CONSTITUTIONALITY OF SUBDIVISION CONTROL EXACTIONS: THE QUEST FOR A RATIONALE

John D. Johnston, Jr.†

The author analyzes the "voluntariness," "privilege" and "police power" rationales commonly used to justify subdivision control exactions and concludes that the "police power" rationale is the most appropriate. He then examines three general categories of exactions—for streets, paving and utilities, and educational and recreational uses—in order to delimit the proper exercise of the police power. He concludes that municipalities should have the burden of establishing a rational nexus between their exactions and the public needs created by a subdivision development.

The task of translating scientific and technological advancement into societal improvement provides one of mankind's most profound challenges. Indeed, a scientific or technical innovation can be evaluated only in the light of its actual use in improving the quality of human life. In this context, man's greatest achievements sometimes illuminate his most abject failures. Advancements in industrial productivity and medical science, for instance, have confronted our society with enormous challenges in the use of expanding leisure time and the resolution of complex social problems attributable to enhanced longevity.

A similar challenge is presented by man's increasing ability to control and shape his physical environment. The post-war years, in particular, have marked a growing recognition of societal responsibility for the quality of our environment, especially in the urban sector. Today effective action to improve the beneficial aspects of urban life and to diminish or eliminate the others is widely perceived as a social imperative.1 Unfortunately, recognition of society's accountability for the urban environment constitutes no guarantee of effective action to improve it. To date there has been very little agreement on objectives, priorities, or means of implementation.2

† Associate Professor of Law and Assistant Dean of the School of Law, Duke University. The author gratefully acknowledges the research assistance of James Franklin Heinly, a third-year student at Duke Law School.

1 See, e.g., the congressional declaration that "improving the quality of urban life is the most critical domestic problem facing the United States," in the initial sentence of the Demonstration Cities and Metropolitan Development Act, Pub. L. 89-754, 80 Stat. 1255 (1966).

2 City planning is a most peculiar activity and a most peculiar profession. Indeed, there is probably no other single field of endeavor where so much controversy and confusion exist about what exactly the activity is and should be . . . " Hartman, Book Review, 76 Yale
Meanwhile, existing problems grow more acute. For instance, the continuing migration of rural residents to urban areas and the population decline among major cities create an enormous demand for suburban residences and ancillary municipal services. Rapid suburban development...
raises two pervasive issues of critical importance for city and county officials: (1) What controls can be effectively employed to assure optimum land utilization in view of projected population increases? (2) How can the municipality’s ability to assume necessary capital costs and supply expanded services be more closely related to the pace of urbanization?

The past half-century has seen the introduction and evolution of several devices designed to meet these problems, the most widely employed being zoning, special assessments, and subdivision control regulations. From a private developer’s standpoint, imposition of any of these devices by a municipality can adversely affect the profitability of his enterprise. This may occur directly, as, for example, when a municipality forces him to contribute land or cash for public improvements; or indirectly, as when the most profitable use of his land is prohibited. It is not surprising, therefore, that developers have sometimes vigorously contested the legality of each of these devices, usually claiming that they are ultra vires, deprive the developer of his property without due process of law, or constitute a taking of private property for public use without compensation. Counsel for municipalities, on the other hand, have generally defended these devices as a proper exercise of police and taxing powers.

When developers have challenged the validity of these devices, the sharp conflict presented between public needs and private interests has caused the American judiciary to respond in discordant tones. Perhaps more disappointing, however, is the tendency of courts to elaborate upon the conclusions reached rather than to discuss the factors which actually influenced each decision. Hence, not only have different theories been used to justify and limit the use of these devices, but effective analysis has been made even more difficult by the judiciary’s unwillingness to focus upon the interests which these various theories are designed to protect.

The tendency to avoid discussion of the difficult but crucial issues is nowhere more perplexing than in subdivision control cases. Declarations of judicial deference to legislative determinations bearing on the public welfare characterize those opinions which uphold disputed subdivision exactions. On the other hand, opinions favorable to developers often con-

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7 The tidal wave of metropolitan growth is engulfing the suburbs and bringing them face to face with the realities of urban expansion. Visions of semi-rustic life have vanished in the ring communities as the urbanized sectors have pushed outward, bringing in their wake new roads and expressways, huge shopping centers and industrial plants, and blight and congestion. ... Increasing service demands, mounting governmental costs, rising tax rates, and land use sprawl have become the common lot of outlying local units situated in the path of this growth.

tain little more than emphatic assertions that property may not be taken without compensation, and that a taking may result from unreasonable restrictions on the use of land even though unaccompanied by physical appropriation. Of course, neither interest should be allowed to nullify the other. In the usual case, however, the balance struck between them is obscured by a pronouncement that the decision was reached by use of some unexplained "reasonableness" test.

This article will review some of the more significant cases concerning subdivision control regulations in an attempt to formulate a sound and consistent approach to their validity in urban planning.

I

SUBDIVISION CONTROL IN HISTORICAL CONTEXT

The earliest subdivision control enabling acts preceded zoning legislation in many states. Since their purpose was to promote ease of conveying and stability of land titles, they dealt primarily with disclosure of engineering and surveying data. Only within the past fifty years has subdivision plat approval been integrated with community planning. Although the first Model City Planning Enabling Act did not appear until 1928, by 1934 some 269 local planning boards were exercising powers of subdivision control in twenty-nine states. A survey in early 1965


9 The authors of an excellent recent analysis have concluded that judicial approaches to "reasonableness" of land use regulations may be classified under four general headings, two of which may be further subdivided. Heyman & Gilhool, "The Constitutionality of Imposing Increased Community Costs On New Suburban Residents Through Subdivision Exactions," 73 Yale L.J. 1119, 1124-30 (1964). These formulations encompass a spectrum ranging from a deferential "confiscation" test to the correlative-benefits test initiated by Plymouth Coal Co. v. Pennsylvania, 232 U.S. 531 (1914) and utilized by Mr. Justice Holmes in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922). Although the latter approach has been abandoned by the United States Supreme Court, it retains formidable vitality in some state courts. See Paulsen, "The Persistence of Substantive Due Process In the States," 34 Minn. L. Rev. 91 (1950); Hetherington, "State Economic Regulation and Substantive Due Process of Law," 53 Nw. U.L. Rev. 13 (1958). One article concludes that the confiscation test "avoids the more subtle questions," while the correlative benefit test "does not focus attention on all the meaningful considerations." Heyman & Gilhool, supra at 1127-28.

10 "Municipal control of land subdivision is not new. A number of enabling statutes or charter provisions authorized some form of regulation in the last century. Real estate subdividers were required to obtain approval from some local official or commission before the subdivision plat could be recorded." Reps, "Control of Land Subdivision By Municipal Planning Boards," 40 Cornell L.Q. 258 (1955).

11 According to a survey published in 1941, the requirements most frequently imposed were drawings to scale, on cloth, with indication of the north point. A surveyor's certificate was more frequently required than an indication of the name of the subdivision. Lautner, Subdivision Regulations 219 (1941). Engineering data most frequently required included location of monuments, lot lines, dimensions, and streets. Id. at 225.


13 Reps, supra note 10, at 259.
showed that, of 1,377 American cities with more than 10,000 population, 1,261 had an official planning agency.\textsuperscript{14}

Today subdivision control is inseparable from the planning process. Generally, state enabling legislation encourages municipalities to develop a master plan of future growth.\textsuperscript{15} Planning boards are empowered to prohibit recordation of subdivision plats which do not meet the requirements of the master plan.\textsuperscript{16} The most common conditions imposed are (1) that certain of the subdivided lands be dedicated for streets, parks or schools, and (2) that certain utilities be installed to serve the subdivision residents. Sometimes, in lieu of actual dedication or construction, an “equalization fee” will be exacted to help defray the municipality’s expense of installing or adding to relevant services.\textsuperscript{17} The extent to which these conditions are actually imposed upon developers is a function of two variables: the scope of control permitted by the state enabling act, and the degree to which state courts are willing to supervise official action.

Many early judicial opinions contained assertions that developers have no duty to take the public interest into account in planning their subdivisions.\textsuperscript{18} A correlative proposition was that, in the absence of special enabling legislation, municipalities have no inherent power to impose subdivision control regulations.\textsuperscript{19} Although subdivision control enabling acts are now effective in every jurisdiction,\textsuperscript{20} their interpretation by the judiciary may well reflect the conviction that they constitute an interference with the time-honored freedom of developers. As the objective of subdivision control has shifted from promotion of the stability of land titles to exaction of costly improvements for the benefit of the subdivision residents, the probability of adverse judicial reaction has been considerably heightened;\textsuperscript{21} and where the requirements include exactions of land for

\textsuperscript{14} International City Managers' Ass'n, The Municipal Year Book 315 (1965).
\textsuperscript{15} See notes 75-80 infra and accompanying text.
\textsuperscript{16} See notes 50-65 infra and accompanying text.
\textsuperscript{17} See notes 180-226 infra and accompanying text.
\textsuperscript{18} “In the absence of any statute on the subject, the owner of land might subdivide it in any way he saw fit, having regard only to his own wishes and without regard to public convenience.” People ex rel. Tilden v. Massieon, 279 Ill. 312, 345, 116 N.E. 639, 640 (1917). Compare the following statement, made forty-five years later: “Thus, the business of subdividing is one affected with a public interest, and is subject to reasonable regulation to protect this interest.” Comment, 1961 Wis. L. Rev. 310, 321 n. 57 (1961).
\textsuperscript{20} The most complete analysis of planning and subdivision control statutes appears as an appendix to Haar, “The Master Plan: An Impermanent Constitution,” 20 Law & Contemp. Prob. 353, 378-413 (1955). Much of this material is now out of date, however, because of subsequent statutory changes. A more current legislative digest is contained in Anderson & Roswig, Planning, Zoning, and Subdivision: A Summary of Statutory Law in the 50 States (1966).
\textsuperscript{21} The entire municipality is a healthier, safer environment when subdivisions are provided with adequate streets, water, sanitation, and open space. It is this benefit to the total community which sustains the exercise of the police power, rather than a more direct benefit to
uses which will benefit the general public as well, the probability of invalidation is maximized.22

The transition in goals of subdivision control has necessitated reconsideration of its rationale. The observable progression has been from “voluntariness,” to “privilege,” to the police power.

A. “Voluntariness”

Since residential sites are unsalable without reasonable access, a developer usually provides for one or more new streets when he divides a tract of land into lots.23 Recordation of a plat showing new streets constitutes an offer of dedication for public use.24 Acceptance by the local governing body is not obligatory or automatic, but may take place in several established ways.25 In many jurisdictions, statutes prescribe the method by which streets can be withdrawn from dedication after acceptance.26 Even where there has been no acceptance for public use, the sale of lots by reference to a recorded plat constitutes an estoppel to withdraw streets from dedication without permission of abutting lot owners.27 Offers of dedication for park or recreational uses may take place in the same manner and with similar consequences.28

the subdivision itself. In addition, streets and recreation areas are available for use by the general public. It is thus difficult to perceive any basis for distinguishing between compulsory dedication for streets on the one hand and for recreation or educational uses on the other, on the ground that the latter constitute a greater benefit to the general public. As we shall see, however, some decisions have so held.

22 Although Rosen v. Village of Downers Grove, supra note 19, held that cash exactions for educational purposes were not authorized, the opinion includes this revealing statement: “But because the requirement that a plat of subdivision be approved affords an appropriate point of control with respect to costs made necessary by the subdivision, it does not follow that communities may use this point of control to solve all of the problems which they can foresee.” Id. at 453, 167 N.E.2d at 234. This ominous warning presaged the holding, in Pioneer Trust & Sav. Bank v. Village of Mount Prospect, 22 Ill. 2d 375, 176 N.E.2d 799 (1961), that a subsequent enabling act authorizing such exactions was unconstitutional.

23 Some subdivision control enabling acts subject developers to planning regulations only where the proposed subdivision will require the opening of a new street. E.g., Mass. Ann. Laws ch. 41, § 81L (1966). Other enabling acts define “subdivision” so as to include any division of a lot or tract into a greater number of lots for the purpose of sale or of building development. E.g., Standard Planning Act § 1. The Washington statute embodies both tests. Wash. Rev. Code Ann. § 58.16.010 (1961).

24 Recordation of a plat showing new streets is generally held to constitute sufficient manifestation of an intent to dedicate them to public use. 11 McQuillin, Municipal Corporations § 33.50, at 702 (3d ed. rev. 1964) [hereinafter cited as McQuillin]. For discussion of the distinctions between “common law” and “statutory” dedication, see Comment, “Dedication of Land in California,” 52 Calif. L. Rev. 559 (1965).

25 At common law, an offer of dedication could be revoked at any time before acceptance for public use so long as no intervening public or private interests would be impaired. 11 McQuillin, Municipal Corporations § 33.60 (3d ed. rev. 1964). Where plat recordation complies with statutory dedication procedures, it has been held that the dedication is complete and cannot thereafter be revoked. Ibid.

Failure of the municipality to open or maintain a platted street within a prescribed number of years can constitute abandonment, whereby title reverts to the dedicator or passes to abutting landowners. Id., §§ 33.79-33.80. The same result generally obtains when a street is vacated after public use by appropriate municipal authority. 1 Antieau § 9.10.

26 Id. § 9.04 (1965) [hereinafter cited as Antieau]. For discussion of the distinctions between “common law” and “statutory” dedication, see Comment, “Dedication of Land in California,” 52 Calif. L. Rev. 559 (1965).

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Initially, the developer determines whether streets or parks will be offered for dedication, where they will be located, and how much of his gross land-area they will consume. If the recorded plat reflects only the developer's decisions on these variables, his offer of dedication can accurately be characterized as voluntary. By this definition, voluntary offers of dedication for streets, parks, and other public uses are not infrequent.

When recordation of a plat is contingent upon approval by the local planning agency, and perhaps also by the local governing body, an element of coercion is introduced into the dedication process. If the agency to which a proposed plat must be submitted has express power to require conformity to a master street or park plan, the final arrangement is more accurately characterized as compulsory rather than voluntary. Nevertheless, courts sometimes invoke the fiction of voluntariness in sustaining compulsory (i.e., uncompensated) dedication for public use.

In upholding street width and location requirements imposed on a developer by the city of Detroit, the Supreme Court of Michigan stated that "in theory at least, the owner of a subdivision voluntarily dedicates sufficient land for streets in return for the advantage and privilege of having his plat recorded." The Supreme Court of Montana recently relied on the Michigan case to support a decision upholding compulsory dedication for park and recreational purposes on the ground, inter alia, that the developer's "act of attempting to secure approval of the plat was voluntary. There is no law requiring it to subdivide and sell its land by plat."
An Oklahoma developer, complying with a planning commission requirement that he dedicate five percent of his tract for public purposes, conveyed two and one-half acres to Oklahoma City, after which his plat was approved and recorded. He then brought an action in the alternative to cancel the deed or recover the market value of the acreage conveyed. The Oklahoma Supreme Court avoided passing on the validity of the planning commission's requirement by phrasing the crucial issue in terms of duress and undue influence.

The question here is not whether the rule of the Commission is a proper police regulation, but rather, even if it is invalid, would its use by the city, in convincing plaintiff that he should make a deed, constitute such menace, duress, or undue influence as to warrant cancellation of the instrument?

