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SUBDIVISION EXACTIONS: VIRGINIA CONSTITUTIONAL RESTRICTIONS

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I. INTRODUCTION

New directions in zoning law have recently been established by the Supreme Court of Virginia. The court has declared unconstitutional an ordinance imposing a temporary building moratorium,[1] another establishing minimum building lot sizes,[2] and one compelling individual developers to first dedicate property in fee to the local government, and to then construct and maintain designated public facilities upon the dedicated land.[3]

Collectively, these decisions can be interpreted as a judicial rejection of legislative efforts to impede or thwart community growth.[4] But as the inexorable, and perhaps inevitable, trend of urbanization continues within Virginia, local governing bodies, responding to constituent pressures, will undoubtedly continue to enact ordinances purporting to control the timing, quantum and type of new development activities within their boundaries. In the face of such legislative persistence, confrontations between private property rights and the police power appear inevitable.

The purpose of this article is not to discuss the merits of urbanization or planned growth, but rather to discuss the constitutional restrictions upon municipal power to require exactions of either land

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1. Board of Supv'rs v. Horne, 216 Va. 113, 215 S.E.2d 453 (1975).

2. Board of Supv'rs v. Williams, 216 Va. 49, 216 S.E.2d 33 (1975); Board of Supv'rs v. Allman, 215 Va. 434, 211 S.E.2d 48 (1975). While minimum lot size requirements may be valid in some cases, they will be struck down where they have exclusionary effects. *See* Board of Supv'rs v. Carper, 200 Va. 653, 107 S.E.2d 390 (1959).

3. Board of Supv'rs v. Rowe, 216 Va. 128, 216 S.E.2d 199 (1975). For further discussion of the *Rowe* holding see 10 U. RICH. L. REV. 220 (1976).

4. For a discussion of recent developments in exclusionary zoning see Note, *Challenging Exclusionary Zoning Practices*, 10 U. RICH. L. REV. 646 (1976). For a discussion of this issue prior to the Supreme Court of Virginia decisions in 1975 see Dolbeare, *Mandatory Dedication of Public Sites as a Condition in the Subdivision Process in Virginia*, 9 U. RICH. L. REV. 435 (1975).

or fixed monetary sums from developers as a condition precedent to the issuance of a building permit.

II. *Board of Supervisors v. Rowe* AND THE SUBSTANTIAL RELATION TEST

In *Board of Supervisors v. Rowe*,[5] landowners brought an action seeking to have a James City County zoning ordinance declared unconstitutional. The ordinance established a special "B-2" (business) zone for a strip of property abutting a major thoroughfare between Williamsburg and the Busch Gardens amusement center. Within the B-2 zone, landowners were required, *inter alia*,[6] to set all buildings back at least seventy-five feet from the highway, dedicate fifty-five feet of this "set-back" for a service road, curbs, sidewalks and median strips, and construct a service road on the dedicated land conforming to standards set by the Virginia Department of Highways and Transportation.

In its discussion of the validity of the dedication requirement, the court noted that other jurisdictions had construed their zoning enabling statutes as empowering local governing bodies to compel fee dedications (or payment of a fixed fee in lieu of dedication). However, in making its determination, the court focused upon the then-applicable Virginia statutes. Section 15.1-466(f) of the Code of Virginia stated that subdivision ordinances may require

> [t]he acceptance or dedication for public use of any right-of-way located within any subdivision which has constructed therein, . . . any street, curb, gutter, sidewalk, drainage or sewage system or other improvement . . . .[7]

Next, the court referred to section 15.1-478, which provided that the

5. 216 Va. 128, 216 S.E.2d 199 (1975). The unanimous opinion was authored by Justice Poff.

6. The ordinance further provided that landowners restrict use of their property to hotels, motels, service stations, gift shops, antique shops and restaurants other than fast-food or drive-in restaurants; build on lots not less than 150 feet in width; provide ten-foot perimeter open spaces adjacent to buildings and along the sides and rear of their property lines; provide landscaping for such perimeter areas; and submit all architectural plans to a review board for approval.

