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DONALD B. AYERS v. THE CITY OF LOS ANGELES
34 Cal.2d 31; 207 P.2d 1

Supreme Court of California in Bank

June 14, 1949

PRIOR HISTORY: APPEAL from a judgment of the Superior Court of Los Angeles County.

Proceeding in mandamus to compel a city council to approve a proposed subdivision map. Judgment denying writ affirmed.

OPINION BY: SHENK, J.

This appeal is by the petitioner from a judgment denying relief in a mandamus proceeding brought to compel the respondent city council to approve a proposed subdivision map without certain imposed conditions.

A tentative map for the subdivision of 13 acres owned by the petitioner in what is commonly known as the Westchester District in the city of Los Angeles was submitted in October, 1944, to the city planning commission pursuant to the Subdivision Map Act (Stats. 1937, p. 1874, as amended, now Bus. & Prof. Code, § 11500 et seq.). The planning commission attached four conditions to which the petitioner objected, whereupon he appealed to the city council. The matter was noticed for a hearing before that body, after which an order was made sustaining each of the conditions. The petition-er thereupon commenced the present proceeding in the superior court. Because of the inclusion in the petition of allegations tendering the issue of lack of a full hearing, the court in overruling the demurrer to the petition also ordered that the trial of other factual issues proceed on presentation and consideration of all material and relevant evidence. The trial consumed two weeks in the course of which the trial judge viewed the locality of the proposed subdivision. Findings were made and judgment entered upholding the lawfulness and reasonableness of the imposed conditions. The appeal involves the sufficiency of the evidence to support the findings and judgment.

The area known as Westchester District of which the proposed 13-acre sub-division forms a part consists

of 3,023 acres. It is bisected in a northerly and southerly direction by Sepulveda Boulevard, and easterly and westerly by Manchester Boulevard. It extends 1 mile to the south of Manchester and a mile and a half to the north; and 1 mile on either side of Sepulveda. Before subdivision the land in the district was owned by Los Angeles Extension Company, Security•First National Bank of Los Angeles, and Superior Oil Company. The petitioner represented the latter as subdivider and selling agent.In 1940, the formation of a general plan of development of the district was commenced. The plan fixed the business area on Sepulveda Boulevard immediately south of Manchester Boulevard and the petitioner was placed in charge of development by the subdividers. The so•called cellular design of residence lot subdivision was employed so that the rear of residential lots abuts the principal thoroughfares, thus prohibit-ing access to the lots therefrom. Another purpose of this type of subdivision was to minimize the amount of land required for street purposes. This general plan had been followed in the Westchester district. Requirements insuring uniformity were imposed, among which were the dedication of a 10-foot strip in the residence areas and a 13•foot strip on each side in the business section for the widening of Sepulveda Boulevard, and the setting aside of a strip for planting purposes varying in width at the rear of lots in the residence sections bordering the principal thoroughfares.

The petitioner's 13•acre tract, the last of the subdivisions in the district, is a long narrow triangle. Its northerly boundary is less than 500 feet in length, and the southerly point of the triangle about 2,400 feet from the northerly line. Arizona Avenue runs along the westerly line. Sepulveda Boulevard, the principal thoroughfare and heavily trafficked artery, borders the easterly line. These highways converge and form the southerly point of the triangle. Sepulveda Boulevard, from a point a short distance north of the convergence to the north line of the tract, is 100 feet wide but south of that point is 110 feet wide. Seventy•seventh Street enters Arizona Avenue from the west approximately opposite the center of the tract, and the proposed subdivision map shows the extension of that street through the tract. Seventy•ninth Street enters Arizona Avenue from the west a short distance north of the southerly point of the tract. An extension of that street through the subdivision would leave a triangular tip of land about 12 1/2 feet wide by 75 feet to the southerly point. The proposed subdivision would include 10 residence lots north of the Seventy•-seventh Street extension fronting on Arizona Avenue with 80•foot frontages and depths to Sepulveda Boulevard varying from 312 to 462 feet. Entrance to the residence lots would be from Arizona Avenue exclusively. The lot immediately north of and adjoining the Seventy-seventh Street extension is proposed to be used for business drive-in, and the lot south of Seventy•seventh Street for religious purposes.

The four conditions imposed by the planning commission and approved by the city council and the trial court are:

1. That a 10•foot strip abutting Sepulveda Boulevard be dedicated for the widening of that highway.

2. That an additional 10•foot strip along the rear of the lots be restricted to the planting of trees and shrubbery for the purpose of preventing direct ingress and egress between the lots and Sepulveda Boulevard.

3. That the extension of Seventy•seventh Street be dedicated to a width of 80 instead of 60 feet.

4. That the area which would be covered by an extension of Seventy-ninth Street and south to the point of the triangle be dedicated for street use for the purpose of eliminating it as a traffic hazard.

The petitioner objected to the foregoing conditions on the ground that they were not expressly provided for by the Subdivision Map Act nor by city ordinance; that conditions 1, 2 and 4, and condition 3 insofar as it required dedication in excess of 60 feet in width, bear no reasonable relationship to the protection of the public health, safety or general welfare, and amount to a taking of private property for public use without compensation.

Article VIII (§§ 94 to 99 1/2) of the Los Angeles City Charter deals with the department of city planning. By section 94 the department is given all the powers and duties which are granted to or imposed upon city planning commissions or departments by state law, and as provided by city ordinance, subject to article VIII. Pursuant thereto and to the Planning Act of 1929 (Stats. 1929, p. 1805 as amended; 2 Deering's Gen. Laws, Act 5211b), there is functioning in the city of Los Angeles a planning commission and a director of planning appointed by it who acts as the advisory agency of the commission. Section 95 of the charter requires the director of planning to prepare a master plan for the physical development of the city, and vests in him the powers and calls for discharge of the duties in relation to proposed subdivisions as required by the Subdivision Map Act and as may be imposed by ordinance. By section 96 1/2 the planning commission is required to hold hearings on the master plan or parts thereof and consider and adopt the same.

Section 11525 of the Subdivision Map Act vests control of the design and improve-ment of subdivisions in the governing bodies of cities and counties, subject to review as to reasonableness by the superior court in and for the county in which the land is situated.

Section 11526 provides that the design, improvement and survey data of subdivisions and related matters, including procedure in securing official approval, are governed by the provisions of the Subdivision Map Act and by the provisions of local ordinances regulating the design and improvement of subdivisions.

Section 11538 makes it unlawful for any person to offer for sale or to sell any subdivision lot until the filing of a final map in compliance with the act and local ordinances. The conveyance of any part of a subdivision by lot or block number is not permitted until a final map has been recorded (§ 11539). Section 11550 declares that the initial action is the preparation of a tentative map with data as specified in the local ordinances and the map act.

Section 11551 states that if there is a local ordinance regulating the design and improvement of subdivisions the subdivid-er shall comply with its provisions before the map may be approved; but if there is no such ordinance the governing body as a condition precedent to approval may require streets and drainage ways properly located and of adequate width but may make no other requirements.

Section 11552 provides that if the subdivider is dissatisfied with the initial action regarding the tentative map he may appeal to the governing body which upon a noticed hearing shall take testimony as to the character of the neighborhood in which the subdivision is to be located, the kinds, nature and extent of improvements, the quality or kinds of development to which the area is best adapted and any other phase

of the matter it may desire to inquire into, at the conclusion of which the governing body may make such findings as are not inconsistent with the provisions of the act or local ordinances.

The words "Design" and "Improvement" as used in the act are defined. Section 11510 provides that "Design" refers to street alignment, grades and widths, alignment and widths of easements and right of ways for drainage and sanitary sewers and minimum lot area and width. Section 11511 defines "Improvement" as only such street work and utilities to be installed, or agreed to be installed, by the subdivider on the land to be dedicated for streets, highways, etc., as are necessary for the general use of the lot owners in the subdivision and local neighborhood traffic and drainage needs.

Ordinance No. 79310 of the city of Los Angeles, as amended, prescribes the rules and regulations governing the platting and subdividing of lands and the filing and approval of subdivision maps. The ordinance adopts the definitions for "Design" and "Improvement" as declared in the Subdivision Map Act. Specifically treated are such subjects as primary and secondary streets, which are to conform to the master plan of traffic arteries, alignments, street widths, grades, curves and tangents, intersec-tions, dead-ends, rounding block corners, private streets, alleys, size, frontage and side lines of lots, blocks, sewer and drainage gardes and facilities, existing improve-ments, dangerous areas, easements, walkways, and the like. Under "Conditions of Acceptance" it is provided that the city engineer may refuse to accept any final map which does not conform to the provisions of the Subdivision Map Act, the provisions of the ordinance, or the conditions of approval of the tentative map. It is also provided that upon recommenda-tion of the advisory agency or the city engineer such variations may be made as in the exercise of sound, reasonable judgment may be warranted or required because of the size, use, physical or other conditions of the property, or the type of subdivision, except that no variations may be made as to the requirements of the Subdivision Map Act.

It appears to be the petitioner's contention that no condition may be exacted which is not expressly provided for by the Subdivi-sion Map Act or the ordinance provisions not in conflict therewith; that at all events the requirements may deal only with streets to be laid out by the subdivider within the confines of the subdivi-sion to take care of traffic needs therein, and that no dedication may be exacted for additions to existing streets or highways.

It must be obvious at the outset that this effect may not be drawn from the statute or from the city's organic law or ordinanc-es. The foregoing review of those provisions does not indicate that the authority of the city planners is so circumscribed. The status of an autonomous city (Const. art. XI, § 6; West Coast Advertising Co. v. San Francisco, 14 Cal.2d 516 [95 P.2d 138]; City of Oakland v. Williams, 15 Cal.2d 542 [103 P.2d 168]) is recognized by express references to city ordinances in the Subdivision Map Act. Where as here no specific restriction or limitation on the city's power is contained in the charter, and none forbidding the particular conditions is included either in the Subdivision Map Act or the city ordinances, it is proper to conclude that conditions are lawful which are not inconsistent with the map act and the ordinances and are reasonably required by the subdivision type and use as related to the character of local and neighborhood planning and traffic conditions.

The petitioner relies on section 11551 of the act which purports to limit authority to impose conditions in the absence of local ordinances, and on the definition of the word "Improvement" in section 11511. But

here the applicable provisions of the ordinanc-es and of the act do not restrict reasonable conditions to provide streets and highways in relation to the local and neighbor-hood traffic needs. The word "Improvement" as used in the act refers only to such improvements as are to be installed by the subdivider on the land to be dedicated to those needs. Implicit therein is the recognition that reasonable conditions may be imposed for the dedication of land for necessary purposes which is not to be improved by the subdivider. The provisions of the act do not impose the restrictions or limitations on the land which may be dedicated as invoked by the petitioner, but merely constitute a definition of the word "improvement" as used in the act. If the dedications for the widening of Sepulveda Boulevard and for the elimination of the southern tip of the triangle are otherwise lawfully required it can be no source of complaint to the petition-er that he is not required to make the improvement as well as the dedication. The trial court correctly determined that the conditions imposed were not precluded by the act.

The Subdivision Map Act (§ 11552) and the city ordinances indicate that the matters for consideration in relation to the reasonableness of imposed conditions contemplate the character of the neighborhood, the kinds, nature and extent of improve-ments, the quality or kinds of development to which the area is best adapted, the traffic needs, and other phases, including the size, use, physical or other conditions of the property, and the type of subdivision.

As to condition 1, that a 10•foot widening strip be dedicated, the finding is that the widening of Sepulveda Boulevard had been in contemplation by the authorities whether or not the petitioner intended to subdivide; but that the creation and the proposed uses of the subdivision would give rise to traffic and other conditions necessitating the widening of the boulevard; that the widening was necessary for and would benefit the lot owners, and that the requirement was reasonably related to the protection of the public health, safety and general welfare.

With regard to condition 2, that an additional 10 feet be reserved for a planting strip, the court found that such a strip was already in contemplation, but that the creation of the subdivision necessitated the restricted use to confine ingress and egress to and from the lots away from Sepulveda Boulevard; to screen the lot owners from the traffic noises, fumes and views of the fast•moving traffic on the boulevard; to provide safety islands for residents crossing the boulevard on foot and waiting lanes for vehicular traffic, and that the imposition of the condition was reasonably related to the protection of the public health, safety and general welfare.

It was found that the foregoing pattern of subdivision, including the widening and planting strips in the development of Sepulveda Boulevard frontage, was in conformity with neighborhood plan and design, and had been carried out without objection by the petitioner and others in the district until the filing by petition-er of the tentative map for subdivision of his 13 acres. Variations in some requirements, changes in or abandonment of others, delays in making improvements, incomplete-ness of the master plans or failure to indicate thereon the precise details, the court found to be minor, not unauthorized, and without adverse bearing on the lawfulness or reasonableness of the conditions imposed.

The finding as to condition 3, respecting the required 80•foot width of the Seventy•seventh Street extension through the tract, was covered by the trial court's general conclusion that there was no unreasonable application of the Subdivision Map Act as to any of the conditions objected to by the

petitioner.

Specifically as to condition 4, the dedication to eliminate the southerly tip of the triangle, it was found that without regard to the subdivision it had been the intention to project Seventy•-ninth Street either across the petitioner's tract or below it; also that the subdivision would give rise to and create traffic conditions and hazards necessitating the elimination of the tip for the proper control of traffic in the locality, would benefit the lot owners in the proposed subdivision, and was reasonable related to the protection of the public health, safety and general welfare.

All intendments must be indulged to sustain the findings and judg-ment. Conside-ration alone of the physical facts and conditions, remembering also that the trial judge viewed the locality, indicate sufficient support therefor.

The contentions respecting the required width of the Seventy•-seventh Street extension will not be further discussed except to note that the proposed business and religious uses of the respec-tive abutting lots and the fact that Seventy•seventh is the only street to transverse the tract between Sepulveda Boulevard and Arizona Avenue, sufficiently support the conclusion that the required width is reasonably related to the potential traffic needs.

The petitioner does not quarrel with the conclusion that the other conditions are desirable and that their fulfillment will accomplish the ends stated. His more specific complaint is that the city contemplated taking the property for the purposes indicated in any event, that the benefit to the lot owners and the tract will be relatively small compared to the beneficial return to the city at large; therefore that the requirements amount to an exercise of the power of eminent domain under the guise of pursuing the authority of subdivision map proceedings, and that the exercise thereof is unconstitutional unless compensation be paid.

In his arguments the petitioner appears to have lost sight of the particular type of lot subdivision and uniformity of neighbor-hood design and plan theretofore applied in the locality, including the requirement for strip dedication for widening purposes and strip restriction to planting use without dedication. As stated, consideration of these matters is not precluded by the provisions of the Subdivision Map Act, but on the contrary both the statutory provisions and the local law indicate that the subdivision design and use should conform to neighborhood planning and zoning requirements. Here the greater than average depth of the lots minimizes the land loss and street improvement cost. In fact it may be said that the petitioner's position would seem to be greatly improved by this type of subdivision and its related requirements in conformity with neighborhood planning and zoning.

The regular design of subdivision, with ingress and egress to and from Sepulveda Boulevard, would have been out of harmony with the neighborhood plan and traffic needs. It would have required dedication and improvement by the petitioner of lateral service roads and lanes for diversion of the local traffic to and from the main artery which the evidence shows would have used more land than for the widening and planting strips, and would have increased the cost of the improvements to be installed by the petitioner. The record indicates that the so•called cellular design was generally adopted because it interfered less with the free flow of traffic, minimized the hazards on the main thoroughfares, and reduced land dedication and

improvement expense. The petitioner and the lot owners in the subdivision will participate in these benefits and savings by the selection of and adherence to the particular design. In fact the petitioner makes no objection to that design as such. It is to be assumed that he prefers it with the resulting savings in land and cost. But he seeks in addition compensation for the fulfillment of the conditions which make this type of lot subdivi-sion feasible.Similar observations apply to the dedication of the southerly tip of the triangle. The petitioner could reasonably be required to provide for the dedication and improvement of the extension of Seventy•ninth Street through the tract to provide safe turning for traffic to and from the subdivision, and incidentally to eliminate as a traffic hazard the practically useless remainder of the tip. He has lost nothing by the requirement for dedication and is benefitted by being relieved of the burden of improvement. The conclusion is justifiable that the widening and plainting strips and the elimination of the hazardous tip are as much a part of design and improvement within the proposed subdivision as would the lateral and transverse service roads and lanes had the regular or noncellular design been selected.

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 in a subdivi-sion map proceeding 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. Nor does the fact that master plans are incomplete, or that the specific details are not shown thereon, affect the result. It was in evidence that the city had been working toward the formulation of a complete and entire master plan, although all the elements or parts thereof were not as yet in the final stage of completion.

The contention that the requirements for a master plan or some over•all plan must be approved and adopted before authority vests in relation to the conditions here imposed is without merit since in any event the charter contemplates that portions thereof may be adopted. It is inconceivable that a master plan including all essential factors for a growing city could be completed in a short period of time. The trial court correctly concluded that delay in the adoption of the final master plan or plans had no material bearing on the controversial issues in this proceeding. The reasonableness of the conditions and the authority to impose them do not necessarily depend upon their inclusion in the official master plan for the district. As noted, subdivision design and improvement obviously include conformance to neighborhood planning and zoning, and it may properly be said that the formulation and acceptance of the uniform conditions in the development of the district constitute the practical adoption of a master plan and zoning requirements therefor.

Nor is there merit in the petitioner's contention that a uniform plan is lacking because of some discrepancies in uniformity or delays in enforcement or fulfillment of the conditions. Time, funds and manpower are requisites to execution, and lack of speed in accomplishment, or some changes because of differing circum-stances as to use or otherwise, cannot defeat the otherwise uniform and reasonable application of the imposed conditions in a growing community.

The petitioner may not prevail in his contention that, since the use of the land for the purposes stated was contemplated in any event, the dedication and use reservation requirements in this proceeding are unconstitutional as an exercise of the power of eminent domain. 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, dedica-tion, 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 well•consi-dered observations in Mansfield & Swett v. Town of West Orange, 120 N.J.L. 145 [198 A. 225], also involving a subdivision proceeding, are pertinent in this connection. The court there recognized the distinction between the exercise of the sovereign power of eminent domain and the noncompensatory nature of reasonable restrictions in respect to private interests when they must yield to the good of the communi-ty. That these general principles apply in subdivision map proceedings is also demonstrat-ed in the cases of Ridgefield Land Co. v. City of Detroit, 241 Mich. 468 [217 N.W. 58], and Newton v. American Sec. Co., 201 Ark. 943, 948 [148 S.W.2d 311], where the distinction was made between the exercise of authority in such proceedings and the exercise of the power of eminent domain. In each of those cases it was held that the requirement for the dedication of land to the widening of existing streets was not a compulsory taking for public use; but that where it is a condition reasonably related to increased traffic and other needs of the proposed subdivision it is voluntary in theory and not contrary to constitutional concepts.

In Village of Euclid v. Ambler Realty Co., 272 U.S. 365 at 387 [47 S.Ct. 114, 71 L.Ed. 303] (1926) it was observed that regula-tions, the wisdom, necessity and validity of which as applied to existing conditions were so apparent that they are now uniformly sustained, would probably have been rejected as arbitrary and oppressive a century or even a half a century ago; that while the meaning of constitutional guaranties is invariable, the scope of their application must expand or contract to meet the physical changes which are constantly coming within the field of their operation; and that only those regulations must fall which clearly do not meet the constitutional meaning as applied to changing conditions. Similar expressions are found in Miller v. Board of Public Works, 195 Cal. 477, 484•485 [234 P. 381, 38 A.L.R. 1479]; Zahn v. Board of Public Works, 195 Cal. 497, 513 [234 P. 388]; and Dwyer v. City Council, 200 Cal. 505, 514 [253 P. 932] (1927). These declarations by the Supreme Court of the United States and of this state more than 20 years ago are also pertinent in this case to uphold the conclusions of reasonableness based on the record.

No sufficient reasons have been advanced which would justify this court in overturning the findings of the trial court as to the authority for and the reasonable-ness of the conditions imposed.

The judgment is affirmed.

DISSENT BY: CARTER, J.

I dissent.

Inasmuch as it has been concluded by the majority that the conditions here involved were validly imposed under the police power, it becomes necessary to discuss appellant's contention that the conditions imposed (with the exception of condition No. 3) constitute an exercise of the power of eminent domain disguised as the police power.

First, I would like to point out that the proposed projection of Seventy•ninth Street (which would leave an isolated tip or triangle on the proposed subdivision) has been abandoned. It is this triangle which it is proposed that appellant dedicate for street purposes (condition No. 2). The trial court found that "since the institution of said action, the location and projection of Seventy•ninth Street in an easterly direction in and to Sepulveda Boulevard has been changed so that at the present time the plan of the City of Los Angeles with regard to the projection of Seventy•ninth Street is to project said street into Sepulveda Boulevard at a point south of the tip of said tract so that the same will not intersect said tract or any portion thereof;..."

If the Subdivision Map Act is construed to mean that the city planning commission may require a dedication of land to improve streets already in existence from one who proposes to subdivide before his tentative map may be approved and recorded, regardless of the fact that there is no ordinance requiring such dedication, then it is my position that such a procedure is nothing more than a taking of appellant's property without making compensation therefor. It is my position, also, that such a construction flies in the face of the express words of the statute (§ 11551 Bus. & Prof. Code), and that by so doing, the majority have opened the door to the question of constitutionality. The question then presented is whether the required dedication goes beyond the police power and enters the field of eminent domain.

In House v. Los Angeles County Flood Control Dist., 25 Cal.2d 384, 388 [153 P.2d 950], this court said: "While the police power is very broad in concept, it is not without restriction in relation to the taking or damaging of property. When it passes beyond proper bounds in its invasion of property rights, it in effect comes within the purview of the law of eminent domain and its exercise requires compensation. (Varney & Green v. Williams, 155 Cal. 318 [100 P. 867, 132 Am.St.Rep. 88, 21 L.R.A.N.S. 741]; Pacific Telephone etc. Co. v. Eshleman, 166 Cal. 640 [137 P. 1119, Ann.Cas. 1915C 822, 50 L.R.A.N.S. 652])."

So far as the construction of improvements is concerned, however, even though their purpose be to promote and insure the public safety and convenience, the right of the state to take "private property" without the payment of "just" compensa-tion, has been expressly forbidden by both the eminent domain provision of the state Constitution and the due process clause of the Fourteenth Amendment to the Constitution of the United States. (Cal. Const., art. I, § 14; Chicago, B.&Q.R.Co. v. Chicago, 166 U.S. 226 [17 S.Ct. 581, 41 L.Ed. 979].) Obviously, under these provisions, if the state (or its subdivisions) appropriates the land itself for a public use, it is exercising its power of eminent domain with a corresponding liability to pay the owner the value of the land.
The majority say that the 10•foot widening strip needed for Sepulveda Boulevard (condition No. 1) is necessary and reasonably related to the protection of the public health, safety and general welfare. In Mansfield & Swett v. Town of West Orange, 120 N.J.L. 145 [198 A. 225], which is, incidentally, one of the very few cases relating to subdivisions, this theory was expressly exploded. "Nor do we think that increased traffic hazards constitute a valid objection to the development. It is not a sound argument that the subdivision will attract additional dwellers, and thereby increase the volume of traffic and create the need for additional police supervi-sion.These are mere incidents of municipal growth. The proposed developments, if surrounded with reasonable safeguards, will plainly not create abnormal traffic hazards inimical to the public welfare." And in House v. Los Angeles County Flood Control Dist., supra, Mr. Justice Curtis, speaking for the majority of this court, said: "Thus there is recognized the incontestable proposition that the exercise of the police power, though an essential attribute of sovereignty for the public welfare and arbitrary in its nature, cannot extend beyond the necessities of the case and be made a cloak to

destroy constitutional rights as to the inviolateness of private property."

In Bacich v. Board of Control, 23 Cal.2d 343, at 351 [144 P.2d 818]: "... it is said that in spite of that so•called policy 'the courts cannot ignore sound and settled principles of law safeguarding the rights and property of individuals. This [improve-ment] may be of great convenience to the public generally, but the properties of abutting owners ought not be sacrificed in order to secure it'; and, quoting from Sedgwick on Constitutional Law: 'The tendency under our system is too often to sacrifice the individual to the community; and it seems very difficult in reason to show why the State should not pay for property which it destroys or impairs the value, as well as for what it physically takes.... (Liddick v. City of Council Bluffs, 232 Iowa 197 [5 N.W.2d 361, 372, 382]).

> "In some degree those opposed policies are manifested in the conflict between the constitutional mandate that compensation be paid when private property is taken or damaged for a public purpose and the exercise of police power where compensation need not be paid. The line between those two concepts is far from clearly marked . . . . It does not appear that any compelling emergency or public necessity required its construction without the payment of compensation for property damaged. Therefore the State may not escape the payment of compen-sation under the police power."

The majority say that the petitioner may not prevail in his contention that, since the use of the land for the purposes stated was contemplated in any event, the dedication and use reservation requirements in this proceeding are unconstitutional as an exercise of the power of eminent domain. "A sufficient answer [say the majority] is that the proceeding here involved is not one in eminent domain nor is the city seeking to exercise that power." Why is this a sufficient answer? Is a court to be precluded from a determination of whether or not constitutional mandates have been disobeyed because of the form a proceeding takes? It would seem that because the conditions imposed were said to have been imposed under the police power this court should be precluded from determining whether or not such was the case.

The majority rely on the "well•considered" cases of Mansfield & Swett v. Town of West Orange, supra, and Ridgefield Land Co. v. City of Detroit, 241 Mich. 468 [217 N.W. 58]; and Newton v. American Sec. Co., 201 Ark. 943 [148 S.W.2d 311]. In the Mansfield case, which is not particularly applicable here, there is a great deal said to the effect that city planning is an exercise of the police power. I have no quarrel with that statement. The facts of that case are distinguishable from those here under consideration. There, a proposed subdivision of a 4 1/2•acre lot was under consideration. On this lot was an old manor house which the subdivider proposed to destroy and build in a number of homes. This proposition was disapproved by the planning board for several reasons, among which was the fact that the surrounding property owners did not approve; that it would not conform to existing conditions in the area; that it would increase traffic hazards, fire hazards, and place upon the municipality the burden of additional policing and additional supervision of traffic, and that it would interfere with safety, health and general welfare in the community. The court held that none of these objections were valid in that planning was done as an exercise of the police power and for the benefit of the public.

The Ridgefield Land Company and Newton cases support the view taken by the majority, but the reasoning leaves much to be desired, despite the adjective applied by the majority. In the Ridgefield case,

it was said: "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." As authority for this proposition, the courts cites Ross v. U.S. ex. rel. Goodfellow, 7 App.D.C. 1, to the effect that: "It 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 it at all. He cannot be made to dedicate streets and avenues to the public. If public necessity demands parts of his land 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 and limitations applicable alike to all persons. In providing for such record in the Act of 1888 (25 Stats. 451) Congress sought to subserve the public interest and convenience by requiring practical conformity in all subdivisions of land into squares, streets and avenues, with the general plan of the city as originally established, and this, regardless of the fact that it might, in instances, practically coerce the dedication of streets to public use which would otherwise have to be paid for."

The word "coerce" is particularly applicable in the case under consideration. Section 11538 (Bus. & Prof. Code) provides: "It is unlawful for any person to offer to sell, to contract to sell or to sell any subdivision or any part thereof until a final map or record of survey map thereof in full compliance with the provisions of this chapter and any local ordinance has been duly recorded or filed in the office of the recorder of the county in which any portion of the subdivision is located." Section 11539 provides: "Conveyances of any part of a subdivision shall not be made by lot or block number, initial or other designation, unless and until a final map has been recorded." Section 11541: "Any offer to sell, contract to sell or sale contrary to the provisions of this chapter is a misdemeanor, and any person, firm, or corporation, upon conviction thereof, shall be punishable by a fine of not less than twenty•five dollars ($25) and not more than five hundred dollars ($500), or imprisonment in the county jail for a period of not more than six months, or by both such fine and imprisonment."

In the three cases relied upon by the majority (Mansfield & Swett v. Town of West Orange, supra; Ridgefield Land Co. v. City of Detroit, supra, and Newton v. American Sec. Co., supra), it would seem that the only penalty provided for in the event that the proposed subdivision was not approved was that the plat could not be recorded. These cases do not involve a fine or imprisonment, or both, as contemplat-ed by the Map Act.

The construction placed upon the Subdivision Map Act by the majority has the effect of telling the subdivider that he may dedicate land to the city for the privilege of recording and selling -• a matter which is not a privilege, but a right, in other situations, or let the land go idle, or sell it and go to jail, pay a fine, or both. This, it appears to me, amounts to a form of duress that is reminiscent of the type of practice which prevailed in another country prior to the last great war.

It is true that in Archer v. City of Los Angeles, 19 Cal.2d 19, 23, 24 [119 P.2d 1], a majority of this court said: "The state or its subdivisions may take or damage private property without compensation if such action is essential to safeguard public health, safety, or morals. [Citing cases]. In certain circum-stances, however, the taking or damaging of private property for such a purpose is not prompted by so great a

necessity as to be justified without proper compensation to the owner. [Citing cases]. The liability of the state under article I, section 14 of the California Constitution arises when the taking or damaging of private property is not so essential to the general welfare as to be sanctioned under the 'police power' [citing cases], and the injury is one that would give rise to a cause of action on the part of the owner independently of the constitutional provision." [Citing cases.] This is a doctrine of stateism with which I positively disagree as appears from my dissenting opinion in that case.

Manifestly, the correct test of whether or not the police power has been properly exercised is not and never has been the degree of public necessity. To be appropriate it must be for the public health, safety, morals, or general welfare.We should all agree upon that. But if the degree of public necessity be the test, then the constitutional guarantee of just compensation for property taken for a public use is completely and forever abrogat-ed. If a legislative body finds that public necessity requires the taking of property for highways, for streets, for a water supply, for recreational areas, for hospitals, for schools or other public buildings, or for a myriad of other public purposes, the courts must accept such a finding as conclusive. If such a finding is all that is necessary to warrant the exercise of the police power, there will be no occasion for the state or other public agency ever paying for any private property taken or damaged for a public improvement. Who may say that property for schools, highways, streets, etc., is not absolutely necessary for the proper function-ing of the government? Indeed, it is an indispensable factor in the exercise of the power of eminent domain where compensation is payable, that the public convenience and necessity demand the taking or damaging of any private property involved in the public improvement contemplated. Thus, under the theory advanced in the majority opinion, in any case that the power of eminent domain may be properly exercised, the police power could also be invoked with the result that no compensation could be recovered. Although it is difficult to charter the dividing line between the exercise of the two powers, it should be said that police power operates in the field of regulation, except possibly in some cases of public emergency, such as a fire, where buildings may be destroyed, rather than in the taking of property for some public improvement. "But the moment the legislature passes beyond mere regulation, and attempts to deprive the individual of his property, or of some substantial interest therein, under pretense of regulation, then the act becomes one of eminent domain, and is subject to the obligations and limitations which attend an exercise of that power.... Under the one [police power], the public welfare is prompted [sic] by regulation and restricting the use and enjoyment of property by the owner; under the other [eminent domain], the public welfare is promoted by taking the property from the owner and appropriat-ing it to some particular use." (Vol. I, Lewis, Eminent Domain (3d ed.), § 6, p. 14.)

In Beals v. City of Los Angeles, 23 Cal.2d 381, 387 [144 P.2d 839], Chief Justice Gibson, speaking for the majority of this court, said: "We agree, however, with plaintiff's contention that the complaint states a cause of action. Closing of the alley results in the taking or damaging of private property for a public use. It is settled that the ascertainment and payment of damages is a condition precedent to the right of a city to do public work which will destroy or damage private property. [Cases cited.] The obligation to make compensation arises from the constitutional provision that 'Private property shall not be taken or damaged for public use without just compensation having first been made to, or paid into court for, the owner... (Cal. Const., art. I, § 14.) In Bigelow v. Ballerino, 111 Cal. 559, 564 [44 P. 307], which also involved the vacation of an alley, it is stated that, 'The constitutional rights of an owner of private property which is sought to be taken or damaged for public use are two: 1. The right to compensation; and 2.The right to have that compensation made or paid into court before his property is taken or injuriously affected... the

property owner may rest secure in the protection which the constitution affords him that his property shall not be taken or damaged without compensation first made. It is not incumbent upon him to demand that the authorities shall respect his rights; the duty is theirs to work no unlawful invasion of them.'" [Emphasis added.]

In People v. Ricciardi, 23 Cal.2d 390, 397 [144 P.2d 799], Mr. Justice Shenk, speaking for the majority of this court, said: "It is also the settled law that 'An abutting owner has two kinds of rights in a highway, a public right which he enjoys in common with all other citizens, and certain private rights which arise from his ownership of property contiguous to the highway, and which are not common to the public generally;... An abutting landowner on a public highway has a special right of easement and user in the public road for access purposes, and this is a property right which cannot be damaged or taken away from him without due compensation."

And yet, this same court now holds that certain land may be taken from a property owner for improvement of an existing street just because he wishes to subdivide his property adjacent thereto. If he chooses to build a house for himself and live there in solitary splendor, could the city require dedication of land for street widening purposes, or would it be required to pay him just compensation? What if he chooses not to subdivide and the proposed plan for widening Sepulveda Boulevard goes through?

The widening of the space for vehicle traffic in a street or other highway, by adding to the street or highway a strip of land of an abutting property owner, clearly gives the owner a right to compensation. (55 A.L.R. 896; Fulton County v. Amorous, 89 Ga. 614 [16 S.E. 201]; Terrell County v. York, 127 Ga. 166 [56 S.E. 309]; Watkins v. Welch Grape Juice Co., 96 App.Div. 114 [89 N.Y.S. 47]; Peckham v. Henderson, 27 Barb. (N.Y.) 207; Quantz v. Concord, 150 N.C. 539 [64 S.E. 433]; Re Girard Avenue (Pa.), 11 Phila. 499; Barnhart v. City of Grand Rapids, 237 Mich. 90 [211 N.W. 96]; Dow Arneson Co. v. City of St. Paul, 117 Minn. 164 [225 N.W. 92]; Sherlock v. Mobile County, 241 Ala. 247 [2 So.2d 405]; City of Raleigh v. Hatcher, 220 N.C. 613 [18 S.E.2d 207].) There would appear to be no necessity for citing the numerous cases involving street widening done by the state, or its subdivisions, under the power of eminent domain.

I object to the following statement in the majority opinion as unsound and in conflict with settled law: "As noted, subdivision design and improvement obviously include conformance to neighbor-hood planning and zoning, and it may properly be said that the formulation and acceptance of the unfirm conditions in the development of the district constitute the practical adoption of a master plan and zoning requirements therefor." [Emphasis added.] No authority is cited for this amazing statement which is directly contrary to one made by the same author in the case of Kleiber v. City etc. of San Francisco, 18 Cal.2d 718, 724 [117 P.2d 657]: "The act [Housing Authorities Law; Stats. Ex. Sess. 1938, p. 9; 2 Deering's Gen. Laws, Act 3483] also prescribed the powers, duties and obligations of the authority and of the city in carrying out its salutary purposes. Every necessary legislative act was completed by the legislature. There was nothing left to do except to administer the law. Governing bodies of cities, counties, or cities and counties perform both legislative and executive or administra-tive acts. The former is ordinarily performed by ordinance; the latter may be done by resolution. The steps to be taken by the city to gain the advantages afforded by the law are in the ascertainment of facts, and are administrative in character. To gain those advantages the city must proceed in the manner specified in the act. Furthermore, since the statute is the only authority

under which the city may act in the premises, and the subject matter of the action is of more than local concern, the city is bound to proceed in accordance therewith. [Emphasis added.]

The Planning Act of 1929 as amended (Stats. 1937, ch. 665, p. 1817; 2 Deering's Gen. Laws, 1944 ed., Act 5211b, p. 1768) provides for the adoption by the city of a master plan, or portions thereof. The charter of the city of Los Angeles provides for the preparation of a master plan or portions thereof by the director of planning and the city planning commission and for the adoption thereof by the city council. The charter (art. III, § 21) also provides that "All legislative power of the city except as herein otherwise provided is vested in the Council and shall be exercised by ordinance, subject to the power of veto or approval by the Mayor as herein set forth. Other action of the Council may be by order or resolution, upon motion."

It would seem that the control of streets in a city • laying out, widening, etc., • is a legislative power delegated by the state. (4 McQuillin, Municipal Corporations, p. 73; Kellogg v. Sherrill, 24 Ohio App. 169 [156 N.E. 418].) And that any plan proposed by the planning commission for such streets must be established by ordinance adopted by the city council as provided for by the city charter.

McQuillin, speaking of city planning, has this to say: "Manifestly all action on the part of the city in this, as in other respects, must be sanctioned by the law. No power can be exerted by its officers, or citizens however necessary or desirable unless it proceeds from legislative authority consistent with organic legal provisions, national and state. Inasmuch therefore as city planning and zoning involves interference more or less with the rights of persons and of property the path along which the city may safely move in this enterprise should be known, otherwise difficul-ties and failures are certain. If under the law as it now stands obstacles interpose they may be removed by knowledge of the city's political and legal status, its power and the source and construc-tion thereof, including, of course, judicial decisions relating thereto which point out the purpose of constitutional guarantees and rights of persons and of property as such rights exist at the time of the action, and as they may be restricted in response to insistent reasonable public requirements by the particular community or the part thereof involved." (1 McQuillin, Municipal Corporations (2d ed.), p. 354.)

The same arguments are applicable to the requirement (condi-tion No. 4) of a 10•foot strip of land for tree and shrub planting purposes. The Map Act does not contemplate the imposition of such a condition. The act refers to street alignment, grades, widths, easements, rights of way for drainage and sanitary sewers, minimum lot area and width, street work, utilities, highways and public ways. Assuming that this is a requirement analogous to a set•back line and that the director of planning may be authorized by ordinance to impose such a condition in the interests of the public health, safety, etc., there is still no ordinance so providing, and there is no such provision in the Map Act. As this court said in the Kleiber case, supra, "the city must proceed in the manner specified in the act..."

I cannot agree with the majority of this court in the interpre-tation of the Subdivision Map Act (Bus. & Prof. Code, § 11500 et seq.) or with the interpretation of the only local ordinance which is applicable to the facts at hand. In my opinion, the statutes and the ordinance should be construed in the manner hereinafter set forth.

This case involves the interpretation of portions of the California Subdivision Map Act (Bus. & Prof.

Code, § 11500 et seq.), certain ordinances of the city of Los Angeles, and the validity of the methods employed by respondent city in administer-ing the same.
Appellant, a Los Angeles subdivider, pursuant to the Subdivi-sion Map Act and certain ordinances of the city, submitted to the planning department of the city of Los Angeles a tentative subdivision map of a 13•acre tract in what is generally referred to as the Westchester District. After investigation, the city council of respondent adopted the recommendation of its planning commission and imposed upon appellant a number of conditions precedent to approval of the map. Appellant sought a writ of mandate in the trial court to require respondent city to approve the map without the imposition of the following four conditions:

(1) That appellant dedicate a strip 10 feet wide along the front of his tract for the widening of Sepulveda Boulevard on which his subdivision abuts;

(2) That appellant dedicate for street purposes the triangular southerly point or tip of his subdivision;

(3) That appellant dedicate a strip 80 rather than 60 feet in width for 77th Street which traverses the subdivision; and

(4) That appellant set aside a strip of land 10 feet in width in addition to the 10 feet needed for widening the boulevard for the planting of trees and shrubbery.

These four conditions were held by the trial court to have been validly imposed as a condition precedent to approval of the subdivision map.

Appellant contends: (1) That the State Planning Act of 1929 as amended (Stats. 1929, p. 1805, 2 Deering's Gen. Laws, Act 5211b, p. 1768) is applicable to the city of Los Angeles, and that respondent had neither conformed to its provisions, nor to the provisions of the Los Angeles City Charter requiring a master plan; (2) That the proper construction of the Subdivision Map Act did not permit the imposition of conditions (1), (2), and (4), or if a proper construction did so permit, that the act is unconstitutional in that the imposition of such conditions constituted an exercise of the power of eminent domain without compensa-tion under the guise of the police power.

Article VIII of the charter of the city of Los Angeles (provid-ing for a department of city planning) provides in section 94 1/2 thereof that the department shall be under the control and management of a director of planning. Section 95g provides that "He [the Director of Planning] shall make investigations and report on the design and improvement of all proposed subdivisions of land and shall have such powers and perform such duties as are required by the Subdivision Map Act of the State of California."

The Subdivision Map Act (Bus. & Prof. Code, supra) provides that any person, firm, corporation, partnership or association, causing land to be divided into a subdivision for himself or for others shall comply with certain formalities. Such subdivider must prepare and present to the governing body of the particular city or county a "tentative map" of the proposed subdivision and the existing conditions in and around it. This map must comply with the provisions of the act and of any local ordinance passed by the governing body of the city or county. It also provides that it is unlawful for any person to offer to sell, to

contract to sell or to sell any subdivision or any part thereof until the proposed subdivision has been approved and a map thereof recorded.

The Business and Professions Code provides: Section 11506: "'Local ordinance' refers to an ordinance regulating the design and improvement of subdivisions, enacted by the governing body of any city or county under the provisions of this chapter or any prior statute, regulating the design and improvement of subdivisions, in so far as the provisions of the ordinance are consistent with and not in conflict with the provisions of this chapter."

Section 11510: "'Design' refers to street alignment, grades and widths, alignment and widths of casements and right of ways for drainage and sanitary sewers and minimum lot area and width."

Section 11511: "'Improvement' refers to only such street work and utilities to be installed, or agreed to be installed, by the subdivider on the land dedicated or to be dedicated for streets, highways, public ways, and easements, as are necessary for the general use of the lot owners in the subdivision and local neighborhood traffic and drainage needs, as a condition precedent to the approval and acceptance of the final map thereof."

Section 11551: "In case there is a local ordinance, the subdivider shall comply with its provisions before the map or maps of a subdivision may be approved. In case there is no local ordinance, the governing body may, as a condition precedent to the approval of the map or maps of a subdivision, require streets and drainage ways properly located and of adequate width, but may make no other requirements."

Ordinance No. 79310 as amended by ordinances Nos. 81815, 83263 and 85666 was in effect at the time appellant submitted the map of the proposed subdivision here involved.

There was admitted in evidence a master plan for primary and secondary streets which had been approved by the city planning commission. There is no doubt that Sepulveda Boulevard falls within the "primary street" classification. This master plan had not been adopted by the city council by ordinance as the following excerpt from the testimony at the trial shows. Mr. Bennett, director of planning for the city of Los Angeles since 1941, after testify-ing that it was the proper procedure for the city council to adopt by ordinance any zoning map and text, was questioned, and answered as follows:

> "Question: And Exhibit Y, which is the proposed master plan of traffic arteries for the city of Los Angeles, has that been adopted by the Council?

"Answer: No, sir.

"Question: Either by resolution or ordinance?

"Answer: No, sir."

With respect to the condition on (No. 1, supra) imposed for the purpose of widening Sepulveda Boulevard, concededly a primary street, and upon which appellant's subdivision abuts, the ordinance

makes no provision. The applicable section provides that "all streets as far as practicable shall be in alignment with existing adjacent, connecting and surrounding streets." It does not provide that the subdivider must dedicate a portion of his property for the purpose of widening an adjacent street. The Subdivision Map Act provides that in case there is no local ordinance (and local ordinance refers to "design and improvement"), the governing body may require that streets be properly located and of adequate width, but "may make no other requirements." [Emphasis added.] (Bus. & Prof. Code, § 11551.) A reasonable construction of this section would appear to be that the governing body may require the subdivider to comply with the conditions as to width and location of streets within his subdivision. It makes no provision for the proposed widening of existing adjacent streets. Condition No. 4 deals with a proposed dedication or setting aside of an additional 10•foot strip for tree planting purposes. Again, neither the ordinance here involved, nor the Subdivision Act makes any provision for this. It would therefore appear that conditions 1 and 4 were invalidly imposed under the Subdivision Map Act and the applicable ordinance.

