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Municipalities And The Increasing Need For Low And Moderate Income Housing

MUNICIPALITIES AND THE INCREASING NEED FOR LOW AND MODERATE INCOME HOUSING

Inadequate housing has been an interminable and seemingly unresolvable problem for too long. To declare in 1971 that municipalities face a serious housing inadequacy is unfortunately to do no more than to echo the rhetoric of the past.[1] This problem has historically been recognized as concerning the quality of existing housing, with emphasis on slum removal.[2] The substandard quality of housing has by no means been overcome by public and private efforts.[3] To the contrary, along with inadequate quality, the nation now suffers from an increasingly inadequate quantity of housing for people of low and moderate income levels.[4]

The shortage of low and moderate income housing is primarily caused by the simple economics of land development. The higher priced housing is preferred by subdividers and developers as it brings a greater yield per acre and hence a higher return on the initial investment of the purchase price of the land.[5] The price of housing has become so prohibitive that

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[1]In a report accompanying the Housing Act of 1949, S. REP. No. 84, 81st Cong., 1st Sess. 5 (1949), it was stated: "The evidence of the current testimony presented during the hearings . . . demonstrated increasing recognition of the fact that the housing problem is one of great magnitude and long standing."

[2]*See* Demonstration Cities and Metropolitan Development Act of 1966, S. REP. No. 1439, 89th Cong., 2d Sess. (1966).

[3]A DECENT HOME, the President's Commission on Urban Housing (1968).

[4]In the REPORT OF THE NATIONAL COMMISSION ON URBAN PROBLEMS TO THE CONGRESS AND TO THE PRESIDENT OF THE UNITED STATES, BUILDING THE AMERICAN CITY, H.R. DOC. No. 34, 91st Cong., 1st Sess. ____ (1968) [Hereinafter cited as The Douglas Commission], the seriousness and the national scope of the housing problem are expressed in the following passage from the Report:

> We must put housing on the front burner. We must focus our housing programs on housing for poor people. We believe in giving local authorities the tools and the money to get the job done. The states must have an expanded role, especially in getting sites, providing for low income housing and in breaking down the barriers of codes and zoning.

Id. at 30. More specific evidence of the seriousness of the housing shortage is the fact that in Montgomery County, Maryland, 1500 people are presently on the waiting list for low and moderate income housing. This figure, while deplorable in itself, is not wholly indicative of the shortage. Many people come into the Housing Agency, see the length of the waiting list and leave without signing. Interview with David Cohen, Agent, Montgomery County Housing Authority, in Silver Spring, Maryland, Feb. 13, 1971.

[5]For example, the Montgomery County Housing Authority reports that the average price of homes sold last year in the county was $40,000 for new homes and $35,000 for used homes. And sometimes this subdivider preference is encouraged by zoning ordinances which impose a minimum acreage requirement. Interview with David Cohen, Agent, Montgomery County Housing Authority, in Silver Spring, Maryland, Feb. 13, 1971.

much of suburban America has been labeled "tight little islands of residential exclusivity."[6]

The harmful results of this shortage are multifold. It forces people of low and moderate income levels to seek housing in the inner city areas, thus adding to the cramped and tense situation which already exists.[7] It increases racial tensions by virtually excluding blacks from the suburbs.[8] It prevents much of the low income working force from living near their place of employment, and it causes by the same effect a labor shortage in those exclusive suburbs.[9] Thus, both those living in the suburbs and those excluded concur that there is an "urgent need"[10] for inexpensive housing in the suburbs.

Since the communities are generally in accord that lower cost housing construction is needed, it appears that new methods must become available on a local level to help provide for more low and moderate income housing.[11] There are four possible methods by which a municipality could provide more low and moderate income housing without incurring inordinate cost:[12]

I. A requirement that developers dedicate some of their land to the community to be used to provide the needed housing.

II. That, as a condition precedent to permission from the community to subdivide, developers must contract to provide a certain portion of their subdivision for use as low or moderate income housing.

III. An "in lieu" payment, at the discretion of the zoning

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[6]Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent,* 21 STAN. L. REV. 767, 791 (1969).

[7]*See, e.g.*, REPORT OF THE NATIONAL COMMISSION ON CIVIL DISORDERS (1968).

[8]*See* TIME, March 15, 1971 at page 17.

[9]Mr. Benson, a subdivider in Montgomery County said that a good example of the labor shortage was that people in his developments "were crying for domestic help, but where am I going to put domestics, on two acre lots—they can't afford it." Interview with Mr. R. Benson, Developer with W.C. and A.N. Miller, Developers, in Maryland, Feb. 13, 1971. The Montgomery County Housing Authority also agrees that there is a shortage of labor due to the housing shortage, and [employees] there feel that police, firemen, and teachers are needed in the community. Interview with David Cohen, Placement Dept., Montgomery County Housing Authority [hereinafter referred to as MCHA]. Feb. 13, 1971.

[10]INTERIM REPORT OF THE MIDDLE INCOME HOUSING COMMISSION FOR MONTGOMERY COUNTY. (unpublished)

[11]In hope of obtaining these new methods, citizens groups in Montgomery County, Md. have proposed an amendment to the existing zoning ordinance which would, if enacted, insure much more building in the lower income price range. The ordinance has not yet been adopted.

