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Money Payment Requirements as Conditions to the Approval of Subdivision Maps: Analysis and Prognosis

Michael B. Kean

IV.

CONCLUSION

If the line of reasoning expressed in the *Shelley* case is adopted, the neighborhood school system which results in segregated schools will be held to deprive Negroes of equal protection of the law. However, in order to utilize the reasoning of *Shelley,* one must show private discrimination within the residential area, reflected in the districting of the schools. In order to do this one would have to change the social make-up of the community, for not all residential areas are based on racial discrimination. Many factors are considered by the individual in establishing a home, not the least of which is cost. In the same manner, many factors may properly be considered by school boards in the creation of school zones.

Since the neighborhood school system is deeply rooted in our American heritage, it would seem that the better solution is to allow redefining of school districts along more balanced racial lines, taking into account the reality of the neighborhood situation, rather than declaring school zones unconstitutional when race is used as one factor in their delineation. This is the California approach.

The basic problem facing the state legislatures is to provide the best possible education for every citizen, and the legislatures should be granted wide discretion in their attempts to attain this goal. Positive legislation, using race as one criterion, is both realistic and necessary. Although there may not be a duty to integrate, this must be distinguished from the state legislatures' right to affirmatively act towards bringing about integration.

William B. Freilich

MONEY PAYMENT REQUIREMENTS AS CONDITIONS TO THE APPROVAL OF SUBDIVISION MAPS: ANALYSIS AND PROGNOSIS*

I.

INTRODUCTION

Today's residential developer is being faced with the necessity of complying with sometimes questionable and often costly demands by local authorities as a condition to the approval of his subdivision maps and

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plans.[1] These demands, which have been multiplying in number and variety, threaten to increase the developer's costs without adding to the market value of his product. This has proved particularly bothersome to the contemporary builder who has turned to larger scale operations in order to pare costs and to bring housing within the reach of a wider circle of potential home buyers, consequently becoming highly cost conscious and worrying lest his product be priced out of the market.

Building codes, zoning and subdivision controls all directly affect the builder's operations and limit his flexibility and independence in a way not paralleled in any other industry not a public utility. Since most of the regulation is imposed and supervised by local government units, the requirements vary widely from locality to locality according to the discretion of planning commissions, zoning boards and building inspectors.[2]

A particularly recent, but apparently rapidly growing, innovation in the field of land development controls has been to demand money payments as a condition to the approval for filing subdivision maps or plans. It is unquestionable that the increase in population attending land development in a community results in a corresponding increase in the expense of providing public services, such as roads, sewage disposal, schools, police and fire protection. Within limits, the developer may be required to bear a share of this increased cost, but there is a danger of abuse if local government officials incline toward making the new inhabitants bear more than a fair share. This is often a likelihood, rather than a mere possibility since the officials are members of the local population which would otherwise have to share the cost. Because the interested parties will resort to the courts to delineate proper and improper use of money payment demands, it is anticipated that this will become one of the important local government problems of the immediate future. Cases which have already been decided may show the direction which the law will take, and this study is an attempt to ascertain that direction.

II.

THE ORIGIN AND DEVELOPMENT OF SUBDIVISION REQUIREMENTS

Since money payments are only one of a large variety of subdivision controls, they may not be considered in complete isolation. All subdivision

University. The Institute was founded in 1958 with a generous grant by the Home Builders Association of Philadelphia and Suburbs to conduct research in the law relating to home building and community development as an aid to local government officials, home owners, the building industry and the general public.

1. For a comparison with other uses of conditions affecting builders, see Strine, *The Use of Conditions in Land-Use Control,* 67 DICK. L. REV. 109 (1963). On subdivision control in general, see 6 POWELL, REAL PROPERTY § 866 (1958); 2 RATHKOPF, ZONING AND PLANNING ch. 71 (3d ed. 1962); YOKLEY, SUBDIVISIONS (1963); Anno., 11 A.L.R.2d 524 (1950). For comparative analyses of subdivision legislation, see Note, 36 N.Y.U.L. REV. 1205 (1961); Note, 28 IND. L.J. 544 (1953); Note, 65 HARV. L. REV. 1226 (1952).

