FORCED DEDICATIONS AS A CONDITION TO SUBDIVISION APPROVAL—*Associated Home Builders, Inc. v. City of Walnut Creek* (Cal. 1971).

In California, the Subdivision Map Act is the enabling statute for local supervision of subdivision development.[1] Under the statute, the control of design and improvement of subdivisions is vested in the city or county with a limited right of judicial review to examine the reasonableness of the enacted ordinances.[2] The act requires a subdivider to file a tentative map showing the design of the proposed subdivision for approval before the land can be legally sold.[3]

Through the exercise of its police power, the governing body can impose any reasonable condition which is designed to conform the subdivision to the safety and general welfare of the public.[4] These conditions often take the form of uncompensated forced dedications of land.

The California legislature's recent enactment of Business and Professions Code section 11546 illustrates the express authority granted to municipalities to demand exactions.[5] Section 11546 authorizes the governing body to require that a subdivider dedicate land or pay fees in lieu thereof for park or recreational purposes as a condition precedent to the approval of his subdivision map.[6] By enacting section 11546, the legislature removed any implication arising from the case law that a city was not privileged to request park dedication in proper instances.[7] Such legislation is the direct result

1. CAL. BUS. & PROF. CODE § 11500-641 (West 1964).
2. CAL. BUS. & PROF. CODE § 11525 Supp. I, 1965), *amending* CAL. BUS. & PROF. CODE § 11525 (West 1964).
3. CAL. BUS. & PROF. CODE § 11538 (West 1964).
4. The Subdivision Map Act permits the adoption of local ordinances as defined in the act and it has accordingly been held that such local ordinances may be adopted when they are supplemental to the act and are not in conflict therewith, and provided that they bear a reasonable relation to the purpose and requirements of the act. Kelber v. City of Upland, 155 Cal. App. 2d 631, 636, 318 P.2d 561, 564 (1957).
5. CAL. BUS. & PROF. CODE § 11546 (West 1965).
6. *Id.*
7. Associated Home Builders, Inc. v. City of Walnut Creek, 11 Cal. App. 3d 1129, 90 Cal. Rptr. 663 (1970).

of current municipal financial problems which make the provision of necessary services impossible.

Most cities have suffered a common experience when dealing with mass subdivisions.[8] Plats are approved, homes are sold, and new residents move into the community only to find that necessary public services have neither been installed nor are they forthcoming. A situation follows in which either the new residents are faced with inadequate services or the entire community is forced to bear higher taxes. Such taxes are in fact attributable to the new subdivisions. Most municipalities in the United States are presently experiencing a financial crisis due to inadequate economic resources to meet increasing demands for all types of municipal services.[9]

Some of this burden has already been alleviated by legal decisions. Courts have found no serious constitutional obstacles to subdivision ordinances requiring the installation of streets,[10] sidewalk sewers,[12] and drainage facilities.[13]

Unfortunately, the California decisions have neither been uniform in result nor in rationale. Much of this confusion was directly attributable to the supreme court's last major statement on the area in *Ayers v. City Council of Los Angeles*.[14] This case upheld the validity of forced dedication for streets, but the language of the opinion left a legacy of confusion in the lower courts.[15]

Recently, the supreme court again faced the problem of forced

8. For an example of city planning preparation, see City of San Diego Council Policy, 600-10 (1971). For an excellent discussion of many of the problems associated with the Subdivision Map Act in California, see Taylor, *Current Problems in California Subdivision Control*, 13 HASTINGS L.J. 344 (1962) [hereinafter cited as Taylor].

9. For another excellent general discussion and an illustration of the tremendous growth pressuring municipalities, see Heyman & Gilhool, *The Constitutionality of Imposing Increased Community Costs on New Suburban Residents Through Subdivision Exactions*, 73 YALE L.J. 1119 (1964) [hereinafter cited as Heyman].

10. Ayers v. City Council of Los Angeles, 34 Cal. 2d 31, 207 P.2d 1 (1949).

11. Evola v. Wendt Constr. Co., 170 Cal. App. 2d 21, 338 P.2d 498 (1959).

12. Longridge Estates v. City of Los Angeles, 183 Cal. App. 2d 533, 6 Cal. Rptr. 900 (1960).

13. City of Buena Park v. Boyer, 186 Cal. App. 2d 61, 8 Cal. Rptr. 674 (1960).

14. 34 Cal. 2d 31, 207 P.2d 1 (1949).

