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### MANDATORY DEDICATION OF PUBLIC SITES AS A CONDITION IN THE SUBDIVISION PROCESS IN VIRGINIA

*Robert L. Dolbeare\**

The growth pressure on the suburban and rural counties in Virginia in the seventies should be as great as that experienced by counties in the Boston to Washington corridor in the sixties. This urban corridor is working its way south.

As suburbs grow, services are needed: schools, fire protection, police protection, and libraries. New residents mean more traffic, more noise, more smog and more taxpayer demands. They want homes with nearby schools and parks, plus public water and sewer service. Many want single family houses on separate lots, thereby creating a demand for subdivisions that consume large quantities of land.<sup>1</sup> Each suburban area is faced with a number of "Shady Acres" subdivisions, and each Shady Acres comes with a section one with so many lots, followed by a section two with more lots—the process seems endless. Side by side with these pressures, land values have soared, making property acquisition by the localities for public use almost prohibitive.

Localities have used various means to avoid these growth pressures. Moratoriums have been declared on rezoning, subdividing and issuance of building permits. Large lot zoning has been tried

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1. Townhouses and condominiums are now making large inroads in Virginia. One reason is the lack of land in more developed suburban areas.

and declared invalid.<sup>2</sup> But these and similar no-growth steps ignore the valid need for suburban homes.

A more sensible alternative is to let growth pay for its services and needs. Since most developments pass through a subdivision process, that step is a logical time to review and assess these costs. The costs can be met by requiring the subdivider to dedicate land for public facilities, such as schools, parks, and fire stations. If the available land is not appropriate, because of terrain, location or overall county needs, cash fees can be substituted for the equivalent land value.

Such dedication provisions are becoming more common as growth pressures build.<sup>3</sup> They are being considered in Virginia, some counties having already enacted subdivision ordinances containing dedication provisions.<sup>4</sup>

Whether dedication requirements can withstand legal challenge is a question that developers and their attorneys will raise, and one

2. Large lot zoning has been described as a veiled attempt to exclude people and has been struck down by the Virginia Supreme Court. *Board of Supervisors v. Carper*, 200 Va. 653, 107 S.E.2d 390 (1959).

3. The Washington Environmental Research Center surveyed techniques used by local governments to cope with environmental problems. The survey disclosed that 47% of responding counties over 10,000 population and 29% of responding counties over 50,000 population have requirements for dedication. CARTER, FROST, RUBIN & SUMEK, *ENVIRONMENTAL MANAGEMENT AND LOCAL GOVERNMENT* (1974). The response breakdown shows the "middle" population areas have most frequently resorted to dedication requirements:

Cities over 500,000	40%
250,000 to 500,000	44%
100,000 to 250,000	54%
50,000 to 100,000	53%
25,000 to 50,000	45%
10,000 to 25,000	45%
Counties over 500,000	48%
250,000 to 500,000	37%
100,000 to 250,000	68%
50,000 to 100,000	21%

Those states with less land and more people use this device most. In the west 60% of those responding cities and 52% of those responding counties used dedication. The southern states used the technique least with only 36% of responding cities and 20% of responding counties requiring dedication of sites. The study did not analyze what types of sites were required.

4. In addition to personal interviews with state and local planners, the author surveyed counties in Virginia's Alexandria to Richmond to Norfolk urban corridor plus most of the other suburban counties. Specific ordinances are discussed in the body of this article.

which local government planners and their attorneys must be able to answer in the affirmative. The answer can be determined only after analyzing certain subsidiary questions:

1. Is mandatory dedication a "taking" which requires reimbursement?
2. Are required cash fees constitutional?
3. Can Virginia localities use this procedure under present enabling legislation?
4. What safeguards must localities incorporate into their dedication procedure?

#### I. CONSTITUTIONALITY OF MANDATORY DEDICATION; IS IT A TAKING?

Mandatory dedication must pass two constitutional tests, the due process clause of the fourteenth amendment of the United States Constitution and the similar provision in the Virginia Constitution.<sup>5</sup> A federal constitutional question of taking could be raised in either state or federal courts. However, there is a general lack of federal case law on subdivision ordinances.<sup>6</sup> Therefore one must turn to state court decisions.

Few state courts have reached the question of constitutionality. Of these, *Ayres v. City Council*<sup>7</sup> is the most influential "subdivision" case. In *Ayres* the developer presented a plat for a thirteen-acre subdivision adjacent to a major cross-city road to which the city sought to ban all direct access from the lots. The planning commission and the city council required that various conditions be met before the plat could be recorded. The developer challenged four of these as onerous: (a) dedication of a ten-foot strip for widening the cross-city road; (b) restriction of an additional ten-foot strip for trees and shrubbery to separate the subdivision from the same road; (c) dedication of a cross street eighty feet wide whereas it was only sixty feet wide in an adjacent subdivision; and (d) dedication and

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5. VA. CONST. art. I, §11.

6. This probably results for two reasons. Most state subdivision enabling legislation provides for an appeal from adverse governmental decisions to the local state trial court. *E.g.*, VA. CODE ANN. § 15.1-475 (Repl. Vol. 1973). In addition, federal courts are likely to abstain from acting to permit the state court to initially hear such local questions. *E.g.*, *Fralin and Waldron, Inc. v. City of Martinsville*, 493 F.2d 481 (4th Cir. 1974).

7. 34 Cal. 2d 31, 207 P.2d 1 (1949).

elimination of a small median created by the cross-city road, the eighty-foot street and another street.

The first two items were significant because they related to potential problems created by the subdivision over and above its own internal traffic flow, drainage and utilities. All four items would benefit persons living outside the subdivision by improving traffic flow on the through streets. The developer contended that no dedications could be exacted to add to existing streets. The court concluded that the conditions were reasonably related to "local and neighborhood planning and traffic conditions."<sup>8</sup> They rejected as invalid the developer's objection that the proposed conditions contemplated future needs. Because the developer was seeking the benefit of subdividing, he had the "duty" to comply with conditions that contributed to the safety of his potential lot owners "and of the public."<sup>9</sup> This latter emphasis indicated court approval of relating the subdivision to the needs of the entire community.

The court's emphasis on a "duty" to meet conditions to obtain the "privilege" of subdividing sparked a vigorous dissent, which argued for a "right" to subdivide.<sup>10</sup> The dissent was concerned about conditions based on reasonable necessity, pointing out that future conditions grounded on that argument could include schools, recreational areas or other public purposes.<sup>11</sup> The conclusion drawn by the dissent is that once the "right to subdivide" shifts to a privilege of having a subdivision accepted, many conditions can be added without resulting in a constitutional "taking." The *Ayres* majority had cited with approval, and the minority had cited with concern, an earlier Michigan case which had bluntly stated that a developer "voluntarily dedicates land for streets in return for the advantage and privilege of having his plat recorded."<sup>12</sup>

Developers have accepted internal street dedication because lots will not sell without access. As time has passed utility easements have likewise been accepted. But when the locality begins to exact dedication for public needs, such as schools and recreational areas,

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8. *Id.* at \_\_\_\_, 207 P.2d at 5.

9. *Id.* at \_\_\_\_, 207 P.2d at 7.

10. *Id.* at \_\_\_\_, 207 P.2d at 11 (Carter, J., dissenting).

11. *Id.*

12. *Ridgefield Land Co. v. Detroit*, 241 Mich. 468, \_\_\_\_, 217 N.W. 58, 59 (1928).

the developers' resistance has increased. Since *Ayres*, a number of state courts have wrestled with constitutional assaults on subdivision ordinances requiring dedication of public space over and above that required for internal needs, such as streets.<sup>12.1</sup>

*Pioneer Trust and Savings Bank v. Mount Prospect*,<sup>13</sup> illustrates the more restrictive test of such dedications. The Illinois Supreme Court held any burden to be borne by the developer must be "specifically and uniquely attributable" to the particular subdivision. Specifically the court was concerned with school costs not caused by the subdivider but resulting from the total development of the community. In effect, the court created a situation in which no developer could be required to contribute to the solution of a problem unless he alone was responsible for it. This approach is unworkable, particularly in smaller subdivisions. How would a 30-lot subdivision provide half of a baseball diamond or a tenth of a fire station?