Condition No. 2 involves the proposed dedication of the southerly triangular tip of plaintiff's proposed subdivision for street purposes. It is apparent from the record that at this point or tip two main traffic arteries meet, Arizona Street on the westerly side of appellant's subdivision and Sepulveda Boulevard on the easterly side. Mr. Dorsey, the traffic engineer, testified that the climination of the point was necessary to reduce the traffic hazards at that intersection. He stated that the two fundamen-tals of traffic engineering involved were the reduction of the points of conflict where the flow of traffic on one street intersects that on the other street, and that the traffic movements should be brought as close to a right angle as possible. But respondents set forth in their brief that the condition was imposed for the purpose of widening either Sepulveda Boulevard or Arizona Street, or both. It is difficult to perceive how widening either or both of the streets would eliminate the so•called dangerous point. And, again, neither the ordinance nor the Subdivision Map Act makes provision for widening existing adjacent, connecting or surrounding streets.

The majority say that since "no specific restriction or limitation on the city's power is contained in the Charter, and none forbidding the particular conditions is included either in the Subdivision Map Act or the city ordinances, it is proper to conclude that conditions are lawful which are not inconsistent with the Map Act and the ordinances and are reasonably required by the subdivision type and use as related to the character of local and neighborhood planning and traffic conditions." The charter refers to the "design and improvement of all proposed subdivisions." The Subdivision Map Act provides that local ordinances regulating "design and improve-ment" may be enacted by the governing body of any city or county, and the words "design and improvement" are defined by the act. It is inconceivable how it can be said that the consistent use of these two words in the act and in the charter do not place a restriction upon the conditions which may be imposed. It seems very clear that the legislative intent was to provide for uniformity in subdivision planning with respect to streets, ways, drainage facilities, lot size, setback lines and the like within the proposed subdivision, and that it was not contemplated that the city would widen its existing highways at the expense of the property owner. It is no answer to say that the subdivider cannot complain because he is not required to make the improvement as well as dedicate the land. Since the section defining "improvement" is expressly limited to mean the street work and utilities to be installed by the subdivider on land dedicated for such streets as are necessary for the use of the lot owners and local neighborhood traffic, the Legislature must have intended that the subdivider was to dedicate land only for

streets within his subdivision. It cannot be contended seriously by anyone that the Legislature intended the subdivider to improve, at his own expense, a state highway such as Sepulveda Boulevard, and a street such as Arizona.

The charter provides that the director of planning shall have such other duties as are imposed upon him by ordinance. Assuming that the council could, by ordinance under the Map Act, place upon the director the duty of requiring dedication of property by subdividers for the purpose of widening existing streets, the fact remains that there is no such ordinance in existence.

The Los Angeles City Charter provides that the director of planning shall have such powers and perform such duties as are required by the Subdivision Map Act of the State of California, and in "addition to the foregoing, he shall have such additional powers and duties as may be imposed upon him by ordinance." Section 97 of the charter provides that no ordinance shall be adopted appertain-ing to certain matters unless approved by the city planning commission. Among those enumerated matters are set forth the following: "The acquisition, establishing, opening, widening, narrowing, straightening... of any public street, road, highway..." Thus it would seem that although the planning commission must approve, it was the clear intent that such matters should be covered by ordinance. It would appear, therefore, that condition No. 2 was invalidly imposed under the applicable laws in force.

With respect to condition No. 3, that appellant dedicate a strip of land 80 rather than 60 feet in width for the widening of 77th Street which traverses the subdivision, appellant concedes in his brief that it is a street "necessary for the general use of the lot owners in the subdivision and local neighborhood traffic." (Bus. & Prof. Code, § 11511.) From the record it appears that this condition was imposed to bring the proposed extension of 77th Street into alignment with the existing portion of 77th Street on the westerly side of Arizona previously set forth, that all streets shall be in alignment with existing, connecting streets, and that it was properly imposed under both the Subdivision Map Act (Bus. & Prof. Code, § 11551) and the applicable ordinance. Appellant's only contention with respect to the imposition of this condition is that the width required is "unreasonable." It is without merit. The state and its political subdivisions, acting in the interest of public health, welfare and safety, may make reasonable require-ments. It is apparent from the record that the requirement of a width of 80 feet rather than 60 feet for 77th Street which traverses appellant's proposed subdivision is not an unreasonable or arbitrary requirement in the interests of the public safety and welfare. This condition is of the type contemplated by the Subdivision Map Act.

Appellant's contentions that the provisions of the Los Angeles City Charter and the state Planning Act of 1929 (2 Deering's Gen. Laws, Act 5211b, as amended) requiring a master plan had not been complied with in that there was no general, complete, over•all plan are without merit.The charter, section 96 1/2 provides that a "master plan or any part thereof" may be adopted by the state Planning Act (assuming without deciding that it is applicable to the city) that: "The master plan, with the accompanying maps, diagrams, charts, descriptive matter and reports shall include such of the following subjects matter [sic] or portions thereof as are appropriate to the city, county or region...." Thus it would appear that both legislative bodies did not intend that a plan, in its entirety, was to be necessary at any one particular time. A general plan for a city would include a plan for not only its subdivisions, street systems with their building lines or setbacks, but many other things necessary for a well•developed community. It cannot be seriously

contended nor was it intended that a work of such magnitude could be accomplished overnight.

I would, therefore, reverse the judgment and direct the trial court to issue a writ of mandate directing the approval of the proposed map subject to compliance with condition No. 3 hereinabove set forth.

PIONEER TRUST AND SAVINGS BANK v. THE VILLAGE OF MOUNT PROSPECT

22 Ill. 2d 375; 176 N.E.2d 799

Supreme Court of Illinois

May 19, 1961

PRIOR HISTORY: APPEAL from the Circuit Court of Cook County.

Mr. JUSTICE HERSHEY delivered the opinion of the court:

Plaintiffs brought a mandamus proceeding in the circuit court of Cook County to compel the corporate authorities of the village of Mount Prospect to approve a plat of subdivision which complied with all the provisions of the official plan of the municipality except that requiring a dedication of land for public use. The case was submitted to the court on an agreed statement of facts. The court entered an order finding the land dedication require-ments of the village's official plan invalid and directed the issuance of a writ of mandamus commanding the corporate authorities to approve the plat. The trial court has certified that the validity of a municipal ordinance is involved and that the public interest requires a direct appeal.

Article 53 of the Revised Cities and Villages Act authorizes municipalities to establish plan commissions with authority to recommend to the corporate authorities the adoption of an official plan. Section 53 • 2 (Ill. Rev. Stat. 1959, chap. 24, par. 53 • 2) provides that the plan may "establish reasonable standards of design for subdivisions and for re-subdivisions of unimproved land and of areas subject to redevelopment, including reasonable requirements for public streets, alleys, ways for public service facilities, parks, playgrounds, school grounds, and other public grounds." Section 53 • 3 provides that no plat of subdivision "shall be entitled to record or shall be valid unless the subdivi-sion shown thereon provides for streets, alleys, . . . and public grounds in conformity with the applicable requirements of the official plan."

The village of Mount Prospect has established a plan commis-sion and has adopted by ordinance an official plan as recommended by the commission. Section 6 of article II of that plan contains a requirement for the dedication of public grounds as follows:

> "Dedication of Lands for Public Use: The plat shall have lettered upon it a statement of dedications properly conveying all usable lands dedicated for such public uses as streets, public schools, parks or any other public use, and there shall be attached to the plat a certifi-cate of title certifying the ownership of all such lands to be so dedicated by said plat. Public grounds, other than streets, alleys and parking areas, shall be dedicat-ed in appropri-ate

> locations by the plat (a) at the rate of at least one (1) acre for each sixty (60) residential building sites or family living units, which may be accommodated under the restrictions applying to the land; or (b) at the rate of at least one•tenth (1/10) acre for each one (1) acre of business or industrial building sites which may be accommodated under the restrictions applying to the land."

Plaintiff Salvatore Dimucci is engaged in the business of subdividing real estate for residential purposes and caused a plat of the subdivision to be submitted to the plan commission for approval which complied in all respects with the aforesaid ordinance except as to the dedication of some 6.7 acres of land which would be required under the language of section 6 of article II quoted above. The plaintiffs have refused to dedicate land, and, in view of that refusal, the village board has refused to approve the plat of the subdivision. It is established in the record that the 6.7 acres of land sought to be required to be dedicated or donated would be for the use of an elementary school and for the use of the Mount Prospect Park District as an elementa-ry school site and a secondary use as a playground. The proposed subdivision shows some 250 residential units.

The issue here presented for determination is the validity of the quoted section of the ordinance, and no provision of the ordinance other than that requiring the dedication is under attack by the plaintiffs in this proceeding.

The statute from which the village derives its authority has been before us on two previous occasions. (Petterson v. City of Naperville, 9 Ill.2d 233; Rosen v. Village of Downers Grove, 19 Ill.2d 448.) In each of these cases the issue presented for decision was narrowly circumscribed, and in neither case did we pass upon the precise point that is involved here. The Petterson case did not involve any question of required dedication of land, but rather concerned the reasonableness of a requirement that the subdivider provide curbs and gutters for the streets of the subdivision. We sustained the validity of such a requirement, stating that "the power to prescribe reasonable requirements for public streets in the interest of the health and safety of the inhabitants of the city and contiguous territory includes more than a mere designation of the location and width of streets." The Rosen case involved a portion of an ordinance of the village of Downers Grove which required subdividers to dedicate land for educational facilities but also provided that if the plan commission should deem that the dedication of such land would not of itself meet the reasonable requirements of providing educational facilities for the proposed subdivision, then the plan commission might require any additional means for providing reasonable facilities. Acting under this ordinance, the municipality attempted to require subdividers to pay a certain sum per lot for educational purposes. We held this attempt invalid because the specific technique employed was not authorized by the statute, and also because the term "educa-tional purposes" was broader than the language of the statute. The Downers Grove ordinance did contain a paragraph, similar to that involved in the instant case, requiring the dedication for public grounds of at least one acre of land for each 75 family living units; but this particular provision was not directly involved in the litigation and we refused to pass on its validity.

Our opinion in the Rosen case thus specifically left undecided the question that is now presented for decision. It did, however, suggest some basic principles for distinguishing between permissi-ble and forbidden requirements. We stated in the Rosen case that the statutory provisions with respect to reasonable requirements for streets and public grounds were based upon the theory that "the developer of a

subdivision may be required to assume those costs which are specifically and uniquely attributable to his activity and which would otherwise be cast upon the public." We further observed: "But because the requirement that a plat of subdivision be approved affords an appropriate point of control with respect to costs made necessary by the subdivision, it does not follow that communities may use this point of control to solve all of the problems which they can foresee. The distinction between permissi-ble and forbidden requirements is suggested in Ayres v. The City Council of Los Angeles, 34 Cal.2d 31, 207 P.2d 1, which indicates that the municipality may require the developer to provide the streets which are required by the activity within the subdivision but can not require him to provide a major thoroughfare, the need for which stems from the total activity of the community." It is in the light of these basic principles that the reasonableness of the requirement sought to be imposed by the defendant village must be determined. If the requirement is within the statutory grant of power to the municipality and if the burden cast upon the subdivid-er 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.

Mr. Justice Holmes, in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 67 L.ed. 322, stated the same issue with his usual clarity and conciseness, when he said: "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. Hairston v. Danville & Western Ry. Co. 208 U.S. 598, 605. 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."

There can be no controversy about the obvious fact that the orderly develop-ment of a municipality must necessarily include a consideration of the present and future need for school and public recreational facilities. Neither the plaintiffs nor the defendants in this case take the negative side of the question as to the desirability either of education or recreation. The question is not one of the desirability of education or recreation, nor of the desirability to improve the public condition, but, rather, the question presented here is one of determining who shall pay for such improvements. Is it reasonable that a subdivider should be required under the guise of a police power regulation to dedicate a portion of his property to public use; or does this amount to a veiled exercise of the power of eminent domain and a confiscation of private property behind the defense of police regulations?

That the addition by this subdivision of some 250 residential units to the municipality would of course aggravate the existing need for additional school and recreational facilities is admitted by the parties to this cause. No complaint is made by the plaintiff in this cause that the land required to be dedicated for such purposes by subdivision control ordinance is unnecessary. The sole question thus presented here is whether the state of law is such that a mandatory dedication of the land without cost to the public may be sustained in the regulation of proposed subdivision when it is admitted that such land may well be needed.

However, this record does not establish that the need for recreational and educational facilities in the event that said subdivision plat is permitted to be filed, is one that is specifi-cally and uniquely attributable to the addition of the subdivision and which should be cast upon the subdivider as his sole financial burden. The

agreed statement of facts shows that the present school facilities of Mount Prospect are near capacity. This is the result of the total development of the community. If this whole community had not developed to such an extent or if the existing school facilities were greater, the purported need supposedly would not be present. Therefore, on the record in this case the school problem which allegedly exists here is one which the subdivider should not be obliged to pay the total cost of remedying, and to so construe the statute would amount to an exercise of the power of eminent domain without compensation. Sanitary District of Chicago v. Chicago and Alton Railroad Co. 267 Ill. 252, and cases there cited; Ridgemont Development Co. v. City of East Detroit, 358 Mich. 387.

Section 6 of article II of the defendant village ordinance imposes an unreason-able condition precedent for the approval of a plat of a subdivision and purports to take private property for public use without compensation. The circuit court of Cook County was correct in so holding, and the judgment of that court is affirmed.

CITY OF DUNEDIN v. CONTRACTORS AND BUILDERS ASSOCIATION OF PINELLAS COUNTY

312 So. 2d 763;

District Court of Appeal of Florida, Second District.

April 30, 1975

SUBSEQUENT HISTORY: Rehearing Denied June 10, 1975.

OPINION: GRIMES, Judge.

This case involves the authority of a municipality to charge a so•called "impact fee" for the privilege of connecting to its water and sewer systems.

The City of Dunedin (city) passed certain ordinances which imposed a fee of $325 for each water connection and $375 for each sewer connection "to defray the cost of production, distribution, transmission and treatment facilities for water and sewer provided at the expense of the City of Dunedin." These fees were in addition to charges imposed for the cost of physically connecting into the systems. Certain local contractors, together with the Contractors and Builders Association of Pinellas County, filed suit seeking declaratory and injunctive relief against the imposition of these fees. The final judgment stated in part:

> The City of Dunedin is enjoying, or suffering, depending upon one's viewpoint, growth problems. The demand for sewer and water connections has strained the capabilities of the

> sewer and water departments to near the breaking point. Attempting to cope with the demand for sewer and water connections, the City adopted Ordinance 72•26, which as amended assessed against new connections a total 'impact fee' of approximately $700.00 for dwelling or commercial units.
>
> ... The salutary purpose of Ordinance 72•26 strikes a sympathetic chord with the Court. Implicit in the ordinance is the philosophy that those who are creating the inordinate demand for services ought to bear the prime cost of the same. ...

However, the court concluded that the city was without authority to impose the fees and entered a judgment enjoining their collection.

There are three reported Florida decisions dealing with a form of impact fee. The cases of Venditti•Siravo, Inc. v. City of Hollywood, 1973, 39 Fla.Supp. 121, and Janis Development Corp. v. City of Sunrise, 1973, 40 Fla.Supp. 41, dealt with ordinances which imposed a surcharge on building permits. The funds derived by the surcharge in Venditti were to be used for acquiring and developing parks, and the funds collected in Janis were to be used for roads. Hence, there was only a nebulous relationship between the subject upon which the charge was being imposed and the facilities for which the money was going to be spent. In each case the court properly characterized the fee as a tax which was beyond the city's authority to impose. In Pizza Palace of Miami, Inc. v. City of Hialeah, Fla.App.3d, 1970, 242 So.2d 203, our sister court held that a sewer connection fee could not be charged against a lessee because the ordinances of the city provided that the owner had the responsibility for connecting to the sewer lines. The court pointed out that it was unnecessary to its decision to pass upon the validity of the sewer connection charge itself. Thus, it is evident that the case sub judice is a case of first impression in Florida.

The imposition of fees such as those in this case have been upheld in several other jurisdictions. In Brandel v. Civil City of Lawrenceburg, 1967, 249 Ind. 47, 230 N.E.2d 778, the court sustained an ordinance setting a $200 fee for those who connected to a new section of the sewage system and a $62.50 fee for those who connected to the old sewage system. The court noted that the fee was in the nature of a "use tax" for the "services" of disposing of sewage from particular property. The court rejected a charge of discrimination, pointing out that the original cost of the old system was less than that of the new system and, therefore, it was logical that the charges for its use would be less than those for the use of the new system.

In Hartman v. Aurora Sanitary District, 1961, 23 Ill.2d 109, 177 N.E.2d 214, the District established a capital improvement fund for the purpose of building new sewage facilities to be financed by a $160 connection fee charged for connections in recently annexed territories. The connection fee for the original territory of the District was $15. In upholding the $160 fee, the court said:

> ... It is patent that the rapid expansion of our municipalities has rendered inadequate prior facilities developed for the health and welfare of the community. It is only proper that all citizens of the community should share equally in the cost of maintaining a sanitary plant which benefits the health and welfare of the entire community by the proper disposal of sewage. It would seem equally fair that those property owners who benefit especially, not

> from the maintenance of the system, but by the extension of the system into an entirely new area, should bear the cost of that exten-sion. ...

A city ordinance raising the sewer connection charge for single family dwellings from $25 to $255 was attacked in Hayes v. City of Albany, 1971, 7 Or.App. 388, 490 P.2d 1018. The money was earmarked for the construction and expansion of the city's sanitary sewer system. The plaintiff contended the ordinance was invalid as being a tax and further argued that even though it be considered a "user charge" it was void because it was not "just and equitable." In upholding the ordinance, the Oregon court distinguished several adverse decisions on the basis that in those cases the funds collected could be used for general public purposes, whereas the proceeds from the sewer connection charge were limited to the development and maintenance of the sewage disposal system. The court concluded that the city had the power to make a charge reasonably commensurate with the burden currently imposed or reasonably anticipated upon the system.

One of the most recent cases on the subject is Home Builders Association of Greater Salt Lake v. Provo City, 1972, 28 Utah 2d 402, 503 P.2d 451, in which the City of Provo enacted an ordinance imposing a sewer connection fee for each living unit in newly constructed buildings. The purpose of the fee, which admittedly exceeded the cost of inspection and connection, was to provide the requisite funds to improve and enlarge the sewer system. In sustaining the ordinance, the court held that the fee was neither a tax nor an assessment but a payment for services furnished.

While many parts of this country are experiencing growth due to the population explosion, at the present time no state is more imminently faced with the problems inherent in population increase than Florida. Where a city's water and sewer facilities would be adequate to serve its present inhabitants were it not for drastic growth, it seems unfair to make the existing inhabitants pay for new systems when they have already been paying for the old ones. The question posed here is whether the city could legally finance the expansion through increased connection charges. The court below concluded that the connection charge was, in reality, a tax. If this is so, it cannot be sustained because a municipality cannot impose a tax, other than ad valorem taxes, unless authorized by general law.

In construing Fla.Stat. § 180.13 (1971) our Supreme Court in Cooksey v. Utilities Commission, Fla.1972, 261 So.2d 129, said:

> "Implicit in the power to provide municipal services is the power to construct, maintain and operate the neces-sary facilities. The fixing of fair and reason-able rates for utilities services provided is as incident of the authority given by the Constitution and statutes to provide and maintain those services. ..."

The imposition of fees for the use of a municipal utility system is not an exercise of the taxing power nor is it the levy of a special assessment. State v. City of Miami, 1946, 157 Fla. 726, 27 So.2d 118. In our view, connection fees such as those involved in this case do not constitute a tax but a charge which may be made for the use of the utility service pursuant to the authority of its charter and Fla.Stat. § 180.13 (1971), providing they meet the criteria hereafter set forth. We hold that where the growth patterns are such that

an existing water or sewer system will have to be expanded in the near future, a municipality may properly charge for the privilege of connecting to the system a fee which is in excess of the physical cost of connection, if this fee does not exceed a proportionate part of the amount reasonably necessary to finance the expansion and is earmarked for that purpose. Having announced the rule, we must now determine its applicability to the instant case.

The evidence clearly demonstrates dramatic growth within the area logically served by the city systems. The evidence also supports the fact that the sewer and water systems were running near capacity and the expansion of these systems was imminent. The only expert witness at the trial testified that the average charge per connection necessary to finance the expansion within the area to be reasonably served was $357 for water and $631 for sewer, both of which were in excess of the fees established by the ordinance. Hence, the amount of the fee appears reasonable for the purpose for which it is imposed. The trial judge found the fees to be unreasonable charges, but this was premised upon his view that the cost of prospective capital improvements could not be considered in setting the amount of the connection charges.

Our greatest concern in this case was whether the funds collected as a result of the fees were clearly earmarked for capital expansion. The language of the ordinances does not unequivocally mandate the use of the funds for capital improve-ments. Yet, the evidence shows that the fees were established for this purpose, and the city has steadfastly handled the funds separately with a view toward expanding the monies only for improvements to the respective systems. In this regard we are assisted by the finding of the court below "that the proceeds derived from the $700 connecting fees are earmarked by the city for capital improvements to the systems as a whole." Clearly, the use of such funds must be so limited, and in view of the position taken by the city in this litigation, any use of the funds contrary to these purposes would be subject to appropriate legal sanction.

At the trial, the appellees also attacked the ordinances on constitutional grounds. The judge did not pass on the constitu-tional questions because, having determined that the fee was a tax which was beyond the authority of the city to assess, he deemed it unnecessary to do so. What we have already said adequately disposes of the constitutional questions. We believe the ordinanc-es are constitutional and do not unlawfully discriminate against newcomers as asserted by appellees. The fees are payable by every person who hereafter connects into the city's water ow sewer system, even if he has lived in the city all his life and his property is in the heart of the city. See Home Builders Associa-tion of Greater Salt Lake v. Provo City, supra; Airwick Industries, Inc. v. Carlstadt Sewerage Authority, 1970, 57 N.J. 107, 270 A.2d 18.

The ordinances in question are valid and enforceable. Therefore, the claims for refund sought in appellees' cross•appeal cannot be sustained.

Appellees also filed a petition to review as inadequate a cost judgment entered subsequent to the final judgment. Pursuant to Craft v. Clarembeaux, Fla.App.2d, 1964, 162 So.2d 325, this petition was treated as a Notice of Interlocutory Appeal. In light of our decision in this case, the cost judgment must also be set aside.

Reversed.

CONTRACTORS AND BUILDERS ASSOCIATION OF PINELLAS COUNTY v. CITY OF DUNEDIN

329 So. 2d 314

Supreme Court of Florida

February 25, 1976

SUBSEQUENT HISTORY: Rehearing Denied April 2, 1976.

OPINION BY: HATCHETT

In an action for declaratory judgment, brought against the City of Dunedin in Circuit Court, provisions of certain ordinances were adjudged defective, as being an ultra vires attempt by the city to impose taxes; and the city was enjoined from collecting fees the ordinances required as a precondition for municipal water and sewerage service. In addition, the Circuit Court ordered the City to refund the fees, but only to persons who had paid under protest. On appeal to the District Court of Appeal, Second District, that court reversed the circuit court judgment, City of Dunedin, Florida v. Contractors and Builders Association of Pinellas County, etc. et al., 312 So.2d 763; and, on June 10, 1975, certified that its decision passed upon a question of great public interest. As is customary in cases where such certificates have been entered, we exercise our discretion to review on its merits the decision below.E.g., Grant v. State, 316 So.2d 282 (Fla.1975); Winston v. State, 308 So.2d 40 (Fla.1974) (reh. den. 1975). See Fla.Const. art. V, § 3(b)(3).

A. Plaintiffs in the trial court, petitioners here, are building contractors, an incorporated association of contractors, and owners of land situated within the city limits of Dunedin. They do not complain of all the fees Dunedin requires to be collected upon issuance of building permits, but contend that monies which the city collects and earmarks for "capital improve-ments to the [water and sewerage] system as a whole" (R. 725) constitute taxes, which a municipality is forbidden to impose, in the absence of enabling legislation. It is agreed on all sides that "a municipality cannot impose a tax, other than ad valorem taxes, unless authorized by general law," 312 So.2d at 766, and that no general law gives such authorization here. Respon-dent contends that these fees are not taxes, but user charges analogous to fees collected by privately owned utilities for services rendered. For the reasons stated in Judge Grimes' scholarly opinion, we accept this analogy, but we decline to uphold a revenue generating ordinance that omits provisions we deem crucial to its validity. We are unpersuaded, moreover, that the limitations, which the city has in fact placed on fees collected pursuant to Dunedin, Fla., Code §§ 25•31, 25•71(c) and (d), can suffice to make those fees "just and equitable", within the meaning of Fla.Stat. § 180.13(2) (1973). In principle, however, we see nothing wrong with transferring to the new user of a municipally owned water or sewer system a

fair share of the costs new use of the system involves.

But the fees in Janis Development and Venditti-Siraro bore no relationship to (and were greatly in excess of) the costs of the regulation which was supposed to justify their collection. In each case, the fees were required to be paid as a condition for issuance of building permits. In the Janis Development case, $200.00 per dwelling unit built was put into a fund for road maintenance. In Venditti•Siraro, one percent of estimated construction costs went into a fund for parks. Because the surcharges were collected for purposes extraneous to the enforcement of the building code, the courts concluded that the surcharges amounted in law to taxes, which the municipalities had not been authorized to impose. In contrast, evidence was adduced here that the connection fees were less than costs Dunedin was destined to incur in accommodating new users of its water and sewer systems. We join many other courts in rejecting the contention that such connection fees are taxes.

The avowed purpose of the ordinance in the present case is to raise money in order to expand the water and sewerage systems, so as to meet the increased demand which additional connections to the system creates. The municipality seeks to shift to the user expenses incurred on his account. A private utility in the same circumstances would presumably do the same thing, in which event surely even petitioners would not suggest that the private corporation was attempting to levy a tax on its customers.
Under the constitution, Dunedin, as the corporate proprietor of its water and sewer systems, can exercise the powers of any other such proprietor (except as Fla.Stat.§§ 180.01 et seq., or statutes enacted hereafter, may otherwise provide.) Municipal corporations have "governmental, corporate and proprietary powers" and "may exercise any power for municipal purposes, except as otherwise provided by law." Fla.Const. art. VIII, § 2(b); City of Miami Beach v. Fleetwood Hotel, Inc., 261 So.2d 801 (Fla.1972). "Implicit in the power to provide municipal services is the power to construct, maintain and operate the necessary facilities." Cooksey v. Utilities Commission, 261 So.2d 129, 130 (Fla. 1972). There are no provisions in Chapter 180, Florida Statutes, expressly governing capital acquisition other than through deficit financing, but it is provided that the "legislative body of the municipali-ty... may establish just and equitable rates or charges" for water and sewerage. Fla.Stat. § 180.13(2) (1973). See generally Annot., 61 A.L.R.3d 1236, 1248•1259 (1975).

When a municipality sells debentures as a means of financing the extension or enlargement of a public utility, the indebtedness thus incurred is eventually made good with utility revenues; and anticipated revenues "may be pledged to secure moneys advanced for the ... improvement." Fla.Stat. § 180.07(2) (1973). When money for capital outlay is borrowed, water and sewer rates are set with a view towards raising the money necessary to repay the loan. State v. City of Tampa, 137 Fla. 29, 187 So. 604, 609 (1939); State v. City of Miami, 113 Fla. 280, 152 So. 6 (1933) (reh. den. 1934) ("certificates of indebtedness ... are payable as to both principal and interest solely out of a special fund to be created ... out of the net earnings" At 13).

Water and sewer rates and charges do not, therefore, cease to be "just and equitable" merely because they are set high enough to meet the system's capital requirements, as well as to defray operating expenses. State v. City of Tampa, supra; State v. City of Miami, supra. We see no reason to require that a municipality resort to deficit financing, in order to raise capital by means of utility rates and charges. On

the contrary, sound public policy militates against any such inflexibility [emphasis added].. It may be a simpler technical task to amortize a known outlay, than to predict population trends and the other variables necessary to arrive at an accurate forecast of future capital needs. But raising capital for future use by means of rates and charges may permit a municipality to take advantage of favorable conditions, which would alter before money could be raised through issuance of debt securities; and the day may not be far distant when municipalities cannot compete successfully with other borrowers for needed capital. The weight of authority supports the view that raising capital for future outlay is a legitimate consideration in setting rates and charges. Hayes v. City of Albany, 7 Or.App. 277, 490 P.2d 1018 (1971); Hartman v. Aurora Sanitary District, 23 Ill.2d 109, 177 N.E.2d 214 (1961); Home Builders Ass'n of Greater Salt Lake v. Provo City, 28 Utah 2d 402, 503 P.2d 451 (1972). n9

It is also established that differential utility rates and charges may be "just and equitable". Fla.Stat. § 180.13(2) (1973); Hayes v. City of Albany, supra, notwith-standing the differential. In Brandel v. Civil City of Lawrenceburg, 249 Ind. 47, 230 N.E.2d 778 (1967), the court upheld an ordinance setting differential connection charges where two distinct sewerage systems had been engineered in the same political entity. The user connecting to the more expensive system paid a higher connection charge. Another common type of differential charge makes the character of the user determinative of utility rates:

In determining reasonable rate relationships, a municipality may sometimes take into account the purpose for which a customer receives the service .... Courts have recognized that differences in sewer use rates for residential customers and various other customers may be reasonable. Some customers may be subject to a flat rate while other customers are subject to rates based on water consumption or type and number of receptacles. Rutherford v. City of Omaha, 183 Neb. 398, 160 N.W.2d 223, 228 (1968) (authorities omitted)

Dunedin distinguishes between residential and commercial users, on one hand, and industrial users, on the other. See ante, pp. 316•317 n. 1, and petitioners do not question this distinction. Here the issue is whether differential connection charges are "just and equitable", when they vary depending on the time at which the connection to the utility system is made.

Raising expansion capital by setting connection charges, which do not exceed a pro rata share of reasonably anticipated costs of expansion, is permissible where expansion is reasonably required, if use of the money collected is limited to meeting the costs of expansion.n10 Users "who benefit especially, not from the maintenance of the system, but by the extension of the system... should bear the cost of that extension." [emphasis added] Hartman v. Aurora Sanitary District, supra, 177 N.E.2d at 218. On the other hand, it is not "just and equitable" for a municipally owned utility to impose the entire burden of capital expenditures, including replacement of existing plant, on persons connecting to a water and sewer system after an arbitrarily chosen time certain.

The cost of new facilities should be borne by new users to the extent new use requires new facilities, but only to that extent. When new facilities must be built in any event, looking only to new users for necessary capital gives old users a windfall at the expense of new users [emphasis added].

When certificates of indebtedness are outstanding, new users, like old users, pay rates which include the

costs of retiring the certificates, which represent original capitalization. State v. City of Miami, supra. New users thus share with old users the cost of original facilities. For purposes of allocating the cost of replacing original facilities, it is arbitrary and irrational to distinguish between old and new users, all of whom bear the expense of the old plant and all of whom will use the new plant. The limitation on use of the funds, shown to exist de facto in the present case, has the effect of placing the whole burden of supplementary capitalization, including replacement of fully depreciated assets, on a class chosen arbitrarily for that purpose.

In Hayes v. City of Albany, supra, the situation was very much like the situation here. An existing system faced the imminent prospect of expansion and, as of a date certain, residential connection fees climbed from $25 to $255. (A hypothetical industrial user's charges soared from $200 to a prohibitive $400,000.) These charges were to be deposited in a fund restricted as follows:

> All monies received from the Sewer Connection Charges plus interest, if any, shall be deposited in the Sanitary Sewer Capital Reserve Fund... and shall be expended from that fund only for the purpose of making major emergency repairs, extending or oversizing, separating, or con-structing new additions to the treatment plant or collection and interceptor systems. 490 P.2d at 1020.

If the ordinance in the present case had so restricted use of the fees which it required to be collected, there would be little question as to its validity. We conclude that the ordinance in the present case cannot stand as it is written.

The same considerations which underlie statutes of frauds require that a revenue producing ordinance explicitly set forth restrictions on revenues it generates, where such restrictions are essential to its validity. As between private parties, a contract "that is not to be performed within the space of one year", Fla.Stat. § 725.01 (1973), or which is "for the sale of goods for the price of $500 or more", Fla.Stat. § 672.201 (1973), is unenforce-able unless reduced to writing, with certain exceptions not pertinent here. Counsel for respondent has represented that the fees collected under the ordinance exceed $196,000.00. Brief for Respondent at 53. Nothing in the record indicates that capital outlay for expansion will be completed within a year's time.

The failure to include necessary restrictions on the use of the fund is bound to result in confusion, at best. City personnel may come and go before the fund is exhausted, yet there is nothing in writing to guide their use of these moneys, although certain uses, even within the water and sewer systems, would undercut the legal basis for the fund's existence. There is no justification for such casual handling of public moneys, and we therefore hold that the ordinance is defective for failure to spell out necessary restrictions on the use of fees it authorizes to be collected. Nothing we decide, however, prevents Dunedin from adopting another sewer connection charge ordinance, incorporating appropriate restrictions on use of the revenues it produces. Dunedin is at liberty, moreover, to adopt an ordinance restricting the use of moneys already collected. We pretermit any discussion of refunds for that reason.

The decision of the District Court of Appeal is quashed and this case is remanded to the District Court

with directions that the District Court dispose of the question of costs; and that the District Court thereafter remand for further proceed-ings in the trial court not inconsistent with this opinion. In the trial court's consideration de novo of the question of refunds the chancellor is at liberty to take into account all pertinent developments since entry of his original decree.

It is so ordered.

THE CITY OF DUNEDIN, FLORIDA v. CON-TRACTORS AND BUILDERS ASSOCIA-TION OF PINELLAS COUNTY

358 So. 2d 846

District Court of Appeal of Florida, Second District

May 5, 1978

OPINION BY: RYDER

We are revisited by adversaries in a case involving the authority of a municipality to charge a so•called "impact fee" for the privilege of connecting to its water and sewer systems. This time, the issue is whether appellees are entitled to refund of impact fees previously paid under protest to the City of Dunedin.

In City of Dunedin v. Contractors and Builders Association of Pinellas County, 312 So.2d 763 (Fla.2d DCA 1975), we reversed the judgment of the trial court and held certain ordinances adopted by Dunedin in 1972 which imposed "impact fees" valid and enforceable. A properly drafted impact fee ordinance is lawful and not an unauthorized tax. We, however, were concerned by the fact that the terms of the City's ordinances did not unequivocally mandate the use of the funds for capital improvements of the water and sewer systems, but nevertheless opined the ordinance was valid since the City had in fact earmarked the proceeds for capital improvements to the systems as a whole. Thereafter, we certified the matter to the Supreme Court as one of great public interest.

The Supreme Court, in Contractors and Builders Association of Pinellas County v. City of Dunedin, 329 So.2d 314 (Fla.1976), agreed, in general, with this court's reasoning regarding the validity of imposing impact fees, but held the Dunedin ordinances defective for failure to spell out necessary restrictions on the use of fees collected. Thus, the Supreme Court quashed this court's opinion and remanded the matter to the trial court for further proceedings consistent with its opinion.

While the prior appeal was pending, the City of Dunedin had enacted Ordinance No. 74-19. Ordinance 74-19 provided that the proceeds accumulated by the fees can be used only for the expansion of the water or sewer system and trust funds were established therefor. After remand, the City enacted Ordinance No. 76-19. Ordinance 76-19 provided that the use of any funds previously collected under the 1972 Ordinances is restricted to extension or construction of new additions to the treatment plant and systems so as to meet the increased demand which additional connections to the system create.

Also during the appeal of this case, due to the dire need for sewer and water system expansion, the City of Dunedin engaged in the issuance of bonds in 1974 for enlargement of the City's sewer and water system. However, the disputed impact fees still remain in escrow and have not been spent.

After remand from the Supreme Court, the trial court conducted proceedings. A motion for summary judgment by the City of Dunedin on the basis of these ordinances was denied. The trial court held an evidentiary hearing and subsequently entered its supplemental judgment in which it declared Ordinances 74-19 and 76•19 "legally sufficient to permit the imposition and collection of an impact fee." However, the trial court also stated that the enactment of Ordinances 74-19 and 76-19 could not justify denying appellees their right to a refund of the impact fees they had previously paid under protest. For authority, the trial court cited Forbes Pioneer Boat Line v. Board of Commissioners, 258 U.S. 338, 42 S.Ct. 325, 66 L.Ed. 647 (1921).

Further, the trial court wrote in its supplemental judgment that "though not necessary, it is appropriate to pass upon one other issue raised by the parties" and made the finding that all of the improvements for which the impact fees in issue were collected are now in existence and are being paid from the proceeds of the bond issue floated by the City in 1974. This appeal ensues.

There is no question that a municipality may now impose "impact fees." The only question we have before us now is whether or not those appellees who paid impact fees under protest are entitled to a refund.

The supreme court's decision in Contractors, supra, is the law of the case. Consequently, we affirm that portion of the judgment finding the ordinances legally sufficient to permit the City to impose and collect impact fees; however, we reverse that portion of the judgment which orders a refund of impact fees paid under protest.

The Forbes case, is inapplicable to the case sub judice. The Forbes case involved the unlawful exaction of tolls by a drainage district from persons utilizing the lock of a canal. As the litigation to recover the fees so collected progressed, the Florida Legislature passed an act that purported to validate their collection. However, the United States Supreme Court held that ratification of an act is not good if attempted at a time when the ratifying authority could not do the act. In other words, the drainage district was without authority to exact a charge for the passage of the plaintiff's boat through the canal, and the United States Supreme Court held that the authority could not be later conferred retroactively by the State Legislature so as to permit the drainage district to keep the charge exacted from plaintiff.

On the contrary, in instant case the City of Dunedin initially had the authority to exact an impact fee and, further, we are very much persuaded by the words of Mr. Justice Hatchett in Contractors, supra, wherein he wrote " . . . Nothing we decide, however, prevents Dunedin from adopting another sewer connection charge ordinance, incorporating appropriate restrictions on use of the revenues it produces. Dunedin is at liberty, moreover, to adopt an ordinance restricting the use of moneys already collected. We pretermit any discussion of refunds for that reason." (Emphasis ours) 329 So.2d 314 at 322.

The very question of refunds was before the Florida Supreme Court at the time it issued its decision. Had

the Supreme Court wished to order a refund of these impact fees to appellees then, it would have done so at that time. However, it pretermitted this question to allow the City to adopt an ordinance restricting the use of the moneys already collected. Although Mr. Justice Hatchett also indicated that during the trial court's consideration de novo of the question of refunds the chancellor was at liberty to take into account all pertinent developments since entry of his original decree, we are of the opinion that the City has followed the directions of the supreme court explicitly. It has specifically earmarked the impact funds for the water and sewer system expan-sion. Those funds may now be used for the purposes of further expansion or retiring bonds issued for the earlier (post•1974) expansion of the system.

Consequently, that portion of the chancellor's supplemental judgment ordering the return of the fees to those persons paying under protest is REVERSED.

BANBERRY DEVELOPMENT CORPORATION v. SOUTH JORDAN CITY

631 P.2d 899

Supreme Court of Utah

June 3, 1981, Filed

OPINION: OAKS, Justice: This is a suit by three subdividers against a city to challenge the validity of water connection and park improvement fees imposed as a condition to connection to the city water main and as a condition to final approval of the subdividers' plat. At issue in this appeal are the legality of any such fees, and, if they are legal, the criteria for judging their reasonableness.

The procedure for charging the park improvement fee does not appear in the record. City Ordinance 13-1-5, which the subdividers concede was lawfully enacted and constitutional, requires a subdivider who desires to connect to the city water system to enter into an agreement "specifying the terms and conditions under which the water extensions and connection shall be made and the payment that shall be required." Paragraph 10 of the agreement form adopted by the city and required of all subdividers before plat approval obligates the subdividers to pay the entire cost of all water lines required to service the subdivision, including extensions from existing water mains and all connecting lines within the subdivision. It also provides that "the City shall charge the Applicant a connection fee in the amount of $____ for each individual dwelling unit to be served within the subdivision, which sum shall be payable in full to the City before the subdivision system is connected to any existing City water mains." The required connection fee was $ 800 for a 3/4-inch line and $ 1,000 for a 1-inch line.

Objecting that the collection of the water connection fees in advance from the developer constituted an unlawful tax and an unconstitutional taking of property without due process, the subdividers sought injunctive relief. They challenged the city's park improvement fee of $ 235 per lot on the same basis. They also attacked both fees as discriminatory.

On motions in advance of trial, the district court (1) sustained the validity of the park improvement fee and granted the city's motion to dismiss as to it, and (2) held the advance collection of the water connection fee contrary to statutory law, granted the subdividers' motion for summary judgment, and permanently enjoined the city from its enforcement. Both the city and the subdividers have appealed.

I. THE VALIDITY OF WATER CONNECTION AND PARK IMPROVEMENT FEES

The district court ruled that the advance collection of the water connection fee was rendered illegal by the combined effect of U.C.A., 1953, § 10-8-38 and § 17-6-22. Section 10-8-38 empowers the city, for the purpose of defraying costs of construction or operation of a sewer system, to require mandatory hookup and payment of charges when a sewer is available and within 300 feet of any property containing a building used for human occupancy. Section 17-6-22 provides that a municipal corporation which contrasts with an improvement district for sewage services shall have authority to make service charges to parties who connect to its sewer system. If the municipality also operates a waterworks system, the section provides that these charges "may be combined with the charge made for water furnished by the water system and may be collected and the collection thereof secured in the same manner as that specified in Section 10-8-38, Utah Code Annotated 1953."

Because § 10-8-38 does not authorize the charging of a sewer connection fee in the case of vacant lots, and because § 17-6-22 provides that the city may collect water fees in the same manner as § 10-8-38 authorizes for the collection of sewer fees, the combination of these two statutes is urged to forbid cities from collecting water fees in circumstances not authorized for sewer fees. This does not follow. Section 17-6-22 is permissive, not mandatory. It poses no statutory prohibition against the collection of a water connection fee from a subdivider for each lot in a subdivision at the time the subdivision is hooked up to the city water system.

The validity of a sewer connection fee to raise money to enlarge and improve a sewer system was sustained by this Court in Home Builders Ass'n v. Provo City, 28 Utah 2d 402, 503 P.2d 451 (1972), discussed hereafter. In a decision issued after the trial court acted in this case, we sustained a municipality's power to withhold the privilege of city water service until a landowner had paid a valid municipal sewer connection fee. Rupp v. Grantsville City, Utah. 610 P.2d 338 (1980). In two other decisions issued after the trial court acted in this case, we sustained a municipality's requirement that subdividers dedicate a portion of subdivision land for recreational purposes (or pay cash in lieu) as a condition of final approval of their plat. Call v. City of West Jordan, Utah, 606 P.2d 217 (1979). On rehearing in this same case, we held that the reasonableness of the dedication or cash requirement in a particular case was a question of fact that must be resolved at trial. Call v. City of West Jordan, Utah, 614 P.2d 1257 (1980).

These four decisions have resolved the legality of water connection and park improvement fees designed to raise funds to enlarge and improve sewer and water systems and recreational opportunities, as well as the legality of conditioning water hookups or plat approval on their collection. However, these decisions leave open the question of the reasonableness of any individual fee charged or land dedication required. This question of reasonableness must be resolved on the facts in each particular case. We therefore reverse both judgments and remand the entire case for trial on the reasonableness of the fees the city has

imposed in this case.

Because this case is being remanded for trial, it is appropriate for this Court to elaborate on the constitutional standards of reasonableness that should govern the validity of subdivision charges such as these.

