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Development Exactions

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BOOK REVIEW

DEVELOPMENT EXACTIONS. Edited by James E. Frank* and Robert M. Rhodes.** Washington, D.C.: Planners Press, American Planning Association. 1987. Pp. 198. \$29.95.

REVIEWED BY RICHARD F. BABCOCK¹

MOST people in this country are aware that many American cities and towns are in a serious financial condition. The flow of federal dollars has been substantially cut, and few state and local dollars can be raised to help with the increasing demands for services. So the municipalities have looked to another source of funds to finance their needs. And they have turned to the development community. If a builder wants a subdivision approved or a permit for a shopping center, the city demands a site for a school, financial assistance in its housing program, the widening of a highway, or a bundle of cash. These demands are commonly known as "exactions."

I suspect the editors of the *Law Review* put me up to this Book Review because they knew I was the special editor of a "competing" publication on exactions,² and they hoped they could encourage a good old-fashioned response and rejoinder among the respective publications. If that was their goal, they have failed. This is an excellent publication with very few warts.

The national survey of exaction practices is especially useful. It is comprehensive and detailed, appropriately weighted for size of city or

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2. *Exactions: A Controversial New Source for Municipal Funds*, 50 LAW & CONTEMP. PROBS. 1 (1987).

county. Out of 11,722 cities and counties, 1,166 were sampled, with a response rate of almost 39%.³ To me, the surprising responses were those who answered that they made their demand on a case-by-case basis—in other words, ad hoc. For example, in exactions involving land dedication, 35.6% of the communities said they used such a technique,⁴ and 30.1% replied they used standards but “with some flexibility.”⁵ However, we don’t learn just what was meant by “flexibility.” In the case of cash payments, 17.4% of the communities used a “case-by-case” basis,⁶ and 7.9% had a formula, again, “with some flexibility.”⁷ Because the survey is not intended to be judgmental, it does not express an opinion on the fact that one quarter of the cash exactions involve discretion—how unbridled we are not told. It would have been useful to follow up on those discretionary practices to find out just how the communities did make their decision on what applicants A and B should pay. Was there a denial of equal treatment?

In the chapter entitled “Politics and Administration of Development Exactions,”⁸ the authors touch on what may be the next major issue in the administration of land use controls: joint ventures between cities or counties and private developers. First, the authors note that “[e]xaction bargaining is a sufficiently powerful development tool that, once used, is likely to quickly become a major part of the land use controls of a community.”⁹ Then the authors go on to state:

Second, officials tend to smooth the sharp edges of exactions and move toward accommodation and the tradeoffs with the developers.

...

.....

Developers are no less adaptive. Especially in cities that wish to grow rapidly—Scottsdale, Fairfield, Chandler, Colorado Springs—developers have learned from engaging in negotiations about exactions that *it is often necessary to become partners in what amounts to joint ventures.*¹⁰

3. Bosselman & Stroud, *Legal Aspects of Development Exactions*, in DEVELOPMENT EX-ACTIONS 70-103 (J. Frank & R. Rhodes eds. 1987).

4. *Id.* at 126.

5. *Id.*

6. *Id.* at 141.

7. *Id.*

8. Weschler, Mushkatel & Frank, *Politics and Administration of Development Exac-tions*, in DEVELOPMENT EXACTIONS, *supra* note 3, at 15-41.

9. *Id.* at 38.

10. *Id.* at 38-39 (emphasis added).

Just what those joint ventures involved, we are not told. Does the city take a cut of the equity? We do know there are some communities such as San Diego which have taken a share of the gross leases.¹¹

This raises the nice question of whether a city can be both a regulator and an entrepreneur. Is there an inherent conflict of interest? Suppose a city has a share of the equity in a shopping center and an application comes to the city for a second shopping center within a competitive area. What decision? Or suppose a city stands to pocket an extra \$57 million in the sale of its land if it grants a buyer a bonus in floor area ratio, but that added height and bulk will have an alleged adverse impact on a neighboring park.¹² Is that the selling of zoning as one New York court has said?¹³ And this raises the question whether we should stop kidding ourselves and openly acknowledge that zoning changes are for sale. If so, what does this mean insofar as comprehensive planning is concerned?

Bosselman and Stroud's chapter, "Legal Aspects of Development Exactions,"¹⁴ and their addendum after *Nollan v. California Coastal Commission*,¹⁵ is a respectable (and predictable) analysis of the law in this confused field. Of course, no aficionado of the land use field is going to forego writing on *Nollan*, *First English Evangelical Lutheran Church v. County of Los Angeles*,¹⁶ and *Keystone Bituminous Coal Association v. DeBenedictis*.¹⁷ Critiques will overwhelm the law journals, ad nauseum.

The truth is that all of these cases raise as many questions as they provide answers. Is *Nollan* simply an obvious extension of *Loretto v. Teleprompter Manhattan CATV Corp.*?¹⁸ Or does it go beyond mere physical invasion and suggest a new more rigid test for exactions? We haven't yet had a definitive answer on the impact of *First English* on moratoria, although it may be ventured that customary moratoria will be upheld if set for a fixed period of time. Nor are we yet certain just when a "taking" begins. Is it when the original zoning went into

11. 19 URB. LAND INST. PROJECT REFERENCE FILE, Oct.-Dec. 1986, at 5. See R. Babcock, *The City as Entrepreneur: Folly or Wisdom?* 6 (Sept. 9, 1988)(draft of unpublished manuscript prepared for the Urban Land Institute's Forum on Public/Private Partnership, Washington, D.C., Sept. 30, 1988).

12. *Municipal Art Soc'y v. City of New York*, 137 Misc. 2d 832, 834-35, 522 N.Y.S.2d 800, 801 (Sup. Ct. 1987).

13. *Id.* at 838, 522 N.Y.S.2d at 804.

14. Bosselman & Stroud, *supra* note 3.

15. 107 S. Ct. 3141 (1987).

16. 107 S. Ct. 2378 (1987).

17. 107 S. Ct. 1232 (1987).

18. 458 U.S. 419 (1982).

effect or when, five years later, the landowner makes an application for a change and is turned down? And on and on.

One area that Bosselman and Stroud do not touch on, probably because they felt obliged to stick strictly to the decided cases, is the large number of people who do not challenge exactions because of the cost of litigation and the years of delay in obtaining a permit. I call this municipal leverage. One of the interesting facts in the *Nollan* case is that the Commission had "similarly conditioned 43 out of 60 coastal development permits along the same tract of land, and that of the 17 not so conditioned, 14 had been approved when the Commission did not have administrative regulations in place allowing imposition of the condition, and the remaining 3 had not involved shorefront property."¹⁹ So essentially, all shorefront properties had granted an easement to the public to cross their property. I would have to assume that most, if not all, of them were equally unhappy about the condition. Unfortunately, unlike Mr. & Mrs. Nollan, they did not have pro bono attorneys to carry their case through the California Supreme Court and to the United States Supreme Court.²⁰

Municipalities may be poor but they are not fools. They know the vagaries of the market most often will compel developers to get their permits now and not take the risk and cost of litigation. For this reason, cities should not go into a death dance over these decisions.

On the whole, this is a superb publication useful to those who are struggling with this new force in land use regulation.

19. *Nollan v. California Coastal Comm'n*, 107 S. Ct. 3141, 3144 (1987) (citation omitted).

20. The Pacific Legal Foundation represented the Nollans throughout their suit with the California Coastal Commission. Telephone interview with Timothy A. Bittle, Staff Att'y, Pacific Legal Foundation, Sacramento, California (Oct. 24, 1988).