2. The judgment of an administrative official should not be disturbed except where it is arbitrary, tyrannical or unreasonable. McManus v. CAB, 310 F.2d 762 (2d Cir. 1962); Marathon Oil Co. v. Welch, 379 P.2d 832 (Wyo. 1963); Gulino Constr. Corp. v. Hilleboe, 8 Misc. 2d 853, 167 N.Y.S.2d 787 (Sup. Ct. 1956).

controls are of comparatively recent origin and owe their promulgation to the recognition of municipal planners that the ground plan of any American city tends to be no more than the composite of the subdivision plans of many individual subdividers, formerly acting independently and controlled only by anticipated market demand. The failure of developers to coordinate their several plans with a comprehensive plan for the development of the community could and did lead to haphazard growth, clogging transportation and communication lines, unbalancing the community, and providing for the eventual deterioration and blight which could be remedied only by redevelopment.[3] Another problem which caused land subdivision to become a matter of municipal concern arose when local governments, enmeshed in the enthusiasm of land speculation, extended public improvements into the newly proposed developments only to be left with additional debt and no added revenue when speculators' bubbles burst in rapid succession.[4] It was because of this public loss that subdivision controls were approved in the courts.

The statutory framework for subdivision controls was not born from this experience, however, but traces its ancestry to earlier platting statutes, which were originated to facilitate the conveyance of lands by reference to the recorded plat, rather than by the more cumbersome method of description by metes and bounds.[5] Since it was already customary to require a plat to be approved for accuracy before it could be admitted to record, this afforded an appropriate point of control when the need for more comprehensive regulation became apparent.[6] The validity of a subdivision map act is tested by the rules of law relating to the exercise of the police power of the state. Reasonable regulation is permitted which is related to the health, safety and welfare of the public.[7] The municipalities, not the purchasers of lots, are recognized as the principal beneficiaries of the controls,[8] and the legitimate interest of the municipalities in the utility of land development and the maintenance of tax values is thought to justify this type of regulation.[9] Taken in this context, courts have viewed the subdivision of land as a privilege to which conditions may properly be attached.[10]

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3. HAAR, LAND-USE PLANNING 347-49 (1959); SEGOE, LOCAL PLANNING ADMINISTRATION 494 (1941); 2 RATHKOPF, ZONING AND PLANNING ch. 71, at 71-3, 71-4 (3d ed. 1962).

4. HAAR, *op. cit. supra* note 3, at 350.

5. HAAR, *op. cit. supra* note 3, at 349-50; POWELL, *op. cit. supra* note 1, at 94. A subdivider can evade the statute, and consequently the imposition of conditions, by dividing and disposing of fewer than the statutory minimum of lots (see *infra* note 11), and conveying them by the metes and bounds method. But this practice would be commercially impractical to the investment developer. Where the number of lots will exceed the statutory minimum, metes and bounds conveyances to escape the controls will not be permitted, and criminal penalties may be imposed if it is attempted. See, *e.g.*, PA. STAT. ANN. tit. 53, § 22772 (Purdon Supp. 1962).

6. Rosen v. Village of Downers Grove, 19 Ill. 2d 448, 167 N.E.2d 230, 234 (1960).

7. Petterson v. City of Naperville, 9 Ill. 2d 233, 137 N.E.2d 371 (1956).

8. Gordon v. Robinson Homes, Inc., 342 Mass. 529, 174 N.E.2d 381 (1961).

9. SEGOE, *op. cit. supra* note 3, at 494-500.

10. Ayres v. City Council, 34 Cal. 2d 31, 207 P.2d 1 (1949).

Subdivision controls are invoked only when the proposed division of land will bring a tract within the statutory definition of a subdivision, which differs from state to state.[11] In contrast with zoning, which only imposes restrictions on the use of land,[12] subdivision controls may include positive impositions and have been exercised to require the developer to install public improvements on his land at his own expense.[13] Among the requirements which have been imposed and upheld have been the dedication of land for streets and the grading and paving thereof,[14] the construction of sewers,[15] curbs,[16] gutters and other drainage facilities,[17] parks and playgrounds,[18] a central sewage disposal plant,[19] and water mains.[20]

III.

