Kentucky Law Journal

Volume 50 | Issue 4 Article 7

1962

Mandatory Dedication of Playgrounds and Parks in Residential Subdivisions

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MANDATORY DEDICATION OF PLAYGROUNDS AND PARKS IN RESIDENTIAL SUBDIVISIONS

As our cities continue their sprawl into surrounding rural land, there is an increasing awareness of the inadequacy of the playgrounds and parks in these new areas. There seems to be little controversy over the importance and desirability of playgrounds and parks;[1] the basic problem lies in devising a method of providing adequate facilities for new residential areas. One possible method involves mandatory dedication by subdividers as a condition precedent to the filing of a subdivision plat.[2] The purpose of this note is to consider the constitutionality of mandatory dedication, with particular reference to the Kentucky law on the subject, as well as to offer possible alternatives.

SUBDIVISION CONTROL IN GENERAL

1. Definition

Subdivision control "relates to the way in which land is divided and made ready for building development."[3] Such control is based upon the older platting statutes which required a survey and a recordation of a plat map. Through state enabling acts, local governing units have been given the authority to impose certain requirements which must be met before the plats can be recorded.[4] Subdivision control is intimately related to zoning; both are manifestations of police power designed to deter community blight and to direct future growth. Zoning regulates the type of building development which can take place on the land; subdivision control regu-

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[1] Planning Advisory Service Rept. #46, 1 (Jan. 1953): It has long been agreed that accessible parks, playgrounds and schools are as necessary to a good living environment as are proper densities and compatible land uses. Cities are permitted the construction of new residential areas, which though good or excellent in residential structure, are lacking in the environmental features which result in wholesome and enduring neighborhoods. One characteristic of the slums in many cities is its inadequate park and playground space; and one lesson that the slum has taught us is that once subdivision and development have taken place, it is virtually impossible for the city to provide that open space without either demolishing buildings or completely redeveloping the area.

[2] Other methods:

(a) voluntary dedication by developers—This is an unrealistic method and has been carried out by only a few subdividers,

(b) reservation of property either voluntary or mandatory—This method is provided for in Ky. Rev. Stat. 100.362, 100.790 to 100.830 (hereinafter cited as KRS), but has never been used, due mainly to lack of funds,

(c) purchase by city or county, before or after subdivision is developed. This has been used some, but has been limited in use due to insufficient funds.

[3] Melli, *Subdivision Control in Wisconsin*, 1953 Wis. L. Rev. 389.

[4] According to Haar, Land Use Planning 347 (1959) and 28 Ind. L.J. 544 (1952), forty-nine states have subdivision statutes, thirty-nine vesting control in a planning commission or board, while the other ten vest authority in the local governing body.

lates the way in which the land is divided and made ready for building development. At least one writer has emphasized the fact that through subdivision control the city has its best opportunity to control its growth in a manner which will benefit the community as a whole.[5] The early enabling acts were aimed mainly at street patterns; however, thirty-two states presently require physical improvements on the land such as curbs, sidewalks, sewers, and surfaced streets—all at the subdivider's expense.[6]

2. Social Justification

In justifying why a land owner should be compelled to obtain the approval of a government agency before he can subdivide his land and to provide improvements at his own expense, the courts have stressed the fact that everyone concerned receives some benefit.[7] The community is benefited by the protection of its interest in assuring the permanence of new developments, by the adequacy of facilities for future services, and by health and fiscal safeguards—all without the prohibitive cost of acquiring the property by condemnation. The home buyer and mortgage lender are protected in their investment by being reasonably assured that the property will keep its value. The subdivider is also protected in a sense from possible financial ruin which might well result from excessive subdivision.

3. Constitutionality

The power of state legislatures to enact statutes requiring filing of subdivision plats is commonly recognized.[8] Generally, the validity of any particular regulations which act as conditions precedent to the recording of the plats has depended upon the legislative authorization or upon the reasonableness of the regulation. The courts have generally upheld regulations which require the subdivider to make such improvements as grading streets and installing utilities as being reasonable regulations by the community.[9] Some courts have strictly limited the conditions to be imposed to those specified in the enabling legislation. For example, under a statute referring only to direction and width of streets, the Minnesota court held that no requirement for grading streets could be made.[10] Also, the New Jersey court has held that in the absence of enabling authority the

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[5] Webster, Urban Planning and Municipal Public Policy, ch. 9 (1958).
[6] 28 Ind. L.J. 544, 554 (1952).
[7] Melli, *Subdivision Control in Wisconsin*, 1953 Wis. L. Rev. 389.
[8] Annot., 11 A.L.R.2d 524 (1950).
[9] Allen v. Stockwell, 210 Mich. 488, 178 N.W. 27 (1920).
[10] State *ex rel.* Lewis v. City Council of Minneapolis, 140 Minn. 433, 168 N.W. 188 (1910).