[12]Increased public housing programs, exercise of condemnation powers, and increased federal, state, and local financial aid all involve expenditure of public money. These methods are assumed not to be totally sufficient, since notwithstanding their longstanding availability, the housing shortage remains. The inadequacy of existing methods is expressed in the REPORT OF THE NATIONAL ADVISORY COMMISSION ON CIVIL DISORDERS (1968).

commission, instead of the condition precedent (II) or the dedication requirement (I).

IV. An incentive mechanism where, for a promise by the developer to provide the needed housing in his development, he would receive a bonus from the town council.

When determining the legality of concepts such as those set out above, courts must first determine whether the zoning enabling act of the state authorizes the municipality to enact an ordinance.[13] If the courts find that an ordinance is authorized by statute, they then determine whether the ordinance is a valid exercise of the police power.[14] This involves an inquiry as to whether the ordinance is "in the general public interest for the promotion of the health, safety or general welfare of the community."[15] Only the constitutional question[16] will be discussed below as the statutory question appears to be a less significant threat to judicial acceptance of the concepts involved.[17] If a court determines that a zoning commission may constitutionally concern itself with the subject matter involved, it finally rules on whether the method used by the ordinance is permissible.

The initial question thus is whether a county zoning council, acting under the police power of the state,[18] may legitimately concern itself with

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[13]Vickers v. Township Comm., 37 N.J. 232, 181 A.2d 129 (1962). The court in *Vickers* held that a township ordinance amendment must be "adopted in conformity with the statutory requirements." *Id.* at 140.

[14]*See* National Land & Investment Co. v. Kohn, 419 Pa. 504, 215 A.2d 597 (1965); *see also* Sylvester v. Zoning Bd. of Adjustment, 398 Pa. 216, 157 A.2d 174 (1959).

[15]County Comm'rs. v. Miles, 246 Md. 355, 228 A.2d 450, 454 (1967).

[16]Constitutional as referred to in this note shall be a consideration of the term as examined against both state and federal constitutions. The Supreme Court has not heard a zoning case since 1928 when it decided *Nectow v. City of Cambridge*, 277 U.S. 183 (1928). Since that time, state courts have been left with the responsibility of deciding both federal and state constitutional questions and as a result the two have been merged into one single question: namely—whether there has been a taking without just compensation. *See, e.g.*, Jenad, Inc. v. Village of Scarsdale, 18 N.Y.2d 78, 218 N.E.2d 673, 271 N.Y.S.2d 955 (1966).

[17]That which is authorized by the enabling statute is usually all-inclusive of the police power. The general trend of the legislatures is to *enable* the municipalities to do all that which the legislature itself can do under the police power. *See, e.g.*, City of Baltimore v. Sitnick, 254 Md. 303, 255 A.2d 376, 379, n. 4 (1969). Thus the two questions seem to merge. In any case, the statutory question, if different from the constitutional is easily resolved by amendment which would be forthcoming if municipalities wanted statutory power not presently existing.

[18]In most states, the power of a county in exercising its zoning function is as broad as possible and tantamount to the power of the state itself. *See, e.g.*, Scull v. Montgomery County Citizens League, 249 Md. 271, 239 A.2d 92 (1968); Simon v. Town of Needham, 311 Mass. 560, 42 N.E.2d 516 (1942). Therefore, if the state may constitutionally concern itself with this subject matter, so may the county council or municipality, whose authority is concurrent in this regard to that of the state. *But see* Kline v. City of Harrisburg, 362 Pa. 438, 68 A.2d 182 (1949).

low and moderate[19] income housing within proper constitutional confines.[20] State efforts to provide low income housing are constitutionally permissible as an exercise of the police power because the purpose of the expenditure is to clear up blight and slum conditions.[21] The removal of slums has been held a constitutional exercise of the police power because it is for the general welfare, and betterment of the health, safety, and morals of the community.[22]

State concern with moderate income housing has met judicial objection. In *Opinion of the Justices*,[23] the Supreme Court of Massachusetts ruled, in the form of an advisory opinion, on the constitutionality of a bill authorizing a state housing agency to finance the building and rehabilitation of low and moderate income housing. The court advised that insofar as the bill provided for moderate income housing, it was considered the spending of public monies for private purposes and therefore, was unconstitutional since it was not confined to a public purpose.[24] The original justification for state concern with low income housing was that the state was acting in the general welfare by removing slums and blighted areas.[25] But this justification was not thought to be present when the state was legislating to provide for moderate income housing, because providing moderate income housing was not considered helpful in clearing up blight and slum conditions.[26]

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[19]Moderate income has had trouble defining itself with respect to housing. No dollar figure is available but has been defined as "any housing subsidized by any federal or state government under the program . . . ." MASS. ANN. LAWS ch. 40B § 20 (Cum. Supp. 1970).

[20]What is permissible under the police power is limited to the needs of the community. *See, e.g.*, Village of Euclid v. Ambler Realty Corp., 272 U.S. 365 (1926); Scull v. Montgomery County Citizens League, 249 Md. 271, 239 A.2d 92 (1968).

[21]None of the following cases which use blight as a justification for state concern with low income housing define the term. Blight is used interchangably with slum, and both are used to refer to those undesirable conditions whose elimination would be in the general welfare of the community. *See, e.g.*, Martin v. North Carolina Housing Corp., 277 N.C. 29, 175 S.E.2d 665 (1970). In *In re Bunker Hill Urban Renewal Project IB*, 37 Cal. Rptr. 74, 389 P.2d 538, 61 Cal. 2d 21 (1964), an area with a high incidence of crime, poverty, fire, and disease was referred to as a blighted area.

