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## SUBDIVISION EXACTIONS IN WASHINGTON: THE CONTROVERSY OVER IMPOSING FEES ON DEVELOPERS

Throughout the country, municipalities are finding themselves increasingly short of funds to make necessary public improvements. Mushrooming residential development is largely responsible for this problem.<sup>1</sup> Traditionally, the money to pay for new or improved roads, water systems, sewage facilities, parks, and schools has come from a municipality's general tax revenues or utility charges.<sup>2</sup> Faced with rising costs and difficult economic times, however, municipalities are looking to the builders and developers of new subdivisions to help finance public improvements.<sup>3</sup>

In Washington, Snohomish County and San Juan County each enacted an ordinance requiring developers to pay fees as a condition of plat approval.<sup>4</sup> In *Hillis Homes, Inc. v. Snohomish County*,<sup>5</sup> the Washington Supreme Court declared the fees invalid.<sup>6</sup> The court held that the fees constituted a tax because the ordinances were intended to raise money

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1. See generally Johnston, *Constitutionality of Subdivision Control Exactions: The Quest for a Rationale*, 52 CORNELL L.Q. 871, 872 & nn.3-6 (1967); Juergensmeyer & Blake, *Impact Fees: An Answer to Local Governments' Capital Funding Dilemma*, 9 FLA. ST. U.L. REV. 415, 415 & nn.1-2 (1981).

The population of the United States as a whole grew at an average rate of 14% per decade from 1950 through 1980; the corresponding growth rate for Washington state was 20% per decade. BUREAU OF THE CENSUS, U.S. DEPT OF COMMERCE, STATE AND METROPOLITAN AREA DATA BOOK 448 (1982). While Washington state's population grew 21% between 1970 and 1980, San Juan County's population more than doubled over this same 10-year period. WASHINGTON STATE RESEARCH COUNCIL, THE BOOK OF NUMBERS—A STATISTICAL HANDBOOK ON WASHINGTON STATE GOVERNMENT 5 (1982); see also *Census reveals San Juan fastest growing county in state*, Bellingham Herald, Dec. 16, 1980, at 4A, col. 1.

2. See Heyman & Gilhool, *The Constitutionality of Imposing Increased Community Costs on New Suburban Residents Through Subdivision Exactions*, 73 YALE L.J. 1119, 1119-20 (1964).

3. See 1983 ZONING AND PLANNING HANDBOOK 45 (F. Strom ed.); Curtin, *Requiring Dedication of Land by Developers*, 1974 INST. ON PLAN. ZONING & EMINENT DOMAIN 57, 57-59; Juergensmeyer & Blake, *supra* note 1, at 415-16.

4. SNOHOMISH COUNTY, WASH., CODE tit. 26A (1980); San Juan County, Wash., Resolution 274, 1979 (Dec. 11, 1979) (repealed 1983).

Title 26A of the Snohomish County Code provided for parks only. See SNOHOMISH COUNTY, WASH., CODE ch. 26A.01 (1980). In addition to this ordinance, an informal procedure was established whereby fees were imposed for schools and fire districts. See *Hillis Homes, Inc. v. Snohomish County*, 97 Wn. 2d 804, 806, 650 P.2d 193, 194 (1982).

San Juan County's fees were to be allocated for solid waste disposal facilities, parks, roads, and sheriff's services. San Juan County, Wash., Resolution 274, 1979, § 3 (Dec. 11, 1979) (repealed 1983).

5. 97 Wn. 2d 804, 650 P.2d 193 (1982).

6. *Id.* at 808, 650 P.2d at 194-95.

rather than regulate development, and that the counties did not have statutory authority to impose such a tax.<sup>7</sup>

While the cases in *Hillis Homes* were pending before the state supreme court, the Washington legislature enacted a statute prohibiting the imposition of development fees absent a "voluntary agreement" between a developer and a municipality.<sup>8</sup> This new statute reduces the significance of the court's holding in *Hillis Homes*. Whatever its precise effect on the *Hillis Homes* decision, the construction and scope of the new statute are uncertain.

This Comment briefly traces the history of subdivision regulation in Washington as a means of imposing conditions on developers or exacting land dedication or fee payment from developers. It discusses the *Hillis Homes* decision and analyzes the relationship between the new state statute and other statutory land use regulations. This Comment concludes that, although a municipality's authority to impose development fees has been limited, existing statutory authority still allows a municipality to impose conditions on subdivision development.

## I. BACKGROUND

### A. *Introduction to Subdivision Law*

Subdivision regulations are generally upheld as a valid exercise of the police power.<sup>9</sup> A state legislature has discretion to exercise the police power, and the legislature may delegate the police power to municipalities in order to further the general health and welfare.<sup>10</sup> Valid state delegation usually takes the form of a planning or subdivision enabling act<sup>11</sup> which establishes the general procedures to be followed for the filing, review, and approval or disapproval of subdivisions, and imposes a set of substantive standards for the design and improvement of subdivisions.<sup>12</sup>

7. *Id.* at 810-11, 650 P.2d at 195-96.

8. Act of Apr. 20, 1982, ch. 49, § 5, 1982 Wash. Laws 1st Ex. Sess. 1374, 1375-77 (codified at WASH. REV. CODE § 82.02.020 (1983)). See also *infra* part IC3.