LEGAL LIMITATIONS ON SUBDIVISION REQUIREMENTS

The power of local officials to impose conditions and to exact performance before approval of a subdivision plan must be found in a valid statute or an ordinance promulgated pursuant to such a statute.[21] Subdivision ordinances are usually enacted by the governing municipal body,[22] but statutory authority is sometimes delegated to a local planning commission.[23] While in general the provisions of the statute control the breadth of an ordinance, some courts have been willing to grant extensive freedom of interpretation to the local governing body.[24] On the other

11. The definition of a subdivision varies from state to state. The minimum requirement is only that a parcel of land be divided into two or more lots. YOKLEY, *op. cit. supra* note 1, at 4.

12. RHYNE, MUNICIPAL LAW 811 (1957).

13. As one illustration of the tremendous expense that can be involved, not necessarily representing a maximum, a developer has been assessed fifty thousand dollars. See City of Buena Park v. Boyar, 186 Cal. App. 2d 61, 8 Cal. Rptr. 674, (Dist. Ct. App. 1960). A study in New Jersey showed that the developer installed 98% of the street gradings, 96% of the pavements, 87% of the curbings, 85% of the storm drains, and 83% of the water mains (among other utilities and improvements) in subdivisions. It was not indicated whether the installations were voluntary or required. HAAR, LAND-USE PLANNING 369 (1959).

14. Ayres v. City Council, 34 Cal. 2d 31, 207 P.2d 1 (1949).

15. Allen v. Stockwell, 210 Mich. 488, 178 N.W. 27 (1920); Green Acres Bldg. Corp. v. Bd. of Zoning Appeals, 22 Misc. 2d 877, 197 N.Y.S.2d 565 (Sup. Ct. 1959).

16. Petterson v. City of Naperville, 9 Ill. 2d 233, 137 N.E.2d 371 (1956).

17. *Ibid.*

18. *In re* Lake Secor Dev. Co., 141 Misc. 913, 252 N.Y. Supp. 809 (Sup. Ct. 1931).

19. Medine v. Burns, 29 Misc. 2d 890, 208 N.Y.S.2d 12 (Sup. Ct. 1960); Gulino Constr. Co. v. Hilleboe, 8 Misc. 2d 853, 167 N.Y.S.2d 787 (Sup. Ct. 1956).

20. Yardville Estates, Inc. v. City of Trenton, 66 N.J. Super. 51, 168 A.2d 429 (1961); Zastrow v. Village of Brown Deer, 9 Wis. 2d 100, 100 N.W.2d 359 (1960).

21. Knutson v. State, 239 Ind. 656, 157 N.E.2d 469 (1959). The term ordinance, as used here and throughout this comment, is meant to include all forms of local regulations adopted through legislatively delegated authority, including planning commission regulations and the like.

22. However, a subdivision ordinance may be enacted by initiative petition. Mefford v. City of Tulare, 102 Cal. App. 2d 919, 228 P.2d 847 (Dist. Ct. App. 1951).

23. See YOKLEY, *op. cit. supra* note 1, at 28-39.

24. The usual rule is that cities take no power by implication, having only powers expressly granted and those necessary to make effective the power expressly conferred. Coronado Dev. Co. v. City of McPherson, 189 Kan. 174, 368 P.2d 51 (1962). But California and Illinois appear willing to imply municipal powers. In Ayres v. City Council, 34 Cal. 2d 31, 207 P.2d 1 (1949), conditions were held to be lawful if

hand, the grant of power to control future development of the community by subdivision control ordinances has been held to be an implied denial of the power to control the same matters by other types of regulatory devices, such as building permit applications.[25] Since the statutes generally may be viewed as imposing conditions in derogation of common-law rights, they should be strictly construed,[26] but sometimes they carry provisions requiring liberal construction.[27] In addition, the courts have accorded a presumption of validity to any properly enacted statute or ordinance, which an interested party must overcome clearly and affirmatively to be successful.[28]

A considerable body of case law has been accumulated adjudging valid and invalid requirements compelling the builder to provide public facilities. The leading opinion, (there being as yet no decision in the United States Supreme Court) is generally acknowledged to be *Ayres v. City Council*.[29] There it was held that a person seeking to acquire the advantages of subdivision has a duty to comply 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. . . ."[30] Later cases have cited *Ayres* as indicating that the legality of a condition is to be judged by determining whether the need for the requirement arises from the builder's activity, or from general conditions and circumstances in the community as a whole.[31] The developer 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.[32]

When a developer is required to improve the site which he is subdividing, it may be said that he is only being required to complete the task which he has undertaken. This is to regard the dedication of streets, grading and paving, and installing sewers as all part of a total process whereby a cowpasture is converted into a building site.[33] While this theory has justified many impositions upon the builder, local communities have

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they were not in actual conflict with the enabling act. It has since been stated that the city has the power to supplement the enabling act, but not to materially alter it. Kelber v. City of Upland, 155 Cal. App. 2d 631, 318 P.2d 561 (1957). See also Petterson v. City of Naperville, 9 Ill. 2d 233, 137 N.E.2d 371 (1956) (legislative intent used to broadly interpret express delegation).

