IMPACT FEES: COMMON PROBLEMS, COMMON SOLUTIONS

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In Canada, as well as the United Kingdom, both monetary and amenity/public work exactions are accepted elements of planning and land use regulation schemes at the local government level. In both cases, the authority to levy impact fees (in Canada, development cost charges or levies) and to exact amenity and works are always statutorily based. In the United States, similar fees and exactions, while most often statutorily authorized, are not uncommonly ultra-statutory, and founded on the police power generally. The constitutional legitimacy of both statutory and ultra-statutory fees and exactions in the United States must be measured against the Fifth Amendment's protection of owners from taking of property for public purposes without compensation. In Canada in recent years, the nature of, "*informal contributions*" of money and/or works and amenities in excess of what may be statutorily required, has become much more common. Given explicit judicial disapproval[1], the practice of demanding ultra-statutory contributions ("USC's") is often hidden from view, but nonetheless thrives in great part because of the increasing devolution of service delivery functions on local governments unaccompanied by any expansion of the traditional revenue raising mechanisms available to off-set demands for expenditure.

Recently in *PNI* v. *City of Victoria* [2004], S.C.C. 75, the Supreme Court of Canada allowed a claim in restitution arising from a mutual mistake shared by both a municipality and a developer. The mistake was that both believed that the City was competent to contract away its zoning authority where the developer had agreed to provide extra-statutory public works services and amenities to the City as part of a development agreement. The contract asserted by the developer (that Council could not subsequently downzone before full build-out) failed as a fetter on legislative discretion. While obiter to the issue of unjust enrichment, the Court first referred to the extra works and services provided as, "*the fruit of ultra-vires demands*", and later as, "*demands that are not strictly authorized*". While the nature of the, "*demands*" was indirectly relevant to the unjust enrichment cause of action, their characterization as "*ultra-vires*", even in that context, has significant public law implications.

"*Community amenity contributions*", "*development approval contributions*" and "*gifting*" are three terms used in Canada to describe the common practice whereby owners/developers provide USC's of work, land or money to local governments. The term ultra-statutory need not necessarily imply absolute illegality; merely that USC's are not mandated by local government legislation. As such contributions are ostensibly "*voluntary*", they are usually the subject of various coy forms of negotiation, that take place when the owner/developer is most likely to be in a giving mood. The latter state, while susceptible to swings in the market and interest rates, is always some time prior to the enactment of "*legislative*" amendments necessary for the proposed development to

[1] *First National Properties Ltd. v. Highlands (District)* (1996) 32 M.P.L.R. (2d) 26. Also see *PNI v. City of Victoria* [2000] SCC 64, where at paragraph 49 the Court affirmed the view that: "*The basic position in Canadian law is that municipalities cannot zone in exchange for amenities without some specific statutory authority for such arrangements*."

proceed. The emphasis in the last sentence is for good reason on the word "*legislative*". In the local government context, amendments to an official community plan bylaw and a zoning bylaw are most often viewed by Court as legislative in nature. Such legislative change is most often driven by broad policy and political considerations. Almost any consideration is relevant[2], a factor which sets the stage for bargaining. In contrast, discretionary permitting is not legislative in nature, but rather is quasi-judicial, and, as such is much more tightly circumscribed by the doctrine of relevant considerations.[3]

The classic circumstances in which USC's arise, are those where land is neither designated in an official community plan, nor zoned for the proposed development, or alternatively, if designated in the official community plan as "future urban" or "urban", is not yet zoned for the particular use proposed. These circumstances often arise from the absence of urban infrastructure to deliver services, such as water, sewer, parks, and schools, and other community essentials and amenities necessary to serve new development. In addition, it may also arise from the lack of capacity of centralized community services like sewage treatment plants, and reservoirs to cope with additional demand arising from the immediate augmenting of the urban area. These inadequacies in service infrastructure or of capacity in existing facilities are usually a temporal impediment described in planning language as a lack of "concurrency". The developer has the land, the market is right and the lenders are comfortable, but there is no concurrent capacity in the public infrastructure to support the development. In such a situation, a council will be very unwilling to pass the legislation necessary to re-designate a developer's land to "urban" in the OCP, or to re-zone it for immediate development. The developer's usual suggestion in such cases is to offer to make things concurrent. If the facts are that one or two million dollar's worth of various public services stand between development now, or ten years from now, a developer may write a cheque and donate that amount to the municipality on the condition that it is used for the necessary public infrastructure, or alternatively, contract to undertake and complete the works and services, or both. If there are no other compelling planning or political reasons why the land ought not to be developed, a council with the comfort of knowing that public funds or private resources are available for the necessary works and services, may seriously consider the sought after legislative changes to the official plan and the zoning regulations.

