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Programs That Work

Changing Interpretations of the Nexus and Developer Credit Elements in Parkland Dedication Ordinances

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Executive Summary

Parkland dedication is receiving increasing attention from cities because it provides capital funding without raising taxes on existing residents. Its parameters are dependent on interpretation of court rulings and in the past decade these have changed in ways that substantially enhance the potential of these revenues for local governments. The changes invariably become the focus of controversies between developers who resist paying the dedication fees and elected officials who are charged with safeguarding the interest of taxpayers. This paper addresses two central areas of controversy: Changes in interpretations of what constitutes a "nexus"; and the magnitude and characteristics of credits given to developers who provide park amenities in their projects. The "essential nexus" principle requires there to be a reasonably proximate connection between facilities developed with the resources derived from a dedication and the residents who will reside in the development providing those resources. A recent census of the 73 cities in Texas that have parkland dedication ordinances was analyzed and the relative merits of five different approaches they have used for defining service areas is discussed: a single city-wide zone, pre-determined zones; reasonable proximity; specified distance; and a hybrid model of distance/pre-established zones. Among the 73 ordinances reviewed, approximately half believed the most equitable ratio for crediting developers for park amenities they provided within subdivisions was 50%. Among the others, maximum credit varied from 0% to 100%. The relative merits are evaluated, together with the extent to which floodplain land and retention ponds are acceptable to meet a dedication requirement.

Keywords

Parkland dedication, essential nexus, developer credits

Introduction

Writing in 1980, Howard and Crompton reported the post-World War II years were the "Golden era of public parks and recreation…in which budget increases made more resources available for the development of new facilities." They went on to note,

"By the middle of the 1970s, it was clear that a new era was dawning…Many agencies are sustaining substantial budget cuts" (p. 1)… Agencies are being forced to investigate a wide spectrum of alternative resources" (p. 2). They recognized that the tax revolt of the late 1970s, which changed the political climate in the U.S., meant that financing would become increasingly challenging for public park and recreation agencies and analyses over the past forty years have consistently confirmed this forecast (for example, Zou & Crompton, 2020).

Capital financing for parks is especially challenging in fast growth cities, most of which do not have designated funding vehicles to pay the costs of new or expanded facilities required to service new growth (Crompton & Ellis, 2020; Fodor, 1999). The costs of growth could be curtailed by cities refusing to expand infrastructure such as roads, sewers, wastewater, and other utilities on which development depends. However, the political dominance of "the growth machine" in many fast growth cities prevents this approach (Molotch, 1976).

Parkland dedication was among the alternative resources that emerged in response to the 1970s tax revolt. Its initial forms were tentative; limited to acquiring land for neighborhood parks. By the mid-1980s, the courts in all states had affirmed the legality of these tentative exactions. As elected officials recognized its utility as a vehicle for shifting the cost of new facilities to developers and new residents, its scope evolved and expanded to embrace a fee-in-lieu of land; all parks in a system not only neighborhood parks; and a development fee to pay for transitioning bare land into a park. These incremental extensions gradually have been accepted by both the stakeholders and the courts.

Arguments for capital funds to invest in parks often lack traction because elected officials invariably prioritize the financing of "core services" such as police and fire. Parkland dedication offers a way forward. It is compatible with the fiscal conservatism philosophy that prevails in many cities. It may be conceptualized as a type of user fee, since the intent is to assign the cost of accommodating increased demand for parks created by new residences to the landowners, developers, and/or new homeowners who are responsible for creating the additional demand. If parkland dedication is not fully embraced, then the most likely alternatives are to raise taxes on existing residents who do not benefit from the new facilities which is likely to be anathema to fiscal conservatives, or to reduce the level of service that results in a lower quality of life for existing residents.

Invariably, changes in the form, components, and magnitude of parkland dedications create tensions between developers who are required to pay the dedications and elected officials who are charged with safeguarding the interest of taxpayers. Since in most states, dedications are a component of subdivision regulations, rather than authorized by state statures, their parameters are dependent on interpretation of rulings by the courts or, more frequently, mediated and settled out of court to avoid the substantial costs likely to be incurred by all parties if the dispute enters the court system. In mediation cases, their resolution does not enter the wider public domain, and is not available to inform the development and evolvement of ordinances. From the court rulings and the author's experience in mediations of dedication disputes, it is clear that in the past 2 decades there is an increasing expectation by both the courts and mediators that procedures used to address these issues must be transparent and carefully constructed using relatively sophisticated analyses (Crompton, 2020).

