Subdivision Exactions in California: Expansion of Municipal Power

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SUBDIVISION EXACTIONS IN CALIFORNIA: EXPANSION OF MUNICIPAL POWER

In order to meet the tremendous population growth that California has experienced during the last few decades, large quantities of open space land have been privately developed. The private developer's prime motivation has been the maximization of profits. Developments based primarily on such motivation may tend to ignore human needs and result in a detriment to overall community development. As a result, a strong public interest has emerged in preventing haphazard development of communities by private developers. There has been increasing political pressure on state governments to provide some form of local land use controls which would promote the orderly and efficient use of land in growing communities. Because of the large amounts of land that are consumed in subdivision development, particular emphasis has been placed on the passage of legislation which would allow control and regulation of residential development.

A necessary concomitant to the need for alleviation of population congestion caused by the proliferation of residential subdivisions has been the need for open space to accommodate the influx of new residents. This, in turn, has created a need to preserve open spaces for local parks and recreational areas. Ironically, the subdivision which generates the need for more open space is often the very cause of the reduction in available open space.

To ameliorate the impact of subdivisions, advocates of orderly community development have recently been urging that some provision for neighborhood park and recreational facilities be incorporated into plans for subdivision developments through the medium of community land use regulations. In response to this public pressure, state legislatures have enacted enabling legislation permitting municipalities to control and regulate the development of their communities and to shift certain of the increased costs of public facilities created by the new subdivisions, such as streets and sewers, to the private developer—and through him to the home buyer.

The purpose of such legislation is to allow municipalities to utilize the police power to control and regulate the design and improvement of subdivisions under a long range scheme for community development. Requiring city approval of a proposed map of a subdivision from a developer is the usual device used to insure compliance with the municipality's overall development plan. Under the authority of
the enabling legislation, municipalities generally enact local ordinances which impose certain requirements on private developers.\(^1\)

California’s approach to the problem of controlling subdivision development is typical of modern legislation. The basic enabling legislation is embodied in the Subdivision Map Act (SMA),\(^2\) which applies exclusively to subdivisions.\(^3\) Under the SMA a subdivision is defined as real property, divided for the purpose of sale or lease, into five or more parcels, but exclusive of apartments, businesses and industries.\(^4\) Control and enforcement of the design and improvement of subdivisions is vested in governing bodies of cities and counties,\(^5\) and they are required to enact local legislation to implement the various provisions of the SMA.\(^6\) Local legislation, however, is limited to that which is specifically or impliedly contained in the SMA.\(^7\)


3. “Subdivision” refers to any real property, improved or unimproved, or any portion thereof shown on the county tax roll as a unit or series of contiguous units. Id. § 11535(a) (West Supp. 1971).

4. It is also inapplicable to: trailer parks; mineral, oil or gas leases; certain parcels less than five acres which abut upon a public street or highway; parcels where each lot has a gross area of twenty acres or more; and cemeteries. Id.

5. Id. § 11525. Violation of the SMA is a misdemeanor and penal sanctions are provided. Id. § 11541 (West 1964). Any conveyance made contrary to the SMA, where it is applicable, is voidable. Id. § 11540.

6. The legislation must control the design and improvement of subdivisions. Id. § 11525 (West Supp. 1971). “Design” and “improvement” are specifically defined in id. §§ 11510, 11511 (West 1964), as amended, (Supp. 1971).

A developer is required to first file a tentative map of his proposed subdivision for approval. The SMA sets out the mechanics for granting map approval, and the local ordinances and resolutions specify the conditions which must be met by the developer. In the event a developer is dissatisfied with any of the preconditions imposed by the municipality, there is a grievance procedure available through local hearings and, if necessary, through appeals to the courts.

The original SMA included requirements for dedication of land for streets. Provisions were subsequently added to the SMA authorizing payment of fees for sewers and drainage facilities and dedication of land for schools. A conspicuous omission from these requirements was a provision enabling local authorities to require dedication of land for parks and recreational facilities. Municipalities had

Also, a fee may be collected to defray the administrative costs of processing the subdivider's maps. Id. § 11529 (West Supp. 1971).

8. It is unlawful to sell or lease or to contract to sell or lease any land within the proposed subdivision until a final map fully complies with the SMA and local ordinances and has been duly recorded or filed in the county recorder's office. Id. § 11538 (West 1964).

9. Separate sections provide for the administration of: tentative maps, id. §§ 11550-55 (West 1964), as amended, (Supp. 1971); final maps, id. §§ 11565-68; parcel maps, id. §§ 11575-80 (West Supp. 1971); certificates and acknowledgments on final maps, id. §§ 11585-93 (West 1964), as amended, (Supp. 1971); taxes and assessments, id. §§ 11600-05; final approvals, id. §§ 11610-19; recording, id. §§ 11625-29; and revocation of approvals, id. §§ 11640-41 (West 1964).

10. A municipality may appoint an advisory agency to make investigations and reports regarding proposed divisions of land. Id. § 11509 (West 1964), as amended, (Supp. 1971). It may also appoint an appeal board to hear grievances from actions of the advisory agency. Id. § 11512 (West Supp. 1971). An advisory agency has fifty days from the date of filing of a tentative map to report on the map and that report shall approve, conditionally approve or disapprove a proposed map. The governing body has ten days to act on this report. If dissatisfied with the action of the advisory agency, the subdivider has fifteen days to appeal to the appeal board which must hold a public hearing on the matter within fifteen days, or at its next succeeding regular meeting, from the date of appeal. The appeal board has seven days from conclusion of the hearing to declare its findings either sustaining, modifying, rejecting or overruling any action of the advisory agency. If still dissatisfied, the subdivider has fifteen days to appeal directly to the governing body. The governing body has fifteen days, or until its next succeeding regular meeting, to grant a hearing and seven more days after the conclusion of the hearing to declare its findings. Id. § 11552. If, after this possible 4½ month period, the subdivider desires to appeal to the courts, he has 6 months in which to file his appeal. Id. § 11525.1.


attempted to impose park and recreation requirements on developers as a condition precedent to approval of a map. Such attempts had been unsuccessful because there was no specific provision for this authority in the SMA.\textsuperscript{14} The legislature was prompted to remedy this situation, and in 1965 enacted section 11546 of the Business and Professions Code as part of the SMA.\textsuperscript{15} In its present form, this provision invests municipalities with the authority to require the dedication of land, or pay a fee in lieu thereof, or a combination of both, for park purposes as a precondition to approval of a subdivision map. The statute authorizes these exactions\textsuperscript{16} if the following conditions are met: (1) the city has definite standards for determining the amount of the exaction; (2) the exaction is used only for the purpose of providing park or recreational facilities to serve the subdivision; (3) there is a general plan for city growth which contains a recreational element with definite principles and standards for park and recreational facilities; (4) the amount of the exaction bears a reasonable relationship to the use of the park and recreational facilities by the future inhabitants of the subdivision; and (5) the city specifies when development of the facilities will begin.\textsuperscript{17}

Pursuant to section 11546, the city of Walnut Creek enacted an ordinance,\textsuperscript{18} passed resolutions,\textsuperscript{19} and drew up a comprehensive park plan.\textsuperscript{20} The basic scheme outlined by the Walnut Creek legislation provided for an overall city plan depicting existing and future park sites on a city map.\textsuperscript{21} The city plan included provisions for neighborhood parks, community and special parks, and other recreational facilities;\textsuperscript{22} however, exactions from developers were limited to neighborhood and community parks serving the subdivision.\textsuperscript{23} The plan established a


\textsuperscript{15} Cal. Stat. 1965, ch. 1809, § 2, at 4183. The same legislation also amended \textit{Cal. Bus. & Prof. Code} § 11510 to add the following: "‘Design’ also includes land to be dedicated for park or recreational purposes.” Cal. Stat. 1965, ch. 1809, § 1, at 4183.

\textsuperscript{16} The term "exactions" is used in this note generically to include dedication of land, payment of fees in lieu thereof, or a combination of both.

\textsuperscript{17} \textit{Cal. Bus. & Prof. Code} §§ 11546(b) to (f) (West Supp. 1971). Subdivision (a) provided that the local ordinance had to be in effect for thirty days prior to the filing of the tentative map of the subdivision. Subdivision (g) provided that only fees could be required of subdivisions containing fifty parcels or less. Section 11546 does not apply to industrial subdivisions.

\textsuperscript{18} Walnut Creek, Cal., Municipal Code § 10-1.516 (1967).

\textsuperscript{19} Walnut Creek, Cal., Res. 1883 (1964); 2225 (1967).

\textsuperscript{20} Walnut Creek, Cal., Long Range Park and Recreation Plan (1964) [hereinafter cited as Park Plan].

\textsuperscript{21} Walnut Creek, Cal., Res. 1883 (1964).

\textsuperscript{22} Park Plan, \textit{supra} note 20, at 3.

\textsuperscript{23} Walnut Creek, Cal., Municipal Code § 10-1.516(b)(1), (2) (1967).
standard of two and one half acres per thousand residents as the minimum requirement for parks, and each developer was required, before his map was approved, to dedicate land for parks, or pay fees in lieu thereof, on the basis of the number of residents expected to be brought into the community as a result of the subdivision.

The developer was required to dedicate land when the city had already designated a neighborhood park site within the proposed subdivision, if the slope, topography, geology and general surroundings of the site were suitable for the park purposes. If dedication of land was found to be impossible, impractical or undesirable, the developer was required to pay a fee in lieu thereof in an amount equal to the fair market value of the land that would have otherwise been dedicated. A combination of land and fees was required when only a portion of the neighborhood park site on the city map was within the proposed subdivision. Any fees collected under the plan were to be used only for the purpose of providing park or recreational facilities to serve the subdivision. The parks were to be developed by the city as they became necessary; however, upon approval of the subdivision map, the city was required to specify when development of the park would begin. Subdividers and residents of the subdivision were to be consulted before development of the park in order to insure that local needs were met. At the option of the city, credit could be granted to the developer for park and recreational facilities which he had included in his subdivision plan, provided the developer would guarantee that such land would be permanently maintained for such purposes.

