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ARTICLES

THE REGULATION OF SUBDIVISIONS

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Extraordinary growth in suburban populations is creating complex physical, social, fiscal, and legal problems. In recent years, the need for planning has become apparent to enlightened communities. In an effort to resolve the dilemmas created by rapid urban expansion, municipalities have employed devices such as community planning and zoning, mapping ordinances, building permit controls, special assessments, the exercise of eminent domain, and urban renewal. Federal revenue sharing on a more locally autonomous basis than at present, and land grant-in-aid contracting may be just beyond the horizon.

Subdivision regulation seeks to ensure that the expanding suburbs will have adequate parks, schools, streets, flood control facilities, and shopping centers to serve their projected populations. One writer has stated that subdivision control is justified by the interests of—and confers benefits on—the community, the home buyer, the mortgage lender, and the subdivider.¹ County planning boards and commissions having the function of administering subdivision control are now authorized in many states.²

An important device used by communities to regulate subdivision growth is the imposition of certain conditions upon the subdivider which must be satisfied before his plat can be approved. These conditions might require the builder to construct local improvements such

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1. Melli, *Subdivision Control in Wisconsin*, 1953 WIS. L. REV. 389. See also KRASNOWIECKI, OWNERSHIP AND DEVELOPMENT OF LAND, CASES AND MATERIALS 536-37 (1965); Note, *Land Subdivision Control*, 65 HARV. L. REV. 1226 (1952); Note, *An Analysis of Subdivision Control Legislation*, 28 IND. L.J. 544 (1953).

2. C. ANTIEAU, LOCAL GOVERNMENT LAW 131 (1966).

as street curbs or to dedicate portions of his land for similar purposes. This Article will examine and evaluate three tests which the courts of various jurisdictions have applied in order to determine whether such conditions are valid. In order to facilitate this inquiry, the Article initially will survey the general law of subdivisions. In this regard, it is necessary to discuss the sources of authority for subdivision regulation and the public policy bases for such authority.

AUTHORITY FOR SUBDIVISION CONTROL

Subdivision Defined

Subdivision regulation is authorized by state statute. One author has described the statutory history of the definition of a subdivision in this way:

The early model enabling legislation did not formally define subdivision. Thus, Bettman's Model Subdivision Regulation Act contains no definition, but refers to the process of subdivision as though it were a word of art. The Municipal Planning Enabling Act drafted by Bassett and Williams empowers a municipal planning commission "to approve plats showing new streets, highways, or freeways, or the widening thereof," but does not further define subdivision. Most of the modern enabling statutes include a definition of subdivision; those that omit such a definition have been construed to authorize each municipality to define the term.³

Whether a division of land constitutes a "subdivision" must be determined from the definition contained within the statute, and not from contradictory definitions that might appear in the regulations of local planning commissions.⁴ If the statutory definition is not satisfied, the local board has no authority. For example, in *Corpus Christi v. Unitarian Church of Corpus Christi*,⁵ a church sought plat approval and a construction permit for church construction on its 2½-acre tract. Under rules formulated by the local planning commission, approval of the construction was conditioned upon the dedication of an abutting strip of land for the purpose of widening a street. The church brought a successful mandamus action. Since the church did not contemplate dividing the land into parts, it was held that the Texas subdivision

3. 3 R. ANDERSON, *AMERICAN LAW OF ZONING* 380 (1968).

4. ABA COMM. REPORTS ON LOCAL GOVERNMENT 100 (1965). See also *Peninsula Corp. v. Planning & Zoning Comm'n*, 151 Conn. 450, 199 A.2d 1 (1965).

5. 436 S.W. 2d 923 (Tex. Civ. App. 1968).

statute did not apply. Further, in the absence of a specific statutory, charter, or ordinance provision, the local police power would not per se provide authority for the imposition of such a condition.⁶

A typical component of a statutory definition of "subdivision" focuses upon the number of parcels into which the tract is to be divided. The required number of "sub-parcels" may be small. For example, in *In re Sidebotham*,⁷ it was held that the California statute defining a subdivision as the division of property into five or more parcels was not arbitrary in the choice of "5 or more lots" as a controlling factor.

Subdivision Control

E. C. Yokley, a leading authority, has stated: "The general power of a local public agency to exercise varying degrees of control over the development of land subdivision is derived from the general state statutes, private acts, and municipal charters. Specifically, at the local level, this power is implemented by subdivision control ordinances and the rules and regulations of planning commissions."⁸

The California enabling statute—the Subdivision Map Act⁹—is typical. Under its authority, cities and counties may enact local ordinances implementing the Act. Regulation and enforcement are entirely local concerns, and no state agency is involved. A home rule city may enact any regulation so long as no specific restriction or limitation on the city's power is contained in the charter, and none forbidding the particular condition is included in either the Map Act or the local ordinance.¹⁰ Referring to the California system, one writer has stated:

By allowing local governments to control the "improvement and design" of new subdivisions, it was hoped that the primary objectives of the Act would be achieved, e.g. the coordination of new subdivision designs with those of the community and the assurance that lands dedicated to the public are initially improved by the subdivider so as to avoid an undue burden on the taxpayer.¹¹

6. *Id.* at 929.