The more liberal line of cases holds the exaction is not dependent upon exclusive use of the facilities by those who will occupy the new subdivision. For example, in *Associated Home Builders v. Walnut Creek*,<sup>14</sup> the court upheld a state enabling statute and a city ordinance that required either dedication of land, a payment of fees or a combination of both for park or recreational purposes.<sup>15</sup> The court, relying on the *Ayres* case, rejected the association's contention that dedications could be justified only if the particular need is attributable to the population increase in the subdivision alone. The California court specifically rejected the test announced in the *Pioneer Trust* case,<sup>16</sup> and found a sufficient nexus between the subdivision and the dedication because the land or fees would be used to acquire

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12.1. A number of state court decisions on mandatory dedication of land or of cash in lieu of land for recreational facilities are collected at Annotation, Validity and Construction of Statute or Ordinance Requiring Land Developer to Dedicate Portion of Land for Recreational Purposes, or Make Payment in Lieu Thereof, 43 A.L.R.3d 862 (1972).

13. 22 Ill. 2d 375, 176 N.E.2d 799 (1961).

14. 4 Cal. 3d 633, 484 P.2d 606, 94 Cal. Rptr. 630 (1971), *appeal dismissed*, 404 U.S. 878 (1972).

15. The local ordinance required land dedication in accordance with proposed parks located on the city's master park and recreational plan.

16. *Id.* at —, 484 P.2d at 613 n.7, 94 Cal. Rptr. at 637 n.7. The *Pioneer Trust* case has been criticized as creating an unworkable situation in Illinois. Platt & Maloney-Merkle, *Municipal Improvisations: Open Space Exactions in the Land of Pioneer Trust*, 5 URBAN LAW. 706 (1973).

a park to serve the subdivision and because the location of land or amount of fees was based on the number of inhabitants in the subdivision.<sup>17</sup>

A similar result was obtained by the Wisconsin Supreme Court in *Jordan v. Menomonee Falls*.<sup>18</sup> In *Jordan*, the ordinance required dedication of school, park and recreation sites and reservation for subsequent acquisition of other sites for "facilities necessary to serve the additional families brought into the community by subdivision development."<sup>19</sup> That ordinance also contained an option for cash payments in lieu of actual land dedication.

The decisions in *Walnut Creek* and *Jordan* were appealed to the United States Supreme Court but both appeals were dismissed "for want of a substantial question." The United States Supreme Court found the federal constitutional challenge to dedication of land or fees for parks and schools without merit.<sup>20</sup>

The Virginia constitutional provision requiring compensation for the taking or damaging of property for public uses<sup>21</sup> will not prevent mandatory dedication. Again, the police power is involved. Prior to the United States Supreme Court decision in *Euclid v. Ambler Realty Co.*,<sup>22</sup> the Virginia Supreme Court sustained zoning ordinances against constitutional attack.<sup>23</sup> The Court has held that the definition of general welfare and the state's police power to protect the general welfare changes as new conditions arise, noting: "General welfare in Alexandria today may warrant regulations which would have been fantastic in Sherwood Forest."<sup>24</sup>

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17. The city ordinance required two and one-half acres or cash equivalent for each 1000 new residents.

18. 29 Wis. 2d 608, 137 N.W.2d 442 (1965), *appeal dismissed*, 385 U.S. 4 (1966).

19. *Id.* at \_\_\_\_, 137 N.W.2d at 443.

20. It is unfortunate that more definitive United States Supreme Court rulings are not available, but dismissals in *Walnut Creek* and *Jordan* are binding as precedents. See *Ohio ex rel. Eason v. Price*, 360 U.S. 246, 247 (1959) (Brennan, J., mem.); *Ahern v. Murphy*, 457 F.2d 363, 364 (7th Cir. 1972). See also *Sax, Takings and the Police Power*, 74 YALE L.J. 36, 44 (1964).

21. VA. CONST. art. I, § 11.

22. 272 U.S. 365 (1926).

23. *Gorieb v. Fox*, 145 Va. 554, 562, 134 S.E.2d 917, 919 (1926), *aff'd*, 274 U.S. 603 (1927).

24. *West Bros. Brick Co. v. Alexandria*, 169 Va. 271, 288, 192 S.E. 881, 888 (1937).

The few Virginia Supreme Court decisions touching on subdivision matters have turned on unrelated problems, but the court has clearly defined the process in terms of a police power delegated by the General Assembly to local governing bodies.<sup>25</sup> The court's test of the use of this power is one of reasonableness, stating what is reasonable in one locality could be unreasonable in another.<sup>26</sup> In pointing out the difference between zoning and subdividing, the court stated that the former can prohibit certain uses of property whereas the latter regulates the manner in which that use takes place.<sup>27</sup> By zoning ordinances, a locality can prevent subdividing as to certain lands; subdivision ordinances only allow regulation of the manner in which the subdivision may develop.

The Virginia Attorney General has approved an ordinance requiring dedication of streets, drainage easements, parks and playgrounds and the reservation of sites for schools, libraries and other municipal buildings.<sup>28</sup> The reserved sites were to be held by the developer for up to eighteen months to permit purchase by the governing body. If they were not purchased, they could be used for subdivision lots. The opinion mirrored the rationale of *Ayres* when it stated the governing body was "merely providing that if he [the developer] wished to subdivide he must meet these requirements. [T]he landowner is not being required to subdivide his property."<sup>29</sup> Somewhat later, the Attorney General ruled that mandatory dedication or reservation of land for parks or school sites was permissible.<sup>30</sup> The Attorney General's rationale was that subdividers "knowingly" create needs for facilities and can be required to provide for that need.<sup>31</sup>

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25. *National Realty Corp. v. Virginia Beach*, 209 Va. 172, 174, 163 S.E.2d 154, 156 (1968) [hereinafter cited as *National Realty*]; *Board of Supervisors v. Georgetown Land Co.*, 204 Va. 380, 383, 131 S.E.2d 290, 292 (1963).

26. *Board of Supervisors v. Georgetown Land Co.*, 204 Va. 380, 384, 131 S.E.2d 290, 293 (1963). The case involved the size of lots, the court permitting an exception to the local ordinance.

27. *Id.* at 382, 131 S.E.2d at 292.

28. 1966-67 OP. VA. ATT'Y GEN. 272.

29. *Id.* at 273.

30. 1973-74 OP. VA. ATT'Y GEN. 343.

31. *Id.* at 343. However, the Attorney General was of the opinion that a minimum requirement of four acres per subdivision would be unreasonable and that requiring a subdivider to provide facilities for needs not caused by his activities could be unreasonable and confiscatory.



Without a precise decision from the Virginia Supreme Court, a state constitutional attack on mandatory dedication has theoretically not been foreclosed. However, in view of the court's past rulings and two strong Attorney General opinions, such an attack would appear to have little chance of success. State governmental agencies have discussed mandatory dedication in subdivision and land use studies without any expressed concern or reservation about constitutional limitations.<sup>32</sup> This administrative approval coupled with the Attorney General's published opinions would be a difficult combination to overcome. The majority opinion in *Ayres* has become a cornerstone upon which many state courts have built their decisions upholding mandatory dedication of land for public purposes.<sup>33</sup> It is reasonable to predict the Virginia Supreme Court would reach a similar conclusion.

Although the concept of mandatory dedication by subdividers may be constitutionally acceptable, it can still be abused to the extent that it may be unconstitutional as applied. Each case must depend on its facts; there must be some relationship between the dedication sought and the subdivision itself. Whether the Virginia Supreme Court will accept the more restrictive test of *Pioneer Trust* or the more liberal test of *Walnut Creek* remains to be seen. Under either test, local governing bodies should be prepared to demonstrate the fairness of their standard.<sup>34</sup> This serves a twofold purpose: it bolsters the ordinance's defense against a legal attack while it demonstrates to the developer why, under 1975 conditions, he is

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32. *E.g.*, VIRGINIA DIVISION OF PLANNING AND ECONOMIC DEVELOPMENT, SUGGESTIONS FOR REGULATING SUBDIVISIONS (1956). The report proposed requiring dedications of land for streets, drainage, parks and playgrounds and reservation of land for other public uses. *Id.* at 21. Their draft ordinance was similar to the one considered in the 1966 Attorney General opinion, *supra* note 28. In 1974 the Virginia Advisory Legislative Council (VALC) submitted its report to the Governor and to the General Assembly. VIRGINIA ADVISORY LEGISLATIVE COUNCIL, LAND USE POLICIES (1974) [hereinafter cited as 1974 Report].