II. THE REASONABLENESS OF SUBDIVISION FEES IN GENERAL

Like so many other municipalities in this state, the City of South Jordan confronts the problems of providing a fast-growing city with adequate services for water, sewer, recreation, and other common needs. In 1978, the city had to deal with the development of about 600 lots (including the 400 in subdividers' develop-ment), up from about 65 in prior years. Such growth puts a severe strain on the financial and personnel resources of a small municipality, and if not properly managed could well overburden common facilities like water and sewer to the point where their service would deteriorate severely for the existing occupants and be inadequate for the new ones. An appropriate way to provide adequately for such services is by advance planning and financing.

The conventional means of financing municipal facilities are tax revenues, special assessments, and bonding. In addition, in recent years many local governmen-tal units in this country have employed subdivision plat controls to require fees, such as the water and park fees involved in this case, that force developers to contribute to the centralized capital costs of municipal services in addition to the concededly valid localized costs applicable solely to their development. The courts of this state and others have approved the legality of such fees, but are still struggling to define the limits of reasonableness that must be imposed upon their amount. Without legal limits •• imposed by statute or constitution •• subdivision charges could easily be used to avoid statutory requirements for bonding municipal improvements, statutory limits on municipal taxation, and legal limits on restrictive or exclusionary zoning.

The subdividers argue that the water the park fees far exceed the city's costs in respect to these matters and that the excess would be used in the city's general operating fund. The city maintains in its brief in this Court that the water connection fees would be used to enlarge water lines and storage and pumping facilities, and the park improvement fees would be used to enlarge and develop city parks. The parties differ on whether such an intent was secured by enforceable restriction, such as deposit to a separate fund. These contentions, all relevant to reasonableness, are matters for consideration at trial.

The subdividers also argue that the water connection fee cannot be imposed on the developer, but must be deferred for imposition on the lot owner or homeowner at the time of hookup. We find this argument unpersuasive. This is not a case where the party burdened with the exaction will derive no benefit from it. When the subdivision is connected to the city's water and sewer systems, the city must be prepared to perform its services on demand, and from that fact the subdividers derive immediate benefit. The provision of standby capacity to a subdivision requires the commitment of substantial capital. The city does not have to wait until someone turns on a tap or flushes a toilet before it requires participation in the cost of providing its services. Subject to the requirements of reasonableness discussed below, a hookup fee that requires a subdivider to make advance payment of some portion of the common capital costs attributable to committing service to the lots in the subdivision is valid. The same is true of the park

improvement fee.

The proceedings on remand in this case will be governed by two leading decisions of this Court, one dealing with a municipal service that employs an expensive central facility like water or sewer, and the other with a municipal service that employs dispersed resources like recreational land. Though the standards of reasonableness in these two circumstances are essentially the same, their application is somewhat different. The two different types of charges will therefore be discussed separately.

III. REASONABLENESS OF WATER CONNECTION FEE

Home Builders Ass'n v. Provo City, 28 Utah 2d 402, 503 P.2d 451 (1972), sustained the validity of a sewer connection fee (in addition to the monthly sewer charge) for each living unit of newly constructed buildings connected to an existing sewer system. The fee was imposed in order to improve and enlarge the sewer system. It was not a revenue measure or an assessment, the court found, but "a reasonable charge for the use thereof," as authorized by U.C.A., 1953, § 10-8-38. Significantly, the $ 100-per-lot charge was derived by dividing the total number of sewer connections in the municipality into the net value of the sewer system, and the funds obtained were to be restricted to the enlargement, improvement, and operation of the sewer system and to the retirement of indebtedness incurred in its construc-tion.

In approving the sewer connection fee in Home Builders, this Court relied on Airwick Industries, Inc. v. Carlstadt Sewerage Authority, 57 N.J. 107, 270 A.2d 18 (1970). That case approved a connection fee arrangement by which the capital and interest costs of a new central sewage system, although met initially by the actual users, would ultimately be borne by all properties benefitted, including lands that were unimproved when the central expenditures were originally made. The municipality did this by including as part of its connection fee what our Court characterized as "a sum of money which would represent a fair contribution by the connecting party toward the expense theretofore met by others."

The Home Builders case established the principle upon which the reasonable-ness of the water connection fee in this case should be judged. The "fair contribu-tion" of the connecting party should not exceed "the expense thereof met by others." Or, as the New Jersey Supreme Court held in a subsequent case, the rules governing the allocation of improvement costs between city and developer would ideally have been such as to insure, to the greatest extent practicable, that the cost of extending a municipal water facility would fall equitably upon those who are similarly situated and in a just proportion to benefits conferred. They should be sufficiently flexible to permit consideration to be given to the facts and circumstances of each particular case. Deerfield Estates, Inc. v. Township of E. Brunswick, 60 N.J. 115, 286 A.2d 498, 505 (1972). Therefore, where the fee charged a new subdivision or a new property hookup exceeds the direct costs incident thereto (as a means of sharing the costs of common facilities), the excess must survive measure against the standard that the total costs "fall equitably upon those who are similarly situated and in a just proportion to benefits conferred." Stated otherwise, to comply with the standard of reasonableness, <u>a municipal fee related to services like water and sewer must not require newly developed properties to bear more than their equitable share of the capital costs in relation to benefits conferred</u> [emphasis added].

<u>To determine the equitable share of the capital costs to be borne by newly developed properties, a</u>

municipality should determine the relative burdens previously borne and yet to be borne by those properties in comparison with the other properties in the municipality as a whole; the fee in question should not exceed the amount sufficient to equalize the relative burdens of newly developed and other properties [emphasis added].

Among the most important factors the municipality should consider in determining the relative burden already borne and yet to be borne by newly developed properties and other properties are the following, suggested by the well-reasoned authorities cited below: (1) the cost of existing capital facilities; (2) the manner of financing existing capital facilities (such as user charges, special assessments, bonded indebtedness, general taxes, or federal grants); (3) the relative extent to which the newly developed properties and the other properties in the municipality have already contributed to the cost of existing capital facilities (by such means as user charges, special assessments, or payment from the proceeds of general taxes); (4) the relative extent to which the newly developed properties and the other properties in the municipality will contribute to the cost of existing capital facilities in the future; (5) the extent to which the newly developed properties are entitled to a credit because the municipality is requiring their developers or owners (by contractual arrangement or otherwise) to provide common facilities (inside or outside the proposed develop-ment) that have been provided by the municipality and financed through general taxation or other means (apart from user charges) in other parts of the municipality; (6) extraordinary costs, if any, in servicing the newly developed properties; and (7) the time-price differential inherent in fair comparisons of amounts paid at different times. Home Builders v. Provo City, supra; Rose v. Plymouth Town, 110 Utah 358, 173 P.2d 285 (1946); Airwick Industries, Inc. v. Carlstadt Sewerage Authority, supra; Deerfield Estates, Inc. v. Township of E. Brunswick, supra; West Park Ave; Inc. v. Township of Ocean, 48 N.J. 122, 224 A.2d 1 (1966); Rutan Estates, Inc. v. Town of Belleville, 56 N.J. Super. 330, 152 A.2d 853 (App.Div. 1959); Zehman Construction Co. v. City of Eastlake, 92 Ohio Law Abst. 364, 195 N.E.2d 361 (Ct.App. 1962); Strahan v. City of Aurora, 38 Ohio Misc. 37, 311 N.E.2d 876 (Ct. Com. Pleas, 1973); R. Ellickson, "Suburban Growth Controls: An Economic and Legal Analysis," 86 Yale L.J. 385, 467•89 (1977); F. Michelman & T. Sandalow, Government in Urban Areas, 533•36 (1970).

In adjudicating the validity of any individual application of this standard of reasonableness, the courts must concede municipalities the flexibility necessary to deal realistically with questions not susceptible of exact measurement. Precise mathematical equality "is neither feasible nor constitutionally vital." Airwick Industries, Inc. v. Carlstadt Sewerage Authority, supra, 270 A.2d at 26. Similarly, municipal officials must also have the legal power to deal creatively with extraordinary or unforeseen circumstances in the provision of municipal services. Rose v. Plymouth Town, 110 Utah 358, 173 P.2d 285 (1946). We agree with and adopt the New Jersey court's ruling in Deerfield Estates, Inc. v. Township of E. Brunswick, supra, 286 A.2d at 507•508:

The rule we lay down must be given a pragmatic application. Complete equality of treatment may sometimes be impossible, especially where a municipality has followed no set pattern with respect to past extensions. Nor should a municipality be denied the right to modify an established pattern where altered circumstances reasonably so dictate. Equality of treatment may upon occasion be forced to give way before some supervening public interest. But insofar as such equality can reasonably be achieved this must be done.

The required flexibility will be implemented by the presumption of constitutional-ity incident to a municipality's exercise of its legislative powers. Call v. City of West Jordan, Utah, 614 P.2d 1257, 1258 (1980); Crestview-Holladay Homeowners Ass'n, Inc. v. Engh Floral Co., Utah, 545 P.2d 1150 (1976); Dowse v. Salt Lake City Corp., 123 Utah 107, 255 P.2d 723 (1953). Since the information that must be used to assure that subdivision fees are within the standard of reasonableness is most accessible to the municipality, that body should disclose the basis of its calculations to whoever challenges the reasonableness of its subdivision or hookup fees. Once that is done, the burden of showing failure to comply with the constitutional standard of reasonableness in this matter is on the challengers. Home Builders Ass'n of Greater Kansas City v. City of Kansas City, Mo., 555 S.W.2d 832 (1977).

IV. REASONABLENESS OF PARK IMPROVEMENT FEE

In Call v. City of West Jordan, Utah, 606 P.2d 217 (1979), opinion on rehearing, 614 P.2d 1257 (1980), this Court upheld the validity of a city ordinance that required subdividers, as a condition of plat approval, to dedicate certain proposed subdivision land to the city (or pay cash in lieu) for flood control and/or park and recreation facilities. In remanding the case for trial on the constitutionality of the ordinance as applied (i.e., the requirement that seven percent of the subdivision land be dedicated), this Court ruled that "the dedication should have some reasonable relationship to the need created by the subdivision." Id. at 1258. The Court quoted the following from Home Builders Ass'n of Greater Kansas City v. City of Kansas City, Mo., 555 S.W.2d 832, 835 (1977):

> [If] the burden cast upon the subdivider is reasonably attributable to his activity, then the requirement [of dedication or fees in lieu thereof] is permissible; if not, it is forbidden and amounts to a confiscation of private property in contravention of the constitutional prohibitions rather than a reasonable regulation under the police power.

Under the reasonableness test in Call v. City of West Jordan, supra, the benefits derived from the exaction need not accrue solely to the subdivision (614 P.2d at 1259); flood control and recreation are needs that cannot be treated in isolation from the rest of the municipality. At the same time, the benefits derived from the exaction must be of "demonstrable benefit" to the subdivision (Id. at 1259).

As with water connection fees, <u>the amount of such exactions or fees should be such that the burden of providing these municipal services "falls equitably upon those who are similarly situated and in a just proportion to benefits conferred."</u> Deerfield Estates, Inc. v. Township of E. Brunswick, 60 N.J. 115, 286 A.2d 498, 505 (1971), [emphasis added]. The measurement of "benefits conferred" may have a more significant impact on the reasonableness of park fees than on water connection fees. The central facilities that support water and sewer service would generally confer the same benefits in every part of the municipality, but the benefits conferred by recreational, flood control, or other dispersed resources may be measurably different in different parts of the municipality. <u>Park improvement fees should therefore be fixed so as to be equitable in light of the relative benefits conferred on, as well as the relative burdens previously borne and yet to be borne by, the newly developed properties in comparison with the other properties in the municipality as a whole. The fees in question should not exceed the amount sufficient to equalize the relative benefits and burdens or newly developed and other properties</u> [emphasis added].

The factors to be considered in the determination of relative burden are similar to the factors discussed in Part III in connection with water connection fees. The flexibility to be tolerated within the presumption of regularity and the disclosure of the basis of calculation specified in Part III is also applicable to this type of subdivision charge.

The judgments of the trial court are reversed in the appeal and the cross-appeal, and the cause is remanded for proceedings consistent with this opinion. No costs awarded.

WE CONCUR: Gorden R. Hall, Justice, I. Daniel Stewart, Justice.

CONCUR BY: HOWE (In Part)

DISSENT BY: HOWE (In Part)

DISSENT: HOWE, Justice: (Concurring and Dissenting) I concur that the defendant city may lawfully require water connection fees to be paid at the time the main line running through the subdivision is connected to the city system and water is brought to the edge of each lot. I arrive at this conclusion in view of the authority invested in cities and towns to "construct, maintain and operate waterworks," § 10-8-14 U.C.A. 1953; to "fix the rates to be paid for the water use," § 10-8-22; and to "enact ordinances, rules and regulations for the management and conduct of the waterworks system owned or controlled by it," § 10-7-14. It is not unreasonable to require payment of the connection fee when the water is turned into the main line coursing through the subdivision because at that time the defendant city is obligated to furnish water to each and every lot as requested. In order to prepare to do this, the defendant city had to make capital expenditures to enlarge its capacity so that it could meet the new demands to be imposed upon it. I concur that § 10-8-38 is not a prohibition against advance collection.

I dissent, however, from the holding in the majority opinion that the city may lawfully impose park improvement fees. I concur with the reasoning of Justice Wilkins in his dissenting opinion in Call v. City of West Jordan, Utah, 606 P.2d 217 (1979). The imposition of the park improvement fees is even more offensive in this case since the city conditioned the furnishing of water service to the subdivision upon their payment. To me the two subjects are entirely separate and I believe it to be an abuse of the city's authority to own and operate a waterworks system (a proprietary operation) to use the furnishing of water as leverage to collect fees for other unrelated purposes. Section 10-8-38 authorizes cities and towns to discontinue water service to premises where the sewer service charges have not been paid, but I find no authorization to also deny service until park improvement fees have been paid.

TIMOTHY ROSS LAFFERTY v. PAYSON CITY

642 P.2d 376

Supreme Court of Utah

February 17, 1982, Filed

OPINION: OAKS, Justice:

This appeal concerns the legality of two fees a municipality imposed on the construction of new homes.

In 1977, Payson City enacted an ordinance requiring the payment of an "impact fee" of $ 1,000 per family dwelling prior to the issuance of any building permit. The ordinance stated that this fee was necessary because of an emergency situation created by property development within the city limits; the City needed additional revenue to offset the costs of the necessary increases in municipal services. This fee was in addition to all other municipal fees.

In 1979, the City enacted other ordinances increasing the fees the City charged for connecting residences to various city services. The revised amounts were: $ 1,000 for sewer; $ 450 for water (3/4-inch hookup); $ 250 for electricity (100 amp service). Plaintiff Lafferty, a city resident who apparently desired to construct a single-family dwelling, paid the impact fee and the connection fees under protest and then brought this suit for a declaration that these fees were taxes that were illegal and discriminatory under the state and federal Constitutions, for an injunction against their enforcement, and for restitution of the $2,725 he had paid.

I. THE IMPACT FEE

As to the impact fee, the district court granted plaintiff's motion for summary judgment, holding that the fee was discriminatory in its imposition on new homeown-ers and not on existing ones, and illegal as a tax not authorized by law. In No. 17534, the City appeals from that decree.

The district court relied on Weber Basin Home Builders Association v. Roy City, 26 Utah 2d 215, 487 P.2d 866 (1971), where this Court invalidated an increase in a building permit fee on the basis that it was an illegal tax. The opinion notes that the purpose of the increase was to obtain additional money for the City's general fund, into which the proceeds were deposited. As in this case, the defendant city contended that the additional funds were needed to finance improvements in the city's water and sewer systems necessitated by new home construction.

Subsequent decisions have approved connection fees or subdivision fees, subject to the reasonableness limitations discussed hereafter. Banberry Development Corp. v. South Jordan City, Utah, 631 P.2d 899 (1981); Call v. City of West Jordan, Utah, 606 P.2d 217 (1979); Home Builders Association of Greater Salt Lake v. Provo City, 28 Utah 2d 402, 503 P.2d 451 (1972). But in each of these cases, the fees were imposed to finance a specific municipal service or capital expenditure. The Weber Basin Home Builders case was distinguished on the basis that a reasonable charge for a specific service is permissible, whereas a general fee that amounts to a revenue measure is not.Home Builders Association of Greater Salt Lake, 28 Utah 2d at 404, 503 P.2d at 452. We reaffirm that distinction, and agree with the district court's conclusion that the impact fee deposited in the City's general revenues in this case is an illegal tax. Weber Basin Home Builders Association v. Roy City, supra. The partial summary judgment the City has challenged by its appeal in No. 17534 is therefore affirmed.

II. CONNECTION FEES

The district court denied plaintiff's motion for summary judgment on the alleged facial invalidity of the various connection fees, and put plaintiff to trial on the reasonableness of those fees. That was the correct procedure. Banberry Develop-ment Corp. v. South Jordan City, supra; Home Builders Association of Greater Salt Lake v. Prove City, supra.

At the conclusion of trial, the court made findings on the per-unit cost of the three services. In each case, the per-unit costs were substantially in excess of the amount of the connection fees. The court therefore concluded that the connection fees were valid because they were "reasonable and represent the cost of creating, maintaining and using the aforesaid utilities." In No. 17536, plaintiff appeals from that decree.

Six months after the district court's decree, this Court issued its opinion in Banberry Development Corp. v. South Jordan City, supra, which involved water connection fees and park improvement fees. In that case, we outlined "the constitutional standards of reasonableness," 631 P.2d at 903, that govern the validity of connection fees charged by municipalities. Plaintiff contends that this decree must be vacated and the case remanded for reconsideration in light of Banberry because the district court's decision that the three connection fees were reasonable was based on only part of the factors this Court subsequently outlined in Banberry. We agree.

The Banberry opinion identifies seven important factors that should be considered "in determining the relative burden already borne and yet to be borne by newly developed properties and other properties...." 631 P.2d at 903•4. In brief, those factors are (1) the cost of existing capital facilities; (2) the means by which those facilities have been financed; (3) the extent to which the properties being charged the new fees have already contributed to the cost of the existing facilities; (4) the extent to which they will contribute to the cost of existing capital facilities in the future; (5) the extent to which they should be credited for providing common facilities that the municipality has provided without charge to other properties in its service area; (6) extraordinary costs, if any, in serving the new property; and (7) the time•price differential inherent in fair comparisons of amounts paid at different times. 631 P.2d at 904.

The objective of the complicated comparison in Banberry is to assure that municipal fees pertaining to newly developed properties do not require them to bear more than their equitable share of the capital costs (in comparison with other properties) in relation to benefits conferred. If properly applied, those seven factors should put the new homeowner on essentially the same basis as the average existing homeowner with respect to costs borne in the past and to be borne in the future, in comparison with benefits already received and yet to be received. The municipality has the burden of disclosing the basis of its calculations to whoever challenges the reasonableness of the fees, and its allocations need not achieve precise mathematical equality [emphasis added]. Banberry, 631 P.2d at 904.

The City's brief in this case states that the increases in connection fees were based on the costs of expansion by future construction in the service areas involved. Thus, the expert evidence on the unit cost of water and sewer services was based on the 1979 cost of constructing the expansion facilities needed in

those areas. That measure does not achieve the equitable allocation sought in Banberry, since it fixes the entire cost of new facilities on newly developed properties without assurance that these costs are equitable in relation to benefits conferred and in comparison with costs imposed on other property owners in the municipality. For example, if the costs of maintenance and repayment of bonded indebtedness for construction of the existing system are being financed by general tax revenues, service fees, or other payments collected from the entire municipality -- including the newly constructed homes -- the new homes will be burdened with all of the capital costs of expanding the service capacity plus a portion of the costs of the existing one. In an effort to avoid this kind of unfairness, the seven factors in Banberry require a different approach than imposing all costs of expansion of capacity on the newly developed properties.

The expert evidence on the unit cost of electrical services was based on the replacement cost in 1979 of the municipality's existing electrical system. If appropriately discounted for the age and condition of the existing system, that measure would satisfy one of the factors in Banberry, but would be incomplete without inquiry into the other factors, such as how the existing system was financed. This is necessary, for example, to assure that a property owner involved in a new home development is not required to buy into the capital value of existing municipal services and then pay for some portion of the same capital value a second time by future tax payments against the bonded indebtedness used to construct them originally [emphasis added].

Since not all of the factors set out in this Court's intervening opinion in Banberry Development Corp. v. South Jordan City, supra, were considered in ruling on the reasonableness of these municipal fees, we deem it appropriate to vacate the decree of the district court in case No. 17536 and remand for further proceedings (including the taking of additional evidence, if necessary) consistent with Banberry and with this opinion.

So ordered. Each party to bear own costs.

HOLLYWOOD, INC. v. BROWARD COUNTY

431 So. 2d 606

District Court of Appeal of Florida, Fourth District.

March 23, 1983; Rehearing Denied June 13, 1983.

OPINION: HURLEY, Judge.

This appeal concerns the validity of a Broward County ordinance that requires a develop-er/subdivider, as a condition of plat approval, to dedicate land or pay a fee to be used in expanding a county level park system sufficiently to accommodate the new residents of the platted development. The appellant has asserted that Broward County lacks legal authority to adopt this type of ordinance. We do not agree and,

thus, we affirm the trial court's conclusion that the ordinance is valid.

The appellant is a real estate development corporation that paid a fee under the ordinance and later commenced this action seeking declaratory and injunctive relief as well as a refund of the fee. The appellant has challenged the part of the ordinance that requires, as a condition of plat approval, the dedication of land or the payment of a fee for use by the county in acquiring and developing county level parks.

We note that the ordinance has, since this suit commenced, been amended again and renumbered. See § 5•198(h), Broward County Code (1981 supp. # 15).

The ordinance has three alternate provisions: (1) the developer can dedicate three acres for every one thousand residents of the proposed subdivision, (2) the developer can pay an amount of money equal to the value of land that would have been dedicated, or (3) the developer can pay an impact fee according to a schedule in the ordinance. The developer in this case chose option two and paid an amount equal to the value of the land that would have been dedicated. At trial, the county introduced evidence that the ordinance seeks to impose fees only for those capital acquisition costs that the county will incur because of the new subdivision residents and that the money collected will be used for the substantial benefit of those residents. The trial court concluded that the ordinance is a valid and constitutional exercise of the county's legislative powers.

We discern two principal thrusts in appellant's overall attack on the ordinance: (1) the appellant asserts that the Broward County Commission lacks authority under the Broward County Charter to enact this type of ordinance and (2) the appellant asserts that no Florida court has countenanced the imposition of land or fee requirements for use by a county in expanding its county level parks. Included in these attacks are allegations that the ordinance violates fundamental constitutional rights including due process and equal protection and allegations that the ordinance constitutes an unconstitutional taking without just compensation and is, in fact, an illegal tax. In response, the appellee contends that the ordinance does not exceed the broad home rule powers of the Broward County Charter and that the ordinance merely exacts reasonable and valid regulatory fees.

I THE CHARTER

At the outset, we note that counties, as political subdivi-sions of the state, derive their sovereign powers exclusively from the state. Florida charter counties, such as Broward County, derive their sovereign powers from the state through Article VIII, Section 1(g) of the Florida Constitution which provides in pertinent part:

> Counties operating under county charters shall have all powers of local self•government not inconsistent with general law, or with special law approved by the vote of the electors. The governing body of a county operating under a charter may enact county ordinances not inconsis-tent with general law. Through this provision, the people of Florida have vested broad home rule powers in charter counties such as Broward County.

The people have said that charter county governments shall have all the powers of local government unless the state government takes affirmative steps to preempt local legislation. Of course, the power of charter county governments is limited by certain provisions of the Florida Constitution such as the Declaration of Rights in Article I and the limitations on taxing power found in Article VII. In addition, the counties' power is limited, just as is the state's power, by the provisions of the United States Constitution and any federal legislation that binds the states.

In the absence of preemptive federal or state statutory or constitutional law, the paramount law of a charter county is its charter. Cf.City of Miami Beach v. Fleetwood Hotel, Inc., 261 So.2d 801 (Fla.1972) (city charter). In essence, the charter acts as the county's constitution and, thus, ordinances must be in accordance with the charter.

The people of Broward County have empowered their county government with very broad powers by incorporating the following provisions into their charter:

Section 1.03. GENERAL POWERS OF THE COUNTY.

> A. Unless provided to the contrary in this Charter, Broward County "shall have all powers of local self-government not inconsistent with general law or with special law approved by vote of the electors."

Section 1.08. CONSTRUCTION.

> The powers granted by this Charter shall be con-strued liberally in favor of the county government. The specified powers in this Charter shall not be construed as limiting, in any way, the general or specific power of the government, as stated in this Article. Pursuant to these provisions, the people of Broward County have conferred all the powers a Florida charter county can have, subject only to other contrary provisions in the charter.

The appellant relies on another provision in the charter as establishing by inference that the county government violated the charter in enacting the ordinance under review. That provision provides:

Section 6.12. PLAT ORDINANCE.

> The legislative body of each municipality within Broward County and the County Commission for the unincor-porated area shall, within six (6) months after the effective date of this Charter, create a mandatory plat ordinance.
>
> No plat of lands lying within Broward County, either in the incorporat-ed or unincorporated areas, may be recorded in the Official Records prior to approval by the County Commission. The County Commission shall enact an ordinance establishing standards, procedures and minimum requirements to regulate and control the platting of lands within the incorporated and unincorporated areas of Broward County. The governing body of each municipality may enact an ordinance establishing additional standards, procedures and requirements as may be

necessary to regulate and control the platting of lands within its boundaries.

We can find nothing in this provision which suggests that the people of Broward County intended to prohibit their county government from enacting an ordinance requiring dedications or fees for expanding parks as a condition of plat approval. Thus, we find appellant's first attack to be ineffective.

II VALIDITY OF DEDICATION OR FEE REQUIREMENTS

The more difficult question is whether the ordinance violates the state or federal constitution. As noted before, the appellant has alleged that the ordinance denies due process and equal protection, that it effects a taking without just compensation, and that it exacts illegal taxes.

This court has previously considered the validity of an ordinance which required the dedication of park land or the payments of fees in lieu of dedication. See Admiral Development Corp. v. City of Maitland, 267 So.2d 860 (Fla. 4th DCA 1972). In Admiral Development a real estate developer challenged an ordinance as being beyond the scope of the city's charter authority and unconstitutional. The ordinance required, as a condition of plat approval, that the subdivider dedicate at least five percent of the platted land or pay five percent of the value of the land to be used for park and recreation areas. This court scrutinized the city charter and concluded that the ordinance was beyond the scope of the city government's power under its char-ter.Secondly, we concluded that the five percent fixed percentage was arbitrary and overbroad. We reasoned that a fixed percentage that relates to the amount of land to be platted, rather than the number of residents that will occupy the land, cannot adequately ensure that the subdivider pays only for the amount of new park lands that the locality will be required to acquire in order to service the new development.
In the present case, as noted above, there is no problem with a lack of power under the charter provisions themselves, that is, assuming the ordinance is not inconsistent with state or federal law. Secondly, the ordinance under review does not suffer the infirmities of a fixed percentage ordinance. The ordinance in the present case exacts land or fees based on the number of people expected to live in the subdivision rather than the amount of land to be platted.

In Admiral Development, we declined to provide a general prescription by which park fee ordinances should be evaluated. Yet we did suggest that the appellee city might look for guidance, in the consideration of any proposed charter amendment or ordinance adoption, to a California case that considered and rejected a due process, equal protection, and taking without just compensation challenge. 267 So.2d at 863 n. 3 (citing Associated Home Builders of Greater East Bay, Inc. v. City of Walnut Creek, 4 Cal.3d 633, 94 Cal.Rptr. 630, 484 P.2d 606 (1971)). Although we believe that the ordinance now under review satisfies the standards established by the California Supreme Court in Walnut Creek, we also believe that our reference to the California case has been superseded to some extent by later Florida decisions. Nonetheless, we think it helpful to note the California court's statements concerning the rationale justifying subdivision exactions for parks:

The rationale of the cases affirming constitutionality indicate the dedication statutes are valid under the state's police power. They reason that 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 dedicate a portion of his land for park purposes whenever the influx of new residents will increase the need for park and recreational facilities. Such exactions have been compared to admittedly valid zoning regulations such as minimum lot size and setback requirements. [Citations omitted.] 4 Cal.3d at 644•45, 94 Cal.Rptr. at 639, 484 P.2d at 615; see also Wald Corp. v. Metropolitan Dade County, 338 So.2d 863, 867 (Fla. 3d DCA 1976) (discussed infra), cert. denied, 348 So.2d 955 (Fla.1977).

The Florida Supreme Court recently announced the legal standards by which Florida courts must evaluate ordinances which exact dedications or fees from real estate developers. See Contractors & Builders Association of Pinellas County v. City of Dunedin, 329 So.2d 314 (Fla.1976). In City of Dunedin the court rejected the argument that fees exacted from builders for the construction of capital improvements to water and sewage systems constitute illegal taxes. The court held that local governments can impose impact fees which do not exceed a pro rata share of the reasonably anticipated costs of capital expansion reasonably required because of new development so long as the use of the money collected is limited by law to meeting the costs of that capital expansion and so long as the exactions are not inconsistent with a state statute. Thus, the court held that local governments can shift to new residents the reasonable capital costs incurred on their account.

One of our sister courts has also addressed the question of whether subdivision exactions are permissible under Florida law. See Wald Corp. v. Metropolitan Dade County, 338 So.2d 863 (Fla. 3d DCA 1976), cert. denied, 348 So.2d 955 (Fla.1977). The Wald case concerned a county ordinance that required subdividers, as a condition of plat approval, to dedicate drainage canal rights-of-way and maintenance easements. The apparent purpose of the ordinance was to protect the subdivision from periodic flooding and to protect up•and•downstream owners from the effects of the subdivision's rainwater runoff. The court, recognizing that subdividing is a profit making enterprise, held that a county can impose dedication or impact fee require-ments in order to forestall the potential adverse effects of the development and to enable the county to provide adequate public facilities for the new residents. After surveying constitutional tests used by courts in other states to evaluate subdivision exactions, the court enunciated a "rational nexus" or "reasonable connection" test. The court held that dedication or impact fee ordinances are valid when there is a reasonable connection between the required dedication or fee and the anticipated needs of the community because of the new develop-ment.

From City of Dunedin, Wald, and Admiral Development, we discern the general legal principle that reasonable dedication or impact fee requirements are permissible so long as they offset needs sufficiently attributable to the subdivision and so long as the funds collected are sufficiently earmarked for the substantial benefit of the subdivision residents. In order to satisfy these requirements, the local government must demonstrate a reasonable connection, or rational nexus, between the need for additional capital facilities and the growth in population generated by the subdivision. In addition, the government must show a reasonable connection, or rational nexus, between the expenditures of the funds collected and the benefits accruing to the subdivision. In order to satisfy this latter requirement, the ordinance must specifically earmark the funds collected for use in acquiring capital facilities to benefit and new residents. The developer, of course, can attempt to refute the government's showing by offering additional evidence.

III THE EVIDENCE

In the present case, Broward County offered evidence that it has adopted and implemented a county park program with a standard of three acres of developed county level parkland per one thousand residents. The evidence also shows that this standard is not unreasonably high; in fact, it could be argued that it is low. In addition, the record shows that the county is meeting the needs of the current population through various methods including a $73 million bond issue, but that the growth generated by new subdivi-sions will require the county to acquire and develop new land in order to maintain its standard of three acres per one thousand residents. The county also offered evidence to show that the fees collected under the ordinance were less than the amount it would have to pay in order to maintain its standard of parkland and yet accommodate the subdivision residents even after they were credited for the future ad valorem taxes they would pay towards retiring the outstanding park bonds. Thus, Broward County demonstrated a reasonable connection between the need for additional park facilities and the growth in population that will be generated by the subdivision and, in addition, that the fees were an equitable pro rata share of the cost of reasonable capital expansion required because of new development. Although the developer attempted to refute this showing, the trial court resolved the conflicts in the evidence in a permissible manner and the judgment is supported by competent substantial evidence.

Broward County also demonstrated a reasonable connection, or a rational nexus, between the expenditures of the funds collected under the ordinance and the benefits accruing to the subdivision. The ordinance requires the funds collected to be "expended within a reasonable period of time, for the purpose of acquiring and developing land necessary to meet the need for county level parks created by the development in order to provide a system of county level parks which will be available to and substantially benefit the residents of the platted area." The ordinance further limits the use of these funds to acquiring and developing new land for park purposes within fifteen miles of the platted land. The reasonableness of this distance is shown by the county's evidence that residents travel widely in order to take advantage of the features that can be provided at county level parks. Based on this evidence, we believe that the ordinance adequately earmarks the funds collected for use in expanding the regional park system to accommodate the subdivision residents.

IV PRIOR CASE LAW

The appellant has asserted that the Broward ordinance violates our holding in Broward County v. Janis Development Corp., 311 So.2d 371 (Fla. 4th DCA 1975). Janis involved a Broward County road impact fee ordinance. The ordinance, which was enacted while Broward County was a non•charter county, attempted to assess $200 per dwelling on new development, as a condition for the issuance of a building permit, to be used to construct or improve roads, streets, highways and bridges or to acquire rights•of•way for such facilities in the vicinity of the development. In considering the validity of the ordinance, we first looked to the source of power to enact the ordinance. We implicitly concluded that Broward County, as a non•charter county, could impose such a fee, if at all, only because it had the power to require building permits. Next, we concluded that the impact fees were impermissible as regulatory fees exacted pursuant

to the power to require building permits because the money generated was far in excess of the cost o regulating the quality of building. We distinguished cases upholding the validity of ordinances requiring dedications or fees in lieu thereof, such as that involved here, on several grounds. First, we found that the ability to pay a fee in lieu of dedication actually inured to the benefit of a subdivider and was an amelio-rating characteristic of the dedication ordinanc-es.Second, we found certain deficiencies in the particular road impact fee ordinance under review. In particular, we considered the requirement that the money be used to construct or improve roads in the vicinity of the development to be an insufficient and nebulous limitation on the county's discretion in spending the funds. We then concluded that the fees were not valid as regulatory fees and must therefore constitute taxes. Finally, we concluded that, evaluated as taxes, the fees were illegal because they were not authorized by a state statute as required by the Florida Constitution.

Even if we assume that Janis Development has not been limited in prospective application by the more recent opinion of the Florida Supreme Court in City of Dunedin, the present ordinance would not violate Janis Development. In the case now before us, the source of power to require dedications or fees is not the county's power to require platting, but rather the county's power to regulate the adverse effects of subdivision development. In this case, the evidence shows that the money collected will not exceed the amount the county will spend in alleviating the adverse effects attributable to the regulated development. In addition, the present ordinance sufficiently earmarks the future use of the money for capital facilities to serve the new subdivision. Thus, in the present case, the ordinance is valid as a regulatory measure and is not, as in Janis, invalid and by default a tax.

In addition to relying on Florida cases, the parties have cited authorities from other states. Although these authorities disagree on the proper test which should be used to evaluate the validity of park dedication or fee ordinances, they overwhelming-ly recognize that government has a legitimate interest in and can use its police power to ensure, the adequate provision of parks, open space, and recreational areas. On the other hand, at least one court has said:

> While government can clearly require the dedication of watermains and sewers as well as property for streets and alleys, we believe these to be distinguish-able from the dedication of property for recreational purposes. The former bears a substantial relation to the safety and health of the community while the latter does not. Berg Development Co. v. City of Missouri City, 603 S.W.2d 273, 275 (Tex.Civ.App. 1980, writ ref'd n.r.e.). We respect-fully disagree. Open space, green parks and adequate recreation areas are vital to a community's mental and physical well•being. As such, the ability to regulate subdivision development in order to ensure the adequate provision of parks and recreational facilities is a matter that falls squarely within the state's police powers to provide for the health, safety, and welfare of the community.

V SUMMARY

To summarize, we hold (1) that the ordinance does not violate the provisions of the Broward County Charter and (2) that subdivi-sion exactions for county level parks are permissible so long as (a) the exactions are shown to offset, but not exceed, reasonable needs sufficiently attributable to the new

subdivision residents and (b) the funds collected are adequately earmarked for the acquisition of capital assets that will sufficiently benefit those new residents. Accordingly, the judgment of the trial court is AFFIRMED.

HOME BUILDERS AND CONTRACTORS ASSOCIATION OF PALM BEACH COUNTY, INC. v. THE BOARD OF COUNTY COMMIS-SION-ERS OF PALM BEACH COUNTY

446 So. 2d 140

District Court of Appeal of Florida, Fourth District

October 12, 1983

PRIOR HISTORY: Appeal from the Circuit Court for Palm Beach County; Lewis Kapner, Judge.

OPINION BY: DOWNEY

This case involves the validity of a Palm Beach County ordinance imposing an impact fee on new development for the purpose of constructing roads made necessary by the increased traffic generated by such new development.

Appellants, Home Builders and Contractors Association of Palm Beach County, Inc. (hereafter Home Builders), and Ted Satter Enterprises, Inc., filed suit against the Board of County Commis-sioners of Palm Beach County for declaratory and injunctive relief to invalidate Palm Beach County Ordinance 79•7, as amended, denominated the "Fair Share Contribution for Road Improvements Ordinance." From a final judgment upholding the validity of the ordinance, Home Builders has perfected this appeal.

The Palm Beach 1980 County Comprehensive Plan recognized that in view of the unusual growth rate being experienced in the county and in order to maintain a consistent level of road service and quality of life, extensive road improvements would be necessary, requiring regulation of new development activity which generates additional automobile traffic. The County Commission therefore enacted Ordinance 79•7 in order to finance the necessary road capital improvements and to regulate increases in traffic levels. The ordinance would require any new land development activity generating road traffic to pay its "fair share" of the reasonably anticipated cost of expansion of new roads attributable to the new development.

The ordinance has a formula which takes into consideration the costs of road construction and the number of motor vehicle trips generated by different types of land use. It provides for a fee of $300 per unit for single family homes, $200 per unit for multi-family, $175 per unit for mobile homes with other amounts for commercial or other development, all subject to annual review. The fee is to be paid upon commencement of any new land development activity generating traffic. The ordinance divides the county into forty zones, indicated on a map incorporated by reference into the ordinance, and establishes a

trust fund for each zone. Funds collected from building activity in a particular zone may only be spent in that zone, and must be spent within a reasonable time after collection (not later than six years) or returned to the present owner of the property.

The briefs of the parties and amicus present the following questions for resolution:

1. Whether Palm Beach County has authority to impose an impact fee on new development for the construction of public roads.

2. Whether the proposed ordinance violates the equal protection clauses of the Constitutions of the United States and State of Florida.

3. Whether the ordinance imposes a regulatory fee or a tax. In a well considered final judgment the trial judge either expressly or impliedly answered the foregoing questions adversely to appellants.

I. The initial question which must be answered is the challenge to the county's authority to enact an ordinance of this kind. Palm Beach County is a non•charter county, and thus we must look to Article VIII, Section 1(f) of the Florida Constitution and various enabling statutes to resolve the scope of the county's authority in this area.

Article VIII, Section 1(f), Florida Constitution, provides:

> (f) NON•CHARTER GOVERNMENT. Counties not operating under county charters shall have such power of self -government as is provided by general or special law. The board of county commissioners of a county not operating under a charter may enact, in a manner prescribed by general law, county ordinances not inconsistent with general or special law, but an ordinance in conflict with a municipal ordinance shall not be effective within the municipality to the extent of such conflict.

Ordinance 79•7, the ordinance in question, expressly cites as authority for the enactment of that legislation Sections 125.01 and 163.3161, Florida Statutes. Section 125.01(1)(m) & (w), Florida Statutes (1981), provide:

> (1) The legislative and governing body of a county shall have the power to carry on county government. To the extent not inconsistent with general or special law, this power shall include, but shall not be restricted to, the power to:
>
> (m) Provide and regulate arterial, toll, and other roads, bridges, tunnels and related facilities; eliminate grade crossings; provide and regulate parking facilities; and develop and enforce plans for the control of traffic and parking.
>
> (w) Perform any other acts not inconsistent with law which are in the common interest of the people of the county, and exercise all powers and privileges not specifically prohibited by law. In addition, Section 163.3161, Florida Statutes, known as the Local Government

> Compre-hensive Planning Act, contains a broad grant of power for local govern-ments to enact plans and programs to guide and control future develop-ment.

The Supreme Court of Florida in Speer v. Olson, 367 So.2d 207, 210•11 (Fla. 1979), characterized the legislative intent in enacting Chapter 125 as follows:

> The intent of the Legislature in enacting the recent amendments to Chapter 125, Florida Statutes, was to enlarge the powers of counties through home rule to govern themselves.

The first sentence of Section 125.01 (1), Florida Statutes, (1975), grants to the governing body of a county the full power to carry on county government. Unless the Legislature has pre•empted a particular subject relating to county government by either general or special law, the county governing body, by reason of this sentence, has full authority to act through the exercise of home rule power. The court went on to point out that one of the legislative purposes in passing Chapter 125 was to enable local governments to govern themselves without the necessity of running to the legislature every year for authority to act (citing State v. Orange County, 281 So.2d 310 (Fla. 1973)).

We know of no general or special act which purports to limit the grant of authority contained in the foregoing constitutional and statutory enactments nor is the ordinance inconsistent with any general or special law. Art. VIII, sec. 2(f), Fla. Const. Accordingly, we hold that Palm Beach County had the power and authority to enact the fee impact ordinance in question, assuming the ordinance involves a regulatory fee rather than a tax.

II. Home Builders contends the ordinance is invalid because of the disparity between the people who benefit and the people who pay. As stated in its brief:

> Our position is that since anyone can drive a vehicle over any of these roads, regardless of whether he lives in the zone or has paid the impact fee, there is too great a disparity between those who pay and those who receive the benefit, making the charge in reality a tax, which the county does not have the power to impose.

If by that argument it is Home Builders' position that the benefits accruing from roads constructed with the impact fees collected must be used exclusively or overwhelmingly for the subdivision residents in question, we would have to differ. It is difficult to envision any capital improvement for parks, sewers, drainage, roads, or whatever, which would not in some measure benefit members of the community who do not reside in or utilize the new development. For example, landowners abutting a subdivi-sion may well derive substantial benefit from intra-subdivision drainage facilities. Parks within subdivisions are not restricted to subdivision residents only. Furthermore, intra-subdivision streets and roads may be extensively used by persons not residents thereof.

A resume of the decisions in this and other jurisdictions demonstrates that those attacking impact fees often rely upon this same argument; it is one frequently found and generally rejected. In Call v. City of West Jordan, 606 P.2d 217 (Utah 1979), on rehearing 614 P.2d 1257 (1980), the appellant contended that an ordinance requiring a developer to contribute seven percent of the development land, or a fee in lieu

thereof, for public use for flood control, parks, or recreation areas was invalid because, among other things, the land dedicated or the fees paid would not be used solely for the benefit of the subdivision in question and that nonresidents of the subdivision and of the county would be using the improvements also. The Supreme Court of Utah rejected this contention, and held that it is sufficient if the improvements constructed with the fees imposed bear a reasonable relationship to the needs created by the subdivision. Call, supra, at 220. Similar arguments met the same fate in the oft cited case of Associated Home Builders v. City of Walnut Creek, 4 Cal.3d 633, 94 Cal.Rptr. 630, 484 P.2d 606 (1977), and in the case of Ayres v. City Council of City of Los Angeles, 34 Cal.2d 31, 207 P.2d 1 (1949). Our recent decision in Hollywood, Inc. v. Broward County, 431 So.2d 606 (Fla. 4th DCA 1983), also supports a holding that benefit accruing to the community generally does not adversely affect the validity of a development regulation ordinance as long as the fee does not exceed the cost of the improvements required by the new development and the improvements adequately benefit the development which is the source of the fee.
III. Next Home Builders contends that the fair share ordinance is arbitrary and discriminatory and thus violates the equal protection provisions of the Federal and State Constitutions. The thrust of the argument is that since municipalities may "opt out" of the ordinance under Article VIII, Section 1(f) of the Florida Constitution, and thirty•three of the thirty•seven municipalities in the county have opted out, equal protection is denied to those subject to the ordinance.

