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Taking without Compensation through Compulsory Dedication—New Horizons for California Land Use Law: Associated Home Builders v. City of Walnut Creek

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The continuing depletion of recreational open space in California and the financial inability of municipalities to provide such open space for the public prompted the legislature in 1965 to enact section 11546 of the Business and Professions Code. This statute authorized Cali-


2. CAL. BUS. & PROF. CODE ANN. § 11546 (West Supp. 1971). In enacting this statute, the legislature declared that its intent was to implement the recommendations of the Final Report of the Assembly Interim Committee on Municipal and County Government to the 1965 Regular Session of the Legislature.

In its Final Report, the Assembly Committee on Municipal and County Government found that increased population had created the need for more neighborhood recreational space but that methods for acquiring such space then available to local governments all involved substantial increases in bonded debt or property tax burdens. The "preferred" method—that of assessing the subdivider fees or requiring dedication of land as a condition to subdivision approval—might be illegal absent a proper state enabling statute tying the exactions to the benefit of the subdivision residents affected. Such enabling legislation was recommended. 6 ASSEMBLY INTERIM COMM. REPORTS, FINAL REPORT OF THE ASSEMBLY INTERIM COMM. ON MUNICIPAL AND COUNTY GOV'T 31, ch. 1809, § 3 [1965] Cal. Stat. 4183.

3. The governing body of a city or county may by ordinance require the dedication of land, the payment of fees in lieu thereof, or a combination of both, for park or recreational purposes as a condition to the approval of a final subdivision map, provided that:

(a) The ordinance has been in effect for a period of 30 days prior to the filing of the tentative map of the subdivision.
(b) The ordinance includes definite standards for determining the proportion of a subdivision to be dedicated and the amount of any fees to be paid in lieu thereof.
(c) The land, fees, or combination thereof are to be used only for the purpose of providing park or recreational facilities to serve the subdivision.
(d) The legislative body has adopted a general plan containing a recreational element, and the park and recreational facilities are in accordance with definite principles and standards contained therein.
(e) The amount and location of land to be dedicated or the fees to be paid shall bear a reasonable relationship to the use of the park and recreational facilities by the future inhabitants of the subdivision.
(f) The city or county must specify when development of the park or recreational facilities will begin.
(g) Only the payment of fees may be required in subdivisions containing fifty (50) parcels or less.

The provisions of this section do not apply to industrial subdivisions. CAL. BUS. & PROF. CODE ANN. § 11546 (West Supp. 1971).
fornia cities and counties to enact ordinances requiring subdividers to dedicate land, or to pay fees in lieu thereof, for park and recreational purposes as a condition to the approval of a final subdivision map. In upholding the constitutionality of section 11546 against claims, *inter alia*, that it authorized "takings" of property without payment of just compensation, the California Supreme Court, in *Associated Home Builders v. City of Walnut Creek*, has served notice of its intention to expand the state's police power into areas traditionally reserved only for the exercise of eminent domain, and has further clouded an already confused area of the law.

The immediate catalyst to this action was the enactment by the City of Walnut Creek, pursuant to the authority granted it by the California legislature, of Municipal Code Section 10-1.516. This section provides that if land designated in the City's general plan as park or recreational space falls within a proposed subdivision, an amount of such land must be dedicated to public recreational use. The amount of land to be dedicated depends upon the type of residence built and the number of future residents of the proposed subdivision. A resolution setting forth the specific formula to be used provides that two and one-half acres are to be dedicated for each 1,000 new residents. Furthermore, if no park or recreational space is designated on the City's general plan and the proposed subdivision is within three-fourths of a mile of an existing or planned park, or if no dedication is feasible, the subdivider must pay a fee equal to the value of the land he would have had to dedicate under the above formula.

*Associated Home Builders of the Greater East Bay, Inc.* sought declaratory relief claiming principally that the state statute and the city

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4. *Id*. See *Subdivision Map Act*, Cal. Bus. & Prof. Code Ann. §§ 11500-11629 (West 1964 and Supp. 1971). The Subdivision Map Act is the enabling statute providing for the supervision of subdivisions by local California governments. Section 11525 requires that every county and city adopt an ordinance regulating and controlling the design and improvement of subdivisions. Under section 11610 the subdivider may file a final map of his subdivision for approval by the proper local government. Section 11567 describes the form and contents of the final map. It must show all lots, blocks, and streets within the subdivision as well as all survey data necessary to specify its location.

5. 4 Cal. 3d 633, 484 P.2d 606, 94 Cal. Rptr. 630 (1971).
6. *Id.* at 636, 484 P.2d at 609, 94 Cal. Rptr. at 633.
7. *Id*.
8. *Id*.
9. *Associated Home Builders of the Greater East Bay, Inc.* [hereinafter referred to as *Associated*] is a non-profit corporation organized to promote the home-building industry. 4 Cal. 3d at 635 n.1, 484 P.2d at 608 n.1, 94 Cal. Rptr. at 632 n.1.
ordinance were unconstitutional as violative of the Due Process and Equal Protection Clauses of the Federal and California Constitutions in that they deprived the subdivider of his property without compensation.\textsuperscript{10}

A unanimous California Supreme Court, speaking through Justice Mosk, held the compulsory exactions of the statute and ordinance to be constitutional, implicitly finding a valid exercise of the police power.\textsuperscript{11}

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10. The due process clause of the Fourteenth Amendment provides: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law. . . ." U.S. Const. amend. XIV, § 1.

The California Constitution's due process clause is nearly identical. It provides: "[N]or [shall any person] be deprived of life, liberty, or property without due process of law. . . ." Cal. Const. art. I, § 13, cl. 6. Additionally, the California Constitution provides: "Private property shall not be taken or damaged for public use without just compensation having first been made to, or paid into court for, the owner. . . ." Cal. Const. art. I, § 14.

The Fourteenth Amendment contains no "just compensation" provision (as does the Fifth Amendment Due Process Clause). However, the Fourteenth Amendment has been interpreted as imposing this requirement upon the states. Chicago, B. & Q. R.R. v. City of Chicago, 166 U.S. 226 (1897).

The Equal Protection Clause of the Fourteenth Amendment provides: "[N]or [shall any State] deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The California Constitution requires that "all laws of a general nature shall have a uniform operation," and that "no special privileges or immunities shall ever be granted which may not be altered, revoked, or repealed by the Legislature; nor shall any citizen, or class of citizens, be granted privileges or immunities which, upon the same terms, shall not be granted to all citizens." Cal. Const. art. I, §§ 11 and 21. The California Supreme Court has held that "the Fourteenth Amendment to the Federal Constitution, and sections 11 and 21 of article I of the California Constitution, provide generally equivalent but independent protections in their respective jurisdictions." Department of Mental Hygiene v. Kirchner, 62 Cal. 2d 586, 588, 400 P.2d 321, 322, 43 Cal. Rptr. 329, 330 (1965).

11. 4 Cal. 3d 633, 648, 484 P.2d 606, 618, 94 Cal. Rptr. 630, 642 (1971). While this Note will principally concern itself with Associated's claim that its property was unconstitutionally taken without just compensation, it must be noted that Associated advanced various other contentions attacking the validity of sections 11546 (note 3 supra) and 10-1.516 (text accompanying note 6 supra), all of which were easily disposed of by the court. First, Associated argued that section 11546 imposed a "double tax" upon new subdivision residents and that it constituted a special assessment against the future subdivision property owners without a right of hearing or protest. See note 155 infra. Second, Associated argued that section 11546 favored, for example, apartment developers building on unsubdivided land, and that it prejudiced the high-density subdivider in favor of the low density subdivider. See text accompanying notes 169-71 and 177-92 infra. Third, Associated contended that a city might set dedication requirements or in-lieu fees so high as to purposely exclude low-income groups from the community. See text accompanying notes 172-76 infra. Fourth, Associated contended that recreational facilities did not bear a sufficient relationship to the health and welfare of the subdivision residents to warrant a taking under the police power. The court summarily rejected this contention, noting that no court had ever distinguished between the traditionally approved exactions (sewers, streets, drainage fa-
The court expressly rejected Associated's contention that the legislation allows a taking of property without compensation. From this holding, the reasonable deduction follows that if the state is not "taking" under its power of eminent domain, it must be "regulating" under its police power. As such, no compensation is required. However, the court failed to discuss the difficult issue of how to distinguish, both theoretically and practically, between an exercise of emi-

12. The court nowhere expressly stated that it found the exactions imposed by Business and Professions Code § 11546 to be valid under the state's police power. It does, however, cite approvingly a number of out-of-state cases where similar exactions have been upheld under the police power. 4 Cal. 3d at 644-45, 484 P.2d at 615, 94 Cal. Rptr. at 639.

nent domain and an exercise of police power. A discussion of this issue is crucial to an understanding of the controversy involved in the case.