15. Taylor, *supra* note 8 at 352.

dedications. The interpretation of the language of the decision upholding the constitutionality of section 11546 promises to be of great importance in establishing the permissible limits of subdivision exactions.

The facts of the case itself are very brief. The City of Walnut Creek enacted ordinances pursuant to the authority granted by section 11546 implementing a general park and recreation plan. An association of home builders brought an action for declaratory and injunctive relief seeking a determination of the constitutionality of section 11546, and the city's ordinance and supplementing resolutions.

The trial court sustained the constitutionality of both the statute and the implementing ordinances. On appeal, the judgment was reversed in part.[16] Those portions of the city's ordinance and resolutions which provided for payment of an in lieu fee for other than land acquisition purposes were held invalid.[17]

Justice Mosk, expressing the unanimous view of the court, rejected most of the court of appeals' arguments and held that fees could be used for other than land acquisition purposes. However, the decision is most important in that the language of the court provides new guidelines for the permissible use of forced dedications. *Associated Home Builders, Inc. v. City of Walnut Creek, 4 Cal. 3d 633, 94 Cal. Rptr. 630, 484 P.2d 606 (1971).*

Before the supreme court, Associated contended that to avoid problems concerning equal protection and due process the dedication requirement must be justified by establishing a strict nexus. That is, the subdivision alone must be responsible for the increase in population which necessitates new park and recreational facilities.

The court strongly rejected Associated's argument. In considering Associated's contention the court re-examined the *Ayers* decision. Prior to *Associated,* the courts had uniformly interpreted *Ayers* as requiring that the necessity for the dedication be inherent in physical conditions created by the development itself.[18] The court held that such a view was incorrect.[19] It held that *Ayers* did

16. 11 Cal. App. 3d 1129, 90 Cal. Rptr. 663 (1970).

17. Fifty-three cities and counties submitted briefs amicus curiae in support of the city's contention that the language of the opinion invited litigation and that fees could be used for other than land acquisition purposes.

18. Scrutton v. County of Sacramento, 275 Cal. App. 2d 412, 79 Cal. Rptr. 872 (1969); Mid-Way Cabinet, etc. Mfg. v. County of San Joaquin, 257 Cal. App. 2d 181, 65 Cal. Rptr. 37 (1967).

19. Associated Home Builders, Inc. v. City of Walnut Creek, 4 Cal. 3d 633, 638, 94 Cal. Rptr. 630, 634, 484 P.2d 606, 610 (1971), *appeal dismissed,* 40 U.S.L. W. 3175 (U.S. Oct. 19, 1971) (No. 71-86). [hereinafter cited as *Associated*].

not require that the subdivision be individually responsible for the increased need.

However, it is suggested that the actual basis for the holding can be found in the great need for recreational facilities.[20] The court recognized the urgency of the problem and the need for immediate positive action. It reasoned that present and future demands for recreational facilities necessitate affirmative action on the part of government and that the increase in population has warranted such methods for protecting the general welfare of the public. Indeed, the court was emphatic in stating:

> We see no persuasive reason in the face of these urgent needs caused by present and anticipated future population growth on the one hand and the disappearance of open land on the other to hold that a statute requiring the dedication of land by a subdivider may be justified only upon the ground that the particular subdivider upon whom an exaction has been imposed will, solely by the development of his subdivision, increase the need for recreational facilities to such an extent that additional land for such facilities will be required.[21]

Associated's second major contention related to the imposition of fees. They argued that fees in lieu of dedication constituted a general revenue device since the benefit could not be directly related to the subdivision. The court, by upholding the language of 11546 and eliminating a strict nexus requirement, removed most of the grounds for Associated's argument.