The constitutionality of section 11546 and the Walnut Creek legislation was recently challenged in Associated Home Builders, Inc. v. City of Walnut Creek. The plaintiffs alternatively asserted that the

24. Walnut Creek, Cal., Res. 2225 at 3 (1967) (3d "whereas" clause); Park Plan, supra note 20, at 3.
25. WALNUT CREEK, CAL., MUNICIPAL CODE § 10-1.516(b) (1967).
26. Id. § 10-1.516(b) (1); Walnut Creek, Cal., Res. 2225, at 1 (1967).
27. The "in lieu" fees were required if no park or recreational facility was designated within the proposed subdivision, or if dedication of land was not feasible and a neighborhood or community park was within a ¾ mile radius of the subdivision.
28. Walnut Creek, Cal., Res. 2225, at 3 (1967).
29. WALNUT CREEK, CAL., MUNICIPAL CODE § 10-1.516(b) (2)(aa) (1967).
30. Walnut Creek, Cal., Res. 2225, at 3 (1967).
31. WALNUT CREEK, CAL., MUNICIPAL CODE § 10-1.516(d) (1967).
32. Walnut Creek, Cal., Res. 2225, at 3 (1967).
33. WALNUT CREEK, CAL., MUNICIPAL CODE § 10-1.516(c) (1967); Walnut Creek, Cal., Res. 2225, at 2 (1967).
34. 4 Cal. 3d 633, 484 P.2d 606, 94 Cal. Rptr. 630, appeal dismissed, 92 S. Ct. 202 (1971).
Walnut Creek legislation, even if deemed to be constitutional, failed to comply with the provisions of section 11546. The California Supreme Court answered the challenges by unanimously upholding both the state enabling act and the local implementing legislation. Although there have been similar challenges against subdivision exactions in other jurisdictions, this is the first time exactions for park purposes have been challenged in California as an unreasonable exercise of the police power. More importantly, however, the court in Associated gave a much broader constitutional interpretation to the requirements that may be imposed on developers than have the decisions of courts in other jurisdictions. Much of the prior authority relied upon by the court in Associated does not appear to warrant the broad construction which has been given section 11546 and the Walnut Creek legislation. This note will review some of the authority relied upon by the court in Associated and will analyze the reasons given by the court for its decision. This note will also compare the court's decision with decisions in other jurisdictions.

**Judicial Approaches to the Constitutionality of Subdivision Exactions**

Characterization of exactions as "subdivision controls" allows them to be justified as a proper exercise of the police power. The exactions are primarily viewed as regulatory in nature because they come into operation only when a developer decides to subdivide his land. The proposition that developers do not have an absolute right to subdivide their land is generally accepted; most authorities conclude that subdividing is a privilege, and that the dedication of land, or payment of fees, is deemed to be done voluntarily by the developer to gain approval of his subdivision map. Under this theory, the sub-

35. This note is necessarily confined to a discussion of the reasonableness of subdivision exactions. The term "reasonableness" is also used in a broader context, exercise of the regulatory power in general. Courts have discussed it under four rubrics: "arbitrariness," "confiscation," "discrimination," and "taking." See generally Bowden, supra note 1, at 474-92; Heyman, supra note 1, at 11-48; Heyman & Gilhool, supra note 1, at 1124-30.


38. See Bowden, supra note 1, at 476; Heyman, Planning and the Constitution: The Great 'Property Rights' Fallacy, CRY CALIFORNIA, Summer 1968, 29, 33 (how far regulation can go is basically a political question).

divider's interest in the land is viewed as purely economic; that is, he is merely producing a product. In return for the profit he expects to make, the developer can be subjected to reasonable regulation to insure that he will develop his land in a manner designed to minimize the economic impact on the entire community.

Subdivision exactions viewed in this manner allow a court to concentrate on two constitutional issues which routinely arise in litigation concerning such exactions. First, the court must determine whether the purpose of the exaction is within the constitutional objectives of the police power; that is, whether it is calculated to promote the public welfare. Secondly, the court must determine whether the exaction in question is reasonable; that is, whether the method used reasonably tends to serve the stated purpose and whether it is within the constitutional limitations for the exercise of the regulatory power.

Whether the purpose of the exaction is within the constitutional scope of the police power has not caused any serious problems in the courts. In general, there is a judicial presumption in favor of the validity of zoning legislation, and a marked deference to legislative judgment, especially in California, concerning what is a worthy public objective. The most common land dedication requirements have been

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note 1, at 184 (questions the "voluntariness" of the dedication); Johnston, supra note 1, at 876-85 (same).

40. "Clearly, the nonsubdivider is entitled to compensation for his land when it is converted to street, park, or other public use. Why should the subdivider be excluded from this guarantee? . . . [T]here is an elementary but vital distinction between developers and other landowners. The subdivider is a manufacturer, processor, and marketer of a product; land is but one of his raw materials. In subdivision control disputes, the developer is not defending hearth and home against the king's intrusion, but simply attempting to maximize his profits from the sale of a finished product. As applied to him, subdivision control exactions are actually business regulations." Johnston, supra note 1, at 922-23.

41. "The statutes in most states permit at least the cost of on site improvements to be charged either to the developer, the new homeowners (through benefit assessments), or to the entire community. However, the general practice in an area of rapid growth is to insist that an increasingly higher proportion of both on site and off site costs be borne by the developer, and in turn passed on to the new home buyer for whom such improvements are created." Cutler, supra note 1, at 385.

42. ANDERSON, supra note 1, at § 7.01; Bowden, supra note 1, at 474; Heyman & Gilhool, supra note 1, at 1122.


44. "In some states, notably California, courts defer substantially to legislative judgments [citing Lockard v. City of Los Angeles, 33 Cal. 2d 453, 461-62, 202 P.2d 38, 43 (1949)]. . . . To the extent that the judicial attitude is one of deference to legislative determinations, the probability of negative judicial action is lessened and the probability that the regulatory proposal will be found valid is increased. . . . In addition, an attitude of judicial deference leads to greater legislative experimentation. Thus, California, in many details, has planning legislation more advanced that [sic]
for streets, and exactions for this purpose have routinely been held permissible by the courts since streets are clearly related to the orderly development of a community. Similarly, no serious contention as to the constitutionality of dedication requirements for water, sewers, sidewalks and drainage systems has been made. The vital nature of these requirements has apparently been obvious to developers, residents and the courts.

Dedication requirements for parks, on the other hand, have only recently come under scrutiny. The vital nature of parks to a community is not as readily apparent as the need for streets, water or sewers. The amount of land required for parks is generally greater than that required for roads or sewer lines. The topography generally necessary for parks insures that the dedicated land will be prime subdivision real estate. The Supreme Court of Pennsylvania, in an early case, decided that although parks were desirable, they were not necessary in the same sense as streets, and land exactions for parks were therefore held not to be justified under the police power. Since that opinion,

other states. It is very unlikely that California courts will abandon this attitude of deference in view of its long and well established history in California case law." Heyman, supra note 1, at 9-10.

"Judicial deference [in California] is most notable to legislative definitions of worthy public objectives and legislative choice of the means . . . best designed to accomplish them. One should note that this judicial attitude has been evidenced in cases involving regulations adopted by city councils and county boards of supervisors which often must make decisions based on scanty technical data and under conditions where a rather narrow range of interests tend to be represented." Id. at 17.

45. Heyman & Gilhool, supra note 1, at 1133, 1136-41. But cf. Reps & Smith, supra note 1, at 410 (schools should be treated differently).

46. "The requirement that a subdivider set aside land for parks has at least two features which distinguish it from similar requirements with respect to streets, and those which relate to water, sewer, and drainage systems. First, the amount of land which is involved may be greater, and may be more obviously a salable portion of the tract. Second, the vital nature of the streets, sewers, waterlines, and drainage facilities is more obvious to the developer, the purchasers, and the courts than is true of parks and playgrounds. Perhaps a third factor should be added. With or without subdivision controls, a developer planning and opening a new subdivision must show streets, sewers, etc. These are a traditional as well as an essential part of a new neighborhood. Neighborhood park space is less common; it serves a public interest which has been ignored." Anderson, supra note 1, at § 19.39.

47. Miller v. City of Beaver Falls, 368 Pa. 189, 82 A.2d 34 (1951), where the court asked the question: "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?" Id. at 193, 82 A.2d at 36. And answered it in the negative noting: "The city is not without a remedy, but it cannot eat its cake and have its penny too. If it desires plaintiffs' 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. . . . All that is required is that just compensation be paid therefor." Id. at 198, 82 A.2d at 38-39.
however, cases concerning exactions for parks have rarely been challenged on the ground that the purpose is unrelated to the welfare of the community; when they have been so challenged, they have been upheld.\textsuperscript{48}

Although the constitutionality of using the police power to make exactions for park purposes is no longer a serious issue, courts have had more trouble with the second question—the reasonableness of the exactions. The term "reasonableness" is necessarily an imprecise term and judicial approaches to its definition in terms of dedication requirements have differed.

\textbf{Ayers: Foundation Case Law}

An early landmark California case, \textit{Ayers v. City Council of Los Angeles},\textsuperscript{49} involved the reasonableness of subdivision exactions. This decision has provided the foundation for judicial theories in several other jurisdictions determining the constitutionality of such exactions.

In \textit{Ayers} the owners of thirteen acres of land adjacent to a main boulevard in Los Angeles wanted to develop a residential subdivision. The proposed subdivision was the last one to be developed in the particular area. The city had previously planned to widen the contiguous boulevard and had planned to condemn part of this parcel of land to do so. The developer utilized a cellular design for his proposed subdivision which was the generally adopted method of residential subdivision in that locality. This design was advantageous to the developer because it minimized the amount of land required for street purposes, and it was advantageous to the city because it interfered less with the free flow of traffic than did other designs. Furthermore, the cellular design complied with the city's overall neighborhood plan. Ingress and egress to the subdivision from the boulevard was provided through tributary streets perpendicular to it.

As a condition to approval of the subdivision map, the city first required the owner to dedicate a ten foot strip of his land for the purpose of widening the boulevard; secondly, the city required another ten foot strip of the land for planting of trees to insulate the subdivision from the boulevard; thirdly, the city required dedication of an eighty foot strip of land for a street which would cut across the subdivision; finally, the city required dedication of a small triangular island in or-

\textsuperscript{48} See, e.g., Billings Properties, Inc. v. Yellowstone County, 144 Mont. 25, 33, 394 P.2d 182, 187 (1964). "If the legislature thinks it wise to apportion the cost of increased facilities to new residents whose activities make them necessary, whether for reasons of fairness, efficiency, or convenience, such a policy, unless palpably arbitrary, should not be liable to constitutional invalidation." Heyman & Gilhool, supra note 1, at 1154.

