Stetson University

From the Selected Works of Paul Boudreaux

March 6, 2012

The Impact Xat

Paul Boudreaux, Stetson University

Available at: https://works.bepress.com/paul_boudreaux/5/
THE IMPACT XAT

Paul Boudreaux*

ABSTRACT

At a time when the economy and the housing market rise and fall together, the phenomenon of impact fees complicates the construction of new housing across the nation. Although justified as a means of forcing new development to “pay its way” for the costs of government infrastructure necessitated by the new housing, impact fees typically are imposed in a way that makes them, in effect, a dubious population tax. Indeed, the typical fee does little to discourage costly suburban sprawl. This essay – using economic lessons from policies that discourage usage of scarce resources with light bulbs, bathrooms, and buildings – suggests a new policy course. The essay proposes an “impact xat” (a hybrid of a tax and fee) based on a combination of location and size of the housing, along with a conservation baseline to encourage close-in, affordable housing. If it were to replace the current system of property taxes, the impact xat could offer a simpler, fairer, and wiser path for the regulation of housing development in the twenty-first century.

TABLE OF CONTENTS

I. INTRODUCTION 2
II. BULBS, BATHROOMS, AND BUILDINGS 3
III. THE LURE OF IMPACT FEES 21
   A. A Short History of Impact Fees 23
   B. Today’s Laws Governing Impact Fees 29
   C. Impact Fees (a/k/a the Population Tax) at Work Today 42
   D. Impact Fees and Suburban Sprawl 51
IV. CREATING THE IMPACT XAT 56
   A. Distance-Based Fees 57
   B. Size-Based Fees 62
   C. Terminology 68
   D. The Impact Xat at Work 70
V. EXPLORING THE REACH OF IMPACT XATS 75
VI. CONCLUDING THOUGHTS 77

* Professor of Law, Stetson University College of Law, Gulfport and Tampa, Florida. This essay was supported through a Stetson Law scholarship grant. It was shaped and improved after comments from many scholars, including those at workshops at Stetson, the University of Maryland School of Law, and Wake Forest University School of Law.
I. INTRODUCTION

At a time when our nation’s economic prosperity is tied closely to the health of the housing market,¹ the construction of new housing has become complicated by the phenomenon of government-imposed impact fees. Almost unknown a few decades ago, these fees have revolutionized the practice of community development in the United States. Advocates point to the money collected by needy local governments from profit-making developers and justify the fees through an argument that the funds reimburse governments for new services – schools, police, roads, and so on – necessitated by the new development. After years of indecision, courts for the most part have given their blessing to impact fees, which of course are passed on by

¹ The economic health of the United States in the new millennium has been defined largely by a boom and subsequent bust of the housing market. Under the commonly related narrative, the first seven years of the new millennium witnessed relative prosperity, fueled in large part by rapidly rising housing prices. This boom was in turn caused largely by easy credit, including the phenomenon of the seemingly high-yield but ultimately risky subprime mortgage loan. Wealth accumulated from rising home prices fueled consumer spending, which pushed overall economic growth. But when mortgage loan defaults began to mushroom in number and creditors began to foreclose on houses, the boom quickly burst in 2007 and 2008, spending prices downward and reversing the overall economic cycle. For a discussion of the economic crisis generally, see, e.g., John V. Duca, John Muellbauer, & Anthony Murphy, Housing markets and the financial crisis of 2007-2009: Lessons for the Future, 6 J. of Fin. Stability 4 (2010); Times Topics: Housing, N.Y. Times, http://topics.nytimes.com/top/reference/timestopics/subjects/h/housing/index.html (accessed Feb. 24, 2012). Many economists assert that the persistent slump in housing starts is a significant factor in the failure of the economy to rebound. See Joshua Zumbrun, Housing Weakness Impedes Monetary Policy, Feroli, Harris Say, BLOOMBERG BUSINESSWEEK, Feb. 24, 2012 (noting that weakness in the housing market stifles the economy), http://www.businessweek.com/news/2012-02-24/housing-weakness-impedes-monetary-policy-feroli-harris-say.html; Lucia Mutikani, Manufacturing, housing data flag underlying strength, REUTERS, Feb. 15, 2012 (linking housing market to future growth).
developers in large part to new residents. Meanwhile, environmentalists cite the fees as a means of combating suburban sprawl.

But the typical impact fee system fails to meet its touted potential. As this essay explains, governments typically impose fees in a rigid and simplistic manner that makes the fees little more than a tax on new population, which holds corrosive and socially exclusionary effects. While they do generate money for local governments that otherwise are loathe to raise taxes directly, the fees typically do little steer new construction away from suburban sprawl or to encourage environmentally smart forms of development.

By contrast, a more nuanced and sophisticated fee type of fee, which this essay jocularly calls a xat (“tax” backwards, to indicate its hybrid status between fee and tax), would create a market incentive for developers to meet the demand for housing in a growing nation in economically and environmentally responsible ways. Such a xat would be calculated through a formula that takes into account both location and the size of the land proposed for new housing. The argument is bolstered by lessons of consumer choice in smaller markets of domestic life, such as light bulbs, bathroom toilets, and green buildings – three introductory topics to which the essay now turns.

II. BULBS, BATHROOMS, AND BUILDINGS

Scenario #1: Light Bulbs. It has become an article of faith among environmentalists that fluorescent lamps should replace incandescent bulbs as the dominant source of light in American households. The incandescent bulb – not invented but improved by Thomas Edison in the 1870s – is a simple but inefficient way of creating light, because the bulb uses its electric current to
create more heat than light. By contrast, fluorescent bulbs (or “lamps” as they are called by engineers) are more complicated but more efficient at converting electricity to light. Accordingly, a household that switches to fluorescent bulbs saves energy; moreover, although the fluorescent bulbs cost more initially, they last much longer, making them cost-efficient in the long run. 

---

2 An incandescent bulb works by sending an electric current through a thin metal filament; this current energizes electrons in the filament (usually made of tungsten, largely because it does not melt when heated to a high temperature), which in turn, while cooling down, releases some of the energy as photons, creating visible light. Edison figured out a way to place inside the bulb an inert gas and a strong filament, so that the filament would glow for many hours. Because the process works in effect by slowly burning the filament, however, it expends a sizeable fraction of the energy as heat and not light. See Louis A. Bloomfield, *Incandescent Light Bulbs*, http://rabi.phys.virginia.edu/HTW/incandescent_light_bulbs.html. Thus the famous child’s Easy-Bake Oven has for years been able to cook brownies successfully simply through the heat of a 100-watt incandescent bulb – or so my wife tells me. For a story about the future of the Easy-Bake Oven in a post-incandescent world, see Gregory Karp, *Light bulb goes off for Easy-Bake Oven’s new idea*, CHI TRIB., Feb. 24, 2011, http://articles.chicagotribune.com/2011-02-24/news/ct-talk-0224-easy-bake-oven-20110224_1_bulb-100-watt-incandescent-light-easy-bake-ovens.

3 A typical fluorescent lamp uses electricity to heat up mercury inside a tube of inert gas. Invisible ultraviolet photons emitted from the mercury in turn excite the phosphors in the tube, which in turn emit visible light. This process creates a much greater amount of light for energy used than do incandescents. Fluorescents also last far longer than incandescent bulbs. See Encyclopedia of Laser Physics and Technology, *Fluorescent Lamps*, http://www.rp-photonics.com/fluorescent_lamps.html. Some experts expect that future of domestic lighting lies with the solid-state light-emitting diode (“LED”), which creates the light inside televisions and cell phone screens, but which has yet proven impractical for general lighting of large spaces. See Richard Stevenson, *The LED’s Dark Secret: Solid-state lighting won’t supplant the light bulb until it can overcome the mysterious malady known as ‘droop,*’ IEEE SPECTRUM (August 2009), http://spectrum.ieee.org/semiconductors/optoelectronics/the-leds-dark-secret.
Adhering to the environmentalist policy of requiring “best technology” for the pursuit of harmful activities – a concept at the heart of the U.S. Clean Water Act\(^4\) and pollution rules for automobiles,\(^5\) for example – mainstream environmentalists have long advocated for laws to ban new incandescent bulbs for household use.\(^6\) In the environmentally conscious European Union, sale of all new incandescent bulbs will be barred by late 2012.\(^7\) The saving of energy – which means burning less of climate-warming fossil fuels for electricity – is at heart of the rule. “By switching to compact fluorescent bulbs,” the EU’s energy commissioner has asserted, “families and companies can reduce their negative contribution to climate change and save money at the same time.”\(^8\)

In the United States, President George W. Bush in 2007 reluctantly signed legislation adopted by a Democratic-controlled Congress that, among other steps, would begin a phase-out of incandescent bulbs, starting in 2012. To be accurate, the law does not prohibit such bulbs *per se*,

---


THE IMPACT XAT

se – rather, it sets forth energy usage standards that incandescents cannot meet.9 This fits with the nature of the so-called “best technology” approach of environmental law: the statutes typically only require outcomes that in effect require the use of equivalently good technology.10

More recently, however, “tea party” conservatives in the United States have called for a reprieve of incandescent bulbs. Notably, Rep. Michelle Bachmann (R-Minn.) introduced in 2011 a Light Bulb Freedom of Choice Act.11 Characterizing the issue as one of liberty against big government, the erstwhile presidential candidate proclaimed that “President Bachmann will allow you to buy any light bulb you want.”12 Mainstream environmentalists, of course, shook their heads in disapproval. It is normatively unassailable, they argued, to save energy, reduce

---


10 U.S. Environmental Protection Agency, What Are Effluent Guidelines? (explaining that “best technology” typically is not a design requirement but a performance requirement), http://water.epa.gov/scitech/wastetech-guide/questions_index.cfm.


carbon emissions, and help long-term consumer finances by requiring fluorescent lamps.\textsuperscript{13}

But the issue is not so clear-cut. A few years ago, I ran across an article that astounded the card-carrying environmentalist in me. A story in the \textit{Washington Post} asserted that one group of Americans was resisting mightily the switch to fluorescents.\textsuperscript{14} This group was not climate-change-denying conservatives. It was women. After checking to make sure that the famously left-leaning \textit{Post} was not playing a trick on its readers, I read on. The story explained that, as its subhead read, “Energy-Savers a Turnoff for Wives.” The assertion was that many women so greatly prefer the supposedly “warm” light given off by incandescents that they reject the energy and money savings of “cold”-looking fluorescents. The head of the federal government’s Energy Star Program, Wendy Reed, was quoted as saying: “I have heard time and again that a husband goes out and puts the bulb into the house, thinking he is doing a good thing. Then, the [fluorescent] bulb is changed back out by the women. It seems that women are much more concerned with how things look. We are the nesters.”\textsuperscript{15} The \textit{Post} relayed an anecdote of an Oregon couple in which a wife battled her husband over replacement of her beloved incandescents.\textsuperscript{16}

The tone of the astounding article was lightly critical, implying that even women who say they are environmentalists aren’t putting their money where their lights are. But this criticism


\textsuperscript{15} \textit{Id.}

\textsuperscript{16} \textit{Id.}
was perhaps misplaced. After all, few citizens make the environmentally beneficial decision at every point in their lives. To do so would require sending automobiles and air conditioners to scrap heaps and turning down the thermostats of tiny little solar-powered apartments to 40 degrees in the winter. Most environmentalists don’t do this because they weigh the disadvantages to be greater than the advantages, even considering the benefit to the environment as a whole. If Americans are allowed to drive cars, why not allow people to enjoy the glow of an incandescent bulb, if it truly is important to them? This point fits with a fundamental economic criticism that mandatory “command and control” environmental laws fail to account for the sometimes-large utility offered to certain persons through environmentally harmful conduct.17

17 The most famous early legal criticism of laws requiring environmentally friendly conduct was Bruce A. Ackerman & Richard B. Stewart, Reforming Environmental Law, 37 STAN. L. REV. 1333 (1985). In the economic literature, Richard N. Stavins has written that “Economists have consistently have urged the use of ‘market-based’ or ‘economic-incentive’ instruments—principally pollution taxes and systems of tradable permits—to address environmental problems, rather than so-called ‘command-and-control’ instruments, such as design standards, which require the use of particular technologies, or performance standards, which prescribe the maximum amount of pollution that individuals can emit.” Richard N. Stavins, What Can We Learn from the Grand Policy Experiment? Lessons from SO2 Allowance Trading, 12 J. OF ECON. PERSPECTIVES 69, 69 (1998). Taxes used as economic incentives are often called Pigovian taxes in honor of ARTHUR C. PIGOU, ECONOMICS OF WELFARE (1920).

More recently, commentators have stated that “It has become an article of faith among economists, legal scholars, and policy makers that economic forms of regulation such as effluent taxes and emissions trading are inevitably more efficient than traditional command-and-control regimes for environmental protection.” Daniel H. Cole & Peter Z. Grossman, When is Command-and-Control Efficient? Institutions, Technology, and the Comparative Efficiency of Alternative Regulatory Regimes for Environmental Protection, 1999 Wis. L. Rev. 887, 887. This article sought to identify certain instances in which a regulation that commands conduct can be more efficient than economic incentives. One empirical study of a variety of environmental regulatory regimes concluded that economic incentives were most often effective in improving these regimes. Winston Harrington & Richard D. Morgenstern, Economic Incentives versus Command and Control, RESOURCES, 130-17 (Fall/Winter 2004).
In 2011, the popular home furnishings store IKEA stopped carrying incandescents. At the same time, the New York Times reported that some home designers were in effect stockpiling the old bulbs in anticipation of their legally mandated disappearance. One decorator refused to accept the “sickly hue” of fluorescents, while an actor and designer in New Orleans related that he carried a package of 60-watt incandescents to hotels when the travelled: “I look better in 60 watts,” he said. Meanwhile, the owner of a new French restaurant in Washington, D.C., was quoted as saying that he planned to use an estimated total of 600 bulbs over the life of the restaurant’s current lease. “I have a light-enough carbon footprint in the other aspects of the design,” he said, “so I can allow myself a lighting splurge.”

