

EVALUATING LINKAGE AND BEYOND: LETTING THE WINDFALL RECAPTURE GENIE OUT OF THE EXACTIONS BOTTLE

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OUTLINE

I.	INTRODUCTION	5
A.	<i>Definition of Housing Linkage</i>	6
B.	<i>Roots in Exactions and Inclusionary Zoning</i>	7
C.	<i>Description of Existing or Proposed Linkage Programs</i>	9
II.	TYPES OF LINKAGE	10
A.	<i>Formula-Based Mandatory and Quasi-Mandatory Programs</i>	10
1.	Mandatory Linkage	10
2.	Quasi-Mandatory Linkage	12
3.	“Reversed” Mandatory Linkage	15

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B.	<i>Incentive-Based Programs</i>	16
C.	<i>Negotiated Linkage</i>	17
D.	<i>Variations Among Linkage Programs</i>	19
E.	<i>Contextual Variables</i>	22
III.	EVALUATION OF LINKAGE POLICIES	24
A.	<i>Criteria for Evaluation</i>	24
B.	<i>Legality</i>	25
1.	<i>Linkage and Inclusionary Zoning</i>	25
2.	<i>Linkage and Exactions Tests</i>	27
3.	<i>Is Housing a Public Facility?</i>	37
4.	<i>Will Mandatory Linkage Survive the Exactions Tests?</i>	37
5.	<i>Possible Alternative Legal Bases for Linkage</i>	37
C.	<i>Sensitivity to Market Effects</i>	38
D.	<i>Effectiveness</i>	40
E.	<i>Targeting</i>	41
F.	<i>Trust-Fund Allocations</i>	42
G.	<i>Social Implications of Housing Location</i>	43
H.	<i>An Alternative Rationale: Windfall Recapture</i>	43
IV.	CONCLUSION: EVALUATING LINKAGE, AND BEYOND ...	45

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I. INTRODUCTION

Recent local attempts to increase the production of low income housing in the United States reinforce the adage that necessity is the mother of invention. The sharp decline in federal programs has forced local authorities to bear the social and political burden of inadequate housing for the poor. Therefore, it is no surprise that the innovation which had characterized federal housing legislation has been replaced by inventiveness among local authorities.

Many cities are searching for ways to fill the void left by the decline of federal programs. Since local authorities traditionally control most land development, the search for low income housing has turned to the link between real estate development and the supply of affordable housing. Some cities are already implementing a variety of new and innovative approaches along these lines, while others have placed the housing issue on their agenda. Since the problem of insufficient low income housing is a continuing one, more cities and states will address this issue in the near future.

The emergence of linkage is typical of how American land use policies and methods are developed. Because the Constitution mandates a separation of powers between federal and state levels with land use

planning typically falling within the jurisdiction of the states, most new land use controls emerge from the states. Because state level initiative often proves weak, much room is left for local action. Thus, most innovations in American land use planning, including zoning itself, arose out of local experiments. This process of land use development differs from that of many other countries, where land use planning legislation is most frequently shaped nationally.¹

The bottom-up process is a mixed blessing. On the one hand, it allows for variety and innovation, with fifty different legal entities, and within them thousands of local authorities, all acting like idea generators capable of puffing up new concepts and methods of testing them locally. Once born, these ideas undergo a survival of the fittest process, competing for national, professional and legal attention through the various media for idea exchange. This process ensures that only the more transferable and robust policies survive. This process of innovation may involve an influx of new ideas whose attractiveness does not correlate with efficacy. Popular appeal may be gained at the expense of careful up-front evaluations. Comparatively, other countries require single-opportunity national policies to pass through the national legislative and administrative sieves. In the United States there appears to be no custodian to evaluate local policies which have the potential to set important national precedents.

This article proposes a partial remedy for this shortcoming in the innovation process. Rather than waiting for results of *ex post facto* evaluations of linkage, this article proposes that many facets of linkage can be evaluated today. After surveying both existing and proposed policies, the article evaluates existing programs in terms of their legality, capacity to deliver lower income housing, and their broader public policy implications from economic, social, and planning perspectives.

A. *Definition of Housing Linkage*

Linkage, or linked development, is a policy that taps a currently burgeoning type of land use, such as commercial development, in order to finance the construction of housing or to promote some other social need such as job training or employment. Stated differently, linkage is

1. For a more complete analysis of the context for the emergence of U.S. land use law and policy see Alterman, *Exactions American Style: The Context for Evaluation*, in *PRIVATE SUPPLY OF PUBLIC SERVICES: EVALUATION OF REAL ESTATE EXACTIONS, LINKAGE, AND ALTERNATIVE LAND POLICIES* 3 (R. Alterman ed. 1988) [hereinafter R. Alterman].

land use regulation that requires or induces certain developers to construct or help finance needed housing, often "affordable" housing, as a condition for receiving permission to build or to obtain some "bonus."² Therefore, linkage requires that a builder intending to build X, must also build or help finance Y.

The history of this new and rapidly developing field is relatively brief. The most prevalent type of linkage is between downtown office developments and low or moderate income housing. San Francisco and Boston are the best known examples, with San Francisco being the recognized pioneer. Recently, planners in several cities have suggested various ways of broadening the concept of linkage. These changes affect both the "donor," or generator, and the "recipient," or target.

B. *Roots in Exactions and Inclusionary Zoning*

Linkage programs can be viewed as an extension of two other methods of land use control: exactions and inclusionary zoning.³ As the historic survey by R. Marlin Smith demonstrates,⁴ states and local governments have used exactions for several decades. An exaction requires developers to supply or finance public facilities or amenities made necessary by the proposed development, including infrastructure, parks, and schools. Linkage is an extension of the developer's responsibility to provide for public needs with services that are not public facilities, such as housing and social services.

The use of exactions has been increasing in recent years.⁵ Although

2. Some take a narrower view of linkage, identifying it only with mandatory requirements. See Keating, *Linking Downtown Policy in Three Cities*, 52 J. AM. PLAN. A. 133 (1986); and Kayden and Pollard, *Linkage Ordinances and Traditional Exactions Analysis: The Connection Between Office Development and Housing*, 50 LAW & CONTEMP. PROBS. 127, 128 (1987). Others, however, construe linkage more broadly and include incentive-based programs as well. See D. PORTER, DOWNTOWN LINKAGES (The Urban Land Institute, 1985) [hereinafter D. PORTER]; Juergensmeyer, *The Legal Issues of Capital Facilities Funding*, in R. Alterman, *supra* note 1, at 53 [hereinafter Juergensmeyer]; Merriam and Andrews, *Defensible Linkage*, 54 J. AM. PLAN. A. 199 (1988).

3. The degree to which linkage can draw upon the legal rationale for these two mechanisms is a separate question which will be addressed later. See *infra* notes 56-105 and accompanying text.

4. Smith, *From Subdivision Improvement Requirements to Community Benefit Assessments and Linkage Payments: A Brief History of Land Development Exactions*, 50 LAW & CONTEMP. PROBS. 5 (1987).

5. A survey of 452 communities in 1985 is cited in Fulton, *Exactions Put to the Test*, 53 PLANNING COMMENT 6 (1987), and fully reported in DEVELOPMENT EXACTIONS (J. Frank & R. Rhodes ed. 1987). Another survey is reported in Bauman and Ethier,

traditionally exactions required the dedication of land for a limited range of public services, exactions currently allow for the collection of fees in lieu of either land or the actual construction of the facility in question. Their use has been extended beyond the provision of on-site facilities to include off-site facilities made necessary by the development. Additionally, the more recent sophisticated version of exactions such as impact fees are increasingly being used to translate needs entirely into more flexible monetary terms for financing public facilities.⁶

The evolution of exactions and the emergence of impact fees have provided linkage with a precedent for imposing monetary fees while relaxing the need for location proximity. Linkage plans usually rely on a fee payment option with an in-kind option as well, and do not require the mandated housing to be provided on-site. Another regulatory scheme, environmental impact review, has also indirectly supported the idea of off-site responsibility.

"Inclusionary zoning" or "inclusionary housing" has served as the second important stepping stone for linkage policies by placing the issue of the supply of low and moderate income housing on the legislative agenda. Inclusionary zoning was originally proposed as a method to alleviate the phenomenon of exclusionary zoning which arose from the misuse of zoning.⁷ Although the distinction between inclusionary zoning and linkage is often blurred,⁸ they are distinct concepts.

Inclusionary zoning attempts to socially integrate residential areas. Linkage policies, on the other hand, are essentially methods for allocating responsibility for supplying housing or social services. While linkage policies usually require nonresidential development to provide for housing or other social services, inclusionary zoning is primarily concerned with residential land uses.

Despite these differences, the two distinct policies share an important component. The decline in federal housing assistance programs

Development Exactions and Impact Fees: A Survey of American Practices, 50 LAW & CONTEMP. PROBS. 51 (1987).

6. For analyses of this evolutionary process, see Connors and High, *The Expanding Circle of Exactions: From Dedication to Linkage*, 50 LAW & CONTEMP. PROBS. 69 (1987); Juergensmeyer, *supra* note 2; R. Alterman, *supra* note 1.

7. For a comprehensive discussion of inclusionary zoning, see A. MALLACH, *INCLUSIONARY HOUSING PROGRAMS: POLICIES AND PRACTICES* (1984) [hereinafter A. MALLACH].

8. This point of view is expressed in *INCLUSIONARY ZONING MOVES DOWNTOWN* (D. Merriam, D.J. Brower, P.D. Tegeler eds. 1985) [hereinafter *INCLUSIONARY ZONING*].

has made it necessary for planners in some cities to incorporate a supply-responsibility component or in-lieu fees into inclusionary zoning. Such schemes typically require or encourage a developer to set aside a specific proportion of the development as low or moderate income housing units for some length of time. This aspect of inclusionary zoning is indeed close to the notion of linkage. However, the starting point is different and the legal implications appear distinctive as well.

C. *Description of Existing or Proposed Linkage Programs*

Approximately a dozen cities in various parts of the country are already implementing linkage programs, while others are considering whether to adopt such policies. Since this is a growing field, the author may be unaware of some examples; however, the most prominent proposed or approved cases are discussed in this article.

The information about the programs presented in this article is based on both primary and secondary evidence. The primary evidence presented is based on firsthand interviews and an analysis of the legislation in the following seven cities: San Francisco, Boston, New York, Chicago, Madison, Hartford (partial), and Stamford (partial).⁹ Three major examples of linkage—San Francisco, Boston, and New York—will be discussed in great detail; two are in existence, the third was proposed and rejected. Secondary evidence is derived from the literature provided about programs in Princeton and Jersey City, New Jersey; Palo Alto and Santa Monica, California; Miami, Florida; Seattle, Washington; and Cambridge, Massachusetts.¹⁰

Five types of linkage programs are identified in this article: mandatory; quasi-mandatory, incentive-based, negotiated, and “reverse” linkage. A representative case for each type of linkage is included in the text, in addition to a reference to New York; the others are presented in the Appendix.¹¹ The nature of the evidence (primary

9. The author did not undertake empirical research directly measuring outputs and impacts.

10. The major secondary source is a report prepared for the Urban Land Institute (U.L.I.) by Douglas Porter in 1985. Mr. Porter has kindly provided the author with update sheets for the cities included in the 1985 report, correct for January 1987 and, in some cases, a month or two later. See D. PORTER, *supra* note 2, at 2. A similar version of Porter's 1985 paper also appeared in *URBAN LAND* 16 (Sept. 1985). The update sheets may be obtained by contacting Mr. Porter at the Urban Land Institute, or the author. Other secondary sources are cited where relevant.