9. See, e.g., *Ridgefield Land Co. v. City of Detroit*, 241 Mich. 468, 217 N.W. 58, 59 (1928). Subdivision controls were originally enacted to ensure the accuracy of surveys and boundary determinations. Johnston, *supra* note 1, at 874; Reps, *Control of Land Subdivision by Municipal Planning Boards*, 40 CORNELL L.Q. 258, 258 (1955). By the 1950's, however, subdivision laws were looked to as a means of regulating growth and providing standards for orderly land development. Reps, *supra*, at 258-59.

10. 6 E. MCQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* §§ 24.37-.38 (3d rev. ed. 1980); Johnston, *supra* note 1, at 887; see also *Mansfield & Swett, Inc. v. Town of W. Orange*, 120 N.J.L. 145, 198 A. 225, 229 (1938).

11. NATURAL RESOURCES DEFENSE COUNCIL, INC., *LAND USE CONTROLS IN THE UNITED STATES* 321 (1977); Johnston, *supra* note 1, at 887.

12. See, e.g., U.S. DEPT OF COMMERCE, *A STANDARD CITY PLANNING ENABLING ACT* (1928)

This latter component of subdivision regulation—the imposition of substantive requirements—allows municipalities to condition plat approval on particular actions or agreements by developers.

### *B. Subdivision Conditions and Exactions*

Local governments have traditionally conditioned subdivision approval on two basic types of requirements: dedication of land for internal streets, and installation of improvements such as paving, sidewalks, water mains, and sewer and drainage facilities.<sup>13</sup> The courts have generally upheld these traditional requirements as valid exercises of the police power even where the enabling act did not specifically mention the improvement in dispute.<sup>14</sup> In Washington, the only pre-1982 appellate court decision involving a requirement imposed by a municipality as a condition of subdivision approval was *Breuer v. Fourre*,<sup>15</sup> in which the Washington Supreme Court upheld the compulsory dedication of streets within a plat.<sup>16</sup>

Over the last several decades, courts in many states have addressed the validity of subdivision exactions which require developer contributions toward a wide variety of public improvements, most notably parks and

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[hereinafter cited as STANDARD ACT]. The Standard Act is no longer in print in its original form as a publication of the U.S. Department of Commerce, but it is reprinted in full in MODEL LAND DEV. CODE app. B (Tent. Draft No. 1, 1968). See also WASH. REV. CODE ch. 58.17 (1983) (Washington's subdivision enabling act).

13. O. BROWDER, R. CUNNINGHAM, J. JULIN & A. SMITH, BASIC PROPERTY LAW 1337 (3d ed. 1979). In addition to installing these improvements, developers must meet specified municipal standards. See, e.g., STANDARD ACT, *supra* note 12, § 14 (authorizing planning commission to adopt regulations governing plat improvements).

14. See, e.g., *Garvin v. Baker*, 59 So. 2d 360, 362 (Fla. 1952) (ordinance dictated minimum street width); *Petterson v. City of Naperville*, 9 Ill. 2d 233, 137 N.E.2d 371, 378 (1956) (curbs, gutters, and storm water drainage required); *Allen v. Stockwell*, 210 Mich. 488, 178 N.W. 27, 29–30 (1920) (requirement that developer grade and gravel the streets, provide sidewalks, and install surface drains and sanitary sewers); *Deerfield Estates, Inc., v. Township of E. Brunswick*, 60 N.J. 115, 286 A.2d 498, 502 (1972) (developer required to install water mains); *Brous v. Smith*, 304 N.Y. 164, 106 N.E.2d 503, 506 (1952) (developer required to construct streets to provide access to subdivision); *Breuer v. Fourre*, 76 Wn. 2d 582, 585, 458 P.2d 168, 170 (1969) (developer required to dedicate streets in plat); see also Curtin, *supra* note 3, at 58–59.

One theory used to uphold the requirements is the “special assessment” theory. That reasoning allows the municipality to require the developer to make such improvements under the theory that, if the municipality were to install these types of improvements itself, it could then impose a special assessment lien against the subdivision properties to recover the costs. See *West Park Ave., Inc. v. Township of Ocean*, 48 N.J. 122, 224 A.2d 1, 3 (1966); Johnston, *supra* note 1, at 900–01.

The special assessment theory is satisfactory where the required improvements benefit solely the land being developed. But its validity is weakened when the subdivider is required to install improvements for, or make contributions to, facilities such as parks or schools which may benefit others outside the subdivision. Johnston, *supra* note 1, at 901; see also *West Park Ave.*, 224 A.2d at 3–4.

15. 76 Wn. 2d 582, 458 P.2d 168 (1969).

16. *Id.* at 585, 458 P.2d at 170.

schools.<sup>17</sup> Until the *Hillis Homes* decision, however, the Washington courts had not explored questions of constitutional and statutory authority for the imposition of these subdivision exactions.

