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THE CONSTITUTIONALITY OF IMPOSING INCREASED COMMUNITY COSTS ON NEW SUBURBAN RESIDENTS THROUGH SUBDIVISION EXACTIONS

IRA MICHAEL HEYMAN*
THOMAS K. GILHOOL†

EXTRAORDINARY growth in suburban population is creating complex physical, social, and fiscal problems.[1] Although these problems have been cast upon an archaic structure of local government which often impedes their efficient and equitable solution, answers to the problems cannot be deferred until the structure of local government is modernized. Nor are the affected suburban communities all alike; they include "employing," "mixed," and "residential" centers, and range from old, established, higher income municipalities to sparsely settled, unincorporated areas of still uncertain character.[2] In spite of their differences, most of these communities have the common problem of providing necessary capital facilities and service levels for newcomers without imposing extraordinary revenue burdens on present residents.

Local governments already raise and spend vast sums of money. In 1952, municipalities spent about 8.4 billion dollars to support such functions as protection of persons, transportation, education, sanitation, welfare, and recreation.[3] The 1961 bill was 16.5 billion dollars.[4] Of the 1961 total local revenue of 15.8 billion dollars over 47 percent came from local taxes, 37 percent from charges for utilities and other local sources. Less than 16 percent came from

*Professor of Law, University of California, Berkeley; Visiting Professor of Law, Yale University, 1963-64.

†Member, Editorial Board, YALE LAW JOURNAL, 1962-64.

1. The 1960 urban population of the United States was 125.3 million, an increase of 29% over 1950's 96.8 million. Of the urban population, 112.8 million resided within Standard Metropolitan Statistical Areas, (SMA's), areas in and nearby central cities, 58 million lived within the central cities, and the balance of 54.8 million lived outside them.

During 1950-1960 the central cities grew some 10.8% in population. This growth was concentrated in a small number of Southern and Western cities. Much of it resulted from annexation. Most central cities lost population. During the same 10 years in areas within SMA's but outside of central cities there was a 48.5% increase in population. See U.S. BUREAU OF THE CENSUS, STATISTICAL ABSTRACT OF THE UNITED STATES 1963; THE MUNICIPAL YEAR BOOK 1963.

These statistics indicate immense present growth in the suburban areas surrounding central cities. Demographers predict that there will be no appreciable change in this pattern. See generally BOGUE, THE POPULATION OF THE UNITED STATES (1959).

2. See generally DOBRINER, THE SUBURBAN COMMUNITY (1958).

3. Manvel, *Trends in Municipal Finances,* in THE MUNICIPAL YEAR BOOK, 1963 264, 265.

4. *Ibid.*

state or federal subventions.[5] Studies in two diverse metropolitan areas indicate that residential property owners are carrying a major share of the revenue burden.[6] As the property tax by its uniform application makes no distinction between old and new residents, it is apparent that to the extent that increasing local costs are generated by newcomers to a community, older residents may be penalized by the newcomers.

The costs generated by new residents may be grouped conveniently into two classes: capital costs (new streets, sewers, waste disposal plants, schools, parks, libraries, water mains, and fire and police stations) and service costs (additional public employees, maintenance, and the like).

Although the disparity in growth rates between various communities is immense, the per capita expense for new capital facilities is strikingly responsive to population growth. Analysis of municipal expenditures in a typical metropolitan area, for instance, shows a direct relationship between the growth rate of a community and its bonding for schools and libraries.[7] And service

5. *Ibid.*

6. The studies of the New Haven, Connecticut Metropolitan Area and the San Francisco Bay Area in California are, respectively, QUADRENNIAL REPORTS OF INDEBTEDNESS, RECEIPTS AND EXPENDITURES OF MUNICIPALITIES 1960 (Conn. Public Doc. #22); DAVISSON, FINANCING LOCAL GOVERNMENTS IN THE SAN FRANCISCO BAY AREA (1963).

In the Bay Area 69% of the 1960 revenues were provided locally while 31% came from state and federal grants-in-aid and shares of state imposed and collected taxes and license fees. In the New Haven Area 86% of the 1960 revenues were provided locally while 14% came from state and federal sources. In the Bay Area and New Haven Area, respectively, 51% and 75% of all local revenues were from property taxes. These latter percentages are somewhat higher than the national figures of 49.5% and 44.7% for 1952 and 1961 respectively. See Manvel, *supra* note 3, at 266. These national percentages, of course, do not disclose any distinctions which might exist between large central cities and suburbs.

7. The following table shows growth rates, per capita school and library bonding, and per capita locally financed educational expenses in the towns and cities of the New Haven Standard Metropolitan Area as of 1960. The New Haven SMA is made up of the towns of Branford, East Haven, Guilford, Hamden, North Haven, Orange, West Haven, and Woodbridge and the City of New Haven.

Town or City	*Growth Rate 1950-1960 (%)*	*Per Capita School and Library Bonding (in dollars)*	*Per Capita Locally Financed Educ. Exp. (in dollars)*
Orange	181.9	366	91.3
Woodbridge	83.6	379	96.3
East Haven	75.1	131	52.2
North Haven	68.7	299	69
Guilford	55.4	229	69.2
Branford	51.8	166	59.5
Hamden	38.2	141	61.9
West Haven	34.3	81	46.3
New Haven	7.5	70.2	40

Population statistics are from U.S. CENSUS OF POPULATION: 1960, CHARACTERISTICS OF POPULATION, Vol. 1, pt. 8, at 12. Revenue, bonding, and expenditure data are from QUADRENNIAL REPORTS OF INDEBTEDNESS, RECEIPTS AND EXPENDITURES OF MUNICIPALI-

charges, at least for some items, tend to increase according to population in the same way as bonding expenses.[8] The revenue burden for services is cast equitably on new and old residents. The taxes of the old residents have been paying for a certain number of employees. New employees are added to service new residents. But the cost of the new employees probably is covered by the taxes levied on the new residents; hence the burden on older residents is not affected appreciably unless the newcomers demand increased service levels. In such case the old residents share equally in the increased levels. Further, since service charges mount gradually in rough proportion to the number of new residents, no fiscal "emergency" is normally presented by an increase in service charges due to new population. Neither of these propositions is true for capital expenditures. Consider, for instance, the construction of a new school to house the children of newcomers. If general taxes of the community are the main source of funds for the new school, either the old residents pay the whole bill, if land acquisition and construction costs come out of current revenue, or they pay a good portion of the bill for the additional school, if, as is usual for school construction, the costs are paid out of receipts from bonds which will be paid off from future general tax receipts.[9] Moreover, to the extent that capital improvements are paid out of current revenues (which is often the case for certain kinds of improvements such as trunk line sanitary and storm sewers), there is an appreciable drain on revenue resources in a specific year and a fiscal "emergency" is created.

This article deals with the power of a municipality to impose some of the capital costs generated by newcomers on a subdivider-developer, and thereby to shift these costs to new residents, by requiring the subdivider-developer to make various improvements, to dedicate land, or to pay various fees as a condition of residential subdivision and development. We shall examine the constitutional limitations on subdivision exactions first, as an exercise of a municipality's police power and, then, as an exercise of its taxing power. Finally we shall explore the considerations — fiscal necessity, socio-economic exclusion, variety in the suburban landscape and adequate levels of service — which should be taken into account in drafting enabling acts which authorize exactions.

Requiring newcomers to pay part of their way is not particularly new. Municipalities, in the twenties and thirties, began to require land developers to install improvements — especially streets — in order to deter premature and excessive subdivision and to protect ratepayers from the costs of municipally installed improvements which remained unused when lots were not sold.[10]

TIES 1960 (Conn. Public Doc. #22). See also Nash, Financing Local Government: An Empirical Study of Urban and Suburban Dwellers' Benefits and Burdens (unpublished paper in Yale Law Library).

8. See *"Per Capita Locally Financed Educ. Exp."* column in note 7 *supra.*

9. Of course bonding helps shift some costs to future newcomers.

10. See Reps, *Control of Land Subdivision By Municipal Planning Boards,* 40 CORN. L.Q. 258, 266 (1955).

Since then the land developer largely has been displaced by the subdivider-developer who buys raw land, subdivides, improves, builds houses, and sells.[11] Coincidentally the number of municipalities which impose exactions and the number and type of exactions have increased.[12] Most municipalities now require the subdivider to provide interior streets, sidewalks, and sanitary and storm sewers. Many municipalities require the subdivider to share the costs of improvements such as water mains, sewers, and "oversize" facilities. Some municipalities, by requiring dedication or reservation of sites, or by exhortation, negotiation, or purchase have exacted from the subdivider some contribution to school and recreation costs.

Courts have found no serious constitutional obstacles to subdivision ordinances requiring the installation of interior streets, sidewalks, and sewers. Recently, however, a number of courts have balked at provisions requiring land dedications or fees for schools and parks. But few of the old or new cases are very precise in identifying the constitutional principles which underlie their judgments.

THE POLICE POWER

The Scope of Regulation

In defining the constitutional scope of governmental power to regulate the use of land, courts have asked, first, whether the conceived purpose of a regulation comes within the constitutionally acceptable objectives of the police power: the protection of health, safety and morals, or the general welfare. Courts have next examined whether the specific exercise of regulatory power is "reasonable" or whether it exceeds these various limitations on the exercise of regulatory power.

Before zoning became a familiar means of use regulation, courts treated land regulations as legislative extensions of common law nuisance principles. A landowner could be prohibited from carrying on activities which the legislature viewed as unreasonably interfering with the enjoyment of land by other landowners. Thus, statutes which barred noxious uses in residential

11. See THE TWENTIETH CENTURY FUND, AMERICAN HOUSING 75, 96 (1944); U.S. DEPT. OF LABOR, STRUCTURE OF THE RESIDENTIAL BUILDING INDUSTRY IN 1949 (Bull. 1170, 1954) [discussed in BEYER, HOUSING: A FACTUAL ANALYSIS 83 (1958)]; Rogg, *Another Look at Some Factors in Determining Housing Volume,* in 1960 PROCEEDINGS, CONFERENCE ON SAVINGS AND RESIDENTIAL FINANCING 31, 46-48; and Maisel, *Background Information on Costs of Land for Single Family Housing,* in Appendix to GOVERNOR'S ADVISORY COMMISSION ON HOUSING PROBLEMS, REPORT ON HOUSING IN CALIFORNIA 221, 274-75 (April, 1963).

12. TENNESSEE STATE PLANNING COMMISSION, SUBDIVISION IMPROVEMENT COSTS: WHO PAYS FOR WHAT (1958) summarizes studies conducted by the Urban Land Institute and reported originally in Technical Bull. No. 2 7(1955), by the League of Virginia Municipalities (1955), the Institute of Public Service of the University of Connecticut (1955), and its own survey of Tennessee municipalities (1958).

For pre-World War II practices see LAUTNER, SUBDIVISION REGULATIONS Ch. VI (1941).

neighborhoods, such as brickyards [13] and stables,[14] statutes which prescribed height limitations to lessen the danger of fire and congestion,[15] and statutes which established set-back lines to assure adequate light and air were upheld [16] as valid legislative efforts to proscribe nuisance-like uses. Similarly, the early cases, including the landmark decision of *Village of Euclid v. Ambler Realty Co.*,[17] treated zoning as comprehensive regulation to avoid nuisance-like impacts generated by particular uses in particular areas, for instance commercial establishments in single family dwelling areas.[18]

More recently the permissible objectives of land regulation have been expanded considerably as courts have departed from nuisance analysis and have relied on the general welfare aim of the police power doctrine. The courts have thus upheld such regulations as industrial-only zoning [19] and large minimum acreage zoning.[20] The first has been seen as advancing the general welfare by attracting industry to provide employment and to increase the community's tax base,[21] the second as protecting the character of the community.[22] This expanded conception of valid regulatory objectives results from the fact that the validity of land regulation is usually treated as a constitutional question with the normal presumption in such cases in favor of legislative judgments. With the progression from nuisance (pre-zoning) to nuisance-like (early zoning) to general welfare (recent zoning), the permissible objectives test, except as it has been incorporated in the "taking" test, has in most jurisdictions ceased to be a serious barrier to regulation.

13. Hadacheck v. Sebastian, 239 U.S. 394 (1915).

14. Reinman v. Little Rock, 237 U.S. 171 (1915).

15. Welch v. Swasey, 214 U.S. 91 (1909).

16. Windsor v. Whitney, 95 Conn. 357, 111 Atl. 354 (1920); Lincoln Trust Co. v. Williams Bldg. Corp., 229 N.Y. 313, 128 N.E. 209 (1920); Wulfsohn v. Burden, 241 N.Y. 288, 150 N.E. 120 (1925); Goreib v. Fox, 274 U.S. 603 (1927).

17. 272 U.S. 365 (1926).

18. *Id.* at 387-88. See also Bettman, *Constitutionality of Zoning*, 37 HARV. L. REV. 834, 836, 839 (1924).

19. *E.g.*, People *ex rel.* Skokie Town House Builders v. Village of Morton Grove, 16 Ill. 2d 183, 157 N.E.2d 33 (1959); State *ex rel.* Berndt v. Iten, 259 Minn. 77, 106 N.W.2d 366 (1960); Gruber v. Mayor and Tp. Comm. of Raritan Tp., 37 N.J. 1, 186 A.2d 489 (1962).

20. *E.g.*, Senior v. Zoning Commission of Town of New Canaan, 146 Conn. 531, 153 A.2d 415 (1959) (4 acres); Honeck v. County of Cook, 12 Ill. 2d 257, 146 N.E. 2d 35 (1957) (5 acres); Flora Realty & Investment Co. v. City of Ladue, 362 Mo. 1025, 246 S.W.2d 771 (1952), *appeal dismissed*, 344 U.S. 802 (1953) (3 acres); Fischer v. Bedminster Township, 11 N.J. 194, 93 A.2d 378 (1952) (5 acres); *Contra*, Christine Bldg. Co. v. City of Troy, 367 Mich. 508, 116 N.W.2d 816 (1962); Hitchman v. Oakland Tp. 329 Mich. 331, 45 N.W.2d 306 (1951).

