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Subdivision Exactions: The Constitutional Issues, the Judicial Response, and the Pennsylvania Situation

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COMMENTS


I. INTRODUCTION

The relatively recent flood of population from city to suburb\(^1\) has threatened to drown both judiciary and legislature in the task of reconciling closely competing interests. The most perplexing of these confrontations is that between the legal right of new residents to settle where they wish and the suburban desire to exclude newcomers. The matter is especially problematic because, unlike the emotional or racial underpinnings which have dominated such exclusion in the past, this exclusionary intent can be explained in terms of more rational, sometimes laudable, factors. For example, there is an understandable suburban wish to maintain a less crowded lifestyle which requires, by definition, that a limit be placed upon the number of incoming residents. Not without significant difficulty, the courts have weighed what is essentially an aesthetic interest against the requirements of an expanding population, and, despite their police power rationales, have struck down exclusionary regulations geared toward this end.\(^2\)

There, is however, another foundation for the desire to limit the ingress of persons into a suburban area which transcends the subjective


\(^2\) Exclusionary zoning devices such as minimum-acre lot size, floor space, and set back requirements, have generally been invalidated by the courts on the grounds that these devices hinder the migration of the less wealthy to the subject areas, and, therefore, such devices have an effect outside the permissible goals of zoning. See generally Bigham & Bostick, Exclusionary Zoning Practices: An Examination of the Current Controversy, 25 VAND. L. REV. 1111 (1972); Davidoff & Gold, Exclusionary Zoning, 1 YALE REV. L. & SOC. ACTION 56 (1971); Sager, Tight Little Islands: Exclusionary Zoning, Equal Protection and the Indigent, 21 STAN. L. REV. 767 (1969); Note, Large Lot Zoning, 78 YALE L.J. 1418 (1969). But see Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) (ordinance prohibiting more than two individuals unrelated by blood from living in the same dwelling unit upheld).

preference for the maintenance of open space. It focuses instead upon the quantifiable amounts of dollars and cents required to properly service a larger population, and the question becomes what a municipality can afford, rather than what it would prefer. This fact has left suburban areas with two general alternatives: devise a method to keep such migration to a minimum; or assure that a revenue source is available to fund the cost of government attributable to the new residents. With regard to the former alternative, the Pennsylvania Supreme Court, confronted with attempts to avoid this financial burden through restrictive zoning measures, has stated a clear response:

The question posed is whether the township can stand in the way of the natural forces which send our growing population into hitherto undeveloped areas in search of a comfortable place to live. We have concluded not.³

This resolute stance, echoed frequently throughout the country,⁴ pressures municipalities to discover acceptable variants of the second alternative — the finding of monies to fund services for their expanded population. A logical alternative from the municipal point of view would seem to be one which shifts this financial burden generated by newcomers from longtime residents to the newcomers themselves. For example, instead of enforcing a uniform property tax rate against both longtime resident and newcomer to finance the expansion of municipal facilities, a municipality might act to avoid the situation where "older residents may be penalized by newcomers" by exacting increased costs from the newcomer alone.⁵ To the extent that new arrivals often settle in housing developments commonly known as subdivisions, the "subdivision exaction" seeks to do just that.⁶

4. See note 2 supra.
6. The term "subdivision" actually refers to the end product of the process whereby a municipality divides its land into parcels for development pursuant to an overall planning scheme. Consequently, what constitutes a subdivision varies from jurisdiction to jurisdiction according to the historical division of land and the planning goals involved. See R. Anderson, American Law of Zoning §§ 19.01–02, at 377–85 (1968). In Pennsylvania, "subdivision" is defined in the Municipalities Planning Code as the division or redivision of a lot, tract or parcel of land by any means into two or more lots, tracts, parcels or other divisions of land including changes in existing lot lines for the purpose, whether immediate or future, of lease, transfer of ownership or building or lot development: Provided, however, that the division of land for agricultural purposes into parcels of more than ten acres, not involving any new street or easement of access, shall be exempted. 53 Pa. Stat. Ann. tit. 53, § 10107(21) (1972).
For an extensive discussion of subdivision controls in general, including their historical development and the local procedures implementing them, see generally R. Anderson, supra, ch. 19. See also Freilich & Levi, Model Regulations for the Control of Land Subdivision, 36 Mo. L. Rev. 1 (1971), for an overview of the specific scheme in the state of Missouri.
The term "subdivision exaction" cannot be defined with precision. Basically, the term is used here to describe those conditions which municipalities may impose, pursuant to appropriate enabling statutes, before rendering approval of a subdivision developer's plat, without which approval the developer could not record and market the individual lots which comprise his tract of land. Most typically, these conditions take the form of compulsory dedication — conveyance without charge to the municipality — of land for streets, and the construction of improvements such as the streets themselves, sewers, sidewalks, water facilities, and curbs and gutters. The municipality will often require the dedication of land for purposes which will also serve the needs of those apart from the subdivision, such as those for schools or parks. Some will condition their approval upon the assessment of "equalization fees," charged in lieu of a

7. Some form of subdivision-control enabling statute has been enacted in every state. See R. Anderson & B. Roswig, Planning, Zoning, & Subdivision: A Summary of Statutory Law in the 50 States (1966).

Several relatively old cases construed the ability to record a subdivision plat as the basis of an exaction’s validity. See, e.g., MacFarland v. Miller, 18 App. D.C. 554 (1901); Ross v. Goodfellow, 7 App. D.C. 1 (1895). The argument accepted was that the recording allowed the sale of the plat as a residential subdivision, increasing its value, and for that benefit the developer should be subject to restriction. 7 App. D.C. at 10-11. Other cases, in a like manner, argued that since there was no compulsion to so market a tract of land, subdivision was a voluntary act by which the developer subjected himself to conditions able to be imposed as the municipality deemed fit. See, e.g., Fortson Inv. Co. v. Oklahoma City, 179 Okla. 473, 66 P.2d 96 (1937). The demise of these doctrines seems to have begun with Ridgefield Land Co. v. City of Detroit, 241 Mich. 468, 217 N.W. 58 (1928), wherein the court stated, "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." Id. at 472, 217 N.W. at 59 (emphasis added). The language was included as an apparent afterthought by the court, and the case was decided on a police power rationale, upholding the street dedication requirement at issue. Id.

Most courts seem to have disregarded the "privilege" rationale, and as to voluntariness, seem to agree that "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." Johnston, The Constitutionality of Subdivision Control Exactions: The Quest for a Rationale, 52 Cornell L.Q. 871, 878 (1967). Typical enabling statutes make approval mandatory. See, e.g., Okla. Stat. Ann. tit. 11, § 435 (1961). Occasionally, however, the voluntariness rationale appears even in modern cases, but always as dicta. See, e.g., Billings Properties, Inc. v. Yellowstone County, 144 Mont. 25, 394 P.2d 182 (1964), wherein the court stated that the "act of attempting to secure approval of the plat was voluntary" since "[t]here is no law requiring . . . the developer . . . to subdivide and sell its land by plat." Id. at 32, 394 P.2d at 186.

8. See, e.g., Ayres v. City Council of Los Angeles, 34 Cal. 2d 31, 34, 207 P.2d 1, 3 (1949). The city also required a dedication of a small piece of land for traffic safety purposes. 34 Cal. 2d at 38-39, 207 P.2d at 5-6.


13. These cases are those which have, of late, provoked the most significant discussion and which are treated in depth in part II B of this Comment. See, e.g., Associated Home Bldrs. v. City of Walnut Creek, 4 Cal. 3d 633, 484 P.2d 606, 94 Cal. Rptr. 639 (1973); appeal dismissed, 404 U.S. 878 (1971), for an excellent discussion of the problems involved.
land dedication. In short, to varying degrees, the subdivision exaction is a method of contribution which enables the municipality to finance the construction of capital facilities and the provision of services to the new area without relying upon the general revenues. It should be noted that the subdivider's contribution is usually passed on to the eventual homeowner-buyer.

Aside from the obvious question of statutory authorization, the basic legal issues raised by such exactions are constitutional ones. In effect, the subdivision exaction forces the developer to expend land and/or, money to provide what might otherwise have been characterized as municipal functions. Hence, the key issue becomes whether the exaction is a reasonable police power regulation, or a taking through eminent domain which would require compensation to the developer. There is no severe shortage of case law in these regards but, as one commentator has noted, there is a 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.

Nevertheless, it is submitted that the task of interpreting and sorting out the extant rationales must be accomplished.

Although the ideal world would meet the difficulties of municipal finance through techniques less problematic, "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." To do so fairly and effectively, the task of rationalizing the strictures which do exist must be approached. To this end, this Comment adopts three goals: first, it seeks to synthesize the basic constitutional challenges which have been raised to the subdivision exaction, and the methods by which the various state courts have acted in an effort to meet them. Since there is no statement from the United States Supreme Court in the area, the goal of this portion of the Comment is to segment and analyze in some reasoned manner the varying viewpoints which have evolved. Second, this Comment will discuss two areas of potential constitutional challenge in an effort to delineate issues not yet seriously raised, but which may demand resolution in the future. The third objective springs from the observation that, while


15. Johnston, supra note 7, at 873 (emphasis in original).

16. Heyman & Gilhool, supra note 5, at 1157.
Pennsylvania has enacted subdivision exaction enabling legislation, its appellate courts have not yet set the constitutional boundaries for implementation of that legislation by local governmental units. This part of the Comment, then, will attempt to determine the manner in which this legislation deals with present and future issues involving subdivision exactions. Hopefully, the recommendations offered regarding the manner in which the enabling act should be construed or amended will facilitate the development of a rational approach.

II. THE THRESHOLD PROBLEM: IDENTIFYING THE SCOPE OF PERMISSIBLE POLICE POWER REGULATION AS IT RELATES TO SUBDIVISION EXACTIONS

With the exception of a few early aberrations, the first and most basic challenge to any subdivision exaction, whether it be raised by the subdivider, the homeowner-buyer, or the court itself, concerns the ability of the municipality constitutionally to effectuate the exaction without just compensation being paid therefor. Ultimately, the dispute reduces itself to one of conflicting formulations of the state’s police power to regulate in the realms of public health, safety, and welfare, and its concomitant ability to grant to municipalities, through enabling legislation, certain regulatory prerogatives.

The police power has been described as “an inherent attribute of state sovereignty, the plenary exercise of which rests in the discretion of state legislatures.” While exercise of the police power is theoretically confined to those measures which directly promote public health, safety, and welfare, in practice, courts tend to uphold the validity of its exercise so long as that exercise is geared toward ends and accomplished by means which are minimally rational. As one commentator has observed, “When the police power is invoked as the impetus for legislative expression, the burden cast upon the party arguing against its validity is a heavy one; classically,

18. See note 7 supra.
19. The fifth amendment to the United States Constitution provides in pertinent part: “nor shall private property be taken for public use, without just compensation.” U.S. CONST. amend. V. Although this clause of the fifth amendment is applicable only to the federal government, the due process clause of the fourteenth amendment has been interpreted to impose this same prohibition upon the states. Appleby v. Buffalo, 221 U.S. 524 (1911).
20. Should this hurdle be cleared, other issues may then spring forward. Treated subsequently in this paper, for example, are the constitutional issues which may arise as to the exclusionary potential of subdivision exactions (part III A), and the equal protection problems which could surface when it is noted that exaction requirements are generally levied only against housing developments, and not, for example, the apartment complex which causes an influx of persons and a similar strain on the municipality (part III B). See notes 136–46 and accompanying text infra.
22. Heyman & Gilhool, supra note 3, at 1122.
if the question be 'fairly debatable,' its exercise will be upheld.'