\textsuperscript{49} 34 Cal. 2d 31, 207 P.2d 1 (1949).
der to eliminate an existing traffic hazard which had been created by the extension of another street at the southern tip of the subdivision.

The subdivider challenged these required dedications, contending that the city was exercising the power of eminent domain under the guise of subdivision map proceedings in order to avoid fair payment for the land taken. The court, in upholding the constitutionality of the dedications, summarily dismissed this contention:

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 . . . dedication . . . so as to conform to the safety and general welfare of the lot owners in the subdivision and of the public.50

Earlier in the opinion the court had noted:

Questions of reasonableness and necessity depend on matters of fact. . . . In a growing metropolitan area each additional subdivision adds to the traffic burden. It is no defense to the conditions imposed in a subdivision 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.51

These statements have been cited by other courts in subsequent decisions concerning subdivision exactions and have been interpreted in various ways. The statements by the court appear to suggest that, under certain circumstances, the city can require the developer to satisfy part of a general public need. In other words, that it is constitutionally permissible, under the police power, to take a little more land than is required to satisfy the specific needs generated by the subdivision under the guise of regulation.52

50. Id. at 42, 207 P.2d at 7 (emphasis added). Commenting on these statements, one commentator noted: "This statement is disappointing. Obviously, the form in which the proceeding is conducted should not determine applicability of the constitutional guarantee of just compensation. The facile verbalization that the subdivider has a duty to comply with 'reasonable conditions' merely obscures the central problem—how is 'reasonableness' to be determined?" Johnston, supra note 1, at 891.

51. 34 Cal. 2d at 41, 207 P.2d at 7.

52. "Ayers . . . and Bringle v. Board of Supervisors indicate the extent to which the police power may be employed in restricting land use. They indicate at least two things. First, a land owner may be compelled to dedicate a part of his property to public use even if he did not create the need for which the land is sought to be used. Second, a city may use official sanctions such as building permits, etc., to bargain with landowners in municipal projects such as street widening." Bowden, supra note 1, at 482. "[I]n the two leading cases on the question, Ayers . . . and Brouse v. Smith, one judgment is clearly identifiable. It is permissible to require a landowner to pay for improvements which are generated by his use of the land whether or not the com-
When considered in light of the fact situation in Ayers, however, this latter conclusion is not so clear. For example, the court noted that the cellular design of the subdivision precluded direct ingress and egress from the boulevard, and that any other design would have been “out of harmony with the neighborhood plan and traffic needs.” Had the developer used another design he would have been required to construct lateral roads for diversion of local traffic to and from the boulevard at a greater expense than the plan required by the city. Further, the court found that, regardless of the design used, the subdivider would have been required to dedicate the ten foot strip for widening of the boulevard because of the additional traffic the subdivision would have created. The ten foot strip of land required for the planting of trees was required because of the cellular design of the subdivision which necessitated a buffer zone to the boulevard. Although this strip may not have been required had the subdivision been designed with direct access to the boulevard, a more conventional design would have required additional land for diversionary streets in any event. Similarly, the eighty foot strip of land required for the street which cut across the subdivision would have been required to accommodate the increased traffic generated by the subdivision development. The increased traffic conditions caused by the subdivision would have also necessitated dedication of the small triangular island so as to eliminate the traffic hazard.

From the previous discussion it is readily apparent that the exactions from the developer were directly related to the needs generated by the subdivision in all four instances. That is, the four requirements—the ten foot strip for widening the boulevard, the ten foot strip for trees, the widening of the street which ran through the subdivision, and the small triangular island—would have been approximately the same regardless of the design of the subdivision so long as the same number of units were built. This fact allowed the court to conclude:

[W]here it is a condition reasonably related to increased traffic and other needs of the proposed subdivision [dedication] is voluntary in theory and not contrary to constitutional concepts.53

Thus, actual use of the street by the community was not the basis of the holding, even though the Ayers court referred to the “benefit [to] the city as a whole.” Rather, the benefit to the public was the general free flow of traffic and conformity with the neighborhood plan and design made possible by the cellular design of the subdivision.

53. 34 Cal. 2d at 42, 207 P.2d at 8 (dictum).
Since *Ayers* there have been a number of approaches taken by courts in other jurisdictions for testing the reasonableness of the method used to achieve the objectives of subdivision exaction statutes. Many of the cases have cited *Ayers* in support of their position. Since the various judicial approaches provide the background on which *Associated* was decided, the next sections discuss these approaches in some detail.

**Correlative Need Theory**

One formulation used by some courts to test the regulatory nature of subdivision exactions has been to require a one-to-one relationship between the exaction and the need generated by development of the subdivision. The logic of this formula is as follows: the influx of people creates a need for municipal facilities to serve them; cost accounting techniques are available to determine, with relative certainty, the amount necessary to satisfy the needs of the new residents; thus, municipalities may only require an amount of land or fees to satisfy the needs generated by the subdivision itself.

The Illinois Supreme Court in *Rosen v. Village of Downers Grove* was the first court to use the *Ayers* opinion to support a formula relating the exaction to the needs generated by the subdivision. In *Rosen* the subdivider sued to enjoin school officials from enforcing an ordinance requiring dedication of land to the public for “educational purposes.” The state enabling statute referred to dedication requirements for school grounds; however, the local planning commission attempted to exact fees in lieu of land which were to be used for general educational purposes. The court found that: (1) the fee technique used by the commission was beyond statutory authorization; and (2) the term “educational purposes” was broader than the term “school grounds” used in the state enabling statute. In reaching its decision, the court construed *Ayers* in the following manner:

> The distinction between permissible and forbidden requirements is suggested in *Ayers* . . . which indicates that the municipality may require the developer to provide the streets which are required by the activity within the subdivision but cannot require him to provide a major thoroughfare, the need for which stems from the total activity of the community.

As has already been discussed, *Ayers* did in fact allow a dedication requirement for a major thoroughfare outside of the subdivision. While it is true that the exaction in *Ayers* was not made on the ground that the total activity of the community had increased, the dedication was

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56. *Id.* at 453, 167 N.E.2d at 234.
certainly not based on the location of the streets as intimated by the Rosen court. Whether the specific needs were represented within or without the subdivision was immaterial in Ayers. Instead, the controlling determination in Ayers was that the exaction was based on the increased traffic generated by the creation of the subdivision.

The dicta in Rosen concerning Ayers was cited in a subsequent Illinois case, Pioneer Trust & Savings Bank v. Village of Mount Prospect, to establish the prevailing rule in Illinois concerning subdivision exactions. Pioneer involved a mandamus proceeding to compel the city to approve the subdivider's map without the necessity of complying with a local ordinance requiring dedication of land for a school. The court held the ordinance invalid because there was no showing that the exaction was related to the activities of the subdivider. In the court's view, the central question was who should be required to pay for the improvements. The court concluded that the subdivider should not be forced to remedy a problem which resulted from the total development of the community, and stated the following rule:

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

This rule—that the needs generated by the subdivision determine the permissible scope of the exaction—is somewhat broader than the dicta in Rosen, but is actually a more valid interpretation of the Ayers decision.

The Wisconsin Supreme Court adopted a modified version of Pioneer in Jordan v. Village of Menomonee Falls. In Jordan a city ordinance exacted a fee of $200 per lot in lieu of dedication of land for park and school purposes. The developer paid the fee under protest and sued for a refund. The court found that the exaction was valid under the city ordinance, and, after quoting the above passage from Pioneer, said:

We deem this to be an acceptable statement of the yardstick to be applied, provided the words "specifically and uniquely attrib-
utable to his activity" are not so restrictively applied as to cast an unreasonable burden of proof upon the municipality which has enacted the ordinance under attack.\textsuperscript{60}

The court thus modified the \textit{Pioneer} test by the introduction of equitable discretion in applying the "specifically and uniquely attributable" test.

The \textit{Pioneer} rule was adopted in substance in Montana in \textit{Billings Properties, Inc. v. Yellowstone County}.

An action for a declaratory judgment was brought by a subdivider to determine the validity of state statutes requiring dedication of a fixed percentage of subdivision land for parks and playgrounds. The subdivider's map was rejected when he failed to dedicate land in compliance with the statutes. The court upheld the validity of the statutes and relied on \textit{Pioneer, Rosen} and \textit{Ayers} to reach the following conclusion:

\begin{quote}
[T]his court is of the opinion that if the subdivision creates the specific need for . . . parks . . . then it is not unreasonable to charge the subdivider with the burden of providing them.\textsuperscript{62}
\end{quote}

Although the court used different words—specific need, rather than specifically and uniquely attributable—the justification given for the reasonableness of the exaction is the same basic formulation utilized in \textit{Pioneer}—the exaction is directly related to the need generated by the subdivision.

In still another case, \textit{Frank Ansuini, Inc. v. City of Cranston},\textsuperscript{63} a developer in Rhode Island challenged, as beyond the scope of the police power, a local ordinance requiring voluntary dedication of 7 percent of his land for park purposes as a condition precedent to final map approval. The Supreme Court of Rhode Island labeled the fixed percentage exaction arbitrary and held the statute invalid. The court distinguished \textit{Pioneer} from cases\textsuperscript{64} in other jurisdictions, which had allowed exactions based on a fixed percentage of the development, and concluded as follows:

\begin{quote}
\textsuperscript{60.} \textit{Id.} at 617, 137 N.W.2d at 447. "By requiring the village to establish a 'rational nexus' between its exactions and the public needs created by the new subdivision as defined by the objectives in the enabling act, \textit{Jordan} steers a moderate course between the judicial obstructionism of \textit{Pioneer Trust} and the excessive deference of \textit{Billings Properties}.”
\textit{Johnston, supra} note 1, at 917.

\textsuperscript{61.} 144 Mont. 25, 394 P.2d 182 (1964).

\textsuperscript{62.} \textit{Id.} at 33, 394 P.2d at 187 (emphasis added).

\textsuperscript{63.} 264 A.2d 910 (R.I. 1970).

