

## Frequently Asked Questions: Negotiated Exactions

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### GENERAL INFORMATION

#### What is a negotiated exaction?

Every new development project places added demands for public facilities such as roads, water and sewer systems, schools, and parks. To help accommodate these additional demands, municipalities sometimes negotiate with developers to persuade them to donate land or right-of-way, make capital improvements, or contribute cash toward needed infrastructure improvements in lieu of donating land, materials, or services. These voluntary contributions to municipalities are known as negotiated exactions.

In some cases, the exaction may be required for the developer to gain planning approvals. In other cases, the exaction may be voluntary or may hinge on the public sector agreeing to modify a public project in ways that would benefit the complementary private development. In cases when a planned development is large and will be constructed over many years, the developer and local jurisdiction may enter into a development agreement that includes negotiated exactions.

#### How do negotiated exactions differ from impact fees and proffers?

Negotiated exactions are similar to impact fees in that they are both charges to developers for the public infrastructure required to accommodate new development. However, with negotiated exactions, the contribution is determined through *ad hoc* negotiations between a developer and the local jurisdiction. In contrast, the amount of impact fee to be paid by a developer is determined by a formula established under State or local law for calculating the costs of the needed infrastructure improvements. For more information on impact fees, refer to FHWA's [Frequently Asked Questions on impact fees](#).

**Disclaimer:** *The contents of these Frequently Asked Questions (FAQs) do not have the force and effect of law and are not meant to bind the public in any way. These FAQs are intended only to provide information and clarity to the public regarding existing requirements under the law or agency policies. Value capture techniques and policies are often implemented outside of Federal funding or regulatory requirements.*

The proffer system is a conditional zoning system particular to Virginia that was first established in 1973.<sup>1</sup> Proffers are voluntary conditions to which the landowner agrees in exchange for approval of a rezoning application. The voluntary conditions might include height restrictions, setback increases, or roadway improvements. Landowners sometimes proffer cash in lieu of constructing improvements.<sup>2</sup> Once proffers are accepted, they become part of the property's zoning regulation, so they are the functional equivalent of an amendment to the zoning ordinance.<sup>3</sup> Proffers are different from negotiated exactions in that they relate to rezoning rather than to approval of a specific new development project.

#### How long have exactions been used in the United States?

As far back as the 1920s, States began enacting laws requiring exactions from developers as part of the development approval process. These exactions were typically land dedications internal to the development project, such as new roads and sidewalks within a subdivision. Beginning in the 1950s, local governments started passing laws requiring exactions external to the development, such as new roads or intersections to connect a subdivision to an existing network.<sup>4</sup> The use of exactions has grown over the intervening decades as other sources of infrastructure funding have become harder to obtain.<sup>5</sup>

## What types of infrastructure have been funded with negotiated exactions?

Exactions are often used to fund local roads, but they have also been used to help fund transit stations, sidewalks, streetlights, and water and sewer lines. An exaction can take many forms, including:

- A conveyance or dedication of property for a public purpose,
- A requirement to construct public improvements such as a new traffic signal, or
- A requirement to pay money to finance acquisition or construction of public facilities.

## In what situations are negotiated exactions common?

Exactions are considered an attractive strategy in high-growth areas and in jurisdictions with limited fiscal capacity.<sup>6</sup> In these areas, there may be public resistance to financing growth-related costs through general revenue sources.<sup>7</sup> Negotiated exactions may also work in situations where private development and public transportation improvements are mutually beneficial. A typical example might involve a private developer agreeing to contribute to a new transit station. In this case, the transit station would provide improved access to the development, and the development would generate additional transit trips.

## What are the opportunities associated with negotiated exactions?

Compared to traditional revenue sources and other value capture techniques, negotiated exactions may offer the following opportunities for localities:

- Administratively, negotiated exactions are relatively simple and can typically be managed by most planning boards and local government staff in the usual process of development permitting.<sup>8</sup>
- Some municipal officials and developers prefer to negotiate development fees rather than use a formula to determine the amount that the developer will pay.
- Negotiated exactions typically face limited resistance from the public, because they offer to

shift some of the cost of infrastructure improvements from existing taxpayers to developers (and ultimately to the future occupants of a proposed development).<sup>9</sup>