The court then decided the issue against the developer because the lower court's finding "that the deed was a voluntary dedication to the public" was not "against the clear weight of the evidence."³³

Perhaps the Oklahoma developer committed a tactical error in executing the conveyance. An action to compel recordation of his plat without compliance with the commission's requirement would presumably have required judicial consideration of the rule's validity. Nevertheless, the characterization of his conveyance as "voluntary" seems to be insupportable in view of the planning commission's refusal to approve his plat without it, and in consideration of the statutory requirement making commission approval a prerequisite to plat recordation.³⁵

A more recent New Jersey appellate decision³⁶ reached a similar conclusion of voluntariness, even though the planning board's minutes indicated that tentative approval of the plat was granted "with the proviso that the deed for a [two-acre] park be given to the City prior to filing for final approval," and that the acting city manager assured the board that "I would not sign the final map—and you will see that it was signed a week or so later—until such time as I had received the deed."³⁷ It is pure sophistry to characterize as "voluntary" any exaction which is expressly required as a condition precedent to plat approval, when plat approval itself is a prerequisite for recordation.

³⁴ Ibid.
³⁵ "All plans, plats, or replats of land . . . shall first be submitted to the regional planning commission and approved by it before it [sic] shall be entitled to record in the office of the county clerk." Okla. Stat. tit. 11, § 435 (1961).
³⁷ Ibid. at 490, 147 A.2d at 599.
The Supreme Court of New Jersey thwarted an attempt to invoke the "voluntariness" fiction in the recent case of *West Park Ave., Inc. v. Township of Ocean.* There the developer purchased sixty lots in an established subdivision with the intention of constructing dwellings upon them. It applied for building permits, but was informed by officials of the municipality that no building permits or certificates of occupancy would be issued unless arrangements were made for payment of the sum of $300 per house into a trust or sinking fund for capital improvements to educational facilities. There was no municipal ordinance authorizing this requirement, nor, according to the supreme court's interpretation, did the subdivision control enabling act authorize such exactions. Issuance of building permits was conditioned upon the developer's written agreement to pay $300 into the fund at the closing of the sale transaction for each dwelling. After $13,700 had been paid pursuant to this agreement, the developer brought an action for its recovery. Although the municipality finally conceded that the exactions were unauthorized, it insisted upon enforcement of the agreement.

In a strongly worded opinion, the court sustained the developer's contention that the agreement was unenforceable because it was made under duress. The trial court had held in favor of the municipality on the ground that the payments were voluntary as a matter of law because of the developer's failure to institute legal action before they were made. In rejecting this conclusion, the court took a realistic view of the developer's position: "Plaintiff feared it could not survive if its project stood still..."

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39 "It is not our purpose to prejudge the constitutional power of the Legislature to authorize municipalities to impose charges such as the one here involved. Rather our point is that the Legislature has not committed that authority to local government." Id. at 127, 224 A.2d at 4.

The enabling act, N.J. Rev. Stat. § 40:55-1.21 (Supp. 1964), authorizes municipalities to require developers to install or furnish "street grading, pavement, gutters, curbs, sidewalks, street lighting, shade trees, surveyor's monuments, water mains, culverts, storm sewers, sanitary sewers or other means of sewage disposal, drainage structures, and such other subdivision improvements as the municipal governing body may find necessary in the public interest." The court apparently utilized the canon of ejusdem generis to reach its conclusion that the statute does not encompass the furnishing of educational improvements outside the subdivision. It held that, with respect to educational facilities, the only authorization is that provided in N.J. Rev. Stat. § 40:55-1.20 (Supp. 1964) for reservation of school and park sites for a period of one year, during which the subdivider is not permitted to construct improvements. If, within the year, the municipality decides to use the land so reserved, proceedings to acquire it through the power of eminent domain must be instituted. Thus, the only adverse effect upon the developer is the uncompensated tying up of part of his land for a period of one year. See Cunningham, "Control of Land Use in New Jersey Under the 1953 Planning Statutes," 15 Rutgers L. Rev. 1, 22-24, 39 (1960).

41 The court characterized the payments as "illegally extorted," via "the guise of 'voluntary' contributions with spurious 'agreements' to make them stick." Id. at 128, 224 A.2d at 4. Similar, though less emotionally charged, holdings are Gordon v. Village of Wayne, 370 Mich. 329, 121 N.W.2d 823 (1963); Ridgemont Dev. Co. v. City of E. Detroit, 356 Mich. 387, 100 N.W.2d 301 (1960).
during a period of litigation. It also sensed a danger of hostile enforcement of ordinances bearing upon the construction of homes.\footnote{2} The court refused, however, to speculate on the validity of equalization fees where authorized.

Despite the possibility of adverse judicial decisions such as \textit{West Park Ave.}, it appears that many municipalities have, without a formal requirement of dedication (or even authority to require dedication), “persuaded” developers to make “voluntary” offers of land for public uses such as parks and recreation areas.\footnote{3} One means of persuasion which has been used is bargaining over (or, more realistically, threatening to withhold), municipal services such as water and sewer connections. While this technique has been held invalid where the municipality is under a duty to provide such services,\footnote{4} it can be quite effective in situations where there is no such duty.\footnote{5} Another device, which deserves fuller treatment than is possible here, is the requirement of replatting (including compliance with existing planning regulations) as a precondition to changes in zoning classification.\footnote{6}

Even in the absence of legal authority to require dedication of land for public uses, municipalities clearly occupy a strong tactical position to require such dedication prior to plat approval. \textit{First}, the value of the land dedicated may be less than the cost of legal proceedings to challenge the requirement. \textit{Second}, the entire subdivision project is delayed during the

\footnote{2}{West Park Ave., Inc. v. Township of Ocean, supra note 40 at 124, 224 A.2d at 2.}
\footnote{3}{This type of coercion has apparently existed in some areas for a number of years. A survey made more than thirty years ago revealed an Oklahoma City requirement that subdividers dedicate not less than five per cent of the gross subdivision area (exclusive of streets) for “public use.” The survey concluded that, “while the statement is explicit in requiring open-space dedications, regulation is in fact not so vigorous. Instead, persuasive methods have been used with success in securing dedications, but the [Planning] Commission has ‘not sought to do this by force of law.’” Lautner, Subdivision Regulations 179 (1941). See also Hubbard & Hubbard, \textit{Our Cities Today and Tomorrow} (1929), the “dominant note” of which has been said to be the revelation “that dedications in many cases are secured successfully by means of persuasion.” Lautner, supra, at 184. One commentator notes that “a few communities will offer the developer a bonus of additional lots if he dedicates recreational land.” Frey, “Subdivision Control and Planning,” 1961 U. Ill. L.F. 411, 442 (1961). Professor Haar confirms the continuing vitality of such methods with the statement that “individual negotiations and compromises are a hallmark of this form of land use control” (i.e., subdivision control). Haar, “The Social Control of Urban Space,” in Winge (ed.), \textit{Cities and Space} 175, 189 (1963). With reference to the legality of such “negotiated concessions,” see Cutler, “Legal and Illegal Methods for Controlling Community Growth on the Urban Fringe,” 1961 Wis. L. Rev. 370, 392 (1961).}
\footnote{4}{See Reid Dev. Corp. v. Township of Parsippany-Troy Hills, 10 N.J. 229, 89 A.2d 667 (1952).}
slow process of trial and appeal, and the profitability of the enterprise may be dependent upon speedy completion of the subdivision. Finally, the developer may submit out of fear of punitive delays in approving subdivision plats of other tracts he owns in areas subject to the same planning control authority.

Others besides the municipal planning board can exert irresistible pressures on the developer. For instance, lenders may require recordation of the subdivision plat and compliance with public use dedication “suggestions” as a precondition to extension of a financing commitment. Or the prospective lender or insurer may actually impose its own open-space requirements as a prerequisite to such a commitment. Perhaps the most striking example of the latter is FHA’s land-use intensity formula.

Submission to such persuasion is “voluntary” only in the sense that the developer believes the projected subdivision will be sufficiently profitable to absorb the loss of dedicated land. In theory, of course, the developers are free to “shop around” for other lenders, insurers, or land in other municipalities with more lenient planning requirements. But practical considerations may render even this “freedom” illusory. For example, it has been said that, for residential homes selling for less than $22,000, FHA and VA approval are a virtual necessity “from a marketability point of view.”

Confrontation of the obvious constitutional issues presented by compulsory dedication of land for public use, however, cannot be postponed indefinitely. Inevitably, courts are required to determine the validity of authorized, but obviously compulsory, regulations. Some courts have accepted the argument that plat recordation is a privilege rather than a right and, hence, that reasonable conditions may be placed upon the grant of the privilege.

B. The “Privilege” of Recordation

Citations of authority supporting the privilege rationale usually begin with Ross v. Goodfellow. That case involved the interpretation of an 1888 statute empowering the commissioners of the District of Columbia to regulate the subdivision and platting of all land in the District.

47 A recent analysis confirms that, at the “economic feasibility study” stage (i.e., before the decision to purchase land for development), a developer usually must submit his plans to and receive the approval of his sources of financing and their insurers or guarantors. The FHA marketability study is of particular significance. Weiss et al., Residential Developer Decisions 52-54 (1966).
49 Weiss, supra note 47, at 52.
The statute provided that no plat could be recorded in the District without express authorization of the commissioners, and that subdivision control orders promulgated by them should have the force and effect of law thirty days after publication. Pursuant to this authority, the commissioners promulgated orders requiring that streets in proposed subdivisions outside the cities of Washington and Georgetown should, as far as practicable, conform to the width and alignment of the streets and avenues of Washington. The regulations further provided that existing streets or avenues of the City of Washington might be deflected beyond the city limits where the commissioners should deem it advisable.

The dispute arose over the commissioners' extension and deflection of Delaware Avenue to include approximately three acres of a proposed subdivision. Had the Avenue been extended in a straight line, it would not have touched this land. The commissioners, however, deemed the deflection advisable "in view of the location of the metropolitan branch of the Baltimore and Ohio Railroad and for other reasons ...." Accordingly, they denied approval of a proposed subdivision plat which did not indicate dedication of land for the deflected extension of Delaware Avenue. The subdividers brought an action for mandamus to compel recordation and were successful in the trial court, the judge holding that the commissioners had no authority to deflect Delaware Avenue and require the subdividers to dedicate land as a prerequisite to recordation.

The court of appeals reversed on the ground that Congress, in requiring the commissioners to secure conformity with the general plan of the city, did not intend "a rigid extension on the exact alignment of existing streets and avenues." Thus, the details of the general plan were questions of fact to be determined by the commissioners, and their findings were not subject to judicial review. The court concluded that Congress had invested the commissioners with a nonreviewable discretion in the location of street extensions for which they could require dedication as a prerequisite to approval of subdivision plats.

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53 Id. at 8.
54 The act of 1888 charges [the commissioners] ... with the duty of ascertaining a fact and requires them to pass judgment upon it; and no matter how erroneous such judgment might be, the courts would have no power to revise it, because no jurisdiction to review the decisions of the Commissioners, in such cases, has been conferred upon the courts.
55 [We are of the opinion that it was the purpose of the act of 1888 to repose some discretion in the Commissioners with respect to the location of the extensions of the avenues whenever called upon to admit a plat to record. That this discretion might sometimes even be unjustly and oppressively exercised, was a matter for Congress alone to consider.
56 Id. at 10.
The subdividers in Ross had contended that, even if the commissioners had the power to propose a deflection of Delaware Avenue, they were not authorized to condition plat approval upon the dedication of land for the proposed street. The court rejected this contention.

[I]t must be remembered that each owner has the undoubted right to lay off his land in any manner that he pleases, or not to subdivide it at all. He cannot be made to dedicate streets and avenues to the public. If public necessity demands part of his land for highways, it can be taken only by condemnation and payment of its value. But he has no corresponding right to have his plat of subdivision so made admitted to the records.

In providing for public record Congress can accompany the privilege with conditions and limitations applicable alike to all persons. In providing for such record in the Act of 1888, Congress sought to subserve the public interest and convenience by requiring practical conformity in all sub-divisions of land into squares, streets and avenues, with the general plan of the city as originally established, and this, regardless of the fact that it might, in some instances, practically coerce the dedication of streets to public use which would otherwise have to be paid for.66

This recitation is unaccompanied by citation of authority. The opinion appears to rest solely on the conclusion that the action of the commissioners was authorized by Congress, and that their exercise of this authority was not subject to judicial review. The crucial issue—whether the required dedication constituted a taking for which compensation is required by the fifth amendment—apparently was not raised by the subdividers.67 It is thus improper to cite Ross as authority for the proposition that compulsory dedication of streets as a condition of plat recordation is not prohibited by the fifth amendment.

Several years later the commissioners established minimum lot size regulations, which required that all lots in recorded subdivisions be no less than sixteen feet wide and fifty feet deep. In MacFarland v. Miller,8 the owner of a lot 32' by 46' 4" desired to construct two dwellings on his property, each sixteen feet wide and thirty-six feet deep. These contemplated structures were in compliance with all applicable building code regulations, except one which prohibited the erection of two or more dwellings unless the land on which they were to stand had been subdivided such that each house would stand on a separate lot. The owner attempted to record a plat showing two 16' x 46' 4" lots, but was denied recordation because of the violation of the minimum-size requirement. He was then denied a building permit because of the failure to subdivide.

66 Id. at 10-11.
67 On motion for rehearing, the court held that Ross was not a case "in which is drawn in question the validity of a treaty or statute of or an authority exercised under the United States . . . ." Id. at 15.
His proceeding by mandamus to compel issuance of the building permit was successful. The court of appeals upheld the refusal to record his plat on the authority of *Ross*, but held that he could not be compelled to subdivide. It further held that, since his proposed structures complied with the building code, the commissioners had no authority to deny the permit.

This case raises disturbing questions about the privilege rationale. For instance, suppose the subdivider in *Ross* had, without seeking to record a plat, simply "laid off" his land in some manner so as to provide reasonable access to each lot but did not dedicate three acres for the extension of Delaware Avenue. Does *MacFarland* indicate that the commissioners would have had no power to compel dedication, because "no penalty is provided for failure to obey the [commissioners'] regulations beyond the denial of record?" Reading *Ross* and *MacFarland* together, the "privilege" rationale becomes simply a variant of the "voluntariness" doctrine: the owner is free to subdivide in any way he chooses, so long as he does not seek to record a plat of his subdivision; if he does elect to record, however, then he must comply with the prescribed subdivision regulations. This suggests that the "privilege" rationale is inapplicable to situations where recordation is mandatory rather than elective. Under the elective system, an owner has three alternatives: (1) subdivide according to regulations and record a plat; (2) subdivide in some other manner, without recordation; (3) not subdivide. With a mandatory platting requirement, however, the second alternative disappears. Thus, the severity of such regulations may be relatively insignificant where compliance is at the option of the owner, but cannot be ignored where compliance is mandatory.

Since the application of *Ross* and *MacFarland* to compulsory recordation is doubtful, and since neither case raised the question of the effect of the fifth amendment on the scope of permissible subdivision regulation, the "privilege" rationale expounded in these cases may be of limited application.

