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(Rule 976, Cal. Rules of Ct.)

BUILDING INDUSTRY ASSOCIATION OF SOUTHERN CALIFORNIA, Plaintiff and Appellant,
v.
CITY OF **OXNARD**, Defendant and Respondent.
Civ. B037716.
Court of Appeal, Second District, Division 6.
March 23, 1990.
Certified for Partial Publication [FN*].

FN* Pursuant to California Rules of Court, rules 976(b) and 976.1, this opinion is certified for partial publication. Portions deleted are noted by the insertion of the following symbol at the points of omission [[ ]].

Building industry association challenged validity of city ordinance establishing requiring "growth requirements capital fee" to be paid by developer upon applying for building permit. The Superior Court, Ventura County, No. 74291, William L. Peck, J., determined that ordinance was valid, and association appealed. The Court of Appeal, Abbe, J., held that ordinance did not violate takings clause, as there was reasonable nexus between fees charged and needs created by new development for expanded public facilities.
Affirmed.

148K2(1.2)
EMINENT DOMAIN
K. Relating to zoning, planning, or land use.
Cal.App. 2 Dist. 1990.
City ordinance establishing "growth requirements capital fee" to be paid by developer upon applying for **building** permit did not violate takings clause, as reasonable nexus existed between fees charged and needs created by new development for expanded public facilities, assuming that such nexus is even required by takings clause. U.S.C.A. Const.Amends. 5, 14.
Building Industry Ass'n of Southern California v. City of **Oxnard**
267 Cal.Rptr. 769, Ordered Not Published, (Rule 976, Cal. Rules of Ct.)
Stanley E. Cohen, Thousand Oaks, David W. Tredway, Cohen, England & Whitfield, Oxnard, for plaintiff and appellant.
Gary L. Gillig, City Atty., City of Oxnard, K.D. Lyders, Lawler, Bonham & Walsh, Oxnard, for defendant and respondent.

ABBE, Associate Justice.

The City of **Oxnard** (the City) determined that residential, commercial and industrial development within its boundaries created a need for additional public facilities and capital improvements. In order to finance the additional facilities and improvements the city council enacted an ordinance establishing a "growth requirements capital fee" to be paid by a developer upon applying for a **building** permit.
The Building Industry of Association Southern California (BIA) challenged the

ordinance as being void on its face, contending that the fee is an unconstitutional taking, that it is a tax enacted without a two-thirds vote of the electorate in violation of California Constitution, article XIIIA, and that the Subdivision Map Act (Gov.Code, s 66410, et seq.) is preemptive. The trial court found the ordinance to be valid, and we affirm.

FACTS

The ordinance requires the payment of $0.63 per square foot of covered space in a new residential development, $0.33 per square foot of covered space in a new commercial or industrial development, and $0.03 per square foot of uncovered space in a new industrial development.

The amount to be paid per square foot of development was determined by estimating the value of existing public facilities as of the date of the ordinance. The facilities were then divided into two categories: those facilities largely associated with residential use such as the library, service center and community center, and those facilities that serve commercial and industrial as well as residential development. Such "shared facilities" include the civic center, public safety buildings, equipment yard, parking lots and streets.

Because residential development covered 74 percent of the total developed area in the City, 74 percent of the value of the shared facilities was attributed to residential use. That amount was added to the value of the public facilities placed in the residential use category to obtain the total value of all public facilities attributable to current residential use. This value was divided by the total number of square feet covered by all existing residences. The resulting quotient of 0.63 represented the value of existing public facilities attributable to a square foot of existing residential development. The ordinance requires new residential development to pay an equivalent fee.

In similar manner the remaining 26 percent of the value of the shared facilities was apportioned per square foot of existing commercial and industrial development, with an adjustment made for uncovered industrial development. The fees charged per square foot of new commercial and industrial development are equivalent to that quotient.

The fees collected pursuant to the ordinance are placed in the "Capital Outlay Fund" to be used only to pay for costs of capital improvements. Capital improvements are defined as "public facilities or equipment funded through the City's Capital Improvement Budget."

The Capital Outlay Fund is divided into two sub-funds: one for fees derived from new residential development and another for fees derived from new commercial and industrial development. Fees derived from residential development may be used for all types of capital improvements, whereas fees derived from commercial and industrial development may be used for all types of capital improvements except park and recreation facilities and cultural and civic facilities. "Cultural and Civic facilities" are related to the library, auditorium, concert hall and similar uses.

Finally, the ordinance provides: "The amount of fees collected pursuant to this ordinance which can be applied to any capital improvement shall be limited to that portion of the cost which is reasonably attributable to the need generated by new development or benefit conferred upon new development. In approving each Capital Improvement Budget using funds from the Capital Outlay Fund, the City Council shall apportion the costs of capital improvements

between needs or benefits related to existing development and needs or benefits related to new development."

In upholding the validity of the ordinance the trial court found, among other things, that the fee bears a reasonable relationship to the need for public improvements created by new development, that the formula for determining the amount of the fee is reasonable, and that the fee is not a tax and not violative of the California Constitution.