This quote highlights a critical economic point. The goal of environmental protection is not to get Americans to use less energy through light bulbs per se. The goal is to push Americans to use less energy, period. Compared with energy-gobbling features of a typical American home such as a water heater, refrigerator, air-conditioner, and above all, a furnace, light bulbs use a relatively small amount of energy, regardless of the form of illumination. According to the U.S. Department of Energy, nearly 45 percent of household energy goes to heat

---


20 The actor was Bryan Batt, who played, among other things, Sal Romano in the acclaimed TV series *Mad Men*. *Id.*

21 *Id.*
the home (a fraction that has risen with the expansion of house size in recent decades); the water heater uses nineteen percent and the air conditioner nine percent. Household lights, by contrast, account for only six percent of household energy usage (and the number has fallen in recent years).\footnote{22 U.S. DEPARTMENT OF ENERGY, \textit{Residential Site Energy by End Use, Building Data Energy Book} (2010), http://buildingsdatabook.eren.doe.gov/ChapterIntro2.aspx.}

If it is a public policy goal to conserve energy, is there a legal mechanism under which consumers are consistently encouraged to save energy but are given the choice of how to do so? Of course, the economist says. Increase the price of electricity, through a tax, to account for the harms of energy usage, such as the global costs of fossil-fuel-induced climate change.\footnote{23 Because the harm generated by the burning of fossil fuels to create electricity is not reflected in the private transaction between the seller and buyer of a light bulb or any other electricity-using good, the use of such good is said to create an \textit{external economy} or \textit{externality}. A solution to the problem of externalities is for law to tax these goods, in order to force the buyer and seller to \textit{internalize} at least some of the costs imposed on others. \textit{See} Bryan Caplan, \textit{Externalities}, \textit{The Encyclopedia of Economics}, http://www.econlib.org/library/Enc/Externalities.html.} Although not all households would use less energy, an increased cost would nudge many households to look for a variety of ways to conserve energy and save money. One household might chose to turn down the thermostat a degree or two in winter, or to take shorter hot showers, or simply to be more diligent in turning off lights when they are not needed. Another household might replace the old bulbs with fluorescents. But the choice of chilly lights or chilly rooms (the latter would probably save far more energy) would be left to the personal preference of the individual citizen.
**Scenario #2: Low-Flow Toilets.** In a memorable episode of the acclaimed former cartoon TV show *King of the Hill*, the all-American suburban dad, Hank Hill, installed a low-flow toilet in order to save water, in compliance with local law. He soon discovered, however, that the new toilet had the perverse effect of increasing his water usage. As he explained to the county zoning board, “Unfortunately in the real world, where things don’t flush like they do in the movies, it can take three, four, or, in the case of my wife, Peggy Hill, six flushes to completely remove solid waste.”

In the real world, this kind of perverse economic effect is called the *rebound effect*, through which a legal regulation generates a series of responses that undermine the purpose of the regulation. John Tierney, the skeptical science columnist for the *New York Times*, has written about this phenomenon. He infuriates many mainstream environmentalists with his questioning of accepted truths of the environmental policy. Tierney has cited nineteenth century British economist William Stanley Jevons, who posited that technological revolutions in the efficient usage of coal would result, paradoxically, in greater usage of coal, because of the new economic activity that the efficiencies would generate. Similarly, when the relatively cheap incandescent light bulbs replaced the old costly and inefficient gas lamps, households installed so many more lights that they ended up using just as much energy. Better efficiency standards for other household items, such as air conditioning and refrigerators, have encouraged citizens to buy bigger and more of the units, cutting away at the potential overall energy savings. Some

---


Americans who trade in their gas-guzzling pickup trucks for hybrid cars might find the fuel economy so liberating that they take more and longer trips. And supposedly efficient new washing machines and toilets might require multiple operations to complete their assigned tasks.

How can policy fight against the energy rebound effect? Law can retreat from indirect efficiency standards for specific forms of resource usage (such as cars, refrigerators, and toilets) and focus directly on the ultimate goal: the conservation of resources. By charging more for gasoline, more for electricity, and more for water consumption, each and every consumer is encouraged to look for ways to conserve (and save money), be it through newer and more efficient items, lifestyle changes, or replacement of the taxed conduct with non-taxed replacements. For gasoline, a consumer could decide to bicycle for short trips instead of using taxed gasoline. For toilet usage, one could follow the maxim of “if it’s brown, flush it down; if it’s yellow, be mellow.”

Since 1980, market-oriented economists have slowly convinced finally policymakers that technology standards for specific forms of conduct (such as air pollution from furnaces that burn coal) are often unsuccessful in achieving environmental gains for low cost. Focus on the outcome, not the means, the economists have said. If we desire a specific outcome – say, a maximum amount of pollution – policy can “cap” this amount, and then allow trading among actors to create the most economically efficient outcome. Accordingly, in the 1990 Clean Air


27 See, e.g., Ackerman & Stewart, supra note 17 (criticizing the inflexibility of command-based regulation).
Act amendments, Congress diverged from its usual practice of requiring best-technology standards and imposed a cap-and-trade program for the emission of acid-rain generating sulfur dioxide from smokestacks.\(^\text{28}\) The experiment was a success, as SO2 emissions plummeted, at a relatively minor cost to the economy, as polluters were spurred to look for any number of a variety of ways to cut their emissions – even if the government hadn’t thought of them.\(^\text{29}\)

Across the globe since 1990, nearly every new idea for environmental protection has involved some form of outcome-based regulation, as opposed to specific technology standards. The free-market economists have won. This fact makes it especially ironic that conservative American politicians, opposing President Obama’s plan for attacking the global problem of greenhouse gas emissions – an emissions trading program, of course – turned the economic mantra of “cap and trade” into an epithet about wrong-headed big government, with great success among the American populace.\(^\text{30}\)

**Scenario # 3: LEED Buildings.** The opportunity for certification of a “green” building as a LEED (Leadership in Environmental and Energy Design) structure has shaken up modern construction in America, especially for public and high-cost buildings. From the futuristic glass

---


29 See, e.g., Stavins, supra note 17; Joseph Goffman, Title IV of the Clean Air Act: Lessons for Success of the Acid Rain Emissions Trading Program, 14 PENN ST. ENVT'L. L. REV. 177 (2006) (explain how the sulfur dioxide trading program has achieving environmental gains with lower than expected costs to industry).

Hearst Corporation skyscraper on West 57th Street in New York, to a sprawling 17-acre industrial distribution center developed by Stirling Capital Investments in the desert outside Victorville, California, American corporations have been tripping over themselves to attain LEED certification, which almost automatically confers upon them the status of good environmental steward. Meanwhile, governments across the nation are requiring that new public buildings be LEED certified. Most federal departments, as well as local governments from Cambridge, Massachusetts, to Indianapolis, Indiana, to Portola Valley, California, require or encourage LEED or other “green” building certification. In the mind of the environmental public, LEED certification appears to be unquestionably beneficial.

But, as with bulbs and toilets, skeptics poke holes in the world of LEED certification. Critics have followed two lines of thought. The first is a criticism of process. The standards for LEED certification have been created by the U.S. Green Building Council, a non-profit organization supported largely by member of the construction industry. Among others, Professor Sarah Schindler contends that it is inappropriate for governments to employ industry-created standards for their environmental laws. The argument is that the farmer has let the fox guard


the henhouse, or, use another analogy, that professors have let their students set the standards for what makes an “A” examination.

The second criticism is economic. A building is certified as meeting LEED standards at the design stage. The standards employ a 100-point scale; a high score triggers certification.\textsuperscript{34} The score is calculated through a complex checklist, using design efficiencies for the energy and atmosphere (the most important factor for new buildings), water efficiency, indoor environmental quality, materials and resources, and the sustainability of the site.\textsuperscript{35} In addition to certain prerequisites, the largest credit – up to 17 points – is for optimal energy design; using renewable energy sources (solar, wind, etc.) can earn another seven points.\textsuperscript{36} Six points can be credited for building with access to public transportation, such as being within a quarter mile of bus lines.\textsuperscript{37} There are a variety of single credits, for things such as having a bicycle storage area and changing rooms nearby to using regional materials in construction.\textsuperscript{38}


\textsuperscript{36} \textit{See id.} at vi, 35, 38.

\textsuperscript{37} \textit{See id.} at vi, 6.

\textsuperscript{38} \textit{See id.} at vi, 7.
The essence of the criticism is that LEED certification is a flawed method of achieving conservation because it depends on design and not on outcome.\textsuperscript{39} It encourages the use of “gizmos,” as critics state in reference to technological items that gather points, but fails to ensure that the building is actually operated in a manner that saves energy. Certification does little to ensure that the operators follow through on potential. According to one critical energy efficiency consultant, who was quoted in the \textit{New York Times} in 2009, the plaque that certified buildings proudly display “should be installed with removable screws. Once the plaque is glued on, there’s no incentive to do better.”\textsuperscript{40} This consultant has noted that some LEED certified buildings have installed their solar panels at the wrong angle or have covered up part of the panels with other equipment; as a result, LEED buildings don’t necessarily save energy.\textsuperscript{41} Architectural writer Lloyd Alter, using a variant of the portmanteau word \textit{greenwashing} to refer to unsupported environmental public relations efforts by corporations, calls the process of green


building certification as LEEDwashing. A building plan might get credit, for example, for using tinted windows that reduce the amount of sunlight during the summer, but the operational practice of keeping thermostats set to a chilly 69 in summer seven days a week – a standard practice in much of office America – gobbles up energy at such a rate that it overwhelms the savings from the tinted windows.

Another criticism is that LEED does little to discourage sprawling construction. Although the revised point system does include significant factors relating to access to public transportation and other existing services, many certified LEED buildings have been constructed on “greenfields” far from existing urban centers. For residences, certification is available even for enormous houses, fitted out with numerous environmentally oriented technologies, despite the fact that large houses by necessity almost always consume oversized amounts of electricity or oil. Indeed, there is a concern that the lure of LEED certification may cause corporations to choose new construction over adapting existing buildings, resulting in large energy expenditures in the construction process. After analyzing various data sets, physicist John Scofield asserted in 2009 that LEED certified commercial buildings, on average, “show[ed] no significant primary energy savings over comparable non-LEED buildings” and that the LEED certification “is not

---


lowering source energy consumption and, accordingly, is not delivering reduction in greenhouse gas emission associated with building operation.”

What system would cut energy usage and greenhouse gas emissions? A direct penalty on such usage, of course. A stiff tax on carbon emissions would push electrical suppliers to pass along costs to users, who in turn would be spurred to look for a myriad of ways to avoid paying for the higher costs, either through technological “gizmos” or through simpler measures, such as smaller houses, lower air-conditioning usage, smaller cars, and living closer to work. The benefit of a simple tax is that the government would not have to make any of the contentious choices of inclusion or exclusion in the LEED checklist approach; the tax would encourage any and all energy savings.

One reason that a market disincentive might not work as well as a technology command, however, is a phenomenon that might be called psychological inertia. This inertia might lead a user to act in a way that might seem irrational. If one has been using a certain technology for some time, this psychological inertia might cause one to stick with the familiar old technology, even if using the old technology necessitates paying a heavy governmental tax. When and if this psychological inertia is widespread, it might make sense for government to overcome it by forcing users to adopt a new technology.

---


45 Here’s a homespun example. For years my wife has scolded me for using an entire square sheet of paper towel for even a tiny spill; she rips off a small piece of the paper towel for such minor needs. Although I know that could save money (and trees) by more frugal usage of paper towels, and although I have no objection to ripping off a piece of the towel, a psychological inertia (for decades I’ve simply pulled off an entire sheet) keeps me forgetting to rip (note continued …)
Another reason for policymakers to be reluctant to adopt market disincentives on, for example, energy usage is that any such mechanism – be it a simple tax, a more complex cap-and-trade program, or packaging the two as an “impact fee” on energy users – would impose relatively disproportionate burdens on Americans with modest incomes. A household that earns $40,000 a year is likely to spend a far higher percentage of its income on energy – electricity, natural gas, and gasoline – than does a household that earns $500,000 annually, even if the richer household has a bigger house and bigger cars. This phenomenon makes any and all usage taxes susceptible to the label of being regressive, as opposed to the progressivity of the income tax, under which wealthier families pay higher percentages of their income.  

A potential solution to regressivity would be to grant each household what might be called a conservation baseline credit. Let’s consider how such a credit would work for household electricity. Law could allow each household to consume a certain amount of electricity free of charge; this charge-free baseline could be established at a level that is equivalent to, perhaps, the amount used by the most frugal one percent of American households (the precise calculation could be adjusted easily as desired). Such a family would likely be a household that lives in very small house or apartment, has limited use of heating or air-conditioning, and runs few appliances. Such a credit system would greatly assist low-income households – from urban families in small apartments without air-conditioning in Philadelphia to off a small piece. But a solution has been found: We now buy a brand of “green” towels in which the pre-cut sheets are less than half the size of the traditional square sheet, thus forcing me to use “less” of the towel. This “technological” fix has overcome my inertia.

American Indian households in small houses in New Mexico – from having to pay a regressively large amount through an energy tax. Households with larger electricity usages would pay the bulk of the tax. The baseline credit plan would no doubt be subject to the criticism that some households use electricity for reasons that are supposedly “out of their control” – such as the fact that the household has five children or lives in a suburb with few small houses. To be most effective, however, there should be no allowance for such factors. (The most acceptable adjustment might be for geography, in that households in cold climates tend to use more electricity than those in warmer climates.) Each household would be constantly encouraged, by the stick of the tax and the carrot of the conservation baseline credit, to consider a variety of ways to limit its energy usage.47

An even-handed tax, combined with a fairly simple conservation baseline credit, would be the most effective way of curbing energy usage while not regressively harming modest-income households. The simplicity of such a system, combined with its effect of encouraging energy savings throughout the human lifecycle, offers great lessons for understanding the 47 Likewise, a significant tax on energy usage for commercial buildings would encourage both builders and operators to look continually for ways to save energy. This incentive might result in some buildings using expensive but energy-efficient insulated multi-pane glass windows (this incentive would be especially strong in sunny climates); others might prefer to install an thick soil “green” roof (useful in cold climates); some might find that an array of energy-saving features made economic sense. Other companies might respond to employee complaints about high gas prices incurred during long commutes and decide to locate the new corporate building on public transportation routes, and not in an isolated suburban greenfield. Finally, a corporation for which the economics of green technology simply are not cost-efficient, especially if the company is teetering on the edge of bankruptcy, would not be forced to adopt any specific measures. But there is no doubt, economics tells us, that a tax – assuming it is large enough (and the number could be continually be adjusted) – would result in decreased energy usage over time. See generally CHARLES J. KIBBERT, SUSTAINABLE CONSTRUCTION: GREEN BUILDING DESIGN AND DELIVERY (2005) (discussing technical approaches to energy-efficient construction).
benefits and flaws of our land use laws and the popularity of impact fees, to which this essay now returns.