21. See cases cited at note 19, *supra;* and Madsen, *Non-Cumulative Zoning in Illinois*, 37 CHI-KENT L. REV. 108 (1960). Not all courts which have been concerned with exclusive industrial zoning have reacted like the New Jersey, Illinois, and Minnesota courts. Rather, they have seen as the only permissible objective for such zoning the protection of the health and safety of the prospective residential occupants in industrial areas. This is probably a correct characterization of Corthouts v. Town of Newington,

Courts customarily consider the "reasonableness" of an exercise of regulatory power under four rubrics: "arbitrariness," "confiscation," "discrimination," or "taking." Each represents a cluster of considerations that may be intertwined in any particular case, but here each will be treated separately.

"Arbitrary" has two meanings. The first, the more conventional one, is that there is no rational relation between the regulation as applied and the posited objective.[23] The other meaning attributed to "arbitrary" is that the detriment visited on the landowner subject to the regulation is not outweighed by the public good realized by its application.[24] Courts in different jurisdictions tend to adopt one or the other approach. The first leads to judicial deference to legislative judgments; the second establishes the courts as ultimate arbiters in nearly all regulation disputes.

The "confiscation" limitation assures that however justifiable the objectives of a regulation, it will not deprive the regulated land of all reasonable value.[25] It represents the furthest boundary of a constitutional balance between individual property rights and the community's interests in the use of land. As a minimum, property right means the right to avoid regulation which destroys

140 Conn. 284, 99 A.2d 112 (1953) (although the holding was that the zoning was confiscatory because there was no present or foreseeable demand for industrial sites); Comer v. City of Dearborn, 342 Mich. 471, 70 N.W.2d 813 (1955) (although here too industrial demand was apparently non-existent and there were a number of non-conforming residences near the subject site); Lamb v. City of Monroe, 358 Mich. 136, 99 N.W.2d 566 (1959) (where the zoning was upheld mainly because the subject site was in the midst of present industrial uses but also because blight would otherwise occur and demands of homeowners to ameliorate noise, smoke and the like emanating from the industrial uses would probably cause undesirable frictions); and, perhaps, Roney v. Board of Supervisors, 138 Cal. App. 2d 740, 292 P.2d 529 (1956) (where the court stressed the protection of residents but also the prevention of blight and the gain realized by a municipality's residents from the effective use of property for industrial purposes).

22. See cases cited at note 20, *supra*.

23. Often the inquiry is whether the regulation supports permissible enabling act objectives, *e.g.*, Pierro v. Baxendale, 20 N.J. 17, 118 A.2d 401 (1955) and Fanale v. Borough of Hasbrouck Heights, 26 N.J. 320, 139 A.2d 749 (1958) where total exclusion of motels and of apartment houses respectively were found reasonably related to permissible objectives. But sometimes the question is whether the exclusion of a specific use from a zone in which arguably similar uses are permitted is arbitrary. See, *e.g.*, Katobimar Realty Co. v. Webster, 20 N.J. 114, 118 A.2d 824 (1955) (exclusion of a commercial use from an industrial zone); Vickers v. Township Comm., 37 N.J. 232, 181 A.2d 129 (1962) (exclusion of trailers from an industrial zone in which single-family houses were permitted); Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (exclusion of apartments from a single family residential zone).

24. *E.g.*, Hartung v. Village of Skokie, 22 Ill. 2d 485, 177 N.E. 2d 328 (1961); Bauske v. City of Des Plaines, 13 Ill. 2d 169, 148 N.E.2d 584 (1957); LaSalle Nat'l Bank v. County of Cook, 12 Ill. 2d 40, 145 N.E.2d 65 (1957); Krom v. City of Elmhurst, 8 Ill. 2d 104, 133 N.E.2d 1 (1956). See Babcock, *The Illinois Supreme Court and Zoning: A Study in Uncertainty*, 15 U. CHI. L. REV. 87, 88, 93-4 (1947); Babcock, *The New Chicago Zoning Ordinance*, 52 NW.U. L. REV. 174, 175 (1957); Babcock, *The Unhappy State of Zoning Administration in Illinois*, 26 U. CHI. L. REV. 509, 532-40 (1959).

25. See generally 1 RATHKOPF, ZONING AND PLANNING 6-1 to 6-5 (3d ed. 1962). Usually the objection that a regulation is confiscatory arises in judging the validity of

the possibility of economic return. The limitation is illustrated by *Arverne Bay Construction Co. v. Thatcher*,[26] where residential-only zoning of land when there was no readily foreseeable market for such purpose was held invalid because the owner could make no effective economic use of his property in the interim.

The "discrimination" limitation is, at its core, the requirement of the equal protection of the law. It encompasses general ideas of fairness and equal treatment and in the context of land use regulation means that similarly situated landowners may not be treated dissimilarly.[27] A typical discrimination dispute was litigated in *Ronda Realty Corp. v. Lawton*,[28] where a regulation required apartment house owners to provide off-street parking facilities but imposed no comparable requirements on the owners of hotels and boarding houses. The case where a landowner is preferred over his neighbors raises the same problem. In zoning cases, for example, the court must find that a

a seemingly proper regulation as applied to a specific parcel of property. Often the parcel is located on a zone boundary and adjoining uses substantially interfere with the permitted use in the subject zone. *E.g.*, Skalko v. City of Sunnyvale, 14 Cal. 2d 213, 93 P.2d 93 (1939) (property zoned residential adjacent to canneries in a bordering industrial zone); Bassey v. City of Huntington Woods, 344 Mich. 701, 74 N.W.2d 897 (1956) (property fronting on a heavily traveled highway zoned for single-family residences). The establishment of minimum frontages and side and rear yards raises similar problems, *e.g.*, Robyns v. City of Dearborn, 341 Mich. 495, 67 N.W.2d 718 (1954). So also does physical change, *e.g.*, Forde v. City of Miami Beach, 146 Fla. 676, 1 So. 2d 642 (1941) (hurricane damage required extensive sea walls which rendered property uneconomic for single-family homes).

Loss of value short of nearly total loss normally is held not to render a regulation confiscatory. See cases cited in RATHKOPF, *op. cit. supra* at 6-10 to 6-20. But such loss might lead a court to determine that a specific regulation is arbitrary. See note 23 *supra*.

Occasionally, regulations which prohibit nuisance type activities render worthless land previously used for such activities but nevertheless are upheld. See, *e.g.*, Consolidated Rock Products Co. v. City of Los Angeles, 57 Cal. 2d 515, 370 P.2d 342, *appeal dismissed*, 371 U.S. 36 (1962). The decision is criticized in Note, 50 CALIF. L. REV. 896 (1962).

26. 278 N.Y. 222, 15 N.E.2d 587 (1938).

27. The "equal protection" clause of the 14th amendment secures equality of right by forbidding arbitrary discrimination between persons similarly circumstanced. Classification is consistent with this principle if it be reasonably based on the public policy to be served. It is not necessarily fatal that the classification be wanting in purely theoretical or scientific uniformity or mathematical nicety or that there be some inequality in practice. The principle bars invidious discrimination.

* * *

It suffices if the classification bears a reasonable and just relation either to the general object of the legislation as to some substantial consideration of public policy or convenience or the service of the general welfare. If that be the case, the action taken is not arbitrary or discriminatory in the invidious sense.

Schmidt v. Board of Adjustment, 9 N.J. 405, 418-19, 422, 88 A.2d 607, 613, 615 (1952) (citations omitted).

28. 414 Ill. 313, 111 N.E.2d 310 (1953). The evil to be remedied was congested streets. The court saw no justification in singling out one generator of cars to reduce the evil while exempting comparable uses which in the court's view probably produced more traffic congestion.

zoning amendment is "in accordance with a comprehensive plan" to avoid invalidation on the grounds of "spot zoning."[29] The role of the courts, with deference to the legislative judgment, is to determine whether the facts merit the different classification and the resultant different treatment.[30]

The "taking" limitation has often been intertwined with the definition of permissible objectives of regulatory power. It seeks to distinguish between situations in which regulation is proper and those in which eminent domain must be used to accomplish the public objective. One of the chief ends sought is to prevent the costs of use limitations beneficial to the public from being imposed on landowners simply on the basis of the location of their property.

A typical taking dispute occurred in *Vernon Park Realty Co. v. City of Mount Vernon*.[31] There the municipality zoned for parking use only one parcel of land which was located downtown and which until that time had been used as a parking lot. The court held that the public objective — to reduce traffic congestion — could be accomplished only by eminent domain. Other examples include a case in which a municipality's beach front, the property of one owner, was zoned for recreation purposes only,[32] a case in which use and height restrictions were imposed on properties surrounding an airport,[33] and a case in which a municipality designated certain areas for probable acquisition and provided that no compensation would be paid for improvements erected within three years after the designation.[34]

No one definitive theory has been constructed to separate permissible regulation from prohibited taking. Amidst parallel lines of precedent, however, four approaches are discernible.

One approach seeks to weigh the disadvantages imposed on the owners of the regulated land against the advantages flowing to the community from the regulation. This approach originated in Justice Holmes' opinion in *Pennsylvania Coal Co. v. Mahon*.[35] It has been characterized by subsequent authorities

29. See 1 RATHKOPF, ZONING AND PLANNING (3d ed. 1962) 26-1 to 26-23.

30. The tendency of courts in economic regulation cases as distinguished from civil rights cases is to read prohibitory effects of the equal protection clause narrowly. See, *e.g.*, Railway Express Agency v. New York, 336 U.S. 106 (1949); Williamson v. Lee Optical Co., 348 U.S. 483 (1955). *But see* Morey v. Doud, 354 U.S. 457 (1957).

This generalization also applies to land use regulations, see cases cited in 1 RATHKOPF, *op. cit. supra*, at Ch. 7, although it is clear that the possibility of improper discrimination by administrators concerns courts which have considered flexible regulatory devices. See, *e.g.*, Eves v. Zoning Bd. of Adjustment, 401 Pa. 211, 164 A.2d 7 (1960); Rodgers v. Village of Tarrytown, 302 N.Y. 115, 96 N.E.2d 731 (1951); Huff v. Board of Zoning Appeals, 214 Md. 48, 133 A.2d 83 (1957).

31. 307 N.Y. 493, 121 N.E.2d 517 (1954).

32. McCarthy v. City of Manhattan Beach, 41 Cal. 2d 879, 264 P.2d 932 (1953).

33. *Compare* Yara Engineering Corp. v. City of Newark, 132 N.J.L. 370, 40 A.2d 559 (1945), *with* Harrell's Candy Kitchen v. Sarasota-Manatee Airport Authority, 111 So. 2d 439 (Fla. 1959).

34. Miller v. City of Beaver Falls, 368 Pa. 189, 82 A.2d 34 (1951).

35. 260 U.S. 393 (1922).

as the definitive approach to the regulation-taking problem.[36] In truth the approach is but a restatement of the second "arbitrariness" test, and is not very helpful in those situations in which the taking problem is most acute. In *Mount Vernon,* for example, the disadvantage to the individual landowner (the dimunition of the land's value by the restriction to parking uses) cannot be weighed meaningfully against the gross advantages to the public (the parking space, the ease of traffic, both at no cost).[37] In fact in *Mahon* itself the weighing test was not used to determine whether the challenged regulation was a taking.[38]

Another approach avoids the more subtle questions by focussing solely on the economic uses for a property which are left after regulation. In Judge Fuld's dissent in *Mount Vernon,* for instance, the question is said to be whether the regulation "so restricts the use of property that it cannot be used for any reasonable purpose."[39] This approach establishes the "confiscation" limitation as the sole criterion for taking.[40]

A third approach, the approach of Professor Allison Dunham, is largely

36. This is so often repeated that exhaustive citation is impossible. Typical expositions of the proposition are contained in Kratovil and Harrison, *Eminent Domain — Policy and Concept,* 42 CALIF. L. REV. 596, 609-10 (1954); and Note, 50 CALIF. L. REV. 896, 899 (1962). *Cf.* Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962).

37. For an incisive criticism of the weighing approach as applied in an analagous area, see Reich, *The New Property,* 73 YALE L.J. 733, 769 (1964).

38. The case concerned a statute which forbade mining of coal in such a way as to cause the subsidence of, among other things, structures used for human habitation, public buildings, and streets. The court held the statute unconstitutional as it applied to the mining of coal in places where the right to mine such coal had been reserved. Holmes, for the Court, addressed himself to two situations: (1) the statute as applied to protect the home of the individual appellee which was located on land conveyed by the coal company by a deed which expressly reserved the right to remove all subsurface coal without liability for attendant damages; (2) the statute as more generally applied to streets and public building sites where again the right to mine subsurface coal had been reserved.

Holmes used the "weighing" process only where he treated the situation of the parties. The question he answered by its use was whether the limited public interest which the Court saw in protecting appellee's private house justified the appropriation or destruction of the appellant's interest in the subsurface coal. This was a typical substantive due process approach — not one of "taking." He did not analyze in weighing terms when he considered the validity of the statute as applied to streets and public building sites, but rather in terms of cost allocation.

For another aspect of Holmes' opinion see note 47 *infra.*

39. Vernon Park Realty Co. v. City of Mount Vernon, 307 N.Y. 493, 501, 121 N.E.2d 517, 521 (1954).

40. This, arguably, is the present approach of the New Jersey courts. Industrial-only zoning in that state is justifiable in public welfare terms (*i.e.,* increasing tax ratables and providing employment). See Gruber v. Mayor and Township Comm., 39 N.J. 1, 9-11, 186 A.2d 489, 493-94 (1962); *Cf.* Katobimar Realty Co. v. Webster, 20 N.J. 114, 130-32, 118 A.2d 824, 833 (1955) (dissenting opinion). If there is some market for industrial land the regulation is valid. Gruber v. Mayor and Township Comm., *supra,* at 12, 186 A.2d at 495.

