

Susman, Catherine – Written Assignment 4

According to Marlowe, Riverbark, & Vogt (2009), there are six standard components that may be included in a capital financing plan for public entities: debt financing; public-private partnerships; pay-as-you-go; governmental grants; interlocal arrangements; and economic development (p. 129). Economic development includes certain types of charges on property such as the imposition of special assessments, impact fees, and exactions (Marlowe, Rivenbark, & Vogt, 2009, p. 139). All three of these types of charges are, in essence, a type of private financing of public capital facilities and infrastructure (p. 139). This type of private financing is a staple of small and municipal governments and is especially important for local governments facing growing community infrastructure needs (pp. 142-148).

While special assessments and impact fees are a type of monetary assessment levied against a specific piece of property subject to development, an exaction is not necessarily a monetary charge (Marlowe, Rivenbark, & Vogt, 2009, pp. 139-148). Exactions may take the form of a cash payment such as requiring the developer to “buy into” the existing public infrastructure (p. 148). More commonly, however, exactions require the developer to build public infrastructure facilities such as streets and utility connections, and then dedicate (i.e., give) the newly built infrastructure to the public entity (p. 147).

This type of financing may be seen as controversial. Even the name given the financing “exaction” may reflect this view. According to Black’s Law Dictionary, an exaction is “[t]he wrongful act of an officer . . . in compelling payment . . . for his services, under color of his official authority, where no payment is due . . .” and is cross-referenced with extortion (Nolan, Nolan-Haley, Connolly, Hicks, & Alibrandi, 1990, p. 557). Viewing this type of financing as inherently inappropriate, however, is too simplified a view. There is a necessity for the use of

this type of financing that is supported both by inherent fairness as well as legal authority (Marlowe, Rivenbark, & Vogt, 2009, pp. 141-144).

The inherent fairness of this type of financing may be seen as supported by both the “benefit principle” and the “ability-to-pay principle” of public finance (Marlowe, Rivenbark, & Vogt, 2009, p. 141). Under the benefit principle, rather than externalizing all costs for the needed infrastructure to the general taxpayers, the developer, and owners of the new development as the users (i.e., beneficiaries) of the newly built and publically-dedicated infrastructure pay for such infrastructure (p.141). Similarly, albeit more indirect, under the ability-to-pay principle, rather than allowing all costs for needed infrastructure to be externalized, the costs of the needed infrastructure is distributed based on the ability to pay in that the developer and the owners of the development who have the capacity to pay, are required to pay for the infrastructure.

The concern of a public entity inappropriately exploiting the use of exactions as part of public financing for capital infrastructure is assuaged by the same legal framework that allows for the use of this type of financing (Marlowe, Rivenbark, & Vogt, 2009, pp. 143-144). Specifically, the United States (U.S.) Supreme Court in *Nollan vs. California Coastal Commission* 483 U.S. 825 (1987), held that substantive due process under the U.S. Constitution requires both a legitimate public purpose for the proposed exaction and a nexus (means/end) between the proposed exaction and the proposed new use, otherwise the public entity would be held to have committed a taking (pp. 838-842). Justice Scalia in that case commented that these types of exaction are subject to heightened scrutiny (p. 843). The U.S. Supreme Court further elaborated on the limitations imposed on these types of exactions in the U.S. Supreme Court Case *Dolan v. City of Tigard*, 512 U.S. 374 (1994). In the *Dolan* case, the Supreme Court held not only must there be a nexus between the proposed exaction and the proposed new use, but that nexus must

be roughly proportional (*Florence Dolan v. City of Tigard*, 1994, p. 391). Justice Rehnquist, in the Dolan case, stated that there is no presumption of legislative validity; rather the public entity must have specific facts showing the proportionality of the nexus between the exaction and the new use (p. 391).

References

- Florence Dolan v. City of Tigard*, 512 U.S. 374 (United States Supreme Court June 24, 1994).
- Marlowe, J., Rivenbark, W. C., & Vogt, A. J. (2009). *Capital Budgeting and Finance - A Guide for Local Governments*. Washington, D.C.: International City/County Management Association.
- Nolan, J. R., Nolan-Haley, J. M., Connolly, M. J., Hicks, S. C., & Alibrandi, M. N. (1990). *Black's Law Dictionary* (Sixth Edition ed.). (T. P. Staff, Ed.) St. Paul, Minn: West Publishing Co.
- Nollan v. California Coastal Commission*, 483 U.S. 825 (United States Supreme Court June 26, 1987).