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SUBDIVISION APPROVAL REQUIRED LAND OR FEE FOR PARKS & RECREATION

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The *Walnut Creek* decision described herein challenged the constitutionality of mandatory dedication requirements in California. This landmark 1971 case is illustrative of the types of legal controversy surrounding mandatory dedication for public parks and recreation as a requirement to subdivision approval. Mandatory dedication is the topic for the second edition of *Legal Issues in Recreation Administration* (LIRA).

Beginning in 1990, LIRA is a quarterly publication co-sponsored by the National Recreation and Park Association and the George Mason University Center for Recreation Resources Policy. LIRA is a complementary publication to the *Recreation and Parks Law Reporter* (RPLR). RPLR will continue to provide descriptions of recently reported court decisions in the area of recreational injury liability. LIRA, on the other hand, will present case reports focusing on a specific law-related topic impacting recreation administration, including recreational injury liability. In addition to mandatory dedication for public parks, future topics will include diversion of public parkland to other uses, and various civil rights and constitutional issues. Your suggestions regarding topics for a review of case law in future editions of LIRA are encouraged. Subscription rates for LIRA are $100/yr. (4 issues); $50/yr for NRPA members. For further information regarding, LIRA please contact: Dr. Brett A. Wright, Director, Center for Recreation Resources Policy, George Mason University, 4400 University Drive, Fairfax, Virginia 22030 (703) 323-2826.

Requiring Open Space for New Subdivisions

In the case of *Associated Home Builders of Greater East Bay, Inc. v. City of Walnut Creek,* 94 Cal.Rptr. 630, 484 P.2d 606 (1971), a non-profit association for the promotion of the home building industry (Associated) challenged the constitutionality of a state statute which authorized "the governing body of a city or county to require that a subdivider must, as a condition to the approval of a subdivision map, dedicate land or pay fees in lieu thereof for park and recreational purposes." The challenged statute, Section 11546 of the Business and Professions Code, provided as follows:

> The governing body of a city or county may by ordinance require the dedication of land, the payment of fees in lieu thereof, or a combination of both, for park or recreational purposes as a condition to the approval of a final subdivision map, provided that:
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> (a) The ordinance has been in effect for a period of 30 days prior to the filing of the tentative map of the subdivision.
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> (b) the ordinance includes definite standards for determining the proportion of a subdivision to be dedicated and the amount of any fee to be paid in lieu thereof.
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> (c) The land, fees, or combination thereof are to be used only the purpose of providing park or recreational facilities to serve the subdivision.
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> (d) The legislative body has adopted a general plan containing a recreational element, and the park and recreation facilities are in accordance with definite principles and standards contained therein.

> (e) The amount and location of land to be dedicated or the fees to be paid shall bear a reasonable relationship to the use of the park and recreational facilities by the future inhabitants of the subdivision.
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> (f) The city or county must specify when development of the park or recreational facilities will begin.
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> (g) Only payment of fees may be required in subdivisions containing fifty (50) parcels or less.
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> The provisions of this section do not apply to industrial subdivisions.

Associated also challenged the ordinance (Section 10-1.516 of the Walnut Creek Municipal Code) enacted by defendant City of Walnut Creek to implement this statute.

> [As described by the court, the general park and recreation plan adopted by the city] provides that if a park or recreational facility indicated on the general plan falls within a proposed subdivision the land must be dedicated for park use by the subdivider in a ratio (set forth in a resolution) determined by the type of residence built and the number of future occupants. Pursuant to the ratio, two and one-half acres of park or recreation land must be provided for each 1,000 new residents. If however, no park is designated on the master plan and the subdivision is within three-fourths of a mile radius of a park or proposed park, or the dedication of land is not feasible, the subdivider must pay a fee equal to the value of the land which he would have been required to dedicate under the formula. (The requirement of dedication is qualified as to subdivisions containing 50 parcels or less... only the payment of fees may be required in subdivisions of such size.)

The trial court found in favor of the defendant city. Associated appealed to the state supreme court. As described by the state supreme court, "Section 11546 and the city's ordinance are designed to maintain and preserve open space for the recreational use of new subdivisions."

