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## ENVIRONMENTAL LINKAGE FEES: The Impact Fees of the Future

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# **ENVIRONMENTAL LINKAGE FEES**

## **The Impact Fees of the Future**

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A RESEARCH PROJECT SUBMITTED IN  
PARTIAL FULFILLMENT OF THE REQUIREMENTS  
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ACKNOWLEDGED  
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**CHAPTER 1**  
**INTRODUCTION**

## 1.1 Topic of Research

The topic selected for this study is the concept of environmental linkage fees is the selected area of research for this project. The role that these fee systems will play in the future of both planning and environmental preservation will be examined in this study.

It is important however, to define and differentiate between experimental impact fees, a more general impact fee and other developmental exactions. This differential analysis will demonstrate how environmental linkage fees are distinct from other types of impact fees and exactions, while also maintaining similar characteristics. The study will also review the legal precedence for the application other types of impact fees and describe the conditions necessary for these fees to withstand legal challenges that an environmental linkage fee system might encounter.

## 1.2 Purpose of the Study

The preservation of the environment should be a paramount concern for all communities. The preservation of clean water, air, soil, and the entire ecosystem in general is the primary cause most environmentalists are fighting for. Larger jurisdictions, with larger problems, also have a greater capability, in general, to deal with environmental contamination. It is the smallest towns and communities that have the least capacity to deal with such problems. Here, environmental linkage fees can make a difference.



The environmental movement, which began in the late 1960's and was strongest during the early 1970's, faltered during the years of the Reagan/Bush administrations. The Bush platform to be the "environmental President" was the push that the environmental movement needed to regain its momentum. The real push, however, came when the Bush/Quayle administration neglected this promise, which gave activist and special interest groups a common target, and a clear-cut goal. People became concerned that the government had neglected the problems of the environment.

The unregulated development of land is also a problem. Many communities, looking for ways to increase their tax base, allowed expansive areas of undeveloped land to be turned into massive subdivisions, suburban malls and commercial strips, with little or no regard for the future consequences of these actions. As a result, many of these communities now face overcrowded schools, limited open space and stressed public infrastructure systems. One mechanism that some communities are employing is the imposition impact fees on new development to help ease the burden of that development on public services.

Impact fees are usually levied for capital improvements serving the subdivision, such as new water and sewer facilities, that are not usually financed through subdivision exactions. These fees have been found to be acceptable because the new development has created the need for the expansion of such services. As the fees are collected, they are earmarked for a specific purpose and courts have ruled that the money can not be used towards a municipality's budget

deficit or operating costs.

The widespread use of impact fees has meant that more and more developers are sharing in the cost of facilities such as sewers, roads, parks and schools. More recently, linkage programs have been used to make sure that new development pays for a share of its impact on the environment as well. According to Arthur Nelson, "we are now seeing something new: one-time assessments levied against new development to pay for its share of the cost of preserving one or more environmental resource. We call these assessments 'environmental linkage fees'." These types of fees have already been established in certain areas in California and Nevada to preserve the habitat of endangered species and protect environmentally sensitive lands<sup>1</sup>.

The problem with evaluating the legality of environmental linkage fees is that, up until the present time, the concept has not withstood a strong legal contest, as no challenges have been made to the legitimacy of establishing such a fee. Another problem is the need to establish the situations that are best suited for the use of these fees. The concept is relatively new, and the optimum use needs to be more clearly identified. A third concern is that as the fees are just beginning to be recognized, their full potential is not known. The fees have been initially used for habitat preservation for endangered species and environmentally sensitive lands. The full potential of these fees needs to be explored.

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<sup>1</sup>Nelson, Arthur, James Nicholas and Lindell Marsh. (1992). "New-Fangled Impact Fees". Planning. v58 n10 October. pp20.

The use of these fees in the environmental movement is also not fully understood. One of the driving forces behind the concept of creating such a fee structure has been the preservation of the environment. More and more communities are faced with both an increase in environmental degradation and in development. New ways of maintaining that community, both in terms of quality of life, and fiscally, will have to be developed.

The need for such a fee system that will serve to mitigate environmental problems, can be seen at the local, regional and national levels. Locally, these fees could be a significant element which finance environmental preservation and improve the ability of the community to sustain development through public infrastructure, while ensuring the stability of its existing services. The fees are a way which the community can locally help itself to maintaining both existing and newly required services.

At the regional level, by coordinating the local communities, the fee system would serve a similar purpose, at a larger scale. No one region of the country has been fortunate enough to maintain or improve its quality of life, and a sustainable population without some sacrifices. The sacrifices may not be currently evident, but will certainly play a factor in the near future. By establishing a linkage fee system at the regional level, the preservation of large expanses of open space, used for recreation or aquifer protection, would be ensured at a satisfactory level for the future.

The nation would also benefit from a similar coordination of funds, which could be used to attack large scale concerns that affect all citizens, regardless of location, such as disposal of hazardous wastes or better controls for air quality. A system of this type would clearly contribute to the preservation and mitigation of environmental quality.

Many communities implement an impact fee system to assist them in providing services to the residents of the town. A typical impact fee is assessed to new residential development, and is used to develop new schools or police facilities. An environmental linkage fee system could be used to mitigate the impact of development on the environment. The fee could be used to pay for air quality or water quality protection measures, in addition to the land acquisition and habitat preservation.

The purpose of this study is to fully explore the concept of environmental linkages fees. One objective of this project is to examine the possible legal conflicts that may arise over the use of these fees, and to develop techniques in which communities may overcome these conflicts. The outcome of this task would be ordinance development guidelines and recommendations, which would assist communities in writing a legally strong ordinance.

The second objective is to expand the concept of the linkage fee, into a broader tool for land use regulation. A tool which could be used in regional mitigation regarding environmental protection, at a level larger than the local community. To accomplish this, the study will focus on other issues which arise

from the use of these fees. Such issues may include regional air quality or multi state open space preservation. The outcome of this task would be recommendations on which issues could benefit most from the use of environmental linkage fees.

### 1.3 Methodology

The first objective of this project will be to introduce the concept of environmental linkage fees. It will be important to explore the legal challenges that such a system may face. As it has been previously stated, the fees have not experienced a stringent contest as to their legitimacy. In order to accomplish this, the legitimacy of development exactions and impact fees in general has to be established. This legitimacy is important to establish in order to anticipate legal challenges to the fees, and to develop methods to avoid those challenges.

The next objective of this project is to develop generic guidelines that will assist a community or municipality in creating and utilizing a linkage fee program. To accomplish this, existing ordinances will be examined, and the characteristics of the community will be defined, to recognize characteristics that make such a program successful. These parameters will be used to outline the system's structure based on the characteristics of the community.

The third objective of the project is to address the feasibility of expanding the scope of the system to include the mitigation of larger scale problems, such as air pollution. It will be this examination that will help to conceptualize the future

directions of linkage programs.

The background research encompassed library research, at both academic and legal libraries. This research provided information on past experiences with the topic in the practicing world, and help to establish the legitimacy of a fee system.