33. *Aunt Hack Ridge Estates, Inc. v. Planning Comm'n*, 160 Conn. 109, 273 A.2d 880 (1970); *Jenad, Inc. v. Scarsdale*, 18 N.Y.2d 78, 218 N.E.2d 673, 271 N.Y.S.2d 955 (1966); *Jordan v. Menomonee Falls*, 29 Wis. 2d 608, 137 N.W.2d 442 (1965), *appeal dismissed*, 385 U.S. 4 (1966); *Billings Properties, Inc. v. Yellowstone Co.*, 144 Mont. 25, 394 P.2d 182 (1964).

34. In *Associated Home Builders v. Walnut Creek*, 4 Cal. 3d 633, 484 P.2d 606, 94 Cal. Rptr. 630 (1971), *appeal dismissed*, 404 U.S. 878 (1972), the court discussed a state legislative report tying park needs to population growth. In *Jordan v. Menomonee Falls*, 29 Wis. 2d 608, 137 N.W.2d 442 (1965), *appeal dismissed*, 385 U.S. 4 (1966), the court pointed out that a municipality might be able to show that a group of subdivisions over a number of years created certain demands; the particular municipality showed a relationship between increased numbers of lots, increased overall population and increased school population.

being asked to dedicate for Shady Acres, section two when he was not required to do so in 1974 for Shady Acres, section one.

## II. CONSTITUTIONALITY OF CASH FEES

A problem that arises in mandatory dedication of public spaces is determining the amount of land needed for the particular purpose and then allocating it to the subdivision being considered. When streets or utility easements are needed, the allocation is more direct. Each lot needs access, frontage and certain utilities. Parklands, schools or libraries present more complex apportionment. Of these, parks are easiest, if one accepts the premise that pure open space meets this need. A small subdivision need not provide enough space for a baseball field, but it can provide areas for swings or a bicycle path. Larger facilities, such as schools, cannot be selected solely by the local planning commissions on a subdivision by subdivision basis. Few counties need one school site per subdivision let alone one library or fire station. Furthermore, the school board may not desire a school site in the particular subdivision. Location of major facilities requires balanced views of school boards, utility departments, road engineers and the local board of supervisors. Some type of master plan is in order.

There is ample Virginia enabling legislation for such master planning. The basic device is the comprehensive plan.<sup>35</sup> Prior to 1975, this was permissive legislation and the local governing body could plan in depth or not plan at all. The 1975 General Assembly amended the legislation to require every locality to adopt a master plan by July 1, 1980.<sup>36</sup> While the details of the plan are left up to the localities, the subdivision ordinance is one method of implementing the plan.<sup>37</sup> The comprehensive plan itself does not zone or prohibit building. It is a long range recommendation for the general growth of the locality. It may designate proposed transportation

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35. VA. CODE ANN. §§ 15.1-446 to -457 (Repl. Vol. 1973).

36. Va. Acts of Assembly 1975, ch. 641, at \_\_\_\_\_. Currently local governments are using this device; but less than half of the counties have a comprehensive plan. Mizell, *Toward a State Land Use Policy for Virginia*, 50 UNIV. VA. NEWSLETTER 2 (September 15, 1973).

37. VA. CODE ANN. § 15.1-447 (Repl. Vol. 1973). Other means of implementation suggested are an official map showing present and proposed public facilities and services, *id.* §§ 15.1-458 to -463, a capital improvements program or long range budgeting of proposed public facilities *id.* § 15.1-464, and a zoning ordinance, *id.* §§ 15.1-486 to -498.

facilities and a system of parks, schools and public buildings. Once the plan is approved by the local governing body, no public building may be constructed nor public area acquired unless it has been approved by the local planning commission as conforming to the plan.<sup>38</sup> Prior to adopting the plan or amendments to it, the governing body holds public hearings.<sup>39</sup> The master plan or official map, together with the subdivision review process, can insure that parks and schools are not sprinkled like salt and pepper, but are meaningfully located.<sup>40</sup>

The comprehensive plan will alert potential subdividers to prospective public sites. However this can actually result in a degree of unfair treatment between developers. The developer with the predesignated area on his tract looks with envy at his competitor with a tract free of school or library sites. Although location on a plan is not equivalent to reservation of a site, let alone its acquisition,<sup>41</sup> the developer can anticipate that the planning commission will require dedication of the predesignated school site before it approves the subdivision plat. Both subdivisions produce students, yet only one yields land.

To remedy this situation and to require each subdivision to carry its share, a number of states have required cash fees in lieu of land or a combination of fees and land. This technique can be expected to appear in Virginia localities.<sup>42</sup>

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38. *Id.* § 15.1-456. Prior to the 1975 legislation, local governing bodies were not required to even establish planning commissions. Now they must do so by July 1, 1976. Va. Acts of Assembly 1975, ch. 641, at \_\_\_\_\_. The governing body appoints the commission. VA. CODE ANN. § 15.1-437 (Repl. Vol. 1973).

39. VA. CODE ANN. §§ 15.1-448, -453 (Repl. Vol. 1973).

40. The local planning commission is generally the body that reviews and approves subdivision plats in suburban counties. *Id.* § 15.1-473.

41. *Id.* § 15.1-458. The original legislation proposed would have called for a five year reservation of each site. *Zoning, Subdivision Control and Planning in Virginia*, H.D. Doc. No. 7, 1962 General Assembly 24-25. The landowner would not have been able to get a building permit in such area. These restrictions were not adopted by the General Assembly.

42. A number of counties surveyed by the author were considering such legislation. Hanover County, a growing suburban county, has provided that a developer "may" dedicate a monetary amount for use in acquiring open space or recreational areas outside the subdivision. Hanover County, Va., Subdivision Ordinance ¶ 5-8(4). If the funds are not used within twenty-four months they revert to the developer. No guidelines are included within the ordinance for deciding between land and fees. The 1974 Virginia Advisory Legislative Council discussed cash fees and proposed legislation for fees as a prerequisite to subdivision plat approval. 1974 Report, *supra* note 32, at 60. The legislation died in committee in 1974.

The requirement of cash in lieu of land has met with mixed results in other states. Several courts have called this provision a tax because the funds went into a general revenue fund and their expenditure was not related to the particular subdivision.<sup>43</sup> Although they struck down cash fee provisions, only the court in *Aunt Hack Ridge Estates, Inc. v. Planning Commission*<sup>44</sup> did so on constitutional grounds. In *Aunt Hack Ridge Estates*, the court held land dedication provisions to be a valid exercise of delegated police power,<sup>45</sup> but found provisions authorizing use of cash fees to acquire park land for general use by all town residents to be constitutionally defective. The court held that any money collected must be limited to the regulated subdivision's direct benefit.<sup>46</sup>

A fee provision would permit all subdivisions to carry their fair share. If dedication of land can be compelled and is labeled a "non-taking" from a compensation stand point, it is difficult to see how the payment of the same value in cash becomes a "taking." This has been the view expressed in those state courts sustaining ordinances with cash fee provisions for park and recreational purposes.<sup>47</sup> The New York Court of Appeals said it was difficult to distinguish between "taxing" land by dedication requirements and "taxing" by cash.<sup>48</sup> The similarity is a logical one from the developer's point of view because he is primarily interested in profits and profits are equally reduced for a 100 lot subdivision by requiring land worth \$10,000 as they are by a \$100 per lot fee.