We are of the opinion, however, that the rule as enunciated in Pioneer is the more reasonable and should apply in this jurisdiction. It seems obvious to us that a fixed percentage requirement will inevitably create inequities, which will be less likely to arise under the specifically and uniquely attributable formula.65

This same basic formulation was applied recently in Maryland in the case of Baltimore Planning Commission v. Victor Development Co.66 There, the developer wanted to build an apartment building, and needed a building permit in order to obtain financing for the development. The city rejected the developer's plan, and gave as its only reason that the development would cause the public schools to become overcrowded. The Maryland Court of Appeals accepted the developer's argument that there was no statutory authorization, in the city charter or otherwise, which would allow the city planning commission to refuse to grant approval of the developer's plan on that ground. In dicta the court noted:

There is little doubt that the developer can be required to deal with the problems he creates in his own subdivision but there is even less doubt that he cannot be saddled with the resolution of problems common to the area and for which he is no more responsible than other citizens.67

Three of the five cases discussed, Pioneer, Jordan and Frank, have adopted the Pioneer criteria—that the exaction must be "specifically and uniquely attributable" to the activity of the developer—in order to test the regulatory nature of the exaction. The other two cases, Billings and Baltimore, use different language, "specific need" and "problems he creates," to reach the same basic result. To summarize, all five cases hold that there must be a direct relationship between the exaction and the need generated by the subdivision.

Correlative Benefit Theory

The correlative need formulation considers only the acquisition side of any exaction—the relationship between need and exaction. Another approach to the problem is to consider the permissible uses to which exactions of land or fees may be applied—the relationship between the exaction and the benefits conferred on the subdivision. Such an approach may be described as a correlative benefit theory—there must be a one-to-one relationship between the exaction made and the benefit conferred on the subdivision.68 In other words, the exaction can be used only for the direct benefit of the subdivision from which

65. 264 A.2d at 913.
67. Id. at 393, 275 A.2d at 482.
68. For a discussion of the correlative benefit theory see Heyman & Gilhool, supra note 1, at 1128-30.
the exaction was made. Under this theory, if the statute authorizing the exactions did not restrict the exaction to that which would benefit the subdivision, then the exaction would be unconstitutional because it would be in the nature of a tax.

In one case where this approach was applied, *Haugen v. Gleason*, the developer was required to pay a fee of $37.50 per lot as a condition for approval of his plan; the fees were to be used for acquisition of land for parks. The developer challenged the constitutionality of the statute authorizing such fees and sought declaratory relief and a refund of his fee. The Supreme Court of Oregon held the statute invalid because there was no requirement that the fees thus collected be expended to benefit the land being subdivided. Under the statute, the fees became part of the public funds of the county and, therefore, were in the nature of a tax which exceeded the constitutional bounds of the police power. The court noted:

[The regulation] authorizes the county to lay a tax upon one class of landowners for a public purpose which may be, but need not be, related to the activity being regulated. The regulation cannot stand because it fails to limit the use of money so produced to the *direct benefit* of the regulated subdivision.70

The same judicial approach was taken earlier in New York in *Gulest Associates, Inc. v. Town of Newburgh*. In that case the court held a similar statute invalid because the expenditure of the fees exacted was not directly related to the development of the subdivision. *Gulest* was subsequently overruled by the New York Court of Appeals and is discussed further below.73

The Need/Benefit Theory

A third judicial approach which has been taken by the courts is merely a combination of the first two approaches—not only must there be a one-to-one relationship between the exaction and the need generated by the subdivision, but there must also be a one-to-one relationship between the exaction and the benefit conferred on the particular subdivision. This is the most comprehensive standard adopted by the courts as a judicial test for the validity of a subdivision exaction. Under this approach, in order that an exaction retain its regulatory nature as an exercise of the police power, the courts require that exactions of land

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70. *Id.* at 105, 359 P.2d at 111 (emphasis added).
73. *See* text accompanying notes 79-90 *infra*. 
or money based on the needs generated by the subdivision must be used by the city only for the direct benefit of the subdivision involved.

A superior court in Connecticut used this rigorous approach in *Aunt Hack Ridge Estates, Inc. v. Planning Commission.*\(^{74}\) In that case the city ordinance required dedication of 4 percent of the developer's land for parks or a fixed fee in lieu thereof. The fees were to be put into a fund for parks or playgrounds for the use of residents of the Town of Danbury. The court held that such a fee was a tax because there was no restriction on the use of the fees and the statute was therefore unconstitutional. As stated by the court:

> [T]he developer may be required to assume those costs which are specifically and uniquely attributable to his activity and which would otherwise be borne by the public. Any moneys collected, however, must be specifically confined and limited to the direct benefit of the regulated subdivision.\(^{75}\)

The Supreme Court of New Jersey adopted the same judicial approach in *Longridge Builders, Inc. v. Planning Board.*\(^{76}\) There, the city attempted to require a developer to pave a 361 foot right of way from the subdivision to an existing public road. The developer challenged the requirement on the ground that there was no statutory authority requiring private developers to pave city streets. The court agreed and invalidated the requirement on statutory grounds. The court specifically refused to rule whether the city could require the developer to provide off-site improvements. In reaching its decision, the court said:

> It is clear to us that, assuming off-site improvements could be required of a subdivider, the subdivider could be compelled only to bear that portion of the cost which bears a rational nexus to the needs created by, and benefits conferred upon, the subdivision. It would be impermissible to saddle the developer with the full cost where other property owners receive a special benefit from the improvement.\(^{77}\)

This judicial approach allows the most protection to the developer; yet it is not so restrictive as to thwart the policy of encouraging municipalities to develop and implement long range plans. Nor should it necessitate frequent and lengthy litigation resulting in delays in implementation of these plans because, as stated earlier, cost accounting techniques are available to determine and apportion the costs of new facilities.\(^{78}\)


\(^{75}\) Id. at 77-78, 230 A.2d at 47.

\(^{76}\) 52 N.J. 348, 245 A.2d 336 (1968).

\(^{77}\) Id. at 350, 245 A.2d at 337-38.

\(^{78}\) See Heyman & Gilhool, *supra* note 1, at 1141-46.
Incidental Need Theory

Another, much broader, judicial approach to permissible subdivision exactions has been taken in New York. This approach requires only that an incidental relationship be established between the exaction and the need generated by the subdivision. Other than this incidental nexus, no judicial limitations are placed on the exactions which may be required in the exercise of the police power to "regulate" subdivision development.

This liberal approach was taken in Jenad, Inc. v. Village of Scarsdale where the city had enacted regulations which required subdividers to pay a fee of $250 per lot, in lieu of dedication of land, to be collected and "credited to a separate fund to be used for park, playground and recreational purposes in such manner as may be determined by the Village Board of Trustees from time to time." In validating the statute, the New York Court of Appeals overruled the prior Gulest decision which had held fee requirements invalid because there was no requirement in the statute for a relationship between the exaction and the benefit conferred upon the subdivision. The court noted, however, that even if Gulest was correct, it would have had no bearing on the Jenad decision because the fees collected in Jenad were put into a fund for park and recreational purposes and could be expended only for "acquisition and improvement of recreation and park lands in the village." In response to the developer's contention that the fee was a tax, the court glibly retorted: "This is not a tax at all but a reasonable form of village planning for the general community good." The court glossed over any possible objections to the dedication requirements for parks saying that the requirements were merely a kind of zoning "akin . . . to other reasonable requirements for necessary sewers, water mains, lights, sidewalks, etc." In its cursory opinion, the court cited a portion of Jordan v. Village of Menomonee Falls, as follows:

It was held in the Jordan case that it was not necessary to prove that the land required to be dedicated for a park or school site was to meet a need solely attributable to the influx into the community of people who would occupy this particular subdivision. The court concluded that "a required dedication . . . should be upheld . . . if the evidence reasonably establishes that the municipality will be required to provide more land for schools, parks, and playgrounds as a result of approval of the subdivision."

80. Id. at 82, 218 N.E.2d at 675, 271 N.Y.S.2d at 956.
81. Id. at 84, 218 N.E.2d at 675, 271 N.Y.S.2d at 958.
82. Id. at 84, 218 N.E.2d at 676, 271 N.Y.S.2d at 958 (emphasis added).
83. Id.
84. 28 Wis. 2d 608, 137 N.W.2d 442 (1965), appeal dismissed, 385 U.S. 4 (1966).
85. 18 N.Y.2d at 85, 218 N.E.2d at 676, 271 N.Y.S.2d at 958-59.
Jenad's interpretation of the Jordan case appears to be erroneous inasmuch as it ignores the fact that Jordan specifically adopted the test that an exaction is valid only if it is "specifically and uniquely attributable" to the activity of the developer. The New York court's further rationalization that the Scarsdale exaction is "a reasonable form of village planning for the general community good" and that it was "merely a kind of zoning," as if there were some magic in these words, would not appear to overcome the constitutional considerations which must be discussed in determining the validity of the exactions in question. There is nothing in the opinion of the New York court relating the fee of $200 per lot to the needs generated by the subdivision, nor any limitation imposed requiring that the fee be used for the benefit of the particular subdivision. Regarding this latter point, the court specifically overruled Guleser which had held that the fees must be used for the direct benefit of the subdivision. More significantly, the court did not formulate any constitutional limits regarding permissible exactions.

To summarize, the judicial approach of the New York court in Jenad is far less rigorous than the other approaches described earlier. In fact, it may be considered the most liberal of the four attempts made by the courts to determine a constitutional standard for testing the validity of subdivision exactions. Under this approach, once a need is established by the creation of a subdivision, the municipality may exact a fixed fee without regard to any direct relationship between that fee and the need generated. Furthermore, it may spend that fee on general community needs without limiting the expenditure to the direct benefit of the subdivision paying the fee.

Summary

There is no pretense made that the formulas discussed above are endowed with any magical or mathematical certainty, nor that they represent the only possible approaches which could be taken. They

86. Id. at 84, 218 N.E.2d at 676, 271 N.Y.S.2d at 958.  
87. Id.  
88. See Johnston, supra note 1, at 920-21.  
89. 18 N.Y.2d at 84, 218 N.E.2d at 675, 271 N.Y.S.2d at 957. See Johnston, supra note 1, at 920.  
90. The decision was 4-3. A vigorous dissent by Judge Van Voorhis began as follows: "The principle of decision in this case would constitutionally allow municipal officers to prohibit real estate development in cities, towns and villages unless the newcomers pay whatever sums of money the local public authorities may decide arbitrarily to impose upon them for the privilege of moving into the community, to be spent on schools, public buildings, police and fire protection, parks and recreation or any other general municipal purpose past, present or to come, and without relation to special benefits or assessed valuation." 18 N.Y.2d at 86, 218 N.E.2d at 677, 271 N.Y.S.2d at 959.
are used here only to illustrate the various approaches taken by courts which have considered the problem. Conceivably the jurisdictions utilizing either of the first two formulations—the correlative need theory or the correlative benefit theory—could have adopted the third formulation, which was merely a combination of the two, had the issues been before the respective courts for decision.