A decade ago, an article in this journal offered an analysis of parkland dedication ordinances in Texas (Crompton, 2010). Since that paper was published, there has been a substantial shift in interpretation of the legal parameters relating to three central elements in these ordinances. The first of these elements is changes in the formulas used to calculate the magnitude of exaction that an ordinance mandates. This was addressed in an earlier article in this journal (Crompton, 2022). The remaining two issues discussed in this paper are changes in interpretations of what constitutes a "nexus," and the magnitude and characteristics of credits given to developers who provide park amenities in their projects.

The data are drawn from a census of all 73 cities in Texas that have a parkland dedication ordinance. There was wide variation in both the size and characteristics of the cities, and in the constituent elements, requirements and interpretations of the ordinances. This suggests findings from the analyses are likely to be reasonably representatives of ordinances enacted by cities in other states.

The Principle of Essential Nexus

The "essential nexus" principle requires there must be a reasonably proximate connection between facilities developed with the resources derived from an exaction and the residents who will reside in the development providing those resources. Thus, courts require a local government to identify "service areas" or "benefit districts" where fees will be collected, and mandate that fees collected from developments in a service area are spent on capital park improvements within it. The Supreme Court confirmed the essential nexus principle in 1987 (*Nollan v California Coastal Commission*, 1987), but it did not quantitatively define "essential nexus."

To the best of the author's knowledge, no subsequent court decisions have offered definitive guidance. As a result, local governments have substantial discretion in defining service areas. The key criterion is: Can residents of the contributing developments be expected to use the facilities where the resources are expended? Ideally, the size of districts should be based on empirical studies that measure how far people in a community travel to parks, but such data are rarely available.

Interpretations of what constitutes a reasonable nexus have changed substantially since the legality of parkland dedication was confirmed by state courts in the 1970s and 1980s. Initially, it was widely interpreted to mean within walking/biking distance of a park. However, it has been substantially broadened since that time. Analyses of the 73-ordinances revealed that cities have adopted five different approaches to defining service areas: a single city-wide zone, predetermined zones, reasonable proximity, specified distance, and a hybrid model of distance/preestablished zones.

Most small cities in Texas did not establish nexus districts so, effectively, rationalized that all residences in the city were within a reasonable distance of all city parks. While this explained the absence of districts in small cities, it was surprising that four Texas cities with over 100,000 population did not have nexus districts: Brownsville (183,000), League City (106,000), Lewisville (106,000), and Sugarland (118,000). Ostensibly, such large population numbers without service areas appears difficult to reconcile with the requirement for a nexus. However, a different perspective emerges if a comparison is made with the average populations in each service district in the five largest Texas cities. In Houston, the average population in each of the city's 21 districts is 112,310, and similarly large average district populations are used in Dallas (193,843), El Paso (139,706), Fort Worth (176,594), and El Paso (139,706).

Table 1
The Number of Service Districts in Texas Cities that Have Them

3-5 Districts		7-14 Districts		>13 Districts	
Pearland	3	Dallas	7	College Station	17
Seguin	3	Rosenberg	8	Houston	21
Wylie	3	Round Rock	9	Austin	26
Allen	4	Pharr	12	Pflugerville	29
Frisco	4	Arlington	13	Rockwell	35
Georgetown	4	Missouri City	13		
Mansfield	4	Plano	14		
McKinney	4				
New Braunfels	4				
San Marcos	4				
Bryan	5				
El Paso	5				
Fort Worth	5				

Because it is administratively simpler than other approaches, the most widely adopted method is to establish pre-determined service areas. The 25 Texas cities that reported having predetermined service areas are listed in Table 1. The population range of cities in each of the three columns in Table 1 are:

- 3-5 service districts: Seguin 28,000 to Fort Worth 882,000
- 7-14 service districts: Rosenberg 40,000 to Dallas 1.3 million
- Over 13 service districts: Rockwell 45,000 to Houston 2.3 million

Clearly, there are extraordinarily large variations in the number of service districts, and they are not related to size of city. Presumably, this reflects multiple interpretations among cities' legal departments as to what constitutes a "reasonable" distance to establish an essential nexus. None of the cities offered a rationale for the number of service areas they designated. Several of them adopt language similar to that used in the City of Wylie ordinance to "justify" their service areas:

> Municipal parks are those parks providing for a variety of outdoor recreational opportunities and within convenient distances from a majority of the residences to be served thereby. The park zones established by the parks and recreation department and shown on the official parks and recreation map for the city shall be prima facie proof that any park located therein is within such a convenient distance from any residence located therein.