25. *E.g.*, Reggs Homes, Inc. v. Dickerson, 16 Misc. 2d 732, 179 N.Y.S.2d 771 (Sup. Ct. 1958) (attempt to impose road building requirements and park fund payments on building permit approval rejected); Reid Dev. Corp. v. Parsippany-Troy Hills Township, 10 N.J. 229, 89 A.2d 667 (1952) (attempt to control the size of lots in a subdivision as a condition of extending water mains declared ultra vires).

26. See Coronado Dev. Co. v. City of McPherson, 189 Kan. 174, 368 P.2d 51 (1962).

27. N.J. STAT. ANN. § 40:55-2 (1940); WIS. STAT. § 236.45(2)(b) (1959).

28. Petterson v. City of Naperville, 9 Ill. 2d 233, 137 N.E.2d 371 (1956).

29. 34 Cal. 2d 31, 207 P.2d 1 (1949).

30. 207 P.2d at 7.

31. Rosen v. Village of Downers Grove, 19 Ill. 2d 448, 167 N.E.2d 230, 234 (1960).

32. *Ibid.* The California statute expressly provides that requirements must be related to needs created by the subdivision. CAL. BUS. & PROF. CODE §§ 11510, 11525-26.

33. See cases cited *supra* notes 13, 16.

attempted by a dubious extension of this rationalization to demand that the developer provide every new facility, including parks[34] and schools,[35] that the growing community will require, claiming that this is justified by the population increase attributable to the activity of the subdivider-builder.[36] This effort has met with only mixed success, with the courts distinguishing problems caused by the builder's activity from those which may be said merely to be aggravated by it.[37] Even this formulation fails to note that the connection is specious, for new development is seldom undertaken and is never successful, unless there is an existing demand for new housing on the part of ready and willing consumers. This demand is due not to the builder's activity, but to the location and desirability of the community itself. If it is considered that the demand will be directly related to the normal growth of the community, then it becomes more difficult to justify requiring facilities, including parks and schools, not related to the physical structure of the subdivision, since in most cases the subdivision population will constitute only a portion of the total public using such an improvement.

The problems which arise in fairly restricting the builder's duty to alleviate conditions which are theoretically imputable to his activity might well be resolved by reference to the law relating to special assessments.[38] Those cases where the developer can be required to grade and pave streets or provide sewers are also cases where the community could later undertake the work and recover all, or substantially all, of the costs through assessment.[39] There is an advantage to the community in requiring the

34. *In re* Lake Secor Dev. Co., 141 Misc. 913, 252 N.Y. Supp. 809 (Sup. Ct. 1931). The attempt to require parks has met with only mixed success. Commentators have favored it because the benefit from parks is frequently local. See Reps, *Control of Urban Land Subdivision*, 14 SYRACUSE L. REV. 405, 410-11 (1963); Comment, 1961 WIS. L. REV. 310, 321-23. *But see* Miller v. City of Beaver Falls, 368 Pa. 189, 82 A.2d 34 (1951), for a vigorous opinion condemning such an attempt as an uncompensated exercise of the power of eminent domain.

35. The courts have not as yet found sufficient reason to uphold a dedication requirement for school land. In Pioneer Trust & Sav. Bank v. Village of Mount Prospect, 22 Ill. 2d 375, 176 N.E.2d 799 (1961), the court conceded a need for the land in question, but found that such need did not arise uniquely from the subdivision itself and credited it to the total growth of the community. Under those circumstances, it was held that requiring the developer to pay the entire cost of remedying the need amounted to an exercise of the power of eminent domain without compensation. Even stronger in its terms is the dicta in Midtown Properties, Inc. v. Township of Madison, 68 N.J. Super. 197, 172 A.2d 40 (1961), to the effect that the cost of public education may be met only by public taxation, and any requirement on a developer directed to this end is a violation of his constitutional rights.

