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Constitutional Law--Mandatory Subdivision Exactions for Park and Recreational Purposes--The Home Builders Association of Greater Kansas City v. City of Kansas City

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CONSTITUTIONAL LAW—MANDATORY SUBDIVISION EXACTIONS FOR PARK AND RECREATIONAL PURPOSES

The Home Builders Association of Greater Kansas City v. City of Kansas City[1]

In 1973 the Chas. S. Bordner Construction Company applied for the recordation of a subdivision plant known as Woodson Estates Extension.[2] The City of Kansas City, Missouri, had in effect an ordinance which provided, as a condition of final subdivision approval, that the developer dedicate to the city nine percent of the merchantable land for park purposes.[3] This ordinance was enacted by the city pursuant to state statute empowering municipalities to adopt regulations governing the subdivision of land. The statute specifically permitted municipalities to require subdividers to dedicate "adequate open spaces . . . for recreation, light and air."[4] The Board of Park and Recreation Commissioners selected a 5.1 acre park site on Bordner's plat. Bordner refused to dedicate this parcel of land and instead offered 11.94 acres at another location or a cash payment in lieu of dedication. Neither alternative was acceptable to the City Plan Commission and approval of Woodson Estates Extension was denied.

The Home Builders Association of Greater Kansas City, along with individual subdividers, brought a class action suit against the City of Kansas City. The Association challenged the constitutionality of the mandatory dedication ordinance and sought declaratory and injunctive relief.[5] The Circuit Court of Jackson County held the ordinance unconstitutional and stated:

> [The] fixed percentage dedication requirement of Sec. 31.32(A) is an arbitrary requirement unsupported by any showing of necessity, and as such constitutes a taking of [respondent's] property without just compensation in violation of Article I, Sections 10 and 26 of the Constitution of the State of Missouri and the Fifth and Fourteenth Amendments to the Constitution of the United States . . . .[6]

On direct appeal the Missouri Supreme Court reversed and remanded the case for new trial because the trial court erred in placing the burden of justifying the ordinance on the municipality. The court said that the

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1. 555 S.W.2d 832 (Mo. En Banc 1977).
2. Brief for Respondent at 6, Home Builder's Ass'n v. City of Kansas City, 555 S.W. 832 (Mo. En Banc 1977).
3. KANSAS CITY, MO., CODE OF GENERAL ORDINANCES § 31.32 (1973).
4. § 89.410, RSMo 1969.
5. 555 S.W.2d at 832.
6. *Id.* at 833.

party challenging the constitutionality of an ordinance must bear the burden of proving unreasonableness. Before reaching this holding, the court announced in dictum[7] the following rule regarding mandatory dedications for recreational purposes:

> If the requirement is within the statutory grant of power to the municipality and if the burden cast upon the subdivider is *reasonably* attributable to his activity, then the requirement is permissible; if not, it is forbidden and amounts to a confiscation of private property in contravention of the constitutional prohibitions rather than reasonable regulation under the police power. *Insofar as the establishment of a subdivision within a city increases the recreational needs of the city, then to that extent the cost of meeting that increase in needs may reasonably be required of the subdivider.*[8]

Since the turn of the century local governments have attempted to restrict land utilization[9] through the imposition of subdivision controls[10] in order to guide community development and to protect prospective residents and nearby land owners from the dangers of poorly designed areas. One common subdivision control method is the mandatory dedication ordinance. Under such an ordinance, as a condition precedent to plat approval, a developer must convey to the municipality an interest[11] in a percentage of the area of his new subdivision.[12] The dedicated land then is used by the government for a public purpose. This method is particularly advantageous to municipalities because it enables them to acquire needed land without using public revenues.[13] It also places the

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7. Judge Finch pointed out in his dissent that the majority opinion established the quoted phrase as the rule for Missouri even though the matter was not raised by either party on appeal. In the interests of restraint, Finch would prefer that such rules not be made unless there is a true adversary presentation concerning the issue. 555 S.W.2d at 835-39. The author of the majority opinion apparently was cognizant of this complaint; after announcing the Missouri rule for mandatory park exactions, the majority stated: "We turn then to a consideration of the *issues in this case.*" *Id.* at 835 (emphasis added).