Thus, although the task of the judiciary has been to weigh the owner's right to use land against the municipality's power to regulate and condition that use, the scales employed are significantly tipped in the municipality's favor. Moreover, both the nature of that being weighed and the significance accorded divers factors are often muddled by the courts, making it difficult to glean a predictable methodology from precedent, as suggested in the following statement: "In the usual case . . . the balance struck between [the interests involved] is obscured by a pronouncement that the decision was reached by use of some unexplained 'reasonableness' test."  

Notwithstanding the important problems raised by the subdivision exaction and the mire of legal theory in which the concept rests, neither court nor commentator has adequately pinpointed and assessed the issues and possible solutions which have been suggested. Hence, this Comment, within this first section, has divided the field into its two logical parts: the grounds upon which subdivision exactions have been challenged as falling without the police power; and the rationales advanced to classify the requirements as being within the police power.

A. The Challenges: Contentions that Subdivision Exactions are Outside the Scope of Permissible Police Power Regulation

According to the traditional analysis of the constitutionality of police power regulation, the specific regulation must have been enacted to further permissible goals falling within the scope of the police power, and the exercise of that regulation must be reasonable. It can readily be observed that subdivision exactions satisfy the first requirement. Street, school, and recreational constructions that are financed by exactions certainly are intended to promote the general health, safety, and welfare of the com-
community. However, it is in determining the reasonableness of the regulation that the great controversy exists.

Although the question of the reasonableness of a particular regulation has generally turned upon whether it is confiscatory, arbitrary, discriminatory, or constitutes a taking according to some commentators, only the latter two considerations appear applicable to subdivision exactions. Unfortunately, the challenges to exactions made in the cases do not neatly fall into either of these categories. There are elements of discrimination in the form of specific application of the exaction to the subdivision, and elements of an uncompensated taking when the subdivider dedicates parcels of his subdivision with no apparent benefit to himself. Consequently, it would appear more helpful to characterize the attacks that have been made upon subdivision exactions as arguments of unfairness designed to demonstrate that the police power regulation is unreasonable.

The unfairness challenge usually is presented in two forms. As noted previously, the asserted justification for the exaction is that the financial responsibility for the provision of facilities and services should be placed with those who created the need and, obviously, will most benefit by them. Thus, one argument that the exaction is unreasonable is based upon the contention that the need for additional services was not generated by the influx of newcomers. This challenge is less forceful with regard to exactions for streets, sewers, pavements, water systems, and the like because these facilities are directly tied to the service requirements created by the subdivision. However, if exactions are intended to finance projects which

27. See Heyman & Gilhool, supra note 5, at 1130, 1134.
28. Id. at 1124. Heyman and Gilhool define these four factors in the following manner: confiscation results when the landowner is left with no significant value in his property after the imposition of the regulation; arbitrariness usually occurs when the regulation is not rationally related to the permissible objectives sought; discrimination exists if those similarly situated are not treated equally. Taking, however, is not easily defined, although it has been suggested that a regulation will be deemed unreasonable as a taking if there is no "correlative benefit" to the landowner. Id. at 1124-30.
29. For example, as a general statement, Heyman & Gilhool, supra note 5, opine that subdivision exactions generally do not raise the problems of confiscation or arbitrariness, since the exactions are generally not severe enough to diminish unduly the value of the property, and are usually tailored toward the meeting of some goal related to the public health, safety, or welfare. Id. at 1130-34. This appears to be true as a general rule, in that the problems raised most often focus upon a claim that a subdivision newcomer is being charged more than his fair share for the need he generated. See text accompanying notes 27-28 supra. However, since the date of their article, at least one further issue has been raised, relating to the fact that most ordinances do not so charge apartment complexes despite the influx of population they cause. See Associated Home Bldrs. v. City of Walnut Creek, 4 Cal. 3d 633, 642-43, 484 P.2d 606, 614, 94 Cal. Rptr. 630, 638, appeal dismissed, 404 U.S. 878 (1971). Further, in East Neck Estates, Ltd. v. Luchsinger, 61 Misc. 2d 619, 305 N.Y.S.2d 922 (Sup. Ct. 1969), the court invalidated an exaction on the ground that it was confiscatory in that it reduced the value of the developer's property approximately 40 per cent. Id. at 622-23, 305 N.Y.S.2d at 925-26. Since it is believed that such issues may become increasingly important in the future, they are dealt with in detail in section III of this Comment.
30. See Heyman & Gilhool, supra note 5, at 1134.
31. "Judicial reaction uniformly has been that the imposition of street dedication and improvement conditions does not constitute a taking." Heyman & Gilhool, supra note 5, at 1132. The two cases which seem to have formed the foundation for this now almost universally accepted position are Ayres v. City Council of Los Angeles, 34
also may benefit the community at large, such as schools, parks, or playgrounds, there is less reason to believe that the project was undertaken solely in response to service the subdivision. Since the facilities or services would have been provided regardless of the existence of the subdivision, they should be financed out of general revenues. As such, this challenge may be analogized to special assessments, another form of contribution to finance improvements.

Special assessments are taxes on specific properties deemed to be specially benefitted by an improvement. In the words of one court:

All such assessments have one common element: they are for the construction of local improvements that are appurtenant to specific land and bring a benefit substantially more intense than is yielded to the rest of the municipality. The benefit to the land must be actual, physical and material and not merely speculative or conjectural.

Although the subdivision exaction is not considered a tax on property, its relation to the special assessment is clear: presumably, that which is


32. This form of exaction has been subject to conflicting treatment from the courts in recent years. See part II B of this Comment. Many courts have avoided this problem where it is possible to interpret the enabling legislation so that the municipality has no authority to require the exaction in dispute. In Haugen v. Gleason, 226 Ore. 99, 359 P.2d 108 (1961), the court held that since fees collected as part of the subdivision exaction would be used for the partial benefit of those not within the subdivision, the exaction was a tax. Id. at 104-05, 359 P.2d at 111. By means of an extremely literal interpretation of the ordinance in issue, the court held that "since the ordinance contains nothing to relate the money, or its expenditure, to the land being subdivided, the result is that the money will become part of the public funds of the county or the school district, as the case may be." Id. at 105, 359 P.2d at 111. Finding no authority in the statute for the municipality to charge the fee which, as so characterized, was a tax, the court invalidated the ordinance. Id. The case should be contrasted with Jenad, Inc. v. Village of Scarsdale, 18 N.Y.2d 78, 218 N.E.2d 673, 271 N.Y.S.2d 955 (1966), wherein the court specifically upheld an ordinance which placed such fees in a fund for use by the entire village, not just the subdivision. Id. at 104, 218 N.E.2d at 675, 271 N.Y.S.2d at 957.


36. However, the exaction has sometimes been challenged as a nonuniform tax. See note 33 supra. As one judge has noted, a charge which "could be used for the acquisition and improvement of recreation and park lands for the village generally . . . would be in the nature of a tax and not a fee or assessment for special benefits . . . ." Jenad, Inc. v. Village of Scarsdale, 18 N.Y.2d 78, 89, 218 N.E.2d 673, 679, 271 N.Y.S.2d 955, 962 (1966) (Van Voorhis, J., dissenting). Agreement with this view was expressed by the majorities in Kelber v. City of Upland, 155 Cal. App. 2d 631, 638, 313 P.2d 561, 566 (4th Dist. Calif. 1957), and Haugen v. Gleason, 226 Ore. 99, 104-05, 359 P.2d 108, 110-11 (1961). So classified, the charge would be illegal not only as unauthorized under the enabling legislation, but as a nonuniform tax. On the problems inherent in distinguishing as to when a charge is subject to such uniformity requirements, see Wanamaker v. School Dist. of Philadelphia, 441 Pa. 567, 274 A.2d 524 (1971). For an analysis of the Wanamaker decision and its implications in Pennsylvania, see also Note, Taxation — The Business Use and Occupancy Tax of Philadelphia and the Uniformity Clause of the Pennsylvania Constitution, 75 DICK. L. REV. 102 (1971).
permissible to finance through special assessments, due to the local impact of the facility or service funded by the assessment, could also be financed through subdivision exactions provided that there is statutory authorization for either method.\footnote{37}

A second challenge to the exaction as an unreasonable police power regulation considers the effect of the exaction rather than the reason for it. Proponents of this position argue that while the service provided by the municipality is not one of community-wide concern and thus should not be financed by general revenues, the exaction is nevertheless unreasonable because it will benefit other persons in addition to the subdivision residents.\footnote{38} While the contention comes close to restating the first challenge—that an exaction is justifiable only insofar as it can be related to a need uniquely created by the subdivision dweller—the distinction between the two positions may be clarified by their respective deficiencies: the first would militate against any exaction designed to remedy a need which the total community created, while the second would ignore the cause of the problem so long as the monies exacted were used solely to benefit the subdivision residents who, along with the rest of the community, were aggrieved.\footnote{39} For example, adherents to the first position, while conceding

\footnote{37. However, the courts have indicated that the converse is not necessarily true. As will be demonstrated in part IIB of this Comment, some courts have upheld land dedications and fees in lieu thereof for schools and recreational facilities. It is very doubtful that these improvements could be financed by special assessments. See text accompanying note 35 \textit{supra}.}

\footnote{38. For example, in Gulest Assocs., Inc. v. Town of Newburgh, 25 Misc. 2d 1004, 209 N.Y.S.2d 729, aff'd, 15 App. Div. 2d 815, 225 N.Y.S.2d 538 (S. Ct. 1962), the court found a subdivision exaction system which placed fees charged in a fund for use of the town in establishing recreational facilities constitutionally deficient, stating that the money paid by the subdivision residents could be used "in any section of the town at any time, and for any recreation purpose... not directly related to the development of the subdivision." 25 Misc. 2d at 1008, 209 N.Y.S.2d at 732. This holding was later overruled in New York by the Court of Appeals in Jenad, Inc. v. Village of Scarsdale, 18 N.Y.2d 78, 218 N.E.2d 673, 271 N.Y.S.2d 953 (1966). Similarly, in West Park Ave., Inc. v. Township of Ocean, 48 N.J. 122, 224 A.2d 1 (1966), the court believed that a subdivision fee charged on a per lot basis, to be placed in a fund to be used for capital improvements in the township's educational system, was inherently discriminatory. \textit{Id.} at 125, 224 A.2d at 3-4. This conclusion was based upon the fact that the vacant land on which the subdivision was placed had previously borne its taxation share of educational costs, and was now being charged specially. The court reacted to the fact that the subdivision exactions would be used for schools to be attended by those throughout the township and not just by those in the subdivision, stating "there would be an imbalance if new construction alone were to bear the capital costs of new schools, while also being charged with the capital costs of schools serving other portions of the school district." \textit{Id.} at 126-27, 224 A.2d at 4. Other courts have disagreed that such would constitute unfairness to the point of illegality. See notes 0-135 and accompanying text \textit{infra}. In any event, the problem may be solved by the employment of modern cost accounting techniques. \textit{See note 175 infra}.}

\footnote{39. \textit{See} Associated Home Bldrs. v. City of Walnut Creek, 4 Cal. 3d 633, 484 P.2d 606, 94 Cal. Rptr. 630, \textit{appeal dismissed}, 404 U.S. 878 (1971). The court characterized this contention as follows: 

\textit{[E]ven if it be conceded that no showing of a direct relationship between a particular subdivision and an increase in the community's recreational needs is required, nevertheless the subdivider cannot be compelled to dedicate land for such }
that their numbers contributed to a school overcrowding problem, would reject a subdivision exaction tailored to remedy the matter, contending that the solution was a "public" responsibility. Adherents to the second position, while conceding their role in creating school overcrowding, would accept a subdivision charge only to the extent that it would be specifically channelled into remedying that portion of the overcrowding which the subdivision actually caused — that is, the exactions could be used to provide school space only for the children of the subdivision.40

One additional challenge that has appeared has been one questioning the method by which the exaction amount is calculated. In other words, the complaint may be that what is exacted bears no relation in amount to the expenditures which the subdivision will cause the exacting municipality to make. This is especially true of uniform per lot or percentage-of-land-area exactions. For instance, where existing recreational facilities might be adequate to cope with an increased population without added improvement in one area, while in another, full scale recreational construction would be needed, a uniform exaction clearly would be unrelated to the needs created by the particular subdivision.41 However, a majority of courts have validated uniform per lot or percentage-of-land-area exactions, finding a

40. It should again be noted that many state enabling statutes and many local ordinances authorize not only land dedications and improvement construction, but also fees paid in lieu thereof. See, e.g., N.Y. TOWN LAW § 277, ¶ 1 (McKinney 1965). Most commonly, the fees are paid if the municipality determines that the land dedication would be undesirable, as in the case where a subdivision is too small in area to warrant taking a portion of the land for park purposes — the park would simply be too small to be practical. In jurisdictions which adhere to the position that subdivision exactions must be used for the benefit of the subdivision residents charged, this invariably raises problems: since the fees are put to use in constructing, for example, recreational facilities outside of the subdivision itself (note that if the land were available for such construction within the subdivision, a land dedication would have been required instead), it is difficult to prove that the recreational facilities provided will benefit the subdivision uniquely. The most oft-cited example of such analysis is Gulest Assocs., Inc. v. Town of Newburgh, 25 Misc. 2d 1004, 209 N.Y.S.2d 729 (Sup. Ct.), aff'd, 15 App. Div. 2d 815, 225 N.Y.S.2d 538 (1962).