36. The effect of the prospective population growth on the existing community facilities is not a legitimate consideration for the planning commission in approving or disapproving a map. Beach v. Planning & Zoning Comm'n, 141 Conn. 79, 103 A.2d 814 (1954).

37. See notes 34, 35, *supra*.

38. This is suggested in Comment, 1961 WIS. L. REV. 310, 321-23.

39. Special assessments have been levied to pay for practically all types of improvements which have been commonly made conditions of map approval. See Browning v. Hooper, 269 U.S. 396, 46 S.Ct. 141 (1926) (streets); Craighill v. Lambert, 168 U.S. 611, 18 S.Ct. 217 (1898) (park); Appeal of Dellaripa, 88 Conn. 565, 92 Atl. 116 (1914) (sewer system).

work to be done during construction of the subdivision rather than later, since additional costs of financing and collection can thus be avoided. The power to levy special assessments for improvements depends upon the degree of peculiar benefit to the landowners in the immediate vicinity of the improvements; when the property assessed is peculiarly benefitted, but there is also a substantial benefit to the general public, it is possible to apportion the costs, raising only a portion by special assessment.[40] When the circumstances are such that a special assessment for a particular improvement would be permitted, but not for the entire cost, it would obviously be unfair to circumvent the constitutional limitation on the taxing power by requiring the developer to make the improvement solely at his expense. It should be noted that the power to levy special assessments is generally said to be based on the taxing power,[41] but the power to undertake public improvements is grounded on the duty to provide for the public health, safety and general welfare under the police power, causing special assessments occasionally to be linked generically with the latter.[42]

IV.

LEGAL LIMITATION ON MONEY PAYMENT REQUIREMENTS

The principal argument in favor of the legality of money payment demands is that they are in commutation of work which the developer could have been required to do himself; in effect, that they are substitutionary in character.[43] If this is so and is taken literally as a limitation, it would follow that payments could not be demanded where dedication and improvement by the builder could not be required. From the developer's viewpoint, there are arguments against money payments even where the work could be required. Dedication and improvement result in visible additions to the property which he is offering for sale and may well enhance marketability, while in the case of a cash contribution the potential buyer has nothing but a vague assurance of future benefits to spur his desire to purchase, and no firm guarantee that he will not be assessed for the improvements when they are undertaken.

If the money payments can be directed into other channels where they can be used for general public purposes, the imposition is in reality a tax which is not being assessed equally throughout the entire municipality; it has therefore been held that unless the use of the funds collected is so restricted that it must confer a direct benefit on the subdivision, the

40. Briscoe v. Rudolph, 221 U.S. 547, 31 S.Ct. 679 (1911); Mullins v. City of Little Rock, 131 Ark. 59, 198 S.W. 262 (1917).

41. Village of Norwood v. Baker, 172 U.S. 269, 19 S.Ct. 187 (1898).

42. Borough of Mt. Pleasant v. Baltimore & O. R. Co., 138 Pa. 365, 20 Atl. 1052 (1891). See 48 AM. JUR. *Special Assessments* § 10 and cases cited in n.11 (1943).

43. City of Buena Park v. Boyar, 186 Cal. App. 2d 61, 8 Cal. Rptr. 674 (Dist. Ct. App. 1960).

requirement is invalid because in essence it is a tax.[44] The direct benefit rule is an attempt to maintain a clear distinction between regulation under the police power, assessment under the power to tax, and a taking under the power of eminent domain—a distinction which has been by no means obvious in the past.[45] Claims that specific requirements for dedication or improvements by the developer were but disguised exercises of the taxing or eminent domain powers have been rejected in the past,[46] only to be raised anew in opposition to money payment requirements. Courts which had been willing to imply the power to impose dedication and improvement conditions[47] have refused to find similar power when money payments were demanded. In a California case, *Kelber v. City of Upland,*[48] the court declared invalid an ordinance which required the payment of a certain sum per lot, part of the proceeds to be used for acquiring park and school sites anywhere in the city and the residue to be placed in a general drainage fund. The court was of the opinion that money payment conditions might be imposed for the purpose of remedying needs of the particular subdivision, or applied toward making proper connections between that subdivision and the surrounding area, but that when a condition was imposed for the purpose of helping to meet the future needs of an entire city, the municipality had exceeded its power. Similarly, in an Oregon case,[49] where the funds collected were to be used for "land acquisition" and there was nothing in the ordinance to relate the expenditure to the subdivision, the court found that the primary purpose was to provide general public benefits instead of completing the subdivider's work. The ordinance was therefore held to contemplate a tax, a power which had not been delegated to the municipality.