Because of the uniform acceptance of the nexus requirement, courts had been unwilling to allow fees in lieu of dedication. This was sometimes the result of an inability to point to the specific benefit. Provisions of this nature have also failed since the courts viewed such requirements as exceeding the scope of the police powers.[22]

Before *Associated*, the leading California case concerning fees was *Kelber v. The City of Upland*.[23] This decision invalidated a local ordinance requiring the subdivider, as a condition of approval,

20. This is apparent from the court's own admission that the decision could be justified without the support of Ayers. *Associated*, 4 Cal. 3d at 638, 94 Cal. Rptr. at 634, 484 P.2d at 610.

21. *Associated*, 4 Cal. 3d at 639, 94 Cal. Rptr. at 634, 484 P.2d at 610.

22. *See, e.g.*, Santa Clara County Contractors Assoc. v. City of Santa Clara, 232 Cal. App. 2d 564, 43 Cal. Rptr. 86 (1965).

23. 155 Cal. App. 2d 631, 318 P.2d 561 (1957).

to pay a fee into a general park and school fund. The fees were to be used collectively for the benefit of the entire city. The city contended that the requirement was compatible with the tendency to extend the police power to include greater areas of public welfare.

The case was decided on grounds of lack of authority in the Subdivision Map Act. Language in the opinion suggested that, even with express legislative authorization, such an expansion of the police powers would be invalid.

The *Kelber* rationale had generally been upheld in decisions prior to *Associated.* Whenever general funds were used, the courts were quick to hold that such a procedure exceeds the scope of the act.[24] The view had been that such procedures were actually revenue measures made under the guise of the police power.

Section 11546 provides that fees may be charged in lieu of dedication and that only the payment of fees may be required in subdivisions containing fifty parcels or less.[25] This section clearly contains the express authorization that was absent in the ordinances involved in the *Kelber* decision.

In *Associated,* the court of appeals defined the term "recreational facilities" so as to limit the manner in which fees could be collected and used. It held that fees could be used to purchase land for recreational facilities when suitable land was not found within the subdivision. Fees could only be used to purchase other land and could not be used to purchase improvements such as bleachers, bats, balls, slides, swings, or other forms of capital improvements.

Here, however, the supreme court did not accept this position and held that the intent of the legislature[26] was to allow fees to be collected for the purchase and improvement of park and open space facilities and that these improvements were to include necessary equipment and development costs. Fees can now be required in lieu of dedication for purchase of land outside the subdivision. Fees may also be used to improve land already owned by the city which serves the needs of the subdivision.[27]

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24. *See, e.g.,* Santa Clara County Contractors Assoc. v. City of Santa Clara, 232 Cal. App. 2d 564, 43 Cal. Rptr. 86 (1965), and Wine v. Council of City of Los Angeles, 177 Cal. App. 2d 157, 2 Cal. Rptr. 94 (1960). However, Longridge Estates v. City of Los Angeles, 183 Cal. App. 2d 533, 6 Cal. Rptr. 900 (1960), held such an arrangement valid even though the benefit to the subdivider could not be specifically pointed out.

25. CAL. BUS. & PROF. CODE § 11546(g) (West 1965).

26. Cal. Report of the Assembly Interum Comm. on Municipal and County Gov't, v.6, no. 21, at 43 (1963-1965).

27. *Associated,* 4 Cal. 3d at 647, 94 Cal. Rptr. at 641, 484 P.2d at 617.

The use of fees in lieu of dedication should promote effective planning. Costs of development can be apportioned among many subdivisions, each of which has contributed to the total need.

As far as the court was concerned neither the requirement of fees nor the elimination of a strict nexus requirement presented a constitutional problem. The court felt that constitutional challenges to section 11546 were unfounded for two distinct reasons:

First, section 11546 provides its own standards which eliminate any need for a direct connection requirement.[28] The act requires that the dedication shall be used only for the purpose of providing park or recreational facilities to serve the subdivision.[29] The act does not require that the facilities be located on the land of the subdivider, but they must bear a reasonable relationship to the future inhabitants of the subdivision.[30]

The second basis for holding that section 11546 was within the proper exercise of the police power comes from the court's view that subdividing is not a right but a privilege.[31] Since the subdivider is seeking to acquire the advantages of subdivision, he has a duty to comply with reasonable conditions for dedication. The court held, based on authority found in *Ayers*, that eminent domain was not in issue since it is not unreasonable to force a subdivider to conform to municipal requirements.[32]

In light of section 11546's own limiting requirements, it appears that a discussion of the privilege argument was unnecessary. However, the topic is noteworthy in that it demonstrates a difficulty in explaining subdivision exactions.