The court in Morris County Land Improvement Co. v. Parsippany-Troy Hills Town-

an inquiry into the objectives of a regulation.[41] Professor Dunham argues that while it is consistent with our traditions to prevent someone from using his property so as to cause harm to the community, by burdening the community with his own external costs, it is implicit in the just compensation provisions of our constitutions that the community pay the costs of regulation designed only to produce community benefits. The distinction, in his words, is between "compelling an owner without compensation to furnish the beneficial development and compelling him to bear the costs of his activity."[42] The distinction between burden and benefit is, however, very difficult to make. While it might be applied successfully in a case like *Mount Vernon,* where it could have been said that the use of the parcel for a commercial building would not be harmful nor would it create by itself an external cost, the distinction provides no litmus for most cases. Consider, for instance, height and use limitations imposed on land surrounding an airport to facilitate the airport's safe operation. Should such zoning be viewed as preventing harms to the successful operation of the adjoining land use or should it be viewed as creating a public benefit?[43] Industrial-only zoning is viewed by Dunham as benefit inducing;[44] yet the cases are nearly unanimous in upholding the device.[45] In fact, Dunham's analysis leads to no sure result in evaluating the host of land regulations, including setbacks and conventional zoning, which can be conceptualized both as harm preventing and as benefit inducing.[46]

A fourth approach, with roots antedating *Village of Euclid v. Ambler Realty Co.,* seeks to determine whether the regulation confers on the protesting owner a correlative benefit in terms either of economic return or mutual

ship, 40 N.J. 539, 193 A.2d 232 (1963), held invalid a zoning ordinance which greatly restricted the use of swamp land in order that it be retained in its natural state as a flood water basin and a wild life sanctuary, stating that eminent domain was necessary to accomplish the open space objective. It was not made clear whether regulation was improper because of the public benefit purpose or because the land was worthless as regulated. Support for both positions can be found in the court's language.

41. Dunham, *A Legal and Economic Basis for City Planning,* 58 COLUM. L. REV. 650 (1958). See also Dunham, *Flood Control via the Police Power,* 107 U. PA. L. REV. 1098 (1959); Dunham, *City Planning: An Analysis of the Content of the Master Plan,* 1 J. LAW & ECON. 170 (1958).

42. Dunham, *A Legal and Economic Basis for City Planning,* 58 COLUM. L. REV. 650, 670 (1958).

43. See cases cited in note 33 *supra;* Note, *The Airport and the Land Surrounding It in the Jet Age,* 48 KY. L. REV. 273 (1960).

44. Dunham, *supra* note 42, at 667.

45. See cases cited in notes 19 and 21 *supra.*

46. Set back regulations, for instance, while preventing any owner from "harming" his neighbors' access to light and air and aesthetic sensibilities, also provide communities with broad ways and the opportunity of more cheaply widening streets. One of the chief purposes of official map acts is to save money for communities by prohibiting owners from building in the beds of mapped streets unless they can show appreciable economic loss flowing from the prohibition. See Headley v. City of Rochester, 272 N.Y. 197, 5 N.E. 2d 198 (1936); State *ex rel.* Miller v. Manders, 2 Wis. 2d 365, 86 N.W.2d 469 (1957); Kucirek and Beuscher, *Wisconsin's Official Map Law,* 1957 WIS. L. REV. 176.

amenity.[47] If there is no correlative benefit, the regulation constitutes a taking. This approach accounts for the conventional regulatory devices such as residential zoning, setbacks, and official maps and also for the newer devices such as historical zoning and industrial-only zoning. In all but the last each owner is receiving in return for the restriction imposed on him special amenity benefits flowing from like regulation of his neighbors. And in industrial-only zoning each owner will profit, since industrial parks have a higher market value than scattered industrial sites.[48]

The correlative benefit theory, however, suffers from two deficiencies. Its concern with the private benefits flowing to those regulated rather than with the benefits to the community at large seems inconsistent with the usual case analysis of proper regulatory objectives which focuses on public benefits. Actually, there is no inconsistency because the question to which the correlative benefit analysis is directed is not whether the objective of the regulation is public and therefore permissible, but whether the regulation is impermissible because it constitutes a taking. More important, in some cases the correlative benefit analysis does not focus attention on all the meaningful considerations. Recently, for example, courts have upheld regulations which seek to control

47. Correlative benefit, then called "average reciprocity of advantage," was the rationale of several early land use regulation cases. Plymouth Coal Co. v. Pennsylvania, 232 U.S. 531 (1914) (upholding a statute requiring owners of adjoining coal veins to leave supporting boundary line pillars); Jackman v. Rosenbaum Co., 260 U.S. 22 (1922) (upholding Pennsylvania's party wall statute).

In Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922), the absence of correlative benefit seems to have been the rationale for holding the regulation a taking. The City of Scranton had never acquired by eminent domain or initial conveyance the subsurface rights in the ground upon which public facilities were built (in other words the coal barons were there first). The "acquisition" of such rights by regulation constituted a taking because the public alone benefitted from regulation: there was no "average reciprocity," as Holmes put it, for the owners. They were regulated quite harshly and, unlike the regulated owners in *Plymouth Coal Co.*, they got nothing in return. "Average reciprocity" meant something more to Holmes than the general kind of return (the advantage of living in a civilized society) that Brandeis in dissent thought sufficient; it meant some special kind of return not enjoyed by the community at large.

In Ambler Realty Co. v. Village of Euclid, the district court struck down a comprehensive zoning ordinance and asserted that the ordinance could not be sustained on the principle of reciprocity of advantage. 297 Fed. 307, 315-16 (1924) (dictum). Without explicitly treating reciprocity, the Supreme Court reversed and held the ordinance an appropriate exercise of the police power, conducive to the general welfare. 272 U.S. 365 (1926).

48. See LOGIE, INDUSTRY IN TOWNS 26-51 (1952); KITAGAWA & BOGUE, SUBURBANIZATION OF MANUFACTURING ACTIVITY (1955); NELSON & ASCHMAN, REAL ESTATE AND CITY PLANNING 357-59 (1957); CHAPIN, URBAN LAND USE PLANNING 313 (1957); FUCHS, CHANGES IN THE LOCATION OF MANUFACTURING IN THE UNITED STATES SINCE 1929 93 (1962), for discussion of the efficiency of industrial parks both for the municipality and for the industry. For a discussion of the benign aesthetics of industrial parks, see ANDREWS, URBAN GROWTH AND DEVELOPMENT 359 (1962). For the effect of industrial parks on land values, see generally ISARD, LOCATION AND SPACE-ECONOMY (1956).

the timing of urban development.[49] The community benefits from these regulations most concretely by avoiding unnecessary municipal expenses created by haphazard development. It is difficult, however, to see those landowners who presently are restricted to low density uses as the recipients of any special benefit. Nevertheless, the regulation seems wise because the goals are important and regulation is the only means to realize them; nor is eminent domain a feasible alternative in such cases.

Subdivision exactions have been traditionally regarded as a species of regulation and, thus, subject to the same constitutional limitations as zoning and other more common forms of land regulation. Arbitrariness and confiscation raise no serious problems for exactions nor do the Holmes or Fuld taking approaches. And, as we shall show, properly drawn exaction ordinances are neither discriminatory nor will they result in takings even under the restrictive Dunham approach or the correlative benefit test.

Conventional Subdivision Exactions

At the outset there seems to be no justification for avoiding the question of whether conventional subdivision exactions comport with constitutional limitations on the exercise of the police power by characterizing subdividing as a privilege [50] or by asserting that exactions only condition the recordability of a plat and not the subdivision and development of land.[51] If the use of land is to be regulated and conditioned, the policies underlying our notions of the proper scope of regulation ought to be faced squarely.

Most land use regulations, exclusive residential and exclusive industrial zoning, for example, prohibit uses conceived of as creating harms or as impairing the general welfare. Subdivision exactions, however, permit the desired uses but append affirmative conditions designed to minimize their impact on others in the community.[52] Before examining the reasonableness of exactions we must first inquire whether the regulatory object, to minimize these impacts, is permissible.

The impacts on the municipality to be minimized by such regulatory conditions as the dedication of streets — to consider the most common of the conventional exactions — clearly fall within the permissible scope of regulation. No court to our knowledge has rejected the validity of objectives such as convenient access to houses for fire and police protection and rational street plans to handle traffic adequately.

49. *E.g.*, Josephs v. Town of Clarkstown, 24 Misc. 2d 366, 198 N.Y.S.2d 695 (1960). See Cutler, *Legal and Illegal Methods for Controlling Community Growth on the Urban Fringe*, 1961 WIS. L. REV. 370, 392.

50. *Cf.* Ridgefield Land Co. v. City of Detroit, 241 Mich. 468, 217 N.W. 58 (1928). See Note, *An Analysis of Subdivision Control Legislation*, 28 IND. L.J. 544, 557 (1953).

51. *Cf.* Newton v. American Security Co., 201 Ark. 943, 148 S.W.2d 311 (1941). See Note, *Platting, Planning & Protection — A Summary of Subdivision Statutes*, 36 N.Y.U.L.REV. 1205, 1213-14 (1961); Note, *An Analysis of Subdivision Control Legislation*, 28 IND. L.J. 544, 574-86 (Appendix, Item V) (1953).

52. These are similar to minimum acreage zoning requirements which permit residential use but require spacing to minimize "harms" seen to flow from higher density use.

The condition posited raises no problem of confiscation or arbitrariness. The exaction is clearly related to proper objectives and in any but an extraordinary situation would not preclude an economic use of land.[53]

What of the limitations on discrimination and taking? We assume that similar street conditions are imposed on all subdividers. This is done fairly automatically in the case of streets (and other internal improvements, for example, sewers) where the facilities created are used by the subdivision residents and fill needs created by them. If the conditions are not similar, however, there might be a serious equal protection problem. But given equality of treatment between contemporaneous subdividers, the only possible discrimination is between builders on land subdivided at a time when these conditions were not imposed and when the community bore the costs of street acquisition, or at least street improvement, and present builders and their customers who now must bear these costs alone. But classifying such builders differently would not be unreasonable under an equal protection test; legislation must take effect on some day, and hence there would not be proscribable discrimination.[54]

A taking argument seems to have merit at first glance, for the developer is being required to dedicate a portion of his land to the community which then acquires title to the streets. But if the regulation requiring the subdivider to construct the streets is valid, formal acquisition of title is bereft of importance. Under such circumstances the developer wants the community to acquire the streets so as to shift the costs of their continued maintenance and repair to the community's tax base. Thus the dedication "requirement" is actually of advantage to the developer, and it has even been suggested that because of this advantage to the developer he may be required to improve the streets before the community accepts his proferred dedications.[55] This suggestion, however, leaves unanswered the question whether a regulation requiring the construction of improved streets, as well as a mere dedication requirement, should be treated as a taking. Certainly the community benefits from having developers provide streets which are useful to the whole community as well

53. Problems of arbitrariness could arise if, for instance, streets of unreasonably large width or unreasonably expensive paving were demanded. Apparently such demands are occasionally made with the intent of inhibiting development or adding to its expense in order to prohibit the construction of lower cost housing. See, *e.g.*, Fagin, *Financing Municipal Services in a Metropolitan Region*, 19 J. AM. INSTIT. OF PLANNERS 214 (1953); Wehrly, *Are Modern Subdivision Regulations Pricing Moderate Income Groups Out of the New Housing Market*, in PROCEEDINGS: LOCAL GOVERNMENT CONFERENCE ON SUBDIVISION CONTROL 14 (1957).

54. *E.g.*, Joslin Mfg. Co. v. City of Providence, 262 U.S. 668 (1923) (legislation providing compensation for injury from condemnation to businesses previously established but not to those established after the date of the legislation upheld in face of equal protection challenge).

55. See BEUSCHER, LAND USE CONTROLS VII-21. The original Model Subdivision Controls Act saw the withholding of municipal improvement of streets in unapproved subdivisions as a major tool to enforce subdivision regulations. DEPT. OF COMMERCE, A STANDARD CITY PLANNING ENABLING ACT 6, 18 (1928).

as the residents of the development; yet the community will not need to spend its own money for their acquisition and initial improvement.

Judicial reaction uniformly has been that the imposition of street dedication and improvement conditions does not constitute a taking. The courts, however, have been less than precise in stating why this is true. Nevertheless, in the two leading cases on the question, *Ayres v. City Council of Los Angeles*[56] and *Brous v. Smith*,[57] one judgment is clearly identifiable. It is permissible to require a landowner to pay for improvements which are generated by his use of the land whether or not the community is also benefited by the expenditure.[58] The California court in *Ayres* assumed that "the dedication of land to the widening of existing streets" was "reasonably related to increased traffic and

56. 34 Cal. 2d 31, 207 P.2d 1 (1949).

57. 304 N.Y. 164, 106 N.E. 2d 503 (1952).

58. Thus in *Ayres v. City Council of Los Angeles*, the California court writes:

> It 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 . . . . [T]he requirement for the dedication of land to the widening of existing [boundary] streets was not a compulsory taking for public use; . . . it is a condition reasonably related to increased traffic and other needs of the proposed subdivision [and] it is voluntary in theory and not contrary to constitutional concepts.

34 Cal. 2d at 42, 207 P.2d at 7-8.

And the New York court's more extensive discussion in Brous v. Smith:

> The statute reflects a legislative judgment that the building up of unimproved and undeveloped areas ought to be accompanied by provision for roads and streets and other essential facilities to meet the basic needs of the new residents of the area. "We all know that where subdivision of land is unregulated lots are sold without paving, water drainage, or sanitary facilities, and then later the community feels forced to protect the residents and take over the streets and . . . provide for the facilities." (Bettman, City and Regional Planning Papers (1946), p. 74.) Thus, the regulations benefit both the consumer, who is protected "in purchasing a building site with assurance of its usability for a suitable home," and the community at large, which naturally gains greatly from the use of "sound practices in land use and development."
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> * * *
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> Unimproved or defective roads can cause a complete breakdown of services in a community. The state has a legitimate and real interest in requiring that the means of access to the new construction be properly improved and sufficient for the purpose.
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> * * *
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> But the town . . . does not seek to condemn land owned by petitioner. It is petitioner who wishes to construct dwellings on his property, and the town merely conditions such construction upon his compliance with reasonable conditions designed for the protection both of the ultimate purchaser of the homes and of the public. That the state may empower the town to do this is clear. ". . . the subjection to the police power of all property gives the State the right to forbid the use of property in the way desired, save under reasonable conditions promoting the public welfare."