### C. *Subdivision Regulation in Washington*

Chapter 58.17 of the Revised Code of Washington dictates regulations, requirements, and procedures for the approval of subdivisions in Washington.<sup>18</sup> Local authority over subdivision regulation is delegated to the legislative bodies of cities, towns, and counties throughout the state.<sup>19</sup> Section 58.17.110 states that during subdivision review a municipality "shall determine if appropriate provisions are made for, but not limited to, the public health, safety, and general welfare, for open spaces, drainage ways, streets, alleys, other public ways, water supplies, sanitary wastes, parks, playgrounds, sites for schools and schoolgrounds."<sup>20</sup> If appropriate provisions are not made, then the municipality may deny the plat.<sup>21</sup> In addition, the municipality may condition approval on dedication of land.<sup>22</sup>

In a 1982 decision, *Hillis Homes, Inc. v. Snohomish County*,<sup>23</sup> the Washington Supreme Court addressed the validity of regulations requiring payment of fees for parks, schools, or fire protection as a condition of subdivision approval. *Hillis Homes* included consolidated cases from

17. See D. MANDELKER & R. CUNNINGHAM, *PLANNING AND CONTROL OF LAND DEVELOPMENT* 826 (1979). Different states have reached differing results based on the particular court's interpretation of (1) language in the state enabling act, and (2) the requisite "nexus" between the proposed development and the public improvement at issue.

For cases upholding a municipality's authority to require dedication of land or payment of fees for parks or school facilities, see *Associated Home Builders, Inc. v. City of Walnut Creek*, 4 Cal. 3d 633, 484 P.2d 606, 94 Cal. Rptr. 630, *appeal dismissed*, 404 U.S. 878 (1971); *Billings Properties, Inc. v. Yellowstone County*, 144 Mont. 25, 394 P.2d 182 (1964); *Jenad, Inc. v. Village of Scarsdale*, 18 N.Y.2d 78, 218 N.E.2d 673, 271 N.Y.S.2d 955 (1966); *Call v. City of W. Jordan*, 606 P.2d 217 (Utah 1979), *modified on rehearing*, 614 P.2d 1257 (Utah 1980); *Jordan v. Village of Menomonee Falls*, 28 Wis. 2d 608, 137 N.W.2d 442 (1965), *appeal dismissed*, 385 U.S. 4 (1966).

For decisions striking down dedication or fee requirements, see *Aunt Hack Ridge Estates, Inc. v. Planning Comm'n*, 27 Conn. Supp. 74, 230 A.2d 45 (1967); *Pioneer Trust & Sav. Bank v. Village of Mount Prospect*, 22 Ill. 2d 375, 176 N.E.2d 799 (1961); *J.E.D. Assocs., Inc. v. Town of Atkinson*, 121 N.H. 581, 432 A.2d 12 (1981); *Haugen v. Gleason*, 226 Or. 99, 359 P.2d 108 (1961).

For excellent discussions of the judicial response to subdivision exactions throughout the country, see generally Heyman & Gilhool, *supra* note 2; Johnston, *supra* note 1; Juergensmeyer & Blake, *supra* note 1; Reps, *supra* note 9.

18. WASH. REV. CODE ch. 58.17 (1983).

19. See, e.g., *id.* § 58.17.070. At the local level, some duties may be further delegated to an established planning commission or planning agency. See *id.* § 58.17.100.

20. *Id.* § 58.17.110.

21. *Id.*

22. *Id.* The statute does not require that the dedicated land be used for any particular purpose.

23. 97 Wn. 2d 804, 650 P.2d 193 (1982).

Snohomish and San Juan Counties challenging county subdivision regulations.

1. *Background of Hillis Homes, Inc. v. Snohomish County*

In June 1979 the Snohomish County Board of Commissioners adopted title 26A of the Snohomish County Code, requiring payment of park fees or dedication of land in lieu of the fees as a condition of residential development approval.<sup>24</sup> The county was to use monies collected to purchase or develop park land within the park service district in which the development was located.<sup>25</sup> In addition to the title 26A fee provisions for parks, the county adopted an informal procedure to impose fees for schools and fire districts.<sup>26</sup>

In December 1979 the San Juan County Board of Commissioners also approved a development fees ordinance.<sup>27</sup> The San Juan County Expanded-Use Fees Ordinance applied to all residential developments,<sup>28</sup> and levied a set fee per dwelling unit or lot.<sup>29</sup> The proceeds were to be deposited in special accounts to benefit the geographic area from which payment was received.<sup>30</sup>

Developers in both counties challenged the validity of the development fees ordinances.<sup>31</sup> On appeal, the cases were consolidated before the Washington Supreme Court.<sup>32</sup>

2. *The Washington Supreme Court's Opinion in Hillis Homes, Inc. v. Snohomish County*

On September 2, 1982, the Washington Supreme Court invalidated

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24. SNOHOMISH COUNTY, WASH., CODE § 26A.03.010 (1980). The ordinance recited that the county derived authority for the regulation through its police power and land use approval authority. *Id.* § 26A.01.010. A fee of \$250 per lot was imposed on subdivisions, payable in full before plat recordation. *Id.* §§ 26A.04.010, .07.010(1)(a).

25. *Id.* §§ 26A.04.020, .07.060. Park service districts were defined to be coterminus with school districts. *Id.* § 26A.02.110.

26. *Hillis Homes, Inc. v. Snohomish County*, 97 Wn. 2d 804, 806, 650 P.2d 193, 194 (1982).

27. San Juan County, Wash., Resolution 274, 1979 (Dec. 11, 1979) (repealed 1983). The provision recited that the county government could no longer afford public service improvements necessitated by new residential growth, and that existing residents were being forced to pay a substantial share of the costs of new growth. *Id.* § 1. No constitutional or statutory provisions were cited in support of the county's authority to impose such fees.

28. *Id.* § 2.