In the absence of data measuring how far people travel to parks, the analyses suggested that cities' sought to reduce the number of service districts to the fewest number that a city's legal advisers believe is permissible. This trend has resulted in an expansion of the size of service areas over the past two decades. Most cities with many service districts restrict the scope of their ordinances to "neighborhood parks" rather than extending them to include all parks. This is a legacy from the 1970s and 1980s when all the early ordinances were limited to neighborhood parks. The increased size of nexus districts reflects three realities.

First, it recognizes that most residents no longer walk or bike to parks, which was the premise behind earlier, smaller zones, rather they travel by car and select the park that best meets their needs for a desired experience (for example, National Service Research, 2020).

Second, larger service areas are operationally more desirable because they can more quickly accrue the threshold amount of money needed to fund capital projects, and there is more flexibility to spend the revenue where it is needed most. If service areas are small, often there is insufficient revenue generated in many of them to support meaningful improvements, so households contributing the funds must wait an inordinate amount of time to receive the benefits their funds are intended to provide.

Third, additional districts add administrative complexity. Discussion with city staffs consistently confirms that the challenge and costs associated with accurately accounting for each land dedication, monies collected, and the funds expended increases with the number of districts included in an ordinance.

Parkland dedications emanate from new development. This often occurs in higher income areas, rather than in areas that have most need. In some instances, this results in exacerbating perceived inequalities in the spatial provision of parks. For example, if the level of service in one area is (say) 1 acre of parks per 1,000 population while in an adjacent area in which more development is occurring it is (say) 10 acres per 1,000 population, then the exaction requirement likely will perpetuate that inequity. Courts' rulings do not allow this disparity to be addressed by imposing a larger exaction on developers than the existing level of service and/or transferring it to another deficient area (*Town of Flower Mound vs Stafford Estates*, 2004; Vernon's Civil Statutes, 212.904). However, a local government has broad discretion in drawing district boundaries so the perceived inequality could be addressed implicitly through combining some of the new development areas with deficient areas and/or increasing the size of districts.

Perceived inequalities may be further facilitated by allowing for flexibility at the periphery of predetermined service districts, so resources can be expended for a park in an adjacent area if it can be shown that it will benefit residents in the development from which the dedication funds originate. A typical clause in the Dallas ordinance states: "Fees must be spent in the same zone or in an adjacent zone in a scenario where the development occurs close to a zone border."

A third method used to operationalize a nexus was the *reasonable proximity* approach. Examples of typical language were, "Located within convenient distances from a majority of the residences to be served" (Corpus Christi), and "As close to the subdivision as practical to ensure that the subdivision's residents gain the benefit of the improvements" (Temple). This approach is arbitrary, because what constitutes "reasonable" is likely to differ widely among any given set of stakeholders. It abrogates the guiding principle of horizontal equity, since it requires a judgement to be made on each individual case and there are no quantitative guidelines to ensure that similar developments in the same jurisdiction are treated similarly. It is inevitable there will be inconsistency among those judgements, leaving an ordinance vulnerable to legal challenges.

A fourth operationalization of nexus seeks to reduce the arbitrariness by *specifying distance* from a development on which the fee is imposed. Examples included, "The parkland should be not more than one mile from the development or subdivision, or within 2 miles in the event the city council determines it is not feasible, practicable, or advantageous to expend the funds within the 1-mile distance" (Grapevine), and "The park most likely to serve a subdivision shall be located within 2.5 miles from the

subdivision, measured in straight lines, at the corners, from the subdivision boundaries" (Universal City). However, this approach remains arbitrary, absent any data that indicate the specified distances are appropriate.

In addition, this approach requires careful tracking of the expenditure of funds from each development to ensure they are correctly allocated, which is likely to be administratively complex, difficult, and costly in fast growth cities.

The fifth operationalization was *a hybrid model that combined the distance and predetermined areas approaches*. It honors the nexus principle by requiring expenditures be as close as possible to the development generating the resources but recognizes there are circumstances that may prevent that from occurring in a reasonable time frame. In those cases, it permits the resources to be expended elsewhere in the same service area. Examples included the San Antonio ordinance that stated:

> All fees collected shall be used for the acquisition of land for a public park and/or development or construction of improvements to existing public parkland, within one (1) mile of the periphery of the proposed development. However, if [1] such acquisition opportunities are not available or [2] existing parkland is already developed or improved within one (1) mile of the proposed subdivision or development, then areas within two (2) miles of the periphery of the proposed subdivision or development may be considered. For fees collected that do not exceed fifteen thousand dollars ($15,000.00), and there are no available properties within two (2) miles, then areas within four (4) miles of the periphery of the proposed subdivision or development may be considered for the acquisition and development of public parkland and/or construction of improvements to existing public parkland within such periphery.