The concept of USC's as voluntary donations antecedent to, or as part of the legislative process surrounding land use decisions, raises significant legal issues – issues that are currently being addressed in many common law jurisdictions around the world. At the root of these legal concerns are problems of arbitrariness, predictability, relevance and proportionality going to the questions of should and to what extent ought such ad-hoc negotiated contributions be rationally related to public burdens caused by the proposed development, and how and on whom should such public infrastructure burdens be

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[2] To take just one example of a relevant consideration, it is an indelible stamp of a legislative act that a majority of Council may vote affirmatively or negatively on a planning matter taking into account only their assessment of public support for or against the matter, and consequently their re-election chances.

[3] There is still a strong line of authority in Canadian planning and zoning law that site specific exercise of the zoning power ("spot zoning") is not really legislative in anything but form and is in substance quasi-judicial. This is certainly also the case in many American jurisdictions.

imposed and distributed. Often the integrity of planning decisions and public confidence in the administration of the planning system are at issue.

In a recent newspaper article, the following report of a Vancouver Council meeting appears in relation to two USC requirements (referred to in Vancouver as Community Amenity Contributions):

> "*Its obviously cash in exchange for law, said David Garner a lawyer and downtown resident opposed to the construction of one of the buildings …*
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> *Council unanimously approved the development. The 3.36 Million CAC will go to the City's affordable housing fund said Director of Current Planning Larry Beasley. Do we have a right to just make up a number and levy a fee on any developer who comes to town? asked Coun. Ladner.*
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> *There is no upper limit on the amount a city can request from a developer for a CAC contribution. The value of a requested CAC is based on the increase in land value resulting from the proposed rezoning. During debate on another project involving a CAC donation, Coun. Tim Louis tried to extract a larger contribution from the developer of a hotel and condo project …. Louis suggested increasing the CAC to 2.4 Million after grilling [the Developer] about the amount of profit the developers were expecting."*[4]

This paper explores issues raised by USC's and examines the judicial reaction to developers' contributions in the United Kingdom, the United States, and in Canada.

British Columbia Statutory Exactions

In British Columbia, impact fees (also known as development cost charges and development cost levies) are invariably statutorily authorized fixed formal fees.[5] They are designed to provide for off-site services to mitigate the public burden of servicing growth in the community generally. The subject matter of such fees is circumscribed by statute in most jurisdictions and is perceived by many local governments to be excessively narrow in comparison to need. This view has led to statutory fees being supplemented by USC's.

The British Columbia model of statutory development charge reflects many key values identified by courts in the U.S., and required by executive directives in the UK, relating to USC-like contributions. They are general and uniform in their application over broad areas of territory. They must be similar for development that imposes similar cost burdens. They are enacted in advance, and are thus predictable allowing the development

[4] Vancouver Courier January 27, 2005 "*Council Okays Monstrous Condos*" by Mathew Claton

[5] See British Columbia's S. 933, *Local Government Act*

industry to allocate their costs to either or both of land acquisition (i.e., reducing purchase prices) or by passing on to consumers. They avoid *ad-hoc* leveraged negotiations, which are highly prone to political and bureaucratic arbitrariness, and which very often lack sustained and coherent policy underpinnings. In addition, such charges are not susceptible to unequal and disproportionate allocation of burdens, but are required by statute to reflect burdens on the public purse, supported by the official plan and financial plan of the local government.

In contrast, USC's display a potential for all of the faults just listed, in that they are "negotiated" on an *ad-hoc*, case-by-case basis, as the "price" of particular legislative change. In many cases, the amounts and value of the exactions are determined by the value of the developments, the perceived profit, urgency on the part of the developer to proceed, the imminence of local elections or other factors that do not at all remotely reflect the actual impact of the development on physical public infrastructure services, the community or the environment. In Canada, if USC's are valid at all[6], they present a face of governmental power that, if not amenable to judicial review on some principled basis, will ultimately become entirely unpredictable, arbitrary, and discriminatory.

U.K. Statutory Development Contributions

In the United Kingdom, USC's have not surfaced as a legal problem, but rather as a political one. This is so because the relevant planning and land use control legislation provides very broad authority for, "voluntary contributions" to be made by developers to entice approvals out of planning authorities. The very breadth of the legislative authority in the U.K. to accept, "voluntary contributions" has itself led to deep political and legislative concern about the effect of *ad-hoc* and unrestricted exactions of cash and works.

The *Town and Country Planning Act* requires that development approvals be subject of "material considerations" and that:

> "Any person interested in land … may by agreement or otherwise, enter into … a planning obligation…
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> a) restricting the development or use of land in any specialized way;
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> b) requiring specified operations or activities to be carried out in, or, under or over the land;
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> c) requiring the land to be used in any specific way; and
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> d) *requiring a sum or sums to be paid to the authority.*"

[6] USC's in British Columbia have no express statutory foundation tied to planning and development regulatory powers. The Ministry of Municipal Affairs has published a paper approving of USC's and suggesting that the statutory authority arises under the general authority of the local government to contract.