III. THE LURE OF IMPACT FEES

Impact fees have transformed the economics of housing construction in modern America. Although precise numbers are difficult to ascertain – largely because impact fees, like most land use laws, are the province of the thousands of local governments in the United States – impact fees of various types are imposed by jurisdictions across the nation. One detailed survey in 2011 collected information from hundreds of jurisdictions in 35 states.\(^{48}\) The cost of the average impact fee for a single housing unit was $11,908.\(^{49}\) From their early days in the 1970s, when governments charged for increased water and sewer infrastructure necessitated by new development, today’s “impacts” sometimes include things such as public parks, public art, and using up land that otherwise could have been used for affordable housing.\(^{50}\)


\(^{49}\) See Duncan Associates, *supra* note 48, at 4-5.

\(^{50}\) See *id.* at 3-5 (discussing the range of fees).
As explained in this part, challengers in the past sometimes successfully fought such mechanisms in court by arguing that the laws amounted to an unlawful special tax, as opposed to a permissible user fee. Today, however, most states permit localities to impose impact fees, through a test that parallels that of U.S. constitutional law for governmental exactions of land, under the famous case duo of Nollan and Dolan, discussed below.

Governments and advocates assert that impact fees serve two broad purposes. First, fees compensate governments for services that are necessitated by the new housing development. This is a simple “but for” argument: without the new development, the government would not have to provide the services; with it, the government does. Accordingly, the argument concludes, it is fair for government pass along these marginal costs to the housing developer. The most commonly uttered phrase is that “new development should pay its own way,” or some variant thereof.51

The second assertion is that impact fees help combat and curb suburban sprawl.52 Implicit in this argument in an assumption that fees would steer new development towards infill – that is, towards locations inside existing built-up area. This essay, however, asserts a criticism of how local governments institute impact fees in early 21st century America. The criticism is as follows: Impact fees tend to act as taxes on population, rather than as disincentives to suburban

51 For a longer discussion of this argument and a survey of the literature on impact fees, see Vicki Been, Impact Fees and Housing Affordability, 8 CITYSCAPE: A J. OF POL’Y DEV’T AND RESEARCH 139, 143-48 (2005), http://www.huduser.org/periodicals/cityscpe/vol8num1/ch4.pdf.

52 See, e.g., id. at 142 (discussing the promise of impact fees to restrain sprawl); DAVID L. CALLIES, ROBERT H. FREILICH, & THOMAS E. ROBERTS, LAND USE 199 (5th ed. 2008) (positing the role of impact fees in limiting sprawl).
sprawl. This observation leads to a new vision for an impact “xat” that would more directly and efficiently discourage sprawl and encourage infill housing development in a growing nation.

A. A Short History of Impact Fees

The idea of charging housing developers a fee for permission to build evolved in the years after World War II, when the United States became the first suburban nation in world history – a nation in which millions of citizens were enabled, because of the private automobile, to live far from employment, schools, and shopping. Impact fees received their first treatment in the legal literature, as well as their fundamental justification, in 1977, when Professors Fred Jacobsen and Jeff Redding published an article using the term “impact taxes;” it was subtitled “making development pay its way.” According to Jacobsen and Redding, developer reaps a “windfall” when government supplies infrastructure to support a new housing development. Because this support is a windfall, they reasoned, it was appropriate for government to charge the developer to make it “pay its way.”

Here is a somewhat stylized hypothetical of the argument, using a 21st century example. A developer named Smith concludes that market demand will respond to a new housing development in a suburban county that has recently received favorable publicity for its good school test scores and low crime rate. Smith considers a large new development, tentatively named Babbling Brooks Homes. Most previous housing subdivisions in the county have been


54 Id. at 407-09.
THE IMPACT XAT

located close to the central city. Although Smith considers a handful of available sites fairly close to the big city, Smith chooses a tract of land in the more distant part of the county, for a number of reasons: land is cheaper there; there is more room for a spacious development; and there are fewer neighbors nearby to raise complaints about things such as earthmoving trucks, increased traffic, and added congestion. As for the location’s major drawback – its distance from the big city – this causes Smith to lose little sleep. First, Smith knows that many businesses are relocating from the big city to the wealthy suburban county and that more new businesses are opening in the suburbs than in the old city – phenomena typical of most metro areas in a suburbanized nation.

As Smith’s plan for Babbling Brooks works its way through the county governmental approval process – a developer typically must seek approval to subdivide the property, among other steps – it becomes clear that the county government might need to expend money for a number of areas, in response to the new development. First, the county road that leads west to the Babbling Brooks site would be filled with far more traffic that it has before; in order to handle this traffic, the county concludes that it should add a new lane in either direction on the road. Next, state law requires that counties provide water and sewer service to all homes, except those in distant rural areas; accordingly, the county would have to install water and sewer lines for the new homes in Babbling Brooks. Third, the influx of people to the development would strain the government’s police, fire, and school systems. To be able to respond quickly to the new houses, new police and fire stations might be required. Most costly of all, it appears that the
new households that move to Babbling Brooks would necessitate the construction of at least one new public school.\textsuperscript{55}

Without a provision for shifting the costs of these services to the developer (either through a monetary charge or requiring that the developer itself to provide at least some of the services), the costs would have to be borne by the county government and thus by the county’s current citizens. Because many of the services are one-time, big-ticket “infrastructure” costs, such as a new school, the costs would be paid “up front” – that is, either before or soon after Babbling Brooks opened. In general, there are two ways for the county government to pay for these services. The first method is to pass the costs on to all citizens of the county.\textsuperscript{56} The second

\textsuperscript{55} There are many additional governmental services that might be necessitated by an influx of people, including parks, recreational facilities, water drainage and treatment, libraries, counseling centers, health clinics, and on and on. The list is limited only by the extent of government.

\textsuperscript{56} The argument goes as follows. Assume that there are two categories of residents in a community: existing residents and new residents. The existing residents have long paid for infrastructure, used by them only, through their taxes. When the influx of new residents occurs, their new homes and lives cause a marginal increase in the costs of the locality’s infrastructure. If taxes continue to pay for the all infrastructure, the existing residents will pay for a share of this marginal cost increase. Because the existing residents do not need the new infrastructure, it is perceived to be normatively unfair to have them pay for a share of it. It is asserted that it is fairer for the new residents to pay for the full amount of the marginal costs. \textit{See} Been, \textit{supra} note 51, at 143 (discussing the logic); THOMAS P. SNYDER & MICHAEL A. STEGMAN, \textsc{Paying for Growth: Using Impact Fees to Finance Infrastructure} (1986). In this way, the new development and new residents are forced to “internalize” the costs to the locality of their migration. Been, \textit{supra} note 51, at 144. In other words, they are forced to “pay their own way.”
is to charge the developer of Babbling Brooks (and thus indirectly the occupants of the new homes) for the costs, through an impact fee.\footnote{Scholars have devoted considerable attention to the issue of whether and how much impact fees drive up the cost of housing. Professor Vicki Been in 2005 published an excellent survey of the topic. Applying straightforward economics, she concluded that such fees, because they increase the cost to the developer, are likely to push developers to pass along some of the charge to affected housing units. Been, \textit{supra} note 51, at 150-53. How much of the fee will be passed on buyers depends on the elasticity of demand. If demand is elastic, the developer will not be able to pass along much of the costs; if demand is inelastic the buyers will bear most of the cost of the fee. \textit{Id.} at 152. Elasticity depends on factors such as the ready availability of alternatives for the buyer. If a development subject to fees is across the street from a similar development in another jurisdiction without fees, buyers are likely to shun any attempt to pay a large part of the fees in the affected area (indeed, the developer may find it unprofitable to build in a location with such competitors). But if consumers have no such ready alternatives, they will agree to pay some or much of the cost of the fee. \textit{Id.} at 153. Been’s survey of empirical evidence, including an early study of Dunedin, Fla., showed that, according to the empirical studies, impact fees apparently often did increase costs to consumers. \textit{Id.} at 154-61. This evidence seems to dovetail with the common assertion that the most important factor in consumer choices for real estate is “location, location, location” – an assertion that is consistent with a fairly inelastic demand. If consumers want to live in a particular community, because of its location, they will agree to pay a premium to do so.}

The first technique would not necessarily demand an immediate increase in local taxes. Governments often pay for big-ticket projects through the issuance of bonds, which are then paid off over time. But any form of paying for the infrastructure costs through general expenditures...
would result in existing citizens, as well as the residents of Babbling Brooks, paying for much of the government services necessitated by the new development. By contrast, an impact fee is imposed only on the new development and can be assessed in full before construction of the new housing begins.

Advocates of impact fees have convinced both legislatures and courts that it is more equitable to charge the developer for the costs. Professors Jacobsen and Redding asserted that it is a “windfall” to developers when they are not charged for the full amount of the costs. “It is hard to say that existing communities have an obligation to subsidize new development,” they concluded. A few years later, Professor Julian Conrad Juergensmeyer, whose writings helped spread the popularity of impact fees, declared, with co-author Robert Mason Blake, that “[t]he proposition that new residents should bear the capital expense they create should not seem

---

58 One might not see this as normatively “unfair” to existing residents on the county. After all, when these existing residents moved in (or were born), other people, including the then-existing residents, helped pay for services provided to them, such as schools, sewer, and fire protection. If new migrants to Babbling Brooks did not have to pay for the full share of the infrastructure costs, because existing residents helped pay, they would nonetheless receive similar beneficial treatment in the future, when yet another new housing development is built in the county.

59 Professor Been has noted that the imposition of impact fees can help prospective homebuyers, in that the fees provide a source of revenue that enables the construction of necessary infrastructure, which will then increase the value of the home, as well as relieving pressure on property taxes to pay for infrastructure. Been, supra note 51, at 148-49. The increased value of the home, however, will result in a rise in the homeowner’s property tax. Id. at 149.

60 Jacobsen & Redding, supra note 53, at 408.

61 Id. at 419. The term “subsidize” is, of course, perhaps the most tendentious term in domestic policy debate, with the connotation that one is receiving monetary support from the government that may not be deserved.
unfair.”62 Professor Franklin James wrote in 1990 that “impact fees have normative merits as sources of local government revenue, because they allocate the costs of new infrastructure on the beneficiaries of the infrastructure: landowners, developers, and consumers of the new development.”63

More recently, Professors David Callies, Robert Freilich, and Thomas Roberts have reiterated the “subsidy” argument, adding the characterization that having all current residents of a jurisdiction pay for the new services constitutes “exporting” money to the new development.64 They also noted that with some services, such as the provision of water, it might be logistically difficult, if not impossible, for the government to keep up with the demands of new housing developments; imagine the complications of large new subdivisions in a desert area of Arizona, for example, where there is no more water available for public use.65

In sum, the policy argument for imposing impact fees on new housing is a fairly simple form of “but for” reasoning:

1. New housing creates a need for new governmental expenditures, for things such as new schools, roads, sewers, parks, etc.


63 Franklin James, Evaluation of Local Impact Fees as a Source of Infrastructure Finance, 11 MUNICIPAL FIN. 407, 413 (1990).

64 DAVID L. CALLIES, ROBERT H. FREILICH, & THOMAS E. ROBERTS, LAND USE 199 (5th ed. 2008).

65 See id. at 199-200, 261 (discussing the “drain” on local government from new development).
2. But for the new housing, these expenditures would not have to be made.

3. Therefore, it is normatively fair to pass on the costs of these expenditures to the party making the new housing: the developer seeking permission to build.

B. Today’s Laws Governing Impact Fees

Advocates also make clear another reason for the popularity of paying for infrastructure costs through impact fees instead of through general revenues. To take the latter course might necessitate raising local taxes – a governmental action that lawmakers are loathe to do except under the direst circumstances. Politically, it is far more palatable to impose the monetary charge on a small group – the new residents of the development – that presumably includes many people that are not yet voting residents of the jurisdiction and thus do not yet have political clout. Indeed, advocates of charging developers have avoided the word “tax.” While Redding’s and Jacobsen’s 1977 article referred to the charge as an “impact tax,” by 1981 Juergensmeyer and Blake uniformly called the charge a “fee.” One reason for the change is that many state courts held that monetary charges would be impermissible if they were considered a tax – because of either state laws limiting local governments’ authority to impose taxes or requirements that

---

66 See, e.g., City of Montgomery v. Crossroads Land Co., 355 So. 2d 363 (Ala. 1978) (purported “fee” was considered a “tax” and thus was beyond jurisdiction’s authority); Contractors & Builders Ass’n v. City of Dunedin, 329 So. 2d 314, 317-20 (Fla. 1976) (local government held no statutory authority to impose a “tax” but did have authority to impose “fee”), cert. denied, 444 U.S. 867 (1979).
certain taxes be imposed broadly across the populace.\textsuperscript{67} By contrast, a fee is a charge that is imposed only a certain category of people because they receive a privilege in return, such as an entrance “fee.”\textsuperscript{68} With housing developments, the argument goes, it is justifiable to impose a fee only on those parties – developers and residents of the development – who benefit directly from the government expenditures.\textsuperscript{69}

This is not to say that an impact fee on new housing faces no legal obstacles. Indeed, both federal and state courts have developed often-complex sets of rules for the permissible application of impact fees and their closely related variant, the land \textit{exaction}. A brief examination of this law helps illuminate the usage and limitations of the current practice of impact fees. With the development of the modern suburban housing subdivision in the early twentieth century, some local governments began to require that the developer “dedicate” a portion of the property to the government – that is, that the developer transfer title to part of the land – in return for receiving the government’s approval to subdivide the land into housing plots and build on them. This transferred land typically was used by government for roads, drainage channels, and other public areas of the development.\textsuperscript{70} Under the old model of urban or rural

\textsuperscript{67} See, \textit{e.g.}, FLA. CONST. art. VII, § 2 (ad valorem taxes such as property taxes, “shall be at a uniform rate within each taxing unit,” with limited exceptions); Venditti-Siravo, Inc. v., City of Hollywood, 39 Fla. Supp. 121, 122-23 (Fla. Cir. Ct. 1973) (purported “fee” was considered a property “tax” and thus invalid because it was imposed only on new development).

