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Forced Dedications in California

Carolyn M. Farren

FORCED DEDICATIONS IN CALIFORNIA

As a condition precedent to the issuance of a building permit,[1] the granting of a zoning variance,[2] or the approval of a subdivision map,[3] some governmental agencies require that applicants dedicate[4]—without compensation—portions of their land to public use.[5] Such "forced dedications"[6] have been justified by the courts as an exercise of the sovereign's inherent police power[7] to regulate the use and enjoyment of private property for the promotion of public health, safety and general welfare.[8] This note will review such forced dedications in light of the California constitutional guarantee of just compensation for the taking of private property.[9]

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[1] *E.g.*, Southern Pac. Co. v. Los Angeles, 242 Cal. App. 2d 38, 51 Cal. Rptr. 197 (1966).

[2] *E.g.*, Bringle v. Board of Supervisors, 54 Cal. 2d 86, 351 P.2d 765, 4 Cal. Rptr. 493 (1960).

[3] *E.g.*, Newton v. American Sec. Co., 201 Ark. 943, 148 S.W.2d 311 (1941); Ayres v. City Council, 34 Cal. 2d 31, 207 P.2d 1 (1949); Ridgefield Land Co. v. Detroit, 241 Mich. 468, 217 N.W. 58 (1928).

[4] Dedication: "An appropriation of land to some public use, made by the owner, and accepted for use by or on behalf of the public." BLACK'S LAW DICTIONARY 500 (*4th* ed. 1951). In forced dedications this means that the owner gives the public entity possessory rights and title to the land.

[5] *E.g.*, Newton v. American Sec. Co., 201 Ark. 943, 148 S.W.2d 311 (1941); Bringle v. Board of Supervisors, 54 Cal. 2d 86, 351 P.2d 765, 4 Cal. Rptr. 493 (1960); Ayres v. City Council, 34 Cal. 2d 31, 207 P.2d 1 (1949); Southern Pac. Co. v. Los Angeles, 242 Cal. App. 2d 38, 51 Cal. Rptr. 197 (1966); Ridgefield Land Co. v. Detroit, 241 Mich. 468, 217 N.W. 58 (1928).

[6] The term forced dedication as used in this note refers to dedications of property for which no compensation is paid.

[7] *See, e.g.*, Ayres v. City Council, 34 Cal. 2d 31, 42, 207 P.2d 1, 8 (1949); Brous v. Smith, 304 N.Y. 164, 106 N.E.2d 503 (1952). *See also* Johnston, *Constitutionality of Subdivision Control Exactions: The Quest for a Rationale*, 52 CORNELL L.Q. 871, 885 (1967) [hereinafter cited as Johnston].

[8] *See, e.g.*, Ayres v. City Council, 34 Cal. 2d 31, 42, 207 P.2d 1, 8 (1949); Brous v. Smith, 304 N.Y. 164, 106 N.E.2d 503 (1952).

[9] "Private property shall not be taken . . . for public use without just compensation having first been made to, or paid into court for, the owner . . . ." CAL. CONST. art. I, § 14.

Protection against governmental taking of property without compensation is guaranteed by both the federal and state constitutions. However, the California Constitution imposes more rigorous standards of governmental responsibility than does the fifth amendment of the Federal Constitution (as made applicable to the states through the fourteenth amendment). *See* Van Alstyne, *Statutory Modification of Inverse Condemnation: The Scope of Legislative Power*, 19 STAN. L. REV. 727, 729 (1967). Therefore, discussion in this note will, for the most part, be limited to the California Constitution.

Police Power v. Eminent Domain

"Forced dedication" is upheld as a valid exercise of the police power, the result being that the government acquires land without giving compensation.[10] At first glance this seems to be in contradiction with both the California and Federal Constitutions, which guarantee that private property shall not be taken[11] for public use without just compensation.[12] In order to determine whether such a contradiction actually exists, it is essential to have a clear understanding of the theoretical differences between the police power[13] and the eminent domain power. This is not an easy task, for the line between the two is difficult to draw.[14]

> Theoretically, not superimposed upon but coexisting alongside the power of eminent domain is the police power, unwritten except in case law. It has been variously defined—never to the concordant satisfaction of all courts or legal scholars—and frequently it has been inconsistently applied by different courts . . . sometimes, to our belief, by the same court. The police power is described more readily than it can be defined.[15]

The prevailing view recognizes that both of these powers may only be exercised for the promotion of the public welfare.[16] The police power, however, is employed to *regulate* (and/or restrict) the use and enjoyment of property,[17] while eminent domain power is used to *take* land for some particular use.[18] It is this distinction that determines whether compensation is necessary.[19] If there is a "taking",

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For, "in the relatively few decisions in which the Supreme Court has reviewed *state* determinations of just compensation, it has intimated that considerable deference to state law will be accorded, limited only by the minimum requirements of reasonableness, fairness, and equal treatment imposed by the fourteenth amendment." *Id.* at 767.