We disagree. Using the rational basis test articulated in In re Estate of Greenberg, 390 So.2d 40 (Fla. 1980), we believe the evidence demonstrates that the ordinance bears a reasonable relationship to a legitimate state purpose. The Florida Constitu-tion itself provides that county ordinances of non•charter counties shall not be effective in a municipality if it conflicts with a municipal ordinance. Surely that in itself should not render all non•charter county regulatory fees ineffective or impact fees could only be allowed in charter counties. Furthermore, the fact that an impact fee is payable on land located in the county whereas it would not be payable on nearby land in a municipality which has opted out does not offend equal protection. Unequal or different charges or fees assessed in incorporated and unincorporated areas, like different hours for retail liquor sales and other areas of regulation which may lack uniformity, are not improper where such legislation is otherwise a valid exercise of governmental power. As the court said in Wednesday Night, Inc. v. City of Fort Lauderdale, 272 So.2d 502, 505 (Fla. 1973):

Insofar as concerns equal protection, it is well settled that the Constitution of the United States does not prohibit legislation which is limited to the territory within which it is to operate. The constitution guaranty of equal protection of laws does not require territorial uniformity. See Ocampo v. United States, 234 U.S. 91, 34 S.Ct. 712, 58 L.Ed. 1231, and McGowan v. Maryland, 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed.2d 393.

In addition, we would observe that for aught we know any of these municipali-ties which have opted out may themselves one day enact impact fees, which will tend to lessen the ostensible unequal treatment of land development in different areas.

IV. Finally, appellants maintain that the ordinance is a tax rather than a regulatory fee and thus in violation of Article VII, Section 1(a) of the Florida Constitution. In all candor we concede this is the most difficult point raised in this appeal. As one reads the various cases involving the dichotomy between a fee and a tax the distinction almost seems to become more amorphous rather than less. In any event, some

years ago this court decided Broward County v. Janis Development Corp., 311 So.2d 371 (Fla. 4th DCA 1975), and held that a county ordinance imposing an impact fee for roads was in reality a tax rather than a fee. Appellants naturally rely heavily upon Janis to support their argument that this ordinance is a tax in sheep's clothing and that impact fees and roads are simply not compatible. However, the problem with the Janis ordinance was not that it involved an impact fee for roads (as opposed to parks or drainage, etc.) but rather that the legislation had several inherent defects. For example, the money generated by the ordinance far exceeded the cost of meeting the needs brought about by the new development. In addition, the ordinance was lacking in specific restrictions regarding the use of revenue received. These are the features which required this court to hold it was not dealing with a regulatory fee. The amount and use of the funds simply did not jibe with the concept of regula-tion; it smacked more of revenue raising which is descriptive of a tax.

In Contractors & Builders Ass'n of Pinellas County v. City of Dunedin, 329 So.2d 314 (Fla. 1976), cert. denied 444 U.S. 867 (1979), and Hollywood, Inc., supra, the supreme Court and this court pointed out the features of the Janis ordinance which kept it from passing muster as an acceptable impact fee ordinance. Consequently, the Palm Beach County ordinance in question here was crafted with Dunedin' s lessons in mind. The present ordinance recognizes that the rapid rate of new development will require a substantial increase in the capacity of the county road system. The evidence shows that the cost of construction of additional roads will far exceed the fair share fees imposed by the ordinance. In fact the county suggests that under the ordinance the cost will exceed the revenue produced by eighty•five percent. The formula for calculating the amount of the fee is not rigid and inflexible, but rather allows the person improving the land to determine his fair share by furnishing his own independent study of traffic and economic data in order to demonstrate that his share is less than the amount under the formula set forth in the ordinance. Lastly, expenditure of the funds collected is localized by virtue of the zone system.

Thus, it appears that the Palm Beach County ordinance meets the tests laid down in Dunedin and followed in Hollywood, Inc., which supports the trial judge's findings that the ordinance imposes a regulatory fee and not a prohibited tax. We would sum up this point by quoting from an informative article by Juergensmeyer and Blake entitled Impact Fees: An Answer to Local Governments' Capital Funding Dilemma, 9 Fla. St. U.L. Rev. 415, 440•41, wherein it is said:

> The appropriate framework for determining whether an impact fee is a regulation or a tax is one of public policy in which a number of factors should be weighed. The home rule powers granted local governments in Florida, the legislative mandate that local governments must plan comprehensively for future growth, and the additional broad powers given them to make those plans work effectively, indicate that properly limited impact fees for education-al or recreational purposes should be construed as regulations. Characteriza-tion as a regula-tion is particularly appropriate where an impact fee is used to complement other land use measures such as in lieu fees or dedications. If an impact fee is character-ized as a regulation, its validity should then be determined by reference to the dual rational nexi police power standard. Although the foregoing quote is by its own terms limited to fees for education-al and recreation-al purposes, we see no reason why it could not have included roads.

For the foregoing reasons, we affirm the judgment appealed from.

AFFIRMED.

RUSS BUILDING PARTNERSHIP v. CITY AND COUNTY OF SAN FRANCISCO
199 Cal. App. 3d 1496; 246 Cal. Rptr. 21

Court of Appeals of California, First Appellate District,
Division Five

January 20, 1987

NOTICE: Certified for partial publication • Pursuant to the direction of the Supreme Court (44 Cal.3d 839, 854•855 [244 Cal.Rptr. 682, 750 P.2d 324]), the Reporter of Decisions is ordered to partially publish this decision. The portions ordered published follow.

PRIOR HISTORY: Superior Court of the City and County of San Francisco, Nos. 780795, 789365 and 790661, Morton R. Colvin, Judge.

DISPOSITION: In summary, we hold that the transit fee was a lawful development fee which is not governed by California Constitution articles XIII A or XIII B, and it does not interfere with plaintiffs' due process and equal protection rights. The fee is not a double tax and does not violate section 3.598 of the city's charter. Any error in calculating the fee was harmless, and the judgment in favor of the city and against Russ Building plaintiff is affirmed.

OPINION BY: LOW

OPINION: We hold that the San Francisco Transit Impact Development Fee Ordinance is valid.

[Text omitted.] NOT CERTIFIED FOR PUBLICATION.

In this consolidated appeal, plaintiff Russ Building Partnership (hereafter Russ Building plaintiff), and plaintiffs Pacific Gateway Associates Joint Venture (Pacific), Crocker National Bank (CNB), and Crocker Properties, Inc. (hereafter collectively Crocker plaintiffs), appeal from a judgment upholding the validity of San Francisco's Transit Impact Development Fee Ordinance (the Ordinance). They contend that the trial court erred (1) in treating the Ordinance as a development fee and (2) in finding that the Ordinance could not be successfully challenged under articles XIII A and XIII B of the California Constitution, or the equal protection and due process clauses of the federal and state Constitutions.

In May 1981, the City and County of San Francisco (city) enacted Ordinance No. 224•81 "[in] order to be able to provide public transit services for new develop-ment in the downtown area . . . ." The Ordinance

requires that the owners of buildings located in downtown San Francisco which contain newly developed office space, who have not yet received a building permit or a certificate of completion prior to the effective date of the Ordinance, pay a transit fee as a condition of issuance of a certificate of completion and occupancy. The fee is designed to provide revenue for the San Francisco Municipal Railway system (Muni) to offset the anticipated increased costs to accommodate the new riders during peak commute hours generated by the construction of new office space in the downtown area. The San Francisco Board of Supervisors fixed the fee to be paid by property owners at a maximum of $ 5 per square foot of new office space.

Under the Ordinance, the transit fee is payable by each building's owner in a lump sum at the end of construction. Alternatively, the owner may choose to amortize the fee over several years and make installment payments. The amount of the fee assessed is to cover increased transit costs which the city predicts will be generated over the 45-year life of each office building. There is no provision for adjusting the amount owed by each owner depending on the actual "life" of the building or actual transit operation costs. The board of supervisors may, however, adjust the $ 5-per-square•foot figure for future developers, depending on changing conditions.

In May 1981, Russ Building plaintiff filed a class action suit against the city to have the Ordinance declared invalid on its face and in its application. Another suit was filed against the city by Crocker plaintiffs, who additionally challenged the retroactive application of the Ordinance. The two cases were consolidated for trial of common issues.

The trial court entered judgment in favor of the city, finding that the Ordinance was not a tax and was a "debatably rational" development fee. It also found that the retroactive application of the Ordinance as against the Crocker plaintiffs was legal. Appeals were taken separately from the trial court's judgments and the cases have been consolidated for appeal before this court.

I

Both sets of plaintiffs argue that the transit impact fee is not a legitimate develop-ment fee because the $ 5•per•square•foot fee exceeds the reasonable cost of the increased services to be provided, and thus is a "special tax" which must be approved by two•thirds of the electorate pursuant to California Constitution, article XIII A, section 4 (hereafter referred to as section 4). Whether the transit fee is a development fee or a special tax is an issue of law. (See generally, Heckendorn v. City of San Marino (1986) 42 Cal.3d 481, 487 [229 Cal.Rptr. 324, 723 P.2d 64].)

Typically, a development fee is an exaction imposed as a precondition for the privilege of developing the land. Such fees are commonly imposed on developers by local governments in order to lessen the adverse impact of increased population generated by the development. (See Candid Enterprises, Inc. v. Grossmont Union High School Dist. (1985) 39 Cal.3d 878 [218 Cal.Rptr. 303, 705 P.2d 876] [school-impact fees]; Associated Home Builders etc., Inc. v. City of Walnut Creek (1971) 4 Cal.3d 633 [94 Cal.Rptr. 630, 484 P.2d 606, 43 A.L.R.3d 847] [dedication of land for park space or fee in lieu thereof].) This is one of the most common subjects of local police power regulations. (See Trent Meredith, Inc. v. City of Oxnard (1981) 114 Cal.App.3d 317, 325 [170 Cal.Rptr. 685].) "'The position of the public entity is that this

arrangement is only fair. The developer has created a new, and cumulatively overwhelming, burden on local government facilities, and therefore he should offset the additional responsibilities required of the public agency by the dedication of land, construction of improvements, or payment of fees, all needed to provide improve-ments and services required by the new development. . . . '" (Ibid.)

The question which remains is how does the transit fee imposed here differ from a "special tax" within the meaning of section 4. The distinction between a tax and other exactments is admittedly blurred •• taking on a different meaning in different contexts. Our Supreme Court has defined "special taxes" in section 4 "to mean taxes levied for a specific purpose rather than . . . a levy placed in the general fund to be utilized for general governmental purposes." (City and County of San Francisco v. Farrell (1982) 32 Cal.3d 47, 57 [184 Cal.Rptr. 713, 648 P.2d 935].) (Heckendorn v. City of San Marino, supra, 42 Cal.3d at p. 489.) In reaching this conclusion, the court held that the term must be strictly construed and ambiguities resolved so as to limit the situations to which the two•thirds requirement applies. (City and County of San Francisco v. Farrell (1982) 32 Cal.3d 47, 52 [184 Cal.Rptr. 713, 648 P.2d 935].) The court reasoned that a restrictive interpretation was necessary because of the inherently undemocratic requirement that the tax must be approved by a super-majority of the electorate. (Ibid.)

While the Ordinance in this case does exact a fee for a specific purpose •• to fund the cost of providing for increased ridership caused by the development •• the crucial inquiry is whether the transit fee is a tax at all. The definition in Farrell makes the distinction between types of taxes only. To ascertain whether the transit fee is a tax, we first turn to the purpose behind section 4, using the strict interpretation approach announced in Farrell.

A

California Constitution, article XIII A was enacted to provide effective real property tax relief. "[Sections] 3 and 4 combine to place restrictions upon the imposition of such taxes." (City and County of San Francisco v. Farrell, supra, 32 Cal.3d at p. 56.) One characteristic of a special tax is that it levies a fee to replace revenue for services which were affected by the reduction caused by article XIII A. (See Heckendorn v. City of San Marino, supra, 42 Cal.3d at p. 489.) In contrast, the transit fee imposed by the Ordinance is not intended to replace revenues lost as a result of article XIII A. It is triggered by the voluntary decision of the developer to construct office buildings and is directly tied to the increase in ridership that this construction will possibly generate.

In Terminal Plaza Corp. v. City and County of San Francisco (1986) 177 Cal.App.3d 892 [223 Cal.Rptr. 379], the city enacted an ordinance which required residential hotel owners to make a one•for•one replacement of residential units which were lost through conversion or demolition as a condition for obtaining a building permit. In distinguishing this exactment from a special tax, the court concluded that "fees not exceeding the reasonable cost of providing the service or regulatory activity for which the fee is charged and which are not levied for general revenue purposes, have been considered outside the realm of 'special taxes.' [Citations.]" (Id., at p. 906.)

The transit fees required by the Ordinance were limited to the estimated costs involved to serve the increased ridership. None of the transit fees are earmarked for general revenue purposes. Further, unlike

most taxes, the fees imposed by this Ordinance are not compulsory but are exacted only if the developer voluntarily chooses to create new office space. (See id., at p. 907; Trent Meredith, Inc. v. City of Oxnard, supra, 114 Cal.App.3d at p. 328.) Developers have been required to pay for streets, sewers, parks and lights as a condition for the privilege of developing a particular parcel. There is little difference between these public improvements and the benefit to the public from the increased transit services paid for by the transit fee. In all instances, there is an increased burden on public improvements by virtue of the development. Moreover, such a construction will not interfere with giving voters effective property tax relief, the central purpose behind article XIII A of the California Constitution. (City and County of San Francisco v. Farrell, supra, 32 Cal.3d at p. 56.)

In Beaumont Investors v. Beaumont•Cherry Valley Water Dist. (1985) 165 Cal.App.3d 227 [211 Cal.Rptr. 567], the reviewing court had to decide whether a "facilities fee" imposed for connection to the local water district's system was a special tax. The developer argued that the fee exceeded the reasonable cost of construction of the water system improvements required by the development and is a special tax. The reviewing court agreed. It relied on Government Code section 50076. That section was part of legislation enacted to implement article XIII A of the California Constitution. That section provides: "As used in this article, 'special tax' shall not include any fee which does not exceed the reasonable cost of providing the service or regulatory activity for which the fee is charged and which is not levied for general revenue purposes." (Stats. 1979, ch. 903, § 1.) The court concluded that the people failed to sustain their burden of proving that the facilities fee did not exceed the reasonable value of the services for which it was collected. (Beaumont Investors, supra, at p. 238.)

Unlike Beaumont Investors, the city has undertaken numerous studies and has held public hearings to determine the reasonable cost of the increased transit services. To this end, the city hired consultants to project long•term needs and costs of transit services. Similarly, in J. W. Jones Companies v. City of San Diego (1984) 157 Cal.App.3d 745 [203 Cal.Rptr. 580], the city imposed a "facilities benefit assess-ment" on undeveloped property as a condition of obtaining a building permit which partially financed various public services built to serve the anticipated population generated by the development. These public improvements included sewer, street and transportation services, among others. The court concluded this was not a special tax but a special assessment levied on property which was benefitted by the public facilities. (Id., at p. 758.)

Whether we term the transit fee a special assessment or a development fee, as applied in this context, the charge levied is directly related and limited to the cost of increased municipal transportation services engendered by the particular development, and it is not a "special tax" for purposes of section 4.

B

Plaintiffs also contend that the transit fee is a "proceed of taxes" within the meaning of California Constitution, article XIII B and is subject to its limitations. That provision places limits on the growth of appropriations at both the state and local government levels, and requires excess appropriations to be returned by a revision of the tax rate or fee schedules within the next two years. (Cal. Const., art. XIII B, § 2; see County of Placer v. Corin (1980) 113 Cal.App.3d 443, 449 [170 Cal.Rptr. 232].) The "[proceeds] of taxes" subject to the limitation is defined as "all tax revenues and the proceeds to an entity of

government, from (i) regulatory licenses, user charges, and user fees to the extent that such proceeds exceed the costs reasonably borne by such entity in providing the regulation, product, or service . . . ." (Cal. Const., art. XIII B, § 8, subd. (c).) Plaintiffs claim that the transit fee imposed by this Ordinance is a user charge or fee subject to the limitation. We disagree.

The transit fee is not a special tax within the meaning of section 4 and is not within the ambit of California Constitution, article XIII A, and therefore is not the type of revenue intended to be controlled by article XIII B of the California Constitution. Moreover, it is imposed as a condition of development of real property, which is not a regulatory license, user fee or charge. For these reasons, we conclude that the transit fee is not a "proceed of taxes" within the meaning of article XIII B. (See also City Council v. South (1983) 146 Cal.App.3d 320, 334•335 [194 Cal.Rptr. 110].)

II

A

Plaintiffs claim that the Ordinance discriminates against owners of office buildings constructed after 1979, denying them access to government benefits on the same footing as owners of pre•1979 buildings, and that it arbitrarily singles out commercial buildings while giving retail stores in the downtown area a free ride.

Under an equal protection analysis, the transit fee as an economic regulation is presumed to be constitutional. (Candid Enterprises, Inc. v. Grossmont Union High School Dist., supra, 39 Cal.3d at p. 890.) Since developers are not a "suspect class" and development is not a "fundamental interest" (ibid.; see also Trent Meredith, Inc. v. City of Oxnard, supra, 114 Cal.App.3d at p. 328), we determine only whether the '"distinctions drawn by a challenged [Ordinance] bear some rational relationship to a conceivable legitimate state purpose.' [Citations.]" (Candid Enterprises, Inc. v. Grossmont Union High School Dist., supra, at p. 890.)

The stated purpose of the Ordinance is "to require developers of new [commercial office space] in the downtown area to pay a fee which is related directly to the incremental financial burden imposed upon the Municipal Railway." (Ord. No. 224-81, § 38.3.) The impact fee is necessary because "[new] developments will bring increased need for public transit service in the downtown area during peak periods. The Municipal Railway will be burdened with the demands of transporting a larger number of passengers." (Ord. No. 224•81, § 38.2.) The "Downtown Plan Environ-ment Impact Report" indicated that the expansion of downtown office space is expected to exceed that of downtown retail space by 110 percent. The city concluded that "[future] increases in demand for public transit service" will therefore be "attributable directly to new development in the downtown area increasing the number of persons using the Municipal Railway during peak periods." (Ord. No. 224-81, § 38.2.)

Consistent with the purpose of the Ordinance, the owners of new office space are required to pay for additional public facilities, the need for which is generated by their development. That the existing buildings will indirectly benefit from improved services does not result in such inequity as to offend equal protection principles. (See J. W. Jones Companies v. City of San Diego, supra, 157 Cal.App.3d at p. 757.)

Likewise, the argument that retail stores, which are also responsible for increased ridership, somehow got a windfall also fails. The Ordinance imposes the fee on the projected ridership directly and reasonably arising from the new office space. The city may rationally conclude that office workers increase the need for transit services during peak hours. The conclusion that it is office space, and not retail stores, that is primarily responsible for the need for improved transit services is properly left to the sound discretion of the local governing body. Since the trial court found this determination to be reasonably arrived at, this Ordinance must be upheld as being directly and additionally related to legitimate governmental goals. (Terminal Plaza Corp. v. City and County of San Francisco, supra, 177 Cal.App.3d at p. 910.) The trial court did not err in finding that the Ordinance does not violate equal protection standards.

B

Under a substantive due process analysis, "[a] law regulating or limiting the use of real property for the public welfare does not violate substantive due process as long as it is reasonably related to the accomplishment of a legitimate governmental interest. [Citations.]" (Id., at p. 908.) Plaintiffs maintain that it is unreasonable to force developers to underwrite public transit costs over a 45•year period.

There was no dispute that an office building has a useful life of 45 years and that over that life-span it will generate additional passengers for Muni. Expert testimony demonstrated that long•term cost projections are employed in a variety of contexts, such as the purchase of capital equipment, financing pension funds and evaluating long•term bonds and stocks. Such long•term projections have been approved in deciding how much park and recreational space should be set aside to accommodate an increased population 40 years into the future. (See Associated Home Builders etc., Inc. v. City of Walnut Creek, supra, 4 Cal.3d at p. 639.) This is true even though inflation and other variables may affect the accuracy of such projections. Based on the data used by the city's consultants, the trial court could properly conclude that the imposition of a lump sum fee representing increased transit costs over a 45•year period was not arbitrary or unreasonable and was not an unconstitution-al taking of plaintiffs' property.

III

Our Supreme Court has held that "[double] taxation occurs only when 'two taxes of the same character are imposed on the same property, for the same purpose, by the same taxing authority within the same jurisdiction during the same taxing period.'" (Associated Home Builders etc., Inc. v. City of Walnut Creek, supra, 4 Cal.3d at p. 642, quoting Rhyne, Municipal Law, p. 673.) In Associated Home Builders, it was determined that the requirement of land dedication for recreational use or the payment of "in•lieu fees" as a precondition of approval for development was sufficiently different from a property tax so that no unconstitutional double taxation resulted. This case is dispositive of the issue before us. The Ordinance is a development fee, not a tax. (See discussion, pt. I A, ante.) It is charged one time, at the completion of construction of new office space, and does not recur as does a property tax. Furthermore, the transit fee is designed specifically to fund Muni maintenance and development, whereas a property tax provides general revenue to cover a wide range of municipal services.

Plaintiffs attempt to distinguish the facts of the Associated Home Builders case on the ground that the fee imposed there was calculated differently than the fee in the instant case. Relying on Flynn v. San

Francisco (1941) 18 Cal.2d 210 [115 P.2d 3], they maintain that the transit fee is more akin to a property tax because both the transit fee and property taxes are calculated based on the number of square feet in the development. This argument is without merit. In Flynn, the city imposed a "license fee" on certain types of vehicles in addition to an ad valorem tax on these same vehicles. The license fee was unrelated to use of vehicles or any regulatory purpose. The court found that it was imposed only as an incident of ownership, as was the ad valorem tax, and constituted double taxation. (Id., at pp. 214•215.) Regardless of the method of calculation, the transit fee is not imposed by virtue of property ownership, but is a fee for the privilege of developing real property and to defer increased costs of transit services. As such, it is identical to the fee imposed in Associated Home Builders. As a matter of law, the imposition of the transit fee does not result in double taxation.
IV

The Crocker plaintiffs separately contend that the enactment of the Ordinance violates section 3.598 of the San Francisco City Charter. That section provides that "[rates] for each utility except the municipal railway shall be so fixed that the revenue therefrom shall be sufficient to pay, for at least the succeeding fiscal year, all expenses of every kind and nature incident to the operation and maintenance of said utility." (Italics added.) If there is a deficit for "said utility," section 3.598 of the San Francisco City Charter authorizes the imposition of a tax levy approved by a two-thirds vote of the board of supervisors. Under section 3.598, rates for Muni are proposed by the San Francisco Public Utilities Commission and are "approved, rejected or amended by the board of supervisors."

The trial court found that the "charter section specifically excepts the Muni from the requirements of the section." The trial court was correct in concluding that a Muni transit fee is not subject to the constraints of the above•cited language of section 3.598 of the San Francisco City Charter. Reviewing the plain language of the Ordinance, the board is not required to make up Muni deficits by levying a tax. The trial court correctly determined that the transit fee imposed does not violate the charter provision.

Having concluded that the city may constitutionally enact the transit fee pursuant to its police power, we offer no opinion as to the wisdom of the fee itself or upon the legality of any other exaction. We are mindful of the local government's need to generate revenue to maintain the quality of life the residents of the city have come to expect. This has become increasingly difficult in the post•Proposition 13 era. The transit fee imposed falls within permissible bounds.

V [Text omitted.] NOT CERTIFIED FOR PUBLICATION.

VI

Lastly, Russ Building plaintiff attacks the amount of the transit fee, contending that the methodology used and the assumptions relied upon by the city's consultants were unsupported by the evidence. The board fixed the transit fee at $ 5 per square foot. This was based on a June 1981 estimate of increased transit costs calculated by Bruce Bernhard of the San Francisco Public Utilities Commission Bureau of Finance. This fee was less than Bernhard's calculation of $ 6.57 per square foot. Prior to trial, the city retained Touche•-Ross as a consultant. Touche•Ross calculated the increase in the transit costs to be $ 8.36 per square foot. This figure was based on a projected use over the next 45 years. The trial court found that

the 45•year forecast was reasonable as it "rationally and directly related" to the estimated life of the buildings. The trial court also concluded that the assumptions and figures employed by the consultants in arriving at this amount were rationally based.

During the 10•week trial, each side presented exhibits and experts to testify about the methodology employed in calculating the transit fee. It is sufficient to state that the parties' experts differed in their approach. Whether the approach taken by the city's consultants was economically justifiable and financially and scientifically sound was a question of fact for the trial court, whose conclusion must be upheld if supported by substantial evidence. (See generally, United Business Com. v. City of San Diego (1979) 91 Cal.App.3d 156, 182 [154 Cal.Rptr. 263].)

A

Russ Building plaintiff challenges the use of the 45•year projection, claiming that it was not possible to estimate the increased transit costs that far into the future. Plaintiff relies on the testimony of its experts who stated, essentially, that for such a long period of time there were too many variables to consider to make any reliable estimate. Naturally, this conclusion was disputed by the city's experts. While the degree of precision of the costs decreases proportionally with the length of the projection, we cannot state that such long term forecasts are inherently unreliable or are so arbitrary as to be mere speculation. The trial court's decision approving the 45-year term was supported by substantial evidence.

B

Next, Russ Building plaintiff argues that Touche•Ross used an improper discount rate in calculating the present transit fee. Touche•Ross applied a discount rate of 1.74 percent in arriving at the net present value of the lump sum fee levied against plaintiff. Plaintiff contends that the discount rate was too low and that it should be based on the rate for the "snapshot year" 1980•1981, the period from which the ridership data was taken. Touche•-Ross used an economic forecast which estimated the discount rate over the 45•year projected term, rather than the rate for the "snapshot year." This was the only long•term projection in the record, and there was testimony on both sides concerning its accuracy. The trial court found that there was a rational basis for using this method and we agree.

Russ Building plaintiff contends this figure is too low and that the discount rate for the snapshot year should have been used. We find no inconsistencies in the use of a snapshot year to predict the amount of increased services needed and the 45-year forecast to estimate the cost of those services over useful lives of the buildings. The increased usage of the transit system can be calculated to a reasonable certainty by selecting a model year, in this case 1980•1981, and extrapolating the need based on known quantities for ultimate office capacity, vehicle capacity, route structure and patronage volume.

In contrast to the future usage figure, the cost of those services is not reasonably ascertainable in any one year, but fluctuates with the economy. The cost for maintaining, repairing and purchasing new vehicles, and the costs of salaries and insurance, to name a few, are variable, subject to influences outside the control of city officials, e.g., gas prices, the inflation rate, etc. Under such circumstances, it would be unreasonable to base the discount rate on a "snapshot year" since it could be a year of unusually high or

low inflation and, as we note, the inflation rate has not remained the same. In arriving at the cost of the increased transit services over the projected 45•year life of the building, it is more rational to use a forecast based on historical economic trends. We find substantial evidence to support the trial court's finding.

C

Relying on Birkenfeld v. City of Berkeley (1976) 17 Cal.3d 129 [130 Cal.Rptr. 465, 550 P.2d 1001], Russ Building plaintiff also argues that the failure to include a rate adjustment mechanism is unconstitutional. Plaintiff proposes the city collect an annual installment, subject to yearly recalculations of the estimated cost. Plaintiff's reliance on Birkenfeld is misplaced. In that case, a City of Berkeley rent control ordinance required a rollback of all controlled rents to those in effect on August 15, 1971; this would become the maximum rent subject to adjustments on a unit-by-unit procedure, which the court held was too cumbersome to be effective. (Id., at p. 136.) In this context, the court held that "[for] such rent ceilings of indefinite duration an adjustment mechanism is constitutionally necessary to provide for changes in circumstances and also provide for the previously mentioned situations in which the base rent cannot reasonably be deemed to reflect general market conditions." (Id., at p. 169.)

There is no similarity between the method for arriving at the maximum rent allowed in Birkenfeld and the projected costs for increased transit services in the instant matter. Unlike the Berkeley ordinance, the transit fee was not artificially limited to one particular year, but calculated based on the expected costs over the 45-year period, taking into consideration the fluctuating market conditions and inflation rate. A fair reading of Birkenfeld convinces us that an annual readjustment of the transit fee is not constitutionally mandated in this instance, and plaintiff's contention necessarily fails.

D

Next, Russ Building plaintiff challenges the data used in the "snapshot year."

1

First, plaintiff argues the city erred in assuming that no federal or state grants for capital improvements for expansion of the transit system would be issued. The 1984 amendment to the Ordinance provides that "capital subsidies . . . shall be assumed only when and to the extent that receipt of such subsidies is reasonably probable." (Ord. No. 224-84, § 38.5, subd. (b).) The trial court found that there exists "a debatable rational basis for concluding that State and Federal assistance for expansion vehicles and garage facilities will be unavailable . . . ."

In support of this finding, the trial court reasoned that since 1980 the city has had to use its own funds to finance all expansion vehicles. This evidence went uncontradicted. Also, the agency responsible for approving transportation grants to the region, the metropolitan transit commission, treats expansion as its lowest priority, behind maintaining "existing and committed" service. While plaintiff demonstrated the city's success with obtaining capital grants, there was insufficient evidence to show that the money received was used to expand upon existing facilities. On the basis of this record, we find sufficient

evidence to support the trial court's conclusion that the board could not reasonably anticipate government funds for expanding the transit system over the next 45 years.

2

Section 38.3 of the Ordinance requires the owners of the new buildings to pay the "incremental financial burden" imposed on the Muni system, and that the fee should "measure the total incremental burdens" generated by new office development. The 1984 amendment to the Ordinance requires that costs and revenues for off-peak periods not be included in calculating the transit fee. (Ord. No. 224•84, § 38.5, subds. (e), (f).) Plaintiff argues that it is illogical not to include revenues collected from off-peak service in offsetting the total increased costs of services.

a

Russ Building plaintiff argues that the city erred in ignoring the revenues generated during off-peak periods. The argument goes that since the new office workers will surely use the Muni during off-peak hours, the revenue collected therefrom should be used to offset the cost of the increased transit services.

The evidence reveals that Muni provides off-peak service at a huge deficit. Touche-Ross, the city's consulting firm, used a marginal cost accounting approach and allocated the off-peak revenue to off-peak service, thereby reducing the deficit incurred during that period. There was no testimony that a surplus resulted from this accounting method. Thus, it does not appear that the increase in revenue during off-peak hours has any financial impact on the cost of funding an expansion of the system to accommodate peak service use. The trial court found that this approach was rationally based, and we agree.

b

Russ Building plaintiff also argues that the city deliberately understated the revenue to be generated by fast pass use during peak hours. In its statement of decision, the trial court found: Peak operating revenue is composed of fast pass revenue and cash fare. In order to determine the average revenue per peak period trip, it is necessary to estimate the proportion of trips which are paid by fast pass versus the cash fare. Touche•Ross calculated that 54 percent of all peak period trips made by downtown workers will be paid for by fast pass, and 46 percent will be in cash. The trial court concluded that the estimate for fast pass use was a reasonable one.

Russ Building plaintiff contends that Touche•Ross mixed its data bases to arrive at an artificially lower revenue estimate from fast pass use. Touche•Ross combined the high number of fast passes sold at a discount price during 1980•1981 with the high estimate of monthly fast pass trips derived from a 1979 study in which the fast pass was not discounted. This, plaintiff claims, unreasonably inflated the fast pass/cash ratio and yielded underestimat-ed revenue. We agree. In order to estimate the revenue likely to be generated by fast pass use, the calculation should be based on the cost per ride paid for at the time the ride is taken. If the Muni maintained a constant pricing policy, it would not matter which year would be used to derive the sales figures. But since the pricing of fast passes fluctuates, it is inconsistent to compare the last year's cost of riding Muni with this year's ridership. Plaintiff is correct in concluding that use of

different periods artificially underestimates fare revenue derived from fast pass sales. The sales figures and the ridership use should come from the same target year.

3

Next, Russ Building plaintiff challenges the application of a "transfer rate" as part of the increased costs. Touche•Ross calculated a transfer rate to account for the times a rider is likely to transfer to another line in getting to his downtown destination during the peak period. The transfer rate was calculated to be 1.39, which meant that for every 100 trips to or from downtown, there would be 139 actual rides on the various Muni lines. The city's policy, codified in Ordinance No. 224•81 section 38.3, provided that there be no increase in the level of crowding resulting from the new office space. The trial court did not question the "legislative wisdom" behind this policy and looked only to the reasonableness of Touche•Ross's calculations. The court found the calculations to be reasonable. Plaintiff claims that the transfer rate arrived at is unjustified since the "crosstown" and "feeder routes" are not operating at or beyond capacity. We agree.

Touche•Ross calculated the transit fee so that the average "load factors" •• a measure of the degree of crowding •• does not rise due to construction of the new office buildings. The trial court found that even though the connecting routes were not operating at capacity, it was reasonable for the city to maintain the average load factors during peak periods because (1) it could reasonably be expected that surplus space would disappear over the 45•year life of the project and (2) excess passenger capacity can be reasonably viewed as an asset to be preserved.

While it may be ideal transit policy to preserve the present load factors in the connecting routes, it is unfair to require Russ Building plaintiff to bear this burden alone. While the population generated by plaintiffs' buildings will likely increase the ridership on the "feeder" and "crosstown" routes, there is no evidence of increased cost to Muni to operate these lines. This is the only relevant consideration, since the fee imposed by the city must not be more than needed to provide the improvements and services required by the development. (See Trent Meredith, Inc. v. City of Oxnard, supra, 114 Cal.App.3d at p. 325.) Anything beyond that would be unrelated to the development and constitute a tax. The trial court should have examined the city's policy against the applicable constitutional standards. Had it done so, it would have concluded that only necessary expansion costs could be assessed against plaintiff.

4

However, we find these errors to be harmless. (See Warner Constr. Corp. v. City of Los Angeles (1970) 2 Cal.3d 285, 301 [85 Cal.Rptr. 444, 466 P.2d 996].) The difference between the transit fee as originally estimated and the amount using the methodology discussed above would result in an estimated fee well above the $ 5 figure imposed on the Russ Building plaintiff. Using the Touche•Ross analysis relied on by the trial court, a recalculation of the fast pass revenue figure would result in a $ 0.60•per•square•foot reduction, from $ 8.36 to $ 7.76. (See fn. 2, ante.) If the transfer rate were recalculated to exclude below capacity "policy lines," the fee would be further reduced by 81 cents per square foot; from $ 7.76 to $ 6.95; still well above the $5•per•square•foot fee imposed by the city. Accordingly, it would serve no purpose to remand this matter for further findings.

VII

In summary, we hold that the transit fee was a lawful development fee which is not governed by California Constitution articles XIII A or XIII B, and it does not interfere with plaintiffs' due process and equal protection rights. The fee is not a double tax and does not violate section 3.598 of the city's charter. Any error in calculating the fee was harmless, and the judgment in favor of the city and against Russ Building plaintiff is affirmed.

[Text omitted.] NOT CERTIFIED FOR PUBLICATION.

Each party to bear its own costs on appeal.

DISSENT: KING, J., Concurring and Dissenting. I agree with the majority that the San Francisco Transit Impact Development Fee Ordinance is valid as imposing a development fee.

[Text omitted.] NOT CERTIFIED FOR PUBLICATION.

RUSS BUILDING PARTNERSHIP v. CITY AND COUNTY OF SAN FRANCISCO

484 U.S. 909; 108 S. Ct. 253

SUPREME COURT OF THE UNITED STATES

October 19, 1987

PRIOR HISTORY: Appeal from Ct. App. Cal., 1st App. Dist. Reported below: 188 Cal. App.3d 977, 234 Cal. Rptr. 1

DISPOSITION: Appeal dismissed.

JUDGES: Rehnquist, Brennan, White, Marshall, Blackmun, Stevens, O'Connor, Scalia

OPINION: The appeal is dismissed for want of jurisdiction.

CITY OF KEY WEST v. R.L.J.S. CORPORATION

537 So. 2d 641; 1989 Fla. App.

Court of Appeal of Florida, Third District

January 3, 1989, Filed

SUBSEQUENT HISTORY: Rehearing Denied February 15, 1989; Review Denied May 12, 1989.

PRIOR HISTORY: An Appeal from the Circuit Court for Monroe County, M. Ignatius Lester, Judge.

OPINION BY: PEARSON

We address a question of first impression in this state, namely, does a municipality's assessment of developmental impact fees upon the developer of a condominium apartment building violate any constitutionally protected right of the developers where such fees are assessed after a building permit has been issued and the developers have sold a substantial number of the building units? We conclude that no constitutional right of the developers was offended by the municipality's action and reverse the trial court's contrary declaration.

I. R.L.J.S., et al., the plaintiffs in the declaratory judgment action below, are joint venture developers of the 1800 Atlantic Condominium in Key West. In August 1981, the City of Key West approved the developers' community impact statement and site plan. Several months later, the City issued a building permit for 76 units, all of which had been sold. In October 1983, the developers obtained a building permit for 92 additional units, some 40 of which were already sold. The developers paid $ 19,400 in sewer connection and permit fees when they obtained this second permit.

In the spring of 1984, the City issued certificates of occupancy for the first 76 units. Thereafter, during a one•year period beginning in late 1984, the City enacted ordinances imposing separate impact fees for sewers, solid waste, and traffic. As the trial court correctly observed, the purpose of these ordinances was "to allocate to new residents of the City 'a fair share of the cost of new public facilities', specifically those . . . dealing with sewer and solid waste treatment and those capital improvements necessitated by increased traffic on account of new development in the City." Each of the ordinances provided that "no certificate of occupancy shall be issued" until any applicable impact fee was paid. Accordingly, upon the developers' failure to pay the three impact fees, the City denied their request that certificates of occupancy be issued for the additional 92 units in the develop-ment.

II. The developers filed a declaratory judgment action against the City. The trial court, convinced by Contractors and Building Association v. City of Dunedin, 329 So.2d 314 (Fla. 1976), that "an opportunity to pass on such fees to the ultimate user who causes the impact on the community is necessary for the law to meet constitutional muster," entered summary judgment for the developers on the grounds, first, that the developers were not afforded such an opportunity and, second, that the City attempted to retrospectively apply the fees after the developers' rights in the building permit had vested. In the trial court's words:

> The timing in this case is particularly significant to the Court in that it makes virtually impossible any chance of the developer citizen being able to pass on the impact fee. Because the Plaintiffs' rights in their building permit had already vested, Key West could not retrospectively impose fees that amount to a personal punishment to him. Such interference with the Plain-tiffs' vested rights to complete construction in accor-dance with the terms of

> the building permits, constitute [sic] a due process violation and are [sic] therefore unconstitutional.

The City took this appeal.

III. We disagree with the developers and the trial court that the Dunedin case holds that an impact fee is constitutional only when the developer is given the opportunity to pass the fee on to new residents, that is, the purchasers of the developed units. The developers' view of Dunedin 's holding is apparently drawn from several unconnected passages in the opinion:

> In principle, however, we see nothing wrong with trans-ferring to the new user of a municipally owned water or sewer system a fair share of the costs new use of the system involves. . . . .
>
> The avowed purpose of the ordinance in the present case is to raise money in order to expand the water and sewage systems, so as to meet the increased demand which additional connections to the system create. The municipality seeks to shift to the user expenses incurred on his account. . . . .
>
> The cost of new facilities should be borne by new users to the extent new use requires new facilities, but only to that extent.

Contractors and Builders Association v. City of Dunedin, 329 So.2d at 317•18, 318, 321 (emphasis in original).

We reject the developer's argument that the "user" or "new user" referred to in Dunedin variously as the person who is to share the costs involved in the new use of the system, the person to whom these expenses are to be shifted, or the person who is to bear the expenses of the new facilities, is necessarily the person who purchases the condominium unit from the developer and lives in the unit. While we agree that the purchasers of and residents in the condominium unit are likely users of the area's transportation, sewer, and solid waste services, they are not exclusively so. Thus, in our view, the term "user" encompasses anyone who may derive benefit from the services, as, for example, a developer seeking to sell condominium units.

Nor can the later statement in Dunedin that "[t]he cost of new facilities should be borne by new users" be read, as the developers suggest, to mean that only those persons who actually use the services must pay for them. Plainly, the statement was not intended as a sweeping declaration that taxpayers who own property in the impacted area but do not actually use new facilities are to be relieved from the burden of paying an impact fee established by an ordinance. Instead, we believe that the proper reading of the Dunedin statements is that as between all of the taxpayers of the municipality and the specific group of taxpayers in the impacted area, the latter group was to bear the cost of the required new facilities, and that no distinction is to be drawn between the developer of the property and the ultimate purchasers of units from the developer. Dunedin, then, does little to further our inquiry.

IV. But Dunedin aside, the developers claim that the doctrine of vested rights which protects property owners and builders who rely on an act or omission by the government protects them from the impact of the impact fees.

Generally, the doctrine of vested rights limits local governments in the exercise of their zoning powers when a property owner relying in good faith upon some act or omission of the government has substantially changed position or incurred such excessive obligations and expenses that it would be highly inequitable and unjust to destroy the rights that the owner has acquired. Hollywood Beach Hotel Co. v. City of Hollywood, 329 So.2d 10, 15 (Fla. 1976); City of Lauderdale Lakes v. Corn, 427 So.2d 239, 243 (Fla. 4th DCA 1983); Smith v. City of Clearwater, 383 So.2d 681 (Fla. 2d DCA 1980), review dismissed, 403 So.2d 407 (Fla. 1981). The developers say the doctrine protects them because after receiving the building permit, they reasonably believed that they knew of all the expenses that they would have to pay, and in reliance on this set prices for the units. They claim that the City's subsequent assessment of impact fees after the units were sold retroactively denied them the force and effect of the building permit.

The question thus presented has no easy answer; courts of other jurisdictions which have considered similar claims by developers have not been in agreement.

A. In City of Pontiac v. Mason, 50 Ill. App.3d 102, 365 N.E.2d 145 (1977), the developer received building and plumbing permits for its shopping center, and the center was connected to city sewage lines. Thereafter, the city enacted an ordinance imposing a sewage connection fee, and refused to issue a certificate of occupancy until the developer paid the fee. The appellate court upheld the fee, finding that estoppel was not established and that, since the ordinance was passed before the shopping center was finished, the ordinance authorizing the fee did not violate the developers' rights. City of Pontiac differs from the present case in one crucial respect: the project in that case was a shopping center••its units presumably to be rented, not sold••and there was no indication••and, apparently, no argument••that it would have been difficult, much less impossible, for the developer to recoup some, or a large part, or all of the connection fee.

Likewise, in Westfield•Palos Verdes Co. v. City of Rancho Palos Verdes, 73 Cal.App.3d 486, 141 Cal. Rptr. 36 (1977), an environmental excise tax imposed by the city after the developer had begun construction of condominiums was upheld and the developers' vested rights argument rejected:

> Appellants' attempt to use a vested rights principle to gain immunity from unforeseen taxes is virtually without precedent, and if followed to its logical conclusions, would shield any lawful business from newly enacted taxes if that business had made any sort of irrevocable commit-ments, either financial or contractual, in commenc-ing operations in that municipality. The imposition of a new tax, or the increase in the rate of an old one, is simply one of the usual hazards of the business enter-prise. 73 Cal.App.3d at , 141 Cal.Rptr. at 42 (citations omitted).

Once again, there is concededly a crucial difference from the present case: under the California ordinance, the units that were already sold were exempted from the developer's assessed taxes. Id. at , 141 Cal.Rptr. at 39.