municipality had no power to require sidewalks, curbs, and gravel roadways.[11] However, the general rule appears to be that when there is express statutory authority to impose conditions precedent, the limits on what conditions can be required will be broadly construed as long as they are imposed for the good of the community.[12] This rule was well illustrated in a recent Wisconsin case in which the court held that a municipality could require a subdivider to make and install, as a condition of its approval of the subdivision plat, any public improvements reasonably necessary.[13]

In upholding reasonable subdivision regulations as not constituting a taking of property without due process of law, the courts have based their holdings on three theories.[14] First, reasonable conditions are a valid exercise of the police power and not an exercise of the power of eminent domain. The state or its representative has the power to prescribe regulations relating to the health, safety, morals and general welfare of the people. This power is sometimes classified into two categories:[15] (a) where the state regulates performance of certain acts by others such as in zoning or requiring certain professions to be licensed; (b) where the State acts affirmatively in taking or destroying private property because of an emergency.[16] State action under either category is not considered as taking property for a public use, and thus the individual incurring the loss is not entitled to compensation as he would be under eminent domain proceedings. The rationale of the courts in holding that conditions precedent may be imposed before plats can be recorded as a valid exercise of the police power is as follows: where the State requires the individual to act affirmatively, it is a valid exercise of police power, even though it involves a substantial expenditure by the individual;[17] in subdivision control, the one seeking to have the plat recorded or subdivision approved is the one who takes the affirmative step; therefore, as long as the requirements are reasonable, conditions precedent to the recording or approval of the plat may be imposed under the police power.[18] The second theory used by the courts is that subdivision regulations, even those requiring dedication, do not

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[11] Magnolia Dev. Co. v. Coles, 10 N.J. 223, 89 A.2d 664 (1952).
[12] Melli, *Subdivision Control in Wisconsin*, 1953 Wis. L. Rev. 389, 399.
[13] Zastrow v. Village of Brown Deer, 9 Wis.2d 100, 100 N.W.2d 359 (1960).
[14] Beuscher, Materials on Land Use Controls VII: 22 (1958).
[15] Annot., 86 A.L.R. 1523 (1933).
[16] Bowditch v. Boston, 101 U.S. 16 (1879) (Property destroyed to stop spread of fire).
[17] Lehigh Valley R.R. Co. v. Board of Public Utl. Comm's., 278 U.S. 24 (1928); New York & N.E. R.R. v. Bristol, 151 U.S. 556 (1894).
[18] Newton v. American Sec. Co., 201 Ark. 943, 148 S.W.2d 311 (1941); Ayres v. City Council of Los Angeles, 34 Adv. Cal. 29, 207 Pac.2d 1 (1949); Ridgefield Land Co. v. Detroit, 241 Mich. 668, 217 N.W. 58 (1928).

take property unconstitutionally because the landowner can, if he desires, refuse to plat. He still has his land and can sell it as unplatted real estate.[19] The third theory used by the courts is that regulation of land subdivision guards against fraud and sharp practices.[20]

SUBDIVISION CONTROLS REQUIRING DEDICATION OF LAND

1. In General

Dedication of land for public use may be accomplished by two methods, common law dedication and statutory dedication.[21] In common law dedication the public receives an easement on the property "dedicated" by the owner without compliance with any statute or regulation. In statutory dedication, the city obtains title to the property through the owner's compliance with the statute or regulation requiring such dedication. The problem of subdivision controls requiring dedication of land to the public lies entirely within the statutory method.

The earlier subdivision controls did not generally require dedication of land, but as the courts began to uphold requirements of street plans and public improvements as a valid exercise of the police power, more and more conditions precedent were added to subdividers' burdens, including those requiring dedication of land. Dedication of land was first required in connection with streets, which was upheld by the courts as a valid exercise of the police power where it was within the enabling legislation and was reasonable.[22]

2. Constitutionality

The leading case standing for the proposition that it is within the police power to require a subdivider to dedicate land is *Ayres v. City Council of Los Angeles.*[23] There the court announced the broad rule that where no specific restriction or limitation on the city's power is contained in the charter and none forbidding the particular conditions is included either in the Subdivision Map Act or the city ordinances, it is proper to conclude that conditions are lawful which are not inconsistent with the Map Act and the ordinances and are reasonably required by the subdivision type and use as related to the character of local and neighborhood planning and traffic conditions. The court recognized that such dedications would en-