The next significant case in the development of the "privilege" rationale was *Ridgefield Land Co. v. City of Detroit*. There the subdivider submitted a proposed plat showing streets whose width conformed to existing streets in previously recorded subdivisions but were narrower than the width prescribed by the city's master street plan. When recordation was
denied because of noncompliance with the master plan, the owner sought a writ of mandamus to compel acceptance of the plat, contending that the increased width requirement was invalid as an attempted taking for public use without compensation.

While conceding that existing streets could not be widened without payment for compensation, the court distinguished the situation under review. Here the city is not trying to compel a dedication. It cannot compel the plaintiff to subdivide its property or to dedicate any part of it for streets. It can, however, impose any reasonable condition which must be complied with before the subdivision is accepted for record. In theory at least, the owner of a subdivision voluntarily dedicates sufficient land for streets in return for the advantage and privilege of having his plat recorded. Unless he does so, the law gives him no right to have it recorded.63

This was followed by a supporting quotation from Ross.64 It should be noted that, since Michigan law permitted conveyance of subdivision lots by metes and bounds, recordation was not a legal necessity.65 Thus, application of the privilege rationale seems proper. Yet the court was unwilling to rely solely upon the “privilege” rationale. The exaction was upheld alternatively as a proper exercise of the police power.

C. The Police Power Rationale of Subdivision Control

The Ross court deferred to administrative discretion in the imposition of regulations designed to assure conformity with the general plan for the District of Columbia. But in Ridgefield Land Co. the Supreme Court of Michigan expressly limited the power of the city to the imposition of reasonable conditions on its grant of the privilege of recordation, saying that:

The streets in the City of Detroit, as elsewhere, were originally laid out for the horse and buggy age. They are too narrow for the present traffic conditions. It has become necessary for the general convenience and the public safety to widen them and to prevent others of the same kind from being established. Because of this necessity, there is nothing unreasonable in the demand of the city that the streets designated in the plaintiff's plat shall be of such a width as to conform to the general street plan. It has been determined that streets of a certain width are necessary to accommodate

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64 The court quoted the passage which appears in the text accompanying note 56, supra.
65 The statute imposed a penalty of ten dollars per lot upon the sale of subdivision lots by reference to an unrecorded plat. There was no penalty for sale of such lots by metes and bounds description. Municipalities were, however, authorized to prepare and record plats of previously unrecorded subdivisions; for tax purposes, such plats were treated the same as if they had been recorded by the subdivider. Mich. Comp. Laws, ch. 74, § 3350 (1915). Since the proposed subdivision consisted of eighty acres, however, sale by plat reference may have been considered a practical necessity.
the traffic. They are necessary for the public safety, and therefore the right to provide for them is within the police power of the city.  

The opinion thus indicates that, when the reasonableness of subdivision control regulation is at issue, the ultimate determinant of validity should be neither voluntariness nor privilege, but the police power. This suggests two questions. First, why impose a reasonableness requirement where the owner is permitted to subdivide without recordation? On this matter, the opinion is silent. Second, if reasonableness must be a function of "necessity," what is the test and how is it applied? The court refers to a self-evident relationship between street width and public safety and indicates that this relationship justifies the exercise of the police power. But this begs the question. The relationship exists with respect both to existing streets and to proposed streets, but the opinion explicitly concedes that the police power does not justify the widening of existing streets without compensating those whose land is taken for that purpose. The opinion furnishes no explanation for the distinction. Nevertheless, subsequent to Ridgefield Land Co., the test of validity of subdivision control regulations has often been said to depend upon whether or not they constitute a "reasonable exercise of the police power." In the formulation and application of tests of reasonableness, however, the courts have expressed divergent views.

Perhaps confusion is inevitable. The police power is, after all, deliberately expansible to meet emerging public needs. In particular, the scope of the "public welfare" branch of the police power has expanded enormously in recent years. In addition, more and more activities, formerly thought to be private in nature, have been recognized as "affected with a public interest." Therefore, it is relatively simple to relate virtually any

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67 See note 9, supra.
68 The classic articulation is, of course, that of Mr. Justice Holmes:
   It may be said in a general way that the police power extends to all the great public needs. . . . It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and preponderant opinion to be greatly and immediately necessary to the public welfare.
70 The assertion that, when private property is "affected with a public interest, it ceases to be juris privati," originated with Hale, De Portibus Maris, in 1 Hargrave, Tracts Relative to the Law of England 78 (1787). It was utilized in Munn v. Illinois, 94 U.S. 113 (1876), to sustain state economic regulation. The opinion provides this elaboration:
   Property does become clothed with a public interest when used in a manner to make it of public consequence, and affect the community at large. When, therefore, one devotes his property to a use in which the public has an interest, he, in effect, grants to the public an interest in that use, and must submit to be controlled by the public for the common good, to the extent of the interest he has thus created.
Id. at 126.
71 This doctrine was applied in Miller v. Schoene, 276 U.S. 272 (1928), to sustain a Virginia
type of subdivision control regulation to the public health, safety, or welfare, at least in their broadest conception. Nevertheless, the constitutional guarantees of due process and compensation for property taken for public use may not be ignored. The task of delineating the proper scope of the police power has, therefore, fallen to the judiciary.

II

Subdivision Control: Methods and Techniques

The police power is an inherent attribute of state sovereignty, the plenary exercise of which rests in the discretion of the state legislatures. It is well settled that the police power can be delegated to political subdivisions of the state, so long as adequate standards for its exercise are prescribed and procedural safeguards are provided. State courts have been reluctant to uphold local exercise of police power for subdivision control in the absence of express authorization, usually in the form of an enabling act.

It is easy to characterize a decision which holds some novel regulation or exaction to be ultra vires as a judicial failure to confront directly the more difficult constitutional questions; however, such a conclusion is probably unfair. If the scope of the police power is to be expanded to meet a newly-asserted public need, the state legislature, rather than the court, is the appropriate body to recognize the need and to take appropriate action to meet it. Thus, a finding that the power to require exactions statute requiring the removal of red cedar trees within a certain proximity of apple orchards. The "preponderant public concern" represented by the commercial value of apples was held to justify the exercise of the police power to destroy a competing private interest. Id. at 279. For development of the conception of subdivision control as business or economic regulation, see text accompanying notes 228-30 infra.

With respect to economic regulation, the scope of legislative power had been aptly described as follows:

So far as the requirement of due process is concerned, and in the absence of other constitutional restriction, a state is free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose. The courts are without authority either to declare such policy, or, when it is declared by the legislature, to override it.

Delegation is usually accomplished by legislative grant in the form of statute or municipal charter. See 2 McQuillin, Municipal Corporations § 4.28 (3d ed. rev. 1966).

of developers has been delegated to the local legislature or planning commission is prerequisite to judicial consideration of the constitutionality of an implementing ordinance.

In reviewing the cases which have considered the validity of specific types of subdivision control exactions, it is convenient to employ three classifications: streets, utilities, and other public uses such as educational and recreational facilities.

A. Compulsory Dedication for Streets

We have already noted that division of a tract into more than a few lots usually requires new streets to provide convenient access. If developers could determine in their sole discretion the width and arrangement of streets within their subdivisions, the likely result would be a confusing, inefficient street pattern for the community. The Standard City Planning Enabling Act therefore authorizes municipal planning commissions to promulgate subdivision regulations providing for:

[T]he proper relation of streets in location to other existing or planned streets and to the master plan, for adequate and convenient open spaces for traffic, utilities, access of fire fighting apparatus, recreation, light and air, and for the avoidance and congestion of population, including minimum width and area lots.

The sole prerequisite to a commission’s exercise of subdivision control authority is the adoption of a major street plan. As the explanatory note to section 13 of the Act indicates, “the planning commission is empowered to exercise its control of subdivisions only after it shall have developed at least a major street plan for the territory to be controlled.” Although many states have adopted enabling acts which are not based on the Standard Planning Act, all assume that coordination of street alignment is a primary function of subdivision regulation.

Under the Standard Act the act of subdividing constitutes the source of the planning commission’s jurisdiction, rather than a developer’s submission of a proposed plat with the request that it be admitted to public record. The developer becomes subject to the planning commission’s regulations regardless of the form of transfer or type of description utilized.

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75 See text accompanying notes 23-27 supra.
78 Standard Planning Act § 26 n.66. [Emphasis added.] A later note explains that, while coordination of streets is “one of the primary purposes of giving control of land subdivision to planning commissions,” their powers are “not limited to this purpose . . . .” Standard Planning Act § 27 n.70.
79 This provision, the significance of which has apparently not been fully appreciated, subjects the developer to the penalties described in note 80 infra, even though the subdivision lot is described by metes and bounds rather than by reference to an unapproved plat. Standard Planning Act § 16.
Failure to conform to those regulations subjects him to fine and injunctive procedures. It should be obvious that the “voluntariness” and “privilege” rationales are incompatible with the Standard Planning Act and any other enabling act containing similar provisions. Regulations adopted pursuant to such authorization must derive their validity from the police power, and no other source.

There is a great potential for disagreement between developer and planning commission over the necessity or propriety of subdivision control exactions, especially in situations where a nonsubdividing landowner clearly cannot be required to furnish land without being compensated. A prime example is provided by those situations wherein the planning commission requires dedication of land for streets whose width exceeds that of existing connecting streets.

This problem was presented in the leading case of Ayres v. City Council, where the subdivider owned thirteen acres of land in the shape of a long, narrow right triangle, bounded on two sides by thoroughfares, which intersected at the apex. (The tract was less than 500 feet wide at the base and extended some 2,400 feet to the apex.) The owner proposed to subdivide this tract into ten residential lots, one business lot, and one lot for religious use. A nearby cross street, sixty feet in width, would have bisected the tract if extended through the developer’s land. On his proposed plat, the subdivider dedicated a strip of land sixty feet in width for the extension of this street, with the business and religious use lots abutting it on either side. The planning commission, however, conditioned plat approval upon the dedication of a strip eighty feet in width for the extension of this street. The subdivider, challenging the reasonableness of the condition, brought an action of mandamus to compel recordation of his plat.

The Supreme Court of California upheld the requirement, stating that:

The contentions respecting the required width of the Seventy-seventh Street extension will not be further discussed except to note that the proposed business and religious uses of the respective abutting lots and the fact that Seventy-seventh is the only street to transverse the tract between Sepulveda Boulevard and Arizona Avenue, sufficiently support the con-
clusion that the required width is reasonably related to the potential traffic needs.\textsuperscript{83}

That activities conducted on the lots in question would generate additional traffic is obvious. The owners of land abutting the existing sixty-foot street probably also generated traffic; but under existing law they could be forced to provide land for its widening only through exercise of the power of eminent domain.\textsuperscript{84} The court’s opinion fails to broach two major issues. \textit{First}, why is the subdivider excluded from the constitutional guarantee of just compensation in this case? \textit{Second}, assuming that the subdivider can be required to dedicate land for streets within his sub-
division to a width exceeding that of existing connecting streets, what test is to be employed in judicial review of the reasonableness of such require-
ments? The second issue suggests two further inquiries. (1) To what extent may the planning commission rely on forecasts of future traffic needs in requiring dedication for streets?\textsuperscript{85} (2) What consideration should be given to the extent of the burden imposed on the subdivider?\textsuperscript{86} Apparently, the court was satisfied with upholding the requirement on the basis that the street extension was located entirely within the owner’s tract and would receive traffic generated from within his subdivision.

In \textit{Ayres}, the court also upheld three other conditions which the planning commission had imposed upon the developer: dedication of a ten-foot strip for widening the boulevard located along one side of the tract; restriction of an additional ten-foot strip along this boulevard to the planting of trees and shrubbery in order to prevent “direct ingress and egress”;\textsuperscript{87} and dedication of a small triangle in the intersection of the two thoroughfares at the apex of the tract for the purpose of eliminating it as traffic hazard. The subdivider argued that these conditions were un-
authorized by the enabling act, which refers only to regulation of “design and improvement” of subdivisions.\textsuperscript{88} His argument was rejected on the

\textsuperscript{83} Ayres v. City Council, 34 Cal. 2d 31, 39, 207 P.2d 1, 6 (1949).
\textsuperscript{84} 11 McQuillin, Municipal Corporations §§ 32.04, 32.62 (3d ed. rev. 1964).
\textsuperscript{85} "Nor is it a valid objection to say that the [disputed exactions] ... contemplate future as well as more immediate needs. Potential as well as present population factors affecting the subdivision and the neighborhood generally are appropriate for consideration." Ayres v. City Council, supra note 83, at 41, 207 P.2d at 7. This statement is helpful only in its

\textsuperscript{86} E.g., if the subdivider’s land measures only three hundred feet in length and his proposed plat shows five sixty-foot lots, an exaction of even sixty feet for street extension through the middle of his tract may impose an unreasonable burden. In Ayres, the developer did not even contest the validity of this requirement.

\textsuperscript{87} Ayres v. City Council, supra note 83, at 34, 207 P.2d at 3.
\textsuperscript{88} In the absence of a subdivision control ordinance, California municipalities are em-
powered to require only “streets and drainage ways properly located and of adequate width.” Cal. Bus. & Prof. Code § 11551 (West 1964). But every city and county is required to adopt ordinances “regulating and controlling the design and improvement of subdivisions.” Cal. Bus. & Prof. Code § 11525 (West 1964). The original (1943) definitions of "design" and
somewhat surprising ground that power to impose these requirements was *not expressly excluded* by the Subdivision Map Act or the city's charter.\(^9\)

The subdivider further contended that the benefit of these exactions would inure primarily to the city rather than to his subdivision, and thus that he should receive compensation for them. The court replied:

A sufficient answer is that the proceeding here involved is not one in eminent domain, nor is the city seeking to exercise that power. 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.\(^9\)

This statement is disappointing. Obviously, the *form* in which the proceeding is conducted should not determine applicability of the constitutional guarantee of just compensation.\(^91\) The facile verbalization that the subdivider has a duty to comply with "reasonable conditions" merely obscures the central problem—how is "reasonableness" to be determined?

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\(^9\) "improvement" were: "‘Design’ refers to street alignment, grades and widths, alignment and widths of easements and right of ways for drainage and sanitary sewers and minimum lot area and width." Cal. Bus. & Prof. Code § 11510 (West 1964).

\(^9\) "Improvement" refers to only such street work and utilities to be installed, or agreed to be installed by the subdivider on the land to be used for public or private streets, highways, ways, and easements, as are necessary for the general use of the lot owners in the subdivision and local neighborhood traffic and drainage needs as a condition precedent to the approval and acceptance of the final map thereof.


\(^9\) Where as here no specific restriction or limitation on the city's power is contained in the charter, and none forbidding the particular conditions [i.e., the exactions imposed] 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.

\(^9\) The duty to pay compensation is not limited to situations in which the power of eminent domain is expressly invoked through conventional condemnation proceedings. A growing body of law recognizes that landowners have a cause of action against public authorities for diminution in the value of their property resulting from activities which constitute so substantial an injury or interference as to amount to a "taking." These proceedings are sometimes referred to as "inverse condemnation." See 11 McQuillin, *Municipal Corporations* § 32.132(a) (3d ed. rev. 1964). Inverse condemnation proceedings against the federal government are authorized by the Tucker Act, 62 Stat. 933 (1946), 28 U.S.C. § 1346(a) (2) (1962). See *United States v. Duvall*, 357 U.S. 17 (1958).