All courts agree that the extent to which land dedication is required becomes the standard that cash fee provisions must meet. Therefore the same Virginia Supreme Court dicta and Attorney General's opinion that support land dedication would support cash dedication in event of a state constitutional attack.

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43. *Aunt Hack Ridge Estates, Inc. v. Planning Comm'n*, 27 Conn. Super. 74, \_\_\_\_, 230 A.2d 45, 47 (1967); *Haugen v. Gleason*, 226 Ore. 99, 359 P.2d 108 (1961).

44. 27 Conn. Super. 74, 230 A.2d 45 (1967).

45. *Id.* at \_\_\_\_, 230 A.2d at 47.

46. *Id.*

47. *Associated Home Builders v. Walnut Creek*, 4 Cal. 3d 633, 484 P.2d 606, 94 Cal. Rptr. 630 (1971); *Jenad, Inc. v. Scarsdale*, 18 N.Y.2d 78, 218 N.E.2d 673, 271 N.Y.S.2d 955, (1966); *Jordan v. Menomonee Falls*, 29 Wis. 2d 608, 137 N.W.2d 442 (1965).

48. *Jenad, Inc. v. Scarsdale*, 18 N.Y.2d 78, 84, 218 N.E.2d 673, 676, 271 N.Y.S.2d 955, 958 (1966). "[O]ne arrangement is no more of a 'tax' or 'illegal taking' than the other." *Id.*

The tax provisions of the Virginia constitution provide no barrier to this fee approach.<sup>49</sup> An argument that it is a non-uniform tax on property is met by dicta in subdivision cases that courts view the issue as not involving the property itself but the use of it.<sup>50</sup> The Virginia courts rejected a similar constitutional attack in *Pocahontas Consolidated Collieries Co. v. Commonwealth*,<sup>51</sup> upholding fees on the privilege of deed recordation.<sup>52</sup> The recording "privilege" and its corresponding fee were directly related. The conveying and receiving parties were paying costs for their deeds. That cost was "specifically and solely attributable" to the property. Like the Attorney General's opinion on dedication of sites,<sup>53</sup> the precedent value of the recording fee case is strongest for cash fees limited to the effect of the particular subdivision. The non-Virginia decisions holding cash fees in lieu of land to be the equivalent of taxes have focused hardest on the lack of a direct relationship between the use of the funds and the subdivision supplying them.<sup>54</sup>

### III. COVERAGE OF VIRGINIA ENABLING LEGISLATION

Once the constitutional question is overcome, the scope of existing enabling legislation should be explored. The state courts that have struck down mandatory dedication of land or cash for public sites did so because their state enabling legislation was not adequate to authorize it.<sup>55</sup>

The dedication approach received consideration in the Virginia General Assembly as a result of the 1974 Virginia Advisory Legislative Council (VALC) Report on Land Use Policies.<sup>56</sup> This report was premised on the existence of adequate legislation "to enable coun-

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49. Taxes on property in Virginia must be uniform within the classification. VA. CONST. art. X, § 1.

50. *Board of Supervisors v. Georgetown Land Co.*, 204 Va. 380, 383, 131 S.E.2d 292 wherein this phraseology was used to contrast subdivision ordinances with zoning ordinances.

51. 113 Va. 108, 73 S.E. 446 (1912).

52. *Id.* at 112-13, 73 S.E. at 448.

53. See notes 30-31 *supra* and accompanying text.

54. *Aunt Hack Ridge Estates, Inc. v. Planning Comm'n*, 27 Conn. Super. 74, 230 A.2d 45 (1967); *Haugen v. Gleason*, 226 Ore. 99, 359 P.2d 108 (1961).

55. *West Park Ave., Inc. v. Township of Ocean*, 48 N.J. 122, 224 A.2d 1 (1966) (fees per house for schools); *Haugen v. Gleason*, 226 Ore. 99, 359 P.2d 108 (1961) (fees in lieu of land for parks).

56. 1974 Report, *supra* note 32, at 28.

ties and municipalities to implement land development control and planning programs” and the report recommended statutes to require subdivision control, as opposed to merely authorizing it.<sup>57</sup> A legislative package included with the report would have required subdivision control, authorized the Division of State Planning and Community Affairs to set up a model “minimum” subdivision ordinance and promulgated a permit fee system as a substitute for land dedication.

The 1975 General Assembly agreed with some of the VALC recommendations when it enacted legislation that revised the emphasis of Virginia’s land use legislation.<sup>58</sup> Subdivision guidelines that had formerly been introduced by the permissive “may include” were rewritten and are now introduced by the directive “shall include.” These rewritten directives contain two clauses that relate to public facilities other than streets and utilities. One uses a catch-all phrase after a list of specific public facilities and calls for adequate provisions for “other public purposes.”<sup>59</sup> The other clause of interest in this discussion is the requirement for adequate provisions for installation of public utilities and “other community facilities.”<sup>60</sup>

The shift of emphasis and the effect of revised statutory guidelines can be appreciated when viewed against the history of subdivision law in Virginia. The scope of the permissible regulation within subdivision statutes has not been tested in the Virginia Supreme Court. The few cases involving subdivision legislation provide little insight except to state that subdivision ordinances are part of the state’s police power and that the test for their validity is one of reasonableness.<sup>61</sup> With no definitive case law, the scope of existing subdivision enabling legislation must be delineated by reviewing its legislative evolution and its actual application and governmental interpretation.

The Virginia legislature passed The Map Act (or Plat Act) in

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57. *Id.* at 29.

58. Va. Acts of Assembly 1975, ch. 641, at \_\_\_\_.

59. VA. CODE ANN. § 15.1-466(d) (effective June 1, 1975). This phraseology was not changed from prior legislation. *See id.* (Repl. Vol. 1973).

60. *Id.* § 15.1-466(e) (effective June 1, 1975).

61. *See* Board of Supervisors v. Georgetown Land Co., 204 Va. 380, 383, 131 S.E.2d 290, 292 (1963).

1888,<sup>62</sup> to provide for "the sub-division of tracts of land into lots or parcels."<sup>63</sup> This first general subdivision law placed major emphasis on lot sizes, streets and alleys.<sup>64</sup> The case law applying the Map Act was confined to the effect of street dedication and possible vacation of streets.<sup>65</sup>

After World War II, the General Assembly enacted the Virginia Land Subdivision Act<sup>66</sup> to provide for regulating land subdivision "into lots, streets and alleys and other public areas."<sup>67</sup> The phrase "other public areas" appears only in the introduction of the Act of the Assembly. The body of the Act authorized local regulation to include requirements of adequate open spaces for "traffic, recreation, light and air."<sup>68</sup> The provision on recording plats transferred title to land set aside for "streets, alleys, easements and public grounds laid out."<sup>69</sup> If plats were vacated prior to subdividing, that vacation restored title to the landowners for any land set aside for "public uses."<sup>70</sup> The legislature thus used the phrases public areas, public uses and public grounds interchangeably. Such broad phrases could cover parks, school sites or other public facilities. Since they are used in conjunction with the express terms "streets, alleys, easements," the general terms mean more. At this time subdividers stopped at streets and alleys.<sup>71</sup> They provided these only because they could not sell a land-locked lot.

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62. Va. Acts of Assembly 1887-88, ch. 486, at 553.

63. *Id.*

64. However the section on recording the plat specifically referred to other site reservation, providing the plat acted as a fee simple deed "to such portion thereof as is therein dedicated to charitable, religious or educational purposes." *Id.* at § 3. This provision never appears again in Virginia subdivision legislation. It probably owes its presence to the fact that many early subdivisions were in fact towns in and of themselves, more like Restons than the common "Block B, Section 3, Shady Acres." In fact some early plats included parks and other public places. See *Oney v. West Buena Vista Land Co.*, 104 Va. 580, 581, 52 S.E. 343, 344 (1905).

65. See, e.g., *Sipe v. Alley*, 117 Va. 819, 86 S.E. 122 (1915).

66. Va. Acts of Assembly 1946, ch. 369, at 638.

67. *Id.*

68. VA. CODE ANN. § 15-781 (Repl. Vol. 1956), *repealed by* Va. Acts of Assembly 1962, ch. 623, at 960.

69. *Id.* § 15-792.