8. *Id.* (emphasis in original).

9. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 387 (1926).

10. *See generally* 4 R. ANDERSON, AMERICAN LAW OF ZONING §§ 23.01-.48 (2d ed. 1977); Reps, *Control of Land Subdivision by Municipal Planning Boards,* 40 CORNELL L.Q. 258 (1955); Comment, *Land Subdivision Control,* 65 HARV. L. REV. 1226 (1952).

11. Typically, municipalities take a fee simple interest in exacted land. However, there are situations where an easement is acceptable. 4 R. ANDERSON, *supra* note 10, § 23.25 at 106.

12. Various rationales have been employed by the courts to uphold these requirements. *See* Johnston, *Constitutionality of Subdivision Control Exactions: The Quest For a Rationale,* 52 CORNELL L.Q. 871, 876-87 (1967).

13. Comment, *Subdivision Exactions: The Constitutional Issues, the Judicial Response and the Pennsylvania Situation,* 19 VILL. L. REV. 782, 785 (1974).

cost of providing this land on the developer whose subdividing activities have generated the demand for additional services.[14]

Traditionally, local governments have exacted land for streets,[15] alleys, sidewalks,[16] drainage facilities,[17] street lights, water lines,[18] sewers,[19] and curbs and gutters. These improvements not only provide desired amenities for the eventual residents, but also presumably enhance the saleability of the tract for the developer. Thus such exactions are accepted by developers as a traditional and vital part of new subdivisions.[20] Recently, however, because of population increases, the consequent rapid consumption of available land, and the overcrowding of existing facilities, a number of communities have elected to surpass these conventional subdivision exactions by also requiring developers to dedicate land for park and school sites or to pay fees[21] for the acquisition and maintenance of such sites. These exactions are readily distinguishable from similar requirements for streets and sewers because the amount of land involved is greater, and because parks and schools normally benefit the community at large, not merely the new neighborhood.

The subject of much litigation has been the question whether the imposition of a particular land use control amounts to a *taking* of private

14. Comment, *Subdivision Land Dedications: Objectives and Objections,* 27 STAN. L. REV. 419, 432 (1975).

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

16. *See, e.g.,* Allen v. Stockwell, 210 Mich. 488, 178 N.W. 27 (1920).

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

18. *See, e.g.,* Zastrow v. Village of Brown Deer, 9 Wis. 2d 100, 100 N.W.2d 359 (1960).

19. *See, e.g.,* Medine v. Burns, 208 N.Y.S.2d 12 (Sup. Ct. 1960).

20. *See* Heyman & Gilhool, *The Constitutionality of Imposing Increased Community Costs on New Suburban Residents Through Subdivision Exactions,* 73 YALE L.J. 1119, 1128-29 (1964).

21. Payments in lieu of dedication are paid by a developer to the municipality when his plat is found unsuitable for a park site because of shape, size, or topographical conditions. The payment commonly is set at a fixed amount per lot or as a percentage of the assessed value of all the land in the particular plat. *See, e.g.,* Coronado Devel. Co. v. City of McPherson, 189 Kan. 174, 368 P.2d 51 (1962); Jordan v. Village of Menomonee Falls, 28 Wis. 2d 608, 137 N.W.2d 442 (1965), *appeal dismissed,* 385 U.S. 4 (1966). Some developers have challenged such fees on the ground that payment in lieu of dedication constituted a taking of property without due process of law, and that the exacting municipalities lacked statutory authority to demand money. The courts, however, generally have upheld reasonable in lieu payments as long as the exacted amounts are placed in a fund expressly set aside for acquiring land for parks, playgrounds, and other recreational facilities. *See, e.g.,* Jenad, Inc. v. Village of Scarsdale, 18 N.Y.2d 78, 271 N.Y.S.2d 955, 218 N.E.2d 673 (1966). *See generally,* 4 R. ANDERSON, *supra* note 10, § 23.40. A Connecticut court has held that exacting fees in lieu of dedication is invalid if the proceeds are not kept by the municipality in a fund limited solely to the future recreational needs of the paying subdivision. *See* Aunt Hack Ridge Estates, Inc. v. Planning Comm'n, 27 Conn. Supp. 74, 230 A.2d 45 (Super. Ct. 1967).