41. See, e.g., Frank Ansuini, Inc. v. City of Cranston, 107 R.I. 63, 264 A.2d 910 (1970). The court invalidated an exaction ordinance which required all subdivisions to dedicate seven per cent of their total land for recreational purposes, labelling it "clearly arbitrary on its face." Id. at 71, 264 A.2d at 914. Apparently, the court reacted to the fact that a set percentage applied to all subdivisions without regard to the individual circumstances could not be tailored to defray the specific expenses which particular subdivisions would necessitate incurring.
sufficiently reasonable nexus between such a scheme and the expense which the municipality will have to absorb."42

Admittedly, these challenges to subdivision exactions may not reflect traditional legal theory concerning what is a valid police power regulation. Nevertheless, they represent the types of questions which have been posed to the courts who have considered the issues. As a result, an appreciation of the distinctions between the challenges will aid in formulating a rational approach to the judicial responses.

B. The Judicial Responses: The Criteria Employed in Constitutionally Evaluating Subdivision Exactions as Police Power Regulations

Restating the basic issue, the courts have had to delineate the circumstances in which a municipality under proper state authorization can compel a subdivider to "donate" to the governmental unit his land, his services, and/or his money. The subdivider and the homeowner-buyer complain because such conditions to the approval of the project raise the selling price; many judges complain of what they deem an affront to their senses of fairness. But, more often than not, the municipality states a tenable position: increased population causes increased expenses. The question becomes one of who should pay. The response evoked has depended largely upon which of the variety of tests constructed is applied to the particular situation.

The evolution of these constitutional tests is a curious example of the dangers inherent in the failure properly to credit the importance of circumstances in which particular cases were decided. After ruling out the obvious constitutional infirmities of confiscation, arbitrariness, and discrimination,43 analysis of the relevant cases must progress with an eye upon three objective factors, already highlighted, which often serve to distinguish fundamentally the approaches the courts have taken.

First, all valid municipal subdivision exactions are functions of state enabling statutes. The extent to which the state legislature appears to favor the exaction process may significantly influence the degree of latitude a court will afford a municipality in the enforcement of particular exaction ordinances.44 Second, the type of exaction involved is significant. An exaction ordinance or an enabling statute might provide only for streets, sewers, and other improvements which are physically located within the subdivision itself. Courts have generally upheld such exactions because

42. See, e.g., Jordan v. Village of Menomonee Falls, 28 Wis. 2d 608, 137 N.W.2d 442 (1965), appeal dismissed, 385 U.S. 4 (1966), wherein the court approved a $120 per lot exaction for school purposes, speaking of the need only to "reasonably establish" the nexus of that charged to that need generated by the subdivision. 28 Wis. 2d at 618, 137 N.W.2d at 447. One commentator concludes that Jordan offered "the most consistent workable rationale." Johnston, supra note 5, at 924. For an examination of the implications of Jordan, see notes 114-35 and accompanying text infra.

43. See note 28 and accompanying text supra.

44. For a discussion of the Billings Properties case, an opinion focusing primarily on this factor, see notes 97-102 and accompanying text infra.
these improvements can be directly related to the needs caused by the subdivision residents, and because they serve only those residents.\textsuperscript{45} However, those subdivision exactions that require dedication of land for recreational or school purposes raise distinct legal problems and merit separate treatment.\textsuperscript{46} Third, certain ordinances and enabling statutes allow the municipality to exact a fee in lieu of land dedication, and again, despite its general classification as a "subdivision exaction," this device must be separated from the others so termed.\textsuperscript{47} It is submitted that these three factors serve to reconcile seemingly inconsistent cases, and to distinguish seemingly compatible decisions; as such, these factors must be kept in mind as one scrutinizes the approaches that courts have taken in this area.

1. Ayres v. City Council of Los Angeles: The "Benefit to the Subdivider" Test

Through the 1920's and 1930's, courts faced with constitutional challenges to subdivision exactions seemed content to validate them through general statements of their service to the public health, safety, or welfare. In large measure, this was due to the fact that the usual requirement exacted only the construction and dedication of streets within the subdivision itself.\textsuperscript{49} When faced with more, courts seemed to strain to avoid confronting the basic issue of whether the municipality should be forced to pay for what it required.

A good example is the 1928 case of Ridgefield Land Co. v. City of Detroit.\textsuperscript{50} In that case, the Supreme Court of Michigan examined an exaction ordinance which required the subdivider to conform to the city's general plan which indicated the city's desire to widen a street which bordered one side of the subdivider's tract. As a result, the city required the subdivider to dedicate a strip of land which abutted that street.\textsuperscript{52} It was clear that the required dedication was not necessitated by the subdivision, since the city had planned to widen the road even before the subdivision's existence. Moreover, it would not primarily serve the development, since it was an exterior, rather than interior, route. The court was content, however, to dispose of the issue by observing that since the streets of Detroit were built for "the horse and buggy age," the widening requirement was "necessary for the public safety."\textsuperscript{53} Realizing, perhaps, that no one could dispute the wisdom of providing safe streets, and realizing further that the observation did not settle the issue of who should fund

\textsuperscript{45} See note 32 supra.
\textsuperscript{46} See note 33 supra.
\textsuperscript{47} See notes 33, 36 & 38 supra.
\textsuperscript{48} 34 Cal. 2d 31, 207 P.2d 1 (1949).
\textsuperscript{49} See Reps & Smith, supra note 25, at 410 and the cases cited therein.
\textsuperscript{50} 241 Mich. 468, 217 N.W. 58 (1928).
\textsuperscript{51} The general plan set out mandatory width, drainage, and pavement specifications for certain types of streets. Id. at 469, 217 N.W. at 58-59.
\textsuperscript{52} Id. at 472, 217 N.W. at 59.
the project, the Ridgefield court invoked a fiction: "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." 54 Since according to the city charter the subdivider could not sell his land in separate tracts without preliminary approval, construing his dedication as "voluntary" was, euphemistically, an indulgence on the part of the court. 55

In Ayres v. City Council of Los Angeles, the Supreme Court of California faced a similar issue, but chose a more realistic tack. The plaintiff-subdivider appealed the denial of a mandamus action against the City Council of Los Angeles to compel the approval of his plat. By this time, it was widely conceded that a municipality could constitutionally require the subdivider to provide internal service roads, 56 and thus the plaintiff challenged the exaction of four other requirements: 1) the dedication of a 10-foot strip of land to be used for the widening of a bordering street, similar to that required by Detroit in Ridgefield; 2) the condition that the subdivider not only reserve a 10-foot wide strip of land within the subdivision which bordered the street as it would eventually be widened, but also plant shrubbery thereon so as to shield the contiguous homes from traffic; 3) the extension of a street through the subdivision to a width within the subdivision of 80 feet, instead of 60 feet as the plaintiff had originally planned (which width was the dimension of the street as it existed outside of the subdivision); 4) the dedication of a small parcel of the land whereon several roads converged, for the purposes of traffic safety. 57 The court validated all of the exactions. 58

In so doing, the court began with the tacit assumption that in any event the subdivider would have to provide the internal streets of the development. 59 What made this assumption crucial to the result in Ayres was the observation that Los Angeles, as a matter of city planning policy, required the subdivision to be laid out in a manner which produced a significant reduction in street provision costs for the developer. The design which was termed "cellular" reduced the amount which the subdivider would otherwise be required to dedicate. 60 The court noted this benefit to the subdivider and continued as follows:

The petitioners and the lot owners in the subdivision will participate in these benefits and savings by the selection and adherence to the particular design. In fact the petitioners makes no objection to that design as such. It is to be assumed that he prefers it with the resulting

54. Id.
55. See note 7 supra.
56. 34 Cal. 2d at 37, 207 P.2d at 8.
57. Id. at 34–35, 207 P.2d at 5–6.
58. Id. at 34–39, 207 P.2d at 5–6.
59. See text accompanying note 56 supra.
60. By this plan, the rear areas of all residential lots abutted the principal thoroughfares, thereby relieving the developer of the burden of dedicating his land for street construction. The effect of such planning was to create residential "cells" attached to, but not fronting on, heavily traveled highways. See 34 Cal. 2d at 33–34, 207 P.2d at 2–3. Consequently, the developer was not forced to dedicate land in order to provide access for the lots.
savings in land and cost. But he seeks in addition compensation for
the fulfillment of the conditions which make this type of lot subdivision
feasible . . . . The conclusion is justifiable that the widening and
planting strips and the elimination of the hazardous tip are as much a
part of the design and improvement within the proposed subdivision
as would the lateral and transverse service roads and lanes had the
regular or non-cellular design been selected.\(^61\)

The reasoning of the court should be considered in view of the highly sig-
nificant conclusion in *Ayres* that “it is no defense to the conditions imposed
in a subdivision map proceeding that that *their fulfillment will incidentally
also benefit the city as a whole.*”\(^62\)

The *Ayres* test justifies a subdivision exaction as a police power
regulation through a stress not only on the reasonableness of the require-
ment in terms of public health, safety, and welfare as the courts in prior
cases had done,\(^63\) but also on the financial benefit that the exaction, in the
long run, accords to the subdivider and thus to the homeowner within the
subdivision. In this respect, the *Ayres* standard closely resembles that
used to determine the validity of special assessments.\(^64\)

2. Pioneer Trust & Savings Bank v. Village of Mount Prospect:*65 The
”Specifically and Uniquely Attributable” Test

*Pioneer Trust & Savings Bank v. Village of Mount Prospect* also
involved a mandamus proceeding to compel a subdivision plat approval.
The Illinois subdivision exaction enabling statute allowed municipalities
to enforce “reasonable” requirements designed to promote the development
of parks and playgrounds.\(^66\) Consequently, the defendant village required
a subdivision land dedication for recreational purposes of 1 acre per 60
families.\(^67\) Purporting to rely upon *Ayres*, the Supreme Court of Illinois
posited a constitutional standard for the subdivision exaction in issue:

\[\text{If the burden cast upon the subdivider is specifically and uniquely}
\text{attributable to his [the subdivider's] activity, then the requirement is}
\text{permissible; if not, it is forbidden and amounts to a confiscation of}
\text{private property in contravention of the constitutional prohibitions}
\text{rather than reasonable regulation under the police power.}^68\]

