

EXACTIONS AND IMPACT FEES

I. NATURE OF THE TOOL

Exactions are burdens or requirements a local government places on a developer to dedicate land or construct or pay for all or a portion of the costs of capital improvements needed for public facilities as a condition of development approval. Exactions come in many forms—they may be called conditions or impact fees and may be in the form of infrastructure building, cash payments to the local government, dedications of land for public uses, conditions on future land use, restrictions on alienation, or other restrictions or burdens on the permit applicant.

Exactions may take place as part of a general zoning plan—especially when site plan review or planned unit developments are zoning options—and form standard conditions of a zoning area or a rezoning. In such a case, they are usually called impact fees since they seek to offset the infrastructure/public costs of development. Exactions may also be *ad hoc* and imposed in exchange for the local government granting a variance or exception to zoning regulations.

Local governments in Florida have the power to impose exactions based on the broad zoning and regulatory power they possess under “home rule” as authorized by the Florida Constitution. Thus, local governments have the power to regulate to control the adverse impacts that development may cause to the local area.

II. RELATION TO WATERFRONTS

Protection of recreational and working waterfronts and public access often involves zoning tools such as type of land use, height, density, and other restrictions. Exactions and impact can help to make these restrictions more flexible while still working to promote the restrictions’ aims of protecting recreational and working waterfronts and public access to the water. Thus, the tools of exactions and impact should receive careful consideration and incorporation into the local government’s land use policy.

III. LEGAL ISSUES

While they may be a valuable growth management tool, local governments must carefully implement exactions to avoid legal pitfalls. First, exactions should be founded on the same general police power that underlies all zoning: the authority to protect the health, safety, or welfare of the public. The authority to protect the health, safety, and welfare of the public has been interpreted broadly enough to permit local governments to zone to promote the beauty of an area.¹

¹ Berman v. Parker, 348 U.S. 26 (1954).

Often a local government zoning or special/overlay district contains certain prohibitions designed to further a specific purpose, such as preservation of recreational and working waterfronts. Under such a plan, certain land uses, such as non-water-dependent uses, may be heavily restricted, subject to additional permit review, or only allowed as conditional uses subject to additional criteria, including an exaction. In each case, the authority of the local government to deny the permit also gives the local government authority to exact concessions from the developer. Developers and landowners receive protection from abuse of this power by local governments.

First comes a requisite for clarity. Any restrictions or requirements imposed on a permit applicant must be clearly stated with sufficient clarity to allow the permit applicant to understand and follow them. Second, there is a requirement of reasonableness of the restrictions. Any conditions, exactions, or impact fees must be reasonable, and not arbitrary or capricious. Thus, it must be possible for an applicant to fulfill the permit conditions—even if such fulfillment means that an applicant could, at least in theory, pay the exaction. Stated another way: A local government may not establish conditions that it knows are impossible to meet or that have no rational basis in fact.

The United States Constitution has been interpreted to impose its own conditions on exactions. Any exactions or conditions must have a substantial relationship to—or “nexus” to use the Supreme Court’s terminology—with the reason for which the local government could reject the permit application. For instance, in the case of *Nollan*,² the local government tried to insist that the landowner dedicate an easement along the beach as a condition of rebuilding a larger house on their beachfront lot. The U.S. Supreme Court said this was not permissible since the reason that the local government could reject the application was based on the development’s impact on the public’s *visual* access to the water, not the ability to traverse the beach along the water. Thus, the reason the local government could legally deny the permit (i.e.—impact on the public’s visual access to the water) had nothing to do with the exaction sought (i.e.—an easement for lateral beach access).

Similarly, exactions must be “roughly proportional” to the amount of impact the proposed development would have on the problem sought to be controlled by the restriction.³ For example, a development could not be required to widen a road if the need for the wider road is due primarily to increased traffic other than the proposed development.

No easy answer exists as to when exactions will constitute a taking of property in violation of the Fifth Amendment to the U.S. Constitution—one must examine the facts in each case and consider

1. The character of the government action;
2. the nature and extent of the impact on the owner of the property; and
3. whether the regulation requires a private property owner to shoulder a burden that should more appropriately be carried by society as whole

² *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825 (1987).

