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

> "Be sure you are right, then go ahead." There is nothing in the nature of American constitutional law which should produce timidity or the palsying of effort by fear of constitutional difficulties. The American Constitution is sufficiently beneficent and wide-armed to receive within its protection whatever is morally and intellectually justifiable and really needed for the public welfare.
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> BETTMAN, CITY AND REGIONAL PLANNING PAPERS 84 (1946).

> We do not sit to determine whether a particular housing project is or is not desirable. The concept of the public welfare is broad and inclusive. . . . The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.
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> Douglas, J., for the Court in *Berman v. Parker*, 348 U.S. 26, 33 (1954).

IN THE YEARS conventionally numbered from *Euclid v. Ambler*[1] in 1926, controlling or influencing land use and land development has become a major enterprise of federal, state, and local governments. Dismally for the lawyer, the legal aspects of the endeavor assume multi-volume proportions. If the matter poses any single central question, however, it surely is, "Who is to make the land-use, the land-development, decisions?" Assuming, as one must, that the answer is to have a strong public flavor, a further question arises: "Just how

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[1] 272 U.S. 365 (1926). Perhaps in California we should say since Miller v. Board of Public Works, 195 Cal. 477, 234 Pac. 381 (1925) and Zahn v. Board of Public Works, 195 Cal. 497, 234 Pac. 388 (1925), the local landmark zoning decisions.

onerous can the public decision, constraint, or influence be—how sharply can it bite into the traditional, and presumably still existing, prerogatives and expectations of the property owner?"

If the entire matter could be thus reduced, an orderly-minded person might assume that there is an agency at some tier of government that simply tells the landowner what he must, may, or may not do. Any inviolable immunities or powers of the landowner might be specified at length in charter fashion. But, unfortunately, neither government, private property, nor public planning is this simple. And neither is the relevant legal and constitutional history. To the distress of the more positive-minded public planners, the specific devices available to implement public planning have an almost gimmick-like quality. Subdivision control, as exercised through map or plat approval, is an example.

The explanation is largely historical. In the late 1800's, most states enacted subdivision map acts that were concerned simply with the easy and accurate description of land. California did so.[2] Somewhat later, the requisite of public approval and such rudimentary requirements as street alignment were added. California did this too.[3] Then, about the time zoning started to become universal practice, it dawned upon most observers that every subdivision becomes an important and relatively permanent feature of the community—that every urban area is, for the most part, a composite of the plans of individual subdivisions. The obvious conclusion was drawn that if there is ever to be any public planning and control of land development and use, there is no better stage for it than at the critical first division of land into usable parcels.[4]

In 1928, the U.S. Department of Commerce, the agency that also prepared the model zoning act which became the base for most zoning

[2] Cal. Stat. 1893, ch. 80, §§ 1-4, p. 96.

[3] Cal. Stat. 1907, ch. 231, § 19, p. 290; Smith v. Bach, 183 Cal. 259, 191 Pac. 14 (1920).

[4] The oft-quoted statement of these considerations is that of RATCLIFF, URBAN LAND ECONOMICS 415 (1949):

> In the entire process of city growth, there is no step more critical than the original subdivision of raw land. To a considerable extent, the size and shape of the lots, the street system that is provided, and the general character of the land planning determine the use to which the land is to be permanently dedicated. The character of the neighborhood is largely established by the way in which the land is subdivided. Furthermore, there is little chance to offset or remedy the mistakes in judgment or the errors of shortsighted cupidity that are reflected in the land arrangements; for, once the lots have been sold off into individual ownership, even a few of them, replanning and resubdividing become virtually impracticable. Subdividers, then, are city builders, builders of a structure that lives down through the years as a boon or a burden for the men and women and children who must live out their lives within an environment over which they had no original control.

law in this country, promulgated its Standard City Planning Enabling Act.[5] The subdivision control provisions of this proposal became parity for American jurisdictions in the regulation of subdivision development. California accepted them. The current Subdivision Map Act,[6] although much amended and frequently recast, is traceable to an enactment of 1929 that is identifiably the Department of Commerce proposal.[7] In this third stage of subdivision control, preoccupation is with (1) integration of the particular subdivision into the community's plans for its own development, and (2) the imposition of qualitative controls that presumably assure subdivision development in a manner conducive to the well-being of the prospective occupants and the community in general.