Landowners threatened with unlawful seizure of their property may enjoin a public authority from taking possession until constitutional and statutory requirements have been met. 11 McQuillin, *Municipal Corporations* § 32.129 (3d ed. rev. 1964). The action by mandamus to compel recordation of a plat without compliance with subdivision control exactions seems closely analogous; in effect, the plaintiff asks the court to prohibit the municipality from acquiring his property otherwise than by eminent domain proceedings.
The court clearly indicated that the planning commission may properly consider the potential traffic volume over the new streets, whether generated from within or without the subdivision, in determining what must be dedicated.

In a growing metropolitan area each additional subdivision adds to the traffic burden. It is no defense to the conditions imposed in a subdivision map proceeding that their fulfillment will incidentally also benefit the city as a whole. Nor is it a valid objection to say that the conditions contemplate future as well as more immediate needs. Potential as well as present population factors affecting the subdivision and the neighborhood generally are appropriate for consideration.\(^9\)

But this speaks only to the propriety of the commission's *criteria* for imposing the exactions. It does not reveal the relative weight which reasonably may be given to each of those criteria. On this question, perhaps the most influential determinant of the decision in the Ayres case was the following:

In fact, it may be said that the petitioner's position would seem to be greatly improved by this type of subdivision and its related requirements in conformity with neighborhood planning and zoning. [The regular design of subdivision] . . . would have required dedication and improvement by the petitioner of lateral service roads and lanes for diversion of the local traffic to and from the main artery which the evidence shows would have used more land than for the widening and planning strips, and would have increased the cost of the improvements to be installed by the petitioner. The record indicates that the so-called cellular design was generally adopted because it interfered less with the free flow of traffic, minimized the hazards on the main thoroughfares, and reduced land dedication and improvement expense. . . . In fact, the petitioner makes no objection to that design as such. It is to be assumed that he prefers it with the resulting savings in land and cost.\(^9\)

Apparently, the reasonableness of these exactions was determined by balancing the detriment imposed upon the owner against the benefit conferred upon the community. The court found that the required design actually imposed no burden upon the subdivider; in fact, it resulted in savings to him. In the light of this finding, it is hardly surprising that the planning commission's requirements were upheld.

While five justices concurred in the opinion of the court, a vigorous dissenting opinion presented the conclusions of two of their brethren that, except for the widening of the cross street, the planning commission requirements were unauthorized by the Subdivision Map Act and constituted a taking of the petitioner's land for which compensation was required.\(^9\)

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\(^9\) Ayres v. City Council, supra note 89, at 41, 207 P.2d at 7.
\(^9\) Id. at 40, 207 P.2d at 6-7.
\(^9\) The dissenter disagreed with the majority's conclusion that the requirements of dedication for the boulevard widening and the planting strip, and dedication of the small triangle,
On the latter point, the dissenters drew a distinction between police-power regulation and improvements for which compensation must be paid.

If a legislative body finds that public necessity requires the taking of property for highways, for streets, for a water supply, for recreational areas, for hospitals, for schools or other public buildings, or for a myriad of other public purposes, the court must accept such a finding as conclusive. If such a finding is all that is necessary to warrant the exercise of the police power, there will be no occasion for the state or other public agency ever paying for any private property taken or damaged for a public improvement. . . . Thus, under the theory advanced in the majority opinion, in any case that the power of eminent domain may be properly exercised, the police power could also be invoked with the result that no compensation could be recovered. Although it is difficult to charter [sic] the dividing line between the exercise of the two powers, it should be said that police power operates in the field of regulation, except possibly in some cases of public emergency, such as a fire, where buildings may be destroyed, rather in the taking of property for some public improvement. 95

This formulation is not helpful, because it makes no attempt to indicate the basis upon which the distinction between “regulation” and “improvement” should be drawn. In fact, it is doubtful that the dissenting justices even attempted to apply it. Widening Seventy-seventh Street by twenty feet seems to be as much of an “improvement” as broadening Sepulveda Boulevard or requiring dedication of the apex of the owner’s tract. The dissenters, however, concurred in affirming the requirement for widening Seventy-seventh Street. 96

Ayres has been followed in a number of subsequent cases concerning compulsory dedication of land for streets. Unfortunately, it is usually cited...
to support the flat proposition that subdivision control requirements for street widening are valid conditions to plat approval. Such citations fail to consider the limited facts of Ayres: the regulations had actually benefited the subdivider by reducing his costs.

Another leading case, *Brous v. Smith*, confirms the proposition that subdivision control authority is not based solely on the grant of the "privilege" of plat approval, but is attributable to police-power considerations attendant upon the act of development itself. In *Brous* the developer held six lots which had been platted in 1872, some sixty years prior to the enactment of New York's subdivision control enabling act. His application for a building permit to erect residences on these lots was denied because there was no improved road providing access as required by statute. He brought a mandamus action against the building inspector, contending that the statute was invalid as a taking of his property without compensation. Although the plaintiff acknowledged, and the court agreed, that improved streets are a public necessity, he argued that they could validly be acquired only by exercise of the power of eminent domain. Judge Fuld, speaking for the court, answered this argument as follows:

Of course, no one may question that the town, were it desirous of constructing a road across petitioner's property, would have to condemn the necessary land and compensate petitioner. But the town here has no such desire or design and 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 its approval of such construction upon his compliance with reasonable conditions designed for the protection both of the ultimate purchasers of the homes and of the public. That the state may empower the town to do this, is clear.

In support of this conclusion, the opinion cited several New York decisions:


98 At least two decisions have announced a more restricted—but, unfortunately erroneous—interpretation of Ayres: that subdividers may constitutionally be required to provide only those improvements made necessary by activity within the subdivision. See text accompanying notes 169-77 infra, discussing Rosen v. Village of Downers Grove, supra note 97, and Pioneer Trust & Sav. Bank v. Village of Mount Prospect, 22 Ill. 2d 375, 176 N.E.2d 799 (1961).


100 N.Y. Sess. Laws 1932, ch. 634.

101 N.Y. Town Law § 280-a(2) (McKinney 1965).

102 In this era of the automobile, modern living as we know it is impossible without improved highways linking people with their jobs, their sources of food and other necessities, their children's schools and their amusements and entertainments. 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.


103 Id. at 170-71, 106 N.E.2d at 506-07.
upholding various types of zoning restrictions such as building setback and minimum lot size.\textsuperscript{104}

The plaintiff was not, of course, challenging the validity or wisdom of these decisions. He contended that they were inapposite to his situation, and that cases upholding the owner's right to compensation were controlling.\textsuperscript{105} The opinion unfortunately does no more than announce a conclusion that compulsory improvement of streets is a proper exercise of the police power. It does not indicate which factors influenced the decision. In \textit{Brous}, as in \textit{Ayres}, the fundamental problem is one of fairness.\textsuperscript{106} Conceding that a rational nexus can be found between improved streets and the public health, safety, and welfare, on what basis is the developer distinguishable from a non-developer who is entitled to compensation when part of his land is converted to a public street?

It should be pointed out that analogies between subdivision control and zoning must be drawn with great care, because the two are not coterminal. The fact that zoning requires no transfer of ownership or possession would seem to suggest that its permissible limits are wider than the ambit of subdivision control exactions. The latter requires the developer to relinquish ownership of land or make a direct financial contribution for a public activity in lieu of dedication. Recent decisions, however, indicate that the subdivision control authority is actually broader than the zoning power. For instance, zoning of land for parks and open spaces has been held invalid,\textsuperscript{107} while compulsory dedication by subdividers for such uses has been sustained in several recent cases.\textsuperscript{108}

It is worth noting that the statute under consideration in \textit{Brous} provided a "safety valve" which closely parallels the variance procedure typical of zoning enabling acts.\textsuperscript{109} This administrative procedure assures that cases in which planning commission regulations impose great hardship on developers can be adjusted without recourse to the judiciary. Such a procedure has been said to render a statute "insulated from constitutional

\begin{footnotes}
\item[106] The question could also be expressed in terms of equal protection under the fourteenth amendment, but the Supreme Court has not reviewed any subdivision control cases to date.
\item[108] See notes 192-213 infra and accompanying text.
\item[109] N.Y. Town Law § 280-9(3) (McKinney 1965).
\end{footnotes}
attack if the court insists upon the exhaustion [of administrative remedies] doctrine.’’

B. Compulsory Installation of Paving and Utilities

The Standard City Planning Act authorizes planning commissions to promulgate regulations:

[A]s to the extent to which streets and other ways shall be graded and improved and to which water and sewer and other utility mains, piping, or other facilities, shall be installed as a condition precedent to the approval of the plat.

Similar provisions are found in virtually every existing enabling act.** They were enacted in response to the sad experiences with land development which culminated in the boom of the late 1920's and early 1930's.***

For the most part, subdividers tended to be land speculators rather than homebuilders.**** Their profits were realized from the sale of lots created by subdividing larger tracts. Subdividers obviously had little to gain by providing paved streets and utilities, and there was no significant demand for improvements by the purchasers of the lots, who often were victims of high-pressure sales tactics.***** Orderly development of these lots, however, could not be accomplished without providing paved streets and necessary utilities such as sewer and water. The owner who installed these latter improvements incident to construction of a dwelling on his lot risked the loss of his investment in wells and septic tanks by subsequent annexation to a town or city whose public health regulations required connection to central water and sewer systems. The Standard Planning Act and similar enactments signified recognition that paved streets and utilities are as essential to efficient subdivision planning and control as adequate street widths.

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** Similar provisions of New York's official map statute, N.Y. Gen. City Law § 35 (McKinney 1951), were so described in Mandelker, "Planning the Freeway: Interim Controls in Highway Programs," 1964 Duke L.J. 439, 462. For application of a similar rationale in a zoning case, see Michael v. Guilford County, 153 S.E.2d 106 (N.C. 1967).


**** For examples see Note, 36 N.Y.U.L. Rev. 1205, 1210 n.30 (1961).

***** The boom produced thousands of “paper” subdivisions. A New Jersey survey in 1933 revealed that “unoccupied or sparsely occupied platted lands in New Jersey total nearly 185,000 acres, an acreage sufficient to supply over a million 50 X 120 foot lots . . . The number of vacant lots is sufficient to accommodate an additional population of 4,000,000—equivalent to the entire present population of the State.” New Jersey State Planning Board, Land Subdivision in New Jersey 9 (1938).

****** The thesis that this term should be regarded as descriptive, rather than pejorative, is ably defended in Elias & Gillies, “Some Observations on the Role of Speculators and Speculation in Land Development,” 12 U.C.L.A.L. Rev. 789 (1965). With respect to speculative practices during the booming twenties, see Cornick, Problems Created by Premature Subdivision, ch. 1 (1938); Monchow, Real Estate Subdividing, ch. 1 (1939).

******* See, e.g., excerpts from Johnston, The Legendary Mizners (1953), quoted in Haar, Land-Use Planning 345-49 n.3 (1959). For a fictionalized account of the effect of the land boom on the residents of one small town, see Wolfe, You Can't Go Home Again 109-20, 142-46 (1940).
Any municipality which adopts an implementing subdivision control ordinance confers upon its planning commission the power to require the subdivider to provide paving and utilities as a condition precedent to plat approval. The Standard Planning Act provides that final approval of any subdivision plat shall not be granted until the subdivider has either provided the required improvements or furnished a performance bond in an amount sufficient to "secure to the municipality the actual construction and installation of such improvements or utilities at a time and according to specifications fixed by or in accordance with the regulations of the commission."

The furnishing of paving and utilities constitutes a major expense item for developers. Accordingly, it might have been anticipated that the constitutionality of this type of exaction would be hotly contested by subdividers and closely scrutinized by the judiciary. The actual experience has been quite the contrary. In very few reported cases has the validity of paving and utilities exactions been questioned, and, in general, the issue has been resolved in favor of the municipality.

One of the leading cases, Allen v. Stockwell, was decided prior to the advent of comprehensive subdivision planning. The City of Pontiac, Michigan, had adopted a subdivision control ordinance, pursuant to the "necessary and expedient" clause of its home rule charter, which required grading and graveling of streets and provision for surface drains, cement sidewalks, and sanitary sewers. A subdivider had to furnish a performance bond or actually complete the improvements according to city specifications before his plat would be approved. The state statute provided that no plat could be admitted to public record prior to approval by the city commission.

A subdivider who had refused to provide these utilities brought an action of mandamus against the city commission of Pontiac to compel approval of his proposed plat. In affirming the trial court's denial of the writ, the Supreme Court of Michigan stated:

The Commission of the city has ample authority to make and enact the platting ordinance herein set forth. A careful examination of the ordinance in question satisfied us that it is a reasonable regulation, a reasonable exercise of municipal and police power under the charter and statute, and that the same should be sustained and complied with.

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118 The local governing body was authorized, by ch. VII, § 21 of the charter, to exercise "all municipal powers necessary, or which may be deemed expedient, for the complete and efficient management and control of the municipal property and the administration of the municipal government. . . ." Id. at 490, 178 N.W. at 28.
The court cited no authority and offered no amplification of its reasoning with respect to the "reasonableness" of the requirements or the source of the city's authority to enforce them.

Another leading case, *Petterson v. City of Naperville*, brought into issue the extra-territorial application of subdivision control authority. The Illinois subdivision control enabling act required subdividers of land located within one and one-half miles of any municipality which had adopted an "official plan" to obtain approval of the municipality's governing body before recording a subdivision plat. The subdividers' land was located within the stated distance of the City of Naperville, which had adopted a city plan. Although a plat of their proposed subdivision was approved by the county planning authority, the Naperville planning commission rejected it because of their failure to provide curbs, gutters, and storm sewers. They then brought an action seeking both a declaratory judgment that the city's requirements were void and an injunction against enforcement of the subdivision control ordinance.

Evidence adduced at the hearing disclosed that the county authorities had approved open-ditch roadside drainage with culverts, which could be installed at a cost of $880. The cost of compliance with the city's requirements, on the other hand, was estimated to be $19,810. Other testimony tended to show that drainage from the subdivision would flow away from the city, that streets outside the city were not maintained by it, that surface water drainage has a direct relationship to public health, and that road maintenance costs where curbs and gutters had been provided were negligible as compared to roads served by open ditches. The special master held for the plaintiffs, concluding that the city's actions were reasonable but that the ordinance constituted an invalid delegation of legislative power to the planning commission. The trial court affirmed, but on the ground that the ordinance was unreasonable.