A different California court considered a similar issue in People v. H & H Properties, 154 Cal.App.3d 894, 201 Cal.Rptr. 687 (1984). There, a company purchased two apartment buildings and later received city approval to convert them into condomin-iums. Still later, the city passed an ordinance requiring those convert-ing rental apartments into condominiums to help their displaced tenants find comparable housing and pay either moving expenses or compensation for anticipated rent increases. The appellate court held that the ordinance did not abridge any vested right of the company because the company was merely required to pay some money and was not prevented from proceeding with the condomin-ium conversion. The court explained that "[i]f the project has lost its attractiveness, the developers are free to pull out, and they always retain the option of holding on to the units and leasing them out." 154 Cal.App.3d at , 201 Cal.Rptr. at 691. Because the developers in the present case could not pull out (most of the units having already been sold), H & H Properties is of little precedential value in resolving the claim before us.

B. More on point is Russ Building Partnership v. City and County of San Francisco, 188 Cal.App.3d 977, 234 Cal.Rptr. 1 (Ct. App.), review granted, 236 Cal.Rptr. 403, 735 P.2d 444, review modified, 237 Cal. Rptr. 456, 737 P.2d 359 (1987), affirmed in part and reversed in part, 44 Cal.App.3d 839, 244 Cal.Rptr. 682, 750 P.2d 324 (Cal. 1988), appeal dismissed, 484 U.S. 909, 108 S.Ct. 253, 98 L.Ed.2d 211 (1987) and U.S., 109 S.Ct. 209, L.Ed.2d (1988).

In Russ, the plaintiff received a permit to erect an office building in San Francisco. After construction had begun, the city enacted an ordinance which provided that owners of downtown buildings containing newly developed office space could not receive a certificate of occupancy until they paid a transit impact fee. Beginning the long journey through the courts, the Russ Building Partnership sought a judgment declaring the ordinance invalid. The trial court found that the ordinance was a debatably rational development fee and that its "retroactive" application to Russ was lawful. Disagreeing, the court of appeal found that the fee could not be applied against the plaintiff since it had "obtained a vested right to complete the buildings and occupy them under the conditions in existence when the original building permits issued." 188 Cal. App.3d at , 234 Cal.Rptr. at 9. The California Supreme Court granted review and, although ordering that there be omitted from the court of appeal decision the discussion of vested rights, nonetheless went on to make clear that it agreed with the court of appeal on the general vested rights question:

> Plaintiffs had been issued building permits, had begun construction, and had made a substantial financial commitment to their projects almost two years before the City enacted the TIDF ordinance. Thus, they had a vested right to complete the buildings and occupy them under the conditions contained in the permits. It is clear that if the resolutions authorizing plaintiffs' building permits did not contain the transit mitigation condition, application of the later-enacted TIDF ordinance to plaintiffs would impair their vested rights and violate due process. However, if the TIDF falls among the funding mecha-nisms contemplated by the resolutions, the application of the ordinance to plaintiffs is proper. 44 Cal.App.3d at , 244 Cal.Rptr. at 685, 750 P.2d at 327 (cita-tions omitted).

Clearly, if we were to apply the law of Russ to the facts of the present case, the impact fees could not be assessed against the developers, because no provision allowing the assessment of fees was included in the

building permit. However, we decline to follow Russ as we do not believe that a requisite to the validity of an impact fee is that the possibility that it will be imposed at some future time be made an express condition of a building permit.

C. The usual vested right claim involves a change of mind, a broken promise: a city issues a building permit imposing one requirement and in the course of construction imposes a different requirement. In a sense, the building permit assures the builder that he may go forward and build in accordance with the approved plans. When a new building requirement is thereafter imposed, it can be readily said that the city had changed its mind and that the rights vested in the builder by virtue of the permit have been unfairly disturbed.

But a building permit, although assuring its possessor that he may safely rely on it and build in accordance with the approved plans, provides no assurance to the possessor that a taxing authority of the very same government will not increase taxes on the property being built upon, or, as in the present case, impose fees for certain municipal services which will be especial-ly required when the building is completed.

Illustrative of this point is State v. Oyster Bay Estates, Inc., 384 So.2d 891 (Fla. 1st DCA 1980). There the developer received a dredging permit from the Board of Trustees of the Internal Improvement Fund. Later, the Legislature passed a law enabling the Department of Environmental Regulation to impose further restrictions on development. The First District held that the developer derived no vested rights from the first permit. Since the Trustees' authority was limited to certain areas, nothing they did could guarantee that the Department of Environmental Regulation, which had authority to regulate different matters, would not impose any additional requirements. Said the court,

> We therefore find no basis upon which it can be concluded that action by the Board in approving the navigational channel (a matter within its jurisdiction), conferred rights upon [the developer] with respect to construction of inland canals upon [the developer's] upland property (over which the Board had no jurisdiction). 384 So.2d at 893.

In our view, there is likewise no basis to conclude that the action of the building department of the City in approving building plans and issuing a permit (a matter within the depart-ment's jurisdiction) conferred any right upon the developer to expect that the legislative arm of the City •• its council •• would not enact an ordinance imposing impact fees where warranted.

Moreover, notwithstanding the developers' apparent belief, a law enacted during work in progress or when work is complete is not vitiated by the invocation of the word "retroactive." A law is not constitutionally infirm merely because the person affected is unable to divert the effects of the law to another or, here, to pass along the unanticipated costs that result from the law. Indeed, a long series of United States Supreme Court cases has upheld laws which operated retroactively.

The leading modern case is Usery v. Turner Elkhorn Mining Co., 428 U.S. 1, 96 S.Ct. 2882, 49 L.Ed.2d 752 (1976). In Usery, a coal mining company challenged a law which required it to pay benefits to miners who left the company's employ before the effective date of the law. The Court clearly stated that government may impose burdens that are unanticipated:

> [I]t may be that the liability imposed by the Act for disabilities suffered by former employees was not anticipated at the time of actual employ-ment. But our cases are clear that legislation readjusting rights and burdens is not unlawful solely because it upsets other-wise settled expectations. 428 U.S. at 16, 96 S.Ct. at 2892•93, 49 L.Ed.2d at 766•67 (footnote omitted).

In Usery, the mining company argued that competitive forces would prevent it from effectively passing on to the consumer the costs imposed by the law. The Court, however, stated that it was "for Congress to choose" who should bear the burden of the miners' disabilities. "It is enough to say that the Act approaches the problem of cost spreading rationally; whether a broader cost-spreading scheme would have been wiser or more practical under the circumstances is not a question of constitutional dimension." 428 U. S. at 19, 96 S.Ct. at 2894, 49 L.Ed.2d at 768. Similarly, in Pension Benefit Guaranty Corp. v. R.A. Gray & Co., 467 U.S. 717, 104 S.Ct. 2709, 81 L.Ed.2d 601 (1984), the Court rejected a challenge to a federal law which regulated employer withdrawals from the company's pension plan during the five months prior to the enactment of the statute. The Court dismissed the employer's claim that retroactive legislation does not satisfy due process require-ments unless employers have "an opportunity to conform their conduct to the requirements of [the] new legislation." 467 U.S. at 731, 104 S.Ct. at 2719, 81 L.Ed.2d at 612 (quoting brief of employer). See also United States v. Darusmont, 449 U.S. 292, 101 S.Ct. 549, 66 L.Ed.2d 513 (1981) (upholding retroactive application of taxes); Welch v. Henry, 305 U.S. 134, 59 S.Ct. 121, 83 L.Ed. 87 (1938) (same).

Just as forceful are cases in which the buyer, not the seller, was compelled to pay an unexpected special assessment. In Moody v. City of Vero Beach, 203 So.2d 345 (Fla. 4th DCA 1967), the buyers bought a piece of property, and later learned of a special assessment for improvements performed before they bought the property. The Fourth District upheld the assessment against the buyers, saying that "[p]ublic works must be paid for even though they were constructed before any assessment was levied on their account." 203 So.2d at 347. See also Phillip Wagner, Inc. v. Leser, 239 U.S. 207, 36 S.Ct. 66, 60 L.Ed. 230 (1915) (special assessment not unconstitutional because for special benefits long since accrued); Anderson v. City of Ocala, 83 Fla. 344, 357•58, 91 So. 182, 187 (1922) ("[A]n assessment for benefits derived from improvements previously made does not constitute a deprivation of property without due process of law"); Hall v. Street Commission-ers, 177 Mass. 434, 59 N.E. 68 (1901) (Holmes, C.J.); 70A Am.Jur. Special or Local Assessments § 13, at 1137 (1987) ("A special assessment may be levied upon an executed consider-ation, that is, for a public work or improvement already done; such an assessment interferes with no contract and divests no vested rights.").

It thus clearly appears that government can constitutionally impose burdens which are unexpected whether or not the burdens are susceptible to being passed on to another person. See Westfield -Palos Verdes Co. v. City of Rancho Palos Verdes, 73 Cal.App.3d at 494, 141 Cal.Rptr. at 42 ("The imposition of a new tax, or an increase in the rate of an old one, is simply one of the usual hazards of the business enterprise."); John McShain, Inc. v. District of Columbia, 205 F.2d 882, 883 (D.C. Cir. 1953) (same). Even if the developers in this case could show that the costs could not be passed on to what they call "users," they would still be liable to pay the impact fees.

V. We acknowledge that the result we reach may seem harsh. To be sure, the developers sold most of

the units in the condominium and only later found out that they had to pay more money to the City. But as we have said, absent a contractual agreement, one may not justifiably assume that taxes will remain the same or that an impact fee will not be imposed. The imposition of an impact fee resulting in an unanticipated increase in a developer's cost may seem harsh, but it is not unconstitu-tional.

The fees collected must be earmarked for the substantial benefit of the residents, Hollywood, Inc. v. Broward County, 431 So.2d at 606, and may not exceed a pro rata share of reasonably anticipated costs of expansion. The money collected may be used only to meet the costs of expansion. Contractors and Builders Association v. City of Dunedin, 329 So.2d 314, 320 (Fla. 1976). See also Home Builders and Contractors Association v. Board of County Commissioners, 446 So.2d 140, 143•44 (Fla. 4th DCA 1983). Additionally, developers can try to avoid the problem of unantici-pated fees. Real estate transaction reference books warn about the need to plan for unexpected special assessments. One leading book on Florida real estate law instructs "[t]hat to avoid dispute, many contracts include a term which specifies which party shall be responsible for the payment of the assessment." 1 R. Boyer, Florida Real Estate Transactions § 4.28, at 4•72 (1988). See also A. Arnold, J. Douglas, & D. Feld, Modern Real Estate and Mortgage Forms § 30 (1986); S. Goldberg, Sales of Real Property 387•91 (1971).

The judgment under review is reversed and the cause remanded with directions to enter judgment for the City of Key West in accordance with this opinion.

Reversed and remanded.

NOLLAN ET UX. v. CALIFORNIA COASTAL COMMISSION

483 U.S. 825; 107 S. Ct. 3141

SUPREME COURT OF THE UNITED STATES

Argued March 30, 1987
June 26, 1987

PRIOR HISTORY: APPEAL FROM THE COURT OF APPEAL OF CALIFORNIA, SECOND APPELLATE DISTRICT

SYLLABUS: The California Coastal Commission granted a permit to appellants to replace a small bungalow on their beachfront lot with a larger house upon the condition that they allow the public an easement to pass across their beach, which was located between two public beaches. The County Superior Court granted appellants a writ of administrative mandamus and directed that the permit condition be struck. However, the State Court of Appeal reversed, ruling that imposition of the condition did not violate the Takings Clause of the Fifth Amendment, as incorporated against the States by the Fourteenth Amendment.

Held:

1. Although the outright taking of an uncompensated, permanent, public -access easement would violate the Takings Clause, conditioning appellants' rebuilding permit on their granting such an easement would be lawful land•use regulation if it substantially furthered governmental purposes that would justify denial of the permit. The government's power to forbid particular land uses in order to advance some legitimate police•power purpose includes the power to condition such use upon some concession by the owner, even a concession of property rights, so long as the condition furthers the same governmental purpose advanced as justification for prohibiting the use. Pp. 831•837.

2. Here the Commission's imposition of the access•easement condition cannot be treated as an exercise of land•use regulation power since the condition does not serve public purposes related to the permit requirement. Of those put forth to justify it •• protecting the public's ability to see the beach, assisting the public in overcoming a perceived "psychologi-cal" barrier to using the beach, and preventing beach congestion •• none is plausible. Moreover, the Commission's justification for the access requirement unrelated to land•use regulation •• that it is part of a comprehen-sive program to provide beach access arising from prior coastal permit decisions •• is simply an expression of the belief that the public interest will be served by a continuous strip of publicly accessible beach. Although the State is free to advance its "comprehensive program" by exercising its eminent domain power and paying for access easements, it cannot compel coastal residents alone to contribute to the realization of that goal. Pp. 838•842. 177 Cal. App. 3d 719, 223 Cal. Rptr. 28, reversed.

SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and WHITE, POWELL, and O'CONNOR, JJ., joined. BRENNAN, J., filed a dissenting opinion, in which MARSHALL, J., joined, post, p. 842. BLACKMUN, J., filed a dissenting opinion, post, p. 865. STEVENS, J., filed a dissenting opinion, in which BLACKMUN, J., joined, post, p. 866.
JUDGES: Rehnquist, Brennan, White, Marshall, Blackmun, Powell, Stevens, O'Connor, Scalia.

OPINION BY: SCALIA

OPINION: JUSTICE SCALIA delivered the opinion of the Court.

James and Marilyn Nollan appeal from a decision of the California Court of Appeal ruling that the California Coastal Commission could condition its grant of permission to rebuild their house on their transfer to the public of an easement across their beachfront property. 177 Cal. App. 3d 719, 223 Cal. Rptr. 28 (1986). The California court rejected their claim that imposition of that condition violates the Takings Clause of the Fifth Amendment, as incorporated against the States by the Fourteenth Amendment. Ibid. We noted probable jurisdiction. 479 U.S. 913 (1986).

I

The Nollans own a beachfront lot in Ventura County, Califor-nia. A quarter•mile north of their property is Faria County Park, an oceanside public park with a public beach and recreation area. Another public beach area, known locally as "the Cove," lies 1,800 feet south of their lot. A concrete seawall

approximately eight feet high separates the beach portion of the Nollans' property from the rest of the lot. The historic mean high tide line determines the lot's oceanside boundary.

The Nollans originally leased their property with an option to buy. The building on the lot was a small bungalow, totaling 504 square feet, which for a time they rented to summer vacationers. After years of rental use, however, the building had fallen into disrepair, and could no longer be rented out.

The Nollans' option to purchase was conditioned on their promise to demolish the bungalow and replace it. In order to do so, under Cal. Pub. Res. Code Ann. §§ 30106, 30212, and 30600 (West 1986), they were required to obtain a coastal development permit from the California Coastal Commission. On February 25, 1982, they submitted a permit application to the Commission in which they proposed to demolish the existing structure and replace it with a three•bedroom house in keeping with the rest of the neighborhood.

The Nollans were informed that their application had been placed on the administrative calendar, and that the Commission staff had recommended that the permit be granted subject to the condition that they allow the public an easement to pass across a portion of their property bounded by the mean high tide line on one side, and their seawall on the other side. This would make it easier for the public to get to Faria County Park and the Cove. The Nollans protested imposition of the condition, but the Commission overruled their objections and granted the permit subject to their recordation of a deed restriction granting the easement. App. 31, 34.

On June 3, 1982, the Nollans filed a petition for writ of administrative mandamus asking the Ventura County Superior Court to invalidate the access condition. They argued that the condition could not be imposed absent evidence that their proposed develop-ment would have a direct adverse impact on public access to the beach. The court agreed, and remanded the case to the Commission for a full evidentiary hearing on that issue. Id., at 36. 677

On remand, the Commission held a public hearing, after which it made further factual findings and reaffirmed its imposition of the condition. It found that the new house would increase blockage of the view of the ocean, thus contributing to the development of "a 'wall' of residential structures" that would prevent the public "psychologically . . . from realizing a stretch of coastline exists nearby that they have every right to visit." Id., at 58. The new house would also increase private use of the shorefront. Id., at 59. These effects of construction of the house, along with other area development, would cumulatively "burden the public's ability to traverse to and along the shorefront." Id., at 65•66. Therefore the Commission could properly require the Nollans to offset that burden by providing additional lateral access to the public beaches in the form of an easement across their property. The Commission also noted that it had similarly conditioned 43 out of 60 coastal development permits along the same tract of land, and that of the 17 not so conditioned, 14 had been approved when the Commission did not have administrative regulations in place allowing imposition of the condition, and the remaining 3 had not involved shorefront property. Id., at 47•48.

The Nollans filed a supplemental petition for a writ of administrative mandamus with the Superior Court, in which they argued that imposition of the access condition violated the Takings Clause of the Fifth Amendment, as incorporated against the States by the Fourteenth Amendment. The Superior Court ruled

in their favor on statutory grounds, finding, in part to avoid "issues of constitutionality," that the California Coastal Act of 1976, Cal. Pub. Res. Code Ann. § 30000 et seq. (West 1986), authorized the Commission to impose public access conditions on coastal develop-ment permits for the replacement of an existing single-family home with a new one only where the proposed development would have an adverse impact on public access to the sea. App. 419. In the Court's view, the administrative record did not provide an adequate factual basis for concluding that replacement of the bungalow with the house would create a direct or cumulative burden on public access to the sea. Id., at 416•417. Accordingly, the Superior Court granted the writ of mandamus and directed that the permit condition be struck.

The Commission appealed to the California Court of Appeal. While that appeal was pending, the Nollans satisfied the condition on their option to purchase by tearing down the bungalow and building the new house, and bought the property. They did not notify the Commission that they were taking that action.

The Court of Appeal reversed the Superior Court. 177 Cal. App. 3d 719, 223 Cal. Rptr. 28 (1986). It disagreed with the Superior Court's interpretation of the Coastal Act, finding that it required that a coastal permit for the construction of a new house whose floor area, height or bulk was more than 10% larger than that of the house it was replacing be conditioned on a grant of access. Id., at 723•724, 223 Cal. Rptr., at 31; see Cal. Pub. Res. Code Ann. § 30212. It also ruled that that requirement did not violate the Constitution under the reasoning of an earlier case of the Court of Appeal, Grupe v. California Coastal Comm'n, 166 Cal. App. 3d 148, 212 Cal. Rptr. 578 (1985). In that case, the court had found that so long as a project contributed to the need for public access, even if the project standing alone had not created the need for access, and even if there was only an indirect relationship between the access exacted and the need to which the project contributed, imposition of an access condition on a development permit was sufficiently related to burdens created by the project to be constitution-al. 177 Cal. App. 3d, at 723, 223 Cal. Rptr., at 30•31; see Grupe, supra, at 165•168, 212 Cal. Rptr., at 587•590; see also Remmenga v. California Coastal Comm'n, 163 Cal. App. 3d 623, 628, 209 Cal. Rptr. 628, 631, appeal dism'd, 474 U.S. 915 (1985). The Court of Appeal ruled that the record established that that was the situation with respect to the Nollans' house. 177 Cal. App. 3d, at 722•723, 223 Cal. Rptr., at 30•31. It ruled that the Nollans' taking claim also failed because, although the condition diminished the value of the Nollans' lot, it did not deprive them of all reasonable use of their property. Id., at 723, 223 Cal. Rptr., at 30; see Grupe, supra, at 175•176, 212 Cal. Rptr., at 595•596. Since, in the Court of Appeal's view, there was no statutory or constitutional obstacle to imposition of the access condition, the Superior Court erred in granting the writ of mandamus. The Nollans appealed to this Court, raising only the constitutional question.

II

Had California simply required the Nollans to make an easement across their beachfront available to the public on a permanent basis in order to increase public access to the beach, rather than conditioning their permit to rebuild their house on their agreeing to do so, we have no doubt there would have been a taking. To say that the appropriation of a public easement across a landowner's premises does not constitute the taking of a property interest but rather (as JUSTICE BRENNAN contends) "a mere restriction on its use," post, at 848•849, n. 3, is to use words in a manner that deprives them of all their ordinary meaning. Indeed, one of the principal uses of the eminent domain power is to assure that the government be able to require conveyance of just such interests, so long as it pays for them. J. Sackman, 1 Nichols on Eminent

domain § 2.1[1] (Rev. 3d ed. 1985), 2 id., § 5.01[5]; see 1 id., § 1.42[9], 2 id., § 6.14. Perhaps because the point is so obvious, we have never been confronted with a controversy that required us to rule upon it, but our cases' analysis of the effect of other governmental action leads to the same conclusion. We have repeatedly held that, as to property reserved by its owner for private use, "the right to exclude [others is] 'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'" Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 433 (1982), quoting Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979). In Loretto we observed that where governmental action results in "[a] permanent physical occupation" of the property, by the government itself or by others, see 458 U. S., at 432•433, n. 9, "our cases uniformly have found a taking to the extent of the occupation, without regard to whether the action achieves an important public benefit or has only minimal economic impact on the owner," id., at 434•435. We think a "permanent physical occupation" has occurred, for purposes of that rule, where individuals are given a permanent and continuous right to pass to and from, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises.

JUSTICE BRENNAN argues that while this might ordinarily be the case, the California Constitution's prohibition on any individual's "exclu[ding] the right of way to [any navigable] water whenever it is required for any public purpose," Art. X, § 4, produces a different result here. Post, at 847•848, see also post, at 855, 857. There are a number of difficulties with that argument. Most obviously, the right of way sought here is not naturally described as one to navigable water (from the street to the sea) but along it; it is at least highly questionable whether the text of the California Constitution has any prima facie application to the situation before us. Even if it does, however, several California cases suggest that JUSTICE BRENNAN's interpretation of the effect of the clause is erroneous, and that to obtain easements of access across private property the State must proceed through its eminent domain power. See Bolsa Land Co. v. Burdick, 151 Cal. 254, 260, 90 P. 532, 534•535 (1907); Oakland v. Oakland Water Front Co., 118 Cal. 160, 185, 50 P. 277, 286 (1897); Heist v. County of Colusa, 163 Cal. App. 3d 841, 851, 213 Cal. Rptr. 278, 285 (1984); Aptos Seascape Corp. v. Santa Cruz, 138 Cal. App. 3d 484, 505•506, 188 Cal. Rptr. 191, 204•205 (1982). (None of these cases specifically addressed the argument that Art. X, § 4 allowed the public to cross private property to get to navigable water, but if that provision meant what JUSTICE BRENNAN believes, it is hard to see why it was not invoked.) See also 41 Op. Cal. Atty. Gen. 39, 41 (1963) ("In spite of the sweeping provisions of [Art. X, § 4], and the injunction therein to the Legislature to give its provisions the most liberal interpretation, the few reported cases in California have adopted the general rule that one may not trespass on private land to get to navigable tide•waters for the purpose of commerce, navigation or fishing"). In light of these uncertainties, and given the fact that, as JUSTICE BLACKMUN notes, the Court of Appeal did not rest its decision on Art. X, § 4, post, at 865, we should assuredly not take it upon ourselves to resolve this question of California constitutional law in the first instance. See, e. g., Jenkins v. Anderson, 447 U.S. 231, 234, n. 1 (1980). That would be doubly inappropriate since the Commission did not advance this argument in the Court of Appeal, and the Nollans argued in the Superior Court that any claim that there was a pre•existing public right of access had to be asserted through a quiet title action, see Points and Authorities in Support of Motion for Writ of Administra-tive Mandamus, No. SP50805 (Super. Ct. Cal.), p. 20, which the Commission, possessing no claim to the easement itself, probably would not have had standing under California law to bring. See Cal. Code Civ. Proc. Ann. § 738 (West 1980).

Given, then, that requiring uncompensated conveyance of the easement outright would violate the Fourteenth Amendment, the question becomes whether requiring it to be conveyed as a condition for issuing a land•use permit alters the outcome. We have long recognized that land•use regulation does not effect a taking if it "substantially advance[s] legitimate state interests" and does not "den[y] an owner economically viable use of his land," Agins v. Tiburon, 447 U.S. 255, 260 (1980). See also Penn Central Transpor-tation Co. v. New York City, 438 U.S. 104, 127 (1978) ("[A] use restriction may constitute a 'taking' if not reasonably necessary to the effectuation of a substantial government purpose"). Our cases have not elaborated on the standards for determining what constitutes a "legitimate state interest" or what type of connection between the regulation and the state interest satisfies the requirement that the former "substantially advance" the latter. They have made clear, however, that a broad range of governmen-tal purposes and regulations satisfies these requirements. See Agins v. Tiburon, supra, at 260•262 (scenic zoning); Penn Central Transportation Co. v. New York City, supra (landmark preservation); Euclid v. Ambler Realty Co., 272 U.S. 365 (1926) (residential zoning); Laitos & Westfall, Government Interference with Private Interests in Public Resources, 11 Harv. Envtl. L. Rev. 1, 66 (1987). The Commission argues that among these permissible purposes are protecting the public's ability to see the beach, assisting the public in overcoming the "psychological barrier" to using the beach created by a developed shorefront, and preventing congestion on the public beaches. We assume, without deciding, that this is so •• in which case the Commission unquestionably would be able to deny the Nollans their permit outright if their new house (alone, or by reason of the cumulative impact produced in conjunction with other construction) would substantially impede these purposes, unless the denial would interfere so drastically with the Nollans' use of their property as to constitute a taking. See Penn Central Transportation Co. v. New York City, supra.

The Commission argues that a permit condition that serves the same legitimate police•power purpose as a refusal to issue the permit should not be found to be a taking if the refusal to issue the permit would not constitute a taking. We agree. Thus, if the Commission attached to the permit some condition that would have protected the public's ability to see the beach notwithstanding construction of the new house •• for example, a height limitation, a width restriction, or a ban on fences •• so long as the Commis-sion could have exercised its police power (as we have assumed it could) to forbid construction of the house altogether, imposition of the condition would also be constitutional. Moreover (and here we come closer to the facts of the present case), the condition would be constitutional even if it consisted of the requirement that the Nollans provide a viewing spot on their property for passersby with whose sighting of the ocean their new house would interfere. Although such a requirement, constituting a permanent grant of continuous access to the property, would have to be considered a taking if it were not attached to a development permit, the Commission's assumed power to forbid construction of the house in order to protect the public's view of the beach must surely include the power to condition construction upon some concession by the owner, even a concession of property rights, that serves the same end. If a prohibition designed to accomplish that purpose would be a legitimate exercise of the police power rather than a taking, it would be strange to conclude that providing the owner an alternative to that prohibition which accomplishes the same purpose is not.

The evident constitutional propriety disappears, however, if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition. When that essential nexus

is eliminated, the situation becomes the same as if California law forbade shouting fire in a crowded theater, but granted dispensations to those willing to contribute $ 100 to the state treasury. While a ban on shouting fire can be a core exercise of the State's police power to protect the public safety, and can thus meet even our stringent standards for regulation of speech, adding the unrelated condition alters the purpose to one which, while it may be legitimate, is inadequate to sustain the ban. Therefore, even though, in a sense, requiring a $ 100 tax contribution in order to shout fire is a lesser restric-tion on speech than an outright ban, it would not pass constitu-tional muster. Similarly here, the lack of nexus between the condition and the original purpose of the building restriction converts that purpose to something other than what it was. The purpose then becomes, quite simply, the obtaining of an easement to serve some valid governmental purpose, but without payment of compensation. Whatever may be the outer limits of "legitimate state interests" in the takings and land•use context, this is not one of them. In short, unless the permit condition serves the same governmental purpose as the development ban, the building restric-tion is not a valid regulation of land use but "an out•and•out plan of extortion." J.E.D. Associates, Inc. v. Atkinson, 121 N.H. 581, 584, 432 A. 2d 12, 14•15 (1981); see Brief for United States as Amicus Curiae 22, and n. 20. See also Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S., at 439, n. 17.

III

The Commission claims that it concedes as much, and that we may sustain the condition at issue here by finding that it is reasonably related to the public need or burden that the Nollans' new house creates or to which it contributes. We can accept, for purposes of discussion, the Commission's proposed test as to how close a "fit" between the condition and the burden is required, because we find that this case does not meet even the most untailored standards. The Commission's principal contention to the contrary essentially turns on a play on the word "access." The Nollans' new house, the Commission found, will interfere with "visual access" to the beach. That in turn (along with other shorefront development) will interfere with the desire of people who drive past the Nollans' house to use the beach, thus creating a "psychological barrier" to "access." The Nollans' new house will also, by a process not altogether clear from the Commission's opinion but presumably potent enough to more than offset the effects of the psychological barrier, increase the use of the public beaches, thus creating the need for more "access." These burdens on "access" would be alleviated by a requirement that the Nollans provide "lateral access" to the beach.

Rewriting the argument to eliminate the play on words makes clear that there is nothing to it. It is quite impossible to understand how a requirement that people already on the public beaches be able to walk across the Nollans' property reduces any obstacles to viewing the beach created by the new house. It is also impossible to understand how it lowers any "psychological barrier" to using the public beaches, or how it helps to remedy any additional congestion on them caused by construction of the Nollans' new house. We therefore find that the Commis-sion's imposition of the permit condition cannot be treated as an exercise of its land•use power for any of these purposes. Our conclusion on this point is consistent with the approach taken by every other court that has considered the question, with the exception of the California state courts. See Parks v. Watson, 716 F. 2d 646, 651•653 (CA9 1983); Bethlehem Evangelical Lutheran Church v. Lakewood, 626 P. 2d 668, 671•674 (Colo. 1981); Aunt Hack Ridge Estates, Inc. v. Planning Comm'n, 160 Conn. 109, 117•120, 273 A. 2d 880, 885 (1970); Longboat Key v. Lands End, Ltd., 433 So. 2d 574 (Fla. App. 1983); Pioneer Trust & Saving Bank v. Mount Prospect, 22 Ill. 2d 375, 380, 176 N.E. 2d 799, 802 (1961); Lampton v. Pinaire, 610 S.W. 2d 915, 918•919 (Ky. App. 1980);

Schwing v. Baton Rouge, 249 So. 2d 304 (La. App.), application denied, 259 La. 770, 252 So. 2d 667 (1971); Howard County v. JJM, Inc., 301 Md. 256, 280•282, 482 A. 2d 908, 920•921 (1984); Collis v. Bloomington, 310 Minn. 5, 246 N.W. 2d 19 (1976); State ex rel. Noland v. St. Louis County, 478 S.W. 2d 363 (Mo. 1972); Billings Properties, Inc. v. Yellow-stone County, 144 Mont. 25, 33•36, 394 P. 2d 182, 187•188 (1964); Simpson v. North Platte, 206 Neb. 240, 292 N.W. 2d 297 (1980); Briar West, Inc. v. Lincoln, 206 Neb. 172, 291 N.W. 2d 730 (1980); J.E.D. Associates v. Atkinson, supra; Longridge Builders, Inc. v. Planning Bd. of Princeton, 52 N.J. 348, 350•351, 245 A. 2d 336, 337•338 (1968); Jenad, Inc. v. Scarsdale, 18 N.Y. 2d 78, 218 N.E. 2d 673 (1966); In re MacKall v. White, 85 App. Div. 2d 696, 445 N.Y.S. 2d 486 (1981), appeal denied, 56 N.Y. 2d 503, 435 N.E. 2d 1100 (1982); Frank Ansuini, Inc. v. Cranston, 107 R.I. 63, 68•69, 71, 264 A. 2d 910, 913, 914 (1970); College Station v. Turtle Rock Corp., 680 S.W. 2d 802, 807 (Tex. 1984); Call v. West Jordan, 614 P. 2d 1257, 1258•1259 (Utah 1980); Board of Supervisors of James City County v. Rowe, 216 Va. 128, 136•139, 216 S.E. 2d 199, 207•209 (1975); Jordan v. Menomonee Falls, 28 Wis. 2d 608, 617•618, 137 N.W. 2d 442, 447•449 (1965), appeal dism'd, 385 U.S. 4 (1966). See also Littlefield v. Afton, 785 F. 2d 596, 607 (CA8 1986); Brief for National Association of Home Builders et al. as Amici Curiae 9•16.

JUSTICE BRENNAN argues that imposition of the access require-ment is not irrational. In his version of the Commission's argument, the reason for the require-ment is that in its absence, a person looking toward the beach from the road will see a street of residential structures including the Nollans' new home and conclude that there is no public beach nearby. If, however, that person sees people passing and repassing along the dry sand behind the Nollans' home, he will realize that there is a public beach somewhere in the vicinity. Post, at 849•850. The Commission's action, however, was based on the opposite factual finding that the wall of houses completely blocked the view of the beach and that a person looking from the road would not be able to see it at all. App. 57•59.

Even if the Commission had made the finding that JUSTICE BRENNAN proposes, however, it is not certain that it would suffice. We do not share JUSTICE BRENNAN's confidence that the Commission "should have little difficulty in the future in utilizing its expertise to demonstrate a specific connection between provisions for access and burdens on access," post, at 862, that will avoid the effect of today's decision. We view the Fifth Amendment's Property Clause to be more than a pleading requirement, and compliance with it to be more than an exercise in cleverness and imagination. As indicated earlier, our cases describe the condition for abridgment of property rights through the police power as a "substantial advanc[ing]" of a legitimate state interest. We are inclined to be particularly careful about the adjective where the actual conveyance of property is made a condition to the lifting of a land•use restriction, since in that context there is heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police power objective.

We are left, then, with the Commission's justification for the access require-ment unrelated to land•use regulation:

> "Finally, the Commission notes that there are several existing provisions of pass and repass lateral access benefits already given by past Faria Beach Tract appli-cants as a result of prior coastal permit decisions. The access required as a condition of this permit is part of a comprehensive program to provide continuous public access along Faria Beach as the lots

undergo development or redevelop-ment." App. 68.

That is simply an expression of the Commission's belief that the public interest will be served by a continuous strip of publicly accessible beach along the coast. The Commission may well be right that it is a good idea, but that does not establish that the Nollans (and other coastal residents) alone can be compelled to contribute to its realization. Rather, California is free to advance its "comprehensive program," if it wishes, by using its power of eminent domain for this "public purpose," see U.S. Const., Amdt. 5; but if it wants an easement across the Nollans' property, it must pay for it.

Reversed.

DISSENT BY: BRENNAN; BLACKMUN; STEVENS

DISSENT: JUSTICE BRENNAN, with whom JUSTICE MARSHALL joins, dissenting.

Appellants in this case sought to construct a new dwelling on their beach lot that would both diminish visual access to the beach and move private development closer to the public tidelands. The Commission reasonably concluded that such "buildout," both individually and cumulatively, threatens public access to the shore. It sought to offset this encroachment by obtaining assurance that the public may walk along the shoreline in order to gain access to the ocean. The Court finds this an illegitimate exercise of the police power, because it maintains that there is no reasonable relationship between the effect of the development and the condition imposed.

The first problem with this conclusion is that the Court imposes a standard of precision for the exercise of a State's police power that has been discredited for the better part of this century. Furthermore, even under the Court's cramped standard, the permit condition imposed in this case directly responds to the specific type of burden on access created by appellants' develop-ment. Finally, a review of those factors deemed most significant in takings analysis makes clear that the Commission's action implicates none of the concerns underlying the Takings Clause. The Court has thus struck down the Commission's reasonable effort to respond to intensified development along the California coast, on behalf of landowners who can make no claim that their reasonable expectations have been disrupted. The Court has, in short, given appellants a windfall at the expense of the public.

I

The Court's conclusion that the permit condition imposed on appellants is unreasonable cannot withstand analysis. First, the Court demands a degree of exactitude that is inconsistent with our standard for reviewing the rationality of a State's exercise of its police power for the welfare of its citizens. Second, even if the nature of the public•access condition imposed must be identical to the precise burden on access created by appellants, this require-ment is plainly satisfied.

A

There can be no dispute that the police power of the States encompasses the authority to impose conditions on private develop-ment. See, e.g., Agins v. Tiburon, 447 U.S. 255 (1980); Penn Central Transportation

Co. v. New York City, 438 U.S. 104 (1978); Gorieb v. Fox, 274 U.S. 603 (1927). It is also by now commonplace that this Court's review of the rationality of a State's exercise of its police power demands only that the State "could rationally have decided" that the measure adopted might achieve the State's objective. Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 466 (1981) (emphasis in original). In this case, California has employed its police power in order to condition development upon preservation of public access to the ocean and tidelands. The Coastal Commission, if it had so chosen, could have denied the Nollans' request for a development permit, since the property would have remained economically viable without the requested new development. Instead, the State sought to accommodate the Nollans' desire for new development, on the condition that the development not diminish the overall amount of public access to the coastline. Appellants' proposed development would reduce public access by restricting visual access to the beach, by contributing to an increased need for community facilities, and by moving private development closer to public beach property. The Commis-sion sought to offset this diminution in access, and thereby preserve the overall balance of access, by requesting a deed restriction that would ensure "lateral" access: the right of the public to pass and repass along the dry sand parallel to the shoreline in order to reach the tidelands and the ocean. In the expert opinion of the Coastal Commission, development conditioned on such a restriction would fairly attend to both public and private interests.

The Court finds fault with this measure because it regards the condition as insufficiently tailored to address the precise type of reduction in access produced by the new development. The Nollans' development blocks visual access, the Court tells us, while the Commission seeks to preserve lateral access along the coastline. Thus, it concludes, the State acted irrationally. Such a narrow conception of rationality, however, has long since been discredited as a judicial arrogation of legislative authority. "To make scientific precision a criterion of constitutional power would be to subject the State to an intolerable supervision hostile to the basic principles of our Government." Sproles v. Binford, 286 U.S. 374, 388 (1932). Cf. Keystone Bituminous Coal Assn. v. DeBenedic-tis, 480 U.S. 470, 491, n. 21 (1987) ("The Takings Clause has never been read to require the States or the courts to calculate whether a specific individual has suffered burdens . . . in excess of the benefits received"). As this Court long ago declared with regard to various forms of restriction on the use of property:

> "Each interferes in the same way, if not to the same extent, with the owner's general right of dominion over his property. All rest for their justification upon the same reasons which have arisen in recent times as a result of the great increase and concentration of population in urban communities and the vast changes in the extent and complexity of the problems of modern city life. State legislatures and city councils, who deal with the situation from a practical standpoint, are better qualified than the courts to determine the necessity, character, and degree of regulation which these new and perplexing conditions require; and their conclusions should not be disturbed by the courts unless clearly arbitrary and unreasonable." Gorieb, 274 U.S., at 608 (citations omitted).

The Commission is charged by both the State Constitution and legislature to preserve overall public access to the California coastline. Furthermore, by virtue of its participation in the Coastal Zone Management Act (CZMA) program, the State must "exercise effectively [its] responsibilities in the coastal zone through

the development and implementation of management programs to achieve wise use of the land and water resources of the coastal zone," 16 U.S.C. § 1452(2), so as to provide for, inter alia, "public access to the coas[t] for recreation purposes." § 1452(2)-(D). The Commission has sought to discharge its responsibilities in a flexible manner. It has sought to balance private and public interests and to accept tradeoffs: to permit development that reduces access in some ways as long as other means of access are enhanced. In this case, it has determined that the Nollans' burden on access would be offset by a deed restriction that formalizes the public's right to pass along the shore. In its informed judgment, such a tradeoff would preserve the net amount of public access to the coastline. The Court's insistence on a precise fit between the forms of burden and condition on each individual parcel along the California coast would penalize the Commission for its flexibility, hampering the ability to fulfill its public trust mandate.

The Court's demand for this precise fit is based on the assumption that private landowners in this case possess a reason-able expectation regarding the use of their land that the public has attempted to disrupt. In fact, the situation is precisely the reverse: it is private landowners who are the interlopers. The public's expectation of access considerably antedates any private development on the coast. Article X, § 4 of the California Constitution, adopted in 1879, declares:

> "No individual, partnership, or corporation, claiming or possessing the frontage or tidal lands of a harbor, bay, inlet, estuary, or other navigable water in this State, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose, nor to destroy or obstruct the free navigation of such water; and the Legislature shall enact such laws as will give the most liberal construction to this provision, so that access to the navigable waters of this State shall always be attainable for the people thereof."

It is therefore private landowners who threaten the disruption of settled public expectations. Where a private landowner has had a reasonable expectation that his or her property will be used for exclusively private purposes, the disruption of this expectation dictates that the government pay if it wishes the property to be used for a public purpose. In this case, however, the State has sought to protect public expectations of access from disruption by private land use. The State's exercise of its police power for this purpose deserves no less deference than any other measure designed to further the welfare of state citizens.

Congress expressly stated in passing the CZMA that "[i]n light of competing demands and the urgent need to protect and to give high priority to natural systems in the coastal zone, present state and local institutional arrangements for planning and regulating land and water uses in such areas are inadequate." 16 U.S.C. § 1451(h). It is thus puzzling that the Court characterizes as a "non•land•use justification," ante, at 841, the exercise of the police power to "'provide continuous public access along Faria Beach as the lots undergo development or redevelopment.'" Ibid. (quoting App. 68). The Commission's determination that certain types of development jeopardize public access to the ocean, and that such development should be conditioned on preservation of access, is the essence of responsible land•use planning. The Court's use of an unreasonably demanding standard for determining the rationality of state regulation in this area thus could hamper innovative efforts to preserve an increasingly fragile national resource.

B

Even if we accept the Court's unusual demand for a precise match between the condition imposed and the specific type of burden on access created by the appellants, the State's action easily satisfies this requirement. First, the lateral access condition serves to dissipate the impression that the beach that lies behind the wall of homes along the shore is for private use only. It requires no exceptional imaginative powers to find plausible the Commission's point that the average person passing along the road in front of a phalanx of imposing permanent residences, including the appellants' new home, is likely to conclude that this particu-lar portion of the shore is not open to the public. If, however, that person can see that numerous people are passing and repassing along the dry sand, this conveys the message that the beach is in fact open for use by the public. Furthermore, those persons who go down to the public beach a quarter•mile away will be able to look down the coastline and see that persons have continuous access to the tidelands, and will observe signs that proclaim the public's right of access over the dry sand. The burden produced by the diminution in visual access •• the impression that the beach is not open to the public •• is thus directly alleviated by the provision for public access over the dry sand. The Court therefore has an unrealistically limited conception of what measures could reason-ably be chosen to mitigate the burden produced by a diminution of visual access.

The second flaw in the Court's analysis of the fit between burden and exaction is more fundamental. The Court assumes that the only burden with which the Coastal Commission was concerned was blockage of visual access to the beach. This is incorrect. The Commission specifically stated in its report in support of the permit condition that "[t]he Commission finds that the applicants' proposed development would present an increase in view blockage, an increase in private use of the shorefront, and that this impact would burden the public's ability to traverse to and along the shorefront." App. 65•66 (emphasis added). It declared that the possibility that "the public may get the impression that the beachfront is no longer available for public use" would be "due to the encroaching nature of private use immediately adjacent to the public use, as well as the visual 'block' of increased residential build•out impacting the visual quality of the beachfront." Id., at 59 (emphasis added).

The record prepared by the Commission is replete with references to the threat to public access along the coastline resulting from the seaward encroachment of private development along a beach whose mean high•tide line is constantly shifting. As the Commission observed in its report: "The Faria Beach shoreline fluctuates during the year depending on the seasons and accompany-ing storms, and the public is not always able to traverse the shoreline below the mean high tide line." Id., at 67. As a result, the boundary between publicly owned tidelands and privately owned beach is not a stable one, and "[t]he existing seawall is located very near to the mean high water line." Id., at 61. When the beach is at its largest, the seawall is about 10 feet from the mean high-tide mark; "[d]uring the period of the year when the beach suffers erosion, the mean high water line appears to be located either on or beyond the existing seawall." Ibid. Expansion of private development on appellants' lot toward the seawall would thus "increase private use immediately adjacent to public tide-lands, which has the potential of causing adverse impacts on the public's ability to traverse the shoreline." Id., at 62. As the Commission explained:

> "The placement of more private use adjacent to public tidelands has the potential of creating use conflicts between the applicants and the public. The results of new private use encroachment into boundary/buffer areas between private and public property can create

> situations in which landowners intimidate the public and seek to prevent them from using public tidelands because of disputes between the two parties over where the exact boundary between private and public ownership is located. If the applicant's project would result in further seaward encroachment of private use into an area of clouded title, new private use in the subject encroach-ment area could result in use conflict between private and public entities on the subject shorefront." Id., at 61•62.

