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**Cover Page Footnote**
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DEVELOPER OBLIGATIONS FOR PUBLIC SERVICES IN ISRAEL: LAW AND SOCIAL POLICY IN A COMPARATIVE PERSPECTIVE†

RACHELLE ALTERMAN*

I. INTRODUCTION AND CONTEXT

A. What Are Developer Obligations?

If the term “developer obligations” seems unfamiliar, American readers will recognize it as similar to, though broader than, what is known in the United States as “exactions.” Developer obligations are requirements placed by planning authorities on developers to supply or help finance public facilities as a condition for granting development permits. Developer obligations come in many forms: land dedication, payment of a fee, construction of a public facility, or supply of a public service. They may apply to a specific type of public facility or amenity, or to public services in general.

Why propose a new term? Because these requirements are known by varying names in many countries. The American usage, “exactions,” is specific to the United States and has not yet seen common usage outside land use law and planning circles. In Britain, the equivalent term is “planning gain,” and in France it is “participation.” Other countries, such as Israel, may have many terms to indicate each separate tool, or no specific term at all. These terms have culture-specific connotations. Perhaps the clearest comparison is between the somewhat harsh connotation of the American term, “exactions,” and the virtually opposite connotation of the British term, “planning gain.”

The term “developer obligations” is therefore proposed as an international term that, hopefully, has fewer culture-specific connotations.

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than the terms previously mentioned. I will use "developer obligations" in the broadest sense, to include some indirect mechanisms for financing public services, such as the land betterment tax and land readjustment, and I will use "exactions" to indicate the methods focused directly at financing such services.

**B. Developer Obligations and Privatization**

Although developer obligations have probably existed to some extent in most countries where planning control is exercised over private development, they have only recently begun to draw the interest of researchers in planning and law. An impressive volume of research has already appeared in the United States, Britain, and in some other countries. In the United States, exactions have in recent years been at the cutting-edge of innovative urban policies; in degree of rationalization, they are probably the most sophisticated in the world today. United States experiments of the 1970's, such as impact fees, have received legal recognition and widespread application. Impact fees are regulations which require developers to pay fees calculated to reflect the full impact of the demand generated by the new developments on existing or new urban services. United States experiments of the 1980's, such as linkage, whereby developers of commercial buildings are required to build or finance low cost housing, are being studied eagerly not only by American, but also by outside observers.

This growing attention may be credited to a view that developer obligations fall within the trendy notion of "privatization," although developer obligations in fact predate privatization in most countries. Privatization in its broad sense may take on many forms: government divestment from areas formerly funded (for example, public housing, airline, telephone, or water services); private contracting of government services (i.e., garbage collection); public-private partnerships of various types; and, the focus of this essay, developer obligations for

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1. The author has recently edited a book which analyzes and evaluates the current status of developer obligations in the United States. PRIVATE SUPPLY OF PUBLIC SERVICES: EVALUATION OF REAL ESTATE EXACTIONS, LINKAGE, AND ALTERNATIVE LAND POLICIES (R. Alterman ed. 1988) [hereinafter PRIVATE SUPPLY OF PUBLIC SERVICES].


public facilities. The new division of labor emerging between government and the private sector both in the West and the East will likely reshape the old tools and bring the practice of developer obligations into the limelight of public attention.

C. Israel as a Case Study

This paper analyzes the Israeli experience with developer obligations, viewing it as an interaction between law, planning, and social policy. The paper intermittently compares Israeli law and policy with that of three other countries: the United States, Great Britain, and France.

Israel serves as an illuminating case study because it offers a context where opposites interact. Israel combines characteristics of Western countries and developing countries, of a social welfare policy and a vibrant private sector, and of a highly centralized, publicly oriented system of planning and land policy and a tolerance for local government initiative. As a social democracy, its citizens expect the government to supply a well developed set of social services.

The Israeli story concerns an onerous set of laws that enable developer obligations, but yet have been absorbed into the development market and integrated with social policy. It is a tale of opposites cohabiting peacefully: a highly institutionalized system of formal exactions focused on obtaining land for public facilities alongside informal negotiations for additional benefits. Israel thus offers students of planning law an opportunity to study the tensions between public policy and private development and the interaction of the law with social policy and market operation.

D. The Land Policy Context

An estimated ninety-two to ninety-four percent of Israel’s total land area of 16,000 square miles is nationally controlled; it is administered by the Israel Lands Authority.\(^5\) If so much of the land is public, why is there the need for a developer obligation system at all? The answer lies both in the nature of the remaining six to eight percent and in the Lands Authority’s policies concerning public land.

\(^5\) The Israel Lands Authority does not publish official figures on the extent of public land. Ninety-three percent is the commonly-cited estimate; however, there is some doubt as to whether the range includes land transferred to municipalities—mostly as exactions. The Lands Authority will not officially confirm these figures, but its spokespersons acknowledge that it can be used as an estimate.
Because much of the private land is in metropolitan areas, where Israel's population is concentrated, this land plays a more important role in urban development than its size would suggest. In the quite urbanized Arab villages where demographic growth and development are especially intense, land is almost totally private. Still, most development takes place on public land—in development towns, semi-rural areas, and metropolitan areas where, despite the concentration of private land, public land usually constitutes more than half the area. Yet, as we shall see, public land ownership has not made developer obligations superfluous.

If public lands in urban areas had been a product of municipally initiated land assembly and banking, there might have been little need to apply regulative exactions. After all, one of the purposes of land banking is to ensure the adequate supply of public facilities when land is released for development. This policy has been practiced by many Western European cities and was promoted as national policy in the since repealed British Community Land Act of 1975. However, municipal land banking is virtually non-existent in Israel, reflecting the legal and financial weakness of local authorities. Most development occurs on land centrally administered by the Israel Lands Authority, which is strictly limited by law in its powers to sell land. Rather, the Authority leases land on a long-term basis either to public bodies or to private developers. But because leased land is subject only to minimal restrictions on its transfer and because its leasing price is assessed up front, leased land is very similar to private land. However, the leases are generally not used as a substitute for planning controls or developer obligations, because planning controls are a different legislative and institutional responsibility than the leasing of national lands.

Local authorities are responsible for land use planning and the provision of land for public facilities. If, within this division of labor, the United States model applied, whereby local zoning authority generally

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8. BASIC LAW: STATE LANDS (1960), when read in conjunction with Israel Lands Law § 7 (1960) (passed on the same day), dictates a fixed cumulative total of 10,000 hectares which the Lands Authority is allowed to sell. The Authority's spokespersons indicate that they are not sure whether to consider the land transferred to the municipalities as included in this total; but in any event, the amount of transfers is not yet close to the total.

does not affect development initiated by state or federal government, municipal land use regulation would be a mockery. A way had to be found for local authorities to apply land use regulations, including some form of exactions, to developments occurring on national land. Such a system evolved with time.

E. The Planning and Legal Contexts

Israel's land use planning system operates under the Planning and Building Law of 1965. This law repealed the legislation that the British introduced in 1922 and 1936 during their mandate over Palestine and which remained in force after independence in 1948. Two important changes in 1965 pertain directly to exactions. Until then, planning controls did not apply to government bodies. The 1965 law, however, required all government jurisdictions to abide by land use regulations and procedures, except in defense related land use. The law also expanded the land exactions system considerably. Some doubt was left regarding the authority to impose exactions on the Israel Lands Authority, but such doubt was resolved through an agreement between the Authority and the municipalities whereby the Authority agreed to subject itself to the exactions rules. Indeed, today the officers of the Authority sometimes insist that the exactions be mandatorily taken, because the legal procedures provide some protections to the landowners.

The 1965 law added a national planning tier over the two tiers that existed earlier. The result was a three-tier edifice of planning institutions and a parallel set of plans in a system that combines centralized, top-down planning with bottom-up initiative. Lower-level plans must be strictly consistent with all higher-level plans.

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10. In the United States, this arises from the constitutional supremacy of higher levels of government. Some of the federal or state laws, such as in the area of environmental control, do apply to state and federal government, and these levels of government often comply voluntarily.


14. Some argue that the concept of expropriation does not apply to state land, but others see no reason why expropriation cannot imply a statutory requirement that one government jurisdiction transfer land to another, especially given section 259 of the Planning and Building Law which subordinates government authorities to the planning law. In the agreement, the Lands Authority has in fact been somewhat more generous than the law requires.

15. Planning and Building Law §§ 2-6, 49-54.

Mandatory Local Outline Plans and optional Detailed Plans are at the lower level. As in many other countries today, the plans and the regulations are one and the same, providing legally binding directives on land use, bulk, height, design guidelines, or environmental mitigation. These plans usually grant development rights. American readers can view outline plans as a cross between master plans and simplified zoning; British readers can view them as akin to planning schemes prior to the Town and Country Planning Act of 1947. \(^{17}\) Most other European readers will easily recognize the Israeli outline and detailed plans as quite similar to their own.