This type of regulation is still much in evidence and undoubtedly will continue indefinitely. California courts state the primary purposes of the Subdivision Map Act to be (1) to provide for control of the design and improvement of subdivisions with proper consideration of their relation to adjoining areas,[8] and (2) to require the subdivider to do the original work of providing or improving streets and other improvements before their maintenance is taken over by the city or county.[9] But without leaving behind this "design and improvement" type regulation, subdivision planning and control has entered its fourth and critical stage. The comparatively simple map acts and their implementing local ordinances have been swept up in the whole range of governmental and financial problems associated with rapid and extensive urban growth. The general result has been that communities have attempted to ameliorate some of the problems by imposition of novel conditions and requirements in connection with land subdivision. The clash, of course, is with the property rights of owners and developers.

Legal aspects of this development, as it has occurred in other states, has been much discussed in recent literature.[10] California cer-

[5] See HARR, LAND-USE PLANNING 347-351 (1959); Reps, *Control of Land Subdivision by Municipal Planning Boards*, 40 CORNELL L.Q. 258 (1955).

[6] CAL. BUS. & PROF. CODE §§ 11500-641.

[7] See Cal. Stat. 1929, ch. 837, §§ 1-40, pp. 1790-1805.

[8] Kelber v. City of Upland, 155 Cal. App. 2d 631, 318 P.2d 561 (1957).

[9] Hoover v. Kern County, 118 Cal. App. 2d 139, 257 P.2d 492 (1953).

[10] *E.g.*, Cutler, *Legal and Illegal Methods for Controlling Community Growth on the Urban Fringe*, WIS. L. REV. 370 (1961); Delehant, *Representing the Land Developer: Step by Step Techniques*, 40 NEB. L. REV. 330 (1961); Fagin, *Regulating the Timing of Urban Development*, 20 LAW & CONTEMP. PROB. 298 (1955); Frey, *Subdivision Control and Planning*, 1961 ILL. L. FORUM 411 (1961); Panel, *Subdivision Regulations Requiring Utilities, Streets, Parks, Etc.*, 23 NIMLO MUNI. L. REV. 615 (1960); Schmandt, *Municipal Control of Urban Expansion*, 29 FORDHAM L. REV. 637 (1961); Smith, *The Dilemma Faced by Municipalities in Controlling Nearby Land Development*, 40 NEB. L. REV. 318 (1961).

tainly has the underlying growth and planning problem. Presumably we shall also have the full statutory and case law sequelae. After an outline of the California law providing for subdivision approval, this article summarizes the existing statutory provisions and decisions on the more prevalent problems.

The Subdivision Map Act

Understanding of California subdivision regulation is frequently confused because it involves two different sets of state laws and two different types of local ordinances, *i.e.*, the Subdivision Map Act, the Real Estate Law,[11] local ordinances directly implementing the map act, and local ordinances adopted under other powers of cities and counties.[12]

The Subdivision Map Act is the enabling statute for local supervision of subdivisions. Its enforcement is entirely local; there is no state agency directly concerned with its administration.

The Real Estate Law is administered by the State Real Estate Commissioner. Its purpose is to prevent fraud, misrepresentation, and deceit in the marketing of parcels. Usually this is done by issuing a "subdivision public report" for the information of prospective purchasers. The Real Estate Commissioner has no authority to control directly the manner of subdivision or the making of improvements.

Apart from the provisions added to deal with specific problems, the Subdivision Map Act vests control of the "design" and "improvement" of "subdivisions" in the governing body of cities and counties. Each city and county is required to enact an ordinance for the purpose.[13] With minor exceptions and qualifications, the act's definition of "subdivision" can be paraphrased as being real property—improved or not—shown on the latest adopted tax roll as a unit or contiguous unit—divided for the purpose of sale or lease—into five or more parcels —within any one-year period.[14] "'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."[15] "'Improvement' refers to only such street work and utilities to be installed, or agreed to be installed by the subdivider on the land to be used for public or private streets, highways, ways, and easements, as are necessary for the general use of the lot owners in the

[11] CAL. BUS. & PROF. CODE §§ 11000-202.