The deed restriction on which permit approval was conditioned would directly address this threat to the public's access to the tidelands. It would provide a formal declaration of the public's right of access, thereby ensuring that the shifting character of the tidelands, and the presence of private development immediately adjacent to it, would not jeopardize enjoyment of that right. The imposition of the permit condition was therefore directly related to the fact that appellants' development would be "located along a unique stretch of coast where lateral public access is inadequate due to the construction of private residential struc-tures and shoreline protective devices along a fluctuating shoreline." Id., at 68. The deed restriction was crafted to deal with the particular character of the beach along which appellants sought to build, and with the specific problems created by expansion of development toward the public tidelands. In imposing the restriction, the State sought to ensure that such development would not disrupt the historical expectation of the public regarding access to the sea.

The Court is therefore simply wrong that there is no reason-able relationship between the permit condition and the specific type of burden on public access created by the appellants' proposed development. Even were the Court desirous of assuming the added responsibility of closely monitoring the regulation of development along the California coast, this record reveals rational public action by any conceivable standard.

II

The fact that the Commission's action is a legitimate exercise of the police power does not, of course, insulate it from a takings challenge, for when "regulation goes too far it will be recognized as a taking." Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922). Conventional takings analysis underscores the implausibili-ty of the Court's holding, for it demonstrates that this exercise of California's police power implicates none of the concerns that underlie our takings jurisprudence.

In reviewing a Takings Clause claim, we have regarded as particularly significant the nature of the governmental action and the economic impact of regulation, especially the extent to which regulation interferes with investment•backed expectations. Penn Central, 438 U.S., at 124. The character of the government action in this case is the imposition of a condition on permit approval, which allows the public to continue to have access to the coast. The physical intrusion permitted by the deed restriction is minimal. The public is permitted the right to pass and repass along the coast in an area from the seawall to the mean high•tide mark. App. 46. This area is at its widest 10 feet, id., at 61, which means that even without the permit condition, the public's right of access permits it to pass on average within a few feet of the seawall. Passage closer to the 8•foot•high rocky seawall will make the appellants even less visible to the public than passage along the high•tide area farther out on the beach. The intrusive-ness of such

passage is even less than the intrusion resulting from the required dedication of a sidewalk in front of private residenc-es, exactions which are commonplace conditions on approval of development. Furthermore, the high•tide line shifts throughout the year, moving up to and beyond the seawall, so that public passage for a portion of the year would either be impossible or would not occur on appellant's property. Finally, although the Commission had the authority to provide for either passive or active recreational use of the property, it chose the least intrusive alternative: a mere right to pass and repass. Id., at 370. As this Court made clear in Prune Yard Shopping Center v. Robins, 447 U.S. 74, 83 (1980), physical access to private property in itself creates no takings problem if it does not "unreason-ably impair the value or use of [the] property." Appellants can make no tenable claim that either their enjoyment of their property or its value is diminished by the public's ability merely to pass and repass a few feet closer to the seawall beyond which appellants' house is located.

Prune Yard is also relevant in that we acknowledged in that case that public access rested upon a "state constitutional . . . provision that had been construed to create rights to the use of private property by strangers." Id., at 81. In this case, of course, the State is also acting to protect a state constitutional right. See supra, at 847•848 (quoting Art. X, § 4 of California Constitution). The constitutional provision guaranteeing public access to the ocean states that "the Legislature shall enact such laws as will give the most liberal construction to this provision so that access to the navigable waters of this State shall be always attainable for the people thereof." Cal. Const., Art. X, § 4 (emphasis added). This provision is the explicit basis for the statutory directive to provide for public access along the coast in new development projects, Cal. Pub. Res. Code Ann. § 30212 (West 1986), and has been construed by the state judiciary to permit passage over private land where necessary to gain access to the tidelands. Grupe v. California Coastal Comm'n, 166 Cal. App. 3d 148, 171•172, 212 Cal. Rptr. 578, 592•593 (1985). The physical access to the perimeter of appellants' property at issue in this case thus results directly from the State's enforcement of the State Constitution.

Finally, the character of the regulation in this case is not unilateral government action, but a condition on approval of a development request submitted by appellants. The State has not sought to interfere with any pre•existing property interest, but has responded to appellants' proposal to intensify development on the coast. Appellants themselves chose to submit a new development application, and could claim no property interest in its approval. They were aware that approval of such development would be conditioned on preservation of adequate public access to the ocean. The State has initiated no action against appellants' property; had the Nollans' not proposed more intensive development in the coastal zone, they would never have been subject to the provision that they challenge.

Examination of the economic impact of the Commission's action reinforces the conclusion that no taking has occurred. Allowing appellants to intensify development along the coast in exchange for ensuring public access to the ocean is a classic instance of government action that produces a "reciprocity of advantage." Pennsylva-nia Coal, 260 U.S., at 415. Appellants have been allowed to replace a one•story 521•square•foot beach home with a two•story 1,674•square•-foot residence and an attached two•car garage, resulting in development covering 2,464 square feet of the lot. Such development obviously significantly increases the value of appellants' property; appellants make no contention that this increase is offset by any diminution in value resulting from the deed restriction, much less that the restriction made

the property less valuable than it would have been without the new construction. Furthermore, appellants gain an additional benefit from the Commission's permit condition program. They are able to walk along the beach beyond the confines of their own property only because the Commission has required deed restrictions as a condition of approving other new beach developments. Thus, appellants benefit both as private landowners and as members of the public from the fact that new development permit requests are conditioned on preservation of public access.

Ultimately, appellants' claim of economic injury is flawed because it rests on the assumption of entitlement to the full value of their new development. Appellants submitted a proposal for more intensive development of the coast, which the Commission was under no obligation to approve, and now argue that a regulation designed to ameliorate the impact of that development deprives them of the full value of their improvements. Even if this novel claim were somehow cognizable, it is not significant. "[T]he interest in anticipated gains has traditionally been viewed as less compelling than other property-related interests." Andrus v. Allard, 444 U.S. 51, 66 (1979).

With respect to appellants' investment•backed expectations, appellants can make no reasonable claim to any expectation of being able to exclude members of the public from crossing the edge of their property to gain access to the ocean. It is axiomatic, of course, that state law is the source of those strands that constitute a property owner's bundle of property rights. "[A]s a general proposition[,] the law of real property is, under our Constitution, left to the individual States to develop and administer." Hughes v. Washington, 389 U.S. 290, 295 (1967) (Stewart, J., concurring). See also Borax Consolidated v. Los Angeles, 296 U.S. 10, 22 (1935) ("Rights and interests in the tideland, which is subject to the sovereignty of the State, are matters of local law"). In this case, the State Constitution explicitly states that no one possessing the "frontage" of any "navigable water in this State, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose." Cal. Const., Art. X, § 4. The state Code expressly provides that, save for exceptions not relevant here, "[p]ublic access from the nearest public roadway to the shoreline and along the coast shall be provided in new development projects." Cal. Pub. Res. Code Ann. § 30212 (West 1986). The Coastal Commis-sion Interpretative Guidelines make clear that fulfillment of the Commission's constitutional and statutory duty requires that approval of new coastline development be condi-tioned upon provi-sions ensuring lateral public access to the ocean. App. 362. At the time of appellants' permit request, the Commission had conditioned all 43 of the proposals for coastal new development in the Faria Family Beach Tract on the provision of deed restrictions ensuring lateral access along the shore. Id., at 48. Finally, the Faria family had leased the beach property since the early part of this century, and "the Faria family and their lessees [including the Nollans] had not interfered with public use of the beachfront within the Tract, so long as public use was limited to pass and repass lateral access along the shore." Ibid. California therefore has clearly established that the power of exclusion for which appellants seek compensation simply is not a strand in the bundle of appellants' property rights, and appellants have never acted as if it were. Given this state of affairs, appellants cannot claim that the deed restriction has deprived them of a reasonable expectation to exclude from their property persons desiring to gain access to the sea.
Even were we somehow to concede a pre•existing expectation of a right to exclude, appellants were clearly on notice when requesting a new development permit that a condition of approval would be a provision ensuring public lateral access to the shore. Thus, they surely could have had no expectation that they could obtain approval of their new development and exercise any right of exclusion afterward. In this

respect, this case is quite similar to Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984). In Monsanto, the respondent had submitted trade data to the Environmental Protection Agency (EPA) for the purpose of obtaining registration of certain pesticides. The company claimed that the agency's disclosure of certain data in accordance with the relevant regulatory statute constituted a taking. The Court conceded that the data in question constituted property under state law. It also found, however, that certain of the data had been submitted to the agency after Congress had made clear that only limited confidenti-ality would be given data submitted for registration purposes. The Court observed that the statute served to inform Monsanto of the various conditions under which data might be released, and stated:

> "If, despite the data•consideration and data•disclosure provisions in the statute, Monsanto chose to submit the requisite data in order to receive a registration, it can hardly argue that its reasonable investment•backed expectations are disturbed when EPA acts to use or disclose the data in a manner that was authorized by law at the time of the submis-sion." Id., at 1006•1007.

The Court rejected respondent's argument that the requirement that it relinquish some confidentiality imposed an unconstitutional condition on receipt of a Government benefit:

> "[A]s long as Monsanto is aware of the conditions under which the data are submitted, and the conditions are rationally related to a legitimate Govern-ment interest, a voluntary submission of data by an applicant in exchange for the economic advantages of a registration can hardly be called a taking." Id., at 1007.

The similarity of this case to Monsanto is obvious. Appel-lants were aware that stringent regulation of development along the California coast had been in place at least since 1976. The specific deed restriction to which the Commission sought to subject them had been imposed since 1979 on all 43 shoreline new develop-ment projects in the Faria Family Beach Tract. App. 48. Such regulation to ensure public access to the ocean had been directly authorized by California citizens in 1972, and reflected their judgment that restrictions on coastal development represented "'the advantage of living and doing business in a civilized community.'" Andrus v. Allard, 444 U.S., at 67, quoting Pennsylvania Coal Co. v. Mahon, 260 U.S., at 422 (Brandeis, J., dissenting). The deed restriction was "authorized by law at the time of [appellants' permit] submission," Monsanto, supra, at 1007, and, as earlier analysis demonstrates, supra, at 849•853, was reasonably related to the objective of ensuring public access. Appellants thus were on notice that new developments would be approved only if provisions were made for lateral beach access. In requesting a new develop-ment permit from the Commission, they could have no reasonable expectation of, and had no entitlement to, approval of their permit application without any deed restriction ensuring public access to the ocean. As a result, analysis of appellants' investment•backed expectations reveals that "the force of this factor is so over-whelm-ing . . . that it disposes of the taking question." Monsanto, supra, at 1005.

Standard Takings Clause analysis thus indicates that the Court employs its unduly restrictive standard of police power rationality to find a taking where neither the character of governmental action nor the nature of the private interest affected raise any takings concern. The result is that the Court invalidates regulation that represents a reasonable adjustment of the burdens and benefits of development along the California coast.

III

The foregoing analysis makes clear that the State has taken no property from appellants. Imposition of the permit condition in this case represents the State's reasonable exercise of its police power. The Coastal Commission has drawn on its expertise to preserve the balance between private development and public access, by requiring that any project that intensifies development on the increasingly crowded California coast must be offset by gains in public access. Under the normal standard for review of the police power, this provision is eminently reasonable. Even accepting the Court's novel insistence on a precise quid pro quo of burdens and benefits, there is a reasonable relationship between the public benefit and the burden created by appellants' development. The movement of development closer to the ocean creates the prospect of encroachment on public tidelands, because of fluctuation in the mean high•tide line. The deed restriction ensures that disputes about the boundary between private and public property will not deter the public from exercising its right to have access to the sea.

Furthermore, consideration of the Commission's action under traditional takings analysis underscores the absence of any viable takings claim. The deed restriction permits the public only to pass and repass along a narrow strip of beach, a few feet closer to a seawall at the periphery of appellants' property. Appellants almost surely have enjoyed an increase in the value of their property even with the restriction, because they have been allowed to build a significantly larger new home with garage on their lot. Finally, appellants can claim the disruption of no expectation interest, both because they have no right to exclude the public under state law, and because, even if they did, they had full advance notice that new development along the coast is conditioned on provisions for continued public access to the ocean.

Fortunately, the Court's decision regarding this application of the Commission's permit program will probably have little ultimate impact either on this parcel in particular or the Commission program in general. A preliminary study by a Senior Lands Agent in the State Attorney General's Office indicates that the portion of the beach at issue in this case likely belongs to the public. App. 85. Since a full study had not been completed at the time of appellants' permit application, the deed restriction was requested "without regard to the possibility that the applicant is proposing development on public land." Id., at 45. Furthermore, analysis by the same Land Agent also indicated that the public had obtained a prescriptive right to the use of Faria Beach from the seawall to the ocean. Id., at 86. The Superior Court explicit-ly stated in its ruling against the Commission on the permit condition issue that "no part of this opinion is intended to foreclose the public's opportunity to adjudicate the possibility that public rights in [appellants'] beach have been acquired through prescriptive use." Id., at 420.

With respect to the permit condition program in general, the Commission should have little difficulty in the future in utilizing its expertise to demonstrate a specific connection between provisions for access and burdens on access produced by new development. Neither the Commission in its report nor the State in its briefs and at argument highlighted the particular threat to lateral access created by appellants' development project. In defending its action, the State emphasized the general point that overall access to the beach had been preserved, since the diminu-tion of access created by the project had been offset by the gain in lateral access. This approach is understandable, given that the State relied on the reasonable assumption that its action was justified under the normal standard of review for determining legitimate exercises of a State's

police power. In the future, alerted to the Court's apparently more demanding requirement, it need only make clear that a provision for public access directly responds to a particular type of burden on access created by a new development. Even if I did not believe that the record in this case satisfies this requirement, I would have to acknowledge that the record's documentation of the impact of coastal development indicates that the Commission should have little problem presenting its findings in a way that avoids a takings problem.

Nonetheless it is important to point out that the Court's insistence on a precise accounting system in this case is insensi-tive to the fact that increasing intensity of development in many areas calls for farsighted, comprehensive planning that takes into account both the interdepen-dence of land uses and the cumulative impact of develop-ment. As one scholar has noted:

> "Property does not exist in isolation. Particular parcels are tied to one another in complex ways, and property is more accurately described as being inextrica-bly part of a network of relationships that is neither limited to, nor usefully defined by, the property boundaries with which the legal system is accustomed to dealing. Frequently, use of any given parcel of property is at the same time effectively a use of, or a demand upon, property beyond the border of the user." Sax, Takings, Private Property, and Public Rights, 81 Yale L.J. 149, 152 (1971) (footnote omitted).

As Congress has declared: "The key to more effective protection and use of the land and water resources of the coastal zone [is for the states to] develo[p] land and water use programs for the coastal zone, including unified policies, criteria, standards, methods, and processes for dealing with land and water use decisions of more than local significance." 16 U.S.C. § 1451(i). This is clearly a call for a focus on the overall impact of development on coastal areas. State agencies therefore require consider-able flexibility in responding to private desires for development in a way that guarantees the preservation of public access to the coast. They should be encour-aged to regulate development in the context of the overall balance of competing uses of the shoreline. The Court today does precisely the opposite, overruling an eminently reasonable exercise of an expert state agency's judgment, substi-tuting its own narrow view of how this balance should be struck. Its reasoning is hardly suited to the complex reality of natural resource protection in the 20th century. I can only hope that today's decision is an aberration, and that a broader vision ultimately prevails.

I dissent.

JUSTICE BLACKMUN, dissenting.

I do not understand the Court's opinion in this case to implicate in any way the public-trust doctrine. The Court certainly had no reason to address the issue, for the Court of Appeal of California did not rest its decision on Art. X, § 4, of the California Constitution. Nor did the parties base their arguments before this Court on the doctrine.

I disagree with the Court's rigid interpretation of the necessary correlation between a burden created by development and a condition imposed pursuant to the State's police power to mitigate that burden. The

land•use problems this country faces require creative solutions. These are not advanced by an "eye for an eye" mentality. The close nexus between benefits and burdens that the Court now imposes on permit conditions creates an anomaly in the ordinary requirement that a State's exercise of its police power need be no more than rationally based. See, e.g., Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 466 (1981). In my view, the easement exacted from appellants and the problems their development created are adequately related to the governmental interest in providing public access to the beach. Coastal development by its very nature makes public access to the shore generally more difficult. Appellants' structure is part of that general development and, in particular, it diminishes the public's visual access to the ocean and decreases the public's sense that it may have physical access to the beach. These losses in access can be counteracted, at least in part, by the condition on appellants' construction permitting public passage that ensures access along the beach.

Traditional takings analysis compels the conclusion that there is no taking here. The governmental action is a valid exercise of the police power, and, so far as the record reveals, has a nonexistent economic effect on the value of appellants' property. No investment•-backed expectations were diminished. It is significant that the Nollans had notice of the easement before they purchased the property and that public use of the beach had been permitted for decades.

For these reasons, I respectfully dissent.

JUSTICE STEVENS, with whom JUSTICE BLACKMUN joins, dissenting.

The debate between the Court and JUSTICE BRENNAN illustrates an extremely important point concerning government regulation of the use of privately owned real estate. Intelligent, well•infor-med public officials may in good faith disagree about the validity of specific types of land•use regulation. Even the wisest lawyers would have to acknowledge great uncertainty about the scope of this Court's takings jurispru-dence. Yet, because of the Court's remarkable ruling in First English Evangelical Lutheran Church v. Los Angeles County, 482 U.S. 304 (1987), local governments and officials must pay the price for the necessarily vague standards in this area of the law.

In his dissent in San Diego Gas & Electric Co. v. San Diego, 450 U.S. 621 (1981), JUSTICE BRENNAN proposed a brand new constitu-tional rule. He argued that a mistake such as the one that a majority of the Court believes that the California Coastal Commission made in this case should automatically give rise to pecuniary liability for a "temporary taking." Id., at 653•661. Notwithstanding the unprecedented chilling effect that such a rule will obviously have on public officials charged with the responsi-bility for drafting and implementing regulations designed to protect the environment and the public welfare, six Members of the Court recently endorsed JUSTICE BRENNAN's novel proposal. See First English Evangelical Lutheran Church, supra.

I write today to identify the severe tension between that dramatic development in the law and the view expressed by JUSTICE BRENNAN's dissent in this case that the public interest is served by encouraging state agencies to exercise considerable flexibility in responding to private desires for development in a way that threatens the preservation of public resources. See ante, at 846•848. I like the hat that JUSTICE BRENNAN has donned today better than the one he wore in San Diego, and I am persuaded that he has

the better of the legal arguments here. Even if his position prevailed in this case, however, it would be of little solace to land•use planners who would still be left guessing about how the Court will react to the next case, and the one after that. As this case demonstrates, the rule of liability created by the Court in First English is a shortsighted one. Like JUSTICE BRENNAN, I hope "that a broader vision ultimately prevails." Ante, at 864.

I respectfully dissent.

ST. JOHNS COUNTY, et al. v. NORTHEAST FLORIDA BUILDERS ASS'N

583 So.2d 635

Supreme Court of Florida

April 18, 1991

NOTICE: Released for Publication August 15, 1991.

SUBSEQUENT HISTORY: As Revised August 15, 1991. Rehearing Denied August 15, 1991, Reported at 1991 Fla.

PRIOR HISTORY: Application for Review of the Decision of the District Court of Appeal • Certified Great Public Importance; Fifth District • Case No. 89•861; (St. Johns County).

OPINION BY: GRIMES

We review St. Johns County v. Northeast Florida Builders Association, 559 So. 2d 363 (Fla. 5th DCA 1990), in which the district court of appeal certified as a question of great public importance the question of whether St. Johns County could impose an impact fee on new residential construction to be used for new school facilities. We have jurisdiction under article V, section 3(b)(4) of the Florida Constitution.

In 1986, St. Johns County initiated a comprehensive study of whether to impose impact fees to finance additional infrastructure required to serve new growth and development. At the request of the St. Johns County School Board, the county included educational facilities impact fees within the scope of the study. In August of 1987, the county's consultant, Dr. James Nicholas, submitted a methodology report setting forth what action the county could take to maintain an acceptable level of service for public facilities. The report calculated the cost of educational facilities needed to provide sufficient school capacity to serve the estimated new growth and development and suggested a method of allocating that cost to each unit of new residential development. As a conse-quence, on October 20, 1987, the county enacted the St. Johns County Educational Facilities Impact Fee Ordinance.

The ordinance specifies that no new building permits will be issued except upon the payment of an impact

fee. The fees are to be placed in a trust fund to be spent by the school board solely to "acquire, construct, expand and equip the educational sites and educational capital facilities necessitated by new development." St. Johns County, Fla., Ordinance 87•60, § 10(B) (Oct. 20, 1987). Any funds not expended within six years, together with interest, will be returned to the current landowner upon application. The ordinance also provides credits to feepayers for land dedications and construction of educational facilities. The ordinance recites that it is applicable in both unincorporated and incorporated areas of the county, except that it is not effective within the boundaries of any municipality until the municipality enters into an interlocal agreement with the county to collect the impact fees.

The Northeast Florida Builders Association together with a private developer (builders) filed suit against the county and its county administrator (county) seeking a declaratory judgment that the ordinance was unconstitutional. The opposing sides each filed a motion for summary judgment. The trial court entered summary judgment for the builders, declaring the ordinance to be unconsti-tutional on a variety of grounds. In a split decision, the district court of appeal affirmed, holding that the ordinance violated the constitutional mandate for a uniform system of free public schools.

This Court upheld the imposition of impact fees to pay for the expansion of water and sewer facilities in Contractors & Builders Association v. City of Dunedin, 329 So. 2d 314 (Fla. 1976). We stated:

> Raising expansion capital by setting connection charges, which do not exceed a pro rata share of reasonably anticipated costs of expansion, is permissible where expansion is reasonably required, if use of the money collected is limited to meeting the costs of expan-sion. Id. at 320.

In essence, we approved the imposition of impact fees that meet the requirements of the dual rational nexus test adopted by other courts in evaluating impact fees. See Juergens-meyer & Blake, Impact Fees: An Answer to Local Governments' Capital Funding Dilemma, 9 Fla. St. U.L. Rev. 415 (1981). This test was explained in Hollywood, Inc. v. Broward County, 431 So. 2d 606, 611-12 (Fla. 4th DCA), review denied, 440 So. 2d 352 (Fla. 1983), as follows:

> In order to satisfy these requirements, the local government must demonstrate a reasonable connection, or rational nexus, between the need for additional capital facilities and the growth in population generated by the subdivision. In addition, the government must show a reasonable connection, or rational nexus, between the expenditures of the funds collected and the benefits accruing to the subdivision. In order to satisfy this latter requirement, the ordinance must specifically earmark the funds collected for use in acquiring capital facilities to benefit the new residents.

The use of impact fees has become an accepted method of paying for public improvements that must be constructed to serve new growth. See Home Builders & Contractors Ass'n v. Board of County Comm'rs, 446 So. 2d 140 (Fla. 4th DCA 1983) (road impact fees upheld), review denied, 451 So. 2d 848 (Fla.), appeal dismissed, 469 U.S. 976 (1984); Hollywood, Inc. v. Broward County, 431 So. 2d at 606 (park impact fees upheld). However, the propriety of imposing impact fees to finance new schools is an issue of first impression in Florida.

Turning to the first prong of the dual rational nexus test, we must decide whether St. Johns County demonstrated that there is a reasonable connection between the need for additional schools and the growth in population that will accompany new development. In the ordinance, the county commissioners made a legislative finding that the county "must expand its educational facilities in order to maintain current levels of service if new development is to be accommodated without decreasing current levels of service." St. Johns County, Fla., Ordinance 87•60, § 1(C) (Oct. 20, 1987). No one quarrels with this proposition. However, an impact fee to be used to fund new schools is different from one required to build water and sewer facilities or even roads. Many of the new residents who will bear the burden of the fee will not have children who will benefit from the new schools. Thus, Dr. Nicholas determined that on average there are 0.44 public school children per single•family home in St. Johns County. Applying the single-family home ratio to a per•student cost calculation, he concluded that it required $ 2,899 per new single•family home to build the school space anticipated to be needed to serve the children who would live in the new homes. Finding that existing taxes and revenue sources would produce $ 2,451 per single-family home, Dr. Nicholas concluded that for each new single-family home there was an average net cost of $ 448 for building new schools that would not be covered by existing revenue mechanisms. He made similar calcula-tions based upon his determination of the number of public school children residing in multiple family units of construction.

The builders argue that because many of the new residences will have no impact on the public school system, the impact fee is nothing more than a tax insofar as those residences are concerned. We reject this contention as too simplistic. The same argument could be made with respect to many other facilities that governmen-tal entities are expected to provide. Not all of the new residents will use the parks or call for fire protection, yet the county will have to provide additional facilities so as to be in a position to serve each dwelling unit. During the useful life of the new dwelling units, school-age children will come and go. It may be that some of the units will never house children. However, the county has determined that for every one hundred units that are built, forty-four new students will require an education at a public school. The St. Johns County impact fee is designed to provide the capacity to serve the educational needs of all one hundred dwelling units. We conclude that the ordinance meets the first prong of the rational nexus test.

The question of whether the ordinance meets the requirements of the second prong of the test is more troublesome. As indicated, we see no requirement that every new unit of development benefit from the impact fee in the sense that there must be a child residing in that unit who will attend public school. It is enough that new public schools are available to serve that unit of development. Thus, if this were a countywide impact fee designed to fund construction of new schools as needed throughout the county, we could easily conclude that the second prong of the test had been met.

However, the St. Johns County impact fee is not effective within the boundaries of a municipality unless the municipality enters into an interlocal agreement with the county to collect the fee. The ordinance provides that the funds shall be spent solely for school construction necessitated by new development. However, there is nothing to keep impact fees from being spent to build schools to accommo-date new development within a municipality that has not entered into the interlocal agreement. Therefore, as in the ordinance first considered in Contractors & Builders Associa-tion v. City of Dunedin, there is no restriction on the use of the funds to ensure that they will be spent to benefit those who have paid the

fees. As a consequence, we hold that no impact fee may be collected under the ordinance until such time as substantially all of the population of St. Johns County is subject to the ordinance.

The builders also contend that the ordinance violates article IX, section 1 of the Florida Constitution, which provides:

> SECTION 1. System of public education.••Adequate provision shall be made by law for a uniform system of free public schools and for the establishment, mainte-nance and operation of institutions of higher learning and other public education programs that the needs of the people may require.

Insofar as the constitution provides for "free public schools," it is clear that no student may be required to pay tuition as a condition of being admitted into school. Of course, this does not mean that the students' parents are exempt from paying any of the costs of maintaining the school system. Obviously, property owners who have children pay ad valorem taxes, portions of which pay for schools. The mandate of free public schools insures that students' access to public schools is not dependent upon the payment of any fees or charges. Under the schedule of charges in the St. Johns County ordinance, the payment of the impact fees is unrelated to school attendance. Thus, to the extent that the impact fee is imposed upon each dwelling unit, we see no violation of the constitutional imperative of free schools.

The builders point out, however, that the feepayer is given an alternative to paying the impact fee set forth in the uniform schedule of fees. Thus, section 7 of the ordinance provides in part:

> B. If a feepayer opts not to have the impact fee determined according to paragraph (A) of this section, then the feepayer shall prepare and submit to the St. Johns County School Board an indepen-dent fee calculation study for the land development activity for which a building permit or permit for mobile home installation is sought. The student generation and/or educational impact documentation submitted shall show the basis upon which the independent fee calculation was made. The St. Johns County School Board may adjust the educational facilities impact fee to that deemed to be appropriate given the documen-tation submitted by the feepayer. The County Administrator shall make the appropriate modification upon notice of such adjustment from the School Board. St. Johns County, Fla., Ordinance 87•60 (Oct. 20, 1987).

Dr. Nicholas stated that under section 7(B), the develop-er of an adult retirement living facility could avoid the payment of the impact fee because no children would be living in the facility. He also said that property owners who warranted that their children would attend private school could be exempt upon the understanding that if a school child later occupied the home, the fee would have to be paid. He acknowledged that childless couples could also obtain an exemption under the same warranty. Thus, in a very real way the alternative mechanism of determining the impact fee under section 7(B) permits households that do not contain public school children to avoid paying the fee. This means that the impact fees' have the potential of being user fees that will be paid primarily by those households that do contain public school children, thereby colliding with the constitutional requirement of free public schools.

The county asks that if we conclude that section 7(B) has the effect of converting the educational facilities impact fee into a user fee, the offending section be severed in order to preserve the validity of the balance of the ordinance. The ordinance contains a severability clause. A legislatively expressed preference for severability of voided clauses, although not 'binding, is highly persuasive. State v. Champe, 373 So. 2d 874, 880 (Fla. 1978). Severance of section 7(B) will not impair the operation or effectiveness of the ordinance. Further, the severance of section 7(B) will not affect the stated purpose or intent of the ordinance, which reads:

> Section Three: Intents and Purposes
>
> A. This ordinance is intended to assist in the implementation of the St. Johns County Comprehensive Plan.
>
> B. The purpose of this ordinance 15 to regulate the use and develop-ment of land so as to assure that new development bears a proportionate share of the cost of capital expenditures necessary to provide public educa-tional sites and facilities in St. Johns County. St. Johns County, Fla., Ordinance 87•60 (Oct. 20, 1987).

We believe the ordinance, absent section 7(B), constitutes a workable scheme within the legislative intent. See Eastern Air Lines, Inc. v. Department of Revenue, 455 So. 2d 311, 317 (Fla. 1984) (severance appropriate if legislative intent can be accom-plished absent invalid portions and if remainder of law is not rendered incom-plete by severance), appeal dismissed, 474 U.S. 892 (1985); State ex rel. Boyd v. Green, 355 So. 2d 789 (Fla. 1978) (test for severability is whether portion to be stricken is of such import that remainder would be incomplete or would cause results not contemplated by the legislative body).

The builders further contend that the ordinance conflicts with the requirement of a "uniform system" of public schools contained in article IX, section 1 of the Florida Constitution. In School Board v. State, 353 So. 2d 834 (Fla. 1977), this Court rejected the thought that the constitutional provision required uniformity in physical plant or curriculum from county to county. To the contrary, the Court said:

> By definition, then, a uniform system results when the constituent parts . . . operate subject to a common plan or serve a common purpose. Id. at 838.

We see nothing in this section of the constitution that mandates uniform sources of school funding among the several counties. In fact, it could be argued that educational facilities impact fees are themselves a vehicle for achieving a uniform system of free public schools because in rapidly growing counties ordinary funding sources may not be sufficient to meet the demand for new facili-ties. We further note that the legislature must contemplate that the uniform system of free public schools may be funded by a variety of sources, including county funds, because section 236.24(1), Florida Statutes (1989), provides:

> (1) The district school fund shall consist of funds derived from the district school tax levy; state appro-priations; appropriations by county commissioners; local, state, and federal school food service funds; any and all other sources for school purposes; national forest trust funds and bother federal sources; and gifts and other sources. (Emphasis added.)

Sections 236.012(4) and 236.35, Florida Statutes (1989), also suggest that the legisla-ture did not intend to limit the financing alternatives available to individual school districts or counties.

The builders' reliance upon Brown v. City of Lakeland, 61 Fla. 508, 54 So. 716 (1911), is misplaced. This case held that the legislature could not authorize municipalities to issue bonds for the purpose of erecting schools that would be paid by a municipal tax levy. However, the provisions of the 1885 constitution upon which the Court predicated its decision have not been carried forward into our present constitution.

The Florida Constitution only requires that a system be provided that gives every student an equal chance to achieve basic educational goals prescribed by the legislature. The constitution-al mandate is not that every school district in the state must receive equal funding nor that each educational program must be equivalent. Inherent inequities, such as varying revenues because of higher or lower property values or differences in millage assessments, will always favor or disfavor some districts. We hold that the ordinance does not violate the requirement of a uniform system of public schools. See Penn v. Pensacola--Escambia Govern-mental Center Auth., 311 So. 2d 97 (Fla. 1975) (even if city or county funds benefitted the capital needs of the school board, there would be no violation of article IX).

We also reject the builders' contention that the county is preempted by the constitution and by state law from enacting the ordinance. The builders' argument is twofold. First, they claim that the ordinance interjects the county into an area in which school boards have been given exclusive authority by constitution and by statute. Because school boards have the authority to tax under article IX, section 4(b) of the Florida Constitution, the builders reason, counties and school boards must be fiscally independent of each other. They also assert that under section 230.23(10)(a), Florida Statutes (1989) (School Boards shall "arrange for the levying of district school taxes necessary to provide the amount needed from district sources."), school boards have exclusive authority to secure financing of public schools through appropriate channels. Second, the builders argue that the pervasive legislative control of various aspects of school financing evinces an intent that the legislative scheme be the sole mechanism for funding school construction.

We do not agree. Article VIII, section 1(f), provides:

> The board of county commissioners of a county not operating under a charter may enact, in a manner pre-scribed by general law, county ordinances not inconsis-tent with general or special law . . . . (Emphasis added.)

The implementing statute, section 125.01(1), Florida Statutes (1989), provides the governing body of a county with home•rule power, unless the legislature has preempt-ed a particular subject by general or special law. Speer v. Olson, 367 So. 2d 207, 210•11 (Fla. 1979). The provisions of section 125.01 are to be liberally con-strued "in order to . . . secure for the counties the broad exercise of home rule powers authorized by the State Constitution." § 125.01(3)(b), Fla. Stat. (1989).

We do not find the ordinance inconsistent with the constitu-tional and statutory provisions cited by the builders. First, article IX, section 4(b) is only a grant of taxing authority to the school boards. It does not

limit the imposition of a fee such as the one at issue here. Nor does that provision in any way limit county involvement in school financing. Further, section 230.23 does not place the exclusive duty to secure adequate public school financing with school boards. Finally, nothing in the legislative scheme regarding education finance suggests a legislative intent to preempt county involvement in the financing of public schools. To the contrary, various statutes make clear that the legislature contemplated county involvement in educational funding. See §§ 236.012(4), .24(1), .35, Fla. Stat. (1989). Even the Local Government Comprehensive Planning and Land Development Regulation Act contemplates that counties should become involved in facilitat-ing the adequate and efficient provision of schools. § 163.3161 (3), Fla. Stat. (1989).

Finally, we conclude that the ordinance does not create an unlawful delegation of power. The county determines the amount of the fees and collects them. The money is placed in a separate trust fund. The school board may only spend the funds for the new educational facilities prescribed by the ordinance. The school board must make annual accountings of its expenditure of the funds to the county. There has been no unlawful delegation of power because the fundamental policy decisions have been made by the county, and the discretion of the school board has been sufficient-ly limited. See Brown v. Apalachee Regional Planning Council, 560 So. 2d 782 (Fla. 1990).

We quash the decision below and uphold the validity of the ordinance upon the severance of section 7(B) therefrom. However, no impact fee may be collected under the ordinance until the second prong of the dual rational nexus test has been met.

It is so ordered.

COMMERCIAL BUILDERS OF NORTHERN CALIFORNIA v. CITY OF SACRAMEN-TO

941 F.2d 872

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

August 7, 1991, Filed

PRIOR HISTORY: Appeal from the United States District Court for the Eastern District of California. D. C. No. CV•S•89•638•EJG. Edward J. Garcia, District Judge, Presiding.

DISPOSITION: Affirmed.

OPINION: SCHROEDER, Circuit Judge

INTRODUCTION

Commercial Builders appeals the district court's grant of summary judgment in favor of the City of

Sacramento in Commercial Builders' suit challenging a city ordinance to help expand available low•income housing. The Ordinance in question conditions certain types of nonresidential building permits upon the payment of a fee intended to offset the burdens on the city caused by low•income workers who move there to fill jobs created by the project in question. Appellants are a group of commercial developers who filed suit contending the ordinance constitutes a taking under the fifth and fourteenth amendments.

The district court granted summary judgment in favor of the city, holding that the Ordinance did not effect an unconstitutional taking. It specifically found that the Ordinance substantially advanced a legitimate interest and that the city had adequately supported its contribution requirement by showing a sufficient nexus between nonresidential development and the demand for low•income housing. The court therefore concluded that the ordinance was not infirm under Nollan v. California Coastal Comm'n, 483 U.S. 825, 97 L. Ed. 2d 677, 107 S. Ct. 3141 (1987), which requires such a nexus between land use restrictions and the articulated purpose behind them. Because we agree that the Ordinance here at issue does not amount to an unconstitutional taking, we affirm.

DISCUSSION

In 1987, the City and County of Sacramento commissioned a consulting firm, Keyser-Marston Associates, to study the need for low•income housing, the effect of nonresidential development on the demand for such housing, and the appropriateness of exacting fees in conjunction with such development to pay for such housing. Keyser-Marston submitted its report, estimating the percentage of new workers in the developments that would qualify as low•income workers and would require housing. As instructed, it also calculated fees for development based on a yearly subsidy of $12,000 per qualified household that would be connected to the development. This figure represented the difference between $42,000, the minimum cost of building a two-bedroom apartment, and $30,000, the maximum rental income expected from a low-income household. Also as instructed, however, in the interest of erring on the side of conservatism in exacting the fees, it reduced its final calculations by about one-half.
Based upon this study, the City of Sacramento enacted the Housing Trust Fund Ordinance on March 7, 1989. The Ordinance lists several city•wide findings, including the finding that nonresidential development is "a major factor in attracting new employees to the region" and that the influx of new employees "create[s] a need for additional housing in the City." Pursuant to these findings, the Ordinance imposes a fee in connection with the issuance of permits for nonresidential development of the type that will generate jobs. The fees, calculated using the Keyser•Marston formula, are to be paid into a fund to assist in the financing of low•income housing. The city projects that the fund will raise about $3.6 million annually, nine percent of the projected annual cost of $42 million for the needed housing. Additional money will come from other sources, such as debt funding and general revenues.

Commercial Builders does not argue that the city lacks a legitimate interest in expanding low-income housing. Rather, it contends that this Ordinance constitutes an impermissible means to advance that interest, because it places a burden of paying for low-income housing on nonresidential development without a sufficient showing that nonresidential development contributes to the need for low•income housing in proportion to that burden. We affirm because we find the Ordinance sufficiently related to the legitimate purpose it seeks to achieve.

We have held that a condition placed upon the granting of a permit to develop land may constitute an impermissible taking, but we have done so only where the condition lacked any rational relationship to the project for which the permit was sought. In Parks v. Watson, 716 F.2d 646 (9th Cir. 1983), we held that where a developer seeking vacation of platted streets offered to pay for such vacation, a city could not insist that the developer dedicate its geothermal wells to the city as a precondition for such vacation. The dedication requirement, we held, "had no rational relationship to any purpose related to the vacation of the platted streets." 716 F.2d at 653. The condition therefore violated the fifth amendment.

We noted in Parks that the analysis we applied was based upon a consensus among the states that had considered the constitutionality of subdivision exaction regulations. 716 F.2d at 653. Prior to Nollan, other federal courts similarly upheld ordinances placing restrictions or conditions upon development where the ordinances were reasonably related to legitimate public purposes. See, e.g., Rogin v. Bensalem Township, 616 F.2d 680, 690•92 (3d Cir. 1980), cert. denied sub nom. Mark•Garner Associates v. Bensalem Township, 450 U.S. 1029, 68 L. Ed. 2d 223, 101 S. Ct. 1737 (1981); Maher v. City of New Orleans, 516 F.2d 1051, 1064•67, reh'g denied, 521 F.2d 815 (5th Cir. 1975), cert. denied, 426 U.S. 905, 48 L. Ed. 2d 830, 96 S. Ct. 2225 (1976); Texas Landowners Rights Ass'n v. Harris, 453 F. Supp. 1025, 1031•32 (D.D.C. 1978), aff'd mem., 598 F.2d 311 (D.C. Cir.), cert. denied, 444 U.S. 927, 62 L. Ed. 2d 184, 100 S. Ct. 267 (1979). Under this analysis, the Ordinance here at issue cannot be said to work an unconstitutional taking. It was enacted after a careful study revealed the amount of low•income housing that would likely become necessary as a direct result of the influx of workers that would be associated with the new nonresidential development. It assesses only a small portion of a conservative estimate of the cost of such additional housing. The burden assessed against the developers thus bears a rational relationship to a public cost closely associated with such development.

The appellants contend that, even if the Ordinance would pass constitutional muster under these principles, it must be struck down because the Supreme Court has now articulated a more stringent standard under which courts must analyze the imposition of conditions upon development. The appellants point out that in Nollan v. California Coastal Comm'n, 483 U.S. 825, 97 L. Ed. 2d 677, 107 S. Ct. 3141 (1987), the Court held that such conditions must not only be ones that the government might "rationally have decided" to employ for a given legitimate public purpose; they must also substantially advance such a purpose. See 483 U.S. at 834 & n.4. They argue that under the standard articulated in Nollan, an ordinance that imposes an exaction on developers can be upheld only if it can be shown that the development in question is directly responsible for the social ill that the exaction is designed to alleviate.

As a threshold matter, we are not persuaded that Nollan materially changes the level of scrutiny we must apply to this Ordinance. The Nollan Court specifically stated that it did not have to decide "how close a 'fit' between the condition and the burden is required," because it found that the regulation in question "d[id] not meet even the most untailored standards." 483 U.S. at 838. It also noted that its holding was "consistent with the approach taken by every other court that has considered the question," citing Parks as the lead case in its string cite. Id. at 839. Other circuits that have considered the constitutionality of ordinances that placed burdens on land use after Nollan . None have interpreted that case as changing the level of scrutiny to be applied to regulations that do not constitute a physical encroachment on land. See, e.g., St. Bartholomew's Church v. City of New York, 914 F.2d 348, 357 n.6 (2d Cir. 1990), cert. denied sub

nom. Committee to Oppose Sale of St. Bartholomew's Church v. Rector, 113 L. Ed. 2d 214, 111 S. Ct. 1103 (1991); Adolph v. Federal Emergency Management Agency, 854 F.2d 732, 737 (5th Cir. 1988); Naegele Outdoor Advertising, Inc. v. City of Durham, 844 F.2d 172, 178 (4th Cir. 1988). In keeping with this generally accepted view, we have recently reversed a district court's invalidation, under Nollan, of a requirement that a developer undertake off•site measures to mitigate harm to the environment, finding that that court had inappropri-ately required too close a nexus between the regulation and the interest at stake. Leroy Land Development v. Tahoe Regional Planning Agency, 939 F.2d 696 (9th Cir. 1991), rev'g Leroy Land Development Corp. v. Tahoe Regional Planning Agency, 733 F. Supp. 1399 (D. Nev. 1990). We see no reason to depart from this view in this case.

We therefore agree with the City that Nollan does not stand for the proposition that an exaction ordinance will be upheld only where it can be shown that the development is directly responsible for the social ill in question. Rather, Nollan holds that where there is no evidence of a nexus between the development and the problem that the exaction seeks to address, the exaction cannot be upheld. Where, as here, the Ordinance was implemented only after a detailed study revealed a substantial connection between development and the problem to be addressed, the Ordinance does not suffer from the infirmities that the Supreme Court disapproved in Nollan. We find that the nexus between the fee provision here at issue, designed to further the city's legitimate interest in housing, and the burdens caused by commercial development is sufficient to pass constitutional muster. [emphasis added]

The appellants also place some significance on the fact that this Ordinance is a fee provision. They contend that the fee represents a transfer of property, i.e., the money paid over to the city. See Webb's Fabulous Pharmacies, Inc. v. Beckwith, 449 U.S. 155, 66 L. Ed. 2d 358, 101 S. Ct. 446 (1980) (treating a purely financial exaction as a taking). In this respect, they argue, it more closely resembles a physical taking of property, which automatically falls within the purview of the fifth amendment, than a land use regulation, which is subject to a reasonableness analysis. Under appellants' theory, however, compensation would be required for every fee; therefore, every fee would be unconstitution-al. We see no valid basis for such a rule.