29. *Id.* § 3(2). The total fee of \$650 per lot was allocated as follows: \$250 for solid waste, \$100 for parks, \$250 for roads, and \$50 for the sheriff. *Id.*

30. *Id.* § 3(7)(d), (4).

31. *Hillis Homes*, 97 Wn. 2d at 807, 650 P.2d at 194.

32. *Id.* at 805, 650 P.2d at 193.

both the Snohomish County and San Juan County fees as unauthorized taxes.<sup>33</sup> The court focused on the purpose of the fees, stating: "If the fees are merely tools in the regulation of land subdivision, they are not taxes. If, on the other hand, the primary purpose of the fees is to raise money, the fees are not regulatory, but fiscal, and they are taxes."<sup>34</sup> The court found that these fees were intended primarily to raise revenue, rather than to regulate residential development, and thus declared them to be taxes.<sup>35</sup>

The court further stated that counties must have express constitutional or legislative authority to levy taxes,<sup>36</sup> and found no such authority in this case.<sup>37</sup> Thus, the court held that the ordinances imposing the fees in the two counties were invalid.<sup>38</sup> The court also held that the plaintiffs in these cases were entitled to refunds of the fees paid.<sup>39</sup>

### 3. *The New State Statute*

On April 9, 1982, while the consolidated cases in *Hillis Homes, Inc. v. Snohomish County* were pending before the Washington Supreme Court, the legislature enacted a new law prohibiting municipalities from imposing most forms of development fees.<sup>40</sup> The statute further provides:

33. *Id.* at 808, 650 P.2d at 194-95.

34. *Id.* at 809, 650 P.2d at 195.

35. *Id.* at 810, 650 P.2d at 195-96.

The fatal blow to the San Juan County provisions in particular may have been the court's conclusion that use of the fees paid was not sufficiently restricted to remedying problems created by the new subdivision. The trial court in the San Juan County case stated in its memorandum opinion that "[t]he ordinance exacts a fee . . . without any means of limiting or relating it to actual increases brought about or anticipated to be brought about by . . . an increase in lots or residential buildings." *Cory v. San Juan County*, No. 4005/4107 (consolidated), slip op. at 4 (San Juan County Super. Ct. Feb. 1, 1982), *aff'd in part and rev'd in part sub nom. Hillis Homes, Inc. v. Snohomish County*, 97 Wn. 2d 804, 650 P.2d 193 (1982) (copy on file with the *Washington Law Review*). The supreme court did not specifically address the issue, but the trial court opinion may have contributed to the supreme court's conclusion that "the primary purpose, if not the only purpose of [the ordinance], is to raise revenue rather than to regulate residential developments." 97 Wn. 2d at 810, 650 P.2d at 196. Had use of the fees been limited to remedying deficiencies in the vicinity of the new subdivision that were created or aggravated by the new development itself, the court might have been more likely to characterize the fees as valid regulatory tools rather than as revenue-generating taxes.

36. 97 Wn. 2d at 809, 650 P.2d at 195.

37. *Id.* at 810-11, 650 P.2d at 196.

38. *Id.* at 811, 650 P.2d at 196.

39. *Id.*

40. Act of Apr. 20, 1982, ch. 49, § 5, 1982 Wash. Laws 1st Ex. Sess. 1374, 1375-77 (codified at WASH. REV. CODE § 82.02.020 (1983)). The statute, enacting Engrossed S. 4972, 47th Leg., 1st Ex. Sess., amended § 82.02.020 of the Revised Code of Washington. Prior to 1982, this code section involved state preemption of the power to tax retail sales and use of personal property, parimutuel wagering, conveyances, and cigarettes. Act of May 24, 1979, ch. 196, § 3, 1979 Wash. Laws 1st Ex. Sess. 1755, 1758 (amended 1982). Before 1982, title 82 of the Washington Revised Code in no way concerned development exactions, or subdivision or building permit regulation.

Various proposals to expand or limit municipalities' authority to impose such fees had been before

“This section does not prohibit voluntary agreements with [municipalities] that allow a payment in lieu of a dedication of land or to mitigate a direct impact that has been identified as a consequence of a proposed development, subdivision, or plat . . . .”<sup>41</sup>

The enactment of this statute reduces the significance of the court’s holding in *Hillis Homes*. The new statute explicitly prohibits imposition of “any tax, fee, or charge” on new developments except for specified exceptions.<sup>42</sup> Regardless of whether a payment is characterized as a tax or a regulatory fee, it is prohibited unless included in an exception. In addition, the reach of the statute is even broader than that of the holding in *Hillis Homes*, because the statute applies to any “county, city, town, or other municipal corporation,”<sup>43</sup> whereas the case affected only counties.<sup>44</sup>

## II. ANALYSIS

### A. *The Relationship Between Hillis Homes and Section 58.17.110 of the Revised Code of Washington*

Before the Washington Supreme Court’s decision in *Hillis Homes* and the enactment of the new state statute, chapter 58.17 of the Revised Code of Washington was the only law which governed subdivision regulation in Washington.<sup>45</sup> Chapter 58.17 expressly permits a municipality to deny a plat if appropriate provisions are not made for the public health and general welfare.<sup>46</sup> It also authorizes a municipality to condition approval on dedication of land.<sup>47</sup>

In *Hillis Homes* the court adopted a narrow interpretation of the scope of subdivision regulation authorized by chapter 58.17. In concluding that the fees imposed were taxes rather than valid regulatory fees, the court specifically found that “[n]either [the Snohomish County nor the San

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the legislature since 1969. Brief of Appellant [*Hillis Homes, Inc.*] at 19–23, *Hillis Homes*; Brief of Respondent Snohomish County Fire Protection District #7 at 13–14; Opening Brief of Appellants/Cross Respondents MacBryer, Carlson, CARMAC, and CARMAC Co. at 41–48. Prior to 1982, however, no statute that mentioned the imposition of fees as a condition of subdivision approval had been enacted.