Generally, the police power is the power to regulate reasonably the use of property for the good of public health, safety, morals or general welfare, while the eminent domain power governs the taking of property for a public use and for which just compensation must be paid.\textsuperscript{15}

Eminent domain has been defined as "the power of the sovereign to take property for public use without the owner's consent."\textsuperscript{16} Though just compensation is not an essential element of the meaning of eminent domain, it is so crucial to the valid exercise of the power that courts have incorporated this limitation into the meaning of the term.\textsuperscript{17} The power of eminent domain, like that of the police power, is inherent in the concept of sovereignty.\textsuperscript{18} While its source is not constitutional, the power of eminent domain is limited by both the Federal and State Constitutions and by statute. The Fifth\textsuperscript{19} and Fourteenth Amendments and Article I, section 14 of the California Constitution require that private property be taken only for a "public use" and, if acquired, that "just compensation" be paid to the owner.\textsuperscript{20} Section 1241 of the California Code of Civil Procedure requires that the proposed public use be an authorized one and that the property sought to be condemned be necessary for the public use proposed.\textsuperscript{21} The term "public use" is generally applied in the sense of "general welfare" or "public good."\textsuperscript{22} To that extent the statute seems merely to reiterate requirements implicit in the Federal and State Constitutions. However, the requirements of section 1241 emphasize the importance of the concept of public necessity to the definition of eminent domain.\textsuperscript{23}

It has been stated that it is impossible to afford the term "police

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\item \textsuperscript{15} E. McQuillan, The Law of Municipal Corporations § 32.04 (3d ed. 1964) [hereinafter cited as McQuillan].
\item \textsuperscript{16} P. Nichols, The Law of Eminent Domain § 1.11 (rev. 3d ed. 1964) [hereinafter cited as Nichols].
\item \textsuperscript{17} Id.
\item \textsuperscript{18} See Kohl v. United States, 91 U.S. 367, 373-74 (1875); People ex rel. Dept. of Public Works v. Chevalier, 52 Cal. 2d 299, 304, 340 P.2d 598, 601 (1959).
\item \textsuperscript{19} "No person shall . . . be deprived of life, liberty, or property, without due process of law; nor shall private property, be taken for public use, without just compensation." U.S. Const. amend. V.
\item \textsuperscript{20} See note 10 supra.
\item \textsuperscript{21} Cal. Code Civ. Proc. § 1241 (West 1967).
\item \textsuperscript{22} Nichols, supra note 16, at § 1.11.
\item \textsuperscript{23} Id. § 1.41[1].
\end{itemize}
power" a "concise and accurate" definition.\(^{24}\) Attempts to do so have produced such results as: "the power of the sovereign to prevent persons under its jurisdiction from conducting themselves or using their property to the detriment of the general welfare,"\(^{25}\) or the power of the sovereign to legislate in behalf of the public health, morals, or safety by general regulations reasonably adapted to the end in view and not creating any arbitrary discrimination between different classes of men or things.\(^{26}\)

The line between taking and regulation is hazy at best and the United States Supreme Court, in recent years at least, has been reluctant to delineate specific criteria with which to distinguish the two concepts.\(^{27}\) Earlier cases, however, saw the development of two theories which attempted to clarify the terms. The first was developed in the late 19th century and may be termed the "physical acquisition test."\(^{28}\) This test apparently rests upon a literal interpretation of the word "taking." Unless there is a physical invasion\(^{29}\) or appropriation\(^{30}\) of private property by the government, no taking results and therefore no compensation to the owner is required. This test emerged, however, when the scope of governmental regulation was limited to the control of "noxious uses" of property, and the distinction between physical appropriations and simple regulation was easy to draw.\(^{31}\)

\(^{24}\) Id. § 1.42.

\(^{25}\) Id.

\(^{26}\) Id.


\(^{28}\) See Mugler v. Kansas, 123 U.S. 623, 668-69 (1887) (using the term "physical invasion" and "practical ouster"). See also Sax, Takings and the Police Power, 74 Yale L.J. 36, 67-69 (1964) [hereinafter cited as Sax].

\(^{29}\) An example of a physical invasion amounting to a taking is provided in Pumpelly v. Green Bay Company, 80 U.S. (13 Wall.) 166 (1872). There the plaintiff's land was rendered useless by its flooding resulting from the State's construction of a dam. The Pumpelly holding was discussed in Transportation Co. v. Chicago, 99 U.S. 635, 642 (1878) and restated as follows:

[It was held in Pumpelly] that permanent flooding of private property may be regarded as a "taking". . . . [T]here was a physical invasion of the real estate of the private owner, and a practical ouster of his possession. But in the present case [where the plaintiffs were temporarily denied access to their business by the city's construction work] there was no such invasion. No entry was made upon the plaintiffs' lot.

Thus, under the "physical acquisition" test, the state need not hold fee title to the property in question. If it asserts proprietary control over the property the state will be deemed to have "taken" it. See Sax, supra note 28, at 39, n.15.

\(^{30}\) In Mugler v. Kansas, 123 U.S. 623, 668-69 (1887), the court found no appropriation where the "legislation does not disturb the owner in the control or use of his property for lawful purposes, nor restrict his right to dispose of it. . . ."

\(^{31}\) The abatement of "noxious uses" was not the taking of property because uses
In the early 20th century, as government regulation grew more intense, it became clear that substantial property interests could be affected by what earlier courts would have called regulation. Justice Holmes' response to this spectre of increased regulation may be termed the "degree test." Under this test, there is no qualitative difference between taking and regulation as in the physical acquisition test, but rather there exists "a continuum in which established property interests [are] asked to yield more or less to the pressures of public demands." The economic harm caused the property owner is balanced against public necessity. Should the regulation go too far it is deemed a taking, and the once clear distinction between regulation and taking thus becomes one of degree. In order for the regulation to be a valid exercise of the police power, it must be reasonable.

Although the two tests rest on conceptually different grounds, both have been cited approvingly by the United States Supreme Court.

contrary to the public interest were not considered property. Gardner v. Michigan, 199 U.S. 325, 332-33 (1905). See also Sax, supra note 28, at 38-9.

For examples of such simple regulations to abate noxious uses of property see L'Hote v. New Orleans, 177 U.S. 587 (1900) (regulation of prostitution upheld); Fertilizing Co. v. Hyde Park, 97 U.S. 659 (1878) (ordinance abating offensive fertilizer factory within city limits a valid exercise of police power).

For examples of physical appropriations see notes 29 and 30 supra and cases cited therein.

32. Sax, supra note 28, at 40-41.
34. Sax, supra note 28, at 41.
35. Understandably, there was wide variation in the results of such a fluid test. Some cases seemed to emphasize the economic burden which the "regulation" placed on the property owner. See, e.g., Penn. Coal Co. v. Mahon, 260 U.S. 393, 414-15 (1922); Hudson Water Co. v. McCarter, 209 U.S. 349, 355 (1908). Thus if only a slight burden was placed on the property owner by the governmental regulation, the regulation was upheld. See, e.g., Noble State Bank v. Haskell, 219 U.S. 104, 110 (1911); Interstate Consol. St. Ry. v. Mass., 207 U.S. 79, 86-88 (1907).

Other cases are weighted in favor of the public interest. In Hadacheck v. Sebastian, 239 U.S. 394, 410 (1915), the Court found the plaintiff's brick making business would have to yield to the community good, despite substantial financial loss to the plaintiff. A similar result was reached in Erie R.R. v. Public Utilities Comm'rs, 254 U.S. 394, 410 (1921).

36. See cases cited note 33 supra.
37. See, e.g., Goldblatt v. Town of Hempstead, 369 U.S. 590, 594-95 (1962); Pac. Tel. & Tel. Co. v. Eshleman, 166 Cal. 640, 662, 137 P. 1119, 1127 (1913).

38. It is difficult to tell where the Court stands today with respect to the two tests. The Court used the "physical acquisition" test in United States v. Central Eureka Mining Co., 357 U.S. 155 (1958). There, the United States "regulated" out of
The degree test has been used, however, only in a manner supplemental to the physical acquisition test. That is, so long as there is a clear appropriation of property by public authorities for public use, the physical acquisition test applies and requires that compensation be paid. But where there is a purported regulation which does not involve an actual taking for government use, or which is so encompassing as to become a virtual taking, the degree test applies.

The compulsory dedication cases represent an apparent exception to the physical acquisition test. As will be seen, the general pattern of these cases concerns a property owner who is contemplating a use or addition to his property which requires him to obtain permission from some governmental authority, but who is required by that authority, as a condition precedent to the grant of such permission, to dedicate a portion of his property to the public. Although these cases clearly involve a physical acquisition of private property by government, courts have nevertheless considered such acquisitions to be reasonable exercises of the police power rather than takings of property. A variety of compulsory dedications, including new streets, street widening, water mains, curbs and gutters, sidewalks and sewers, have been upheld as valid exercises of the police power. The compulsory dedication cases have refused (albeit not expressly) to apply the physical acquisition test, undoubtedly because of the inevitable judicial invalida-

business privately owned gold mines. Yet the Court found no taking because the government had not occupied, used, or taken physical possession of the mines. *Id.* at 165-66.

In Goldblatt v. Town of Hempstead, 369 U.S. 590 (1962), the Court approvingly cited the "degree" test but declined to state how far regulation could go before it became a taking. *Id.* at 594.