Many of the issues presented in the cases discussed in this section were also presented in Associated. It is with the background of these four formulations—the correlative need theory; the correlative benefit theory; the need/benefit theory; and the incidental need theory—that Associated was decided.

**Arguments Presented in Associated**

Associated Home Builders of the Greater East Bay, a nonprofit corporation, brought suit in a class action asking for declaratory and injunctive relief and challenging the constitutionality of section 11546 and the Walnut Creek implementing ordinance and resolutions. The corporation also contended that the Walnut Creek legislation did not comply with the provisions of section 11546. The trial court found for the city and the California Supreme Court affirmed the decision holding that: (1) section 11546 and the city's implementing legislation were constitutional; and (2) the city's legislation complied with the provisions of section 11546.

The court in Associated was presented with a variety of conten-

91. Throughout its opening brief, plaintiff-appellant argued that subdividing was a constitutionally protected right. Opening Brief for Appellant at 30-31, Associated Home Builders, Inc. v. City of Walnut Creek, 4 Cal. 3d 633, 484 P.2d 606, 94 Cal. Rptr. 630, appeal dismissed, 92 S. Ct. 202 (1971).

On appeal the intermediate court noted: "At the outset, we must emphasize that the sale and subdivision of land for the purpose [of sale] is not a privilege, but a right. Likewise, under the existing plethora of laws, in which the subdivider has no practical freedom of action, it cannot longer be said that in presenting a subdivision map for approval, there is an implied consent to mandatory dedication." 90 Cal. Rptr. 663, 670. In a footnote the court stated: "Any rationalization that by presenting a subdivision map for approval, the subdivider voluntarily offers to make any 'dedications' required by the authorities is a fiction which cannot be permitted to subvert the constitution." Id. at 670 n.8.

These two points, among others, virtually compelled the supreme court to hear the case in light of the earlier Ayers opinion. In fact, the city made the issue whether subdividing was a right or a privilege one of its three major contentions on appeal. Respondents' Petition for a Hearing by the Supreme Court at 9-11, Associated Home Builders, Inc. v. City of Walnut Creek, 4 Cal. 3d 633, 484 P.2d 606, 94 Cal. Rptr. 630, appeal dismissed, 92 S. Ct. 202 (1971). The supreme court, however, dismissed this issue at the beginning of its opinion. See text accompanying note 105 infra.
tions by the plaintiff concerning the constitutionality of section 11546\(^2\)

Only two of the seven arguments presented by the plaintiff challenging the constitutionality of section 11546 are discussed in this section of the text. While the five other points of contention are important in themselves, they are not as significant to the decision in Associated as are the two discussed in the text. The other five arguments are as follows:

1. The conditions imposed by section 11546 could only be made if they were related to the health and safety of the subdivision residents as were the conditions for streets, sewers and drainage facilities. The court found that parks were also related to the health and welfare of subdivision residents and that it knew of no case holding to the contrary. 4 Cal. 3d at 641, 484 P.2d at 612, 94 Cal. Rptr. at 636. The dissent in Ayers unwittingly forecast this result and possibly the result of future litigation: "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." 34 Cal. 2d at 48, 207 P.2d at 11.

2. If section 11546 were upheld as a valid exercise of the police power, then cities could also require contributions for such services as added costs of fire and police protection, the construction of a new city hall and a general contribution to defray additional costs of all types of governmental services necessitated by the subdivision. The court distinguished the capital costs generated by the subdivision from the more general and diffuse costs for services. Also, the court emphasized the unique problem with land; it is a limited resource. The subdivision diminished the supply of land but increased the demand for it by bringing in new residents. The decision was restricted to the validity of the exactions required by section 11546 and special mention was made of the fact that there was no implication that the requirements under section 11546 were the only ones that could be made. The requirements of section 11546 were justified only because the increase in residents created the need for park facilities and the land or fees were to be used for the new residents, and that these considerations distinguished them from such matters as the increased cost of governmental services. 4 Cal. 3d at 641-42 & n.8, 484 P.2d at 613 & n.8, 94 Cal. Rptr. at 637 & n.8. For a discussion of the distinction between capital costs and service costs see Heyman & Gilhool, supra note 1, at 1120-21.

3. Section 11546 was a double tax. The court summarily dismissed this claim noting that section 11546 provided for the initial cost of the facilities, while subsequent property taxes provided for the development and maintenance of the facilities. 4 Cal. 3d at 642, 484 P.2d at 613-14, 94 Cal. Rptr. at 637-38. A related argument was that the exactions were special assessments without the right to a hearing or protest. The court only noted that similar arguments were rejected in Jordan and Jenad. Id. at 642 n.10, 484 P.2d at 614 n.10, 94 Cal. Rptr. at 638 n.10. For discussions comparing subdivision exactions and assessments see Heyman & Gilhool, supra note 1, at 1136-55; Reps & Smith, supra note 1, at 407-12.

4. Section 11546 arbitrarily affected only subdividers. See discussion of this point in text accompanying note 133 infra.

5. The delegation of authority contained in section 11546(f) was arbitrary. Subsection (f) provides that the city must specify when development of the park or recreational facilities will begin. The corporation contended that the discretion available to the city was arbitrary and was violative of due process and equal protection of the laws. The court noted that: (1) the need for parks would vary from community
and the Walnut Creek legislation.\textsuperscript{93} The plaintiff assailed section
to community; and (2) the city's resolution 2225 provides that development and im-
provements would be made as they became necessary. The court considered this
statement sufficient to satisfy constitutional standards and reminded the corporation
that the courts were available to redress any unreasonable delay. 4 Cal. 3d at 643,
484 P.2d at 614, 94 Cal. Rptr. at 638. The court footnoted an additional argument
that subdivision (g) of section 11546 was discriminatory because it provided for pay-
ment of fees only from subdivisions containing fifty parcels or less. The court an-
wsered that the same population density formula applied to subdivisions with more or
less than fifty parcels so a definition of the word "parcel" was not essential. \textit{Id.} at 643
n.11, 484 P.2d at 614 n.11, 94 Cal. Rptr. at 638 n.11.

The court summarized its discussion of the constitutionality of section 11546 as
follows: "The clear weight of authority upholds the constitutionality of statutes similar
to section 11546. [The court here reviewed the holdings of \textit{Pioneer}, \textit{Billings}, \textit{Jenad},
\textit{Jordan} and \textit{Aunt Hack}]. . . .

"The rationale of the cases affirming constitutionality indicate the dedication stat-
utes 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 res-
idents will increase the need for park and recreational facilities [citing \textit{Jordan} and
\textit{Billings}]. Such exactions have been compared to admittedly valid zoning regulations
such as minimum lot size and setback requirements [citing \textit{Jenad}]." \textit{Id.} at 644-45, 484
P.2d at 615, 94 Cal. Rptr. at 639.

93. The plaintiff presented four arguments against the constitutionality of the sec-
tion 10-1.516 of the Walnut Creek Municipal Code. They are as follows:

(1) Under the ordinance, the fees were determined arbitrarily and without a rea-
sonable relationship to principles of equality. For a discussion of this contention, see
text accompanying note 137 \textit{infra}.

(2) Procedures and standards set forth in the ordinance were indefinite and ar-
bitrary. The plaintiff urged that the concept of fair market value was too indefinite a
standard and that the city should not have absolute discretion to determine when fees
should be paid. The court brushed aside the first contention noting that the question
of fair market value was frequently litigated and no authority cited required a more
precise definition. The court found that the city's resolution 2225 established suffi-
ciently precise criteria for requiring in lieu fees. Fees would be required when the slope,
topography and geology of the site and its surroundings made dedication impossible,
impractical or undesirable. 4 Cal. 3d at 645-46 & n.15, 484 P.2d at 616 & n.15, 94
Cal. Rptr. at 640 & n.15.

(3) A provision in the ordinance allowing credit at the option of the city and,
thus, reducing the requirements imposed on the developer would result in unequal
treatment. Credit would be given if the developer guaranteed that certain portions of
the subdivision would be permanently maintained for use as park or recreational facili-
ties. The specific complaint was that there were no standards for determining when
credit should be given. The court found this practice acceptable because it supported a
legislative policy of encouraging municipalities to adopt long range master plans. To
hold to the contrary would thwart this policy and would undermine the flexibility of
the municipality in controlling community growth. This was the type of haphazard
pattern of community growth that subsection (d) of section 11546 was designed to
eliminate. Subsection (d) requires the adoption of an overall plan with a recreational
element before exactions for park purposes can be made. \textit{Id.} at 646, 484 P.2d at
616-17, 94 Cal. Rptr. at 640-41.
11546 as being unconstitutional because it failed to satisfy what has been referred to in this note as the correlative need theory developed in *Pioneer* or the correlative benefit theory developed in *Haugen*. In presenting both of these theories for consideration, the plaintiff was in effect also presenting the need/benefit theory for the court's consideration, since it is a combination of the first two theories.

The primary contention of the plaintiff was that section 11546 was not within the scope of the police power and was nothing more than a veiled form of eminent domain. The plaintiff acknowledged that subdivision regulation was legitimately within the police power, but argued that subdividers were entitled to the constitutional protections afforded land owners from the improper exercise of the police power. The plaintiff concluded that the statute improperly allowed the taking of property for public use without just compensation. In essence this argument was the same argument that was presented, and sustained, in *Pioneer* where the court found that the only constitutionally permissible exactions were those that were specifically and uniquely attributable to the developer's activities. In fact, the plaintiff's argument placed great emphasis on the *Pioneer* decision, especially its construction of the California court's holding in the earlier *Ayers* case.

(4) Any fees exacted could be used only to purchase land. The court held that the fees could be used to acquire or improve the land but not for purposes unrelated to those ends. It based its findings on the phrases "park or recreational purposes" and "park and recreational facilities" in section 11546 noting that the word "purposes" was broader than the word "facilities." *Id.* at 646-47, 484 P.2d at 617, 94 Cal. Rptr. at 641. The plaintiff also contended that the Walnut Creek legislation did not comply with the provisions of section 11546. In very brief language the court rejected this contention and noted that a long range park plan existed and contained sufficiently definite principles and standards to satisfy the statute. The plan indicated the location of various types of parks and contained principles for their development. Also, resolution 2225, which contained the standards for determining the amount of the exaction, was incorporated into section 10-1.516 of the Walnut Creek Code because it was passed with the same formality as a statute. This satisfied the requirements of subdivision (b) of section 11546 which requires the ordinance to state the standards for determining the amount of the exaction. *Id.* at 647-48, 484 P.2d 617-18, 94 Cal. Rptr. 641-42.