The research on current linkage programs and systems was done through State legal libraries, and active law departments in the academic field, such as the Government Law Center of the Albany Law School. These contacts provided information on both the current status of existing linkage programs and made it possible to obtain copies of existing legislation pertinent to the linkage programs.

The expansion on the future applications of environmental linkages fees will be addressed. This will be more conceptual in nature, and deal with issues and concerns that can be expected in the future but are currently not a concern, or fully recognized as a problem.

The final section addresses recommendations for designing and implementing an environmental linkage fee ordinance followed a comparison the types of communities that have successful ordinances on the books, and the characteristics of that community. The section is not intended to present a legally adaptable ordinance but rather a guide for the development of such an ordinance.

#### 1.4 Review of Similar Studies

There have been many studies which examine the use of impact fees in general, but there have been few studies done on environmental linkage fees. Linkage is not a new concept to planning, but environmental linkage is a fairly new adaptation of this concept. The concept of linkages will be examined, and that knowledge, along with the legitimacy of other types of impact fees, will be adapted to the concept of environmental linkage fees.

## **CHAPTER 2**

# **THE LEGITIMACY OF DEVELOPMENT EXACTIONS and IMPACT FEES**



## 2.1 Introduction

A developing community is faced with many issues concerning growth, including the effects that rapid land development is having on public facilities and services. The elected officials may be unable to face demands for adequate schools, public safety, transportation amenities, recreation and open space facilities or public sewer and water infrastructure equipment. The problem pertains not only to the existing residents but also to the community's ability to extend these services to future populations.

One way of meeting these demands is to establish and implement an impact fee system. The purpose of the system is to generate funds that may be used for expanding and updating infrastructure facilities such as water or sewer lines or treatment plants. These funds could also be used for land acquisition to develop recreational uses or to obtain open space areas.

The purpose of this chapter is to examine the legitimacy of impact fees. The differences between these fees, special assessments and development exactions will be explored to distinguish impact fees from both of these mechanisms. Also, this chapter will examine the preconditions needed to establish these fees as legitimate growth management tools.

## 2.2 Distinguishing Characteristics

In order to examine the legitimacy of impact fees, it is important to understand the difference between impact fees, special assessments and subdivision exactions.

Special Assessments are charges levied against property particularly and directly benefitted by local improvements in order to pay the cost of those improvements. These assessments are:

- 1) an exercise of the taxing power of a community;
- 2) used to finance improvements which benefit specific property;
- 3) used exclusively to provide for on-site improvements;
- 4) payment of taxes that follows actual improvements.

Subdivision exactions are a requirement that the subdivider "dedicate" land for public use or pay a fee in lieu of, which contributes to a fund to purchase land or facilities in consistency with the use of the "dedicated land". These exactions are:

- 1) an exercise of the police power;
- 2) used to finance improvements which benefit entire subdivision;
- 3) used to provide, for the most part, on-site improvements;
- 4) payment of fees only as an alternative to the required dedication;
- 5) may involve extensive and sometimes elaborate negotiation.

Impact fees are charges levied on new development in order to generate revenue for funding improvements that are needed as a result of the new development. These fees are:

- 1) also an exercise of police power;
- 2) used to finance a developer's "fair share" of improvements, which benefit the entire community;

- 3) can be used to provide for either on-site or off site improvements, the majority of time it is an off site issue;
- 4) payments that occur at the time of the issuance of a building permit;
- 5) either fixed or negotiated;
- 6) can apply to platted or unplatted parcels;
- 7) can act as alternative or supplement to exactions.

### 2.3 Defining Characteristics of Development Exactions

There are many notions and concepts which aid in defining the term development exaction. A common starting ground to define this term is to focus on the aspects of development regulation that require a builder to give something to the town, city or county. The definition could be expanded to include regulations that include something being turned over to a common maintenance entity, such as a property owners association, and their control over open space within a cluster development project. The traditional exactions that would include land dedications, or payments in lieu of land would also be examples within these definitions. A further expanded definition of exactions might include public facility donations; impact taxes; and payments for affordable housing in some zoning schemes.<sup>2</sup>

There are some distinctions<sup>3</sup> that have to be established between general regulatory restrictions and exaction. The fact that a land use regulation increases the cost of development does not imply that the regulation is an exaction. The regulation is only categorized as an exaction when something is transferred to

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<sup>2</sup>James, Frank E and Robert M. Rhodes. 1987. Development Exactions. American Planning Association, Chicago, IL. pp 2-3.

<sup>3</sup> Ibid., pp 3-4.

public or common ownership. A regulation that requires improvements to the site in regards to the health safety or welfare of its inhabitants, is not an exaction under this definition.

A second distinction is that the definition does not assume that the exaction will be fixed. The majority of exactions result from an open ended negotiation with developers and the permitting authority, therefore, the amount of land dedication, for example, would vary according to project and developer.

A third distinction is that it does not anticipate any particular beneficiary as applied to the exactions. As an example, the dedication of a trunk sewer extending from the existing sewer network would be considered an exaction whether the sewer is for the exclusive use of the proposed development or for several developments.

#### 2.4 Defining Characteristics of Impact Fees

Impact fees are usually levied for capital improvements outside a subdivision, such as new water and sewer facilities, that are not normally financed through exactions. The fees can also be used to expand or improve these facilities. The fee is generally assessed when the building permit is issued, or as a facility connection charge against the units in the development. They can also be levied against developments that do not require subdivision, such as multi-family housing.

Impact fees raise a statutory authority problem because developers claim that the fees are taxes which the municipality is not authorized to impose. There are two rationales in decisions that apply the tax label to an extra-development impact fee<sup>4</sup>. The first is that impact fees are a positive exaction of funds, and therefore a tax. The premise for this argument is that it ignores the police power regulations that mandate the developer to expend funds for capital improvements within the development. The argument also ignores the fact that the money collected through the fees will be used to benefit the entire community, not just the proposed project.

The second argument against impact fees that are used for education, recreation or public safety can not be raised under the police power. State courts have held that shifting the burden of capital funding for these types of facilities is within a municipality's police power. A tax financing program would apply "across the board" to all development, therefore providing a source of capital funding for the municipality's schools or public safety facilities as needed. The impact fee system applies only when a specific project that significantly affects the community's ability to supply needed services is proposed. An example of such a project would be a 200 lot residential subdivision, in a community previously facing overcrowded schools.

The line between the definition of impact fees and development exactions is extremely fine, and sometimes non-existent. The only defensible line which can be

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<sup>4</sup>Hagman, DG and JC Juergensmeyer (1986). Urban Planning and Land Development Control Law, 2ed. West Publishing Company, Saint Paul, MN.

drawn is that exactions result in control of property or property rights being turned over to an association, or government agency, whereas an impact fee system requires the developer to pay his or her fair share of a community's cost resulting the project. As an example, an exaction would require the developer to dedicate land for a new school. The impact fee would be levied on a developer, so the community could use the fees collected to build a new school.

## 2.5 Impact Fees are not Taxes

Two cases will be examined in which the court upheld impact fees under legislation that authorizes municipalities to assess user charges for the maintenance and construction of capital facilities; *Contractors & Builders Association of Pinellas County v. City of Dunedin*, and *Home Builders Association v. Provo City*.