Indeed, the only circuit court to treat a fee provision as an unconstitutional taking under Nollan was ultimately reversed by the Supreme Court. In Sperry Corp. v. United States, 853 F.2d 904 (Fed. Cir. 1988), the Federal Circuit found unconstitu-tional a government exaction of a percentage of any award from the Iran Claims Commission. It treated the fee as a physical taking because it constituted a transfer of the possession of property. 853 F.2d at 906•07. It then invalidated it because it found the exaction arbitrary. Id. at 908. The infirmity, the court held, was the assessment of the cost of the Iran hostage crisis only against those who successfully asserted claims associated with Iranian interests. Because that crisis was a national concern, the court concluded, the burden should instead have been borne equally by the whole nation. Id.

The Supreme Court disagreed, holding that the exaction of a percentage of any award made by the Iran Claims Commission was a permissible means of collecting reimbursement for costs incurred in the operation of that Commission. United States v. Sperry Corp., 493 U.S. 52, 110 S. Ct. 387, 107 L. Ed. 2d 290 (1989). The Court expressed doubts as to the appropriateness of the Federal Circuit's analysis of the fee under principles applicable to physical takings, noting that "it is artificial to view deductions of a

percentage of a monetary award as physical appropriations of property. Unlike real or personal property, money is fungible." 110 S. Ct. at 395 n.9. Under this reasoning, the Ordinance does not, as appellants suggest, constitute a taking per se.

In Webb's Fabulous Pharmacies, 449 U.S. 155, 66 L. Ed. 2d 358, 101 S. Ct. 446, upon which these appellants have also relied, the Court struck down a Florida statute that confiscated all interest on interpleader funds deposited with the state courts. The Court there reasoned that the statute in question served no purpose, because another Florida statute required that parties make payments for the services rendered by court personnel in maintaining such funds. 449 U.S. at 163•64. The appellants argue in this case that the Ordinance here at issue is similarly unrelated to a permissible purpose, contending that the mere desire to generate revenue for the public good cannot, after Webb's Fabulous Pharmacies, support the exaction.

The Sperry Court disposed of a similar argument. Its decision to uphold the deduction from awards was primarily based on the fact that the fee was used to pay for the operations of the tribunal that resolved the disputes of all of those from whom such a fee was collected; thus, a close nexus between the charge and the activity creating the cost was established. The Court indicated, however, that it would have been satisfied with an even looser nexus, stating that "Sperry may be required to pay a charge for the availability of the Tribunal even if it never actually used the Tribunal." 110 S. Ct. at 395•96. A purely financial exaction, then, will not constitute a taking if it is made for the purpose of paying a social cost that is reasonably related to the activity against which the fee is assessed. Again, we conclude that the required nexus is present in this case.

Finally, the appellants contend that, regardless of the standard to be applied in assessing the validity of the Ordinance, they have raised an issue of material fact in their attack on the conclusions of the Keyser•Marston study. This attack came in the form of an affidavit from their planner, David Wade, suggesting that commercial development may be a less decisive factor in worker migration than the Keyser-Marston study indicates. Wade concluded that, in addition to employment opportuni-ty, the availability of low•income housing is itself partly responsible for any influx of low•income employees to Sacramento. Wade also opined that it is at least as true that employers follow the work force as the converse. This affidavit, appellants argue, sufficiently calls into question the city's findings concerning the nexus between its Ordinance and the social ill it sought to cure to preclude summary judgment.

The appellants' argument lacks merit. Even viewing the Wade affidavit in the light most favorable to the developers, it does not rebut the Keyser-Marston conclusion that commercial development is related to an increase in the need for low•income housing. The Ordinance accounts for what the developers characterize as the indirectness of the connection between the creation of new jobs and the need for low•income housing by charging only a small percentage of what the Keyser-Marston study calculated to be the cost of meeting new low•income housing requirements. As we have already noted, nothing in Nollan or any other authority cited by the appellants requires the nexus to be more direct than that achieved through the legislative process that the city here employed. We therefore agree with the district court that the Wade affidavit is insufficient to preclude summary judgment.

The district court correctly found that, as a matter of law, Sacramento's Housing Trust Fund Ordinance

does not work an unconstitutional taking. Summary judgment in favor of the city was therefore proper.

AFFIRMED.

DISSENT: BEEZER, Circuit Judge, dissenting.

I respectfully dissent.

As Justice Scalia warned in Nollan, a state can leverage its police power to the point where a regulation of land use becomes an "out•and•out plan of extortion." Nollan v. California Coastal Comm'n, 483 U.S. 825, 837, 97 L. Ed. 2d 677, 107 S. Ct. 3141 (1987). Sacramento's ordinance is a transparent attempt to force commercial developers to underwrite social policy. Apparently, legislators find it politically more palatable to exact payments from developers than to tax their constituents. The Takings Clause prohibits singling out developers to bear this burden.

Historically, courts have upheld exactions when states were able to justify them as serving a public purpose related to the burdens caused by development. For example, courts have sustained requirements that developers construct various on•site improvements, such as sewers, watermains, sidewalks, curbs and gutters, storm drains, and landscaping. Requiring off•site improvements that serve a public purpose, such as roads, schools, parks and sewage treatment plants, may also be justified where the requirement alleviates a public burden or ameliorates harmful effects caused by the development. When the developer is asked to bear a fair share of the burden, such a requirement directly furthers the legitimate interests of the government. See, e.g., Leroy Land Development v. TRPA, 939 F.2d 696, 699 (9th Cir. 1991). When the governmental exaction solves a problem actually created by the development (for example, requiring the developer to provide needed infrastructure), it is no coincidence that the exaction results in a benefit to the development as well as the community.

In response, state and local governments have begun to stretch the use of exactions to the breaking point. Sacramento would have developers pay not just for public improvements necessitated by development, but for private subsidies with little or no causal connection to development. Not surprisingly, under a scheme requiring no connection, no benefit accrues to the development in return.

It is no longer the case that exaction requirements are imposed only when the direct benefit to the land and extra costs to government created by development are demonstrable. Instead, exaction fees have approached . . . "grand theft," as the benefit to private landowners has become marginal, or in some cases, nonexistent, and the public need attributable to new development more tenuous and theoretical. Smith, supra note 1, at 29 (footnotes omitted).

Sacramento has commissioned a study that demonstrates at best a tenuous and theoretical connection between commercial development and housing needs. But the Takings Clause requires a cause•and•effect relationship between the two. Pennell v. San Jose, 485 U.S. 1, 20, 99 L. Ed. 2d 1, 108 S. Ct. 849 (1988) (Scalia, J., dissenting). In my view, Sacramento has not shown such a relationship. Even the study relied on by the city to support the ordinance states that its "nexus analysis does not make the case that building

construction is responsible for growth."

The ordinance is nothing more than a convenient way to fund a system of transfer payments. Although Sacramento attempts to justify the ordinance as an exercise of its police power, the city actually is exercising its taxing power • free of the encumbrances generally thought to limit the exercise of that power. The traditional manner in which American government has met the problem of those who cannot pay reasonable prices for privately sold necessities • a problem caused by the society at large • has been the distribution to such persons of funds raised from the public at large through taxes, either in cash (welfare payments) or in goods (public housing, publicly subsidized housing, and food stamps). Unless we are to abandon the guiding principle of the Takings Clause that "public burdens . . . should be borne by the public as a whole," this is the only manner that our Constitution permits. Pennell, 485 U.S. at 21•22 (Scalia, J., dissenting) (citation omitted).

The new workers attracted by the new jobs associated with the new develop-ment surely will increase the demand for all manner of goods and services. If Sacramento has shown a sufficient causal connection in this case, we can be expected next to uphold exactions imposed on developers to subsidize small business retailers, child-care programs, food services and health-care delivery systems.

John T. DOLAN and Florence Dolan, Petitioners on Review, v.
CITY OF TIGARD, Respondent on Review

854 P.2d 437

Supreme Court of Oregon

317 Ore. 110; 854 P.2d 437

January 11, 1993, Argued and submitted
July 1, 1993, Decided
July 1, 1993, Filed

PRIOR HISTORY: On review from the Court of Appeals. LUBA No. 91•161; CA No. A73769.

* Judicial review from Land Use Board of Appeals, 22 LUBA 617 (1992). 113 Or App 162, 832 P2d 853 (1992).

DISPOSITION: The decision of the Court of Appeals and the order of the Land Use Board of Appeals are affirmed.

COUNSEL: David B. Smith, Tigard, argued the cause and filed the petition for petitioners on review.

James M. Coleman, of O'Donnell, Ramis, Crew & Corrigan, Portland, argued the cause and filed the response for respondent on review.

Daniel J. Popeo and Paul D. Kamenar, Washington, D.C., and Gregory S. Hathaway, of Garvey, Schubert & Barer, Portland, filed a brief amicus curiae for Washington Legal Foundation.

Timothy J. Sercombe and Edward J. Sullivan, of Preston, Thorgrimson, Shidler, Gates, & Ellis, Portland, filed a brief amicus curiae for 1000 Friends of Oregon.

Ronald A. Zumbrun and Robin L. Rivett, Sacramento, California, and Richard M. Stephens, Bellevue, Washington, filed a brief amicus curiae for Pacific Legal Foundation.

JUDGES: In Banc. Van Hoomissen, J. Peterson, J., dissented and filed an opinion.

OPINION BY: VAN HOOMISSEN

OPINION: Petitioners in this land use case seek review of a Court of Appeals' decision affirming a Final Opinion and Order of the Land Use Board of Appeals (LUBA) in favor of respondent City of Tigard (city). Dolan v. City of Tigard, 113 Or App 162, 832 P2d 853 (1992). The issue is whether city has demonstrated the required relationship between the conditions that it attached to its approval of petitioners' proposed land use and the expected impacts of that land use. Petitioners argue that, because city failed to demonstrate an "essential nexus" or a "substantial relationship" between the exactions demanded by city and the impacts caused by their proposed development, city's exactions constitute a "taking" under the Fifth Amendment of the federal constitution. City responds that it need only show a "reasonable relationship" between the imposition of the conditions and the legitimate public interest advanced. For the reasons that follow, we affirm the Court of Appeals' decision.

Petitioners own 1.67 acres of land in downtown Tigard. The land is within city's "central business district" zone and is subject to an "action area" overlay zone (CBD•AA zone). The land's current use is as a retail electric and plumbing supply business, a general retail sales use.

Petitioners applied to city for a permit to remove an existing 9,700•square foot building and to construct a 17,600 square foot building in which to relocate the electric and plumbing supply business and to expand their parking lot (phase I). Petitioners eventually intend to build an additional structure and to provide more parking on the site (phase II); however, the exact nature of that additional expansion is not specified. Petitioners' proposed intensified use (phase I) is permitted outright in the CBD zone; however, the AA overlay zone, which implements the policies of the Tigard Community Development Code, allows city to attach conditions to the development in order to provide for projected transportation and public facility needs.

City granted petitioners' application, but required as conditions that petitioners dedicate the portion of their property lying within the 100-year floodplain for improvement of a storm drainage system and, further, that they dedicate an additional 15-foot strip of land adjacent to the floodplain as a pedestri-an/bicycle

pathway. Petitioners sought a variance from those conditions, which city denied.

In its 27•page final order, city made the following pertinent findings that petitioners do not challenge concerning the relationship between the dedication conditions and the anticipated impacts of petitioners' project:

> "Analysis of Variance Request. The [City of Tigard Planning] Commission does not find that the requirements for dedication of the area adjacent to the floodplain for greenway purposes and for construction of a pedestrian/bicycle pathway constitute a taking of applicant's property. Instead, the Commission finds that the dedication and pathway construction are reasonably related to the applicant's request to intensify the development of this site with a general retail sales use, at first, and other uses to be added later. It is reasonable to assume that customers and employees of the future uses of this site could utilize a pedestrian/bicycle pathway adjacent to this development for their transportation and recreational needs. In fact, the site plan has provided for bicycle parking in a rack in front of the proposed building to provide for the needs of the facility's customers and employees. It is reasonable to expect that some of the users of the bicycle parking provided for by the site plan will use the pathway adjacent to Fanno Creek if it is constructed. In addition, the proposed expanded use of this site is anticipated to generate additional vehicular traffic, thereby increasing congestion on nearby collector and arterial streets. Creation of a convenient, safe pedestrian/bicycle pathway system as an alternative means of transportation could offset some of the traffic demand on these nearby streets and lessen the increase in traffic congestion.

". . . .

> "At this point, the report will consider the applicant's request from the requirement to dedicate portions of the site within the 100•year floodplain of Fanno Creek for storm water management purposes. The applicant's Statement of Justification for Variance . . . does not directly address storm water draining concerns . . ..
>
> "The Commission does not find that the requirements for dedication of the area within the floodplain of Fanno Creek for storm water management and greenway purposes constitutes a taking of the applicant's property. Instead, the Commission finds that the required dedication would be reasonably related to the applicant's request to intensify the usage of this site, thereby increasing the site's impervious area. The increased impervious surface would be expected to increase the amount of storm water runoff from the site to Fanno Creek. The Fanno Creek drainage basin has experienced rapid urbanization over the past 30 years causing a significant increase in stream flows after periods of precipitation. The anticipated increased storm water flow from the subject property to an already strained creek and drainage basin can only add to the public need to manage the stream channel and floodplain for drainage purposes. Because the proposed development's storm drainage would add to the need for public management of the Fanno Creek floodplain, . . . the requirement of dedication of the floodplain area on the site is related to the applicant's plan to intensify development on the site." City of Tigard Planning Commission Final Order No. 91•09 PC at 13, 20•21.

On petitioners' appeal, the Tigard City Council approved the Planning Commission's final order.

Petitioners appealed to LUBA. They did not challenge the adequacy of city's above quoted findings or their evidentiary support in the record. Rather, petitioners argued that city's dedication requirements are not related to their proposed development and, therefore, that those requirements constitute an uncompensated taking of their property under the Fifth Amendment.

In considering petitioners' federal taking claim, LUBA assumed that city's findings about the impacts of the proposed development were supported by substantial evidence. Dolan v. City of Tigard, 22 Or LUBA 617, 626 n 9 (1992). Accordingly, LUBA considered only whether those findings were sufficient to establish the requisite relationship between the impacts of the proposed development and the exactions imposed, i.e., do city's findings support city's action? LUBA stated:

> "Petitioners do not contend that establishing a greenway in the floodplain of Fanno Creek for storm water management purposes, and providing a pedestrian/bicycle pathway system as an alternative means of transportation, are not legitimate public purposes. Further, petitioners do not challenge the sufficiency of the 'nexus' between these legitimate public purposes and the condition imposed requiring dedication of portions of petitioners' property for the greenway and pedestrian/bicycle pathway. Rather, petitioners' contention is that under both the federal and Oregon Constitutions, the relationship between the impacts of the proposed development and the exactions imposed are insufficient to justify requiring dedication of petitioners' property without compensa-tion. "Id. at 621 (emphasis in original).

LUBA concluded:

> "In view of the comprehensive Master Drainage Plan adopted by respondent providing for use of the Fanno Creek greenway in management of storm water runoff, and the undisputed fact that the proposed larger building and paved parking area on the subject property will increase the amount of impervious surfaces and, therefore, runoff into Fanno Creek, we conclude there is a 'reasonable relationship' between the proposed development and the requirement to dedicate land along Fanno Creek for a greenway.
>
> "Furthermore, the city has adopted a Comprehensive Pedestrian/Bicycle Pathway Plan which provides for a continuous network of pedestrian/bicycle pathways as part of the city's plans for an adequate transportation system. The proposed pedestrian/bicycle pathway segment along the Fanno Creek greenway on the subject property is a link in that network. Petitioners propose to construct a significantly larger retail sales building and parking lot, which will accommodate larger numbers of customers and employees and their vehicles. There is a reasonable relationship between alleviating these impacts of the development and facilitating the provision of a pedestrian/bicycle pathway as an alternative means of transportation." Id. at 626•27.

LUBA held that the challenged conditions requiring dedication of portions of petitioners' property did not

constitute an unconstitutional taking under the Fifth Amendment. Id. at 627.

The Court of Appeals affirmed, rejecting petitioners' contention that in Nollan v. California Coastal Comm'n, 483 U.S. 825, 107 S Ct 3141, 97 L Ed 2d 677 (1987), the Supreme Court had abandoned the "reasonable relationship" test for a more stringent "essential nexus" test. Dolan v. City of Tigard, supra, 113 Or App at 166•67.

On review, petitioners first argue that city must meet a higher standard than a "reasonable relationship," that there must be an "essential nexus" or "substantial relationship" between the impacts of the development and the dedication requirements; otherwise, imposing exactions as a condition of land use approval is an unconstitutional taking. They rely on Nollan v. California Coastal Comm'n, supra. Petitioners argue that, because city has not demonstrated an essential nexus between its exactions and the demands that petitioners' proposed use will impose on public services and facilities, the requisite substantial relationship is missing and, therefore, that the exactions imposed on them by city constitute a taking under the Fifth Amendment. As a fallback position, petitioners argue that city cannot demonstrate even a "reasonable relationship" between their development's impacts and city's exactions.

City responds that the "reasonable relationship" test which was widely applied in regulatory takings cases before the Supreme Court's decision in Nollan was not abandoned in Nollan. Under that test, city asserts, the dedication conditions that it imposed on petitioners do not constitute a taking under the Fifth Amendment.

A land-use regulation does not effect a "taking" of property, within the meaning of the Fifth Amendment prohibition against taking private property for public use without just compensation, if it substantially advances a legitimate state interest and does not deny an owner economically viable use of the owner's land. Nollan v. California Coastal Comm'n, supra, 483 U.S. at 835•36; Keystone Bituminous Coal Assn. v. DeBenedictis, 480 U.S. 470, 495, 107 S Ct 1232, 94 L Ed 2d 472 (1987): Agins v. City of Tiburon, 447 U.S. 255, 260, 100 S Ct 2138, 65 L Ed 2d 106 (1980). Requiring an uncompensated conveyance of the easement outright would violate the Fourteenth Amendment. Nollan, supra, 483 U.S. at 834.

Before the Supreme Court's decision in Nollan, federal and state courts struggled to identify the precise connection that must exist between the conditions incorporated into a regulation and the governmental interest that the regulation purports to further if the regulation is to be deemed to "substantially advance" that interest. In the midst of a range of tests set forth by various courts, the Ninth Circuit Court of Appeals concluded in Parks v. Watson, 716 F2d 646, 652 (9th Cir 1983), that, at the very least, a condition requiring an applicant for a governmental benefit to forego a constitutional right is unlawful if the condition is not rationally related to the benefit conferred. By way of example, the Parks court discussed "subdivision exaction" cases, where a city allows a developer to subdivide in exchange for a contribution. In such cases, the court noted, "there is agreement among the states 'that the dedication should have some reasonable relationship to the needs created by the subdivision.'" Id. at 653. Thus, under the Parks analysis, exactions and impacts must be "reasonably related." In Parks, the court held that the exactions had "no rational relationship to any public purpose related to the [impacts of the development]" and, therefore, that the exactions could not be required without just compensation. Id. at 653.

In Nollan, the Court did not purport to abandon the generally recognized "reasonably related" test and, in fact, noted that its approach was "consistent with the approach taken by every other court that has considered the question, with the exception of the California state courts." 483 U.S. at 839 (citing a long list of exaction cases, beginning with Parks v. Watson, supra). The Nollan court stated: "We can accept, for purposes of discussion, the Commission's proposed test [the 'reasonably related test'] as to how close a 'fit' between the condition and the burden is required, because we find that this case does not meet even the most untailored standards." Id. at 838.

Thus, we are unable to agree with petitioners that the Nollan court abandoned the "reasonably related" test. We recognize, however, that the Nollan court's application of that test does provide some guidance as to how closely "related" exactions must be to impacts. For example, the Nollan court stated that the evident constitutional propriety of an exaction disappears

> "if the condition substituted for the prohibition utterly fails to further the end advanced as the justification for the prohibition. When that essential nexus is eliminated, the situation becomes the same as if California law forbade shouting fire in a crowded theater, but granted dispensations to those willing to contribute $ 100 to the state treasury." Id. at 837.

Petitioners read that passage as indicating that in Nollan the Supreme Court abandoned the "reasonably related" test for a more stringent "essential nexus" test. We do not read Nollan that way.

The quoted passage indicates that, for an exaction to be considered "reasonably related" to an impact, it is essential to show a nexus between the two, in order for the regulation to substantially advance a legitimate state interest, as required by Agins v. City of Tiburon, supra, 447 U.S. at 260. In Nollan, the Court stated that, "unless the permit condition serves the same governmental purpose as the development ban, the building restriction is not a valid regulation of land use but 'an out•and•out plan of extortion.'" Nollan v. California Coastal Comm'n, supra, 483 U.S. at 837 (citations omitted). Nollan, then, tells us that an exaction is reasonably related to an impact if the exaction serves the same purpose that a denial of the permit would serve. See Dept. of Trans. v. Lundberg, 312 Or 568, 578, 825 P2d 641, cert den 113 S Ct 467 (1992) (sidewalk dedication requirement serves the same legitimate governmental purposes that would justify denying permits to develop commercially zoned properties).

In this case, we conclude that city's unchallenged factual findings support the dedication conditions imposed by city. The pedestrian/bicycle pathway condition had an essential nexus to the anticipated development because, as the city found in part

> "the proposed expanded use of this site is anticipated to generate additional vehicular traffic, thereby increasing congestion on nearby collector and arterial streets. Creation of a convenient, safe pedestrian/bicycle pathway system as an alternative means of transportation could offset some of the traffic demand on these nearby streets and lessen the increase in traffic congestion." Dolan v. City of Tigard, supra, 22 Or LUBA at 622 (quoting City of Tigard Planning Commission Final Order at 20).

We are persuaded that the transportation needs of petitioners' employees and customers and the increased traffic congestion that will result from the development of petitioners' land do have an essential nexus to the development of the site, and that this condition, therefore, is reasonably related to the impact of the expansion of their business.

Because the development would involve covering a much larger portion of petitioners' land with buildings and parking, thus increasing the site's impervious area, the condition requiring petitioners to dedicate a portion of their property for improvement of a storm drainage system also is reasonably related to the impact of the expansion of their business. The increased impervious surface would be expected to increase the amount of storm water runoff from the site to Fanno Creek. We hold that there is an essential nexus between the increased storm water runoff caused by petitioners' development and the improvement of a drainage system to accommodate that runoff.

We agree with LUBA's conclusion that the challenged condition requiring dedication of portions of petitioners' property is not an unconstitutional taking of petitioners' property in violation of the Fifth Amendment.

The decision of the Court of Appeals and the order of the Land Use Board of Appeals are affirmed.
DISSENT BY: PETERSON

DISSENT: PETERSON, J., dissenting.

Petitioners own a commercial building in the business district of Tigard. They sought permission to replace an existing building with a larger building. The City of Tigard imposed two conditions to the granting of a building permit: one was that petitioners convey a 15-foot easement adjacent to the east bank of Fanno Creek for "storm water management and greenway purposes"; the other was that petitioners convey an 8-foot easement for a pedestrian/bicycle pathway. Petitioners appealed, asserting a violation of the Fifth Amendment to the Constitution of the United States.

The Fifth Amendment provides in part that "private property [shall not] be taken for public use, without just compensation." This case principally involves questions of federal law. The majority states the issue as follows:

> "The issue is whether city has demonstrated the required relationship between the conditions that it attached to its approval of petitioners' proposed land use and the expected impacts of that land use." 317 Or at 112.

Development exactions such as those involved in the present case are not unusual. Over the years, a body of law has developed that permits governments, acting under their police power, to accomplish some things that also could be accomplished under their eminent domain powers. Roberts, Mining with Mr. Justice Holmes, 39 Vand L Rev 287 (1986). Local governments, in the exercise of their federal police power and without payment of compensation, have been authorized to require developers to grant easements, make payments, or give up rights as a condition to the development of their property.

The federal rule that applies to such exactions has two facets. First, the exaction must serve a legitimate state purpose. Second, the exaction must be reasonably necessary to address problems, conditions, or burdens created by the underlying change of use of the landowner's property. Nollan v. California Coastal Comm'n, 483 U.S. 825, 107 S Ct 3141, 97 L Ed 2d 677 (1987). The second facet requires a showing that the development created a need for the exaction. If a recited need for an exaction is only an excuse for what actually is a taking, the exaction is invalid.

As does the majority, I place the burden of proving these two elements on the government that exacts the conditions. In establishing that the need for the exactions arises from an increased intensity of use, the government must show more than a theoretical nexus. It must show that the granting of the permit probably will create specific problems, burdens, or conditions that theretofore did not exist, and that the exaction will serve to alleviate the specific problems, burdens, or conditions that probably will arise from the granting of the permit. More than general statements of concern about increased traffic or public safety are required to support, as permissible regulation, what otherwise would be a taking. The Nollan opinion states:

> "We view the Fifth Amendment's Property Clause to be more than a pleading requirement, and compliance with it to be more than an exercise in cleverness and imagination. As indicated earlier, our cases describe the condition for abridgement of property rights through the police power as a 'substantial advancing' of a legitimate state interest. We are inclined to be particularly careful about the adjective where the actual conveyance of property is made a condition to the lifting of a land-use restriction, since in that context there is heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police power objective." 483 U.S. at 841.

Here, Tigard had two possible ways to obtain the easements. The first, and less desirable from the city's view, was to condemn the easements. That would require payment of compensation under either the state or federal constitution. A second possible way to obtain the easements is by making the granting of them a condition to the granting of a permit.

I am satisfied that the city has met the first test, that the exactions serve a legitimate state purpose. The pivotal issue is whether the second requirement •• that the need for the exactions arises from increased intensity of use •• has been established. For the answer to this question, the court should look at the city's order to determine whether its findings of fact demonstrate a need for the exactions ordered by the City.

The city's order makes repeated references to other city ordinances that contemplate the creation of a floodplain greenway and a pedestrian/bicycle pathway. The order suggests that such exactions were to be attached to all requests for improvements. For example:

> "Code Section 18.86.040 contains interim standards which are to be addressed for new developments in the CBD•AA zone. These requirements are intended to provide for projected transportation and public facility needs of the area. The City may attach conditions to any development within an action area prior to adoption of the design plan to achieve the

following objectives:

". . .

"b. The development shall facilitate pedestrian/bicycle circulation if the site is located on a street with designed bike paths or adjacent to a designated greenway/open space/park. Specific items to be addressed are as follows:

"i. Provision of efficient, convenient and continuous pedestrian and bicycle transit circulation systems, linking developments by requiring dedication and construction of pedestrian and bike paths identified in the comprehensive plan. . . .

". . .

"A bicycle/pedestrian path is called for in this general location in the City of Tigard's Parks Master Plans (Murase and Associates, 1988) and the Tigard Area Comprehensive Pedestrian/ Bicycle Pathway Plan 1974). In addition, Community Development Code Section 18.120.180.A.8 requires that where landfill and/or development is allowed within or adjacent to the 100-year floodplain, the City shall require the dedication of sufficient open land area for greenway adjoining and within the floodplain in accordance with the adopted pedestrian/ bicycle plan. The proposed development site includes land within the 100 year floodplain of Fanno Creek.

". . . .

"It is imperative that a continuous pathway be developed in order for the paths to function as an efficient, convenient, and safe system. Omitting a planned for section of the pathway system, as the variance would result in if approved, would conflict with Plan purposes and result in an incomplete system that would not be efficient, convenient, or safe. The requested variance therefore would conflict with the City's adopted policy of providing a continuous pathway system intended to serve the general public good and therefore fails to satisfy the first variance approval criterion.

". . . .

"As noted above, approval of the variance request would have an adverse effect on the existing partially completed pathway system because a system cannot fully function with missing pieces. If this planned for section is omitted from the pathway system, the system in this area will be much less convenient and efficient. If the pedestrian and bicycle traffic is forced onto City streets at this point in the pathway system because of this missing section, pedestrian and bicycle safety will be lessened. * * *

". . . .

> "Code Section 18.120.180.A.8 requires that where landfill and/or development is allowed within or adjacent to the 100-year floodplain, the City shall require the dedication of sufficient open land area for greenway adjoining and within the floodplain in accordance with the adopted pedestrian/bicycle plan. . . .

". . . .

> ". . . As already noted, the code at Section 18.120.080.A.8 and many other related sections (e. g., Section 18.84.040.A.7) require dedication of floodplain areas, not only for construction of pathways, but primarily to allow for public management of the storm water drainage system. . . .
>
> ". . . In order to accomplish these public improvements related to increasing the flow efficiency of Fanno Creek, dedication of the area of the subject site within the 100•year floodplain and also the adjacent five feet is imperative. Not requiring dedication of this area as a condition of development approval, as the applicant's variance proposal requests, would clearly conflict with purposes and policies of the Comprehensive Plan, Community Development Code, and the City's Master Drainage Plan." City of Tigard Planning Commission Final Order No. 91•09PC, pp 9•22 (1991) (emphasis added).

The quoted sections show the resolve of the city to get the easements and the purpose for the easements. However, the quoted sections of the order in no way establish that the easements necessarily are needed because of increased intensity of use of petitioners' (or anyone else's) property. Unquestion-ably, omission of the easements from any of the planned floodwater or pathway developments would "result in an incomplete system." But that is beside the point. If all that need be shown is that easements are needed for a legitimate public purpose, the constitutional protection evaporates. The critical question before us is whether the order shows an increased intensity of such magnitude that it creates the need for the exaction of the easements.

The following findings specifically relate to increased intensity of use in connection with the pedestrian/ bicycle pathway easement:

> "The Commission finds that the dedication and pathway construction are reasonably related to the applicant's request to intensify the development of this site with a general retail sales use, at first, and other uses to be added later. It is reasonable to assume that customers and employees of the future uses of this site could utilize a pedestrian/bicycle pathway adjacent to this development for their transportation and recreational needs. In fact, the site plan has provided for bicycle parking in a rack in front of the proposed building to provide for the needs of the facility's customers and employees. It is reasonable to expect that some of the users of the bicycle parking provided for by the site plan will use the pathway adjacent to Fanno Creek if it is constructed." Id. at 13.

Whether the first sentence of the quoted material is viewed as a legal conclusion or a finding of ultimate fact, it must be supported by findings of fact. Supporting findings are lacking. The sentence beginning

with "It is reasonable to assume" is speculation, not a finding. Moreover, it states the obvious. If a pathway were built, of course customers and employees "could utilize [the pathway] for their transportation and recreational needs." Concerning the third sentence, the fact that the plans contain a reference to a bicycle rack does not establish increased intensity of use (particularly because other city ordinances require, as was required in this case, provision for bicycle parking in the plans).

The city did make some specific findings relevant to the pedestrian/bicycle pathway:

> "In addition, the proposed expanded use of this site is anticipated to generate additional vehicular traffic thereby increasing congestion on nearby collector and arterial streets. Creation of a convenient, safe pedestrian/bicycle pathway system as an alternative means of transportation could offset some of the traffic demand on these nearby streets and lessen the increase in traffic congestion." Ibid.

The real issue is whether the findings that a larger building is being constructed and the two sentences of the quoted findings are sufficient to support the pathway exaction. I maintain that if the city is going to, in effect, take a portion of one's property incident to an application for a permit to develop the property, the findings of need arising from increased intensity of use must be more direct and more substantial than those. The findings of fact that the bicycle pathway system "could offset some of the traffic demand" is a far cry from a finding that the bicycle pathway system will, or is likely to, offset some of the traffic demand. (Emphasis added.) In essence, the only factual findings that support the pedestrian/bicycle pathway exaction are these: A larger commercial building is to be constructed and, as a result, there is anticipated to be "additional vehicular traffic." That is not enough to support what amounts to a virtual taking of petitioners' land. I would require findings that demonstrate that the increased intensity of use requires the exaction. These findings do not establish that the pathway exaction is needed because of any higher intensity of use.

I turn to the flood control and greenway easement. The factual conclusion asserted to support this exaction reads as follows:

> "The increased impervious surface would be expected to increase the amount of storm water runoff from the site to Fanno Creek. The Fanno Creek drainage basin has experienced rapid urbanization over the past 30 years causing a significant increase in stream flows after periods of precipitation. The anticipated increased storm water flow from the subject property to an already strained creek and drainage basin can only add to the public need to manage the stream channel and floodplain for drainage purposes. Because the proposed development's storm drainage would add to the need for public management of the Fanno Creek floodplain, the Commission finds that the requirement of dedication of the floodplain area on the site is related to the applicant's plan to intensify development on the site." Id. at 21.

Those findings do not establish such an increased intensity of use as to require the exaction of the flood control and greenway easement. All that these findings establish is that there will be some increase in the amount of storm water runoff from the site. A thimbleful? The constitution requires more than that.

Jurisprudence lags behind the times. It is its nature to react, rather than to act. Today, forces of change are at work that challenge traditional "takings" law, forces that jurisprudence has not yet had time to accommodate. Those forces coalesce into a single phenomenon: increasing interdependence among us. There are more of us, we live closer together, and we are increasingly interconnected. That phenomenon is not going to change except, perhaps, to accelerate.

With respect to "takings" jurisprudence, two essentially opposing tendencies emerge. The first is a tendency to recognize the legitimacy of attempts by state and local governments to regulate private property in ways that once might have been unthinkable. No person has the same range of possible uses for real property that he or she once may have had, because many uses that once were possible now may be forbidden because of their palpable impact on others. In truth, by regulation, governments regularly and permissibly take private property for public use without compensation.

The second tendency •• to some extent an outgrowth of the first •• is that state and local governments attempt to further particular goals by placing limitations on uses of private property that only will be lifted if the property owners "dedicate" some portion of their property to the particular government program. The temptation, particularly in times of limited tax revenues, is to place the primary burden for funding projects on the shoulders of those whose private property happens to be in the neighborhood of the proposed projects, whether or not the projects bear any relationship to the property or to the uses to which the property is put.

The first of these tendencies seems benign and, even if it were otherwise, it would be inevitable. Some private property rights are going to have to bend, if our increasingly interdependent society is to continue to evolve and progress peacefully. The second tendency is an attempt at licensed extortion. The trouble is, what once would have been recognizable as extortion may turn, in time, into something considered benign because it is so familiar. That transmogrification is encouraged every time a court cannot distinguish whether a particular governmental regulation falls within the ambit of the second tendency, rather than the first.

In cases involving exactions attached to permits, hearings are held, evidence is taken, and findings are made, and the government must show why the development spawns the need for the exaction. The findings relating to the need for exactions arising from future increased intensity of use after the property is developed must establish more than a potential increase in intensity; they must establish more than some increase in intensity; they must establish a bona fide need for the extraction that arises from the development.

Because this case turns on federal law, the majority and I rely on the same federal precedents. Why, then, do we arrive at different results? Under current federal law, if a local government follows the procedures mandated by federal law, it can, incident to the regulation of use of land, take a large part of the owner's ownership rights, so long as there remains some economically feasible private use. Lucas v. So. Carolina Coastal Council, 505 U.S. , 112 S Ct 2886, 120 L Ed 2d 798, 815 n 8 (1992). As the Lucas opinion itself states, landowners who lose 95 percent of the beneficial use of their property are entitled to no compensation, whereas landowners who lose all beneficial use fully are compensated. Ibid.

That power of the government gives it tremendous leverage against landowners who seek to improve their property. Because of the profound potential adverse effects that the substantive rule places on landowners, I read the federal precedents to require a high threshold that the government must meet in showing that the exaction is needed because of intensified land use by the landowner. It is not enough for a government to read the latest pertinent decision of the Supreme Court of the United States and insert in its order "magic words" from the decision (such as "the dedication and pathway construction are reasonably related to the applicant's request to intensify the development of this site"). If in fact the government needs to take part of a landowner's property because of intensified uses of the developed property, imposing the burden of showing precisely why the need in fact exists is a modest burden to place on the government. Such precision is lacking in this order.

From reading the order in this case, I am convinced that Tigard decided that it needed a pedestri-an/ bicycle pathway and a flood control greenway easement along Fanno Creek. One way of getting these, free of cost, is by requiring all owners who propose to change the use of their property to convey the easements to the city. That is what happened in this case.

The findings here do not establish any cognizable remediable purpose attributable to the change in use. The conditions relating to the pedestrian/bicycle pathway and flood control and greenway easements are impermissible on the record made in this case. I therefore dissent.

For decisions to the contrary, see, e.g., Lloyd E. Clarke, Inc. v. City of Bettendorf, 1968, 261 Iowa 1217, 158 N.W.2d 125; Norwick v. City of Winfield, 1967, 81 Ill.App.2d 197, 225 N.E.2d 30.

Fla.Const. Art. VII, @@ 1, 9 (1968); City of Tampa v. Birdsong Motors, Inc., Fla.1972, 261 So.2d 1.

We cannot accept appellees' argument that since a property owner within the municipal limits is required to use the city's sewer facilities, the sewer connection ordinance has the effect of imposing a tax. It is only when building is commenced upon his property and the need for sanitary facilities arises that a landowner must pay the fee. Just because he is prohibited from using a septic tank doesn't mean he is being taxes. See Brandel v. Civil City of Lawrenceburg, supra.

No one doubts that a municipality has the power to make reasonable charges for water and sewer services. The question is whether the cost of projected capital improve-ments can be

consid-ered in setting the charges.

The ordinances setting water and sewerage connection charges or otherwise pertinent are the following:

Sec. 25•14. Sewage connection required; notice.

The owner of any house, building, or property used for human occupancy, employment, recreation, or other purpose, situated within the city and abutting on any street, alley or right•of•way in which there is now located or may in the future be located a public sanitary or combined sewer of the city, is hereby required at his expense to install suitable toilet facilities therein, and to connect such facilities directly with the proper public sewer in accordance with the provisions of this chapter, within ninety (90) days after date of official notice to do so, provided that said public sewer is within two hundred (200) feet of the house, building, or properties used for human occupancy.... Sec. 25•31. Same • Classes of permits; contents; inspection fees.

There shall be two classes of building sewer permits: (1) for residential and commercial service; and (2) for service to establishments producing industrial waste. In either case, the owner or his agent shall make applica-tion on a special form furnished by the city. The permit application shall be supple-mented by any plans, specifi-cations, or other information considered pertinent in the judgment of the city sewer superintendent. No permit will be issued unless the assessment as set forth in section 25•71(c) and (d) has been paid....

Sec. 25•32. Same • Costs paid by owner.

All costs and expense incident to the installation, connection and maintenance of the building and collector sewers shall be borne by the owners. The owners shall

indemnify the city from any loss or damage that may directly or indirectly be occasioned by the installation of the building sewer.

Sec. 25•71. Meters • Connection or installation charge.

(a) The connection charge for the installation of a meter inside the city shall be as follows:

5/8 inch meter	$ 95.00
1 inch meter	$170.00
1•2/2 inch meter	$265.00
2 inch meter	$360.00

(b) The connection charge for the installation of a meter outside the city limits shall be as follows:

5/8 inch meter	$105.00
1 inch meter	$180.00
1•1/2 inch meter	$290.00
2 inch meter	$390.00

(c) In addition to the meter installation charges described herein, there shall be paid an assessment to defray the cost of production, distribution, transmission and treatment facilities for water and sewer provided at the expense of the City of Dunedin, as follows:

Each dwelling unit;	
for water	$325.00
for sewer	475.00
Each transient unit;	
for water	150.00
for sewer	275.00
Each business unit;	
for water	325.00
for sewer	475.00

(d) The assessments as set forth herein shall be payable upon issuance of the building permit for said unit or units in the case of new construction, or in the case of a presently existing structure or structures, such assessments shall be payable when the permits for water or sewer connections are issued.

Petitioners challenge as unlawful the fees prescribed by Dunedin, Fla. Code @ 25•71(c).

Petitioners take the position that the ordinance is bad, if for no other reason, then because it denies equal protection of the laws to new residents of Dunedin. There is a substantial question whether petitioners here have standing to assert new residents' rights. Construction Industry Association of Sonoma County v. City of Petaluma, 522 F.2d 897, 44 U.S.L.W. 2093 (9th Cir., 1975). Assuming standing arguendo, the ordinance easily meets the rational basis test, see post, pp. 319•320, and no right to travel inter-state is affected, contrary to petitioners' assertion. Cf. Annot., 63 A.L.R.3d 1184 (1975). In Shapiro v. Thompson, 394 U.S. 618, 89 S.Ct. 1322, 22 L.Ed.2d 600 (1969), welfare recipients were disqualified as such for one year by moving into Connecticut. Under Dunedin's ordinance, a joint water and sewer connection costs approximately $800.00, regardless of whether the new user comes from Dunedin, elsewhere in Florida, or from another state or country.

In the event of connection to an existing structure, the fees are payable "when the permits for water or sewer connections are issued." Dunedin, Fla.Code @ 25•71(d). The complaint here did not allege existing structures on the plaintiffs' land, however. Petitioners contend that Dunedin has imposed a tax under the guise of setting charges for water and sewer connections, relying on Broward County v. Janis Development Corp., 311 So.2d 371 (Fla. 4th Dist.1975) aff'g Janis Development Corp. v. City of Sunrise, 40 Fla.Supp. 41 (17th Cir. 1973); Pizza Palace of Miami v. City of Hialeah, 242 So.2d 203 (Fla. 3d Dist. 1972); and Venditti•Siraro, Inc. v. City of

Hollywood, 39 Fla.Supp. 121 (17th Cir. 1973). The Pizza Palace case is wholly inapposite, and the others are readily distinguishable. Only if the moneys collected in Venditti•Siraro and Janis Development had been used to underwrite the administra-tive costs of issuing building permits, or other costs incurred in enforcing building codes, would those cases be analogous to the present one. Compare State ex rel. Harkow v. McCarthy, 126 Fla. 433, 171 So. 314 (1936) with City of Panama City v. State, 60 So.2d 658 (Fla.1952). The analogy would be very close if the fees had been earmarked for future capital outlay: for example, acquisition of automobiles for building inspectors to use in their work.

The Supreme Court of Illinois, in Hartman v. Aurora Sanitary District, 23 Ill.2d 109, 177 N.E.2d 214 (1961), observed at 219:

> We have found that such reasonable charges have been uniformly sustained as a service charge rather than a tax. City of Maryville v. Cushman, 363 Mo. 87, 249 S. W.2d 347; State ex rel. Gordon v. Taylor, 149 Ohio St. 427, 79 N.E.2d 127, 37 Ohio Op. 112; City of North Muskegon v. Bolema Construc-tion Co., 335 Mich. 520, 56 N.W.2d 371; Chastain v. Oklahoma City, 208 Okl. 604, 258 P.2d 635.

Petitioners contend that utility revenues constitute taxes, to the extent such revenues are expended for purposes unrelated to the utility. Nothing prohibits a municipality's "making a modest return of its utility operation or certain portions thereof, providing the rate is not unreasonable." Pinellas Apartment Ass'n v. City of St. Petersburg, 294 So.2d 676, 678 (Ala. 2d Dist. 1974); Mitchell v. Mobile, 244 Ala. 442, 13 So. 2d 664 (1943). Contra, Madera v. Black, 181 Cal. 306, 184 P. 397 (1919). Augmenting general revenues is a natural use for such profits, and general revenues are expended for the whole range of municipal purposes. Privately held utilities also apply a modest portion of revenues to public or charitable purposes, and such charitable contributions are counted as operating expenses, when rates and charges are calculated.