\textsuperscript{68} See, \textit{e.g.}, Merriam-Webster Dictionary Online, \textit{Fee}, http://www.merriam-webster.com/dictionary/fee (“sum paid or charged for a service”).

\textsuperscript{69} Professors Jacobsen & Redding argued that profits from a development are a “windfall” because the developer receives from government a valuable right – the right to build. Jacobsen & Redding, \textit{supra} note 53, at 407-08.

\textsuperscript{70} See Juergensmeyer & Blake, \textit{supra} note 62, at 418.
development, the government typically would first build a street or road, and private parties would then build structures adjacent to this existing infrastructure. Under the new suburban model, however, the developer often created an entire community, sometimes from scratch, and itself designed the public ways, which were then transferred to the government.

From this precedent of trading the right to build in return for the dedication of land, governments were emboldened during the twentieth century to be more creative in their use of the practice. Instead of the word dedication, with its connotations of a happy volunteering of property by the developer, critics of government popularized a new word. The word exaction, which means the demand of a payment, is probably most familiar to educated persons through William Shakespeare’s The Merchant of Venice, in which the moneylender Shylock cruelly chooses as security from the borrower Antonio to “exact” a pound of flesh from Antonio if he fails to repay the loan on time.71

The constitutional limits of exactions were clarified in a case from coastal California. Beaches typically are property controlled by governments under a “public trust,” which sometimes overlaps with private property rights on beachfront property.72 Because governments often want to facilitate the citizenry’s access to the public trust beaches, construction on private beachfront property often engenders tough regulation.73 Indeed, governments sometime demand

71 William Shakespeare, The Merchant of Venice, act IV, scene I (Duke’s speech).


73 One of the most notable statements of private property rights in recent history was made by the U.S. Supreme Court in Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992). There, a state coastal commission applied a rule that prevented any new construction within a certain distance of the ocean. The regulation prevented the
exactions of easements of land, running to and from the beach, through the property of landowners who seek permits to build. The government may assert that the exaction is justified by the burden to the public created by the new construction. In 1982, the Nollans of Ventura County, like many affluent oceanfront homeowners in California, wanted to tear down an old small house and replace it with a bigger one. The state agency charged with regulating beachfront construction conditioned the permission to rebuild on the exaction of an easement from the public street to be beach across the Nollans’ land. Because the homeowners’ plan was simply to replace one house with another, the government could not assert that the rebuilding would have any adverse effect on public finances; nor did the agency assert that it risked any environmental harm. Rather, the government justified its demand for an exaction largely on a contention that a larger house (the Nollans’ was one of many houses along the local oceanfront) would block somewhat the view of the ocean from the public street, thus preventing the public “psychologically … from realizing a stretch of coastline exists nearby that they have every right to visit.”

plaintiff from completing his plans to build a splashy beachfront house or, indeed, any construction. The Court, through Justice Antonin Scalia, clarified that a regulation of land is “taking” if it eliminates “all economically beneficial use” of the land, with certain limited exceptions, even if the government had a good reason for the regulation. The effect of the Lucas doctrine has been limited, however, in large part because few cases match Lucas’s facts in the extent of the total deprivation of economic value of the property.

74 Nollan v. California Coastal Commission, 483 U.S. 825, 827-28 (1987). The Nollans had previously rented out the small bungalow on the property; their plan was to build a three-bedroom house that, the court characterized, would have been “in keeping with the rest of the neighborhood.” Id.

75 Id. at 828.

76 Id. at 828-29.
The U.S. Supreme Court in *Nollan v. California Coastal Commission* held that the government’s exaction was an “taking” of property without compensation, in violation of the Fifth Amendment.\(^{77}\) Writing for a five-justice majority, Justice Antonin Scalia, then fairly new high court appointee of President Ronald Reagan, took the opportunity to express a deep skepticism of government’s motivations in dealing with private property, asserting that the agency’s conduct amounted to “extortion.”\(^{78}\) After concluding that the “psychological barrier” argument was factually illogical, the court held that when there is no “essential nexus” between, on one hand, the burden supposedly imposed on the public by new construction and, on the other hand, the government’s demand for land, the exaction is unjustified. In such a situation, the government is simply “taking” land from the landowner; under the U.S. Constitution’s Fifth Amendment, “private property shall not be taken for public use without just compensation.”\(^{79}\) The majority opinion concluded by declaring that “it [the government] wants an easement across the Nollans’ property, it must pay for it.”\(^{80}\)

---

\(^{77}\) *Id.* at 831-32 (asserting that “the right to exclude [others is] ‘one of the most essential sticks in the bundle of rights that are commonly characterized as property.’ *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 433, (1982), quoting *Kaiser Aetna v. United States*, 444 U.S. 164, 176, (1979).”).

\(^{78}\) 483 U.S. at 837 (“In short, unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but ‘an out-and-out plan of extortion,’” *quoting J.E.D. Associates, Inc. v. Atkinson*, 121 N.H. 581, 584, 432 A.2d 12, 14-15 (1981)).

\(^{79}\) U.S. CONST. amend. V.

\(^{80}\) 483 U.S. at 841-42. The Court implied that although the policy of increasing public access to the beach was a worthy goal, “that does not establish that the Nollans (and other coastal residents) alone can be compelled to contribute to its realization.” *Id.* at 841-42.
Nollan struck a blow for the nascent property rights movement of the Reagan era, in that courts were required to scrutinize, at least in theory, governments’ demands for exactions. But Nollan did nothing to prevent governments, when faced with a potential minor harm to the public by virtue of a construction plan, from demanding a large exaction, as long as that exaction had a “nexus” to the harm. The court held unconstitutional the exacting of a mountain to make up for a molehill of harm in 1994, in Dolan v. City of Tigard.81 There, the environmentally conscious city of Tigard, Oregon, a suburb of Portland, instituted a complicated land use program to create more “open space” and discourage automobile use. Among other things, each business in the downtown had to provide 15 percent of its land as non-built-upon open space. Meanwhile, the city also sought to improve the drainage system along a creek, which runs through downtown, and to create a pedestrian and bicycle path alongside the creek route.82 When Florence Dolan sought permission to build on the site of her plumbing and electrical business downtown – among other things, she wanted to double the size of the store and replace a gravel parking lot with a larger asphalt one – the city conditioned the permit on her dedicating a portion of her land along the creek and granting the city an easement for the public path. The city justified its exactions through the reasoning that improvements in the parking lot would send more water into the creek (thus justifying the storm drainage improvements) and that the bigger store would attract more traffic to downtown Tigard (thus justifying the easement for the bicycle path).83 Perhaps eager to develop new law, the Court’s majority, writing though then-Justice William H.


82 Id. at 376-78.

83 Id. at 379-80.
Rehnquist, conceded that this rationale fulfilled Nollan’s “nexus” test. However, the Court held, an exaction also must be “roughly proportional” in scope to the harm purportedly created by the landowner’s development. A government that seeks an exaction must make an “individualized determination” to ensure that the exaction is not too large for the purported harm of the new construction.

The Nollan/Dolan doctrine is a mainstay of both land use treatises and legal education. It sets forth a distinct doctrine, employs new terminology ("essential nexus" and "roughly proportional"), and includes two hotly contested Supreme Court cases that neatly mesh together. It is a dream for both treatise writers and educators. The problem with the Nollan/Dolan doctrine, however, is that time has largely passed it by. Although governments can and do still impose exactions for certain putative land use ills, it is more common today for governments to impose an impact fee than to exact title to land itself. Imposing a fee gives government greater flexibility. Receiving X amount of money gives one at least as much utility, if not more, than receiving a specific plot of land that it worth X amount. The money can readily be converted into a myriad of uses; a piece of land may not be so easily fungible. Moreover, a developer is likely to prefer to pay an impact fee than to submit to an exaction. A fee is predictable and can simply be added to the accountant’s ledger, whereas an unpredictable exaction of land holds the potential for mucking up a developer’s spatial plans.

Remarkably, however, the U.S. Supreme Court has never clarified whether the Nollan/Dolan doctrine applies with full force to impact fees – that is, whether an impact fee must

84 Id. at 384.

85 Id.
hold an “essential nexus” to the costs of a new development, and whether the fee must be “roughly proportional” to this cost.\textsuperscript{86} This is of little consequence, however, as nearly all states have developed constitutional or statutory law that in effect resemble the federal law, in that they attempt to ensure that the impact fee “matches” the posited costs generated by the planned development. It is instructive to examine the two states in which impact fees have been most intensely debated – California and Florida. Located at the warm southern corners of the continental United States, these two states were the two great focuses of internal migration in the second half of the twentieth century and have played oversized roles in many areas of land use law and policy.

Florida holds the richest history of state law on impact fees. In one of the earliest state high court decisions, the Florida Supreme Court upheld in 1976 an impact fee for water and sewer services imposed on new developments by the city of Dunedin.\textsuperscript{87} A coastal town on Gulf coast, Dunedin’s population nearly doubled during the 1970s (but, interestingly, has risen only slightly since then).\textsuperscript{88} The Florida court reasoned that an impact fee was a reasonable business decision:

\begin{quote}
The avowed purpose of the ordinance in the present case is to raise money in order to expand the water and sewerage systems, so as to meet the increased demand which
\end{quote}

\textsuperscript{86} See City of Monterey v. Del Monte Dunes at Monterey Ltd, 526 U.S. 687, 702-03 (1999) (noting that the Court has never extending Nollan/Dolan beyond the situation of exactions of land).

\textsuperscript{87} Contractors and Builders Ass’n of Pinellas County v. City of Dunedin, 29 So. 2d 314, 318 (Fla. 1976).

additional connections to the system create. 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 … ⁸⁹

After rejecting arguments that the fee was a disguised tax and that it impermissibly distinguished new residents from existing ones, the Court held that the only legal restriction is that the government cannot charge a particular developer more than the pro rata share of the expanded facilities necessitated by new development.⁹⁰ In making the calculation, the government not need make a “perfect” determination of the pro rata share.⁹¹

There are limits, nonetheless, to the latitude granted to Florida jurisdictions in imposing impact fees. Most notably, a developer can avoid a fee if the development at issue clearly would not generate any costs for a particular government service. In a case involving a public school fee imposed by Volusia County, on the Atlantic coast, the Florida Supreme Court held in 2000 that the fee could not be imposed on a mobile home development that was limited to persons at least 55 years old. Because the aged residents of this development would not be attending public school, it would not be fair to have the residents pay for schools. In sum, the Court set forth a “dual rational nexus test” for impact fees in Florida: “[T]he local government must demonstrate reasonable connections between (1) ‘the need for additional capital facilities and the growth in population generated by the subdivision’ and (2) ‘the expenditures of the funds collected and the

⁸⁹ 29 So. 2d at 318.

⁹⁰ Id. at 320.

⁹¹ Id. at 320 note 10.
benefits accruing to the subdivision.””92 This is roughly a reiteration of the Nollan/Dolan test: the government must show that the new development generates costs for new services and that the fee roughly matches the cost.

Most states follow a doctrine similar to Florida’s awkwardly named “dual rational nexus” test. Although California has a long history of impact fees, its law was slower to develop, perhaps because of its history of deference to government regulation in a state with so many competing demands, including environmental concerns, on a limited amount of buildable land. This changed in the 1980s, in the wake of the state’s famous anti-tax movement,93 the conservative impetus of the Ronald Reagan era, and the U.S. Supreme Court’s pronouncements in Nollan and Dolan. The most significant result in California was the enactment in 1989 of a Mitigation Fee Act, which sets forth standards for the imposition of impact fees on new construction.94 California defines a mitigation fee as money “charged by a local agency to the applicant in connection with approval of a development project for the purpose of defraying all

---

92 Volusia Cty. v. Aberdeen at Ormond Beach, L.P., 760 So. 2d 126, 134 (quoting St. Johns Cty., 583 So.2d at 635, 637 (Fla. 1991), in turn quoting Hollywood, Inc. v. Broward Cty. 431 So.2d 606, 611-12 (Fla. App. 4th 1983)). Questions that were left unresolved included: What if a development is unlikely to have any public schoolchildren, not because of law, but because of economic factors, such as the fact that the development attracts only rich people who send their children to private school? What if the development included only small efficiency apartments that were unlikely to house any children?

93 The most notable feature of California’s anti-tax movement was 1978’s Proposition 13, which amended the state Constitution to limit property taxes. CAL. CONST. art. 13A, § 1. The restriction was upheld in Nordlinger v. Hahn, 505 U.S. 1 (1992).

or a portion of the cost of public facilities related to the development project.” 95 When imposing a fee, a government must, among other things, “identify the use to which the fee is to be put” and “determine how there is a reasonable relationship between the need for the public facility and the type of development project on which the fee is imposed.” 96 Again, this standard roughly matches the Nollan/Dolan test.

An early high court application of the Mitigation Fee Act arose from fees put in place by Culver City, a moderate-sized municipality that is surrounded in large part by the western part of Los Angeles. 97 Famous as an early center of the movie industry, Culver City’s population has remained fairly steady in recent decades, in large part because there are few spots in which to build. In the 1988, the owner of land in which a private tennis center had once stood applied to build condominiums. 98 The city, which asserted a local need for a tennis facility, charged the owner a fee of $280,000, purportedly to mitigate for the loss of the old tennis courts. 99 It also charged a “public arts” fee through which a developer had to pay one percent of the value of the

95 Id. § 66000.


97 See Ehrlich v. City of Culver City, 911 P.2d 429 (1996). The tennis center was built in the mid-1970s, during which tennis experienced a great boom in popularity in the United States. One impetus was the fame garnered by two young Americans – the brash Jimmy Connors and the elegant Chris Evert – who each captured the Wimbledon singles tennis title for their respective sexes in 1974.