> The adoption of a general plan (subd. (d)) avoids the pitfall of compelling exactions from subdividers of land which may be inadequate in size or unsuitable in location or topography for the facilities necessary to serve the new residents. Under the legislative scheme, the park must be in sufficient proximity to the subdivision which contributes land to serve the future residents. Thus subdividers, providing land or its monetary equivalent, afford the means for the community to acquire a parcel of sufficient size and appropriate character, located near each subdivision which makes a contribution, to the serve the general recreational needs of the new residents.
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> If a subdivision does not contain land designated on the master plan as a recreation area, the subdivider pays a fee which is used for providing park or recreational facilities to serve the subdivision. One purpose of requiring payment of a fee in lieu of dedication is to avoid penalizing the subdivider who owns land containing an area designated as park land on the master plan. It would, of course, be patently unfair and perhaps discriminatory to require such a property owner to dedicate land, while exacting no contribution from a subdivider in precisely the same position except for the fortuitous circumstance that his land does not contain an area which has been designated as park land on the plan.

As described by the state supreme court, Associated maintained that "section 11546 violates the equal protection and due process clauses of the federal and state Constitutions in that it deprives a subdivider of his property without just compensation."

> It is asserted that the state is avoiding the obligation of compensation by the device of requiring the subdivider to dedicate land or pay a fee for park or recreational purposes, that such contributions are used to pay for public facilities enjoyed by all citizens of the city and only incidentally by subdivision residents, and that all taxpayers should share in the cost of these public facilities. Thus, it is asserted, the future residents of the subdivision, who will ultimately bear the burden imposed on the subdivider, will be required to pay for recreational facilities the need for which stems not from the development of any one subdivision but from the needs of the community as a whole.

According to Associated, "a dedication requirement is justified only if it can be shown that the need for additional park and recreational facilities is attributable to the increase in population stimulated by the new subdivision alone." Further, Associated maintained that "the validity of the section may not be upheld upon the theory that all subdivisions to be built in the future will create the need for such facilities."

The state supreme court rejected Associated's argument that "a dedication requirement may be upheld only if the particular subdivision creates the need for dedication." According to the supreme court, "a subdivider who was seeking to acquire the advantage of subdivision had the duty to comply with reasonable conditions for dedication so as to conform to the welfare of the lot owners and the general public." Further, the court found dedication conditions "were not improper because their fulfillment would incidentally benefit the city as a whole or because future as well as immediate needs were taken into consideration and that potential as well as present population factors affecting the neighborhood could be considered in formulating the conditions imposed upon the subdivider."

The state supreme court also found that "section 11546 can be justified on the basis of a general public need for recreational facilities caused by present and future subdivisions."

> The elimination of open space in California is a melancholy aspect of the unprecedented population increase which has characterized our state in the last few decades. Manifestly governmental entities have the responsibility to provide park and recreation land to accommodate this human expansion despite the inexorable decrease of open space available to fulfill such need...
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> These problems are not confined to contemporary California. It has been estimated that by the year 2000 the metropolitan population of the United States will increase by 110 to 145 million, that 57 to 75 million of the increase will occur in areas which are now unincorporated open land encircling metropolitan centers, and that the demand for outdoor recreation will increase tenfold over the 1956 requirement. Walnut Creek is a typical growth community. Located minutes' distance by motor vehicle from the metropolitan environs of Oakland and East Bay communities, the city population rose

> from 9,903 in 1960 to 36,606 in 1970, an increase of more than 365 percent in a decade.
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> We see no persuasive reason in the face of these urgent needs caused by present and anticipated future population growth on the one hand and the disappearance of open land on the other to hold that a statute requiring the dedication of land by a subdivider may be justified only upon the ground that the particular subdivider upon whom an exaction has been imposed will, solely by the development of his subdivision, increase the need for recreational facilities to such an extent that additional land for such facilities will be required.

In addition, Associated argued on appeal that "the subdivider cannot be compelled to dedicate land for such [recreational] needs, or pay a fee, unless his contribution will necessarily and primarily benefit the particular subdivision." As noted by the state supreme court, section 11546 requires that "the land dedicated or the fees paid are to be used only for the purpose of providing park or recreational facilities to serve the subdivision and that the amount and location of land or fees shall bear a reasonable relationship to the use of the facilities by the future inhabitants of the subdivision." On the other hand, the supreme court found that "the requirement of dedication or the payment of a fee may be justified under the state's police power even if the recreational facilities provided by the subdivider's contribution are not used for the specific benefit of future residents of the subdivision but are employed for facilities used by the general public."