40. *Id.* § 1.42[1].
42. Ayres v. City Council of Los Angeles, 34 Cal. 2d 31, 207 P.2d 1 (1949).
43. *Id.*
44. Lake Intervale Homes v. Parsippany Township, 43 N.J. Super. 220, 128 A.2d 300 (1956); Zastrow v. Village of Brown Deer, 9 Wis. 2d 100, 100 N.W.2d 359 (1960).
45. Petterson v. City of Naperville, 9 Ill. 2d 233, 137 N.E.2d 371 (1956).
tions which would follow if such a test were used.48 Some courts, as will be seen, have limited the scope of compulsory dedications to situations wherein the proposed property use by the owner would itself create the need for certain public improvements. The exactions are justified as being reasonable conditions whereby the owner corrects the burden he has imposed on the community.49

The general approach taken in the compulsory dedication cases is similar to the degree test approach. The courts, seeking to establish a standard of reasonableness for the exactions imposed, balance the public's need against the property owner's detriment. However, as previously noted, the degree test was used only in those situations where the physical acquisition test was inappropriate.50 Its use presupposes, therefore, no physical appropriation of property by the government for a public purpose. This fact alone militates against the use of the degree test by itself in mandatory dedication situations. Since neither the physical acquisition test nor the degree test per se have been utilized in defining a constitutional standard of reasonableness, the question remains: what standard of reasonableness has been adopted?

In Associated, the plaintiff claimed that the exactions pursuant to section 11546 would be constitutionally justified only if (1) the need for the recreational land to be dedicated could be attributed to the new subdivision alone,51 and (2) the subdivider's contribution would necessarily and primarily benefit the particular subdivision.52 The Associated court, noting its prior decision in Ayres v. City Council of Los Angeles,53 rejected plaintiff's contentions:

We held [in Ayres] . . . that the conditions were not improper because their fulfillment would incidentally benefit the city as a whole or because future as well as immediate needs were taken into consideration and that potential as well as present population factors affecting the neighborhood could be considered in formulating the conditions imposed upon the subdivider. We do not find in Ayres support for the principle urged by Associated that a dedication requirement may be upheld only if the particular subdivision creates the need for the dedication.54

Thus, in holding section 11546 to be a reasonable exercise of this

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49. See text accompanying notes 69, 125-29 infra.
50. See text accompanying notes 32-40 supra.
51. 4 Cal. 3d at 637, 484 P.2d 610, 94 Cal. Rptr. at 634.
52. Id. at 640, 484 P.2d at 611-12, 94 Cal. Rptr. at 635-36.
53. 34 Cal. 2d 31, 207 P.2d 1 (1949).
54. 4 Cal. 3d at 638, 484 P.2d at 610, 94 Cal. Rptr. at 634.
state's police power, the court in *Associated* acceded substantial weight to *Ayres*, a leading case in the area of mandatory dedications. *Ayres*, however, has never been afforded a consistent interpretation. Some courts have construed *Ayres* as mandating a narrow standard of reasonableness, while others see that decision as authority for a broader view of the state's power. *Associated* relied upon *Ayres* for this more permissive view. But the court in *Associated*, seemingly dissatisfied with sole reliance on *Ayres*, went further and prophetically announced a new standard of reasonableness in the area of compulsory dedications—a standard which has resulted in the broadest view to date of the state's police power. Why the court offered this new approach to mandatory dedications when unnecessary to its decision is not clear. However, the ambiguity of the *Ayres* opinion and the confusion it has engendered throughout the country certainly suggests the desirability of a new and clearer approach.

In *Ayres*, the City of Los Angeles imposed, as a condition to the approval of the plaintiff's proposed 13-acre subdivision, a requirement that the subdivider: (1) dedicate a 10-foot strip abutting Sepulveda Boulevard (a major thoroughfare) running along the eastern boundary of the subdivision for the purpose of widening Sepulveda, (2) restrict an additional 10-foot strip along Sepulveda for the planting of trees and shrubbery which would prevent direct ingress and egress to the subdivision from Sepulveda, and (3) dedicate an 80-foot wide extension of a street which was to enter the subdivision from the west. Despite

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55. *Id.*
56. 34 Cal. 2d 31, 207 P.2d 1 (1949).
57. See Heyman & Gilhool, *supra* note 41, at 1132.
58. See text accompanying notes 100-103 *infra*. This narrow standard of reasonableness requires the government entity demanding the exactions to make a dual showing concerning the reasonableness of the compelled exactions. First, it must show a "reasonable relationship" between the needs generated by the owner's proposed use of his property and the exactions required. Second, the government must demonstrate that some economic benefit to the property owner would result from the compelled exactions themselves.
59. See text accompanying notes 80-99 *infra*. Generally, this broader view of the police power necessitates only that the government entity compelling the exactions show a "reasonable relationship" between those exactions and the needs generated by the owner's proposed use of his property.
60. 4 Cal. 3d at 638, 484 P.2d at 610, 94 Cal. Rptr. at 634, wherein the court opined:
   Even if it were not for the authority of *Ayres* we would have no doubt that section 11546 can be justified on the basis of *general public need*. . . . (emphasis added)
For a discussion of this expansive new concept see text accompanying notes 139-144 *infra*.
61. *Id.*; see text accompanying notes 139-144 *infra*.
62. 34 Cal. 2d at 34, 207 P.2d at 3.
the subdivider's claim that the city should be acting under its eminent domain power, the court found the exactions to be a constitutional exercise of the city's police power. In so holding, the court reasoned that since the subdivider was seeking to acquire the advantages of lot subdivisions,

upon him rests the duty of compliance with reasonable conditions for design, dedication, improvement and restrictive use of the land so as to conform to the safety and general welfare of the lot owners in the subdivision and of the public.63

Accordingly, the subdivider was deprived of a compensation award for his "taken" property. As to the precise meaning of the term "reasonable conditions" the court was silent, though it did opine that "[q]uestions of reasonableness and necessity depend on matters of fact."64 It might be inferred from this that the question of reasonableness depends upon, and should be limited to, the particular facts and circumstances of each case. Thus, while the Ayres court afforded no specific definition of "reasonable", some insight into the meaning of the term may be seen by examining the factual circumstances of that case.

Two principal considerations led the court to its holding. First, at least some of the need for the exactions was attributable to the proposed subdivision itself.65 Second, the court found that the subdivision design required by the city had economically benefited the subdivider in such a manner that the imposed exactions would not be financially detrimental to him.66

With respect to the need attributable to the subdivision, the city showed that the new subdivision residents would generate increased traffic flow necessitating wider streets, and that the planting strip would insure conformance of the proposed subdivision to the prevailing design pattern of the neighborhood.67 The court noted, however, that "[p]otential as well as present population factors affecting the subdivision and the neighborhood generally are appropriate for consideration."68 The court failed to state precisely how much of the need must be attributable to the subdivision in particular as opposed to that amount attributable to the neighborhood generally. Thus, the degree

63. Id. at 42, 207 P.2d at 7 (emphasis added).
64. Id. at 41, 207 P.2d at 7.
65. Id. at 38-39, 207 P.2d at 5-6.
66. Id. at 40-41, 207 P.2d at 6-7.
67. Id. at 38-39, 42, 207 P.2d at 5, 8.
68. Id. at 41, 207 P.2d at 7 (emphasis added). As will be seen later, this point is crucial in the Associated court's holding.
of relationship between needs generated by the new subdivision itself and the exactions demanded by the city was left obscure. Later cases interpreted the Ayres “need” test to mean everything from needs shown to be “specifically and uniquely attributable” to the proposed subdivision to needs which were related to the proposed subdivision only by general legislative fiat. Under the former test, which is a questionable interpretation of Ayres, a city would be required to make an evidentiary showing that the new subdivision had imposed specific burdens on the community which it would then be expected to correct. Under the latter test, the entry of a new subdivision as a matter of law would impose particular burdens on the community as specified in the legislation and the city would not be required to show that certain specific needs were caused by the subdivision’s creation. Despite the court’s lack of clarity on the subject, some commentators have interpreted the Ayres need principle to require a “reasonable relationship” between the dedication imposed and the increased traffic and other needs of the proposed subdivision. Applying this interpretation of Ayres, these commentators have concluded it to be the primary basis of the Ayres holding. Yet, the term “reasonable relationship” is a conveniently vague phrase which fails to describe the extent to which present and future general neighborhood needs may be considered when imposing “reasonable conditions” on a subdivider. The court did not resolve this issue. However, in view of the fact that the court considered present generated need as well as future neighborhood needs, the only proper meaning which can be attached to the Ayres need test is that at least some, but not all, of the needs for which exactions are imposed on the subdivider must be traceable to the new subdivision.

The subdivider in Ayres had suffered no financial loss and had actually economically benefited from the exactions imposed. This fact

69. See, e.g., Rosen v. Village of Downers Grove, 19 Ill. 2d 448, 453, 167 N.E.2d 230, 234 (1960); Pioneer Trust and Sav. Bank v. Village of Mount Prospect, 22 Ill. 2d 375, 176 N.E.2d 799, 801-02 (1961). See text accompanying notes 126-127 infra. 70. Billings Properties, Inc. v. Yellowstone County, 144 Mont. 25, 35, 394 P.2d 182, 188 (1964). 71. Heyman & Gilhool, supra note 41, at 1132-33. As used by these commentators, the meaning of the term “reasonable relationship” appears to be very close to that of the “specifically and uniquely attributable” test. However, this formulation of the Ayres need test appears to ignore the court’s earlier statement: Nor is it a valid objection to say that the conditions contemplate future as well as more immediate needs. Potential as well as present population factors affecting the subdivision and the neighborhood generally are appropriate for consideration. 34 Cal. 2d at 41, 207 P.2d at 7 (emphasis added). 72. Heyman & Gilhool, supra note 41, at 1132-33.
supplied the second basis of the court's holding. The city-required "cellular" subdivision design was found to have reduced the total amount of land which the subdivider would have had to dedicate under a regular subdivision design. Implicitly applying a set-off principle, the court found that when the subdivider asked to be compensated for his dedicated land, he was in fact requesting compensation in addition to those savings wrought by the cellular design required for the subdivision. One commentator has suggested that this lack of detriment to the subdivider was the very basis for the court's finding that the regulations imposed were reasonable.