[12] See Griffin, *Subdivision Regulation*, ch. 26 in CALIFORNIA LAND SECURITY AND DEVELOPMENT (Cal. C.E.B. 1960); SUBDIVISION MANUAL (California Senate, 1959).

[13] CAL. BUS. & PROF. CODE § 11525.

[14] CAL. BUS. & PROF. CODE § 11535.

[15] CAL. BUS. & PROF. CODE § 11510.

subdivision and local neighborhood traffic and drainage needs. . . ."[16]

With the exception of these definitions, the act makes no general reference to conditions that may be imposed or requirements that may be made in the local ordinance. It blandly states:[17]

> 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.

The subdivider is provided a direct procedural avenue for challenging conditions or requirements. The act provides that if he is dissatisfied with any action of the planning commission with respect to his tentative map, or the kinds, nature, and extent of the improvements required, he may appeal to the governing body for a public hearing. The governing body is required to hear testimony respecting the character of the neighborhood in which the subdivision is to be located, the kinds, nature and extent of improvements, and the quality or kinds of development to which the area is best adapted. It may sustain, modify or reject any recommendations or rulings of the planning commission and "may make such findings as are not inconsistent with the provisions of [the act] . . . or local ordinance adopted pursuant to [the act]. . . ."[18]

In 1961, the legislature authorized creation of a subdivision map appeal board by any city or county as an intermediary between the planning commission and the governing body.[19] If an appeal board is created, appeals from the planning commission to the board, and from the board to the governing body, are upon the same basis as appeals directly from the commission to the governing body.

The decision of the governing body concerning design or improvements is expressly made subject to review as to its reasonableness by the superior court. A special proceeding may be brought within ninety days after the decision and the proceeding is given a prescribed precedence over other matters on the calendar.[20] At least as judged by appellate decisions, the direct court review proceedings appear to be little used. Perhaps the reasoning is that logically, if inartistically, expressed by one development-minded lawyer:[21]

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[16] CAL. BUS. & PROF. CODE § 11511.

[17] CAL. BUS. & PROF. CODE § 11551.

[18] CAL. BUS. & PROF. CODE § 11552.

[19] Cal. Stat. 1961, ch. 194, § 1, p. 1200, § 3, p. 1201-2; CAL. BUS. & PROF. CODE §§ 11512, 11552.

[20] CAL. BUS. & PROF. CODE § 11525.

[21] Delhant, *supra* note 10.

> There is one thing to remember, that you almost have to win on the approval of a plat before the planning board and the city council. Court appeals from denials are almost impossible, because basically when a plat is denied with no grounds stated, you have to prove that the action of the board was arbitrary, and you would be surprised how many nonarbitrary reasons a board or a city can come up with between the time they denied the plat without approval and the time you get to court. So the only way to hope for a successful appeal, in my opinion, would be to nail the administrative body down by a court reporter and a record on the grounds of the denial; in other words, what are the grounds? "Because you won't dedicate parks." Fine! Then you can go to court.

Local Ordinances

City and county ordinances attaching conditions to the approval of subdivision maps fall into two categories: (1) those which derive their force from the enabling Subdivision Map Act, and (2) those which may be validly enacted without regard to that legislation. The act defines the kind of local ordinance it contemplates: "'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 [act] . . . , in so far as the provisions of the ordinance are consistent with and not in conflict with the provisions of this [act] . . . ."[22]

But there can be at least three types of ordinances relating to subdivisions that would not necessarily be inconsistent with the act: (1) those regulating divisions of land that are not "subdivisions" within the meaning of the act; (2) those imposing requirements or conditions pursuant to the general homerule powers of cities and counties; and (3) those based upon state legislation other than the Subdivision Map Act.