7. 12 Cal. 2d 434, 85 P.2d 453 (1939).

8. E. YOKLEY, *THE LAW OF SUBDIVISIONS* 7 (1963).

9. *See* CAL. BUS. & PROF. CODE §§ 11506, 11590 (West 1964).

10. *See, e.g., Ayres v. City Council*, 34 Cal. 2d 31, 207 P.2d 1 (1949).

11. Comment, *Dedication of Land in California*, 53 CALIF. L. REV. 559, 571 (1965). CALIFORNIA SENATE INTERIM COMM. ON SUBDIVISION, DEVELOPMENT AND PLANNING, 3 APPENDIX TO JOURNAL OF THE SENATE, REG. SESS. 15 (1955).

It should be noted that the community's authority to adopt local ordinances relating to "design and improvement" is not unlimited, but is restricted by the Act. The local ordinances that may be adopted are those that are supplemental to and not in conflict with the Act, and those that bear a reasonable relation to its purposes and requirements.¹² Under the California plan, if the ordinance does not conflict with the Act, and has a reasonable relation to its purposes, the governing body of the city may require, as a condition precedent to approval of a plat or map, that the subdivider comply with reasonable and relevant conditions for design, dedication, and improvement of the land. The builder may be required to conform with such conditions in order to promote the safety and general welfare of lot owners in the subdivision and of the public.¹³

Professor Allison Dunham has given an excellent summary of the typical means of ensuring compliance with the statutes involved in subdivision control:

The method of securing submission of the plats for approval varies, but includes one or more of the following "penalties"

(1) A plat cannot be filed for public record until approval is certified thereon.

(2) Sale of lots by reference to unrecorded plats is forbidden by injunction, criminal sanction, or by making such sales voidable at the option of the purchaser.

(3) A building permit cannot be issued for construction of buildings not fronting on approved streets.

(4) Public improvements cannot be constructed in unapproved subdivisions.¹⁴

State implementation of such measures generally has accomplished the desired goals effectively and with little complication. Problems have arisen, however, with respect to the administration of local restrictions.

Problems of Ultra Vires Action

The legislative authorization to the local governing body should be clear and reasonably definite in its terms. More conditions imposed upon

12. 42 CAL. JUR. 2d, *Records and Recording Laws* 76; *Kelber v. Upland*, 155 Cal. App. 2d 631, 318 P.2d 561 (1957).

13. *Ayres v. City Council*, 34 Cal. 2d 31, 207 P.2d 1 (1949).

14. A. DUNHAM, *MODERN REAL ESTATE TRANSACTIONS, CASES & MATERIALS* 10 (1958).

subdividers have failed in the courts for a lack of clear authorization than for any other reason.¹⁵ Even when the municipal regulation appears to be reasonable, producing only minimal burdens on the subdivider, the courts initially ignore the ordinance and attempt to ascertain whether the enabling act is sufficiently definite. At the other extreme, broad municipal authority has been denied by the courts for the same reason, leaving open the question of whether such broad powers could have been asserted successfully had the statutory authorization been clear.

A good example of an attempt at reasonable and minimal regulation that failed for want of clear statutory authorization appeared in *State ex rel. Strother v. Chase*.¹⁶ In *Chase*, a Missouri city council's requirement that a subdivider provide an alley within his plat was disallowed because the council was authorized by statute to require only streets and avenues. Problems associated with municipal attempts to require acts of a broader and more drastic nature from the subdivider are illustrated in *In re Lake Secor Development Co.*¹⁷ In *Lake Secor*, the town planning board had attempted to require a subdivider to construct a water system as a condition precedent to plat approval. The statute under which the town board derived its power enabled the local board

15. Fitzgerald, *The Subdivider's Responsibility in Urban Development*, 3 INSTITUTE ON PLANNING AND ZONING 121 (1963). See also 3 R. ANDERSON, AMERICAN LAW OF ZONING 400-01 (1968).

16. 42 Mo. App. 343 (1890). In a recent Oklahoma case, *Dickey Clay Mfg. Co. v. Ferguson Inv. Co.*, 388 P.2d 300 (Okla. 1963), the planning commission's regulations required the subdivider to furnish both a performance bond and a payment bond with respect to public improvements and utilities he was required to supply. The statute provided only for a performance bond to assure compliance with such conditions. When the developer did not pay bills owing for materials, the materialman sued and joined the surety. The court held that the commission's regulations, insofar as they required a payment bond, were ultra vires and, though expressly carried into the surety's bond, became surplusage and unenforceable. The petition did not allege reliance upon the commission's regulations or the bond.