None of the California cases to date have squarely faced the question of why an uncompensated taking for public use is unconsti-

28. CAL. BUS. & PROF. CODE § 11546(c) (West 1965).
29. *Id.*
30. In that this was a declaratory action, specific facts were not presented which would provide a meaningful example of when the court would find a reasonable relationship. However, the court did decline to rule on the validity of forced dedications for facilities like regional parks which are not conveniently located near the subdivision. The court stated that in view of § 11546, this was not in issue. This in itself provides some insight into the scope of the application of the statute.
31. *Associated*, 4 Cal. 3d at 638, 94 Cal. Rptr. at 634, 484 P.2d at 610.
32. *Id.*

tutional in all areas but that of subdivision controls.[33] The cases, from other jurisdictions, that do discuss the limits of the police power are not very precise in identifying the principles which underlie their judgments.[34]

In determining the validity of uncompensated dedications, the courts have alluded to several tests to define the constitutional limits of the government's power to regulate the use of land. The courts must first decide whether the purpose of regulation comes within the constitutionally acceptable objectives of the police power. In other words, does the purpose of the regulatory action properly involve the protection of health, safety, morals, or the general welfare?[35]

If the exaction is related to the public welfare, as it appears to be in *Associated,*[36] the courts must then decide if the exercise of the regulatory power is reasonable. In any determination of whether an exaction is reasonable the court must consider various factors. For example, in order to be valid, the court must decide that the regulation is not arbitrary or discriminatory and does not involve a taking.

Arbitrariness generally relates to a determination of whether there is any logical relationship between the regulation as applied and the posted objective.[37] The discrimination test is, at its core, the requirement of equal protection of the law. In respect to land use regulation, equal protection requires that similarly situated landowners must be treated in the same manner.[38]

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33. The two California Supreme Court cases specifically dealing with forced dedications fail to establish standards which would indicate the constitutional basis for their decisions. *Associated,* 4 Cal. 3d 633, 94 Cal. Rptr. 630, 484 P.2d 606 (1971); Ayers v. City Council of Los Angeles, 34 Cal. 2d 31, 207 P.2d 1 (1949).

34. The courts have been unable or unwilling to establish the definite limits of the police power. People v. Brazee, 183 Mich. 259, 149 N.W. 1053 (1914), *aff'd* 241 U.S. 340 (1916).

35. Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); Miller v. Board of Public Works, 195 Cal. 477, 234 P. 381 (1925), *appeal dismissed,* 273 U.S. 781 (1927).

36. The protection and conservation of the natural resources of the state is in the general welfare and serves a public purpose, and so constitutes a reasonable exercise of the police power. Peabody v. County of Vallejo, 2 Cal. 2d 351, 40 P.2d 486 (1935); Tulare Irrigation District v. Lindsay-Strathmore Irrigation District, 3 Cal. 2d 489, 45 P.2d 972 (1935).

37. Kelber v. The City of Upland, 155 Cal. App. 2d 631, 318 P.2d 561 (1957).

38. Any attempted exercise of the police power which results in a denial of the equal protection of the laws is invalid. Smith v. Cahoon, 283 U.S. 553 (1931).

The taking test seeks to distinguish between situations in which regulation is proper and those in which eminent domain must be used to accomplish the public objective.[39] The general rule is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.[40] If there is a taking, the power of eminent domain is involved and compensation is mandatory.[41] If, on the other hand, there is only regulation, it is the police power which is being used and no compensation is required.[42]

No one test has been developed which can clearly separate permissible regulation from prohibited taking.[43] However, two different rationales tend to be of some importance in determining the reasonableness of a forced dedication.