- By shifting the cost of infrastructure improvements to developers, negotiated exactions increase the cost of new development in “greenfield” areas. Doing so could encourage developers to move development projects to areas where the necessary infrastructure capacity already exists.
- Because negotiated exactions are usually collected up front, public agencies can access the funds as soon as they are paid rather than waiting for the new development to generate tax revenues.<sup>10</sup>
- When they are paid up-front, negotiated exactions generally tend to transfer risk to developers, who must then rely on sufficient demand for new development to recover the associated costs.<sup>11</sup>

## What are some of the challenges with using negotiated exactions?

Localities may encounter the following challenges when negotiating exactions:

- The amount of funding that can be raised via negotiated exactions is dependent on the demand for new development in a given jurisdiction, which in turn will depend on local economic conditions as well as broader economic trends.<sup>12</sup>
- Exactions often face opposition from developers, their associations, and interests who believe that constraints on development will negatively affect them. However, negotiated exactions may face less resistance than impact fees, as the ability to negotiate the amount of exactions to be paid may allow more flexibility to meet the needs of both developers and local jurisdictions.<sup>13</sup>
- Exactions have frequently been litigated. Agencies that decide to pursue negotiated exactions are encouraged to refer to legal precedents established nationally and within particular jurisdictions.<sup>14</sup> More information on legal considerations is provided below.
- Negotiating favorable terms with developers requires experience and resources.<sup>15</sup>

- Depending on the negotiated terms, exactions may not cover the entire cost of infrastructure or services.<sup>16</sup>
- Because negotiated exactions are not standardized and are imposed on a case-by-case basis, they could be subject to accusations of unreasonableness, favoritism, or corruption.<sup>17</sup>
- Because exactions are outside of the typical budget approval process, the funds could be subject to misuse if they are not subject to a transparent and accountable process for deposit and disbursement.
- Exactions could discourage new development by raising costs for developers. This could result in developers moving their projects—and the accompanying job growth and economic activity—to jurisdictions where exactions or fees are lower or do not exist.<sup>18</sup>

## STRUCTURE AND APPLICATION OF NEGOTIATED EXACTIONS

### What are the legal requirements for negotiated exactions?

Local governments must have the authority to impose exactions under State law. This authority may be granted by specific enabling legislation or through general grants of authority, such as home rule statutes.<sup>19</sup> Some courts have upheld the concept of implied authority where enabling legislation for exactions did not exist.<sup>20</sup> If enabling legislation is in place, the local government must follow the substantive and procedural standards set forth in that legislation.

A listing of State laws pertaining to negotiated exactions is located on the FHWA website at: [https://www.fhwa.dot.gov/ipd/value\\_capture/legislation/negotiated\\_exactions.aspx](https://www.fhwa.dot.gov/ipd/value_capture/legislation/negotiated_exactions.aspx).

Additional legal requirements for negotiated exactions are very similar to those for development impact fees. Negotiated exactions need to meet two legal prerequisites:

- 1) There must be a reasonable relationship ("rational nexus") between the exaction and the development project; and

- 2) There must be "rough proportionality" between the cost of the exaction and the extent of infrastructure expansion required by the proposed development project.

These requirements are a consequence of the following Supreme Court rulings, as well as other rulings at both the State and Federal levels: *Nollan v. California Coastal Commission*,<sup>21</sup> *Dolan v. City of Tigard*,<sup>22</sup> and *Koontz v. St. Johns River Water Management District*.<sup>23</sup> As with all value capture techniques, practitioners are advised to consult with legal counsel familiar with the case law in their respective States.

### Are negotiated exactions easy to implement?

Negotiated exactions may be more challenging to implement than impact fees, because the implementing agency needs to have the requisite skills (both technical and political) to negotiate favorable terms with developers. Implementation of negotiated exactions is typically more successful when an implementing agency possesses a robust framework for estimating the cost implications of the proposed development on infrastructure and services. This may be easier for greenfield projects than for changes to existing developments.

### How are negotiated exactions paid?

Negotiated exactions can be structured as upfront cash payments or as in-kind contributions of land or infrastructure. If the implementing agency receives exactions as up-front payments, it can typically use the funds immediately to create or improve infrastructure required by the proposed development.

### How are funds resulting from negotiated exactions managed?

Funds received as negotiated exactions are typically deposited in accounts dedicated to the creation or expansion of infrastructure necessitated by each development.

## OTHER

### **Is public involvement required during negotiation of an exaction?**

The public will typically be able to weigh in on the terms of a negotiated exaction during the approval process for a new development. For example, the public may have an opportunity to attend public meetings or provide written comments on a proposed new development.