98 Id. at 434.

99 Id. at 435-39.
proposed development to a city arts fund, which was used to create public art in the city.¹⁰⁰ While upholding the principle of imposing fees on any “type” of development that will generate a need for public facilities, including public recreational spaces, the California Supreme Court held that the charge of the $280,000 was not roughly proportional to the incremental need for public tennis courts.¹⁰¹ The court upheld, however, the public art fee.¹⁰²

Most recently, the California city of Lemoore defended its complex system of impact fees in a state appellate court in 2010.¹⁰³ A small but growing city in California’s agriculturally oriented Central Valley, Lemoore (named after a pioneer named Dr. Lee Moore), imposed fees on new housing developments for recreational faculties, police, city vehicles, fire, and garbage collection, among other services. For the recreational facilities fee, the city determined how much it has spent over the years on capital recreational facilities and divided this amount by its current population; the per capita figure (about $2000) was then charged as a fee to new developers, based on the number of persons expected to reside in the new development.¹⁰⁴ The rationale is that this money is needed to maintain recreational facilities at their current level.¹⁰⁵

¹⁰⁰ As an alternative to paying the fee, a developer could supply the art itself, if approved by the city government. There is no record whether any developers have sought to engage in the risky step of supplying their own art project.

¹⁰¹ Id. at 448-49.

¹⁰² Id. at 450-51 (concluding that the charge was a permissible form of aesthetic regulation).

¹⁰³ Homebuilders Ass’n of Tulare/Kings Cty. v. City of Lemoore, 185 Cal. App. 4th 554 (2010).

¹⁰⁴ Id. at 563.

¹⁰⁵ Id. at 562.
A developers’ organization sued, asserting that this approach violated the Mitigation Fee Act, in that the city had not identified with particularity the specific recreational facilities that the city was planning to build and for which it needed money.\(^\text{106}\) Lemoore had generalized plans but not specific ones for an aquatic center, a fitness center, and a naval air museum (Lemoore is home to a large naval air station). The court rejected the developers’ argument, concluding that a city need not have plans to build specific facilities in order to impose an impact fee.\(^\text{107}\) It is noteworthy that the Mitigation Fee Act requires merely that a government show a link between a need for a public facility and the “type” of development that typically generates a need for more facilities.\(^\text{108}\) Indeed, it would make little sense if a fee could be charged only to a development that, when combined with earlier developments, triggers the need for a new facility; if this were the case, developers would time their applications to avoid being the straw that breaks the government’s infrastructure back. Accordingly, most impact fees are imposed on each and every new development, regardless of the specific timing of planned governmental expenditures. One developer might pay fees even though a city has no immediate plans for capital expenditures; another developer might pay a similar fee in a year in which the city is making large expenditures. The fee varies only by the size of the development.

The only feature of Lemoore’s fee system that was set aside was the charge for fire protection. A study performed for the city found that fire protection services were adequate in

\(^{106}\) *Id.* at 564-65.

\(^{107}\) *Id.* at 565-66.

the older, established part of town, but inadequate in the rapidly growing western part of the town near the naval station. Because the eastern sector was found to be adequately supplied with fire services for the near future, the court reasoned, rather was no reasonable match between new development there and the imposition of impact fee for fire services.\textsuperscript{109} This differentiation between an older, well-provisioned section of a jurisdiction and a more rapidly sprawling section helps establish the call for impact fee reform in Part IV of this essay.

\textit{C. Impact Fees (a/k/a the Population Tax) at Work Today}

Although “impacts” vary and the size of the fee may depend on whether the housing unit is a single-family house or an apartment, most jurisdictions impose fees that are otherwise uniform across the jurisdiction; notably, the fee does not vary based on distance from town centers or the size of the housing lot. To see how impact fees currently work in practice, let us examine fees from two populous jurisdictions: Orange County, Florida, and Palo Alto, California.

Orange County, Florida, is in the center of the state and includes the city of Orlando; in part because of high costs on the coasts, central Florida has been the fastest growing area of the state in recent years. Orange County’s population in 2010 was more than 1.14 million, or more than double its population in 1980 and about ten times that of 1950. The County enacted impact fees in the early 21st century, during the housing boom, for schools, law enforcement, fire

\textsuperscript{109} Id. at 571-73.
protection, roads, and parks and recreation.\textsuperscript{110} As of 2010, the typical total of fees for a single-family house was $18,686 – a number significantly higher than the national average.\textsuperscript{111} In 2010, however, the county cut the amounts of its fees, in an attempt to stimulate new housing construction.\textsuperscript{112} For 2011, Orange County imposed a school fee of about $6,525 for new single-family houses and $3,921 for multi-family units (both of these figures represented cuts of about 50 percent from the 2010 fees). For roads, a single-family house incurred a fee of about $2,868, whereas a multi-family unit generated $2,010. The fees for parks, law enforcement, and roads were smaller. The 2011 total for a typical single-family house was $10,760.\textsuperscript{113} Although Orange County includes both extensive rural areas and longstanding developed sections, such as central Orlando, the fees do not vary on the location of the planned housing. Nor do they vary on the size of the housing unit or the acreage of the land.

By contrast, the fee schedule of Palo Alto, California, is more sophisticated, perhaps befitting the affluent and high-tech home of Facebook, Hewlett-Packard, and Tesla Motors. Interestingly, Palo Alto does not impose a fee for school costs, which constitute the largest fee in


\textsuperscript{112} Duncan Associates, supra note 48, at 3.

\textsuperscript{113} Orange County Government, Fla., \textit{Impact Fee Calculator} (calculation for one single-family house), http://apps.ocfl.net/eBuilding/ImpactFee/ImpactFeeCalc/impact_calc.asp#summarybookmark.
most jurisdictions.\textsuperscript{114} But the city assesses “traffic” fees that vary depending on the location, particularly for commercial development. Next, a “community facilities” fee ranges from $4,454 to $13,458, depending on whether a planned house is larger than 3000 square feet or whether a multi-family unit exceeds 900 square feet.\textsuperscript{115} Most significantly, for all housing developments of 50 or more units, the city assesses a parkland fee of $55,186 for each single-family home or $37,984 for each multifamily unit.\textsuperscript{116} This charge, by far the largest fee, does not vary by location or size of home. Some “affordable” and below-market-rate housing developments are exempt from the impact fees.\textsuperscript{117}

The practice of impact fees in modern America, as shown by the Orange County and Palo Alto examples, proves the assertion that we may fairly characterize these charges as \textit{fees on new population}. Fees are assessed, most often, because a new development will bring new people into a jurisdiction. Employing the “but for” syllogism set forth above, we can replace “housing” with “people” and come up with the following:

1. \textit{New people create a need for new governmental expenditures, such as for schools, roads, sewers, parks, etc.}

2. \textit{But for the new people, these expenditures would not have to be made.}


\textsuperscript{115} \textit{Id.}

\textsuperscript{116} \textit{Id.} The fee is paid “in lieu of” a parkland dedication by a developer. \textit{Id.}

\textsuperscript{117} \textit{Id.}
3. *Therefore, it is fair to pass on the costs of these expenditures to the party bringing in the new people.*

Such a syllogism is fully defensible, I assert, under the current law of constitutional limitations on local government law. If a jurisdiction experienced zero population growth, it would never (or at least for long time) need to build new roads, a new fire station, or a new public park. New population is a but-for cause of the need for new expenditures. Applying the *Nollan/Dolan* test, an impact fee imposed on new population would meet the “rationale nexus” test, as long as government fulfilled the simple requirements of showing that new population necessitated certain new expenditures and that the fee “roughly” matched the number of new people. Likewise, a new population tax would meet the simple proof requirements of California’s Mitigation Fee Act (if it were reworded to replace *population* for *development*) and Florida’s dual rationale nexus test. Indeed, the venerable language reiterated time and again in the Florida cases refers straightforwardly to a fee imposed because of a “growth in population” facilitated by the new development.118

Once we have re-characterized an impact fee as a population fee (or tax), we can test the both the practical and normative implications of these fees. There are two ways for a jurisdiction’s population to grow. The first way is through in-migration. The second is through reproduction of the existing population – that is, by creating babies. As to the later method, the syllogism that an increase in population justifies an impact fee can be applied to newly born people. Just as a developer generates new population through in-migration, so do the parents of

---

118 Volusia Cty. v. Aberdeen at Ormond Beach, L.P., 760 So. 2d 126, 134 (*quoting* St. Johns Cty., 583 So.2d at 635, 637 (Fla. 1991), *in turn quoting* Hollywood, Inc. v. Broward Cty., 431 So.2d 606, 611-12 (Fla. App. 4th 983)).
a baby. An impact fee would make these families “pay their way.” Cumulatively, new children in a jurisdiction necessitate new government facilities, such as roads (at first, parents will drive the new people to doctors’ visits; later on, the new people will secure their cars and drive on their own), parks (more children mean more swing sets and soccer fields, of course), and most notably, more public schools and classrooms. The great “baby boom” of the two decades after World War II forced local governments to allocate money to schools and other services. Today, the concern that more children will necessitate more school expenditures encourages many jurisdictions to adopt land use polices that implicitly discourage in-migration of families with children.119

One might assert an obvious objection that it is normatively “unfair” to impose an impact fee on parents simply for having children. But similar normative arguments can be posited against requiring new housing developments “pay their way.” New housing is created largely in order to respond to a growing American population. Since the 1970s, when impact fees first became popular, the United States’ population has continued to grow – in fact, more rapidly than many other wealthy nations’ populations. As of 2012, the United States held more than 313 million people (not counting millions of undocumented and uncounted persons) – an increase of

119 The phenomenon of using land use laws to discourage families with children was noted as early as 1970 in Paul Davidoff & Linda Davidoff, Opening the Suburbs: Towards Inclusionary Land Use Controls, 22 SYR. L. REV. 509, 519-21 (1970). For a further discussion of the topic and current federal law, see Michael P. Seng, Discrimination against Families With Children and Handicapped Persons under the 1988 Amendment to the Fair Housing Act, 22 J. MARSHALL L. REV. 541 (1988).
more than 50 percent from the 1970 total of about 203 million. The United States’ population now grows by about three million persons a year, more than one million of which recently has been attributable to legal immigration. In fact, the rate of increase in the number of American households has grown even more rapidly than the population, as the number of persons per household has shrunk, due to the facts that more people live alone and that women have fewer children than in decades past. The number of American households rose from about 63 million in 1970 to nearly 117 million in 2009—an increase of more than 85 percent. The number of Hispanic households has more than quadrupled since 1976. These new people and new households must live somewhere. Indeed, at the peak of the housing boom in 2008, nearly half of all homebuyers were first-time homebuyers.


125 See id.

It should be clear that as the United States’ population grows, local governmental efforts to deter population growth through fees have the effect of simply pushing the pressure of new population to other jurisdictions that not impose such fees on new population. Accordingly, if a particular locality desires to restrain its population, it might be encouraged to adopt impact fees that are as large, if not larger, than those of other jurisdictions. This incentive might lead, in effect, to an unhealthy competition among jurisdictions, each of which may desire to use fees to push population growth elsewhere. This incentive holds obvious parallels, in reverse, to the phenomenon of “race to the bottom,” so often in criticized in commentary on environmental policy, through which governments compete, through lax regulation, to attract new business migrants.127

The facts of a rapidly growing American population casts doubt on the fundamental normative argument behind impact fees on new development: that those fees are an equitable way to make the development “pay its way.” Once impact fees are characterized as fees on new population, the policy argument may be re-characterized as: “It is fair to impose impact fees on development because they bring new people into this jurisdiction.” Moreover, once fees are

unmasked as charges on new population, we can fit impact fees into characterizations of local government politics – in particular, the desire of existing residents to suppress the population growth in their communities. In its simplest form, this desire is recognized through the phenomenon of NIMBY – meaning “not in my backyard!” and reflecting the attitude of some toward new construction near them. More complexly, many commentators have identified the local government practice of exclusionary zoning, through which existing residents use land use laws to exclude new migrants. Both observations document well that many citizens, especially affluent suburbanites, desire to stifle population growth in their county, city, or town.  


129 Professor Been has summarized the concerns that impact fees are motivated by a desire to exclude low-income persons or minority persons, or that they have this effect. Been, supra note 51, at 146; see also ROBERT J. BULLARD, EUGENE GRIGSBY III, AND CHARLES LEE, RESIDENTIAL APARTHEID (1994). The argument is that because racial minorities tend to have lower incomes, increased prices due to impact fees disproportionately affect them. This assertion is debatable. After all, a prospective homebuyer needs a certain income to be able to buy a home (more in credit-right 2012 than in credit-easy 2005, it is worth noting). For this group of relatively affluent people (which includes a disproportionally small percentage of minority persons to begin with), an increase in price of say $20,000 will not necessary “exclude” a significantly higher percentage of minority persons. Laws that affirmatively prevent the construction of low-cost housing, such as apartments and small homes, are undoubtedly a far more powerful force in excluding low-income and minority households.
If we were to envision a stereotype of a community in which the desire to suppress population growth were strong, it would be jurisdiction in which: the population is already fairly dense; automotive traffic frays nerves; new development tends to be close to existing built-up areas because of natural constraints such as mountains or water; antipathy against new housing dovetails with concern over the environmental impacts; and the citizens are well educated and able to mobilize to use law to restrain the growth of new housing. Such a place would likely be in California, where all of these factors exist; in fact, the average impact fee in California in 2011 was $23,849, by far the highest in the nation.

The perfect example of this model might be Palo Alto, the affluent city in the densely built-up Silicon Valley, which itself is hemmed in by sea, mountains, California’s tight environmental laws, and a limited supply of fresh water. It takes little imagination to realize that most current residents of Palo Alto (median household income was more than $118,000 in 2011, and the median home is worth more than $900,000) have little desire to see their city’s population grow. Indeed, Palo Alto imposes the highest average total of impact fees for a new housing unit anywhere in the country: more than $74,458 per unit in 2011.

---

130 See Been, supra note 51, at 142 (noting that “communities undergoing the most growth, particularly those on the urban fringe, appear to be most likely to adopt fees”).

131 Duncan Associates, supra note 48, at table p 2.


133 Id. at 4, table 3.
By contrast, the 2011 survey of impact fees did not mention any jurisdictions in North Dakota imposing a housing impact fee. North Dakota’s population has remained essentially flat since 1930.\textsuperscript{134} It is not that new roads, new fire stations, and new parks are costless in North Dakota. Rather, it is that North Dakota jurisdictions have not been concerned about rising populations; the state matches a model of a location in which there is no desire to discourage population growth. Similarly, the only jurisdiction in southeastern Louisiana that imposes a significant impact fee is St. Tammany Parish, which is located across Lake Pontchartrain from the city of New Orleans. As a relatively high ground in a mostly flat region, St. Tammany has experienced rapid population growth, in contrast to the stagnant or failing populations elsewhere in southeastern Louisiana.\textsuperscript{135} The examples fit the model in which impact fees are imposed only by jurisdictions that seek to restrain their populations.