304 N.Y. at 169-70, 106 N.E.2d at 506-07.

other needs of the proposed subdivision."[59] The New York court in *Brous* suggested that it was unfair to force the community to provide streets which are essential only in light of the basic needs of the new residents. The courts, in other words, were saying that so long as there is some reasonable relation between the needs normally generated by a use and the conditions imposed on the use no taking has occurred. These statements certainly satisfy the Dunham test approach to taking.[60]

The correlative benefit approach to taking is also satisfied by the posited exaction, for the homebuyers are receiving needed streets. To the extent that they do not pay the costs of the streets, they are getting what amounts to a gift from the municipality. But as the exactions cover the costs of the street, an equivalent benefit is obtained, thus obviating questions of taking. The developer is seen as the collector and rarely will he be unable to collect.[61] Thus, in the conventional exaction context the correlative benefit test and the Dunham test resolve to much the same thing. Similar analysis supports the host of other conventional exactions which have been approved by courts. These include exactions for sewers,[62] water mains,[63] sidewalks,[64] and the like.[65]

59. 34 Cal. 2d at 42, 207 P.2d at 7-8. This assumption is quite suspect. Two of the conditions imposed in *Ayres* related to the widening and landscaping of a portion of a boundary highway to which the subdivision had no access. It is difficult to say, therefore, that the traffic to be generated by the subdivision related to that portion of the highway which was to be widened. Three related problems arise from this. First, that the condition was arbitrary because there was no relationship between it and the "increased traffic and other needs of the proposed subdivision," the court's own referrent. If the purpose of the condition was viewed more broadly, however, for instance the provision of more adequate roadways for the community's traffic, it would not be arbitrary. But in the latter case the condition might well be considered a taking because the subdivider and his customers would be getting nothing in return for the exaction and there would be no rational nexus between the costs generated and the exaction. Moreover, there would be serious equal protection problems if this subdivider were required to dedicate more land than other subdividers simply because of propinquity.

60. Interestingly, the courts make no distinction between developers and their customers. The activities of both — construction and occupancy respectively — are seen to generate the need for additional streets and to permit imposition of the cost. Of course the exaction is imposed on the developer and the home buyers ultimately pay it only to the extent that market factors permit its transfer.

61. In a large jurisdicion the market will allow all developers to collect the cost of exaction. Where many jurisdictions demand the exaction, the developer will be able to collect. Only in the rare case where one jurisdiction exacts and the many surrounding jurisdictions do not might the market prevent collection. In that case the developer will consider the exaction with the many other factors that determine his sale price, and he may choose to build elsewhere.

62. *E.g.*, Medine v. Burns, 29 Misc. 2d 890, 208 N.Y.S.2d 12 (Sup. Ct. 1960); Stanco v Suozzi, 11 Misc. 2d 784, 171 N.Y.S.2d 997 (Sup. Ct. 1958); Mefford v. City of Tulare, 102 Cal. App. 2d 919, 228 P.2d 847 (1951).

63. *E.g.*, Lake Intervale Homes v. Parsippany Township, 43 N.J. Super. 220, 128 A.2d 300 (1956); SE-Frank Developers v. Gibson, 157 N.Y.S.2d 812 (Sup. Ct. 1956), *modified*, 5 App. Div. 2d 687, 169 N.Y.S.2d 136 (1937); Zastrow v. Village of Brown Deer, 9 Wis. 2d 100, 100 N.W.2d 359 (1960).

64. *E.g.*, Allen v. Stockwell, 210 Mich. 488, 178 N.W. 27 (1920).

65. *E.g.*, City of Buena Park v. Boyar, 186 Cal. App. 2d 61, 8 Cal. Rptr. 674 (1960)

Newer Subdivision Exactions

Typical of the newer kinds of demanded exactions are land dedications for school and park sites and fees to be used for the acquisition and improvement of such sites. The question is whether they should be treated any differently from the conventional exactions which have received judicial approval.

It would seem clear that the objectives of these exactions are permissible. They are intended to minimize the overcrowding of existing facilities devoted to education and recreation — activities clearly important to the general welfare of the community. Since there is value left to the property owner and since the regulation is required to attain the objective, the newer exactions would also appear to avoid the barriers of confiscation and arbitrariness as easily as the conventional exactions.

Discrimination and taking limitations, however, are seen to pose a unique problem. The problem is the same under both rubrics. It is whether the subdivision homebuyers, who ultimately finance such exactions, will be required to pay more than a "fair" share for community schools, parks, and other facilities financed by the exactions. If they are forced to pay more than a fair share the result arguably is both a taking and discriminatory. Taking occurs because there is imposed on the homebuyers costs resulting not only from their own activities but from the activities of the rest of the community. Discrimination flows because such buyers unreasonably are being isolated to pay costs attributable to other residents as well.

A number of state courts have recently been faced with ordinances which require land dedications or the payment of fees for school and park purposes.[66] In all cases but two the courts found the exactions not authorized by the applicable enabling act. The courts paid tribute, however, to the presence of constitutional issues which they did not confront. In the two other cases, *Pioneer Trust & Savings Bank v. Village of Mount Prospect*[67] and *Gulest*

(drainage canal); Petterson v. City of Naperville, 9 Ill. 2d 233, 137 N.E.2d 371 (1956) (curbs and gutters).

66. Kelber v. City of Upland, 155 Cal. App. 2d 631, 318 P.2d 561 (1957); Pioneer Trust and Savings Bank v. Village of Mount Prospect, 22 Ill. 2d 375, 176 N.E.2d 799 (1961); Rosen v. Village of Downers Grove, 19 Ill. 2d 448, 167 N.E.2d 230 (1960); Coronado Development Co. v. City of McPherson, 189 Kan. 174, 368 P.2d 51 (1962); Ridgemont Development Co. v. City of East Detroit, 358 Mich. 387, 100 N.W.2d 301 (1960); Gulest Associates, Inc. v. Town of Newburgh, 25 Misc. 2d 1004, 209 N.Y.S.2d 729 (Sup. Ct. 1960), *aff'd*, 15 App. Div. 2d 815, 225 N.Y.S.2d 538 (1962); Haugen v. Gleason, 226 Ore. 99, 359 P.2d 108 (1961).

The progeny of *Kelber* indicate the confused state of the law of exactions. *Compare* Wine v. Council of City of Los Angeles, 177 Cal. App. 2d 157, 2 Cal. Rptr. 94 (1960) (which followed *Kelber* and held a Los Angeles sewer connection fee unauthorized under the enabling act), *with* Longridge Estates v. City of Los Angeles, 183 Cal. App. 2d 533, 6 Cal. Rptr. 900 (1960) (in which another division of the same district appellate court distinguished *Kelber* as applying only to cities created under general law and upheld the Los Angeles sewer fee as a valid exercise of police power by a charter city).

67. 22 Ill. 2d 375, 176 N.E.2d 799 (1961).

Associates, Inc. v. Town of Newburgh,[68] the Illinois and New York enabling acts, respectively, authorized the exactions, and the courts held the authorization unconstitutional. Different constitutional analyses, however, were stressed in each case. In *Pioneer Trust & Savings Bank,* a land exaction for a school or playground was held invalid because the exaction was not related to the costs generated by the subdivision. The court seemed to apply the analysis of the conventional exaction cases, and under that analysis it found the statute wanting. In *Gulest,* on the other hand, the court applied a criterion not found in the conventional cases: it was troubled because there was no requirement that fee exactions for recreational purposes would be used to construct facilities directly benefiting the prospective buyers of the subdivision homes.

The *Pioneer Trust & Savings Bank* case had been preceded in the Illinois Supreme Court by *Rosen v. Village of Downers Grove.*[69] In *Rosen* a local ordinance was applied to require a $325 per lot payment for an "educational facilities" fund, and the court stated that the theory underlying the enabling act provisions concerning dedications of streets and public grounds was that "the developer of a subdivision may be required to assume those costs which are specifically and uniquely attributable to his activity and which otherwise would be cast upon the public." Since the fees envisaged in *Rosen* would not necessarily be limited to such costs, construing the enabling act to include a fee authorization would be inconsistent with the act's theoretical underpinning. *Rosen's* statement of the theory of the enabling act was elevated to constitutional principle in *Pioneer Trust & Savings Bank,*[70] which held invalid an ordinance which required the dedication for public purposes of one acre per sixty families. The municipality was demanding 6.7 acres from an intended 250 family subdivision for an elementary school site or a playground. The applicable enabling act permitted "reasonable rquirements for parks, playgrounds, school grounds, and other public grounds."[71] The court held this exaction unconstitutional repeating the quoted statement from *Rosen.* The court approved the distinction, drawn by the California court in *Ayres,*[72] between facilities generated by the activity within the subdivision and other facilities required by the total activity of the community. Recognizing that the addition of the subdivision would aggravate the existing need for additional school and recreational facilities, the court stated that it had not been shown that the needs for recreational and educational facilities underlying the exaction were "specifically and uniquely attributable" to this intended subdivision so that the cost "should be cast upon [this] subdivider as his sole financial burden." On the contrary, the court stated that the present crowding of the village

68. 25 Misc. 2d 1004, 209 N.Y.S.2d 729 (Sup. Ct. 1960), *aff'd,* 15 App. Div. 2d 815, 225 N.Y.S.2d 538 (1962).

69. 19 Ill. 2d 448, 453, 167 N.E.2d 230, 233-34 (1960).

70. 22 Ill. 2d at 379, 176 N.E.2d at 801 (1961).

71. Rev. Cities and Villages Act § 53-2, ILL. REV. STAT. ch. 24 § 11-12-5 (1961).

72. Ayres v. City Council of Los Angeles, 3b Cal. 2d 31, 207 P.2d 1 (1949). See note 56 *supra.*

school facilities resulted from the total development of the community and therefore the school problem "is one which the subdivider should not be obliged to pay the total cost of remedying."[73]

The court's statement in *Pioneer Trust & Savings Bank* could mean either that the school and park shortages which would ensue after occupation of the development would result not from the new subdivision but from the fact that the community had already filled existing facilities, or that there was no formula to relate the potential "needs" of the subdivision for parks and schools to the fees or land dedications sought to be exacted. The first alternative is unlikely in view of the Illinois court's stress on protecting the subdivider from paying the "total cost of remedying" the shortage in facilities. If the first alternative were intended, the court would have held merely that school and park exactions are invalid. Rather, the court spoke in terms of imposing the "total" cost on the subdivider. Even more persuasive, only the second alternative is consistent with the reasoning of the conventional exaction cases. There it is evident that the need for improved streets is also caused by the inadequacy of existing street facilities, and the provision of new streets benefits the whole community. It is most likely, then, that the Illinois court was disturbed by the absence of a formula relating *need* and *exaction* in order to avoid discrimination and taking. Modern cost-accounting techniques can provide adequate formulas to relate need and exaction and thus satisfy the conventional cost-generation approach of the Illinois court. This will be explored in detail below.

Gulest Associates, Inc. v. Town of Newburgh[74] suggests an alternative constitutional analysis which departs from the conventional police power analysis. The *Gulest* court would prohibit exactions unless they result in facilities which *directly benefit* the subdivision to which they are related. In *Gulest* the Appellate Division affirmed a lower court decision holding unconstitutional an enabling act providing that if it is not feasible to locate a park within a subdivision, the planning board *"may require"* in lieu of land dedication the payment of fees "which . . . shall be available for use by the town for neighborhood park, playground or *recreation purposes* including the acquisition of property."[75] The court found that the planning board's apparently unlimited discretion to levy or not levy a fee charge raised an equal protection problem, and that the phrase "recreation purposes" was unconstitutionally vague. But the court was also concerned that the fees were not limited to uses for the benefit of the residents of the particular subdivision — the fees could even be spent before the subdivision was completed.

In a recent article Reps and Smith have formulated the direct benefit analysis suggested in *Gulest*.[76] If the improvements financed by the exactions

73. 22 Ill. 2d at 381-82, 176 N.E.2d at 802.

74. 25 Misc. 2d 1004, 209 N.Y.S.2d 729 (Sup. Ct. 1960), *aff'd* 15 App. Div. 2d 815, 225 N.Y.S.2d 538 (1962).

75. N.Y. TOWN LAW § 277 (emphasis added).

76. Reps and Smith, *Control of Urban Land Subdivision*, 14 SYRACUSE L. REV. 405 (1963). *Cf.* Doebele, *Improved State Enabling Legislation for the Nineteen-Sixties: New Proposals for the State of New Mexico*, 2 NATURAL RES. J. 321, 339-42 (1962).

are not located so that their benefit inures exclusively to the homeowners in the subdivision itself or if they are not of a type which could be financed by a peculiar kind of tax, the special assessment, they are unconstitutional. This formulation leads them to draw a distinction between streets, sewers, and neighborhood parks on the one hand and school buildings, police and fire stations, and various sanitation facilities on the other. Exactions for the former are valid, for the latter unconstitutional.

Three arguments, none of which seem sound, are advanced for this departure from the usual police power analysis found in the conventional exaction cases. The more usual police power test, it is argued, is not strict enough because "positive exactions" rather than "negative prohibitions" are involved.[77] But while exaction conditions imposed by subdivision regulations might seem superficially more like "takings of private property without compensation" than prohibitions on use, the actual cost of a zoning regulation to an owner in any specific case might easily be higher. For instance, restricting property fronting on an intersection of two busy streets to residential uses [78] or excluding a residential subdivision [79] or a trailer park [80] from an industrially zoned area might well deprive an owner of more value than requiring a subdivider to construct roads or to pay fees in lieu of dedications for parks and schools, fees which he will normally pass on to consumers who often are receiving governmental subsidies in the form of guaranteed loans. There seems no ground for distinguishing constitutionally a "positive exaction" and a negative regulation of use. Either, neither, or both can be discriminatory or a taking in any specific case.