In *Contractors and Builders Association of Pinellas County v. City of Dunedin, Fla.*, 329 So.2d 314 (1976), the petitioners did not complain about all fees imposed by the city prior to the issuance of a building permit but rather that the fees, which were earmarked for capital improvements to the water and sewer systems as a whole, constitutes taxation. The respondents contended that these fees were not taxes but user charges similar to fees collected by privately owned utility companies for services rendered. The court ruled that a tax had not been imposed in this instance.

The plaintiffs also contended that the court found in *Broward County v. Janis Development Corp.*, 311 So.2d 371 (Fla 4th Dist. 1975) and in *Venditti-*

Siraro Inc. v. City of Hollywood, 39 Fla.Supp. 121 (17th Cir. 1973) that a tax was imposed under the same guise that it alleged in this case. The court stated that in both instances, the fees were in excess of the cost of the regulation which was supposed to justify their collection. The fees were imposed as a condition of the issuance of a building permit, but the court found that the surcharges collected were extraneous to the enforcement of the building code, therefore it was a tax, which the municipality was unauthorized to impose. In Dunedin, the fees were less than the cost of accommodating new users.

The court did however have concerns about the validity of the fees despite these facts because the city had neglected to accurately restrict the use of the fees collected. The plaintiffs felt that a refund of fees collected should be imposed for this reason. The court stated that nothing prevents the city from adopting a new ordinance which incorporates use restrictions on the fees, nor an ordinance restricting the use of fees which have been previously collected, therefore found no reason to require the refunds.

## 2.6 Impact Fees are not User Fees

The issue in Home Builders Association of Greater Salt Lake v. Provo City, 28 Utah 2d 402, 503 P.2d 451 (1972), dealt with the legality of an ordinance imposing a \$100 sewer connection fee for each housing unit of newly constructed buildings connecting to the existing sewer system. The ordinance was the result of engineering studies which recommended that, in addition to the monthly service

charge, a connection fee be established to provide the requisite funds to improve and enlarge the system. The monies collected would be deposited in the Sewer Disposal Operating Fund, which would be used for new lines, enlargement of the treatment plant, and the retirement of bonds.

The plaintiffs claimed that the connection fee, which exceeds the cost of inspection or regulation was a revenue measure, which the city is not authorized by relevant statutory provisions to enact. The Supreme Court of Utah emphasized the law as it specified:

"Any city or town may, for the reason of defraying the cost of construction, reconstruction, maintenance, or operation of any sewer system or sewage treatment plant may make a reasonable charge for the use thereof..."

In addition, in *Murray City v. Board of Education of Murray City School District*, 16 Utah 2d 115, 121, 396 P.2d 628 (1964), the Court denied the characterization of a sewer charge and connection fee as revenue measures and stated that they are neither taxes nor assessments but rather payments for services furnished. Therefore, the City of Provo was within its statutory authorization to enact a reasonable charge for the right to connect to and use to city sewer.

In *Hayes v. City of Albany, Or.App.*, 490 P.2d 1018 (1971), the court found that the city had the power to levy a connection charge reasonably commensurate to meet the burden currently imposed or to be anticipated upon the city's system and that such a charge was a valid exercise of police power.

The plaintiffs relied on *Weber Basin Home Builders Association (WBHBA) v. Roy City*, 26 Utah 2d 215, 487 P.2d 866 (1971), where the Utah Supreme



Court found that a \$100 increase in the charge for a building permit was for the purpose of raising general revenue for the city and placed a disproportionate and unfair burden on new households, and therefore was discriminatory and unconstitutional. The Court stated however that in *WBHBA v. Roy City* that the funds derived from the fee were placed into the city's general revenue fund, and thus could be used for something entirely unrelated to the stated purpose of the charge.

The Court also cited *Airwick Industries Inc. v. Carlstadt Sewerage Authority*, 57 N.J. 107, 270 A.2d 18 (1970), where the validity of a sewer connection charge was challenged. The New Jersey court stated that "all properties where service was available, whether actually using the system or not, should pay for the construction and installation expenses from which every property has received some benefit and increase in value". A periodic charge was paid by the actual users of the system and no payment was received from the unimproved properties, yet, the unimproved properties benefited from the improvement of the system, and would benefit unfairly in respect to cost, as those properties provided no payment for initial expenses. The court concluded this to be reasonable and would assume a fair share be contributed by all properties, when they attain the status of improved property.

## 2.7 Considerations

The importance of this case is the finding that impact fees have to be specifically earmarked for the said purpose of the ordinance. The Utah Supreme Court found against these fees in Weber Basin Home Builders Association (WBHBA) v. Roy City on the grounds that the fees would be placed into the city's general fund. The court noted that in Home Builders Association of Greater Salt Lake v. Provo City, the funds were placed in a specific funds, for a specific, defined purpose, and found in favor of the establishment of the fees.

Attacks on the reasonableness of impact fees and user charges usually do not succeed. The courts are concerned with equal protection and problems arise when impact fees are levied against new development for facilities that serve both old and new users of the system. Also some systems have a differential fee structure, charging new users more than old users, and also charging some new users more than others. The courts typically use a rational relationship to resolve equal protection objections to the fees. This is similar to the nexus test the courts have adopted to resolve takings objections to subdivision exactions. The Utah Supreme Court has stated<sup>5</sup>:

To determine the equitable share of the capital costs to be borne by the newly developed properties, a municipality should determine the relative burdens previously borne and yet to be borne by those properties in comparison with the other properties in the municipality as a whole; the fee in question should not exceed the amount sufficient to equalize the relative burdens of newly developed and other properties.

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<sup>5</sup>Mandelker, DR 1989. Land Use Law, 2ed. The Mitchie Company, Charlottesville, VA.

In *Western Heights Land Corporation v. City of Fort Collins, Colo 362 P.2d 155 (1961)* the plaintiff charged that a fee, levied on a square foot basis, in addition to a tap fee for connection to public sewer and water, was discriminatory and should be invalidated. The court held that charges of this nature, on a footage or area basis, are lawful and that the mode of adoption of such charges was within the legislative authority of the municipality. The court stated that because these charges are derived on the same basis for every unit, the charges were uniform.

The plaintiff also contended that the charges are in effect taxes, used to raise general revenue for the city. This court also stated that because the funds have been designated to the support and maintenance of the public systems, they are not revenue generating devices. The court also held that the city may prescribe reasonable rates for the connections and use of the facility.

## 2.8 Impact fees are not "in lieu of" fees

The "in lieu of" fee system was developed as a refinement to required land dedications. The system was used when dedication was insufficient for the intended purpose, by substituting a money payment "in lieu of" the dedication of land.

This system is similar to the impact fee system in the sense that both are intended to support capital facilities. The impact fee system is however, a more flexible cost shifting tool. The distinction between these two fee systems results in

decided advantages for developing impact fees for the following reasons<sup>6</sup>.