When outline plans are first prepared they must cover the complete planning area, \(^{18}\) but amendments—which are the rule rather than the exception—can cover any area, from a single lot to a whole urban district. \(^{19}\) Detailed plans, if required, are expected to implement the outline plans. They can vary in detail and coverage and may be similar to site plans, subdivision plats, more detailed zoning, or urban design plans. \(^{20}\) Usually, building permits can only be issued on the basis of an approved plan—outline or detailed. \(^{21}\) Exactions requirements may be stated in local outline and detailed plans, \(^{22}\) or as conditions added to building permits. \(^{23}\)

The second tier consists of District Outline Plans that cover each of the six administrative districts. \(^{24}\) These are ostensibly mandatory, but some are still in preparation. These plans usually do not deal with rules of development within cities, and thus they have little to say about exactions policy—although legally they could. Finally, the top tier consists of national plans prepared for selected regions or subject areas by the National Planning Council. \(^{25}\) In a small country, national plans sometimes deal with detailed planning of particular projects of national or regional impact. In such cases national plans may specify

\(^{17}\) Town and Country Planning Act, 1947, 10 & 11 Geo. 6, Ch. 51.

\(^{18}\) Planning and Building Law §§ 62, 134.

\(^{19}\) Section 134 of the Planning and Building Law authorizes amendments to outline and detailed plans. The geographic coverage of amendments is not mentioned in the law, but in practice such amendments usually cover only portions of their respective planning areas. The author has previously conducted empirical research on the characteristics of amendments and the quantities of land affected under section 134. See Alterman, Decision-Making in Urban Plan Implementation: Does the Dog Wag the Tail, or the Tail Wag the Dog?, 3 Urb. L. & Pol’y 41 (1980); see also Alexander, Alterman & Law-Yone, supra note 16.

\(^{20}\) Planning and Building Law §§ 66-70.

\(^{21}\) Id. § 145(b). The exception is Planning and Building Law § 78.

\(^{22}\) Id. § 188(a).

\(^{23}\) Id. §§ 145(a)-(b), 265(2); Regulation for Building Permits (Issuance and Condition) (1970).

\(^{24}\) See id. §§ 55-60.

\(^{25}\) Id. §§ 49-54.
developer obligations. An example is a plan for a power plant where the Israel Electric Company was required to develop a park.

Parallel to this hierarchy of plans is a hierarchy of decisionmaking bodies. Local plans are administered by approximately one hundred local planning and building commissions.26 These bodies are usually composed of the elected municipal council,27 but when the Minister of the Interior delineates a multimunicipality local planning district, as he usually does for smaller towns, the commission’s membership is partly local representatives and partly representatives of several central government offices.28

The centralized character of the system is clearly embodied in the structure and authority of the six district planning commissions, most of whose members are representatives of central government agencies.29 All major decisions of the local planning bodies, including the approval of all local plans (and thus any developer obligations stated in these plans), variances, and nonconforming use permits, require the approval of the district commission.30 Local authorities nevertheless leverage their limited powers in initiating plans and issuing building permits. Exactions naturally figure high on the local authorities’ list of powers because they enable a give-and-take with both private and public bodies over assets of high economic value to the municipality.

At the third tier are the national level bodies. The National Planning Council is composed of representatives of all relevant government offices, environmental protection agencies, and a few professional and public interest representatives.31 The National Planning Council is the upper-level body in charge of national policy. The Minister of Interior is in charge of administering the entire law and most types of plans require his signature.32 Finally, since the cabinet approves national plans, it is technically a planning body as well.33

In Israel’s legal system, as in other common-law-based systems such as Britain, court decisions are an important source of law.34 This func-

27. Id. § 18(a).
28. Id. § 19.
29. Id. § 7(a).
30. Id. §§ 28, 62(a), (c), 64, 68, 78, 85-87, 97, 98, 105, 112, 113, 139, 146, 147.
31. Id. § 2(b).
32. Id. §§ 2(b)(1), 109, 265 (section 2(b)(1) designates the Minister of the Interior as chairman of the National Planning Council; section 109 requires the Minister to approve all local and district plans before implementation; and section 265 gives the Minister control over the implementation of the Planning and Building Law).
33. Id. § 53.
34. Kayden, Planning Gain: Developer Provision of Public Benefits in Britain, in Private Supply of Public Services, supra note 1, at 164-65 (by implication).
tion differs from Roman-law-based systems, such as France, where court decisions have little precedential value. The role played by the Israeli courts, however, is much more limited than the role played by United States courts. While in the United States courts are the major force shaping land use law, in Israel—as in most countries—land use law is based on specific legislation, rather than on the application of general constitutional doctrines. Israeli courts are thus more reluctant than American courts to delve into substantive planning questions. Nevertheless, court decisions in land use law have been important in clarifying the Planning and Building Law's intertwining legal theories in the areas of property, torts, and administrative law, for example.

II. A Rich Assortment of Developer Obligations

The Israeli kit of tools for financing public services provides a rich assortment of exactions and several alternative, indirect instruments. Some, such as betterment recapture and land readjustment, are quite innovative. The total package is one of the most exacting in the Western world today—at least since the abolition of Britain's Development Land Tax Act. The Israeli package is composed of several cumulative layers of demands placed upon the developer. Many of these requirements are based on the same piece of legislation—the 1965 Planning and Building Law. The Israeli case thus provides a rare opportunity for studying how various forms of developer obligations interrelate under a single legal and public policy roof and how the marketplace reacts to these cumulative layers.

In the following sections the mechanisms of developer obligations available under Israeli law will be examined. Three subsets will be distinguished: 1) Formal exactions—those that have an explicit grounding in the law and that are specifically intended for public services (in Israel, these are focused mainly on obtaining land, rather than financing); 2) Informal exactions—those that are based on negotiations be-

35. Renard, Financing Public Facilities in France, in Private Supply of Public Services, supra note 1, at 173.
36. Even though Israel does not have a complete, written constitution, it does have an unwritten one, composed of a set of Supreme Court decisions on most issues of constitutional import on matters of civil rights, supplemented by several Basic Laws on constitutional matters, such as the electoral system and governmental structure.
37. See Schiffman, Land Readjustment: An Alternative to Development Exactions, in Private Supply of Public Services, supra note 1, at 250.
38. Britain's Development Land Tax Act, 1976, ch. 24, included a hefty betterment-recapture tax that originally taxed away up to sixty percent of appreciated land value. It was gradually reduced in import by Prime Minister Thatcher, and was finally abolished in the mid-1980's.
between the developer and the authorities and that are often legally questionable; and, 3) Alternative mechanisms—those that have other purposes, but that can also help finance or obtain land for public services.

A. Formal Exactions

1. Land Dedication Requirements

If you were to ask an Israeli planner or lawyer whether there are provisions in the law which require developers to contribute to public facilities, the answer would immediately be: "Oh yes, of course. You mean the forty percent land dedication requirement." The Knesset (Israel Parliament) in 1965 and professionals ever since have focused almost exclusively on how local authorities can obtain adequate land for public services, rather than on how to finance their construction or operation. The land deduction requirement is one of the most highly utilized implementation tools of the Planning and Building Law.

a. Why the concern with obtaining land

The emphasis on the exaction of land rather than fees probably arises from Israel's division of labor between local and central government in supplying public services. Local authorities are expected to provide the land, whereas the central government and national quasi-public bodies are in charge of the construction and finance of many social service facilities for education, health, and welfare. Though local roads and sewage lines are the responsibility of local authorities (except in government initiated new towns or settlements), the capital outlay for construction is often provided in part or in full by central government grants. In towns with wealthier populations, local taxes and levies today cover most of the costs of construction of the infra-

39. Until recently, private initiatives to establish a new town or village were uncommon. Israel's 30-odd new towns and several hundred co-operative villages and kibbutzim were all created through public initiative and with public financing for the major infrastructure. Recently, there were a few pioneering examples of privately initiated "community" villages or small towns (neither dogmatically cooperative nor openly urban). In these settlements, the residents have borne the burden of all or most of the infrastructure. One example is Givat Elah in the lower Galilee. This trend toward privatization is, in the author's opinion, expected to grow. In the near future, we are likely to see the arrangements surrounding infrastructure financing, which until now have been decided in an ad hoc manner for each new initiative, as a broader legal and public issue. Public policy questions that will arise concern the proper division of labor between the public and private sectors and the legal question of possible discrimination against other "regular" settlements where the financing was public.
structure and social facilities; however, many other towns have weak tax bases or ineffective tax collection mechanisms.

A welfare state like Israel is expected to offer its citizens a large dose of social services. This expectancy, when combined with the country’s relatively high birth rate, small size, and high density of development, have created a need to devote a large proportion of land in every development to public services.40 The result, however, is hardly the spacious sites with ample open spaces you might expect. Because land in Israel is a scarce resource, its use is tightly planned from the start, including the public slice. Sites for schools and parks in Israel are usually much smaller than in most urban areas in North America or Europe.