70. *Id.* § 15-793.

71. Most subdivision plats recorded in the '40s and '50s in the Richmond metropolitan area consist of lots, streets and alleys and no more. Toward the end of the '50s subdivision plats began including utility easements.

The effect of the 1946 Land Subdivision Act is difficult to determine because the Virginia Code continued the earlier special legislation for cities of a certain size, areas adjacent to cities over certain sizes, etc.<sup>72</sup> One of these special acts covered Fairfax County,<sup>73</sup> then as now one of the fastest growing counties in Virginia. In 1950 that special legislation was amended to permit the county to require "reservation of suitable and adequate sites for schools, parks and playgrounds."<sup>74</sup> In the early 1960's the Fairfax County Commonwealth's Attorney asked for an opinion from the Virginia Attorney General as to the county's power to require the sites to be dedicated without compensation. The Attorney General stated he had "grave doubts" that the legislation authorized it.<sup>75</sup> He based his doubt on three grounds: authorizing a "reservation" did not necessarily imply "dedication"; dedication might be a taking violative of the Virginia and United States Constitutions; and a lack of a limitation on the quantity of land being required and standards for its measurement might make the dedication unreasonable.<sup>76</sup> He was also concerned with the lack of any requirement that the county actually use such land for the purpose of the dedication. However, the Attorney General stated the well-settled law requiring an owner "to dedicate a reasonable quantity of land for public use as a condition of subdividing . . . ."<sup>77</sup> Limitations on land quantities and standards for its measurement could be built into the local ordinances. The opinion therefore accepted the concept of dedication. The Attorney General based his "grave doubts" on the provisions in the Fairfax special act which provided that recording of the plat transferred title only for streets, and had not been amended to include parks or schools. However, the 1946 Virginia Land Subdivision Act which applied to all counties provided that recording of the plat

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72. See, e.g., VA. CODE ANN. § 15-795 (Repl. Vol. 1956), repealed by Va. Acts of Assembly 1962, ch. 623, at 960 (special acts for counties adjoining counties of a population in excess of 1,000 per square mile continued).

73. Va. Acts of Assembly 1946, ch. 379, at 716.

74. Va. Acts of Assembly 1950, ch. 542, at 1145.

75. 1960-61 OP. VA. ATT'Y GEN. 68, 69.

76. *Id.*

77. *Id.* This is an early recognition in Virginia of the concept that subdividing is not a right, but a regulated privilege. The opinion cites no case law on this point. It agrees with the positions taken in *Ayres v. City Council*, 34 Cal. 2d 31, 207 P.2d 1 (1949), and *Ridgefield Land Co. v. Detroit*, 241 Mich. 468, 217 N.W. 58 (1928), and is consistent with subsequent Virginia Supreme Court decisions. See *Board of Supervisors v. Georgetown Land Co.*, 204 Va. 380, 131 S.E.2d 290 (1963).



transferred title to "streets, alleys, easements and public grounds laid out."<sup>78</sup> His conclusion might have varied under that statute.

In 1956, the State Division of Planning and Economic Development published its *Suggestions for Regulating Subdivisions*<sup>79</sup> which was based on the 1946 Virginia Land Subdivision Act. The report discussed reservation and outright dedication of school and recreational sites,<sup>80</sup> and suggested enactment of an ordinance calling for dedication of streets, drainage areas, parks and playgrounds without reimbursement and for reservation of land for schools, libraries, municipal buildings and similar public and semi-public uses.<sup>81</sup> Reserved land would be held for eighteen months following the recording of the plat to permit the governmental body to purchase. The purchase price would be based on raw land cost, cost of improvements, development costs plus not more than ten per cent profit. If the sites were not purchased within eighteen months, the land could be used for subdivision lots. This recommended ordinance served as a basis for many local subdivision ordinances.<sup>82</sup>

In 1960 the General Assembly realized that the multiplicity of subdivision laws was confusing for any developer, planner or government official, and asked for a study to develop a comprehensive law uniform throughout the state.<sup>83</sup> The VALC subsequently recommended to the 1962 session a single statute to deal uniformly with counties and municipalities alike.<sup>84</sup> The recommended bill included provisions for comprehensive plans, zoning ordinances, and subdivi-

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78. VA. CODE ANN. § 15-793 (Repl. Vol. 1956), *repealed by* Va. Acts of Assembly 1962, ch. 623, at 960. The current phraseology is "streets, alleys, or other public use." VA. CODE ANN. § 15.1-478 (Repl. Vol. 1973).

79. VIRGINIA DIVISION OF PLANNING AND ECONOMIC DEVELOPMENT, *SUGGESTIONS FOR REGULATING SUBDIVISIONS* (1956).

80. *Id.* at 20-21.

81. *Id.* at 21-22.

82. Loudoun County, Va., Subdivision Ordinance § 7-4.2 (1957); Similar provisions occur in later adopted ordinances. Spotsylvania County, Va., Subdivision Ordinance § 5-32 (1961). JAMES CITY COUNTY, VA., CODE § 17-44 (1964); PRINCE GEORGE COUNTY, VA., CODE § 17-37 (1964). It is quite common for counties without a separate planning staff to consult the State Division of Planning and Community Affairs (formerly the Division of Planning and Economic Development) for assistance in drafting subdivision ordinances.

83. Va. Acts of Assembly 1960, at 1083, H.D.J. Res. 89. The study was also requested for zoning and planning laws.

84. H. DEL. DOC. NO. 7, 1962 General Assembly, at 6-7. The Council felt that localities would have sufficient flexibility to handle local problems within their ordinances.

sion ordinances, and provided the basis for Virginia's present statutory scheme.<sup>85</sup>

The provision allowing requirements for open spaces in the pre-1962 Virginia Land Subdivision Law<sup>86</sup> did not appear in the VALC report or in the legislation. It was replaced by a more general clause which permitted "adequate provisions for drainage and flood control and other public purposes."<sup>87</sup> This general clause was the basis for the Attorney General's conclusion in a 1966 opinion<sup>88</sup> that dedication of recreational areas could be required as a condition for subdividing.<sup>89</sup> Stafford County had proposed reservation of up to 10% of the subdivision total area for parks, playgrounds, schools, libraries and other public uses. The developer would be reimbursed except for streets, drainage, parks and playgrounds. If there was no acquisition within 18 months, the reserved school or library sites could then be used for lots.<sup>90</sup> The Attorney General summarily said such requirements were for public purposes and came under the Code provision.<sup>91</sup>

In 1972 the General Assembly asked for another review of zoning, subdivision and land use legislation in Virginia.<sup>92</sup> Their charge to the VALC included a direction to consider protecting the rights of owners of property and to consider Virginia's needs for land for parks, open space areas and schools.

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85. Va. Acts of Assembly 1962, ch. 407, at 642.

86. VA. CODE ANN. § 15-781 (Repl. Vol. 1956), *repealed* by Va. Acts of Assembly 1962, ch. 623 at 960. This legislation allowed stated subdivision regulations to provide "for adequate open spaces for traffic, recreation, light and air and for a distribution of population and traffic which will tend to create conditions favorable to health, safety, convenience and prosperity."

87. VA. CODE ANN. § 15.1-466 (Repl. Vol. 1973). Once again recordation of the plat transferred in fee land set aside for streets, alleys, or other public use. *Id.* § 15.1-478, and vacating the plat prior to development returned the title to "streets, alleys, easements for public passage and other public areas." *Id.* § 15.1-481. The broad "public purpose" and "public area" phraseology continued.

88. 1966-67 OP. VA. ATT'Y GEN. 272.

89. *Id.* at 273.

90. These are the same provisions proposed in the basic subdivision ordinance suggested in 1956 by the State Division of Planning and Economic Development. See text accompanying notes 77-80, *supra*.

91. 1966-67 OP. VA. ATT'Y GEN. 272, 273. The Attorney General did not cite his 1961 opinion to Fairfax County. The Stafford County ordinance had a 10% limitation on land dedication without reimbursement whereas Fairfax did not. This apparently eased the grave doubts of constitutionality that the Attorney General had in 1961.