property for public use for which the fifth amendment of the United States Constitution requires the payment of "just compensation,"[22] or whether such a control is merely a *regulation* for which no compensation is constitutionally required. When the government constructs a highway through private property or builds a levee that floods neighboring land,[23] courts uniformly have said that "taking" has occurred.[24] The government is acting as a proprietor in acquiring private property for a public purpose and therefore must condemn the land and pay the landowner its fair market value. On the other hand, when the government prohibits the operation of a particular business in an urban area[25] or restricts permissible building heights,[26] no compensation is constitutionally required. In those instances the government is said to be merely "regulating" to prevent the use of property in a manner that is detrimental to the public interest. When it regulates, the government does not gain private property for itself; it simply denies the owner the unrestricted use and enjoyment of his property.[27]

When it is clear that the government is acting as a proprietor by acquiring private property for a public purpose, or it is clear that the government is merely regulating land use, the courts have had little difficulty deciding in which situations compensation should be paid. However, the effects of some land use controls usually cannot be so easily categorized. Mandatory park dedications, for example, do not fit into either category. When a governmental entity exacts land for a park site, it is appropriating private property for a public purpose. Unlike conventional takings, however, it is not acting as a proprietor by initiating the acquisition. It is the developer who has taken the initiative by submitting his plat for recordation. As a result, the mandatory dedication of land for park purposes at best amounts to a hybrid form of taking. United States Supreme Court decisions in the land use control area have yielded inconsistent and frequently contradictory rationales for distinguishing permissible regulation from prohibited taking.[28] Consequently, there exists little guidance for lower courts.

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22. U.S. CONST. amend. V. This principle has been made applicable to the states by incorporation in the fourteenth amendment. Chicago, B. & Q. R.R. v. City of Chicago, 166 U.S. 226 (1897).

23. Hollingsworth v. Parish of Tensas, 17 F. 109 (W.D. La. 1883); Hansen v. Hammer, 15 Wash. 315, 46 P. 332 (1896).

24. Sax, *Takings and the Police Power,* 74 YALE L.J. 36 (1964).

25. *See, e.g.,* Reinman v. City of Little Rock, 237 U.S. 171 (1915) (livery stable); Northwestern Fertilizing Co. v. Hyde Park, 97 U.S. 659 (1878) (fertilizer plant).

26. *See, e.g.,* Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

27. *See* Mugler v. Kansas, 123 U.S. 623, 658-59 (1887); Petterson v. City of Naperville, 9 Ill. 2d 233, 137 N.E.2d 371 (1956).

28. The Supreme Court has employed three discernible approaches to determine what constitutes a taking. The first is the simplistic "physical invasion" test—if a state asserts a proprietary interest for itself in private property, there is

Professor Sax has suggested an unorthodox but highly useful approach for determining the definition of a taking.[29] Sax would divide government activities into two categories, entrepreneurial and mediatory. In the former the government attempts to enhance its own enterprises by competing for various resources. Because the government cannot acquire an asset for its own account without paying, it must compensate individuals for their resultant economic losses. These sorts of activities constitute a taking. In the latter the government acts in its arbitral capacity to resolve conflicting uses between private property owners. When the government functions as a mediator, no compensation is necessary. Thus, under the Sax approach, the nature of the government activity provides the basis for distinguishing between a taking and a regulation.