94. The court questioned the plaintiff's standing in this action because the plaintiff admitted that it would pass the costs on to the future residents of the subdivision and not suffer any detriment. But the court preferred to decide the matter on the merits. *Id.* at 642 n.9, 484 P.2d at 613 n.9, 94 Cal. Rptr. at 637 n.9.

95. The plaintiff did not set out his arguments in the manner that they are listed in the court's opinion. They are presented here according to the weight given to them in the opinion. Also, the plaintiff did not use the language of the four theories presented in this note. The arguments were presented in constitutional terms and "labels" are attached to those arguments here for the purpose of analysis.


97. *Id.* at 17-20. It is interesting to note that respondent city thought that section 11546 met the test outlined in *Pioneer*. *"Respondent City strongly contends that*
The plaintiff reasoned that park and recreational needs stem from the total development and activity of the entire community and not just from the activities of a particular subdivision. Therefore, all taxpayers should share the cost of these facilities. Thus, the plaintiff contended that statutes like section 11546 can be justified only if permissible exactions are restricted to the specific need generated by the subdivision alone.

The plaintiff also contended that section 11546 was invalid because there was no provision in the statute relating the exactions to the benefit of the subdivision concerned. This argument, of course, is described in this note as the correlative benefit theory. The plaintiff reasoned that the statute merely authorized an assessment of fees and that lack of any provision for a direct benefit to the subdivision from such assessment took the statute out of the realm of regulation and placed it in the realm of taxation. As a taxation statute, it denied future residents of the subdivision the equal protection of the laws.

The plaintiff relied on the legislative history of the statute to show that a direct benefit property tax had been considered by the legislature and rejected. The plaintiff contended that the provisions of subdivision (e) of section 11546, which required only a reasonable relationship between the exaction and the use of the park by the future residents, were not precise enough to justify the statute as a police power regulation. The plaintiff alleged that the lack of more precise standards under the statute could subject a developer to the payment of more than his fair share of the cost of park facilities. Further, possible inequities in the statute were magnified by the fact that the SMA was discriminatory in operation because it did not impose any exaction requirements on nonsubdividers, such as apartment house builders. To illustrate his point, the plaintiff posed the example of apartment houses situated adjacent to a subdivision, where residents of both developments used the park facilities, but only the subdivision residents were required to pay for them.

The court did not squarely confront the plaintiff's arguments, and instead, upheld the statute under the theory similar to the incidental

§ 11546 meets the test laid down in the Pioneer Trust & Savings Bank case . . . and upheld in the Billings, Jordan, Jenad and Aunt Hack Ridge Estates cases . . . in that the burden cast upon the subdivider is specifically and uniquely attributable to his activity." Reply Brief for Respondent at 41, Associated Home Builders, Inc. v. City of Walnut Creek, 4 Cal. 3d 633, 484 P.2d 606, 94 Cal. Rptr. 630, appeal dismissed, 92 S. Ct. 202 (1971).

98. Opening Brief for Appellant, supra note 91, at 38-40.
99. Id. at 41-43.
100. Id.
101. Id. at 23.
102. Id. at 42-43.
need theory outlined above in the New York case of Jenad.\textsuperscript{103} Adoption of this theory allowed the court to summarily reject the plaintiff's arguments and to circumvent the constitutional issues raised by the plaintiff. The court then presented its own justification for the statute using selected portions of prior case law, legislative history and public policy considerations to support its decision.

**Criticism of Associated**

The court cited Ayers as prior California case authority establishing the requisite constitutional standard necessary to adjudicate a subdivision exaction dispute. The court, however, constructed Ayers in a manner which was antithetical to the construction given to that case in Pioneer. The construction given to Ayers by the court in Associated was what this note has previously described as the incidental need theory. The construction given to Ayers by the court in Associated was what this note has previously described as the incidental need theory. The court in Pioneer, of course, construed Ayers to embody the correlative need theory. In the process of adopting the incidental need theory, the Associated court rejected the first two formulations—the correlative need and correlative benefit theories—and, thereby, necessarily rejected a combination of those two, the need/benefit theory. In reaching its decision, the court reinterpreted and broadened its prior holding in Ayers, noted the urgency of the current requirement for parks as explained in the legislative history of section 11546, and announced its support of the public policy to preserve open space lands. The court concluded that there has been no unconstitutional discrimination in the application of section 11546 or the Walnut Creek legislation. As will be discussed, Associated has established a much broader constitutional standard for upholding subdivision exactions than would have been necessary to uphold the particular statutes involved in the case. As a result, the court has indicated a willingness to allow much more under the guise of regulation than do decisions in other jurisdictions.

**Ayers: Distinguishable Authority**

The court relied heavily on Ayers as authority to reject the plaintiff's initial contention that section 11546 could only be justified if it were shown that the need for the facilities was attributable to the increase in population stimulated by the new subdivision alone.\textsuperscript{104} The court did not directly confront this issue, but noted that arguments similar to those presented by the plaintiff in Associated were rejected in Ayers. The court stated that Ayers had held that: (1) the subdivider had the duty to comply with reasonable conditions for the wel-

\textsuperscript{103} See text accompanying notes 79-90 supra.

\textsuperscript{104} 4 Cal. 3d at 638, 484 P.2d at 610, 94 Cal. Rptr. at 634.
fare of the lot owners and the general public; (2) the conditions imposed on the developer were not improper because they would incidentally benefit the city as a whole; and (3) present and future need and population factors could be taken into consideration in determining the amount of permissible exactions.105

As has been previously discussed,106 the decision in Ayers was based on a factual situation in which the exactions had been directly related to the needs created by the subdivision and had resulted in a benefit to future lot owners. In fact, the Ayers decision cited in detail the trial court's findings to this effect.107 By citing the Ayers holdings without reference to its factual situation, the court gave Ayers an entirely different interpretation than has been given the case by other courts. In its interpretation of Ayers, the court apparently adopted the incidental need theory of permissible subdivision exactions which has been previously discussed. This, of course, is entirely different than the interpretation of Ayers by the Pioneer court, which adopted the correlative need theory. Thus cited out of context, the holdings of the Ayers case would indicate that, by development of a subdivision, a subdivider can be required to entirely remedy general public needs which he has only partially created. However, the Ayers case must be put into its factual context to determine what was meant in reference to the "general welfare . . . of the public" and only "incidentally [a] benefit [to] the city as a whole."108 The public welfare and benefit to the city referred to in Ayers were not the actual physical use of the dedicated land, since there would always be incidental use of streets by anyone entering or leaving the subdivision. Ayers instead referred to an indirect benefit for the general welfare—conformity to the overall plan to reduce traffic congestion that would result from the increased traffic caused by the development of the subdivision. The court in Ayers had concluded that the dedication requirements were as much a part of the design of the subdivision as would lateral and transverse service roads have been had the subdivider used a noncellular design.109

Nevertheless, in its new interpretation of Ayers the court in Associated rejected the plaintiff's contention that the statute could only be justified under the Pioneer formulation.110 That is, in Associated, the

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105. *Id.*
106. See text accompanying notes 49-53 *supra.*
107. *Ayers v. City Council, 34 Cal. 2d 31, 38-39, 207 P.2d 1, 5-6 (1949).*
108. *Id.* at 41-42, 207 P.2d at 7.
109. *Id.* at 40-41, 207 P.2d at 6-7.
110. "The only case cited by Associated which declared a statute similar to section 11546 to be unconstitutional recognized the need for recreational facilities caused by the influx of new residents but held that the need for such facilities must be 'specifically and uniquely attributable' to the subdivider's activities and that the record did not indicate that this requirement had been met [citing Pioneer]. We have
court relied on *Ayers* to reject the correlative benefit theory, even though the facts of *Ayers* clearly showed that the exaction had been justified on the basis of a need generated by creation of the subdivision alone, which had also been the basis of the holding in *Pioneer*. It should also be noted that the supreme courts of Illinois, Montana, Rhode Island and Wisconsin all relied on *Ayers* in support of the formulation proposed by the plaintiff, and which was rejected by the California court in *Associated*. If those courts were faced with a statute similar to section 11546, they would hold that the statute could be justified only if the need for the facility was directly attributable to the activity of the subdivider; this interpretation of *Ayers* would more closely approximate the holding of the court in *Ayers*.

Public Needs and Subdivision Exactions

Although the court held that *Ayers* was sufficient authority to support its decision, section 11546 was also justified by the court on a completely separate ground—"a general public need for recreational

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111. "*Pioneer Trust* relied upon *Ayers*, interpreting it as holding that a developer may be compelled to provide the streets which are required by the activity within the subdivision but cannot be required to provide a major thoroughfare, the need for which stems from the total activity of the community. The court in *Pioneer Trust* goes on to state that in light of this principle a dedication requirement may be upheld only if the burden cast upon the subdivider is specifically and uniquely attributable to his activity and that no such showing was made. The *Ayers* case cannot be interpreted in this manner. One commentator has written that *Pioneer Trust* completely misunderstood the holding of *Ayers*." *Id.* at 644 n.13, 484 P.2d at 615 n.13, 94 Cal. Rptr. 639 n.13. See Johnston, *supra* note 1, at 893-94, 907-08. *Ayers*, of course, allowed dedication of land outside of the subdivision, but the dedication requirement was not based on the location of the streets. It was based on the increased traffic needs generated by the subdivision and those traffic needs were specifically and uniquely attributable to the activity of the subdivider. See text accompanying note 56 *supra*. Two other writers, however, have given *Ayers* the same interpretation as was given to it by the California court. See note 52 *supra*.