11. Other cities which have considered or adopted mandatory or quasi-mandatory linkage policies are described in the Appendix. These cities include: Chicago, where

or secondary) is indicated in each case, along with citations of the sources.

II. LINKAGE PROGRAMS

A. *Formula-Based Mandatory and Quasi-Mandatory Programs*

1. Mandatory Linkage: San Francisco

Established in 1980, the San Francisco program was the pioneer linkage program. Initially called the Office/Affordable Housing Production Program, the city created it by an administrative decision, which cited the California Environmental Quality Act (CEQA) as authorization.¹² CEQA called for "mitigation measures" to be imposed when an adverse impact is anticipated.¹³ Before 1981, these mitigation measures were interpreted to include socially oriented measures.

Amendments to CEQA in 1981 and 1982 allowed mitigation measures to address only physical environmental effects. For several years subsequent to the 1981-82 amendments, the planning commission relied on its discretionary powers in granting building permits.¹⁴ Seeking a solid legislative basis for its program, San Francisco used its home rule authority to enact in August 1985 the Office/Affordable Housing Production Program. The ordinance amends the Subdivision Code contained in the San Francisco Municipal Code.¹⁵

Seeking to prevent legal challenges, San Francisco's decision makers sought to validate their linkage policy by a study documenting the causal link between the construction of new office space and an increased need for housing. The city commissioned two studies. The 1979 study attempted to provide an initial quantitative estimate of the

linkage was a significant issue on the mayoral election platform and is still hotly debated; Princeton, N.J.; Palo Alto, Ca.; and Stamford, Conn. Santa Monica, Ca. has a special mandatory-negotiated version and will be discussed with the negotiated programs.

12. WEST'S ANN. CAL. PUB. RES. CODE § 21000 *et seq.* (1970).

13. CEQA defined a significant impact on the environment, requiring mitigation, as a "substantial, or potentially substantial, adverse change in the environment." WEST'S ANN. CAL. PUB. RES. CODE §§ 21068 and 21002.1(b).

14. The history of the San Francisco program is presented in detail by Diamond, *The San Francisco Office/Housing Program: Social Policy Underwritten by Private Enterprise*, 7 HARV. ENVTL. L. REV. 449-86 (1983). See also Share and Diamond, *San Francisco's Office-Housing Production Program*, 35 LAND USE LAW 4 (Oct. 1983).

15. Ordinance No. 358-85, City and County of San Francisco, *Office/Affordable Housing Production Program* (File No. 115-85-10).

demand for housing generated by new office space.¹⁶ A second study in 1984 is cited by the 1985 ordinance as the factual basis for linkage requirements.

San Francisco's linkage requirement applies to office development anywhere in the city that adds 50,000 square feet or more of new or substantially rehabilitated office space. The 1984 study concluded that to provide affordable housing for the demand generated by new office development would impose a cost of \$9.47 to \$10.47 on each square foot of office development. The city, however, used a figure of \$5.34. The program has a housing requirement that mandates that 38.6 units per 100,000 square feet of office space be provided.¹⁷

A developer can elect either to build the housing, or to pay an in-lieu fee. If the developer elects to build, it must allocate 62% of the housing units derived from the above-stated formula to low or moderate income housing for 20 years. The ordinance creates an elaborate system to ensure that these requirements are met, but fails to distinguish between low and moderate income housing. If, on the other hand, the developer makes an in-lieu payment, the money is placed in a City Wide Affordable Housing Fund established by the ordinance to be spent exclusively on low and moderate income housing. The developer is required to render full payment before a certificate of occupancy will be issued. The ordinance apparently estimates that the developer's subsidy per housing unit is \$13,834. This figure is relied upon where reimbursements are due, or where a combination of the construction and the in-lieu fee is elected.¹⁸

16. The report was prepared by Sedway Cooke for the Department of City Planning. See Diamond, *supra* note 14.

17. In its earlier version, the San Francisco program called for a complex system of credit weights that depended on the type of housing commitment made (new or rehabilitated; low or moderate income, etc.). Low income housing received higher credits. The previous system, although mandatory, allowed for some negotiation. It has been replaced by a simpler across-the-board mandatory formula. See Diamond, *supra* note 14.

Some argue that negotiation still predominates the determination of the construction in-kind requirement. See Susskind, McMahon, Tohn, and Rolley, *Mitigating Adverse Development Impacts: Case Studies of Seven Linkage Programs*, PROGRAM ON NEGOTIATION AT HARVARD LAW SCHOOL, WORKING PAPER SERIES, May 1986 [hereinafter Susskind]. Also see Susskind and McMahon, *Reframing the Rationale for Downtown Linkage Programs*, in R. Alterman, *supra* note 1, at 203 [hereinafter Susskind and McMahon].

18. See *supra* note 15 (subsection dealing with "compliance through combination of construction or payment of in-lieu fee").

San Francisco's 1985 downtown plan calls for payments of fees by office developers in addition to the housing fee. The money collected is to subsidize public art, open spaces, child care, and transit, for a total of \$13 per square foot. The plan also places a ceiling on the total amount of new office space allowed downtown.¹⁹ As the longest running programs enacted, the San Francisco case will be of particular interest in the author's evaluation below.

2. Quasi-Mandatory Linkage: Boston

The second major program enacted was modeled after the San Francisco program but with several important differences. Boston's linkage policy is quasi-mandatory because it applies to anyone requesting zoning relief, including a variance, conditional use permit, or zoning change. Boston established its program in December of 1983, through an amendment to the Boston Zoning Code. Another amendment in February 1986 reduced the payment period for the in-lieu fee, in effect raising the fee.²⁰

Unlike the San Francisco program, which applies to any project falling within its specifications, the Boston program applies only to cases where deviation from the existing zoning is sought.²¹ The developer of any project of more than 100,000 square feet requiring zoning relief must prepare a Development Impact Project Plan to be reviewed by the Boston Rehabilitation Authority (BRA). The language of the Boston legislation clearly indicates the attempt to ground the linkage program in a regulatory mode associated with planning review, rather than in a fee or tax-like mode.

Similar to the San Francisco program, the Boston program has a threshold requirement. The linkage requirement applies only to additional space above the threshold, so that a building of 150,000 square feet will be charged only for the 50,000 square feet above the 100,000 square foot threshold. The fee, called a Housing Contribution Grant,

19. October 1986, update sheet to the Urban Land Institute report, *supra* note 10.

20. The first amendment establishing a linkage program in Boston was Text Amendment No. 73 to the Boston Zoning Code, which added Article 26 and became effective December 1983. The second amendment occurred in February 1986. Copies of the relevant legislation and other information from the Boston Redevelopment Authority (BRA) were provided by the courtesy of Ms. Edith Netter, then Senior Counsel to the BRA. These copies are on file with the author.

21. In Boston, existing zoning is such that almost every downtown development will receive zoning relief.

is \$5.00 per square foot, with an additional \$1.00 fee per square foot for job training added by a 1986 amendment to the zoning code.

Subsequent to its enactment, the Boston program sought to place its required fee on firmer factual grounds. A 1986 study commissioned by the BRA calculates that new office construction and the office employees accompanying the projects would increase housing costs in the city by \$11.28 per square foot of new office space.²² The money collected by the program is to be placed in the Neighborhood Housing Trust Fund, which is administered by the Office of the Collector General.

As in San Francisco, the developer in Boston has an option of electing either the Housing Creation Option, or the monetary Housing Contribution Option. Boston makes no attempt to calculate the requirement in terms of number of housing units. If a developer chooses the construction option, the cost of the units constructed must be at least equivalent to the sum of the contribution required by the program had the developer elected the contribution option. Unlike San Francisco, both options require that the housing units be designated solely for low or moderate income households. The program fails to distinguish between these two categories.

Other significant differences exist between the current programs in the two cities. Unlike the San Francisco model, which applies only to net office space, the Boston program applies to a wide range of land uses, including: office, retail business and service, institutional, educational (excluding any public institutions), and hotels and motels (with the exception of apartment hotels). An often overlooked feature of the Boston program is that, in addition to the aforementioned types of developments, the ordinance could at times apply to residential or other land uses not falling under the rubric of Development Impact Uses. A fee may be imposed on a land use project that directly reduced the supply of low and moderate income dwelling units.²³ For example, the developers of new or rehabilitated luxury apartment blocks at times displace lower income residents and therefore could be required to make the statutory contribution. This provision thus serves to introduce an inclusionary zoning-like element into the program.

The Boston program further differs from its predecessor by making a

22. A report titled *The Linkage Between Office Development and Housing Costs in the City of Boston* was prepared by Jerold S. Kayden, K. Case and R. Pollard for the BRA. A copy of the report was provided by Mr. Kayden and Ms. Netter.

23. See the Boston linkage legislation *supra* note 20, at § 26A-3 titled *Development Impact Project Requirements*, and § 26A-2 titled *Definitions*.

geographic distinction between the downtown area and the surrounding neighborhoods. Based on this distinction, the 1986 amendment changes the payment period from twelve years anywhere in town, to seven years if the project is located in the downtown area. In effect, the Boston contribution is significantly lower than \$5.00 per square foot of new or rehabilitated space. For example, with a discount rate of 10%, the five dollars would be worth \$1.58 in present value for the twelve year payment period, and \$3.83 for the seven year period.²⁴ A geographic distinction is also made with respect to where the funds are to be spent. If feasible, 10% of the funds collected from downtown projects are to be reserved for downtown, and 20% of the funds raised in the other areas are to be reserved for the adjacent neighborhoods. The balance of the funds can be spent anywhere in the city.

Although Boston bases its program on San Francisco's, there are several significant differences. In effect, the Boston in-lieu fee is considerably lower than San Francisco's because of the extended payment period and the higher threshold. However, the Boston program has a broader range of land use "donors," and thus a broader tax base on which to impose linkage requirements. Finally, in Boston, unlike San Francisco, the program is linked to the city's discretionary planning review and has a geographically differentiated component.

A new version of linkage—parcel-to-parcel linkage—was instituted in Boston in 1986. This program applies to publicly owned downtown parcels only, linking their disposition to publicly owned parcels in designated neighborhoods. The same quantitative requirements apply as in "regular" linkage.²⁵

New York City

In 1984, New York City's Mayor Koch appointed the Development Commitments Study Commission at the request of the American Planning Association and community housing groups. The commission considered and rejected proposals for a linkage exaction program similar to that of San Francisco and Boston.²⁶ A senior official interviewed

24. The calculation is presented in a BRA information sheet titled *Questions and Answers on the Linkage Program*.

25. See *supra* note 10. See also Herbers, *Linking Good Deeds to Development: Whose Good Deal Is It?* GOVERNING PROTOTYPE 28 (1987).

26. Report to the Mayor of the Development Commitments Study Commission, July 1984. For a description of the background that led to the appointment of the commission, see Werth, *Tapping Developers*, 50 PLANNING 21 (January 1984) and Teg-

affirmed that the City Planning department still holds this position.²⁷ To justify its rejection of linkage, the commission maintains:

Zoning regulations and specific zoning decisions should not be tied to income generation for general public purposes. The study commission believes that such a practice, even if directed toward a worthy objective such as housing, would distort the purpose of zoning and could have a damaging effect. . . . If the real estate market, particularly that of Manhattan, is to be tapped to provide necessary monies for a housing trust fund, then the obligation should take the form of a tax to be imposed uniformly on a broad base of real estate activity, not solely on projects requiring discretionary zoning actions.

Although it rejected a linkage exaction, the commission recommended the creation of a Housing Trust Fund, through a variety of proposed revenue sources. As of the writing of this article, that fund has not been created and only a tax on condominium sales exists.²⁸ However, it is possible that the city currently possesses the authority to impose housing exactions through the environmental impact statement required of developers seeking discretionary zoning actions which will have a significant environmental impact.²⁹ Such impact could be expanded to include effects on the character of the neighborhood or community.