### **Do exactions address equity concerns?**

Not necessarily, but they could. Implementing agencies could address potential equity issues as part of the project development process by examining the impacts of new development on different populations, including minorities and lower-income households. Inclusionary zoning is a type of exaction that addresses equity concerns.<sup>24</sup>

## RESOURCES

### **FHWA EDC-5 Value Capture: Capitalizing on the Value Created by Transportation**

[https://www.fhwa.dot.gov/innovation/everydaycounts/edc\\_5/value\\_capture.cfm](https://www.fhwa.dot.gov/innovation/everydaycounts/edc_5/value_capture.cfm)

### **FHWA Center for Innovative Finance Support – Value Capture**

[https://www.fhwa.dot.gov/ipd/value\\_capture](https://www.fhwa.dot.gov/ipd/value_capture)

### **FHWA Center for Innovative Finance Support – Negotiated Exactions**

[https://www.fhwa.dot.gov/ipd/value\\_capture/defined/negotiated\\_exactions.aspx](https://www.fhwa.dot.gov/ipd/value_capture/defined/negotiated_exactions.aspx)

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<sup>1</sup> Edward Mullen and Michael Banzhaf, Virginia's Proffer System and the Proffer Reform Act of 2016, *Richmond Public Interest Law Review*, 2017, <https://scholarship.richmond.edu/cgi/viewcontent.cgi?article=1402&context=piir>.

<sup>2</sup> *Ibid.*

<sup>3</sup> *Rowland v. Town Council of Warrenton*, Virginia Supreme Court, Record No. 190580 (Koontz). May 28, 2020, <http://www.courts.state.va.us/opinions/opnscvwp/1190580.pdf>.

<sup>4</sup> FHWA, "Negotiated Exactions,"

[https://www.fhwa.dot.gov/ipd/value\\_capture/legislation/negotiated\\_exactions.aspx](https://www.fhwa.dot.gov/ipd/value_capture/legislation/negotiated_exactions.aspx).

<sup>5</sup> Jennifer Evans-Cowley, *Development Exactions: Process and Planning Issues*, Lincoln Institute of Land Policy, working paper, 2006, <http://www.impactfees.com/publications%20pdf/evans-cowley-planning.pdf>.

<sup>6</sup> Sharada Vadali, *Using the Economic Value Created by Transportation to Fund Transportation*, Transportation Research Board, National Cooperative Highway Research Program Synthesis 459, 2014, p. 23,

<http://www.trb.org/Economics/Blurbs/170750.aspx>.

<sup>7</sup> Michael Iacono, David Levinson, Zhirong Zhao, and Adeel Lari, *Value Capture for Transportation Finance: Report to the Minnesota Legislature, 09-18S*, University of Minnesota Center for Transportation Studies, Minneapolis, 2009, <https://www.leg.mn.gov/docs/2009/mandated/090911.pdf>, p. 23.

<sup>8</sup> Iacono, et al., 2009.

<sup>9</sup> Iacono, et al., 2009.

<sup>10</sup> FHWA, *Value Capture Implementation Manual*, section 4.2.3.

<sup>11</sup> *Ibid.*

<sup>12</sup> *Ibid.*

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*

<sup>15</sup> World Bank, "Developer Exactions and Impact Fees," <https://urban-regeneration.worldbank.org/node/14>.

<sup>16</sup> *Ibid.*

<sup>17</sup> *Ibid.*

<sup>18</sup> Evans-Cowley, 2006.

<sup>19</sup> *Ibid.*

<sup>20</sup> Jerry Kolo and Todd Dicker, *Practical Issues in Adopting Local Impact Fees*, *State and Local Government Review*, vol. 25, no. 3, 1993, pp. 197-206.

<sup>21</sup> 483 U.S. 825, 107 S. Ct. 3141 (1987).

<sup>22</sup> 114 512 U.S. Ct. 2309, 129 L.Ed.2d 304374 (1994).

<sup>23</sup> 570 U.S. 133 (2013).

<sup>24</sup> Municipal Research and Services Center (Washington State), *Inclusionary Zoning: One Approach to Create Affordable Housing*, <http://mrsc.org/Home/Stay-Informed/MRSC-Insight/November-2016/Inclusionary-Zoning-for-Affordable-Housing.aspx>.



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