CHAPTER 26

DEVELOPMENT FEES

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"Why would anyone oppose the $100 million golf-course development fee proposed by Mayor Fasi?"

Why not $200 million? or $300 million? As a U.S. Senator declarec back in the '50s, "A hundred million here, a hundred million there pretty soon you're talking about real money"! The money would be used for affordable housing. With thousands of folks willing to line up days in advance for a few hundred subsidized housing opportunities who in Hawaii can quarrel with the need? But is arbitrarily whacking golf-course developers going about solving the housing crisis the righ way?

It is only natural to applaud any effort to shift some of the cost o government to people who seemingly can better afford it—in this case to golf-course developers and golfers willing to pay exorbitan club dues and green fees. But laws (such as the U.S. Constitution designed to protect us from the tyranny of the majority should not be ignored, even when the aggrieved parties are either hesitant to assert their own rights or perceived as well-heeled foreigners.

The proposed $100 million impact fee is arbitrary in a variety of ways. The amount itself had to have been pulled out of a hat. Evidently the mayor believes developers are willing and able to pay. This may have been true when the fee was first proposed, but the market in Japan for memberships in such courses plummeted in the early 1990s. And make no mistake, that's the only market that ever could have supported such a price tag.

Maybe after the demand for golf-course permits softens, other items will be put on sale: $25 million for tennis courts? $10 million for a bowling alley? And why stop with sport facilities? Maybe permits for university branches can be sold at auction.

All of this—including the $100 million golf-course impact fee—is pure silliness.

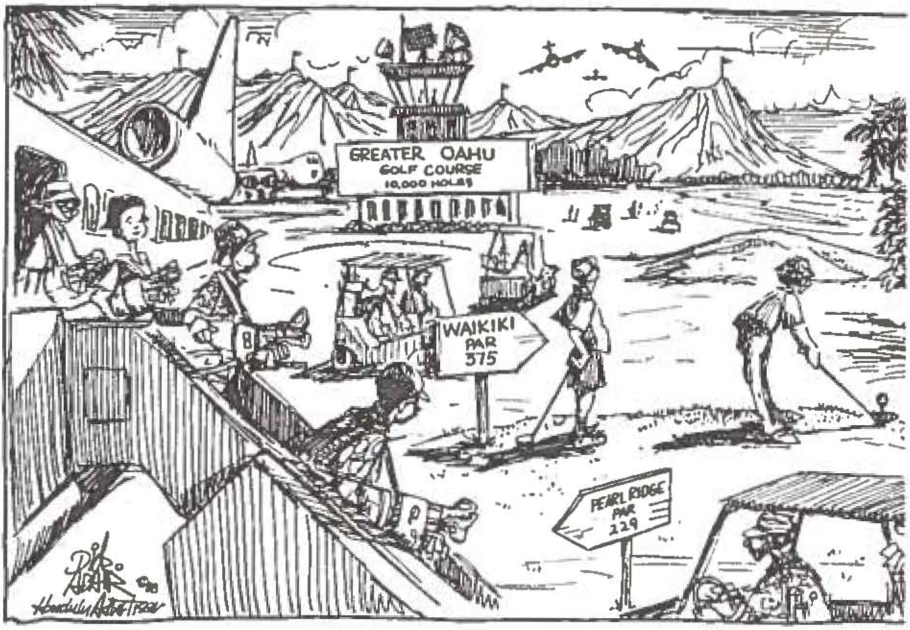
Proper use of fees. Impact fees are supposed to be charges on land development that compensate government for related costs. Through them, developers pay for new (or better) roads, water, sewers, parks, schools, open spaces, libraries, police and fire stations, sanitary landfills and, yes, in some jurisdictions, low-income housing—but only if their need can be rationally tied to a particular land development. In this sense, the development impact fee is a necessary and a proper use of governmental power.

Clearly, golf courses should pay their way. The cost of public facilities needed because of them should be borne by the developer.

How much capital facility cost can we stick on golf courses? Not very much. Golf courses will certainly increase traffic, so a road impact fee is rational. They also need water, and they need to dispose of wastewater and refuse. Therefore, water, sewer and landfill fees also would be reasonable. This could total $10 million or so. But how in the world does a golf course generate a need for housing? Some folks like to live around a golf course, but they aren't the ones in need of affordable housing.

The right to use one's own property as he or she sees fit (except when it is somehow harmful to neighbors or the public at large) is guaranteed by the U.S. Constitution. Golf courses tend to be good neighbors.

The State and the counties are responsible for the regulation of land use. Selling zoning permits for what the market will bear is not regulation. Indeed, it is impossible to charge "top dollar" for permits while properly regulating land use. For example, any developer paying $100 million is likely to insist upon a "choice" location, even if it is not ideal from the community standpoint.



Legitimate approaches. There may be legitimate ways to make golf-course developers pay extra. The first is for county government to be more systematic in calculating development fees. The Hawai State Tax Review Commission has pointed out that the countie generally have done a poor job of making these calculations. In fact amounts often have been *ad hoc* determinations, typically too low to cover the full impact of development. This not only shortchanges the people of Hawaii but also makes it impossible to determine whether favor were involved. The public trust demands that the process of calculating development fees be aboveboard and based upon clear guidelines.

A second legitimate approach is a development tax (rather than fee). The State could levy this or could give counties authority to do so. A shift of taxing authority from the State to the counties is as likely as my chances of winning next year's Hawaiian Open. But a state tax on golf-course development is not all that farfetched. The State so far has not enacted such a tax primarily because there is no compelling reason for it. After all, why should golf courses be discouraged or otherwise treated separately? And, unlike development fees, a tax would have to be according to a preset objective formula. There would be no room for subjectivity and so a measure of power would be lost.

A third possible legitimate approach is through converting the use of land from a "right" to a "privilege." In order to establish a privilege approach, however, it would first have to be agreed that government actions, such as zoning decisions, create and destroy land value. This is the "windfalls/wipeout" theory. Its bottom line is that since government grants the privilege of development, it can charge whatever it likes for the privilege. However, to be consistent and fair, when government destroys value, it must compensate the landowner for that destruction as well.

That's the way it worked in England for about half of the twentieth century. First the government wiped out property owners by nationalizing development rights, then required permission for *any* development, with a whopping (as much as 100 percent) "windfall" charge.

This approach may not be attractive for several reasons. First, paying for a development-rights "wipeout" in Hawaii would be astronomically expensive. Second, private land development likely would slow dramatically as the cost of major projects approached nonprofitability. When land development premiums get too high—like maybe $100 million per golf course—private development stops completely.

An arbitrarily set $100 million premium on golf courses would violate constitutional rights and be a just plain bad idea. Let's get government back to doing its job—keeping development out of areas where it is harmful, and charging for a fair share of the public costs involved. Low-income housing and other general problems of society are the responsibility of all taxpayers. If developers want something a little extra from government, let them bargain for it through a development agreement.

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