Although the commentators differ concerning the true basis of the Ayres court's holding, and the court itself is vague about its definition and tests for reasonable exactions, it could be argued that since it placed so much emphasis on the factual setting the court intended its need and economic benefit arguments to be limited to the facts of the case. So limited, the court's finding that reasonable conditions were imposed under the state's police power can be justified. If a subdivider creates a need for streets and then actually gains by the city's method of satisfying the need, he cannot complain that anything has been taken from him. Streets are an obvious necessity for access to subdivision homes. Thus, despite the Ayres court's adverse ruling to the particular subdivider, he did not suffer any significant detriment because of the dedication requirement.

The Ayres decision, however, has not been limited to its peculiar facts by subsequent California decisions. The need and benefit arguments, as utilized by the Ayres court to determine when conditions imposed on subdividers were reasonable, have been selectively incorporated by the California courts into opinions either supporting or

73. 34 Cal. 2d at 40-41, 207 P.2d at 6-7.
74. The court does not explain the term but it apparently refers to a design in which not all streets within the subdivision connect with streets outside the subdivision. Thus, there are a limited number of streets by which access may be gained to the subdivision when compared to a subdivision of "regular" design.
75. 34 Cal. 2d at 40, 207 P.2d at 6-7. The subdivider had to provide streets within his subdivision for access to the homes he was to build. He was no doubt more than willing to dedicate such streets to public use in order to relieve himself of their maintenance. He objected primarily to the widening of a street outside his subdivision. But because of the "cellular" design of the subdivision, the court found that the amount of the required street dedications was less than the subdivider would have had to dedicate under a "regular" subdivision design.
76. 34 Cal. 2d at 40, 207 P.2d at 7.
77. Johnston, Constitutionality of Subdivision Control Exactions: The Quest for a Rationale, 52 CORNELL L.Q. 871, 892 (1966) [hereinafter cited as Johnston].
rejecting the exercise of the police power. Some later courts have used both arguments. All later courts have at least required that the Ayres need test be met. Hence, while an expansive police power has been enunciated in most California decisions, the exact basis has remained unclear, perhaps due to the vagueness of the Ayres decision itself.

Those courts which have required only satisfaction of the Ayres need test have also advanced various interpretations of it. For example, in Bringle v. Board of Supervisors, the plaintiff, in return for the granting of a five year extension to his zoning variance, was required to dedicate an easement to the county for widening of the street fronting plaintiff's property. The California Supreme Court upheld the mandatory dedication and cited Ayres for the proposition that a dedication for street widening, “where reasonably related to the increased traffic and other needs of the proposed subdivision, does not constitute a taking of private property without compensation.” The court concluded that, in the absence of any showing to the contrary by the plaintiff, the board's determination that street widening was reasonably related to the needs generated by plaintiff's excavating business must be upheld. It is significant that the Bringle court was presented with no record of the proceedings held before the county planning commission and therefore possessed no record of the evidence presented by the county in support of its claim that plaintiff's activities would necessitate the proposed street widening. The court simply implemented the legal presumption that the county's showing before the commission was adequate and, because the plaintiff failed to produce evidence manifesting a clear abuse of discretion, the presumption was conclusive. The court thus considerably lightened the defendant's burden of showing a reasonable

80. 54 Cal. 2d 86, 351 P.2d 765, 4 Cal. Rptr. 493 (1960).
81. Id. at 89, 351 P.2d at 767, 4 Cal. Rptr. at 495.
82. Id. at 89-90, 351 P.2d at 767, 4 Cal. Rptr. at 495.
83. Id. at 88, 351 P.2d at 766, 4 Cal. Rptr. at 494.
84. Id. at 89, 351 P.2d at 767, 4 Cal. Rptr. at 495. The court stated: Where an authorized board grants a variance it will be presumed that official duty was performed and that the existence of the necessary facts was found, and the board's action will not be disturbed in the absence of a clear showing of an abuse of discretion. Id., citing CAL. CODE OF CIV. PROC. § 1963(15), now CAL. EVID. CODE § 664 (West 1968).
relationship between the plaintiff’s activities and the needs flowing therefrom. The Ayres need requirement had apparently been energized with the advantage clearly moving toward the governmental entity compelling an exaction.

However, in Kelber v. City of Upland, the city had required by ordinance that subdividers contribute a flat rate of $30.00 per lot for a “Park and School Site Fund” and $99.07 per acre for a “Subdivision Drainage Fund. The funds were to be used to meet the future needs of the entire city for park and school sites and drainage facilities. In unanimously holding the ordinance ultra vires the Subdivision Map Act, the court of appeal stated:

[T]his fund raising method is not related to the needs of this particular subdivision . . . [and] it is not reasonably required by the type and use of the subdivision as related to the character of local and neighborhood planning and traffic conditions. . . .

Thus, the court found unacceptable the city’s failure to relate particular needs of a subdivision to the fees charged the subdivider. While not a constitutional decision, Kelber is significant for its narrow interpretation of the Ayres need test.

In Mid-Way Cabinet Fixture Manufacturing v. County of San Joaquin, Mid-Way sought a building permit from the county to enlarge its cabinet shop. As a condition precedent to granting the permit, the county required Mid-Way to convey without compensation certain access rights and land for a “return road” to a future expressway. These requirements were based upon evidence presented by the county purporting to show increased traffic burdens on streets fronting the plaintiff’s property. Examining this evidence the court of appeal found

not the slightest hint that there would be an appreciable increase in traffic. On the contrary, other than an inconsequential increase of truck deliveries from a possibly expanded cabinet shop output there will be no effect at all.

In disallowing the mandatory dedication, the court ruled: “Justification of conditions depends upon there being some real relationship between

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86. Id. at 633, 638, 318 P.2d at 562, 565.
87. Id. at 638, 318 P.2d at 565.
89. Id. at 183, 65 Cal. Rptr. at 38.
90. Id. at 183-84, 65 Cal. Rptr. at 39.
91. Id. at 184-85, 65 Cal. Rptr. at 39.
92. Id. at 185, 65 Cal. Rptr. at 39.
the thing wanted by the landowner from government and the quid pro
quo exacted by government therefor.\textsuperscript{985}

In Scrutton v. County of Sacramento,\textsuperscript{99} the plaintiff property owner
sought to have her property rezoned from agricultural to multiple fam-
ily residential use for the purpose of developing apartment units.\textsuperscript{95} The
planning commission recommended approval of the rezoning subject to
the condition that plaintiff dedicate certain land to widen streets abutting
her property and improve them \textit{at her own expense}, including pavement,
sidewalks, curbs and gutters.\textsuperscript{98} In rejecting these conditions the
court cited Ayres for the proposition that such conditions can be valid
"if reasonably conceived to fulfill public needs emanating from the
landowner's proposed use."\textsuperscript{97} The court found that instead of showing
such generated need, the county had merely attempted to demonstrate
that the dedications would benefit the plaintiff's proposed apartments.\textsuperscript{98}

It is true that some of the courts have justified the exaction not only
for its fulfillment of public needs caused by the proposed development,
but also because it would benefit the landowner financially. Standing
alone, the landowner's economic benefit supplies inadequate underpin-
ning for the exaction. The police power forms the exaction's constitu-
tional foundation. That power is aimed at public need, not private
profit.\textsuperscript{99}

While the Bringle, Mid-Way Cabinet, and Scrutton courts relied upon
the Ayres need test singularly to provide a sufficient measure for the
constitutionality of mandatory dedications, the court in Sommers v. City of Los Angeles\textsuperscript{100} utilized both the Ayres need and economic bene-
fit arguments in its constitutional analysis.

In Sommers the plaintiff sought a building permit to remodel his gas
station and enlarge its parking space.\textsuperscript{101} As a condition to its granting
the permit, the city required Sommers to dedicate some of his land for
widening of the streets abutting his station.\textsuperscript{102} In upholding the ded-
ication, the court found that (1) the dedication bore a reasonable re-
lationship to the increased vehicular traffic generated by the enlarged

\textsuperscript{93.} Id. at 192, 65 Cal. Rptr. at 44 (emphasis added).
\textsuperscript{95.} Id. at 415, 79 Cal. Rptr. at 875.
\textsuperscript{96.} Id.
\textsuperscript{97.} Id. at 421, 79 Cal. Rptr. at 879.
\textsuperscript{98.} Id. at 422, 79 Cal. Rptr. at 880.
\textsuperscript{99.} Id. (citations omitted).
\textsuperscript{100.} 254 Cal. App. 2d 605, 62 Cal. Rptr. 523 (1967).
\textsuperscript{101.} Id. at 606-07, 62 Cal. Rptr. at 525.
\textsuperscript{102.} Id. at 608, 62 Cal. Rptr. at 526.
service station, and (2) the extra street width itself would benefit the
gas station by improving ingress and egress thereto and that streets
improved to their ultimate width generally increased the value of ad-
Jacent property.\textsuperscript{103}

It should be noted that this kind of economic benefit is different
from the general benefit which any property owner seeks to gain from
governmental approval of a proposed use for his property. While the
courts have actually discussed two kinds of economic benefit to the
property owner, apparently none have noted the distinction between
the two. One type of benefit may be termed “general economic bene-
fit.” This is the benefit which the property owner seeks to acquire
from the proposed improvement for which he must obtain governmen-
tal approval. The second type of benefit may be called “specific eco-
nomic benefit” and consists of an economic advantage flowing from
the imposed exaction itself.