41. WASH. REV. CODE § 82.02.020 (1983). The statute also imposes restrictions on such “voluntary agreements,” requiring that monies be held in a special account, and spent within five years or else refunded to property owners. *Id.* The new law took effect on July 1, 1982. Act of Apr. 20, 1982, ch. 49, § 25, 1982 Wash. Laws 1st Ex. Sess. 1374, 1387.

42. WASH. REV. CODE § 82.02.020 (1983).

43. *Id.*

44. See *Hillis Homes*, 97 Wn. 2d at 811, 650 P.2d at 196.

45. WASH. REV. CODE ch. 58.17 (1983); see also *supra* notes 18–22 and accompanying text.

46. WASH. REV. CODE § 58.17.110 (1983).

47. *Id.*



Juan County] ordinance makes any provision for regulation of residential developments.”<sup>48</sup> This extreme statement cannot be reconciled with the guidelines in section 58.17.110.

If the municipality may deny a plat where adequate provision is not made for public services, the municipality should be able to stop short of an outright denial and, instead, condition approval on the developer’s providing the necessary public services. In effect, this is what occurs in many situations through informal negotiations between a developer and a municipality. If a developer seeking plat approval knows of deficiencies in existing public services, the developer will likely offer to provide at least a part of the needed improvements in order to gain approval.

Furthermore, the provision in section 58.17.110 allowing mandatory dedication should be interpreted so as to permit a municipality to require payment of fees. At the least, compulsory fees should be allowed for improvements such as parks, schools, or boundary roads in cases where dedication is not feasible.<sup>49</sup>

The stated purpose of chapter 58.17 is in part “to prevent the overcrowding of land; to lessen congestion in the streets and highways; to promote effective use of land; . . . to facilitate adequate provision for . . . parks and recreation areas, sites for schools and schoolgrounds and other public requirements.”<sup>50</sup> Consistency with the spirit and intent of the dedication provision in section 58.17.110 would allow the compulsory payment of fees in lieu of dedication of land.

#### *B. The Relationship Between the New State Statute and Section 58.17.110 of the Revised Code of Washington*

Section 58.17.110 of the Revised Code of Washington provides that “[d]edication of land to any public body, may be required as a condition of subdivision approval and shall be clearly shown on the final plat.”<sup>51</sup> The new statute explicitly states that it “does not preclude” mandatory dedication of land as a condition of plat approval pursuant to section 58.17.110.<sup>52</sup> The new law apparently seeks to limit the power of municipi-

48. *Hillis Homes*, 97 Wn. 2d at 810, 650 P.2d at 196.

49. This problem arises most frequently with small subdivisions. For example, a county cannot feasibly require dedication of park land unless the subdivision is large enough to yield a reasonably sized park. The solution for small subdivisions is to require payment of a fee into a park fund; when sufficient funds accumulate, park land can then be purchased to serve contributing subdivisions. This was the approach of the New York court in *Jenad, Inc. v. Village of Scarsdale*, 18 N.Y.2d 78, 84, 218 N.E.2d 673, 676, 271 N.Y.S.2d 955, 958 (1966).

50. WASH. REV. CODE § 58.17.010 (1983).

51. *Id.* § 58.17.110.

52. *Id.* § 82.02.020.

palties to require dedication by restricting dedications to those within the proposed subdivision that are “reasonably necessary as a direct result of the proposed development or plat.”<sup>53</sup> Section 58.17.110 does not contain this restrictive language.

Although the new statute appears to limit the scope of section 58.17.110, it does not appear to amend that section.<sup>54</sup> Because the new law primarily involves the imposition of fees, the reference to section 58.17.110 more likely merely identifies an existing limit on the reach of the new prohibition. Some land use lawyers feel that the restrictions on land dedication mentioned by the new law (that is, that it be reasonably necessary as a direct result of the proposed development) were already implicit in the land dedication provision of section 58.17.110.<sup>55</sup>

### C. Provision for Voluntary Agreements

The “voluntary agreement” provision of the new statute may have the greatest impact on a municipality’s power to regulate development. While prohibiting development fees in general, the statute allows “voluntary agreements” between a municipality and a developer.<sup>56</sup> The concept of voluntariness is an uncertain one, however, and encompasses a wide range of behavior. On the one hand, since land development is generally a profit-oriented business, few if any developers will spontaneously offer to pay a fee for public improvements. On the other hand, if the choice is between payment of fees and plat or permit disapproval, many developers

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53. *Id.*

54. If section 58.17.110 was in fact changed, the legislature violated the state constitutional requirement that the text of any amended statutory section be set forth in full in the new enactment. WASH. CONST. art. 2, § 37. This constitutional provision states that “[n]o act shall ever be revised or amended by mere reference to its title, but the act revised or the section amended shall be set forth at full length.” The state supreme court has stated:

“[This section] was undoubtedly framed for the purpose of avoiding confusion, ambiguity, and uncertainty in the statutory law through the existence of separate and disconnected legislative provisions, original and amendatory, scattered through different volumes or different portions of the same volume.” . . . Another important purpose . . . is the necessity of insuring that legislators are aware of the nature and content of the law which is being amended and the effect of the amendment upon it.