17. 141 Misc. 913, 252 N.Y.S. 809 (Sup. Ct. 1931). In *Beach v. Planning & Zoning Comm'n*, 141 Conn. 79, 103 A.2d 814 (1954), which involves the kind of problem frequently facing growing municipalities, the Planning and Zoning Commission of the Town of Milford refused to approve a plat for a 145-lot subdivision because the town's financial condition was not equal to the task of providing school, police and fire protection. The subdivider appealed. The Supreme Court of Errors held that the detailed statute contained no authority for disapproving subdivision applications on the ground of avoiding financial burdens. In *Avonside, Inc. v. Zoning & Planning Comm'n*, 153 Conn. 232, 215 A.2d 409 (1965), the Supreme Court of Connecticut held that a town's subdivision regulation requiring a developer to pay fees based on a percentage of the cost of constructing streets and making other public improvements set forth in the subdivision plan exceeded the town's statutory authorization and was, therefore, invalid.

to impose only such conditions as were related to streets, light, and air. The water system requirement was disallowed on the ground that the statute made no mention of such a power. Another example of this type of case is *Sussex Woodlands, Inc. v. Mayor and Council of the Township of West Milford*.¹⁸ The subdivider in *Sussex Woodlands* sought to subdivide an 800-acre tract by conveying one three-acre lot to a purchaser. The town planning board, pursuant to its ordinance, conditioned approval of the minor subdivision on the payment of back taxes for the entire 800-acre tract. The subdivider brought an action challenging the town's authority to so regulate, and relief was granted since there was no statute expressly authorizing the payment of back taxes as a part of subdivision regulation.

THE BASES OF SUBDIVISION REGULATION

Depending on the nature of the subdivision statute and the factual conditions presented, the courts have sustained subdivision regulation on various grounds. Among the more common are the following: (1) The subdivider voluntarily requests local approval in order to record his plat, and therefore must subject himself to regulation. (2) Local control over the subdivision street layout is necessary to accomplish conformity with the city street design so as to avoid traffic chaos. Also, the land description must conform to city surveys in order to permit identification of owners and their properties on the tax rolls. (3) Regulation is an inherent police power necessary to promote the public health, safety, and general welfare. (4) The subdivider causes a burden upon municipal services and, along with the ultimate purchasers of the plots, receives tangible benefits from the conditions he is required to fulfill and the improvements he is compelled to make.¹⁹

The logic supporting the first two bases for regulation is too obvious to require discussion. The third basis is illustrated in the leading case of *Ayres v. City Council of City of Los Angeles*.²⁰ This was a mandamus proceeding where the subdivider sought to compel the city council to approve a subdivision map without requiring compliance with con-

18. 109 N.J. Super. 432, 263 A.2d 502 (1970). The court distinguished *Economy Enterprises, Inc. v. Manalapan Township Comm'n*, 104 N.J. Super. 373, 250 A.2d 139 (1969), which upheld the implied right of a municipality to require a subdivider to pay inspection fees, where such fees were shown to correspond roughly with township subdivision regulation expenses. The conditions imposed, said the court, must be limited to controls relating to the physical development of the property.

19. See Fitzgerald, *supra* note 15, at 121-23.

20. 34 Cal. 2d 31, 207 P.2d 1 (1949).

ditions that had been imposed by the city planning commission. These conditions required that the builder dedicate a 10-foot strip of land along an abutting major boulevard for widening purposes, that an extension of a street in the subdivision be dedicated to a width of 80 feet (rather than the 60-foot dedication proposed by the builder), that a splinter area proposed for development be dedicated for street use, and that an additional 10-foot strip of the builder's land be restricted to the planting of trees and shrubbery.

Petitioner argued that the only enforceable conditions were those that were specified in the Map Act or in ordinance provisions not conflicting with the Act. After a lengthy recital of the Act's provisions, the court addressed itself to the subdivider's argument in language that has been cited repeatedly and relied upon in subsequent decisions. The court stated its test as follows:

[C]onditions are lawful which are reasonably required by the subdivision type and use as related to the character of local and neighborhood planning and traffic conditions.

.. [I]t is the petitioner who is seeking to acquire the advantages of lot subdivision and upon him rests the duty of compliance with reasonable conditions for design, dedication, improvement and restrictive use of the land so as to conform to the safety and general welfare of the lot owners in the subdivision and of the public.²¹

The court upheld each condition as being reasonably related to the promotion of the public welfare. Each condition also was found to be "reasonably required by the subdivision type and use as related to the character of local and neighborhood planning and traffic conditions."²²

The fourth basis of regulation may be illustrated by the case of *City of Bellefontaine Neighbors v. J J Kelley Realty & Building Co.*²³ There, the applicable statute required that before a subdivision plat could be recorded, it had to be approved by the local common council, which was empowered to require changes to make the plat conform to any street development plan.²⁴ Pursuant to the statute, the city required a subdivider to pave a street within his subdivision as a

21. *Id.* at —, 207 P.2d at 5, 7.