Money payment conditions must not be confused with fees legitimately chargeable to a builder or developer to cover the cost of administration in the granting of building permits, making inspections of work in progress, and recording the plans, although when such fees greatly exceed the cost of the services rendered, they must be judged on the same police power

44. Kelber v. City of Upland, 155 Cal. App. 2d 631, 318 P.2d 561 (1957); Haugen v. Gleason, 226 Ore. 99, 359 P.2d 108 (1961); City of Buena Park v. Boyar, 186 Cal. App. 2d 61, 8 Cal. Rptr. 674 (Dist. Ct. App. 1960); Longridge Estates v. City of Los Angeles, 183 Cal. App. 2d 533, 6 Cal. Rptr. 900 (Dist. Ct. App. 1960). See also Rosen v. Village of Downers Grove, 19 Ill. 2d 448, 167 N.E.2d 230 (1960).

45. There has always been a fear that the powers will tend to merge. Mr. Justice Holmes, in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 43 S.Ct. 158 (1922), wrote confidently:

> The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. A similar assumption is made in the decisions upon the Fourteenth Amendment. . . . When this seemingly absolute protection is found to be qualified by the police power, the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States. *Id.* at 415, 43 S.Ct. 160.

46. See, *e.g.,* Petterson v. City of Naperville, 9 Ill. 2d 233, 137 N.E.2d 371 (1956); Ayres v. City Council, 34 Cal. 2d 31, 207 P.2d 1 (1949).

47. See note 24, *supra.*

48. 155 Cal. App. 2d 631, 318 P.2d 561 (1957).

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

standards as the money payment requirements.[50] A city has the right, pursuant to properly delegated authority, to exact a license tax on persons carrying on the "business of acquiring, subdividing, improving, selling or otherwise dealing in and disposing of real property."[51] But, in *Newport Bldg. Corp. v. City of Santa Ana*,[52] an ordinance imposing a business license fee of fifty dollars per lot on subdividing alone, partially to cover the outlay of capital for parks, recreation and fire protection, and a second ordinance prohibiting the approval of a map until the business license tax was paid for each lot were voided as an attempt to assert an unconstitutional regulation in the guise of raising revenue.[53] In distinguishing the levy from a legitimate business tax, the court said:

> If the ordinance had been so worded as to cover plaintiff's whole operation of subdividing, improvement, construction and selling . . . we could agree. Unfortunately, that was not done. The whole fee procedure in the defendant's ordinance is indelibly tied to a regulation whose field is already occupied by the Subdivision Map Act. While we can conceive of the work of subdivision being separately carried on for pay and therefore being classified as a business . . . as here referred to, [it] involved only the preparatory expenditure through which plaintiff might ultimately attract the public to buy. Incidental only in plaintiff's operations, it did not here constitute plaintiff's business. It constituted a useful part of plaintiff's whole business of subdividing and selling.[54]

Where it has been shown that the funds collected will be used for the direct benefit of the subdivision assessed, and that the sum is reasonable, money payment requirements have been upheld. In *City of Buena Park v. Boyar*,[55] an assessment of fifty thousand dollars to be applied to the construction of an off-site drainage ditch to serve the subdivision and connect it with the city sewage relief channel was sustained despite the objection that the ditch would serve other areas as well as that being developed. After pointing out that the charge did not cover the entire cost of constructing the ditch, the court reasoned that the subdivider could have been required to construct the ditch himself, as it was essential to the proper drainage of the subdivision, and that the funds could only be spent on the one project. The court concluded that the requirement was undoubtedly for the direct benefit of the subdivision in question when considered in relation to it and the adjoining area. Similarly, an earlier

50. See Merelli v. City of St. Clair Shores, 355 Mich. 575, 96 N.W.2d 144 (1959); Daniels v. Borough of Point Pleasant, 23 N.J. 357, 129 A.2d 265 (1957).