[10] *See* Sommers v. Los Angeles, 254 Cal. App. 2d 605, 62 Cal. Rptr. 523, (1967), where the city's demand that appellant dedicate certain strips of his property for street widening purposes, as a condition precedent to the granting of a building permit, was held a valid exercise of the police power.

[11] U.S. CONST. amend. V; CAL. CONST. art. I, § 14.

[12] U.S. CONST. amend. V; CAL. CONST. art. I, § 14.

[13] In Sommers v. Los Angeles, 254 Cal. App. 2d 605, 611, 62 Cal. Rptr. 523 527 (1967), it is noted that the police power is not static, but rather it is flexible and expandable to meet the changing conditions of everyday life.

[14] "The courts, even the highest court of the land, have despaired of giving a satisfactory definition to the police power of a state. . . ." Pacific Tel. & Tel. Co. v. Eshleman, 166 Cal. 640, 662, 137 P. 1119, 1126 (1913). *See* Bacich v. Board of Control, 23 Cal. 2d 343, 351, 144 P.2d 818, 823-24 (1943).

[15] Mid-Way Cabinet Fixture Mfg. v. San Joaquin County, 257 A.C.A. 206, 211, 65 Cal. Rptr. 37, 40 (1967).

[16] 1 J. LEWIS, THE LAW OF EMINENT DOMAIN § 6 (3d ed. 1909).

[17] *See, e.g.*, 11 E. MCQUILLIN, THE LAW OF MUNICIPAL CORPORATIONS § 32.04 (3d ed. 1964).

[18] *Id.*

[19] An exercise of police power does not necessitate compensation, whereas

the power of eminent domain is involved, and compensation is mandatory.[20] If, on the other hand, there is only "regulation", it is the police power which is being used, and no compensation is required.[21]

At first, "taking" was defined by the relatively simple "physical invasion" test.[22] Early cases in eminent domain concluded that only actual invasions of property could be compensable takings.[23] This definition was later broadened by the "degree test," which indicates "that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking."[24] One result of the application of this test is that the boundary between "taking" and "regulation" has become vague.[25]

> When an order passes beyond proper regulation, it amounts to a taking of the property, and the order is then referable, not to the police power but to the power of eminent domain. . . . Nor is it of consequence that the law or order be regulatory, if, in effect, it is a taking of property or a deprivation of the use of property within the meaning of the Constitution.[26]

It is apparently the difficulty of when to apply this test that results in some of the present confusion[27] with the word "taking."[28]

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just compensation to the landowner is constitutionally guaranteed when the power of eminent domain is exercised. 1 J. LEWIS, THE LAW OF EMINENT DOMAIN § 6 (3d ed. 1909). *See also* Ayres v. City Council, 34 Cal. 2d 31, 49, 207 P.2d 1, 11 (1949).

[20] An exception to the constitutional requirement of compensation for a taking is recognized in emergency situations. In this narrow exception the government may, by exercising the police power, take private property. Archer v. Los Angeles, 19 Cal. 2d 19, 119 P.2d 1 (1941). However, acquiring land by means of "forced dedication" does not fall within this exception to the requirement of compensation, for there is no emergency to justify it. Note, *Bringle v. Board of Supervisors. Condemnation Without Compensation?*, 13 HASTINGS L.J. 401 (1962).

[21] *See* notes 16 & 17 *supra.*

[22] Justice Harlan suggested the physical invasion test in Mugler v. Kansas, 123 U.S. 623, 668, 669 (1887). *See also* Kratovil & Harrison, *Eminent Domain—Policy And Concept*, 42 CALIF. L. REV. 596, 599 (1954).

[23] *E.g.*, Mugler v. Kansas, 123 U.S. 623 (1887). "At one time it was commonly held that, in the absence of explicit expropriation, a compensable taking could occur *only* through physical encroachment and occupation." Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1184 (1967) [hereinafter cited as Michelman].

[24] Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922); *accord*, Mid-Way Cabinet Fixture Mfg. v. San Joaquin County, 257 A.C.A. 206, 65 Cal. Rptr. 37 (1967).

[25] Goldblatt v. Hempstead, 369 U.S. 590, 594 (1962).

[26] Pacific Tel. & Tel. Co. v. Eshleman, 166 Cal. 640, 663, 137 P. 1119, 1127 (1913).

[27] "There is no set formula to determine where regulation ends and taking begins." Goldblatt v. Hempstead, 369 U.S. 590, 594 (1962).

[28] Mid-Way Cabinet Fixture Mfg. v. San Joaquin County, 257 A.C.A. 206, 212, 65 Cal. Rptr. 37, 41 (1967).