The first is that impact fees can be used to fund types of facilities that are not normally the subject of dedication requirements. These fees can also be applied to facilities constructed outside the development. Second, impact fees can be applied to developments that are platted before the advent of dedication or in lieu of fees, and impose on incoming residents their fair share of capital cost. Also, impact fees can be applied to any unit, such as condominiums, apartments and commercial developments which create the need for extra-development capital expenditures. Impact fees can also be collected upon the issuance of building permits or certificates of occupancy, which is when the growth creating the need for new services occurs, rather than at the time of platting.

In *Gulest Associates, Inc. v. Newburgh*, 15 A.D.2d 815, 225 N.Y.S. 538 (1962), the plaintiffs contended fees collected for the purpose of developing neighborhood parks, playgrounds or the acquisition of land were unconstitutional. The court held that the money requirement was an unreasonable regulation because the funds collected were not used solely for the benefit of the residents of the particular subdivision charged, but could be used in any section of town for any recreational purpose.

The court required a direct benefit test, in that the funds collected from required payments have direct benefit to the homeowners of the subdivision that was charged. If the fees were used for purposes outside the subdivision, the direct

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<sup>6</sup>Hagman, DG and JC Juergensmeyer 1986.

benefit was not met, and therefore the ordinance was invalid. This decision was however, overruled in the Jenad case.

In *Jenad Inc. v. Village of Scarsdale*, NY Crt of Appeals, 218 N.E.2d 673 (1966), one of the arguments used by the plaintiff involved the constitutionality of collecting fees in lieu of land dedication for recreational purposes. Chief Justice Desmond, in the majority opinion states that: "We think that this labeling distorts the purpose and meaning of the requirements. This is not a tax at all but a reasonable form of village planning for the general community good."

In *Call v. City of West Jordan*, Utah 606 P.2d 217 (1979), the plaintiff challenged the validity of an ordinance adopted by the defendant which required that developers dedicate 7% of the land to the city, or pay the equivalent of that 7% in cash, which would be used for flood control and/or parks and recreational facilities. The plaintiff felt that this was a revenue-raising scheme for the purpose of meeting the financial needs of the city, and therefore was improperly levied as a tax against their property. In this decision, the Supreme Court of Utah cites the Jenad case, and stated that if reasonably designed and carried out for the purpose intended, the fee was a proper form of planning for the public good, and therefore not a tax.

## 2.9 Establishing a Nexus

In 1964, Ira Michael Heyman and Thomas K. Gilhool wrote an article that proposed a new way of evaluating the validity of subdivision exactions by using cost-accounting techniques. They stated that it would be possible to determine the cost generated by new residents, thus avoiding charging those residents a disproportionate share<sup>7</sup>.

The Wisconsin Supreme Court, in *Jordon v. Village of Menomonee Falls*, Wis. 137 N.W.2d 442 (1965), used this "rational nexus" test and offered a more disciplined decision based on that standard. The court is concerned that it is virtually impossible for a municipality to prove that money payment was assessed to meet a need solely generated by a particular subdivision. The result of this concern was a two part "rational nexus" test of reasonableness for judging the validity of an ordinance. The court held that by using this substitution test, that fees collected for education and recreation purposes were valid exercises of the police power.

The first "rational nexus" was established if the local government could demonstrate that a series of subdivisions had generated the need to provide facilities for the benefit of the new stream of people. The second "rational nexus" is met where the fees were to be used exclusively for site acquisition and the amount spent in constructing additional facilities was greater than the amount

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<sup>7</sup>Bosselman, Fred C. and Nancy Stroud. 1987. "Legal Aspects of Development Exactions" from, Development Exactions. American Planning Association, Chicago, IL. pp 74.

collected from the developments creating the need for additional facilities.

The nexus requirements provide a balanced, consistent and realistic test of the payment requirements for extra-development capital funding. The requirements can be met by the municipality through accurate accounting procedures. Once these "nexi" are established, the burden of disprove the reasonableness of the payment required shifts to the developer, according to the presumption of validity of zoning and land use regulations.

## 2.10 Relevance to Environmental Linkage Fees

This chapter has established conditions for the legitimate use of impact fees and development exactions. The cases cited provided the necessary findings establishing the to apply the principles of each case to an environmental linkage fee.

It is necessary to set forth these principles because environmental linkage fees have not been legally challenged in their own right. By making assumptions about the correlation of the issues raised in these cases, it will be possible to conceptualize legal conflicts that may arise from using an environmental linkage fee ordinance, and how to effectively avoid those conflicts.

## 2.11 Conclusions

The cases that have been discussed in this chapter have been cited to determine the legitimacy of an impact fees system established by a municipality to finance certain types of projects. The use of the fees is important, the municipality must design the ordinance carefully, and use the funds for their intended purpose. Also, the line between an impact fee system, and a development exaction system has been delicately drawn. The line will be crucial during the next chapter, which establishes and defines the foundation of the concept of environmental linkages fees.



**CHAPTER 3**  
**LINKAGE PROGRAMS**

### 3.1 Introduction

The objective of this chapter is to examine the concept of linkage in planning. The best examples of this notion takes place in the cities of Boston and San Francisco, where programs have been established that require developers of office space in the downtown area to contribute to the affordable housing needs in the surrounding communities. The contribution is either in the form of a payment(linkage fee), or the construction of affordable housing units. It is important to understand the linkage principles in this instance, as these principles will be adapted to environmental linkage fees.

The legality of a linkage program is similar to that of an impact fee or exaction ordinance, so many of the notions overlap, and will be explained briefly. The notions that are unique to linkage programs will be explored with more detail.

### 3.2 Concept of Linkage

On the surface, the concept of linkage in planning appears to be elementary in comparison to impact fees or exactions. A linkage program will work if the exaction that is required from the developer is to be used for the mitigation of a condition which results directly from the developer's project. The notion is similar to an impact fee system, but there is one fundamental difference.

The distinction is that the relationship of the exaction to the mitigating concern is not as directly obvious as with an impact fee system. An impact fee ordinance may require a developer to pay a given amount for every residential unit

built, to help supplement the community's burden in supplying the new residents with community infrastructure.

A linkage fee system may require developers to pay a given amount based on the square footage of commercial property to be built, and the community could use these funds to develop low and moderate income housing. The premise behind this fee is that the increase in commercial property will increase the demand for residential land. The price of the existing residential land will increase, as it becomes more scarce, and the community will become less affordable to low and moderate income families.

By collecting the fees, the community would have a mechanism to supplement income needs through rent subsidy programs, or to construct new housing, partially funded with the fees collected. Similarly, the community may require that the developer construct a given number of low to moderate income housing for every square foot of new commercial uses that are proposed.

As stated previously, downtown office development and housing in the surrounding neighborhoods is the best example of linkage in planning. The cities of Boston, Massachusetts and San Francisco, California were the first major cities to begin such a program. By reviewing the basic principles of the program, it will be possible to understand the working principle of linkage.

In San Francisco, 36 million square feet of office space was constructed between 1965 and 1983, and an additional 24 million square feet is expected by

the year 2000.<sup>8</sup> The cost of living and the cost of homes increased beyond the means of residents in the city. In 1981 San Francisco became the first city in the US to adopt a linkage policy.