DISCUSSION

BIA contends that under Nollan v. California Coastal Commission (1987) 483 U.S. 825, 107 S.Ct. 3141, 97 L.Ed.2d 677, in order for a governmental exaction to be constitutional there must exist a reasonable relationship between the exaction and the need created by new development. It argues that no such relationship exists here.

In Nollan the Coastal Commission granted a development permit subject to the condition that the property owners allow the public an easement to pass across a portion of their property. That condition was challenged as violating the takings clause of the Fifth Amendment of the United States Constitution as applied to the state through the Fourteenth Amendment. The Supreme Court agreed with the property owners, finding there was no nexus between the condition and the public need created by the development.

Assuming, for the sake of argument, that under Nollan the takings clause requires a reasonable nexus between the fees charged here and the needs created by new development, we find that such a nexus exists.

BIA's argument that there is no reasonable relationship between the fee and the needs emanating from proposed development has two prongs:

First, it argues, instead of determining what needs for additional public improvements will be created by new development, the ordinance surcharges new residents and businesses coming into the City to maintain the existing ratio of population to public facilities, resulting in a requirement that newcomers "buy-in." Second, it argues, the fee is for "general purpose capital needs," and the relationship between such needs and new development, if it exists at all, is so remote and attenuated that there is no causal relationship justifying the imposition of the fees.

Turning to BIA's first argument, although determining what specific needs will be created by proposed new development and apportioning the costs among developers is one reasonable method of relating the fee to the burden (cf., J.W. Jones Companies v. City of San Diego (1984) 157 Cal.App.3d 745, 203 Cal.Rptr. 580), it is not the only reasonable method. Determining the necessity and form of regulations is primarily a legislative and not a judicial function; if the reasonableness of a regulation is fairly debatable, the legislative determination will not be disturbed. (Remmenga v. California Coastal Com. (1985) 163 Cal.App.3d 623, 629, 209 Cal.Rptr. 628.)

Here the City made a determination that new development will require the support of new or expanded public facilities, and that the cost of those facilities will be at least the same per square foot of new development as the value of existing public facilities per square foot of existing development.

It is reasonable to assume that if a city doubles in size, it will need to double the amount of capital invested in public facilities. It is not, as suggested by BIA, a "buy-in" plan whereby newcomers are required to buy into existing facilities. It is a plan to require new development to pay for new or

expanded facilities the need for which is reasonably related to growth.

We disagree with BIA's second argument, that the relationship between the "general purpose capital needs" of the City and new development is too remote. Although it may not be possible to quantify how much impact any particular development has on public facilities, cumulatively the effect of new development on public facilities is direct and obvious: the larger the city, the more public facilities it needs. The city is merely requiring new development to invest the same amount per square foot in new public facilities as existing development has invested in existing public facilities.

BIA relies on dicta in Associated Home Builders v. City of Walnut Creek (1971) 4 Cal.3d 633, 94 Cal.Rptr. 630, 484 P.2d 606. There Associated Home Builders challenged the constitutionality of a statute authorizing cities and counties to require a subdivider to dedicate land or pay a fee in lieu thereof for park and recreational purposes. (Former Bus. & Prof.Code, s 11546, now Gov.Code, s 66477.) Associated Home Builders argued that if the statute were upheld a city or county could constitutionally require contributions from subdividers for such purposes as fire and police protection, the construction of a new city hall or even a general contribution to defray the costs of all types of governmental services. The court noted, however, that the statute in question expressly provides that the fees or dedicated land must be used for the needs of the subdivision that rendered the exaction and concluded that "... the circumstances may be distinguished from a more general or diffuse need created for such areawide services as fire and police protection...." (Id., at p. 642, 94 Cal.Rptr. 630, 484 P.2d 606.)

We do not believe the court in Associated Home Builders was attempting to set forth any rule as to what public needs may be too "general or diffuse" to justify an exaction from a subdivider. Rather the court was merely pointing out that Associated Home Builder's argument was not pertinent to the particular statute in question. In a footnote to the portion of the sentence we quoted above the court stated in part: "We do not imply that only those exactions from a subdivider are valid which present the special considerations set forth with regard to section 11546 but hold only that the exactions required by the section are justified by special factors not applicable to such matters as the increased cost of governmental services...." (Id., at p. 642, fn. 8, 94 Cal.Rptr. 630, 484 P.2d 606.)

Were the court attempting to set forth a rule on this question it would be significant that although the court mentioned the general and diffuse nature of governmental services such as police and fire protection, the court omitted any mention of another example proffered by Associated Home Builders, the building of a new city hall.

In the Associated Home Builder's opinion the court stated that if a park is already developed close to a subdivision, it is difficult to see why a fee in lieu of dedication may not be used to purchase park land elsewhere in the city to maintain the proper balance between the number of people in the community and the amount of parkland available. (Id., at p. 640, fn. 6, 94 Cal.Rptr. 630, 484 P.2d 606.) Similarly here where a landowner develops property in a city with existing public facilities it is difficult to see why a fee may not be exacted to purchase more such facilities to maintain the proper balance between the number of people in the community and the amount of public facilities available.

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A portion of this opinion is unpublished. The judgment is affirmed. Costs on appeal are awarded to respondent.

STONE, P.J., and GILBERT, J., concur.
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