92. Va. Acts of Assembly 1972, H. Del. J. Res. 44, at 1633.

While the study hearings were in process, the Attorney General issued an opinion stating that a dedication or reservation requirement proposed by Powhattan County for up to 10% of the subdivision's gross area for parks, schools or recreation purposes was valid under Section 15.1-466 of the Virginia Code.<sup>93</sup> The Attorney General said a set minimum requirement of dedicating at least four acres would be unreasonable for smaller subdivisions.<sup>94</sup> During this VALC study period several other counties considered forms of dedication or reservation requirements. In November 1973, Loudoun County, a suburban county subject to the Washington, D.C. growth pressures, revised its subdivision ordinance to require a developer to show on his preliminary plat any schools, parks or other public use areas shown on the county's comprehensive plan.<sup>95</sup> The planning commission would then determine whether or not such sites should be dedicated to, reserved for or acquired by the appropriate governing body.<sup>96</sup>

The 1974 VALC Report submitted to the Governor and the General Assembly addressed subdivision legislation in three ways: (1) recommendation of mandatory subdivision ordinances and comprehensive plans; (2) recommendation of a standard statewide minimum subdivision ordinance to be prepared by the Secretary of Commerce and Resources and the Division of State Planning and Community Affairs; and (3) proposed legislation to permit local governing bodies to collect cash fees for schools and other public buildings as a condition for subdivision plat approval.<sup>97</sup> The first proposal was a reaction to the failure of local governments to use the tools the

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93. 1973-74 OP. VA. ATT'Y GEN. 342. The Attorney General cited his earlier opinion to the Commonwealth's Attorney of Stafford County, 1966-67 OP. VA. ATT'Y GEN. 272, and *Billings Properties, Inc. v. Yellowstone Co.*, 144 Mont. 25, 394 P.2d 182 (1964). *Billings* upheld a 1917 Montana subdivision enabling statute authorizing mandatory dedication of up to one-ninth of the subdivision area for parks. *Id.* at \_\_\_\_\_, 394 P.2d at 185.

94. 1973-74 OP. VA. ATT'Y GEN. 342, 343. The Attorney General cited an Illinois case, *Rosen v. Village of Downers Grove*, 19 Ill. 2d 448, 167 N.E.2d 230 (1960), preceding *Pioneer Trust and Sav. Bank v. Mount Prospect*, 22 Ill.2d 375, 176 N.E.2d 799 (1961), and holding similarly on the requirement of a direct relationship between the land sought and the subdivision's needs. He used that as an example of one approach, but did not say that was the only approach.

95. Loudoun County, Va., Subdivision Ordinance § 9-9-7. The preliminary plat is a basis for the subdivider and the planning commission to work out the details to be incorporated in the final plat which is the one that is ultimately recorded. *Id.* at §§ 9-8, 10-3.

96. *Id.* at § 4-7-1.

97. 1974 Report, *supra* note 32.

legislature had given them and was adopted by the 1975 General Assembly.<sup>98</sup> The second proposal was to bring in state expertise and to set up a uniform minimum standard. However, it was not received well by local planners and their legislators who preferred to keep planning closer to home.<sup>99</sup> The third proposal was to "provide a greater degree of fairness" by providing some standards for cash and land dedication systems.<sup>100</sup> This legislation was also not adopted in 1974 and 1975.

The VALC recognized that the public was concerned about uncontrolled conversion of open land to development, but that a "no growth" stance would not pass federal and state constitutional limitations on interference with the right of people to travel and own and use property.<sup>101</sup> The Council was clearly sympathetic to local attempts to have "growth" pay its way, but was concerned that these attempts may be based on inadequate factual studies and the price sought might be an arbitrary one.<sup>102</sup>

By 1975, many counties had adopted various dedication provisions. Goochland County required dedication of open space for "recreation, light and air" using a variable percentage of the total area

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98. Va. Acts of Assembly 1975, ch. 641, at \_\_\_\_.

99. Many local officials tend to view state minimum standards as a surrender of local autonomy. This is ironic, since many counties have previously sought guidance from state planners in preparing their ordinances. Of course, this advice can be rejected at will.

100. 1974 Report, *supra* note 32, at 31. As a precondition to adopting a cash fee ordinance, a locality would have to adopt a comprehensive plan, a capital improvement program and a subdivision ordinance. The standards were not detailed except the total cash or land outlay could not exceed 2% of the market value of the developed land. *Id.*

101. 1974 Report, *supra* note 32, at 11. On the right to travel and its impact on planning, see *Construction Indus. Ass'n v. Petaluma*, 375 F. Supp. 374 (N.D. Cal. 1974).

At the end of the 1974 session, the House of Delegates referred several pending land use bills to its Committee on Counties, Cities and Towns for study and a report for the 1975 session. Va. Acts of Assembly 1975, H.D. Res. 14. The subcommittee's report was submitted early in the 1975 session. H. Doc. No. 23, 1975 General Assembly. The report was critical of ordinances on financing public sites that had been enacted by local governing bodies up to that time. *Id.* at 5. This criticism reflects the committee's views and does not constitute a basis for the legislature's intent in the 1975 session. The report described mandatory dedication as "of questionable constitutional validity." *Id.* at 7. This conclusion runs contrary to the overwhelming majority of state decisions, contrary to the two United States Supreme Court decisions rejecting appeals on federal questions, and contrary to the reported opinions of the Virginia Attorney General. It also runs contrary to the views of the Division of Planning and Economic Development, *supra* note 32, and the 1974 Report, *supra* note 32.

102. 1974 Report, *supra* note 32, at 14.

that increased as the individual lot size decreased.<sup>103</sup> Hanover County adopted the same provision presented to the Attorney General by Stafford County in 1966, except it included an optional provision for cash donation in lieu of land dedication.<sup>104</sup> This ordinance limited dedication to open spaces or parks and called only for reservation with reimbursement for other public areas. Shenandoah County extended its dedication provision to include land for parking lots, parks, playgrounds, schools and fire stations and land "for preserving outstanding natural or historic features."<sup>105</sup> The VALC had proposed a broad package of legislation to clarify these practices and to make mandatory certain minimum standards.<sup>106</sup>

The legislation adopted in 1975 strengthens the position of counties adopting mandatory land dedication.<sup>107</sup> It carries forward the authority to adopt ordinances or regulations for drainage, flood control and "other public purposes." It also changes other provisions of the subdivision law in a favorable manner. The regulations formerly authorized by the enabling legislation, for grading, graveling and improving streets and for installing water, sewer and "other utilities or other facilities"<sup>108</sup> are now mandatory, and include "community facilities" in place of the latter phrase.<sup>109</sup> The phrase "community facilities" is not defined in the Code. However, the new comprehensive plan section uses "community service facilities" to include parks, schools, public buildings, hospitals and community centers.<sup>110</sup> Certainly the General Assembly did not call upon the developer to build schools; the ordinance is to provide for them. By analogy the ordinance must provide for water, sewer and other public utilities. The developer in the past has done this by providing easements for use by utility departments and the electric and telephone companies. When this new phraseology is combined with the retained provision for drainage and flood control and "other public

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103. Goochland County, Va., Subdivision Ordinance § 5-35.1.

104. Hanover County, Va., Subdivision Ordinance § 5-8.

105. Shenandoah County, Va., Subdivision Ordinance § 4-72.

106. 1974 Report, *supra* note 32.

107. Va. Acts of Assembly 1975, ch. 641, at \_\_\_\_.

108. VA. CODE ANN. § 15.1-466(e) (Repl. Vol. 1973).

109. *Id.* § 15.1-466(e) (effective June 1, 1975).