Concluding that the overcrowding problem which the village experienced
was the result of the “total development of the community,” the court held

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\(^{61}\) *Id.* at 40–41, 207 P.2d at 6.
\(^{62}\) *Id.* at 41, 207 P.2d at 7 (emphasis added).
\(^{63}\) *See* note 49 and accompanying text *supra*.
\(^{64}\) *See* text accompanying note 35 *supra*.
\(^{65}\) 22 Ill. 2d 375, 176 N.E.2d 799 (1961).
1961).
\(^{67}\) 22 Ill. 2d at 377, 176 N.E.2d at 801.
\(^{68}\) *Id.* at 380, 176 N.E.2d at 802.
that the "specifically and uniquely attributable" criteria had not been met, and invalidated the ordinance.69

The Pioneer Trust test, put forth in 1961, has survived in form, if not in substance. The words have been echoed frequently, although their strict application by the Pioneer Trust court has not always been duplicated.70

It is submitted, however, that the test was born of an unparalleled misreading of the Ayres opinion. At no time did Ayres endorse a constitutional standard which required the finding of an unassailable link between the need for the exaction and the creation of the subdivision. In fact, much of that required of the subdivider in Ayres had been planned by the city to be funded with municipal revenues before the subdivision was even so much as contemplated.71 It should be remembered that the Ayres court found no problem in observing that the exaction with which they dealt might also benefit the entire community, so long as the subdivision also retained an advantage from its imposition. It apparently follows that, if the exaction alleviates problems in the surrounding community, the surrounding community must have had a role in the creation of the problems which the exaction was designed to remedy. Hence, the test as stated in Pioneer Trust finds no support in Ayres.

One commentator has attacked the Pioneer Trust reasoning on a second ground, contending that the overcrowding problem present in Pioneer Trust was in fact "specifically and uniquely attributable" to the subdivision so the court failed to correctly apply its own test.72 The court noted that before the subdivision was created, existing facilities had reached their respective capacities.73 Thus the need for more facilities could be traced to the subdivision — in other words, what existed was adequate, so long as there were no population increases.74 This contention, however, seems to ignore the fact that the converse is also true: had it not been for the total growth of the community, existing facilities in the village would not have reached their capacities. Even if the population had increased, without that total growth the facilities would have been able to absorb the additional strain caused by a migration of new residents into the area. Therefore, the need for new facilities was not "specifically and uniquely attributable" to the subdivision. In any event, Pioneer Trust conceived a test which was difficult to pass, and placed a severe burden upon the exacting municipality.

69. Id. at 381-82, 176 N.E.2d at 802.
70. See notes 97-107 and accompanying text infra.
71. The city in Ayres had had the street-widening in issue platted on its official map before the subdivision was submitted for approval. 207 P.2d at 5-6.
72. In the words of Johnston, supra note 7:
Pioneer Trust seems to have erred 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.
Id. at 909.
73. 32 Ill. 2d at 381, 176 N.E.2d at 802.
74. Johnston, supra note 7, at 909.
3. Gulest Associates, Inc. v. Town of Newburgh:75 The "Direct Benefit to the Subdivision" Test

If Ayres' insistence that there must be shown some benefit passing to the subdivision were combined with Pioneer Trust's emphasis on the establishment of a direct causal link between the exaction and the need which demanded that remedy, the hybrid result might be a test which required the showing of a direct and primary benefit accruing to the subdivision from the exaction. One year after the Pioneer Trust decision, such a hybrid was spawned by the Supreme Court of New York's Orange County, in Gulest Associates, Inc. v. Town of Newburgh. An ordinance, validly enacted under the enabling legislation, allowed the municipality to charge fees in lieu of land dedications for recreational purposes.76 The court reasoned that since the grant of power by the state legislature was "not necessarily, if at all, for the benefit of future residents of the area covered by the plat . . . the charge is made for the benefit of the town as a whole."77 Furthermore, the money could be used "in any section of the town at any time and for any recreation purpose . . . not directly related to the development of the subdivision. It may be spent before the development of the subdivision is undertaken or completed."78 The precise facts upon which the Gulest court relied are unclear, but commentators seem to agree that the holding 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 subdivision."79

That position was clarified in Justice Van Voorhis' dissent in Jenad, Inc. v. Village of Scarsdale,80 decided four years after Gulest. Chief Judge Desmond purported to overrule Gulest in the majority opinion in Jenad, but did so only insofar as Gulest found the town ordinance involved vague, a ground which seemed to be merely secondary to the Gulest court's holding. Chief Judge Desmond's language seems inclusive enough, however, to mark the demise of the direct benefit test in New York:

Even if the Gulest decision were correct [with respect to vagueness of the Town Law] — and we hold it is not — it would not apply here since by the Scarsdale rules and regulations the monies collected

76. As the court characterized the problem, quoting the enabling statute:

The basic issue is then whether the Legislature may constitutionally provide for the payment of money as a condition to approval of a subdivision plat in 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."

77. 25 Misc. 2d at 1007, 209 N.Y.S.2d at 73.
78. Id.
79. Johnston, supra note 7, at 911. 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 5, at 1136 (emphasis in original).
as “in lieu” fees are not only put into a “separate fund to be used for park, playground and recreational purposes” . . . but, as provided by the board of trustees, expenditures from such fund are to be made only for “acquisition and improvement of recreation and park lands” in the village. There is nothing vague about that language. 81

Quite clearly, *Gulest* invalidated the ordinance on the ground that it could be used by the town for purposes other than those which would directly benefit the subdivision. The *Jenad* majority validated the ordinance presented therein on the basis of the observation that it was not vague precisely *because* it went into a fund which, as in *Gulest*, could be used for development of recreational areas not primarily serving the subdivision. Without citing *Gulest* specifically, Justice Van Voorhis, in dissent, pinpointed the problem in such an arrangement and thus highlighted what appears to have been in the minds of the *Gulest* majority:

No one contends that this park and recreation fund of the Village of Scarsdale is for the special benefit of this real estate tract; it can be expended only for the benefit of the village as a whole yet every lot in every new tract is required to be assessed at $250. . . . whether the lot is worth $2000. or $25,000, or whether the size is two acres or half an acre, and regardless of where it is located in the village or whether it will ever receive any benefit from some general village project not yet conceived. 82

As a result of this failure to tie the exaction to a specific benefit to be conferred on the subject of the exaction, Justice Van Voorhis concluded that “the exaction would be in the nature of a tax and not a fee or assessment for special benefit,” thereby implying that the constitutional test by which to measure such exactions was one which relied upon the distinction between special and general benefits in special assessment cases. 83

Despite the *Jenad* court’s unfavorable view of it, the *Gulest* direct benefit approach has been supported by commentators. One article 84 advances the opinion that it is the most constitutionally sound test for three reasons: first, the authors contend that a subdivision dedication, improvement, or fee requirement is a “positive exaction,” as opposed to a police power regulation in the nature of a zoning restriction, a “negative prohibition.” As such, it involves a more severe burden, and should thus be judicially regulated according to the *Gulest* and *Pioneer Trust* requirements. 85

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81. *Id.* at 82-83, 218 N.E.2d at 675, 271 N.Y.S.2d at 957-58.
82. *Id.* at 88-89, 218 N.E.2d at 678, 271 N.Y.S.2d at 961 (Van Voorhis, J., dissenting).
83. *Id.* at 89, 218 N.E.2d at 679, 271 N.Y.S.2d at 962 (Van Voorhis, J., dissenting).
85. *Id.* at 407.
proportionate share of the improvement; at least part of the cost should be shared by the surrounding community. Finally, the writers insist that what it is impermissible to fund by special assessment is similarly impermissible to fund by subdivision exaction. The specific reference is to schools, which these authors construe to be so much a part of the public responsibility that private charges therefor are unconstitutional, lest there develop a tuition system in community educational schemes.

Other authors contend that these positions are unsound. As to the first, they argue that the distinction between a "positive exaction" and "negative prohibition" is not illuminating, since, in some circumstances, the former may be less burdensome than the latter. The convincing example they offer is the situation wherein a plat of land in an area commercially promising is residentially zoned. As between this and subdivision exactions, these authors seem justified in concluding that "[e]ither, neither, or both can be discriminatory or takings in any specific case." As to the second rationale, they contend that it is possible to apply a cost analysis to cure this purported defect. In addition, they reiterate the oft-cited statement in Ayres to the effect that an incidental public benefit resulting from the exaction is not constitutionally impermissible so long as there is some other palpable justification for the exaction as applied. Finally, with regard to the fear of a development of tuition-like systems in the public schools, these commentators note that a similar situation presently exists, since different communities set tax rates of differing amounts which equalization programs would mitigate only to inconsequential degrees. Thus, the fear that persons will be unable to move into a particular area due to its high cost of education may have already materialized.

4. The Offshoots: The Attempts to Apply Conflicting Constitutional Criteria

As the constitutionality of requiring internal subdivision improvements became settled, the issue which rose to the forefront of the dispute

86. Id. at 409.
87. Id. at 410, citing Midtown Properties, Inc. v. Madison Twp., 68 N.J. Super. 197, 209, 172 A.2d 40, 47.
88. E.g., Heyman & Gilhool, supra note 5.
89. Id. at 1137.
90. Id. at 1141-46.
91. Id. at 1137-38.
92. Id. at 1140-41. The questions raised by the use of diverse cost accounting methods are indeed numerous and complex. Since this Comment is concerned with the general legal issues raised by subdivision exactions, rather than the practical aspects of their application, which, however, are related to the legal problems, no position is taken upon nor an extensive discussion provided regarding these questions. 93. See note 32 supra. There were very few cases which challenged the validity of this type of exaction after Pioneer Trust and Gulest. Of late, they have come up in rather unusual circumstances. See, e.g., Baker v. Planning Bd. of Framingham, 353 Mass. 141, 228 N.E.2d 831 (1967), where the subdivider challenged the planning board's imposition of a water drainage system on his land. The subdivider had agreed to provide a system which would meet the needs of his subdivision but deprive the surrounding area of a water retention capability which the subdivider's land, when vacant, provided. Id. at 142-43, 228 N.E.2d at 832. The court, in reversing the planning board, held that it was impermissible to require the subdivider to provide a water drainage system on his land which would deprive the surrounding area of a water retention capability which the subdivider's land, when vacant, provided.
involved the constitutionality of requiring land dedications or equalization fees in lieu thereof for the purpose of providing for the expansion of the municipality's school or recreational system. It should be noted that Ayres involved an exaction requiring land dedication largely for traffic safety purposes and, although the Ayres court did not specifically limit its analysis to such a situation, it was not clear whether it could be extended beyond its facts to exactions for educational or recreational purposes. The potential extension of the less stringent Ayres test is dubious in light of the fact that Pioneer Trust and Gulest were decided with reference to land dedication for recreation and school purposes, and fees in lieu thereof, respectively. As one commentator noted, "Pioneer Trust and Gulest seemed to confirm the emergence of highly restrictive standards for the validity of exactions for recreation and educational purposes . . . ." This restrictiveness, however, became difficult to rationalize with the courts' views of zoning ordinances as presumptively valid. Consequently, courts were by no means clearly convinced that, legally or practically, subdivision exaction requirements for these purposes warranted the imposition of significant barriers to their validation.