[22]Martin v. North Carolina Housing Corp., 277 N.C. 29, 175 S.E.2d 665 (1970). This case holds that state concern with enhancing the availability of low income housing for sale or rental is a valid public purpose and thus justified under the police power where the purpose is to clear up blighted areas. *See also* Opinion of the Justices, 351 Mass. 716, 219 N.E.2d 18 (1966).

[23]351 Mass. 716, 219 N.E.2d 18 (1966).

[24]The court stated that "so far as the . . . bill is to provide housing for families of moderate income, the bill does not appear to be confined to a public purpose." 219 N.E.2d at 26.

[25]Opinion of the Justices, 351 Mass. 716, 219 N.E.2d 18 (1966); Martin v. North Carolina Housing Corp., 277 N.C. 29, 175 S.E.2d 665 (1970).

[26]That the court thought this justification was absent in the legislation in question is

In *Massachusetts Housing Finance Agency v. New England Merchants National Bank*,[27] the Supreme Court of Massachusetts reversed its earlier opinion as to the constitutionality of state concern with moderate income housing, and held that public monies could constitutionally be expended to facilitate the availability of moderate income housing. It was successfully urged upon the court that the only method by which to permanently achieve an elimination of blighted areas was "to mix families of varied economic means [which would] provide for the prevention and hence the 'permanent elimination' of slum conditions in the project."[28] The opinion does not explain exactly how mixing families of varied economic means will add permanence to the removal of blight, but the intimation is that the presence of the moderate income family would induce the low income families to improve their property. Absent the presence of the moderate income family, the lower income family and thus the neighborhood would remain unimproved and subject to blight.[29]

The rationale of the Massachusetts court presupposes a blight problem by which concern for moderate income housing may be justified. In many suburban areas in the country there exists a serious inadequacy of moderate income housing, but where there is no appreciable problem of blight.[30] And if the shortage in these areas is to be overcome by zoning enactments, justification must be sought in criteria other than the blight oriented one used in Massachusetts.[31]

An acute shortage of housing may, standing alone, be so detrimental to the general welfare that a zoning board is acting within the police power when it attempts to alleviate the problem. This justification would be independent of the blight oriented concept. Shortage of housing was the

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apparent in the statement that "[t]his is not a bill aimed to clear blighted areas or remove slums," 219 N.E.2d at 24.

[27]___ Mass. ___, 249 N.E.2d 599 (1970).

[28]*Id.* at 607.

[29]Where two low income people own adjacent property, they are both economically better off if neither one improves his property than if only one improves his property. This situation, taken in its aggregate, results in an entire neighborhood in a state of disrepair and unimprovement. *See* Davis and Winston, *The Economics of Urban Renewal*, 26 LAW AND CONTEMPORARY PROBLEMS 105, 106-112 (1961). This situation could be alleviated by mixing low income families with moderate income families. Section 7(a) of the act in question had this as a goal by stating that "income limits shall be sufficiently flexible to avoid undue economic homogenity among tenants." St. 1966, c. 708 § 7(a) as amended by St. 1968, c. 709.

[30]For example, in Montgomery County, Md., Fairfax County, Va., and Westchester County, N.Y. there is not a slum problem but there exists an acute shortage of housing.

[31]While blight was the controlling justification in *Massachusetts Housing*, *see* 249 N.E.2d at 601, n.4, where the housing shortage existing in Cambridge was used to further justify the purpose of the act, and shortage, as opposed to blight removal, is the problem which exists in many suburban areas like Montgomery County, Maryland.

sole justification for Vermont legislation which made credit available for those desiring to construct homes in that state.[32] In *Vermont Home Mortgage Credit Agency v. Montpelier National Bank*[33] this legislation was considered a valid public purpose. Housing shortage, not blight removal or poverty,[34] was the legislative purpose which placed this act within the legitimate scope of the police and spending powers.[35] *Vermont Home Mortgage* indicates the possibility of judicial acceptance of housing shortage as a justification for state concern with moderate income housing.

In view of the existing housing shortage,[36] it is arguable that state activity to provide more moderate income housing is in the general welfare and as such should be held to be a valid exercise of the police power in states other than Vermont. In *Martin v. North Carolina Housing Corp.*,[37] the Supreme Court of North Carolina based its approval of that state's mortgage act on the fact that it was directed toward "persons or families of lower income"[38] with emphasis on clearing up blight and slum conditions.[39] Yet, there is language in the opinion which might show the court's willingness to consider favorably the validity of governmental concern with moderate income housing based upon a shortage of that housing.[40]

Thus, courts could justify state concern with moderate income housing either on its propensity to clear up blight, or simply because it is so

[32]VERMONT STAT. ANN. tit. 10, ch. 11B § 291 (Cum. Supp. 1970-71).

[33]____ Vt. ____, 262 A.2d 445 (1970). This case upheld an act creating an agency empowered to acquire first mortgage loans on dwelling properties located within the state.

[34]The court in *Vermont Home Mortgage* does not mention a low income limitation.

[35]The court took judicial notice of the fact that "[r]ising costs of money, here and elsewhere, have placed capital funds for home construction in critically short supply." 262 A.2d at 449, citing Klaman, *Public/Private Approaches to Urban Mortgage and Housing Problems*, 32 LAW AND CONTEMPORARY PROBLEMS 250 (1967), which speaks of the near credit crisis of 1966, which had adverse effects on the housing industry.

