

THE LOCAL GOVERNMENT

"LAND GRAB"

— Leslie A. Hoffmann

The theories behind requiring land/fee exactions for municipal facilities as a condition precedent to subdividing are based upon the assumption that the municipality is "allowing" the subdivider to sell his land as lots and he therefore must compensate for any additional burdens his activity places upon public facilities. The question here does not concern the desirability of these improvements, but rather concerns who shall pay for them. The legal issue to be explored is: to what extent is it reasonable for a subdivider to be required under the guise of police power regulation to dedicate a portion of his property to public use and at what point does this amount to confiscation of property in contravention of 5th amendment rights? There are several subissues to be pondered: To what extent, if any, are the rationales behind land dedications valid? Must the burden of improvements cast upon the developer be specifically and uniquely attributable to his activity or can he be required to confer substantial benefits upon the public without receiving just compensation? Since in actuality the developer passes on as much of these additional costs as possible to his purchasers, does requiring these new residents to "pay their own way" into the community discriminate against persons who can not pay the cost of admission? Does this have an exclusionary impact based upon income resulting in concomitant racial exclusion? Do not these exactions result in a disproportionate burden upon new subdivision residents in contravention of the equal protection clause which requires fair and equal treatment among all persons similarly situated? Are not these exactions a form of revenue raising and should not they be treated as a tax and not as a police power regulation?

PURPOSES OF LAND EXACTIONS

According to the Census bureau, the U.S. population increased by 50 million in the last 30 years and is projected to increase another 50 million in the next 30 years. In addition, since 1950 the U.S. has experienced great urban expansion in the fringe areas around our cities and this population movement is expected to continue at an even faster rate in the future.¹ These two factors have burdened many municipal budgets to the point of financial crises in the effort to meet increasing demands with inadequate economic resources. Local governments have been engaged in a continual struggle to provide expanding suburbs with adequate schools, roads, recreational and municipal facilities. Unfortunately, population growth and expansion has proceeded more rapidly than planning, and cities have been caught with inadequate funds. In addition, it seems inevitable that demand will always exceed supply, and spending will always keep pace with revenues so that there will never be sufficient tax money to meet all current and long term obligations. Since subdivisions represent a potential drain on many aspects of the municipal budget (additional recreational space, police and fire protection, and school facilities), many municipalities have sought to minimize the economic impact of the influx of new people into the community by requiring subdividers to bear the costs of parks, schools, and other municipal facilities. These costs are in addition to improvements within the subdivision itself such as interior streets, sewers, etc. In *Pa. Coal v. Mahon* (260 U.S. 393, 416 (1922)) Justice Holmes warned; "We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving

the desire by a shorter cut than the constitutional way of paying for change". Have we ignored or forgotten this admonition?

THE RATIONALES BEHIND REGULATION

Not infrequently, when a subdivider approaches the local planning commission to seek approval of his plat, he is asked to dedicate a portion of his ground for arterial streets, playgrounds, schools, and other public facilities. If he refuses, his plat will not be approved. In many cases this practice of requiring land dedication as a condition precedent to plat approval can look suspiciously like a veiled unconstitutional exercise of the power of eminent domain; yet, none of the cases to date squarely face the question of why an uncompensated taking for public use is unconstitutional in all areas except that of subdivision controls.² Rather, courts have relied upon a number of rationales. Two such overlapping theories are the "voluntary" and "privilege" theories. The reasoning is as follows: because there is no right to subdivide, and the state need not permit it, exactions can be imposed. Thus, theoretically, the owner "voluntarily" dedicates land to the municipality for the "privilege" of having his plat recorded. Two problems exist in these theories. First, since plat approval is generally statutorily required before the sale of lots commences, can it realistically be said that land dedications are voluntary? Secondly, recordation is a method of enforcement to insure the orderly planned growth of undeveloped areas. As such, recordation is merely a statutory grant of authority by which the municipality supervises land transfers and is not a source of power or privilege in and of itself.

The second rationalization generally used to justify the taking of property without the due-process requirement of just compensation is the state's police power. The thrust of this theory is that subdivision control is like any other land use "regulation" which can constitutionally impose limitations upon the use of property. A word of caution: even though it is easy to relate any type of subdivision control "regulation" to the public health, safety and welfare, this does not mean that constitutional guarantees of due process and just compensation for property taken for public use may be ignored. Traditionally, the police power authorizes the state to prohibit only "uses" of property that are harmful to the public; it does not authorize the *confiscation* of property simply because it is useful to the public. The distinction between "taking" & "regulation" is outlined by Nichols in his treatise on Eminent Domain: "The distinguishing characteristic between eminent domain and the police power is that the former involves the taking of property because of its

need for the public use while the latter involves the regulation of such property to prevent the use thereof in a manner that is detrimental to the public interest."³ "It is universally conceded that when land or other property is actually taken from the owner and put to public use by the public authorities, the constitutional obligation to make just compensation arises, however much the use to which the property is put may enhance the public health, morals, and safety."⁴ Since land dedication requires the developer to *deed* the land to the local government for public use and benefit, it is difficult to understand how this action can be justified under the state's police power when it constitutes a blatant taking of land in contravention of 5th Amendment guarantees.