[19] Newton v. American Sec. Co., 201 Ark. 943, 148 S.W.2d 311 (1941).
[20] Matter of Sidebotham, 12 Cal.2d 434, 85 P.2d 453 (1938).
[21] Annot., 11 A.L.R.2d 524, 546 (1950).
[22] Ross v. U.S. *ex rel* Goodfellow, 7 App. D.C. 1, 10-11 (1895); Newton v. American Sec. Co., 201 Ark. 943, 148 S.W.2d 311 (1941); Ridgefield Land Co. v. Detroit, 241 Mich. 468, 217 N.W. 58 (1928).
[23] 34 Adv. Cal. 29, 207 P.2d 1 (1949).

able a city, through long-range planning, to provide for future growth without the prohibitive cost of acquiring the necessary property by condemnation.

While the *Ayres* case on its facts does not stand for the proposition that a municipality can require dedication of land for a park or playground, if the court's broad ruling is followed, then, presumably, other courts would uphold such requirement, even though the enabling legislation did not directly provide for such dedication. The *Ayres* case stands in direct opposition to the cases holding that the approving body of the municipality is to be strictly limited to the standards or conditions specified in the enabling legislation.[24] This contrast might well be explained in terms of the enabling acts of the states involved, for California has gone far beyond the other states in granting broad powers to Los Angeles as an autonomous unit.[25] There has been very little litigation on the issue of requiring dedication of parks and playgrounds due to the fact that developers usually decide not to go to court but to do it the municipality's way so they can get on with the business of selling lots and homes.[26] Two New York decisions involving the requirement of dedication of parks and playgrounds have recognized the validity of the requirement.[27]

The only case in which a court has broadly stated it unconstitu-

[24] Tuxedo Homes v. Green, 258 Ala. 494, 63 So.2d 812 (1953) (The city engineer in absence of statutory authorization could not require installation of a lift pump for sewer.); Rosen v. Village of Downers Grove, 19 Ill.2d 448, 167 N.E.2d 230 (1960) (Ordinance requiring every plat by which land was subdivided to dedicate to public for educational purpose "such areas as might be deemed necessary by plan commission to facilitate establishment of school facilities convenient to subdivision" was invalid, because ordinance was broader than statute which authorized municipalities to establish plan commissions and because ordinance was broader than statute which authorized municipalities to establish plan commissions and because ordinance fixed no standards whatever to govern plan commission in determining amount of land to be dedicated.); State *ex rel.* Lewis v. City Council of Minneapolis, 140 Minn. 433, 168 N.W. 188 (1910) (The city could not require grading under statute referring only to direction and width of streeth.); Magnolia Dev. Co. v. Coles, 10 N.J. 223, 89 A.2d 664 (1952) (The municipality had no power to require sidewalks, curbs, gutters, and gravel roadway, in absence of enabling authority.).

[25] Cal. Const. §11: "Any county, city, town or township may make and enforce within its limits all such . . . police . . . regulations as are not in conflict with the general laws." This can be contrasted with the grant by the Kentucky legislature which delegates police power to municipalities only to the extent that it is expressly delegated by the legislature. Jones v. Russell, 224 Ky. 390, 6 S.W.2d 460 (1928).

[26] Beuscher, *supra* note 14 at 44.

[27] In Reggs Homes, Inc. v. Dickerson, 179 N.Y.S.2d 771 (1958), the court, in holding that a planning board was without power to extract a fee at the rate of fifty dollars per building plot to be allocated to the town park fund, said, by way of dictum, that the planning board could require inclusion of park facilities in approving a new plat. In Ward v. City of New Rochells, 197 N.Y.S.2d 64 (1959), the court, in holding that a dedication of twenty per cent of the land to be subdivided for educational purposes was sufficient to meet the requirement of ten per cent of the land to be dedicated for recreational purposes, assumed the validity of the dedication requirement.

tional to require subdividers to dedicate land for playgrounds and parks as a condition precedent to the filing or recording of a plat is *Pioneer Trust Sav. Bank v. Village of Mount Prospect.*[28] However, a closer examination of the case indicates that the decision turned more on the facts involved than on the abstract constitutional issue. The court emphasized the fact that there was no evidence that a school which was to be built on the land dedicated only secondarily as a playground, would be necessary to the needs of the residents of the subdivision. To the contrary, it appeared that the present school facilities were near capacity—a situation which would be remedied by the building of a new public school on the subdivider's dedicated land. The court said that such mandatory dedication violated the rule of reasonableness—for the burden cast upon the subdivider was not specifically and uniquely attributable to the subdivider's activity. Thus it was not shown that the residents of the new subdivision would receive the primary benefit and the court did not feel that the subdivider should pay the total cost of remedying the school problem.