[36]If the credit situation in 1966 was adverse enough to the general welfare to sustain the Vermont act under the police power of the state, the credit situation in 1971 would lead to a similar if not more strongly worded statement. *See* ECONOMIC REPORT OF THE PRESIDENT, 113-17 (1970).

[37]277 N.C. 29, 175 S.E.2d 665 (1970).

[38]*Id.* at 667.

[39]As such, the North Carolina court follows the reasoning of the Massachusetts court, and has blight and slum removal as the justification of its housing act.

[40]That the North Carolina court would be receptive to change in this regard is implicit in the elasticity the court wrote into the following passage of the opinion: "A slide-rule definition to determine public purpose for all time can not be formulated; the concept expands with the population, *economy*, scientific knowledge and changing conditions." 175 S.E.2d at 672 (emphasis added). In *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926), Mr. Justice Sutherland said of the police power that it "is not capable of precise delimitation. It varies with circumstances and conditions." *Id.* at 387.

desperately needed.[41] In either case it is apparent that moderate income housing is a proper subject for the concern of a municipality under the police power of the state. The only question now remaining is what method can best be employed by the municipality to obtain the needed housing.

REQUIRING THE DEVELOPER TO DEDICATE A PORTION OF HIS LAND TO THE COMMUNITY SO THAT THEY MAY USE IT TO PROVIDE LOW AND MODERATE INCOME HOUSING

Dedication[42] of land to the community by the subdivider has been traditionally utilized by municipalities to defray the cost of subdivision. The rationale for requiring dedication is that the subdivider who reaps profit from the subdivision should pay for the costs which his activities create such as roads,[43] parks,[44] and sometimes schools.[45] Since dedication involves the transfer of property from a private citizen to the public, it is subject to the constitutional limitation that it not constitute a taking of private property without just compensation.[46] If the courts find that the activity of the subdivider creates a municipal need, the subdivider may be required to give land for the fulfillment of the need which he has created, and no compensation need be given the subdivider.[47]

The most often quoted test for determining the constitutionality of these dedications is that advanced in *Pioneer Trust and Savings Bank v. Village of Mount Prospect.*[48] In *Pioneer* a developer challenged the

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[41]Of the two independent justifications for state efforts to provide moderate income housing, it is suggested that courts considering the question use the justification advanced by the Massachusetts court. Vermont's justification, shortage, is based on a present credit shortage. Credit could ease and with it so would the shortage of middle income housing, and with this would go much of the concern over the housing problem existing today, and this would in all probability be far in advance of the permanent elimination of blight. It thus would seem that justifying moderate income housing with a concern for blight would better speak to the challenge of the Douglas Commission. Note 4 *supra.*

[42]Dedication occurs where the subdivider conveys title to a certain part of his land to the community. *See* 3 R. ANDERSON, AMERICAN LAW OF ZONING § 19.25 (1968).

[43]*E.g.*, Ayres v. City Council, 34 Cal. 2d 31, 207 P.2d 1 (1949).

[44]*E.g.*, Jenad, Inc. v. Village of Scarsdale, 18 N.Y.2d 78, 218 N.E.2d 673, 271 N.Y.S.2d 955 (1966).

[45]*E.g.*, Jordan v. Village of Menomonee Falls, 28 Wis. 2d 608, 137 N.W.2d 442 (1965). *But see* Pioneer Trust & Sav. Bank v. Village of Mount Prospect, 22 Ill. 2d 375, 176 N.E.2d 799 (1961).

[46]*See, e.g.*, Jenad, Inc. v. Village of Scarsdale, 18 N.Y.2d 78, 218 N.E.2d 673, 271 N.Y.S.2d 955 (1966). *See also* Heyman and Gilhool, *The Constitutionality of Imposing Increased Community Costs on New Suburban Residents Through Subdivision Exactions*, 73 YALE L.J. 1119 (1964).

[47]Jenad, Inc. v. Village of Scarsdale, 18 N.Y.2d 78, 218 N.E.2d 673, 271 N.Y.S.2d 955 (1966).

[48]22 Ill. 2d 375, 176 N.E.2d 799 (1961).

required dedication of land for use as recreational and school sites. The developer argued that the requirement was tantamount to an unconstitutional taking in violation of both the state and federal constitutions. In sustaining his challenge, the court held that land dedication requirements would be enforced against the subdivider only where the need for the land is "specifically and uniquely attributable to his activity and which would otherwise be cast upon the public."[49]

An exact definition of "specifically and uniquely attributable" was not advanced in *Pioneer*. It has been applied both restrictively, and liberally.[50] The test was given a restrictive application in *Pioneer*,[51] and has been similarly applied by other courts.[52] Where restrictively applied the test used would probably not permit lower cost housing exactions.[53] The court in *Pioneer* made it clear that the problem of school space is community-wide and as such is one that "the subdivider should not be obliged to pay the total cost of remedying, and to so construe the statute would amount to an exercise of the power of eminent domain without compensation."[54] This language leaves little room for the contemplated dedication. The shortage of housing is a nation-wide problem and the reasoning here would indicate that if land for schools could not be exacted, then land for lower income housing surely could not.[55]

Other jurisdictions have applied the *Pioneer* test less restrictively. In

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[49]*Id.* at 801 *citing* Rosen v. Village of Downers Grove, 19 Ill. 2d 448, 167 N.E.2d 230, 233 (1960).