Reps and Smith's second argument is directed to that part of their formulation which requires that the benefits of the exaction inure exclusively to the subdivision. Two statements are made in its support: ". . . it is equally self-evident that an individual who purchases a house within a subdivision should bear no more than his proportionate share of governmental expense . . .;" and, "There can be no justification for placing upon . . . future homeowners the costs of benefits which will inure to the general public."[81] The two-fold concern here, which also exists under conventional regulatory analysis, does not require so draconian a doctrine. First, given a proper cost-accounting approach it is possible to determine the costs generated by new residents and thus to avoid charging the newcomers more than a proportionate share. Second, the conventional zoning and subdivision cases hold that it is immaterial that a subdivision exaction also would inure to the benefit of the public so long as there is a rational nexus between the exaction and the costs generated by the creation of the subdivision.

77. Reps and Smith, *supra* note 76, at 407.

78. *E.g.*, Johnston v. City of Claremont, 49 Cal. 2d 826, 323 P.2d 71 (1958).

79. *E.g.*, Gruber v. Mayor and Township Comm. 39 N.J. 1, 186 A.2d 489 (1962); tate *ex rel* Berndt v. Iten, 259 Minn. 77, 106 N.W.2d 366 (1960).

80. *E.g.*, Vickers v. Township Comm., 37 N.J. 232, 181 A.2d 129 (1962).

81. Reps and Smith, *supra* note 76, at 409.

Reps and Smith's third argument is directed to the other part of their formulation which would bar exactions used to finance improvements not of a type which, in their view, could be financed by special assessments. They say that ". . . public school buildings and fire stations have generally been thought to be so much a responsibility of the general public that such financing [special assessment] was not available."[82] Thus they argue that constitutional considerations, presumably limitations against discrimination and taking, prohibit one from viewing education, fire, and police expenses which arise from the influx of new people to new residential developments as costs to be imposed on such people regardless of the formula devised to ascertain how much of the increased cost is generated by their presence. They cite a Michigan case, *Merrelli v. City of St. Clair Shores*,[83] and dictum in a New Jersey case, *Midtown Properties, Inc. v. Town of Madison*,[84] in support of these propositions.

Merrelli struck down a fee schedule for building permits designed to shift a portion of the municipal expenses arising from building activity (street maintenance and fire and police protection) to the home builders. The court in *Merrelli* relied heavily on a New Jersey decision also concerned with building permit fees, *Daniels v. Borough of Point Pleasant*.[85] There the court held that a city could not raise revenue for school costs and other services under its police power. However, the court then added that such income could be raised if the power were properly delegated by the legislature.

Both *Merrelli* and *Daniels* involve the powers granted to municipalities by state statutory and constitutional provisions, not due process and equal protection limitations on the exercise of governmental powers. The inquiry was whether the municipalities had requisite authorization to impose the fees. This is evident in New Jersey where the *Daniels* case was one of a series construing unique New Jersey statutes authorizing license fees for mixed tax and regulatory purposes.[86] And in *Merrelli* the court found that the problems addressed in the ordinance "are the public problems of the community and the expenses incurred in their solution are to be defrayed (absent *valid legislation otherwise providing*) from the general revenues of the city. . . ."[87]

82. *Id.* at 410. An understandably similar point of view has been advanced by the National Association of Homebuilders, RYAN & MCDONALD, LEGAL PROBLEMS OF LAND SUBDIVISION 27-29 (1960).

83. 355 Mich. 575, 96 N.W.2d 144 (1959). They also cite University Custom Houses, Inc. v. Township of Redford, 355 Mich. 606, 96 N.W.2d 151 (1959), a companion case to *Merrelli*.

84. 68 N.J. Super. 197, 209-10, 172 A.2d 40, 47 (1961), *aff'd without opinion*, 78 N.J. Super. 471, 189 A.2d 226 (App. Div. 1963).

85. 23 N.J. 357, 362, 129 A.2d 265, 267-68 (1957).

86. See Gilbert v. Town of Irvington, 20 N.J. 432, 120 A.2d 114 (1956); Bellington v. Township of East Windsor, 17 N.J. 558, 112 A.2d 268 (1955); Weiner v. Borough of Stratford, 15 N.J. 295, 104 A.2d 659 (1954); Salomon v. Jersey City, 12 N.J. 379, 97 A.2d 405 (1953).

87. 355 Mich. at 586, 96 N.W.2d at 149 (emphasis added).

There is the hint of a constitutional issue in a statement in *Merrelli* restricting money raised pursuant to the police power to the amount necessary to defray the cost of regulation.[88] But here too it is important to note that the court was speaking about the police power in the sense of authority vested in municipalities and not in the constitutional sense of limitations on the exercise of governmental power already properly vested in municipalities. Other service and construction charges unrelated to the cost of regulation have been upheld under the police power where municipal authorization was clear.[89] It would seem, moreover, only sophistry to make a constitutional distinction between ordinances requiring the improvement of streets (conceded to be proper regulation in Michigan)[90] and ordinances requiring the payment of fees in lieu of street improvements (allegedly improper under a contrary interpretation of *Merrelli*). The *Merrelli* court is saying that in Michigan, as elsewhere, the authorization of municipalities to exercise police power is not read as expansively as due process and equal protection considerations would permit.[91]

The dictum in *Midtown Properties* is not so easily explained as *Merrelli*. *Midtown* raises a policy issue concerning the police power, an issue which might lead a court to adopt the direct benefit test:

> It is the duty of the municipality to educate our citizenry; to build schools, and equip and maintain them for such purposes. The cost for public education, in a democratic society, must be borne by the public and the funds to be used for such purpose must be raised by public taxation.
>
> * * *
>
> It is my opinion that any attempt to compel a developer to pay for building a school, or to donate land for a school, as a condition precedent to giving . . . approval to a subdivision is violative of his constitutional rights. . . .[92]

88. The police power may not be used as a subterfuge to enact and enforce what is in reality a revenue raising device . . . . The indirect costs, as well [as the direct costs], of administering and enforcing the police regulation are recoverable, but they must in fact be such . . . costs, as distinguished from the costs of expanded government services, and they must be established by reasonably accurate accounting procedures . . . .

355 Mich. at 588, 96 N.W.2d at 150.

89. City of Glendale v. Trondsen, 48 Cal. 2d 93, 308 P.2d 1 (1957) (garbage fee imposed whether or not payee utilized municipal garbage services and upheld under both the police and taxing powers); Longridge Estates v. City of Los Angeles, 183 Cal. App. 2d 533, 6 Cal. Rptr. 900 (1960) ($400 per acre sewer outlet charge as a condition for subdivision permission); Stanco v. Suozzi, 11 Misc. 2d 784, 171 N.Y.S.2d 997 (Sup. Ct. 1958) ($500 per building sewer fee for building permit).

90. Ridgefield Land Co. v. City of Detroit, 241 Mich. 468, 217 N.W. 58 (1928).

91. *Cf.* 4 COOLEY, TAXATION § 1680 (4th ed. 1924); 1 ANTIEAU, MUNICIPAL CORPORATION LAW §§ 5.01-5.03, 6.00 (1963). In fact, 4 COOLEY § 1680 is cited in the penultimate paragraph of *Merrelli*, 355 Mich. at 558, 96 N.W.2d at 150.

92. Midtown Properties, Inc. v. Township of Madison, 68 N.J. Super. 197, 209-10, 172 A.2d 40, 47 (1961), *aff'd without opinion*, 78 N.J. Super. 471, 189 A.2d 226 (App. Div. 1963).

In support the court cited *Township of Springfield v. Bensley*,[93] which held that a municipality could not prohibit a building project because the local school system could not absorb the projected increase of students, and the *Rosen* and *Gulest* cases from Illinois and New York respectively.[94] These authorities are unpersuasive. The *Bensley* holding has since been overruled by *Gruber v. Mayor and Township Comm.*,[95] and the *Rosen* and *Gulest* cases are clearly distinguishable.[96]

However unpersuasive the authorities, the *Midtown* dictum clearly illustrates the policy considerations at stake. It is inconsistent with democratic principles, the judge implies, to impose on parents any special charges for the education of their children; public schools must be funded completely from a general tax base.[97] What is feared, apparently, is the erosion of a free educational system and the growth in its stead of a system in which the quality of education depends on tuition-like charges and in which those who cannot pay the fee are excluded. Though the argument evokes sympathetic responses, it is unrealistic as a constitutional proposition, for it looks only at individual communities and ignores the fact that different communities spend varying

93. 19 N.J. Super. 147, 88 A.2d 271 (Ch. Div. 1952).

94. Rosen v. Village of Downers Grove, 19 Ill. 2d 448, 167 N.E.2d 230 (1960); Gulest Associates, Inc. v. Town of Newburgh, 25 Misc. 2d 1004, 209 N.Y.S.2d 729, *aff'd*, 15 App. Div. 2d 815, 225 N.Y.S.2d 538 (1962).

95. 39 N.J. 1, 186 A.2d 489 (1962). In the *Bensley* case the Township sought the revocation of a building permit issued one and one-half years before urging that the defendant was constructing more apartments than originally planned. The applicable zoning ordinance did not control the number of apartments in multiple unit buildings, but rather relied on area ratios to limit densities. Nevertheless, the Township argued that it was threatened with additional burdens to its school and sewer sanitation systems. Hypothesizing that the Township's factual representations were correct, the court stated:

> The inadequacy of facilities presently available in a neighborhood cannot support the objection to a building project otherwise permissible under the zoning ordinance and the building code. It is the duty of the municipal authorities to supply all such facilities as the town grows and expands in population and as the need for increased facilities arises. . . . [T]he court is not concerned with the economics involved in the performance of the duty resting on the municipal authorities to furnish required facilities as and when and to the extent needed. The duty is paramount.

19 N.J. Super. 147, 158, 88 A.2d 271, 277 (Ch. Div. 1952). Similar holdings are found in other New Jersey cases including Ridgefield Terrace Realty Co. v. Borough of Ridgefield, 136 N.J.L. 311, 55 A.2d 812 (Sup. Ct. 1947); and De Mott Homes, Inc. v. Margate City, 136 N.J.L. 330, 56 A.2d 423 (Sup. Ct. 1947), *aff'd*, 136 N.J.L. 639, 57 A.2d 388 (Ct. Err. & App. 1948).

The *Gruber* case rejected the premise of this line of authority by legitimating as objectives the attraction of industry and the exclusion of residential subdivision in order to enhance municipal tax bases and minimize drains on municipal resources. See Note, 16 RUTGERS L. REV. 469 (1962).

96. See text at notes 70-75 *supra*.

97. Midtown Properties, Inc. v. Township of Madison, 68 N.J. Super. 197, 209-10, 172 A.2d 40, 47 (1961), *aff'd without opinion*, 78 N.J. Super. 471, 189 A.2d 226 (App. Div. 1963).

amounts of money for educational purposes.[98] The result is tuition-like differences in school taxes from municipality to municipality. State sponsored tax equalization programs and state payments to local districts for educational expenses tend to equalize the level of services somewhat, but such programs only mitigate previously gross differences. The *Midtown* dictum is undesirable as well, for it precludes all legislative balancing of such values as minimizing the impacts on older residents of tax costs generated by rapid suburban growth and providing a source of needed revenue both to service newcomers and to protect from dilution the quality of present services.

In sum, the Reps and Smith direct benefit-special assessment analysis is rejected for two reasons: First, there is no justification for courts to veto on constitutional grounds a legislative determination that new residents ought to be subjected to the payment of increased municipal costs attributable to their presence. While some might disagree with the wisdom of the legislative decision, it is far from arbitrary and unreasonable, especially when it is realized that such a determination seeks to protect older residents from what might well be conceived as unjust tax rises and provides another source of needed municipal revenue. Second, no justification appears for perceiving a constitutional dividing line between statutes which permit one kind of cost to be imposed (for instance, street improvements) and not another (for instance, educational facilities) as long as a method exists for relating costs and exaction. If such a method is sound both the Dunham and correlative benefit taking tests are satisfied, for it is not unreasonable to see subdivision development as generating the need for a variety of facilities and buyers as receiving the use of their facilities in return for the exactions ultimately imposed upon them. Similarly, a method of relating generated costs to the exaction solves the problems of discrimination.

Cost-Accounting

Modern cost-accounting technique is the method available to relate cost and exaction in order to avoid questions of discrimination and taking.[99]

Assuming that developers will pass on the costs of exactions to their customers, an equal protection and taking analysis involves examination of two sets of relationships — that between new residents in different subdivisions,

98. Net current expenses per pupil for the school year 1961-62 for the towns and city in the New Haven Standard Metropolitan area, see note 7 *supra*, were as follows: Woodbridge, $534; Orange, $488; New Haven, $470; North Haven, $452; Hamden, $442; Guilford, $430; Branford, $394; West Haven, $383; East Haven, $320. CONNECTICUT PUBLIC EXPENDITURE COUNCIL, LOCAL PUBLIC SCHOOL EXPENSES AND STATE AID IN CONNECTICUT SCHOOL YEARS 1957-58 THROUGH 1961-62 (1963).

99. On cost-accounting generally, see MATZ, CURRY & FRANK, COST ACCOUNTING (1952) and SOLOMON, STUDIES IN COSTING (1952). On municipal cost-accounting, see DUE, GOVERNMENT FINANCE: AN ECONOMIC ANALYSIS (1959) and TENNER, MUNICIPAL & GOVERNMENTAL ACCOUNTING (1955). For an early and suggestive work on municipal cost-accounting, see STEPHAN, POSSIBILITIES OF THE USE OF COST ACCOUNTING IN PUBLIC BUDGET MAKING (1939).