\textit{D. Impact Fees and Suburban Sprawl}

There is an important word that circles silently around this law and practice of impact fees. The word is “sprawl.” Suburban jurisdictions that are attractive to outsiders, such as Palo Alto and St. Tammany, are typically greatly worried about sprawl. There is, not surprisingly, less concern in thinly populated North Dakota. Indeed, advocates of impact fees have often asserted that fees are an effective means of fighting and reining in suburban sprawl. This section


\textsuperscript{135} See Duncan Associates, \textit{supra} note 48, at 7.
shows, however, that the existing practice of impact fees is relatively ineffective in both limiting sprawl and in encouraging infill, which is the only serious antidote to sprawl.

It is unnecessary to catalog here the social and environmental harms that many observers have pinned on suburban sprawl, which is defined as low-density housing and commercial development that occupies a large area. A short list of ills will suffice. Sprawl gobbles up valuable farmland, natural areas, and animal habitat. Sprawl spreads people apart, necessitating longer commutes and clogging roadways. Sprawl makes it difficult to foster effective public transportation. Sprawl separates houses from jobs and stores, thus requiring excessive automotive use, with a resultant climb in fuel usage and climate-warming carbon emissions. Sprawl encourages larger houses, which use more energy. Sprawl causes social alienation and segregation by encouraging rich people to live far from poor people, and each household far from its neighbors. Sprawl pulls commerce and wealth away from longstanding urban neighborhoods, exacerbating their financial and social problems. And sprawl causes obesity, because it encourages a sedentary, auto-dominated, lifestyle. This essay proceeds on the

---


137 The literature denouncing suburban sprawl is immense. For an interesting and wide-ranging discussion of the adverse effects of sprawl, see generally JAMES HOWARD KUNSTLER, THE GEOGRAPHY OF NOWHERE (1993); see also ANDRES DUANY, ELIZABETH PLATER-ZYBERK, & AND JEFF SPECK, SUBURBAN NATION: THE RISE OF SPRAWL AND THE DECLINE OF THE AMERICAN DREAM (2001); JANE HOLTZ KAY, ASPHALT NATION (1997); and DOLORES HAYDEN & JIM WARK, A FIELD GUIDE TO SPRAWL (2006). A concise and useful summary of arguments against sprawl is SIERRA CLUB, SPRAWL COSTS US ALL (2000), http://www.sierraclub.org/sprawl/report00/. A happier assessment of sprawl is offered by PETER BRUEGMANN, SPRAWL (2005). It is not the purpose of this essay to dive into the incredibly tricky and murky waters of the sprawl debate, which spread from sociology to physics and medicine. My opinions can be discerned in part in Paul Boudreaux, Looking the Ogre in the Eye: Ten Tough Questions for the Anti-Sprawl Movement, 14 TULANE ENVTL. L. J. (2001). Rather, this essay proceeds under the (note continued …)
assumption that it is a normatively wise governmental policy to try to discourage suburban sprawl.

Many advocates have touted impact fees as an effective way to fight sprawl. In their 1981 article, Juergensmeyer and Blake cited impact fees as a solution for suburban localities looking to “halt or retard growth” and “improve the quality of life” for existing suburban residents.\(^{138}\) Professor Been, citing planning scholars, wrote in 2001 that “charging users the marginal cost of providing services to a development will encourage developers to build in areas already served by underused infrastructure, such as infill areas, rather than on underdeveloped agricultural ‘greenfield’ land.”\(^{139}\) Professors David Callies, Robert Freilich, and Thomas Roberts in 2008 chided a world without impact fees, in which “the exportation of general revenues to new suburban and exurban areas subsidize urban sprawl.”\(^{140}\)

As we have seen, however, impact fees typically work as a fee on population growth. As formulated in most places – in which the fee is imposed uniformly across the geography of the jurisdiction – impact fees do little to push new development away from the outskirts of a metro

\(^{138}\) Juergensmeyer & Blake, \textit{supra} note 62, at 415, 446.


\(^{140}\) Callies, Freilich, & Roberts, \textit{supra} note 52, at 199.
area or to pull housing towards sectors that are already built up. Accordingly, in these places, the only way that impact fees can be construed as fighting sprawl is through the following syllogism:

1. Our suburban jurisdiction, which consists mostly of single-family houses with yards, defines “sprawl” as any new development in our jurisdiction.

2. Impact fees discourage the construction of new houses in our jurisdiction.

3. Therefore, our impact fees discourage sprawl in our jurisdiction.

The flaws in the logic are obvious. First, an important reason that most new housing units in suburban areas are site-built single-family houses is that local zoning laws require it. Most suburban localities demand single-family houses with yards, removed from commercial uses. These zoning laws exclude or discriminate against types of housing that are not suburban sprawl: densely built apartment buildings, townhouses, and mobile homes. Thus, the law of impact fees, which ostensibly discourages sprawl, runs counter to the law of zoning, which makes it difficult to build any new housing other than sprawl. How are the two policies congruent? They work together to discourage new population growth: impact fees by increasing the cost of development and discouraging new housing, and zoning laws by barring the

---

141 The famous U.S. Supreme Court case that upheld, and indeed approved, the practice of suburban discrimination against housing other than single-family homes was Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926). Depending on the time and place, the legal preference in favor of single-family houses may or may not dovetail with consumer demand. As of 2012, with a lingering economic recession and tight mortgage credit, many metro areas were experiencing a dearth in the supply of inexpensive rental housing – an observation shown by the fact that the costs of rental housing were rising at the same time that housing sale prices were stagnant. See, e.g. Motoko Rich, Rents Keep Rising, Even as House Prices Fall, N.Y. TIMES, Feb. 24, 2012 (discussing the rising demand for rental housing), http://www.nytimes.com/2012/02/25/business/homes-arent-selling-but-its-an-apartment-landlords-market.html?ref=housing.
construction of dense housing. This point underlines the observation that impact fees are characterized appropriately as a population tax.

Moreover, impact fees do little to encourage the opposite of sprawl, which is infill. By imposing fees that are similar in size regardless of the location in the jurisdiction – whether on the rural outskirts of a suburban area or on an available spot in the middle of an already-dense suburban sector – these impact fees do nothing to spur development in this latter, non-sprawl location.142 Infill – constructing inside already built-up districts – is the only way that a growing metro area can avoid sprawl. The fact that most localities’ impact fees do not encourage infill can be explained, once again, by viewing impact fees as population fees. If a goal of a jurisdiction is to restrain its population growth, it is enticed to impose impact fees because these fees help push population growth to other localities. The great multiplicity of local governments in most American metro areas gives suburban localities ample opportunity to push new population to other localities in the area.143 This effect may be especially powerful if an affluent, well-motivated suburb is able to impose fees that are larger and more effective at discouraging new housing than those of its counterparts in less-affluent, less-organized localities elsewhere in the metro area.144 Accordingly, we can assert this conclusion: Impact fees typically are more


143 See, e.g., Richard Briffault, Our Localism, 90 COLUM. L. REV. 346 (1990) (discussing the insular and protectionist nature of local governmental decisionmaking).

144 Moreover, a developer is encouraged to avoid impact fees by moving to jurisdictions further out – conduct that is the definition of exurban sprawl.
effective at discouraging population growth in a particular suburban jurisdiction than they are at curbing suburban sprawl across a metro area.

For a fee system to be truly effective at fighting sprawl in a growing metro area, rather than simply moving it around, it would both discourage growth at the suburban outskirts and at the same time encourage infill construction close to old downtowns and areas that are already built up.

IV. Creating the Impact Xat

An impact fee policy to discourage suburban sprawl would draw on lessons set forth in Part II of this essay, which examined bulbs, bathrooms, and buildings. These examples showed that legal restrictions which target one discrete form of behavior – such as by requiring fluorescent lamps, low-flow toilets, or LEED certified buildings – are likely to be ineffective at reaching larger goals and may sometimes even backfire. A more straightforward method of achieving a larger goal, such as energy conservation, is to address this goal broadly and holistically, through nondiscriminatory fees that uniformly discourage the harmful activity – be it home electricity, domestic water usage, or building energy consumption – wherever it occurs. Taxes are more effective than discrete conduct requirements both because they cover every example of the activity to be discouraged and because they encourage users to look continually for ways to conserve and avoid the tax – even in ways that government has not imagined. But usage activities are not prohibited, in order to allow specific activities that provide great utility to go forward. These lessons help us shape a new model for monetary charges on new housing construction.
A. Distance-Based Fees

A fee that is effective in combating suburban sprawl would discourage low-density housing development far from existing built-up areas and encourage new housing close to the older neighborhoods. Just as greater electricity usage triggers larger fees in the domestic taxation model, housing built further away from the built-up areas would be saddled with higher fees under the proposed model. This distance-based system of fees would dovetail with the traditional rationale for impact fees in recouping governmental infrastructure costs; such costs are likely to be higher the further a development is built from the existing infrastructure.

Consider two hypothetical examples. The first is Jones County, a fairly large expanse of rural areas and one moderate-sized city, Annestown. Founded before the automobile age, the six-miles-wide Annestown has a discrete downtown with a compact “Main Street” in the center of the city. In 1950, Annestown held most of the population of the County; outside of the city lay only farms and a few small villages. The city had a single electrical power plant and a water reservoir on the edge of the city boundary, as well as a few police and fire stations and a couple of public parks, all of which satisfied the demands of the compact city. Since 1950, however, suburbs have sprung up in various spots across the formerly rural areas of the County. Residents were lured by large houses with suburban lawns and by government-backed mortgage loans. Jones County’s population continued to grow, but Annestown’s population itself was stagnant, and many vacant lots and underutilized blocks appeared in the older parts of the city.

The Jones County government decided in the 1990s that its rate of sprawl was too great. The county struggled to keep up with providing services to the new suburban housing, which
was often located far from existing governmental facilities. Moreover, much of the new development occurred in locations that had longed served as farmland for which Jones County was particularly renowned; meanwhile, many subdivisions sent pollution and sediment into small rivers that served as unique habitat for local fish and fowl. The county enacted a law that imposed a sizeable impact fee on each housing unit built in the jurisdiction; this helped the county’s finances somewhat, but did nothing to steer new housing in or close to Annestown. The county then considered creating a wide suburban development border to encircle Annestown, with impact fees considerably higher outside of the border than within. But the county worried, with good reason, that this border could cause developers to rush to build around the very edges of the border before others were able to do so.  

A distance-based impact fee, by contrast, would be calculated using the distance from downtown Annestown. Although the numbers could be flexible, of course, one idea would be to impose no fee for a development located three miles from a point in downtown Annestown (that is, no fee for just about all new housing inside the city limits), but to assess a fee that increases as development move further out. The fee for a house built fifteen miles out could be treble that of one for a house built only five miles out. There are no zones; the fee is calculated through a sliding scale. Because the distance from Annestown roughly approximates the increasing marginal cost of additional government infrastructure, this distance-based fee system fits with the fiscal purposes of impact fees and discourages developments in the environmentally sensitive rural areas of Jones County. It also fits the requirements of the Nollan/Dolan test.

145 The most famous American effort to create a boundary within which metropolitan development is limited is the Urban Growth Boundary around Portland, Oregon; one criticism is that the boundary, which was first drawn in 1978 by an intergovernmental body called “Metro,” encouraged a rush to build at its edges. See Metro, Urban Growth Boundary, http://www.oregonmetro.gov/index.cfm/go/by.web/id=277.
Housing close to downtown Annestown is not charged any fee because it is infill. Although there may be some small infrastructure costs to new housing inside the city, Jones County knows that its population must grow, along with that of the United States, and that imposing zero fees for infill in the city would avoid the effect of the impact fee serving as a population fee. Indeed, as new population is encouraged to move to Annestown, as opposed to the suburban or rural areas, the eventual collection of taxes from the new urban residents may well result in the infill housing proving to be financially beneficial for both the city and the county.

In the real world, a vanguard of the idea of distance-based fees has been the city of Lancaster, California. Located in the dry Antelope Valley, about 50 miles by air (but almost 70 by highway) across the San Gabriel Mountains from central Los Angeles, Lancaster was a small town of fewer than 4000 persons as recently as 1950. But as the nearby Edwards Air Force Base drew people to the valley in the Cold War, Lancaster grew rapidly, a phenomenon that in recent years has been fueled by the expansion of the Los Angeles County population through the San Gabriel passes and the flight of many families seeking relief from high home prices and social pressures of the big city. Lancaster’s population mushroomed to more than 48,000 by 1980; in 2010, it held greater than 156,000 people. In the 1980s, not long after the city’s formal incorporation, Lancaster imposed traditional impact fees that were uniform across the city (and thus served in effect as a population fee); this did little to discourage sprawling development.  

---


In 1992, the city instituted an Urban Structure Program, through which a distance “surcharge” is imposed on developments outside of the core downtown service area, with the surcharge rising the further a development lies from the service area or other existing infrastructure sites. The fee covers the expenses of roads, drainage systems, water, sewage, schools, libraries, and sheriff, among other costs. Readily calculable through a simple formula, the fee includes charges not only for new capital construction, but also for increased future maintenance costs necessitated by housing far from the city’s center. By some accounts, the fees have discouraged sprawling subdivisions, and at the same time fostered housing infill near the city center, with a concomitant revitalization of Lancaster’s downtown neighborhoods.