Today, zoning ordinances and official map requirements give the community effective control over the layout and design of proposed subdivisions which was the original purpose for required plat recordation and subdivision control regulations. However, municipalities under the guise of subdivision control seek not only to control subdivision design but also to shift the burden of needed municipal improvements upon the individual subdivider through a system of positive exactions which go far beyond the negative prohibitions which are the normal exercises of the police power. On this basis some authorities argue that exactions are a form of taxation.⁵ These authorities maintain that exactions, in no real sense, regulate subdivisions in the interest of public health, safety and welfare, but rather represent municipal efforts to shift the burden of providing necessary public improvements upon the new subdivision homeowners. Thus, they claim that this is a tax problem and should be treated as such.

(Continued on page 15)

Many land dedication ordinances are deliberately made unreasonably severe in order to discourage residential development.

"... overzealous officials try to exact as much as possible without regard to the developers' rights or the effect upon new residents."

LAND GRAB

(from page 9)

PRACTICAL EFFECT OF LAND DEDICATIONS

Generally speaking, the public shifts the burden of the needed improvements upon the purchaser. But to consider the effect upon the homeowner there must be a distinction drawn between the different types of improvements charged to the purchaser. The on-site improvements such as streets, curbs, sidewalks, gutters, etc. have caused few problems. These improvements benefit *solely* the property within the subdivision and the need is caused directly by the subdivider's activity. The cost when passed on to the home buyer is not unreasonable because expenses for these improvements could be directly charged to the property owner by a special assessment. But, serious questions are presented where municipalities predicate plat approval upon the meeting of conditions which require the developer to construct facilities which exceed the needs of his development (which constitute a wind-fall to other property owners) or require him to dedicate land for general municipal facilities such as schools.

Municipalities justify such requirements by rationalizing that the population increase which is responsible for these needed facilities is attributable to the builder's activity and, therefore, he should be made to bear the burden of his own profit-making venture. There are two fallacies in this rationalization. The first is that the builder is responsible for the community's growth. Population expansion is due to (1) the geometric growth of population and (2) the location and desirability of the community itself. The builder merely seeks to meet an already existing demand. Thus, realizing that the demand is directly related to the normal

growth of the community itself, it is difficult to justify exactions which benefit the public at large when the subdivision residents constitute only a portion of the population influx into the community and only a portion of the public benefiting from such improvement. When the subdivider is forced to subsidize the public, one of two results occur, both of which result in increased consumer costs. First, if the developer is forced to absorb the additional burden, he will have little incentive to engage in this high risk activity again. As the supply of lots decreases, newcomers will be forced to pay higher prices for available lots and homes or seek older housing elsewhere. Second, if the developer shifts the costs to the purchaser, the new owner will be forced to pay a higher price for his land. In either case, the effect of land exactions is to stem the tide of population migration by indirectly slowing growth by closing off the supply of housing or by increasing costs. Either way, the municipalities can effectively place the cost of single family dwelling beyond the reach of many Americans. Thus, in reality, exactions require new persons to pay the price of admission into an existing community by way of public improvement fees. This practice has an exclusionary effect upon those who can not afford the price. In *Appeal of Kitmar Builders*, 268 A. 2d 765 (1970), the court held that municipalities may not refuse to confront population growth by adopting regulations which effectively restrict population. The court admonished the town to provide the services which traditionally had been the municipality's responsibility to furnish. Where many land dedication ordinances are deliberately made unreasonably severe in order to discourage residential development ⁵, this decision is equally applicable.

Query: Are new homeowners really paying their own way or more? While new residents pay for their share of the municipal facilities in their neighborhoods, they are not relieved from property taxes used to meet the obligation of previous municipal bonds which pay for the facilities in the existing parts of town. Secondly, other new residents who do not live in subdivisions, such as buyers of existing village lots, townhouses, and condominiums and apartment dwellers all utilize and burden public facilities, but pay no like fee. Therefore subdivision

homeowners carry a disproportionate burden of municipal expenses. To quote New York Supreme Court Justice Van Voorhis in his dissent to *Jenad, Inc. v. City of Scarsdale* 218 N.E. 2d 673, 677, (1966), "There must be apportionment of tax burdens either among all property owners of the state, or the local division, or the property owners specifically benefited by the improvements...If one is required to pay more than his share and he receives no corresponding benefit from the excess, ... that may properly be styled extortion or confiscation. A tax or assessment upon property arbitrarily imposed without reference to some systems of just apportionment can not be upheld." Thus, to burden only subdivision homeowners with indirect exactions for provide community facilities is discriminatory and in contravention of equal protection which requires fair and equal treatment among those similarly situated, *Ronda Realty Co. v. Lawton*, 111 N.E. 2d 310 (1953).

