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Exaction of Right-of-Way by Exercise of Police Power

A report prepared under ongoing NCHRP Project 20-6, "Legal Problems Arising Out of Highway Programs", for which the Transportation Research Board is the Agency conducting the Research. The report was prepared by John C. Vance. Robert W. Cunliffe, TRB Counsel for Legal Research, was principal investigator, serving under the Special Technical Activities Division of the Board at the time this report was prepared.

THE PROBLEM AND ITS SOLUTION

State highway departments and transportation agencies have a continuing need to keep abreast of operating practices and legal elements of special problems in highway law. This report deals with the legal issues related to exactions, i.e., the compulsory dedication of private property for a public use without payment of compensation. Illustrative test cases are described related to the exaction of highway right-of-way.

This paper will be included in a future addendum to a text entitled, "Selected Studies in Highway Law." Volumes 1 and 2, dealing primarily with the law of eminent domain, were published by the Transportation Research Board in 1976; and Volume 3, dealing with contracts, torts, environmental and other areas of highway law, was published in 1978. An addendum to "Selected Studies in Highway Law," consisting of five new papers and updates of existing papers, was issued during 1979, a second addendum, consisting of two new papers and 15 supplements, was distributed early in 1981, and a third addendum consisting of eight new papers, seven supplements,

and an expandable binder for Volume 4 was distributed in 1983. The text now totals more than 2,200 pages comprising 56 papers. Copies have been distributed to NCHRP sponsors, other offices of state and federal governments, and selected university and state law libraries. The officials receiving copies in each state are: the Attorney General, the Highway Department Chief Counsel, and the Right-of-Way Director. Beyond this initial distribution, the text is available through the TRB publications office at a cost of $90.00 per set.

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Exaction of Right-of-Way by Exercise of Police Power

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INTRODUCTION

> So great moreover is the regard of the law for private property that it will not authorize the least violation of it; no, not even for the general good of the whole community. . . . Besides, the public good is in nothing more essentially interested than in the protection of every individual's private rights. 1 BLACKSTONE, *Commentaries* 139.

> The protection of private property in the Fifth Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. A similar assumption is made in the decisions upon the Fourteenth Amendment. When this seemingly absolute protection is found to be qualified by the police power the natural tendency of human nature is to extend the qualification more and more until at last private property disappears. But that cannot be accomplished in this way under the Constitution of the United States. The general rule at least is that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. HOLMES, J., in *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 67 L.Ed. 322, 43 S. Ct. 158 (1922).

> We do not sit to determine whether a particular housing project is or is not desirable. The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled. DOUGLAS, J., in *Berman v. Parker*, 348 U.S. 26, 99 L.Ed. 27, 75 S. Ct. 98 (1954).

The differing views expressed in the foregoing quotations in respect to the same subject matter (e.g., limits of the police power) all come together and are brought into sharp focus in the cases dealing with the subject matter of this paper. Exactions, or the compulsory dedication of private property for a public use without payment of compensation, strain at the boundaries and test the limits of the police power concept. They walk the thin dividing line between police power regulation and compensable taking of property. Cases relating to exactions can fairly be characterized as consisting of tests devised by the courts to deal with the basically unresolvable problem of where police power ends and eminent domain begins. Because there never has been (and probably never will be) an ultimate criterion by which to distinguish clearly between regulation and taking, the tests (in corollary fashion) are lacking in standards that are precise, easy to apply, and productive of uniform results. The tests in fact are contradictory. And they are perhaps susceptible of the charge that they serve better to explain than to cause the result reached. By this is meant that those courts which favor a liberal interpretation of the police power terminology (i.e., public health, safety, morals, and general welfare) adopt a broad test to explain the result reached in sustaining a particular exaction requirement, while courts favoring a conservative interpretation of the police power language adopt a more narrow test to explain the result reached in striking down the same or a similar exaction requirement. Different perspectives as to the sanctity of private property and the role of the State as guardian of the public welfare are probably at the root of differences in judicial approach and result. This is no better evidenced than in the vigorous dissents that appear in so many of the leading cases in the field. Views touching on rights in property as opposed to obligations of the State to protect the public weal are often strongly held.

Reflecting divergent views, the cases dealing with exactions are not characterized by predictable results arrived at by the application of uniformly accepted standards. However, certain rules and tests, whether clear in definition and precise in application or not, have emerged from the cases, and will be the subject of study herein.

As indicated by its title the scope of this paper is directed to exactions for right-of-way rather than to exactions in general. And, fortunately, the case for the upholding of exactions for right-of-way is, in the ordinary situation, a good deal easier than is the case for sustaining certain other types of exactions, such as those for schools, playgrounds, parks, and recreational areas. However, exactions for right-of-way are part and parcel of the larger problem and cannot be understood, approached, or analyzed without reference to the overall question of the constitutionality of exactions in general. Hence, this paper will treat (in as summary a fashion as possibly consistent with clear understanding) cases dealing with a broad range of exactions, in addition to discussion of the cases dealing specifically with exactions for right-of-way.

Probably for the dual reasons that they constitute a relatively recent development in the law and present intriguing constitutional questions exactions have sparked the interest of scholars, with the result that there has been a spate of law review articles, comments and notes in respect thereto.[1] It is obvious from a reading of the cases that the courts have been influenced by the observations of the commentators and have on occasion adopted certain of their analyses. Because such legal writings have thus in a real sense become part of the development of the substantive law in the premises, references thereto will be made throughout the paper, in particular the writings most often cited and discussed by the courts in their opinions.

HISTORICAL BACKGROUND OF EXACTIONS

A phenomenon of American society following World War II was the largely unforeseen upsurge in movement of people from the nation's cities to the suburbs. The continued and relentless character of the migration was such as quite literally to change the face of the nation. Although it posed grave problems for the cities (such as shrinkage of tax base), it also presented enormous problems for small suburban communities whose governmental structure was not designed or equipped to provide for a sudden and abundant increase in population. The governing officials of small suburban towns and villages were suddenly confronted

with the problem of providing such new facilities and supportive services as were required to meet the needs of a rapidly expanding population. Specifically, they were faced with the prospect of being forced to find monies for capital expenditures to finance such costly improvements as streets, sewers, water systems, schools, parks, recreational areas, fire and police stations, etc. Ways and means were consequently avidly sought by municipal authorities to find new sources of revenues to meet such capital outlays. And sentiment grew rapidly and strongly among the long-time residents of such communities to find a means to make the newcomers "pay their way" rather than to suffer gladly the pyramiding of municipal costs on their backs in the form of across-the-board increases in taxation.