51. City of Los Angeles v. Rancho Homes, Inc., 40 Cal. 2d 764, 256 P.2d 305 (1953).

52. 210 Cal. App. 2d 771, 26 Cal. Rptr. 797 (Dist. Ct. App. 1962).

53. Note the reversal of the usual objection against revenue raising through regulation. See Haugen v. Gleason, 226 Ore. 99, 359 P.2d 108 (1961). Under some circumstances, an otherwise valid tax is not objectionable because it also incidentally regulates. See Magnano Co. v. Hamilton, 292 U.S. 40, 54 S.Ct. 599 (1934). See also Annot., 81 L. Ed. 776 (1936).

54. 26 Cal. Rptr. 797, 800-01 (Dist. Ct. App. 1962).

55. 186 Cal. App. 2d 61, 8 Cal. Rptr. 674 (Dist. Ct. App. 1960).

case[56] upheld the right of a city to require payment of a reasonable charge for connection to and use of sewer facilities located outside of the subdivision, and to condition the approval of the subdivision map on payment of the charge as a proper incident of the exercise of the police power. In this case, the charge was based on a per acre assessment, and the money was placed in a special trust fund for use exclusively in the construction of outlet sewers. The court found no objection to the fact that the funds were not specifically applied to the connection of the immediate subdivision.[57] In both of the above cases it should be noted that the sums charged were for facilities which, while not located on the land of the subdivision itself, were proximate to it. The direct benefit to the subdivision following from the construction of drainage and sewage facilities could not be doubted, nor could it be disputed that the necessity for such improvements was directly attributable to the builder's activity.

There is little difficulty in upholding a money payment condition which is specifically directed to public improvements on the property being subdivided, or when necessary to connect the subdivision with public facilities in the surrounding area.[58] The real test of the validity of the requirement comes when the funds are earmarked for the acquisition of land or construction of public improvements away from the site of the particular subdivision and not necessary as a connector. In *Gulest Associates, Inc. v. Town of Newburgh,*[59] a state statute authorized the town planning board to require the payment of determined amounts, in lieu of dedicating land, when the board should find that a suitable park could not be located in the plat. The money collected was to be used by the town for purchasing property and facilities for recreational purposes in the neighborhood. Regulations adopted pursuant to the act imposed the payment of fifty dollars per lot into a special fund "for the future acquisition and/or improvement of recreational facilities in the town." The developer challenged the act and the ordinance in a summary judgment proceeding, in which the lower court held both pieces of legislation void for failing to contain adequate limitations on the delegation of authority and the use of the money. There was no discussion of the familiar presumption of constitutionality or other interpretive rules generally employed to save legislation.[60] On appeal, the Appellate Division issued a memo-

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

57. See Stanco v. Suozzi, 11 Misc. 2d 784, 171 N.Y.S.2d 997 (Sup. Ct. 1958), where a similar charge to be paid into a general sewage fund as a condition to a building permit was upheld. The fund was to be used only for making sewer connections, and the charge was based on the approximated cost of making the connections. The *Longridge* case has been criticized as a confusion of the reasonable relation to the subdivision test with the power of eminent domain. Reps, *Control of Urban Land Subdivision,* 14 SYRACUSE L. REV. 405, 407 n.11.

58. See text accompanying notes 48, 49, *supra.*

59. 25 Misc. 2d 1004, 209 N.Y.S.2d 729 (Sup. Ct. 1960).

60. See text accompanying note 28, *supra.* A statute should be interpreted in such a manner as to preserve its constitutionality, if at all possible. Plymouth Coal Co. v. Pennsylvania, 232 U.S. 531, 34 S.Ct. 359 (1914).

randum opinion of only one sentence which nevertheless significantly changed the decision: "We agree with the determination of Special Term that the statute in question is unconstitutional *as applied to the facts of this case.*"[61] (Emphasis added.) Presumably the reasoning of the court in saving the statute was that an ordinance limiting the use of the funds to the benefit of the subdivision would have been free from challenge, and could also have been enacted under the authority of the same statute. The statute, section 277 of the New York Town Law, had used the word "neighborhood," but the regulations permitted acquisition of land in the entire town.[62] Due to the lack of discussion, the case is of limited authority, but it does indicate that money payment requirements for off-site, non-connecting facilities are not void per se.