The following studies apply cost-accounting techniques to particular municipal ex-

and that between new residents in subdivision developments and all other residents. In order to assure equal treatment between residents of different subdivisions similar exactions should be imposed on all. This is done fairly automatically with conventional exactions because each subdivision must provide internal facilities in relationship to the specific needs of each. A requirement such as land dedication for schools, however, poses a more difficult problem. To avoid discrimination all developers should be required to make dedications for this purpose according to criteria which will result in equal treatment. But it is normally impossible to demand such dedications from small developers whose subdivisions will not conceivably generate the need for an entire school and whose locations often will be quite inconvenient for such a facility. Moreover, it is extremely difficult to establish criteria for land dedications which result in equal treatment. A number of contemporary ordinances seek a specific percentage of the development's total area. When such a standard applies across the board there is no showing that resultant acreage is at all related to the school needs generated by the subdivisions. As noted, the criterion which determines the extent of the exaction in the case of interior streets is need: each subdivision is "automatically required to provide interior streets necessary to handle the traffic generated by it." There is no necessary relationship, however, between the total acreage of the development and the school needs which will be generated by it. A development with numerous homes on small lots will impose a much greater educational burden than a development with fewer homes on larger lots. Thus a percentage of total acreage is not necessarily a rational measure (or classifying principle) to determine the extent of the dedication exaction.[100] Indeed, this lack of necessary relationship was one of the problems perceived in the *Pioneer Trust & Savings Bank* case.[101]

The exaction of fees for school purposes in lieu of land dedications is a more flexible device and permits of equal application to all subdivisions regardless of size. The fee, however, must be calculated in accordance with a standard which has relevance to its purpose. The police power purpose is need, and thus a sound fee schedule demands an estimate of school population

penditures. BALDWIN & MARCUS, LIBRARY COSTS AND BUDGETS (1941); HARRIS, INSTITUTIONAL COST ACCOUNTING (1944) (hospitals); WHEATON & SCHUSSHEIM, THE COST OF MUNICIPAL SERVICES IN RESIDENTIAL AREAS (1955); ISARD & COUGHLIN, MUNICIPAL COSTS AND REVENUES RESULTING FROM COMMUNITY GROWTH (1957); NATIONAL COMM. ON URBAN TRANSP., COST ACCOUNTING FOR STREETS AND HIGHWAYS (1959).

100. There are other, more salient, measures. For school facilities, *e.g.*, the number of school age children; for convenience this may be calculated on an average children per house, number of houses basis. See note 99 *supra*. This does not mean that a percentage of total acreage dedication is irrational. It may well be that the unplated land exacted can be valued and, in translation, will approximate the money exaction justified by cost-accounting.

101. There lurks in the opinion, of course, a suggestion that the Illinois court fears there is no rational way to measure and attribute school costs to a subdiviison. Pioneer Trust & Savings Bank v. Village of Mount Prospect, 22 Ill. 2d 375, 380-81, 176 N.E.2d 799, 802 (1961). See text following note 73 *supra*.

to be generated by the subdivision and the cost of providing facilities for such a population.

This analysis applies to a variety of facilities: parks, schools, fire stations, and the like. Modern cost-accounting techniques permit precise calculation of costs for various facilities allocable to new subdivisions. The total cost can then be calculated, and fees, in lieu of land dedications or reservations or of the provision of improvements, can be exacted according to a formula applicable to all, thus achieving equality of treatment among all new subdivision residents.

More difficult questions are posed in assuring equal treatment between new subdivision residents and all other residents. Reps and Smith's special assessment approach seeks to proscribe exactions for so-called community facilities. They are worried, in part, about imposing on new residents more than their proportionate share of governmental expense. This is a justified concern; but proscribing exactions entirely is not justified simply because under some circumstances some exactions would result in inequity. Rather, one should seek a way to limit exactions to avoid a disproportionate burden on anyone. Four relevant classes of persons are to be considered in exploring whether subdivision residents, upon whom these exactions might fall, will be forced to bear a disproportionate share of governmental expenses: old residents and those who will buy from them in the future; future buyers of houses in the subdivisions subjected to the exactions; future buyers of future subdivisions; and residents of new rental housing. It is convenient to explore these relationships in the context of exaction fees for school purposes — aware of course that the same analysis applies to a variety of facilities.

Suppose a subdivision development of 400 houses. Available data indicate that in a development of this type each house will contain an average of two children or a total of 800, 600 of whom will be in elementary school at some time and 400 of whom will be in high school at some time. Available information permits quite accurate calculation of the capital expenditures necessary to house this population in schools.[102] The calculation indicates an expenditure of $1.48 million. Federal and state subventions, hypothetically, will cover some 31 percent of this cost leaving approximately $1 million to be charged to the community. Is it proper to impose this whole cost on the subdivision, or will that result in discriminating against the buyers of homes in the development?

102. The now well developed techniques of cost-accounting are designed to summarize the costs incurred to accomplish a particular purpose and to apportion them on some relevant unit basis. Using these techniques three operations are necessary to calculate the amount of permissible exactions: estimation of the new facilities made necessary by the influx of people; estimation of the cost of the facilities; apportionment of the cost among the subdivision units. Thus for schools, for example, the process would be: What square footage increase of classroom space is necessary to accommodate the increase in the school age population? How much will it cost? Apportioning the cost on the basis

It might be said that this does result in discrimination in favor of old residents who will be relieved from a portion of their property tax burden which would be allocable to pay the service charges on bonds issued to build the facilities made necessary by the subdivision. But if the already filled facilities have been paid for by a prior property tax, there is no reason to see the old residents as getting an unjustified benefit except to the rather minimal extent that the undeveloped subdivision property contributed to that property tax revenue. If, on the other hand, the existing schools are not yet paid for and the property tax on the developed subdivision will help pay for them, the old residents are passing some of the costs of existing facilities to the new residents while avoiding the costs of the new facilities. Discrimination can be avoided, however, by reducing the amount of the exaction by the discounted amount of the old school costs to be paid by the property tax on the houses in the new subdivision. This, of course, assumes that the new subdivision is required to finance all the expenses of new schools. This would be rare. To the extent that the old residents through the property tax pay a portion of the expenses for new facilities, the new residents through the same tax could be required to pay the costs of the existing facilities.

Those who in the future will buy or rent the houses of old residents will not have to bear the kind of exaction presently being imposed on new subdivision residents. Does this result in unconstitutional discrimination against the latter group? We believe it does not and that it is proper to see such future buyers in the place of the old residents thus assuring to the old resi-

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of the average number of children per house, what will be the cost per house? That is the permissible exaction.

The following is a model cost accounting of school facilities for exactions. Suppose a subdivision of 400 houses. Eight hundred children are added to the population by the subdivision (ISARD & COUGHLIN, *op. cit. supra* note 99 at 51) [hereinafter cited as I. & C.]. Suppose 600 will be in elementary school at some one time and 400, in high school at another one time. The following calculations are indicated.

Elementary School	*High School*
$ 13.10 per square foot (I.&C. 73)	$ 15.60 per square foot (I.&C. 73)
x85 square feet per child (I.&C. 64)	x125 square feet per child (I.&C. 64)
$1113.50 per child	$1950.00 per child
x600 children	x400 children
$668,100 cost	$780,000 cost

$1,448,100 total cost
—448,911 (31% federal-state subvention — California average)

$ 999,189 total local cost
$ 460,989 for the elementary school
$ 538,200 for the high school

(Land costs have not been included in this accounting because they are so highly variable from place to place. In any given case, however, it would be possible to estimate land costs as well. For the amount of land required for various sized schools, see I.&C. 64).

dents sales prices for their homes which are not lessened by the necessity of buyers paying a special school fee. We presume that such a fee would act to depress the market value of the old homes by an equivalent amount and would result in the old owners thereby having to pay for the new schools, as well as the schools previously funded by their property tax.

It might be argued that future buyers of homes in the development presently subjected to exactions are being preferred to the present buyers who are required to bear the exaction if the latter are required to pay for schools which will outlast the specific educational needs generated by them. For instance, the elementary and high school facilities constructed with the hypothetical $1 million will still be operating after the children of the initial subdivision buyers have graduated. We do not see this as discriminatory because future sales prices of homes in the subject development ought to reflect at least part of the exaction. Nevertheless, it is possible to account for this factor and avoid a potential question of discrimination by charging to the subdivision buyers only that portion of cost allocable to the average use which would be made by the estimated children initially to be housed in the subdivision. Thus, returning to our model, less than one-third the cost of both the elementary and high school facilities would be reflected in the school fee, or some $.29 million.[103] This would result in an upper limitation of $730 per house, which amortized over a twenty year period at six percent would be $62.76 per house per year. Such result should not discriminate against future buyers of homes in the development because they will not be paying additional specific charges for the capital facilities which they occupy but will only be contributing to their cost through the general property tax applicable to all within the jurisdiction. Moreover, it is probable that market forces under such circumstances would minimize the extent to which the original (partial) exaction could be transferred.

As far as residents of future subdivisions are concerned, there is no discrimination, for the same exaction schedule will apply to them.

The remaining question involves possible discrimination in favor of or against new residents in multiple rental dwellings. The exaction schedule

103. Assume twenty years of life for a school (I.&C. 86). The 600 subdivision elementary school children will use it for eight years, 2/5 of its life. The 400 subdivision high chool children will use it for four years, 1/5 of its life. The cost of the school facilities attributable to them is:

$184,396 for the elementary school
107,640 for the high school

$292,036 total

This cost exacted over 400 houses is $730 per house. To recapitulate, of the cost of the required school facilities:

$292,036 will be paid by exactions.
$707,153 will be paid by the municipality.
$448,911 will be paid by state and federal subventions.

could be applied to single parcel rental dwellings. And in fact, it is even possible that a court would *require* the inclusion of new apartment dwellings in any exaction schedule, especially in suburban communities, on the ground that there is no responsible basis for distinguishing between new single family houses and new apartment houses when considering the objectives of a school (or other) exaction regulation.[104]

Cost-accounting provides a method for calculating capital costs generated by subdivision development. While accountants will undoubtedly differ concerning the propriety of specific cost allocations, rational resolutions of such disputes ought to satisfy courts that constitutional taking and discrimination limitations have not been transgressed. Moreover, for reasons to be explored in the last section of this article, we believe that state statutory exaction limits would normally be set well below the sum which would create the more difficult equal protection and taking issues.[105] In the absence of such statutory limits, however, a community would be wise to establish upper limits far enough below the absolute cost of facilities required by the development so as to appear reasonable on their face and cast the difficult burden on protestors to show that the exactions are discriminatory.

THE TAX POWER

Exactions may also be regarded as a species of taxation. Whether an exaction is characterized by the courts as a tax or a police power regulation depends upon the clarity of the enabling act and upon the terms in which the ordinance is drawn.[106] Special assessment and the excise tax have been urged as appropriate analogies for exactions.[107] For these reasons, and because taxation might serve as the appropriate rubric for recasting exaction legislation, it is important to examine what constitutional room there is for a system of exactions based squarely on the taking power.

Special Assessment

Special assessment in the usual case is based on the tax power, albeit a peculiarly qualified tax power.[108] Special assessment doctrine is usually thought to require that the cost assessed to a particular property owner for an improvement must be reflected in an increase in the fair market value of

104. More complex questions will arise where new apartments are constructed on cleared land, normally within central cities. Here discrimination could be avoided by calculating the fee on the basis of net residential units added by the new construction.

105. See text following note 168, *infra*.

106. See notes 86-87 *supra* and 149-50 *infra* and accompanying text.

107. Reps & Smith, *Control of Urban Land Subdivision*, 14 SYRACUSE L. REV. 405 (1963) (special assessment); Doebele, *Improved State Enabling Legislation for the Nineteen-Sixties*, 2 NATURAL RES. J. 321 (1962) (excise tax).

108. 1 PAGE & JONES, TAXATION BY ASSESSMENT § 8 (1909); 14 McQUILLIN, MUNICIPAL CORPORATIONS § 38.01 (3d ed. 1950); RHYNE, MUNICIPAL LAW § 29 (1957); 2 ANTIEAU, MUNICIPAL CORPORATION LAW § 14.00 (1963) [hereinafter these standard treatises shall be cited by the author's name].

the property.[109] Thus, special assessment is not like the usual exercise of the tax power:

> . . . when taxation takes money for the public use, the taxpayer receives, or is supposed to receive, his just compensation in the protection which government affords to life, liberty and property, in the public conveniences which it provides, and in the increase in the value of possessions which comes from the use to which the government applies the money raised by the tax; and these benefits amply support the individual burden.[110]

Special assessment is not content with this diffuse and imprecise compensation. Because of a particular sensitivity to problems of police power regulation and property taking, sensitivities long since muted in other uses of the taxing power, the special assessment must be compensated by benefit and, more important, benefit must be measured by an increase in the value of the property assessed. This special property benefit requirement is justified in such terms as ". . . without reference to benefits, it would either take property for the public good, without compensation, or it would take property from one person for the direct benefit of another,"[111] or "the owner has received a peculiar benefit, which the citizens do not share in common,"[112] and it is therefore "equitable . . . to charge [him] . . . with a greater proportional part of the cost of the work."[113] Because of this special requirement the special assessment is not bound by state constitutional requirements or uniformity and *ad valorem* taxation or by limitations on the amount of taxation.[114]

However strict this doctrinal requirement that a special assessment be offset by an increase in property value, the courts have developed a counter doctrine of deferment to legislative judgments that the benefit to property is present. The result is the practical demise of the property benefit requirement. In *French v. Barber Asphalt Paving Co.*,[115] the Supreme Court announced the federal rule that legislative determination is conclusive of the question whether and how much the property assessed is benefited. This was the summation of many previous cases and has been followed again and again by the Court.[116] It has come to be the accepted state rule.[117] The courts

109. 1 PAGE & JONES § 11; 14 MCQUILLIN § 38.02; RHYNE § 29-2; 2 ANTIEAU § 14.01.

110. 2 COOLEY, CONSTITUTIONAL LIMITATIONS 1055 (1927).

111. Stuart v. Palmer, 74 N.Y. 183, 189, 30 Am. Rep. 289, 294 (1878).

112. Marion Bond Co. v. Johnson, 29 Ind. App. 294, 297, 64 N.E. 626, 627 (1902).

113. City of Boston v. Boston & Albany R.R., 170 Mass. 95, 98, 49 N.E. 95 (1898).

114. 1 PAGE & JONES § 34; 14 MCQUILLIN § 38.05; 2 ANTIEAU § 14.00. A state enabling act is, of course, required.