A device was soon found that was neither new nor as yet widely used that gave promise of going a long way toward meeting the needs of local government and satisfying the probably legitimate demands of the old line residents of the affected communities. This device was subdivision control. It presented the twin advantages of being an established mechanism by means of which part of the burden of installing public improvements could be shifted to subdividers, and it coincided with the fact that the era of the developer had arrived and that the greater part of new residential home construction was being conducted on subdivision lands.

The theory of subdivision control, quite simply, was that as a condition of subdivision map or plat approval by local authorities and the recordation thereof, the developer or subdivider was required to dedicate a certain amount of his land, or render in lieu thereof an equivalence in monies, for such public use as was designated by the subdivision control regulations promulgated by the municipal planning board or commission. Such uses might include streets, storm and sanitary sewers, water mains, curbs, gutters, drainage systems, school sites, playgrounds, parks and recreational areas, depending on the scope of the regulations and the terms of the enabling act empowering the issuance of the regulations by the local planning board.

Historically, the conveyance of land by reference to lot number on a recorded subdivision map or plat rather than by metes and bounds description had its origin in a desire to improve the accuracy and ease of conveyancing. No burden was placed on the subdivider in the beginning to make improvements of any kind on the subdivided land. However, accumulated experience over the years came to indicate that some sort of control over the subdivider was desirable in order to avoid chaotic development in which certain sections of a municipality occupied by unimproved subdivisions would be left without streets, sewage, or water facilities and the municipality would be forced to come to the rescue of the residents of the disordered areas and install the necessary facilities.[2]

In 1928 the United States Department of Commerce took a long step forward in promoting subdivision control by promulgating what was known and designated as the "Standard City Planning Enabling Act." As the name suggests this was model legislation designed for passage at the state level to enable (by delegation of appropriate authority) a specified measure of control to be exercised by local governments and their planning units over the activities of subdividers. This Act eventually served as the prototype for the passage of enabling acts in the various states throughout the country. Today all 50 states have some form of enabling legislation authorizing local governments and planning authorities to impose subdivision controls.[3]

Section 14 of the Standard Planning Act authorizes local government and planning bodies to promulgate subdivision regulations providing for:

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

By terms of the Act the developer must comply with the regulations promulgated under Sec. 14, and secure approval of the subdivision plat by the appropriate local planning authority before recordation thereof. Jurisdiction is conferred on the local planning body by the act of subdividing rather than by the submission of the plat for approval and recordation, and any attempt to sell land by reference to an unrecorded plat is made subject both to criminal sanction and the injunctive process to prevent transfer of title.

Although enabling acts differ from state to state and the regulations of local planning bodies vary from jurisdiction to jurisdiction, it is quite customary for the regulations to provide that as a condition precedent to plat approval and recordation that the subdivider be required to dedicate land or in lieu money for such uses as streets, sanitary and storm sewers, water lines, drainage facilities, schools, playgrounds, parks and recreational areas.[4] It is with uses such as these that the cases are in the main concerned.[5]

Although enabling acts and subdivision control regulations promulgated thereunder were favorably received by municipal officials and planners, the same were vigorously contested by numerous developers, for the reason that although ideally the costs of dedication or in lieu monies could be passed on to the purchasers of subdivision lots, the legal authority to impose such exactions was deemed to pose a threat to the profitability of subdivision enterprises. Moreover, it is doubtless the case that many developers who sought relief in the courts were genuinely persuaded that such exactions were unconstitutional as a disguised but prohibited taking of private property for a public use without payment of just compensation. This argument was, of course, the chief line of attack employed in attempting to unseat subdivision controls in the courts. That it met with only limited success attests to the flexibility of the police power doctrine and the practical wisdom of the courts in having consistently over the years refused to define and delimit the boundaries of the police power.

THE POLICE POWER RATIONALE

Before proceeding to a discussion of the police power rationale and the applicability thereof to the problem of the constitutionality of exactions, it may be noted that the theory that an exaction constitutes a form of taxation has been seriously put forward. However, such reasoning is generally dismissed on the ground that, treated as such, exactions would be unauthorized by the usual enabling legislation, and in addition would violate the principle that *ad valorem* property taxes must be uniform and nondiscriminatory.[6]

It may be stated unqualifiedly that the vast majority of the cases relating to exactions treat of the exercise of police power. The constitutionality of regulations promulgated under the police power traditionally involves the questions whether (a) the specific regulation furthered permissible goals within the scope of the police power, and (b) the specific regulation was reasonable. Exactions rather clearly fall within (a) and the question is hence usually whether they satisfy (b).

It is axiomatic that the police power of the States was unaffected by the delegation of powers to the Federal Government in the United States Constitution and amendments thereto,[7] and restraints on the exercise of such inherent power are found in the application by the judiciary of the fourfold tests whether or not the governmental activity challenged in the courts resulted in (a) arbitrariness; (b) confiscation; (c) discrimination; or (d) a taking.[8] An affirmative finding as to any one of the four tests will doom the activity as a legitimate exercise of the police power.

The question now presents itself as to what tests exist within the framework of the foregoing rubrics by the application of which the constitutionality of exactions for right-of-way may be determined, the rules laid down in the earlier cases being the first for consideration.

Validity of Exactions for Right-of-Way

There is observable in the early cases dealing with the constitutional validity of exactions for right-of-way a progression of theories on which the validity of such exactions is based. These proceed from concepts of (a) "privilege" to (b) "voluntariness" to (c) "reasonableness" of the exercise of police power.[9] The first two (which are, of course, outside the police power concept) are seldom employed today in justification of exactions but the reasoning on which they are premised has not been repudiated.