There are four reasons why such a policy was adopted<sup>9</sup>. The first was a growing public opposition to continued downtown development while little attention was given to alleviate the tight and expensive housing market. The second was to increase revenues to offset a loss in property taxes. The third was that active coalition groups were pressuring the city to improve its affordable housing strategies. Finally, the election of President Reagan in 1981 led to a decrease in Federal funding for affordable housing.

The first task that the planners and administrators had to address in San Francisco was determining the new households that would be needed as a result of the additional office space, and office workers. To accomplish this, the administrators had to estimate the net addition of office space that was expected, and the net increase in employees. Using those numbers, the administrators estimated the net increase in new workers living within the city, and then the new housing units that were necessary to accommodate those office workers.<sup>10</sup>

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<sup>8</sup>Keating, W. Dennis. 1986. "Linking Downtown Development to Broader Community Goals". Journal of the American Planning Association. v52 n2. pp135.

<sup>9</sup>Ibid.

<sup>10</sup>Hausrath, LL. 1988. "Economic Basis for Linking Jobs and Housing in San Francisco". Journal of the American Planning Association, v54 n2. pp. 210-216.

### 3.3 Concerns and Possible Conflicts

The main concern with implementing and using a linkage fee system is that it must be defensible. The nexus between the action, which results in an exaction or an impact fee, and the mitigation, the use of the fees collected, should be clear. To be legally defensible, a linkage program must be a valid exercise of a municipality's authorized power, and it must be able to withstand constitutional challenges<sup>11</sup>.

The relevance to the overall study is to establish the legitimacy and character of a linkage program. As stated earlier in this study, environmental linkages have seen extremely few legal challenges, as the concept is still evolving. It is important to establish the basis for other types of linkage programs, such as office space in the downtown area to housing in the surrounding communities. Through the understanding of these principles, and the knowledge of their generic character, it will be possible to apply the relevant conditions of a linkage program to one that is environmentally oriented.

### 3.4 Defensible Linkage

#### Authorization

The first challenge to a linkage program is one that attacks the municipality's authority to enact such a program. The concerns are comparable to that of an impact fee or exaction in that the courts will determine whether the

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<sup>11</sup>Andrew, CI and DH Merriam. 1988. "Defensible Linkage". Journal of the American Planning Association. v54, n2 pp201.

ordinance is a tax or a regulation<sup>12</sup>:

If it is the municipality's intent in enacting the ordinance to generate general revenues or to pay for nonspecific facilities or improvements, the court will probably hold that the fee constitutes a tax. Most jurisdictions restrict a municipality's authority to establish a tax, and therefore the ordinance would be found not a valid exercise of their authorized power.

If the municipality segregates the fees collected, and designates them for specific improvements, linked to the proposed development, the court should declare that the program is legitimate.

It is important to understand the evolution of the court's view of the scope of the police power, which will be briefly illustrated. Originally, police power allowed the municipalities to regulate land use for the benefit of health, safety and welfare, through the use of building codes and setback requirements. In the 1950's, a municipality could exercise its police power to regulate incorporeal factors, such as aesthetics. The concept of police power has been broadened by judicial interpretation, and continues to be a dynamic process<sup>13</sup>. The legitimacy of an environmental linkage fee program, depends on the continued evolution of this concept in the court system.

In addition to an expanded interpretation of police power, the municipality must be authorized to enact such an ordinance by the state. Without this type of authorization, the best ordinance would fail in the court system<sup>14</sup>.

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<sup>12</sup>Andrew and Merriam. 1988., pp201

<sup>13</sup>Ibid.

<sup>14</sup>Ibid.

## Constitutionality

The second challenge of a linkage ordinance would regard its constitutionality. The ordinance could be contested two ways<sup>15</sup>. The first attack, "on its face", would come when an opponent asks the court to declare that the ordinance violates certain constitutional protection regardless of its application. The second attack, "as applied", would come when an opponent alleges that the ordinance is unconstitutional as it applies to him/her specifically. The ordinance itself may be valid, but as applied to any given situation, may prove to be unconstitutional.

## Takings

The constitutional arguments may take three forms. The first of these arguments would be in the context of a takings. The Fifth Amendment of the US Constitution provides that "private property shall [not] be taken for public use, without just compensation." Costonis<sup>16</sup> has concluded that the Supreme Court's cumulative takings precedents have addressed four types of land use regulations:

1. Those that restrict the uses to which an owner may devote to his land;
2. Those that require an owner to do certain things on his land;
3. Those that obligate an owner to suffer "temporary physical invasions" of his land by the government or its agents, and;

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<sup>15</sup>Ibid.

<sup>16</sup>Ibid., pp 202.

4. Those that obligate an owner to suffer "permanent physical invasions" of his land by the government or its agents.

Although there have been many cases that could provide the illustrations on the issue of takings, the most important to examine is *Nollan v. California Coastal Commission*, 483 U.S. 825, 107 S. Ct. 3141, 97 L.Ed.2d 677. (1987). The Nollans applied to the California Coastal Commission for a permit to demolish an existing beach house, and construct a permanent home on the site. The commission granted the request on the condition that the Nollan's record a deed restriction along their beach of ten feet, to serve as an easement for access<sup>17</sup>.

The US Supreme Court held that this easement constituted permanent physical invasion of the Nollan's property. The relevance of the Nollan case to linkage fees is that the Court decided the case on another basis. The Court analyzed the condition as a regulatory decision and reiterated that land use regulations must "substantially advance" the "legitimate state interest" which is sought<sup>18</sup>. The Commission had not required such an easement on the surrounding properties, or elsewhere in the community. The Court felt that requiring such an easement on Nollan, constituted a taking "as applied", and decided for the plaintiff, appropriately. The Nollan case serves as reinforcement of the nexus principle. In this instance however, a new condition has been added to the consideration of nexus. The action taken by the regulatory body must substantially advance the legitimate interest of that body.

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<sup>17</sup>Ibid., pp 202-203.

<sup>18</sup> Ibid., pp 203.



## Due Process

The US Constitution states, in the Fifth Amendment, "that no person shall be deprived of life, liberty, or property without due process of law". Made applicable to state and local action, the Fourteenth Amendment due process clause addresses two types of due process, procedural and structural<sup>19</sup>.

Procedural due process requires that the procedures used for decision making be fair. The contest to a linkage ordinance regarding procedural due process would probably not arise at the enactment level, but rather when the ordinance is applied. The challenge would typically allege that the administrative body did not follow statutory requirements, such as those dealing with publication of notice and right of appeal.

A challenge that addresses substantive due process typically alleges that an administrative body acted in a manner that is arbitrary and capricious. The Nollan case serves as an example of this challenge, the ordinance must substantially advance the legitimate state interest. The typical challenge may allege that the relationship between the goal and the proposed development is irrational, unreasonable, or nonexistent. If the ordinance is to survive the legal challenges, it must define both the overall extent of that need and the correlation to the proposed development.

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<sup>19</sup>Ibid., pp 203.

### 3.5 Conclusions

The importance of understanding the legal considerations of linkages are similar to the points raised concerning the legitimacy of impact fees and exactions. The fact that environmental linkage fees have not been subjected to legal challenges makes the topic difficult to examine. In order to analyze the topic, it is necessary to examine the individual components that comprise the concepts of impact fees/exactions and linkages fee programs.