The degree test would seem to have little relevance[29] with respect to forced dedications. It is a test for determining the point at which a "regulation" becomes a "taking." It is not applicable to forced dedications, which begin with an actual acquisition of land. Nevertheless, it appears that the vagueness in this area has led courts to conclude that when a government agency acquires land by forced dedication it is not really a "taking." This does not seem to be correct. The "degree test" indicates only that "taking" includes *more* than the mere acquisition of land;[30] a regulation that amounts to a taking is also considered a "taking."[31] This lends no support to the converse of the proposition, *i.e.*, that "taking" may include *less* than physical acquisition.[32] Yet, this is precisely what the forced dedication cases hold. What is clearly a physical acquisition is held not to be a "taking."[33] This result seems to be contrary to the clear intent of article I, section 14 of the California Constitution. "Taking" was meant to include *at least* those cases that involve physical acquisition.

> [I]t should be obvious that the police power doctrine cannot be invoked in the taking . . . of private property in the construction of a public improvement where no emergency exists. To hold otherwise would in effect destroy the protection guaranteed by our Constitution against the taking . . . of private property for a public use without compensation.[34]

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[29] In any event, it is questionable whether the test is recognized any more, due to the holding of Consolidated Rock Prods. Co. v. Los Angeles, 57 Cal. 2d 515, 370 P.2d 342, 20 Cal. Rptr. 638, *appeal dismissed*, 371 U.S. 36 (1962). The Supreme Court dismissed the case for want of a federal question. In *Consolidated Rock*, the question squarely presented to the Supreme Court was "whether zoning ordinances which altogether destroy the worth of valuable land by prohibiting the only economic use of which it is capable effects a taking of real property without compensation." Brief for Appellant at 5, Consolidated Rock Prods. Co. v. Los Angeles, 57 Cal. 2d 515, 370 P.2d 342, 20 Cal. Rptr. 638 (1962).

[30] See text accompanying note 24 *supra*.

[31] Pacific Tel. & Tel. Co. v. Eshleman, 166 Cal. 640, 663, 137 P. 1119, 1127 (1913).

[32] One author attempts to formulate a definition of "taking" by summarizing the courts' approaches. "Taking is . . . constitutional law's expression for any sort of publicly inflicted private injury for which the Constitution requires payment of compensation." Michelman, *supra* note 21, at 1165. This definition, however, does not lead to any clear understanding of the concepts involved since the definition is clearly circular.

[33] Forced dedications "have been traditionally regarded as a species of regulations and, thus, subject to the same constitutional limitations as zoning and other more common forms of land regulation." Heyman & Gilhool, *The Constitutionality of Imposing Increased Community Costs on New Suburban Residents through Subdivision Exactions*, 73 YALE L.J. 1119, 1130 (1964). This conclusion was reached by inserting the classic definition of police power into the courts' holdings, *i.e.*, that it is a regulatory function. See text accompanying notes 20-26 *supra*. But why forced dedications should, in fact, be regulations has never been clearly demonstrated.

[34] Rose v. State, 19 Cal. 2d 713, 730-31, 123 P.2d 505, 516 (1942).

It seems clear that since forced dedication involves an acquisition of land that it is a taking[35] in the constitutional sense.[36]

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[35] In Note, *Bringle v. Board of Supervisors. Condemnation Without Compensation?*, 13 HASTINGS L.J. 401 (1962), it is concluded that forced dedications are takings and require compensation.

[36] In Van Alstyne, *Statutory Modification of Inverse Condemnation: The Scope of Legislative Power*, 19 STAN. L. REV. 727, 761 (1967), it is stated that: "To assume that the 'taking' requirement is necessarily satisfied where physical invasion or destruction has occurred is too broad a position, for it is abundantly clear that total or partial physical destruction of tangible property is not necessarily a taking." To support this point, Professor Van Alstyne cites four cases: United States v. Caltex (Philippines), Inc., 344 U.S. 149 (1952) (oil facility blown up to prevent enemy use); Lawton v. Steele, 152 U.S. 133 (1894) (unlawfully used fish nets seized and destroyed as public nuisance); Bowditch v. Boston, 101 U.S. 16 (1879) (building destroyed to prevent conflagration); Consolidated Rock Prods. Co. v. Los Angeles, 57 Cal. 2d 515, 370 P.2d 342, 20 Cal. Rptr. 638, *appeal dismissed*, 371 U.S. 36 (1962) (value of land destroyed by zoning ordinance). *Caltex* and *Bowditch* can be explained as being exemplary of emergency situations and therefore falling within the exception to the constitutional requirement of just compensation. *See* note 20 *supra*. *Lawton* concerns the seizure of unlawful property. The inherent right of the sovereign to seize unlawfully used property is a well recognized principle of law. C.J. Hendry Co. v. Moore, 318 U.S. 133 (1943). In *Consolidated Rock*, although there was total diminution in value, no land was actually appropriated. Therefore, it seems that none of these cases have any bearing on the forced dedication cases.