Both types of benefit were present in the \textit{Ayres} case. There, the
court impliedly recognized that advantages would accrue to the sub-
divider from the mere act of subdivision itself.\textsuperscript{104} Presumably, the
court was referring to the fact that land values generally increase upon
subdivision and building thereon. This is a form of general economic
benefit which accrues to the property owner upon the subdivision of his
land. However, the court also found additional economic benefit to
the subdivider which resulted from the nature of the required dedica-
tions.\textsuperscript{105} This specific economic benefit consisted of the savings which
resulted from the cellular design of the subdivision.\textsuperscript{106} Such a design,
with its limited ingress and egress features, required less land to be
dedicated for street purposes than would a regular subdivision design.\textsuperscript{107}
But this cellular subdivision design was possible only if the subdivider
made the kinds of dedications imposed by the city.\textsuperscript{108} In other words,
the required dedications made possible the cellular design which in turn
saved the subdivider money. Thus, the dedications themselves resulted
in specific economic benefit to the subdivider. It is this specific eco-

\textsuperscript{103} Id. at 618-19, 62 Cal. Rptr. at 533.
\textsuperscript{104} 34 Cal. 2d at 42, 207 P.2d at 7.
\textsuperscript{105} Id. at 40-41, 207 P.2d at 6-7.
\textsuperscript{106} Id.
\textsuperscript{107} Id. This, of course, assumes that the subdivider recognized (as did the \textit{Ayres}
subdivider) that his dedication of some land for streets would be required in any case.
The \textit{Ayres} subdivider only contested the size and location of the required dedications,
not the fact that streets were required for his subdivision and that dedications were
necessary therefor.
\textsuperscript{108} Id. at 40, 207 P.2d at 6-7.
nomic benefit which the Ayres court appeared to emphasize in its holding.

Later cases, however, with the exception of Sommers, thought it unnecessary to find any such specific economic benefit derived from the nature of the dedications themselves. In Bringle, the plaintiff implicitly would have benefited if the zoning variance extension he requested had been granted him. The variance would have permitted the plaintiff to continue his excavating business on land zoned for agriculture and would have afforded him a general economic benefit flowing from the use of his land. However, no mention was made by the court of any specific economic benefit resulting from the proposed street widening for which his dedication was required.

Similarly, in Southern Pacific Co. v. City of Los Angeles, the Court of Appeal upheld the city's requirement of a street-widening dedication as a condition to approval of the plaintiff's request to build a warehouse fronting the street to be widened. The court, using the general economic benefit principle of Bringle, stated:

If [the builder] desires the benefits resulting from the improvement or change in the character of the land, it must meet any reasonable condition imposed by respondents before the issuance of a building permit—such undoubtedly is the holding in Ayres. . .

Yet, no benefit accruing from the dedication itself is mentioned by the court. If the court had truly followed Ayres, the city would have been required to show some additional special economic benefit to the plaintiff which would result from the widened street rather than the mere general economic benefit resulting from approval of plaintiff's proposed use of his land.

The Ayres-engendered confusion regarding the precise test with which to determine a reasonable regulation under the police power and the proper weight to be afforded the need and benefit arguments used in that case unfortunately is not clarified by the Associated decision. There, the court failed to discuss the special economic benefit argument as used in Ayres. Perhaps this was due to the narrow man-
ner in which plaintiff Associated framed its benefit test: "[T]he sub-
divider cannot be compelled to dedicate lands . . . or pay a fee, un-
less his contribution will necessarily and primarily benefit the particular
subdivision." Benefit here refers to the question of who will use the
dedicated land. To apply the benefit argument as the Ayres court
used the term, the Associated court would have had to find some specific
economic benefit to the subdivider which accrued from the imposed ex-
actions themselves. If, for example, the park or recreational land in
or near the subdivision resulting from the required dedications (or fees)
increased the value of the lots therein, the Ayres special economic benefit
test would be satisfied. While an argument could be made which re-
lates the beneficial use of a nearby park to increased property values
for the subdivision it primarily serves, the Associated court failed to
advance any such rationale. By discussing benefit only in the context
of who will get primary use from the required exactions, the court
avoided any discussion of the benefit test as formulated in Ayres.

Left with this different type of benefit test, the court easily an-
swered the plaintiff's contention by pointing to sections 11546(c)
and (e) of the Business and Professions Code. These provide that
the fees or land dedicated are to be used to serve the subdivision and
that the amount and location of land dedicated and fees paid shall bear
a reasonable relationship to the use of facilities by the subdivision's fu-
ture residents. The court then added: "Whether or not such a direct
connection is required by constitutional considerations, section 11546
provides the nexus which concerns Associated."

If the benefit nexus, as that term is used by the Associated court, is
not constitutionally required for a valid exercise of the police power,
perhaps the court is presaging the possible abandonment of any bene-it test in the future. That this is a distinct possibility is evidenced by
the close relationship between the benefit principle used by Associated
and its apparent adoption of the broad interpretation of the Ayres need
test. In other words, it seems only fair that if the need for recrea-

117. 4 Cal. 3d at 640, 484 P.2d at 611-12, 94 Cal. Rptr. at 635-36.
118. Id. at 640 n.5, 484 P.2d at 612 n.5, 94 Cal. Rptr. at 636 n.5.
119. See text accompanying notes 73-77 supra.
120. See text accompanying note 117 supra.
121. 4 Cal. 3d at 636, 484 P.2d at 609, 94 Cal. Rptr. at 633, citing CAL. BUS. &
PROF. CODE ANN. §§ 11546(c), (e) (West Supp. 1971) [supra note 3].
122. Id.
123. 4 Cal. 3d at 640, 484 P.2d at 612, 94 Cal. Rptr. at 636.
124. Id. at 638, 484 P.2d at 610, 94 Cal. Rptr. at 634.
tional land develops primarily from the influx of new residents and they pay for that need, they ought to derive primary benefit from the use of the new facilities. Accordingly, as the nexus between the required dedication and the need generated by the new subdivision becomes clearer in any given case, the benefit which would accrue from that dedication to the subdivision should become correspondingly greater.

The plaintiff in Associated argued that compulsory dedications could be constitutionally justified only if the need for them were directly tied to the increase in population generated by the subdivision alone and not to the general growth of the community as a whole. This "specifically and uniquely attributable" test of generated need was upheld in Pioneer Trust and Savings Bank v. Village of Mount Prospect. The Associated court, however, citing Ayres, rejected this approach. Justice Mosk did not find in Ayres "support for the principle urged by Associated that a dedication requirement may be upheld only if the particular subdivision creates the need for dedication," and thus adopted the need test enunciated in Ayres. It follows that if dedications can be required which consider general community needs as well as needs generated by the new subdivision in question, then the public at large can receive corresponding benefit from the dedication. And if the Ayres need test presents no constitutional problems to the court, then the principle of primary benefit to subdivision residents, as urged by Associated, may not be constitutionally required either.

Additionally, in dictum, the court found merit in the position offered by the Sierra Club as amicus curiae. Sierra contended that the dedications and fee exactions may validly be employed to provide facilities for the general public rather than for the benefit of the new subdivision.

125. Id. at 637-38, 484 P.2d at 610, 94 Cal. Rptr. at 634.
126. 22 Ill. 2d 375, 377, 176 N.E.2d 799, 801 (1961). The court there erroneously cited Ayres in support of its "specifically and uniquely attributable" test. Nevertheless, the test seems to more adequately solve the constitutional issues than Ayres (i.e. there can be no taking if the subdivider is required to satisfy only the needs he creates) and has been cited approvingly by commentators. See Heyman & Gilhool, supra note 41, at 1141-142. (It is there suggested that modern cost accounting techniques be used to determine exactly what needs can be specifically attributed to the subdivider).
127. 4 Cal. 3d at 638, 484 P.2d at 610, 94 Cal. Rptr. at 634. Ayres did not specify precisely how much need must be shown to be generated by the new subdivision as opposed to general community needs.
128. See text accompanying notes 67-72 supra.
129. This follows from the above stated close relationship between the "need" and "benefit" arguments as used by the Associated court.
130. 4 Cal. 3d at 640-41 n.6, 484 P.2d at 612 n.6, 94 Cal. Rptr. at 636 n.6.
The court noted two factors in support of this position: (1) the increasing mobility of the population (thus enabling subdivision residents to use the facilities even though not conveniently located to the subdivision), and (2) the great need for recreational facilities in California. The court stated, for example, that a subdivider who fortuitously developed land close to an already established park adequate to meet the needs of its residents, could reasonably have his fees used to develop recreational facilities in another part of town in order "to maintain the proper balance between the number of persons in the community and the amount of park land available."  