115. 181 U.S. 324 (1901).

116. See, *e.g.*, Louisville & N.R.R. v. Barber Asphalt Paving Co., 197 U.S. 430 (1904) (legislative determination conclusive); Embree v. Kansas City & Liberty Blvd. Road Dist., 240 U.S. 242 (1916) (determination by delegated commission, with hearing, conclusive); Chesebro v. Los Angeles County Dist., 306 U.S. 459 (1939) (implied legislative determination in creation of special assessment district conclusive).

117. See, *e.g.*, Flynn v. Chiappari, 191 Cal. 139, 215 Pac. 682 (1923); Duling Bros. Co. v. City of Huntingdon, 120 W. Va. 85, 196 S.E. 552 (1938).

have allowed a host of methods for apportioning the assessment, all equally acceptable as approximations of property benefit.[118] To buttress further their deference to legislative determinations of benefit, the courts have held that the benefit need not be reflected in the present property value, rather any benefit in any possible future change in the use of the property will do.[119] Thus, as one commentator puts it, absent fraud or gross unreason a special assessment will not be struck down for lack of property benefit,[120] and the absence of property benefit will fail as a defense to collection or as a ground for attack on the assessment.[121] The result is a host of valid special assessments that exceed the actual benefit to the property assessed.[122]

Contrary to Reps and Smith's assertion, special assessment embodies no categorical spatial requirement.[123] The distance of property from an improvement does not itself preclude the legislature from subjecting it to special assessment. Special assessment for paving a non-abutting intersection has been upheld.[124] Similarly, assessments for widening a street a block away[125]

118. See, *e.g.*, Tonowanda v. Lyon, 181 U.S. 389 (1901) (foot frontage); Quale v. City of Willmar, 223 Minn. 51, 25 N.W.2d 699 (1946) (foot frontage); Appeal of Hazeltine, 23 N.J. Super. 154, 92 A.2d 530 (1952) (square foot); Turner v. Adams, 178 Ark. 67, 10 S.W.2d 41 (1928) (property value).

119. See, *e.g.*, Louisville & N.R.R. v. Barber Asphalt Paving Co., 197 U.S. 430 (1904); Appeal of Public Service Elec. & Gas Co., 18 N.J. Super 357, 87 A.2d 344 (1952); Howard Park Co. v. City of Los Angeles, 119 Cal. App. 2d 515, 259 P.2d 977 (1953).

120. BURRUS, ADMINISTRATIVE LAW AND LOCAL GOVERNMENT 77 (1963). See also 14 McQUILLIN § 38.02; RHYNE § 29-8 and 2 ANTIEAU §§ 14.07-14.13.

121. BURRUS, *op. cit. supra* note 120, at 82, 89-90.

122. Mount Saint Mary's Cemetery Ass'n v. Mullens, 248 U.S. 501 (1919) (assessment for sewer where property was used for a cemetery); Howard Park Co. v. City of Los Angeles, 119 Cal. App. 2d 515, 259 P.2d 977 (1953) (assessment for sewer where property was used for oil production); Quale v. City of Willmar, 223 Minn. 51, 25 N.W.2d 699 (1946) (assessed for water main on fronting avenue where water main on rear avenue already serviced residence and grounds); Chicago & N.W. Ry. v. City of Seward, 166 Neb. 123, 131, 88 N.W.2d 175, 181 (1958) ("It is probably true that too large an amount of the costs of the improvements . . . were assessed to the owners . . ."); Appeal of Hazeltine, 23 N.J. Super. 154, 92 A.2d 530 (1952) (assessed for enlarged storm water system outlet where even if water overflowed it would not overflow on the land assessed); Appeal of Public Service Elec. & Gas Co., 18 N.J. Super. 357, 87 A.2d 344 (1952) (assessment for sewer where the nine acres assessed were fully occupied by outdoor electrical apparatus and equipment, where a statute restricted the sale of utility property to other public utilities, and where the land was serviced by an existing sewer); Beasley v. Moorestown Township, 3 N.J. Super. 535, 67 A.2d 334 (1949) (assessment for sewer on fronting street where sewer on rear street already services the property and where the property was not connected with the new sewer); Shalet v. City Comm'n, 62 N.M. 55, 304 P.2d 578 (1956) (assessment for street paving where property was used for a cemetery and where one assessor testified that paving would not enhance the land value and another testified that paving would depend on its future use).

See generally WINTER, THE SPECIAL ASSESSMENT TODAY 18-19 (1952).

123. Reps & Smith *supra* note 107, at 411.

124. Faver v. Washington, 159 Ga. 568, 126 S.E. 464 (1925).

125. Inhabitants of Plainfield v. Cleary, 11 N.J. Misc. 922, 168 Atl. 628 (Sup. Ct. 1933), *aff'd*, 113 N.J.L. 35, 172 Atl. 565 (Ct. Err. & App. 1934).

and two-thirds of a mile away[126] and for laying out a park three-quarters of a mile away[127] have been upheld. Distance from an improvement may be evidence going to the question of benefit, but the crucial question, in doctrine at least, remains the question of benefit.[128]

Similarly, contrary to Reps and Smith, special assessment embodies no qualitative restriction. They assert that while streets, sewers, and parks may be financed by special assessment, public schools and municipal services may not be.[129] This may be so as a matter of custom, but there is nothing in the theory of special assessment to make it necessary. The commentators commonly rely on two nineteenth century cases for the proposition that public schools may not be subjects of special assessment.[130] The cases do not support the proposition. *Vanover v. Davis*[131] held simply that the Justices of Terrill County, while they had power from the legislature to select sites for public buildings, had no authority to assess taxes. The case gives no indication that the attempted taxation was in any way special; rather it appears to have been general and county wide. *Board of Comm'rs of Public Schools v. County Comm'rs*,[132] on the other hand, upheld a Maryland act granting authority to tax for public schools. The act applied only to Allegheny County and had been attacked as special legislation. There is no indication that special assessment was contemplated; rather, a general school tax seems to have been at issue. A more recent case, *McCoy v. City of Sisterville*,[133] holds that municipal fire protection may be financed by special assessment. *McCoy* suggests that to the extent that municipal services are used by property owners, and where such use is reflected in the market value of the property, they may be financed by special assessment. There is good reason to expect that to whatever extent the construction of schools or any improvement meets the *McCoy* conditions, it can be subject to special assessment. Since, as Dean Jefferson B. Fordham notes,[134] the courts are finding

126. Mock v. City of Muncie, 9 Ind. App. 536, 37 N.E. 281 (1894).

127. Hart v. City of Omaha, 74 Neb. 836, 105 N.W. 546 (1905).

128. Holmes v. City of Harvey, 324 Ill. 336, 155 N.E. 335 (1927). See generally RHYNE §§ 29-3, 29-4.

129. Reps & Smith, *supra* note 107, at 409.

130. See 14 McQUILLIN § 38.29; RHYNE § 29-3.

131. 28 Ga. 354 (1859).

132. 20 Md. 449 (1864).

133. 120 W. Va. 471, 199 S.E. 260 (1938). 14 McQUILLIN § 38.29 and RHYNE § 29-3 both cite cases to the effect that special assessment may not be used to finance public buildings or public services. Again, the cases do not prove out. County of Adams v. City of Quincy, 130 Ill. 566, 22 N.E. 624 (1889) holds only that a court house may be assessed specially for the cost of paving streets in front of it. County of McLean v. City of Bloomington, 106 Ill. 209 (1883) is to the same effect. Trephagen v. City of South Omaha, 69 Neb. 577, 96 N.W. 248 (1903), holds only that the enabling act did not authorize special assessment for garbage colletcion. The court raised no question about the power of the legislature to authorize such an assessment.

134. FORDHAM, LOCAL GOVERNMENT LAW 452 (1949). Among the cases cited by Fordham, see City of Whittier v. Dixon, 24 Cal. 2d 664, 151 P.2d 5 (1944) (upholding special

the theory of special assessment considerably more open ended than had been supposed, customary notions of what improvements are properly subject to special assessment are in for revision.

A further question might well be raised: why maintain in special assessment the by now ephemeral requirement that the assessment be no greater than the increase in property value? Suppose there were to be substituted for the property benefit rule the cost-accounting analysis suggested here for exactions? Certainly the popular conception of special assessment is more closely approximated by a cost-accounting approach.

> The owner, usually, has little concern with any theoretical economic benefit which may accrue to his property from the improvement. If the improvement is worth its cost to him from the services aspect, he is content.[135]

This conception, closely linking the special assessment with the service charge, dominates local legislatures and very often influences state legislatures and the courts.[136] It may be wise explicitly to acknowledge this fact in special assessment theory.

In the earliest statutory provision for special assessment there seems to have been no requirement of property benefit. The assessment originated in the drainage of Rumney Marsh in the County of Kent. The statutory response provided for the construction of sewers and drains; their cost was to be charged to those profited by the new pasture and by the better fishing.[137] A later statutory effort required adjoining property holders — owners and inhabitants — to build new streets and to keep them in repair, all without regard to special property benefit.[138] The property benefit requirement seems to have crept into special assessment doctrine in the course of the colonial effort to transplant the old law to the new world. In the nineteenth century courts became tied to the notion that the property benefit had to be measurable in terms of a rise in the market value of the benefited property.[139] More recently, however, old notions of real property as the exclusive residence of value have altered considerably. It is now recognized that a property owner may receive value in services which is not necessarily reflected in the value of his property. And cost-accounting would seem a most appropriate means of gauging this less tangible value in the form of services.

Despite the fact that cost-accounting theory most closely approximates the popular view of special assessment and more clearly measures the relevant

assessment for the construction of public parking places). To the same effect, see Ambassador Management Corp. v. Incorporated Village of Hempstead, 296 N.Y. 666, 69 N.E.2d 819 (1946), *cert. denied*, 330 U.S. 835 (1947).

135. WINTER, *op. cit. supra* note 122, at 20.

136. *Id.* at 18.

137. 23 Hen. 8 c.5 (1531). See 1 PAGE & JONES § 23.

138. 2 W.&M., c.8, § 7 (1690).

139. For the history of special assessment, see 1 PAGE & JONES §§ 11, 23-31. See also Hammett v. Philadelphia, 65 Pa. 146, 157 (1870) (Justice Read dissenting to a strict property benefit decision and arguing from the history to permissive benefit requirements).

considerations of value, it may be that courts continue to choose the property benefit theory because of some suspicion that property values, and changes in them, are more easily measured and traced than are the costs of community services. But it is hardly necessary to look beyond the confusion and the deference of courts to legislative judgment in special assessment cases to see this proposition belied.[140]

The property benefit requirement protects the special assessment from state constitutional requirements of uniformity and *ad valorem* taxation and exempts the assessment from limitations on the property tax rate. But there is no reason to suppose that such exemption would be sacrificed by a reformulation of special assessment in cost-accounting terms. The cost-accounting assessment would still be distinguished from general property taxation. Indeed it would bear a striking resemblance to municipal service charges which are exempt from the various state constitutional restrictions and, like service charges, the cost benefit assessment would not allow an unreasonable charge.[141] Thus, for example, the sort of assessment illustrated by *Nakima Realty Co. v. City of Milwaukee*[142] — the sort that the traditional special assessment rule is designed to protect against — would be invalid under the cost-accounting rule. There widening a street and constructing a bridge linking Milwaukee with its major suburbs across a nearby river resulted in an assessment of $11,400 against a nearby property owner. The sale price of the property after the improvement was $3,000. Clearly the assessed tax was not reflected in the property's fair market value. The assessment was struck down. Cost-accounting assimilated to special assessment would offer similar protection. It was not the activities of the Nakima Realty Co. but the activities of the whole city which produced the $11,400 bill.

If the property benefit rule has any function not served better by a cost-accounting analysis, it is recovering to the public from property owners whatever increase in the value of their property accrues from public improvements. In this function the special assessment represents one of the few efforts, however imprecise and indirect, to effect Henry George's program. It is, however, a most inadequate effort. Very often special assessment stops well short of recovering the full value produced by public improvements. It may be more realistic to restrict the special assessment to a financing function, and then, if we choose to follow George's banner, to refine a more precise instrument to recover for the public treasury the value produced by public improvements.[143]

Both the traditional formulation of special assessment theory and the cost-accounting formulation go to matters of equal protection and taking — that

140. In contrast, see the abundant literature on cost-accounting cited at note 99 *supra*.

141. RHYNE § 20-5; 2 ANTIEAU § 19.03, at pp. 634-35.

142. 249 Wis. 355, 24 N.W.2d 610 (1946).

143. For a review of recent legislation attempting to realize the single tax, see Browning, *Land Value Taxation: Promises and Problems*, 29 J. AM. INSTIT. PLANNERS 301 (1963).

the assessed owner should not bear an unfair burden, that he should not bear the cost of his streets and those of others as well, that he should receive some benefit from the assessment. It is the merit of Reps and Smith that they recognize these as the crucial questions for the constitutionality of exactions. It was this consideration that led them to adapt special assessment to exactions. But special assessment is not the only tool adequate to the task. Indeed special assessment is more than Reps and Smith thought it was. Where it departs from their conception it does not prejudice equal protection, for even though there are no spatial or qualitative limitations, the traditional property benefit theory assures some minimal equality. Equal protection and the prohibition from taking are arguably jeopardized, however, by the practice of judicial deference to legislative judgments on property benefit. The cost-accounting rule would give the courts a more accurate tool for analyzing both benefits and cost allocation whether the rubric were assessments or exactions.