Privilege Theory

Any discussion of cases dealing with the "privilege" theory must begin with the early case of *Ross v. Goodfellow*, 7 App. D.C. 1 (Ct. App. 1895). In this case the Court had before it the interpretation of an Act of Congress empowering the Commissioners of the District of Columbia to regulate the platting and subdivision of land in the District. The dispute arose over a requirement of the Commissioners that as a condition of approval of a plat of a proposed subdivision that three acres of land in the subdivision be dedicated for an extension of Delaware Avenue located in the City of Washington. Recordation of the plat was refused by the Commissioners when the subdividers declined to make the required dedication. A proceeding in mandamus was then brought by the developers to compel recordation of the subdivision map.

In sustaining the requirement of exaction by the Commissioners, the Court posited its holding on the theory that recordation of the plat was a privilege not a right and could be conditioned on reasonable regulations made by the Commissioners. It said:

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

Voluntariness Theory

Exaction for right-of-way has also been justified on the ground that the activity of the developer in subdividing his land was a "voluntary" undertaking on his part reflecting no compulsion on the part of the government. Thus, in *Ridgefield Land Co. v. City of Detroit*, 241 Mich. 468, 217 N.W. 58 (1928), the Supreme Court of Michigan in sustaining a municipal requirement that as a condition of subdivision plat approval streets in the proposed subdivision conform to the width of city streets, said:

> Here the city is not trying to compel a dedication. It cannot compel the plaintiff to subdivide its property or to dedicate any part of it for streets. It can, however, impose any reasonable condition which must be complied with before the subdivision is accepted for record. In theory at least, the owner of a subdivision *voluntarily* dedicates sufficient land for streets in return for ... having his plat recorded. (Emphasis added.)

Reasonableness of Exercise of Police Power

Following the decision in *Ridgefield, supra*, the courts veered away from use of the "privilege" or "voluntariness" theories to justify exactions for right-of-way and began to test the constitutionality of such exactions against whether the required dedication reflected a "reasonable" exercise of police power. The case spearheading this movement was *Ayres v. City Council of City of Los Angeles*, 34 Cal. 2d 31, 207 P.2d 1 (1949).

Plaintiff subdivider in this case brought a proceeding in mandamus to compel the City Council of Los Angeles to approve for recordation a

map of his subdivision without conforming to certain requirements imposed as a condition of approval by the Council. These conditions included the dedication of a strip of land 10 ft in width running along one of the borders of the subdivision for the purpose of widening a coterminous abutting public road, and the dedication of a right-of-way 80 ft in width (rather than 50 ft as proposed by the plaintiff) within the subdivision to connect with and serve as an extension of an 80-ft public road located outside the subdivision. In ruling against the plaintiff the Supreme Court of California bottomed its holding on the finding that the conditions imposed by the City Council bore a "reasonable relationship" to traffic needs created by the subdivision and hence constituted a "reasonable" exercise of the City's delegated police power.

The Court specifically rejected plaintiff's contention that the exactions were unlawful insofar as (a) they would serve to benefit the entire city rather than the subdivision alone, and (b) looked to future as well as present traffic needs. It stated:

> Questions of reasonableness and necessity depend on matters of fact. They are not abstract ideas or theories. In a growing metropolitan area each additional subdivision adds to the traffic burden. It is no defense to the conditions imposed ... that their fulfillment will incidentally also benefit the city as a whole. Nor is it a valid objection to say that the conditions contemplate future as well as more immediate needs. Potential as well as present population factors affecting the subdivision and the neighborhood generally are appropriate for consideration.

In response to plaintiff's charge that the exactions constituted an unlawful taking of private property for public use without payment of just compensation the Court stated:

> A sufficient answer is that the proceeding here involved is not one in eminent domain nor is the city seeking to exercise that power. It is the petitioner who is seeking to acquire the advantages of lot subdivision and upon him rests the duty of compliance with reasonable conditions for design, dedication, improvement and restrictive use of the land so as to conform to the safety and general welfare of the lot owners in the subdivision and of the public.

The test laid down in *Ayres* and other early cases dealing with exactions for right-of-way was the traditional police power test requiring a showing (a) that the exaction served the police power goals of promoting public health, safety, and the general welfare, and (b) that the particular exaction was *reasonably* designed to serve the needs and promote the interests of both the inhabitants of the subdivision and the community at large. See applying such tests to exactions for right-of-way: *Brous v. Smith,* 304 N.Y. 164, 106 N.E.2d 503 (1952); *Mansfield & Swett v. Town of West Orange,* 120 N.J.L. 145, 198 A. 225 (1938).

Although the standard tests in respect to exercise of the police power were deemed sufficient as relating to dedication of land for right-or-way, such tests came to be viewed as inadequate when applied to other types of exactions, such as those for educational and recreational purposes. The basic reason for dissatisfaction was that in dealing with the latter kinds of exactions problems more difficult of resolution were presented than had appeared in the cases relating to exaction of land for streets. For example, in dealing with an exaction requirement that monies equal to the value of a specified percentage of the land area in the subdivision be placed in a special fund for the acquisition of school sites, playgrounds, parks and recreational areas, the following questions are immediately presented: (a) Is the requirement of payment of equalization fees in lieu of dedication of land a legitimate exercise of the police power? (b) Can the amount of such fees properly be determined by application of a flat percentage rate? (c) Is the earmarking of monies in a special fund for the acquisition of off-site lands for school, playground, park and recreational areas a proper function of the police power?

These are difficult questions, and the courts turned to more specific and narrow tests to aid in the resolution thereof than were offered by the semantics of the time-honored police power concepts. These tests evolved in a series of cases that are next for consideration herein. They are important to this paper because the rules laid down therein have come to be applied to all manner of exactions, including exactions for right-of-way. That is to say, the later cases involving exactions for right-of-way are frequently made to depend and turn on the rules that evolved in the cases pertaining to exactions for educational and recreational purposes. The history of the development of the rules in such cases follows.