22. *Id.* at —, 207 P.2d at 5.

23. 460 S.W. 2d 298 (Mo. Ct. App. 1970).

24. Mo. REV. STAT. § 445.030 (1949).

condition precedent to plat approval. The court upheld this condition in these words:

The development of streets is a matter peculiarly within the province of the City. The mere desire of a subdivider to develop land does not give him the right to compel development and improvement of streets at public expense within the area controlled by him. The City may refuse to permit such subdivision development unless that expense is borne by the subdivider.²⁵

Conditions of this nature are approved because public policy allows a city to require the subdivider, who is seeking a profit, to facilitate municipal development by making the original installation of site improvements. The city then generally assumes the maintenance and control over streets, alleys, water lines, sewers, parks, and recreational areas within the subdivision.²⁶

CUSTOMARY ADMINISTRATIVE CONDITIONS IMPOSED ON THE SUBDIVIDER PRECEDENT TO APPROVAL OF THE PLAT

When discussing conditions precedent to plat approvals, it is appropriate to focus upon two important conditions which may be imposed upon subdividers. Initially, situations where the approving authority attempts to require the construction of improvements should be examined. Next, situations where the approving authority seeks to compel the subdivider to dedicate a portion of his land for public use, or to make payments to the city in lieu of a dedication of his land, should be analyzed.

Construction of Improvements

It has become commonplace,²⁷ although there are exceptions,²⁸ for the courts to uphold requirements made by municipalities or their approving authorities that a subdivider construct certain kinds of improvements within the platted area. The following list is representative of the required improvements which the courts generally have sustained:

- (a) Sidewalks, curbs, gutters, street gradings, and stabilized road surfaces;²⁹

25. 460 S.W.2d at 303.

26. E. YORKLEY, *supra* note 8, at 129.

27. See, e.g., *Ayres v. City Council*, 34 Cal. 2d 31, 207 P.2d 1 (1949).

28. See, e.g., *Kesselring v. Wakefield Realty Co., Inc.*, 306 Ky. 725, 209 S.W.2d 63 (Ct. App. 1948); *State ex rel. Weber v. Vajner*, 92 Ohio App. 233, 108 N.E.2d 569 (1952).

29. *Evola v. Wendt Constr. Co.*, 170 Cal. App. 2d 21, 338 P.2d 498 (1959); *Petterson*

- (b) Surface drainage, storm water, and drainage facilities;³⁰
- (c) Sanitary sewage facilities and water systems or facilities;³¹
- (d) Subdivision streets of increased width and street extensions;³² and
- (e) Installation of—or restrictions on the use of—access streets to existing roads.³³

In California, the Subdivision Map Act explicitly states that street grading, surfacing, sanitary and storm sewers, and water mains are "improvements" which may be required by a city.³⁴ If, however, other improvements "directly benefit" the subdivision in question, they also may be upheld, even though there is no express statutory grant of power. For example, in *City of Buena Park v. Boyer*,³⁵ a subdivider challenged the right of the city's planning commission to demand a \$50,000 contribution for construction of an open drainage ditch to

v. City of Naperville, 9 Ill. 2d 233, 137 N.E.2d 371 (1956); *Allen v. Stockwell*, 210 Mich. 488, 178 N.W. 27 (1920); *Blevins v. City of Manchester*, 103 N.H. 284, 170 A.2d 121 (1965); *Levin v. Livingston Township*, 35 N.J. 500, 173 A.2d 391 (1961); *SE-Frank Developers, Inc. v. Gibson*, 157 N.Y.S.2d 812 (Sup. Ct. 1956); *West Norriton Township v. Abel Inv. Co.*, 19 Pa. D. & C. 2d 58, 73 York 157 (C. P. 1961). *But see* *Lewis v. Minneapolis*, 140 Minn. 433, 168 N.W. 188 (1910), which held a street grading requirement invalid for lack of authorization.

30. *City of Buena Park v. Boyar*, 186 Cal. App. 2d 61, 8 Cal. Rptr. 674 (1960); *Mefford v. City of Tulare*, 102 Cal. App. 2d 919, 228 P.2d 847 (1951); *Petterson v. City of Naperville*, 9 Ill. 2d 233, 137 N.E.2d 371 (1956); *Blevins v. City of Manchester*, 103 N.H. 284, 170 A.2d 121 (1965). *But see* *Castle Estates, Inc. v. Park & Planning Bd.*, 344 Mass. 329, 182 N.E.2d 540 (1962), invalidating water supply and drainage conditions because the planning board had not adopted adequate regulations under the statute to sustain the conditions imposed.