*Flanders v. Morris*, 88 Wn. 2d 183, 189, 558 P.2d 769, 773–74 (1977) (quoting *State ex rel. Gebhardt v. Superior Court*, 15 Wn. 2d 673, 685, 131 P.2d 943, 949 (1942)).

The new statute, explicitly amending section 82.02.020, did not explicitly purport to amend or modify section 58.17.110. The potential uncertainty as to the relationship between these two sections, which are located in widely separated titles of the code, would be just the kind of confusion which the constitutional requirement seeks to remedy.

55. Speech by John W. Hempelmann, quarterly meeting of the Environmental and Land Use Law Section of the Washington State Bar Ass’n (Mar. 2, 1983) (notes on file with the *Washington Law Review*).

56. WASH. REV. CODE § 82.02.020 (1983).

will “voluntarily” pay the fees. Adopting the latter approach, any payment of fees by a developer automatically satisfies the definition of “voluntary” because the developer clearly chose payment as the lesser of two evils.

“Voluntary agreements” under the new statute are likely to be at least somewhat coercive because the municipality will have the threat of plat or permit denial as a bargaining tool. If a municipality fulfills all of the other requirements of the new provision (that is, shows that the fee is to mitigate a direct impact, and is reasonably necessary as a direct result of the proposed development),<sup>57</sup> the municipality may then “require” that the developer voluntarily agree to the fee payment. This interpretation of “voluntary,” whereby municipalities retain control over subdivision approval, comports with municipalities’ traditional police power authority to regulate local land development activities. Use of the word “voluntary” is not strictly appropriate in this context.<sup>58</sup>

The voluntary agreements provided for in the new law allow payments for two purposes: (1) in lieu of dedication of land, and (2) to mitigate a direct impact of the proposed development.<sup>59</sup> In either case, the burden is on the municipality to establish that the fee is “reasonably necessary as a direct result of the proposed development or plat.”<sup>60</sup> These two categories are discussed individually below.

### 1. *Fee in Lieu of Dedication of Land*

Prior to the enactment of the new statute, the only statutory provision governing dedication of land, section 58.17.110, did not specifically require that the need for the land dedication be a direct result of the proposed plat.<sup>61</sup> The voluntary agreement provision in the new law does appear to impose such a requirement. The impact of this provision for voluntary payment of fees in lieu of dedication on the ability of municipi-

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57. See *infra* notes 64–67 and accompanying text.

58. In his article on subdivision exactions, Professor Johnston stated that “[i]t is pure sophistry to characterize as ‘voluntary’ any exaction which is expressly required as a condition precedent to plat approval, when plat approval itself is a prerequisite for recordation.” Johnston, *supra* note 1, at 878.

When the new statute was discussed in the Washington legislature before its enactment, one representative questioned the meaning of “voluntary agreement” in the provision. HOUSE JOURNAL OF THE FORTY-SEVENTH LEGISLATURE OF THE STATE OF WASHINGTON 1417 (1981–82) (floor discussion of Engrossed S. 4972). The answer given by another legislator was unresponsive. *Id.*

59. WASH. REV. CODE § 82.02.020 (1983).

60. *Id.* The statute further requires that any fees collected pursuant to such a voluntary agreement be held in a special account to be spent on an agreed-upon capital improvement within five years or else refunded. *Id.*

61. See *supra* note 22 and accompanying text.

palties to require the payment of such fees will depend to a large extent on how the courts interpret the term “direct result.”

Courts could interpret this term to mean that individualized determinations must be made in each case as to whether payment of a fee in lieu of dedication of land is reasonably necessary and, if so, the amount of money that should be required. This interpretation would prevent municipalities from enacting ordinances establishing a specific rate for calculating the amount of money to be required for a particular development (for example, a set percentage of the total land value of the development, or a set number of dollars for a given number of dwelling units or a given projected population).<sup>62</sup> Such a set rate could not take into consideration individual characteristics of a specific development (for example, the amount of open space already planned within the subdivision, proximity to existing parks, or predicted school-age population).<sup>63</sup> Demonstrating that a particular amount of land or money was reasonably necessary as a “direct result” of a particular new development would be a difficult burden for a municipality to carry.

If the statute were interpreted to require an individualized determination, municipalities would have to devise a formula incorporating individual characteristics such as those mentioned above, or make an individualized determination for each project. Either of these two methods would increase the time and expense required of municipalities and would make the process more subjective and therefore more open to attack by unwilling developers.

### 2. *Fee to Mitigate a Direct Impact*

Regardless of any dedication of land or fee in lieu of dedication, the new statute also allows voluntary agreements whereby developers pay a fee to mitigate a direct impact of the new project.<sup>64</sup> The municipality

62. The ordinances struck down by the court in *Hillis Homes* imposed a set fee per subdivision lot. See *supra* Part IC1. Most municipalities in other jurisdictions have similarly established a formula to calculate the fee due. See, e.g., *Collis v. City of Bloomington*, 310 Minn. 5, 246 N.W.2d 19, 21 (1976) (fee equal to 10% of value of land being subdivided); *Jenad, Inc. v. Village of Scarsdale*, 18 N.Y.2d 78, 82, 218 N.E.2d 673, 674–75, 271 N.Y.S.2d 955, 956 (1966) (fee of \$250 per lot); *Berg Dev. Co. v. City of Missouri City*, 603 S.W.2d 273, 274 (Tex. Civ. App. 1980) (fee equal to value of land at rate of one-half acre for every 150 new residents).