PRACTICAL NEED TO COMPLY

Unfortunately, discrimination against outsiders is far from academic because many fast growing suburbs seek to prevent migration by making it economically onerous to enter a community. The problem remains as to what is being done, and the answer to that question is basically: nothing! The reason for this inaction is that exactions are seldom challenged because of the practical need to comply with the municipality's requirements. The average builder is under considerable pressure to move as quickly as possible to get his job done. Consequently, if the city conditions the approval of his plat with an exaction costing him \$12,000 plus lost profits, he has 3 alternatives: (1) to hold the land until the city buys or condemns it, (2) "voluntarily" dedicate the land and lose \$12,000 in plus profits, or (3) litigate the issue of the city's power to impose the condition or the reasonableness of the condition. Typically, the subdivider chooses the second alternative because he depends upon rapid turnover of his capital to survive. No builder can (profitably) afford the two or three years necessary to litigate the constitutionality of the condition(s). Subdividers who are faced with the fiscal problems of paying both taxes and interest on borrowed capital on unimproved prime development land plus meeting overhead expenses and contract obligations with general contractors, subcontractors and materialmen, can not afford to wait for justice to take its course. In addition subdividers fear incurring the ill-will of the city which could result in the use of harassment techniques such as rezoning or difficulties in securing building or occupancy permits. If the builder wants to subdivide in the city again he must submit to the exactions.⁷

The high cost of litigation is not only due to the stiff price of waiting but also includes the high cost of assembling the comprehensive proof necessary to prove the unreasonableness of the exactions. The strong presumption of constitutionality afforded the state, as well as the traditional judicial deference given to government, makes the burden of proof difficult to meet.

Because builders are reluctant to take municipalities to court to test the reasonableness of conditions imposed, it appears that the latter are in an extremely powerful position. Knowing that developers rely upon speed to keep operating and that any attempt on their part to resist fees or dedication results in lengthy and costly delays, overzealous officials try to exact as much as possible without regard to the developers' rights or the effect upon new residents. Surprisingly, some officials negotiate dedications even if they are not given this power by statute or ordinance.⁸ In addition, many existing ordinances which purportedly give certain powers in this area are not even constitutional.⁹ Concessions can vary from contributing \$100,000 for a new school to requiring deeds that restrict the size of the homes to a size larger than required by ordinance.¹⁰ Thus the door is wide open to arbitrary discrimination and abuse. This danger is even more likely where officials are members of the local population who would rather make new residents bear more than their fair share than to have to bear the cost themselves. Therefore, statutory standards and enabling legislation which would require municipalities to comply with statutory mandates would be one step towards restraining the unlimited coercive power presently at the finger tips of local authorities. Policing of these communities should be done by the state as well as making challenge by the private sector more feasible. Statutes should allow the developer to reserve the land required for dedication, but allow him to proceed with his development until the reasonableness of such exaction is judicially determined. Thirdly, the states should secure planning on regional levels to insure the co-operation and co-ordination of communities and to insure orderly area growth rather than permitting innumerable groups, each seeking to serve only its own interest, to adversely affect area development by disregarding the general welfare of the region. Lastly, on the local level, cities should develop overall plans for the location of municipal facilities. They should budget funds and secure passage of bonds for the purchase of undeveloped land before it becomes prime development land purchased by the developer, for orderly planning will secure orderly growth without having to resort to unconstitutional means of financing it. §

- 1 Hauser, *Implications of Changing Metropolitan Areas*, Planning (1958).
- 2 *Subdivision Exactions: Where Is The Limit?*, 42 Notre Dame Lawyer 400, 403 (1967).
- 3 Nichols, *Eminent Domain*, 87 (1964).
- 4 Id. at 90-91.
- 5 Heyman and Gilhool, *The Constitutionality of Imposing Increased Community Costs on New Suburban Residents Through Subdivision Exactions*, 73 Yale L.J. 1119 (1964).
- 6 Fagin, *Regulating the Timing of Urban Development*, 20 Law and Contemporary Problems 298, (1955).
- 7 Hanna, *Subdivisions: Conditions Imposed by Local Government*, 6 Santa Clara Lawyer 172, 191 (1966).
- 8 Cutler, *Legal and Illegal Methods for Controlling Community Growth On the Urban Fringe*, 1961 Wis. L. Rev. 370, 386.
- 9 Id. at 389.
- 10 Id. at 392.