Subdivisions: Conditions Imposed by Local Government

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SUBDIVISIONS: CONDITIONS IMPOSED BY LOCAL GOVERNMENT

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"We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change."1

This warning by Justice Holmes is even more apropos today than it was at the time it was originally declared by the great Justice. A good many areas within the State of California have undergone some amazing changes within the past ten years. Spurred on by the population boom and the increasing demand for housing, the construction industry has experienced an era of unprecedented activity. The result of this has been the rapid development of land into subdivisions and the creation of many difficult problems for local governmental entities. Local government has been engaged in a continual struggle in its attempts to insure that the expanding suburbs will have adequate schools, roads, parks, shopping centers, and flood control facilities. Unfortunately, in most areas, development has proceeded more rapidly than planning, and cities and counties have been caught short, without adequate planning or without funds to put plans into effect. In an effort to keep ahead of the developers, and as predicted by Justice Holmes, some local governments have resorted to taking private property without paying compensation to the owner.

The problems of local government are easier to define than they are to solve. It seems inevitable that demand will always exceed supply where roads, parks, schools, shopping centers, and flood control facilities are concerned. In spite of the fact that local tax revenues are increasing at an alarming rate, it also would appear that spending will always rise to keep pace with revenues, so that there will never be sufficient tax money on hand to meet all current and long term governmental obligations.

In recent years, the need for planning has become apparent to most enlightened communities. Indeed, one might observe today that most cities that are attempting to face up to these problems have

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1 Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416 (1922).
reached the conclusion that the panacea for all of their ailments is to adopt a general plan. One might even suggest that the status symbol for an enlightened community is to purchase a general plan from "planning experts." The credentials of these "experts," unfortunately, are sometimes of questionable value. The wisdom of such an investment has more often than not been called into question by the apparently irresistible compulsion on the part of members of city councils to deviate from their general plan by making exceptions for most controversial proposals.

It is also true that many cities find great difficulty in getting their plans approved by the public. One of the real problems is the need for public education. Most citizens tend to be more concerned with higher taxes and larger governmental expenditures at the local level than they are with obtaining necessary services, and as a result, interest tends to lag behind need. As an example, flood control districts find it extremely difficult to pass bond issues for flood control facilities in "dry years." The education of the public as to the need for advanced planning in certain areas is a slow and painful process. What should be done when an immediate need arises for services or facilities which have been proposed in a long range plan by a local governmental entity? Often the public is not ready to accept the proposal, particularly when it will be footing the bill. Should the government wait and tie its program to the availability of funds, or should it proceed with the program in advance of general public acceptance, basing its decision on the premise that the primary responsibility of government is to provide the facility at the least expense to the public? Some cities, faced with this dilemma, have chosen to proceed with plans even though funds are not available, and have had to devise means of obtaining property without paying for it.

It is at this point that the proposed subdivision comes directly to the fore. The basic issue is whether the subdivider can be required to provide land or funds for projects and improvements that are not directly related to and for the exclusive benefit of the land to be developed and its subsequent owners.

**Payment of Fees**

One method of accomplishing needed community development has been to require the payment of fees by builders into general city funds in return for the approval of subdivision maps or for the granting of building permits. Since the haphazard or fortuitous presentation of subdivision maps to a city council may not always coincide with the needs of the city from a geographical standpoint,
some cities prefer to use their power to approve subdivision maps to acquire sufficient general unrestricted funds with which to carry out their long range plans, rather than to require dedication of land within a subdivision. In *Kelber v. City of Upland*,\(^2\) a requirement for the payment of $30.00 per lot to be placed in a park and school site fund and $99.07 per acre to be placed in a subdivision drainage fund as a condition of approval of a subdivision map was held invalid. The fees exacted were to be used for improvements anywhere in the city; use of such fees was not restricted to the subdivision from which the payment was exacted.

In *Santa Clara County Contractors and Homebuilders Association v. City of Santa Clara*,\(^8\) a requirement for the payment of a fee of $25.00 for each dwelling unit or apartment unit proposed to be constructed within a subdivision, to be deposited in a Capital Outlay Recreational Fund as a condition of approval of a subdivision map, was held invalid. The *Kelber* and *Santa Clara* cases preclude any levy for general city benefits as a condition precedent to map approval. Under proper circumstances, a local ordinance may require the payment of a fee as a condition of approval of a subdivision map for the purpose of defraying the actual or estimated costs of constructing drainage facilities for local or neighborhood drainage areas.\(^4\)

Definite conditions must be met before such fees can be imposed, including adoption of an ordinance which refers to the drainage factor of a pre-existing general plan, and a finding that the fees are fairly apportioned within the local area. Payment of the fee is based upon the sound premise that a subdivision should provide drainage facilities which are necessary to protect the future inhabitants from flooding, but that reasonable limits should be placed upon the requirements imposed by the city.