Tests Governing Validity of Exactions for Educational and Recreational Purposes

The tests that evolved in the cases relating to exactions for educational and recreational purposes were furnished with labels by the commentators writing in respect thereto. Their terminology (leaning to the epigrammatic) was accepted by the judiciary, and the nomenclature for the tests as developed and applied by the commentators and concurred in by the courts, is as follows:

1. "Direct Benefit" Test.
2. "Specifically and Uniquely Attributable" Test.
3. "Rational Nexus" Test.

Discussion of the tests, as above designated, follows.

"Direct Benefit" Test

It appears to be agreed among the commentators that the case of *Gulest Associates, Inc. v. Town of Newburgh,* 25 Misc. 2d 1004, 209 N.Y.S.2d 729 (1960), *aff'd* 15 App. Div. 815, 225 N.Y.S.2d 538 (1962), stands for the proposition that in order for a subdivision control exaction to constitute a permissible exercise of the police power a showing must be made that the exaction confers a "direct benefit" on the subdivision and the inhabitants thereof.[10]

Plaintiff in the *Gulest* case was the owner of 25 acres of land in the Town of Newburgh, New York, which it proposed to divide into 46 lots.

A subdivision map showing the plottage was prepared and approval of the map was granted by the defendant, Town Planning Board, conditioned on the payment by plaintiff to the Town of Newburgh of the sum of $50.00 for each lot shown on the map, which monies were to be used for park, playground or recreational purposes in the Town of Newburgh. Such exaction was authorized by municipal ordinance and by regulations promulgated by the Planning Board requiring dedication for the purposes aforesaid of no more than 10 percent and not less than 3 percent of the gross area of a subdivision, or in lieu thereof payment of the sum of $50.00 for each lot located therein, as a condition precedent to approval and recordation of the subdivision map. Plaintiff refused to pay such sums and brought action for declaratory judgment and injunctive relief. In sustaining plaintiff's position and holding the Town ordinance and Planning Board's regulations unconstitutional the Court emphasized that the exaction was "not necessarily, if at all, for the benefit of the future residents of the area covered by the plat." It stressed that the charge of $50.00 per lot was "made for the benefit of the town as a whole," pointing out that it could be "used in any section of the town at any time and for any . . . recreational purpose." Thus the Court ruled that the grant of authority to expend the equalization fee monies without regard to the provision of any direct benefit to the inhabitants of the subdivision was a fatal defect rendering the exaction an unlawful exercise of the police power.

The rule announced in *Gulest* is clear, simple, and provides relative ease of application. The commentators, Reps and Smith, deem it to be the most satisfactory and constitutionally sound of all the tests that have been announced by the courts to determine the validity of subdivision control exactions.[11]

However, *Gulest* does not appear to have had persuasive influence on cases subsequently decided.[12] This is doubtless for the reason that the great majority of the courts confronted with the problem of the constitutionality of subdivision control exactions have been unwilling to go so far as to impose on the municipality or planning board issuing the regulations the burden of establishing a "direct benefit" to the subdivision and the inhabitants thereof. Such burden would probably result in prohibiting the use of exactions in any situation where the benefit to the subdivision was conjectural, problematical, or insusceptible of clear proof. The majority of the courts have not been persuaded that in order to meet constitutional challenges to exactions (e.g., of arbitrariness, discrimination, confiscation, or taking) that use of the exaction mechanism be so limited. Additionally, it has been felt that imposition of the burden of establishing "direct benefit" would serve to undercut the presumption of the constitutionality of legislation authorizing exactions.

Nonetheless, numerous courts appear to have been convinced that the test to determine the constitutionality of exactions must be tied in some manner to the activity of the subdivider in creating the need for the exaction. And such persuasion has led to the wide adoption of the rule announced by the Supreme Court of Illinois in *Pioneer Trust and Savings Bank v. Village of Mount Prospect,* 22 Ill.2d 375, 176 N.E.2d 799 (1961), that a developer may be required to assume those costs which are "specifically and uniquely attributable to his activity" and which otherwise would be cast upon the public.

"Specifically and Uniquely Attributable" Test

The facts in the *Pioneer Trust* case were as follows. The Village of Mount Prospect enacted an ordinance requiring as a condition of subdivision map approval that subdivision land be dedicated for enumerated public uses at the rate of 1 acre per 60 residential units. Plaintiff subdivider submitted for approval a map showing 250 residential units, but at the same time refused to dedicate 6.7 acres of land required for primary use as an elementary school site and for secondary use as a playground. The Village refused to approve the plat and plaintiff instituted a proceeding in mandamus to compel approval of the map without dedication of any land for school or playground purposes. In upholding plaintiff's position the Supreme Court of Illinois announced the rule as follows:

> If the requirement is within the statutory grant of power to the municipality and if the burden cast upon the subdivider is *specifically and uniquely attributable* to his activity, then the requirement is permissible; if not, it is forbidden and amounts to a confiscation of private property in contravention of the constitutional prohibitions rather than reasonable regulation under the police power. (Emphasis added.)

The Court went on to state that the "record does not establish that the need for recreational and educational facilities . . . is one that is specifically and uniquely attributable to the . . . subdivision and which should be cast upon the subdivider as his sole financial burden. . . . [T]o so construe the statute would amount to an exercise of the power of eminent domain without compensation." The Court supported this conclusion by stating that overcrowding of the schools was the result of total community development, and underscored that the elementary school facilities of the Village were at near capacity before application was ever made for the approval of the new subdivision.

The nub of the holding in *Pioneer Trust* is that the constitutionality of an exaction is dependent on the establishment of a firm link between the activity of the subdivider and the burden cast on the subdivision. Put another way, a direct relationship must be shown between the creation of the subdivision and the particular public use for which dedication of subdivision land is required. This, in terms of proof, is something less than the requirement that "direct benefit" to the subdivision be shown.