7. 216 Va. at 137, 216 S.E.2d at 208, *citing* VA. CODE ANN. § 15.1-466(f) (Repl. Vol. 1973).

recordation of a subdivision plat operates "to transfer, in fee simple" to the local government

> such portion of the premises platted as is on such plat set apart for streets, alleys, or other public use and to transfer . . . of any easement indicated on such plat to create a public right of passage. . . .[8]

Construing these statutes together, the court held that they authorized the enactment of zoning ordinances permitting municipal bodies to "accept dedications by *subdividers* for certain public facilities."[9] The court considered it arguable whether

> the language of the statutes would support an inference that local governing bodies, in the exercise of their authority to grant or withhold subdivision approval, are empowered to require an offer and acceptance of dedications for access roads and other public facilities as the price of property development.[10]

However, since the issue was not before the court, no holding was rendered.[11]

The dedication requirements of the ordinance were declared to violate the Virginia Constitution. Specifically, the court held that such requirements were beyond the powers conferred upon local governments by the zoning enabling statute, and that they deprived landowners of their right under the Constitution of Virginia[12] to be compensated for property taken for public use. The court was careful to point out that the ordinance in question did not apply to "subdividers," but to "individually-owned parcels of land;"[13] and that the need for the dedicated land was "substantially generated by public traffic demands rather than by the proposed development."[14]

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8. *Id. citing* VA. CODE ANN. § 15.1-478 (Cum. Supp. 1974).
9. *Id.* (emphasis in original).
10. *Id.*
11. *Id.*
12. *See* VA. CONST. art. I, § 11, which reads in part: "[T]he General Assembly shall not pass any law . . . whereby private property shall be taken or damaged for public uses, without just compensation."
13. 216 Va. at 138, 216 S.E.2d at 208.
14. *Id.*

Turning to the requirement that landowners within the B-2 zone construct a service road, curbs and sidewalks on the dedicated property, the court ruled that the police power is "elastic," but that "its stretch is not infinite."[15] After stating that "the private money necessary to fund the performance of these requirements is 'property,' "[16] it was held that the construction requirements imposed upon landowners violated article I, section 11 of the Constitution of Virginia, which provides that "no person shall be deprived of his life, liberty, or property without due process of law. . . ."[17]

The holding in *Rowe*, insofar as it applies to dedication requirements, demonstrates that such requirements, even for facilities specifically enumerated in the enabling statute, will be invalidated where they do not "substantially relate" to the needs of the proposed subdivision.[18] The decision is unclear, however, whether a local governing body possesses the authority under the enabling statute to exact fee dedications from non-subdividers.

In regard to the construction and maintenance aspects of the ordinance, the court's rationale appears to be that landowners cannot be compelled, as a condition precedent to development of their property, to contribute funds for improvements which are not substantially related to the needs to be created by their development activities.

III. Subdivision Exactions Upheld

Courts in other jurisdictions have upheld statutes and ordinances imposing exactions upon subdividers (as compared to individual

15. 216 Va. at 139, 216 S.E.2d at 209. The court quoted the following from an opinion written by Mr. Justice Holmes in Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415-16 (1922):

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

16. 216 Va. at 140, 216 S.E.2d at 209.

17. *See* note 12 *supra*. The court's ruling was premised upon a finding that "the need for such facilities is not substantially generated by the proposed development." 216 Va. at 139, 216 S.E.2d at 209. The question of whether the enabling statutes empowered municipalities to compel landowners, as a condition precedent to subdivision approval, to construct and maintain public facilities on dedicated property was not decided.

18. 216 Va. at 139, 216 S.E.2d at 209.

landowners seeking to develop their land).[19] However, in those cases, the authority for such exactions was either expressly authorized, or reasonably implied, from the applicable enabling statute.