The Associated court had at this point adopted only the Ayres need rationale as the basis for its holding. It had cast doubt upon the constitutional necessity of the benefit principle advanced by Associated, and had implicitly dismissed the specific economic benefit test of Ayres. The apparent rejection of the Ayres test can be justified in light of that court's failure to distinguish properly between the police power and the power of eminent domain. The specific infirmity consisted of the suggestion in Ayres that economic benefit to the subdivider from exactions required of him could be setoff against the value of the land taken and could thereby operate in lieu of compensation. This is clearly incorrect since the concept of compensation is alien and irrelevant to an exercise of the police power. The idea of a setoff principle operating as a form of compensation must also be alien since once it is determined that the state is exercising its police power, the property owner is entitled neither to compensation nor, logically, to anything in lieu of compensation. This theoretical blurring of the police power vis-à-vis the power of eminent domain is further evidenced by the fact

131. Id.
132. Id. In support of this proposition the court cites Southern Pac. Co. v. City of Los Angeles, 242 Cal. App. 2d 38, 51 Cal. Rptr. 197 (1966). It is difficult to see how this case supports the court's dictum. In Southern Pacific, the land required from the plaintiff as a condition to the city's approval of his warehouse construction fronted the plaintiff's property. Further, much emphasis was given to the fact that the need for the widened street would be generated mostly from the increased traffic on the fronting street resulting from the plaintiff's warehouse activities.
133. See text accompanying notes 67-72 and 126-27 supra.
134. See text accompanying notes 122-31 supra.
135. See text accompanying notes 115-18 supra.
136. See Ayres v. City Council of Los Angeles, 34 Cal. 2d 31, 40-41, 207 P.2d 1, 6-7 (1949). See text accompanying notes 73-77 supra.
138. Id.
that in both the *Ayres* and the *Mid-Way Cabinet* cases the government contemplated condemning the very land it later "took" under the police power when the property owner was forced to seek local governmental approval.139

However, in addition to moving away from the various benefit tests, the *Associated* court also signaled a possible departure from the *Ayres* need test and the substitution of a far more permissive standard in its stead. Justice Mosk, after utilizing *Ayres* to reject the specifically and uniquely attributable test advanced by *Associated*, noted in dictum: "Even if it were not for the authority of *Ayres* we would have no doubt that section 11546 can be justified on the basis of a *general public need* for recreational facilities caused by present and future subdivisions."140 The court realized that such need is created by the combined pressures of population growth141 and the disappearance of open land in California.142

Apparently, the court is suggesting that general public need can be the future test of a reasonable exercise of the police power. Yet, because public need is also required for an exercise of the power of eminent domain,143 it alone cannot be the distinguishing factor between the two. Further, if public need were indeed the test, by what means could sufficient public need be measured so as to justify an exercise of the police power?

In presaging the possible abandonment of any benefit or need test other than a general public need requirement, the *Associated* court's dictum raises serious questions regarding future limitations of the police power in mandatory dedication situations. In such situations, the property owner requires some kind of approval from the government for a proposed improvement to his property in return for which the government attaches conditions requiring dedications or fees. If the government must demonstrate only a "general public need" and is not required to show either the precise burdens imposed by the property owner upon the community or the lack of a substantial burden upon the property owner himself, the future of the police power in California

140. 4 Cal. 3d at 368, 484 P.2d at 610, 94 Cal. Rptr. at 634 (emphasis added).
141. The population of Walnut Creek increased from 9903 in 1960 to 36,606 in 1970. 4 Cal. 3d at 639, 484 P.2d at 611, 94 Cal. Rptr. at 635.
142. 4 Cal. 3d at 639, 484 P.2d at 611, 94 Cal. Rptr. at 635.
143. See text accompanying notes 21-23 *supra*. 
seems virtually unlimited. So long as the property owner properly requests governmental approval, the decision whether or not to pay compensation for a contemplated public improvement rests entirely within the government's discretion. In the unlikely event that the government chooses to pay for the land which the public improvement requires, it may do so under its power of eminent domain. If it chooses not to pay, it may simply act under the Associated court's expansive notion of the police power, citing the "general public need" for the land in question.

The court's actual holding, however, raises additional questions worth noting. In declaring that present and potential population factors which generally affect the neighborhood may be considered in mandatory dedication situations,\(^1\) the Associated court relied upon a mere conclusional statement in Ayres\(^1\) and failed to support its re-statement of that conclusion.\(^2\) Further, the court failed to afford any reasons for its rejection of the Pioneer Trust "specifically and uniquely attributable" test.\(^3\)

This summary disposition of the "created need" issue raises problems to which the court does not address itself. For instance, the precise justification for imposing costs upon new subdivision residents other than those which they create by their entrance into the community is still lacking definition.\(^4\) The imposition upon the subdivider of some costs which were created by the general growth of the city as a whole

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\(^1\) 4 Cal. 3d at 638, 484 P.2d at 610, 94 Cal. Rptr. at 634.

\(^2\) In fact, the Ayres court seemed to come to exactly the opposite conclusion that it logically should have, judging from its earlier statements. It stated: "Questions of reasonableness and necessity depend on matters of fact. They are not abstract ideas or theories. In a growing metropolitan area each additional subdivision adds to the traffic burden." 34 Cal. 2d at 41, 207 P.2d at 7. One might logically expect the court to conclude: Therefore, each subdivision should "pay for" its addition to the traffic burden. However, the court actually concludes:

Nor is it a valid objection to say that the conditions contemplate future as well as more immediate needs. Potential as well as present population factors affecting the subdivision and the neighborhood generally are appropriate for consideration. Id.

\(^3\) The court only criticizes the Pioneer Trust "specifically and uniquely attributable" test by noting that court's misinterpretation of Ayres. 4 Cal. 3d at 644 n.13, 484 P.2d at 615 n.13, 94 Cal. Rptr. 639 n.13. See note 126 supra.

\(^4\) At least one other court has given qualified support to the Pioneer Trust interpretation. In Jordan v. Village of Menomonee Falls, 28 Wis. 2d 608, 137 N.W.2d 442 (1965), the Wisconsin Supreme Court accepted the Pioneer Trust analysis of Ayres as long as it was not applied so as to cause an unreasonable burden of proof upon the municipality concerned. See generally Heyman & Gilhool, supra note 41.

\(^5\) This assumes the subdivider's cost of dedication or fees is passed on to the new subdivision resident in the form of higher prices.
and not specifically attributable to the new subdivision was arguably more justified in Ayres where the subdivision residents were minimally burdened by the dedications imposed by the city.\textsuperscript{140} However, no similar offsetting benefit accrued to the new subdivisions residents in Associated.

A possible rationale is suggested in a recent law review article, wherein the author views the subdivider as a "manufacturer, processor, and marketer of a product,"\textsuperscript{150} and notes that "subdivision control exactions are actually business regulations."\textsuperscript{151} The subdivider is considered a transient owner who is seeking merely to maximize his profits and who can usually pass the exactions imposed upon him to future home buyers in his subdivision.\textsuperscript{152} Thus, the subdivider suffers from the exactions only because his homes may be slightly higher priced than those in a jurisdiction where such exactions are not imposed. Associated proffered an example of such additional cost,\textsuperscript{153} indicating that under the Walnut Creek formula the addition to the price of each new home brought about by the imposed exactions would amount to only $200.\textsuperscript{154} Further, under this rationale, just as a subdivider fails to lose anything other than a form of business tax,\textsuperscript{155} so also do the new

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\textsuperscript{149} But see note 75 supra.

\textsuperscript{150} Johnston, supra note 77, at 923.

\textsuperscript{151} Id. The basis of the author's comment is Jordan v. Village of Menomonee Falls, 28 Wis. 2d 608, 137 N.W.2d 442 (1965), where it is suggested that the equalization fees imposed upon subdividers who did not dedicate land under a statutory scheme similar to California's were in the nature of an excise rather than property tax.

\textsuperscript{152} See 4 Cal. 3d at 648, 484 P.2d at 618, 94 Cal. Rptr. at 642.

\textsuperscript{153} The example provided was used in another context by plaintiff, but illustrates the additional costs involved: A subdivider owning 25 acres of land valued at $20,000 per acre who divided the land into 100 quarter-acre lots for sale as single family dwellings would be required to dedicate land or pay fees equivalent to $20,000 under the Walnut Creek formula. Since each new residence is assumed to consist of four people, the subdivider is held responsible for having brought 400 people into the community. Under the formula of 2.5 acres dedicated per 1000 new residents, the subdivider would have to dedicate 1 acre (or pay its value, $20,000, in fees to the city). This amounts to an additional $200 cost for each new home. See 4 Cal. 3d at 645 n.14, 484 P.2d at 616 n.14, 94 Cal. Rptr. at 640 n.14.

\textsuperscript{154} Id.