Can local government require payment of building permit fees as an alternative or additional condition of the subdivider? The City of Santa Clara ordinance provided for payment of a fee for approval of a map *and* issuance of a building permit.\(^5\) The Attorney General has expressed the view that an ordinance requiring a fee of $30.00 per dwelling unit for issuance of a building permit for the purpose of

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\(^3\) 232 Cal. App. 2d 564, 43 Cal. Rptr. 86 (1965). Apparently the money was to be used for permanent recreation facilities not necessarily within the area of the subdivision map. The court said, "There was no contention that the money collected was used only in connection with the development of the residential area. . . ." *Id.* at 579, 43 Cal. Rptr. at 95.
\(^4\) *Cal. Bus. & Prof. Code § 11543.5*.
providing revenue for recreational facilities is valid where the fee is tied to the issuance of a building permit rather than the approval of a subdivision map. Some would probably question whether a fee in excess of the reasonable cost of processing a building permit should be approved. The Court in the Santa Clara case relied on the Business and Professions Code, Section 11529 and Section 11543.5. These sections limit the right of a city to require fees for examination of maps and construction of drainage facilities. In holding the fees to be invalid as conditions for approval of a subdivision map, the court specifically refrained from "discussing the correctness of" the Attorney General's opinion that such fees would be valid if limited to building permits.

EXCESSIVE SUBDIVISION IMPROVEMENT REQUIREMENTS

Prior to the passage of Section 11543.5 of the Business and Professions Code, the City of Concord entered into a contract with a subdivider whereby the subdivider paid the total cost of increasing the width and capacity of a drainage channel, although only one-third of the cost was properly attributable to that particular subdivision. The city agreed that two-thirds of the cost of the improvements would be exacted from subsequent subdividers as a condition precedent to approval of their maps. One subdivider subsequently had his map disapproved because of this failure to pay his portion of the fees, paid the fees under protest and sued the city. The city relied on Sections 11543 and 11544 of the Business and Professions Code. These provisions permitted the city to require a subdivider to construct facilities that would be used for the benefit of property not in the subdivision. The city, however, was required to reimburse the subdivider for such facilities and the contract must provide that the city will collect from persons using such facilities a reasonable charge for such use for the benefit of property not within the subdivision. Section 11543 had been amended in 1955 to add reference to drainage facilities, and the court held that the 1955 amendment could not be applied to the contract, which was executed in 1953. The court made this comment:

[The manner of payment for the improvements] chosen by appellants deprives those charged with two-thirds of the cost of the right to be heard upon the important issue of the extent of benefit received by them, and the proper allocation of costs, a right which would have been theirs had a special assessment district been formed. It deprives

6 45 CAL. OPIN. ATT’Y GEN. 23 (1965).
them also of the safeguard of competitive bidding as a means of deter-
mining the fair cost of the drainage structures. . . . We specifically
refrain from passing upon the constitutionality of the 1955 amend-
ments. We do hold that, whatever the effect of those amendments, the
1953 statutes did not authorize the procedure here used, and the con-
tract, therefore is unenforceable as against plaintiffs.\(^9\)

Perhaps Section 11543.5 has provided a suitable alternative to Sec-
tion 11543, thus avoiding a test of the constitutionality of the 1955
amendment.

The Attorney General has concluded that a sanitary district
has no right to require a subdivider to enter into a contract to in-
stall a sewer line larger than necessary for one subdivision in order
to serve other drainage areas likely to be annexed in the future.
However, a sanitary district and a subdivider may mutually contract
for that purpose.\(^{10}\) Presumably, this would apply to approval of
subdivision maps by cities.

DEDICATION OF LAND

Some cities, finding plans ahead of funds, have resorted to the
requirement of dedication of subdivision land in return for subdivi-
sion map approval.

An example will serve to illustrate the problem as it has devel-
oped recently. Suppose that a builder proposes to subdivide ten
acres and develop 40 lots on said ten acres. The property is ap-
proximately 420 feet wide and 1,000 feet long, and was purchased
for $20,000 per acre. On the long side, the property line extends to
the center of a proposed 50 foot flood control channel which the
city has planned to build. This channel would accommodate the
water run-off that would be produced from a surrounding area of
ten square miles as the result of a storm having a frequency of
occurrence of once in fifty years.

Suppose further, that the city proposes that the builder dedicate
a portion of his property 25 feet wide and 1,000 feet long. This land
theoretically cost the subdivider approximately $12,000, which
amount he will lose if he gives in to the city. Additionally, the
dedication will result in a change in shape of the subdivision and
thereby decrease the number of lots the subdivider can create with
the remaining land. This may also increase his improvement costs.
The alternatives of the subdivider are as follows:

1. Hold the land until the city buys the channel or changes the

\(^9\) Id. at 535, 320 P.2d at 218.

\(^{10}\) 28 CAL. OPNS. ATY'Y GEN. 344 (1956).
route of the channel (which will mean tying up his investment);
2. Dedicate the land and lose the $12,000 plus other expected profit;
3. Litigate the question of the city's power to impose this condition.

In the typical case, the subdivider chooses the second alternative because he depends upon rapid turnover of his capital to survive in a highly competitive market. A builder cannot afford to carry interest payments and taxes on land that is not being developed. The subdivider will usually reject litigation because his lawyer cannot promise him speedy and effective relief. Such litigation involves further expenditure of money, to say nothing of incurring the ill-will of the city.