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121 9 Ill. 2d 233, 137 N.E.2d 371 (1956).
123 "This plan may include reasonable requirements with reference to streets, alleys, and public grounds in unsubdivided lands . . . ." Ill. Rev. Stat. ch. 24, § 53-2(2) (1953). By contrast, the current enabling act lists numerous improvements for which "reasonable requirements" may be established. See Ill. Ann. Stat. ch. 24, § 11-12-5 (Smith-Hurd 1962). Ill. Ann. Stat. ch. 24, § 11-12-6 (Smith-Hurd 1962), now designates the plan as an "official comprehensive plan."
125 This evidence was adduced through the testimony of the chief engineer of the county highway department, who had prepared the plat. *Petterson v. City of Naperville*, 9 Ill. 2d 233, 239-40, 137 N.E.2d 371, 375 (1956). The practice of private developers employing public officials in this manner should be prohibited, or at least discouraged, in view of the obvious conflict of interests.
126 The subdividers argued that the planning commission's power to grant variances from
On appeal, the Supreme Court of Illinois held that, because the enabling act conferred extra-territorial jurisdiction upon cities and villages, any ordinance adopted pursuant to it would preempt the field to the exclusion of county regulations. It then rejected the subdividers' argument that the city was not authorized to require installation of street improvements. Although the enabling act did not mention curbs and gutters, it did authorize city planning commissions to enforce "reasonable requirements for public streets. . . ."\(^{127}\) The plaintiffs argued that the scope of this grant was limited to control of street width and alignment. The court refused to interpret the act so narrowly, because:

The legislature undoubtedly had in mind the complex problem connected with the development of territory contiguous to cities as bearing on the health and safety of all inhabitants within and without the municipality; that in such territory, in the interest of uniformity, the streets should be constructed in such a way as to afford reasonably safe passage to the traveling public and provide reasonable drainage in the interest of health.\(^{128}\)

The enabling act was thus interpreted as granting the city power to require adequate drainage in accordance with uniform standards.

The court then considered the reasonableness of applying the city's regulations to the subdividers. The subdividers' argument, based primarily upon the cost differential between the city and county requirements, did not persuade the court. The opinion noted (1) the relationship between the contested exactions and public health, (2) the fact that plaintiffs' land was not treated differently from other land located "within the area in question,"\(^{129}\) (3) the subjection of landowners to "a legitimate exercise of the police power,"\(^{130}\) and (4) the strong presumption of validity to which municipal ordinances are entitled. The subdividers attempted to buttress their argument concerning the unreasonableness of the exactions by contending that they were unconstitutional, either as nonuniform taxation or as a taking of property for public use without just compensation. The court, noting that the case was not an eminent domain proceeding but a suit to compel approval of a plat,\(^{131}\) concluded:

The validity of the ordinance is to be tested, neither by the principle of uniformity of taxation nor by the law of eminent domain, but rather by the settled rules of law applicable to cases involving the exercise of police powers. . . . The imposition of reasonable regulations as a condition precedent to the subdivision of lands and the recording of plats thereof is not a

\(^{127}\) Id. at 246, 137 N.E.2d at 379.

\(^{128}\) Petterson v. City of Naperville, supra note 125, at 245-46, 137 N.E.2d at 378.

\(^{129}\) Id. at 246, 137 N.E.2d at 379.

\(^{130}\) Id. at 247, 137 N.E.2d at 379.

\(^{131}\) Id. at 249, 137 N.E.2d at 380.
violation of the constitutional requirement of uniformity of taxation or tantamount to the taking of private property for public use without just compensation. 132

This compendium of question-begging statements is, of course, reminiscent of Ayres (which the opinion does not cite). The court's reasoning is that, since the action is for plat recordation, it does not involve the taxing power or eminent domain. Because the plaintiffs seek the "privilege"133 of plat recordation, they must comply with "reasonable" police-power regulations. Finally, the requirements in question, though costly, are reasonable because they are "non-discriminatory" and because the plaintiffs did not prove them unreasonable by "clear and affirmative evidence."134

The testimony in Petterson tended to show that the exactions imposed would be very costly to the subdivider. Does this distinguish the case from Ayres, where the required dedications actually resulted in a saving to the subdivider? Not necessarily. It is possible that much, if not all, of the additional cost could be passed on to purchasers of subdivision lots in the form of higher selling prices for "improved lots." The effect of these exactions on the subdivider's profit potential apparently was not presented to the court in Petterson. Perhaps this constituted a major deficiency in the plaintiffs' case. If so, developers are on notice that, in order to establish the burden imposed upon them by compulsory provision of improvements, they must relate the cost of these improvements to the profitability of the subdivision enterprise.135 Otherwise, doubts about the extent of the net financial burden may be resolved against them by courts adhering to the presumption that legislative enactments are valid.

Despite the unsatisfactory opinion, the result reached in Petterson is probably sound. It can be argued that the procedure employed by the planning commission in such cases is merely a method of accomplishing indirectly the same result the city could achieve directly by installing the improvement and imposing a special assessment lien against land benefited. Although the power to levy special assessments has been sustained as an

132 Id at 249-50, 137 N.E.2d at 380.
133 Ill. Rev. Stat. ch. 24, § 53-3 (1953), provided that no plat "shall be entitled to record or shall be valid unless the subdivision shown thereon provides for streets, alleys, and public grounds in conformity with the applicable requirements of the official plan." Ill. Rev. Stat. ch. 109, § 2 (1953), required submission of proposed plats to governing bodies of towns having an official plan for their approval. The penalty for selling subdivided land without full compliance with these requirements was $25 per lot. Ill. Rev. Stat. ch. 109, § 5 (1953).
134 Petterson v. City of Naperville, 9 Ill. 2d 233, 246, 137 N.E.2d 371, 379 (1956).
135 Hopefully, anticipated profits can be estimated with reasonable accuracy in cases where development and marketing of the subdivision is not yet complete. After all lots have been sold, however, precise figures should be available. Such was the case in Jordan v. Village of Menomonee Falls, 28 Wis. 2d 608, 137 N.W.2d 442 (1965). See text accompanying notes 210-11 infra.
exercise of the taxing power, it is not a property tax subject to the require-
ment of uniformity. The power has also been sustained as an exercise of
the police power, or on the basis of contract theories. It is not considered
an exercise of the power of eminent domain.

Whatever legal theory is used to sustain the power to levy such assess-
ments, the reasoning generally employed is most closely analogous to
quasi-contract: where a special benefit is conferred upon adjoining land
by the construction of public improvements such as paving, sewers, or
parks, it is fair to exact from the owner his pro rata share of their cost.

This doctrine is sound where an actual benefit can be shown and
the assessment is no greater than the benefit conferred. It has been ably
demonstrated, however, that the judiciary has avoided the determination
of whether actual benefits have been conferred by invoking the doctrine
of deference to legislative judgments. The result is said to have been
"the practical demise of the property benefit requirement." Nevertheless,
the special-benefit analogy lends powerful support to compulsory
provision of improvements by subdividers.

The analogy becomes tenuous, however, when the subdivider is required
to install improvements outside his subdivision which will inure to the
benefit of others. Suppose, for instance, that his subdivision will necessitate
extension of a four-inch water main to his boundary. Must he bear the
entire cost of extension, or should part of the cost be assessed against
abutting landowners who will be permitted to make use of the main at a
later date if they choose? Or suppose that the municipality determines
that future development of neighboring tracts will result in such increased
demand for water as to require an eight-inch main. Can the municipality
compel the first subdivider to install an eight-inch main as a condition of
plat approval? In both cases, installation of the main will confer a benefit
to the subdivider; but it seems unfair to force one owner to provide im-
provements which will be available for other landowners and are con-
structed to meet their estimated future requirements.

The special assessment was suggested as a helpful analogy in upholding
compulsory installation of subdivision improvements, and not as a concept
establishing the constitutional limits of the police power in subdivision
control matters. Perhaps Ayres furnishes a better analogy. There the sub-
divider was compelled to dedicate land in conformity with a master plan
which established street widths as a function of estimated traffic volume;

136 14 McQuillin, Municipal Corporations § 38.01 (3d ed. 1950).
137 Id. § 38.02.
138 Heyman & Gilhool, "The Constitutionality of Imposing Increased Community Costs
on New Suburban Residents Through Subdivision Exactions," 73 Yale L.J. 1119, 1147-52
(1964).
139 Id. at 1147.
without reference to any particular lot, tract, or subdivision. In fact, the city had contemplated widening one of the boulevards abutting the subdivided land long before the owner submitted a proposed plat for approval. But the existence of the master plan plus the fact that a new subdivision would generate some additional traffic were, according to the court, sufficient bases to justify compulsory dedication as an exercise of the police power. Now, suppose a municipality has established that eight-inch water mains are required to service the demand (actual and potential) from a particular area, and that the immediate development of a subdivision within the area will contribute to that need. It seems consistent with Ayres to require the subdivider to furnish eight-inch mains, even though they will benefit other potential users. The cases might be distinguished if the developer could show that installation of the mains would result in financial detriment. Nevertheless, in neither case would the improvement fill a need attributable solely to the subdivider's activity, and in both cases one may argue that the benefit would inure primarily to the public rather than the subdivider.

It has been held that a subdivider may properly be required to furnish mains outside his boundary to supply additional water required by his subdivision. In a leading New Jersey case, the corporate owner of thirty lots, which were scattered within a subdivision containing more than 300 lots, proposed to combine its holdings into fifteen building sites and to construct a dwelling on each one. The subdivision plat had been recorded prior to adoption of the state enabling act and the local implementing ordinance. Nevertheless, the act of combining and improving these lots, unaccompanied by submission of a new plat for recordation, might have been sufficient to subject the developer to the local planning requirements for subdividers, including extension of water mains to the lots. These requirements were held unreasonable as applied to this particular developer, however, because:

140 The trial court found that the widening of Sepulveda Boulevard and establishment of the planting strip "had been in contemplation of the authorities whether or not the petitioner intended to subdivide." Ayres v. City Council, 34 Cal. 2d 31, 38, 207 P.2d 1, 5 (1949).
143 It is firmly settled in this state that lot lines as delineated on a map filed under the Old Map Act must give way to a subsequent exercise of the zoning power increasing area requirements. . . . Subdivision control, like zoning, is an implementing tool of planning. We can perceive no reason for concluding that filing of a map under the Old Map Act does not prevent application of the one power but it does the other. Both are necessary to abolish the social disease of blight, the essential difference between them being the difference between inoculation and surgery.
144 Only six years prior to the decision in the Lake Intervale Homes case, the same court had held that municipalities had no power to withhold water entirely, but could nevertheless exercise a "governmental discretion as to the extension of the water mains, governed largely
It is undisputed that other property owners contiguous to plaintiff's property and abutting on the extensions made in the instant case will ultimately benefit therefrom. Moreover, plaintiff is a relatively small scale developer and some of the building lots were scattered in isolated pairs throughout the tracts, so that at times an extension along an entire street was necessary in order to service one house in the block.  

Although this seems consistent with the special-benefit analysis, the court chose to rest the decision on the much narrower ground that the municipality had formulated no standards for the installation of improvements by subdividers. The opinion pointedly refers without hostility to a regulation of the New Jersey Board of Public Utility Commissioners, which provided that: "A developer who is ordered to make a deposit to cover the original cost [of water mains] may recoup the entire sum over a prescribed period of time if the revenue produced from the new consumers meets certain requirements."  

The case reveals a judicial indisposition to confine to exactions satisfying the special-benefit rule a municipality's control over provision of utilities outside the subdivision. This attitude, in turn, underscores the emergent recognition that the source of subdivision control regulations is the police power. The exercise of this power is not and has never been dependent upon the conferring of individual benefits. Its justification lies in protection of the public health, safety, morals, and welfare, even though a detriment is suffered by individual property owners.

C. Compulsory Dedication for Educational and Recreational Uses

In addition to authorizing compulsory dedication of land for streets and mandatory installation of subdivision utilities as conditions of plat approval, the Standard City Planning Act authorizes planning commissions to "provide for . . . adequate and convenient open spaces for by the extent of the need and economic considerations. . . ." The providing of water, however, could not be conditioned upon "wholly alien consideration related to planning and zoning." Reid Dev. Corp. v. Township of Parsippany-Troy Hills, 10 N.J. 229, 235, 89 A.2d 667, 670 (1952). But this later statement must be considered in context. The actual holding was predicated upon findings that (1) there was no statutory authority for the municipality's requirement of replatting to form 100-foot frontage lots as a condition of extension of water mains; and (2) the requirement was not one usually imposed upon other subdividers who requested similar extensions. Compare Longridge Builders, Inc. v. Planning Board of Princeton Township, 92 N.J. Super. 402, 223 A.2d 640 (1966), in which a regulation requiring a subdivider to pave a road beyond his boundary was held invalid because unauthorized.

145 Lake Intervale Homes, Inc. v. Township of Parsippany-Troy Hills, supra note 142, at 441, 107 A.2d at 39.

146 Id. at 442-43, 107 A.2d at 39-40.

147 Standard Planning Act § 14 expressly authorizes utility exactions (notes 111, 116 supra); as to streets, it authorizes only regulations providing for "proper arrangement." An explanatory note indicates that this grant of power is made "to insure that streets or rights of way, whether dedicated as public streets or not, shall fit into each other and the ultimate street plan of the city." Id. § 27 n.70.
recreation, light and air, and for the avoidance of congestion of population . . .”  Many state enabling acts contain similar terminology. A few include more explicit authorization for subdivision control regulations, requiring dedication of land for parks, playgrounds, school grounds, and other public uses as a condition of plat approval.  

The Standard Planning Act obligates commissions to “adopt a master plan for the physical development of the municipality,” including the location and extent of playgrounds, parks, and “other public ways, grounds and open spaces, the general location of public buildings and other public property. . . .” Subsequent to the adoption of the master plan, no public building or grounds may be constructed or acquired without the prior approval of the planning commission.

Two very different types of regulatory power are conferred upon municipalities by these provisions of the Standard Planning Act and similar enabling acts. The delegation of power to control the character, extent, and location of public buildings and grounds includes no authorization to require dedication of private land for public purposes. It merely permits the municipality to adopt an orderly and systematic plan for the expansion of its public facilities. Acquisition of land for these public uses is accomplished primarily through exercise of the power of eminent domain, with compensation being paid to private owners. On the other hand, the power to require dedication of land for specified uses is available only in the event of subdivision or development of land by private owners. The amount of land to be dedicated for these purposes, not specified in the Act, is established by local planning commissions, and embodied in standards applicable to all developers.

The distinction may be illustrated by the following example. Suppose a planning commission has adopted a master plan which designates a certain area as the site for a three-acre public park. Suppose further that the commission has promulgated regulations requiring subdividers to dedicate ten percent of the area of their subdivisions for park and playground purposes as a condition of plat approval. Finally, suppose that the three-acre park is located entirely within a fifteen-acre tract which the owner desires to subdivide. He can be required to dedicate one and one-half acres for park purposes, but the additional one and one-half acres of land must be acquired from him by a negotiated sale or eminent domain pro-

148 Id. § 14.
ceedings. If the owner were not seeking subdivision or development approval, he would be entitled to compensation for the entire three acres before the municipality could convert it into a park.

Only one substantial constitutional problem has arisen with respect to reservation of land for public uses via the master plan. Some enabling acts provide that, after the designation of a public use on the official map, no private development of the site shall take place for a specified period.153 Land thus "reserved" is of limited utility until the municipality determines whether or not to acquire it for the designated purpose. The technique is similar to official mapping for streets, except that in the latter case the reservation is for an unlimited period. Street mapping has been upheld against the contention that it constitutes a taking of property for public use without compensation.154

One decision held unconstitutional a Pennsylvania statute which authorized official mapping for parks and playgrounds and imposed a three-year moratorium on construction of improvements.155 The opinion purported to distinguish the street-mapping cases on the ground that streets are "narrow, well defined and necessary," whereas recreational areas "may be very large and very desirable but [are] not necessary."156 The court concluded that the statute constituted "a taking of property by possibility, contingency, blockade, and subterfuge . . . ."157 This opinion represents the


Upon the application for approval of a plat, the municipality may reserve for future public use the location and extent of public parks and playgrounds shown on the official map . . . and within the area of said plat for a period of one year after the approval of the final plat or within such further time as agreed to by the applying party.