The first approach seeks to weigh the disadvantages imposed upon the owners of the regulated land against the advantages flowing to the community from the regulation.[44] A second view, which is of particular importance in *Associated*, seeks to determine whether the regulation confers on the land owner a correlative benefit.[45] That is, does the land owner receive a benefit that sufficiently compensates for the enforcement of the regulation? If, after comparing any advantage to the burden, no correlative benefit can be established, the regulation constitutes a taking.

Subdivision exactions have been treated as a sub-species of land regulation but have been subject to the same constitutional limitations as zoning and other more common forms of land regulation.[46]

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39. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).
40. *Id.*
41. An exception to the constitutional requirement of compensation for a taking is recognized in emergency situations. In this narrow exception the government may, by exercising the police power, take private property.
42. *See, e.g.*, 11 E. MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS, § 32.04 (3d ed. 1964).
43. The boundary line of the police power "cannot be determined by any general formula in advance." Hudson Water Co. v. McCarter, 209 U.S. 349, 355 (1908).
44. This approach has been credited to Justice Holmes' opinion in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922).
45. Plymouth Coal Co. v. Pennsylvania, 232 U.S. 531 (1914) (applied the correlative benefit rationale).
46. *See, e.g.*, Jenad Inc. v. Village of Scarsdale, 18 N.Y.2d 78, 218 N.E.2d 673 (1966).

Unlike zoning and other forms of land regulation, the permissible limits of subdivision control have been unclear due to the courts' reluctance to squarely face the issues.[47] In *Associated*, as in most similar cases, the reader is given no indication of what standards were used to determine the constitutionality of the statute. Justifying subdivision exactions by characterizing subdividing as a privilege provides no understanding whatsoever.[48]

The weakness of the decision, in not providing constitutional justification, becomes apparent when certain arguments are isolated for consideration.

The court held, without explaining why, that section 11546 did not deny equal protection of the law as applied to subdividers. This would leave one to assume that all developers will be treated similarly in respect to park dedications. Anyone who greatly increases a city's population density would be forced to contribute. Such a view would be necessary to support the court's holding that section 11546 is not discriminatory.[49]

To the contrary, it could be argued that not all developers are forced to contribute. Builders of apartment complexes are in no way required to provide any type of facilities. This is true despite the fact that apartment builders are responsible for the greatest population density. Associated contended that both apartment builders and subdividers were in a similar class and that any distinction between the two constituted discrimination.

The court did not answer this challenge with an argument that would settle the constitutional issue. The court tried to establish a meaningful distinction between the two types of developers by arguing that the apartment builder did not use as much land as the subdivider and that excessive land use was the basis for section 11546.[50]

In no way does this satisfy the constitutional test of requiring reasonableness. Since two landowners might be responsible for the

47. However, Mid-Way Cabinet, etc. Mfg. v. County of San Joaquin, 257 Cal. App. 2d 181, 65 Cal. Rptr. 37 (1967), provides an adequate constitutional discussion.

48. The court stated that the clear weight of authority upholds the constitutionality of statutes similar to § 11546. The court felt that its supporting cases from other jurisdictions were decided on the basis of the privilege theory. *See, e.g.*, Billings Properties, Inc. v. Yellowstone County, 144 Mont. 25, 394 P.2d 182 (1964); Jordon v. Village of Menomonee Falls, 28 Wis. 2d 608, 137 N.W.2d 442 (1965); and Jenad Inc. v. Village of Scarsdale, 18 N.Y.2d 78, 218 N.E.2d 673 (1966).

49. See note 38, *supra*.

50. *Associated*, 4 Cal. 3d at 642-3, 94 Cal. Rptr. at 638, 484 P.2d at 614.

same degree of population growth, it would seem that to force one and not the other to contribute is clearly discriminatory.

It is true, of course, that apartment builders do not come under the authority of the Subdivision Map Act since they do not subdivide the land. Nevertheless, if the purpose of the regulation is to force new residents to pay their fair share of municipal costs, the court failed to specifically state a constitutional basis for not including both types of developer in the same class.[51]

A possible solution to this problem might be the passage of additional legislation requiring exactions from large apartment developers. Such legislation could be patterned after certain portions of the Map Act. This solution would have the advantage of providing more needed recreational facilities while meeting a possibly valid constitutional challenge.