A recent case filed in Santa Clara Superior Court involved a suit by a builder against a city and a flood control district to test the validity of forced dedication of subdivision land required by a city for use as a portion of a flood control channel planned by the district. The plaintiff alleged that the city and the district had agreed to cooperate in requiring plaintiff to dedicate portions of a district flood control channel in order to get approval of a subdivision map. The Santa Clara County Flood Control and Water Conservation District was created by act of the State Legislature, and the district was empowered to obtain land by "gift, devise, contract, [and] condemnation."2

The district has the power, upon referral of the problem by an incorporated city, "to require the installation of drainage or flood control improvements necessary and/or convenient for needs of the zone, including but not limited to, residential, subdivision, commercial and industrial drainage and flood control needs." This of course does not give the district the authority to require dedication of land. The plaintiff sought to have the actions of the city and the district declared illegal and unconstitutional on the grounds that they constituted deprivation of property without compensation. In addition, plaintiff sued to recover money for five pieces of property, dedication of which had been required, and alleged the values of the properties to be in excess of $50,000. Demurrers to the complaint were overruled by the court and the case was settled prior to

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2 CAL. WATER UNCODIFIED ACTS act 7335, § 5 (Deering 1962).
3 Ibid.
trial in January, 1965. The plaintiff dismissed the suit and received an undisclosed amount of cash from the defendant district in return for quitclaim deeds to the areas which previously had been dedicated to the city.

The leading case upholding the power of a city to require dedication of land as a condition precedent to the approval of a subdivision map is Ayres v. City Council of Los Angeles.\textsuperscript{14} In that case, the conditions imposed by the city, and allowed by the California Supreme Court, were the dedication of land for a street and the setting aside of other land for landscaping. The court distinguished between the exercise of the sovereign power of eminent domain (which requires compensation) and the imposition of reasonable restrictions upon a land owner seeking to acquire the advantages of subdivision. The holding was that reasonable restrictions of private interests for the benefit of the community may be imposed, without violating constitutional rights, where the land owner voluntarily seeks subdivision. The Attorney General has narrowly construed the Ayres case. He was asked whether an ordinance would be valid which would require every subdivider either to donate school property within the subdivision or to pay the school district $50.00 for each lot.\textsuperscript{15} The Attorney General concluded that this would be invalid. In a subsequent opinion, he explained that the Ayres case, properly may be limited to the actual context giving rise to it. There, a chartered city was seeking to resolve a potentially serious traffic problem, threatening the health and safety of both the residents of the subdivision and the rest of the community, by requiring dedication of a street planting strip. We think it fair, therefore, to say that the Ayres case stands as clear authority only for the proposition that the act does not preclude local regulations reasonably required by the subdivision type and related to the character of local and neighborhood traffic, health and safety needs.\textsuperscript{16} 

Requiring dedication of land for school purposes surely cannot be said to be a condition reasonably related to the character of local and neighborhood traffic, health and safety needs. Accordingly, we reaffirm our ruling that requiring dedication for such purposes constitutes a condition going far beyond those conditions contemplated by the Subdivision Map Act and which may be imposed consistent therewith.\textsuperscript{16}

\textbf{Warning to Cities}

Because the subdivider has to rely upon speedy approval from cities of his subdivision maps in order to keep operating, and a lengthy delay will certainly result from any attempt by the sub-

\textsuperscript{14} 34 Cal. 2d 31, 207 P.2d 1 (1949). See also Annot., 11 A.L.R.2d 503 (1950).
\textsuperscript{15} 22 CAL. OPP. ATT'Y GEN. 168 (1953).
\textsuperscript{16} 29 CAL. OPP. ATT'Y GEN. 49, 53 (1957). (Italicized in original.)
divider to resist the requirements of dedication or payment of fees, the cities would appear to occupy a power-laden position. Builders are reluctant to take the city to court to test the reasonableness of conditions imposed. That is why cities have been pursuing this method of accomplishing their planning goals at an ever increasing rate and at the expense of the builders.

A comment of some interest appears in a report of the Committee on Zoning and Planning which was made up of many city attorneys, and appeared in the 1959 Municipal Law Review. The report discussed the practices of charging fees and requiring dedication of land as measures of subdivision control. The report states:

A practice has grown up around the subdivision process which from a legal standpoint is disturbing. Many planning boards and governing bodies impose subdivision fees on land developers to cover the cost of processing the application, including engineers’ fees, etc. As long as those fees are somewhere near commensurate with the cost of processing, no trouble is likely to arise, and if so, the fees can be justified. Many municipalities, looking for new sources of revenue and mindful of the additional burden that land development causes by way of additional municipal services, are by ordinance and otherwise requiring outright conveyance of lands for schools, parks, etc., and in lieu thereof, a cash payment to be dedicated to the construction of new schools to serve the developments and the purchase of land for parks, playgrounds and school sites.

We are fearful, based upon an analysis of the cases reported to date and general constitutional principles of law, that it is impossible to sustain the imposition of fees or the requirement of dedication of land for municipal projects and improvements which are not directly related to and for the exclusive benefit of land developed and its subsequent owners.