31. *Mefford v. City of Tulare*, 102 Cal. App. 2d 919, 228 P.2d 857 (1951); *Petterson v. City of Naperville*, 9 Ill. 2d 233, 137 N.E.2d 371 (1956); *Blevins v. City of Manchester*, 103 N.H. 284, 170 A.2d 121 (1965); *Lake Intervale Homes, Inc. v. Township of Parsippany-Troy Hills*, 28 N.J. 423, 147 A.2d 28 (1958); *Medine v. Burns*, 29 Misc. 2d 890, 208 N.Y.S.2d 12 (Sup. Ct. 1960); *SE-Frank Developers, Inc. v. Gibson*, 157 N.Y.S.2d 812 (Sup. Ct. 1956); *Zastrow v. Village of Brown Deer*, 9 Wis. 100, 100 N.W.2d 359 (1960).

32. *Ayres v. City Council*, 34 Cal. 2d 31, 207 P.2d 1 (1949); *Petterson v. City of Naperville*, 9 Ill. 2d 233, 137 N.E.2d 371 (1956).

33. *City of Sierra Madre v. Superior Ct.*, — Cal. App. 2d —, 12 Cal. Rptr. 836 (1961); *Ayres v. City Council*, 34 Cal. 2d 31, 207 P.2d 1 (1949); *Krieger v. Planning Comm'n*, 167 A.2d 886 (Md. Ct. App. 1961); *Town of Stoneham v. Savello*, 341 Mass. 456, 170 N.E.2d 417 (1960). *See* *Medine v. Burns*, 29 Misc. 2d 890, 208 N.Y.S.2d 12 (Sup. Ct. 1960), which held that statutory authority was lacking for the imposition of the condition. If authority were conferred specifically, the statute would be constitutional under *Brous v. Smith*, 304 N.Y. 164, 106 N.E.2d 503 (1952).

34. *See* CAL. BUS. & PROF. CODE § 11511 (West 1964).

35. 186 Cal. App. 2d 61, 8 Cal. Rptr. 674 (1960).

service the subdivided area. The city demanded the \$50,000 payment—in addition to a promise to install streets, curbs, gutters, and sidewalks—as a condition precedent to the city's acceptance of the builder's map.

The California District Court of Appeals held that the money paid to the city was "to be expended for the direct benefit of the subdivision, for drainage purposes, and such drainage facility was sorely needed for the general use of the lot owners in the subdivision." Thus, even though California legislation did not expressly permit such a local requirement, the required payment for construction of drainage facilities was allowed because it conferred a direct benefit on purchasers of the subdivided lots.

Judicial review of the conditions imposed by a city and challenged by a subdivider turns upon a determination of whether the conditions are reasonably required in the interests of public safety and convenience. Problems of arbitrariness could arise if, for example, streets of unusually large width or of unduly expensive pavement were demanded. However, the California Attorney General stated in a 1964 opinion that an ordinance could require that a subdivider dedicate curved rather than straight streets, if such a requirement were not based solely on aesthetic considerations. According to the Attorney General, such a requirement would be authorized by the Map Act because it controls street "alignment," and it probably would be constitutional because the slowing of neighborhood traffic would tend to make the subdivision safer for local residents.³⁶

Dedication of Land

Compulsory dedications of land for public use or payments in lieu of a dedication have produced more legal difficulty than conditions requiring construction of improvements within the subdivision. Examples of the more troublesome conditions include requirements that the subdivider construct public utility connections to points outside the subdivision or pay the construction charges for such connections; requirements that the subdivider reserve or dedicate strips of his land for the future widening of streets which adjoin his subdivision; and requirements that open space be reserved or dedicated for parks, playgrounds, school sites, or other public grounds, or that a contribution be made toward the cost of acquiring land elsewhere for these purposes.

The New York State experience illustrates the complex problems that can result from statutes requiring the dedication of land. A 1959

36. 43 OP. CAL. ATT'Y GEN. 89 (1964).

amendment to the subdivision statute states that whenever the dedication of land is impractical, local planning boards may require as a condition precedent to plat approval the payment of money in lieu of dedication. The amount of the payment is determined by the board and is to be used as a trust fund to maintain neighborhood parks.³⁷ However, another portion of the same statute provides that the owner of the land, by adding a notation to the proposed plat stating that he does not intend to offer any land to be dedicated for streets, highways, or parks, may avoid the imposition of such conditions. Also, such a notation eliminates the need to pay a sum of money in lieu of dedication. These provisos appear to vitiate the substantive portion of the statute to the extent that a local governmental body cannot effectively condition approval of a plat on a requirement of dedication.