Local authorities, with few financial resources of their own and no powers to float bonds, have needed a way to obtain sites for public services without financial outlay. The tool provided by statute is one of the most onerous land dedication requirements in the world.41 The requirement can be applied to new neighborhoods or old ones, where changing demographics and lifestyles create a need to upgrade or alter services.

b. Statutory conditions for land dedication

The Planning and Building Law empowers local planning commissions to exact land for public services according to the following conditions stated in the legislation:

Definitions and procedures

Amount: Up to forty percent of any contiguously owned parcel of land can be taken without compensation; this is a cumulative total that takes into account any previous takings.42 This maximum applies to any type or density of residential, industrial, or commercial development. Under the British Mandate Town Planning Ordinance of 1936,43 the maximum was 25 percent.44

40. Our research has shown that the major variable that determines the amount of land needed for public services, aside from roads and parking, is the proportion of children in the neighborhood. M. Vitek, R. Alterman & M. Hill, Land Requirements for Public Facilities in Residential Neighborhoods: Development of a Quantitative Model 96-97 (1988) (Research Report, Center for Urban and Regional Studies, Technion - Israel Institute of Technology) (in Hebrew).
41. See Planning and Building Law §§ 188-196.
42. Id. § 190(a)(1).
44. See Planning and Building Law § 270(a). This section repeals all sections of the Town
Definition of public services: A local outline or detailed plan must designate the land for a public service from the following finite list: playgrounds; roads; gardens or parks; recreational and sports areas; and buildings for educational, cultural, religious, or health services. Under the Town Planning Ordinance of 1936 the list included only roads, playgrounds, and parks.

Procedure: The compulsory dedication is called "expropriation without compensation." Procedurally, the law grafts itself onto the Land (Acquisition for Public Purposes) Ordinance (1943), which is still the basic expropriation law. The law parallels eminent domain in the United States or compulsory purchase in the United Kingdom. Notice must be served as in expropriation, but unlike "usual" expropriation, the notice states that no compensation or reduced compensation is granted.

Unlike in the United States, in Israel the close legal link between expropriation through the state's powers and dedication of land in planning procedures is possible because under Israeli law there is no sharp constitutional distinction between what Americans call "police power" and the powers of "eminent domain." In Israel, both regulative planning powers and powers for expropriation are granted by one statute, the Planning and Building Law (1965). Consequently, Israeli law has never concerned itself with the all-pervasive concern of its American counterpart: that a dedication will not be classified as a "taking," and thus negate a constitutional mandate.

Protections to the landowner

The Planning and Building Law introduced three protections to the landowner that did not exist under the Town Planning Ordinance:

Decline in value of the remainder: Land will not be taken if the market value of the remaining tract is expected to decline in proportional value. This protection is well known among developers and planning administrators.

Planning Ordinance of 1936 except the last sentence of section 27, and sections 32, 37, and 39 (all of which pertain to betterment taxation). See also Planning and Building Law § 190(a)(1). This section expressly increases the compulsory dedication percentage to forty percent from the original twenty-five percent maximum set out in Land (Acquisition for Public Purposes) Ordinance § 20, P.G., Supp. I, No. 1305, p. 44 (1943).

45. Planning and Building Law § 190(a)(1).
47. P.G., Supp. I, No. 1305, p. 44.
48. Planning and Building Law § 190(b).
49. Id. § 190(a)(1).
Future change in use: If the land designation is changed to one that does not allow taking without compensation, the local planning commission must pay compensation to the original owner or return the land taken, as the original owner chooses.\textsuperscript{50} This important protection, though clearly stated in section 196, is not yet well known or widely demanded; however, awareness of this protection has recently increased.

Ex-gratia compensation: The Minister of Interior has the authority to instruct the local planning commission to pay compensation when, in his judgment, the expropriation has caused undue hardship.\textsuperscript{51} A landowner may petition the Minister. Presumably the planning commission has no discretion to award compensation for any land taken under the conditions stated above, even in situations of hardship. However, of the small number of requests submitted to the Minister, rarely has the Minister issued a positive decision.

c. Interpretation by the courts

These seemingly onerous requirements for compulsory dedication suggest frequent court challenges. In practice, the extensive dedication requirement is well accepted by developers, planners, and politicians. Nevertheless, compulsory dedication has engaged the Supreme Court on several occasions and has even included a recent case that received the rare treatment of an additional hearing with a fortified number of judges—a discretionary procedure reserved only for thorny issues on which the usual three judge Court has split.\textsuperscript{52}

In most cases, the courts defer to the judgment of the local and district planning commissions. On a few matters the Supreme Court has expanded the protections provided to the landowner in the statute, but on most issues it has somewhat limited the protections.\textsuperscript{53} To date, court decisions have interpreted the legislation in the following ways.

Proof of a reasonable connection is not required

No proof is needed to show that the dedication is required to meet the additional need for public facilities created by the new development, and that it is proportional to the added burden. In other words,

\textsuperscript{50} Id. § 196(a).
\textsuperscript{51} Id. § 190(a)(2).
\textsuperscript{53} For a detailed legal discussion, including criticism of several key decisions, see Alterman, Exactions of Land for Public Services: Toward a Reevaluation, 15(2) Mishpatim (Laws) [J. FAC. of L., HEBREW U. JERUSALEM] 179 (1985) (in Hebrew).
no Israeli equivalent has emerged to the rational-nexus test which dominates American exactions law. Nor is there even an equivalent to the less demanding British approximation. A rough test concerning a reasonable relationship, to be based on the "threshold level" rationale, could perhaps be teased out of the language of the law regarding the list of services permitted for compulsory dedication when contrasted with the list of services permitted for "regular" expropriation for public purposes. However, court decisions have implied a literal interpretation of the list for compulsory dedication. For example, "educational facilities" can refer to anything from a kindergarten to a high school, and "roads" can include major highways. One Supreme Court judge used hospitals as an example to illustrate his point that a dedication is not required to lead to betterment in the value of the property from which it was taken, thus implying that he did not view dedications as limited to neighborhood level services, which are more likely to involve betterment.

No requirement of proportionality in burden among landowners

Israeli law has not adopted the American test of proportionality in burden among landowners. The burden for a specific service that benefits a whole community could legally be placed on a single landowner. In the United States, this test has been developed in recent years for judging the legality of impact fees. In their book Paying for Growth: Using Development Fees to Finance Infrastructure, Snyder and Stegman distinguish between two types of proportionality: hori-


56. The general definition of "public needs" allowed for expropriation in general under the Planning and Building Law—not compulsory dedication in particular—is a longer list. In addition to the services permitted for compulsory dedication, section 188(b) also includes ports, airports, bus depots, markets, slaughter houses, cemeteries, sewage and water installations, garbage dumps, communal services, and more. The reader will recall that the shorter list that applies to compulsory dedication under section 190(a)(1) includes only roads, playgrounds, parks, and facilities for sports, education, culture, religion, and health. The author has argued elsewhere that a conceivable direction for interpretation might have been to seek the rationale behind the differences between the two lists. Such a rationale might involve the "threshold level" argument: that the shorter list applies to neighborhood level needs, while the longer list applies to city and regional facilities. See Alterman, Toward a Reevaluation, supra note 53.

57. Feizer, 35 P.D. at 652.

zontal equity (proportionality among landowners in similar situations) and intergenerational equity (proportionality among past, present, and future landowners).\textsuperscript{59}

Although no proportionality test has been adopted by the courts in Israel, in practice several factors operate to achieve a reasonable \textit{de facto} horizontal proportionality. The first factor is the practical difficulty of siting a major facility on a single owner's compulsorily-dedicated land because forty percent of most privately owned tracts are too small. Second, most developments require roads and ancillary infrastructure for their own service, and these usually consume over half of the forty percent dedication. Third, the forty percent maximum is usually taken wherever the layout permits, thus the "harshness" is meted out evenhandedly. In the final analysis, the land for a public facility from each site thus contributes to the pool of land for public facilities from which all development in the community benefits. Disproportionate "loading" usually occurs only where an entire tract is taken, but in such a case compensation should be paid.\textsuperscript{60} Problems of proportionality do, however, arise where dedication and expropriation are mixed. Nevertheless, in the absence of a conscious policy for safeguarding proportionality, there are occasional cases of blatant inequity which have little chance of receiving legal recourse.

Intergenerational proportionality is not safeguarded either. However, since 1966, land dedication requirements have usually been consistent because the maximum percentage is normally taken wherever possible. Intergenerational proportionality might have been problematic in the initial years after 1965 because prior to the enactment of the Planning and Building Law, only 25 percent of a tract could be taken.\textsuperscript{61} This, however, never became a legal or public issue.