Perhaps the outstanding case on this subject where the pros and cons are fully discussed in the opinion is that of W. E. Gould & Co. v. City of Park Ridge decided by the Circuit Court of Cook County, January 15, 1958. The ordinance at issue in that case was cleverly designed to try to constitutionally and fairly require developers to contribute to the cost of future school construction precipitated by the land development. A substantial amount of money had been collected (over $100,000) but when the ordinance was tested, it fell, because there was no statutory authority to permit the adoption of such an ordinance, and secondly, because had there been, such would have been unconstitutional as a violation of the 14th Amendment of the United States Constitution.

The article goes on to state that the planning and advisory commission to the governor and legislature of the State of New Jersey have tried without success to find a constitutional way of providing

17 Stickel & Human, supra note 7.
18 Id. at 427-428.
legislation to validate this practice. The committee then issues a warning to municipalities adopting said practice not only as to its constitutionality if attacked, but also to the possibility of being required to pay back enormous funds collected, appropriated, and possibly spent prior to attack.

It should be noted that a 1965 amendment to California Business and Professions Code Section 11526 permits local ordinances to provide for collection of a "proper and reasonable fee" from sub-dividers for examination of maps.

POWER OF CITIES TO REGULATE SUBDIVISIONS

Where do cities derive the power to impose conditions upon approval of subdivision maps? Certain conditions may be imposed which are based upon the general powers of cities and counties, or, like zoning ordinances, are based upon statutes of equal dignity with the Subdivision Map Act.19

In a proper case, the police power may be used to take land without payment of compensation.20 However, the exercise of the police power is properly confined to situations where an emergency may be said to exist. Taking or damaging private property in construction of public improvements is not otherwise justified.21

A chartered city has power under its charter and under the State Constitution to enact legislation,22 and in the case of strictly municipal affairs, local ordinances of a chartered city would prevail over general state laws. However, in determining whether a matter is a strictly municipal affair, the courts apparently decide, under the facts of each case, whether the subject matter under discussion is of municipal or state-wide concern. This question must be determined from the legislative purpose in each individual instance.23

Certain powers have been delegated to cities to impose condi-
tions concerning design and improvement that are reasonably related
to the particular subdivision. In addition, where there is no specific
limitation on the power of a city in its charter, and no provision in
the Subdivision Map Act forbids it, conditions may be lawfully
imposed so long as the requirements are reasonably related to the
character of the local neighborhood planning and traffic conditions.

**SUBDIVISION MAP ACT**

It seems clear that the legislature intended to occupy the field
of subdivision control in passing the Subdivision Map Act and that
it further intended to limit the authority of cities (including chartered
cities) to adopt local ordinances regulating subdivisions. Because
the State has pre-empted the field of subdivision regulation, local
municipal ordinances that conflict with the Subdivision Map Act are
invalid.

Among other things, the Subdivision Map Act regulates the
design and improvement of subdivisions, the survey data, the form
and content of tentative and final maps, and the procedure to be
followed in securing official approval of maps. Control of design
and improvement is vested in governing bodies of cities and counties,
and they are directed to adopt ordinances regulating and controlling
design and improvement.

The problem here concerns the limitations of cities and counties
in controlling design and improvement of subdivision land. To be
determined is whether or not local government is acting in accor-
dance with its delegation of authority as found in the Subdivision
Map Act.

The word "design" is defined by Business and Professions Code
Section 11510 as referring to street alignment, grades and widths,
alignment and widths of easements and rights-of-way for drainage
and sanitary sewers, minimum lot area and width, and certain
dedications.

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25 CAL. BUS. & PROF. CODE § 11525.
26 Ayres v. City Council of Los Angeles, 34 Cal. 2d 31, 207 P.2d 1 (1949). See
Taylor, Current Problems in California Subdivision Control, 13 Hastings L.J. 344
(1962).
27 Santa Clara County Contractors & Homebuilders Ass'n v. City of Santa Clara,
232 Cal. App. 2d 554, 43 Cal. Rptr. 86 (1965); Kelber v. City of Upland, 155 Cal.
28 Professional Firefighters, Inc. v. City of Los Angeles, 60 Cal. 2d 276, 384 P.2d
158, 32 Cal. Rptr. 830 (1963).
29 CAL. BUS. & PROF. CODE § 11526.
30 Ibid.
Business and Professions Code Section 11511 defines "improvement" as referring to:

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

A city has been permitted to require developers to execute an agreement to install improvements consisting of a drainage ditch as a condition to approval of a final subdivision map where the drainage facility was undoubtedly for the direct benefit of the subdivision in question. The drainage ditch was found to be for the general use of lot owners in the subdivision and for local drainage needs and was essential to drain water accumulated on or falling on the land of the subdivision, and to carry it therefrom to the main drainage channel.1

Prior to approval of subdivision maps, it is customary for cities to impose conditions in accordance with the "design and improvement" sections, such as construction and dedication of local streets, storm sewers, street lighting, sidewalks, curbs, gutters, underground utilities, street trees, and street signs. Subdividers accept these conditions without question and there is no doubt about their validity.

A city may also disapprove a tentative map because of flood and inundation hazard, and may require protective improvements to be constructed.2 Obviously, this would not include the power to require dedication of land. In other words, the choice is between disapproving a map if flood hazards exist or requiring protective improvements to be constructed.