112. See *Heyman*, *supra* note 1, at 40-41. *Cf.* Bowden, *supra* note 1, at 482.

113. As this note has attempted to illustrate, the courts have taken a wide variety of approaches to the constitutionality of subdivision exactions. Commentators have given various interpretations to what the courts have said. See note 111 *supra*. However, the consensus of the writers who have taken a position on the subject advocates one of the more rigorous approaches to the constitutionality of subdivision exactions. See generally Cutler, *supra* note 1, at 390; Heyman & Gilhool, *supra* note 1, at 1134, 1141-54; Hirsch & Shapiro, *Some Economic Implications of City Planning*, 14 U.C.L.A. L. REV. 1312, 1325-26 (1967); Reps & Smith, *supra* note 1, at 407; Schmandt, *Municipal Control of Urban Expansion*, 29 FORHAM L. REV. 637, 650 (1961); Note, *Land Subdivision Regulation: Its Effects and Constitutionality*, 41 ST. JOHN'S L. REV. 374, 376-77 (1967); Comment, *Subdivision Regulation: Requiring Dedication of Park Land or Payment of Fees as a Condition Precedent to Plat Approval*, 1961 WIS. L. REV. 310, 320-22.
facilities caused by present and future subdivisions.\textsuperscript{114} The court found support for its public needs concept from three sources. First, the court noted that governmental entities have the responsibility to provide parks and recreation land for the public, and that section XXVIII of the California Constitution has established as a public policy the maintenance and preservation of open space lands for the economic and social well-being of the state and its citizens. Second, the court cited general introductory comments in the legislative committee report recommending section 11546 in which the need for open space and the necessity of parks for a full community life had been emphasized. Third, the court noted that the projected increase in population was expected to increase by tenfold the demand for outdoor recreation in the future. The court summarized its policy argument as follows:\textsuperscript{115}

We see no persuasive reason in the face of these urgent needs . . . on the one hand and the disappearance of open land on the other to hold that . . . the dedication of land by a subdivider may be justified only upon the ground that the particular subdivider . . . solely by the development of his subdivision, increase[s] the need for recreational facilities to such an extent that additional land for such facilities will be required.\textsuperscript{116}

The most troublesome aspect of the court's formulation of public needs as the justification for section 11546 was the merger of two distinct constitutional concepts—even though parks may be a legitimate purpose for which exactions may be made, there is also the issue of permissible methods of making those exactions. As previously discussed,\textsuperscript{117} the purpose of the exactions and the regulatory method used to obtain the exactions are two entirely separate constitutional questions. While it is true that a legislatively declared public need is justification for the purpose of a statute, it does not necessarily follow that the method used will also withstand constitutional scrutiny. The court by basing its justification of section 11546 as a whole on the ground of a general public need for parks blurs this distinction. Certainly, by now,

\textsuperscript{114} 4 Cal. 3d at 638, 484 P.2d at 610, 94 Cal. Rptr. at 634.
\textsuperscript{115} Not content with deciding this issue, the court noted that it perceived merit in the argument of amicus curiae Sierra Club which urged that the fees could be used to purchase or develop land some distance from the subdivision even if the fees were used for facilities used by the general public and would not directly benefit future residents of the subdivision. The court could not see why this was not a viable solution in light of the need for such facilities. \textit{Id.} at 640 n.6, 484 P.2d at 612 n.6, 94 Cal. Rptr. at 636 n.6. This statement by the court is superfluous to the decision but is an indication of how far the court is willing to go in justifying statutes similar to section 11546. Yet nowhere does the court mention why it is not a tax or why it is not an exercise of the power of eminent domain.
\textsuperscript{116} \textit{Id.} at 639-40, 484 P.2d at 611, 94 Cal. Rptr. at 635.
\textsuperscript{117} See text accompanying note 42 \textit{supra}.
there is no question that parks are needed by the public and can be obtained through a proper exercise of the police power. The method used, however, must be one reasonably designed to accomplish the desired objective, and unless so limited, would represent an unauthorized taking of property for a public use without just compensation in violation of eminent domain provisions of the state and federal constitutions. The court in Associated appears to have extended its justification for the purpose of section 11546 to the method it prescribes. In other words, the justification for the method employed in obtaining the exactions is the same as the justification for its purpose—a general public need for park facilities. This rationale, of course, severely limits any constitutional restraints on the exercise of the police power to "regulate" subdivisions. The decision in Associated thus represents a judicial attitude that constitutional considerations inherent in subdivision exactions may be summarily swept aside if the exigencies of the times so dictate.\textsuperscript{118}

Of particular significance is the fact that the court has now laid the groundwork for broader interpretations of the scope of permissible exactions in any subsequent decisions. The fact that the court stated there were sufficient grounds based on its interpretation of Ayers, quite apart from any "public needs" argument, to reject the plaintiff's contention that exactions could be justified only if they were attributable solely to the development of the subdivision would lend credence to the view that the court may have been looking beyond the facts in Associated in its decision. One of the problems of the earlier Ayers decision was its susceptibility to various interpretations as evidenced in Pioneer and Associated. The court's insertion of a general public need as justification for the statute, would also appear to be susceptible to varying interpretations because it is not clear from the opinion what has been justified, the purpose of the statute or the method used under the statute.

\textbf{Legislative History and Statutory Interpretation}

The plaintiff's second contention concerned the relationship between the exaction and the benefit conferred on the subdivision. The plaintiff argued that even if it was conceded that no direct relationship between the subdivision and the communities needs were required, the exaction could only be used to primarily benefit his particular subdivi-

\textsuperscript{118} The dissenting justices in Ayers, neither on the bench when Associated was presented for decision, feared exactly this point: "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 . . . . [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 abrogated]." 34 Cal. 2d at 48, 207 P.2d at 11.
sion. This argument, of course, was similar to the correlative benefit argument advanced in *Haugen*.

The court summarily dismissed the plaintiff's contention that the statute was invalid on this ground and, without discussing any constitutional issues, referred to subdivisions (c) and (e) of section 11546 to answer the challenge. These sections provide that the exaction can be used only for the purpose of providing park facilities to *serve* the subdivision, and also provide that the amount of the exaction should bear a *reasonable relationship* to the use of the facilities by future residents of the subdivision.

As a matter of judicial interpretation, when words in statutes are ambiguous, courts normally consult legislative history and other extrinsic material to determine the legislative intent underlying a statute to resolve the ambiguity. The words "serve" and "reasonable relationship" are necessarily imprecise and would have normally required interpretation by the court. In *Associated* the court apparently concluded that the legislative intent was inherent in the wording used by the legislature, and there was no need for any discussion of constitutional questions in construing the statute. It would thus logically follow that the court should have attempted to determine, from the history of the statute and other extrinsic material, what the legislature had in fact intended when it used these particular words, or when it drafted the entire statute for that matter. If the court had made this examination, it would have found evidence in the legislative history of section 11546 and other related material which indicated that the legislature had intended to adopt either the correlative benefit theory, or the need/benefit theory discussed above, and not the incidental need theory which was ultimately adopted by the court.

There is language in the committee report on which section 11546 was based that indicates that the legislature intended to limit the exaction to the benefit conferred on the subdivision. For example, city and county officials testifying before the legislative committee considering section 11546 had concluded that it was legitimate to assess the subdivision developer for the privilege of subdividing and that the "direct benefit theory" should be used in making the exaction. The committee also relied on *Kelber v. City of Upland* as authority for the proposition that fees for parks would be held invalid if the fees were to be used to subsidize parks for the benefit of the community as a whole and not for the benefit of the affected subdivisions. There was

119. See text accompanying notes 69-70 supra.
121. 1965 Report, supra note 120, at 34.
also testimony by developers that few communities had felt restrained by Kelber and had continued to "extract and extort" land or monies from subdividers who were too committed to their developments to protest the exactions in litigation.\textsuperscript{124} The committee thus concluded that a statute authorizing dedication for parks should be added to the Subdivision Map Act that "will guarantee that the fees assessed or land taken will benefit the residents of the affected subdivision."\textsuperscript{125} This language in the committee report is an embodiment of the correlative benefit theory described earlier—that there be a direct relationship between the exaction and the benefit.

There is other language in the committee report that indicates that the legislature intended to limit the exaction to both the need generated by the subdivision and the benefit conferred on it. For example, the committee had originally recommended a statute for park exactions almost identical to section 11543.5 of the Business and Professions Code.\textsuperscript{126} Section 11543.5 is part of the Subdivision Map Act concerning regulation of drainage and sewer systems, and provides that fees may be exacted, as a condition to approval of final subdivision maps, to defray the costs of constructing sewers and drainage facilities. However, this statute further provides that the fees must be fairly apportioned within such areas either on the basis of benefits conferred or on the need for such facilities created by the proposed subdivision. Furthermore, the fee cannot exceed the pro rata share of the costs of all such facilities. Finally, the fees must be paid into a "planned local drainage facilities fund" and a "planned local sanitary sewer fund," and monies from such funds must be expended solely for the construction of local drainage or sanitary sewer facilities within the area from which the fees comprising the fund were collected.\textsuperscript{127} Thus, section 11543.5 is a statutory embodiment of the need/benefit theory previously discussed—that there be a direct relationship between the exaction and the need and a like relationship between the exaction and the benefit. This theory has been adopted by courts in other jurisdictions as judicial justification for the constitutionality of exactions for parks and schools.\textsuperscript{128} Of even greater significance, however, is that the proposed statute for dedication for parks contained in the committee report was an\textit{exact copy} of section 11543.5, except for necessary substitution of certain words to make the statute apply to parks rather than sewers.\textsuperscript{129}

\textsuperscript{123} 1965 Report,\textit{ supra} note 120, at 36.
\textsuperscript{124} Id.
\textsuperscript{125} Id. at 39.
\textsuperscript{126} Id. at 43-45.
\textsuperscript{127} Id.
\textsuperscript{128} See text accompanying notes 74-78\textit{ supra}.
\textsuperscript{129} 1965 Report,\textit{ supra} note 120, at 43-44.
By failing to interpret the words "serve" and "reasonable relationship" as had been intended by the legislature, the court in Associated impliedly rejected any judicial formulation relating the exaction to the benefit conferred on the subdivision or relating the exaction to a combination of need and benefit. This result taken together with the court's rejection of the correlative need theory established in Pioneer placed the court in Associated in approximately the same position as the New York court in Jenad130 that required only an incidental relationship to justify the exaction. Under this formulation municipalities use land developers to solve some of the cities' general fiscal problems. This result, of course, would appear to be contrary to the legislative intent as evidenced by the legislative history of section 11546.