63. The California Supreme Court concluded in dictum that, even if a subdivision were planned near an existing park, the municipality was justified in assessing a fee for development of additional park facilities elsewhere in the community. *Associated Home Builders, Inc. v. City of Walnut Creek*, 4 Cal. 3d 633, 640 n.6, 484 P.2d 606, 612 n.6, 94 Cal. Rptr. 630, 636 n.6, *appeal dismissed*, 404 U.S. 878 (1971). The court observed: “The subdivider who deliberately or fortuitously develops land close to an already completed park diminishes the supply of open land and adds residents who require park space within the city as a whole.” *Id.*

64. WASH. REV. CODE § 82.02.020 (1983).

must establish that the fee is "reasonably necessary as a direct result" of the project.<sup>65</sup> The "direct impact" and "reasonably necessary as a direct result" criteria probably overlap considerably, imposing essentially the same burden on municipalities trying to sustain such fees.

The term "direct impact" is not defined in the statute. The interpretation of this term will determine the extent of a municipality's power to require payment of fees. The range of questions raised include: Must the improvement for which the fee is designated be necessitated solely by the particular development? Must any monies collected be spent solely for the benefit of the particular development? May the costs for an improvement, the need for which is a result of a number of projects, be apportioned among those projects, thus requiring each developer to pay a proportionate share of the total cost?<sup>66</sup> The general tone of the new statute is one of adversity to most development fees. Thus, the provision concerning payment of fees to mitigate direct impacts will probably be narrowly interpreted.<sup>67</sup> Municipalities will not be able to require developer contri-

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65. *Id.* An example might be a fee to help pay for road improvements off the development site, where traffic forecast to be generated by the new development is an identifiable cause of the need for the improvements.

The "direct impact" of a subdivision development can be analogized to the spillover effects from polluters. In an analysis of either situation, the same question arises: how should the economic costs of development impacts or pollution effects, respectively, be allocated? *See generally* W. RODGERS, HANDBOOK ON ENVIRONMENTAL LAW § 1.2, at 6 (1977); Michelman, *Pollution as a Tort: A Non-Accidental Perspective on Calabresi's Costs* (Book Review), 80 YALE L.J. 647, 666-86 (1971).

66. These questions are similar to those faced by courts in other jurisdictions assessing the constitutional and statutory authority for particular subdivision exactions. *See generally* Johnston, *supra* note 1, at 903-21 (discussing the theoretical basis for imposing exactions for parks and school facilities, and the judicial response to such exactions).

67. At least one new local regulation has been enacted since the new statute was passed. The Snohomish County Council adopted a revised road ordinance on May 11, 1982, just 17 days after the state legislature enacted the new statute concerning development fees. Snohomish County, Wash., Ordinance 82-029 (codified at SNOHOMISH COUNTY, WASH., CODE tit. 26B (1982)). The 1982 ordinance constitutes a reorganization, with some modifications, of the original road ordinance enacted in 1979. Although the new ordinance does not specifically mention the new state statute as enabling authority, some language in the ordinance was taken verbatim from the statute. *See* SNOHOMISH COUNTY, WASH., CODE § 26B.55.080 (1982) (requiring that fees be held in a reserve account, and expended within five years or else refunded).

The new ordinance requires that developers take certain remedial actions prior to land use approval if their developments will decrease the levels of service on roads within the development site or between the site and the nearest state highway. *Id.* §§ 26B.51.080, .52.010. The ordinance delineates procedures for the preparation of a comprehensive traffic study including a projection of future traffic volumes. *Id.* ch. 26B.53. Depending upon the severity of traffic conditions anticipated after development, the developer may be required to fund certain improvements, pay a fee to the county, and/or participate in a road improvement district. *Id.* ch. 26B.55. Although a developer in some instances may choose which option to fulfill, the general obligation under the ordinance is mandatory despite the "voluntary agreement" language in some provisions. *See id.* § 26B.55.040(1).

The Snohomish County Department of Public Works has been imposing obligations on developers under the revised road ordinance since 1982. No legal actions have been instituted challenging the new ordinance. Telephone interviews with Sue Tanner, Snohomish County Deputy Prosecutor (Jan.

butions toward the general costs of providing increased public services to an expanding population.

*D. The Relationship Between the New State Statute and the State Environmental Policy Act*

The new statute may also affect a municipality's power to regulate land development under the State Environmental Policy Act (SEPA).<sup>68</sup> Under SEPA, a municipality may deny or conditionally approve a proposed project based on negative environmental impacts.<sup>69</sup> SEPA thus authorizes a municipality to approve a subdivision application subject to a requirement that the developer pay a fee to mitigate "specific adverse environmental impacts."<sup>70</sup>

If the developer does not view the terms of the conditional approval as a "voluntary agreement," the fee requirement apparently violates the new statute. Using SEPA, however, a municipality can circumvent the new statute. For example, the municipality could deny plat approval due to adverse environmental impacts<sup>71</sup> and identify the negative impacts in the denial document; the developer could then submit an application for a modified proposal, which includes as part of the proposal an offer to pay a fee to mitigate the negative impacts; the municipality could then accept the developer's offer to enter into a "voluntary agreement" and approve the application. The addition of these superfluous procedural steps satisfies the technical requirements of the new statute yet allows the municipality to collect a fee.