THE TEST OF REASONABLENESS

The power to require construction of improvements does not mean that cities may impose excessive subdivision improvement requirements. For example, a requirement that a subdivider construct part of a 50-foot flood control channel to obtain approval of a ten acre subdivision would be no less objectionable than a requirement of dedication of the land for that same portion of the channel.

The test applied by the courts to a condition imposed by a city is the test of reasonableness, that is, are the conditions imposed reasonably required in the interests of public safety and convenience.3

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1 City of Buena Park v. Boyar, 186 Cal. App. 2d 61, 8 Cal. Rptr. 674 (1960).
2 CAL. BUS. & PROF. CODE § 11551.5.
In *Miller v. City of Beaver Falls*, the Pennsylvania court inquired:

Shall this principle relating to streets, which are narrow, well defined and absolutely necessary, be extended to parks and playgrounds which may be very large and very desirable but not necessary?...

The city is not without a remedy, but it cannot eat its cake and have its penny too. If it desires plaintiff's land for a park or playground which it considers desirable or necessary for its future progress, it can readily and lawfully obtain this land in accordance with the Constitution. ... *All that is required is that just compensation be paid.*...

The imposing of reasonable conditions of dedication upon a property owner in return for the granting of a privilege has been upheld under conditions not involving the subdivision of land. In *Bringle v. Board of Supervisors*, the California Supreme Court ruled that a required dedication of a 30-foot wide strip of land as a condition for renewal of a variance to use property zoned for agricultural purposes as an equipment storage yard was permissible where there was a reasonable relationship between the increased use of the property and the widening of the street. Presumably, the issue in this type of case would be the same as in cases arising under the Subdivision Map Act, namely, whether the particular condition imposed is reasonable in light of all the circumstances.

**LOCAL ZONING AND DEDICATION**

Another technique that has been developed in recent times involves the practice of zoning property for low density (for example, 12,000 or 15,000 square foot residential lots). This zoning classification makes it difficult or impossible from an economic viewpoint for a developer to profitably develop his land. The city leaves the door open to the owner to come in and apply for some sort of planned community zoning, and in a mutually arrived at arrangement the city permits the builder to build on 6,000 or 8,000 square foot lots in return for which the builder is required to dedicate certain choice sites for schools and parks. Such arrangements are probably not unconstitutional upon their face because the builder is receiving something in exchange for his dedication of the land in that he is

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84 368 Pa. 189, 82 A.2d 34 (1951).
85 Id. at __, 82 A.2d at 36.
86 Id. at __, 82 A.2d at 38.
87 54 Cal. 2d 86, 351 P.2d 765, 4 Cal. Rptr. 493 (1960).
permitted to build in much greater density on his remaining land than he would have otherwise been able to do. It remains to be seen whether the courts will have the insight to pierce through the form to the substance here and see that in certain cases this amounts to nothing more than a clever scheme to acquire property for public use without payment of just compensation to the owner. Those people responsible for such schemes argue that parks and schools would tend to be used by the people residing in the particular locality, and that the builder will pass along to those people the costs of the parks and the schools, and will thus spread the cost among the residents in the community who stand to benefit most from the facilities. Builders argue that this overlooks the economic realities of the situation. Most builders are not able to pass along extra costs to prospective purchasers because of the tremendous competition in the building industry today. With increasing mobility, the average home buyer today will range from ten to thirty miles in his search for a home, and has no trouble at all in finding areas where such conditions are not imposed and the prices of the houses are correspondingly lower.

**NEW LEGISLATION**

A 1965 addition to the Subdivision Map Act permits a city or a county to require a subdivider to sell land to the local elementary school district at the subdivider’s “cost.” This property is to be used for school purposes where a subdivision of more than 400 units is completed within the same school district, on contiguous parcels, owned by the same subdivider, within three years.39 Another 1965 addition to the Subdivision Map Act permits a city or a county to require by ordinance the dedication of land or payment of fees in lieu thereof for park or recreational purposes as a condition of the approval of a subdivision map. However, the amount and location of land to be dedicated or fees to be paid shall bear a reasonable relationship to the use of the park by the inhabitants of the subdivision.40 Business and Professions Code Section 11510 was amended at the same time to add to the definition of “design and improvement” the dedication of land for parks.

Both bills contain language which carefully relates the requirements of dedication of land or payment of fees as closely as possible to the needs of the subdivision. This, presumably, is to counter the obvious argument of deprivation of property without just compensation. The argument is that reasonable restrictions can be imposed.

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upon a privilege (subdividing land) for the general welfare of the people. However, it would seem to a discerning eye that the authors of this legislation are not so much concerned with equitably spreading the burden of schools and parks among the potential users, as with enhancing the ability of cities or counties to carry out land development and land use plans. There is a pre-existing system for equitably distributing the burdens and responsibilities of providing parks, schools, and other public facilities, namely the use of government funds derived from taxes to purchase private property.

City planners will argue that if they have to wait until funds are available and plans are completed all available land will have been gobbled up by hungry subdividers, and that acquisition of school and park sites will require purchase of improved lands at a tremendous expense to the taxpayers. The filing of a subdivision map presents the city with an opportunity to immediately accomplish a long-range objective in that particular locality at a great saving in funds if this legislation stands the test of constitutionality.