Since money payment requirements are substitutionary in character, the nature of the public work for which the payments have been substituted will determine whether or not the requirement is within the power of the municipality.[63] In general, improvements may be classed in three categories: those which are located on the subdivision and may be said to be a completion of the work begun by the developer, such as streets, sewers and curbing; those which are located off-site, but are necessary to connect public facilities on the site with those in the rest of the community, such as water and sewer lines and access roads; and those off-site improvements which are not related physically to the subdivided tract, including parks, playgrounds and schools. In the first two categories direct benefit is demonstrable, but that is not true of improvements falling in the third, which may benefit the general community as much as the tract under development. There are two justifications for demanding a cash equivalent for off-site improvements not necessary to complete the work of the developer. The land in the subdivision may not be suitable, or the subdivision may not be large enough to permit the taking of sufficient ground. It will often prove more practical to apportion the cost of a park or like community facility among several new and contiguous developments than to locate one small open area in each. If the common park were close enough or accessible enough to be in fact a fair substitution for one in each tract, this would be no more than a substitution for something which the builder could be required to otherwise provide. In the case of

61. Gulest Associates v. Town of Newburgh, 15 App. Div. 2d 815, 225 N.Y.S.2d 538 (1962).

62. See Kelber v. City of Upland, 155 Cal. App. 2d 631, 318 P.2d 561 (1957), and text accompanying note 48, *supra.*

63. A number of cases have been decided on a simple finding that there was no delegation of authority to make an assessment of money as a condition. Gordon v. Village of Wayne, 370 Mich. 329, 121 N.W.2d 823 (1963); Coronado Dev. Co. v. City of McPherson, 189 Kan. 174, 368 P.2d 51 (1962). It seems that an express delegation in the enabling act may be necessary in those states which are unwilling to imply municipal powers. See *supra,* note 24. Some statutes already specifically authorize substitutionary money payments. ARK. STAT. ANN. § 19-2829 (Supp. 1961); N.Y. TOWN LAW § 277. The Arkansas statute requires that the contribution "be used for the acquisition of facilities that serve the subdivision." ARK. STAT. ANN. § 19-2829 (Supp. 1961).

a school, a facility generally financed by taxation,[64] it cannot be said that the builder should provide this type of public improvement, and money payments for this purpose would not be a cash equivalent of something the builder could be required to provide.

The more remote the off-site improvement, the greater the probability that it is a community asset, rather than one peculiarly related to the subdivision. To fairly alleviate this problem, it should be possible to apportion the costs between the new development and the whole community, as is done in the case of special assessments.[65] The special assessment is valid where there is some direct benefit to the assessed landowners as well as a benefit to the community, and a fair standard of apportionment is used.[66] The principal difference between special assessment and the money payment condition would seem to be that the former is generally levied to pay for land acquired or work undertaken by the public, while the latter represents a present payment on behalf of the future landowners to pay for similar facilities to be installed.

V.

CONCLUSION

In the future, it is believed that the courts will continue to test the validity of money payment conditions from the standpoint of the proposed disposition of the collected funds. If the imposition is in substitution for something which the developer could have been required to furnish, land or work, it will be upheld. Assuming that the developer may be required to furnish public facilities which are made necessary by the improvement of his land for building purposes, but not those which are made necessary by the normal growth of the community, in those cases where benefits to the general community are mingled with direct benefits to the subdivision a fair standard of apportionment may serve to show that the community is not trying to collect general revenue in the form of regulating land development in order to avoid constitutional limitations on the taxing power. Where the effect of regulation is not so much to insure an adequately planned and coordinated growth of the community as to stem the tide of a general population increase by closing off the supply of new housing—a result that can be anticipated if building costs become prohibitive—the courts should not be without power to intervene, notwithstanding the presumptions in favor of the regularity of municipal action.[67]

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64. See note 35, *supra.*
65. Reps, *Control of Urban Land Subdivision,* 14 SYRACUSE L. REV. 405, 411-12 (1963).
66. Hancock v. City of Muskogee, 250 U.S. 454, 39 S.Ct. 528 (1919); Briscoe v. Rudolph, 221 U.S. 547, 31 S.Ct. 679 (1911).
67. See Mansfield & Swett, Inc. v. Town of West Orange, 120 N.J.L. 145, 198 Atl. 225 (Sup. Ct. 1938).