In this context, the attempts to escape from Pioneer Trust and Gulest began. For reasons not altogether clear, the vast majority of attempts concerned themselves with a circumvention of Pioneer Trust's "specifically and uniquely attributable" test — Gulest was generally ignored. A good example of these escape attempts is Billings Properties, Inc. v. Yellowstone County, where the Supreme Court of Montana examined an enabling statute, indistinguishable in any material way from the enabling legislation in Pioneer Trust, authorizing municipalities to require sub-

94. Johnston, supra note 7, at 911.

95. See R. Anderson, supra note 6, § 2.14, at 67. See also Johnston, supra note 7, at 911. As a result of this disparity, "commentators were driven to rather tenuous reasoning in the attempt to harmonize this new rationale with conventional zoning and subdivision control doctrine." Id. In so stating, Johnston referred to the Reps & Smith arguments in favor of the Gulest analysis (see notes 84-87 and accompanying text supra), and manifested his approval of the Heyman & Gilhool rebuttal (see notes 88-92 and accompanying text supra). Johnston, supra note 7, at 911-12, 912 n.189.

96. This may be due in part to the simple fact that Pioneer Trust was decided before Gulest, and thus was adopted in most jurisdictions before Gulest was decided. Further, the chances of Gulest's displacing Pioneer Trust diminished as of 1966, when the Court of Appeals of New York — the state in which Gulest was originally decided — cast significant doubt upon the validity of the "direct benefit" analysis in Jenad. See notes 80-83 and accompanying text supra. This is, however, speculation. No court or commentator has offered such an explanation.


98. As Johnston noted, "Billings Properties cannot be harmonized with Pioneer Trust by distinguishing the two statutes. The conflict in the cases stems from the antithetical views of the respective courts." Johnston, supra note 7, at 914.
dividers to dedicate land for parks or playgrounds.\textsuperscript{99} Purporting to accept the “specifically and uniquely attributable” criteria,\textsuperscript{100} the court disposed of the issue in a curious fashion. Since the legislature allowed municipalities to require such a dedication, the court held that “the question of whether or not the subdivision created the need for a park... is one that has already been answered by our Legislature.”\textsuperscript{101} With the utmost judicial deference to the legislature — engaging in no factual analysis of any substance whatsoever — the court avoided the constitutional issues which continued to perplex other tribunals. In deferring to legislative judgment with regard to a specific issue which the legislature had not considered — whether this particular exaction was justifiable — the Billings court avoided the restrictiveness of Pioneer Trust, and instead established a nearly irrebuttable presumption in favor of an exaction’s validity.\textsuperscript{102}

Other courts accomplished similar results through bald assertions that the Pioneer Trust test had been met, without so much as an illusory explanation such as that offered in Billings. For example, in Aunt Hack Ridge Estates, Inc. v. Planning Commission,\textsuperscript{103} the Supreme Court of Connecticut dealt with a statute\textsuperscript{104} similar to those in issue in Pioneer Trust and Billings, stating:

In these days of burgeoning populations, critical housing problems, and the incentive which they create for the activity of land developers, the need for parks, recreational areas and open space for the welfare of the people looms large. Planning commission recommendations for recreational purposes, for controlling the density of population and for parks and playgrounds would be of little value if, as open spaces are built upon, reasonable provision to accomplish these purposes could not be required.\textsuperscript{105}

Of course, this is no response to the basic question of determining for what the municipality should be required to pay while it pursues the effectuation of those noble goals. The court thus continued:

The fact that the exercise of the police power prevents the enjoyment of certain individual rights in property without providing compensation therefor does not necessarily constitute a taking of the property without just compensation... The test which has been generally applied in determining whether a requirement that a developer set aside land for parks and playgrounds [is a taking]... is whether the burden cast upon the subdivider is specifically and uniquely attributable to his own activity... It is clear that the requirement

\textsuperscript{99} Sec. 1, L. 1883, 39 (codified at MONT. RV. CODES, ANN. § 11-602 (1968)) (repealed 1973).
\textsuperscript{101} Id. at 35, 394 P.2d at 188.
\textsuperscript{102} In the words of Johnston, supra note 7, “Just as Pioneer Trust formulated an almost unattainable standard of validity for this type of exaction, Billings Properties established a virtually unassailable presumption in its favor.” Id. at 914.
\textsuperscript{103} 160 Conn. 109, 273 A.2d 880 (1970).
\textsuperscript{105} 160 Conn. at 113-14, 273 A.2d at 883.
which is cast upon the plaintiff . . . is uniquely and solely attributable to its activity in undertaking to establish a subdivision.106

Therefore, applying the Pioneer Trust test to the Pioneer Trust facts, the court reached a result opposite to that in Pioneer Trust, neither explaining the conflict nor so much as noting its existence. The court did, however, add what appeared to be a caveat to its holding: “Moreover, when it chooses to subdivide the land, the open space requirement renders the lots offered for sale more attractive and desirable to purchasers, a circumstance of value to the seller.”107 Clearly, the Aunt Hack court was applying Ayres’ “benefit to the subdivider” logic to reach a result consistent with a supposed Pioneer Trust analysis. The escape from the rigid strictures of Pioneer Trust could not be more apparent.

C. The Future: The Move to Abandon the Past in Favor of a “Rational Nexus” Test

Although the escapes from the unwanted invalidations, which would seem to follow from the standardized constitutional tests, were successful in result, they imposed a methodology characterized more by folly than by precision. The grounds for decision were manifestly unclear. Billings and Aunt Hack serve to demonstrate that tendency since they are virtually indistinguishable from Pioneer Trust except in their results. Thus, if these cases prove nothing else, they prove the existence of a need to disregard the lip-service paid to tests no longer adhered to and embark upon the establishment of definitive signposts to guide the resolution of future conflicts of a similar genre.

The California Supreme Court seems to have provided some impetus in that general direction. In Associated Home Builders v. City of Walnut Creek,108 the court affirmed the constitutionality of the state enabling legislation which allowed municipalities to require subdividers to dedicate land, or contribute fees in lieu thereof, for park or recreation development in the area in which the subdivision was located, with the stipulation that “the amount and location of land to be dedicated or fees to be paid shall bear a reasonable relationship to the use of the park and recreational facilities by the future inhabitants of the subdivision.”109 Pursuant to the enabling statute, the city had enacted an ordinance that required a dedication fixed by the type of residence and the number of future occupants, which, in the instant case, was 2½ acres per 1,000 residents or an equivalent fee which was to be in an amount equal to the value of the land which would other-

106. Id. at 117-18, 273 A.2d at 884-85 (emphasis added).
107. Id. at 119, 273 A.2d at 885.
wise be dedicated under the applicable formula. The plaintiff subdivider challenged the statute and the ordinance on several constitutional bases.

Most significantly, the subdivider specifically invoked the reasoning of Pioneer Trust, and thus forced the court to dispose of the contention by confronting it, rather than by avoiding it. As the court characterized his argument, the subdivider would suffer a taking without just compensation should his land be taken for park or recreation purposes, since such facilities are required by the presence of all citizens.

To dispose of this Pioneer Trust reasoning, the court turned specifically to its previous decision in Ayres, despite the fact that Ayres was decided in a context of land dedication for traffic safety purposes. The court held that "we do not find in Ayres support for the principle urged by Associated that a dedication requirement may be upheld only if the particular subdivision creates the need for the dedication." As a result, the court chose, in a footnote, to explicitly reject the "specifically and uniquely attributable" test, making it one of the few to clearly break with the past.

Although it could have treated the Pioneer Trust contention by referring to the statutory language requiring only a "reasonable relationship" between the exaction and the subdivision, the Associated court specifically chose to rejuvenate Ayres. In so doing, the opinion appears correct, since the enabling statute called for such a link between the exaction and the use by future inhabitants of that to which the exaction is applied. As such, the statutory language appeared more tailored to the disposal of a Gulest contention and, in fact, the court dismissed the subdivider's contention that the exaction was unconstitutional unless used to "necessarily and primarily benefit the particular subdivision" on that ground. However, the court, in what might be construed as dicta, reaffirmed one of the bases of the Ayres holding, positing 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." In addition, the Associated court noted the

110. WALNUT CREEK CAL., MUNICIPAL CODE § 10-1, 516, cited in 4 Cal. 3d at 636-37, 484 P.2d at 608-09, 94 Cal. Rptr. at 633.
112. The court stated:
Thus, it is asserted, the future residents of the subdivision, who will ultimately bear the burden imposed on the subdivider, will be required to pay for recreational facilities the need for which stems not from the development of any one subdivision but from the needs of the community as a whole.
In order to avoid these constitutional pitfalls, claims Associated, a dedication requirement is justified only if it can be shown that the need for additional park and recreational facilities is attributable to the increase in population stimulated by the new subdivision alone and the validity of the section may not be upheld upon the theory that all subdivisions to be built in the future will create the need for such facilities.
4 Cal. 3d at 638-39, 484 P.2d at 610, 94 Cal. Rptr. at 634 (emphasis added).
113. 4 Cal. 3d at 638, 484 P.2d at 610, 94 Cal. Rptr. at 634.
114. Id. at 644 n.3, 484 P.2d at 615 n.3, 94 Cal. Rptr. at 639 n.3.
115. See notes 75-79 and accompanying text supra.
116. 4 Cal. 3d at 640, 484 P.2d at 611-12, 94 Cal. Rptr. at 635-36.
importance of the benefit to the subdivider which passed as a result of
the subdivision approval, thus echoing another Ayres theme.\textsuperscript{118}

Associated provides a statement of California's disagreement with the
Pioneer Trust requirement that a subdivision exaction be tied to a need
created solely by the subdivision. The extent to which the case can be
followed depends upon the willingness of other state courts who have
followed Pioneer Trust, at least in form, to break with precedent. Unfortu-
nately, there are factors in the Associated case which may provide a basis
for other courts to distinguish it as a matter of course, should they be so
inclined. First, the Associated court interpreted an enabling statute which,
even in its most narrow construction, hinted at the legislature's desire to
depart from any rigid constitutional test of subdivision exactions for
recreational purposes. Second, the state of California had as precedent the
Ayres decision, which made original adoption of a new test by this court
unnecessary. Other courts could not make the same claim, especially if
they had previously adopted the Pioneer Trust test. This should be the
lesson of Billings and Aunt Hack.

For this reason, it is submitted that the 1966 decision of the Wisconsin
Supreme Court in Jordan v. Village of Menomonee Falls\textsuperscript{119} will be of
the greatest influence in determining the evolution of constitutional doc-
trine in the area of subdivision exactions for educational and recrea-
tional purposes. In Jordan, the plaintiff subdivider sued the village for recovery
of an equalization fee paid in lieu of a land dedication for the expansion
of schools and parks.\textsuperscript{120} The Wisconsin enabling legislation provided a
general grant of authority to municipalities to condition the approval of
subdivision plats.\textsuperscript{121} It contained no specific grant of authority to require
land dedications or fees in lieu thereof, but did specifically state the legis-
lative intent that it be construed liberally in favor of the municipalities to
which it applied.\textsuperscript{122} The court initially faced the question of whether the
exaction was permissible under the act. Reasoning that subdivision ex-
actions were universally allowed for such improvements as streets and
water systems and taking note of the requirement that the act be construed
liberally, the court upheld the ordinance as authorized by the enabling
legislation.\textsuperscript{123}

\textsuperscript{118} As the court construed the theory, since “the subdivider realizes a profit from
governmental approval of a subdivision since his land is rendered more valuable by
the fact of subdivision and in return for this benefit the city may require him to dedi-
cate a portion of his land for park purposes . . . ” \textit{Id.} at 645, 484 P.2d at 615, 94
Cal. Rptr. at 639.

\textsuperscript{119} 28 Wis. 2d 608, 137 N.W.2d 442 (1965), \textit{appeal dismissed}, 385 U.S. 4 (1966).

\textsuperscript{120} 28 Wis. 2d at 612, 137 N.W.2d at 443-44.