3. "Reversed" Mandatory Linkage—Madison, Wisconsin

An interesting twist to typical linkage policy programs can be found in a resolution proposed by an alderman for Madison, Wisconsin. Unlike the economically vibrant urban centers of San Francisco and Boston, Madison has a demographically weak downtown and a slowly developing periphery—a pattern typical of many American cities. The proposed resolution is to create "a linkage program to increase city fees in order to generate revenues to assist housing and economic development in the central city neighborhoods."³⁰ Various types of additional

eler, *Developer Payments and Downtown Housing Trust Funds*, 18 CLEARINGHOUSE REVIEW, November Special Issue, 679 (1984).

27. Interview with Mr. Carl Weisbrod, Executive Director of the Department of City Planning, New York City, December 1986.

28. See *supra* note 27.

29. See Marcus, *Development Exactions: The Emerging Law of New York State*, in R. Alterman, *supra* note 1, at 78-79.

30. Resolution submitted to the City Council of Madison by Alderman Billy Feitlinger: Resolution 225-86, *Creating a Linkage Program to Increase City Fees in*

fees would be exacted against new developments outside the target area. The staff comments on this proposal anticipate greater problems in proving the causal connection with this form of "reverse" linkage than with the more typical office-to-housing form utilized by other cities.

B. *Incentive-Based Programs*

Several cities have adopted an incentive system that allows developers to apply for a greater density, or another type of bonus, in exchange for building affordable housing or an in-lieu fee. Such bonuses are an extension of the incentive zoning systems that exist in many cities, which require developers to provide amenities such as open space or plazas. Often, the housing exactions are part of a package that includes these other, more conventional exactions.³¹

Hartford, Connecticut

Hartford considered various proposals for establishing linkage for housing and employment, including a mandatory, formula-based linkage requirement for commercial projects over 10,000 square feet.³² After much debate,³³ Hartford revised its bonus system in 1986 and instituted a bonus-based linkage system.³⁴ The "schedule of bonuses" offers additional floor space in exchange for a variety of facilities and improvements, each with its own price tag. Residential uses are offered the highest bonus ratio of 1:8, and employment uses—1:6.25. For comparison—day care centers and nurseries are offered a ratio of 1:6; cultural and entertainment facilities and pedestrian circulation im-

Order to Generate Revenues to Assist Housing and Economic Development in the Central City Neighborhoods. Staff comments by the city attorney, October 1986, provided by Alderman Feitlinger.

31. Reported examples of such programs include Hartford, Miami, and Seattle. The Hartford program will be presented as an example. The other programs appear in the Appendix.

32. The proposed mandatory linkage and the deliberations that led to it are reported by Susskind, *supra* note 17.

33. Stockard and Engler, Inc., Linkage Policy for Hartford, June 1985. This consultant's report recommended a tax on commercial office use as well as other alternatives.

34. Information supplied by Ms. Brenda L. Valla of the University of Florida Growth Management Studies, based on communication with the Hartford Assistant City Manager, Mr. Michael Brown, and attorneys Joseph Lugo and Lisa Silverstre of the Hartford City Attorney's office, April 1987.

provements—1:4; historical preservation—1:2. The 1986 amendment established a fee payment option for residential or employment uses and for job training that calls for a payment of \$5 per square foot of bonus floor area into a Linkage Trust Fund.³⁵

New York City

In mid-1987 New York City amended its zoning code to create an inclusionary housing program containing elements of incentive-based linkage. The program grants bonuses in the form of higher floor area ratios in certain zoning districts in exchange for the construction or rehabilitation of lower income housing or the payment of a fee designated for low and moderate income housing.³⁶ In a way, this policy combines inclusionary zoning and linkage. Since its geographic specification of a half-mile radius indicates that its goal is to create housing rather than integrated neighborhoods, the program is not inclusionary zoning. It could perhaps be called a "housing-to-housing" linkage.

C. *Negotiated Linkage*

Linkage programs, whether mandatory or incentive-based, are not always expressed by a preset formula. At times, they are negotiated on an ad hoc basis. Although this form of linkage raises various legal questions, the nature of the development regulation system is such that negotiated linkage is likely to persevere. Indeed, Susskind and McMahon³⁷ favor negotiated linkage over the formula-based version. As may be expected, there is a dearth of information about negotiated linkage, and it is likely that more examples exist than have been reported. Known examples include Jersey City, New Jersey; Cambridge, Massachusetts; and the special mandatory-negotiated version of Santa Monica, California.³⁸

Since 1985 Jersey City has encouraged developers of retail and commercial projects to construct or rehabilitate housing units, to aid in

35. CITY OF HARTFORD MUN. CODE ch. 35, § 35-5.46, amendment submitted to the Court of Common Council on April 28, 1986. Porter reports that a mandatory employment requirement was established for publicly assisted projects, requiring the employment of Hartford residents, minorities, and female tradeworkers. See Porter, update sheet, *supra* note 10.

36. Section 23-92 of New York City's Zoning Resolution was approved by the City Planning Commission on April 1, 1987, and shortly thereafter received final approval.

37. Susskind and McMahon, *supra* note 17.

38. Porter, *supra* note 10.

financing affordable housing projects, or to contribute to a housing fund. The state agency that implements this policy has quantitative guidelines for these contributions: 10% of housing units should be "affordable," and commercial and industrial developers of over 100,000 square feet should contribute \$3.25 per square foot. Construction of affordable housing reduces this requested contribution to sixty-five cents.³⁹

In Cambridge, since 1985 the city has considered several ordinances that require linkage payments. Meanwhile, the city is negotiating on a case-by-case basis with major developers of all land uses for housing contributions.⁴⁰

Beyond these reported examples are probably many cases that may not have surfaced as full-fledged policy. For example, in New York City one or two cases have been reported where off-site housing was exacted from mixed developments.⁴¹

A special case is Santa Monica, California, where a mandatory linkage program not codified is implemented through a special feature of California law called "developer agreements." These agreements allow municipalities to sign binding agreements with developers that protect the developers from future changes in the municipality's policies.⁴² The linkage policy calls for fees of \$2.25 per square foot for the first 15,000 square feet of net rentable space, and \$5.00 per square foot for the remainder. Units may be constructed in kind at a value equal to the in-lieu fees.⁴³

The list of programs presented here and in the Appendix shows a number of innovative ideas. Linkage-type proposals seem to be slowly emerging from isolated local experiments to a nationally discussed policy issue. Yet, how desirable is linkage in general and particular forms

39. *Id.*

40. *Id.* In summer 1988 Cambridge approved incentive-based linkage.

41. Reported in Exhibit C. appended to the Development Commitments Study Commission Report, *supra* note 26.

42. For an analysis of developer agreements in California, with some reference to Santa Monica, see Cowart, *Negotiating Exactions through Development Agreements*, in R. Alterman, *supra* note 1, at 219. For an analysis of developer agreements in comparison to Britain's "planning gain," see Callies, *Developers' Agreements and Planning Gain*, 17 THE URB. LAW. 599 (1985).

43. Secondary sources for Santa Monica are: Porter, 1985 Report and Update Sheets, *supra* note 10; Susskind and McMahon, *supra* note 17, at 204; Keating, *supra* note 2.

of it? Section D will note the main variations among the programs reported and will outline contextual variables to be taken into account in considering linkage policy. This discussion will serve as the background for an evaluation of linkage in Part III. The paper will conclude with a proposed alternative rationale for linkage.

D. *Variations Among Linkage Programs*

The existing and proposed programs have some important variations among them. These differences can be summarized along the following dimensions:

1. Dimensions for Comparison

* **Types of Donors and Recipient Services:** There are many types of developments that could be donors. The following is a list of donors used by various programs: office development (San Francisco and Seattle programs; Chicago and Stamford proposals); other non-residential developments (Boston, Miami, Palo Alto, Santa Monica, Seattle); industrial development (Palo Alto); upper income housing (Boston, New York City); any land use (Cambridge, Jersey City). None of the programs studied includes government-operated services as possible donors.

There are a variety of recipient services: housing (New York City, Stamford proposal, Jersey City, Palo Alto, Santa Monica); job training (Boston and Hartford); daycare, public art, transit (San Francisco and Hartford); economic development (Chicago and Madison proposals).

* **Location of Donors and Recipients:** Despite the image of linkage, downtown-only location of the donors is not necessarily the dominant option. The donor development may be citywide (San Francisco, Boston and others) or specifically in nondowntown areas (Madison proposal).

The location of the recipients varies: citywide (San Francisco and Boston); only particular neighborhoods (Miami, Chicago, Madison); within a specified radius (Miami—the off-site housing zone; New York City—inclusionary housing off-site option); recipients located downtown or in adjacent areas (Seattle; Madison proposal). In most cases, the program applies uniformly to recipients in all eligible districts, but Boston and Miami distinguish among geographic areas.

* **Mandatory, Bonus-based, or Negotiated:**⁴⁴ Does the requirement

44. For a distinction among mandatory, incentive-based, and negotiated programs

apply to anyone requesting permission to develop, or only if a developer seeks a bonus? Is the policy preset, or negotiated case by case? The San Francisco program is the only approved mandatory program in a major city. Other mandatory programs are in smaller cities (Palo Alto, Princeton, and the unapproved Stamford, Connecticut, proposal). Several cities have opted for an incentive-based system (Hartford, Seattle, Miami). The Boston program is quasi-mandatory because although its program is mandatory it applies only if the developer seeks zoning relief or a special permit. The bonuses referred to above are established in the ordinance. Linkage may also be negotiated case by case and may lead to an agreement with the developer, as occurred in Cambridge, Jersey City, and Santa Monica.

*** Types of Housing Targeted:** Does the program allow any type of housing to be built or financed (San Francisco in the initial years), or does it require construction of low and moderate income housing only? Within the "affordable" housing category is there specific targeting to low income housing through requirements or incentives? Most programs lack this distinction. In San Francisco, the initial program differentiated between types of housing through a weighted credits system. In many cases, "affordable" housing is defined using national "section 8" criteria of fair rent,⁴⁵ and lower income households are defined as having an income of 80 percent of SMSA limits.⁴⁶

*** In Kind or In-lieu Fee:** Does the program call for a fee or actual construction of housing, or for both? Most programs allow the developer to choose between the two options, but some have a fee option only (Princeton; the Chicago proposal).⁴⁷

*** New Construction or Rehabilitation:** Some programs, including San Francisco and Boston, specifically allow substantially rehabilitated units to count as new construction. Other programs fail to define "construction" clearly. Infrequently, a program gives the developer the option of less-substantial rehabilitation. An exception is New York City's 1987 inclusionary housing program that has both a substantial rehabilitation option and a "preservation" option.

see Alterman and Kayden, *Developer Provision of Public Benefits: Toward a Consensus Vocabulary*, in R. Alterman, *supra* note 1, at 22.

45. See 42 U.S.C. § 1437(a)(2) for a definition, and legislative purpose in so defining, low income households.

46. See, e.g., NEW YORK CITY ZONING RESOLUTION, *supra* note 36, at § 23-92 (defining New York City's Inclusionary Housing program).

47. The Chicago reports proposing linkage are unclear as to whether a construction option exists or not.

* **Threshold:** San Francisco, Boston, Santa Monica, and two proposed programs (Chicago and Stamford) have thresholds below which a development is totally exempt, ranging from 15,000 to 100,000 square feet.⁴⁸ Among the programs surveyed, only the Princeton program applies to all nonresidential development regardless of size.⁴⁹

Most of the thresholds have a single cutoff point between the exempt and nonexempt levels. The exceptions are Princeton, with a graded formula, and Santa Monica, with a two-tier system, with a lower fee for the first 15,000 square feet and a higher fee for anything over that. Programs such as Boston, San Francisco⁵⁰ and the proposed Chicago program charge only on the area above the threshold, exempting everything else in both large and small projects. In other cities, including Santa Monica, if a development exceeds the threshold, the entire project is assessed. Bonus-based programs have a threshold arising from the bonus level, which differs from city to city and among zones.