³ *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

IV. PROS & CONS

The greatest pro of exactions is that they allow local governments to assess to development a larger portion of the real costs that the development imposes on the community. The greatest con is the local resistance to such measures, often coming from politically-active interests related to development. This can create a substantial problem at the local level since growth and development represent a major part of the economy for many local government jurisdictions in Florida. Another con that may arise is a legal challenge to exactions which are poorly planned and executed, thus potentially falling outside the parameters imposed on exactions by the U.S. Constitution.

A drawback of conditional uses is that poorly planned criteria for a conditional use could undermine the reasons that the use was not allowed as of right. The difference between permitted uses and conditional uses is one of degree. Permitted uses apply limited land development criteria to determine if a permit should issue. Approval of a conditional use permit occurs through an evidentiary process which is usually outlined in the local government's land development regulations.⁴ Land development regulations must specify what facts and conditions, if proven by the evidence at a hearing, will allow for issuance of a permit for a conditional use.⁵ If the specified facts and conditions do not sufficiently protect the interest sought to be protected, that interest may have to suffer issuance of the permit if the applicant can demonstrate compliance with the conditional use facts and conditions. Careful drafting and consideration of the factual situation should be sufficient to avoid such problems.

V. BEST POLICY PRACTICE

Best policy practices vary greatly in this area. It helps to distinguish between general impact fee policy and policies that impose special exactions on development that otherwise would fail to protect an interest the local government has the authority to protect. First, general impact fee structures.

Impact fees constitute a part of the development permit process for all affected development. Melbourne, Florida, for example, has an established policy to "[r]equire new developments to provide necessary services and facilities or to pay a fair share of the cost of those services and facilities, through impact fees, special assessments, exactions,

⁴ See, e.g. *Clearwater Beach Community Church v. City of Clearwater*, Case No. 89-0111, 1989 WL 644272 at *4 (Florida Div. of Admin. Hearings, July 12, 1989) (quoting from a local government process for approval of a conditional use).

⁵ The existence of a conditional use requires that there be objective criteria that can be used to judge a conditional use permit application. *City of Melbourne v. Hess Realty Corp.*, 575 So.2d 774, 774-75, 775-76 (Fla. 5th DCA 1991).

conveyance of land or easements, or pro-rata agreements.”⁶ To impose an impact fee, a local government must identify the reason for the fee (such as transportation infrastructure), the service area for the fee, and criteria to determine the fee for each development.⁷ Impact fees must be spent to benefit development in the impact fee area and for the type of services or facilities for which the impact fee was charged. The Dundee, Florida Code of Ordinances establishes that if payment of a fee is allowed in lieu of an easement or dedication, the fee is based on the value of the land for which public access was not dedicated.⁸

A local government could make a general finding that growth and development increase the need for public access to the water. Thus, the local government could impose an impact fee for public water access in the jurisdiction or to offset development pressure on recreational and working waterfronts. Calculation of the fee must be based on factors determined relevant to the need for the fee. Thus, for public access, factors could include the number of dwelling units for residential development or number of visitors generated for commercial uses.

In addition to impact fees, a local government may add increased flexibility to all or part of its waterfront by creating a special zoning area or various sub-areas along the waterfront. Each area could specify the interests it seeks to protect and list the uses permitted as of right in the area, such as recreational and working waterfronts, water-dependent uses, or public access to the water. The local government could then add a list of “conditional uses” to the uses permitted as of right. Conditional uses could include, for example, water-front restaurants or residential condominiums. In addition to paying any applicable development impact fees for public access to the water, such development could be required to contribute to additional public access since public access to the water is a prime interest sought to be promoted by typically prohibiting these uses in the zone.

Development seeking a conditional use permit could comply with the exaction for public use in a variety of ways: make cash payments to a fund dedicated to publicly acquiring land that gives public access to the water; dedicate to the local government an easement on the property for public access; or, if the development includes slips, ensure that most or all the slips are available to the public on a “first come, first served” basis.

⁶ Melbourne, Florida Comprehensive Plan, Future Land Use Element, ch. 2.K.2.h.

⁷ While impact fees developed initially to address infrastructure needs such as sanitary sewer, roads, water supply, and education, they have clearly expanded. For example, Islamorada, Florida includes an impact fee to pay for public art and cultural events. Maintenance of recreational and working waterfronts and public access to the water thus should qualify as legitimate purposes for impact fees.

⁸ Dundee, Florida, Code of Ordinances § 6.03.00.