Excise Taxes

Professor Doebele suggests that exactions be recast as excise taxes with but one qualifying hesitation: subdivision may not be a business that is subject to such a tax.[144] This hesitation seems inappropriate; there is no qualitative limit on the sorts of businesses on which an excise tax can be levied.[145] Indeed, the usual state constitution speaks in terms of the power to tax "any occupation, trade or business."[146] *Ridgefield Land Co. v. City of Detroit*[147] points to the possibility of an excise tax on subdividing. More recent cases make the matter even more clear. In *City of Los Angeles v. Rancho Homes, Inc.* the application of an excise tax on "any person doing business as an independent contractor or realtor" to the subdivider was upheld.[148] In striking down a fifty dollar per lot fee for parks, recreation, and fire protection as a regulatory device in conflict with the Subdivision Map Act, the California court in *Newport Building Corp. v. City of Santa Ana*[149] noted that if the ordinance had been worded to cover the whole operation of subdivision — improvement, construction and sales — it would have been upheld as an excise tax. In an even more pregnant decision, the California court, in *City of Glendale v. Trondsen,*[150] upheld a tax for rubbish collection upon building

144. Doeble, *Improved State Enabling Legislation for the Nineteen-Sixties*, 2 NATURAL RES. J. 321, 341-42, n.67 (1962).

145. See 4 COOLEY, TAXATION §§ 1679, 1680 (4th ed. 1924) [hereinafter cited as COOLEY]; 16 McQUILLIN §§ 44.190d, 44.191; RHYNE § 28-13. An early Kentucky case, Hager v. Walker, 128 Ky. 1, 107 S.W. 254 (1908), had struck down an excise tax on real estate agents on the sole ground that it failed to take account of the volume of business.

146. LEGISLATIVE DRAFTING RESEARCH FUND, INDEX DIGEST OF STATE CONSTITUTIONS 1026-27 (1959).

147. 241 Mich. 468, 217 N.W. 58 (1928).

148. 40 Cal. 2d 764, 256 P.2d 305 (1953) (an excise tax of twelve dollars for the first twelve thousand dollars of gross receipts and one dollar on every thousand thereafter).

149. 26 Cal. Rep. 797, 210 Cal. App. 2d 771 (1962).

150. 48 Cal. 2d 93, 308 P.2d 1 (1957).

occupants, *qua* occupants, as a direct cost of service under the police power or, alternatively, as an excise tax on the right of occupancy.[151]

If the business of subdividing may be subject to a tax, what are the constitutional limits on the tax? Excise taxes are grounded upon the usual rationale for the taxing power — the diffuse benefits flowing to taxpayers.[152] Where license fees rest upon the police power, they are limited by police power doctrine. But where revenue is the purpose of a license fee, it is an excise tax and there is no such limitation;[153] indeed, constitutional limitations on the excise tax are permissive.[154] Enabling legislation is necessary,[155] but the excise tax is not subject to state constitutional requirements of uniformity,[156] *ad valorem* taxation,[157] or to tax rate limitations.[158] The tax must, however, be reasonable. In constitutional terms the tax may be neither confiscatory nor discriminatory. Thus if the tax is so great as to prohibit a legitimate activity it will be struck down as confiscatory,[159] and if it is not based upon reasonable distinctions germane to the revenue purpose, it will be held invalid as discriminatory.[160]

As in the other areas of the law of exactions a crucial question is the discrimination doctrine. The most recent Supreme Court treatment of classification for taxation purposes, *Allied Stores of Ohio, Inc. v. Bowers*,[161] is generous in its dicta that state discrimination between residents and non-residents does not render a classification arbitrary if the classification is founded upon a reasonable distinction grounded in state policy. This case, however, is only of uncertain relevance to the subdivision problem. In *Allied Stores* the Court upheld an Ohio statute exempting non-residents from an excise tax on merchandise stored in a warehouse. The classification was held justified by the state's policy of encouraging new industry to locate in the state. In an earlier decision in the same general line of cases, *General American Tank Car Corp. v. Day*,[162] the Court upheld an excise tax imposed upon non-residents in lieu of local property taxes. If an excise tax is regarded as bearing upon the new residents of the subdivision, hitherto non-residents, the situation can be trans-

151. For an excise tax on the right of occupancy, see also 16 McQUILLIN § 44.190d; RHYNE § 28-13.

152. See text accompanying note 110 *supra*.

153. 4 COOLEY § 1787.

154. 4 COOLEY § 1802; RHYNE § 28-13.

155. 4 COOLEY §§ 1676, 1680; 16 McQUILLIN § 44.190a; RHYNE § 28-9.

156. 4 COOLEY § 1681; 16 McQUILLIN § 44.19; RHYNE § 28-9.

157. 4 COOLEY § 1682.

158. 16 McQUILLIN § 44.29.

159. See, *e.g.*, Bessemer Theaters, Inc. v. City of Bessemer, 261 Ala. 632, 75 So. 2d 651 (1954). See generally 4 COOLEY § 1809.

160. See, *e.g.*, City of Los Angeles v. Tannahill, 105 Cal. App. 2d 541, 233 P.2d 671 (1951); Panama City v. Hi-Octane Terminal Co., 121 So. 2d 197 (Fla. 1960). See generally, 1 COOLEY §§ 348-53; 16 McQUILLIN § 44.190b.

161. 358 U.S. 522 (1959).

162. 270 U.S. 367 (1926).

lated into *Day's* terms — the excise tax can be viewed as in lieu of the property taxes that would have been paid had the new residents been long-time residents. It may well be, however, that the courts will not look beyond the subdivider, the *direct* subject of the taxes, to the residents to whom the tax will be passed. While excise taxes on other businesses are just as surely passed on to their customers, the courts' review of the classification usually stops with the classification of the businesses.[163]

Given the variety of municipal circumstances and the contending fiscal considerations, there is good reason to suppose, as the court indicated in *Bowers,* that the construction of a formula for differentiating the relevant classes for taxation is a legislative job. If the legislature thinks it wise to apportion the cost of increased facilities to new residents whose activities make them necessary, whether for reasons of fairness, efficiency, or convenience, such a policy, unless palpably arbitrary, should not be liable to constitutional invalidation. And the cost-accounting analysis offers here, as in special assessments, a minimum standard by which the courts may judge the reasonableness of the legislative classification.

CONCLUSION

A Comparison of Police and Taxing Powers

Analysis of subdivision exactions under the police and tax power doctrines indicates notable similarities. The objectives of regulation, special assessment, and excise tax are differently stated to be protection of the general welfare, recompense for the benefits of public improvements, and generation of revenue to provide public facilities and services. Yet the constitutional limitations on the use of these powers by local governments flow from common bases. Regulation cannot validly discriminate between similarly situated landowners and cannot validly place a heavy "uncompensated" cost for public welfare on landowners without running afoul of equal protection and taking limitations. Special assessments must be levied, if at all, on all similarly situated landowners and must bear some relationship to benefits flowing from the improvements to those assessed. Locally imposed excise taxes must not be discriminatory; they must be imposed consistently with reasonable distinctions; and they must not prohibit a legitimate activity. The equal protection theme runs throughout. The taking theme patently is applicable to regulations and special assessments (external costs can be collected or obligations can be imposed so long as specific correlative benefits are created). While there seems to be no comparable taking limitation on excise taxes, unless taking considerations are seen to be satisfied by the sharing in diffused benefits flowing from general public expenditures, nonetheless there is an upper limit which protects the individual taxpayer from confiscation.

The reason why the regulatory and taxing powers are more often regarded

163. See the cases collected in HELLERSTEIN, STATE AND LOCAL GOVERNMENT 45-56 (1961). See also 3 ANTIEAU § 21.12; RHYNE §§ 28-3, 28-4.

as disparate rather than as akin is because these powers are normally exercised in different manners: regulation prohibits and taxation exacts. The inquiry usually is whether state enabling acts permit the exercise of a power specified as regulatory or taxing. But when their exercise is similar, as in subdivision exactions, and when the phraseology of specific enabling acts are not consulted, the similarity of the powers becomes more obvious. Regardless of label, properly constituted exactions for a wide variety of purposes are constitutionally permissible.

A Legislative Approach

Subdivision exactions, justified under the police or taxing powers, or both, often raise desperately needed municipal revenues. They "shift" a portion of the costs of growth to newcomers in the suburban community, thereby minimizing to some degree the tax impacts of such growth on the community's existing residents. But such exactions raise the spectre of exclusion: arguably they will add so to the cost of suburban housing as to exclude an even larger portion of lower income and non-white population than is presently relegated to life in the central cities by the higher suburban housing costs.

A legislature considering enabling statutes for subdivision regulation ought to examine with care the exclusionary impact of any such legislation. In our view, well drawn legislation can accommodate exaction without exclusion. The following considerations are especially relevant. Subdivision housing is by its nature exclusionary. Many communities are made up primarily of houses in price ranges in excess of the financial capacities of a large proportion of the population.[164] Income level exclusion (and to a large extent concomitant racial exclusion) has already occurred, and modest additional price increments are inconsequential. If the goal of diminishing the exclusive character of such communities were adopted, prohibiting exactions would have little effect. More to the point would be limiting municipal power to enact exclusionary zoning, vigorous enforcement of anti-discrimination legislation applicable to single family housing, and more effective governmental subsidization of house buying. Further, many communities for a variety of reasons will decide against the use of exactions for fear of dampening residential development deemed desirable to provide, for instance, more consumers for downtown retailers or to attract industry by assuring adequate residential facilities for employees.

Finally, for the balance of communities where modest houses are permitted, the impact of exactions will be strikingly slight because legislative and judicial pressures will tend to require the establishment of reasonable ceilings. The amount of the exactions at issue in the subdivision cases to date —

164. The average *construction cost* of single-family houses in the United States in 1962 was $14,325. H.H.F.A., Housing statistics (Annual Data 1963) table A-3. The average rose to $14,925 in 1963. H.H.F.A., Housing statistics (April 1964) table A-3.

$37.50 per lot,[165] $50 per lot,[166] $80 per lot,[167] $325 per lot [168] — can surely not be characterized as exclusionary. Regarded either as lump sum fees or, more pertinently, as amortized over the life of a mortgage such sums can only be minimal in effect. Nevertheless it is true that cost-accounting as a constitutional test may permit exactions that will significantly increase the price of the house. In the cost-accounting of a school offered earlier in an example, a thirty-one percent subvention by federal and state governments was subtracted from the cost allocable to the subdivision. Such a subvention is gratuitous and may vary from jurisdiction to jurisdiction and from time to time, severely increasing the allocable cost. Moreover, in a given circumstance there may be some ambiguity not resolved by the cost-accounting test; it may be unclear, for example, how many of the eight hundred children will attend school at any one time.

There are, however, political pressures that would prevent any state legislature from permitting exactions to approach the constitutional maximum. Measures authorizing exactions will come under the scrutiny of powerful lobbies which are opposed to their passage. The National Association of Home Builders, for instance, can be counted on to develop the case against such measures and to urge at the least modest authorized ceilings on the amounts which a municipality may exact. Further, legislatures should perceive that courts may well respond negatively to a large exaction either by finding that it is unreasonable as an excise tax or by invoking the doctrine of reasonable exercise of the police power. While the courts' primary role in judging exactions should be to assure that new residents do not bear disproportionately large shares of municipal costs, the legislation of modest ceilings on authorized exactions will in effect create a presumption that the exactions are legitimate. Coincidentally, the establishment of such ceilings will minimize the exclusionary tendencies which might flow from exactions.

There are at least three ways to approach the setting of ceilings. One is to establish absolute ceiling amounts applicable to all housing development — for instance no more than $500 per dwelling unit. The exaction still would have to be based on a cost nexus and all developers would have to be treated

165. Haugen v. Gleason, 226 Ore. 99, 359 P.2d 108 (1961).

166. Gulest Associates, Inc. v. Town of Newburgh, 25 Misc. 2d 1004, 209 N.Y.S.2d 729 (Sup. Ct. 1960), *aff'd*, 15 App. Div. 2d 815, 225 N.Y.S. 2d 538 (1962); Kelber v. City of Upland, 155 Cal. App. 2d 631, 318 P.2d 561 (1957) ($30 per lot school fee; $99.07 per acre drainage fee).

167. Longridge Estates v. City of Los Angeles, 183 Cal. App. 2d 533, 6 Cal. Rptr. 900 (1960) ($400 per acre).

168. Rosen v. Village of Downers Grove, 19 Ill. 2d 448, 167 N.E.2d 230 (1960). Among the exactions not translated into monetary terms were those in Pioneer Trust & Savings Bank v. Village of Mount Prospect, 22 Ill. 2d 375, 176 N.E.2d 799 (1961) (6.7 acres of land in 250 unit subdivision); Coronado Development Co. v. City of McPherson, 189 Kan. 174, 368 P.2d 51 (1962) (10% of the appraised value of the unplatted land); Wine v. Council of City of Los Angeles, 177 Cal. App. 2d 157, 12 Cal. Rptr. 94 (1960) ($1315 per acre, *i.e.*, $263 per lot, plus the cost of certain streets).

similarly, but only an exaction of less than $500 would be authorized. A second is to key the ceiling to the cost of the housing. Such a system would be valid if all ceilings fell within the constitutional cost accounting limits and the percentage ceilings were regarded as a legislative effort to assure that the exaction did not deleteriously increase the cost of the house. A third approach would more carefully attempt to balance municipal need and solicitude for existing residents against exclusionary tendencies by relating the amount of permissible exactions (within constitutional limits) to the community's tax base. Where municipal resources are already hard pressed, it seems especially justifiable to shift a part of the cost of necessary new services to the incomers who make them necessary. To aid such municipalities an exaction scale could be keyed to effective property tax rates. Communities with effective tax rates above the state average would be able to impose heavier exactions than communities whose rates were light. Such a scaling would tend to favor communities with high service levels and communities which contain a less than average proportion of high value properties. This is not unreasonable since the legislative task is to balance municipal need and an equitable tax burden on old residents against possible exclusionary tendencies.[169]

A Final Word

We have chosen to challenge the emerging rule that would prohibit exactions for a full range of municipal capital expenditures, particularly for schools and recreation. It seems important to us to free so imprecise and troublesome an area as municipal finance, haunted so often by necessity, from inflexible constitutional strictures. 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, wherever 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.

169. The final question is, when shall the exaction be imposed. For reasons of convenience and notice it is appropriate that the subdivider assume the obligation when he files the subdivision plat and permission to subdivide is granted. To relieve the subdivider of the necessity of additional early financing, the exaction fee should be collectible not on the filing date but on the date of sale.