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FOREWORD

Every half decade or so, zoning comes forth with a hero, a *bette noire,* or an Armageddon of some sort. Five years ago, it was the consequences of taking[1] and the Sherman Antitrust Act.[2] Ten years ago, it was transfer development rights.[3] Fifteen years ago, it was exclusionary zoning,[4] and twenty years ago, it was landmarks.[5] Today, it is exactions.

Webster defines "exactions" as follows: "1 a: the act or process of exacting b: EXTORTION 2 something exacted; esp: a fee, reward, or contribution demanded or levied with severity or injustice."[6] Perhaps that definition suggests that the title of this issue is not a neutral enough term for the subject of these articles. A community that engages in this practice would insist that in approving a subdivision or granting a zoning change it has

1. *See* San Diego Gas & Elec. Co. v. City of San Diego, 450 U.S. 621 (1981); *see also* Williamson County Regional Planning Comm'n v. Hamilton Bank, 105 S. Ct. 3108 (1985); Pearlman, *Section 1983 and the Liability of Local Officials for Land Use Decisions,* 23 URB. L. ANN. 57 (1982); Williams, Smith, Siemon, Mandelker & Babcock, *The White River Junction Manifesto,* 9 VT. L. REV. 193 (1984); Comment, *Takings Law—Is Inverse Condemnation an Appropriate Remedy for Due Process Violations?,* 57 WASH. L. REV. 551 (1982).

2. *See* Town of Hallie v. City of Eau Claire, 471 U.S. 34 (1985); Community Communications Co. v. City of Boulder, 455 U.S. 40 (1982); City of Lafayette v. Lafayette Power & Light Co., 435 U.S. 389 (1978); Comment, *Post* Lafayette *Municipal Liability for Refusing to Zone Outlying Development,* 59 WASH. U.L.Q. 485 (1981).

3. *See* Richmond & Kendig, *Transfer Development Rights—A Pragmatic View,* 9 URB. LAW. 571 (1977); Schnidman, *Transferable Development Rights: An Idea in Search of Implementation,* 11 LAND & WATER L. REV. 339 (1976); *see also* Penn Central Transp. Co. v. New York City, 438 U.S. 104, 137 (1978).

4. *See* Southern Burlington County NAACP v. Township of Mt. Laurel, 92 N.J. 158, 456 A.2d 390 (1983); Southern Burlington County NAACP v. Township of Mt. Laurel, 67 N.J. 151, 336 A.2d 713, *appeal dismissed,* 423 U.S. 808 (1975); Vickers v. Township of Gloucester, 37 N.J. 232, 253, 181 A.2d 129, 140 (1962) (Hall, J., dissenting); Berenson v. Town of New Castle, 38 N.Y.2d 102, 378 N.Y.S.2d 672, 341 N.E.2d 236 (1975); *see also* Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection and the Indigent,* 21 STAN. L. REV. 767 (1969).

5. *See* Penn Central Transp. Co. v. New York City, 438 U.S. 104 (1978); Manhattan Club v. Landmarks Preservation Comm'n, 51 Misc. 2d 556, 273 N.Y.S.2d 848 (Sup. Ct. 1966); Kleinhaus, *Architectural Control: Urban Environment and the Law,* 1 COLUM. J.L. & SOC. PROBS. 26 (1965); Note, *Landmark Problem in New York,* 22 N.Y.U. INTRAMURAL L. REV. 99 (1967); *see also* Fred French Investing Co. v. City of New York, 39 N.Y.2d 587, 386 N.Y.S.2d 5, 350 N.E.2d 381 (1976).

6. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 431 (1986) (emphasis in original).

conferred a windfall on the applicant and is simply taking its fair share—a taxable capital gain, in effect. It would also point to the precarious financial conditions or to the various state schemes that place restrictions on its ability to impose taxes.[7] Or it may, as Connors and High suggest,[8] label the act as "linkage" between the development and the burden the particular growth will foist on the community.

Exactions are becoming an increasingly common phenomena. On April 2, 1982, the first paragraph of a story in the *San Francisco Chronicle* read as follows:

> The Hilton Hotel chain won permission last night to build a 26-story slab-shaped addition to its Tenderloin operation on the condition that it pay more than $1 million to subsidize low-income housing in the area.
>
> The subsidy, which Hilton executives had rejected only a year ago, follows similar concessions last year by two other chains, Holiday and Ramada, in order to get Tenderloin permits.[9]

In one of the last cases in which I was involved, a developer of a very large tract of residences—over one thousand units—was invited by the town to build an olympic-sized swimming pool on the other side of town. He did, and was issued his permits. In another case, a village approved issuance of a permit to our client, a large corporation, on the condition that it agreed in writing to pay the first $25,000 should neighbors file a lawsuit. The neighbors did file, and the corporation paid.

In each of these cases one can imagine the initial reaction of the "extractee"—outrage. In each case he surely went to his attorney and asked two questions: (1) How long will it take to get a final answer in court if we challenge this condition?; and (2) How much will it cost?

The answers probably were: (1) It will take three to four years, with the possibility of defeat; and (2) It will cost tens if not hundreds of thousands of dollars.

By the time the developer approaches his attorney, he has invested a large sum of front-end money and has a great deal of interest in obtaining a permit. Moreover, he wants the permit immediately. He takes out his pencil, does some calculating, and decides to pay up. This example is a classic illustration of what I call "municipal leverage."

Great variations exist in the form and substance of exactions. Some exactions, such as the Boston ordinance Connors and High describe,[10] are set forth in an enacted law, which at least alerts the prospective developer to the amount due. Other exactions are ad hoc, depending on what the city council or the planning commission deems appropriate at the time.