Ayres v. City Council[20] is one of the earliest reported cases upholding a subdivision exaction. The ordinance in question required a subdivider to dedicate land for the widening of certain roads abutting the planned subdivision. In sustaining the ordinance, the court stated:

> Where as here no specific restriction or limitation on the city's power is contained in the Charter, and none forbidding the particular conditions is included either in the Subdivision Map Act or the city ordinances, it is proper to conclude that conditions are lawful which are not inconsistent with the Map Act and the ordinances and are reasonably required by the subdivision type and use as related to the character of local and neighborhood planning and traffic conditions.[21]

Since the subdivider sought the "advantages of lot subdivision" and the exactions imposed were found to be "reasonable," the court concluded that the ordinance was valid and that the subdivider was under a duty to abide by its terms.[22]

In Virginia, Dillon's Rule—allowing only narrowly defined powers of a municipality—is followed, and the *Ayres* holding, premised upon a broad construction of municipal powers delegated by statute, cannot provide a satisfactory rationale for sustaining subdivision exaction ordinances.[23]

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19. In Associated Home Builders v. City of Walnut Creek, 4 Cal. 3d 633, 484 P.2d 606, 94 Cal. Rptr. 630 (1971), the Supreme Court of California held that exactions applying only to subdividers (and not other developers, such as apartment builders) did not invalidate such exactions on equal protection grounds, even though the non-regulated developers were equally likely to burden public facilities. See notes 34 & 35 *infra* and accompanying text for a further discussion of this case.

20. 34 Cal. 2d 31, 207 P.2d 1 (1949).

21. 207 P.2d at 5.

22. *Id.* at 8.

23. *See* Board of Supv'rs v. Horne, 216 Va. 113, 215 S.E.2d 453 (1975), where the court stated:

> In Virginia, the powers of boards of supervisors are fixed by statute and are limited to those conferred expressly. . . . This rule is a corollary to Dillon's Rule that municipal corporations have only those powers expressly granted, those necessarily or fairly implied therefrom, and those that are essential and indispensable.

In *Jordon v. Village of Menomonee Falls*,[24] the Supreme Court of Wisconsin upheld an ordinance requiring subdividers to dedicate land for school, park and recreational purposes, or pay a fee of $200 per subdivided lot. The applicable enabling statute did not specifically authorize such exactions, but did provide:

> *This section and any ordinance adopted pursuant thereto shall be liberally construed in favor of the municipality*, town or county and shall not be deemed a limitation or repeal of any requirement or power granted or appearing in this chapter or elsewhere, relating to the subdivision of lands.[25]

Relying upon this statutory rule of liberal construction, and weighing the objectives contained in another statute,[26] the court concluded that the local governing body possessed the authority to enact the ordinance.

Another local exaction was judicially-sustained in *Frank Ansuini, Inc. v. City of Cranston*.[27] As in *Jordan*, the court relied upon a statutory rule of liberal construction[28] when upholding the "implied authority" of a municipality to compel subdividers to dedicate land for recreational purposes.

Even where a municipality has been given the legislative power to enact subdivision exaction regulations, the courts have placed

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Id. at 115, 215 S.E.2d at 455.

While Code § 15.1-839 (Repl. Vol. 1973) appears to legislatively repeal Dillon's Rule for incorporated towns and certain classes of cities, there is no judicial holding explicating the effect of that statute. Moreover, even if a rule of liberal construction governed the powers of towns and cities, it would appear unlikely that the General Assembly, through enactment of Code § 15.1-466(f), intended to confer upon municipal bodies the power to either compel subdivision dedications or authorize acceptance of such dedication for facilities *other* than those specifically listed in the statute.

24. 28 Wis. 2d 608, 137 N.W.2d 442 (1965), *appeal dismissed*, 385 U.S. 4 (1966).

25. 137 N.W.2d at 446, *citing* W.S.A. § 236.45(2)(b)(1953) (emphasis in original).