Miami v. Florida Public Service Comm'n, 208 So.2d 249, 258•9 (Fla.1968) ("if contributions are of a reasonable amount to recognized and appropriate charities, then they may be classified as legitimate operating expenses." At 259); Re General Telephone Co., 44 P.U.R.2d 247 (Fla.R.R. & P.U.C.1962). See generally Annot., 59 A.L.R.3d 941 (1974). Just as a modest surplus over costs of regulation does not invalidate regulatory fees, State ex rel. Harkow v. McCarthy, 126 Fla. 433, 171 So. 314 (1936) (parking meters permissible unless "city was making inordinate and unjusti-fied profits" At 317), so a modest profit from operation of a public utility does not transform user charges into taxes. Pinellas Apartment Ass'n v. City of St. Petersburg, supra. On the other hand, unreasonable reliance on utility revenues does amount to "imposing upon [ratepayers] unfair tax burdens." Mitchell v. Mobile, 13 So.2d at 667. Cf. City of Panama City v. State, 60 So.2d 658 (Fla.1952).

Chapter 180 was enacted before the 1968 Constitution was adopted, and some language in the chapter is anachronistic. The statutes refer to "powers granted by this chapter," Fla.Stat. @@ 180.03(1),.21 (1973), whereas, under the 1968 Constitution, the provisions of Chapter 180 are restrictions on the exercise of power the constitution itself confers, rather than the grant of powers these statutory provisions formerly constituted.

But a municipality's power to tax is subject to the restric-tions enumerated in Fla.Const. art. VII @ 9 including the restric-tion discussed above. City of Tampa v. Birdsong Motors, Inc., 261 So.2d 1 (Fla.1972).

Special assessments are another common means of financing sewer construction. Fla.Stat. @ 170.01 (1973). The fees in controversy here are not special assessments. They are charges for use of water and sewer facilities; the property owner who does not use the facilities does not pay the fee. Under no circumstances would the fees constitute a lien on realty.

Petitioners cite Norwick v. Village of Winfield, 81 Ill.-App.2d 197, 225 N.E.2d 30 (2d Dist.1967) in which it was held that an Illinois municipality was without authority to raise money for

future capital requirements, by collecting connection fees in excess of actual connection costs. But the decision in that case turned on the construction of a statute granting the Village of Winfield municipal powers, and is of no relevance to the present case. The Illinois court remarked: "The Village directs our attention to foreign cases. These are of no assistance.... This is particularly true in states with so•called 'home rule' munici-palities [like Florida]."

The "costs of expansion" may sometimes be difficult to identify precisely when certain kinds of capital expenditures are made; in this matter, too, "perfection is not the standard of municipal duty." Rutherford v. City of Omaha, supra 160 N.W.2d at 228.

There is authority to the contrary. Hartman v. Aurora Sanitary District, supra; Home Builders Ass'n of Greater Salt Lake v. Provo City, supra. In Provo City, an ordinance like Dunedin's was upheld even though the fees were used for "general operating expenses." 503 P.2d at 451. We reject the view these cases represent.

If subsection c were excised from Dunedin, Fla.Code @ 25•71, the ordinance would be unobjectionable, because reasonable meter connection charges may permissibly furnish utility revenues for unrestricted use within the utility system. The validity of such charges does not depend on limitation of their use.

J. Johnson, "Constitutionality of Subdivision Control Exactions: The Quest for a Rationale," 52 Cornell L.Q. 871 (1967); Heyman & Gilhool, "The Constitutionality of Imposing Increased Community Costs on New Suburban Residents Through Subdivision Exactions," 73 Yale L.J. 1119 (1964).

City and County of Denver v. Greenspoon, Colo., 344 P.2d 679 (1959).

Home Builders Ass'n v. Provo City, 28 Utah 2d at 405, 503 P.2d at 453.

Call v. City of West Jordan, 614 P.2d at 1259. Reasonableness obviously holds the municipality to a higher standard of rationali-ty than the requirement that its actions not be arbitrary or capricious.

It appears from the City's answers to interrogatories and requests for admissions that the City has collected $ 98,000 by its impact fee, which sum the City has allocated for capital improve-ments in the following areas: electrical, 20%; sewage treatment plant expansion, 60%; and water, 20%. But these allocations (some now expended and some not) do not alter our conclusion. The validity of a fee imposed to augment general revenues is determined by its legal status at the time it is exacted, without regard to how the funds are later allocated or spent. This is not a case like those involving connection fees, where the ordinances imposing the fees designated the collections for specific uses.

This case concerns Ordinance 77•43 as amended by Ordinances 78•19, 78•51, and 79•9. The relevant provisions of the amended ordinance were codified as Section 5•192(e) of the broward County Code and provide:

> (e) A plat suitable for residential development pursuant to the applicable land development regulations shall be designed to provide for the park, open space and recreational needs of the future residents of the platted area, and the developer shall be required to comply with the provisions of subsection (1) and subsection (2) prior to the recordation of the proposed plat.
>
> (2) In order to provide lands or funds or both to be used by the County Commission to provide additional regional, subregional and urban parks necessary to meet the need for such county level parks created by addition-al residential development, a developer must, at the discretion of the County Commission, either:
>
> a. Dedicate land of suitable size, dimension,

topography and general character to serve as regional, subregional or urban parks or a substantial portion thereof which will meet County level park needs created by the development. The total amount of land to be dedicated either on or off the development site must equal a ratio of three (3) acres of land for every one thousand (1,000) residents of the development, or

b. Agree to deposit in a non•lapsing Trust Fund established and maintained by the County, an amount of money equal to or exceeding the value of such amount of land as would have been required to be dedicated under subsection a. above, to be deter-mined by the Broward County Property Appraiser's appraised value of the land or by the most recent purchase price paid for the land, whichever is higher. Such amounts of money shall be deposited in the Trust Fund prior to the recordation of the proposed plat, or c. Agree to deposit in a non-lapsing Trust Fund established and maintained by the County an amount of money as set forth in the schedule below for each dwelling unit to be constructed within the platted area. Such amounts shall be deposited prior to the issuance of a building permit for the construction of each dwelling unit. From the effective date of this Ordinance until September 30, 1978 the amount of money to be deposited for each dwelling unit to be constructed shall be as follows and for each fiscal year thereafter shall be increased by six percent (6%) compounded on an annual basis.

Sixty dollars ($60.00) for each dwelling unit with up to one (1) bedroom.

Eighty•five dollars ($85.00) for each dwelling unit with two (2) bedrooms.

One hundred twenty•five dollars ($125.00) for each dwelling unit with three (3) or more bedrooms.

(3) The county commission shall establish an effective

program for the acquisition of lands for development as regional, sub-regional and urban parks in order to meet, within a reasonable period of time, the existing need for county level parks, and to meet, as it occurs, the need for county level parks which will be created by further residential developments constructed after the effective date of this Ordinance. The annual budget and capital program of the County shall provide for appropriation of funds as may be necessary to carry out the County's program for the acquisition of land for county level parks. The funds necessary to acquire lands to meet the existing need for county level parks must be provided from a source of revenue other than from the amounts deposited in the Trust Fund. Such amounts shall be expended within a reasonable period of time, for the purpose of acquiring and developing land necessary to meet the need for county level parks created by the development in order to provide a system of county level parks which will be available to and substantially benefit the residents of the platted area. If a proposed plat is approved by the County Commis-sion and recorded in the Official records after the effective date of this Ordinance then the developer shall be exempted from any provisions in the County Land Use Plan requiring the payment of impact fees for the purpose of providing funds for the acquisition of land for county level parks.

(7) In accordance with the descriptions of neighbor-hood, community, urban, subregional and regional parks contained in Chapter IIIG, Broward County Land Use Plan 1977, monies deposited by a developer pursuant to this subsection shall not be expended to acquire or develop land for park purposes farther from the platted land than the following distances measured from the perimeter of the platted land:

ii. urban, subregional and regional parks •• 15 miles.

In the present case, the appellant has not asserted that the Broward County ordinance violates a statute.

In light of our ruling, we have found it unnecessary to address the appellee's argument that it was empowered to enact the ordinance by the Local Government Comprehensive Planning Act. @ 163.3161, et seq., Fla.Stat. (1975).

The court, however, concluded that the particular ordinance under review was defective because it failed to include sufficient restrictions on the use of the money collected. The ordinance was later amended and upheld. See City of Dunedin v. Contractors & Builders Association of Pinellas County, 358 So.2d 846 (Fla. 2d DCA 1978), cert. denied, 370 So.2d 458 (Fla.1979), cert. denied, 444 U.S. 867, 100 S.Ct. 140, 62 L.Ed.2d 91 (1979).

This test was espoused, at least in part, in Jordan v. Village of Menomonee Falls, 28 Wis.2d 608, 137 N.W.2d 442 (1965), appeal dismissed, 385 U.S. 4, 87 S.Ct. 36, 17 L.Ed.2d 3 (1966), and described in Juergensmeyer & Blake, Impact Fees: An Answer to Local Governments' Capital Funding Dilemma, 9 Fla. St.U.L.Rev. 415, 430•33 (1981).

Of course, a county could not require subdivision exactions which are so formidable as to deny the property owner of all reasonable use of the property. See Graham v. Estuary Properties, Inc., 399 So.2d 1374 (Fla.), cert. denied, 454 U.S. 1083, 102 S.Ct. 640, 70 L.Ed.2d 618 (1981). Such an exaction would not be reasonable.

Although "developing" is arguably ambiguous, we believe that it adequately limits the use of the funds to construction of capital improvements on the newly acquired land.

The appellant has also relied on two trial court opinions which, although not binding as legal precedent are nonetheless persuasive. Venditti•Siravo, Inc. v. City of Hollywood, 39 Fla. Supp. 121 (Cir.Ct.1973); Carlann Shores, Inc. v. City of Gulf Breeze, 26 Fla.Supp. 94 (Cir.Ct.1966). Venditti•Siravo concerned an ordinance that required the payment of a fixed

percentage of building costs. Carlann Shores concerned an ordinance that required dedication of a fixed percentage of the amount of subdivided land or payment of a fee in lieu thereof. Thus, both ordinances were analogous to the ordinance invalidated in Admiral Development, supra.

See Associated Homebuilders of Greater East Bay, Inc. v. City of Walnut Creek, 4 Cal.3d 633, 94 Cal.Rptr. 630, 484 P.2d 606 (1971); Krughoff v. City of Naperville, 68 Ill. 352, 12 Ill.Dec. 185, 369 N.E.2d 892 (1977); Home Builders Ass'n of Greater Kansas City v. City of Kansas City, 555 S.W.2d 832 (Mo.1977); Billings Properties, Inc. v. Yellowstone County, 144 Mont. 25, 394 P.2d 182 (Mont.1964); Patenaude v. Town of Meredith, 118 N. H. 616, 392 A.2d 582 (N.H.1978); Jenad, Inc. v. Village of Scarsdale, 18 N.Y.2d 78, 271 N.Y.S.2d 955, 218 N.E.2d 673 (1966); Banberry Development Corp. v. South Jordan City, 631 P.2d 899 (Utah 1981); Jordan v. Village of Menomonee Falls, 28 Wis.2d 608, 137 N.W.2d 442 (1965); see generally, Annot., Validity and Construction of Statute or Ordinance Requiring Land Developer to Dedicate Portion of Land for Recreational Purposes, or Make Payment in Lieu Thereof, 43 A.L.R.3d 862 (1972).

This view was espoused by the Florida Legislature which has required counties to establish comprehensive land use plans including the "efficient provision of transportation, water, sewage, schools, parks, recreational facilities, housing and other requirements and services...." See @ 163.3161(3), Fla. Stat. (1981) (emphasis added).

This standard requires an analysis of regulatory fees similar to that adopted by this court in Hollywood, Inc., supra.

The Russ Building Partnership filed a class action against defendant City and County of San Francisco on behalf of approximately 6,000 similarly situated property owners in downtown San Francisco.

One of the city's consultants, Bruce Bernhard, manager of the analysis unit of the San Francisco Public Utilities Commission Bureau of Finance, estimated the increased transit costs

attribut-able to new riders as $ 9.18 per square foot in 1981. He later revised this figure to $ 6.57. Defendant city also employed the consulting firm of Touche•Ross in March 1983 to prepare a new estimate of increased incremental transit costs for use at trial. Touche•Ross's initial estimate was $ 8.71 per square foot; this estimate was later adjusted downward to $ 8.36.

The Ordinance does provide that the fee should be reexamined annually to determine the amount to be levied against new buildings completed in subsequent years. (Ord. No. 244•81, @ 38.6.) But this does not provide for reimbursement to owners who have already paid their share of the fee.

The Sewer Impact Fee Ordinance and the Solid Waste Impact Fee Ordinance were passed on December 4, 1984; the Traffic Impact Fee Ordinance was passed on October 15, 1985.

Pursuant to a later agreement, the developers placed an apartment unit in escrow to cover the fees in the event that the developers were unsuccessful in their challenge. In return, the City issued the certificate of occupancy.

The developers question neither the purpose for which the assessment was made nor the amount of the assessment; their claim is simply that the fee may not be applied to them because they are unable to pass it on to "users."

The doctrine of vested rights/equitable estoppel was used by the parties and the trial court as the analytical framework for assessing the developers' claim. While equitable estoppel is derived from equity, and vested rights from constitutional and common law, Florida courts have employed the concepts interchange-ably. See Rhodes, Hauser & DeMeo, Vested Rights: Establishing Predictability in a Changing Regulatory System, 13 Stetson L. Rev. 1, 2 (1983); Jaslow, Understanding the Concept of Equitable Estoppel in Florida, 38 U. Miami L. Rev. 187 (1984). Hereafter, we will usually refer only to vested rights.

The developers cite a number of cases in which impact fees were assessed before the building permit was issued, thus giving the

developer an opportunity to pass the fee on to the "user." That this occurred or was even a usual practice does not, of course, mean that it is constitutionally required that impact fees be imposed before building permits are issued.

In a section of Russ Building Partnership v. City and County of San Francisco, 188 Cal.App.3d 977, , 234 Cal.Rptr. 1, 10 (1987), later withdrawn from publication, see 199 Cal.App.3d 1496, 246 Cal. Rptr. 21 (1987), the court of appeal observed that "[w]hile the court in H & H Properties noted that developers of completed projects are free to withdraw from plans to convert apartments into condominiums, plaintiffs herein have little use for a partially completed project if they choose not to continue because of the burden of the fee imposed."

The edited version of the court of appeal decision is at 199 Cal. App.3d 1496, 246 Cal.Rptr. 21.

After granting review, 236 Cal.Rptr. 403, 735 P.2d 444, the court limited it to two other issues in the same part of the appellate opinion discussing vested rights, that is "(1) whether extrinsic evidence is relevant for interpreting the building permit; and (2) whether the permit, properly interpreted, gave adequate notice to appellants of the development fee imposed after the permits were issued." 237 Cal.Rptr. at 456, 737 P.2d at 359.

The California Supreme Court expressed no views on the continued validity of Westfield Palos Verdes Co. or People v. H & H Properties. Also, it is not clear from any of the opinions in the case whether the plaintiffs would have had the opportunity to pass the impact fees on to the tenants.

This is not to say, however, that businesses are complete-ly at the risk of every cost increase. A municipality is limited in the size of impact fees it may impose; it may not impose a fee so formidable as to deny the property owner all reasonable use of the property. Hollywood, Inc. v. Broward County, 431 So.2d 606, 611 n.6 (Fla. 4th DCA 1983). If an impact fee is too great, the developer may attempt to rescind his contract with

the buyer by claiming commercial impracticability. See @ 672.615, Fla. Stat. (1987) ("Excuse by failure of presupposed conditions"). See generally Restatement (Second) of Contracts @@ 261, 264 (1981); J. Calamari & J. Perillo, The Law of Contracts @ 13•8 (2d ed. 1977); 1 J. White & R. Summers, Uniform Commercial Code @ 3•9 (3d ed. 1988).

The holding of PruneYard Shopping Center v. Robins, 447 U.S. 74 (1980), is not inconsistent with this analysis, since there the owner had already opened his property to the general public, and in addition permanent access was not required. The analysis of Kaiser Aetna v. United States, 444 U.S. 164 (1979), is not inconsistent because it was affected by traditional doctrines regarding navigational servitudes. Of course neither of those cases involved, as this one does, a classic right•of•way easement.

JUSTICE BRENNAN also suggests that the Commission's public announce-ment of its intention to condition the rebuilding of houses on the transfer of easements of access caused the Nollans to have "no reasonable claim to any expectation of being able to exclude members of the public" from walking across their beach. Post, at 857•860. He cites our opinion in Ruckelshaus v. Monsanto Co., 467 U.S. 986 (1984), as support for the peculiar proposition that a unilateral claim of entitlement by the government can alter property rights. In Monsanto, however, we found merely that the Takings Clause was not violated by giving effect to the Govern-ment's announcement that application for "the right to [the] valuable Government benefit," id., at 1007 (emphasis added), of obtaining registration of an insecticide would confer upon the Government a license to use and disclose the trade secrets contained in the application. Id., at 1007•1008. See also Bowen v. Gilliard, ante, at 605. But the right to build on one's own property •• even though its exercise can be subjected to legitimate permitting requirements •• cannot remotely be described as a "governmental benefit." And thus the announcement that the application for (or granting of) the permit will entail the yielding of a property interest cannot be regarded as establishing the voluntary "exchange," 467 U.S., at 1007, that we found to have occurred in Monsanto. Nor are the

Nollans' rights altered because they acquired the land well after the Commission had begun to implement its policy. So long as the Commission could not have deprived the prior owners of the easement without compensating them, the prior owners must be understood to have transferred their full property rights in conveying the lot.

Contrary to JUSTICE BRENNAN'S claim, post, at 843, our opinions do not establish that these standards are the same as those applied to due process or equal protection claims. To the contrary, our verbal formulations in the takings field have generally been quite different. We have required that the regulation "substantially advance" the "legitimate state interest" sought to be achieved, Agins v. Tiburon, 447 U.S. 255, 260 (1980), not that "the State 'could rationally have decided' the measure adopted might achieve the State's objective." Post, at 843, quoting Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 466 (1981). JUSTICE BRENNAN relies principally on an equal protection case, Minnesota v. Clover Leaf Creamery Co., supra, and two substantive due process cases, Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483, 487•488 (1955), and Day•Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 423 (1952), in support of the standards he would adopt. But there is no reason to believe (and the language of our cases gives some reason to disbelieve) that so long as the regulation of property is at issue the standards for takings challenges, due process challenges, and equal protection challenges are identical; any more than there is any reason to believe that so long as the regulation of speech is at issue the standards for due process challenges, equal protection challenges, and First Amendment challenges are identical. Goldblatt v. Hempstead, 369 U.S. 590 (1962), does appear to assume that the inquiries are the same, but that assumption is inconsistent with the formulations of our later cases.

If the Nollans were being singled out to bear the burden of California's attempt to remedy these problems, although they had not contributed to it more than other coastal landowners, the State's action, even if otherwise valid, might violate either the incorporated Takings Clause or the Equal Protection Clause.

One of the principal purposes of the Takings Clause is "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." Armstrong v. United States, 364 U.S. 40, 49 (1960); see also San Diego Gas & Electric Co. v. San Diego, 450 U.S. 621, 656 (1981) (BRENNAN, J., dissenting); Penn Central Transportation Co. v. New York City, 438 U.S. 104, 123 (1978). But that is not the basis of the Nollans' challenge here.

One would expect that a regime in which this kind of leveraging of the police power is allowed would produce stringent land•use regulation which the State then waives to accomplish other purposes, leading to lesser realization of the land•use goals purportedly sought to be served than would result from more lenient (but nontradeable) development restrictions. Thus, the importance of the purpose underlying the prohibition not only does not justify the imposition of unrelated condition for eliminating the prohibi-tion, but positively militates against the practice.

As JUSTICE BRENNAN notes, the Commission also argued that the construction of the new house would "'increase private use immediately adjacent to public tidelands,'" which in turn might result in more disputes between the Nollans and the public as to the location of the boundary. Post, 851, quoting App. 62. That risk of boundary disputes, however, is inherent in the right to exclude others from one's property, and the construction here can no more justify mandatory dedication of a sort of "buffer zone" in order to avoid boundary disputes than can the construc-tion of an addition to a single•family house near a public street. Moreover, a buffer zone has a boundary as well, and unless that zone is a "no•man's land" that is off•limits for both neighbors (which is of course not the case here) its creation achieves nothing except to shift the location of the boundary dispute further on to the private owner's land. It is true that in the distinctive situation of the Nollans' property the seawall could be established as a clear demarcation of the public easement. But since not all of the lands to which this land•use condition applies have such a convenient reference point, the avoidance of boundary disputes is, even more

obviously than the others, a made•up purpose of the regulation.

See also Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483, 487•488 (1955) ("[T]he law need not be in every respect logically consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it"); Day•Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 423 (1952) ("Our recent decisions make it plain that we do not sit as a super•legislature to weigh the wisdom of legislation nor to decide whether the policy which it expresses offends the public welfare. . . . [S]tate legislatures have constitutional authority to experiment with new techniques; they are entitled to their own standard of the public welfare").

Notwithstanding the suggestion otherwise, ante, at 834•835, n. 3, our standard for reviewing the threshold question whether an exercise of the police power is legitimate is a uniform one. As we stated over 25 years ago in addressing a takings challenge to government regulation:

> "The term 'police power' connotes the time•tested conceptional limit of public encroachment upon private interests. Except for the substitution of the familiar standard of 'reasonableness,' this Court has generally refrained from announcing any specific criteria. The classic statement of the rule in Lawton v. Steele, 152 U. S. 133, 137 (1894), is still valid today: . . . '[I]t must appear, first, that the interests of the public . . . require [government] interference; and, second, that the means are reasonably necessary for the accomplishment of the purpose, and not unduly oppressive upon individu-als.' Even this rule is not applied with strict preci-sion, for this Court has often said that 'debatable questions as to reasonable-ness are not for the courts but for the legislature. . . .' E.g., Sproles v. Binford, 286 U.S. 374, 388 (1932)." Goldblatt v. Hemp-stead, 369 U.S. 590, 594•595 (1962).

See also id., at 596 (upholding regulation from takings

challenge with citation to, inter alia, United States v. Carolene Products Co., 304 U.S. 144, 154 (1938), for proposition that exercise of police power will be upheld if "any state of facts either known or which could be reasonably assumed affords support for it). In Connolly v. Pension Benefit Guaranty Corporation, 475 U.S. 211 (1986), for instance, we reviewed a takings challenge to statutory provisions that had been held to be a legitimate exercise of the police power under due process analysis in Pension Benefit Guaranty Corporation v. R. A. Gray & Co., 467 U.S. 717 (1984). Gray, in turn, had relied on Usery v. Turner Elkhorn Mining Co., 428 U.S. 1 (1976). In rejecting the takings argument that the provisions were not within Congress' regulatory power, the Court in Connolly stated: "Although both Gray and Turner Elkhorn were due process cases, it would be surprising indeed to discover now that in both cases Congress unconstitutionally had taken the assets of the employers there involved." 475 U.S., at 223. Our phraseology may differ slightly from case to case •• e.g., regulation must "substantially advance," Agins v. Tiburon, 447 U.S. 255, 260 (1980), or be "reasonably necessary to," Penn Central Transporta-tion Co. v. New York City, 438 U.S. 104, 127 (1978), the govern-ment's end. These minor differences cannot, however, obscure the fact that the inquiry in each case is the same.

Of course, government action may be a valid exercise of the police power and still violate specific provisions of the Constitu-tion. JUSTICE SCALIA is certainly correct in observing that challenges founded upon these provisions are reviewed under different standards. Ante, at 834•835, n. 3. Our consideration of factors such as those identified in Penn Central, supra, for instance, provides an analytical framework for protecting the values underlying the Takings Clause, and other distinctive approaches are utilized to give effect to other constitutional provisions. This is far different, however, from the use of different standards of review to address the threshold issue of the rationality of government action.

As this Court declared in United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 127 (1985):

> "A requirement that a person obtain a permit before engaging in a certain use of his or her property does not itself 'take' the property in any sense: after all, the very existence of a permit system implies that permission may be granted, leaving the landowner free to use the property as desired. Moreover, even if the permit is denied, there may be other viable uses available to the owner. Only when a permit is denied and the effect of the denial is to prevent 'economically viable' use of the land in question can it be said that a taking has occurred."

We also stated in Kaiser Aetna v. United States, 444 U.S. 164, 179 (1979), with respect to dredging to create a private marina:

> "We have not the slightest doubt that the Government could have refused to allow such dredging on the ground that it would have impaired navigation in the bay, or could have conditioned its approval of the dredging on petitioners' agreement to comply with various measures that it deemed appropriate for the promotion of navigation."

The list of cases cited by the Court as support for its approach, ante, at 839•840, includes no instance in which the State sought to vindicate pre•existing rights of access to navigable water, and consists principally of cases involving a requirement of the dedication of land as a condition of subdivision approval. Dedication, of course, requires the surrender of ownership of property rather than, as in this case, a mere restriction on its use. The only case pertaining to beach access among those cited by the Court is Mackall v. White, 85 App. Div. 2d 696, 445 N.Y.S. 2d 486 (1981). In that case, the court found that a subdivision application could not be conditioned upon a declaration that the landowner would not hinder the public from using a trail that had been used to gain access to a bay. The trail had been used despite posted warnings prohibiting passage, and despite the owner's resistance to such use. In that case, unlike this one, neither the State Constitution, state statute, administrative practice, nor the

conduct of the landowner operated to create any reasonable expectation of a right of public access.

This may be because the State in its briefs and at argument contended merely that the permit condition would serve to preserve overall public access, by offsetting the diminution in access resulting from the project, such as, inter alia, blocking the public's view of the beach. The State's position no doubt reflected the reasonable assumption that the Court would evaluate the rationality of its exercise of the police power in accordance with the traditional standard of review, and that the Court would not attempt to substitute its judgment about the best way to preserve overall public access to the ocean at the Faria Family Beach Tract.

As the Commission's Public Access (Shoreline) Interpreta-tive Guidelines state:

> "[T]he provision of lateral access recognizes the potential for conflicts between public and private use and creates a type of access that allows the public to move freely along all the tidelands in an area that can be clearly delineated and distinguished from private use areas. . . . Thus the 'need' determination set forth in P[ublic] R[esources] C[ode] 30212(a)(2) should be measured in terms of providing access that buffers public access to the tidelands from the burdens generated on access by private development." App. 358•359.

The Court suggests that the risk of boundary disputes "is inherent in the right to exclude others from one's property," and thus cannot serve as a purpose to support the permit condition. Ante, at 839, n. 6. The Commission sought the deed restriction, however, not to address a generalized problem inherent in any system of property, but to address the particular problem created by the shifting high•tide line along Faria Beach. Unlike the typical area in which a boundary is delineated reasonably clearly, the very problem on Faria Beach is that the boundary is not constant. The area open to public

use therefore is frequently in question, and, as the discussion, supra, demonstrates, the Commission clearly tailored its permit condition precisely to address this specific problem.

The Court acknowledges that the Nollans' seawall could provide "a clear demarcation of the public easement," and thus avoid merely shifting "the location of the boundary dispute further on to the private owner's land." Ibid. It nonetheless faults the Commission because every property subject to regulation may not have this feature. This case, however, is a challenge to the permit condition as applied to the Nollans' property, so the presence or absence of seawalls on other property is irrelevant.

See, e.g., Bellefontaine Neighbors v. J. J. Kelley Realty & Bldg. Co., 460 S.W. 2d 298 (Mo. Ct. App. 1970); Allen v. Stockwell, 210 Mich. 488, 178 N.W. 27 (1920). See generally Shultz & Kelley, Subdivision Improvement Requirements and Guarantees: A Primer, 28 Wash. U.J. Urban and Contemp. L. 3 (1985).

The Commission acted in accordance with its Guidelines both in determining the width of the area of passage, and in prohibiting any recreational use of the property. The Guidelines state that it may be necessary on occasion to provide for less than the normal 25•foot•wide accessway along the dry sand when this may be necessary to "protect the privacy rights of adjacent property owners." App. 363. They also provide this advice in selecting the type of public use that may be permitted:

> "Pass and Repass. Where topographic constraints of the site make use of the beach dangerous, where habitat values of the shoreline would be adversely impacted by public use of the shoreline or where the access-way may encroach closer than 20 feet to a residential structure, the accessway may be limited to the right of the public to pass and repass along the access area. For the purposes of these guidelines, pass and repass is defined as the right to walk and run along the shoreline. This would provide for public access along the shoreline but would not allow for any additional use of the

accessway. Because this severely limits the public's ability to enjoy the adjacent state owned tidelands by restricting the potential use of the access areas, this form of access dedication should be used only where necessary to protect the habitat values of the site, where topographic constraints warrant the restriction, or where it is necessary to protect the privacy of the landowner." Id., at 370.

At the time of the Nollans' permit application, 43 of the permit requests for development along the Faria Beach had been conditioned on deed restrictions ensuring lateral public access along the shoreline. App. 48.

The Court suggests that Ruckelshaus v. Monsanto is distinguishable, because government regulation of property in that case was a condition on receipt of a "government benefit," while here regulation takes the form of a restriction on "the right to build on one's own property," which "cannot remotely be described as a 'government benefit.'" Ante, at 834, n. 2. This proffered distinction is not persuasive. Both Monsanto and the Nollans hold property whose use is subject to regulation; Monsanto may not sell its property without obtaining government approval and the Nollans may not build new development on their property without government approval. Obtaining such approval is as much a "government benefit" for the Nollans as it is for Monsanto. If the Court is somehow suggesting that "the right to build on one's own property" has some privileged natural rights status, the argument is a curious one. By any traditional labor theory of value justifica-tion for property rights, for instance, see, e. g., J. Locke, The Second Treatise of Civil Government 15•26 (E. Gough, ed. 1947), Monsanto would have a superior claim, for the chemical formulae which constitute its property only came into being by virtue of Monsanto's efforts.

The Senior Land Agent's report to the Commission states that "based on my observations, presently, most, if not all of Faria Beach waterward of the existing seawalls [lies] below the Mean High Tide Level, and would fall in public domain or sovereign category of ownership." App. 85 (emphasis added).

The Senior Land Agent's report stated:

> Based on my past experience and my investigation to date of this property it is my opinion that the area seaward of the revetment at 3822 Pacific Coast Highway, Faria Beach, as well as all the area seaward of the revetments built to protect the Faria Beach community, if not public owned, has been impliedly dedicated to the public for passive recreation-al use." Id., at 86.

As the California Court of Appeals noted in 1985, "Since 1972, permission has been granted to construct more than 42,000 building units within the land jurisdiction of the Coastal Commission. In addition, pressure for development along the coast is expected to increase since approximately 85% of California's population lives within 30 miles of the coast." Grupe v. California Coastal Comm'n, 166 Cal. App. 3d 148, 167, n. 12, 212 Cal. Rptr. 578, 589, n. 12 (1985). See also Coastal Zone Management Act, 16 U.S.C. @ 1451(c) (increasing demands on coastal zones "have resulted in the loss of living marine resources, wildlife, nutrient•rich areas, permanent and adverse changes to ecological systems, decreasing open space for public use, and shoreline erosion").

I believe that States should be afforded considerable latitude in regulating private development, without fear that their regulatory efforts will often be found to constitute a taking. "If . . . regulation denies the private property owner the use and enjoyment of his land and is found to effect a 'taking,'" however, I believe that compensation is the appropriate remedy for this constitutional violation. San Diego Gas & Electric Co. v. San Diego, 450 U.S. 621, 656 (1981) (BRENNAN, J., dissenting) (emphasis added). I therefore see my dissent here as completely consistent with my position in First English Evangelical Lutheran Church v. Los Angeles County, 482 U.S. 304 (1987).

"The constitutional rule I propose requires that, once a court finds that a police power regulation has effected a 'taking,' the government entity must pay just compensation for the period commencing on the date the regulation first effected the

'taking,' and ending on the date the government entity chooses to rescind or otherwise amend the regulation." 450 U.S., at 658.

The ordinance applies to residential building permits, permits for residential mobile home installations, and permits to make improvements to land reasonably expected to place additional students in St. Johns County public schools.

We note that other states have upheld school impact fees in the face of various state law and federal constitutional challeng-es. See Candid Enters., Inc. v. Grossmont Union High School Dist., 39 Cal. 3d 878, 705 P.2d 876, 218 Cal. Rptr. 303 (1985) (impact fee imposed by school district to be used for temporary or permanent school facilities necessitated by rapid growth upheld against claim that it was preempted by state law and violated equal protection); McClain W. No. 1 v. San Diego County, 146 Cal. App. 3d 772, 194 Cal. Rptr. 594 (1983) (county•imposed school impact fee upheld against challenge that fee was unreasonably applied to project designed to attract weekend or retirement home purchasers where school•age children were not prohibited from residing in units). See also Krughoff v. City of Naperville, 68 Ill. 2d 352, 369 N.E.2d 892 (1977) (city ordinance requiring developer to make contribution of land or money for school and park sites upheld as within city's home•rule power and not violative of equal protection); Jordan v. Village of Menomonee Falls, 28 Wis. 2d 608, 137 N.W.2d 442 (1965) (ordinance requiring dedication of land or payment of money in lieu thereof for schools, parks, or recreational sites upheld against challenge that it constituted an unconstitutional tax and a taking without just compensation), appeal dismissed, 385 U.S. 4 (1966).

Even if the ordinance were amended to limit expenditures to schools serving areas subject to the impact fee, we are led to wonder why this would not implicate the requirement of a uniform system of public schools, which is discussed in another context later in this opinion.

In Home Builders & Contractors Association v. Board of County Commission-ers, 446 So. 2d 140 (Fla. 4th DCA 1983), review

denied, 451 So. 2d 848 (Fla.), appeal dismissed, 469 U.S. 976 (1984), an impact fee to build roads imposed by the county was upheld over the objection that many of the municipalities in the county had declined to join in the collection of the fees. However, because the impact fees in that case were designed to be spent only on roads serving the developments that paid the fees, we assume that the nonparticipating municipalities did not benefit from the funds that were collected.

We do not foreclose the possibility that the ordinance could also meet the second prong of the dual rational nexus test by a showing, based on land use plans and demographic and other statistics, that substantially all of the projected development for the county falls within those areas which are subject to the impact fee. However, we reject the county's suggestion that the requisite nexus could be established by ensuring that collected funds are only spent in a manner benefitting the dwelling units for which the fees have been paid and simultaneously confirming that additional educational facilities needed to serve new dwelling units in nonparticipating municipalities are made available when needed and are funded through nonimpact fee funds. This practice would unfairly discriminate against those paying the impact fees because it would result in an inordinate share of their ad valorem taxes being applied to school construction in municipalities which had not signed an interlocal agreement.

We would not find objectionable a provision that exempted from the payment of an impact fee permits to build adult facilities in which, because of land use restrictions, minors could not reside. See White Egret Condominium, Inc. v. Franklin, 379 So. 2d 346 (Fla. 1979).

See generally Smith, From Subdivision Improvement Require-ments to Community Benefit Assessments and Linkage Payments: A Brief History of Land Development Exactions, 50 Law & Contemp. Probs. 5 (Winter 1987).

See, e.g., Hollywood Inc. v. Broward County, 431 So. 2d 606 (Fla. Dist. Ct. App.), cert. denied, 440 So. 2d 352 (1983).

Upholding a county ordinance requiring the dedication of land or payment of a fee to assist the county in acquiring and developing parks, the court noted that (1) the funds had to be expended within a reasonable time, (2) the funds had to be used to meet the need created by the development, and (3) the park system thereby provided would "substantially benefit the residents of the platted area." Id. at 612.

Bauman & Ethier, Development Exactions and Impact Fees: A Survey of American Practices, 50 Law & Contemp. Probs. 51, 51•52 (Winter 1987); Blaesser & Kentopp, Impact Fees: The "Second Generation," 38 Wash. U.J. Urb. & Contemp. L. 55, 59 (1990).

Honolulu is considering an ordinance that would impose a similar low•income housing fee on golf•course developers. Cabrera, Taxman, Spare That Golf Course, Wall St. J., July 11, 1991, at A10, col. 3.

In land•use cases, this sometimes is called the relationship between the "exactions" and the "impacts."

The Takings Clause of the Fifth Amendment to the Constitution of the United States provides:

> "Nor shall private property be taken for public use, without just compensation."

That Clause is made applicable to the states by the Due Process Clause of the Fourteenth Amendment. Penn Central Trans. Co. v. New York City, 438 U.S. 104, 122, 98 S Ct 2646, 57 L Ed 2d 631 (1978). See Annot, Supreme Court's View As to What Constitutes a "Taking" Within Meaning of Fifth Amendment's Prohibition Against Taking of Private Property For Public Use Without Just Compensation, 89 L Ed 2d 977 (1988).

Petitioners also brought a challenge under Article I, section 18, of the Oregon Constitution (Takings Clause). Before this court, however, they expressly have limited themselves to a federal claim. Therefore, we do not address any Oregon constitutional issue.

City's decision includes the following relevant condition:

> "1. The applicant shall dedicate to the City as Greenway all portions of the site that fall within the existing 100•year floodplain [of Fanno Creek] (i.e., all portions of the property below elevation 150.0) and all property 15 feet above (to the east of) the 150.0 foot floodplain boundary. The building shall be designed so as not to intrude into the greenway area."

The dedication required by that condition comprises about 7,000 square feet, or approximately 10 percent of the subject real property.

The applicants requested variances to Community Development Code standards requiring among other things dedication of area of the subject parcel that is within the 100-year floodplain of Fanno Creek and dedication of additional area adjacent to the 100-year floodplain for a pedestrian/bicycle path.

In Nollan, the California Coastal Commission conditioned a permit to the plaintiffs to replace a bungalow on their beachfront lot with a larger house on allowing a public easement to go across their beach, which was located between two public beaches. The California Court of Appeals had found that there was no taking, because the condition did not deprive the landowners of all reasonable use of their property. In an opinion written by Justice Scalia, the Nollan majority concluded that none of the designated purposes was substantially advanced by preserving a right to public access:

> "It is quite impossible to understand how a requirement that people already on the public beaches be able to walk across the Nollans' property reduces any obstacles to view the beach created by the new house. It is also impossible to understand how it lowers any 'psychological barrier' to using the public beaches, or how it helps to remedy any additional congestion on them caused by construction of the Nollans' new house."
> Nollan v. California Coastal Comm'n, 483 U.S. 825,

838•39, 107 S Ct 3141, 97 L Ed 2d 677 (1987).

We review pursuant to ORS 197.850(9), which provides:

"The court may affirm, reverse or remand the order. The court shall reverse or remand the order only if it finds:

"(a) The order to be unlawful in substance or procedure, but error in procedure shall not be cause for reversal or remand unless the court shall find that substantial rights of the petitioner were prejudiced thereby;

"(b) The order to be unconstitutional; or

"(c) The order is not supported by substantial evidence in the whole record as to the facts found by the board under ORS 197.830(13)."

In Nollan, the Supreme Court stated:

"Our cases have not elaborated on the standards for determining what constitutes a 'legitimate state interest' or what type of connection between the regulation and the state interest satisfies the requirement that the former 'substantially advance' the latter. They have made clear, however, that a broad range of governmental purposes and regulations satisfies these requirements." 483 U.S. at 834•35 (footnote omitted).

The Supreme Court generally has eschewed any "set formula" for determining when and under what circumstances a given regulation would be seen as going "too far" for purposes of the Fifth Amendment, preferring to engage in essentially ad hoc, factual inquiries. Lucas v. So. Carolina Coastal Council, 505 U.S. , 112 S Ct 2886, 120 L Ed 2d 798 (1992); see McDougal v. County of Imperial, 942 F2d 668, 677•78 (9th Cir 1991) (takings analysis involves essentially ad hoc, factual inquiries).

Petitioners also argue that, because city's dedication

conditions would require permanent physical occupation of a portion of their property, they amount to a per se taking. That argument is not well taken. Such dedication conditions are not per se takings, because the occupation may occur only with the owner's permission. Petitioners may avoid physical occupation of their land by withdrawing their application for a development permit.

The Supreme Court's analysis in Yee v. City of Escondido, 503 U.S. , 112 S Ct 1522, 118 L Ed 2d 153 (1992), settles this point. In Yee, the owner of a mobile home park asserted a per se taking when the local city council adopted a rent control ordinance that, as the park owner argued, transferred a discrete interest in land from the park owner to his tenants. The Yee court held:

> "The government effects a physical taking only where it requires the landowner to submit to the physical occupation of his land. "This element of required acquiescence is at the heart of the concept of occupation.'" 118 L Ed 2d at 165 (emphasis in original).

Because the park owner in Yee could have evicted the tenants and used the property for another purpose, any physical invasion that might occur would not be the result of forced acquiescence. Ibid.

We are not alone in interpreting Nollan in this manner. In Commercial Builders v. Sacramento, 941 F2d 872 (9th Cir 1991), cert den 112 S Ct 1997 (1992), the Ninth Circuit also held that Nollan did not demand any different level of scrutiny than the one it used in Parks v. Watson, supra:

> "As a threshold matter, we are not persuaded that Nollan materially changes the level of scrutiny we must apply to this Ordinance. The Nollan Court specifically stated that it did not have to decide 'how close a "fit" between the condition and the burden is required' * * *. It also noted that its holding was 'consistent with the approach taken by every other court [sic] has

considered the question,' citing Parks as the lead case in its string cite. * * *

"We therefore agree that Nollan does not stand for the proposition that an exaction ordinance will be upheld only where it can be shown that the development is directly responsible for the social ill in question. Rather, Nollan holds that where there is no evidence of a nexus between the development and the problem that the exaction seeks to address, the exaction cannot be upheld." Id., 941 F2d at 874•75.

In Nollan, the Supreme Court said:

"We view the Fifth Amendment's Property Clause to be more than a pleading requirement, and compliance with it to be more than an exercise in cleverness and imagination. As indicated earlier, our cases describe the condition for abridgement of property rights through the police power as a 'substantial advancing' of a legitimate state interest. We are inclined to be particularly careful about the adjective where the actual conveyance of property is made a condition to the lifting of a land•use restriction, since in that context there is heightened risk that the purpose is avoidance of the compensation requirement, rather than the stated police power objective." 483 U.S. at 841.

See Lucas v. So. Carolina Coastal Council, supra, 120 L Ed 2d at 813 (the Fifth Amendment is violated when land use regulation does not substantially advance legitimate state interests or denies an owner all economically viable use of land).

The term "substantial relationship" is not used in Nollan, although the Court did cite Agins v. City of Tiburon, 447 U.S. 255, 260, 100 S Ct 2138, 65 L Ed 2d 106 (1980), for the proposition that a regulation must "substantially advance legitimate state interests." Nollan, supra, 483 U.S. at 834.

A note in the Boston University Law Review contains an

excellent historical overview of exactions. See Note, "'Take' My Beach Please!": Nollan v. California Coastal Commission and a Rational•Nexus Constitutional Analysis of Development Exactions, 69 BUL Rev 823, 848•49 (1989).

Article I, section 18, of the Oregon Constitution, provides in part:

"Private property shall not be taken for public use . . . without just compensation * * *."

In this court, petitioners make no claim under the Oregon Constitution.

Petitioners do not contest the sufficiency of the evidence to support the findings of fact.

> "For a long time, there has been no Just Compensation Clause in constitutional law. Three words, 'for public use,' have been cut away from it, treated as if they prescribed a distinct command of their own. Instead of the Just Compensation Clause as written, we have a Takings Clause engulfed in confusion and a Public Use Clause of nearly complete insignificance.
>
> "This strange breach is never remarked on. It is simply presupposed, most clearly, by those who complain about the toothlessness of the 'Public Use Clause' in modern doctrine. Their complaint is an old story: it has to do with the line of Supreme Court decisions in which the public•purpose requirement received its current, broad construc-tion." Rubenfeld, Usings, 102 Yale LJ 1077, 1078•79 (1993) (footnotes omitted; emphasis in original).