Apart from internal inconsistencies that are apparent in some statutes, there are several other problems concerning the dedication of land. The most important is a determination of when a local government may require a subdivider to dedicate a portion of his land for some public purpose. More specifically, what type of community benefit will support a municipal requirement that land be dedicated in order to gain subdivision approval? It should be noted that this matter is particularly important to the subdivider who must dedicate his land without reimbursement, as opposed to eminent domain proceedings which usually involve payment for the property appropriated.

There are several approaches to the problems associated with conditions requiring the dedication of land for public purposes such as school facilities. The *Ayres* decision, which was discussed above, typifies one position. *Ayres* enunciated the test of whether the conditions are reasonably related to the type of subdivision proposed. If they are, the conditions will be upheld; otherwise they are invalid. In the following portion of this Article, other approaches will be discussed in order to formulate conclusions as to which method is superior.

A second approach has been adopted by courts in Illinois, where the

37. N.Y. TOWN LAW § 277 (McKinney 1959). The statute reads in part:

[S]uch plat shall show in proper cases and when required by the planning board, a park or parks suitably located for playground or other recreational purposes. If the planning board determines that a suitable park or parks of adequate size cannot be properly located in any such plat or is otherwise not practical, the board may require as a condition to approval of any such plat a payment to the town of a sum to be determined by the town board, which sum shall constitute a trust fund to be used by the town exclusively for neighborhood park, playground, or recreation purposes including the acquisition of property

supreme court has invalidated conditions requiring dedication of land for recreational and educational facilities³⁸ and cash contributions for the same purposes.³⁹ The test appears to be whether the condition which is imposed is sufficiently related to the needs of the subdivision. In *Rosen v. Village of Downers Grove*,⁴⁰ the court held that a condition imposing costs upon a subdivider is valid *only* when the costs are "specifically and uniquely attributable" to his activity.⁴¹ Accordingly, in *Pioneer Trust & Savings Bank v. Village of Mount Prospect*,⁴² a requirement for the dedication of one acre of land for each 60 residential building sites or family living units was invalidated. If it had been applied to the plaintiff subdivider, he would have been required to dedicate 6.7 acres to obtain approval of his 250-lot subdivision. The court, rejecting the village's argument concerning the congested condition of the school facilities, stated: "[T]he school problem which allegedly exists here is one which the subdivider should not be obliged to pay the total cost of remedying, and to so construe the statute would amount to the exercise of the power of eminent domain without compensation."⁴³

A third approach is illustrated by court decisions in New York, California, and Montana. In the recent case of *Jenad, Inc. v. Village of Scarsdale*,⁴⁴ the Court of Appeals of New York validated a condition requiring a subdivider to pay a fee in lieu of providing land. Jenad sought to recover a fee paid to the municipality in lieu of providing land, so the question of dedication was not confronted directly. Nevertheless, the court referred to the power to compel dedication and cited Wisconsin and Montana cases which were similar to *Jenad* and had upheld dedication requirements. The *Jenad* court was divided four to three, and the dissent pointed out that, by upholding the municipality's extraction of a fee in lieu of setting land aside, the majority in effect had allowed the municipality to require dedication.⁴⁵ The dissent argued that the majority opinion would be authority for assessing sub-

38. See, e.g., *Pioneer Trust & Sav. Bank v. Village of Mount Prospect*, 22 Ill. 2d 375, 176 N.E.2d 799 (Ill. 1961).

39. See, e.g., *Rosen v. Village of Downers Grove*, 19 Ill. 2d 380, 167 N.E.2d 230 (Ill. 1960).

40. 19 Ill. 2d 380, 167 N.E.2d 230 (Ill. 1960).

41. *Id.* at —, 167 N.E.2d at 233.

42. 22 Ill. 2d 375, 176 N.E.2d 799 (Ill. 1961).

43. *Id.*

44. 18 N.Y.2d 78, 218 N.E.2d 673, 271 N.Y.S.2d 955 (1966).

45. *Id.* at 86-92, 218 N.E.2d at 677-80, 271 N.Y.S. 2d at 959-65.

dividers for general public purposes without regard to special benefits received by the subdivision. Petitioner in *Jenad* had contended, *inter alia*, that the fee constituted an unauthorized tax. The court answered that the fees were not a tax at all, but were a reasonable form of village planning for the general community welfare.

Jenad appears to grant broader powers to local regulators than would be allowed under *Rosen* and its "specifically and uniquely attributable" test. Additionally, *Jenad*, unlike *Ayers*, does not require that the condition be related to the type of subdivision proposed by the builder. *Jenad* appears to allow any condition that would support the general public welfare, as long as the subdivision itself also would benefit from the condition. *Jenad's* apparent broad grant of local discretion is not unlimited, however.