\textit{The issue of proportionality within Arab villages}

While the issue of proportionality has not yet captured general professional or public attention, it is an important question in the Arab village sector. To understand why, the author will apply Snyder and Stegman's distinction between horizontal and intergenerational proportionality.\textsuperscript{62}

In Arab villages land is mostly private. In these urbanized villages the traditional land system is still dominant, and land is usually transferred through traditional mechanisms such as inheritance and mar-

\textsuperscript{59} Id.
\textsuperscript{60} See Planning and Building Law §§ 188(a), 190(a)(1), (2), (5).
\textsuperscript{61} See supra note 44 and accompanying text.
\textsuperscript{62} Snyder & Stegman, supra note 58.
riage rather than through the marketplace. Almost no land, other than religious facilities, is allocated by the traditional system of public use. The roads in the older parts of the villages are typically very narrow, and sites for schools, parks, or cultural centers are grossly inadequate. An extremely high birth rate creates pressures on existing facilities.

Owners who ask for permits to develop their land sometimes raise the argument of intergenerational inequity: "Why should I suffer if landowners in the past have not been required to dedicate land?" There is also a strong sensitivity about horizontal disproportionality. Planners sometimes find it difficult to avoid such inequity because of the particular configuration of the land ownership pattern. These feelings create a dilemma for planners and elected representatives. On the one hand, the demand for public services is especially high due to an extremely high natural growth rate, the fast pace of social change, and the quick rise in standard of living. There is also a growing expectation that public services will be supplied at national standards. On the other hand, the traditional, extended family-based land regime perseveres. There is strong resistance to compulsory dedication and sensitivity to horizontal and intergenerational equity among the landowners.

**No requirement of benefit to the landowner**

Land can be taken whether or not the landowner or developer stands to benefit directly from the service. This issue was addressed in the important Supreme Court decision of *Feizer v. Ramat Gan Local Planning & Building Commission*, which was considered for an additional hearing. The facts in that case undermined any possibility that the landowners would benefit because their entire plots were taken for a school site. Though "regular" expropriation was involved, the municipality proposed to pay only sixty percent compensation, deducting forty percent as if a compulsory dedication had been made as well. The Court misinterpreted the statute, however, by not recognizing that compulsory dedication and expropriation are two separate legal powers and procedures, as the author has demonstrated in previous works. There is therefore reason to hope that the Court's stand in such cases might be gradually reversed.

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64. Id. at 648 and notes accompanying that page.
65. Id. at 649-50.
What is a public service?

What constitutes a public service? The answer to this question can be expected to differ from one country to another, reflecting different political attitudes to the boundaries of government action, differing social organizations, and different economic structures. In Israel, the range of services included as targets for developer obligations is considerably broader than the equivalent list in the United States, encompassing not only those services traditionally exacted in the United States, such as roads, sewers, parks, and schools, but also nursery schools, health care facilities, cultural centers, and even religious facilities.

The broad definition of services by function is clear from the legislation. The law, however, does not specify the definition of “public services” on another level: does “public” refer to the type of service—education, health, roads—or to the agency that runs it? In Israel, where many services are operated by non-municipal bodies—central government agencies and public nongovernmental agencies—this question could become controversial. For example, can dedicated land be used for a school run by an ultra-Orthodox religious organization? These are officially not part of the public school system but in practice are virtually so. Such schools are increasing in number. Or, can a site be taken for a health clinic operated by the major health provider, the Histadrut General Trade Union? Or for a private clinic?

Court decisions have not clarified whether the dedicated land must be used for a government run public service, or whether the land can be turned over to a quasi-public or even private organization for one of the designated land uses. One possible interpretation of the statute, proposed elsewhere by the author, leads to the farreaching conclusion that land can be exacted only for services that are to be operated by local or central government bodies.67 This question, however, has never been directly addressed by the courts. Nor has it received much attention in the United States.68

How closely must the land use designations match the list of permitted uses?

One Supreme Court decision69 implies that the land use designation for a public facility must be specific and must fall precisely within the shorter list of uses allowable for compulsory dedication, rather than

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67. *Id.* at 197-201.
the longer list of uses allowed for expropriation with compensation.\textsuperscript{70} The Court ruled that a deduction of forty percent of the compensation due for expropriation of a full tract located near the seashore at the south entry to Haifa was illegal because the purpose of the plan was "to enable an open view of the scenery for those entering or leaving the city and to serve as a land reserve for army parades held in Haifa from time to time [those have since ceased—R.A.]."\textsuperscript{71} These purposes, said the Court, were not included among the list of uses permitted for compulsory dedication.\textsuperscript{72}

Under a less strict interpretation, these purposes could be viewed as falling under permitted categories such as gardens, sports, or recreation, but the Court chose the more strict approach. This means that compulsory dedication would be illegal unless the purposes clearly fall within the permitted list. Although that decision was reported in 1977, awareness of this issue has been slow to emerge, receiving a boost only recently.\textsuperscript{73} Some planning commissions still continue to use general catch-all designations, while landowners often remain unaware that compulsory dedication under such circumstances could be ruled illegal.

\textit{Protection in case of land use change}

The generous protection for the landowner granted by section 196 in cases of land use change is partially circumvented by planning authorities.\textsuperscript{74} Many have adopted a "loopholing" habit of indicating the land use purpose in overly general terms, such as "public buildings" or even more generally, "public use." Almost any public use could be included under these rubrics without requiring a change in designation. This practice may be illegal, but it has received very little attention in the courts.

\textit{Interpretation of "decline in value of the remaining part of the plot"}

The protection against taking a portion of a plot if the remainder will decline in value has been interpreted—to the chagrin of developers—to refer to a disproportionate, not an absolute, decline in the

\textsuperscript{70.} Id.
\textsuperscript{71.} Id. at 792.
\textsuperscript{72.} Id.
\textsuperscript{73.} This increased awareness may be due, in part, to the author's 1985 article published in a widely-read Israeli law journal and to a series of lectures given by the author to lawyers, land assessors, and planners in several parts of the country. See Alterman, \textit{Toward a Reevaluation}, supra note 53.
\textsuperscript{74.} See Planning and Building Law § 196(a).
value of the remaining plot. The rationale is similar to the notion of “excess condemnation” in the United States. This is a reasonable interpretation; otherwise an exaction would only be allowed where a significant betterment in value occurs, so as to offset the absolute decline in value of the remaining tract.

**Long delays in implementing the public use**

Another issue of owner protection is the extent of tolerable delay in the undertaking of the public works for which the dedication was ostensibly required. The statute does not indicate whether an unreasonably long delay should be considered a de facto change of designation which would activate the statutory protection and allow the owner to demand compensation or the return of his land. The French have recently introduced such a protection.\(^75\)

For many years, Israeli court decisions have implied that landowners should have protection against unreasonably long delays (meaning several years) in the undertaking of expropriations. But until recently, they never found the delays to be long enough. In a landmark 1988 decision involving expropriation of a whole lot as well as deduction of up to forty percent without compensation, the High Court found that 16 years was indeed an unreasonably long delay.\(^76\) The Court for the first time issued an injunction against a planning commission, forbidding it to expropriate the land.\(^77\) Although the situation where an entire lot is frozen from any lucrative use and is thus practically unsellable is much more blatantly unjust than the case of unused land taken through the forty percent compulsory dedication, this precedent will likely make the planning authorities more aware of the issue of delay in the development of dedicated land.

**Are fees in-lieu of dedication legal?**

In the United States, the problem of proportionality and equity in land dedications has been partially addressed by the mechanism of in-lieu fees, which in many states have been recognized as legal for many

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\(^{75}\) Renard, *supra* note 35, at 178.


\(^{77}\) In Amiatv, the problem was that the actual expropriation, which would have entailed payment of compensation, was avoided by the municipality and that the owner was forced to pay taxes and was unable to sell his lot at a reasonable price. *Id.* at 93. Note that in compulsory dedication the authorities have no interest in delaying the actual expropriation. The Court ordered that the previous land use designation (residential), dating from 1962, be reinstated. *Id.* at 98.
years. Translation of required dedications into monetary terms can help to apportion the load more equitably in situations where the size of the development does not merit supply of some needed services—such as schools—on site but does increase demand for them, or where the layout of the lots might lead planners to ‘‘load’’ some landowners disproportionately. Although no court decisions on this subject exist in Israel, one can assume that in-lieu fees, if ever practiced, would probably be ruled illegal under Israeli law for reasons to be explained later in this article.