In terms of environmental linkage fees the Nollan case provides an important consideration to a linkage program in terms of nexus. The principle of nexus, established in *Jordon v. Village of Menomonee Falls* (discussed in Chapter 2), pertains to the concern that an exaction or an impact fee will be related to the development for which it is required. In *Nollan*, the Court states that in addition to that relationship, the exaction, (or impact fee), must substantially advance the legitimate interest that is sought.

**CHAPTER 4**

**THE CONCEPT OF  
ENVIRONMENTAL LINKAGE**

## 4.1 Introduction

The main objective of this chapter is to explore the feasibility of developing environmental linkage fees. The fact that environmental linkage fees have not faced a strong legal battle, makes the topic more conceptual in nature. The chapter will show that environmental linkage fees are not an entirely new concept for protecting the environment.

To accomplish this task, two steps are necessary. The first will illustrate examples of commonly accepted procedures which can also be viewed as exactions serving as one component of a successful environmental linkage fee program. The next step will be to conceptually expand on the notion of environmental linkage fees and explore additional applications for the use of these fees.

## 4.2 Common Practices

There are currently many regulations that have been accepted as common practice in the development of land. These regulations and their "accepted procedures" could serve as the principles that can make an environmental linkage fee system work in the future. Although no one procedure is as comprehensive as an environmental linkage fee system would be, the examples that are represented by these procedures show the possible success of such a program.

One procedure that is commonly accepted regards protecting the surface water of an area, particularly if that water has importance as a drinking water source for a portion of the population. The Rhode Island Department of

Environmental Management(DEM) requires that a 100 foot buffer of undevelopable land be left along a riparian water body, if that water body is less than 10 feet in width. If greater than 10 feet, a developer would be required to leave a buffer of 200 feet.

It has been an accepted policy that state environmental agencies require some type of buffer along many riparian water bodies. The buffer, in another sense, could be considered an environmental easement. The buffer is designed to protect the water body from degradation. Any development that would contribute to the deterioration of water quality would be prohibited. The buffer is also used in a similar manner for other areas, such as ponds, lakes and wetlands.

The riparian easement is similar to the easement which was required of the Nollans' for right of way access to the beach, which was discussed in the previous chapter. The US Supreme Court ruled that because the easement was required only for the Nollans' property, that it was arbitrary. Also, since requiring the Nollans' to provide the only easement along a well developed beach, legitimate state interests were not being advanced.

One may imply that the court would have upheld the easement if those conditions had not existed. In the case of a riparian easement, the conditions do not exist. Every developer must comply with the requirement and maintain a buffer along the water body to improve or stabilize its quality.

Traditionally, wetlands were viewed as a nemesis by farmers and society. Wetlands were considered unproductive by farmers, because of their mucky soils.

Most people considered them to be undesirable because of the presence of vector species and their perceived poor aesthetic value.

The importance of the true function of wetlands has recently been realized, which has helped to promote the notion that a wetland system is good for the environment. Wetlands protect, and sometimes enhance water quality, provide productive habitat for plants and animals, and act as a natural buffer, controlling erosion. President Carter stated in Executive Order 11988 (1979), that wetlands should be preserved, protected and enhanced by all Federal agencies.

Many States have buffer<sup>20</sup> requirements but there is another regulatory mechanism concerning wetlands that is relevant and applicable to environmental linkages. If the destruction of the wetland is unavoidable, the developer may be required to mitigate the loss of that wetland by constructing a new wetland on site or on a similar site within the community/region.

President Bush, in 1988, stated that he would be the "environmental President", and also stated a policy of no net loss for wetlands. The fact that the President redefined the properties and characteristics of wetlands, which allowed for the destruction of those that no longer fit his definition is of secondary relevance. The point is that the Federal Government not only recognized the importance of wetlands to the environment, but also implied that a wetland replacement program would be acceptable.

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<sup>20</sup>Buffer implies any type of requirement that regulates or restricts development within a given distance to the wetland. In Rhode Island, this "buffer" is referred to as a "50-foot perimeter".

Requiring a developer to mitigate the destruction of a wetland through the construction of another is a type of exaction. Previously, it has been established that if a developer is required to do something as a condition of the permit for development, then that requirement is considered to be an exaction. This form of wetland mitigation then, must also be considered a type of exaction, as one may assume that if a wetland is to be destroyed, most likely a wetland will need to be created as a condition of the permit.

At the local level there are also similar considerations regarding the issues of wetlands and riparian protection. In Rhode Island, all localities must operate within the jurisdiction of the State agency, for instance, RI DEM. For example, if RI DEM prohibits development within 250 feet<sup>21</sup> on either side of the Wood River, the Town of Hopkinton must at least regulate development within 250 feet. The Town is permitted to enforce more stringent requirements than outlined by RI DEM, but never less stringent.

The site plan review process in a locality may require that a developer take certain measures to ensure that proper drainage control is designed for the site. In order to accomplish this a developer may have to perform extensive grading, or construct a retention pond, which adds additional funds and tasks that are necessary for the developer to be granted a permit. By requiring these actions, the site plan review process mandates that a developer must do something to his/her property, which could be viewed as an exaction.

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<sup>21</sup>Hypothetically given as an example.

### 4.3 Environmental Exactions

The origin of environmental exactions may have begun in 1969, when Congress drafted and passed the National Environmental Policy Act (NEPA). NEPA required all projects proposed or funded by Federal sources to be analyzed with regards to environmental impacts through the preparation of an Environmental Assessment and if needed an Environmental Impact Statement (EIS), and that any alternatives to that project be documented. The Act did not require that an agency choose the alternative that had the least negative impact. The Act merely mandated that the alternatives had to be considered.

Many successful EIS reports were supported because the number or quality of the positive impacts (such as jobs created) outweighed those of the negative impacts (increase in heavy truck traffic). The balance of negative impacts to positive impacts was important, as many courts and communities felt more comfortable supporting a project that produced more good than bad<sup>22</sup>.

As a result of NEPA, many states drafted their own version of the act, such as New York (the State Environmental Quality Review Act, SEQRA). The Act gave the state more power to choose the best alternative or required that an EIS show a "positive" balance of impacts. A statute in Florida has provided a significant procedure for the evaluation of an EIS. The statute authorized that the EIS be denied if the balance of environmental impacts were negative, and mandated that the social and fiscal impacts be given consideration and maintain positive balance of

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<sup>22</sup>Bosselman and Stroud. 1987. pp92.



impacts<sup>23</sup>.

Environmental mitigation has been the major technique that has arisen from NEPA, as a way to ensure that the beneficial impacts outweigh the adverse ones. The best example of a mitigating action would be the one regarding wetlands, previously mentioned. The developer is required to create a wetland for each wetland that is destroyed. Another example of this type of mitigation is found in the 1982 Endangered Species Act, which would allow for limited damage to the habitat of an endangered species, in exchange for the enhancement of a similar habitat<sup>24</sup>.

An example of the potential use of an environmental exaction is a program that would require funds to be contributed based on the estimated automobile mileage that is expected as a result of new development<sup>25</sup>. The fees would be used for the maintenance and operation of vehicle exhaust testing centers, and to implement mitigating measures to control air pollution. One such measure may be the promotion or enhancement of mass transit programs and facilities.