[50]One jurisdiction allows no exactions. City and County of Denver v. Denver Buick, Inc., 141 Colo. 121, 347 P.2d 919 (1960).

[51]The developer in *Pioneer* conceded that his activity as a developer would result in an additional 250 housing units in the community and would thus "aggravate the existing need for additional school and recreational facilities. . . ." 176 N.E.2d at 802. This aggravation of the existing need was not enough to justify requiring the developer to pay the cost this need created.

[52]*See, e.g.* Ansuini, Inc. v. City of Cranston, ___ R.I. ___, 264 A.2d 910 (1970). In *Ansuini*, the Rhode Island Court adopted the *Pioneer* test and construed it restrictively so as to invalidate an ordinance requiring a dedication of 7% of the proposed development land as park sites, reasoning that it was not possible for the developers activity to always specifically create a need for exactly 7% of this land, and as such said that the dedication requirement was "arbitrary on its face." *Id.* at 914.

[53]In *Pioneer*, the court based its refusal to sustain the exaction on *Ayres v. City Council*, 34 Cal. 2d 31, 207 P.2d 1 (1949). *Ayres* held that while requiring a developer to donate land for streets *inside* the development would be permissible, to require him to provide a major thoroughfare would be unconstitutional as the need for the major thoroughfare arose from the activity of the entire community. *See also* People *ex rel.* Exchange Bank v. City of Lake Forest, 40 Ill. 2d 281, 239 N.E.2d 819 (1968).

[54]176 N.E.2d 799, 802.

[55]If, even where a developer's activity admittedly aggravates the existing need, he is not responsible for the cost, he surely would not be held responsible for the cost of low and moderate income housing, which need he has not, strictly speaking, aggravated. *But see* Note 70, *infra* for a possible approach by more liberal courts in this regard.

Jordan v. Village of Menomonee Falls[56] the Wisconsin Supreme Court adopted the *Pioneer* test,[57] but would not do so "restrictively."[58] The court thus used the same test as *Pioneer*, but allowed the type of land exaction which *Pioneer* refused.[59] Whether the slight liberalization of the test made in *Jordan* would make room for the low-moderate housing land exaction is questionable.[60] It could be argued to the less restrictive courts in this regard[61] that the need for low and moderate income housing is, in a sense, 'attributable' to the activity of the aggregate of subdividers.[62] There is only a limited supply of land remaining to be subdivided in any given area. It coutd thus be argued that to the extent that subdividers use the remaining land for housing projects which are not low income oriented, they are aggravating the housing problem—the need for low income housing being more acutely felt with the diminishing supply of land available in the area.[63]

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[56]28 Wis. 2d 608, 137 N.W.2d 442 (1965).

[57]Speaking of the *Pioneer* test the Wisconsin Court in *Jordan* stated that "We deem this to be an acceptable yardstick to be applied." 137 N.W.2d at 447.

[58]*Id.*

[59]*See also* Jenad, Inc. v. Village of Scarsdale, 18 N.Y.2d 78, 218 N.E.2d 673, 271 N.Y.S.2d 955 (1966), where the New York Court applied the same test but reached the opposite result.

[60]Even with the slight liberalization, the activity of the subdivider must be the *sine qua non* of the need for which the land is taken. In *Jordan*, the court stated:

> . . . the municipality may require him to dedicate part of his platted land to meet a demand to which the municipality would not have been put *but for* the influx of people into the community to occupy the subdivision lots.

137 N.W.2d at 448 (emphasis added).

[61]*See, e.g.*, Jenad, Inc. v. Village of Scarsdale, 18 N.Y.2d 78, 218 N.E.2d 673, 271 N.Y.S.2d 955 (1966); Jordan v. Village of Menomonee Falls, 28 Wis. 2d 608, 137 N.W.2d 442 (1965).

[62]In both *Jordan*, and *Jenad, Inc.* the courts considered the activity of the *aggregate* of subdividers and developers, whereas in *Pioneer*, only the activity of the one subdivider could be considered. See text accompanying notes 55, 63, 66, *supra*.

[63]This argument has obviously never been accepted since this dedication requirement, not yet enacted, has never been tested in court. It would appear, however, to be consonant with a liberal interpretation of the "specifically and uniquely attributable to" test, especially when considered in view of the critical need for the housing. *See, e.g.*, Petterson v. City of Naperville, 9 Ill. 2d 233, 137 N.E.2d 371 (1956):

> The privilege of the individual to use his property as he pleases is subject always to a legitimate exercise of the police power under which new burdens may be imposed upon property and new restrictions placed upon its use when the *public welfare demands*.

Id. at 379 (emphasis added). This dedication requirement could also be justified by an analogy to the tax imposed upon the severance and dissipation of rare minerals. *Cf.* Soto v. Hope Natural Gas Co., 142 W. Va. 373, 95 S.E.2d 769 (1956).

REQUIRING DEVELOPERS TO DEVELOP PART OF THEIR LAND WITH HOUSES WITHIN A PRICE RANGE ACCEPTABLE TO LOW AND MODERATE INCOMES

If, when an individual intended to develop property, he could be required to develop a fraction[64] of it as low or moderate income housing, the urgent need for this housing could be met while avoiding the serious constitutional challenge[65] available to developers if they were required to dedicate[66] the land. Avoidance of the constitutional challenge would be accomplished by leaving title to the land with the developer,[67] and by permitting him to retain all profit he makes from the low and moderate income units. With title to this land remaining in the developer, the requirement here would be referred to as a condition precedent[68] to subdivision as opposed to a dedication.