> In view of the provisions of section 11546 [requiring land or fees to serve inhabitants of the subdivision], we need not decide in the present case whether a subdivider may be compelled to make a contribution to a park which is, for example, not conveniently located to the subdivision. Parenthetically, however, we perceive merit in the position... It is difficult to see why, in the light of the need for recreational facilities described above and the increasing mobility of our population, a subdivider's fee in lieu of dedication may not be used to purchase or develop land some distance from the subdivision but which also be available for use by subdivision residents. If, for example, the governing body of a city has determined, as has the city in the present case, that a specific amount of park land is required for a stated number of inhabitants, if this determination is reasonable, and there is a park already developed close to the subdivision to meet the needs of its residents, it seems reasonable to employ the fee to purchase land in another area of the city for park purposes to maintain the proper balance between the number of persons in the community and the amount of park land available. The subdivider who deliberately or fortuitously develops land close to an already completed park diminishes the supply of open land and adds residents who require park space within the city as a whole.

Associated had argued that dedications of land or fees for parks and recreation were an invalid exercise of the state's police powers (i.e. the inherent powers of government necessary to preserve the public health, safety, and welfare). Specifically, Associated contended that "the only exactions imposed upon subdividers which may be valid are those directly related to the health and safety of the subdivision residents and necessary to the use and habitation of the subdivision such as sewers, streets and drainage facilities." The state supreme court rejected this argument.

> While it is true that such improvements [sewers, streets, drainage] are categories directly required by the health and safety of subdivision residents, it cannot be said that recreational facilities are not also related to these salutary purposes. So far as we are aware, no case has held a dedication condition invalid on the ground that, unlike sewers or streets, recreational facilities are not sufficiently related to the health and welfare of subdivision residents to justify the requirement of dedication.

Having reviewed pertinent case law from other jurisdictions, the state supreme court found "the clear weight of authority upholds the constitutionality of statutes similar to section 11546."

> The rationale of the cases affirming constitutionality indicate the dedication statutes are valid under the state's police power. They reason that the subdivider realizes a profit from governmental approval of a subdivision since his land is rendered more valuable by the fact of subdivision, and in return for this benefit the city may require him to dedicate a portion of his land for park purposes whenever the influx of new residents will increase the need for park and recreational facilities. Such exactions have been compared to admittedly valid zoning regulations such as minimum lot size and setback requirements.

The state supreme court also considered the constitutionality of the mandatory dedication ordinance within the Walnut Creek municipal code. Associated argued that "the fees the subdivider must pay in lieu of dedicating land are, under the city's ordinance, determined arbitrarily and without a reasonable relationship to principles of equality." Specifically, Associated contended "(1) that the concept of fair market value is too indefinite and that a subdivider would hesitate to incur the delay and expense of testing value in the courts, and (2) that the city has absolute discretion to determine that the dedication of land is not feasible and that a fee should be charged in lieu thereof." The state supreme court found such "contentions are without merit."

> The question of fair market value is litigated frequently in the courts and no authority cited requires a more precise definition. A subdivider need not delay his development because of a dispute over this issue. Nor can it be said... that there are insufficient criteria for determining when a fee should be required in lieu of dedication. Resolution 2225 provides that land dedication will be required if park land designated on the master plan is incorporated within the subdivision and if the slope, topography and geology of the site as well as its surroundings are suitable for the intended use of a park. However, if dedication is impossible, impractical, or undesirable, a fee will be required. The impracticality of dedication occurs whenever the physical characteristics of the land or its surroundings render the land within the subdivision unsuitable for park or recreational purposes.

The state supreme court also considered "whether fees in lieu of dedication may be used only for the purchase of land or whether they may also be employed under the provisions of section 11546 to improve land already owned by the city which serves the needs of the subdivision."

> Section 11546 provides that the fees may be used for "park or recreational purposes" or "park and recreational facilities." The word "purposes" may be somewhat broader than "facilities" but we must look to the underlying object of the legislation in interpreting its scope. It is clear from what has been said above that the Legislature was concerned largely with the maintenance of open space for recreational use. We conclude that it is consistent with this purpose for fees to be utilized either for the purchase of park or recreational land or, if the city deems that there is sufficient land available for the subdivision's use, for improvement of the land itself as, for example, for drainage or landscaping, but not for the purposes unrelated to the acquisition and improvement of land.

Citing the "phenomenon of the appalling rapid disappearance of open areas in and around our cities," the state supreme court concluded that "section 11546 constitutes a valiant attempt to solve this urgent problem, and we cannot say that its provisions or the city's enactments pursuant to the section are constitutionally deficient." The state supreme court, therefore, affirmed the judgment of the lower court upholding the constitutionality of the challenged mandatory dedication statute and municipal ordinance.

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