One might ask why a city should delay the planning of a school or park until after a subdivision map is filed. From a long-range planning viewpoint, would it not make more sense for the city to develop an overall plan for the location of schools, parks, flood control facilities, and not to be dependent upon the haphazard or fortuitous filing of subdivision maps? Would it not make more sense for the cities to utilize their facilities to plan overall development of areas, to budget funds, and to secure passage of bond issues (where necessary) for the purchase of undeveloped land before it is acquired by subdividers?

With the controls that cities have over zoning, they should be able to guide the future development of areas within their boundaries in such a way as to efficiently integrate the park sites, school sites, and drainage facilities which are planned and purchased. It would also seem that this more conventional method of city development would avoid the inevitable battle which will loom in every case where requirements under the proposed bills are imposed. This battle will be waged over the reasonableness of the conditions imposed on each particular subdivision, and the resulting constitutional questions of taking without compensation and denial of equal protection of the laws. The next inquiry follows logically: once certain conditions have been imposed upon a subdivider, what remedies are open to him?

**Remedies of Aggrieved Subdividers**

Business and Professions Code Section 11552 provides an administrative remedy, whereby a subdivider who is dissatisfied with
the action of an advisory agency (such as a planning commission) as to his tentative map may, within 15 days after such action, appeal to the governing body for a public hearing. The hearing shall take place within 15 days, and the decision must be rendered within seven days thereafter.

Prior to 1965, Section 11525 of the Business and Professions Code provided that any subdivider aggrieved by the decision of a governing body "may within 90 days" bring a special proceeding in the superior court to determine the reasonableness of the decision. In 1965, Section 11525.1 was added providing that any action to attach or review a decision of the governing body concerning a sub-division, or the reasonableness of any condition, must be commenced within 180 days after the date of the decision. Also added in 1965 was Section 65850 of the Government Code, which requires the same period for review with respect to any decision of an administrative agency.

An interesting question arises if a subdivider who is dissatisfied with a condition imposed upon him, complies with the condition (after protesting it), and then (after filing a claim) brings an action in the superior court against the city for damages in inverse condemnation or for return of fees paid under protest and for declaratory relief. Must a subdivider appeal a decision requiring an unreasonable dedication or payment of fees when the condition is first imposed by the planning commission or advisory body of the city and must there then be a hearing before the city council on the question of the reasonableness of the condition before he is entitled to sue the city in inverse condemnation? The City of Fremont argued that the special proceedings provided for by the Subdivision Map Act must be pursued to completion by a subdivider and that a decision of the superior court that the condition is unreasonable should be obtained before suit may be brought for inverse condemnation. The city lost the argument and it is suspected that Section 11525.1 was passed at the request of local governmental agencies to strengthen their hand in this area.

The most reasonable interpretation of Section 11525 prior to 1965 would appear to be that the remedy is permissive, not mandatory. Since the remedy provided is judicial, not administrative, the rule requiring the exhaustion of administrative remedies would not apply.

The 1965 amendment substitutes "shall" for "may," and thus

requires a subdivider to bring a special proceeding in superior court within 180 days after the decision of a governing body. The probable motive of the sponsors of this legislation was to prevent a subdivider from being able to sue a city in inverse condemnation for taking of his land, or to sue for refund of fees paid into a park fund, unless the subdivider first had brought such a proceeding and the city had then insisted upon imposing the condition after the superior court had determined that it was unreasonable or invalid. Due to the time normally required to obtain judicial relief, the amendment could effectively prevent challenge by aggrieved subdividers of all but the most outrageously unreasonable conditions. Few builders can afford to hold up their land development plans even for a few months to await the outcome of such a hearing. The result would force acquiescence with the conditions in almost all cases.

One might speculate on what would happen to a builder who complied with a condition imposed by a planning commission and brought his action under Section 11525.1. Assume that he brought a suit within 180 days for inverse condemnation and for return of fees, having appealed unsuccessfully to the local governing body after imposition of the condition by the planning commission or advisory agency. Would he be permitted to proceed simultaneously with his map and his suit? If so, no time would be lost if his suit were unsuccessful or he would get judgment for return of the fees, or payment of the fair market value of his land, in the event the court decided in his favor.

To permit these parallel remedies would certainly temper the rulings of local governing bodies which do not wish to impose conditions that may turn out to be illegal after it is too late to revoke them. One also might argue that good administrative law would not permit such a course of action.

However, in balance, it would seem just to permit the subdivider to proceed in this fashion. To deny him this right would mean virtual absolute control by local government because of the economic pressures on the builders and the "law's delay." It does seem harsh or unreasonable to make local government assume the risks of imposing conditions which turn out to be illegal.

EXHAUSTION OF ADMINISTRATIVE REMEDIES

The doctrine of "exhaustion of administrative remedies" provides simply that an individual must follow available administrative procedures for resolving grievances before dragging a governmental agency into court. The alleged purpose of the rule is to insure that governmental agencies are not brought into court until all possibili-
ties for settlement or compromise have been first exhausted. This will save time and money of the city and of the courts, and will benefit the taxpayers. The essence of the rule is that the governing body of the particular entity involved should have the opportunity to consider all the facts in a controversy and make a judgment upon the merits before the matter is presented to a court.