It is true that the only definition of "subdivision" is that set forth in the act. Local ordinances cannot change the definition. The act, however, expressly leaves cities and counties free to regulate transactions that are not "subdivisions" as defined in the state statute.[23] The result is that requirements of a city or county respecting divisions of land cannot be determined from the Subdivision Map Act alone. Many localities require the filing of a map, or at least the making of some sort of application, in cases of divisions that do not come within the statutory definition. In many cities and a few counties, local ordinances require filing of a map for a division of land into two parcels.[24]

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[22] CAL. BUS. & PROF. CODE § 11506.

[23] CAL. BUS. & PROF. CODE § 11540.1; 12 CAL. OPS. ATT'Y GEN. 74 (1948).

[24] See Clemons v. City of Los Angeles, 36 Cal. 2d 95, 222 P.2d 439 (1950); Morris v. City of Los Angeles, 116 Cal. App. 2d 856, 254 P.2d 935 (1953).

Home rule powers of both cities and counties can justify additional subdivision requirements. In dealing with the argument that these necessarily conflict with the state act, the Supreme Court has stated:[25]

> 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 ordinances. 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 . . . 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 result is a range of decisions dealing with the question whether particular requirements or conditions "conflict with" or "supplement" those contemplated by the state act.[26]

State legislation other than the Subdivision Map Act can also be the basis for ordinances preventing or conditioning the approval of maps. For example, both zoning and master planning have been held to be "based on statutes of equal dignity with the Subdivision Map Act" and therefore capable of excluding or qualifying approval of subdivisions.[27] There are, of course, many items of state legislation concerning local government and finance that conceivably can be made the basis of conditions to subdivision approval. But to the extent that these conditions deal with matters almost unrelated to subdivision regulation, they add little to the power of the locality to issue or deny building permits.[28]

Compulsory Dedication of Land

Subdivision development creates vast needs for new public improvements, facilities, and services. The urgency of the situation is nicely illustrated by one judicial decision that a planning commission lacks authority to disapprove a subdivision because it would cause an "unbearable financial burden" to the locality in providing schools, roads, and police and fire protection.[29]

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[25] Ayres v. City Council of Los Angeles, 34 Cal. 2d 31, 37, 207 P.2d 1, 5 (1949).

[26] For a recent example see Longridge Estates v. City of Los Angeles, 183 Cal. App. 2d 533, 6 Cal. Rptr. 900 (1960).

[27] Roney v. Board of Supervisors of Contra Costa County, 138 Cal. App. 2d 740, 292 P.2d 529 (1956).

[28] See, *e.g.*, Associated Homebuilders v. City of Livermore, 56 Cal. 2d 866, 17 Cal. Rptr. 5, 366 P.2d 448 (1961).

[29] Beach v. Planning & Zoning Comm'n, 141 Conn. 79, 103 A.2d 814 (1954).

Intensive efforts are being made to find ways of passing at least part of the costs along to either the developer or new residents. A wave of litigation arising out of subdivision regulation is the result. The controversy centers around two questions: (1) whether cities and counties may compel the dedication of land within new developments for public purposes other than streets and utilities; and (2) whether they may compel payment of sums of money in lieu of dedication for such purposes. The more basic issue is whether the subdivider can be required to provide land or funds for projects and improvements not directly related to and for the exclusive benefit of the land to be developed and its subsequent owners.[30] The need for public improvements is commonly analyzed in terms of "on site," that is, within the subdivision itself, and "off site," or at a distance away from the actual development. The prominent methods of defraying costs or avoiding public expenditure are limited to four:

1. Subdivision ordinances requiring improvements clearly "on site" in nature.

2. Subdivision ordinances requiring dedication of land for parks, schools, and other public areas that serve both residents of the subdivision (on site) and other persons (off site).

3. Ordinances requiring payment in cash toward cost of parks, school sites, and sewers, etc., that usually are partly "off site" and partly "on site" in nature.