The test announced in *Pioneer Trust* has been adopted and applied in numerous other cases. In *Billings Properties, Inc. v. Yellowstone County,* 144 Mont. 25, 394 P.2d 182 (1964), the enabling statute and regulations promulgated thereunder called for the dedication of specified percentages of total land area in subdivisions for public use as park and playground areas, such requirement of dedication being a condition precedent to subdivision map approval. Plaintiff subdivider attacked the

constitutionality of such exaction on the ground that it constituted a prohibited taking of private property for public use without payment of just compensation under guise of police power regulation.

Plaintiff conceded that if the exaction had been for street right-of-way within the subdivision that it would have been a valid exercise of the police power, but insisted that an exaction for park and playground purposes was on a different footing from an exaction for right-of-way and that the latter was prohibited by provisions of the Federal and State Constitutions. The Supreme Court of Montana refused to accede to the contention that exactions for park and playground purposes were distinguishable from exactions for right-of-way, and invoked the "specifically and uniquely attributable" test of *Pioneer Trust* to hold that the exaction for park and playground purposes constituted a valid exercise of the police power.

The same test was applied in *Aunt Hack Ridge Estates, Inc. v. Planning Commission of the City of Danbury,* 160 Conn. 109, 273 A.2d 880 (1970), to sustain a regulation of the Danbury Planning Commission, requiring as a condition of subdivision map approval that no more than 4 percent and no less than 10,000 sq ft of the total subdivision land area be dedicated to the City of Danbury for park and playground purposes. Plaintiff subdivider challenged the validity of such regulation on the ground, *inter alia,* that it constituted an unlawful taking of private property without payment of just compensation. In upholding the validity of the regulation the Supreme Court of Connecticut stated:

> The test which has been generally applied in determining whether a requirement that a developer set aside land for parks and playgrounds as a prerequisite to the approval of a subdivision plan is whether the burden cast upon the subdivider is *specifically and uniquely attributable* to his own activity. (Emphasis added.)

Applying this test to the facts of the instant case the Court concluded that it was "clear that the requirement which is cast upon the plaintiff by the regulation and statute with which we are concerned is uniquely and solely attributable to its activity in undertaking to establish a subdivision. . . . When it undertakes to subdivide, the population of the area is necessarily increased and the need for open space for its people becomes a public one."

Although the "specifically and uniquely attributable" doctrine of *Pioneer Trust* has been favorably received in a number of jurisdictions, in others it has been the subject of the same criticism that was directed at the *Gulest* test, i.e., that it imposes an unjustifiably heavy burden of proof on the municipality or local planning authority seeking to uphold the validity of a challenged exaction. The burden under the *Gulest* test was to establish that the exaction conferred a *direct benefit* on the subdivision, and the burden under the *Pioneer Trust* test is to show an *unassailable link* between the subdivision and the need for the exaction. It has been argued that an unnecessarily difficult problem of proof is involved in establishing that a *particular* subdivision generated the need for an exaction that would clearly be of benefit to the total community.

Such argument found expression in the leading case of *Jordan v. Village of Menomonee Falls,* 28 Wis.2d 608, 137 N.W.2d 442 (1966), and gave rise to a modification of the *Pioneer Trust* rule that has since found wide acceptance in the cases. Such modification has come to be known and denominated by commentators[13] and courts[14] alike as the "rational nexus" test. The effect of this test is to ease the burden of proof by requiring only that a "rational nexus" (sometimes specified as "reasonable connection" or "reasonable relationship") be shown between the subdivision and the exaction in order to establish a lawful and proper exercise of the police power.

"Rational Nexus" Test

The facts in *Jordan* leading to the establishment of this test were as follows. The Village of Menomonee Falls, pursuant to authorization by enabling statute of the State of Wisconsin, enacted an ordinance providing for the dedication of subdivision land, or payment of equalization fees in lieu thereof, for school, park and recreational purposes. Plaintiff subdividers challenged the constitutionality of such ordinance on the ground that it constituted a prohibited taking of private property for public use without payment of just compensation. In upholding the constitutionality of the ordinance, the Supreme Court of Wisconsin quoted the language employed by the Supreme Court of Illinois in announcing, in *Pioneer Trust,* the "specifically and uniquely attributable" rule, and then had the following to say in respect thereto:

> We deem this to be an acceptable statement of the yardstick to be applied, provided the words "specifically and uniquely attributable to his 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 a school site was to meet a need solely attributable to the anticipated influx of people into the community to occupy this particular subdivision. On the other hand, the municipality might 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. . . .
>
> We conclude that a required dedication of land for school, park or recreational sites as a condition for approval of the subdivision plat should be upheld as a valid exercise of police power if the evidence *reasonably* establishes that the municipality will be required to provide more land for schools, parks and playgrounds as a result of approval of the subdivision.
>
> We deem that the evidence in this case does establish such *reasonable connection.* (Emphasis added.)

The modification of the *Pioneer Trust* rule enunciated in *Jordan* has

received wide acceptance and approval in the cases. For example, it was specifically endorsed by the New York Court of Appeals in *Jenad, Inc. v. Village of Scarsdale*, 18 N.Y.2d 78, 271 N.Y.S.2d 955, 218 N.E. 2d 673 (1966), wherein a municipal subdivision control exaction, described by the Court as being "identical with the one" in *Jordan*, was upheld. Characterizing the *Jordan* opinion as being "careful and convincing" the New York Court adopted the language of the Wisconsin Court to the effect that "it was not necessary to prove that the land required to be dedicated for a park or school site was to meet a need *solely attributable* to the influx into the community of people who would occupy this particular subdivision," and concurred in the conclusion expressed in *Jordan* that "the subdivision plat should be upheld as a valid exercise of the police power if the evidence *reasonably* establishes that the municipality will be required to provide more land for schools, parks, and playgrounds as a result of approval of the subdivision." (Emphasis added.)

In *Associated Home Builders v. City of Walnut Creek*, 4 Cal.3d 633, 94 Cal. Rptr. 630, 484 P.2d 606 (1971), the argument of plaintiff subdivider challenging the constitutionality of an exaction for park and recreational purposes was so framed as to compel the Supreme Court of California to choose between the *Pioneer Trust* "specifically and uniquely attributable" test and the *Jordan* "rational nexus" test in making determination of the validity of the exaction. Plaintiff contended that "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" [*Pioneer Trust* doctrine] and that the validity of the exaction *sub judice* could not "be upheld upon the theory that all subdivisions to be built in the future will create the need for such facilities" [*Jordan* doctrine].