26. *Id.*, *citing* W.S.A. § 236.45(1) (1953), which read in pertinent part:
The purpose of this section is . . . to facilitate adequate provision for transportation, water, sewage, schools, parks, playgrounds and other public requirements. . . .

27. 107 R.I. 63, 264 A.2d 910 (1970).

28. 264 A.2d at 914 n.2, *citing* R.I. GEN. LAWS § 45-23-21 (1956), which provided:
[I]n construing the provisions of this chapter and any ordinance passed hereunder, all courts shall consider the same most favorably to the plan commission, it being the intent hereof to give such plan commission the fullest and most complete powers possible concerning the matters provided for herein.

substantive constitutional limitations upon such regulations. For example, in *Billings Properties, Inc. v. Yellowstone County*,[29] the court upheld a statute requiring certain subdividers to dedicate one-ninth of their land for parks and playgrounds, but stated that "if the subdivision creates the specific need for such parks and playgrounds, then it is not unreasonable to charge the subdivider with the burden of providing them."[30]

An ordinance requiring subdividers to dedicate land for park purposes, or, at the option of the local governing body, pay a fixed fee in lieu of such dedication, was upheld in *Jenad, Inc. v. Village of Scarsdale*.[31] The court found that the ordinance was authorized under a specific zoning enabling statute,[32] and quoted with approval from *Billings*.[33]

Another ordinance, similar to the one in *Jenad*, was upheld in *Associated Home Builders v. City of Walnut Creek*.[34] The authority of the municipality to enact the ordinance was found in a specific enabling statute, and because that statute mandated that all exaction requirements "bear a *reasonable relationship* to the use of the facilities by the future inhabitants of the subdivision,"[35] the court found it free from constitutional infirmity.

Billings, Jenad and *Associated Home Builders* show that local subdivision exaction measures must not only be authorized by statute, but must bear some degree of correlation, whether "reasonable" or "specific," to the future needs of the development.[36]

IV. Subdivision Exaction Controls Held Beyond Delegated Powers

In the absence of a specific enabling statute or other legislative authorization, courts have consistently ruled that a municipality is

29. 144 Mont. 25, 394 P.2d 182 (1964).

30. 394 P.2d at 187. *See also* note 36 *infra*.

31. 18 N.Y.2d 78, 218 N.E.2d 673, 271 N.Y.S.2d 955 (1966).

32. 18 N.Y.2d at 83, 218 N.E.2d at 675, 271 N.Y.S.2d at 957. The dissenting Justices expressed strong disagreement with this portion of the majority opinion.

33. 18 N.Y.2d at 88-89, 271 N.Y.S.2d at 961-62, *citing* Billings Properties, Inc. v. Yellowstone Cty., 144 Mont. 25, 394 P.2d 182 (1964).

34. 4 Cal. 3d 633, 484 P.2d 606, 94 Cal. Rptr. 630 (1971).

35. 484 P.2d at 612, 94 Cal. Rptr. at 636 (footnote omitted) (emphasis added).

36. *See also* Frank Ansuini, Inc. v. City of Cranston, 107 R.I. 63, 264 A.2d 910 (1970), where

without power to enact subdivision exaction regulations. Thus, in *Coronado Development Co. v. City of McPherson*[37] the Kansas Supreme Court, confronted with a city regulation requiring subdividers to pay 10% of the appraised value of their land to the city (for deposit in the Public Land Purchase and Improvement Fund), held that the regulation was beyond the delegated powers of the city, and therefore invalid. Quoting from an earlier opinion, the court said:

> Cities are creations of the legislature and can exercise only the powers conferred by law; they take no power by implication and the only powers they acquire in addition to those expressly granted are those necessary to make effective the power expressly conferred.[38]

A similar result was reached in *Admiral Development Corp. v. City of Maitland*,[39] where the court, in striking down an exaction ordinance,[40] held that

> a municipal corporation possesses and can exercise only such powers as are granted in express words, or those necessarily or fairly implied in or incident to the powers as expressly conferred, or essential to the accomplishment of the declared objects and purposes of a corporation.[41]

Because the enabling statute did not authorize exactions by municipal corporations, the court found the ordinance to be an unlawful enactment.