It is not clear why the latter section omits mention of school sites.

During the one-year reservation period, the owner may use the land for any purpose other than location of buildings. No building permit may be issued for construction of buildings during the period unless the board of adjustment finds that the parcel subject to reservation cannot otherwise "yield a reasonable return to the owner." N.J. Stat. Ann. § 40:55-1.38 (Supp. 1965).

154 Miller v. Beaver Falls, 368 Pa. 189, 82 A.2d 34 (1951). But cf. Segarra v. Iglesias, 71 P.R.R. 139 (1950), in which a thirteen-month reservation period was held to be not unreasonable.

155 Miller v. Beaver Falls, supra note 154, at 193, 82 A.2d at 36. The court was, perhaps, aware of the slimsness of this distinction. A later passage in the opinion indicates that the validity of street mapping is too firmly established in the jurisdiction to be changed. The court was, however, unwilling to extend the doctrine to parks and playgrounds. "A principle of questionable constitutionality should not be extended beyond its present application or limitation especially if such extension would violate either the letter or the spirit of the Constitution." Id. at 196, 82 A.2d at 37-38.

156 Id. at 194, 82 A.2d at 37. Compare District of Columbia v. Armes, 8 App. D.C. 393 (1896), where it was held that official mapping for eventual condemnation is not unconstitutional solely because payment of compensation is deferred until the streets are actually opened.
nadir of deference to legislative judgment on the question of public need. Nevertheless, so long as the period of reservation is not unreasonably long and the owner is not denied all beneficial use of his property,\(^{157}\) this type of statute could be upheld by analogy to street-mapping or interim-zoning ordinances.\(^{158}\)

In sharp contrast to reservation of land for possible acquisition for public use, attempts to impose compulsory dedication for park and educational uses have aroused familiar controversies over authorization, delegation, and administration. The development of case law on this subject deserves systematic review. In what was apparently the earliest case, \textit{In re Lake Secor Dev. Co.},\(^{159}\) the owner of 138 acres of land submitted a plat showing some 2,000 lots, each twenty feet in width and one hundred feet deep. Approval was denied on the ground, \textit{inter alia}, that no area had been reserved for recreational purposes. The enabling act empowered the planning commission to require proposed plats “in proper cases [to] show a park or parks suitably located for playground or other recreational purposes.”\(^{160}\) The New York appellate division affirmed without opinion the trial court’s judgment that the planning commission’s disapproval was authorized, reasonable, and therefore valid.\(^{161}\)

In \textit{Zayas v. Puerto Rico Planning, Urbanizing & Zoning Bd.},\(^{162}\) the enabling act authorized the planning board to adopt regulations controlling plat approval, including provision “for obligatory reservations of the

\(^{157}\) Safety-valve provisions could include assurance of full utilization of the land for any purpose other than buildings, plus the familiar variance remedy administered by boards of adjustment, utilizing either the zoning (“unnecessary hardship”) standard or the more liberal street-mapping (“reasonable return”) standard. Both are provided for in the New Jersey enabling act. See note \textit{152} supra.

\(^{158}\) Interim zoning ordinances are enacted to preserve the status quo pending the completion of a comprehensive land-use plan. The need for “freezing” existing uses has been stated as follows:

It is common knowledge that the preparation of a proper comprehensive zoning ordinance often requires much study and time. The very pendency of the adoption of a comprehensive extraterritorial zoning ordinance might precipitate action on the part of property owners in the territory to be affected which would tend to frustrate the objective sought to be attained by the prospective ordinance. Walworth County \textit{v.} City of Elkhorn, 27 Wis. 2d 30, 38-39, 133 N.W.2d 257, 262 (1965). Similar considerations seem to support the municipality’s interest in preserving existing open space which has been earmarked for recreational uses against development during the period required for reaching a decision whether or not to acquire it. Specific enabling authority is probably necessary, and the time period should not be unduly long. For discussion of these factors in interim zoning, see 1 Yokley, \textit{Zoning Law and Practice} §§ 77-82 (Supp. 1964).


\(^{160}\) N.Y. Town Law § 1149(n) (Cahill’s Consol. 1930). This provision contained the further requirement that parks should be “of reasonable size for neighborhood playgrounds or other recreation uses,” but no standards were prescribed.

\(^{161}\) The supreme court opinion merely announces this conclusion; there is no discussion or citation of authority. \textit{In re Lake Secor Dev. Co.}, supra note 159, at 915, 252 N.Y. Supp. at 812.

\(^{162}\) 69 P.R.R. 27 (1948).
minimum area to be used for schools, parks, ... and other public purposes . . . "

Pursuant to this authorization, the board promulgated a regulation requiring a minimum of five percent of the total area of proposed subdivisions to be reserved and dedicated for recreational purposes. The developer contended that this requirement was an unconstitutional taking of his property. The board replied that, as a condition of plat approval, it could properly require him to transfer the requisite amount of land for recreational purposes. The court upheld the requirement of dedication for park purposes on the ground that it "is a necessary measure and primarily for the public health and safety . . ." But it carefully construed the statute as not requiring an actual transfer of title to the land so dedicated, in order to avoid "a serious constitutional question . . . which would involve the alleged taking of private property without due compensation." As a result, the subdivider retained ownership of the land, but was compelled to make a permanent reservation of the required amount for recreational purposes. The park was not limited to use by the subdivision residents, but was made available to the general public.

The conclusion that there could be no taking so long as the developer retained title seems erroneous. It is well settled that any governmental interference with use and enjoyment of land which is severe enough to result in an ouster of the owner from possession constitutes a compensable taking. If the regulation is severe enough to constitute a taking, then either (1) it is void because no compensation is provided, and the owner retains title free of the regulation, or (2) the owner has an action for inverse condemnation to require payment and effectuate an actual transfer of title. Conversely, if compulsory dedication of land for public uses is a valid exercise of the police power, then the state of the title after imposition of the requirement is of little consequence.

In Pioneer Trust & Sav. Bank v. Village of Mount Prospect, the Illinois enabling act authorized municipal planning commissions to "establish reasonable standards of design" for redevelopment and subdivision lands, and to exact "reasonable requirements for . . . parks, playgrounds,

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163 P.R. Laws Ann. tit. 23, § 10 (1964) (now P.R. Laws Ann. tit. 23, § 10 (Supp. 1965)).
165 Ibid.
166 We are aware of the practical problem that the Government may not be authorized to spend public funds for the establishment of parks on land to which it has no title. But this does not constitute justification for us to redraft the statute and the regulations so as to require a transfer of title. The statute and the regulations in their present form only require that the owner reserve, not that he transfer to the Government, the park area.
168 See note 91 supra.
school grounds, and other public grounds.\textsuperscript{170} The official plan adopted by Mount Prospect pursuant to this statute contained a requirement that each developer dedicate one acre for each sixty new residential building sites and one-tenth acre for each business or industrial building site, to be used for "public grounds, other than streets, alleys and parking areas . . . ."\textsuperscript{171}

A subdivider of land in the village submitted a proposed plat showing 250 residential units to its planning commission. Approval was refused because of his unwillingness to dedicate 6.7 acres of land for an elementary school and playground site. He brought an action for mandamus to compel approval of the plat, contending that the ordinance was invalid. The trial court granted the writ, and its action was affirmed by the Illinois Supreme Court.

A prior decision of that court, \textit{Rosen v. Village of Downers Grove},\textsuperscript{172} had held that the enabling act did not authorize municipalities to exact cash payments from subdividers in lieu of dedication of land for educational purposes. Since compulsory dedication of land for school and park grounds was specifically authorized, the \textit{Rosen} case was not controlling. But the question of the reasonableness of the Mount Prospect requirements remained. In deciding this issue, the court elevated the following passage from its \textit{Rosen} opinion to a statement of the controlling constitutional standard of reasonableness:

\begin{quote}
"[T]he developer of a subdivision may be required to assume those costs which are specifically and uniquely attributable to his activity and which would otherwise be cast upon the public." . . . "The distinction between permissible and forbidden requirements is suggested in Ayres v. City Council . . . which indicates that the municipality may require the developer to provide the streets which are required by the activity within the subdivision but can not require him to provide a major thoroughfare, the need for which stems from the total activity of the community."\textsuperscript{173}
\end{quote}

This statement manifests a complete misunderstanding of \textit{Ayres}, in which the Supreme Court of California had refused to impose such a restrictive test. The Illinois court apparently failed to appreciate the import of the statements in \textit{Ayres} that "it is no defense to the conditions imposed in a subdivision map proceeding that their fulfillment will incidentally also benefit the city as a whole," and that "population factors affecting the subdivision and the neighborhood are appropriate for consideration" by plan-
ning commissions in formulating subdivision control regulations. In fact, the court could hardly have chosen a case whose rationale is more directly opposed to the "specifically and uniquely attributable" test than Ayres. Having purported to follow Ayres, the Pioneer Trust decision reached a contrary result without attempting to distinguish it. Further, the court made no attempt to distinguish its own prior decision in Paterson v. City of Naperville, which had upheld compulsory installation of curbs and gutters.

The "specifically and uniquely attributable" test was applied to the record presented in Pioneer Trust as follows:

The agreed statement of facts shows that the present school facilities of Mount Prospect are near capacity. This is the result of the total development of the community. If this whole community had not developed to such an extent or if the existing school facilities were greater, the purported need supposedly would not be present. Therefore, on the record in this case the school problem which allegedly exists here is one which the subdivider should not be obliged to pay the total cost of remedying, and to so construe the statute would amount to an exercise of the power of eminent domain without compensation.

The decision declares neither the enabling act nor the implementing ordinance invalid per se. It purports only to declare the ordinance invalid as applied to this particular subdivider under these particular circumstances. But can one imagine a better set of facts to demonstrate that the need for new school grounds is "specifically and uniquely attributable" to the new subdivision? Pioneer Trust seems erroneous both in its adoption of an unduly restrictive standard of reasonableness not justified by the supporting authority, and in its misapplication of that test to one of the few factual situations which ought to satisfy it.

During the late 1950's, significant events were taking place in New York as well. For many years, the Town Law had authorized local planning boards to require the inclusion of park facilities as a condition for approval of subdivision plats. Until 1959, however, there was no express provision for exaction of cash in lieu of land dedication for recreational purposes. In that year, an amendment to the enabling act was adopted stating that:

If the planning board determines that a suitable park or parks of adequate size cannot be properly located in any such plat or is otherwise not practical, the board may require as a condition to approval of any such plat

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174 See note 89 supra and accompanying text.
175 In fact, this test probably reflects more accurately the position of the Ayres dissenters. See note 94 supra.
176 See text accompanying notes 121-35 supra.
178 See note 160 supra and accompanying text.
a payment to the town of an amount to be determined by the town board, which amount shall be available for use by the town for neighborhood park, playground or recreation purposes including the acquisition of property.\textsuperscript{179}

The validity of this amendment was immediately contested in \textit{Gulest Associates, Inc. v. Town of Newburgh.}\textsuperscript{180} Newburgh had adopted subdivision control regulations which required dedication of up to ten percent of the gross area of each new subdivision for recreational purposes. The planning board was authorized to determine the amount of land to be dedicated, and empowered to waive dedication altogether in cases where such a requirement would be "unreasonable or undesirable."\textsuperscript{181} In cases where the requirement of dedication was waived, however, the subdivider was required to "deposit" fifty dollars per lot into a "special fund for the future acquisition and/or improvement of recreational facilities in the Town."\textsuperscript{182} The plaintiff owned a twenty-five acre tract of land within the town limits, which it proposed to subdivide into forty-six lots. The planning board approved its plat without provision of open space for recreational purposes, subject to the payment of $2,300 into the fund. The plaintiff thereupon brought an action for a declaratory judgment that the regulation was invalid. The supreme court granted summary judgment in favor of the plaintiff and the appellate division affirmed.

Each tribunal confined its attention to the validity of the 1959 amendment, deeming it unnecessary to determine the validity of the authorization for compulsory land dedication. The amendment was held constitutionally defective for several reasons: the fund was established for the benefit of the whole town, and might be used for recreational programs not directly related to the development of the subdivision;\textsuperscript{183} the authorization to use the fund for "recreational purposes" was too vague; and the statute failed to set forth with sufficient precision and clarity the standards by which towns might exercise the authority. The supreme court justice held the 1959 amendment unconstitutional on its face.\textsuperscript{184} The appellate division affirmed, stating: "We agree with the determination of special term that the statute in question is unconstitutional as applied to the facts.

\textsuperscript{179} N.Y. Town Law § 277 (McKinney 1965). Interestingly, no parallel amendment was made to the Village Law.


\textsuperscript{181} Id. at 1005, 209 N.Y.S.2d at 731.

\textsuperscript{182} Id. at 1005-06, 209 N.Y.S.2d at 731. [Emphasis added.]

\textsuperscript{183} This position is similar to the one taken in Pioneer Trust in mistaken reliance on Ayres. No authority for it is cited in the opinion.

of this case."\textsuperscript{185} Despite this "agreement," the appellate division looked to the application rather than to the face of the statute. The court should have stated the "facts of the case" on which its opinion was grounded. The appellate division may have deemed the sum of fifty dollars per lot to be excessive, or viewed the requirement of $2,300 as an unreasonable burden on the subdivider. In the absence of clarification, however, any interpretation of the ruling is mainly speculation. But commentators seem to agree that the case stands for the proposition that no scheme for cash payments in lieu of dedication is valid unless the funds must be expended in such a way as to confer a direct benefit upon the new subdivision.\textsuperscript{186}

\textit{Pioneer Trust} and \textit{Gulest} seemed to confirm the emergence of highly restrictive standards for the validity of exactions for recreational and educational purposes: the need for new facilities must be "specifically and uniquely attributable" to the new subdivision, and the land or cash donated by the subdivider must be used for the subdivision's direct benefit. There is a superficial consistency between this standard and exactions for streets, which usually are necessitated solely by the new subdivision and confer upon new residents the benefit of access to the existing street system. The same is true with respect to utilities, which are necessitated by the subdivision development and confer "special benefits" upon each newly created lot. But, as we have seen, compulsory dedication for streets has not been confined to that width and alignment necessary to accommodate traffic attributable solely to the new subdivision.\textsuperscript{187} In addition, the judiciary has shown little inclination to require proof that the enhancement of lot value attributable to new utilities is equal to or greater than the special assessment imposed.\textsuperscript{188} In formulating a more restrictive constitutional standard with respect to exactions for purposes other than streets and utilities, these cases departed from traditional police-power analysis. Commentators were driven to rather tenuous reasoning in the attempt to harmonize this new rationale with conventional zoning and sub-


\textsuperscript{186} E.g., "The Gulest court would prohibit exactions unless they result in facilities which directly benefit the subdivision to which they are related." Heyman & Gilhool, supra note 138, at 1136.