\textsuperscript{155} On the issue of taxation, Associated raised two rather peripheral arguments. First, it claimed "double taxation" on the property of future residents of the subdivision since they must not only carry the initial burden of financing their park but must also pay property taxes for its development and maintenance. 4 Cal. 3d at 642, 484 P.2d at 613, 94 Cal. Rptr. at 637. Disregarding the issue of whether Associated even had standing to raise such an issue since the detriment would be suffered by the future property taxpayers and not Associated, the court noted that double taxation occurs only when "two taxes of the same character are imposed on the same property, for the same purpose, by the same taxing authority within the same jurisdiction during the same
subdivision residents fail to lose anything substantial. For while they might pay more for their homes, they are no more adversely affected than would be any consumer doing business in a jurisdiction with a business tax structure that happens to affect the property he consumes. Finally, the strong policy in favor of preservation of valuable land resources is promoted by such mandatory dedications, thus maintaining the long-term property values of the municipality and discouraging the growth of slum-prone, concrete jungles. However, while this explanation offers an excellent rationale for the court's holding, it too offers no analytical test for determining the precise point at which compensation must be given by the state.

An additionally perplexing aspect of the instant decision is the court's failure to adequately discuss the many contentions which specifically alleged equal protection violations or should have been treated as such. The traditional test of Fourteenth Amendment equal protection requires: (1) that any classification of a group of individuals under a state law must serve to foster a legitimate state purpose, and (2) that there must exist a rational relationship of the classification to the achievement of that purpose. The traditional standard for equal protection to which California also adheres, allows the states a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. . . . State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimina-

ing taxing period." Id. Associated's claim did not meet this definition and was properly dismissed by the court.

A second, related argument advanced by Associated was that the exactions constituted a special assessment against the future subdivision property owners without right of hearing or protest. 4 Cal. 3d at 642 n.10, 484 P.2d at 614 n.10, 94 Cal. Rptr. at 638 n.10. Given the court's previous rejection of a strict relationship between benefits flowing to a subdivision's residents and the exactions imposed upon it, the court understandably rejects this argument since just such a strict relationship is required in a special assessment situation. 14 McQuillen, supra note 15, § 38.02.

156. See Johnston, supra note 77, at 923.
157. 4 Cal. 3d at 637, 484 P.2d at 610, 94 Cal. Rptr. at 634.
158. 4 Cal. 3d at 642-43, 468, 484 P.2d at 614, 618, 94 Cal. Rptr. at 638, 642.
159. There is also a "new" concept of equal protection in which a "stricter scrutiny" standard is applied in cases where a law infringes upon "fundamental interests" or creates "suspect classifications." See note 176 infra. There is no indication in the Associated case that the court applied anything other than the traditional concept of equal protection.

tion will not be set aside if any state of facts reasonably may be conceived to justify it.\textsuperscript{162}

It is under this permissive canopy that the two-pronged equal protection requirements must be found.

The \textit{Associated} court found a legitimate state purpose to be reflected in "the recent adoption of article XXVIII of the [California] Constitution, which provides that it is in the best interests of the state to maintain and preserve open space lands. . . ."\textsuperscript{163} The legislative history of section 11546 revealed that passage of the section was based upon an abiding concern over the disappearance of open space in California,\textsuperscript{164} and, while this issue was left unmentioned by the court, it would appear that the elevation to constitutional status of open space preservation is in itself sufficient evidence of a legitimate state interest underlying the enactment of section 11546.

The second equal protection requirement, that the established classification be rationally related to the purpose sought to be achieved,\textsuperscript{165} introduces several important issues into the discussion. An initial question is whether the class of Walnut Creek developers seeking to subdivide, and thus subject to exactions under the local ordinance, is denied equal protection on the basis of a statute which is under-inclusive, and hence without rational basis, since excluded from its ambit are developers who are either subdividers in municipalities without exaction requirements or non-subdividers (e.g., apartment builders).

The court failed to discuss whether the ordinance discriminated in favor of non-Walnut Creek developers. Several factors, however, militate against the finding of such an equal protection violation. First, the permissive standards of the traditional equal protection test make it difficult to prove equal protection violations since some reasonable basis for a classification can usually be unearthed.\textsuperscript{166} Second, if the Walnut Creek exactions are deemed a form of business regulation, their invalidation under traditional equal protection standards is unlikely in view of the United States Supreme Court's general tendency to sustain economic regulations which have been attacked on equal protection


\textsuperscript{163} 4 Cal. 3d at 638, 484 P.2d at 611, 94 Cal. Rptr. at 635.

\textsuperscript{164} \textit{Id.} at 639, 484 P.2d at 611, 94 Cal. Rptr. at 635.


\textsuperscript{166} See cases cited in note 162 \textit{supra}. 
Third, as has already been pointed out, the exactions imposed under the Walnut Creek formula were minimal (about a $200 addition to the price of a new house). It is improbable that a Walnut Creek subdivider would be placed in a financially detrimental position in his competition with subdividers operating outside of Walnut Creek. Moreover, a classification shown to possess some reasonable basis does not fail under the traditional equal protection test merely because it results in some inequality. A fortiori, a subdivider typically is in competition with other subdividers operating in the same community, and hence a community exaction standard would work no prejudice on any one subdivider but rather would treat all equally. Fourth, now that section 11546 has been found constitutional, it may be expected that additional California cities will enact under the enabling statute mandatory dedication ordinances similar to Walnut Creek's. Thus, as more cities enact ordinances which compel exactions from subdividers, the likelihood that any one subdivider may be unfairly discriminated against because he operates in a city which happens to have such an ordinance decreases accordingly.

A more difficult issue, and one to which the court devoted some discussion, is whether the statute discriminates only against subdividers but not against those who do not subdivide (e.g., apartment builders). In its discussion of the issue the court conceded that the "apartment builder, by increasing the population of an area, may add to the need for public recreational facilities to the same extent as the subdivider." The court added, however, that since the apartment is generally vertical, while the subdivision is horizontal . . . [t]he Legislature could reasonably have assumed that an apartment house is thus ordinarily constructed upon land considerably smaller in dimension than most subdivisions and the erection of the apartment is, therefore, not decreasing the limited supply of open space to the same extent as the formation of a subdivision. This significant distinction justifies legislatively treating the builder of an apartment house who does not subdivide differently than the creator of a subdivision.

The court thus expressly found a "state of facts" which could conceivably justify the distinction section 11546 draws between subdividing and non-subdividing apartment builders. This finding vitiated

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168. See note 153 supra.
169. 4 Cal. 3d at 643, 484 P.2d at 614, 94 Cal. Rptr. at 638.
170. Id.
claims that section 11546's classification bears no rational relationship to the achievement of the state's purpose in enacting it. 7

The effects of the required exactions upon future subdivision residents may be discriminatory. Associated raised the possibility that a city might set dedication and fee requirements so high that the cost passed on to the home buyers would preclude the entry into the community of lower income family units. 7 The court recognized the potential danger but observed:

[T]here is nothing to indicate that the enactments of Walnut Creek in the present case raise such a spectre. The desirability of encouraging subdividers to build low-cost housing cannot be denied and unreasonable exactions could defeat this object, but these considerations must be balanced against the phenomenon of the appallingly rapid disappearance of open areas in and around our cities. 8

It is difficult to take issue with this statement by the court. The effect of the Walnut Creek exactions upon the price of new homes was minimal. 7 A $200 addition to the price of a new home in Walnut Creek would not, of itself, exclude a low-income buyer. It is more likely that the price of the new home, excluding any mark-up for exactions imposed upon the subdivider, would itself preclude the low-income buyer from making a purchase. The court warned, however, that deliberate practice of excluding low-income families through excessive exactions from subdividers "would present serious social and legal problems." 9 This leaves open the door for the court to disallow unwarranted exactions. 10

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Other rationales justifying statutory discriminations were also available to the Associated court. Various approaches were discussed in McGowan v. Maryland, 366 U.S. at 426 n.3, wherein the court quoted from Williamson v. Lee Optical, 348 U.S. 483, 489 (1955), as follows:

The problem of legislative classification is a perennial one, admitting of no doctrinaire definition. Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. The legislature may select one phase of one field and apply a remedy there, neglecting the others. The prohibition of the Equal Protection Clause goes no further than the invidious discrimination.

72. 4 Cal. 3d at 648, 484 P.2d at 618, 94 Cal. Rptr. at 642.

73. Id.

74. See note 153 supra.

75. 4 Cal. 3d at 648, 484 P.2d at 618, 94 Cal. Rptr. at 642.

76. If faced with such a future deliberate policy to exclude low-income groups
Another issue raised by the plaintiff also touches on the equal protection problem although the court did not frame its argument around it. Under the Walnut Creek formula, a high-density developer\textsuperscript{177} may be required to dedicate proportionately more land or pay more fees than a low-density developer although each may be responsible for

from subdivisions, the court would probably apply a more critical equal protection standard, analyzing with stricter scrutiny (i.e. "stricter" than the analysis applied to economic regulation) any classification which is "suspect" or which touches upon a "fundamental interest" of a citizen, and invalidating any such classification unless the state enacting it can demonstrate that it necessarily furthers a compelling state interest. Serrano v. Priest, 5 Cal. 3d 584, 597, 487 P.2d 1241, 1249, 96 Cal. Rptr. 601, 609 (1971).