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7. *See, e.g.*, CAL. CONST. art. XIIIA (1978); MASS. ANN. LAWS ch. 59, § 21C (Law. Co-op. Supp. 1986).

8. *See* Connors & High, *The Expanding Circle of Exactions: From Dedication to Linkage*, LAW & CONTEMP. PROBS., Winter 1987, at 69, 72.

9. San Francisco Chronicle, Apr. 2, 1982, § 1, col. 3, at 5.

10. *See* Connors & High, *supra* note 8, at 77-83.

Are exactions a taking that should not be permissible in the absence of just compensation? Under any of the many theories of when a taking occurs, the unsatisfactory answer seems to be maybe yes, maybe no. Certainly exactions hardly fit the Holmesian premise that it is the magnitude of the loss taken that determines whether the regulation goes too far.[11] Some exactions are very modest, some are extreme. Yet so far few, if any, have been held to constitute a taking. Nor do exactions fit the more traditional approach to noxious uses that the first Justice Harlan took in *Mugler v. Kansas.*[12] Harlan reasoned that the abatement of a noxious use is not a taking of property because such a use is not in the public interest. Instead of exacting a payment for continuing the activity, however, the activity was simply banned altogether.

Exactions also fail to fit the harm-benefit dichotomy. First articulated by Professor Ernest Freund eighty-three years ago,[13] and more recently receiving scholarly support,[14] this theory holds that government may regulate to prevent harm, but if it attempts to take some benefit, it must pay. Although generally discredited,[15] this concept may have some plausibility in exaction cases. A demand that a developer pay to widen a highway in front of its subdivision entrance appears to negate a harm that could arise from increased traffic. Similarly, a demand that a developer pay a $300 or $500 fee per house constructed into a school or park fund seems reasonable if there is an assumption that there will be a direct burden on those public services.[16] Linkage, the relationship between high-rise office buildings, low paying jobs, and the need for additional low- and moderate-income housing, also appears to offset a clear public burden.[17] Many exactions, however, appear to be completely ad hoc and unrelated to the proposed development. The request for construction of a public swimming pool, five miles away from a development, can hardly be linked to that development. Moreover, requiring the developer to pay any litigation costs incurred by the municipality appears intended both to mitigate any harm to the municipal fisc and to benefit the town's coffers.

Other theories that distinguish permissible from impermissible takings also reveal the problematic nature of exactions. Professor Joseph Sax's first test for determining whether the state has taken private property without just

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11. *See* Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 413, 415 (1922).

12. 123 U.S. 623 (1887) (liquor manufacturing); *see also* Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 39-40 (1964) [hereinafter *Takings and the Police Power*]. The Supreme Court applied a similar test in L'Hote v. New Orleans, 177 U.S. 587, 597-600 (1900) (prostitution); Fertilizing Co. v. Hyde Park, 97 U.S. 659, 669-70 (1878) (fertilizing plant).

13. E. FREUND, THE POLICE POWER 546-47 (1904).

14. *See, e.g.*, Dunham, Griggs v. Allegheny County *In Perspective: Thirty Years of Supreme Court Expropriation Law*, 1962 SUP. CT. REV. 63.

15. *See, e.g., Takings and the Police Power, supra* note 12, at 36. For Professor Sax's later modification of his theory, see Sax, *Takings, Private Property and Public Rights*, 81 YALE L.J. 149, 150 n.5 (1971).

16. *See* Heyman & Gilhool, *The Constitutionality of Imposing Increased Community Costs on New Suburban Residents through Subdivision Exactions*, 73 YALE L.J. 1119 (1964).

17. *See* Diamond, *The San Francisco Office/Housing Program: Social Policy Underwritten by Private Enterprise*, 7 HARV. ENVTL. L. REV. 449 (1983).

compensation,[18] for instance, is troubling. He suggests that the appropriate test is whether the government is taking property in the process of "enhancement of its resource position in its *enterprise* capacity"—if so, "compensation is constitutionally required."[19] If the government is merely mediating a dispute in its *arbitral* capacity, however, no compensation is required. In most exaction cases the government seems to be engaging in an act of acquisition of resources, yet no claim for damages is demanded or obtained. At most, the demand is declared invalid.[20]

Whatever the shape or substance of the municipal demands, the course of this practice, as Marlin Smith notes, has occasionally been slow-footed but always inexorable.[21] It reminds one of Justice Holmes' aphorism on "the petty larceny of the police power."[22]

Municipal exaction demands are by no means coming to an end. Indeed, they may only be at their genesis.

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18. *See Takings and the Police Power, supra* note 12, at 63. I am indebted to Professor Sax for identifying the various theories.

19. *Id.* (emphasis added).

20. *See, e.g.*, Midtown Properties, Inc. v. Township of Madison, 68 N.J. Super. 197, 172 A.2d 40 (Law Div. 1961); East Neck Estates, Ltd. v. Luchsinger, 61 Misc. 2d 619, 305 N.Y.S.2d 922 (Sup. Ct. 1969); McKain v. Toledo City Plan. Comm'n, 26 Ohio App. 2d 171, 270 N.E.2d 370 (1971).

21. Smith, *From Subdivision Improvement Requirements to Community Benefit Assessments and Linkage Payments: A Brief History of Land Development Exactions*, LAW & CONTEMP. PROBS., Winter 1987, at 5, 28-29.

22. 1 HOLMES-LASKI LETTERS 457 (M. Howe ed. 1953).