\textsuperscript{121} WIS. STAT. ANN. § 236.45 (1957), as amended, WIS. STAT. ANN. § 236.45
(Supp. 1974).

\textsuperscript{122} \textit{Id.} § 236.45(1).

\textsuperscript{123} The court also reasoned from Zastrow v. Village of Brown Deer, 9 Wis. 2d
100, 100 N.W.2d 359 (1960), wherein it had previously upheld an exaction requiring
the establishment of a water system within the subdivision. 28 Wis. 2d at 615-16, 137
N.W.2d at 445-46.
The court then faced the subdivider's contention that the dedication was “an unconstitutional taking of private property for public purpose.” Without the assistance of explicit legislative intent or a Wisconsin precedent, the Jordan court redefined the Pioneer Trust test, adopted the reasoning of Ayres, and attempted to clarify the proportions of their approach for use in the future. Under the court's reasoning Pioneer Trust was approved, provided 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. In most instances it would be impossible for the municipality to prove that the land required to be dedicated for a park or school site was to meet a need solely attributable to the anticipated influx of people into the community to occupy this particular subdivision.

The court was concerned with the specific reasoning of Pioneer Trust. If the educational and recreational burdens were caused by more than one subdivision, for example, Pioneer Trust would hold that the problem could not be traced to a particular development, and would thus invalidate the exaction. Heretofore, few courts had faced the meaning of the “specifically and uniquely attributable” test and expressly rejected it. Nonetheless, after noting the difficulty any municipality would face in attempting to clear the Pioneer Trust criteria, the court stated:

On the other hand, the municipality might well 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. Possible contravening evidence would be a showing that the municipality prior to the opening up of the subdivisions, acquired sufficient land for school, park and recreational purposes to provide for future anticipated needs including such influx, or that the normal growth of the municipality would have made necessary the acquisition irrespective of the influx caused by the opening up of subdivisions.

The Jordan court, in essence then, shifted the burden of proof which, after Pioneer Trust, had been on the municipality. All that was required now was a showing by the municipality that the needs for which the exactions were made stemmed from the influx of subdivisions in general, not from the influx caused by a particular subdivision. If the subdivider could prove that the exactions were not required to accommodate the subdivision residents, or that the need the exaction was to satisfy would result in any event, the exaction would be invalidated. In effect, Jordan enunciated a

124. 28 Wis. 2d at 617, 137 N.W.2d at 447.
125. Id.
126. See notes 97-107 and accompanying text supra.
127. 28 Wis. 2d at 618-19, 137 N.W.2d at 447 (emphasis added).
test which sought only a "reasonable nexus" between the subdivision and the exaction.\(^\text{128}\) The court added two caveats. With apparent intent to dispose of any Gulest remnant which might serve to cloud the application of its reasoning, the court stated:

> We do not consider the fact that other residents of the village as well as residents of the subdivision may make use of a public site required to be dedicated by a subdivider for school, park or recreational purposes is particularly material to the constitutional issue.\(^\text{129}\)

Finally, the court tacitly approved Ayres by invoking its rationale anonymously:

> The test of reasonableness is always applicable to any attempt to exercise the police power. The basis for upholding a compulsory land dedication requirement in a platting ordinance is this: The municipality by approval of a proposed subdivision plat enables the subdivider to profit financially by selling the subdivision lots as home building sites and thus realizes 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.\(^\text{130}\)

Thus, it can be assumed that were the subdivider to receive no net benefit — as in the case where the dedication requirement far outstripped any benefit gained by the plat approval — the reasonableness test by which the police power is to be judged might not be met.\(^\text{131}\)

On the facts before it, the Jordan court applied its new formulation and upheld the ordinance.\(^\text{132}\) The municipality had introduced evidence to the effect that its population had quadrupled in 14 years, due largely to the migration of subdivision dwellers into the area.\(^\text{133}\) The court was not troubled by the fact that the equalization fees paid by the subdivider were put into a fund handled by the school district of which the subdivision was only a part,\(^\text{134}\) a circumstance which had been determinative in the Gulest decision.\(^\text{135}\) Moreover, the court asserted that land dedications and fees in lieu thereof were to be treated identically.\(^\text{136}\)

\(^\text{128}\) The court spoke of the burden as requiring one only to "reasonably establish" that the need facing the municipality was related to the subdivision. \(\text{Id. at 617, 137 N.W.2d at 447}\).

\(^\text{129}\) \(\text{Id. at 619, 137 N.W.2d at 448}\).

\(^\text{130}\) \(\text{Id. at 619–20, 137 N.W.2d at 448}\).

\(^\text{131}\) \(\text{Id. at 619, 137 N.W.2d at 448}\).

\(^\text{132}\) \(\text{See, e.g., Frank Ansuini, Inc. v. City of Cranston, 107 R.I. 63, 264 A.2d 910 (1970) (exaction invalidated on ground that there was established no relationship between amount of required dedication and either benefit accorded subdivider or nature of problems caused by subdivision); East Neck Estates, Ltd. v. Luchsinger, 61 Misc. 2d 619, 305 N.Y.S.2d 922 (Sup. Ct. 1969) (dedication which would reduce value of subdivider's plat from $208,000 to $118,000 held confiscatory).}\)

\(^\text{133}\) \(\text{Id. at 611, 137 N.W.2d at 444}\).

\(^\text{134}\) \(\text{See text accompanying notes 77-79 supra.}\)

\(^\text{135}\) \(\text{28 Wis. 2d at 622, 137 N.W.2d at 449-50.}\)
At least two other state courts have cited Jordan with approval and seemingly accepted its approach. In the Jenad case, the Court of Appeals of New York termed Jordan "a careful and convincing opinion," but delineated no "rational nexus" test to be applied in that state, although its result could easily be characterized as consistent with such a test. Similarly, the California Supreme Court in Associated cited Jordan as further support for the Ayres position that the benefit conferred upon the subdivider as a result of the plat approval should enable the municipality to exact reasonable dedications. Both Associated and Jenad implied that such subdivision exactions were analogous to zoning requirements and, in so doing, may have implied that the standard of proof for their justification should be lessened, as it was in Jordan. All such comments, however, presently exist in the form of dicta, and an outright adoption of Jordan has not, as yet, appeared.

III. THE ADDITIONAL CONSTITUTIONAL PROBLEMS: EXCLUSION AND EQUALIZATION

Disregarding the controversy over a police power justification of the subdivision exaction in the recreation and education contexts, there remain two legal issues which threaten the exaction method of revenue generation. Although no court has made either the basis of a holding, nor actually substantially confronted these matters in dicta, the potential for their being stressed in an attractive and applicable factual situation cannot be ignored, and therefore they will be briefly discussed below.

A. The Exclusionary Potential of the Subdivision Exaction

At least one court — the California Supreme Court in the Associated case — has recognized the possibility that a municipality, unable to keep population density at the desired level through zoning restrictions which increase the price of residences, may set the subdivision exactions unreasonably high to accomplish that same result. Justice Van Voorhis, in his Jenad dissent, also hinted that this tack might be used. However, no
case has been decided to allow a land dedication or fee large enough to reasonably invoke such a fear. Furthermore, some commentators have concluded that as a practical matter, exclusion effectuated through exaction should not be an issue.\textsuperscript{143} Several arguments are advanced in support of this thesis, aside from the fact that exactions to date only modestly increased the costs of residences.\textsuperscript{144} For example, it has been urged in one article that political lobbying groups, such as the National Association of Homebuilders, will provide enough pressure to keep exaction amounts within reasonable bounds.\textsuperscript{145} One commentator asserts that the price increases would be minimal in impact since they could be spread over the course of a 20- or 30-year mortgage.\textsuperscript{146}

While such arguments may be of some persuasive force, they do not resolve the question completely. Both contentions could have been raised 5 years ago just as persuasively with reference to exclusionary zoning techniques, such as large-lot zoning.\textsuperscript{147} However, courts apparently found these justifications insufficient. With the present judicial tendency to keep a watchful eye on zoning ordinances of exclusionary potential, municipalities will have to devise other means to pursue their exclusionary goals.

It is submitted that the nature of the subdivision exaction process itself makes it even more likely that this device will be used in such a manner. It seems safe to state that in the normal situation, the ultimate buyer of a subdivision plat will not be aware of how the exaction procedure affects him. Any dispute between municipality and subdivider will have been resolved before individual plats are offered for sale. In the zoning context, however, the buyer is more often initially involved in the conflict with the municipality — he seeks to buy a \(\frac{1}{2}\)-acre lot for a residence, and is informed that he must purchase two acres; or he seeks a building permit and meets a minimum set-back requirement. The distinction between ex-

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\textsuperscript{143} See, e.g., Heyman & Gilhool, \textit{supra} note 5, at 1155–57.

\textsuperscript{144} Harvith has suggested:

The amount of dedication per dwelling unit should only be in the one to two thousand dollar range, even if dedication were imposed in amounts (of land or cash) sufficient to pay the full locally paid share of the costs of the public schools and parks required by the developments, to the extent those costs would not be met by the tax revenues generated by the new dwelling units. Harvith, \textit{supra} note 25, at 478.

\textsuperscript{145} Heyman & Gilhool, \textit{supra} note 5, at 1156. However, it would seem axiomatic that no political pressure is greater than that exerted by residents of exclusive areas who have vested financial interests and therefore wish to maintain the characters of their respective neighborhoods without incurring additional tax burdens. Indeed, it is submitted that the cases voiding exclusionary zoning schemes were necessary to combat just such overwhelming pressure. Note that in such cases it is in fact the developer who is involved in the action seeking to void the schemes. See notes 1 & 2 \textit{supra}.

\textsuperscript{146} Harvith, \textit{supra} note 25, at 478–79. \textit{See also} Heyman & Gilhool, \textit{supra} note 5, at 1176.

\textsuperscript{147} \textit{See notes} 1 & 2 \textit{supra}.
action and zoning ordinance suggests the possibility that exclusionary subdivision exactions will not face court challenge as frequently as zoning ordinances of similar effect. A subdivider can always pass along to the buyer any loss he suffers on account of an exaction required by the municipality. His only complaint with regard to his need to charge a higher price would seem to be his fear of not finding his desired number of buyers. If, for example, the subdivision lots were salable at extremely high prices, the municipality, through exorbitant exaction amounts, could increase the prices without challenge from the subdivider, unless, of course, the subdivider would not earn his expected profit. By thus assuring itself that only buyers who could afford the large-lot residences would be subdivision dwellers and concomitantly freeing itself of "undesirables," the municipality could accomplish through the subdivision exaction what it might not have been able to do through patently exclusionary zoning. At the same time, the municipality would be increasing its tax base and maintaining open spaces.

Similarly, there arise the possibilities of "deals" between municipalities and subdividers. Usually, a subdivider would be interested in the expeditious completion of his project. Were he financing his project through mortgages, for example, he would thus be working on a planned schedule. A municipality might be able to persuade him to sell his tract in large lots at a proportionally higher price in return for lower exactions or time-saving concessions. Since the subdivider would be free to sell his land as he chose, no buyer could challenge him on that basis. Furthermore, the subdivider might be unwilling to invest the time and money in a suit against the municipality whose cooperation he needs to efficiently complete the development. Through the threat of a high exaction demand when it would affect salability — which the municipality might confidently assert after Jordan — the governmental unit might be able to pressure the subdivider to sell in large lots and, if he is also the builder, to construct only expensive residences, thereby effectuating a low density, high tax base subdivision without ever having to impose exceptionally high exaction demands. In short, the exaction device, which the municipality can utilize with some flexibility

148. The forcefulness of this conclusion rests, of course, not only upon the actual frequency with which prospective purchasers and homeowner-builders, as opposed to developers, have challenged the constitutionality of zoning ordinances, but upon whether the prospective purchaser has standing to challenge a zoning ordinance. Obviously, if the prospective purchaser cannot bring an action against the municipality, this distinction has little meaning. The United States Supreme Court will hopefully clarify this issue when it decides Warth v. Seldin, 43 U.S.L.W. 3208 (U.S. Oct. 15, 1974), granting cert. to Warth v. Seldin, 495 F.2d 1197 (2d Cir. 1974), in which the Second Circuit held that low-income residents of a city had no standing to challenge a suburban town's zoning ordinance on the ground that it violated equal protection. It should be noted that one of the factors cited by the court as a basis of its decision was that the plaintiffs had not alleged a specific injury, such as a denial for a variance or approval of a specific project. 495 F.2d at 1192-93. Consequently, it could be argued that a landowner who intended to construct housing for himself would have standing to challenge the zoning ordinance, and thus would increase the incidence of challenge from nondeveloper parties.
depending on how the need allegedly generated by the subdivision is construed, may serve as a lever to achieve that which is not attainable through a zoning ordinance. To date, no court or commentator has dealt with these possibilities.