Massachusetts and Puerto Rico, in anticipation of regulations requiring dedication, have enacted statutes providing that no such requirements can be made upon the subdivider unless he receives compensation.[29] These provisions are contra to the trend of requiring more and more from the subdivider and might well be explained by the reasoning used by Justice Holmes in the case of *Pennsylvania Coal Co. v. Mahon*:

> The protection of private property in the Fifth Amendment presupposes that it [land] is wanted for public use, but provides that it shall not be taken for such use without compensation. . . . When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the constitution of the United States. . . . We are in danger of forgetting that a strong public desire to improve the public condition is not

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[28] 176 N.E.2d 799 (Ill. 1961).

[29] Mass. Ann. Laws, ch. 41, §810 (1953):

> No rule or regulation shall require, and no planning board shall impose as a condition for the approval of a plan of a subdivision, that any of the land within said subdivision be dedicated to the public use, or conveyed or released to the commonwealth or to the county, city or town in which the subdivision is located, for use as a public way, public park or playground, or for any other purpose, without just compensation to the owner thereof.

Planning Rules and Regulations for Puerto Rico, art. 55 (1952):

> Due consideration shall be given to the allocation of suitable areas for schools, parks and playgrounds. At least five per cent . . . of the total of every proposed subdivision, involving the establishment of a new street or streets, shall be reserved and dedicated for recreational purposes.

> enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.[30]

In summary, there seems to be no direct case authority holding that it is constitutional to require subdividers to dedicate part of their land for playgrounds and parks, but neither is there binding authority to the contrary. The courts might easily hold either way, permitting such dedications by using the reasoning of the *Ayres* case to put such dedications within the police power, or prohibiting them by using the reasoning of the *Miller* case and drawing the line at dedication of streets or by calling the mandatory dedication unreasonable as in the *Pioneer* case. In view of the extensive use of mandatory dedications, a decision on its basic constitutionality is sorely needed.

3. Kentucky Law

Assuming that it is constitutional under the police power to use subdivision controls to require subdividers to dedicate land for playgrounds and parks, the next problem is whether, under the Kentucky enabling legislation, the municipalities' planning commissions are delegated sufficient power to require such dedication as a condition precedent for recording subdivision plats. The Kentucky statutes applicable to all classes of cities require that a plat of all or any land to be subdivided within the planning area be submitted to the planning commission for its approval, which must be obtained before the plat can be recorded by the clerk.[31] The enabling act gives the planning commission of the cities of each class the power to make rules and regulations, which would include subdivision control to enforce their planning measures.[32] The enabling act also provides what the subdivision controls in each class city should contain. For first class cities, KRS 100.087 provides:

> The original subdivision control regulations . . . shall provide for: (c) adequate and convenient open spaces for traffic, utilities, recreation, light and air, and access for firefighting apparatus.

For second class cities, KRS 100.360(3) provides:

> All plans, maps, regulations, and restrictions adopted by the commission shall be made in accordance with a comprehensive design to promote the public health, safety, morals or general welfare, by . . . facilitating the adequate provision of transportation, water, sewerage, schools, parks, playgrounds or other public requirements.

For third through sixth class cities, KRS 100.740(1) provides:

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[30] 260 U.S. 393, 415 (1922).

[31] KRS 100.088, 100.092 (first class cities); KRS 100.360, 100.364 (second class cities); KRS 100.730 (third through sixth class cities). For a complete discussion see 48 Ky. L.J. 252 (1960).

[32] KRS 100.032 (first class cities and counties containing first class cities); KRS 100.350 (second class cities); KRS 100.530 (third through sixth class cities).

> The [subdivision] regulations may provide for the proper arrangement of streets, for adequate and convenient open spaces for traffic, utilities, access of fire fighting apparatus, recreation, light and air, and for the avoidance of congestion of population, including minimum width and area of lots.

The Court of Appeals of Kentucky has consistently held that municipalities of the state possess police power only to the extent it may be delegated to them by the legislature.[33] It is hard to tell from a reading of the statutes whether the power to require dedication of playgrounds and parks has been delegated to municipalities since the enabling act does not speak in terms of mandatory dedication of playgrounds and parks. The term, "playgrounds and parks," is not even mentioned in the provisions for first and third through sixth class cities, which speak rather of "open spaces for recreation." The second class city provision mentions playgrounds and parks but only to provide that the regulations should *facilitate* the provision of such playgrounds and parks. To determine whether the legislature intended mandatory dedication of playgrounds and parks to be within the scope of subdivision regulations, it becomes necessary to look at other related provisions in the enabling act. KRS 100.360(1) & (2) indicates that mandatory dedication was intended, for it provides for the acceptance by a second class city of the dedication of a "street or other public ground."[34] This intention is also borne out by the fact that while a detailed system for payment of land reserved by a city is provided for,[35] no such system is set up for land dedicated to the city.