4. Negotiated dedications of land or payments in cash as a condition to map approval, but not in conformity with any requirements that are written into the subdivision ordinance.[31]

The divergent judicial attitudes toward compulsory dedication are illustrated by two nationally leading cases. The first American decision dealing with subdivision regulation is *Ridgefield Land Co. v. City of Detroit.*[32] The subdivider objected to dedication of strips of land along boundary streets and contended that his private property was being taken for public use without just compensation. The court replied that this argument would have merit

> . . . [I]f this were a case where the plat had been recorded and the city were undertaking to widen the streets or to establish a building line. But this is not such a case. Here the city is not trying to compel a dedication. It cannot compel the plaintiff to subdivide its property or to dedicate any part of it for streets. It can, however, impose any

[30] See Schmandt, *supra* note 10.

[31] See Cutler, *supra* note 10; Comment, WIS. L. REV. 310 (1961); Note, 12 SYRACUSE L. REV. 224 (1960). See also Dunham, *A Legal and Economic Basis for City Planning*, 58 COLUM. L. REV. 650 (1958).

[32] 241 Mich. 468, 217 N.W. 58 (1928).

> reasonable condition which must be complied with before the subdivision is accepted for record. In theory, at least, the owner of a subdivision voluntarily dedicates sufficient land for streets in return for the advantage and privilege of having his plat recorded.[33]

This argument that subdivision is a "privilege" to which almost any condition can be attached has been repeated many, many times.[34] But courts do rebel. In *Miller v. City of Beaver Falls*,[35] for example, the Pennsylvania court, inquired:[36]

> Shall this principle relating to streets, which are narrow, well defined and absolutely necessary, be extended to parks and playgrounds which may be very large and very desirable but not necessary? . . . The city is not without a remedy, but it cannot eat its cake and have its penny too. If it desires plaintiff's land for a park or playground which it considers desirable or necessary for its future progress, it can readily and lawfully obtain this land in accordance with the Constitution which, we repeat, is the Supreme Law of the land. The Constitution of the United States and the Constitution of Pennsylvania empower the city to take and appropriate private land for public purposes. *All that is required is that just compensation be paid therefor.*

All learning in California on this problem, and, in charity, most of the confusion, derives from *Ayres v. City Council of Los Angeles*.[37] The Los Angeles planning commission not only specified the dedication of additional land along a boundary street but required the widening from sixty to eighty feet of one of the interior streets. This street was to connect two main thoroughfares. The subdivider entered the usual complaint that the benefit to the lot owners would be relatively small compared to the general benefit of the city as a whole. The court held:[38]

> It is no defense to the conditions imposed . . . that their fulfillment will incidentally also benefit the city as a whole. Nor is it a valid objection to say that the conditions contemplate future as well as more immediate needs. Potential as well as present population factors affecting the subdivision and the neighborhood generally are appropriate for consideration.

To the additional objection that, since these street widenings were part of the city plan and eventually would be carried out in any event, the dedication requirements amounted to eminent domain the court replied:[39]

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[33] *Id.* at 472, 217 N.W. at 59.

[34] See Annot., 11 A.L.R.2d 524 (1950).

[35] 368 Pa. 189, 82 A.2d 34 (1951).

[36] *Id.* at 193, 82 A.2d at 36.

[37] 34 Cal. 2d 31, 207 P.2d 1 (1949).

[38] *Id.* at 41, 207 P.2d at 7.

[39] *Id.* at 42, 207 P.2d at 7.

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

The California Attorney General has construed the *Ayres* decision rather narrowly. The question was put whether an ordinance would be valid which would require that every subdivider either donate to the appropriate school district property within the subdivision for school building purposes or pay to the school district fifty dollars for each lot within the subdivision. His conclusions were that either requirement would be invalid.[40] In subsequently extending these views to dedication for a variety of purposes, he explained the *Ayres* decision as follows:[41]