Relationship with compensation for ‘‘Worsement’’

A tough issue which has recently engaged the Supreme Court is the relationship between compulsory dedication and compensation for decline in value arising from official plans, which we shall call ‘‘worsement’’ (adopting a British term that denotes the opposite of ‘‘betterment’’). The two questions are linked because the courts have consistently ruled that in cases of expropriation with compensation of a full lot or of over forty percent, the owner should receive compensation in two stages. First, within one year after the plan is approved, the owner can request compensation for decline in value caused by the designation for public use. Such a land use change might take away fifty to ninety percent of a lot’s value. This claim is based on section 197 of the Planning and Building Law, which grants the general right for compensation in case of worsement due to the approval of a statutory plan. Second, when expropriation is actually undertaken and ownership of the land is transferred, which may take many years, the landowner has the right to compensation for the remaining value in accordance with the 1943 Lands (Acquisition for Public Purposes) Ordinance, to which the Planning and Building Law turns for its stipulated expropriation procedure.

The practice among local authorities has been to deduct up to forty percent at both stages. We saw that in the Feizer case the Supreme Court ruled that the deduction at the expropriation stage is legal, perhaps even mandatory. In the past, the prevalent opinion of the legal advisors to the local authorities was that the deduction at the first stage is legal as well, despite the absence of direct legislative authori-

79. See Planning and Building Law § 197.
81. Planning and Building Law § 190(a).
82. 35 P.D. 645 (1981).
zation. After all, their logic went, why should one landowner make a reverse windfall by being fully compensated, while others, who have not had the "luck" of being expropriated or suffering a "wipeout," are required to contribute their forty percent shares?

As a great disappointment to local authorities, in 1987 the Supreme Court ruled in *Local Planning & Building Commission of Rishon Le'Zion v. Hamami* that the practice of deducting a hypothetical exaction from the compensation for worsement is illegal. In a long minority *obiter dictum*, Supreme Court President Shamgar cited the author's 1985 article, used the opportunity to return to the issue of deduction of forty percent at the actual expropriation stage, and expressed doubts about the *Feizer* decision as to whether the deduction at the second stage was legal.

Thus oddly, as the law presently stands, forty percent must not be deducted at the first stage of compensation for a change in designation, but such a deduction is legal, perhaps even obligatory, at the second stage of actual expropriation. The correct interpretation of the law, in the author's view, is that full compensation is due at both stages where a whole tract is expropriated, and no compensation is due in either stage where forty percent or less is taken for a permitted public use.

2. **Integration into the Market and Planning Practice**

Despite its draconian appearance and the real need for some reforms, extensive land exactions have been fully integrated into Israeli planning practice and the land market, for better or for worse. This

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83. 41 P.D. 370 (1987).
85. *Hamami*, 41 P.D. at 382-84.
86. This complicated chain of decisions may soon have a sequel if the Supreme Court decides the appeal of the Tel Aviv District Court's decision, Pri Ha'aretz Co. v. Kfar Saba Local Planning Commission (Feb. 11, 1988) (not yet reported in Psakim Mehozlim [P.M. - Decisions of the District Courts]) (delivered by the same district court judge who sat in the *Hamami* decision). There, the landowner argued that the two-stage rule applies also to compulsory dedication where less than forty percent of a tract is taken and the rest is lucratively developed. The judge ruled (correctly, in the author's opinion) that the dedication falls within section 200 of the Planning and Building Law which exempts the local authorities from paying compensation for worsement. The list of exemptions is very broad and includes most situations where the decline in value is not unreasonable. This clause has never been fully interpreted by the courts, but it is clear that the long list of exempted situations actually leaves only a very narrow range of situations where the owner has the right to compensation, such as where no commercial value is left at all. The case of a forty percent dedication is, in the author's opinion, definitely not one of these situations. The protection against decline in the proportionate value of the remaining part of the lot ensures that the development value will never be severely hurt. Furthermore, the marketplace adjusts land values under the assumption that the compulsory dedication is built in.
tool has become a trademark of Israeli land development practices and has generated its own momentum of "asking for more."

One of the best tests of how well planning controls are integrated into the development market is to investigate land assessment practices. The statute says "up to forty percent," yet when land is appraised for private transactions, the land assessors often assume that the maximum will be taken. They assess the land with an almost automatic forty percent deduction in value. Thus, by turning exactions into a supposed constant and by merging them into land values, the bitter pill has been sweetened by the marketplace—at least as far as developers or speculators buying land for future sale are concerned. It is therefore unsurprising that local authorities have also absorbed this practice into valuation of land for expropriation—as in the Feizer case—and into the assessment of compensation for "worsement." They are reluctant to let go of the latter practice despite the Supreme Court decision in the Hamami case.

Planning practice has also absorbed—nay, swallowed—the exactions rule with remarkable appetite, sometimes to the detriment of planners’ cerebral functions. All too often, in laying out a new area or a planned unit development, planners regard the forty percent as if it were a rationally-based planning standard. They often settle for the amount of land available for public services through dedication and juggle around with the platting to obtain some reasonable configuration. They often avoid the need to conjure up additional methods of obtaining sites or floor area where the neighborhood’s characteristics merit these.

Occasionally, the opposite problem occurs. In commercial or industrial zones, or in Israel’s few low-density urban residential areas, forty percent might be too much. Nevertheless, the land is usually taken to the maximum (recall that the ceiling is uniform across land uses). Availability of these excess sites might lead to the location of NIMBYs (Not In My Backyard),87 such as schools for handicapped children in areas not best suited to the children’s needs. Another prevalent sight is excess public land which remains undeveloped for many years.

In short, a numeric figure supplied by a statute as a ceiling should not become a substitute for a carefully designed planning standard; yet in practice it often is. Many developers and planners seem to prefer the uniformity, certainty, and perceived fairness of the forty percent mark over the more difficult road of tailor-made flexibility that adjusts downward if necessary, or that draws creatively on other tools when dedications are insufficient.

87. NIMBY is planner jargon for an undesirable land use.
B. Informal Negotiated Exactions

Increasingly, planners and officials have been going beyond what formal land dedications can yield. Through negotiations, they have sought to obtain either additional land for construction of public facilities such as kindergartens and sports centers. Monetary payments are not regarded as acceptable. The emerging informal exactions are unarticulated as policy, barely recognized in court decisions, virtually unresearched, and only reluctantly acknowledged by the parties concerned.

1. Why are Additional Dedications of Land Necessary?

To outsiders, the thought that more than forty percent of a land tract may be exacted for public facilities is outrageous. However, Israel is a country with a larger average family size than that of most other Western countries, a predominance of high density multifamily housing with large concentrations of children who generate the need for the largest chunk of land consuming facilities, and a view that public responsibility extends to a wider range of services than is commonly accepted in some other Western countries. In Israel the range of public services includes neighborhood health services, extensive preschool education, cultural facilities, and even religious facilities. Research has shown that by Israeli standards, middle and high density residential areas need more than forty percent of their land for infrastructure and public services. In practice, additional land is often allocated, though it rarely meets the assessed needs in full.

The slowly growing practice of requiring exactions in the form of constructed facilities, though still less frequent than land dedications, is the result of yet another factor. In the past, local authorities could rely on central government to build most facilities. The recent sharp cuts in the national social budget, however, have led some municipalities to employ extracurricular ingenuity. At times, the dedications consist of land plus a whole building; at other times, they consist of space within a condominium. Such dedications call for joint ownership of the land by the developer and the municipality.

2. Legal Issues in Negotiated Exactions

a. Are negotiated exactions legal?

Additional land or dedicated facilities are obtained through negotiations prior to the approval of a land use plan or amendment, or prior

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88. Our recent research concerning allocations needed for the various public services in neighborhoods with varying demographic characteristics shows that education is the single largest land consumer. See M. Vitek, R. Alterman & M. Hill, supra note 40.
89. Id. at 109.
to issuance of a building permit. The developer’s additional obligations may be stated in the plan’s regulations or inserted as conditions within the building permit. At times there is a formal, signed contract, typically through the municipality’s real estate department. At other times an agreement may be implied through the action of the developer who complies with a condition stated in a plan or building permit, for example, by transferring land or built-up space in addition to what is permitted in the statute for taking. The developer’s motive might be to obtain some planning relief in the form of an amended plan with a more lucrative land use, or it might simply be to secure a building permit within a reasonable time.

Israel has no legislation that explicitly permits local authorities to undertake planning agreements, such as the innovative California state legislation enabling “developer agreements.” Nor does it have any equivalent to Britain’s section 52 agreements under the Town and Country Planning Act, or France’s zones d’aménagement concerté. However, Israeli case law indicates that most types of informal agreements are probably legal.

**Legality of what the developer is asked to dedicate**

In several negotiated land dedication cases, the Supreme Court refused to accept the developers’ arguments that the planning authorities’ powers of compulsory dedication or of withholding permits were in effect “swords over the developers’ necks” and thus that land granted “voluntarily” should be viewed as dedicated compulsorily. In general, Israeli courts are quite tolerant of what Americans would call “contract zoning.”