B. The Equal Protection Issue

If the justification behind the subdivision exaction is its ability to have newcomers fund the expenditures made as a result of their presence, it is arguable that a similar exaction should be required of newcomers who, while not residing in subdivisions, nonetheless cause similar burdens. The most obvious example is the apartment complex which may contain thousands of residents who require recreational and school facilities as well as traffic and utility accommodations. The argument is one which calls for the equal treatment of equals: those developers who cause a sizable influx of persons into an area, as both apartment and subdivision developers do, should be treated equally. The significant question seems to be whether there is some basis upon which to distinguish apartment developers from subdivision developers.

Only the Associated court has confronted the issue, disposing of it as follows:

Undeveloped land in a community is a limited resource . . . . The development of a new subdivision in and of itself has the counter-productive effect of consuming a substantial supply of this precious commodity while at the same time increasing the need for park and recreational land. In terms of economics, subdivisions diminish supply and increase demand.

Distinguishing subdivisions from apartment complexes on this ground, the court concluded that "this significant distinction justifies legislative treat-

149. It should be noted that an equal protection argument, as opposed to a due process attack, is often at the basis of a challenge that a land use regulation is exclusionary. See, e.g., Sager, supra note 2. This aspect of equal protection should therefore be considered in conjunction with the exclusionary aspect of subdivision exactions discussed supra.

150. In Pennsylvania, subdivision exaction ordinances may be applicable to apartment complexes. The Pennsylvania enabling statute, section 501 of the Pennsylvania Municipalities Planning Code [hereinafter the Code], states in part, "The governing body of each municipality may regulate subdivisions and land development within the municipality by enacting a subdivision and land development ordinance." PA. STAT. ANN. tit. 53, § 10501 (1972) (emphasis added). In section 107 of the Code, "land development" includes:

the improvement . . . for any purpose involving the division or allocation of land or space between or among two or more existing or prospective occupants by means of, or for the purpose of streets, common areas, leaseholds, condominiums, building groups or other features . . . ."

Id. § 10107(11)(i)(a). Therefore, the enabling statute does not unconstitutionally differentiate between subdivisions and apartment complexes. Nevertheless, an equal protection issue may arise if the particular municipality chooses to make the ordinance applicable only to subdivisions, which the enabling statute arguably permits the municipality to do.

151. 4 Cal. 3d at 641, 484 P.2d at 613-14, 94 Cal. Rptr. at 637.
ment of the builder of an apartment house who does not subdivide differently than the creator of a subdivision.\textsuperscript{152}

Since \textit{Associated} was concerned only with a recreation exaction requirement, it seems doubtful that the court's logic can be extended to other types of exactions. For example, it appears that, unlike their disparate effects upon the availability of land in the recreation realm, apartment complexes and subdivisions affect school populations in similar manners. They both cause the need for new buildings. The key problem is not so much the finding of open space upon which to place the buildings; rather it is the funding of the cost of the structures and other required facilities themselves. A potential answer to this issue may lie in the \textit{Ayres} logic — endorsed by \textit{Jordan} and \textit{Associated} — which points to the benefit a municipality affords a subdivider by approving the subdivision plat and thus allowing him to market a tract of land at a higher price than would otherwise be possible.\textsuperscript{153} Whether a similar situation exists with regard to the apartment developer may depend upon the locality, but it appears that the issue is not one which can be lightly treated.\textsuperscript{154}

IV. THE PENNSYLVANIA SITUATION: THE PROSPECTS FOR DEVELOPING A RATIONAL APPROACH TO THE SUBDIVISION EXACTION ISSUE

The Pennsylvania Municipalities Planning Code (Code),\textsuperscript{155} effective January 1, 1969,\textsuperscript{156} contains the enabling authority for the institution of subdivision exaction ordinances by local governmental units in Pennsylvania.\textsuperscript{157} Though somewhat oblique in language and scope, no authoritative construction of the fundamental subdivision exaction provisions has yet been offered by either the Pennsylvania Superior, Commonwealth, or Supreme Courts.\textsuperscript{158} Pennsylvania, within the confines of what a reasonable interpretation of this legislation will permit, thus has the opportunity to choose an approach to the subdivision exaction dilemma unrestricted by binding precedent. It is submitted that this choice is sufficiently important to warrant careful deliberation. For this reason, a brief treatment of what the statute seems to allow, followed by recommendations with regard to its future interpretation, are offered.

\begin{itemize}
  \item \textsuperscript{152} Id. at 643, 484 P.2d at 614, 94 Cal. Rptr. at 638.
  \item \textsuperscript{153} See text accompanying note 130 \textit{supra}.
  \item \textsuperscript{154} One commentator concludes that the issue as to equal treatment is probably one of constitutional proportions. Harvith, \textit{supra} note 25, at 476.
  \item \textsuperscript{155} \textit{PA. STAT. ANN.} tit. 53, §§ 10101 et seq. (1972).
  \item \textsuperscript{156} \textit{Id.} § 10102.
  \item \textsuperscript{157} \textit{Id.} §§ 10501-15.
  \item \textsuperscript{158} Although the Superior Court of Pennsylvania formerly had appellate jurisdiction over challenges to subdivision ordinances enacted under prior law in Pennsylvania and those arising under the present Code before January, 1970, Act of May 8, 1956, § 1, [1955] P.L. 1540 (repealed 1970), appellate jurisdiction over such controversies has now been vested in the new Commonwealth Court of Pennsylvania. \textit{PA. STAT. ANN.} tit. 17, § 211.402(4) (Supp. 1974).
\end{itemize}
A. Restrictions on Subdivision Exaction Ordinances in Pennsylvania

Section 503 of the Code,\textsuperscript{159} which refers to the permissible contents of a municipality’s subdivision exaction ordinance, is most significant for purposes of deriving the legislative attitude toward the subdivision exaction \textit{qua} means of generating revenues. It is most important to note that section 503 lists permissible subjects for exaction, but specifically states that the local ordinance “need not be limited to” what is therein set forth.\textsuperscript{160} The section further authorizes the inclusion of provisions within the ordinance ensuring that the subdivision conforms to the municipality’s comprehensive plan,\textsuperscript{161} and permits the local unit, with certain exceptions, to condition its approval of the plat upon the installation of “streets . . . graded and improved, and walkways, curbs, gutters, street lights, fire hydrants, water and sewage facilities” as the municipality may deem necessary.\textsuperscript{162} As has been demonstrated, none of these requirements have, in the recent past, created any serious policy or constitutional conflicts in any jurisdiction, in the absence of exceptional circumstances.\textsuperscript{163}

It seems clear that broad exaction provisions tending more toward the constitutional fringe would have to find authorization in the “need not be limited to” language. In this regard, the municipalities of Pennsylvania

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\textsuperscript{159} PA. STAT. ANN. tit. 53, § 10503 (1972). This section provides:

\begin{enumerate}
  \item Provisions for the submittal and processing of plats, and specifications for such plats, including provisions for preliminary and final approval and for processing of final approval by stages or sections of development.
  \item Provisions for insuring that: (i) the layout or arrangement of the subdivision or land development shall conform to the comprehensive plan and to any regulations or maps adopted in furtherance thereof; (ii) streets in and bordering a subdivision or land development shall be coordinated, and be of such widths and grades and in such locations as deemed necessary to accommodate prospective traffic, and facilitate fire protection; (iii) adequate easements or rights-of-way shall be provided for drainage and utilities; (iv) reservations if any by the developer of any area designed for use as public grounds shall be suitable \textit{[sic]} size and location for their designated uses; (v) and land which is subject to flooding, subsidence or underground fires either shall be made safe for the purpose for which such land is proposed to be used, or that such land shall be set aside for uses which shall not endanger life or property or further aggravate or increase the existing menace.
  \item Provisions governing the standards by which streets shall be graded and improved, and walkways, curbs, gutters, street lights, fire hydrants, water and sewage facilities and other improvements shall be installed as a condition precedent to final approval of plats.
  \item Provisions which take into account land development not intended for the immediate erection of buildings where streets, curbs, gutters, street lights, fire hydrants, water and sewage facilities and other improvements may not be possible to install as a condition precedent to final approval of plats, but will be a condition precedent to the erection of buildings on lands included in the approved plat.
  \item Provisions for encouraging and promoting flexibility economy and ingenuity in the layout and design of subdivisions and land developments including provisions authorizing the planning agency to alter site requirements and for encouraging other practices which are in accordance with modern and evolving principles of site planning and development.
\end{enumerate}

\textit{Id.} (footnotes omitted).\textsuperscript{160} 

\textsuperscript{160} \textit{Id.} See note 159 supra.

\textsuperscript{161} PA. STAT. ANN. tit. 53, § 10503(2) (i) (1972). See note 159 supra.

\textsuperscript{162} PA. STAT. ANN. tit. 53, § 10503(3) (1972). See note 159 supra.

\textsuperscript{163} See note 32 and accompanying text supra.
should analyze the implications of section 503(2)(iv), wherein it is provided that the local ordinance may contain provisions to insure that "reservations if any by the developer of any area designed for use as public grounds shall be suitable [sic] size and location for their designated uses." 164 "Public grounds" is defined to include "parks, playgrounds and other public areas; and... sites for schools ...." 165 Although not specifically defined in this particular provision, other portions of the Code make it clear that a "reservation" includes only the developer's setting aside certain areas for future taking by eminent domain. It does not involve a dedication. 166

Pennsylvania has, therefore, not even clearly granted municipalities the right to condition subdivision plat approval upon their present buying of land from the subdivider for park or school purposes. At most, the municipality is allowed to enact provisions insuring that "the layout or arrangement of the subdivision or land development shall conform to the comprehensive plan and to any regulations or maps adopted in furtherance thereof." 167 The comprehensive plan, however, as legislatively defined, only includes the "recommendations" of the planning agency. 168 If the "map" referred to in Section 503(2)(i) is construed to mean the official map of the municipality — another legislatively circumscribed land use control device — it is possible that a reservation could be compelled. 169 In point of fact, however, in no part of the Municipalities Planning Code is there an authorization to require the dedication of a public ground as defined in the Code for any purpose whatsoever.