There are some exceptions to the rule. For example, where a litigant alleges that the action which was taken by a governmental entity was completely illegal and without any authority whatsoever, he need not exhaust any administrative remedies. It can also be argued that the doctrine does not apply to judicial remedies, and that Business and Professions Code Section 11525.1 is a judicial remedy.

It would seem, therefore, that under the present law a subdivider should be able to bring a proceeding under Business and Professions Code Section 11525.1 including a suit for inverse condemnation or return of fees, and at the same time seek declaratory relief. He should, however, take care to exhaust the administrative remedies provided by local ordinances and by Business and Professions Code Section 11525.1 before seeking a judicial remedy. Although his case may present an exception to the rule of the doctrine of exhaustion of administrative remedies, the subdivider is much better off if he has eliminated this doctrine from the issues in the lawsuit before going to court.

**Local Administrative Remedies**

In addition to the Subdivision Map Act remedies, other local remedies may have been added by municipal ordinances of the particular city involved. A city ordinance may provide for the filing of a petition by the builder to the planning commission or the council in the event a condition is imposed which the builder deems unreasonable.

When faced with such additional local administrative remedies provided by city ordinances, the cautious subdivider will take pains to pursue each one in order to avoid falling into the trap of failing to exhaust his administrative remedies. On the other hand, it may be urged at this point that any such additional remedies provided by local ordinances are unconstitutional because they conflict with the Subdivision Map Act through which the state has occupied the field. Otherwise, it would be very easy for a city to completely circumvent the Subdivision Map Act by providing a myriad of burdensome and

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annoying local administrative remedies which would have to be completed before a subdivider could bring his case into court.

**Other Remedies**

The question arises whether there are any remedies open to the subdivider other than those provided by local ordinances and by the Subdivision Map Act. The answer is that there are other remedies open, and that under certain circumstances, these other remedies may be the only proper ones. In *Wine v. City Council of Los Angeles*,\(^43\) conditions imposed by the city were challenged by the subdivider and were held not to be within the control of the city council because the conditions were not part of the "design" or "improvement" of the subdivision. Therefore, the conditions were outside of the authority of the Subdivision Map Act and no challenge to the reasonableness of the conditions imposed by the council was thereby authorized. The *Wine* case puts the subdivider who is contesting the validity of conditions imposed under the Subdivision Map Act in somewhat of a dilemma. If he proceeds to bring a statutory action with 180 days under Section 11525.1, he may find that the *Wine* case will prevent him from obtaining relief where his cause of action is based upon the assertion that the city has exceeded the authority delegated to it by the Subdivision Map Act. If, on the other hand, the subdivider brings an action for inverse condemnation or declaratory relief, and does not follow the procedures set up by Section 11552 and Section 11525.1, he risks having his case thrown out of court for failing to exhaust the administrative remedies provided, unless he could successfully argue that Section 11525.1 provides a judicial remedy which would not come within the rule requiring exhaustion of administrative remedies.

Declaratory relief is also provided for by California law.\(^44\) The subdivider should be able to file a declaratory relief action where the city attempts to impose an allegedly unauthorized condition, and have the court declare it valid or invalid. Section 11525.1 would seem to require this action to be commenced within 180 days.

**Finality of Dedication**

The question which arises in the case of a subdivider who proceeds with his maps, construction and dedication, where required, and at the same time pursues his administrative remedies, is whether the dedication is irrevocable. It has been said that a gift or

\(^43\) 177 Cal. App. 2d 157, 2 Cal. Rptr. 94 (1960).

dedication of land to a city is irrevocable, unless made under duress. It might be argued that acceptance of the benefits of subdivision would create an estoppel and prevent the subdivider from recovering property, dedication of which had been required and completed. This argument, however, would appear to be without basis in law. A subdivider is entitled to exercise the privilege of subdividing his property, provided he meets certain reasonable conditions which are legally imposed for the benefit of all of the people. It would not be logical to argue that the subdivider can be required to submit to unreasonable and illegal conditions in return for receiving the privilege of subdividing his property.

Another argument that cities tend to make is that a subdivider who buys property, knowing that a portion of the property may be required for a flood control channel or a park or a school, walks into the situation with his eyes wide open. Therefore, there is no economic hardship to him because he knew all along what such requirements might be. This argument is also without merit. One does not waive his rights to complain about an illegal condition simply because he knew in advance that there was a chance that such a condition might be imposed.

It is also argued that a subdivider who enters into a subdivision improvement agreement with a city after notification of a condition, and signs a contract calling for installation of improvements, has waived his right to complain about the condition. The argument is also ineffective because the contract for subdivision improvements is in no way related to the condition of dedication of land for a channel or park. If the subdivider has met all the requirements legally imposed by the city, and is in a position to enter into an agreement required by the city for the construction of subdivision improvements, the city cannot require him to waive his constitutional rights to compensation for property taken for public purpose. It also might be argued that Business and Professions Code Section 11627, which says that recording of a final map ultimately determines the validity of the map, would prevent a subdivider from getting his money back after his final map is recorded. This would not be a reasonable interpretation of the statute, however, because it seems limited to the question of validity of the map itself, without regard for conditions imposed.