A second hypothetical of applying distance-based impact fees is somewhat more sophisticated. Like Jones County, Smith County also is large in size, but its oldest town, Willstown, has always been small. Two highways, which cross in Willstown, were built across Smith County in the 1950s; they facilitated housing development for miles along the perpendicular cross formed by the two routes. A progressive government in the 1960s

---

148 Lancaster, Cal., City Code title 15.64 (2011).

149 Id.

150 City of Lancaster, Cal., Residents’ Testimonials (accessed Aug. 10, 2011), http://www.cityoflancasterca.org/index.aspx?page=266. This is not to say that Lancaster is an untroubled paradise. Its modest housing prices for southern California, combined with over-construction during the housing boom of the early 21st century, have attracted many low-income households. The city’s mayor complained in 2011 that Lancaster had become a “dumping ground” for the poor of Los Angeles County. The city was sued in a lawsuit alleging that it has unlawfully targeted Latino and black residents who receive housing vouchers under the federal “section 8” program. See Jennifer Medina, Seeking a Better Life, Section 8 Renters Encounter Resistance, N.Y. TIMES, Aug. 10, 2011, http://www.nytimes.com/2011/08/11/us/11housing.html?_r=1&emc=eta1.
established municipal bus routes along the highways to serve (and encourage) the new developments. By 1980, nearly all the new jobs and business in the growing Smith County were located in long stretches for miles along the two highways. Government services have been provided mostly through the county, not town, government. In response to the population patterns, the county built schools, police stations, fire houses, and large sewer lines along the two routes. Housing and commerce continued to sprout up further out along the highways; by the year 2000, low-density development ran almost continuously for twenty miles along both routes, far from the compact borders of Willstown. This development pattern more closely resembles that of many of today’s smaller localities, in which development is strung out along highways, not concentrated in towns.

In the housing boom of the early 21st century, however, Smith County developers broke away from the pattern of development tied to the two highways. Seeking cheaper land and more space to build large houses, developers built housing subdivisions many miles from the crossing highways, in locations that previously had been rural. The new construction spurred debate over “sprawl.” Serving the new subdivisions strained Smith County’s infrastructure finance; meanwhile, the new developments cut down hundreds of acres of the county’s notable forests (mostly on private land), which had been biologically diverse. Some lawmakers in Smith County called for large impact fees; others for fees based on the distance from the center of Willstown, using the success of Lancaster, California, as a model.

Here, an impact fee policy that would be most effective at curbing Smith County’s sprawl would take into account its distinctive development pattern. An efficient distance-based fee system might calculate the sum of the distance of a planned development from the center of Willstown plus the distance from the closest of any of the two highways, where much of the
infrastructure already exists. Thus, a planned development seven miles from Willstown but one mile from the closest highway would be charged with a sum of eight miles. This would result in a lower fee than a development only six miles from Willstown but four miles from the closest highway, resulting in a fee based on a total of ten miles. Such a fee system would discourage distant sprawl and encourage infill, either close to Willstown or close to either of the two existing highways.

B. Size-Based Fees

While distance-based fees are straightforward and self-explanatory, they do not fully address the concerns associated with sprawl. Once more, we can rely on the lessons of Part II – that an effective system should even-handedly encourage conservation by imposing taxes based on the scope of usage of the resource to be conserved. In the case of suburban sprawl, the putative harms consist of low-density, profligate usage of land. The normative policy imperative calls for denser construction to house a growing American population in a more efficient, less land-intensive manner. Accordingly, an effective impact fee would be based on the amount, or size, of the land occupied. This is the most innovative aspect of the proposed new approach to impact fees.

At one level, a fee based on the size of the land occupied is not revolutionary. After all, charges for electricity, water, and gas are each traditionally based on usage – the more of the
resource used, the higher the charge.\textsuperscript{151} This charge encourages conservation. Although neoclassical, free market economics warns that any government intervention in the market tends to distort the goal of wealth maximization,\textsuperscript{152} it also insists that, if it is desirable policy to discourage a certain activity, imposing a simple tax is likely to be the least disruptive legal step.\textsuperscript{153} The tax will discourage some and encourage others to reconsider their actions, but at the same time it allows an activity to go forward that offers so great a benefit to someone that this person is willing to pay the tax in order to continue to engage in the activity. Government does not have to know precisely how each individual weighs utility versus tax; accordingly, a tax is more efficient than an inflexible prohibition.\textsuperscript{154}

A tax on the size of residential land would constantly and insistently encourage the conservation of land. For suburban housing, developers would be encouraged to build more densely, such as by laying out smaller yards, because the saving of land would result in a lower tax – a savings that would be passed on in part to purchasers. Homebuyers would be encouraged to seek out housing on smaller lots. Apartments (on which many persons can live on a relatively

\textsuperscript{151} It is true that purchasers of large tracts of land typically pay more through the private land transaction. But this private transaction did not account for the externalities that the model assumes do exist. The imposition of a governmental fee addresses these externalities.

\textsuperscript{152} See, e.g., MILTON FRIEDMAN, CAPITALISM AND FREEDOM (1962) (arguing against government intervention in markets).


\textsuperscript{154} See sources cited in note 17.
small amount of land) would gain in attractiveness, at the expense of single-family houses. Depending on the size of the monetary charge, it could form a powerful disincentive to sprawl and encourage densely built infill and conservative usage of land. Single-family houses that occupy a sprawling 20,000 square parcel of land, including a yard, would be charged based on this large amount of footage. Housing in multi-family buildings, such as apartments and condominiums, would be charged based on their pro rata share of the parcel’s size; one condominium unit in a building of 100 units would pay 1/100 of the total footage of the complex, parking lots included, of course.

A size-based fee would affect a myriad of political and economic issues. This essay cannot respond to all of them thoroughly, but it addresses some, albeit cursorily. First, a fee on sprawling land use is justified by the conclusion that such land use imposes external costs, or externalities. It is true that the purported externalities of sprawling land use – such as

---

155 To avoid imposing unexpected charges on existing residents who chose a large home before the imposition of the fee, the charge could be imposed on only new construction, or only upon residents who have moved after the institution of the fee. Over time, almost all persons would eventually be covered. Indeed, traditional impact fees are imposed only on new construction.

156 Such a sized-based tax might appear to be unfair for owners of large parcels of land, who heretofore have not had to pay such a tax. This perceived inequity could be dealt with by imposing the fee only on housing units purchased after the change in law, or by grandfathering in existing owners. Over time, this grandfathering would disappear, as with nonconforming uses in land use law.

Another potential fairness issue concerns farms and other residential and uses that are large by necessity. There are many potential ways to address this perceived inequity; one way would be to exempt acreage used in farming (recognizing the potential for abuse, of course); many current property tax and zoning laws already give favorable treatment to farms.

157 See, e.g., SIERRA CLUB, supra note 137 (asserting the external costs of suburban sprawl).
pollution, loss of natural habitat, and obesity – differ somewhat from the costs of extra roads or schools. Local governments might need additional statutory authority to impose a cost-of-sprawl fee, but it is not conceptually different from existing fees. Indeed, to the extent that local governments are permitted, as they are in many locations, to impose fees for harms to “affordable housing” – on the rationale that usage of land suitable for housing is being taken by a developer’s construction of more expensive housing158 – the imposition of sprawl-based fee would not be a revolutionary extension of governmental power.

Second, a monetary charge based on distance and size of housing land could supplement or even replace the property value taxes that currently form the heart of most local jurisdictions’ finances. Both social critics and economists have criticized property taxes on many fundamental grounds. First, it is asserted that property taxes are normatively less fair than income taxes because they tax status, as opposed to money received, and are imposed on the same status year after year. Because property taxes are based on the current value of the property, regardless of how long the owner has occupied it, the tax can fluctuate greatly, without any conduct of the taxpayer contributing to the change. Free market economists criticize property taxes because they penalize citizens for making productive use of land.159


159 For summaries of the critical arguments about taxing property, as opposed to income, see John A. Miller, Rationalizing Injustice: the Supreme Court and the Property Tax, 22 HOFSTRA L. REV. 79, 83-86 (1993); Barry L. Isaacs, Do We Want a Wealth Tax in America?, 32 U. MIAMI L. REV. 23, 29-30 (1977).
Concerns over unfair or excess taxation could be addressed in part by having a distance-and-size property tax supplant (in whole or in part) the current value-based tax. Under such a system, a high-value condominium close to the central city would pay a smaller tax than a moderate-sized home in a suburban development. The arguable normative inequity of such a result could be addressed by replacing the value-based property tax with both a distance-and-size tax and an income tax, which by definition is progressively burdensome for wealthier citizens.\(^{160}\)

Moreover, modest-income households could be given assistance through a conservation baseline of the sort outlined in Part II. The size-based tax system could exempt from the tax any housing unit of a size equal or smaller to the baseline, which could be the housing footprint of, for example, the smallest ten percent of all units in the region. Accordingly, any household that chose to live in a small apartment could avoid paying any size-based property tax.

The legacy of Henry George must also be addressed. In the late 19th century, this American writer argued for a “single tax” calculated through the size of land.\(^{161}\) George, who argued for communal ownership for property, relied on arguments of unfair “rent” received by large landowners, with many echoes of the writings of Karl Marx.\(^{162}\) There are few similarities, however, between the tax proposal set forth in this essay and George’s philosophy. George was concerned about the supposed unfairness of wealth earned by landownership; by contrast, the

\(^{160}\) In a largely suburban America, of course, size of housing unit tends to correlate with wealth.

\(^{161}\) **HENRY GEORGE, PROGRESS AND POVERTY: AN INQUIRY INTO THE CAUSE OF INDUSTRIAL DEPRESSIONS AND OF INCREASE OF WANT WITH INCREASE OF WEALTH** (1879).

\(^{162}\) **KARL MARX, CAPITAL** (1867) (arguing that owners of capital unfairly earn through the labor of those who work for the capitalist enterprise).
current proposal targets the putative social harms of sprawl, a concern that simply did not exist in the era before the automobile. Accordingly, the proposal for a distance-and-size based fee should not be tarred through an association with George.

A final concern is the potential for gentrification. While some worry about sprawling suburbs of new housing, others fret over the phenomenon of the replacement of low-income people by pioneering affluent people in old urban neighborhoods. Among the concerns is that racial minority households, who often lease their units, are priced out of neighborhoods in which they or their families have lived for decades, but that have become are newly attractive to more affluent white households. There should be no doubt that encouraging infill may spur an immigration of affluent migrants to some neighborhoods that previously have been home to low-income households. This is true of any effort to make central cities more attractive to prospective residents. The putative harms of gentrification can be addressed by techniques

163 See generally GENTRIFICATION OF THE CITY (Neil Smith and Peter Williams eds. 1996) (essays on the issue of wealthy urban migrants supplanting poorer people in urban neighborhoods).

164 The concern over gentrification exists largely in popular central cities, such as New York, Chicago, San Francisco, and Washington, which are attractive to affluent households. See, e.g., Lance Friedman & Frank Braconi, Gentrification and Displacement New York City in the 1990s, 70 J. OF THE AM. PLANNING ASS’N, 1 (2004). There is less of concern, of course, over gentrification in cities with weak economies, such as Detroit, St. Louis, or Memphis, in which the city’s population has fallen for decades and in which there is little attraction for affluent immigration.

165 Cities in Europe that have remained attractive to affluent persons, such as Paris and London, have experienced, as their metro areas have grown, the phenomenon of lower-income households being pushed largely to less-attractive suburbs. Both the largely non-white banlieues of Paris and the poor suburban towns outside of London have been flashpoints for social unrest, in part because of the perception that these towns are excluded from the economic successes of the still mostly white central cities. See, e.g., Sophie Body-Gendrot, Urban ‘Riots’ or Urban Violence in France?, POLICING, March 2012, at 416-27 (discussing social unrest in the suburbs of Paris).
such as protections for existing tenants against eviction and the encouragement of new city housing developments in spots other than existing rental housing. Nonetheless, it is beyond the scope of this essay to determine the appropriate balance between encouraging infill as a solution to sprawl and unease over gentrification.

C. Terminology

Is the proposal for a monetary charge on new housing based on distance and size properly characterized as a fee or a tax? The distinction between the two terms is not always clear. To generalize, a tax is a broadly imposed charge that is designed to serve as a revenue source for the public at large, whereas a fee is narrowly targeted on those seeking a particular service.166 As discussed above, some early laws imposing charges on housing developers were scuttled because they were characterized as taxes that the local government had no authority to impose under state laws.167 Today, local governments uniformly characterize the impact charges as fees, in that the charge is made a condition of the government’s granting of a permit to build and is designed to compensate for services necessitated by the new development. But local governments have pushed the barriers of this distinction. As noted in the significant precedent from Lemoore, California, discussed above in Part III, a city may impose a fee without having specific plans to

166 See, e.g., Merriam-Webster Dictionary Online, Fee, http://www.merriam-webster.com/dictionary/fee (a fee is a “sum paid or charged for a service”).

167 See, e.g., Contractors & Builders Ass’n v. City of Dunedin, 329 So. 2d 314, 317-20 (Fla. 1976) (local government held no statutory authority to impose a “tax” but did have authority to impose “fee”), cert. denied, 444 U.S. 867 (1979).
use the money immediately; it may use the fee money to bolster a fund for future use. In the Culver City case, the city imposed a fee to help pay for public art – not necessarily a service that the developer needed or even desired. With this backdrop, it is arguable that charges for distance and size are properly characterized as fees; the wide ranging effects of sprawl, such as degradation of the environment, are indeed “costs” that sprawl saddles on local government, just as it is saddled by the costs of added roads, sewers, schools, and fire protection. In places where fee is construed narrowly, such as charge might be characterized as a tax.

For purposes of this essay, it is worthwhile to distinguish the proposal for monetary charges based on distance and size from more traditional impact fees. I propose, somewhat jocularly, the term impact xat, which coins a new word. The word xat is distinguishable from a tax, which instantly creates political complications whenever it is surfaces. Unlike a routine tax, a xat is employed in order to compensate for the discrete and recognized social and financial impacts of suburban sprawl.