It does not necessarily follow that a local ordinance requiring such a dedication must fail in Pennsylvania. By its own terms, the Code's list of permissible exaction areas is not all-inclusive. 170 Because the permissibility of requiring such a dedication is an area which seems especially suited for legislative treatment, it is possible to argue that had the legislature intended to allow it, they would have said so. But the converse would also

165. Id. § 10107(17).
169. The official map legislation is set forth in article IV of the Code. Id. §§ 10401 et seq. Essentially, these provisions enable a municipality to make surveys of existing and proposed public streets and grounds to be included in an official map, thereby to make these areas a part of the municipality through condemnation at a future date. Id. § 10401. For a case treating the validity of the device in a context where a subdivider could not obtain approval of his plat since it was reserved for park use on an official map, see Lomarch Corp. v. Mayor and Common Council, 51 N.J. 108, 237 A.2d 881 (1968). However, Section 404 of the Code, Pa. Stat. Ann. tit. 53, § 10404 (1972), specifically states that the mere designation of an area on an official map does not constitute a taking or acceptance of the area. Under section 406, the municipality may designate when these areas on the official map "shall be deemed reserved for future taking or acquisition for public use." Id. § 10406. Nowhere is there authorization for requiring a dedication as a prerequisite to approval of a subdivider's plot.

170. See text accompanying note 160 supra.
seem true: if it were repugnant, it would be statutorily labelled as such. In short, the existing enabling legislation, though certainly no endorsement of ordinances requiring land dedication for these public purposes, does not stand as an unalterable bar to their enaction.

The real problem seems to lie in the sparse precedent which does exist in areas analogous to the subdivision exaction. It sets a strong tone against the approval of these fund-producing devices. For example, in Doran Investments v. Muhlenberg Township Board of Commissioners, a developer appealed the denial of his application for approval after having met all conditions required by the local planned residential development ordinance, including the setting aside of the required amount of open space. The zoning board had objected on the ground that the proposed course of the project’s development “[would] result in a reduction in the amount of actual usable recreational area.” The board’s specific grievance was not altogether clear, but the Doran court reasoned as follows:

We may, however, infer that since some of this privately owned land is to be reserved for the use of the tenants in the project, the Board’s objection is that the developer is not providing a public park. The Board might have attempted to acquire public recreation grounds in this fashion by discussion with the developer; it may not under our constitution make dedication of land a condition precedent to its approval of a lawful use.

The basis upon which this court drew its inference regarding the foundation of the board’s complaint was no clearer than the complaint itself. But even if this language is taken as vague dicta, it is exceptionally surprising that the court would, in 1973, with cases such as Jordan, Associated, Ayres, and Jenad extant, reason as it did. Although Doran did not entail a subdivision exaction, the court’s analysis would appear applicable to that situation.

The only other example of the judicial attitude among the Pennsylvania appellate courts was provided by the Pennsylvania Supreme Court in

172. The ordinance was enacted pursuant to article VII of the Code, PA. STAT. ANN. tit. 53, §§ 10701 et seq. (1972). “Planned residential development” is defined in section 107 of the Code as an area of land, controlled by a landowner, to be developed as a single entity for a number of dwelling units, the development plan for which does not correspond in lot size, bulk or type of dwelling, density, lot coverage and required open space to the regulations established in any one residential district created, from time to time, under the provisions of a municipal zoning ordinance.
173. Id. § 10107(14). The primary purpose of the “planned residential development” scheme is to allow a developer some flexibility in constructing dwelling units on a large tract of land without having every dwelling unit conform to local zoning ordinances yet remaining subject to approval by the municipality. See id. § 10701. In Doran, for example, the developer planned to build 14 single-family homes, 56 garden apartments, and 133 townhouses on a 45-acre tract, leaving 10 acres for recreational purposes. The area was zoned for single family units on 8000-square-foot lots. 10 Pa. Comm. Ct. at 143, 309 A.2d at 452.
174. Id. (emphasis added).
Miller v. Beaver Falls,\textsuperscript{175} a 1951 decision. In that case, the court faced a challenge to the constitutional validity of the ancestor to the present official map legislation set forth in the Municipalities Planning Code.\textsuperscript{176} That former legislation allowed the reservation for future eminent domain taking of certain lands located within a municipality,\textsuperscript{177} and the question was whether the act of reserving the land constituted a taking as of the time of the reservation. In a decision which is apparently unique in the field,\textsuperscript{178} the court applied standard principles to a reservation of land for future taking to be used for recreational purposes:

> It has long been well settled that the mere plotting of a street upon a city plan without anything more does not constitute a taking of land in a constitutional sense so as to give an abutting owner the right to have damages assessed. The doctrine is said to be founded upon equitable considerations and wise public policy. . . .

Shall this principle relating to streets, which are narrow, well defined and absolutely necessary, be extended to parks and playgrounds which may be very large and very desirable but not necessary?\textsuperscript{179}

Declaring the legislation unconstitutional, the court concluded that "[t]he law with respect to streets is too firmly established in Pennsylvania to be changed, but that is no reason or justification for extending it."\textsuperscript{180} Thus, there was manifested a discontent with even a reservation requirement, pursuant to the official map provisions, as to streets. Discontent with a dedication for parks would seem necessarily to follow if required by a subdivision exaction ordinance.

Such has been the case in the few lower court decisions which have arisen in the subdivision exaction area. For example, in one decision, the court reversed the municipality’s refusal to approve a subdivision plan for its failure to dedicate a sewer easement, and noted that such an easement could have been acquired only through condemnation.\textsuperscript{181} Another court refused to allow the conditioning of approval of a subdivision plan upon public street dedication, asserting:

> Neither the Executive nor the Legislature, nor any legislative body, nor any zoning or planning commission, nor any other Governmental body has the right — under the guise of the police power, or under the broad power of general welfare, or under the power of

\begin{itemize}
  \item \textsuperscript{175} 368 Pa. 189, 82 A.2d 34 (1951).
  \item \textsuperscript{177} Id. For a brief discussion of the present official map provisions, see note 169 supra.
  \item \textsuperscript{178} Johnston, supra note 7, draws this conclusion in his brief treatment of Miller, and concludes that "[n]evertheless, so long as the period of reservation is not unreasonably long and the owner is not denied all beneficial use of his property, this type of statute could be upheld by analogy to street-mapping or interim-zoning ordinances." Id. at 906.
  \item \textsuperscript{179} 368 Pa. at 193, 82 A.2d at 36 (emphasis supplied by the court) (citations omitted).
  \item \textsuperscript{180} Id. at 194–95, 82 A.2d at 37.
  \item \textsuperscript{181} Lukens v. Upper Moreland Twp., 82 Pa. D&C. 308 (Montg. County Pa. C.P. 1952).\
\end{itemize}
Commander-in-Chief of the Armed Forces, or under any other express or implied power — to take, possess or confiscate private property for public use.

It is clear that the township may not in effect compel a property owner to dedicate formally his land for public use without compensation.182

B. The Need for Reevaluation in Pennsylvania

After noting the constitutional developments surrounding the validation of subdivision exactions through the mid-1960’s, one commentator opined that “courts in other jurisdictions will be forced to examine or reexamine their own precedents in light of these decisions.”183 Pennsylvania, for all practical purposes, stands in the anomalous position of having no real appellate precedent to analyze. Given the well-known financial plight which both the state and its local units continue to endure, it would seem to require strong justification for the Commonwealth to ignore a potential source of funds. The most compelling argument against a dedication for purposes which might benefit the community as well as the subdivision is the assertion that subdivision residents would be assuming an unfair share of the financial burden; or, at least, that it would be impossible to calculate the fair share they should assume.

But there are persuasive opposing arguments. First, the initial justification behind the subdivision exaction is the correction of an imbalance. Were it not for the imposition of some such equalization device, newcomers would benefit from schools and parks for which they took no initial financial responsibility, while being required only to share through general taxation the cost of expanding the facilities which their presence rendered inadequate.184 Second, as one commentator argued, it may be possible for the jurisdiction whose constitutional sensibilities require such exactness to employ modern cost accounting techniques to relate need and exaction precisely.185 This is extremely important because it lends new dimensions


183. Johnston, supra note 7, at 922.

184. Of course, this contention ignores the fact that the property being subdivided was previously subject to the property tax and therefore contributed to the financing of existing school and recreational construction. However, the previous condition of such land was unimproved; the assessed value was less and, consequently, so was the property tax. Thus, the previous contribution of the now-subdivided land was small relative to the contribution in the form of property taxes from the existing residential property.

185. Heyman & Gilhoole, supra note 5, argue that modern cost accounting techniques are available to relate cost to exaction in order to avoid questions of discrimination and taking. They assert that this could be accomplished by a system exacting only for the amount needed to develop the subdivision, with the proportion of responsibility which...
to the *Jordan* "rational nexus" test. If the state were fearful that the subdivision exaction would create a worse imbalance, it need only construct judicially, on a case-by-case basis, an acceptable standard of proof. The opportunity for flexibility exists, especially in Pennsylvania, and there have been no arguments to the effect that data which could form the groundwork for a rational conclusion regarding the extent to which a subdivision should be responsible for remedying a particular community need cannot be compiled in specific cases. Even if this were not totally possible, until the United States Supreme Court rules upon the issue, the constitutional need for such precision does not exist. Of course, the state has the option to so require within the Commonwealth. In any event, the need to formulate some position on subdivision exactions, if only for clarification, is a real one. The most important facet of the legal theory in this area is its indefiniteness; the process of constitutionally regulating the imposition of exactions which inure to public as well as subdivision benefit can be conducted as the court sees fit. There is little excuse for inaction. It is submitted that the Pennsylvania appellate courts should, in lieu of legislative action, seize the first opportunity to relate this state's stance to the nation's developing position on these issues. Whether the goal is to promote or deter the exaction device, a position must be formulated.

V. Conclusion

It would seem appropriate to conclude by offering a reasoned judgment upon which of the varied approaches to the subdivision exaction problems seems the most fitting. Unfortunately, such pat judgments cannot be made in an area which depends to such a great degree upon the positing of policy formulations. The choice to be made with regard to constitutional methodology in this realm is not to be tied to a general principle which all would accept such as the evenhanded treatment of all those similarly situated. The fundamental question which must be confronted is the degree to which a newcomer into a community should be held responsible for failing to contribute at a time when he was not present to that which he will now make use of; likewise the amount of responsibility he should assume in the process of making amends for his former failure to contribute for that which he will use in the future. The *Pioneer Trust* and *Gulest* schemes are founded upon the presumption that the newcomer should in no way be faulted for his presence; the *Ayres* and especially the *Jordan* should be levied upon each family, according to such factors as their number of residents, etc. They also advocate the proportionate sharing of old and new debt service. *Id.* at 1141-46. Without elaboration, one commentator asserts that the technique might lead to "bureaucratic hegemony," in that without a massive data compilation network it could not, for example, separate true newcomers from longtime residents in the area who happen to be moving into the particular subdivision. See Feldman, *supra* note 23, at 659-60.

186. At no time does Feldman, *supra* note 23, contend that the data could not be compiled. His only objection is to the bureaucracy he contends would be involved. *Id.* at 660. There have been no other criticisms of this suggestion which have been developed to any extent, nor have there been any equally well-reasoned endorsements.
formats imply that the longtime resident should not bear the burden of the new arrival and, in fact, should, as a matter of fairness, reap some benefit. In addition, there exists the problem of the extent to which inexactness in calculating and assessing responsibility as between newcomer and longtime resident can be tolerated. These judgments are functions of individual value preferences; hence, no definitive answers are possible. Moreover, they are not judgments which can be made in isolation from other choices which must be made vis-a-vis local government, such as the burden of proof the municipality should be required to bear in its invocation of any police power regulation, and evaluating the legitimacy of the quality and character of the locale that the municipality desires to obtain. These are tasks for those arms of government whose responsibility it is to probe the individualities of their jurisdiction for indications of which revenue-producing tools would be most fair and effective. This is not an area for generalization.

This observation in itself, however, indicates a problem of far wider scope. The obvious question is why state and local government would so much as bother with the attempted application of a measure beset by such a boggle of policy and methodological difficulties. The obvious answer underlines the effects of desperation when applied to the need for funds. In short, if nothing else, the study of the subdivision exaction highlights the need for equitable alternatives.

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