In another New York decision, *East Neck Estates, Ltd. v. Luchsminger*,⁴⁶ an intermediate court held that confiscation suggests the upper limit of the public power to compel "dedication." The court found that the requirement of dedication of shore frontage by a subdivider for park purposes would result in a \$90,000 decrease in value of land worth \$208,000. Although the broad policy underlying the requirement apparently was a desire to maintain public access to the beach, the court concluded that the standards of reasonableness and due process had been exceeded. The court recognized that *Jenad* granted local planning boards the right to require payment of money or land but concluded that standards of due process still were paramount. Moreover, doubt has been expressed in an administrative opinion as to whether a local unit may require the dedication of land for school purposes as a prerequisite to approval of a subdivision plat.⁴⁷

The California Supreme Court adopted a similar approach in *Associated Home Builders of the Greater East Bay, Inc. v. City of Walnut Creek*.⁴⁸ The plaintiff, a non-profit corporation organized to promote the home building industry, brought a class action attacking certain city ordinances enacted under the authority of section 11546 of the Business and Professions Code, which provided that municipalities could require

46. 61 Misc. 2d 619, 305 N.Y.S.2d 922 (Sup. Ct. 1969).

47. OP. N.Y. STATE COMPTROLLER 68-939. Two recent articles advance the opinion that an administrative requirement of dedication of land for police or fire station sites also would not be allowed. Reps & Smith, *Control of Urban Land Subdivision*, 14 SYRACUSE L. REV. 405 (1963); Heyman & Gilhool, *The Constitutionality of Imposing Increased Community Costs on New Suburban Residents through Subdivision Exactions*, 73 YALE L.J. 1119, 1137 (1964).

48. 4 Cal. 3d 633, 484 P.2d 606, 94 Cal. Rptr. 630 (1971).

the dedication of land, the payment of fees in lieu of such dedication, or a combination of the two, for park and recreational purposes as a condition to approval of a subdivision plat. The statute required the ordinance to include definite standards to determine the proportion of the subdivision to be dedicated, or the amount of any fee to be taken in lieu thereof. Such dedication or payment could be used only to provide parks or recreational facilities to serve the subdivision. The statute further required that the dedication bear a "reasonable relationship" to the use of the park and recreational facilities by future inhabitants of the subdivision. Fees alone could be required with respect to a subdivision containing 50 parcels or less. The city had enacted an ordinance complying with the statute.

The court rejected the subdivider's contention—which may have been based on the *Rosen* rationale—that dedication is a valid condition only if the subdivision will increase the need for recreational facilities to such an extent that additional land for such facilities will be required. The subdivider's other argument—that dedication was valid only if directly related to the health and safety of the residents of the development, as would be the case with sewer facilities—was held to have been satisfied, since park and recreational facilities are sufficiently related to the health and welfare of subdivision residents. The court rejected the rule followed in Illinois (that the need for recreational facilities must be "specifically and uniquely attributable" to the subdivision), drawing support for its conclusion from the recent adoption of article XXVIII of the California Constitution. The new article provides that it is in the best interests of the state to maintain and preserve open space lands to assure the enjoyment of natural resources and scenic beauty for the economic and social well-being of the state and its citizens. However, it should be noted that nothing in the article provides that the open space is to be supplied at the subdivider's expense rather than at the cost of the state. The article may well have been intended only to ease the burden of the state in proving that it is serving a public purpose when it condemns and purchases land in order to facilitate the general economic and social well being of its citizenry⁴⁹

49. The subdivider also contended that subsection (f) of the statute was unconstitutional since it delegated arbitrary power to the city to decide when the development of the recreational facility will begin and empowered the city to require fairly immediate development in one instance and lengthy postponement in another. The court found little merit in this contention, reasoning that needs would vary from one neighborhood to another and that the city's resolution that the improvements should begin as the need developed provided a sufficiently definite standard. The court noted that relief

The court in *Walnut Creek* found that a majority of modern decisions would uphold the constitutionality of fee conditions of the kind authorized by the statute in controversy. This appears to be true when the statute expressly authorizes the city to impose the condition and the condition is reasonable as applied to the particular subdivision. The court based its holding on the state's police power, reasoning that the subdivider receives valuable benefits from subdivision approval, and therefore may be required to dedicate land for park purposes "whenever the influx of new residents will increase the need for park and recreational facilities."⁵⁰ The court rejected the Illinois court's construction of *Ayres* as limiting the power to impose dedication conditions to situations where the "burden cast upon the subdivider is specifically and uniquely attributable to his activity." ⁵¹ The California Supreme Court succinctly stated that, "the *Ayres* case cannot be interpreted in this manner" ⁵²