In a series of appellate decisions, involving developers offering huge sums of cash[7] and extravagantly expensive amenities[8], the English Courts expressed some discomfort that planning decisions were being, "sold in exchange for benefits which were not material planning considerations or did not relate to the proposed development[9]. The Courts also observed that, "once costs go beyond that which is necessary to meet the external costs, the arrangements turn into a system of land taxation of development profits[10].

UK – Executive Response to the Judicial Deference

In *Tesco Stores*, Lord Hoffman concurring in the majority added some cogent observations, given as he put it, "the unusual public importance of the questions involved in this appeal". He went on to observe that it was the "policy" of the Minister in his directions to local governments that:

> "… an obligation to provide such a benefit may be imposed if it is needed to enable the development to go ahead, or designed to serve an acceptable balance of uses or 'so directly related to the proposed development that [it] ought not to be allowed to go ahead] without it."[11]

According to the Ministry policy, benefits from a developer should not be taken, "unless without them the development would be unacceptable in the sense that it would have to be refused as likely to cause demonstratable harm to [public interest]". The Minster's view of "necessity" as being an element of *materiality* referred to in the statute was just that Minster's view, not the law. The Court ignored the policy structures set out in the Ministerial directive. Despite ignoring the Minister's policy, Lord Hoffman did comment that the Minister's policy was akin to the position taken by the Courts in the United States:

> "*The [U.S.] courts, following the decision of the Supreme Court in Nollan v. California Coastal Commission (1987) 483 U.S. 835 apply what has been called the "rational nexus" test. This requires the planning authority, which exacts a contribution to infrastructure as a condition of this consent to demonstrate that, 'the development will cause a need for new public facilities and that the contribution required is proportionate to that need and will actually be used to provide those facilities. This … is very*

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[7] In *R. v. Plymouth City Council and others exparte Plymouth and South Devon Co-operative Society Ltd.* [1993] 2 PLR 75 (C.A.) the amount of £1,800,000.

[8] In *Tesco Stores Ltd. v. Secretary of State for the Environment* (1995) 1 W.L.R. 759, the building of a £7,000,000 bridge.

[9] *R. v. Plymouth City Council and others, supra*

[10] ibid

[11] *Tesco,* supra at p. 775

> *similar to the test of necessity and proportionality in [the Minister's] circular 16/91'"*[12].

Having realized that the Court, by treating the statutory concept of "materiality" broadly, had opened the door for local governments to ignore the Minister's policy directives, a special governmental committee report, a year after *Tesco*, considered and addressed the issue of "voluntary contributions"[13]. The Nolan Committee noted that current conduct of both local governments and developers had had a tremendous detrimental impact on public confidence in planning. In particular, it identified three major public concerns:

- planning was being bought and sold;
- developers were being held to ransom; and
- negotiations and the public interest trade offs were not visible or transparent.

Following the Committee Report, the Deputy Prime Minister's office announced in January 2004 pending legislative change in relation to planning exactions:

> *"The government proposes to put in place safeguards to ensure that the [new] charge is not used as an exercise to extract more benefits from applicants necessary to serve the good planning of its area and mitigate the impacts of development. Though it may be easier to levy a charge than to negotiate; the government believes that a planning contribution by whichever route should be related to the impact of development and be relevant, proportionate and reasonable."*[14]

Subsequently, in November 2004 the British government published a draft of the new legislative policy directives, expressly noting that in great part the need for them arose from the court's refusal to read into the materiality test in the statute both a proportionality and a necessary nexus test. The government eventually legislated:

> *"…that planning obligations are only sought where they meet all of the following tasks. A planning obligation must be:*
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> *i. necessary to make the proposed development acceptable in planning terms;*
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> *ii. relevant to planning;*
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> *iii. directly related to the proposed development;*

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[12] *Tesco (supra)*, where Lord Hoffman questioned and paraphrased an article written by David Callies and Malcolm Grant: Paying for Growth and Planning Gain; An Anglo-American Comparison of Development Conditions, Impact Fees and Development Agreements. 23 Urban Lawyer, Spring 1991 pp. 221-248.

[13] Nolan Committee 1997: "Third Report of the Committee on Standards in Public Life; Standards of Conduct in Local Government;", July 1997

[14] Office of the Deputy Prime Minister, January 30, 2004 www.odpm.gov.uk/stellent/groups/odpm_planning/documents/page/odpm_plan_032594.pdf 027110.hcsp

iv. fairly and reasonably related in scale and kind to the proposed development;

v. reasonable in all other respects.