Professor Van Alstyne recognizes the limitations upon the exception. In Rose v. State, 19 Cal. 2d 713, 730, 123 P.2d 505, 515 (1942), it is stated that the police power "generally operates [only] in the field of regulation, except possibly in some cases of emergency . . . ." This was cited with approval in Van Alstyne, *Inverse Condemnation: Unintended Physical Damage*, 20 HAST. L.J. 431, 435 (1969).

Other taking tests have been proposed. One is: "[W]hen an economic loss is incurred as a result of government enhancement of its resource position in its enterprise capacity, then compensation is constitutionally required; it is that result which is to be characterized as a taking." Sax, *Takings and the Police Power*, 74 YALE L.J. 36, 63 (1964). If this test were applied to forced dedications, the conclusion would be that there is a taking. However, forced dedications are specifically excluded from this test, because there is a reciprocal benefit to the landowner. *Id.* at 73. But Professor Sax does not justify his exception on constitutional grounds. Nor does he explain how such an exception would be applied. Would there be a pretrial hearing to determine whether, in fact, the landowner was benefiting at least as much as he was losing by the proposed dedication? If this were done, then it would be circumventing section 1248(3) of the California Code of Civil Procedure which specifically states that if the benefit to the landowner is greater than the damages so assessed, the owner of the parcel shall be allowed no compensation except the value of the portion taken, but "in no event shall the benefit be deducted from the value of the portion taken."

Additional Judicial Justification

In addition to the theoretical difficulties[37] of the police power justification of forced dedication, there are also certain practical problems. Courts have not been content to use the police power theory as the sole basis for their decisions. Although they hold that forced dedication is an exercise of the police power,[38] they give additional reasons for denying compensation in forced dedication cases. As will be seen, in some instances these secondary justifications are in contradiction with a holding[39] that the police power is the basis of forced dedication.[40]

The most common justification utilized by the courts in denying compensation will be referred to in this note as the "economic benefit theory."[41] This theory consists of two parts.[42] The landowner must:

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[37] See text accompanying notes 22-36 *supra*, where the theoretical weaknesses are discussed.

[38] "In some instances the . . . effect . . . is to compel a property owner to dedicate a portion of his property to the city without receiving the compensation which would be required if the property had been taken by condemnation. The statutes and ordinances which bring this about have been held constitutional under the police power." People *ex rel.* Department of Pub. Works v. Investors Diversified Serv., Inc., 262 A.C.A. 371, 374, 68 Cal. Rptr. 663, 665 (1968).

[39] See text accompanying notes 59-65 *infra*.

[40] *E.g.*, Bringle v. Board of Supervisors, 54 Cal. 2d 86, 351 P.2d 765, 4 Cal. Rptr. 493 (1960); Southern Pac. Co. v. Los Angeles, 242 Cal. App. 2d 38, 51 Cal. Rptr. 197 (1966).

[41] A second basis used is that of "voluntary dedication." In justifying the policy of forced dedication, a few courts have held that dedication is voluntary. *See, e.g.*, Newton v. American Sec. Co., 201 Ark. 943, 148 S.W.2d 311 (1941); Ayres v. City Council, 34 Cal. 2d 31, 207 P.2d 1 (1949); Ridgefield Land Co. v. Detroit, 241 Mich. 468, 217 N.W. 58 (1928), where it is specified that although the dedication is voluntary, the appropriation demanded by the government must be reasonable.

"It has been suggested that since the subdivider can always retain his land in its predeveloped condition, his decision to subdivide is voluntary and anything he is required to give up for the privilege of subdividing he gives freely. No taking occurs since, if he objects too strongly to the exactions, he need not subdivide." G. LEFCO, LAND DEVELOPMENT 327 (1966).

Apparently, *Ayres* is the only California case to invoke this rationale. The holding was roundly attacked by Justice Carter in his dissent in *Ayres*: "The majority [opinion] 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." Ayres v. City Council, 34 Cal. 2d 31, 48, 207 P.2d 1, 11 (1949). Since this line of reasoning does not seem to have been followed in later California cases, it will not be considered further.

[42] The leading cases discuss both aspects of the theory. See text accompanying notes 45-64 *infra*.