168 Homebuilders Association of Tulare/Kings County v. City of Lemoore, 185 Cal. App. 4th 554 (2010).


THE IMPACT XAT

D. The Impact Xat at Work

Here is how an impact xat would work, using our hypothetical jurisdictions. First, reconsider Smith County, which holds small Willstown at its center, and most of its population along the two intersecting highways. Desiring to curb sprawl, to limit infrastructure expenses, and to protect the county’s distinctive forest ecosystem, the county decides to institute a sophisticated impact xat on new construction. Under this system, the charge rises sharply the further a housing development sits from Willstown or one of the established highways; the fee also would vary by the size of the land used.\textsuperscript{171}

Assume further that a developer seeks to respond to a demand for new housing in Smith County by considering three potential sites for a new development. The first would be a traditional greenfield development, four miles from the closest highway, on inexpensive but undeveloped forest and farmland. The plan is for single-family houses with two-car garages on large lots of landscaped zoysia grass, with wide, curving roads and cul-de-sacs. From experience, the developer knows that this sort of suburban development is appealing to many American families. The houses would surround a park with a large fountain and a big stone-carved name of the complex. Absent a sophisticated impact fee system, this option might be the most profitable, considering the inexpensive cost of land and the guarantee of strong demand. But a sophisticated impact xat takes into account the long distance from the highway and the

\textsuperscript{171} As noted above, an impact xat based on the size of land could avoid imposing unexpected charges to existing residents by being imposed only on new construction, as indeed occurs with traditional impact fees.
large lots; the impact xat for this development might be work out to, perhaps, $50,000 per house.\footnote{Under an impact xat, of course, the developer is not charged on the basis of the number of new homes; all that matters is the size of the land used and distance. Thus, a developer who plans dense housing is not penalized; indeed, dense housing may be more attractive, in that the developer can sell more units without increasing the xat it must pay.}

The second option would be a development that is only two miles from a Smith County highway, with a land cost per acre that is somewhat higher than the first option. This plan also would include some large houses of about the same indoor square footage as with the first option, but many of the units in this second option would be three-story townhouses, attached to neighbors, with small backyards. It would include a small privately run park. Because this development would sit fairly close to a highway and because the typical unit would have only a moderate footprint (note that the indoor square footage of the house does not matter \textit{per se}), the impact xat here might work out to only $20,000 per unit. This smaller charge skews the developer’s profit calculations per unit towards this second, less-sprawling option.

The third option is to fill in a vacant spot only one block off a Smith County highway. The spot formerly held a now-shuttered strip mall that once had a bookstore, record shop, and video outlet; it has recently been rezoned for residential use. This development option would call for a mix of apartment “lofts” in four-story buildings of modern design, alongside a handful of tall townhouses. Many of the units would be served by a parking garage. Although there would be no new green park, the developer would be able to tout the fact that the county government runs an existing public park just two blocks away. Because of its close proximity to the highway and the small footprint per unit, this development would come close to the
THE IMPACT XAT

conservation baseline, in which no fee is charged. Here, the impact xat per unit might work out to only $500 per unit.

Because of the differences in impact xats per unit among the three options, attributable to distance and size, the developer (who otherwise might quickly have chosen the first, traditional sprawling option) is encouraged to reconsider. While some prospective homebuyers may be adamant in demanding a traditionally large suburban house on a big lot, as planned in the first option, many households (especially those of only one or two persons, which today make up about half of all American households173) may prefer a smaller loft that is not saddled with a large impact xat (which the developer will pass along, at least in part, to the buyer). Depending on predictions of demand and cost, the developer might well decide that the third option, which entails paying to the government a much smaller xat, is the most profitable choice for a new housing development. Accordingly, the impact xat discourages sprawl.

But the system would not prohibit sprawl. As with the proposals to tax electricity, water, and energy instead of mandating technology, the xat system would allow for flexibility. It would work with, rather than against, market demand. In this way, it contrasts sharply with the approach of an urban growth boundary, which to date has been one of the most touted forms of legal regulation to control sprawl. The most famous example is in Oregon, which since 1978 has made it difficult to build new housing beyond a boundary around Portland – a boundary that has slowly expanded over time, drawn by a multi-jurisdictional Metro council across Multnomah,

While the boundary has achieved success in both slowing suburban sprawl and encouraging infill in Portland itself, the inflexibility of the boundary has created significant flaws. First, the initial boundary was drawn fairly expansively, in order to gain political support; this precipitated a rush to build to the edges of the boundary. Second, because the boundary included only the three Oregon counties, it pushed housing development to distant locations beyond the three counties, and to neighboring Washington state, which lies just across the Columbia River from Portland. Third, the urban growth boundary increased housing prices within the artificial borders. Fourth and finally, the restrictions generated resentment among landowners outside the boundary who otherwise would have been able to sell to housing developers. Oregon voters in 2004 approved a measure that facilitated legal

---

174 See Metro, Urban Growth Boundary (explaining the operation of Portland’s UBG, and including maps), http://www.oregonmetro.gov/index.cfm/go/by.web/id=277.

175 See Randall O’Toole, The Folly of “Smart Growth,” REGULATION 21, 22-23 (Fall 2001).


177 Some have cited figures showing that the urban growth boundary caused an extraordinary rise in the price of land in Portland. O’Toole, supra note 175, at 23. But at the height of the housing boom in 2004, the median price for a single-family home in Portland was lower than that in Seattle or Portland, Maine. See Nat’l Ass’n of Realtors, Median Sales Price for Existing Homes in Metropolitan Areas, Home Prices (2005), available at http://www.realtor.org/Research.nsf/files/REL04Q4T.pdf/$FILE/REL04Q4T.pdf (accessed April 17, 2011).
THE IMPACT XAT

challenges to the restraints of the boundary. All of these problems mirror the drawbacks of stark prohibitions, explored in the examples of bulbs, bathrooms, and buildings.

To see the contrast between an inflexible growth boundary and a flexible impact xat system, consider another example using the other hypothetical jurisdiction. In Jones County, the government seeks to limit suburban sprawl, in part to protect its rivers and farms, and in part to encourage infill housing close to Annestown, its only major town. It too imposes an impact xat based on distance from the town center and on the size of the housing unit. Once again, a distant, large-lot development might generate an impact xat of $50,000 per unit; a closer-in complex $20,000; and an infill development only $500.

But the developer in Annestown is not persuaded by this disparity to build close to downtown. The developer’s market research shows that while the sparsely built, rural areas of Jones County are very attractive to prospective residents, homes inside the town itself are not. Annestown is unattractive because of a high crime rate, poorly regarded schools, and an inefficient local government. The research shows that most prospective residents would be willing to pay a premium of more than $50,000 for a home in the rural area, as opposed to living in the town. These market factors are not something that would be necessary be taken into account by an urban growth boundary or by the county government in the formulation of traditional impact fees. But a market-based impact xat system, even in a jurisdiction that seeks

to discourage sprawl, would allow for expression of this personal preference, just as a higher tax on electricity would allow those who prefer incandescent light bulbs to continue to use them, as long as they pay the tax. In Jones County, if it transpired that developers chose to build homes in the rural area, despite the impact xat, the county would be able to use the funds to help mitigate the adverse effects of the sprawl, such as by infrastructure projects to keep sediment out of the local rivers, or by funding a useful public transportation system in the new suburban areas. The market response also would spur Jones County to pay closer attention to the social factors that discouraged infill in Annestown and to make the city more attractive in the future.

V. EXPLORING THE REACH OF IMPACT XATS

The idea of a sliding-scale fee – or xat, if you will – deserves greater attention as a means of conserving a range of adverse impacts to resources. Such monetary charges hold great promise for discouraging externalities and encouraging wise resources usage in many fields of human interaction with the physical environment. The possibilities are numerous.

Consider, for one example, the problem of auto traffic – a classic externality. Each new vehicle on a crowded highway imposes a small but non-compensable harm to all others behind him or her (each driver suffers the external costs imposed only by the others ahead). Clogged highways are an inefficient form of transportation, in that the road may hold only one or two people for every 20 or 30 feet in length of each lane (except in nearly dead-stopped traffic, autos typically are spaced at least a few feet apart), as opposed to a train, which can transport perhaps twenty persons in the same distance. One way to internalize the costs of added traffic – that is, to make all drivers suffer some of the cost of their addition the problem – would be to impose a
fee based on the physical length of the vehicle. The physical space on the road occupied by a single large pickup truck, such as the 20-feet-long Ford F-350, is about twice that of an eight-feet Smart car with space in between in vehicles; accordingly it is reasonable to assert that the pickup “uses” about twice as much of the public highway as does the tiny car. Government could impose an impact xat based on the length of the vehicles, to account for this variable usage. Autos are also an excellent example of an effective potential conservation baseline. Unlike a gasoline tax, for example, which is likely to be felt by poor persons more intensely than by rich people (because the tax is likely to constitute a larger part of a poor person’s income), a conservation baseline for automobiles could be established at the size of the smallest production-model automobile. Buyers of this vehicle would pay no fee at all; buyers of other autos, however, would pay a xat that would depend on the length of the vehicle. As with all the examples, the fee would not legally prohibit anyone from purchasing the auto of their dreams; rather, the fee would merely make them internalize the external costs to the community.

A more complicated example would involve natural resources, such as forests and trees. Through their roles in creating oxygen, preventing soil erosion, providing wildlife habitat, and other benefits, trees provide valuable ecosystem services. It is notable, however, that while

179 As always in this essay, no attempt is made to assert definitive monetary amounts in the sliding scale fee. This essay sets forth only a conceptual argument.

180 For a discussion of the concept of ecosystem services, one of the founding works was GRETCHEN C. DAILY, NATURE’S SERVICES: SOCIETAL DEPENDENCE ON NATURAL ECOSYSTEMS (1997); see also Stephen C. Farber, Robert Costanza, & Matthew A. Wilson, Economic and ecological concepts for valuing ecosystem services, 41 ECOLOGICAL ECONOMICS 375-393 (2002).
THE IMPACT XAT

wetland landscapes are protected by federal law and a permitting system, there is no coordinated legal system to protect forests. Under an impact xat, however, government could use a simple formula – based on the number of trees, estimated bird population, and slope of land – to impose a fee on the clear-cutting of trees on private land. This xat would, once again, impose its penalty for the loss of ecosystem services generated by the cutting; at the same time, it would encourage, but not require, landowners to consider forest conservation in a range of land use activities. Indeed, conservation of a variety of natural resources could be encouraged by a range of reasonable and rational impact xats, all of which could both fit within an economic justifiable framework and at the same time allow for personal choice.

VI. CONCLUDING THOUGHTS

In an age of anti-government politics, it might seem like folly to suggest a new canvas on which to paint a government regulatory system. But the proposal for an impact xat based on

---

181 See 33 U.S.C. § 1344 (2011). This section authorizes the Secretary of the Army to issue permits for the “discharge” of “dredged and fill” material into “navigable waters.” Such conduct occurs most often in wetlands – places in which shallow water stands for some or most of the year. See 33 C.F.R. pts. 323, 326, 328 (2011) (regulations of the U.S. Army Corps of Engineers).

182 There are a myriad of potential applications of impact xats. As I was writing this essay, the city of Tampa, Fla., proposed to charge citizens more if they throw out an excessive amount of garbage. The idea is called “pay-as-you-throw.” This fee would encourage a variety of life choices that would lead to the generation of less household garbage. The retention of free collection for small amounts of garbage appears to be a variant of the concept of a conservation baseline. See Elizabeth Parker, Pay-as-you-throw for Tampa garbage considered, ST. PETERSBURG TIMES, Oct. 11, 2011, http://www.tampabay.com/news/environment/pay-as-you-throw-for-tampa-garbage-considered/1196202.
distance and size is not simply just another big government idea. Charging users of land a fee to compensate for the external costs of their land usage is, in contrast to many current government regulations, fully justifiable under modern market economic theory. Moreover, unlike the all-too-common instances of governments making regulatory decisions about land on a case-by-case basis, a xat system would be grounded on a proven economic showing of externalities and a showing that the fee is proportional to the harm. It also would avoid the politicization that almost inevitably comes with ad hoc decisionmaking – an assertion exemplified by the scandal in 2011 and 2012 over the Obama administration’s subsidization of the now-bankrupt Solyndra Corporation.  

As the examples of bulbs, bathrooms, and buildings show, sophisticated fee

---

183 A serious concern over ad hoc decisionmaking in government environmental programs is that short-lived political imperatives will outweigh the ultimate policy goal. A notable example of this effect appears to have occurred in connection with the federal government’s guarantee of loans totaling more than $500 million to a solar panel manufacturing firm in California called Solyndra. Here, the ultimate policy goal was to create more renewable energy (or, perhaps, to decrease our reliance on non-renewable fossil fuels). In ad hoc pursuit of this goal, Congress and the U.S. Department of Energy decided to establish a program to guarantee loans to solar energy firms. In 2009, the Energy Department quickly completed loans to Solyndra, in part apparently because of administration pressure to make political points through a publicized announcement by either President Obama or Vice President Biden at a groundbreaking event in California. Despite expressions of great concern over the wisdom of the loan, the Energy Department pushed the guarantees through, during an atmosphere of intense lobbying. An influential Energy Department official (whose wife’s law firm reportedly worked for Solyndra) pushed for quick action of the loan guarantee with an e-mail message that said, “I have the O.V.P. and W.H. breathing down my neck on this,” referring to the Office of the Vice President and White House. See Eric Lipton & John M. Broder, E-Mail Shows Senior Energy Official Pushed Solyndra Loan, N.Y. TIMES, Oct. 8, 2011, http://www.nytimes.com/2011/10/08/us/politics/e-mail-shows-senior-energy-official-pushed-solyndra-loan.html. In fact, Solyndra’s finances were deeply flawed. In 2011, the firm declared bankruptcy, creating the prospect of the government’s losing its entire guarantee of more than $500 million. See Times Topics: Solyndra, N.Y. TIMES, http://topics.nytimes.com/top/news/business/companies/solyndra/index.html?inline=nyt-org.

Even without political pressure, ad hoc decisionmaking may create a “silo” effect in which early decisions wall out the opportunity for future flexibility. For example, if the government had decided in 2006 to foster renewable energy, one of the subsequent ad hoc decisions might have been to focus money and energy on “assisting solar energy.” Once this decision was made (to the possible detriment of other methods of achieving the goal, such (note continued …)
systems offer considerable flexibility and response to changes in markets. The fees would not command specific consumer conduct, and they would operate without any need for government regulatory decisionmaking on a case-by-case basis. Even in the examples of fees on automobile length or tree-cutting, the fees could become simply a sliding scale factor to be routinely included in a consumer’s or business’s financial decisionmaking.

In the core example addressed in this essay – a xat imposed on new housing, based on distance and size – there is little doubt that residential developers could readily input the variable of the impact xat into their financial decisions of where and what kind of housing to build. The new method could transform the practice of development impact fees from their current, dubious effect – that of a population tax—into the useful function of discouraging suburban sprawl. Economics would work hand in hand with environmental and social policies to help build better communities.

■■■