When the Sax test is applied to mandatory exactions for park and recreational purposes, an interesting result is reached. A municipality that requires a developer to dedicate a portion of his land is not mediating between private property owners; it is acting to gain title to land that was formerly in private hands. The government, in effect, acquires resources which add to the economic status of the entire municipality. Because the acquisition and maintenance of recreational facilities is a government enterprise, compensation to the developer would be necessary. Under the Sax approach, it appears that a subdivision exaction for recreational purposes constitutes a taking.

In spite of his test,[30] Professor Sax, along with all courts including the Missouri Supreme Court in *Home Builders*,[31] has treated such subdivision requirements as regulatory.[32] It has not been demonstrated clearly why compensation should not be required for forced dedications.[33] It

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a compensable taking. *See, e.g.,* United States v. Cross, 243 U.S. 316 (1917); Smith v. Corporation of Washington, 61 U.S. (20 How.) 135 (1857). A subsequent theory is the "noxious use" test, which developed from the law of nuisance. It is founded on the premise that if a property use is deemed injurious to the community, then that use can be restricted by the government without compensation to the owner. *See, e.g.,* Mugler v. Kansas, 123 U.S. 623, 668-69 (1887). The third theory, the "diminution in value" test, was first enunciated by Justice Holmes. Under this balancing approach a taking occurs when government interference with private property causes such extensive economic harm that it outweighs the concomitant public benefit. *See* Pennsylvania Coal v. Mahon, 260 U.S. 393 (1922). Although helpful in some cases, none of the above tests has proved to be adequately discriminating and reliable in all situations, and none is applicable in the case of mandatory dedication.

29. Sax, *supra* note 24, at 61-67.

30. *Id.* at 73-74.

31. 555 S.W.2d at 835.

32. *See, e.g.,* Associated Home Builders v. City of Walnut Creek, 4 Cal. 3d 633, 484 P.2d 606, 94 Cal. Rptr. 630, *appeal dismissed,* 404 U.S. 878 (1971); Billings Properties, Inc. v. Yellowstone County, 144 Mont. 25, 394 P.2d 182 (1964).

33. Heyman & Gilhool, *supra* note 20, at 1130.

would appear that the courts have justified the extension of permissible regulation to include mandatory park exactions because the developer's loss frequently is offset by an increase in the value of the rest of his tract due to the park or recreational land use. Additionally mandatory dedication may be the only feasible way for local governments to meet the growing public need for recreational facilities; the cost of purchasing large tracts of improved land would be prohibitive to most municipalities. The public welfare, therefore, apparently has been employed by the courts to justify the lack of compensation for affected subdividers.

If a compulsory dedication requirement for recreational purposes is not considered by the courts to be a taking, the question narrows to whether such a requirement is a valid exercise of a government's regulatory power. To justify government intervention on behalf of the public in this area, courts generally have said that the state legislature must have provided an enabling statute specifically authorizing municipalities to require dedications; and that the activity of the subdivider, and not that of the entire community, has generated the need for the expanded recreational facilities.

State courts have been reluctant to uphold mandatory park dedications in the absence of a state statute[34] expressly delegating such authority to municipalities.[35] The rule announced in *Home Builders* that a dedication ordinance must be "within the statutory grant of power to the municipality"[36] is no exception. The existence of explicit enabling legislation is important to the courts because it demonstrates the legislature's determination that the interests of the public permit the use of this regulatory power by municipalities.

The second requirement, that the need for park exactions be generated by the activity of the particular subdivider, was instituted by the courts to assess the reasonableness of the method through which a municipality specifies how much land each developer should be required to dedicate. One of the first cases to employ this reasoning was *Pioneer Trust and Savings Bank v. Village of Mount Prospect,*[37] which questioned the reasonableness of a municipal ordinance that required subdividers to dedicate, for school and playground purposes, one acre per sixty families.[38] The Illinois Supreme Court held the ordinance invalid as to the subdivider-plaintiff because the village had not shown to the court's satisfaction that the needs for the educational and recreational facilities

34. Johnston, *supra* note 12, at 887.

35. *See, e.g.,* Rosen v. Village of Downers Grove, 19 Ill. 2d 448, 167 N.E.2d 230 (1960); Coronado Devel. Co. v. City of McPherson, 189 Kan. 174, 368 P.2d 51 (1961); Haugen v. Gleason, 226 Ore. 99, 359 P.2d 108 (1961).