**Legality of concessions not stated in the plan**

In the past, local planning bodies commonly compensated landowners for land over the forty percent maximum taken as statutory dedications—and often even for the amount comprising the forty percent—by granting extra development rights without amending the plan. This practice necessitated the adding of extra densities not indi-

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92. Renard, supra note 35, at 176.
icated in the plan and thus not available for public review. Such an exercise required some mathematical acrobatics: the prescribed floor-
area ratio would be calculated on the gross lot area before dedication as opposed to calculating the ratio after the forty percent dedication. In recent years, the courts have repeatedly expressed their distaste for this practice, one that Americans might consider a type of incentive zoning and that others might more critically tag "zoning for sale." The bonus is the extra development rights granted, and the "conces-
sion" by the developer is the dedication. While American-style incentive zoning incorporates this principle overtly into the zoning regulation and makes it known to the public, the Israeli practice has had the status of an ad hoc policy outside the statutory plan.

The national planning authorities have undertaken an educational campaign to eradicate this distasteful practice, emphasizing that it undermines the objectives of the stated densities in plans by damaging the quality of life and by loading more people or floorspace on infra-
structure capacities calculated according to the officially permitted density.94

b. Implications of classification as compulsory or voluntary dedication

Classification of the dedication as compulsory or voluntary can have far reaching implications for the landowner.

**Implications regarding entitlement to compensation in case of changes in use**

The issue of classification of a dedication as compulsory or voluntary can become important where the plan is subsequently amended to a use category that is not permitted for compulsory dedication. This raises the question of whether the landowner is entitled to compensation or the return of his land in accordance with section 196.95 This issue was the central question in a striking Supreme Court decision that concerned one of the most expensive pieces of land in Israel: the location of the Diamond Stock Exchange tower in Ramat Gan.96 Apparently, part of that land had been dedicated for open space and roads in the 1930's, more than the twenty-five percent maximum then

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94. Actually, where this practice became prevalent (even in major cities in the center of the country), one can surmise that the planners took this expectation into account, as did future residents and realtors.
95. See Planning and Building Law § 196(a).
permitted for compulsory dedication. The present owners claimed the right to reclaim their land in view of the change to commercial use (a diamond stock exchange, an almost allegoric expression of commercialism). The Court ruled that although the amendment to the plan that allowed development in the remainder of the tract would not have been granted had the owners not agreed to the dedication, the dedication should nevertheless be classified as voluntary.

Interestingly, developers seem largely incognizant of this danger. Empirical research directed by the present author has shown that, ironically, much of the land obtained through what the owners (and perhaps the municipality as well) believed was transferred though the compulsory dedication route was in fact transferred voluntarily. Unknowingly, the landowners and their lawyers had forfeited the generous protections accorded in the law in cases where land was taken through compulsory dedication and subsequently changed to a use not permitted for such a taking. That protection, grounded in section 196, is more liberal than the protection in cases of expropriation with compensation according to section 195, discussed above. Unlike section 195, section 196 obligates the local planning commission to pay compensation as if it would have been compulsorily purchased at that time, or, alternatively, it grants the owner the right to decide whether he wishes to regain the land. There is no stipulation about any need for the landowner to pay for the betterment value (possibly, apart from the regular betterment tax).

**Implications regarding calculation of the cumulative proportion of land taken**

The question of classification can also become relevant for calculating the cumulative proportion of land permitted for taking without compensation: will land ceded through negotiation be included within that total or outside of it? A recent High Court decision, which concerned ex gratia payments of compensation by the Minister of the In-

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98. Shikun Amami, 35 P.D. at 296.
99. Id. at 299-300.
100. Alterman, Toward a Reevaluation, supra note 53, at 233-34; B. Murray, Exactions of Land for Public Services: Case-Study of Haifa 128-29 (1985) (M.Sc Thesis, Graduate Program in Urban and Regional Planning, Technion - Israel Institute of Technology, R. Alterman, advisor).
101. See Planning and Building Law § 196(a).
102. Id. § 195.
103. Id. § 196(a).
terior, indirectly touched on this question.\textsuperscript{104} Here the High Court ruled for the landowner by including land dedicated through reparation within the cumulative total of land taken.\textsuperscript{105} This decision leads the author to surmise that, when the decisions of the planning bodies are reviewed through the eyes of the High Court of Justice (which oversees administrative norms and constitutional rights), the High Court may be inclined to regard some of the more blatant "little choice left" agreements, where hardship has been caused, as equivalent to compulsory dedications. Thus, the Court may count land taken through the agreement as part of the total amount of land permitted for taking. This rule may not apply in the regular courts, including the Supreme Court in its appeal capacity, where the jurisdiction normally lies for claims for compensation. In that instance, land taken through an agreement might not be counted as part of the total land taken.

\textit{The issue of "fettering of powers" in a public contract}

Also at issue in examining the legality of negotiating exactions is whether the local authority should be allowed to commit itself to avoiding plan or other policy changes forever or even for a specified time. This is the issue of "fettering of powers" that applies to any public contract.\textsuperscript{106} In Israel, case law in various areas has generally held that local governments cannot entirely negotiate away their rights and duties to make new policies as needed. Although in Israel such contracts are valid, the government can release itself from the contract when essential needs merit such unilateral withdrawal.\textsuperscript{107}

One can find an expression of this basic position in section 195 of the Planning and Building Law, which refers to land that was either

\textsuperscript{104} Luft (inheritor of Feizer) v. Minister of the Interior, (Jun. 8, 1988) (not yet reported). The issue here was the refusal by the Minister of the Interior to grant \textit{ex gratia} compensation in cases of hardship due to compulsory dedication. The law leaves the decision to the Minister's discretion. The case was "round four" of the Feizer story, after Mrs. Feizer was no longer living and after one of her inheritors turned to the High Court. Some years before the compulsory dedication, the planning authorities had imposed a land readjustment ("reparcellation") scheme. As part of that scheme, the size of the original lot was reduced and dedicated to public use. We shall see later that the legal relationship between reparation and compulsory dedication is not entirely clear. Of relevance to the present question is the High Court's decision that the tithe taken through reparation \textit{should} be counted as part of the total land taken because the hardship is cumulative. However, the direct \textit{ratio} mentioned in this case pertains to the duty of the Minister to exercise his discretion in cases of hardship, rather than to a direct interpretation of the law as it should be applied by the planning authorities.

\textsuperscript{105} \textit{Id.}

\textsuperscript{106} In England also, despite the existence of a statutory format for planning agreements, the courts are nevertheless reluctant to allow local authorities to fetter their powers. See Young \& Rowan-Robinson, \textit{Section 52 Agreements and the Fettering of Powers}, 1982 J. PLAN. \& ENV'T L. 673.

expropriated or transferred through an agreement. This section grants the landowner the right of first refusal for repurchase at a price no higher than the compensation originally paid plus the betterment in value created by the new plan. This section also implies that planning bodies are indeed free to change their minds. Case law in planning has consistently held that landowners have no vested rights to immunity from future changes in the plans. Landowners should therefore be cautious of giving up rights in a negotiated agreement from which the municipality is free to release itself.

Agreements with the Israel Lands Authority

Informal negotiations also occur between the Israel Lands Authority and local officials, particularly over the transfer of land beyond the forty percent mark for additional facilities needed in higher density areas. Naturally, a different balance of power dominates the negotiating table than when local officials face private developers. Agreements with the Lands Authority are likely to apply to land only. Only in recent years has the Israel Lands Authority become aware of the legal implications of voluntary transfers, and the Authority now demands that the land it dedicates to local authorities go through the formal expropriation process rather than be voluntarily transferred, as was customary before.

3. Legality of Monetary Payments and American-Style Fees

Well outside legal bounds lie requirements by municipalities for any monetary payments that are not specifically authorized in a national statute. Such requirements are probably rare. The fluidity possible in American land use law between in-kind contributions and fees is not possible in a statute based system like Israel’s. The central concern of United States exactions law about the proper classification of a particular exaction as a tax or a police power based fee is much less relevant in Israel. In Israel both types of developer contributions must have explicit authority. This is why American-style in-lieu fees, as well as impact fees, could not emerge in Israel through local initiative. In Israel, in-kind exactions and the betterment tax both exist through specific legislation (in fact, through the same law). Decisionmakers in Israel seem unaware of the advantages or the concept of in-lieu fees and apparently do not sense the need for them.

108. Planning and Building Law § 195.
109. Id. § 195(2).
110. Id. § 190(a)(1); Planning and Building (Amendment No. 18) Law, 35 L.S.I. 214 (1981) (codified at Third Schedule to Planning and Building Law (1965)).
4. Public-Private Partnerships

Lately, some municipalities (Haifa, for example) have exacted parts of commercially run facilities for public use, such as a public sports annex in a private sports club or a percentage of the old-age housing units in a private project to be earmarked for needy persons recommended by the municipality. In these cases and in cases where floor areas in condominiums are handed over to the municipality, the private developer and the municipality often find themselves as strange bedfellows, jointly owning or leasing the plot of land on which the building is located. Economists or planners outside Israel sometimes tag this result a "public-private partnership." In Israel, however, unlike in the United States[111] and Western Europe,[112] such arrangements are not articulated as a policy, but rather as ad-hoc deals about which local elected officials are as yet uneasy, even apologetic. These officials are probably unaware of how popular public-private partnerships are in other countries—in both Western and recently some Eastern Block countries.

