as an attempt to control the price of housing through establishment of zoning criteria. Under this theory, the requirement that a certain share of the housing be for low and moderate income people is merely a "criterion" of the zoning, just like a requirement that the housing be set back fifty feet from the street or less than fifty feet high. As the late Donald Hagman put it, if you could downzone a place so that birds could sing why couldn't you downzone it so that poor people could sing? Hagman, *supra* note 30, at 175. *See* Kleven, *supra* note 36, at 1502-06. The Supreme Court of New Jersey, relying on such a theory, explicitly upheld inclusionary zoning and encouraged its use by New Jersey municipalities. In the matter of Egg Harbor Associates, 94 N.J. 358, 365, 464 A.2d 1115, 1123 (1983); Southern Burlington County NAACP v. Mt. Laurel Two, 92 N.J. 158, 456 A.2d 390 (1983). *See* A. MALLACH, *supra* note 36, at 30-32, 226-33. For a discussion of the effect of the Mt. Laurel case on exactions in New Jersey see Rose, *New Additions to the Lexicon of Exclusionary Zoning Litigation*, 14 SETON HALL L. REV. 851, 874-76 (1984).

such credits the fee is not disproportionately high.

Finally, the earmarking test must be met. Whether the housing to be built by the San Francisco and Boston programs will mitigate the need for low-income housing, and do so in a way that benefits the developments that make the contributions, remains to be seen. In those states that demand strict assurance in advance on these issues, the programs of both cities may be excessively loose. A more cautiously designed linkage program would earmark the funds collected in a manner that guarantees that the funds are used to meet the identified need, and are used in accordance with an overall plan that ensures that the funds will be spent in a manner that benefits the developments from which they are collected. It should not be necessary to identify the specific capital project to which each dollar will be devoted, and the lawyer's desire for precise evidence of linkage will undoubtedly need to be balanced against the administrator's need for flexibility in the use of funds and the administrative costs associated with the required analysis. These costs can probably be reduced to the extent that the factors identified can be converted into data that can be automatically processed.

VIII. Conclusion

In summary, linkage programs should be required to meet the same tests that have evolved for measuring the validity of other forms of development exaction. Under those tests a housing program would probably be a legally acceptable candidate for an exaction process. The important factual question that remains to be evaluated is whether an appropriate method can be established to relate housing need to other types of development, and for assuring that housing will be built in a way that provides a reciprocal benefit to that development. Like other factual questions arising from a judicially-created standard, the answer can only be found through additional litigation.

Beyond these legal issues, however, important policy questions remain. Charitable giving, whether through the ancient tithe or more modern institutions, has been enforced through social pressures rather than legal constraints. Many of the same business institutions that have been relied on to provide support for housing programs through charitable gifts are now being required to support such programs through mandatory linkage programs. If the idea of a mandatory tithe becomes commonplace, it will remain to be seen whether our existing network of

charitable programs can co-exist effectively with a compulsory system having similar goals.