There are two immediate concerns with this type of an exaction. The first is demonstrating the nexus principle. In a city such as Los Angeles, the courts may be more apt to accept the relationship, and the mitigating measures that are proposed. In a municipality or a region that does not have such an obvious air

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<sup>23</sup>Ibid.

<sup>24</sup>Ibid., pp92

<sup>25</sup>Ibid., pp 98.

quality concern, the courts may have difficulty envisioning such a correlation.

The need to satisfy the nexus relationship would be similar to an impact fee nexus test. A municipality would need to demonstrate that as a result of new development, additional automobile trips will be generated, creating an increase in the pollution levels of the municipality.

To calculate such a fee, the administrators of the ordinance would need to determine approximately how many miles a resident of the new development would have to drive in order to obtain necessary services. As an example, a person occupying a residential unit would need to obtain groceries and most likely visit a shopping mall or department store. The contribution would be based upon the expected additional trips that would be generated.

The second concern that a developer may point out is that no fee was levied on the existing residents of the area, yet they also generate an equal amount of auto emissions. When a fee is levied against all persons in a community, that would be considered a special assessment, or a tax, which a municipality is not necessarily authorized to enact without state approval. The legitimacy of imposing an impact fee, or exaction, on new development has been discussed in Chapter 2 of this study, under the subtitle "Impact Fees are not Taxes". Briefly, Courts have upheld the notion that shifting the burden to new development to maintain existing conditions is a legitimate action under a municipality's police power.

#### 4.4 Applicable Issues

The overall purpose of this study was twofold. The first objective was to establish the legitimacy of environmental linkage fees. This was accomplished by documenting the validity of impact fees/exactions and linkage fees in general. The second objective was to provide a basis for the use of these fees and to conceptualize additional areas and issue that could be benefitted through their use.

The best example of the use of these fees, in a basic form, takes place in California, where their use is directed towards habitat enhancement and preservation. Riverside County, California was one of the first places to implement habitat conservation fees to protect the habitat of the Stephens kangaroo rat. A habitat area was delineated and developers within that habitat area have been required to pay \$1950 per acre on all construction. The funds go towards the protection of the habitat and the implementation of a habitat conservation plan. As of late 1992, 25 million dollars had been collected, and an additional 25 million dollars is expected over the next decade<sup>26</sup>.

The rational nexus test, as applied to this program should be satisfied. Since the species is endangered, it is important to protect its habitat, a legitimate State interest. Development which occurs in the defined habitat area decreases the amount of suitable land available for the species. The decrease in habitat as a result of the development and the need to protect the remaining habitat does demonstrate the relationship between the action and the measure taken.

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<sup>26</sup>Nelson, et.al. 1992, pp23.

Another example could be applied to the logging industry. In recent times, the spotted owl has been in the news quite often. The old growth forests of Oregon and Washington, home to this endangered species, are currently being harvested. The logging companies are required to leave 10% of the forest and are allowed to remove 90%. An application of an environmental linkage fee program may require the loggers to pay an additional fee for every acre harvested, which could be used for the protection and enhancement of the remaining habitat. Although "creation versus destruction" would be the most ideal mitigation technique, similar to that of the wetland concept, it is difficult to replace trees that are several hundred years old.

A system that would fund a wetland preservation and enhancement program would also be a good example. Earlier in this chapter, the notion that a developer must create a wetland for each one that is destroyed in the development process was discussed. It was introduced as an example of a commonly accepted procedure.

In this system a developer would also be required to pay a linkage fee, which would be used for the acquisition of wetland properties, and the maintenance of those created in the past. Although the developer is required to create a new wetland system if one is destroyed, there is no long term guarantee that the created wetland would perform as adequately as the one destroyed. A portion of the fees collected could be used to maintain or enhance those wetlands.

In both instances the rational nexus requirements would be similar to those that satisfy the nexus test in the Kangaroo rat example. The administrators of the program would need to demonstrate that the collection of the funds can be used to preserve habitat, or acquire and maintain wetlands, as applicable. The administrators would also be required to show that the action, such as harvesting the old growth forest, does significantly affect the habitat of the spotted owl, and those effects need mitigative actions.

On a broader scale, an additional application of an environmental linkage fee system could be used by multi counties or states. An issue that faces many communities in the western portion of this country is one of air pollution in the city. Earlier in this chapter, the concept of air pollution mitigation was introduced as it relates to automobiles. In the same capacity, a system could be developed that would require industrial developers to pay a fee, which would be used for the maintenance and operation of industrial air quality mitigation strategies.

For the rational nexus test to be satisfied in this example, the designers of the program would need to demonstrate that an increase in industrial facilities increases air emissions, and thus contributes to an increase in air quality problems.

The concept of land acquisition has been considered in the Riverside, California area. The funds are to be used to acquire habitat for endangered species. This type of activity does not have to be confined to a single community/county. In addition, the concept does not have to be applied to habitat acquisition.

The funds could be used to obtain environmentally sensitive areas or lands not suitable for development. Some characteristics of such land may include: prime soils for forest growth, poor soils for septic systems, steep slopes, hydric soils and area of potential ground water recharge. The funds could also be used to acquire lands that could be used for parks or forest reserves.

Although the issue receives little publicity in current environmental concerns, acid rain is still a problem that must be dealt with in the pristine lakes and communities of the northeast. An environmental linkage fee program could provide funds to the communities of the northeast by assessing the emission sources in the Ohio River valley, as applicable. The suspected polluters would pay a fee proportional to the amount of dioxides that are emitted from the facility. The funds would then be used to combat the consequences of acid rain in northern New York for example.

The rational nexus principle applied to this example would require that the relationship between industrial activity in the Ohio River valley and the incidence of acid rain in northern New York be clearly illustrated. The relationship is a well documented and accepted scientific fact. Administrators of the program in New York would have to demonstrate that the goal to maintain pristine conditions in these water habitats, as well as forest habitats, is both a desirable and legitimate State interest. While demonstrating that need, it would also be necessary to show that the use of fees imposed on the industrial development in the Ohio River valley would assist New York in achieving those goals.

The funds that are collected could be used for liming. This is a process which involves the deposition of lime into a lake or pond. The result of this application of lime is the neutralizing of pH levels to their original state. This is a costly and time consuming process. This serves as one example of the use of the funds collected.

#### 4.5 Conclusions

The expanded use of environmental linkage fees is conceptual in nature. The utilization of these fees has not yet been fully explored. Many of the examples used in this chapter have been suggested applications, not active uses. The purpose of this chapter was to expand on the possible uses of these fees and to show the diversity of application to which they can be employed. Based on the principles established for other type of impact fees, exactions and linkage fees, environmental linkage fees can work to mitigate a communities concerns.

The next chapter, will discuss the principles of other types of fees, and the implications to environmental linkage fees in more detail.