Credit/Offsets to Developers for Park Amenities they Provide

A second focus of controversy revolves around the issue of developer credits. Almost all ordinances give credit to developers for park amenities they provide within subdivisions. However, they distinguish between on-site amenities that are available and accessible to all members of the public, and those that are reserved for the private use of residents living in the subdivision.

Credit for Developers Constructing Publicly Accessible Parks

If all else is equal, then developers are likely to be able to build a park at a lower cost than if a city receives the equivalent dedication fee, because they have the needed equipment on site. There is an additional advantage since residents will have prompt access to a park, rather than waiting for the city to construct a proximate facility sometime in the future. Thus, all the ordinances that addressed credits for developers authorized 100% credit to developers who constructed a public park to city standards.

Traditionally, the expectation is that since the park is open to all a city's residents, the city should be responsible for maintenance However, many park systems confronted with reduced operating budgets, struggle to maintain parks at a high-quality level. Accordingly, some developers and their residents guarantee a perpetual high level of maintenance and, thus, maintenance of a subdivision's property values, by making it the responsibility of a homeowners' association or similar vehicle. The Dallas ordinance goes further, requiring also that liability be transferred to subdivision residents:

(i) The owners of the property development are responsible for all general park maintenance at a level consistent with minimum park and recreation standards.
(ii) The City has the right, but not the obligation, to take any action needed to make necessary repairs or improvements within the publicly accessible private park land, and to place a lien on all lots within the development until the city has received full compensation for that action.
(iii) The owners of property in the development agree to defend and indemnify the City, and to hold the City harmless from and against all claims or liabilities arising out of or in connection with publicly accessible private park land or publicly accessible private park land instrument.

These maintenance and liability clauses invariably are present in subdivisions where developers are given credit for providing private parks for the exclusive use of their residents. However, the traditional expectation is that when parks are open to all the public the city should be responsible for their maintenance. Placing these requirements on a public park is a recent nuance.

Credit for Developers Providing Private Park-Like Amenities

The provision of private amenities for the exclusive use of residents within a subdivision compounds the problem of calculating the "rough proportionality" mandate required by the courts between a dedication requirement and the increased demands of the proposed development (*Dolan vs. City of Tigard*, 1994). When addressing this nuance, it is necessary to distinguish between a project level improvement and a system level improvement (Nelson et al., 2008). Parkland dedication refers to outdoor recreation amenities a developer provides on site for the convenience and private use of a project's residents. The land exaction origin of parkland dedications mandates that expenditures must be on outdoor park-like facilities. There is no basis for expanding them to specialist use or to indoor recreation facilities. Typical facilities eligible for credit include playground equipment and shade structures; barbecue equipment; a pagoda or pavilion; picnic areas; a basketball or volleyball court and lighting; and walking and jogging trails.

Such private amenities are likely to absorb some of the demand generated by the new homes that would otherwise have had to be accommodated by public parks. Hence, credit should be given for private amenities when calculating the dedication requirements. However, those residents are also likely to create additional demand on other parks in the city outside the development. Hence, residents should be required to pay for the additional costs required to create the system level improvements needed to accommodate that new demand.

This distinction, between project and system level improvements, suggests while credit toward a developer's dedication requirement should be given for the absorption of local demand generated by new homes, some of the dedication should also be allocated to system level improvements which will be necessitated by the new demand.

What Should be the Maximum Amount of Credit for Private Parks?

The 73 Texas ordinances showed wide variations in the credit proportions assigned to project-level amenities and system level improvements. In 36 of them (51%), either there was no reference to developer credits, or credits were allocated at the discretion of the city on a case-by-case basis.

Cities that give zero credit for park amenities provided by the developer argue the amenities are provided to improve marketability of the real estate. Since the developer's investment is recouped by incrementally increasing the sale price of lots attributable to the amenities, they see no reason to give credit for providing them. However, opponents to this view point out that since the fee is being added to the lots, the home buyer has already indirectly paid for the amenities. If the city does not give credit for them, then the home buyer is being charged twice for the amenities.

In those cases where the decision is left to the city, the lack of criteria in the ordinance breaches the principle of horizontal equity. Presumably, it permits the director and/or city council to award a credit anywhere on the spectrum from 0% to 100%, so different levels of credit could be authorized for similar private facilities and generate allegations of favoritism and inequity. Among the approximately half of the ordinances that believed a guiding criterion was necessary to avoid such allegations: 18 (25%) assigned a 100% credit; 13 (18%) specified 50%; while the maximum specifications in the remaining three ordinances were 10%, 74% and 90%.