(1) create the need for which the required dedication is to be used; and, (2) receive direct economic benefit from the dedication.[43] Apparently, both parts are necessary for the theory to apply.[44]

Southern Pacific Company v. Los Angeles[45] exemplifies the economic benefit theory. It involved conditions placed on the approval of a building permit. Plaintiffs wanted to build a warehouse with railroad tracks extending from it across an abutting road and down the street. The city required a dedication of land for street widening purposes as a condition precedent to the issuance of the permit. This was held to be a proper exercise of the police power. The court, however, also resorted to the "economic benefit" justification for its holding. It was concluded that the proposed warehouse would greatly increase traffic, thereby creating the need for the widened street. It was also pointed out that the plaintiff would benefit economically from the street improvement.[46]

The holding of *Southern Pacific* was cited in *People ex rel. Department of Public Works v. Curtis*[47] as standing for the proposition that

> [t]he decision of a planning body to require dedication for street widening purposes will not be judicially reversed even when it appears that the dedication was made necessary by the growth of the community.[48]

Curtis seems to have ignored the specific findings by the court in *Southern Pacific* that: (1) the construction of the proposed warehouse would, of *itself*, greatly increase the traffic in the area; and,[49] (2) the Southern Pacific Company would benefit economically from a widened road.[50] *Curtis* dangerously extends *Southern Pacific* by holding that any damage that results from forced dedication is "noncompensable because it results from a risk shared by all property holders."[51]

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[43] The court's application of this theory is discussed in text accompanying notes 45-64 *infra*.

[44] "The cases . . . recognize that forced dedication is a concomitant to the development of a larger parcel, ordinarily resulting in a net economic gain to the owner and an increased traffic burden on the neighborhood, for which the owner should pay something." People *ex rel.* Department of Pub. Works v. Investors Diversified Serv., Inc., 262 A.C.A. 371, 380, 68 Cal. Rptr. 663, 668 (1968). *See also* Sommers v. Los Angeles, 254 Cal. App. 2d 605, 62 Cal. Rptr. 523 (1967); Southern Pac. Co. v. Los Angeles, 242 Cal. App. 2d 38, 49-50, 51 Cal. Rptr. 197, 203-04 (1966).

[45] 242 Cal. App. 2d 38, 51 Cal. Rptr. 197 (1966).

[46] *Id.* at 48, 51 Cal. Rptr. at 203.

[47] 255 A.C.A. 418, 63 Cal. Rptr. 138 (1967).

[48] People *ex rel.* Department of Pub. Works v. Curtis, 255 A.C.A. 418, 424, 63 Cal. Rptr. 138, 141 (1967).

[49] Southern Pac. Co. v. Los Angeles, 242 Cal. App. 2d 38, 48, 51 Cal. Rptr. 197, 203 (1966).

[50] *Id.*

[51] People *ex rel.* Department of Pub. Works v. Curtis, 255 A.C.A. 418, 425, 63 Cal. Rptr. 138, 142 (1967).

This declaration seems to effectively remove the constitutional protection of just compensation,[52] leaving the doors wide open for unlimited extensions of the police powers.[53] Such is the danger of the "economic benefit" theory.

Two other leading California cases on forced dedication are *Ayres v. City Council*[54] and *Bringle v. Board of Supervisors*.[55] In *Ayres* the court balanced the economic benefit to be gained by the landowner against his loss that would result from the proposed dedication of the property. This case held that it was a valid exercise of the police power for the city council to refuse approval of a proposed subdivision map unless land was dedicated for street widening purposes, and for the planting of trees.[56]

Bringle involved a zoning variance granted on the condition that a strip of land be dedicated for road widening purposes. Again, the economic benefit theory was applied. Further, the plaintiff was denied compensation since he "did not . . . make any showing that the need for widening the street was not related to the proposed use of the property."[57] It appears from this holding that when dedication is demanded, the court presumes that the need for the dedicated land is created by the proposed use of the property. The burden of proof is put on the plaintiff as to this issue.[58]

The trend of these cases seems to be to consider each factual situation by itself,[59] and to deny compensation when the economic benefit theory applies. The importance of the economic benefit

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[52] CAL. CONST. art. I, § 14.

[53] A possible further narrowing of the constitutional guarantee of just compensation can be noted in People v. Investors Diversified Serv., Inc., 262 A.C.A. 371, 68 Cal. Rptr. 663 (1968), where the court held that proper compensation in an eminent domain case would be affected by the fact that dedication of the property could probably be coerced through the withholding of development privileges. In effect, what the court held was that the value of certain parcels of land is nominal because dedication without compensation could be coerced.

[54] 34 Cal. 2d 31, 207 P.2d 1 (1949).

[55] 54 Cal. 2d 86, 351 P.2d 765, 4 Cal. Rptr. 493 (1960).

[56] "*Ayres* has been followed in a number of subsequent cases concerning compulsory dedication of land for streets. Unfortunately, it is usually cited to support the flat proposition that subdivision control requirements for street widening are valid conditions to plat approval. Such citations fail to consider the limited facts of *Ayres*; the regulations had actually benefited the subdivider by reducing his costs." Johnston, *Constitutionality of Subdivision Control Exactations: The Quest For a Rationale*, 52 CORNELL L.Q. 871, 893-94 (1967).