> To what extent, then, is the *Ayres* case applicable to dispose of the questions here presented? In view of the ambiguity of the opinion we cannot say with absolute assurance. We conclude, however, that the *Ayres* decision properly may be limited to the factual context giving rise to it. There, a chartered city was seeking to resolve a potentially serious traffic problem, threatening the health and safety of both the residents of the subdivision and the rest of the community, by requiring dedication of a street planting strip. We think it fair, therefore, to say that the *Ayres* case stands as clear authority only for the proposition that *the act does not preclude local regulations reasonably required by the subdivision type and related to the character of local and neighborhood traffic, health and safety needs;* and that the regulations there challenged so qualified. . . .
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> Requiring dedication of land for school purposes surely cannot be said to be a condition reasonably related to the character of local and neighborhood traffic, health and safety needs. Accordingly, we reaffirm our ruling . . . that requiring dedication for such purposes constitutes a condition going far beyond those conditions contemplated by the Subdivision Map Act and which may be imposed consistent therewith.

The latest judicial development is only an analogy. In *Bringle v. Board of Supervisors*,[42] an owner of property in Orange County owned property zoned for agricultural purposes. He held a five-year variance permitting use of the property as a storage yard for equipment. As a condition to renewing the variance, the county required dedication of a thirty foot wide strip. The District Court of Appeal held this a clear

[40] 22 CAL. OPS. ATT'Y GEN. 168 (1953).

[41] 29 CAL. OPS. ATT'Y GEN. 49, 53 (1957).

[42] 54 Cal. 2d 86; 4 Cal. Rptr. 493, 351 P.2d 765 (1960).

case of taking without compensation.[43] The Supreme Court ruled, however, that the condition was permissible . . . in the absence of any evidence by such owner as to the effect on traffic conditions . . . or any showing that the need for widening the street was not related to use of the property.[44]

Conditions imposed in connection with zoning variances are, of course, clearly distinguishable from those imposed upon the subdivider. A variance is aptly described as a "privilege." It may be, however, that the *Bringle* decision foretells a general relaxing of supposed limitations, at least as to requirements that can even remotely be made to seem "on-site."

Fees

Analytically, the charging of fees for various purposes as a prerequisite to approval of a subdivision map presents the same problem as compulsory dedication. The leading California case is *Kelber v. Upland.*[45] The decision invalidated an ordinance requiring the subdivider, as a condition to approval of his map, to pay thirty dollars per lot into a park and school site fund and a large sum into a drainage fund. The city argued that the provision, designed to help meet its growing needs, was in line with the modern tendency to extend the police power to include broader fields of public welfare. Although the case was determined on grounds of lack of authority in the Subdivision Map Act, language in the opinion cast doubt on the validity of such a requirement even with express legislative authorization. The Supreme Court denied a hearing by a four to three vote.

With respect to the map act, the District Court of Appeal summarized its views as follows:[46]

> While the act specifically and impliedly permits the adoption of some local ordinances, relating to design and improvement, this is not an unlimited permission but is restricted to such local ordinances as come within the limitations contained in the act. . . . All of the references to local ordinances in the Subdivision Map Act relate to a local ordinance as defined in the statute, and to the design and improvement of subdivisions which are also defined in the statute. . . . It rather clearly appears that these fee provisions are fund raising methods for the purpose of helping to meet the future needs of the entire city for park and school sites and drainage facilities, and that they are not reasonable requirements for the design and improvement of the subdivision itself.

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[43] 345 P.2d 983 (1959). *Rev'd* 54 Cal. 2d 86, 4 Cal. Rptr. 493, 351 P.2d 765 (1960).
[44] *Id.*
[45] 155 Cal. App. 2d 631, 318 P.2d 561 (1957).
[46] *Id.* at 636, 318 P.2d at 564.

This reasoning has been followed in subsequent decisions.[47] But in *Longridge Estates v. City of Los Angeles*[48] the court upheld a fee of 400 dollars per acre required to be paid into a sewer construction account. The subdivider urged that *Kelber* prevented enforcement of the ordinance. The District Court of Appeal pointed out that the city of Upland was a general law city and held that the decision was not applicable to the city of Los Angeles, a charter city. The logic was stated as follows:[49]