There are rarely any empirical data to guide a decision on how much use is likely to be absorbed by park-like amenities within a subdivision, so whichever option is selected by policymakers is arbitrary. Granting a 100% credit implies that residents will confine their park use exclusively to the subdivision and not make any use of any other parks in the city's system. This appears to be an unreasonable assumption. The 50% assumption implies a belief that residents' park use will be evenly divided between the private facilities inside the development project and the system of public parks beyond its boundaries.

Typically, ordinances specify two conditions before accepting credits for private amenities that are reserved for the exclusive use of residents. First, they require documentation of who owns the private amenity, and assurance that a stable source of funding for its maintenance and periodic renovation is adequately provided for in perpetuity by recorded written agreements, covenants, or restrictions. The San Jose ordinance offers a model:

> Private recreation improvements shall be owned by an incorporated nonprofit homeowners' association comprised of all property owners in the subdivision and any of the subdivisions annexed into the association, and which is an organization, operated under recorded land agreements through which each lot owner in the subdivision is automatically a member, and each lot is subject to a charge for a proportionate share of expenses for maintaining the facilities.

Given there are multiple examples, especially in the context of golf courses, of homeowner associations disavowing their obligations to continue to finance developer provided facilities, San Antonio is one of many cities that includes a clause enabling the city to hold future residents accountable:

> The restrictive covenants shall provide that, in the event that any private owner of parkland fails to maintain same according to the standards of the city, the director of parks and recreation may enter the parks and/or open space to maintain same. The cost of such maintenance shall be charged to those

persons having the primary responsibility for maintenance of the parks and/or open space.

The second prerequisite for accepting credit offsets is that the use of the private area is restricted for park and recreational purposes in perpetuity by an open space easement or similar instrument that runs with the land in favor of the future owners of the property; which cannot be defeated or eliminated without the consent of the city; and in no event can be eliminated without providing equivalent park and recreational space elsewhere in the development.

Acceptability of Floodplain Land

The extent to which cities accept floodplain land to fulfill a parkland dedication obligation varies widely along a continuum. At one pole of the continuum, are cities that unequivocally reject any floodplain land being credited for a dedication. At the other pole of the continuum are cities that fully accept floodplain land. However, ordinances that unequivocally accept or reject floodplain lands are outliers. Most cities recognize there are situations in which floodplain land may be advantageous, especially where it is alongside linear parks and thus lends itself for the development of trails alongside natural areas. Accordingly, the most common approach is to indicate floodplain land will not normally be accepted but allow for occasional exceptions. Verbiage in the Cedar Park ordinance illustrates this position:

> No parkland shall be submitted for approval by the city that falls within the one hundred (100)-year floodplain unless the planning and zoning commission determines that the floodplain is desirable for recreation and the floodplain is left in its native condition with the exception of allowing vegetation to be pruned or maintained in a way consistent with the recreational uses and allowing installation of recreational improvements consistent with floodplain uses such as trails, picnic areas etc. If it is determined that the native floodplain areas are useful for recreational purposes, up to fifty percent (50%) of the land area maintained as native floodplain may be counted toward the parkland requirements with the condition that the parkland is at least one hundred (100) feet in width and that none of the parkland is utilized for stormwater detention. In cases where floodplain land is accepted, it is usually accompanied by two caveats.

First, as shown in the Cedar City ordinance it is limited to a maximum of (most commonly) 50% of the dedication, so 50% must be outside the floodplain area. The second caveat is that if floodplain land is accepted, its contribution toward a dedication requirement is usually discounted so either two or three acres of floodplain or greenway equate to one acre of park land.

Concluding Comments

The incremental, but substantial, expansion in both the scope and number of cities adopting parkland ordinances in the past decade suggests an increasing number of elected officials perceive them as an attractive political option for funding parks, because they provide land and/or raise revenues for park improvements without in-

creasing taxes. They have the important political advantage of being "hidden" from home purchasers, because buyers are unaware of the additional cost they may impose on home prices

Since the courts affirmed the legality of dedication ordinances in the 1970s and 1980s, there has been increasing judicial acceptance of the principle of communities passing increasing amounts of the costs of growth through to the new residences that created the costs. The rules have been liberalized so "new normals" have emerged. This is manifested by such changes as expansion of the types of parks that are eligible, inclusion of development fees, increased size of nexus zones, inclusion of reimbursement clauses, and tighter specification of developer credits.

In the author's experience of assisting in the development of parkland dedication ordinances in multiple cities as well as his own, and as serving as an expert witness in court disputes, the issues of nexus and developer credits are invariably at the center of the political controversy that inevitably accompanies a "new normal."

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