[57] 54 Cal. 2d at 89, 351 P.2d at 767, 4 Cal. Rptr. at 495.

[58] *See id. But see* Mid-Way Cabinet Fixture Mfg. v. San Joaquin County, 257 A.C.A. 206, 217, 65 Cal. Rptr. 37, 44 (1967).

[59] People *ex rel.* Department of Pub. Works v. Russell, 48 Cal. 2d 189, 195, 309 P.2d 10, 14 (1957); Mid-Way Cabinet Fixture Mfg. Co. v. San Joaquin County, 257 A.C.A. 206, 218, 65 Cal. Rptr. 37, 41 (1967).

theory is pointed out in *Mid-Way Cabinet Fixture v. San Joaquin County*.[60] In this case it was held that if there is no causal connection between the use for which the permit is sought and the demand for the land, the government must compensate.[61] The "economic benefit" theory could not be used. To the same effect is a hypothetical situation presented in *Southern Pacific*.[62] The court indicated that the builder of a single family dwelling could not be forced to dedicate part of his land without compensation. There would be a relatively small increase in traffic from such a construction, and the benefit to the owner from the widening of the streets would be very slight. Therefore, the court reasoned, there would be little economic benefit to the plaintiff, and an uncompensated forced dedication could not be allowed.[63]

Mid-Way and the hypothetical in *Southern Pacific* demonstrate the true relationship between the police power justification and the economic benefit theory. The dedicator must both create the need for the improvement and receive economic benefit from it or the police power justification for forced dedications may not be used.[64] Thus, one act by the government may be an exercise of either the police power or the power of eminent domain. The determining factor is whether there has been a creation of a need by, and an economic benefit to, the plaintiff.

Application of this theory results in economic benefit being substituted for compensation. This, however, is in contradiction with the police power rationale. For, any discussion of compensation is irrelevant when considering police power.[65]

The Dangers of the Judicial Rationale for Forced Dedication

Compensation is the essence of eminent domain proceedings. By compensation, an attempt is made to restore the landowner as nearly as possible to his previous economic position.

> It is the purpose of eminent domain proceedings to distribute throughout the community the loss inflicted upon the individual by the making of public improvements. In the light of this public policy, the ideal to be aimed at is that the compensation awarded shall put the injured party in as good condition as he would have been in if the condemnation proceedings had not occurred.[66]

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[60] 257 A.C.A. 206, 65 Cal. Rptr. 37 (1967).

[61] *See* text accompanying note 44 *supra*. *See also* Sommers v. Los Angeles, 254 Cal. App. 2d 605, 62 Cal. Rptr. 523 (1967).

[62] Southern Pac. Co. v. Los Angeles, 242 Cal. App. 2d 38, 50, 51 Cal. Rptr. 197, 203-04 (1966).

[63] *Id.*

[64] *See* Mid-Way Cabinet Fixture Mfg. v. San Joaquin County, 257 A.C.A. 206, 65 Cal. Rptr. 37 (1967); Southern Pac. Co. v. Los Angeles, 242 Cal. App. 2d 38, 51 Cal. Rptr. 197 (1966). *But see* People *ex rel.* Department of Pub. Works v. Curtis, 255 A.C.A. 418, 63 Cal. Rptr. 138 (1967).

[65] *See* note 19 *supra*.

[66] Cormack, *Legal Concepts in Cases of Eminent Domain*, 41 YALE L.J. 221, 224-25 (1931).

However, if forced dedications were to be brought as eminent domain proceedings the government agency would, by section 1248(3) of the California Code of Civil Procedure,[67] be required to make monetary payment for the value of the land taken. Economic benefits to the landowner could not be set off against the value of the land taken.[68] By holding that forced dedication is within the police power, and further rationalizing the denial of compensation with the economic benefit theory, the courts are effectively circumventing this statute.[69]

The courts are attempting to balance individual rights as guaranteed by the constitution with the needs of the community.[70] Evidence presented in *Southern Pacific* indicated that, due to a lack of funds, it would take the city one hundred years to buy all the land it needed to meet the growing needs of the community.[71] In light of this evidence, and evidence showing that the landowner would directly benefit from the dedication,[72] a desirable result was achieved in denying compensation in that particular case. The only way to reach such a desirable result, *i.e.*, upholding the practice of forced dedication without compensation, is to consider it an exercise of the police power. If these cases were classified within eminent domain, the courts would be unable to balance the losses incurred against the benefits obtained due to the statutory bar.[73]

However, three important problems have arisen from the judicial practice of associating the economic benefit theory with the police power rationale. The first is that the courts have introduced the concept of compensation via economic benefit, although only on a secondary basis. Police power remains the primary justification. While the courts have considered both of these bases,[74] they need not do so. Once it becomes established that forced dedication is a valid exercise of the police power, sole reliance could be placed on this basis, with-

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[67] "If the benefit shall be greater than the damages so assessed, the owner of the parcel shall be allowed no compensation except the value of the portion taken, but the benefit shall in no event be deducted from the value of the portion taken." CAL. CODE CIV. PROC. § 1248(3).