5. Landowners' Association for Infrastructure

A new type of initiative has recently appeared in scattered cases: the self-organization of landowners who plan to build their private dwellings and who do not wish to wait for the local authority to install infrastructure. Planning commissions can legally freeze development almost indefinitely until they are satisfied that adequate facilities can be supplied.[113] Since in Israel the concept of an adequate facilities ordinance as practiced in the United States[114] is unknown, no rules or procedures exist which stipulate what landowners should do to install infrastructure on their own. So the landowners have created their own rules. In Haifa, the planning bodies approved a detailed plan, but the municipality did not plan to install the infrastructure in the foreseeable future. With the help of the Haifa municipality, the landowners established a system whereby they put up the money and hired the contractors to build the infrastructure, while the municipality acted as a middleman for the financing. Nonparticipating owners, upon requesting building permits, are required to reimburse the participants

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112. G. Hallett, supra note 6, at 206.
113. See Planning and Building Law § 145(a)-(c).
for their portions of the infrastructure (linked to the ever increasing cost-of-construction index, of course).

C. Alternatives to Exactions

The arsenal of tools available in Israel for obtaining land for public facilities or finances for their construction is not limited to exactions. Several other tools exist, and some are quite innovative from a cross-national perspective. The Israeli situation is special not only because of the coexistence of these tools in one country, but also because they are all widely practiced.

1. Land Readjustment ("Reparcellation")

As an alternative to land dedication, a sophisticated land readjustment tool, popularly called "reparcellation" in Israel, is provided by sections 120-128 of the Planning and Building Law. Like equivalent tools available in a few other countries, reparcellation enables the resubdivision of land. The need for readjustment might arise either because the existing subdivision is technically impractical for development due to an unworkable layout of the lots, or because development is frozen due to insufficient infrastructure and public services or inadequate environmental conditions. Unlike its counterparts in other countries, the Israeli tool can be applied without the owners' consent, provided that personal notifications are served.116 No majority vote of the owners is necessary.117

The law stipulates that in reallocating, the authorities should attempt to fulfill two criteria in the best manner possible: 1) to designate the new plot as closely as possible to the location of the old plot; and, 2) to attempt to designate a lot valued as closely as possible to the proportional value of the original lot relative to the total value of the lots.118 If proportionality cannot be maintained, the owners' financial rights are ensured through a mechanism of payments among the owners to level out relative gains or losses due to the increase or reduction

115. The following countries other than Israel practice land readjustment: South Korea, West Germany, Japan, Taiwan, and Australia. LAND READJUSTMENT: A DIFFERENT APPROACH TO FINANCING URBANIZATION 1-29 (W. Doebele ed. 1982).

116. See Planning and Building Law §§ 121-122.

117. Cf. Renard, supra note 35, at 179-80 (in France, a Reallocation and Development Association of Landowners, which is empowered to prepare a reallocation plan and then to develop the area to which the plan applies, can be constituted and approved by the administrative authority if two-thirds of the landowners owning at least two-thirds of the area agree to the association).

118. Planning and Building Law §§ 122(1)-(2).
in value of particular lots caused by the new subdivision.\textsuperscript{119} By law, the municipality acts only as an intermediary, and does not have to spend any of its own funds for these "adjustment payments."

A tough legal question which has split the Supreme Court and which has been granted an additional hearing procedure is the question of the relationship among two levels: the level of the adjustment payments among the owners themselves versus the level of the planning related payments to be exchanged between the landowners and the municipality or vice-versa.\textsuperscript{120} The Court finally interpreted the law to read that the readjustment procedure does not replace or bypass the municipality's right to levy the betterment tax,\textsuperscript{121} or to pay compensation for "worseness" if the owner can demonstrate that such compensation is due.\textsuperscript{122} Thus, the betterment levy—a type of developer provision to be discussed later—is taken on top of the land exacted for public services.

Reparcellation is a nearly ideal tool for providing land for public services. Because readjustment normally results in an increase in overall land values that arise from lifting the freeze on development and from planning more intensive land uses, a portion of the tract can be taken for public facilities without loss to anyone. The law provides that under reparcellation, the forty percent maximum on land dedications can be overridden, with ostensibly no upper limit.\textsuperscript{123} However, because section 197 ostensibly grants rights to compensation for "wipeouts,"\textsuperscript{124} there is a\textit{de facto} limit: the planning authorities will try to assure that some margin of betterment in total land values will be left after the exactions, even though the section 197 rights are, in the author's opinion, quite elusive. The landowner will often find it difficult to claim these rights in court. In Israel, unlike in some other countries that practice readjustment, land is usually exacted for actual public use, rather than for resale to finance the construction of public services.\textsuperscript{125}

\begin{itemize}
  \item \textsuperscript{119} \textit{Id.} § 122(3).
  \item \textsuperscript{120} Tor v. Ramat Hasharon Local Planning & Bldg. Comm'n, 34 P.D. 600 (1980).
  \item \textsuperscript{121} \textit{See infra} notes 126-37 and accompanying text.
  \item \textsuperscript{122} Tor, 34 P.D. at 606-10.
  \item \textsuperscript{123} Land (Acquisition for Public Purposes) Ordinance (Amendment) Law § 4, 18 L.S.I. ___ (1964).
  \item \textsuperscript{124} Planning and Building Law § 197.
  \item \textsuperscript{125} Cf. M. Kitay, \textit{LAND ACQUISITION IN DEVELOPING COUNTRIES}, 5-6, 23-27 (1985); Schnidman, \textit{supra} note 37. These authorities note that land is exacted for resale to finance the construction of public services in the following countries: South Korea, Taiwan, West Germany, Japan, and Western Australia. For an in-depth analysis of land readjustment in Japan, see Nishiymama, \textit{Kukaku-Seiri (Land Readjustment): A Japanese Land Development Technique}, 1 LAND ASSEMBLY & DEV. 1 (1987).
\end{itemize}
Reparcellation is structured as a "win-win" tool to make everyone happy. With its built-in equity criteria, reparcellation is both a powerful and a just method for obtaining land for public facilities. There are, however, various administrative and legal problems. For example, the task of tracing owners to serve notice is sometimes complicated by the lingering predicaments of Israel's history, such as the problem of land purchased in the 1920's and 1930's by Jews residing in Europe, where no descendants survived the Nazi Holocaust. Despite such time-consuming administrative problems, in recent years reparcellation has been applied on a large scale, especially along the Israeli coast where population pressures are intense and thousands of plots need readjustment. Reparcellation should also be considered in dealing with the difficult shortage of public land sites in Arab villages where there is special sensitivity to private land ownership. There, application of the usual forty percent dedication has encountered resistance, and reparcellation, with its visible interowner equity, may be a more palatable alternative (although reparcellation has also met resistance and thus has not yet been widely used).

2. The Betterment Levy

In 1981, Israel revamped its betterment tax by superseding the British-Mandate Town Planning Ordinance of 1936\textsuperscript{126} with the Planning and Building Law.\textsuperscript{127} The tax provides local authorities with a highly cherished financial resource. Local authorities are required to levy fifty percent of all betterment in land value arising directly from public planning decisions.\textsuperscript{128} The tax is collected when a building permit or nonconforming-use permit is issued or at time of sale. All the proceeds remain with the municipalities.\textsuperscript{129} Although the tax applies to all


\textsuperscript{128} See Planning and Building (Amendment No. 18) Law §§ 1(a), 2(a), 3 (section 1(a) sets forth grounds on which the levy can be made; section 2(a) requires landowners to pay local authorities for betterment in land values; and section 3 provides for a fifty percent levy on all betterment in land values).

\textsuperscript{129} Who gets the proceeds is an important question in the design of betterment recapture tools. See Alterman, \textit{Land Value Recapture, supra note 127}. In Britain, the short-lived Development Land Tax passed the proceeds on to the central government, and only part of the proceeds went back to local authorities. In the author's assessment, the difficulties encountered in implementing that tax may reflect the weak interest of local authorities in the tax. Overall, the Israeli tax seems more successful—perhaps due to this difference.
development, the statute enumerates a set of exceptions, which are not left to local discretion, that reflect national social and developmental policy. For example, some development towns are exempt, as are poor neighborhoods included in Israel's large-scale neighborhood revitalizing program. Owner constructed housing units below a certain unit size are exempt. This also excludes smaller units constructed by developers.