Confronted with the compulsion to choose contained in this argument the Court, in upholding the validity of the exaction, criticized the holding in *Pioneer Trust* (see note 13 to the opinion) and endorsed the "rational nexus" dogma espoused in *Jordan*, stating the requirement of the enabling legislation that the amount of land dedicated or in lieu fees paid bear a "reasonable relationship" to the use of the park and recreational facilities by the inhabitants of the subdivision supplied the necessary "nexus" (484 P.2d at p. 612). In support of its adherence to the more liberal view the Court went out of its way to deplore the "melancholy aspect" of population increase in eliminating open space and suggested that legislation calling for park and recreational facilities should be supported wherever possible.

Finally, it is to be noted that an interesting compromise between the dogma of *Pioneer Trust* and that of *Jordan* has been advanced by the Supreme Court of Missouri in *Home Builders Association of Greater Kansas City v. City of Kansas City*, 555 S.W.2d 832 (Mo. 1977). The Court in this case had before it the question of the constitutionality of an ordinance of the City of Kansas City calling for the dedication of land by subdividers, or payment of monies in lieu thereof, for use in the provision of park and recreational facilities within the City limits. After reviewing applicable case law the Court came to the conclusion that "the *Pioneer Trust* rule . . . is too restrictive and should be modified." In effecting such modification the Missouri Court followed the language employed by the Illinois Court in enunciating the rule in *Pioneer Trust* so closely as to replicate verbatim the entire statement thereof with the exception of omitting the words "specifically and uniquely" and substituting in lieu thereof the word "reasonably." The statement of the *Pioneer Trust* rule as modified in *Home Builders Association* thus reads as follows:

> If the requirement is within the statutory grant of power to the municipality and if the burden cast upon the subdivider is *reasonably* attributable to his activity, then the requirement is permissible; if not, it is forbidden and amounts to a confiscation of property in contravention of the constitutional prohibitions rather than reasonable regulation under the police power. (Emphasis supplied by the Court.)[15]

It is readily apparent from a reading of the modified rule that the Missouri Court was of the opinion that the *Pioneer Trust* test could be made workable and feasible by the simple expedient of striking therefrom the language requiring a showing of umbilical connection between the subdivision and the exaction, and substituting in lieu thereof the more latitudinous concept espoused in *Jordan* that there need only be shown a rational nexus (reasonable connection) between the exaction and impact on the community of the influx of new residents.

Application of Tests to Exactions for Right-of-Way

As before stated the rules applied in the cases relating to exactions for educational and recreational purposes have since been picked up and applied by the courts to cases involving determination of the validity of exactions for right-of-way.

Thus, in *People ex rel. Exchange National Bank of Chicago v. City of Lake Forest*, 40 Ill.2d 281, 239 N.E.2d 819 (1968), the "specifically and uniquely attributable" rule of *Pioneer Trust* was invoked to strike down a required dedication of land for right-of-way. Plaintiff in this case was the owner of a 25 acre parcel of land suitable for development as a two-lot tract. A plat showing division of the land into two lots was filed with defendant City of Lake Forest with request for approval. The corporate authorities of defendant refused to approve the plat without a dedication of two strips of land, 33 and 66 ft in width, respectively, along the borders of the proposed subdivision for use as public streets. The Court found that each of the two lots proposed in the subdivision plat had access to a public road and that the dedication of land for additional public ways would benefit only landlocked lots situated in an adjoining subdivision. The Court concluded therefrom that the requirement of dedication demanded by the City constituted an unreasonable and improper exercise of the police power. Citing *Pioneer Trust* it stated:

> We deem . . . that the City's action in refusing to approve the plaintiff's

plat of resubdivision because he did not agree to dedicate land for new public roadways exceeded the bounds of permissible and reasonable regulation and would have constituted a taking of private property for public use without compensation. If the City considers that new streets are necessary at the locations sought herein to serve the community at large or an adjacent subdivision, the City can seek to acquire the needed land by other means, such as by purchase or condemnation.

Holding that the requirement of the Plan Commission of the City of Toledo that as a condition of plat approval plaintiff subdivider dedicate for right-of-way purpose a tract of land located more than 700 ft distant from the site of the proposed subdivision was an unreasonable exercise of the police power, the Court in *McKain v. Toledo City Plan Commission,* 26 Ohio App.2d 171, 270 N.E.2d 370 (1971), citing *Pioneer Trust,* stated:

> A municipality may require in subdivision regulations that a developer provide streets that are necessitated by the activity within the subdivision and such developer may be required to assume any costs which are *specifically and uniquely attributed to his activities* and which would otherwise be cast upon the public, but this does not authorize a municipality to require a developer to dedicate a strip of land to the municipality without payment in order to widen a main thoroughfare 700 feet distant from and totally unrelated to the proposed subdivision. If the subdivision requirement is within the statutory grant of power to the municipality and if the burden cast upon the subdivider is *specifically and uniquely attributable* to his activity, then, the requirement is permissible; if not, it is forbidden and amounts to a confiscation of private property in contravention of constitutional prohibitions, rather than a reasonable regulation under the police power. (Emphasis added.)

The "rational nexus" test was employed in *Arrowhead Development Company v. Livingston County Road Commission,* 92 Mich. App. 31, 283 N.W.2d 865 (1979), to uphold a requirement of a county road commission that a subdivider regrade part of a public road located outside of the subdivision. The Court stated the question for decision in the language as follows: "May a county road commission require the developer of a subdivision to make improvements on a county road which is outside of the subdivision as a condition of plat approval where the improvements are necessary to alleviate a hazardous condition created solely by the subdivision development?"