* **Level of Fee:** Existing mandatory and quasi-mandatory programs have housing fees that range from approximately \$2.43 in Palo Alto to \$5.34 in San Francisco per square foot of developed space. The proposed mandatory programs are higher—\$6 for Stamford and \$10 for Chicago. Reported bonus-based and negotiated programs range from \$2.25 as the lower of the two fees in Santa Monica, to a maximum of \$15 in part of Seattle. The existing mandatory and bonus-based fees cluster at 4 to 5 dollars. However, not all these figures are comparable and some may be misleading because the actual value of the fees depends on the particular details of the programs, such as payment periods. These range from 0 (up-front payment required in San Francisco and Hartford), through 4 and 7 years (Chicago proposal; downtown Boston), to 12 years (the nondowntown option in Boston).

* **Earmarking and Designation Through a Trust Fund:** Most linkage programs specifically designate the funds collected for a specific type of housing. Many are tied to a formal trust fund. In most cases, the legislation or written policy indicates that fees are to be deposited in that fund.

48. San Francisco: 50,000 square feet; Boston: 100,000; Santa Monica: 15,000; Chicago: 50,000; Stamford: 30,000.

49. Susskind and McMahon, *supra* note 17, at 204.

50. The San Francisco legislation is unclear on whether the ordinance imposes the fee on the first 50,000 square feet in projects over that threshold.

2. Conclusions from the Comparison

The existing programs are similar in their technical and quantitative aspects (adoption of thresholds; fees/construction options; fee levels; criteria for defining "affordable housing"). For example, most existing fee levels are around \$5 per square foot, and vary less than one would expect from the actual differences among the cities in type of development, building costs, and the amount of housing needs actually generated by the new development. There is also a virtual consensus on the quantitative criteria for defining eligible households and on the lack of differentiation between low and moderate income housing. There are, however, significant differences regarding the qualitative aspects of the programs (types of donors and recipients, types of services, geographic areas covered).

These observations are somewhat paradoxical. On aspects that should be most sensitive to local conditions, the programs are remarkably similar.⁵¹ What might have been an unavoidable necessity had this been a federal program requiring nationally uniform thresholds, definitions, and fees, is paradoxically adopted in a series of programs created and controlled on the local level.

On the other hand, there is greater variation on the more substantive program elements, such as determining who should bear the cost, who should benefit, what types of services should be supported, and whether a linkage fee is justifiable or desirable. Yet, some of these questions should be the subject of long-range policymaking at the state or national level. It is questionable whether these important issues involving social services should be left wholly to short-range statements made by each locality.

E. *Contextual Variables*

The question whether linkage applies to a particular city depends on local characteristics, or "contextual variables." The following discussion indicates relevant variables.

*** Market Strength of the Development Being Tapped:** This involves determining whether the city has some burgeoning types of development that can serve as "donors." For example, is there a strong downtown that is likely to remain strong? San Francisco and Boston had

51. These aspects include: the amount of actual need for housing generated by the new development; housing costs and market demands; strength of the commercial market; actual income levels and particular social needs in the community.

strong pressures for downtown development when their programs were instituted. Development in Manhattan is very strong and thus would present New York City as a good candidate for linkage. But downtown development strength may be ephemeral. Even in New York there have been recent reports of some weakening in demand for office space.

Other cities and towns might have other suitable candidates for linkage, including suburban shopping centers, industries, or exurban offices. The "reverse linkage" proposed for Madison illustrates candidates other than downtown areas.

* **Policy Regarding Candidate for Tapping:** Even if they have a booming industry of one kind or another, cities differ in whether they seek to promote the boom. For example, San Francisco has adopted an overt policy to try to discourage downtown development, and in 1986 placed a cap on development.⁵² New York City, on the other hand, has a declared policy of promoting further economic development in the downtown.⁵³ Therefore, even though a viable candidate may exist, linkage may be thwarted by the city's other interests.

Cities also consider the regional context in deciding whether to adopt linkage. If neighboring cities lack a linkage policy, the city in question will consider the regional disadvantage it may incur by introducing linkage. Fear of competition from suburbs or other major cities may force a city to forego a linkage policy.

* **Degree of Restriction on Local Taxing Powers:** The two well-known programs of San Francisco and Boston are in cities where voters have restricted the authority to impose new taxes. Linkage, as an attempt to impose a fee through regulation rather than taxation, was therefore an attractive alternative for these two cities. Some other states and cities lack such restrictions.

* **The Local Political Atmosphere:** Local politics is an important variable in evaluating linkage. Although some of the political factors relating to linkage policies are similar in different locales, significant political differences on both the state and local levels may also exist. These differences pertain to the relative political strength of the supporters of low income housing and the developers.⁵⁴ Although it is

52. See Keating, *supra* note 2; Porter, Update Sheets, *supra* note 10.

53. See *supra* note 27 (interview with Mr. Carl Weisbrod).

54. E. Deakin reports significant differences in political dynamics regarding linkage and other forms of exactions. See generally Deakin, *The Politics of Exactions*, in R. Alterman, *supra* note 1, at 96. See generally Susskind and McMahon, *supra* note 17.

likely that state and local authorities will find the linkage issue on their political agenda in the near future, political outcomes are unpredictable. For example, even in Chicago, where the late Mayor Washington's promise to introduce a linkage policy created a coalition on this issue among otherwise opposing groups, adoption of such a policy has proven to be difficult.⁵⁵

III. EVALUATION OF LINKAGE POLICIES

Existing linkage policies supply enough evidence for a preliminary evaluation. The evaluation presented here is to outline in advance the implications of linkage in general and alternative forms in particular. A set of evaluation criteria is first proposed, and each criterion is then applied in subsequent sections.

A. *Criteria for Evaluation*

- * **Legality:** Linkage is a new type of policy, imposed on the land use control system. In this author's opinion, however, it is not simply a linear extension of established types of land use controls. What could be its legal basis? What are its chances of withstanding legal challenges? Can some types of linkage be more resilient than others to legal attack?
- * **Sensitivity to Market Effects:** How sensitive are linkage policies to changes in the development market? What market effect might linkage have?
- * **Effectiveness—Capacity to Deliver:** What extent of funds/housing units can be expected to be delivered by linkage? How have existing programs performed? What are the relevant differences among the programs?
- * **Targeting:** How effectively can linkage target the housing produced to lower income groups? Are there significant differences among particular versions of linkage?
- * **Social and Political Implications of the Mechanism for Trust Fund Allocation:** How will the decisions be made regarding the allocation of trust fund money? What are the political and social implications? Which target groups are likely to benefit most?
- * **Social Implications of Housing Location:** What will be the geographic results of lower income housing location, both under the trust

55. Interview with Mr. Charles Thurow of the Department of City Planning, Chicago City Hall, October 14, 1986, and subsequent telephone updates in February 1987.

fund option and under the actual construction option? What are the social implications of the resulting pattern?

* **Public Justification and Equity:** Linkage implies a new relationship between the public and private sectors in land development. On what public policy grounds can it be justified? What are its implications for equity?

B. *Legality:*

The courts have yet to directly test the legality of linkage. A few cases have considered linkage on nonsubstantive grounds, such as a case on Boston's linkage ordinance.⁵⁶ This section will examine the potential arguments regarding the legality of linkage and their chances of success. This evaluation is from the perspective of an observer of American land use law with a comparative viewpoint.

Since linkage is a new type of policy, legal commentators and city attorneys advising local governments have sought conceptual analogies with existing types of policies which have an established body of law. Two main approaches have been followed, both seeking to classify linkage as a police power mechanism. They parallel the two types of policy roots for linkage discussed in Section I.B.: inclusionary zoning and exactions, especially impact fees. The latter avenue is increasingly dominant, but the first deserves some analysis as well.

1. Linkage and Inclusionary Zoning

Some legal scholars view linkage as inclusionary zoning located downtown rather than in the suburbs where the "classic" inclusionary zoning is applied.⁵⁷ New Jersey and California have already recognized the legality of mandatory or optional inclusionary zoning ordi-

56. *Bonan v. City of Boston*, 398 Mass. 315, 496 N.E.2d 640 (1986), challenged the provisions of the Boston Zoning Code that established linkage. The Massachusetts Supreme Judicial Court did not decide on the merits of the claim, finding that the plaintiffs lacked standing to challenge the linkage program. This decision set aside the ruling of the lower court that the linkage legislation exceeded the city's zoning powers and was therefore invalid. Information on this case was provided by Mr. Donald L. Connors of Choate, Hall and Stewart in Boston. See also Juergensmeyer, *supra* note 2, at 7.

Another case with kinship to linkage is *San Telmo Associates v. City of Seattle*, 735 P.2d 673 (Wash. 1987). There, the Washington State Supreme Court found the city's housing preservation ordinance to be an invalid tax rather than a legitimate exercise of the police power. See Juergensmeyer, *supra* note 2, at 7.

57. See generally INCLUSIONARY ZONING, *supra* note 8.

nances.⁵⁸ If the inclusionary zoning analogy were to hold, linkage would suffer few legal setbacks in these states. Although some leading legal scholars initially saw linkage as a form of inclusionary zoning,⁵⁹ others recognize that the analogy is tenuous.⁶⁰

Inclusionary zoning, as a reaction to exclusionary zoning practices, is a policy designed to create zoning districts and neighborhoods that have a mixture of housing types and income groups.⁶¹ This rationale clearly applies to programs that require a set-aside of housing on-site. When the program is aimed at an in-lieu fee or the off-site supply of housing,⁶² it may fail to provide mixed neighborhoods because the locational link is relaxed. Although inclusionary zoning programs are becoming more akin to exactions and linkage,⁶³ fundamental differences in legal and public policy rationales between the two types of policies still exist.

Inclusionary zoning is a type of "district zoning" that reflects a substantive planning policy about the desirable content of housing developments. This policy regarding the desired socioeconomic mix is similar to many planning statements embodied in zoning districts, relating to the desired mix of land uses, densities and the allocation of adequate land for roads and parking. As the late Paul Davidoff has argued eloquently, the fact that inclusionary zoning deals with a social goal should not affect the criteria used for testing its legality.⁶⁴

Unlike inclusionary zoning, the typical linkage policy is usually oblivious to the desirable character of the zone near the office buildings paying the fee and to the quality of the recipient neighborhoods. Instead, linkage deals with the quantitative production of housing and the allocation of responsibility for financing it. On the other hand, in-

58. See A. MALLACH, *supra* note 7, at 28-37; D. MANDELKER, *LAND USE LAW* 214-220 (1982).

59. See, e.g., Mandelker, *The Constitutionality of Inclusionary Zoning*, in *INCLUSIONARY ZONING*, *supra* note 8, at 31. See also Bosselman and Stroud, *Mandatory Tithes: The Legality of Land Development Linkage*, 17 *LAND USE AND ENVTL. L. REV.* 151, 159 (1986).

60. See Bosselman, *Panel Comments*, in *INCLUSIONARY ZONING*, *supra* note 8, at 41-43; Bellman, *Panel Comments*, in *INCLUSIONARY ZONING*, *supra* note 8, at 43-46.