Clearly, there needs to be a ruling by the court deciding whether the Kentucky enabling act delegates sufficient power to the municipalities to require dedication of playgrounds and parks as a condition precedent for recording subdivision plats.

TWO SUGGESTED ALTERNATIVE METHODS FOR ACQUIRING PLAYGROUNDS AND PARKS

The first alternative method, as suggested by the Housing and Home Finance Agency, provides that the planning commission

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[33] *E.g.*, Jones v. Russell, 224 Ky. 390, 6 S.W.2d 460 (1928).

[34] KRS 100.360(1):

> All plats . . . and all instruments of dedication of land for public use, shall be submitted to the commission and approved by it. . . .

KRS 100.360(2):

> No street or other public ground shown on a subdivision plat . . . within the planning area shall be accepted by the city or county unless the plat and location have been approved by the commission. The legislative body may submit to the commission an ordinance proposing to accept the dedication of any unapproved street or ground. . . .

[35] KRS 100.790 to 100.830 (third through sixth class cities); KRS 100.362 (second class cities).

make its neighborhood or community plans, designating in a general way the nature and extent of the open spaces.[36] Then, as any portion of this planned area comes to be submitted for subdivision approval, the planning commission would take steps to cause the dedication of the recreational spaces at or about the places designated in the plan, and compensate the owner of any subdivided tract for the excess contributed by him above his fair share. In ascertaining the subdivider's fair share, the planning commission would try to determine the recreation area needed by the number of people the subdivider is bringing into the community.[37] Thus the subdivider would be getting some compensation and all subdividers would be subject to equal standards.

The second alternative method would involve the planning commission's requiring a certain percentage of open space for each plot of ground subdivided. The subdivider could then meet this requirement either by keeping his lot sizes much larger than necessary, or by dedicating a playground or park and then cutting down on lot sizes and set back requirements. This method would involve no greater expense on the subdivider and the market would probably show a greater demand for houses in a subdivision with a playground or park than it would for houses in a subdivision without them. Thus, the subdivider would be encouraged to dedicate some of the required open space for a playground or park.[38]

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[36] Housing & Home Finance Agency, *Suggested Land Subdivision Regulations* (1952).

[37] This can be based on standards of people to play area as compiled by National Recreation Association, 315 Fourth Ave., N.Y. 10, N.Y. in their publication, *Standards for Neighborhood Recreation Areas and Facilities and Play Space in New Neighborhoods.*

[38] A similar method is described by the architect, Peter Blake, in an article in the May, 1961 issue of Horizon entitled, "The Ugly America:"

> The mess that is suburban America starts with the sentimental assumption that everybody should live in a detached house on a small lot. The most common residential 'unit' today is a single house of about 1,000 square feet placed on a lot that is 60 feet wide along the street and about 120 feet deep. The house is set back some 25 feet from the sidewalk and about 10 feet from each of the side lines of the property. Because the owners have but limited resources of time and money, they often improve only that part of their lot which represents their 'front' to the outside world. These front yards are, of course, unusable for outdoor living because common restrictions against fenses rob them of all privacy. The rear yard is frequently neglected, and in any case, it is not really big enough for growing children to play in. So the children play in the street; the parents spend most of their time on maintaining a front garden which they can't use; the community has to maintain long roads and long utility lines to service its strung-out houses; and the suburbs go broke.
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> There is a better way. It is entirely possible to build 1,000-square-foot,

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two-story houses on lots that measure only 20 feet wide by 50 feet deep. Such houses would be attached to one another, yet staggered so that each would have a completely private patio space of its own, big enough for large outdoor parties and small enough for any family to maintain without trouble. The 'surplus land' thus saved-something like 6,000 square feet per family—could then be pooled to create several large communal parks each maintained by a small annual contribution for member families. This sort of plan not only preserves much of the natural beauty of the areas that surround our cities but also reduces the cost of roads and utilities and, thus, the suburban tax-burden.

None of this is theory; it has been practiced for years in every Western country including, occasionally, the United States. Baldwin Hills, Los Angeles, was built twenty years ago along the lines described above; today it is the most desirable middle-income community in Southern California.