Zoning requirements of this nature are upheld by the courts if they are justified under the police power for the general welfare of the community.[69] That the public would benefit from the imposition of this requirement upon the developer does not require that the police power manifest itself by way of eminent domain since subdividing is not considered an absolute right.[70] Thus, in order to secure the privilege of having a subdivision plat recorded, the developer may be required to comply with reasonable conditions imposed by the municipality. Such

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[64]The proposed fraction in Montgomery County would be as follows:

Category of Use *Mixture*	*Minimum Percentage to be Devoted to Low and Moderate Income Housing*
A	10%
B	12%
C	14%
D	16%

The increase in set increments is proportionate to a percent increase of allowable commercial use.

[65]Text accompanying notes 48-69, *supra.*

[66]3 R. ANDERSON, AMERICAN LAW OF ZONING § 19.25 (1968).

[67]*Id.*

[68]As generally defined, a condition precedent is that act to be performed by both or either party before the agreement or contract becomes binding. Rogers v. Maloney, 85 Ore. 61, 165 P. 357, 358 (1917).

[69]*See generally* Stewart v. Stone, 130 So. 2d 577 (Fla. 1961); Vickers v. Township Comm., 37 N.J ¶. 232, 181 A.2d 129 (1962).

[70]*E.g.*, Ayres v. City Council, 34 Cal. 2d 31, 207 P.2d 1 (1949); Billings Property, Inc. v. Yellow Stone County, 144 Mont. 25, 394 P.2d 182 (1964). *See also* Reps and Smith, *Control of Urban Land Subdivision*, 14 SYR. L. REV. 405 (1963); Note, 66 COLUM. L. REV. 974 (1966).

compliance does not constitute a confiscation despite the fact that some benefit is derived by the municipality.[71]

Thus, requiring subdividers to develop part of the subdivision for use as low and moderate income housing is permissible if it is reasonable to do so under the police power.[72] A determination of reasonableness starts with the proposition that an ordinance embodying this condition, like all others, enjoys a presumption of validity and reasonableness,[73] and the burden is upon the developer to show that there is no rational basis for the imposition of this condition under the police power.[74]

Since title to the land involved would remain with the developer or subdivider, a zoning ordinance of this nature does not effect an actual confiscation of property, and thus it would only be held unreasonable if it so diminished the value of the property as to be considered confiscatory in nature.[75] This consideration begins with an economic determination of what value would be taken from developers if this requirement were imposed.[76] While a decrease in value is not controlling as to the validity of

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[71]*E.g.*, Ridgefield Land Co. v. City of Detroit, 241 Mich. 468, 217 N.W. 58 (1928).

[72]*See generally* Billings Property, Inc. v. Yellow Stone County, 144 Mont. 25, 394 P.2d 182 (1964). And in determining reasonableness it is important to keep in mind the urgent need for houses; as what is reasonable depends upon public need. *See* Petterson v. City of Naperville, 9 Ill. 2d 233, 137 N.E.2d 371 (1956).

[73]*E.g.*, Allion v. City of Toledo, 99 Ohio St. 416, 124 N.E. 237 (1919). In *Allion* the Supreme Court of Ohio said:

> Unless there is a clear and palpable abuse of power the court will not substitute its judgment for legislative discretion. The local authorities acquainted with local conditions are presumed to know what the needs of the community demand.

Id. at 238. *See also* Vickers v. Township Comm., 37 N.J. 232, 181 A.2d 129 (1962).

[74]*E.g.*, Billings Property, Inc. v. Yellow Stone County, 144 Mont. 25, 394 P.2d 182 (1964). Exemplary of state court attitude to enactments of the legislature is the expressed commitment of the Montana Supreme Court "to uphold enactments of the Legislature *if there is any rational basis* on which they can be upheld . . . ." *Id.* at 188 [emphasis of the court].

[75]And this diminution of value would have to be so great as to make the property unusable for any reasonable purpose. Arverne Bay Constr. Co. v. Thatcher, 278 N.Y. 222, 15 N.E.2d 587 (1938).

[76]Decreased value of property will not per se invalidate the ordinance. Hadacheck v. Sebastian, 239 U.S. 394, 405 (1915). In *Hadacheck* the location of a brick manufacturer's business was zoned for residential use only. The value of his land for residential purposes was estimated to be $60,000, as opposed to $800,000 when used for his brick business. This enormous decrease in property value was not enough to invalidate the ordinance. *See also* Little v. Young, ____ Misc. ____, 82 N.Y.S.2d 909, *aff'd* 274 App. Div. 1005, 85 N.Y.S.2d 41, *aff'd* 299 N.Y. 699, 87 N.E.2d 74 (1948), where the court said:

> Properly administered zoning power . . . may legally leave in its wake scars of lost profits to land owners as well as restricted uses causing inconvenience and disappointment but that is the exact meaning of zoning.