[68] *Id.*

[69] *Id.*

[70] *See, e.g.*, Bringle v. Board of Supervisors, 54 Cal. 2d 86, 351 P.2d 765, 4 Cal. Rptr. 493 (1960); Southern Pac. Co. v. Los Angeles, 242 Cal. App. 2d 38, 51 Cal. Rptr. 197 (1962). For a discussion of the political and economic implications of "forced dedication", *see* Heyman & Gilhool, *The Constitutionality of Imposing Increased Community Costs on New Suburban Residents through Subdivision Exactions*, 73 YALE L.J. 1119 (1964).

[71] Southern Pac. Co. v. Los Angeles, 242 Cal. App. 2d 38, 48, 51 Cal. Rptr. 197, 203 (1966).

[72] *Id.*

[73] See note 67 *supra.*

[74] *E.g.*, Sommers v. Los Angeles, 254 Cal. App. 2d 605, 62 Cal. Rptr. 523 (1967); Southern Pac. Co. v. Los Angeles, 242 Cal. App. 2d 38, 51 Cal. Rptr. 197 (1966); Ayres v. City Council, 34 Cal. 2d 31, 207 P.2d 1 (1949).

out reference to economic benefit.

The second problem with this approach is that there is no set procedure available to determine the losses and/or gains[75] involved. All such determinations are sheer guesswork.

The third problem concerns the inherent dangers of misusing or overextending the police power. In 1896 *Ex Parte Jentzsch* warned of the dangers inherent in the police power:

> [W]hile the police power is one whose proper use makes most potently for good, in its undefined scope and inordinate exercise lurks no small danger to the republic. For the difficulty which is experienced in defining its just limits and bounds, affords a temptation to the legislature to encroach upon the rights of citizens. . . .[76]

Mid-Way expressed the same concern in 1966:

> The protection of private property in the 5th Amendment presupposes that it is wanted for public use, but provides that it shall not be taken for such use without compensation. . . . 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. . . . We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the result by a shorter cut than the constitutional way of paying for the change.[77]

The dangers inherent in the extension of the police power to forced dedications are clearly evidenced in *Curtis*,[78] which held that "forced dedication is a risk shared by all property holders."[79]

Conclusion

It is difficult to justify the holding that a forced dedication is a valid exercise of the police power. There are serious constitutional (as well as conceptual) difficulties in holding that an actual physical acquisition of land is not a "taking." By invoking the economic benefit theory to justify their holdings in forced dedication cases, the courts themselves give evidence to the inadequacy of the police power rationale. As has been pointed out,[80] it seems that, in theory at least, forced dedication should be treated within the power of eminent domain.

On the other hand, it appears that forced dedication without monetary compensation may, in some instances, be socially desirable, or even necessary.[81] This seems especially fair when the landowner

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[75] The procedure for eminent domain is prescribed by section 1248 of the California Code of Civil Procedure. According to this section, the plaintiff is entitled to have a jury assess his damages.

[76] 112 Cal. 468, 473, 44 P. 803, 804 (1896).

[77] Mid-Way Cabinet Fixture Mfg. v. San Joaquin County, 257 A.C.A. 206, 212, 65 Cal. Rptr. 37, 41 (1967).

[78] People *ex rel.* Department of Pub. Works v. Curtis, 255 A.C.A. 418, 63 Cal. Rptr. 138 (1967).

[79] *Id.* at 425, 63 Cal. Rptr. at 142.

[80] *See* text accompanying note 65 *supra.*

[81] *See* text accompanying notes 70-72 *supra.*

both creates the need for the acquisition and receives economic benefit from the consequent government program. On this basis, forced dedication without compensation seems emminently justifiable.

But, because of the restrictions of section 1248(3) of the California Code of Civil Procedure,[82] if forced dedication proceedings were considered as being within eminent domain, the economic benefit could not be balanced against the value of the parcel taken. Thus, as it presently stands, if unjustifiable payment of compensation is to be avoided, forced dedication must be considered to be within the scope of the police power.[83]

This approach presents three major problems. The first is that the police power justification might be employed even where there was no economic benefit.[84] The second is that there are no fixed tests for determining the relevant losses and/or benefits.[85] The third is the dangers inherent in overextending or misapplying the police power.[86]

Forced dedication is a relatively recent phenomenon with which the courts have dealt in a makeshift manner.[87] The result is a glaring contradiction that can be resolved only by legislation.[88] By statute,