At one point in its opinion, the court in Associated compared parks with streets, sewers and drainage facilities and decided that all were related to public health, safety and welfare.131 The court thus did not distinguish parks from other subdivision exactions in determining whether exactions for park purposes could be justified under the police power. However, the court completely disregarded the legislative treatment of the method used in these other exactions in California when it determined the validity of section 11546. As previously noted, the provisions concerning regulation of drainage and sewer systems contained in section 11543.5 of the Business and Professions Code are much more rigorous than are the provisions of section 11546. Section 11543.5 allows exaction of fees for drainage systems if, but only if, the fees are prorated to the subdivision based on the need generated and are utilized solely for the benefit of the subdivision.132 Also, sections 11543 and 11544 of the Business and Professions Code make provisions for reimbursement to a developer if he agrees to construct a drainage or sanitary sewer outside of the subdivision. Section 11525.2 of the Business and Professions Code provides authority for requiring developers to dedicate land for schools, but also provides for complete reimbursement to the developer for the land dedicated. Sections 11610.5 and 11610.7 of the Business and Professions Code authorize exactions for access to coastlines or lakefronts from developers, but exempts such requirements if there is other reasonable access available. No such reimbursement or exemption provisions are made in section 11546 in the event that sufficient park facilities are already available in the municipality. There is also no provision in section 11546 restricting the dedication of land or payment of fees to only those requirements generated by creation of the subdivision. Nor is there any provision that the exaction be used for the direct benefit of the sub-

130. Discussed in text accompanying notes 79-90 supra.
131. See discussion of first argument in note 92 supra.
132. See text accompanying notes 126-27 supra.
division. There is only the requirement that the park facilities serve the subdivision and bear a reasonable relationship to use by the subdivision residents. It is readily apparent that the court's construction of section 11546 is an aberration in the legislative scheme for regulating subdivisions and establishes an entirely new, different, and much broader, standard concerning the constitutionally permissible limits which may be placed on subdivision exactions.

**Discrimination Against Subdividers**

Two other arguments presented by the plaintiff are only tangentially related to the arguments previously discussed, but are worthy of a separate analysis. These arguments involved the arbitrary and discriminatory nature of section 11546 and the Walnut Creek legislation.

The plaintiff first argued that section 11546 arbitrarily affected only subdividers and did not apply to other land developers such as apartment house builders. The plaintiff urged that it was unfair to require a subdivider to pay for a park while excluding a developer of an apartment building from contributing to the park, because the residents of the apartment building might live the same distance from the park and have the same right to use the facilities. The court rejected the plaintiff's argument and pointed out that the legislature could have assumed that apartment houses consumed considerably less open space land and that this distinction justified separate treatment.

The court's statement attributes a legislative intent which cannot be supported by the legislative history of section 11546. As previously discussed, the committee report on which section 11546 was based discussed the need for parks only in terms of the requirement generated by subdivisions. In fact, a more recent committee report has recommended that the provisions of section 11546 be extended to apartment houses. A far more plausible assumption as to the legislative history of section 11546 is under consideration in A.B. 1564, Cal. Legis. Reg. Sess. (1971).

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133. 4 Cal. 3d at 642-43, 484 P.2d at 614, 94 Cal. Rptr. at 638.
134. 1965 Report, supra note 120.
135. While Associated was being litigated in the courts, the interim committee report on which section 11546 was based became final. It had three recommendations with respect to dedication for parks as follows: "Recommendation Number 19. The Subdivision Map Act should be amended to: A. Require cities and counties to require dedication of land or levy fees in lieu of dedication which they are now permitted to require or levy by Section 11546 of the Business and Professions Code. B. Permit such land and fees to be used for open space purposes other than parks and recreation. C. Require cities and counties to demand fees as a condition to granting a residential building permit for multiple dwellings of four or more units where such fees have not been paid in connection with the approval of a subdivision map." Final Report of the California Legislature Joint Comm. on Open Space Land 15, 35 (1970), in 1 APPENDIX TO THE JOURNAL OF THE CALIFORNIA SENATE (1970). Recommendation 19A is under consideration in A.B. 1564, Cal. Legis. Reg. Sess. (1971). Recomm
intent is that, at the time section 11546 was being considered, the legislature had not considered the matter of discrimination at all, and it has now seen the inherent inequities in the statute and recommended that it be changed.\textsuperscript{136}

The plaintiff raised a similar contention against section 10-1.516 of the Walnut Creek Municipal Code, and argued that the fees were determined arbitrarily and without reasonable relationship to principles of equality. A hypothetical example was presented by the plaintiff in which a developer who subdivides, into 100 lots, twenty-five acres valued at $20,000 an acre, was compared to a developer who also subdivides, into 100 lots, fifty acres worth $10,000 an acre. The city ordinance assumes four occupants to each single family home, and therefore each subdivider brings in 400 new residents and each is required to dedicate one acre or its cash equivalent. The cash equivalent for the first subdivider would be $20,000 and for the second would be $10,000.

The court met the plaintiff's argument by arbitrarily assuming that residents in high-density areas would use the facilities more consistently than residents in single family homes with backyards readily available, and on this basis reasoned that it was not inequitable to require the former to pay more.\textsuperscript{137} The court's analysis may be sound as far as it goes; however, compare the first developer in the hypothetical example with a developer who decided to build duplexes on his twenty-five acre subdivision worth the same $20,000 an acre (duplexes also come within the provisions of the Subdivision Map Act). Under section 10-1.516 of the Walnut Creek Municipal Code, duplexes are classified in the manner of low density apartments which have an assumed density of 2-1/2 persons per dwelling unit.\textsuperscript{138} The developer of duplexes is required to dedicate only one acre for every 160 dwelling units.\textsuperscript{139} The first developer will have 400 people in 100 dwelling units on 100 lots. The duplex developer will have 400 people in 100 dwelling units on only 50 lots (each lot twice the size of a lot used by the first developer). Therefore, each subdivision would take up twenty-five acres of land and would add 400 new residents, yet the first subdivider would be required to dedicate one full acre or $20,000, while the duplex devel-

\textsuperscript{136} See Heyman & Gilhool, supra note 1, at 1145-46 & n.104.
\textsuperscript{137} 4 Cal. 3d at 645 & n.14, 484 P.2d at 616 & n.14, 94 Cal. Rptr. at 640 & n.14.
\textsuperscript{138} Walnut Creek, Cal., Res. 2225, at 2 (1967).
\textsuperscript{139} Id.
oper would only be required to dedicate 5/8 of an acre or $12,500 under the Walnut Creek formula. The density is the same in both cases (400 persons per twenty-five acres) so the court's assumption of more consistent use by residents in higher density areas would not apply. Yet examples such as this eluded the court's consideration when it held that the city's ordinance was not discriminatory.

Also, the court's assumption that residents in high density areas would make more consistent use of the park facilities than would residents in single-family homes, which was given as justification for allowing exactions from subdividers, could logically be extended to residents of apartment houses. Apartment house residents would certainly have a greater need to use the park facilities more consistently than either residents of low density one-family houses or residents of high density areas because there are no backyards in apartments. The plaintiff posed the situation where a proposed park was equidistant from a subdivision and an apartment house development. Under these circumstances, the court's assumption of greater use by residents in higher density areas would result in the developer, or more properly, the future residents of the subdivision, paying for a park used primarily by residents of an adjacent apartment building. The court apparently felt that arguments such as the ones developed in this section had no merit and did not disclose unconstitutional discrimination.

Conclusions Regarding the Correctness of Associated

Of the four approaches discernible in the case law concerning subdivision exactions, the Supreme Court of California has chosen to reject the more specific criteria used in most jurisdictions. The weight of authority in the country insofar as permissible subdivision exactions are concerned requires a relationship between the exaction and the need, the exaction and the benefit conferred on the subdivision, or a

140. Other possibilities for abuse are inherent in this decision. As Justice Holmes once noted: "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. . . . 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." Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922). See also People ex rel. The Exch. Nat'l Bank v. City of Lake Forest, 40 Ill. 2d 281, 239 N.E.2d 819 (1968) (city could not require dedication for street because it only benefited adjacent subdivision); East Neck Estates, Ltd. v. Luchsinger, 61 Misc. 2d 619, 305 N.Y.S.2d 922 (Sup. Ct. 1969) (confiscatory to require dedication of land worth $90,000 out of whole parcel worth $208,000); Daniels v. Borough of Point Pleasant, 23 N.J. 357, 129 A.2d 265 (1957) (excessive fees collected for building inspection that were used to defray general government costs held invalid); cf. Van Alstyne, Taking or Damaging by Police Power: The Search for Inverse Condemnation Criteria, 44 S. Cal. L. Rev. 1, 59-60 (1970).
combination of both the need and the benefit as the judicial theory upon which exaction statutes purporting to regulate the use of land are tested. In contrast, New York, perhaps compelled by the same population and land pressures as are present in California, has chosen not to adopt any of these formulations and instead has adopted what has been described above as the "incidental need" theory.

The court in Associated did not state any specific formulation or theory of its own but appears to have adopted a position similar to the position taken by the New York Court of Appeals in Jenad where only an incidental relationship between the need and the exaction was required to justify an exaction. A careful reading of the legislative history indicates that the court's formulation runs counter to the legislative intent in enacting section 11546. The net effect of Associated is to establish a judicial policy that countenances exactions in excess of the needs generated by the subdivision or the benefit conferred on it without encountering any constitutional barriers. This decision allows municipalities to partially solve local fiscal problems, using section 11546 as a vehicle to require developers to bear the burden of costs which are necessitated by the growth of the community as a whole and not just the activity of the subdivider.

Even under the tremendous land pressures that presently exist, there would appear to be no real need to establish such a policy in order to provide adequate park and recreation facilities for an expanding population. Cost accounting techniques are readily available to determine the costs of a facility necessitated by a developer and would not place an undue burden on municipalities. This approach would afford protection to the developer as well as the municipality so that neither bears the burden of the costs generated by the other. Furthermore, an element of discretion is inherent in any judicial formula, as the Supreme Court of Wisconsin observed in Jordan, to keep the burden of the municipality to a minimum. A judicial test relating the exaction to the need and the exaction to the benefit would appear to be most preferable because it would keep subdivision exactions within the scope of regulation and not leave them open to possible abuse as the decision in Associated may have done for section 11546.

This note has attempted to elucidate certain weaknesses in the authority and reasoning on which Associated was based. The early California case, Ayers, is distinguishable authority; the legislative history on which section 11546 is based points to an opposite conclusion than was reached by the court; and the majority of decisions in the country are contrary to the decision in Associated. Even though the holding of the case was that section 11546 was constitutional, the court's interpretative language enunciated a very broad judicial standard of permissible exactions in California and there is a distinct possibility that cities
may take advantage of this means of lessening some of their general financial burden. However, the ultimate scope of permissible exactions will have to await subsequent decisions when the newly broadened interpretation of section 11546 is applied to a specific developer.

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