**CHAPTER 5**  
**CONCLUSIONS and RECOMMENDATIONS**



The main purpose of this study was to explore the feasibility of using environmental linkage fees as a mechanism for environmental mitigation. One measure of the feasibility is the legality of fees in litigation. Since the concept of environmental linkage fees has not been legally challenged, other types of impact fees/exactions and linkage programs were examined in terms of their legal standing.

### 5.1 Research Findings

The examination of other mechanisms has resulted in two crucial findings. The first is that the study has established the basic principles of impact fees and linkage programs, based on the legal precedence of impact fees and linkage fees. These decisions are important, as they may be viewed as the legal standing, by proxy, for environmental linkage fees. The basis for these principles is based on the legal precedence that was discussed in Chapters 2 and 3.

The second finding has revealed potential areas of conflict that an environmental linkage fee program may encounter after its implementation. It is important to understand these areas of conflict, so that they can be recognized and planned for during the process of writing the ordinance.

There have been many points made throughout this study, about what is important to consider and what a municipality must clearly define in the ordinance, so that the ordinance would be a legitimate and successful exercise of the municipality's power. The purpose of this chapter is to discuss what measures should be taken in the future in order to ensure that environmental linkage fees can

be used effectively. In order to accomplish this, a list of recommendations are presented to be used by a community to strengthen the ordinance both in application and legal standing.

## 5.2 Recommendations

One of the most important considerations in the application of environmental linkage fees, and impact fees in general, is the need for standard enabling legislation.<sup>27</sup> The enabling legislation serves two purposes. The first would be to aid local planners in the drafting of an ordinance that is both clear and workable. The second would be to give the court system a standard in which to review ordinances that have come under legal challenge.

The majority of planners and public officials will benefit from guidance by the state legislature while drafting and implementing environmental linkage fee ordinances. Many communities may attempt to draft ordinances that will ultimately fail, because the needed direction and assistance was not available at the state level. Growing communities, such as those in Florida, have been subjected to "trial-and-error" type ordinances, because until recently, that state lacked enabling legislation.

A second consideration is that the enabling legislation should allow for inter-state cooperation as in the examples previously discussed. If the legislation is designed so that principles conflict between states, it would be difficult for a

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<sup>27</sup>Nelson, Arthur. 1988. "Development Impact Fees". Journal of the American Planning Association. v54 n1, pp13.

program which depends on cooperation to operate effectively. The standard enabling legislation would need to be designed as a national model. By using a national model for state enabling legislation, communities and court systems throughout the country would have a common basis to design or evaluate ordinances. Also, the national model may facilitate inter-state cooperation, if neighboring states have similar requirements.

One way to accomplish this national model would be to involve the participation of a nationally recognized and capable agency, such as the American Planning Association. A national model would depend upon the cooperation of the states to adopt the policy after the model has been developed.

It is important to refer the principles that were established in the previous chapters, in order to frame the recommendations for the design and administration of an environmental linkage fee program. These recommendations are based on concerns derived from the results of this study and are not ranked in any order of importance.

**A municipality must be sure that the fees collected are earmarked for specific purposes.** The basis for this consideration was formulated in *Weber v. Roy City, Utah*. The Utah Supreme Court ruled against an ordinance that imposed an impact fee on building permits because the funds collected were placed in a general revenue fund. When establishing an ordinance, a municipality must deposit the funds collected into a specific account. Funds that are placed in general revenue accounts can be used for general revenue purposes. Funds that

are deposited into general revenue accounts are more likely to be used for general purposes and can therefore be classified as a tax.

**The fees should be used for activities that are clearly defined within the purpose of the ordinance.** In addition to earmarking the funds and placing those funds into a special account, the use of the funds must be specifically and clearly defined. The foundation for this consideration is based on Home Builders Association of Greater Salt Lake v. Provo City, Utah, where the State Supreme Court supported an impact fee because the funds were earmarked for a specific and defined purpose. A municipality must clearly document how the funds collected are going to be used.

The purpose of the fee should have some relationship to a documented community policy. The best way to accomplish this would be to have the ordinance consistent with a comprehensive plan. The use of the fees should also have the same type of relationship. Expenditure of fees collected could be documented within a capital budgeting plan.

**The municipality must assess each project on a uniform basis, so that the fees are calculated the same way for each project.** The fees that an ordinance imposes must be calculated on a uniform basis for all projects assessed. The justification for this consideration is based on Western Heights Land Corporation v. City of Fort Collins, Colorado, where the State Supreme Court stated that an ordinance which imposed a fee on the basis of square footage was legitimate because the charges were derived on the same basis for every project.

When developing an ordinance, a municipality must determine the fee to be imposed using the same method for every project. Ordinances which have numerous methods based on different types of development may face challenges "on its face" or "as applied", as discussed in Chapter 3, "Constitutionality".

**A municipality must demonstrate that the projects for which the fee is imposed significantly contributes to the resolution of the problem that is being mitigated.** The basis for this consideration is the rational nexus test. The test mandates that a relationship be demonstrated between the problem which is to be mitigated and the development. Hypothetically, a linkage fee that is to be used to develop alternative transportation methods should not be imposed on a commuter rail system because the rail system does not contribute to the need to develop alternative modes of transportation. The municipality has to be able to show how the development contributes to the problem and how the funds collected will assist the municipality in alleviating the problems.

**A municipality must demonstrate that the purpose for imposing the fee substantially advances legitimate public interest.** The foundation for this consideration is based on *Nollan v. California Coastal Commission*. The US Supreme Court implied that the provision required by the *Nollans'* would be acceptable under some circumstances. The Court decided that the commission had not advanced the public interest and the decided in favor of *Nollan*. A municipality must be sure that the public purpose of the ordinance could be accomplished by imposing the fee.

**When establishing the fee range, a municipality must set the fee at a reasonable level.**<sup>28</sup> If the fee is too low, then the funds collected will not be sufficient enough to support the mitigation measures needed to solve the problems. If the fee is too high, the increase in development costs and contract rents may deflect new development to other communities demanding less from developers.

One of the concerns that was expressed many times during this study was the fact that environmental linkage fees have not been challenged in the court system. In order to examine the use of environmental linkage fees, the legitimacy of impact fees and linkage fees were considered and the principles of those programs were applied to an environmentally oriented program. The result of those applications were the six recommendations in this chapter.

An additional consideration is the evolution of court interpretation of the police power relative to impact fees, which was discussed in Chapter 3. An environmental linkage fee program is dependent on a broader application of the police power doctrine. The courts have supported a linkage fee which assesses downtown office development to fund affordable housing programs, as discussed in Chapter 3. A program which assesses development to mitigate environmental problems resulting from that development should have the same support from the courts.

One way to ensure the favorable court review is to develop a program based on the recommendations presented in this study. Those recommendations

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<sup>28</sup>Keating, 1986, P.134.

form the basis for the legitimacy of impact fees and linkage programs. Recognition of these recommendations in the drafting of an environmental linkage program will be critical in determining its effectiveness and legality.

The purpose of this chapter was to propose broad considerations for the development of an environmental linkage fee program based on the generalizations made of other types of impact fees/exactions and linkage fees. In order to work, an environmental linkage fee program must provide clear details of the program purpose and function. Environmental linkage fees can work to mitigate a community's environmental problems that result from development.





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