A municipal regulation exacting a $50 per lot fee from subdividers was invalidated in *Sanchez v. City of Santa Fe*.[42] After stating that local governing bodies "possess only such power as statutes expressly confer without resort to implication,"[43] the court concluded that the regulation went beyond the authority conferred by statute.

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the court struck down a city subdivision exaction regulation which did not specifically and uniquely relate to the activities of the developer.

37. 189 Kan. 174, 368 P.2d 51 (1962).

38. 368 P.2d at 53 (citations omitted).

39. 267 So. 2d 860 (Fla. D. Ct. App. 1972).

40. The ordinance required subdividers to dedicate five per cent of their land, or pay five per cent of its value, to a municipal fund used to acquire park and recreational areas. 267 So. 2d at 861.

41. *Id.* at 862, *quoting* 23 FLA. JUR. *Municipal Corporations* § 63, at 87-88 (1959).

42. 82 N.M. 322, 481 P.2d 401 (1971).

43. 481 P.2d at 402 (citations omitted).

Another fixed fee exaction was struck down in *West Park Avenue, Inc. v. Township of Ocean.*[44] Since the legislature had not expressly authorized such exactions, the court held that the municipality was without authority to impose them upon subdividers.[45]

These cases demonstrate that the authority for subdivision exactions enacted by local governing bodies must be derived from the zoning enabling statute. In some jurisdictions, courts have held that municipal power to compel subdivision exactions may be implied or inferred, and need not be specifically mandated by statute. Those jurisdictions, however, have relied, either pursuant to statute or case law, upon liberal construction of the powers granted local governing bodies by the enabling statutes.

Where courts have upheld subdivision exaction regulations, they have nevertheless directed that the exaction shall either bear a reasonable relationship to, or be specifically and uniquely attributable to, the needs created by the subdividers' activities.[46]

Where, as in Virginia, municipal powers are strictly construed, local subdivision exaction measures have been consistently declared unlawful. In such jurisdictions, local exactions imposed on persons other than subdividers are probably invalid per se,[47] absent specific legislative authorization.

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44. 48 N.J. 122, 224 A.2d 1 (1966).

45. 224 A.2d at 4. *See also* Haugen v. Gleason, 226 Ore. 99, 359 P.2d 108 (1961), where it was held that a county had no authority to charge a $37.50 per lot fee from subdividers. The court assumed, without deciding, that the county could demand the dedication of *land* for specified purposes under the enabling statutes, but ruled that the statutes did not confer any power "to levy any tax or to produce revenue." 359 P.2d at 111.

46. *See, e.g.*, People *ex rel.* The Exchange Nat'l Bank v. City of Lake Forest, 40 Ill. 2d 281, 239 N.E.2d 819 (1968) (holding invalid a subdivision declaration requirement not "specifically and uniquely" attributable to the needs of the subdivision); State *ex rel.* Noland v. St. Louis Cty., 478 S.W.2d 363 (Mo. 1972) (striking down exaction requirement "not reasonably related" to the activities of the subdivider); Brazer v. Borough of Mountainside, 55 N.J. 456, 262 A.2d 857 (1970) (holding that a municipality can compel a subdivider to "assume a cost 'which bears a rational nexus to the needs created by, and benefits conferred upon the subdivision . . . .'"). *See also* Baltimore Cty. v. Security Mortgage Corp., 227 Md. 234, 175 A.2d 755 (1961), where it was held that a county was without authority to compel a subdivider to bear the costs of public facilities situated outside the boundaries of the subdivision.

47. *See* City of Corpus Christi v. Unitarian Church, 436 S.W.2d 923 (Tex. Civ. App. 1968), where the court held that a city possessed no authority to require a nonsubdividing landowner to dedicate fifteen per cent of the church's land for public streets in order to obtain a building permit.