CLAIMS STATUTES

Local municipal ordinances may provide their own claim statutes and, where applicable, these should be studied carefully in the
event that the subdivider has completed the dedication of land and is suing in inverse condemnation.

Under state law a claim must be presented in writing to a city; that claim must be rejected before a suit can be filed for money damages, and suit must be filed within six months after the facts giving rise to the claim occur.\textsuperscript{47}

**Practical Considerations**

The average subdivider or builder is under considerable time pressure to get his tentative and final maps approved as quickly as possible so that he can begin moving dirt, installing improvements, and building his model homes. The average time from filing of a tentative map to approval of a final map is less than four months (depending upon the area). The time it takes to resolve a case, whether one for declaratory relief, inverse condemnation, or one brought under Section 11525 of the Business and Professions Code, is no doubt considerably longer. In the *Sunnyvale* case,\textsuperscript{48} the complaint was filed in October 1963, and the case was finally settled in January 1965, after it had been scheduled to go to trial in December of 1964. Theoretically, it would be possible to get a case to trial in much less time than that, but as a practical matter, almost any case of that nature would be fairly complex, and it would require a considerable amount of time to complete law and motion matters, discovery matters, and pretrial. If the subdivider wins he may have to respond to an appeal. No subdivider can stand that kind of delay. Subdividers are faced with economic problems of paying both taxes and interest on borrowed capital, meeting overhead, and living up to contracts with construction crews, subcontractors and materialmen. They cannot afford to wait for justice to take its course and must, therefore, proceed to subdivide the property and struggle along as best they can under the conditions that are imposed. At the same time, they may be forced to protect their rights by litigating these conditions through the courts, if necessary.

**Summary and Conclusion**

What is really needed is a faster means of educating the public to recognize the need for improved governmental services in certain areas. In 1955, the electorate of the North Central Zone of the Santa Clara Flood Control and Water Conservation District failed to pass

\textsuperscript{47} CAL. GOVT. CODE §§ 945.4, 945.6.

a bond issue which was intended to finance several very important flood control channels. Engineering studies had shown that these were needed in the area. The electorate was not educated to the necessity for these improvements and failed to approve the bonds. This apparently did not stop the district from going ahead with its plan, however, as pointed out. Would it be unjust to label such action “paternalistic”? On the other hand, would it be better to let people suffer for their mistakes until they learn for themselves, even if it costs more in the long run? Is it good policy for few people who are in positions of control over long range planning to decide what is best for the rest of the people? Policies may be executed to carry out these decisions without consulting the electorate, with the assumption that the people are not interested or have not the intelligence to make proper decisions.

Legislation has been enacted to broaden the power of cities to impose requirements under the Subdivision Map Act, and to limit the right to judicial review. It is submitted that any laws that permit dedication of land for public purposes to be required without compensation will have to stand the test of constitutionality, i.e., are the conditions imposed reasonable in terms of local or neighborhood needs of the owners within the area of jurisdiction? In this connection, let us remember the quotation from Justice Holmes referred to at the beginning of this article.

The subdivider who desires to avoid payment of illegal fees or dedication of property for public purposes in connection with approval of his subdivision maps should protest the conditions at all levels, take pains to exhaust all local and state administrative remedies, comply with all claims statutes, and then bring his action within the time limits set by the Subdivision Map Act for declaratory relief and inverse condemnation, or return of fees, where applicable. In the meantime, he should proceed with his maps as required, including dedicating or reserving property for other than subdivision use, after having been sure to appear and protest at all public meetings where the imposition of the conditions or the approval of his maps were discussed. In the event the conditions are determined to be reasonable and valid, the subdivider will not have lost valuable time by waiting for a legal decision which may take months or years. If the court rules in his favor, he will have completed his subdivision and will not have been penalized for seeking justice in the courts. He will be able to recover a judgment in inverse condemnation in the event of forced dedication or a judgment for return of fees, the deposit of which was required as a condition to approval of his map.

49 Id.
Some builders question whether they may not harm themselves in the long run by fighting the imposition of conditions because of the loss of good will of the local governmental entities. It is well known that there is a lot of room for the exercise of "administrative judgment" at all levels in city and county governments. It is also quite possible that one or more planning or other administrative officials within a city could seriously hinder the operations of any one builder by continually finding ways to delay or impede the progress of the builder when his plans come before the city for consideration. This has been the fear of a considerable number of builders who have been faced with the imposition of unreasonable conditions, but have convinced themselves that there is more to be lost than to be gained from fighting the problem. They have given up. It is submitted that a reputable and efficient builder who finds himself faced with the imposition of an unreasonable condition will not be significantly penalized by local administrative governmental officials if he chooses to properly follow his administrative and legal remedies in a straightforward and friendly manner. In fact, the reverse is likely to be true in that the local governmental officials may develop a greater respect for the subdivider when they learn that he will stand up for his rights and is not one to be easily pushed around. In case the builder runs into a "bad apple" who might take things personally and go on a crusade to impede the progress of that builder, there are other means to combat such unlawful conduct. In any event, the subdivider who merely acquiesces to unwarranted conditions is merely encouraging continued coercion, indirect as it may be, by local government.