Id. at 916.

an ordinance,[77] it does appear to be a proper starting place to determine whether an ordinance is confiscatory.[78]

The developer's main concern is that the part of the development not used for low and moderate income housing would suffer in terms of its marketability[79] where it is proximate to that part of the development occupied by the economically disadvantaged.[80] While perhaps substantially affecting the value, this externality[81] can, to some extent, be architecturally overcome,[82] and to this even the developers agree.[83]

The possibility of architectural alleviation of the externality may not be as great where the public knows in advance that the development must

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[77]*See* Wulfshon v. Burden, 241 N.Y. 288, 150 N.E. 120, 210 N.Y.S. 941 (1925). In *Wulfshon* the court said:

> It is not an effective argument against these ordinances, if otherwise valid, that they limit the use and may depreciate the value of appellant's premises. That frequently is the effect of police regulation and the general welfare of the public is superior in importance to the pecuniary profits of the individual.

Id. at 124.

[78]*See* Simon v. Town of Needham, 311 Mass. 560, 42 N.E.2d 516 (1942). In *Simon* it was held that profit loss to the developer due to a minimum lot size requirement, while not controlling, was entitled to consideration.

[79]That part of the development not used for the low-moderate housing would be marketed to those of higher incomes. If this latter group is aware that the development has lower income people living there, they are less willing to purchase. As such, the marketability suffers. For a discussion of the exclusionary tendency of the suburban market, *see* Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN. L. REV. 767 (1969).

[80]When Mr. R. Benson was asked what the effect would be on the marketability of the rest of the project he replied "It might just kill it." And as Sterling Park, a development in Northern Virginia, put it in an advertisement "when you buy a house, you buy a community."

This unfortunate reality of the housing industry has even been given judicial notice. In *Massachusetts Housing Finance Agency v. New England Merchants Nat'l Bank*, ____ Mass. ____, 249 N.E.2d 599 (1970), the court approved rental rates for the moderate income housing substantially below the fair market rental rate. This rate reduction was to serve as an inducement to "counteract the fact that people do not normally choose to live in projects or neighborhoods with people of substantially lower incomes. . . ." *Id.* at 606.

[81]Externality as here used, means the adverse effect that the presence of the low income family will have uhon the saleability of the rest of the development. As classified it is an "external diseconomy." *See, e.g.*, P. SAMUELSON, ECONOMICS 453-54 (8th ed. 1967).

[82]In the nearby Laytonia housing development in Gaithersburg, Maryland homes range from $15,000 to $65,000. But because the architecture is subtle and the project is well landscaped, it is difficult to spot the less expensive homes. Early in 1970, residents of the Laytonia project heard of the possibility that a low income project was going to be started nearby. They called a meeting to deplore the possibility of poor people living nearby only to discover that many who lived at the development itself were on federal subsidy.

[83]Mr. Benson indicated that it would be possible and lucrative to put the very rich and the very poor together and that he could please both in the process. Note 9, *supra*.

include a certain number of lower income units.[84] It would seem therefore that the economic effect on the development cannot in this case be accurately determined in advance of implementation of such an ordinance.[85] Where damage to property is at best speculative in nature as it is here, the courts are disposed to dismiss the challenge.[86] Thus since value loss[87] is impossible to show, it appears that the developers cannot meet their judicially imposed burden of showing that they would be unreasonably harmed by the adoption of an ordinance of this nature.[88]

PAYMENT IN LIEU OF DEDICATION OF LAND OR OF THE CONDITION PRECEDENT

Both the dedication requirement and the condition precedent might provide the land needed for low and moderate income housing. If a community had enough land at its disposal, all it would need for the construction of low cost housing would be money to finance the actual building of the units. Thus a community could obtain what land it needed by way of dedication requirements, and then with respect to subsequent developments, it could require that developers pay a fee in lieu of compliance with the condition precedent or in lieu of the dedication requirement. This money could be used to construct the needed housing.[89]

Exaction of these payments from subdividers is usually in place of requiring a dedication of land,[90] and these payments are constitutionally permissible to the same extent and for the same reasons as a dedication

[84]If it is obvious, because of the ordinance, that lower income people will be living in a development, no amount of architectural skill will hide the fact.

[85]People from the Montgomery County Project for Low & Moderate Income Housing advocate that a model be experimented with to determine the exact effect of the lower income families' presence on the marketability of the rest of the development. It is suggested by this author that any experiment of this nature would have no value as empirical evidence one way or the other as to effect on marketability, since the fact that it would be an experiment would have adverse effects on marketability.

[86]Florida Palm-Aire Corp. v. Delin, 230 So. 2d 26 (Fla. Dist. Ct. App. 1969). In *Delin* a development company challenged the rezoning of a single family use to a multi-family use, claiming that it would "immeasurably damage Plaintiffs and diminish the value of their property and the saleability thereof." *Id.* at 27. The court dismissed the complaint summarily and refused to speculate as to externalities resulting from rezoning.

[87]Notes 83 and 84 *supra.*

[88]Text accompanying notes 70-85, *supra.*

[89]This in lieu of payment could be of great benefit to the community. Where the developer had good land for low and moderate income housing sites. the community could require the land. But if the location of the terrain or the location of the development were not as good, the community could exact a fee from the developer and use the money to help finance construction at the better locations.

[90]Jenad, Inc. v. Village of Scarsdale, 18 N.Y.2d 78, 218 N.E.2d 673, 271 N.Y.S.2d 955 (1966).

itself.[91] Thus whether or not a municipality may constitutionally exact such payment would depend upon whether this exaction passes the specifically and uniquely attributable test.[92] Since it was concluded that most if not all courts would declare a dedication of land for low and moderate income housing unconstitutional as confiscatory, a payment subject to the same test would also be held unconstitutional.[93]

Imposition of a condition precedent would be permissible as above indicated. But requiring a developer to pay money in lieu of the condition precedent would most likely be subject to the same objection as if the payment were required in lieu of dedication.[94] This exaction, while apparently unconstitutional where imposed at the discretion of the municipality, would probably be upheld if the option to pay it in lieu of supplying the housing was vested in the developer.[95] Of course, if the discretion were left to the developer it is reasonable to conclude that he would pay the fee instead of risking the externality which providing the housing would cause.