V. CONCLUSION

The continued vitality of Dillon's Rule in Virginia renders it likely that courts will find local governing bodies without statutory authority to require exactions from non-subdividing landowners. However, as the Virginia Supreme Court intimated in *Rowe*, municipal authority to require subdividers, as a condition precedent to plat approval, to dedicate land for certain classes of public facilities may be necessarily implied from sections 15.1-466(f) and -478. But since section 15.1-466(f) mentions only several classes of facilities, any municipal power predicated on that section would be restricted to "the acceptance of dedication for . . . *any street, curb, gutter, sidewalk, bicycle path, drainage or sewage system or other improvement* . . . ."[48] The statute is silent as to a municipality's acceptance of dedication for any school, park or recreational improvements, and a strict reading should bar a construction inferring such power.[49]

If statutes presently empower local governing bodies to compel subdivision exactions for streets, curbs, gutters, sidewalks, drainage or sewage systems, or other similar improvements, then such municipal power will undoubtedly be subjected to certain constitutional constraints.[50] The exactions challenged in *Rowe* did not substan-

48. VA. CODE ANN. § 15.1-466(f) (Cum. Supp. 1976) (emphasis added). The 1976 amendment added the bicycle path to the designated list.

49. It is arguable that the phrase "or other improvement" could be construed as conferring upon local governing bodies the power to accept dedications of land for school, park or recreational purposes. However, under doctrines of *noscitur a sociis* and *ejusdem generis*, consistently followed in cases involving questions of statutory construction, the phrase "or other improvement" would be defined by the specific words preceding it. *See, e.g.*, Sellers v. Bles, 198 Va. 49, 92 S.E.2d 486 (1956); East Coast Freight Lines v. City of Richmond, 194 Va. 517, 74 S.E.2d 283 (1953).

50. It should be noted that litigants are far less successful in federal courts challenging the constitutionality of zoning restrictions. *See* Village of Belle Terre v. Boraas, 416 U.S. 1 (1974). Federal courts have not been receptive in general to claims that certain zoning ordinances or city plans are in violation of the due process clause of the fourteenth amendment. *See* Construction Indus. Ass'n v. City of Petaluma, 522 F.2d 897 (9th Cir. 1975), *cert. denied*, 96 S. Ct. 1148 (1976), where the court held that

> [t]he concept of the public welfare is sufficiently broad to uphold Petaluma's desire to preserve its small town character, its open spaces and low density of population, and to grow at an orderly and deliberate pace.

522 F.2d at 908-09. *See also* Note, *Challenging Exclusionary Zoning Practices*, 10 U. RICH. L. REV. 646 (1976). The Supreme Court is not disposed to involving itself in local zoning controversies, and many commentators predict successful challenges will come, if at all, through state court suits.

tially relate to the projected needs of the proposed development, and for this reason, the court held them to be violative of the provision of the Constitution of Virginia insuring that private property will not be taken without just compensation. Thus, any municipal exaction authorized by existing statutes must either be reasonably or substantially related to the anticipated needs of the proposed development. *Rowe* does not define or explain what constitutes a "reasonable" or "substantial" relationship.[51] Yet, there can be little doubt that under contemporary Virginia law, a municipality cannot constitutionally transfer the cost of facilities, predominantly public in nature, to either a subdivision developer or to future residents of that subdivision.

51. The "substantial relation" standard adopted in *Rowe* would appear to require a somewhat lesser degree of correlation between the particular exaction and subdivision needs than the "specific and uniquely attributable" standard articulated by several jurisdictions. *See generally* Johnston, *Constitutionality of Subdivision Control Exactions: The Quest for a Rationale*, 52A Cornell L.Q. 871 (1967); Heyman & Gilhool, *The Constitutionality of Imposing Increased Community Costs on New Suburban Residents Through Subdivision Exactions*, 73 YALE L.J. 1119 (1964).