The broadest statement of the *Jenad* rule is found in a Montana case. In *Billings Properties, Inc. v. Yellowstone County*,⁵³ the Montana Supreme Court held that a state statute requiring subdividers to dedicate a portion of their subdivision for public parks and playgrounds was a reasonable condition precedent to governmental approval of the subdivider's plats. The builder submitted plats that conformed to all the requirements, except that he made no provision for the dedication of land to be used for public parks or playgrounds. The applicable statute

could be provided to the subdivider if permission to develop were delayed unreasonably. The question, however, was whether the *statute*, not the *resolution*, was adequate. The statute appeared to direct the city to make a practical survey of its needs in connection with requests for approval of subdivision maps and to "specify when development will begin." It is submitted that the disposition made of this issue in the lower court is more sound and in accordance with established precedent. That court interpreted the statute as contemplating a "reasonable time" within which development should begin after subdivision occupancy. The California Supreme Court may have felt that the lower court's construction of the statute would restrict the city's discretion more than the high court considered necessary or desirable.

The plaintiff further contended that subdividers of 50 parcels or less were required only to pay fees, while subdividers of more numerous parcels might be required to dedicate land, even though the same amount of acreage might be involved in both situations. The merits of this contention were denied on the logical basis that the city ordinance interpolated both the amount of fees and the amount of land into a value ratio which was applied to subdivisions. Thus, the required fee is equal to the value of the land required to be dedicated under the governing body's formula.

50. 4 Cal. 3d at 644, 484 P.2d at 615, 94 Cal. Rptr. at 639.

51. *Id.* at 644 n.13, 484 P.2d at 615, n.13, 94 Cal. Rptr. at 639 n.13.

52. *Id.* See also Fitzgerald, *supra* note 15.

53. 144 Mont. 25, 394 P.2d 182 (1964).

provided: "For the purpose of promoting the public comfort, welfare, and safety, such plat and survey must show that at least one-ninth of the platted area [for land between 10 and 20 acres in size] . . . is forever dedicated to the public for parks and playgrounds."⁵⁴ The plats were rejected, and the subdivider brought an action in a state court to challenge the validity of the dedication requirement. The court, rejecting the subdivider's contention that the requirement was an unreasonable exercise of the police power, stated that in determining what is reasonable the court must look not only to past decisions, but also to future exigencies.⁵⁵ The court emphasized that the standard must keep pace with the growth of knowledge, the expanding economy, and human progress in general. It also noted that no law required the plaintiff to sell by subdividing and that since a city can impose any reasonable condition precedent to plat approval, in theory at least, the owner of a subdivision voluntarily dedicates sufficient land for streets in return for the advantages and privilege of having his plat recorded. Playground dedication, said the court, is not inherently different from dedication of streets and alleys. If the subdivision creates the specific need for parks, then it is reasonable to charge the subdivider with the burden of providing them.⁵⁶

The court stated that the question of when sufficient need exists had already been determined by statute, which was flexible enough to be used for subdivisions of all sizes. The court concluded that this determination of need was within the power of the legislature and, thus, will not be overturned if "there is any rational basis upon which [it] can be upheld."⁵⁷ Since it found no evidence justifying a different conclusion, the court upheld the statute.

CONCLUSION

Generally, courts have adopted one of three different tests when determining whether a condition of dedication is valid. The *Ayres* court concluded that such conditions will be upheld when they are reasonably related to the subdivision and the surrounding locality. The second test, which has been applied by Illinois courts in the *Rosen* and *Pioneer Trust* cases, requires the condition to be "specifically and uniquely attributable" to the subdivider's activities in order to be upheld.

54. *Id.* at —, 394 P.2d at 184.

55. *Id.* at —, 394 P.2d at 186.

56. *Id.* at —, 394 P.2d at 187.

57. *Id.* at —, 394 P.2d at 188.

The third test, which seems to have the widest following, upholds conditions of dedication when such conditions enhance the general public welfare, so long as it does not amount to confiscation. This latter test, the so-called *Walnut Creek* rule, is the broadest, and it allows a great deal of leeway to a locality in dealing with subdividers.

It is submitted that the *Ayres* test represents a middle ground between the other tests and should be followed by other courts. This approach would seem to avoid the rigidity of the Illinois rule while also avoiding the undue flexibility inherent in *Walnut Creek*. *Ayres* teaches that a rational physical connection should be present between the condition which is imposed and the effect that the proposed subdivision would have on the surrounding area. Total city needs would not be a proper consideration as they implicitly may be under the *Walnut Creek* rationale. It seems inappropriate to burden a subdivider with the needs of the general public welfare. Although such needs must be considered when regulating a city's growth, a subdivider should not be required to pay for such improvements when they are found to be only in the general public interest as opposed to having a rational connection with the subdivision. General public benefits should be paid for by the city