61. See A. MALLACH, *supra* note 7, at 11-13.

62. See *supra* note 36 (New York City's Inclusionary Housing program).

63. This point is also made by Bosselman and Stroud, *supra* note 59, at 159.

64. See Davidoff, *Zoning As a Class Act*, in *INCLUSIONARY ZONING*, *supra* note 8, at 1. See also Mandelker, *The Constitutionality of Inclusionary Zoning* in *INCLUSIONARY ZONING*, *supra* note 8, at 31.

clusionary zoning is concerned with the qualitative aspect of affordable housing.

Another difference between the two programs is that inclusionary zoning is a remedial measure for faulty public and private planning policies.⁶⁵ In other words, if developers, local authorities, and other government or public bodies had supplied mixed housing areas at their own initiative, there would be less of a need for inclusionary zoning and less motivation for compulsory state-level policies made famous by the New Jersey Supreme Court in the *Mount Laurel II* case.⁶⁶ Linkage is not a remedial measure for faulty planning. Far from asking developers to ensure a better social mixture, linkage imposes on developers the onus of supplying or financing housing affordable to low and middle income families.

The public and legal rationale for inclusionary zoning thus differs from linkage on some basic points. For these reasons, the inclusionary zoning analogy to linkage is no longer dominant.

2. Linkage and Exactions Tests

The scope and application of exactions have increased considerably in recent years, as described in Section I.B. Both traditional and newer forms of exactions such as impact fees have gained legal acceptance.⁶⁷ Exactions have benefited from significant illumination by the courts and by numerous scholarly articles.⁶⁸ This judicial acceptance of exactions has led commentators and municipal advisors to attempt to place linkage under the well-recognized regulatory roof of exactions. Commentators disagree as to whether the tests developed for exactions apply to linkage.⁶⁹

65. See Bellman, *supra* note 60.

66. Southern Burlington County, NAACP v. Township of Mt. Laurel, 92 N.J. 158, 456 A.2d 390 (N.J. 1983). See Bellman, *supra* note 60, at 44.

67. This point is made by most of the commentators on exactions law cited in this paper. For a detailed survey of court decisions, see Callies, *The Impact Fee: Funding Public Facilities Generated by New Land Development*, paper prepared for the American Institute of Certified Planners Workshop, Land Use Law for Planners and Lawyers, March 12, 1987, Honolulu, Hawaii.

68. A law journal that has recently devoted a special issue to the subject lists some 180 legal articles and commentary notes devoted to the subject since 1949. See 50 LAW & CONTEMP. PROBS. 1 (1987). Recently, several full-length books have appeared devoted entirely to exactions. For an analysis of this trend, See R. Alterman, *supra* note 1, at 12-13.

69. See generally Diamond, *supra* note 14; Connors and Meacham, *Paying the Piper: What Can Local Government Require as a Condition of Development Approval?*

Although the impact of the two recent United States Supreme Court land use decisions⁷⁰ on the tests for exactions is unclear, most commentators do not predict a change in the tests. It is, however, reasonable to assume that the rules of the game and the stakes involved may have changed. As a result of *First English*, municipalities will probably be more cautious in implementing programs that might constitute a taking of property because courts might now invalidate the ordinance and require payment of compensation for the period during which the taking was effective. Furthermore, *Nollan* implies that courts will apply greater rigor in their scrutiny of exactions.⁷¹ The following are the accepted tests for judging the legality of exactions.

a. *Tax or Regulation?*

This test examines whether the exaction is a land use regulation or a disguised tax. This test applies especially to exactions that involve a financial payment, such as fees in lieu of supplying infrastructure and impact fees. Since all linkage programs have a fee component, this question is especially relevant.

Determining whether an exaction is a regulation or a tax has far-reaching implications. If classified as a tax, the exaction is invalid unless it is expressly and specifically authorized by statute. On the other hand, if the exaction is viewed as an exercise of police power, it will be upheld under a broader legislative delegation of power.⁷² The authorization required when the exaction is classified as a regulation depends

16TH ANNUAL PROCEEDINGS OF THE INSTITUTE ON PLANNING, ZONING AND EMINENT DOMAIN, Ch. 2; Bosselman and Stroud, *supra* note 59; Smith, *supra* note 4; Juergensmeyer, *supra* note 2; Marcus, *supra* note 29.

70. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 107 S. Ct. 2378 (1987); *Nollan v. California Coastal Comm'n*, 107 S. Ct. 3141 (1987).

71. Merriam, *Commentary*, 12 NEWSLETTER OF THE PLANNING AND LAW DIVISION, AMERICAN PLANNING ASSOCIATION (1987); Bosselman and Stroud, *The Current Status of Development Exactions*, 14 FLA. ENVTL. AND URB. ISSUES 8 (1987); Lee and Gluckman, *Hysteria Aside, the First Lutheran Church Case Is Not That Bad for Florida*, 14 FLA. ENVTL. AND URB. ISSUES 6 (1987); Taub, *The Current Status of the Taking Issue*, 14 FLA. ENVTL. AND URB. ISSUES 10 (1987). Others agree, but place greater substantive import on the demand for closer scrutiny. Compare Bauman, *The Meaning of the Supreme Court's First Lutheran Church and Nollan Decisions*, 14 FLA. ENVTL. AND URB. ISSUES 5 (1987); and Marcus, *supra* note 29. See *infra* note 77 and accompanying text.

72. D. HAGMAN AND J.C. JUERGENSMEYER, URBAN PLANNING AND DEVELOPMENT CONTROL LAW 208-09 (1986) [hereinafter D. HAGMAN AND J.C. JUERGENSMEYER]. Juergensmeyer notes that classification by the court as a regulation or a tax is

on the degree of specificity of the state enabling legislation, the existence of home rule powers, and the attitude of the courts.⁷³

Since it is difficult to authorize exactions as a tax, local authorities usually attempt to ensure that their linkage program is classified as a land use regulation. Indeed, most of the linkage programs surveyed for this paper were incorporated into zoning legislation. While recent court decisions regarding impact fees have generally favored their classification as regulations, linkage fees may not fare as well.⁷⁴

The fundamental distinction between taxes and fees is that fees are used to regulate land use while taxes are employed to raise revenue. It is clear that office-to-housing linkage is directed toward raising revenue. Without impact fees, however, it would be impossible to supply the necessary public services and the quality of the residential environment would decline. It is thus legitimate under general police power purposes for local government to condition zoning relief or a building permit on payment of a fee.⁷⁵ Therefore, impact fees are classified as a regulation and not a tax.

In the case of linkage, the quality of office development would not suffer if low income housing is not built. As a result, it is difficult to justify conditioning commercial development on the payment of a linkage fee as a land use regulation. Perhaps the tax avenue should not be ruled out altogether. In the absence of voter-initiated restrictions on the authority to tax, it might be worthwhile to consider whether a linkage fee can be structured as a valid tax.

b. *Rational Nexus*

The rational nexus test inquires into the existence of a reasonable

often done in a result-oriented manner. In other words, if the court intends to invalidate the exaction, it will classify it as a tax. Juergensmeyer, *supra* note 2, at 55.

73. See Connors and Meacham, *supra* note 69, at 2-18.

In New York State, for example, both a liberal and a strict view can be found in court decisions, but a recent case has taken the strict view that explicit authority is required for acquiring powers for land use regulation. See *Kamhi v. Planning Bd. of the Town of Yorktown*, 59 N.Y.2d 385, 452 N.E.2d 1193, 465 N.Y.S.2d 865 (1983).

74. See Juergensmeyer, *supra* note 2, at 57-59, 61-63.

75. In a Florida Supreme Court decision the court presents the following argument why impact fees are not taxes: "The municipality seeks to shift to the user expenses incurred on his account. A private utility in the same circumstances would presumably do the same thing, in which event surely even petitioners would not suggest that the private corporation was attempting to levy a tax on its customers." *Contractors and Builders Association of Pinellas County v. City of Dunedin*, 329 So. 2d 314, 318 (Fla. 1976).

connection between the need created by the new development and the exaction. This test has emerged in recent years as the dominant test for the validity of exactions. Courts have developed this test and the two that follow especially for exactions, as a substitute for the usual constitutional tests applied to other government actions.⁷⁶ This point is reinforced by the *Nollan* case. There, the Supreme Court noted that the condition placed on a building permit must substantially advance legitimate state interests. This standard is more stringent than the rational relationship standard applied to due process or equal protection claims.⁷⁷

In the past decade or two, the courts have relaxed the reasonable connection necessary to uphold an exaction as compared with earlier tests whose roots were in the more traditional versions of exactions. The earlier, more stringent "specifically and uniquely attributable" test was enunciated by the Illinois Supreme Court in 1961 and is still in effect in Illinois.⁷⁸ That test requires municipalities to prove that the need for the additional facilities to be provided or financed through exactions is attributable to the new development alone. This test is, of course, difficult to satisfy regarding most off-site public facilities.

Fortunately, a more relaxed test has since been applied to exactions, first spelled out by the Wisconsin Supreme Court in 1966 in *Jordan v. Village of Menomonee Falls*.⁷⁹ An exaction is upheld if a reasonable connection can be shown between the need for the additional facilities and the growth generated by the new development. This reasonable connection can also be demonstrated when the new development has contributed to a general increase in demand.⁸⁰

The commentators disagree as to how the reasonable connection test

76. D. MANDELKER AND R. CUNNINGHAM, *PLANNING AND CONTROL OF LAND DEVELOPMENT: CASES AND MATERIALS* 513 (1985); Bosselman and Stroud, *supra* note 59, at 167.

77. *Nollan v. California Coastal Comm'n*, 107 S. Ct. 3141, 3147 (1987).

78. *Pioneer Trust and Savings Bank v. Village of Mount Prospect*, 22 Ill. 2d 375, 176 N.E.2d 799 (1961); *cited in* Juergensmeyer, *supra* note 2, at 64 n.9. For an analysis of the implications of the test for linkage in Illinois, see Meyer, *Chicago's Linked Development Fund: The Legality of Imposing an Exaction Fee on Large-Scale Downtown Office Developments*, 62 NOTRE DAME L. REV. 205 (1987).

79. 28 Wis. 2d 608, 137 N.W.2d 442 (1965), *appeal dismissed*, 385 U.S. 4 (1966).

80. *Id.* See also Juergensmeyer, *Funding Infrastructure: Paying the Costs of Growth Through Impact Fees and Other Land Regulation Charges*, in *THE CHANGING STRUCTURE OF INFRASTRUCTURE FINANCE* 23, 29 (J.C. Nicholas ed. 1985).

The New York Appellate Division clearly rejected the more stringent tests and ruled that a relationship is demonstrated "provided that the proposed development is a con-

will affect linkage. Those who feel that linkage is essentially a type of exaction usually assume that a causal link between new office space and an increased demand for lower income housing exists. For this group, the only difficulty lies in finding sophisticated research methodology to prove and quantify the relationship between office space and housing.⁸¹ These analysts therefore rely on improved planning and research capacity to withstand legal challenges.⁸²

Other commentators are somewhat more skeptical about whether the linkage relationship is sufficient to survive the rational nexus test.⁸³ Today, their skepticism is enhanced by the recent Supreme Court decisions in *Nollan* and *First English*. This author believes that the relationship between office or commercial development and low income housing is substantively different from the relationship found in "regular" exactions.

In the typical infrastructure and amenity exaction, the relationship between the new development and the need for which the exaction is taken is one of *dependency*. The service exacted is *ancillary* to the major land use and is necessary for the operation of the new development within existing standards of public services and environmental quality. For example, roads, schools and parks are ancillary to a residential development. Without this infrastructure, the quality of the main land

tributing factor to the problem sought to be alleviated." *Holmes v. Town of New Castle*, 433 N.Y.S.2d 587 (N.Y. App. Div. 1980); *cited by Tegeler, supra* note 26, at 691.