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[91]Jordan v. Village of Menomonee Falls, 28 Wis. 2d 608, 137 N.W.2d 442 (1965). The court in *Jordan* held that:

> . . . the same reasons which under the facts of this case prompt us to hold that the land dedication requirement constitutes a reasonable exercise of the police power apply with equal force and effect to the equalization fee requirement.

Id. at 449.

Note that the considerations are the same only as regards the constitutional question. For special differences in *statutory* analysis, *see* Gordon v. Village of Wayne, 370 Mich. 329, 121 N.W.2d 823 (1963); Coronado Dev. Co. v. McPherson, 189 Kan. 174, 368 P.2d 5 (1962); Kleber v. City of Upland, 155 Cal. App. 2d 631, 318 P.2d 561 (1957) (holding that no *statutory* authority exists to impose in lieu payments). *Contra*, Jenad, Inc. v. Village of Scarsdale, 18 N.Y.2d 78, 218 N.E.2d 673, 271 N.Y.S.2d 955 (1966); Jordan v. Village of Menomonee Falls, 28 Wis. 2d 608, 137 N.W.2d 442 (1965) (holding that the particular *statute* enables exactions).

[92]The specifically and uniquely test applies to the constitutionality of the exaction. When dealing with money exactions, some courts have found *statutory* difficulties in that because the exaction takes the form of cash, it appears to some courts as an unauthorized tax. *See* Newport Building Corp. v. City of Santa Ana, 26 Cal. Rptr. 797 (4th Dist. Ct. 1962). *See also* West Park Avenue, Inc. v. Township of Ocean, 48 N.J. 122, 224 A.2d 1, 4 (1966).

[93]However, where the exaction from the developer takes the form of cash instead of property dedication, one court indicated that the *Pioneer* test dilemma could be avoided altogether by referring to the in lieu payment as a proper excise tax. Jenad, Inc. v. Village of Scarsdale, 18 N.Y.2d 78, 218 N.E.2d 673, 271 N.Y.S.2d 955 (1966).

[94]Since an ordinance containing this provision has not yet been enacted, there is no express authority. *See generally* 3 R. ANDERSON, AMERICAN LAW OF ZONING, § 19.40 (1968).

[95]Gerczack v. Todd, 233 Md. 25, 194 A.2d 799 (1963). Merely because zoning authorities can not require a developer to defray the cost of public improvements beyond the boundaries of his own property, "[t]his does not mean that the developer may not validly contract to do so." *Id.* at 801.

INCENTIVE PROVISION

Dedication, Condition Precedent, and In Lieu Payments all involve the concept of *requiring* the developer to help in some way alleviate the housing shortage. It is the coercive nature of the concepts which makes them susceptible to legal challenge. An alternative method of obtaining the needed housing would be an incentive or bonus provision[96] providing that if the developer agreed to construct the needed housing, he would be entitled to some advantage from the municipality.[97] Providing incentives instead of requiring exactions dispenses with the constitutional challenge that the ordinance is confiscatory.[98] While legally acceptable, this incentive method may be practically unworkable. The developers fear the economic effect of the presence of lower income families in their developments.[99] To overcome this fear, incentives would have to be so attractive that their cost would be prohibitive to the communities.[100]

An incentive provision could be used effectively in connection with a condition precedent. It is estimated that in some suburban areas as much as twenty-five per cent of all future housing must be built for low and moderate income families if the shortage in that economic price range is to be overcome.[101] To require a developer to provide one-fourth of his units for this purpose would make a condition precedent more susceptible to legal challenge than if he were only required to provide five per cent or ten per cent of the units. Hence, about ten per cent of the units could be required of the developer. In addition, incentives could be furnished which might encourage him to provide more units for low and moderate income housing toward reaching the desired goal of twenty-five per cent construction. The original reluctance to take advantage of the incentives would be overcome by the fact that some low and moderate income families are going to be present in developments because of the ten per cent requirement. Thus developers will not be able to avoid the effect that the presence of low and moderate income families will have on

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[96]For a definition and general discussion of incentive or bonus provisions *see* Comment, *Bonus or Incentive Zoning—Legal Implications*, 21 SYR. L. REV. 895 (1970).

[97]Increased densities, smaller lot sizes, exemptions from other exactions and perhaps even a tax break could be used as incentives. For an example of incentives which were effective *see* N. MARCUS & M. GROVES, THE NEW ZONING: LEGAL, ADMINISTRATIVE AND ECONOMIC CONCEPTS AND TECHNIQUES, 16-23 (1969).

[98]*Id.* at 16.

[99]*See* Notes 86, 87, 88 *supra.*

[100]Given that the developer fears that he may not sell his houses if he takes the advantage offered by the community, it is highly unlikely that he would voluntarily comply unless the community offered to compensate for the loss he fears compliance would bring. Since he fears that he may not be able to sell at all, the compensation might have to be tantamount to insuring a desirable return on his investment.

[101]Interview with David Cohen, agent, Montgomery County Housing Authority, in Silver Spring, Maryland, Feb. 23, 1971.