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11, 1984) and Johannes Kurz, Transportation Planning Supervisor, Snohomish County Dep't of Public Works (Feb. 7, 1984) (notes on file with the *Washington Law Review*).

68. WASH. REV. CODE ch. 43.21C (1983).

69. *Id.* § 43.21C.060; Department of Natural Resources v. Thurston County, 92 Wn. 2d 656, 663-64, 601 P.2d 494, 498 (1979) (upholding county's denial of a plat due to adverse impacts on an eagle habitat), cert. denied, 449 U.S. 830, appeal dismissed sub nom. Lake Lawrence, Inc. v. Thurston County, 449 U.S. 802 (1980); Polygon Corp. v. City of Seattle, 90 Wn. 2d 59, 65, 578 P.2d 1309, 1313 (1978) (upholding city's denial of a building permit due to adverse visual, economic, and land use impacts identified in an environmental impact statement); Brown v. City of Tacoma, 30 Wn. App. 762, 766-68, 637 P.2d 1005, 1008 (1981) (upholding city's issuance of a declaration of nonsignificance conditioned on proponent's agreement to include specific mitigating measures to minimize erosion and noise).

70. WASH. REV. CODE § 43.21C.060 (1983). Such action by a municipality is subject to the following additional requirements: the impacts must be identified in the environmental documents prepared under SEPA (environmental checklist, declaration of significance or nonsignificance, draft and/or final environmental impact statement); the conditions imposed must be stated in writing by the decisionmaker; and the condition must be based on policies identified by the municipality and incorporated into regulations, plans, or codes. *Id.*

71. The municipality could take this action either under SEPA, *see supra* note 69 and accompanying text, or under WASH. REV. CODE § 58.17.110 (1983) if the impact is such that the municipality

Because of this anomaly and potential constitutional problems, a court would probably hold that the new statute does not modify a municipality's substantive SEPA authority.<sup>72</sup> Therefore, in situations where an environmental checklist and/or environmental impact statement is required,<sup>73</sup> a municipality could continue to require payment of a fee pursuant to SEPA authority.

### III. CONCLUSION

The new state statute concerning development fees restricts the extent to which Washington municipalities can require developers to pay for public improvements. Mandatory dedication of land authorized by section 58.17.110 of the Revised Code of Washington is still permitted, and a municipality's substantive authority under SEPA to deny or conditionally approve development applications is preserved. But in order for a municipality to require the payment of a fee outside of its SEPA authority, it must meet the requirements of the "voluntary agreement" provisions in the new statute.

Given the general attitude of the Washington Supreme Court in *Hillis Homes*, courts are likely to construe narrowly the exceptions to the general prohibition in the new statute. The municipalities bear the burden of demonstrating that the payments are "reasonably necessary as a direct result" of the proposed development. The success of a municipality's ef-

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concludes that the plat does not make appropriate provisions for one or more of the public services listed in that section. See WASH. REV. CODE § 58.17.110 (1983).

72. If the new statute was intended to modify SEPA by prohibiting municipalities from issuing plat or permit approvals conditioned on mitigation of negative environmental impacts, the statute violates WASH. CONST. art. 2, § 37 because it fails to explicitly amend SEPA. See *supra* note 54 and accompanying text. Furthermore, WASH. CONST. art. 2, § 19 provides that "[n]o bill shall embrace more than one subject, and that shall be expressed in the title." The new statute is entitled "AN ACT Relating to local government finance . . ." Act of Apr. 20, 1982, ch. 49, 1982 Wash. Laws 1st Ex. Sess. 1374, 1374. Although a comprehensive title encompassing a number of sub-subjects is permissible, *Casco Co. v. P.U.D. No. 1*, 37 Wn. 2d 777, 789, 226 P.2d 235, 241-42 (1951) (citing *Mars-ton v. Humes*, 3 Wash. 267, 275-76, 28 P. 520, 523 (1891)), some "rational unity" must exist between the title subject and the incidental subjects. *Water Dist. No. 105, King County v. State*, 79 Wn. 2d 337, 341, 485 P.2d 66, 69 (1971). Here, it is at least questionable whether a "rational unity" exists between the title subject of local government finance and the subject of municipalities' authority to conditionally approve plat or permit applications under SEPA.

73. WASH. ADMIN. CODE R. 197-10-170 (1980) lists a number of activities which are categorically exempt from the threshold determinations and environmental impact statement requirements of SEPA. Thus, a municipality would have no SEPA authority over these activities.

On January 26, 1984, the Washington State Department of Ecology adopted new rules and guidelines interpreting and implementing SEPA. The new regulations repeal ch. 197-10 of the Washington Administrative Code and replace it with a new chapter, ch. 197-11, making some changes to the list of activities categorically exempt from SEPA. Telephone interview with Barbara Ritchie, Environmental Review Section, Washington Dep't of Ecology (Feb. 10, 1984) (notes on file with the *Washington Law Review*).

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orts to require developer contributions will depend on whether the requirements are adequately packaged to satisfy this burden.

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