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[82] *See* note 67 *supra.*

[83] See text accompanying notes 72-73 *supra.*

[84] *See* text accompanying note 74 *supra.*

[85] The purpose of the eminent domain proceedings is to determine how much compensation should be allowed. *See* People *ex rel.* Department of Pub. Works v. Edgar, 219 Cal. App. 2d 381, 32 Cal. Rptr. 892 (1963), where the procedure is clearly set out. The jury is required to give the following answers as to damages: (1) the value of the parcels taken; (2) damages by reason of severance; (3) special benefits which accrued to the remaining property by reason of the construction of improvements. *Id.* at 383, 32 Cal. Rptr. at 893. In *Edgar*, since the special benefits far exceeded the severance damages, the judgment was limited to the value of the land taken. *Id.* at 388-89, 32 Cal. Rptr. at 897. This is in conformity with the procedure set out in CAL. CODE CIV. PROC. § 1248.

[86] *See* text accompanying notes 76-79 *supra.*

[87] "The quantity of private property exposed under present law in America to deliberate governmental destruction without constitutional right to compensation is surprisingly great. California's law in this regard, while no worse off than other states, is little better, and is beset with statutory inconsistencies and anomalies that resist rational explanation, save as illustrations of the ad hoc and episodic development of the legislative pattern. The demands of fairness and equality in a state's dealings with its citizens support the need for a more comprehensive legislative approach, informed by the fundamental policy considerations that undergird the ethical and constitutional duty to compensate justly when private property is taken or damaged for public use." Van Alstyne, *Statutory Modifications of Inverse Condemnation: Deliberately Inflicted Injury or Destruction*, 20 STAN. L. REV. 617, 656-57 (1968).

[88] Any legislative approach to the problem is subject to the state and federal constitutional provisions relating to the taking or damaging of private property. "For example, to the extent that article I, section 14 of the Cali-

the present forced dedication proceedings should be brought under eminent domain. However, in the case of forced dedication an exception should be made to the rule of section 1248(3). The loss sustained by the dedicator should be balanced with the benefit accruing to him. If the latter were as great as the former, no monetary compensation would be necessary.[89]

In order for a case to come within the exception to section 1248(3), three requirements would have to be met: (1) The landowner must have applied to the city for a zoning variance, a building permit or approval of a subdivision map; (2) the city's need for the demanded land would have to be the direct result of the dedicator's proposal, *i.e.*, he would have to *create* the need for which the land is to be taken; and (3) the improvement made by the municipality on the appropriated property would have to directly benefit the dedicator's remaining property as much as, or more than, the value of the land appropriated. All other types of eminent domain cases would remain unchanged.[90]

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fornia constitution imposes more rigorous standards of governmental responsibility than the fifth amendment [of the Federal Constitution] (as made applicable to the states through the fourteenth amendment), realization of the postulated legislative objective may require a state constitutional amendment . . . . On the other hand, to the extent that such state standards represent judicial elaborations of constitutional meaning unaided by legislative interpretation, significant latitude for statutory initiative may exist; one of the most conspicuous features of constitutional law is the disposition of courts to give full effect to statutory measures designed to implement or govern the application of broadly worded constitutional precepts." Van Alstyne, *Statutory Modification of Inverse Condemnation: The Scope of Legislative Power*, 19 STAN. L. REV. 727, 729 (1967). "[I]n the relatively few decisions in which the Supreme Court has reviewed *state* determinations of just compensation, it has intimated that considerable deference to state law will be accorded, limited only by the minimum requirements of reasonableness, fairness, and equal treatment imposed by the fourteenth amendment." *Id.* at 767.

[89] A problem arises when there is some benefit to the landowner, but not enough to equal the loss sustained. Two alternatives are open to the legislature in dealing with this situation: (1) The benefit may be set off against the value lost; (2) The landowner may receive full value for the land. The courts have only considered the situation in which the landowner receives benefits equal to or greater than the value lost. However, in *Southern Pacific* it is suggested by the answer to the hypothetical that forced dedication will not be allowed if the landowner has not benefited from the dedication as much or more than he lost by it. 242 Cal. App. 2d at 50, 51 Cal. Rptr. at 203-04 (1966).

[90] Sections 11525.2 and 11546 of the California Business and Professional Code permit dedication for specific purposes. Section 11525.2, which allows dedication for school sites, requires that the government reimburse the dedicator. Section 11546, which involves dedications for park and recreational purposes, makes no mention of reimbursement. The proposed statute would be subject to specific legislation such as section 11525.2. But under section 11546 the government would be exempt from paying only if the particular case met with the specifications of the proposed legislation.

The advantage of this proposal over the existing method of handling forced dedication cases is that it would protect the individual landowner by requiring that in *every* case an attempt be made to restore him to his previous economic position. At the same time it would provide the courts with a rational, functional and just framework within which to function.

*Carolyn M. Farren**

* Member, Second Year Class.