Answering the question so posed in the affirmative the Court stated:

> In our opinion, an analysis which focuses on the rational nexus between the needs of the subdivision and the proposed outside improvement provides an appropriate tool for determining the propriety of off-plat exactions by road commissions. Because the impact of subdivision developments will vary from community to community, each case must be tested on its own facts to determine whether a road commission is reasonable in exacting improvements outside the proposed subdivision. Nevertheless, we find that the rational nexus analysis provides a flexible device for the resolution of disputes which are, necessarily, fact-dependent. We therefore expressly adopt the rational nexus test for determining the constitutionality of off-site improvements as a condition for plat approval. . . .
>
> We find that the evidence adduced here clearly establishes a rational nexus between the creation of Arrowhead Subdivision and the hazardous traffic condition. . . . In view of this relationship, the road commission's exaction, that plaintiff regrade a hill on a county road, is a legitimate exercise of the state's police power which furthers the public health, safety and welfare.

And in *Longridge Builders, Inc. v. Planning Board of the Township of Princeton,* 52 N.J. 348, 245 A.2d 336 (1968), where the same question was before the Court, i.e., whether as a condition of plat approval a subdivider could be required to make improvements to an off-site public road, the court invoked the rational nexus test to arrive at a resolution of the question, stating:

> It is clear to us that, assuming off-site improvements could be required of a subdivider, the subdivider could be compelled only to bear that portion of the cost which bears a rational nexus to the needs created by, and benefits conferred upon, the subdivision. It would be impermissible to saddle the developer with the full cost where other property owners receive a special benefit from the improvement.

It will not serve a useful purpose to multiply at this point cases dealing with the application of the tests to differing fact situations. As pointed out in *Arrowhead Development, supra,* each case is "fact-dependent" and "each case must be tested on its own facts." A slight variation in the fact situation can and will produce different results. The important matter is an understanding of the rules employed by the courts in making determination of the validity of exactions. The constitutionality of a particular exaction can then be assessed by the application thereto of the governing precepts. In lieu of case by case illustration the reader is here referenced to the following compendium of significant cases (not hereinbefore mentioned) that highlight the application of the salient rules to differing fact situations: *Schwing v. City of Baton Rouge,* 249 So.2d 304 (La. App. 1971); *State ex rel. Noland v. St. Louis County,* 478 S.W.2d 363 (Mo. 1972); *R. G. Dunbar, Inc. v. Toledo Plan Commission,* 52 Ohio App.2d 45, 367 N.E.2d 1193 (1976); *Land/Vest Properties, Inc. v. Town of Plainfield,* 117 N.H. 817, 379 A.2d 200 (1977); *Brazer v. Borough of Mountainside,* 55 N.J. 456, 262 A.2d 857 (1970); *181 Incorporated v. Salem County Planning Board,* 133 N.J. Super. 350, 336 A.2d 501 (1975); *Simpson v. City of North Platte,* 206 Neb. 240, 292 N.W.2d 297 (1980); *Prudential Trust Co. v. City of Laramie,* 492 P.2d 971 (Wyo. 1972); *Krieger v. Planning Commission of Howard County,* 224 Md. 320, 167 A.2d 885 (1961); *KBW, Inc. v. Town of Bennington,* 115 N.H. 392, 342 A.2d 653 (1975); *People v. Curtis,* 63 Cal. Rptr. 138 (1967); *Kammerlocher v. City of Norman,* 509 P.2d 470 (Okla. 1973); *Robbins Auto Parts, Inc. v. City of Laconia,* 117 N.H. 235, 371 A.2d 1167 (1977); *Lampton v. Pinaire,* 610 S.W.2d 915 (Ky. 1980); *Briar West, Inc. v. City of Lincoln,* 291 N.W.2d 730 (Neb. 1980).

It may be further noted that where exactions for right-of-way are

imposed as a condition of approval of other activities, such as grant of building permits, the same rules and tests are applicable as in the case of subdivision control exactions. *Bethlehem Evangelical Lutheran Church v. City of Lakewood,* 626 P.2d 668 (Colo. 1981).

CONCLUSION

It has been seen that the use of the exaction mechanism had its origin in the felt need to police the activities of developers to such extent as to bring about an orderly development of subdivisions and avoid the chaotic conditions created by the failure to require developers to provide such necessary interior improvements as streets and utility facilities. It has been further seen that the phenomenon of a great exodus of people from the cities to the suburbs occurring in mid-century imposed severe burdens on small suburban communities that were suddenly confronted with the problem of finding monies to finance substantial new public improvements necessitated by the largely unexpected increase in population. Established residents of the affected communities balked at shouldering the burden of large capital outlays for the benefit of newcomers and the question inevitably arose: Who shall bear the cost?

Because the larger part of new home building was being conducted by subdividers, a ready answer seemed to be to require the subdivider to bear a large share of the costs. Since theoretically such costs could be passed on to the purchasers of subdivision homes, the newcomers could thus be made to assume their "share" or a substantial amount of the burden of new improvements. This system of apportionment seemed fair and the question was as to the legal means to accomplish it.

The tailor-made answer appeared to be in subdivision control regulations. Such regulations were premised on exercise of the police power and the question became how far the police power could go in requiring exactions of subdividers.

In answer to this question certain tests were developed. The test employed in the early cases (and still used today in many cases) was the traditional police power test of determining whether (a) the regulation was within the permissible limits of police power goals, and (b) the particular regulation was a reasonable exercise of police power within such limits. Refinements of this test came at a later date in the form of the "specifically and uniquely attributable" and the "rational nexus" rules. The difference between the two rules lies largely in the measure of proof. For example, in the one it is necessary to show that the need for the exaction was generated specifically and uniquely by the particular subdivision, and in the other the necessary nexus can be shown by establishing that the particular subdivision was part of a pattern of new subdivisions entering the community which by common and joint action brought about the need for the exaction.