The use of planning obligations must be governed by the fundamental principle that planning permission may not be bought or sold. It is therefore not legitimate for unacceptable development to be permitted because of benefits or inducements offered by a developer which are not necessary to make the development acceptable in planning terms."[15]

U.S. Position

As far as it is relevant to the issue of USC's (that is, *ad-hoc* negotiated exactions as opposed to legislated uniform and fixed formula impact fees), the position in the United States is as Lord Hoffman observed in *Tesco*, very much like the Ministry's position in the UK.

American courts[16] have applied a heightened scrutiny to USC's, (referring to them as "adjudicative exactions"). Heightened scrutiny of such *ad-hoc* exactions requires an onus shift[17] compelling the government to provide sufficient evidence of both nexus and proportionality. The basics of the tests are:

- There must be an essential nexus between the community growth that the new development generates, and the need for the exaction or fee to serve that growth. The development must create or contribute to the need for the public service or work mitigated by the exaction or fee. In this sense, the exaction must be one the absence of which would lawfully allow development approval to be denied.

- The value, size or quantity of the exaction or fee imposed on a particular development must bear a rough relationship in proportion to the specific demand that the proposed development will make to the overall cost of the public objective. The onus is on the government to show this by proper evidence.

- The fees must be earmarked for, and used for, the public purpose for which they were collected.

The proportionality aspect of this test is clearly driven not only by concerns of fairness and of maintaining public confidence in the administration of land use regulation, but also by a legal imperative to ensure that fees are really fees adhesive to the police power and are not taxes (as noted above by the English Court of Appeal in *R. v. Plymouth*), or a taking, contrary to the Fifth Amendment's protection against taking of property without

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[15] IBID, November 2004

[16] *Nollan v. California Coastal Commission* 483 U.S. 825 (1987) and *Dolan v. City of Tigard* 114 S. Ct. 2309 (1994).

[17] Essentially removing the presumption of validity.

compensation. It is noteworthy that the heightened scrutiny in respect of legislative fixed formula impact fees (like Canadian DCC's), are treated differently from ad-hoc negotiated impact fees by many state jurisdictions in the U.S. The presumption of validity applies to such statutorily enabled fix formula fees and provided they are not taxes (that is rising above their source)[18], and provided there is a reasonable relationship between the fee and the burden imposed by development and growth, curial deference applies. The person challenging the exaction or fee bears the onus of showing that either there is no burden, or that the fees are unreasonably disproportionate to burden.[19]

Conclusion

At present in British Columbia, there is no regulation of, and very little (if any) statutory acknowledgment of USC's. In both the U.K. and the U.S., similar *ad-hoc* negotiated exactions and fees are recognized, obvious problems associated with them have been identified, and limits (either imposed judicially or by legislation), have been placed on their use to ensure that the land use regulatory system maintains its public integrity. In the end, both the U.K. and American systems have managed to apply a very similar set of principles.

In British Columbia, the driving force behind negotiated USC's is lack of public revenue necessary to finance public infrastructure, and to mitigate consequential externalities of growth. The DCC system itself has all the virtues identified in the UK and the USA as being necessarily attendant on an impact or development fee system. DCC's are transparent, calculated from already legislated official plan and financial plan infrastructure projections, are uniform, are required to be proportional to impact, and are statutorily reserved only for the use intended. What is needed to bring USC's into the fold is a broadening of the subject matter for which DCC's can be imposed, and to the extent that some of the new subject matter is not as conducive to ascertainable hard cost projections as are sewers, parks or water, the need nevertheless to be surrounded by both nexus (evidence of burden) and proportionality (fair allocation of burden) restrictions. The latter also serve as restrictions to ensure that such charges do not rise above their source and remain fees, rather than becoming indirect taxes giving rise to constitutional challenge.

The U.S., Canada and England are common-law jurisdictions. Despite evolutionary variation, the deep structure of the common law is not comfortable with discretion that is ad-hoc, leveraged and prone to arbitrariness and to discrimination, unwarranted by material and relevant considerations. Instead, a rational relationship between fees (not taxes) and public burdens, proportionality and dedication of fees to purpose, arise from longstanding common-law values. While there is no doubt that cross-fertilization is still a major factor throughout common-law jurisdictions, shared principles common to impact fees clearly reflect very basic and long-held preferences of common law judges.

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[18] *Eurig, Estate (Re)* (1999) 165 DLR (4th) 1 (S.C.C). A similar concern is of importance in Canada given the distinction between regulatory fees and taxes constitutionally recognized in *Eurig*.

[19] See *Ehrlich v. City of Culver City* 12 Cal 4th 854 (1996). Also see *Krupp v. City of Breckenridge* 19 P 3d 687 (2001).