The tax is levied in addition to the exactions; mandatory land dedications cannot be offset against it. The tax's status relative to informal exactions, however, is uncertain. A pilot research project undertaken by the author and a student shows little adverse effects of the tax on planning decisions or the development market, although more thorough research might well reveal more negative effects of this high-intervention policy. With high real estate prices, the tax is an important financial resource in many towns and cities.

The reader might ask, has the betterment levy not made exactions superfluous? It has not. Local authorities want both types of developer obligations: the money from the betterment tax and the land from formal and informal exactions. The law supports them in this goal, at least concerning formal compulsory dedications and land taken through readjustment. This legislation specifically states that in making the betterment assessment, compulsory dedication should not be offset. The legal relationship between the obligation to levy the betterment tax and informal, negotiated exactions is less clear: can the local authority deduct facilities exacted through negotiations from the betterment due?

Furthermore, the law does not create a tradeoff among types of developer obligations through the designation of the proceeds. The earmarking provisions in the law are quite general, allowing expenditure of the funds for "the preparation of schemes in the planning area or the area of the local authority, . . . and the implementation thereof, including the expenses of development and of the acquisition of land for public purposes defined [for the purposes of land expropriation]"
in section 188 of this Law." \(^{136}\) This in effect pertains to any planning or development-related purposes. Most local authorities would have no trouble showing that their capital expenditures on construction exceeded their tax funds. There is neither a need to demonstrate a trade-off between alternative sources of financing nor a rational-nexus or linkage requirement.

It is clear that the rationale for the tax is different than the rationale for exactions, whether in the United States, Israel, or elsewhere: exactions concern impact mitigation—how to answer for the increase in pressure on public facilities; betterment recapture concerns the public's right to claim part of the unearned increment. \(^{137}\)

3. **Extensive Land Expropriation Powers for Land Assembly and Development**

There are also virtually boundless powers of expropriation (equivalent to "eminent domain" in the United States) outside the Planning and Building Law. These powers are based on the unrepealed 1943 Land (Acquisition for Public Purposes) Ordinance\(^ {138}\) and reside with the Minister of Finance, but they can be delegated to local authorities on a case-by-case basis. In the country's formative years these powers were used occasionally for obtaining land for large scale developments, then leasing it back to residents or industries. Some, but not all, of these expropriations were from Arab owners. Because of the sensitivity of land ownership, this controversial practice has almost ceased since the mid-1970's, both on the national and local levels. Local authorities must now rely on their own, more limited powers of expropriation available in the Planning and Building Law. \(^{139}\) But since local governments have little money for paying full market value compensation (discounting the new plan) that the law mandates, they are limited only to exactions.

The new wave of mass immigration to Israel from the U.S.S.R. has recently led some officials to suggest using expropriation powers once again for large-scale land assembly. This time the focus will likely be on the former agricultural land held by Jewish co-operative villages (now in the form of urban communities) located near large urban centers. The expropriation will actually take the form long term lease-holds with the Israel Lands Authority.

\(^{136}\) Planning and Building (Amendment No. 18) Law § 13 (as amended by Planning and Building (Amendment No. 20) Law, 37 L.S.I. 25 (1982)).


\(^{138}\) P.G., Supp. I, No. 1305, p. 44.

\(^{139}\) See Planning and Building Law §§ 188-196.
4. **Special Levies**

Local authorities can pass by-laws to levy charges (similar to special assessments in the United States) for specifically authorized purposes, such as roads and sewerage. They can also levy a variety of service connection charges for water, sewerage, fire protection and electricity.¹⁴⁰ In poorer towns and neighborhoods, however, these levies are often waived or reduced. In addition, some municipalities use various exotic tools such as the "parking ransom," which is imposed by some local authorities when new development falls short of the parking requirements stated in the plan. A "tree ransom" is often levied when trees are cut for clearing a lot, reflecting Israel's longstanding concern with replenishing its lean forests.

III. **THE LAW, SOCIAL POLICY, AND STANDARDS FOR PUBLIC SERVICES**

The standards a society sets for its public services reflect public policy priorities and, over time, mirror changing social values. The supply of adequate sites for infrastructure and social services reflects a well supported policy in Israel. The accepted standards for public services in neighborhoods have changed with time, increasing in quantity and improving in quality. This trend is viewed as a positive expression of the rise in the quality of life as the country has transformed itself from a poor, developing country into a semi-Western one. These standards have also served as a welcomed correction to the low priority status that public services endured during the country's formative years when the pressures of immigrant absorption placed the emphasis on the quantity rather than the quality of housing production.

The extent to which the supply of public services in Israel is driven by social policy is reflected linguistically: in the United States and the legal evolution of exactions, the dominant term has been "infrastructure." "Facilities for social services" has evolved as a recent tag-on. By contrast, the dominant term in Israel is "public services." Education, health, and community services have always been coequals to roads and sewers. Furthermore, the geographic term of reference is always a "neighborhood," instead of the impersonal terms "development" or "subdivision" used in the United States.

The layers of exactions in Israel may seem excessive, yet developers generally seem to accept them. They have not organized against them and have even cooperated in drafting legislation such as the better-

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ment tax. Furthermore, the general feeling among planners and policy makers is that the formal mechanism for exacting land, although seemingly high at the forty percent level, does not ensure adequate land for public services in a typical neighborhood. Thus, the consensus is that municipalities are justified in attempting to negotiate for more.

The national planning authorities have periodically commissioned research to study the changing needs for public services and to design appropriate standards.\textsuperscript{141} At one point, the National Planning Council discussed, but did not adopt, a report claiming that the forty percent dedication suffices only for a floor-area ratio (FAR) of up to 0.6. The report proposed an additional one percent of the land for every 0.06 FAR above that, recommending that the forty percent dedication become a \textit{minimum} standard. Though any formal legislative change is unlikely and undesirable as a substitute to a planning based approach for determining needs in each case, exactions have in practice increased through the use of the informal methods. More controversial are exactions of in-kind construction or, if they ever occur, monetary payments.

IV. Conclusion

The case study of Israel serves as an excellent laboratory for studying the interrelationship between planning and land use law on the one hand, and social and economic needs and policy on the other. When compared with other countries, Israel is unique in its varied set of developer obligations—some being quite innovative—that are imposed as cumulative layers of requirements. Yet the Israeli story demonstrates how this set, onerous as it seems at first sight, can be absorbed into the development market and become a norm for the accepted division of labor between public financing and direct developer obligations for public services.

The Israeli story transmits the lesson that developer obligations are not merely legal or financial tools; they are a reflection of changing social structures and public preferences. The need for exactions cannot easily be bottled up in static formulae specified in the legislation. Israel highlights a reality that is probably shared by many countries. Formal, statutory exactions, even with Israel’s more drastic addition

\textsuperscript{141} A ten year study of public services by the present author and colleagues was aimed at developing a method for calculating needs based on national norms, yet tailored to each particular context. A series of seven guidebooks were commissioned by the Ministry of the Interior (in charge of planning) and were to be used as guidelines by planners and government bodies. R. ALTERMAN \& M. HILL, GUIDEBOOKS TO PLANNING PUBLIC SERVICES (1977-1985).
of a betterment tax, are not likely to put a full stop to informal negotiations. The informal, negotiated versions will always be there to act as corrective mechanisms to either lower or raise exactions. Informal exactions reflect changing social views and needs, current politics, and the state of the development market. Formal and informal exactions are linked vessels: the magnitude of informal exactions depends on the degree to which the formal exactions are perceived to approximate social needs, and the size of both depends upon the strength of the market.

This is not to say that all is well with the law of developer obligations in Israel. While the marketplace may not have suffered, and while the mechanisms of developer obligations have generally succeeded in supplying public services at an acceptable (though not lavish) level, Israeli law leaves considerable room for improvement in citizens’ rights. Needed are improvements in public information and participation, greater assurance of equality and proportionality, more stringent requirements to be placed on the planning bodies to provide a rational demonstration of the need and justification for the developer’s contribution to public services, and better protection to the landowner from arbitrariness and undue hardship.

The analysis in this paper translates into a new challenge for legal research concerning developer obligations in Israel as well as the United States and Britain. Traditionally, legal discourse has focused on each type of developer obligation separately because each often draws on different areas of law: land use and planning law, law of expropriation (eminent domain), taxation and other public finance law, and public contracts law governing agreements. Yet the set of developer obligations draws alternative methods from all of these areas of law. The more challenging front lies in the interrelationships between these areas of law and the tradeoffs among alternative, or cumulative, types of developer obligations.

Central questions that this focus raises include: is it legal for planning authorities to demand “voluntary” exactions in addition to the statutory ones?; what are the legal limits to negotiated agreements in making planning decisions?; and, can in-kind exactions, such as land dedication or public land gained through readjustment, be offset against fee-based obligations such as the betterment tax? This paper has tried to raise these questions, discussing some in greater depth, and leaving others to further research.