> Defendant in this case is a charter city with power over municipal affairs, pursuant to Article XI, section 6, of the Constitution of the State of California. . . . Construction, maintenance, and repair of sewers and storm drains may be provided by ordinance and sustained as a valid exercise of police power in the interest of public health and as an incident to constructing and maintaining streets. . . . The Subdivision Map Act does not preclude, but does clearly approve local ordinances relating to matters covered by the Act. . . . The power to make a reasonable charge for the connection to and use of the sewers was a proper incident to the exercise of police power by defendant to provide them. . . . Plaintiffs point out that others had already paid for or had assumed the burden for paying for much of this system before the ordinances were passed which are now before us. This in no way suggests that new subdivisions should not be required to pay their fair share of the cost of expansion, repair, and replacement made necessary, in part, by their share in the use of this vitally essential service.[50]

To finance sewers, and as an alternative to imposing a fee as a condition to approval of the subdivision map, some cities have established a fee which must be paid prior to connection to the sewer system or as a condition to issuance of a building permit. These fees have been upheld provided that the receipts are used for sewer purposes.[51] They do give rise to controversy, however. The city of Livermore adopted two ordinances providing for the payment of sewer connection charges as a prerequisite to the issuance of a building permit. The first ordinance provided for a fee of 150 dollars per dwelling unit and that the fees for other types of buildings were to be subsequently fixed by ordinance or resolution. The latter was never done. The second ordinance, which repealed the first, required the same fee for dwellings and in addition set a schedule for the fees to be paid by other

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[47] See, *e.g.*, Wine v. Council of City of Los Angeles, 177 Cal. App. 2d 157, 2 Cal. Rptr. 94 (1960).

[48] 183 Cal. App. 2d 533, 6 Cal. Rptr. 900 (1960).

[49] *Id.* at 539, 6 Cal. Rptr. at 905 (1960).

[50] Similar, with respect to drainage facilities, is the reasoning and result in City of Buena Park v. Boyar, 186 Cal. App. 2d 61, 8 Cal. Rptr. 674 (1960).

[51] Cramer v. City of San Diego, 164 Cal. App. 2d 168, 330 P.2d 235 (1958).

types of buildings. Both ordinances required the fees to be paid into a special fund, from which monies could be used only for expanding the sanitary sewer system or for servicing any bonded indebtedness of the city incurred for sanitary sewer purposes. The trial court held both ordinances unconstitutional (as revenue measures made under the guise of police power and that a general law city has no legislative authority to levy the charges. The court also held the classification schedule for fees in the second ordinance to be unreasonable and discriminatory. In a very recent decision, the Supreme Court approved both ordinances as a valid exercise of the police power and as revenue measures under the authority of Health and Safety Code section 5471.[52]

In general, this matter of fees is affected by much legislation unrelated to the basic operation of the Subdivision Map Act. In connection with sewers and drains, the act itself provides that where a local ordinance requires the installation of such facilities by the subdivider as a condition to approval of the map, and where the facilities will serve areas outside the subdivision, the governing body may collect a charge from those outside the subdivision who use the facilities and may reimburse the subdivider.[53] These sections once referred only to sanitary sewers but they were amended in 1955 to include drains. The amendment was held not to be retroactive so as to affect the validity of a contract made under the former version despite a legislative declaration that the change was merely to clarify existing law.[54]

In 1959 Business and Professions Code section 11543.5 was added to provide for imposition of a fee to defray a ratable portion of the costs of constructing planned drainage facilities. Payment of the fee may be made a condition of approval of the map, but a number of conditions specified in the section must be met before such fees may be imposed. By its terms the section was limited in effectiveness to the ninety-first day after adjournment of the 1961 session of the legislature. The 1961 Legislature made the provision permanent.[55]

Perhaps such items of detailed legislation, dealing with specific matters, are to be the future solution to the whole range of subdivision control problems.

[52] Associated Homebuilders v. Livermore, 56 Cal. 2d 866, 17 Cal. Rptr. 5, 366 P.2d 448 (1961).

[53] CAL. BUS. & PROF. CODE §§ 11543, 11544.

[54] Lawrence v. City of Concord, 156 Cal. App. 2d 531, 320 P.2d 215 (1958).

[55] Cal. Stat. 1961, ch. 427, § 1, p. 1490.