81. See Merriam and Andrews, *supra* note 2; Bosselman and Stroud, *supra* note 59. For an example of applied demonstration of research as the basis of Boston's linkage assumptions, see Kayden and Pollard, *supra* note 2.

82. This conclusion is enunciated most clearly by Merriam and Andrews, *supra* note 2, at 205.

83. See Marcus, *supra* note 29. Marcus is skeptical about many aspects of linkage. Juergensmeyer states that "linkage programs would seem to be the most susceptible of all exactions to a taking challenge since the link between the development and the benefit of the fees paid are at times less direct." Juergensmeyer, *supra* note 2, at 66. Meyer states that "the need for additional housing is not specifically and uniquely attributable to large-scale downtown office developments because these developments, while generating jobs, are not placing additional pressure on the housing market. The service sector employment growth is offset by the loss of manufacturing jobs and the pool of unemployed workers." Meyer, *supra* note 78, at 212. Although Meyer refers to the "specifically and uniquely attributable" test, his conclusion about the weak link would lead to a negative conclusion under the rational nexus test as well. *Id.* Bosselman and Stroud, although finally coming down on the cautiously optimistic side, first take the reader through a series of convincing arguments that cast doubt about whether one can show adequate directness of the link. Bosselman and Stroud, *supra* note 59. Callies also expresses some skepticism. Callies, *supra* note 67, at 40.

use would be diminished. Usually, a reversal of roles is intrinsically illogical. Residential construction would not be exacted of builders of a shopping mall in order to supply them with customers. Thus, the relationship of dependency easily supplies the necessary causal link for proving a rational nexus.

In contrast, the relationship between new office or commercial development and lower income housing is not one of dependency but rather of direct or indirect *correlation* between the two land uses. The correlation may or may not reflect an underlying causal relationship.

A causal relationship clearly exists where the office development directly reduces the number of existing housing units, but this is not the typical case of linkage. In other cases, a statistically significant correlation may reflect various intervening variables related to the typical regional housing and employment markets. These other variables might be the underlying causes for the increased demand for lower income housing.

In fact, some degree of statistical correlation could be shown between many land uses and activities within urban areas. After all, urban centers are by definition agglomerations of interdependencies. The office development/housing relationship may not be stronger than many others. Indeed, where only a correlation can be proven, a reversed causal relationship could just as easily be argued—for example, that new housing causes the need for more places of employment rather than the reverse. As Claud Gruen has stated in a piquant and oft-quoted phrase, “[A]dditions to the supply of office space do not create office employment any more than cribs make babies.”⁸⁴ That argument could not be made in the case of infrastructure exactions. Therefore, courts might view a relationship or correlation as insufficient for satisfying the rational nexus test.

Granted, one can find occasional examples of court decisions that accept an infrastructure exaction as legal even though the dependency relationship and the causal link is remote. However, these cases are by no means representative of the typical practice of infrastructure exactions. Instead, they border the outer limits of the rational nexus. Although courts may defer to the local authority’s judgment in borderline cases of infrastructure exactions, courts will likely be reluctant to

84. Gruen, *The Economics of Requiring Office-Space Development to Contribute to the Production and/or Rehabilitation of Housing*, in D. PORTER, *supra* note 2, at 36. See also Netzer, *Exactions in the Private Finance Context*, in R. Alterman, *supra* note 1, at 46.

do so in linkage, where even mainstream cases are on the outer fringes of the nexus relationship.

Most commentators agree that after the *Nollan* decision courts are likely to scrutinize arguments about rational nexus more closely than in the past.⁸⁵ The *Nollan* test will make the tenuous argument about the causal link even more difficult to assert.⁸⁶ A statement made by Bosselman and Stroud is worth noting: “[M]ore rigorous scrutiny of the rational relationship test may make it difficult to justify exactions designed to resolve broad public problems for which the specific development proposal of the particular developer bears no real blame in a cost accounting sense.”⁸⁷

c. *Proportionality*

Another test is whether the burden imposed on the new development is proportional to the need that it creates. The proportionality test derives from the equal protection guarantee of the U.S. Constitution. Linkage is likely to survive an equal protection challenge based on the fact that a particular class of developers is singled out for special treatment. Developers are not a “suspect class,” and the right to develop property is not a fundamental right.⁸⁸ Therefore, linkage does not trigger the strict scrutiny standard of equal protection.

The proportionality test for exactions as drawn by Utah and Florida is more demanding than equal protection. This test inquires into the treatment of the class singled out and the treatment of the members of that class. In the 1981 decision of *Banberry Development Corporation v. South Jordan City*,⁸⁹ the Utah Supreme Court developed a sophisticated test requiring that new developers pay only their share “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 burden of newly developed and other properties.”⁹⁰ The court

85. See *supra* note 71 and accompanying text.

86. *Nollan v. California Coastal Comm'n*, 107 S. Ct. 3141, 3147 (1987).

87. Bosselman and Stroud, *supra* note 59, at 166. This statement was written two years before the Supreme Court decision in *Nollan*. Despite this statement, Bosselman and Stroud are cautiously optimistic about the chances for linkage to survive legal scrutiny as an exaction.

88. See Merriam and Andrews, *supra* note 2, at 18; Juergensmeyer, *supra* note 2, at 59-60.

89. 631 P.2d 899 (Utah 1981); cited in D. HAGMAN AND J.C. JUERGENSMEYER, *supra* note 72, at 212.

90. 631 P.2d at 903.

listed guidelines for ensuring the proportionality of the burden. These guidelines included: the manner in which existing facilities have been financed; the relative extent to which the new developments and existing ones have already contributed to the cost of existing facilities through payment of the property tax and special assessments; the future contributions expected; and whether the developed properties are entitled to a credit.⁹¹ In other words, *Banberry* requires proportionality at present and in the future, as well as the introduction of a sophisticated system of credits.⁹²

In *Contractors and Builders Association of Pinellas County v. City of Dunedin*⁹³ the Florida Supreme Court also required proportionality. The *Dunedin* court required that the fees imposed on users must be no more than what the local government would incur in accommodating the new users of the system.

How will linkage fare if tested according to the proportionality principles of *Banberry* and *Dunedin*? Allowing credit to the new developer for past and future payments is not a problem because it is based on an accounting of the payments made by the donor alone, rather than in relation to nonpayers.⁹⁴ Since lower income housing generally has not been financed by local taxes or fees, any past payments are indirect and likely to be small. Suitable arrangements should be made for crediting future property tax or other payments toward any future housing programs.

More difficult to overcome is the problem of proportionality among past and present developers. In considering this problem, a distinction should be made between proportionality among new developers at present (horizontal proportionality) and proportionality between past and present developers (longitudinal proportionality). Longitudinal proportionality does not fare well under most linkage programs. Since municipalities generally have not supplied housing for lower and middle income households in the past, it is unlikely that existing downtown-type developments have ever been asked to pay for it. Today,

91. *Id.*; cited in D. HAGMAN AND J.C. JUERGENSMEYER, *supra* note 72, at 212.

92. See also D. MANDELKER AND R. CUNNINGHAM, *supra* note 76, at 531.

93. 329 So. 2d 314 (Fla. 1976).

94. Some commentators argue that allowing credits is not a problem because the fees charged, at least in Boston and San Francisco, are well below the estimated additional cost generated by the new development. See Kayden and Pollard, *supra* note 2, at 136-37; Bosselman and Stroud, *supra* note 59, at 180-81. This, however, is not part of the problem of proportionality but of the rational nexus—that one be charged for the need created. Proportionality pertains to relations among developers.

however, these existing developments escape the burden of providing housing which is imposed on new developments. Thus, the problem of longitudinal proportionality is considerably more acute in the case of linkage than in infrastructure exactions. Through exactions, existing development has usually provided for roads, parks, and schools. In fact, the rationale for exactions is often that existing residents do not wish to finance the facilities needed by new residents.

Horizontal proportionality may fare somewhat better. Under most exaction schemes, not all classes of developers have been required to dedicate land or to pay impact fees. Similarly, linkage programs often require payment only from selected classes of housing-generating developments and conversions. However, linkage ensures less horizontal proportionality than exactions because it has more exemptions than the usual exaction programs, including thresholds and exemptions for conversions or rehabilitations. Yet, if the linkage program minimizes or justifies these disparities, it may survive the courts' scrutiny of horizontal proportionality.

Municipalities considering linkage can either hope to avoid a *Banberry* test, or they can attempt to formulate their linkage policy so as to increase both horizontal and longitudinal proportionality. To improve longitudinal proportionality, municipalities can propose a fee or tax to apply to existing floor space of the type of development being charged the linkage fee. This would enhance proportionality between past and present developers. For example, a user tax on office and commercial space was considered by the Chicago Advisory Committee on Linked Development.⁹⁵ Horizontal proportionality could be improved by the following measures: imposing the linkage fee on conversions and rehabilitations as well as new construction; selecting the donor development classes rationally; and rationally justifying threshold levels instead of arbitrarily selecting the levels.

d. *Reasonable Benefit*

The final test inquires into who will benefit from the exaction. If the total community benefits without a specific benefit to the donor development, the exaction is likely to be classified as a tax.⁹⁶ Under an exaction program, the new development should receive some reasonable degree of benefit. This test has also been considerably relaxed in recent

95. See Appendix, Chicago.

96. Connors and Meacham, *supra* note 69, at 17.

years. In contrast to the earlier tests that require proof of direct benefit, the benefit to the development need not be exclusive or direct, but it should be more specific than a general community benefit.

This second type of rational relationship test was implied by the Wisconsin Supreme Court's *Menomonee Falls*⁹⁷ decision. Although the court did not define "reasonableness" of benefit, some commentators suggest that the court implied that "if a local government can demonstrate that its actual or projected extradevelopment capital expenditures earmarked for the substantial benefit of a series of developments are greater than the capital payments required of those development," then sufficient benefit is demonstrated.⁹⁸

As many commentators note, the benefit test also implies that earmarking of the funds designated for the community's need is highly advisable.⁹⁹ Most linkage programs have a mechanism to designate funds through a housing trust fund or some other way. If the test of reasonable benefit is applied by the courts, however, earmarking funds may be insufficient. Since local governments usually do not expend their own funds on lower income housing, it would be difficult for them to show that the designated expenditures for housing intended to benefit the donor class of developments are greater than the payments made through linkage.

Furthermore, in most cities it is difficult to demonstrate that a reasonable degree of benefit from the new housing would accrue to the donor. Designers of linkage programs argue that the additional housing will have a generally positive market effect on the availability of affordable housing. Despite this optimism, however, the amount of housing financed through linkage is small when compared with the shortage of affordable housing, and the effect of the effort on housing stock and prices will likely be insignificant.¹⁰⁰ It is unclear whether the courts will find this degree of benefit to be sufficient to uphold linkage programs.

3. Is Housing a Public Facility?

Before concluding this survey of tests for legality, another question

97. *Jordan v. Village of Menomonee Falls*, 28 Wis. 2d 608, 137 N.W.2d 442 (1965). See *supra* notes 79-80 and accompanying text.

98. D. HAGMAN AND J.C. JUERGENSMEYER, *supra* note 72, at 211.

99. Connors and Meacham, *supra* note 69, at 18; Bosselman and Stroud, *supra* note 59, at 181; Callies, *supra* note 67, at 28-30.