The Gulest rationale was soundly criticized as follows:

The distinction between forced dedication of land and forced payment of fees seems unsupportable. If a developer can be compelled to dedicate land because future residents of his subdivision will need parks, there is no reason why those parks cannot be located outside the subdivision. The need generated by the subdivider's activity remains the same; so long as it is that need which is satisfied, nothing should stand in the way of improvements which incidentally will be more advantageous to the whole community. Note, "Techniques for Preserving Open Spaces," 73 Harv. L. Rev. 1622, 1628 (1962).

\textsuperscript{187} \textit{Ridgefield Land Co. v. City of Detroit}, 241 Mich. 468, 217 N.W. 58 (1928), and \textit{Ayres v. City Council}, 34 Cal. 2d 31, 207 P.2d 1 (1949), are the two leading cases. These cases are discussed in text accompanying notes 61-66 supra and notes 80-93 supra.

\textsuperscript{188} See text accompanying note 138 supra.
division control doctrine. More significantly, the development of new techniques to satisfy the need for additional educational and recreational facilities within the framework of the new strictures seemed to be a virtually impossible task. However, a dramatic reversal has recently oc-

189 While zoning involves no more than negative prohibitions on certain uses of the owner's property, subdivision regulation often makes positive exactions of the owner. It is submitted that this difference necessitates a more specific test of constitutionality, i.e., the legislation should not only be substantially related to the public health, safety, morals, or general welfare, but, insofar as dedications, activities, and expenditures are positively required of the subdivider, these requirements should be reasonably related to the subdivision in question and should concern types of improvement for which municipalities have generally been conceded the power to levy special taxes or assessments.

Reps & Smith, "Control of Urban Land Subdivision," 14 Syracuse L. Rev. 405, 407 (1963). The defect in this reasoning is, of course, that "negative" zoning regulation can have a much more serious economic impact on landowners and developers than subdivision control exactions. "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." Heyman & Gilhool, supra note 138, at 1137.

The Reps and Smith formulation provides an interesting contrast with Professor Dunham's analysis, which appeared four years prior to Pioneer Trust and Gulest:

The public need not compensate an owner when it takes (restricts) his privileges of ownership in order to prevent him from imposing a cost upon others; but when the state takes (uses or restricts) his property rights in order to obtain a public benefit it must compensate him...

It is unconstitutional to compel an owner to commit his land to park use in order to meet the public desire for a park, but an owner may be compelled to furnish a portion of his land for a park where the need for a park results primarily from activity on other land of the owner.

Dunham, "A Legal and Economic Basis for City Planning," 58 Colum. L. Rev. 650, 666 (1958). This rationale, rather than the majority opinion in Ayres, really underlies the "specifically and uniquely attributable" test of Pioneer Trust.

Even if constitutional distinctions between zoning and subdivision control authority are considered illusory, the difficult problem of distinguishing "regulation" from "taking" remains. The best-known theory is probably Ernst Freund's:

Under the police power, rights of property are impaired not because they become useful or necessary to the public, or because some public advantage can be gained by disregarding them, but because their free exercise is believed to be detrimental to public interest; it may be said that the state takes property by eminent domain because it is useful to the public, and under the police power because it is harmful...

Freund, The Police Power § 511 (1904). Freund recognized, however, that the distinction was really one of degree. It is of little utility in subdivision control cases, since exactions are usually imposed to prevent a condition deemed to be harmful; at the same time, they may well confer a benefit upon the general public.

Zoning cases also present difficult questions with regard to the regulation-taking distinction. Professor Sax has formulated a "governmental enterprise" theory to resolve such issue: if regulation is imposed to acquire new governmental resources, it is a taking; if it is imposed to mediate conflicts between competing private economic interests, it is a proper exercise of the police power. See Sax, "Taking and the Police Power," 74 Yale L.J. 36, 67 (1964). However, in much of zoning, and virtually all of subdivision control, government is really acting in a dual capacity. See Comment, "The Validity of Airport Zoning Ordinances," 1965 Duke L.J. 792, 798-800.

190 The noblest attempt was that of Heyman & Gilhool, supra note 138. They proposed a cost-accounting approach, to facilitate computation of the quantum of need for public facilities attributable to new subdivisions. Id. at 1141-46. This clearly would satisfy the "specifically and uniquely attributable" test of Pioneer Trust; but what of the direct benefit requirement of Gulest? Heyman and Gilhool argue that Gulest is unsound and aberrational: "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." Id. at 1137. However, the "conventional subdivision cases" do not support the Pioneer Trust "specifically and uniquely attributable" standard. See text accompanying note 187 supra.
curred. Within the past two years, three jurisdictions have refused to follow Pioneer Trust and Gulest, including the New York Court of Appeals. These decisions apparently signal a return to traditional analysis.\textsuperscript{191}

In Billings Properties, Inc. v. Yellowstone County,\textsuperscript{192} the Supreme Court of Montana upheld a statute requiring dedication of land for park and playground purposes,\textsuperscript{193} rejecting a subdivider's contention that it constituted a taking of his land for public use without compensation. Apart from a rehashing of the voluntariness fiction,\textsuperscript{194} an aside about the statute's legislative history,\textsuperscript{195} and a reference to its vintage,\textsuperscript{196} the opinion stands as an essay in judicial deference to legislative judgment. The court acknowledged the elastic character of the police power\textsuperscript{197} and the necessity for divorcing judgments about the wisdom of legislation from the determination of its constitutionality.\textsuperscript{198} The deference theme was brought to a rousing climax in the court's handling of Pioneer Trust, upon which the subdivider relied heavily. The court appeared to accept the "specifically and uniquely attributable" test without question, but then announced that the test was satisfied with respect to the statute because "the question of whether or not the subdivision created the need for a park or parks is one that has been already answered by our Legislature."\textsuperscript{199}

The Montana enabling act establishes standards for dedication of park land, according to the size of the subdivision, and invests local planning commissions with a measure of discretion to vary these standards in individual cases.\textsuperscript{200} By contrast, the Illinois statute under review in Pioneer Trust authorized municipal planning commissions to require dedi-

\textsuperscript{191} I.e., the decisions eschew illusory distinctions between subdivision control and other police-power instruments, such as zoning, which are offered in justification of a stricter standard of constitutionality for subdivision control exactions.

\textsuperscript{192} 144 Mont. 25, 394 P.2d 182 (1964).

\textsuperscript{193} Mont. Rev. Codes Ann. § 11-602(9) (1957) provides that each proposed plat "must show that at least one-ninth of the platted area, exclusive of streets, alleys, avenues, and highways, is forever dedicated to the public for parks and playgrounds ..." Each municipal governing body was empowered to reduce the production to not less than one-twelfth, "for good cause shown;" the requirement could be waived altogether, where the platted area consists of less than twenty acres.

\textsuperscript{194} See notes 23-30 supra and accompanying text.

\textsuperscript{195} [The provision in question] ... was passed as an amendment to the original statute in the Fifteenth Legislative Session in 1917. A check of the House and Senate Journals for that session reveals that it went through both houses with but one dissenting vote and that significantly enough was by the Senator from Yellowstone County. Billings Properties, Inc. v. Yellowstone County, 144 Mont. 25, 29, 394 P.2d 182, 185 (1964).

\textsuperscript{196} "From that date [1917] until the present suit, there has never been a case even remotely questioning its constitutionality, however, that has no bearing on the ultimate question." Ibid.

\textsuperscript{197} "In gauging the reasonableness of the statute in question, we must not look back solely to past precedents, but must also look ahead." Id. at 31, 394 P.2d at 186.

\textsuperscript{198} Included is a quotation, from an earlier case, to the effect that acts of the legislature will not be invalidated unless unconstitutionality is "shown beyond a reasonable doubt." Id. at 30, 394 P.2d at 185.

\textsuperscript{199} Id. at 35, 394 P.2d at 188.

\textsuperscript{200} See note 193 supra.
cation of land to meet "reasonable requirements for . . . parks, playgrounds, school grounds, and other public grounds," without establishing any guidelines.\(^{201}\) It is difficult to perceive any substantial distinction between the two statutes in terms of their objective or means of implementation. The sole material distinction is the fact that one establishes a general framework of standards while the other delegates authority to local officials to establish "reasonable" standards. Each statute reflects legislative judgments that most subdivisions create a need for parks and other public grounds, that the extent of the need created varies according to the size and location of the subdivision, and that the exact amount of land to be dedicated by a particular subdivider should be determined ultimately by local officials.

*Billings Properties* cannot be harmonized with *Pioneer Trust* by distinguishing the two statutes. The conflicts in the cases stem from the antithetical views of the respective courts. By requiring a showing that the disputed exaction is necessitated solely by the new subdivision, the Illinois court registered its dissent from the legislative judgment that every new subdivision creates a need for additional recreational and educational facilities. The Montana court deferred both to this judgment and to the legislative determination of the quantum of new recreational facilities necessitated by each new subdivision. The two cases are irreconcilable, despite assurances to the contrary in the *Billings Properties* opinion. Just as *Pioneer Trust* formulated an almost unattainable standard of validity for this type of exaction, *Billings Properties* established a virtually unsailable presumption in its favor. Neither position has been tested by subsequent cases in those jurisdictions.

An intermediate rationale was adopted by the Supreme Court of Wisconsin in the landmark case of *Jordan v. Village of Menomonee Falls*.\(^{202}\) The enabling act authorized municipalities and counties to condition plat approval upon compliance with regulations adopted to accomplish the purposes, *inter alia*, of facilitating "adequate provision for . . . schools, parks, playgrounds and other public requirements," in order to provide "the best possible environment for human habitation . . . ."\(^{203}\) Pursuant to this authority, the Village of Menomonee Falls adopted a subdivision control ordinance requiring dedication of "adequate land to provide for the school, park and recreation needs of the subdivision," to the value of $200 for

\(^{201}\) See text accompanying note 170 supra.


\(^{203}\) Wis. Stat. Ann. § 236.45(1) (1957). It has been said that standards such as "the most comfortable environment possible" are "so general as to be useless in testing a proposal . . . ." Lynch, Site Planning 10 (1962).
each new residential lot created. In the event that such dedication of land was "not feasible or compatible with the comprehensive plan," the subdivider was required to make an equivalent cash contribution (called an equalization fee), of which $120 per lot was allocated for the local school district and $80 per lot for the village's park and recreation area fund. These funds were expendable only for site acquisition or capital improvements.

The plaintiffs owned a 7.85 acre tract which they proposed to subdivide into twenty-five lots, without dedication of land for school or park sites. They paid a $5,000 equalization fee under protest, completed the marketing of the subdivision lots, and brought action to recover the fee. They were successful in the trial court, but the decision was reversed on appeal.

The Supreme Court of Wisconsin first determined that compulsory dedication or payment of fees for school and recreational purposes was permitted by the enabling act. Although the statute contained no specific reference to these exactions, the court, by analogy to streets and utilities, held that compulsory dedication of land for school and park purposes was authorized. The court then focused its attention upon the reasonableness of the method by which the village had derived standards specifying the amount of land to be dedicated. The defendants' "planning expert" had testified at the trial that:

... the experience of municipal planners throughout the country has shown that for a good environment for human habitation, for each family in the area, there must be a minimum of 3,000 square feet of land devoted to park and school purposes. After some study of average land values in the village, the village planning commission and the village board determined that land valued at $200 would by and large provide the added park and school lands required for each family brought into the village by creation of the subdivision.

The plaintiffs contended that these exactions constituted a taking of prop-

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204 Jordan v. Village of Menomonee Falls, 28 Wis. 2d 608, 611, 137 N.W.2d 442, 444 (1965).
205 The common practice of providing for transportation in a subdivision is for municipal platting ordinances to require dedication of land for streets by the subdivider. Likewise the accepted way to provide water and sewerage facilities for a proposed subdivision is to require the subdivider to provide the same as a condition to the municipality approving the proposed plat. ...
206 Similarly it would seem to follow that the way to facilitate provision for schools, parks and playgrounds to serve the subdivision would be to require the subdivider to dedicate a portion of the subdivision for such purposes.

Id. at 615-16, 137 N.W.2d at 446.
206 Id. at 615, 137 N.W.2d at 446. At a meeting of the village council before the ordinance was adopted, this planning consultant had stated that the $200 fee was merely a "token" payment, which would not "make even a dent in the burden of additional demands brought on by new subdivisions." Brief for the Plaintiffs-Respondents, pp. 29, 31.
The court purported to accept the "specifically and uniquely attributable" test; but it adopted a more lenient approach than did Billings.\textsuperscript{207}

The record showed that the village's population had more than quadrupled between 1950 and 1964, while school enrollments had doubled between 1958 and 1963. Forty-one subdivisions had been approved subsequent to the adoption of the contested ordinance, from which a total of five dedications had been required. The village had also been obliged to purchase additional land for parks. The court concluded that this evidence satisfied the village's burden of proof that the need for additional facilities was occasioned by the development of the subdivision.

The opinion asserted that the justification for compulsory dedication of land for park and school purposes was equally applicable to cash payments in lieu of dedication. The court held that the fees are simply a substitute for actual dedication, to be employed in cases where the size or location of the subdivision render dedication impractical.\textsuperscript{208} The plaintiffs did not cite \textit{Gulest} in their brief, but they did argue that:

There are numerous cases prohibiting a control of subdivision of land which was intended to benefit the public generally rather than special benefits the land developed. There is no case where a tax was held to have been validly collected to defray in part or in whole the costs of acquisition of public sites for park or school purposes or the costs of construction of public improvements thereon as a condition for plat approval.\textsuperscript{209}

The court correctly reasoned that the underlying premise of this contention was that cash in lieu of dedication can only be sustained as a special assessment, \textit{i.e.,} where the special-benefits test is satisfied. That premise was rejected, the court concluding that the general financial benefit ac-

\textsuperscript{207} In most instances, it would be impossible for the municipality to prove that the land required to be dedicated for a park or a school site was to meet a need solely attributable to the anticipated influx of people into the community to occupy this particular subdivision. On the other hand, the municipality might be able to establish that a group of subdivisions approved over a period of several years had been responsible for bringing into the community a considerable number of people making it necessary that the land dedications required of the subdividers be utilized for school, park, and recreational purposes for the benefit of such influx. In the absence of contravening evidence this would establish a reasonable basis for finding that the need for the acquisition was occasioned by the activity of the subdivider.

\textsuperscript{208} The enabling act contained no provision expressly authorizing cash payments in lieu of dedication. The court recognized that, in cases where dedication is impracticable because of the subdivision's size or location, the only alternatives are to require a cash payment or relieve the subdivider of any obligation to contribute toward filling the school and park needs created by his activity. The power to exact cash in lieu of dedication was then implied from "the stated purpose of the statute." Id. at 622, 137 N.W.2d at 450.

\textsuperscript{209} Brief for the Plaintiffs-Respondents, p. 22, Jordan v. Village of Menomonee Falls, supra note 204.
The municipality by approval of a proposed subdivision plat enables the subdivider to profit financially by selling the subdivision lots as homebuilding sites and thus realizing a greater price than could have been obtained if he had sold his property as unplatted lands. In return for this benefit the municipality may require him to dedicate part of his platted land to meet a demand to which the municipality would not have been put but for the influx of people into the community to occupy the subdivision lots. Jordan v. Village of Menomonee Falls, 28 Wis. 2d 608, 619-20, 137 N.W.2d 442, 448 (1965).