36. 555 S.W.2d at 835.

37. 22 Ill. 2d 375, 176 N.E.2d 799 (1961).

38. *Id.* at 377-78, 176 N.E.2d at 800.

were "specifically and uniquely attributable" to his subdivision.[39] The court said that dedication requirements must be tied *directly* to the demand for services created by the new residents. Commentators have criticized *Pioneer Trust* as creating an "unduly restrictive standard" for testing the validity of municipal exactions.[40] Nevertheless, the "specifically and uniquely attributable" test has been influential in this area.[41]

It often may be impossible for a municipality to prove that the need for the park or school site was generated *solely* by the increase in population stimulated by a new subdivision.[42] Thus, state courts have purported to follow *Pioneer Trust* but actually have adopted more lenient approaches in order to uphold mandatory land dedications for recreational purposes. One example is *Billings Properties, Inc. v. Yellowstone County,*[43] in which the Montana Supreme Court professed to accept the "specifically and uniquely attributable" test, but held that it was satisfied by the legislative determination in the enabling act[44] that new subdivisions create a need for park space.[45] Instead of applying *Pioneer Trust's* highly restrictive approach, the court established an almost irrebuttable presumption in favor of finding a need for such exactions.

In *Jordan v. Village of Menomonee Falls*[46] a developer sued a municipality to recover a fee paid in lieu of a mandatory land dedication for recreational purposes. The Wisconsin court upheld the validity of the dedication ordinance and agreed with the *Pioneer Trust* approach on the condition that the words "specifically and uniquely attributable to the [subdivider's] activity are not so restrictively applied as to cast an unreasonable burden of proof upon the municipality which has enacted the ordinance under attack."[47] The court stated that municipalities only have the burden of "reasonably establishing" that the need for the dedication requirement is related to the activity of the developer.[48] A reasonable nexus between the exaction and the proposed subdivision is thus sufficient.

The rule stated in *Home Builders,* that the need for the dedication requirement must be "reasonably attributable" to the activity of the developer, follows this trend away from the rigid structures of the *Pioneer*

39. *Id.* at 379-80, 176 N.E.2d at 801-02.
40. *E.g.,* Johnston, *supra* note 12, at 911.
41. *See, e.g.,* Aunt Hack Ridge Estates, Inc. v. Planning Comm'n, 160 Conn. 109, 273 A.2d 880 (1970); Frank C. Ansuini, Inc. v. City of Cranston, 107 R.I. 63, 264 A.2d 910 (1970).
42. *See* Jordan v. Village of Menomonee Falls, 28 Wis. 2d 608, 617, 137 N.W.2d 442, 447 (1965), *appeal dismissed,* 385 U.S. 4 (1966).
43. 144 Mont. 25, 35, 394 P.2d 182, 188 (1964).
44. MONT. REV. CODES ANN. § 11-602(9) (1957).
45. 144 Mont. at 35, 394 P.2d at 188.
46. 28 Wis. 2d 608, 137 N.W.2d 442 (1965), *appeal dismissed,* 385 U.S. 4 (1966).
47. *Id.* at 617, 137 N.W.2d at 447.
48. *Id.* at 618, 137 N.W.2d at 448.