Classifications based on race, color, or national origin have been deemed "suspect" by the United States Supreme Court. E.g., McLaughlin v. Florida, 379 U.S. 184 (1964); Oyama v. California, 332 U.S. 633 (1948); Korematsu v. United States, 323 U.S. 214, 216 (1944). Classifications based on wealth are also suspect. See Tate v. Short, 401 U.S. 395 (1971); Williams v. Illinois, 399 U.S. 235 (1970); Anders v. California, 386 U.S. 738 (1967); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois, 351 U.S. 12 (1956). Because such classifications are suspect, they bear a far heavier burden of justification. Serrano v. Priest, 5 Cal. 3d 584, 597, 487 P.2d 1241, 1249, 96 Cal. Rptr. 601, 609 (1971). That is, they will be invalidated unless the state making the classifications can show they are necessary to accomplish a compelling governmental purpose. Id.

Thus, a future California court, analyzing a deliberate policy of exclusion of low-income groups from subdivisions through the device of excessively high exactions imposed upon the subdivider, would have to balance the classification (if there is one) based on wealth against the state's interest of preserving open land space.

Classifications affecting "fundamental interests" will also elicit stricter scrutiny from the courts, resulting in invalidation of the classification absent the showing of a "compelling state interest." The courts have characterized interests as fundamental in several areas. See, e.g., Cipriano v. City of Houma, 395 U.S. 701 (1969) (right to vote); Kramer v. Union Free School Dist., 395 U.S. 621 (1969) (right to vote); Shapiro v. Thompson, 394 U.S. 618 (1969) (right to travel); Douglas v. California, 372 U.S. 353 (1963) (indigent defendant's right to free trial transcript on criminal appeal); Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971) (right to education).

Whether a deliberate policy of low-income group exclusion would infringe upon any fundamental interest remains to be seen. It is important at this point, however, to understand the kind of balancing a future court may have to make between competing, and ostensibly "good", social interests. On the one hand, the court must consider the state's interest in preserving open land space. On the other, consideration must be given to the harmful social effects of allowing a discrimination based on wealth or one which affects a fundamental interest. Regardless of the outcome of this balancing, such a future case is sure to spark controversy.

\textsuperscript{177} A high-density developer, as the term is apparently used by the court, is one who subdivides into smaller parcels than the low-density developer. This results in the introduction of more people into a community by a high-density developer than by a low-density developer if, for example, both begin their subdivisions with tracts of equal size. 4 Cal. 3d at 645, 484 P.2d at 615-16, 94 Cal. Rptr. at 639-40.
bringing an identical number of people into the city. This situation results because high-density land is usually more valuable than low-density land.\textsuperscript{178}

Associated, assuming as did the city of Walnut Creek that each single-family dwelling houses four persons, presented the following hypothetical. A subdivider owning 25 acres of land, valued at $20,000 per acre, divides his land into 100 single-family parcels thus adding 400 new residents. Under the Walnut Creek formula requiring 2.5 acres of land (or its monetary equivalent) to be dedicated for each new 1,000 residents, he must dedicate one acre of land (or pay $20,000 in fees in lieu thereof). A developer who subdivides 50 acres, each worth $10,000, into 100 one-half acre single-family parcels would also cause the entry of 400 new residents. However, this second developer would be compelled to dedicate only one acre too (2% of his total acreage as opposed to the 4% dedication required of the high-density developer) or pay only $10,000 in fees (the value of that single acre).\textsuperscript{179} Associated contended that the hypothetical illustrated the arbitrariness of the regulation as it is applied to the high-density developer.

The court deemed it reasonable to require a high-density developer to dedicate more land or pay higher fees than the low-density developer even though both had caused the entry of the same number of residents into the community.\textsuperscript{180} The court believed this differentiation was permissible as long as there existed a “reasonable relationship between the use of the facilities by future residents and the fee charged the subdivider.”\textsuperscript{181} By assuming that high-density residents would use the public recreational facilities more often than would lower-density residents with larger private yards, a reasonable relationship was found.\textsuperscript{182} Thus, the justification for this distinction between high and low-density developers rested upon a speculative assessment of the prospective use of dedicated land by the subdivision’s new residents.

The logic seems inconsistent with the court’s earlier defense of the legislative exclusion of non-subdividing apartment builders.\textsuperscript{183} The court had argued previously that since apartments typically occupy less land than a subdivision, they diminish the already limited supply of potential recreational land much less consequentially than does a sub-

\textsuperscript{178} \textit{Id.} at 645, 484 P.2d at 616, 94 Cal. Rptr. at 640.

\textsuperscript{179} \textit{Id.} at 645 n.14, 484 P.2d at 616 n.14, 94 Cal. Rptr. at 640 n.14.

\textsuperscript{180} \textit{Id.} at 645, 484 P.2d at 616, 94 Cal. Rptr. at 640.

\textsuperscript{181} \textit{Id.}

\textsuperscript{182} \textit{Id.}

\textsuperscript{183} \textit{Id.} at 642-43, 484 P.2d at 614, 94 Cal. Rptr. at 638.
division. Although reference had been made to the expanded demand for recreational land which the apartment dwellers’ entry into the community would create, the court apparently considered this insignificant when compared with the amount of space the apartment development would require. When discussing the high-density subdivider, however, the court suddenly became concerned with the proportionately greater demand for recreational land generated by high-density residents. Nevertheless, the court failed to recognize that a low-density development requires more land than a high-density development—a factor which might render less efficacious the argument that a greater demand for recreational land must be attributed to high-density residents.

The question arises: Was the court more concerned with the demand for recreational land generated by new residents or with the amount of land which the development would occupy? If it were the former, high-density developers should have been compelled to dedicate more land than low-density developers; but, if the latter was given sway, low-density developers should have been required to dedicate more land. The court adopted a middle ground although mouthing great concern for “demand.”

Legislative intent underlying section 11546 seems to have been concerned with the demand created by new residents rather than the quantity of land a residential subdivision occupies. This supports the court’s arguments as they relate to high-density developers but casts doubt upon those which defend the legislature’s exclusion of non-subdividing apartment builders from section 11546. Thus, the “state of facts” that apartments use less land than subdivisions, as found by

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184. Id.
185. Id. at 643, 484 P.2d at 614, 94 Cal. Rptr. at 638.
186. The committee report concerning section 11546 found that increased population had created the need for more neighborhood recreational space. From this it may be inferred that the legislature was concerned with providing recreational land based on the number of people entering the community rather than the amount of land used by the new subdivision. 6 ASSEMBLY INTERIM COMM. REPORTS, FINAL REPORT OF THE ASSEMBLY INTERIM COMMITTEE ON MUNICIPAL AND COUNTY GOV’T 31, ch. 1809, § 3 [1965] Cal. Stat. 4183.

Additionally, section 11546(e) itself provides: “The amount and location of land to be dedicated or the fees to be paid shall bear a reasonable relationship to the use of the park and recreational facilities by the future inhabitants of the subdivision.” CAL. BUS. & PROF. CODE ANN. § 11546(e) (West Supp. 1971) (emphasis added).

Finally, the Walnut Creek resolution, which provided that 2.5 acres of land were to be dedicated (or the equivalent value in fees) for each 1000 new residents entering the community, was clearly based on an estimate of residents’ use of recreational facilities and not on the amount of land occupied by the subdivision. See text accompanying notes 7 & 8 supra.
the court (albeit implicitly) to support the statute’s discrimination between subdividers and non-subdividing builders, appears ill-founded. Instead legislative intent expresses a concern for providing Californians with recreational land adequate to satisfy the needs of a burgeoning population. There is no indication that the legislature desired the amount of land used by the development in question to be a significant factor in determining how to satisfy those needs. The court itself, when dealing with the problem of discrimination between high-density and low-density subdividers, attached primary importance to the need for recreational land rather than to the amount of land occupied by a subdivision. Hence, the ratiocination that apartments develop “vertically while subdivisions grow horizontally” appears to supply an inadequate basis for differentiating between the two.

A statutory discrimination may be upheld, however, under the rationale that “reform may take one step at a time.” Although the court’s stated rationale may be wanting, the statutory discrimination between subdividers and non-subdividing apartment builders probably can be justified under the theory that reform, in the absence of invidious discrimination, need not be accomplished all at once.

It may be concluded that despite the inconsistencies in the court’s argument and reasoning, section 11546 and reasonable ordinances following therefrom do not violate equal protection principles. While a municipal ordinance promulgated under the authority of section 11546 conceivably could discriminate invidiously by deliberately excluding lower income groups from a subdivision, the Walnut Creek ordinance clearly does not fall within this category.

A more immediate and troubling aspect of the Associated decision is the groundwork it lays for future augmentation of the police power. If public need for scarce land resources can justify exactions for recreational purposes, the subdivider may be fair game for any governmental land need. Large land development companies, with their immense economic resources, may be able to weather the financial storm which undoubtedly will be unleashed by section 11546, its municipal ordinance offspring and the Associated opinion. The small businessman, landowner, or developer who must obtain governmental approval for

187. See text accompanying notes 171-72 supra.
188. See note 186 supra.
189. Id.
190. See text accompanying notes 178-84 supra.
191. See note 172 supra.
192. Id.
a proposed improvement to his property, however, has reason to view darkly the expanded police power in California. As the financial resources of local governments decline, the legacy of Associated may well be a corresponding expansion of the police power into areas traditionally reserved for eminent domain.

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