110. *Id.* § 15.1-446.1. The full list includes parks, forests, schools, playgrounds, public buildings and institutions, hospitals, community centers, waterworks, sewage disposal or waste disposal areas, and the like.

purposes,"<sup>111</sup> the enabling legislation is complete. The localities are left to determine the best reasonable way to provide regulations that carry out these aims. Mandatory dedication of public sites is one method, the details of which could be accomplished by a site plan.<sup>112</sup> Prior to 1975, the concept of a site plan did not appear in the Virginia Code. A site plan is now defined as a proposal which includes all covenants, easements, common open space and public facilities and other information which is "required by the subdivision ordinance."<sup>113</sup> As the adopted ordinances require dedication of sites, they can be included in a site plan.

Since subdivision ordinances implement the comprehensive plan which in turn can include a plan of community service facilities and since subdivision ordinances must provide for the installation of community facilities, it is difficult to see how a planning commission could approve a subdivision plat that violates this comprehensive plan. A logical step is to require public sites to be set aside in the subdivision process. Reservation of sites has been done in the past by numerous localities and has been recommended by state planners since 1956. Dedication of streets, utility easements and drainage has been premised on state legislation that has never said a subdivider "must" dedicate them. The addition of community facilities to that statutory list gives legislative approval of this addition to a dedication list. This analogy was used by the Wisconsin Supreme Court to uphold mandatory dedication of land or cash for school, park and recreation needs of the subdivisions.<sup>114</sup> Wisconsin's separate enabling legislation for localities experiencing growth pressures had as one of its purposes "to facilitate adequate provisions for transportation, water, sewerage, schools, parks, playgrounds."<sup>115</sup> The court acknowledged the history of dedicating streets and water and sewerage easements. The next step was to conclude schools and parks could be handled the same way since they are listed together

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111. *Id.* § 15.1-466(d).

112. *Id.* § 15.1-430(o).

113. The VALC had proposed this definition of site plan for "other than a subdivision." 1974 Report, *supra* note 32, at 59. They would have included such information on the plat of subdivision. The General Assembly defined the plat of subdivision as a "schematic representation of land divided or to be divided." VA. CODE ANN. § 15.1-430(n) (effective June 1, 1975).

114. *Jordan v. Menomonee Falls*, 29 Wis. 2d 608, 137 N.W.2d 442 (1965), *appeal dismissed*, 385 U.S. 4 (1966).

115. WISC. STAT. ANN. § 236.45(1) (1957).

in the Wisconsin Code.<sup>116</sup> This is exactly what Section 15.1-466(e) of the Virginia Code now does. It is bolstered by the broad phraseology in Section 15.1-466(d) calling for "adequate provisions for drainage and flood control and other public purposes." Virginia's enabling legislation is thus stronger than that of Wisconsin.

Open space or recreation or park dedication in Virginia picks up added legal support from the conservation article of the new Virginia Constitution which states the Commonwealth's policy is to protect its lands from "pollution, impairment, or destruction."<sup>117</sup> To carry out this article, the General Assembly has provided that all state laws and regulations shall be interpreted in line with this provision "in recognition of the vital need of the citizens of the Commonwealth to live in a healthful and pleasant environment."<sup>118</sup> An argument could well be made that this combination not only permitted but mandated open space consideration as part of the subdivision process.<sup>119</sup> The 1974 VALC Report aptly described the conservation article in the Virginia Constitution as a response to a "swelling public outcry" for improved handling of "uncontrolled conversion of agricultural, forest and other open lands to commercial, industrial and residential development."<sup>120</sup> The presence of a similar conservation article in the California Constitution received specific favorable consideration when the California Supreme Court sustained state legislation and local ordinances requiring mandatory dedication of parks and recreation areas.<sup>121</sup>

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116. *Jordan v. Menomonee Falls*, 29 Wis. 2d 608, 137 N.W.2d 442, 445 (1965).

117. VA. CONST. art. XI.

118. VA. CODE ANN. §§ 10-178, -179 (Repl. Vol. 1973).

119. See Howard, *State Constitutions and the Environment*, 58 VA. L. REV. 193, 209, 212 n.79 (1972). There are no court cases interpreting Article XI. The Attorney General has ruled that this Article requires the State Water Control Board to consider historical aspects on an application for funds for a sewage retention basin on part of the Kanawha Canal in Richmond. 1971-72 OP. VA. ATT'Y GEN. 471. He stated that the Conservation Article lent definition to reasonable and beneficial uses as set out in the State Water Control Law. By analogy it would lend definition to "other public purposes" in the subdivision law.

120. 1974 Report, *supra* note 32, at 9.

121. *Associated Home Builders v. Walnut Creek*, 4 Cal. 3d 633, 638-639, 484 P.2d 606, 611, 94 Cal. Rptr. 630, 635 (1971). The California provision is stronger than Virginia's, stating "it is in the best interest of the state to maintain, preserve, conserve and otherwise continue in existence open space land." CALIF. CONST. art. 28, § 1. However, the California Supreme Court's decision was broader saying that "the underlying policy" of the Article was furthered by mandatory dedication of parks and therefore such legislation should be upheld "whenever possible." *Walnut Creek*, *supra* at 638-39, 484 P.2d at 611, 94 Cal. Rptr. at 635.

Putting up cash fees in lieu of dedicating land is more difficult to sustain under the current enabling scheme. Although this provision would place all subdividers on equal footing, where cash fees are involved a stricter interpretation of the enabling legislation can be expected if the Virginia Supreme Court follows the reasoning used in *National Realty Corp. v. Virginia Beach*,<sup>122</sup> where the court struck down a \$25 per lot examining fee assessed on Virginia Beach subdivision plats under former Section 15.1-474 of the Virginia Code. The statute had authorized local governing bodies to administer and enforce subdivision regulations, but was silent on charging fees for subdivision review. The court said the lack of an express authorization for assessing fees was fatal since municipal powers must be exercised pursuant to an express grant. The court noted in passing that the legislature had expressly authorized fees for zoning review.<sup>123</sup> Subsequent to that decision, the legislature amended the statute to provide for fees for plat review.<sup>124</sup>

Cash dedication requirements are analogous to assessing costs for off-site improvements required by new subdivisions. Virginia subdivision law permits local governing bodies to do this only for sewerage or drainage facilities;<sup>125</sup> it does not provide catch-all phrases, such as "other public purposes" or "other community facilities." This was a recent addition to the Code<sup>126</sup> because the General Assembly felt separate legislation was needed for assessing costs for off-site sewers and drainage. It is difficult to see how off-site schools or fire stations could be covered by the present limited legislation. When this statutory history is considered with the *National Realty* case, it indicates that Virginia's current enabling statute will not be broad enough to sustain cash fee dedications.<sup>127</sup> Several state supreme courts have held that assessing fees

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*Accord*, Note, *Mandatory Dedication of Land by Land Developers*, 26 U. FLA. L. REV. 41, 55 (1973) (Florida Constitution Conservation Article).

122. 209 Va. 172, 163 S.E.2d 154 (1968).

123. *Id.* at 176, 163 S.E.2d at 157; see VA. CODE ANN. § 15.1-491(f) (Repl. Vol. 1973).

124. VA. CODE ANN. § 15.1-466(i) (Repl. Vol. 1973).

125. *Id.* § 15.1-466(j) (Cum. Supp. 1974).

126. Va. Acts of Assembly 1973, ch. 480, at 1027.

127. The concept of cash fee dedications provoked two dissents in the 1974 VALC Report. 1974 Report, *supra* note 32, at 71-74. John T. Hazel, Jr. objected to land or cash fee dedications stating it penalized new residents who received the increased development cost when they purchased homes and that providing the public improvements was a basic obligation of government, not a burden for the new home purchaser. *Id.* at 71. Rosser H. Payne, Jr., a



was in reality and assessment of taxes on subdividers and the power to tax was not to be inferred from planning legislation.<sup>128</sup> Other courts have held cash dedication provisions to be no different from any other statutory regulation of land.<sup>129</sup> The *National Realty* case is more consistent with the former line of cases.

Virginia's statutory scheme now requires local governing bodies to have reasonable provisions for facilities and other public purposes. Mandatory dedication of public sites is a method of accomplishing these objectives. Whether or not the particular provision is reasonable for a particular locality will vary with the local fact situation. In a quiet, slowly-developing community, requiring land for a school site may be quite unrelated to the school board's needs as related to the particular subdivision. If the locality is rapidly growing, the new subdivisions will force a need for new schools, and requiring land dedication would become reasonable. Permissive cash fee provisions<sup>130</sup> can provide an escape valve for a developer who would prefer to keep his land. To require mandatory dedication of cash fees, specific enabling legislation must be enacted.