Another constitutional question left unanswered is the result of forcing the subdivider to pay the entire cost of the new recreational facility. When dealing with improvements like interior streets it does not seem unreasonable to force the developer to completely assume the cost. There is little doubt that the primary purpose of the regulation relates to the new residents of the subdivision. A developer must provide for ingress and egress and it is immaterial that other residents of the community might also be incidentally benefited.[52]

However, when dealing with improvements like parks, the benefits to the entire community cannot be so easily discounted. For example, since most new subdivisions are basically separate communities, interior streets are primarily used only by the new residents and their guests. This situation can be contrasted to a new park that is likely to attract residents from the entire community simply because it is a new facility.

The court failed to show how the subdivider has been benefited to such an extent that it is permissible to force him to individually pay the entire cost of the new facility.[53] The question becomes:

51. *Id.*
52. The manner in which dedicated streets were to be used is specifically discussed in *Ayers*. Ayers v. City Council of Los Angeles, 34 Cal. 2d 31, 207 P.2d 1 (1949).
53. *See* note 24, *supra*.

is being located near a park such a benefit to the future residents that they should be forced to pay its entire cost? Granted, other citizens of the community may use the park less, but any difference in the amount of use is outweighed by the fact that the other residents in no way had to share in the park's development cost.

The court, relying on *Ayers*, again held that it was immaterial that other citizens would also be benefited by the recreational facility.[54] It appears obvious that this rationalization is nothing but a restatement of the basic constitutional issue to be decided.

Forcing only one group within the community to establish most of the new recreational facilities does not appear to be particularly fair. However, it is felt that the court was unquestionably correct in recognizing that the urgent need for open space and recreational facilities justified any inequities that might exist in the application of section 11546. Other authorities agree with this position.

> In an ideal world the problems of municipal finance would be met more surely and just as fairly by some system more thorough than subdivision exaction. In the meantime, municipalities must meet the demands of the day as best they can, finding a few hundred thousand dollars here and there, whenever they can. So long as our sense of fairness is not seriously affronted—and exactions of the sort we have discussed here fall well within that limit—municipalities must be left to find their salvation.[55]

Section 11546 was favorably received by the court because of the statute's own clarity. It is clear on its face and does provide its own limiting provisions. Many forms of dedication are not based on the same express, clear authority found here. Since it is difficult enough to establish constitutional justification for clear statutes demonstrating the express authority of the legislature, the courts should be relucant to uphold dedications based on strained readings of the Map Act. The courts should exercise restraint in upholding municipal ordinances which have not been specifically authorized by the legislature until they are ready to squarely face constitutional problems.

The legislature should also demand that municipalities, who use the Map Act to force dedications, provide sophisticated cost accounting techniques as a basis for determining the extent of exactions. Cost accounting is a method available to relate cost and dedication to potential users in order to avoid questions of discrimination and taking. By using cost accounting a city could divide equitably the cost of new facilities between new residents in different subdi-

54. *Associated*, 4 Cal. 3d at 638, 94 Cal. Rptr. at 634, 484 P.2d at 610.
55. Heyman, *supra* note 9 at 1157.

visions, and between new residents in subdivision developments and all of the community's other residents. Modern cost accounting techniques allow accurate calculation of costs for various facilities allocable to new subdivisions. When applied, to the entire community, figures can be established which guarantee that new residents pay no more than their fair share of the municipal cost.

CONCLUSION

The *Associated* decision will be welcomed by conservationists and planning commissions who have long insisted that the provision of recreational areas in subdivisions is a necessity. Section 11546 can now be used to provide facilities that will benefit subdivision residents and allow implementation of effective city recreational plans.

In light of precedents allowing other forms of forced dedication, section 11546 does not appear to be unreasonable. As the court pointed out, it contains its own limitations which insure that the exactions will relate to the subdivision. The court did not err in allowing the section to stand. The real criticism of the court can only be that it evaded the opportunity to establish firm constitutional grounds for the validity of subdivision exactions in general.

As other forms of forced dedications are challenged, the welfare of the public will be of the utmost importance. Applying the rationale behind the *Associated* decision, environmentalists and city planners should be able to protect our communities and provide our citizens with the necessary facilities for effective urban living.

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