100. See Susskind and McMahon, *supra* note 17, at 208-209.

should be addressed which is rarely articulated in exactions cases. What is the "public facility" or "public amenity" that is a legitimate target for exactions? Most types of exactions recognized in previous court decisions and implemented in practice, apply to infrastructure, buildings, or amenities that are "public" in some way. These facilities usually possess some of the attributes of a public good, which are non-exclusiveness of use, ready access to the public needing that facility and, sometimes, public ownership of the property.¹⁰¹

Housing, on the other hand, does not possess any of the attributes of a public good. Linkage-produced housing units could be purchased by the residents to become their private property. Use of a housing unit by one family is exclusive of other users. Most societies have public goals about social redistribution of housing, but the redistribution of a private good is a classic target for implementation through general taxation, not exactions.

4. Will Mandatory Linkage Survive the Exactions Tests?

The ambit of the four tests for determining the legality of mandatory exactions has been expanded with time. Linkage does not pass any of the four tests with ease. Although a case can be made that linkage could survive each test separately, the likelihood that it would survive them all is slight. Since linkage is on the outer perimeter of legality on these tests, it is unlikely that it will survive judicial scrutiny.

5. Possible Alternative Legal Bases for Linkage

There are alternative legal bases for mandatory linkage programs. Although policymakers avoid characterizing linkage as a tax, linkage is clearly more related to revenue raising than land regulation. To adopt linkage as a tax, explicit state authority is necessary.

Alternatively, in some states, certain aspects of linkage might come under existing laws and procedures of environmental quality review. A recent decision by the New York State Court of Appeals has affirmed that a developer must mitigate secondary displacement arising from the construction of luxury condominiums in New York City's China-

101. For a definition of a public good in relation to the justification of exactions, see Netzer, *supra* note 84, at 40-41. See also Bosselman and Stroud, *supra* note 59, at 175. Bosselman and Stroud note that "[m]odern courts have suggested few limitations on the range of public facilities and services for which exactions may be used." *Id.* (emphasis added).

town.¹⁰² This decision is limited to situations where new development causes displacement of existing housing, and would have little relevance to a general demand for more housing.

The foregoing analysis is more applicable to mandatory and quasi-mandatory linkage than to incentive-based or negotiated linkage. Incentive-based linkage is more likely to withstand a legal challenge than is mandatory linkage.¹⁰³ Although negotiated linkage enjoys the recommendation of some commentators,¹⁰⁴ it is subject to challenge as contract zoning or as a violation of equal protection because of non-uniform administration.¹⁰⁵ In-depth discussion of these options is, however, beyond the scope of this paper.

Finally, the concept of linkage could be cast into a different legal and public policy mold which would better reflect its underlying rationale. This option is discussed in the concluding section of this paper.

C. *Sensitivity to Market Effects*

It is important for linkage to be sensitive to market effects because it is targeted specifically at economically burgeoning land uses. In the linkage programs surveyed, the fee was set at between 2 and 6 percent of the cost of developing the donor project. Porter estimates that Boston's linkage program will raise rental rates by only 1 or 2 percent, while San Francisco's total fees will add perhaps 4 or 5 percent to construction and leasing costs.¹⁰⁶

Although the burden in absolute terms is not high, the effect of the fee in a competitive market should be evaluated. If the development tapped is high growth and the developer's decision to locate in the particular area is not a marginal decision, the fee is unlikely to significantly affect development. When alternative locations in the city or the region present competition, however, the fee may become an important factor in a firm's decision. If the linkage program drives developers

102. *Chinese Staff and Workers Ass'n v. City of New York*, 68 N.Y.2d 359, 502 N.E.2d 176, 509 N.Y.S.2d 499 (N.Y. 1986). This case is cited and analyzed in Marcus, *supra* note 29, at endnote 48.

103. This point is made by several authors. *See, e.g.*, Merriam and Andrews, *supra* note 2, at 5.

104. Susskind and McMahon, *supra* note 17.

105. Regarding linkage and the contract clause of the Constitution, *see* Merriam and Andrews, *supra* note 2, at 19-21.

106. Porter, *Pain Before Gain: Developer Views on Housing Linkage Programs*, in R. Alterman, *supra* note 1, at 153, 155.

away, the loss in tax revenues may be much greater than the potential revenues raised through linkage. For example, one large office building in downtown Chicago could pay more in state and local taxes over a twenty-year period than the total anticipated linkage contributions from all projects for that same period.¹⁰⁷

The problem is that the market for commercial development is sensitive to a variety of local, regional, and national economic factors that may be difficult to anticipate. This is especially true for development that is part of the city's economic base. For example, a San Francisco study by David Dowall indicates a marked trend toward relocating backoffice employees out of the downtown area because of the high rental prices.¹⁰⁸ In contrast, land uses that follow residential development may be less sensitive to the market.

The linkage programs surveyed show different capacities to adjust to changes in the market. Some programs have attempted to incorporate a measure of flexibility. San Francisco's ordinance requires that an annual evaluation report be made to the Board of Supervisors and a compulsory review after five years. Boston requires the fee formula to be recalculated every three years. Compulsory re-evaluation, if performed at short intervals, is probably preferable to a sunset rule because the latter may itself have an undesirable effect on the market.

The three major types of linkage programs have different effects on the market. Planners of mandatory and quasi-mandatory programs should be especially concerned with overrigidity and should seek mechanisms for effective re-evaluations. A bonus-based fee is somewhat sensitive to market demand. If the fee is a deterrent, the bonus would presumably not be sought. However, the as-of-right development might not be lucrative either, in which case a dampening effect on development would occur nevertheless. Therefore, incentive-based linkage should also include mechanisms to monitor flexibility.

A negotiation-based program is least likely to affect development adversely. Appropriate adjustments and tradeoffs can be accomplished during negotiations to adapt to the rate of development. For example, if necessary, the city can offer tradeoffs with exactions for infrastructure or amenities without abandoning the linkage policy. The amount of the fee can be adjusted as well.

Finally, the threshold component of most mandatory linkage pro-

107. *Id.*

108. Dowall, *Endangered Species: San Francisco's Back-Office Employees*, 45 URBAN LAND 9 (1986).

grams may also have an effect on the market. It could be anticipated that medium-sized projects would be likely to choose a size just below the threshold. Preliminary evidence from Boston, however, fails to support this fear because of the absence of projects of a size just below the cutoff point.¹⁰⁹ Still, it is advisable to monitor and re-evaluate the threshold levels along with the level of the fee.

D. *Effectiveness—Capacity to Deliver*

How effective is linkage likely to be in delivering low and moderate income housing units? Can it significantly affect housing needs, and will it be a reliable source of funding? A distinction should be made between the fee option and the construction option. In Boston, despite the existence of a construction option, the great majority of developers elected to pay the fee. In the first three years of its operation, the Boston program reportedly produced a total of approximately \$40 million in payments and commitments. As of early 1987, these funds had yet to produce any housing.¹¹⁰ In contrast, in the San Francisco program's first years, the construction option was the major avenue of implementation.¹¹¹ After the ordinance was enacted in August 1986, however, the fee option may have become more important.

There are two hypotheses regarding why the construction option was preferred in San Francisco. The first hypothesis is that the construction option allowed the developer an opportunity to substitute some units which it would have built anyway, for units which the program required it to add to the housing stock. As long as moderate income units can be used to satisfy the program's construction option, some degree of substitution is inevitable. Recall that in its first years, the San Francisco program counted upper income housing units toward fulfillment of the linkage requirement. The net units added beyond what the developer would have built anyway remains unknown. The second hypothesis for explaining why the construction option

109. Informal interview with Ms. Edith Netter, then Special Counsel to the BRA, Oct. 2, 1986. See *supra* note 22.

110. *Id.*

111. Keating, *supra* note 2, at 135. In reporting on what the San Francisco program has delivered, Keating talks in terms of housing units constructed by developers or through agreements with not-for-profit groups. No rigorous study has yet been carried out on what was actually delivered, and one planned in 1987 could not be carried out due to unavailability of reliable data (conversation with David Dowall who proposed the study, April 1987). No further assessment can be provided by this author on the actual division between units constructed and fees paid.

might be preferred is that the San Francisco program failed to adequately distinguish between rehabilitated and new units.¹¹²

The preliminary evidence from Boston and San Francisco thus supports the assumption that unless the construction option contains significant opportunities for savings, developers will choose the payment option. This tendency is probably stronger in linkage than in inclusionary zoning because linkage usually applies to commercial developers unaccustomed to constructing housing. When linkage requirements are met through construction, the net number of units actually added to the housing stock will probably be smaller than reported.

Another concern about the effectiveness of linkage is its capacity to ensure a steady source of income to sustain the program. Downtown-type markets are sensitive to economic vicissitudes. The program can weather short term slumps if the earmarked funds are used judiciously.

Many commentators have noted that the funds collected are small compared with the amounts necessary to fulfill housing needs. Yet, when compared with the size of currently available alternative sources of public support for housing, the sums are impressive. The number of units which will actually be constructed by linkage revenues depends on the city's methods and the degree of leverage attained.

E. *Targeting*

Despite the declared purpose of most linkage programs to ameliorate the housing needs of low and moderate income persons, the programs usually lack a mechanism to ensure that low income households receive the intended benefit. Most linkage programs leave the problem of allocation to the trust funds. Under the construction option, in the absence of a mechanism that grants higher credit points to the developer for producing low income units or that requires the construction of a percentage share of such units, it is unlikely that developers would construct such units of their own free will.

It is difficult to explain the gap between the declared intentions and the actual policy. It could be that those who designed the programs felt that the problem of supplying low income housing through linkage is intractable, whether for economic or political reasons. Yet as long as a stated legislative goal is to produce housing for low income groups, a bona fide attempt should be made to design the appropriate mechanism

112. Conversation with David Dowall, February 1987.

for meeting that goal. Finding ways to target low income households should not pose greater difficulty than establishing the linkage program in the first place.

F. *Trust Fund Allocations: Social and Political Implications*

The record so far indicates that linkage programs will likely operate largely through the option of the payment of fees deposited in an earmarked fund. Despite the existence of several programs for the past few years, officials have been slow to establish the trust funds. For example, in Boston the legislation for setting up a trust fund was approved only in 1986. Criteria for allocation and decision had yet to be formulated at that time.¹¹³

As long as the funds in a housing trust fund can meet only a very small part of the need for affordable housing, one does not have to be an expert in *Realpolitik* to anticipate the dynamics that are likely to surround the allocation process. Some of the dynamics may be visible already in Chicago, where a trust fund was considered. There, linkage was proposed as part of the late Mayor Washington's election platform. At that time, an interesting coalition of neighborhood housing activists supported linkage. This "unholy alliance" consisted of two groups which had long shown mutual acrimony—an ethnic white working-class neighborhood that did not support Mayor Washington, and a black neighborhood that did.¹¹⁴ One cannot avoid wondering how long this alliance would hold when the time comes for criteria to be set up for apportioning the funds. Chester Hartman has noted that the linkage issue sustains the neighborhood groups so long as it is an agenda item for rallying public support, but may later weaken these groups by making them adversaries when funds are allocated.¹¹⁵

Who is likely to benefit most from trust fund allocations? This is the element of the targeting question that was elegantly avoided when the linkage program was established. It is unclear whether the political arena will be attuned to the needs of low income families in addressing this question. In addition, the objectives of the trust fund are likely to stress the possibilities of increasing the leverage of its funds in order to produce the maximal number of units. Financing lower income units

113. Conversation with E. Netter, Special Counsel to the BRA, January 1987.

114. Interview with Mr. Charles Thurow, Deputy Commissioner of Planning, Chicago, October 1986, and update conversation February 1987.

115. Informal interview with Mr. Chester Hartman of the Institute for Policy Studies, Washington, D.C., October 1986.

that require deeper subsidies may thus be viewed as a burden. Therefore, linkage funds will probably be targeted more to middle and moderate income households than to lower ones. The political leverage of the eligible groups, especially the lower income ones, will be important in the allocation process.