The foregoing described tests are applied in the determination of the validity of exactions for right-of-way. Little problem is encountered when the tests are applied to the provision of interior streets within the subdivision.[16] Exactions for such purpose are valid by any test. And the requirement that such streets conform to the design and width of connecting public streets outside the subdivision is generally upheld.[17] Likewise is the required dedication of land along an exterior line of the subdivision generally sustained where the purpose of such exaction is to widen an abutting public road in order to accommodate the increased volume of traffic generated by the subdivision.[18] Exactions for the improvement of off-site roads have met (as heretofore seen) with mixed results.[19] Generally speaking, it is necessary to establish a clear connection between traffic conditions on such exterior roads and the influx of new residents into the subdivision in order to sustain the validity of such exactions.[20] Exactions of right-of-way to relieve burdens on traffic flow caused by construction of dense population structures (office buildings, apartment houses, churches) are met by the same tests as applied to exactions for subdivision control.[21]

Exactions are now firmly entrenched as a legitimate means of exercising community growth control, and the validity of particular exactions is to be arrived at and determined by the application thereto of the tests and rules hereinbefore set forth and described.

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[1] For a listing thereof, see "Bibliography" appended to this paper.

[2] Walta, *Subdivision Exactions: Where is the Limit?* 42 NOTRE DAME LAWYER 400 (1967).

[3] See Anderson and Roswig, *Planning, Zoning, and Subdivision: A Summary of Statutory Law in the 50 States* (New York Federation of Official Planning Organizations 1966).

[4] The reader interested in a study of a complete set of subdivision control regulations is referred to the article entitled "Model Regulations for the Control of Land Subdivision," by Freilich and Levi, appearing in 36 MISSOURI L. REV. 1 (1971).

[5] It should be noted at this point that although the significant case law in the field has developed almost exclusively around interpretation of subdivision control regulations, the use of exactions has been extended to such other activities as: rezoning, Transamerica Title Insurance Company v. City of Tucson, 23 Ariz. App. 385, 533 P.2d 693 (1975); grant of variance, Alperin v. Mayor and Township Committee of Middletown Township, 91 N.J. Super. 190, 219 A.2d 628 (1966); site plan approval, Robbins Auto Parts, Inc. v. City of Laconia, 117 N.H. 235, 371 A.2d 1167 (1977); annexation, City of Colorado Springs v. Kitty Hawk Development Co., 154 Colo. 535, 392 P.2d 467 (1964); grant of building permit, Stroud v. City of Aspen, 188 Colo. 1, 532 P.2d 720 (1975); erection of apartment house complex, Riegert Apartments Corp. v. Planning Board of the Town of Clarkstown, 105 Misc. 2d 298, 432 N.Y.S.2d 43 (1979); and conversion to condominiums, Norsco Enterprises v. City of Fremont, 54 Cal. App.3d 488, 126 Cal. Rptr. 659 (1976).

[6] Trachtman, *Subdivision Exactions,* 119 VILL. L. REV. 782, 789 (1974).

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[10] See Johnston, *Constitutionality of Subdivision Control Exactions,* 52 CORNELL L. Q. 871, 911 (1967); Trachtman, *Subdivision Exactions,* 19 VILL. L. REV. 782, 797 (1974); Heyman and Gilhool, *The Constitutionality of Imposing Increased Community Costs on New Suburban Residents Through Subdivision Exactions,* 73 YALE L. J. 1119, 1136 (1964).

[11] See reasons supportive of this viewpoint adduced by these authors in the article entitled "Control of Urban Land Subdivision," that appears in 14 SYRACUSE L. REV. 405 (1963).

[12] The authority of *Gulest* as precedent was probably vitiated by the fact that some years later the appellate court decision was disapproved in Jenad, Inc. v. Village of Scarsdale, 18 N.Y.2d 78, 271 N.Y.S.2d 955, 218 N.E.2d 673 (1966). The treatment of *Gulest* by the Court of Appeals in *Jenad* is, however, largely unclear in that pains were taken to distinguish the fact situations in the two cases, and then *Gulest* was disapproved without specifying the particular ground (out of several possible) on which disapproval was based.

[13] Johnston, *Constitutionality of Subdivision Control Exactions,* 52 CORNELL L. Q. 871, 917 (1967); Trachtman, *Subdivision Exactions,* 19 VILL. L. REV. 782, 802 (1974).

[14] Wald Corporation v. Metropolitan Dade County, 338 So.2d 863 (Fla. App. 1976); Holmes v. Planning Board of the Town of New Castle, 78 App. Div.2d 1, 433 N.Y.S.2d 587 (1980); Arrowhead Development Company v. Livingston County Road Commission, 92 Mich. App. 31, 283 N.W.2d 865 (1979); Longridge Builders, Inc.v. Planning Board of the Township of Princeton, 32 N.J. 348, 245 A.2d 336 (1968).

[15] *Cf.* statement of the *Pioneer Trust* rule by the Illinois Court set forth in full on p.7 , *supra.*

[16] *See* Brous v. Smith, 304 N.Y. 164, 106 N.E.2d 503 (1952); Mansfield & Swett v. Town of West Orange, 120 N.J.L. 145, 198 A. 225 (1938), *supra.*

[17] *See* Ayres v. City Council of City of Los Angeles, 34 Cal.2d 31, 207 P.2d 1 (1949), *supra.*

[18] Id.

[19] *See* People ex rel. Exchange National Bank of Chicago v. City of Lake Forest, 40 Ill.2d 281, 239 N.E.2d 819 (1968); McKain v. Toledo City Plan Commission, 26 Ohio App.2d 171, 270 N.E.2d 370 (1971); Arrowhead Development Company v. Livingston County Road Commission, 92 Mich. App.31, 283 N.W.2d 865 (1979); Longridge Builders, Inc. v. Planning Board of the Township of Princeton, 52 N.J. 348, 245 A.2d 336 (1968), *supra.*

[20] Id.

[21] *See* Bethlehem Evangelical Lutheran Church v. City of Lakewood, 626 P.2d 668 (Colo. 1981), *supra.*

APPLICATIONS

The foregoing research should prove helpful to highway and transportation administrators, their legal counsel, federal administrators, right-of-way departments, and others involved in the exaction of highway rights-of-way through the exercise of police power. This paper addresses the general relationship between police power and eminent domain for right-of-way takings and also describes the tests governing the validity of police power exactions. Applicability to obtaining the necessary land for streets within suburban developments and the more difficult issue of land needed for highway improvements outside of the actual development is discussed.

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