Trust test. Under this rule, in order to enforce a specific exaction, it is unnecessary for the municipality to prove that the required dedication for a park site is to meet a need *solely* generated by the influx into the community of people who will occupy this particular subdivision. Beyond the mere statement of a rule, however, the court in *Home Builders* provided little guidance as to the interpretation of the "reasonably attributable" standard. The court did mention its earlier decision in *State ex rel. Noland v. St. Louis County,*[49] where it invalidated a requirement that, as a precondition to approval of a subdivision plat, the developer relocate a new road and widen and pave an old road. The *Noland* decision was based on the local government's failure to show that the requirements were reasonably related to the activity of this subdivider.[50] The court found that the new subdivision would not create such additional traffic volume as would warrant the proposed street improvements. The need for the required improvements was generated by the community as a whole and not only by this subdivision. If the *Home Builders* rule is applied in the same manner as the *Noland* standard, specific instances of mandatory park dedications presumably will be upheld if the municipality can establish a reasonable connection between its required exaction and the recreational needs created by the proposed neighborhood. On the other hand, if a developer can prove that the community as a whole, and not merely his new subdivision, has generated these needs, the dedication requirement as to him would be invalidated.

In order for a municipality to establish that its park exactions are reasonably attributable to the activity of the subdivider, the services of a city planning expert could prove useful. Such an expert could provide evidence on the amount of recreational space per family needed in the community to provide a proper environment for human habitation. A municipal government then could correlate this figure with the amount of recreational facilities generated by previously approved subdivisions in the area. From such information a theoretical formula relating need to exaction could be developed; the formula could be used to estimate the amount of recreational space necessary to meet the demands of the anticipated influx of people to the new subdivision. In the absence of contravening evidence, the use of such a formula would go a long way toward meeting the reasonably attributable criterion of the *Home Builders* rule.

A municipality with an ordinance specifying a fixed percentage dedication requirement may have difficulty meeting this test. The City of Kansas City, for example, enacted a nine percent exaction rate. It could be argued that such a requirement is unreasonable. Nine percent of the merchantable land may be proper in some situations and wholly impro-

49. 478 S.W.2d 363 (Mo. 1972).
50. *Id.* at 367.

per in others. Alternatively, the Kansas City ordinance[51] also provides that the city can exact platted land for park space at the rate of four acres per one hundred living units.[52] Such a provision is an improvement on a fixed percentage dedication requirement because it is based on population density rather than total area. In given instances, however, it might also be invalid. For example, a park exaction of four acres per one hundred living units could be found not reasonably attributable to the activity of the subdivider in the case of a proposed retirement village where the recreational need of the residents might be considerably less than that of a subdivision of traditional single family dwellings. The particulars of the individual case should dictate the result.

Once a municipal government has established the judicially required nexus between its exaction and the needs of the proposed subdivision, the burden of producing evidence would shift to the developer to demonstrate why the particular dedication requirement should not be applied to his land. As contravening evidence, a developer could show that the growth of the entire community would have necessitated acquiring additional park space regardless of the increase in population caused by his new subdivision.[53] Another strategy might be to offer evidence that the municipality already has sufficient recreational facilities to meet the needs of future subdivisions including that of the developer. Additionally, the nature of the builder's project or the physical condition and age of the intended residents could present variables which would justify an argument that a specific exaction standard should not be applied. In such instances it would be unfair to force a developer to bear the total expense of providing a park site.

The court's declaration in *Home Builders,* that a mandatory subdivision exaction for recreational purposes would be upheld if enacted pursuant to the enabling statute[54] and if the recreational need to be met by the dedication is reasonably attributable to the activity of the subdivider, provides a progressive and workable rationale for such cases. It assures that local legislation, if reasonable and conducive to state planning objectives, will not be invalidated. At the same time, by allowing for the introduction of contravening evidence, it is broad enough in scope to protect developers from arbitrary or excessive municipal requirements. This rule places a heavy burden on municipalities to demonstrate a reasonable relationship between specific recreational exactions and the

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51. KANSAS CITY, MO., CODE OF GENERAL ORDINANCES § 31.32(a) (1973).

52. The ordinance contains no standards for determining which alternative is to be applied to an individual subdivision.

53. Jordan v. Village of Menomonee Falls, 28 Wis. 2d 608, 137 N.W.2d 442 (1965), *appeal dismissed,* 385 U.S. 4 (1966).

54. § 89.410, RSMo 1969.