G. *Social Implications of Housing Location*

Unlike inclusionary zoning, which was based on a social conception of the desirable mixture of social and income groups within a community, linkage is usually devoid of any sociogeographic goal. What are likely to be the social implications of linkage-produced housing? Under the construction option, it is unlikely that developers would include linked housing on the same site as market rate housing. The units built to fulfill linkage requirements would usually be located on less desirable sites, and little integration would ensue, especially where units for low income families are concerned. Under the fee option, locational decisions will depend on the criteria adopted by the trust fund. A special effort is necessary to overcome segregationist tendencies. One does not need a crystal ball to predict that social evaluation studies in the future will criticize the social impacts of linked housing and its economic effects on the budgets of lower income families. A feeling of *deja vu*? Hopefully, scenarios from past public housing and urban renewal programs will not be repeated.

This is perhaps an overly pessimistic picture. In reality, some of the detrimental social effects of linkage can be avoided by structuring the programs so as to designate the areas where the housing should be located. This structure was employed in the Miami program. The new concept of parcel-to-parcel linkage promises further improved thinking about the social ramifications of linkage. Finally, the negative effects could be reduced by encouraging participation between neighborhood groups and developers.

H. *An Alternative Rationale: Windfall Recapture*

The legal analysis has shown that the exactions analogy for linkage is tenuous and fails to supply the public justification necessary for linkage. This does not, however, mean that linkage is an unjustifiable public policy. The very fact that linkage is increasingly being discussed and studied indicates its importance. However, it is this author's view that the appeal of linkage stems not from the officially stated justifica-

tion based on the exactions rationale, but from another rationale to be found below the surface.

Linkage is actually grounded less on harm mitigation and more on the concept of "windfall recapture." Known internationally as the recapture of betterment, the concept "windfall recapture" refers to the unearned increment that accrues to developers not through their own efforts, but through public decisions to upgrade the development value of particular plots of land. The argument is that the public has a right to share in the developer's unearned profit. Although this rationale has yet to emerge on the American political and land policy agenda, the late Donald Hagman has shown in his seminal work that various mechanisms grounded in this concept already exist in the United States.¹¹⁶

Linkage shows that when a severe public need exists and alternative financing mechanisms are no longer available, public opinion in the United States may view a modest windfall-recapture policy as acceptable. The windfall-recapture rationale is most clearly visible in incentive-based and negotiated linkage policies. These policies require payment of the fee or construction of lower income housing only if the developer has also obtained a bonus. The bonus is in effect an increment in the value of the development, created not by the developer, but by an offer made by the planning authorities. If the developer pays the fee or constructs housing, the public shares in the developer's unearned increment.

If the basic concepts underlying linkage are desirable, it may be worthwhile to recast it overtly as a windfall-recapture technique. The proper rationale could provide linkage with a more solid legal basis than the current attempts to base linkage on the exactions analogy. The difficult questions of equity and justice that linkage-as-exactions raises would be resolved by the substitution of the windfall-recapture rationale. This rationale will avoid the proportionality question of whether developers alone should pay for a general community interest. It becomes apparent that linkage programs select commercial developments as donors, not because they cause the need for housing, but because they are a high windfall land use. The rational nexus test is therefore unnecessary. The benefit test becomes reframed because the problem is no longer to ensure that the developer benefits, but to enable

116. D. HAGMAN, *WINDFALLS FOR WIPEOUTS: LAND VALUE CAPTURE AND COMPENSATION* (1978). See also D. HAGMAN AND J.C. JUERGENSMAYER, *supra* note 72, at Ch. 11.

the public to benefit from the unearned increment and to direct that benefit to priority needs. Thus, the exactions tests of rational nexus, proportionality, and benefit are recast in a manner suited to the de facto character of linkage.

Additional advantages of a policy based on windfall recapture are its sensitivity to changes in the real estate market, greater flexibility for changing the target of the funds as circumstances change, and enhanced equity. A developer would not be required to pay a windfall-recapture fee unless there has in fact been a significant increment in land values due to public actions. Therefore, the danger of tapping a shrinking market is much less acute with value capture. A windfall-tapping program is potentially more flexible than linkage because the funds are not designated only for rational nexus use: the designation can be altered as needs change.

Finally, equity is increased because the tax base can be expanded to include all developers who have gained a windfall of some predefined level. It is unnecessary to single out a particular class of developers on the basis of an assumed windfall. Only geese with real golden eggs will be expected to share their profits with the public—and the emergence of linkage shows that many are ready to do so today.

IV. CONCLUSION: EVALUATING LINKAGE, AND BEYOND

American cities are faced with undisputed evidence that the housing market can no longer meet the expanding needs of low and moderate income families. Washington has been unresponsive to these needs. As a solution to this growing problem, linkage was first modestly proposed in a few areas but is now generating interest across the country.

The evaluation of linkage presents a mixed picture. The major strength of linkage is its capacity to deliver funds in significant amounts at a time when few other resources are available. On the other hand, linkage is far from the ideal policy for meeting housing production needs, even at a time of difficult constraints. Linkage is inherently temporary. By targeting a relatively narrow range of potential donors who are currently in a high profit category, linkage is vulnerable to market effects, especially through regional competition. As presently structured, linkage is insufficiently tailored to meet the needs of low income groups, as contrasted with moderate income ones. In addition, linkage is often devoid of any social policy about the desirable location and mix of housing. Finally, linkage usually lacks a sound legal basis and convincing public policy rationale.

Despite these shortcomings, linkage is increasingly popular with local governments. In seeking local control and independence, local governments characterize linkage as a type of exaction analogous to the requirements imposed on developers to finance the public services needed by new development. This analogy, however, is inaccurate. As a result of this somewhat artificial justification, linkage becomes a policy of expediency, tapping a convenient part of the population in a time of emergency without an adequate public policy rationale.

The reasonable approach is to recognize the inherent appeal of linkage in the short term, but to look for more sound alternatives in the long run. These alternatives should seek to tap some of the underlying assumptions and potential public support of linkage. The forces that have propelled linkage so far indicate a new direction in American public policy: a willingness to consider recapturing some of the windfall in land values and real estate development. Perhaps this is a good time to allow the windfall-recapture genie out of the exactions bottle, and to encourage overt public discussion on this issue. The reframed policy could take many alternative shapes, and could draw on the experiences of other countries.¹¹⁷ But in whatever form it takes, future policy should be more comprehensive than linkage, and should have a stronger foundation.

117. See R. Alterman, *Land Value Recapture: Design and Evaluation of Alternative Policies*, Occasional Paper No. 25, Center for Human Settlement (1982).

APPENDIX A

Mandatory and Quasi-Mandatory Programs—Proposed or Enacted:
(including combined mandatory and bonus-based programs)

San Francisco—see Text.

Boston—see Text.

Chicago: Chicago has had a mandatory linkage policy on its public and political agenda. The late Mayor Washington had a linkage program on his election platform, and it was included in the city's 1984 development plan. The issue has been hotly debated.¹¹⁸ In September 1985, the Advisory Committee on Linked Development submitted a report recommending that a Linked Development Program, conceived in broad terms, should be instituted. It would tap downtown real estate in several ways to benefit housing and economic development in the neighborhoods.

One method proposed for financing such a program is an exaction fee on new office space. The mandatory fee would be charged on office space of more than 50,000 square feet at \$10 per square foot, with \$2 charged when a building permit is issued, and the balance spread over 4 years. The money collected would be used for low and moderate income housing. The report does not discuss a construction option.

Another suggestion was to overhaul the city's zoning bonus system of additional densities to allow for contributions to the Linked Development Program. It is unclear from the report whether the intention was that the contributions would be for purposes other than housing (economic development) or for housing as well, paralleling the suggested mandatory program. In the interim, the committee recommended that developers be encouraged to provide technical assistance, develop joint ventures with neighborhood organizations, or donate fees in exchange for bonuses.¹¹⁹

Princeton, N.J.: In response to the requirements under the *Mount Laurel II* decision of the New Jersey Supreme Court, the municipality adopted an ordinance in 1984 requiring all developers of nonresidential projects of any size to make cash contributions of \$3.39 per square foot of space, from the first square foot. No indication was included on how

118. Interview with Mr. Charles Thurow, Deputy Commission of Planning, Chicago City Hall, October, 1986. Subsequent telephone conversation, February, 1987.

119. Draft Majority Report of the Advisory Committee on Linked Development, presented by the Mayor of Chicago (Mayor Washington), September, 1985; provided by Mr. Thurow.

the funds should be used.¹²⁰

Palo Alto, Cal.: In 1984, an ordinance was adopted requiring new commercial and industrial developments either to contribute \$2.43 per square foot to a city housing fund, or to sponsor direct construction of low or moderate income units. Like San Francisco, prior to the ordinance, the city relied on the environmental impact review process to require developers to mitigate impacts on housing availability.¹²¹

Stamford, Conn.: A proposed amendment to the zoning regulations was denied in August 1986. It called for a "housing impact payment" of \$6 per square foot above 30,000 square feet of office space, or one dwelling unit for each 1,000 square feet above the threshold. The rejected proposal required a certain percentage of set-aside funds or units specifically for low rather than moderate income housing (30% in the fee option and 10% in the construction option).¹²²

Bonus-Based Programs:

Seattle: In 1984, the city adopted a program that allows downtown office developers an increase in floor/area ratios specifically for housing. A cash option is available, of \$10 or \$15.30 per square foot of bonus space, depending on downtown zone. Bonus levels are higher for lower income housing than for moderate income. The program also provides incentives for maintaining existing low and moderate income downtown housing through transfers of development rights and requirements for replacement of demolished houses. The funds may go into a housing trust fund, a mortgage assistance program, or to housing projects initiated by nonprofit groups.¹²³

New York City—see Text.

Miami: In 1983 and 1985, Miami adopted two special zoning districts where an increase in FAR is allowed to a nonresidential building if it provides affordable housing. One zone calls for off-site housing, the other for on-site. The formula is 0.15 gross square feet of affordable off-site housing per square foot of bonus space, and 1 square

120. Porter, Report and Update Sheets, *supra* note 10; see also Susskind and McMahon, *supra* note 17, at 204.

121. See Porter, Report and Update Sheets, *supra* note 10.

122. Legal Notice, City of Stamford, Connecticut. The Zoning Board, in its meeting of July 28, 1986, denied the proposed amendments to the Zoning Regulation made by the Housing-Linkage Task Force of Stamford. A copy of the notice was provided by Ms. Carol Davis.

123. See Porter, 1985 Report and 1987 Update Sheets, *supra* note 10. Pickman and Roberts, *Tapping Real Estate Markets to Address Housing Needs*, 9 N.Y. AFF. 3 (1985).

foot of concurrently constructed on-site housing (of any price range) for 1 square foot of bonus space. Affordable housing is defined as 90% or the median price of new housing in Dade County or rental level of 30% of the gross median Dade County monthly income. An alternative cash option is allowed, at \$4 or \$6.67 per square foot of bonus space, for each of the zones respectively, to be deposited in a city fund for affordable housing. In the off-site provision zone, housing must be located within one mile of the district or within an adjacent community redevelopment area. In the on-site-provision zone, all funds are to be expended within that zone.¹²⁴

Hartford—see Text.

Negotiated Programs: see Text for *Jersey City*, *Cambridge, Mass.*,¹²⁵ and a combined mandatory-negotiated program in *Santa Monica*.

124. Porter, *supra* note 10. Legislation was supplied courtesy of Ms. Brenda Valla, Assistant Director of Growth Management Studies, University of Florida, Gainesville.

125. In July 1988, Cambridge approved a bonus-based program. Details were as yet unavailable as this article was going to press.