#### IV. SAFEGUARDS FOR DEDICATION STATUTES

There are several safeguards that should be built into an ordinance requiring mandatory dedication of land for public sites. Regardless of what test the Virginia courts adopt for mandatory dedication of land for public sites,<sup>131</sup> the local government must obtain factual data to demonstrate the relationship between the public site

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planner, had no objection to dedication of land, but objected to asking the developers for "front end" money for schools, etc. *Id.* at 73. Cash dedication is not widespread in Virginia, and does not have any favorable administrative reports or Attorney General opinions to share its defense.

128. *Coronado Dev. Co. v. City of McPherson*, 189 Kan. 174, 368 P.2d 51 (1962); *Haugen v. Gleason*, 226 Ore. 99, 359 P.2d 108 (1961). In *Coronado* the enabling statute included regulation of "open spaces for . . . recreation, light, and air." The court said it went to actual land in accordance with the plan but "no further". *Coronado Dev. Co. v. City of McPherson*, 189 Kan. 174, —, 368 P.2d 51, 53 (1962).

129. *Jenad, Inc. v. Scarsdale*, 18 N.Y.2d 78, 218 N.E.2d 673, 271 N.Y.S.2d 955 (1966); *Jordan v. Menomonee Falls*, 29 Wis. 2d 608, 137 N.W.2d 442, 449 (1965).

130. See Hanover County, Va., Subdivision Ordinance § 5-8 (developer has option to substitute cash for land).

131. See text accompanying note 34, *supra*.

sought and the subdivision. A fixed percentage would penalize the subdivision with large lots.<sup>132</sup> A large percentage factor could drive costs up so much as to eliminate certain price range homes from the market. Goochland County's sliding scale based on density has merit since it recognizes that it is the people living in the subdivision that create the needs.<sup>133</sup>

To avoid the concern of developers that land is being required as a means to discourage subdividing, the county should have a comprehensive plan that includes proposed public facilities. It avoids a contention that the site selection was arbitrary and requires the county to plan ahead. The planning commission acting as a subdivision plan reviewing body is in the best position to decide where the sites should be placed. The comprehensive plan guides that decision. It prevents a pepper and salt approach to needs. It also give a developer some idea of how his subdivision fits into the whole community.

An argument could be raised that the new resident is being asked to pay for all improvements through a higher purchase price for his home, and that the locality is making no effort to meet its basic governmental obligations. The presence of a budgeted capital improvement plan would demonstrate that the county is not attempting to pass "no growth" off in "responsible growth" clothing.<sup>134</sup>

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132. *Compare* Planning Board v. Rockland County Builders Ass'n, 30 N.Y.2d 359, 285 N.E.2d 291, 334 N.Y.S.2d 138 (1972), *appeal dismissed for lack of substantial federal question*, 409 U.S. 1003 (1972), *with* Construction Indus. Ass'n v. Petaluma, 375 F. Supp. 374 (N.D. Cal. 1974).

133. Goochland County, Va., Subdivision Ordinance § 5-35.3 (Feb. 5, 1974).

134. Some Virginia localities have adopted "timed development" in their zoning procedures which requires provisions for parks and schools before rezoning is permitted. *E.g.*, POWHATAN COUNTY, VA., ZONING CODE art. 35. This would permit land already zoned to escape financial responsibility. Furthermore at the time of rezoning, future public needs may be more speculative than at the time of subdividing since many tracts are rezoned and then held for development at a later date. In contrast, few subdividers expend site plan costs without plans for prompt development. A legal problem arises with this "timed development" approach. It is essentially a negotiated zoning. This lack of uniformity may be wise planning, but it is of questionable legality. The only Virginia case, *Alexandria v. Texas Co.*, 172 Va. 209, 1 S.E.2d 296 (1939), did not use the phrases "negotiated zoning" or "contract zoning," but its holding casts doubt on the concept. The Alexandria City Council had granted zoning for a service station conditioned upon certain lighting restrictions. When the service station later challenged those conditions, they were struck as void because they had not been required of others in similarly zoned areas. An amendment to the Virginia Code to permit different

The land to be dedicated should be reflected on the subdivision plat as well as any site plan. The subdivision plat shows all property being divided schematically and the public site is part of that division. If site plans are required, the public facilities should be shown in more detail. Such a requirement means the locality will actually use the property in a manner to meet needs from the subdivision, not just hold the site for some possible use. The purpose of mandatory dedication is not to accumulate public acreage but to answer community needs generated by subdivision growth.

## V. CONCLUSIONS

Growth is here to stay in Virginia. Virginia's growth is best evidenced by the expanding subdivisions of single family residences. The real consumer of land in the current growth is Shady Acres, sections one, two and three. Virginia must adapt to this growth and the most economical way is to plan for the future by setting up standards to control future development.

It is reasonable to have subdivisions bear their share of the growth burden, and it is advisable to preserve open spaces within them. Developers and planners accept road construction, water and sewer contracts, and utility easements as part of the subdivision process. Open spaces and recreation areas have been required by many localities for a number of years. But growth causes other needs: schools, fire stations, libraries, and other public buildings. It is consistent to ask subdivisions to provide for those needs also.

In Virginia, as elsewhere, subdividing has not been looked upon as a right, but as a privilege. Two Virginia Attorneys General have so ruled,<sup>135</sup> and the Virginia Supreme Court has implied such in dicta.<sup>136</sup> It has been so treated by planners and local governments. Consistent with this approach, in 1975, the General Assembly has served notice that the subdivision process must include certain features, including a requirement to provide for "public purposes" and "community facilities" installation. Local governments do not have

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conditions for property rezoned at an owner's request from property already zoned or zoned at the governing body's request was enacted but only for those counties having the urban county executive form of government. See VA. CODE ANN. § 15.1-491(a) (Cum. Supp. 1974).

135. See text accompanying notes 28-31, *supra*.

136. See text accompanying notes 26-27, *supra*.

to do that by requiring dedication of land, but it is certainly a recognized method.

The use of the land or the cash should relate to the subdivision's needs. The California court's approach<sup>137</sup> seems too broad; if the land or cash is used with no benefit to the subdivision except as a part of the whole community, then the subdivision is being asked to support the growth pains of others. This is taxation, not regulation. The Illinois court's approach<sup>138</sup> of "specifically and uniquely attributable" is too narrow. It is difficult to apply particularly for small subdivisions. A middle ground is to require the dedicated land to be related to the given subdivision's growth, but to allow its use to encompass more than the subdivision's residents.

Virginia's Supreme Court and General Assembly have been strict on cash payments, whether it be fees for review or costs of off-site improvements. Certainly no one can quarrel with an option for a developer to post cash, not land, if he so desires. These voluntary funds must be earmarked for a precise use, not deposited in the general fund. There is still a significant legal question as to requiring such cash dedications. The legislature could clear that up since the question results not from constitutional origin, but from the lack of adequate enabling legislation.

The purpose of land use legislation is to promote the safety, health and welfare of the community. We have come 200 years from the time when a man built a town by building first his house, then one for his brother and so on. We demand schools for our children, parks for our leisure, police and fire departments for our safety and a myriad of services for our welfare. Booming bedroom communities demand more facilities while consuming the space needed for what they demand. Responsible growth means orderly planning for our land uses and our service needs and spreading that cost among the responsible parties. Shady Acres must contribute its share.

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137. See *Ayres v. City Council*, 34 Cal. 2d 31, 207 P.2d 1 (1949); *Associated Home Builders v. Walnut Creek*, 4 Cal. 3d 633, 484 P.2d 606, 94 Cal. Rptr. 630 (1971).

138. *Pioneer Trust and Sav. Bank v. Mount Prospect*, 22 Ill. 2d 375, 176 N.E.2d 799 (1961).