The decision has been criticized on the ground that the court's "unique interpretation" of enabling legislation has approved a power of subdivision regulation which may be "virtually unlimited." Note, "Validity of Subdivision Fees for Schools and Parks," 66 Colum. L. Rev. 974 (1966). It is suggested that the court should have invoked the special-benefit test of Gulest, then moved to a "sophisticated application of cost-accounting methods" in order to limit the scope of the power to exact fees in lieu of dedication. Id. at 980. Heyman and Gilhool, who suggested the cost-benefit analysis to meet the "specifically and uniquely attributable" test formulated in Pioneer Trust, had no such reverence for the special-benefit theory underlying Gulest. See note 190 supra.
than streets and utilities received additional impetus from the recent decision in *Jenad, Inc. v. Village of Scarsdale*.

The enabling act authorized village planning boards to require proposed subdivision plats to "show in proper cases and when required by the planning board, a park or parks suitably located for playground or other recreational purposes." A proviso empower the planning board to waive, "subject to appropriate conditions and guarantees, for such period as it may determine, the provision of any or all such improvements as in its judgment of the special circumstances of a particular plat or plats are not requisite in the interests of the public health, safety and general welfare." The planning commission of the Village of Scarsdale adopted an implementing resolution which stated:

> The Commission may require adequate, convenient and suitable areas for parks or playgrounds, or other recreational purposes, to be set aside in the subdivision and to be dedicated to the Village, as provided for by §179-1 of the Village Law. No arbitrary percentage of area shall be insisted upon by the Commission, but, in general, subdividers will be required to set aside up to 10 percent of the area for these purposes.

> After considering the character and recreational needs of the neighborhood in which the subdivision is located, the suitability of land in the subdivision for park and playground purposes . . . the Commission may direct and determine that cash is to be deposited in lieu of land dedications for park, playground and recreational purposes. In such event, the Commission shall require a cash deposit of $250 for each lot in the subdivision.

> All such cash deposits shall be paid to the Village of Scarsdale and credited to a separate fund to be used for park, playground and recreational purposes in such manner as may be determined by the Village Board of Trustees from time to time.

The subdivider developed his tract in two sections, by separate plats. The first was approved by the planning commission in 1956, subject to an agreement that the developer would set aside land for park and playground purposes for the entire tract at the time the second plat was submitted for approval. When the second plat was submitted in 1958, the planning commission determined that there was no suitable park or playground site within the subdivision. Since the two plats created twenty-four

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new lots, the planning commission assessed the developer $6,000 in lieu of land dedication. The developer paid this fee, then brought an action for its recovery on the grounds that the village law did not authorize its collection and, alternatively, that if the fee was authorized it was unconstitutional.

The supreme court dismissed the complaint, ruling that the payment was made voluntarily and not under duress. Consequently, even if the regulation was invalid, the plaintiff had made a payment under mistake of law which it could not recover. The appellate division reversed, granting the plaintiff's motion for summary judgment. It held that was controlling on the issue of the validity of Town Law § 179-1. Since there was no requirement that funds paid in lieu of dedication be earmarked for the direct benefit of the new subdivision, the regulation was unconstitutional as applied to the plaintiffs. The court further held that the payment was made under duress, and the plaintiff could maintain the action despite its failure to file formal protest at the time the fee was paid. A dissenter was of the opinion that the case was distinguishable from in that (1) Scarsdale had safeguarded recreational funds against withdrawal for other purposes, and (2) the village's area was so small as to confer direct benefits on the plaintiff as well as other residents, wherever the recreational facilities might eventually be located.

On appeal, the usual ultra vires and constitutional issues had become somewhat obscured by the peripheral considerations which had been dispositive of the case in the two lower courts. Nevertheless, the Court of Appeals decided both issues. It upheld the enabling act and the regulations of the Scarsdale planning commission by a four-three decision.

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217 This ground was apparently not even raised in the defendant's motion for summary judgment. See Brief for the Plaintiff-Respondent, p. 3, Jenad, Inc. v. Village of Scarsdale, supra note 215.
219 In our opinion, the decision in is dispositive of the constitutional issue here raised and compels a determination that the subject provisions of the Village Code are illegal and void. We conclude that the law and regulations struck down in the case are indistinguishable from the code provision here in issue.
220 This contention contrasts with that of the developer in In re Lake Secor Dev. Co., 141 Misc. 913, 252 N.Y. Supp. 809 (Sup. Ct. Westchester County 1931), aff'd, 235 App. Div. 627, 255 N.Y. Supp. 853 (2d Dep't 1932), in which it was argued that the subdivision created no need for recreational facilities because "all Putnam County is a park." Id. at 915, 252 N.Y. Supp. at 812.
221 I.e., issues of duress, waiver, and estoppel. As a result, only nine of the thirty-three pages of the plaintiff-appellant's brief are devoted to the constitutional issue. Only is cited and discussed. The constitutional issues consumed eight of the twenty-nine pages of the defendants'-appellants' brief. These issues were considerably amplified in an amicus brief filed on behalf of the New York State Home Builders Ass'n, Inc.
Although the enabling act does not specifically authorize collection of cash in lieu of land dedication, the power to waive dedication “subject to appropriate conditions and guarantees” was held to permit this exception.\(^{222}\) Gulest appeared to offer strong support for the plaintiff’s position, even though it had no binding effect as precedent. The court in Jenad distinguished Gulest, employing the reasoning of the dissenter in the appellate division. But the majority did not simply distinguish Gulest; it categorically rejected the conclusion that the authorization for expenditure of funds for “any recreational purpose” is unconstitutionally vague.\(^{223}\) The direct-benefit requirement was also rejected.\(^{224}\)

Although the majority relied upon Jordan and Billings to sustain the Scarsdale fee against the “unreasonableness” contention, both cases are arguably distinguishable from Jenad. In Jordan the burden was placed upon the municipality to demonstrate the relationship between the need created by the new subdivision and the amount exacted from the developer. The record on appeal in Jenad does not indicate the basis on which the amount of $250 per lot was determined,\(^{225}\) or what connection the fee bore to the need for recreational facilities created by the plaintiff’s development.\(^{226}\) Nor is there any discussion of the actual pecuniary effect

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\(^{222}\) In so holding, the court adopted the position previously taken by the state comptroller. Opinions, State Comptroller, No. 6836 (1954). This opinion was apparently not published. It is printed in Brief on Behalf of New York State Home Builders Ass’n, Inc. as Amicus Curiae, pp. 34-36, Jenad, Inc. v. Village of Scarsdale, 18 N.Y.2d 78, 218 N.E.2d 673, 271 N.Y.S.2d 955 (1966).

\(^{223}\) Even if the Gulest decision were correct—and we hold it is not—it would not apply here since by the Scarsdale rules and regulations the moneys collected as “in lieu” fees are not only put into “a separate fund to be used for park, playground and recreational purposes” (there was no such reserve set up in Gulest) but, as provided by the board of trustees, expenditures from such fund are to made [sic] only for “acquisition and improvement of recreation and park lands” in the village. There is nothing vague about that language.

\(^{224}\) Id. at 84-85, 218 N.E.2d at 675, 271 N.Y.S.2d at 957-58.

\(^{225}\) A memorandum presented to the Scarsdale mayor and trustees by the village attorney on August 20, 1957 listed twenty-one California and three New York municipalities which had adopted “cash in lieu” ordinances. The amount varied from $10 to $50 per lot, and from $50 to $250 per acre. This memorandum was referred to the village’s planning commission, which recommended a cash deposit of $250 per lot. The trustees approved this recommendation on September 24, 1957. Papers on Appeal from the Order, pp. 25-33, Jenad, Inc. v. Village of Scarsdale, supra note 222.

\(^{226}\) In apparent recognition of the deficiencies of the regulations contested in Jenad, the Scarsdale planning commission subsequently adopted the following amendment:

The Commission may require adequate, convenient and suitable areas for parks or play-
of this exaction on the profitability of the plaintiff's enterprise. If the Court of Appeals had actually followed Jordan, presumably it would have remanded the case to the supreme court for further proceedings to establish the basis for the exaction of $250 per lot, and to determine whether or not the fee would constitute an unreasonable burden on the plaintiff's activity. Jordan, therefore, offers little support for the result actually reached in Jenad.

Nor is Billings really in point. That case dealt with land dedication, not cash in lieu thereof. The Montana enabling act established specific standards for determining the amount to be dedicated, subject to modification by local officials. By contrast, the New York statute lays down no guidelines at all. It leaves the establishment of standards entirely to local planning commissions. Billings does offer support on the question of deference to the legislative determination that subdivisions create a need for recreational facilities, but its rationale offers no support for the exaction actually imposed upon the subdivider in Jenad.

The dissenting opinion closely follows the dissent in Jordan. It asserts that the exaction cannot be upheld as a tax or special assessment, that the police power does not extend to this type of exaction, and that the exaction is neither authorized nor constitutional. Unfortunately, the dissenting opinion ignores Jordan and Billings, thereby forfeiting an opportunity to point out that neither case fully supports the result reached by the majority.

CONCLUSION

Analysis of individual precedents is absolutely essential to an understanding of the presently confused state of subdivision control doctrines.
A careful reading of early cases such as Ross and Ridgefield Land Co., for instance, would have demonstrated the inapplicability of the "voluntariness" and "privilege" rationales after platting ceased to be discretionary. When these unsatisfactory doctrines finally gave way to the police-power rationale, bench and bar were unprepared to apply the new analysis to subdivision control problems. Meanwhile, the inexorable pressure of urbanization and suburbanization forced state and municipal legislatures to take action to protect the public interest "while there was yet time."227 Their response to emerging public needs inevitably contravened certain traditional attitudes about land ownership. As we have seen, the conflict has been resolved generally in favor of such devices as compulsory dedication for streets and installation of subdivision utilities. On the issue of compulsory dedication, or cash in lieu of dedication, for other public purposes, however, the tide of judicial opinion has run in favor of subdividers until very recent times.228 Billings, Jordan, and Jenad have probably reversed the trend, but their reasoning is so divergent that it will be some time before consistent patterns of judicial review can be anticipated. Meanwhile, courts in other jurisdictions will be forced to examine or re-examine their own precedents in the light of these decisions.

Virtually every subdivision control dispute presents issues concerning the constitutionality and interpretation of the enabling act, the validity of the implementing ordinance, and the question whether a given regulation constitutes so severe a burden as to be unreasonable as applied to a particular subdivider. These issues are closely interrelated. Each involves judgments about the proper scope of the police power and the ambit of freedom from official regulation that is implicit in the concept of private property.

The effect of the constitutional guarantee that private property not be taken for public use except upon payment of just compensation adds to the confusion. Clearly, the nonsubdivider is entitled to compensation

227 "Scarsdale and other communities, observing that their vacant lands were being cut up into subdivision lots, and being alert to their responsibilities, saw to it, before it was too late, that the subdivisions make allowance for open park spaces therein." Jenad, Inc. v. Village of Scarsdale, supra note 222 at 84, 218 N.E.2d at 676, 271 N.Y.S.2d at 958.
228 One of the most forceful statements contrary to this trend is the concluding paragraph of Heyman & Gilhool, "The Constitutionality of Imposing Increased Community Costs on New Suburban Residents Through Subdivision Exactions," 73 Yale L.J. 1149, 1157 (1964):

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 their salvation.
for his land when it is converted to street, park, or other public use. Why should the subdivider be excluded from this guarantee?\footnote{But while the [Ayres] development undoubtedly received some benefit from the improvement [widening of Sepulveda Boulevard], it does not seem equitable that one owner should be forced to donate land for the use of the general public merely because he has decided to subdivide, while other owners, who will benefit to the same degree, can force the city to exercise the power of eminent domain. Note, "Land Subdivision Control," 65 Harv. L. Rev. 1226, 1233-34 (1952).} As implied by the excise-tax rationale of Jordan, there is an elementary but vital distinction between developers and other landowners. The subdivider is a manufacturer, processor, and marketeer of a product; land is but one of his raw materials. In subdivision control disputes, the developer is not defending hearth and home against the king’s intrusion, but simply attempting to maximize his profits from the sale of a finished product. As applied to him, subdivision control exactions are actually business regulations.

In a very real sense, all subdivision control exactions are grounded upon a judgment that subdivisions which do not provide adequate space for streets, utilities, parks, and other public uses are defective. Although the consumer may be able to discern the existence of such defects, his bargaining power is probably too weak to force subdividers to provide necessary improvements. From the municipality’s point of view, the danger from a defective subdivision is actually greater than the threat posed by defectively manufactured automobiles, refrigerators, or other durable goods. The subdivision remains, long after the automobiles have been relegated to the junk heap, to spawn conditions of slum and blight. Further, the removal or rehabilitation of a subdivision may necessitate large expenditures of public funds. The ability of a defective environment to cripple or maim its inhabitants may not be so dramatic and obvious as that of automobiles and other inherently dangerous instrumentalities, but it is no less real.

While assuring the provision of improvements deemed necessary for the maintenance of acceptable living conditions, municipalities must recognize that exactions which add such a financial burden as to discourage developers from undertaking residential subdivisions are self-defeating, especially in a society characterized by vigorous population growth. In purely economic terms, the municipality must steer a course between permitting the development of substandard subdivisions and imposing exactions which are so severe as to stifle new development altogether.

From the subdivider’s point of view, the crucial question is whether his expected return from a subdivision sufficiently outweighs the costs and risks involved. As long as he knows in advance the cost of public improvements which lie will be required to furnish, these costs can be included in his projections. The ultimate purchaser, seeking the best
value for the amount which he can afford, will consider many factors besides the initial cost of house and lot. An unforeseen paving or sewer assessment, for instance, can transform his dreamhouse into a financial nightmare. Determination of those costs which the developer may constitutionally be required to bear therefore requires accommodation of the interests of all three parties: the municipality, the developer, and the purchaser.\textsuperscript{230}

\textit{Jordan v. Village of Menomonee Falls}\textsuperscript{231} offers the most consistent, workable rationale for the accommodation of these interests within the traditional police-power analysis. But \textit{Jordan}, unlike \textit{Billings} and \textit{Jenad}, charts a difficult course for municipal officials. The burden of establishing a rational nexus between their exactions and the public needs attributable to subdivision development is a substantial one. Standards can be developed and supported only after considerable data have been gathered and carefully analyzed.\textsuperscript{232} It may be impossible to determine to everyone's satisfaction the precise point at which sufficient subdivision improvements are furnished to prevent the development from being "substandard." But if we accept similar uncertainties in zoning and building-code enforcement, we should be equally willing to do so in subdivision control matters—provided, of course, that state and local officials allocate sufficient resources to accomplish the formulation of defensible subdivision standards.


\textsuperscript{231} See text at notes 202-212 supra.

\textsuperscript{232} In theory, the most scientific way to relate the quantity of land to be dedicated to the need for the use of such land would be to require a land use analysis of the particular needs of each subdivision relating to parks, school facilities, storm water drainage, etc. Such a flexible provision is expensive, time consuming, and subject to abuse by overzealous or uniformed officials. Much more common is the arbitrary requirement that some definite percentage, such as 5 or 10 percent, of the land area be dedicated for such purposes.

It is most unscientific to take a flat percentage of each subdivision for public land. It would be far more logical to require, as is being done more and more, a cash contribution which would be designed to defray that part of the cost of the public sites required to serve the particular subdivision.