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Subdivision Control in South Carolina

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SUBDIVISION CONTROL IN SOUTH CAROLINA†

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I. OBJECTIVES OF SUBDIVISION CONTROL

The objectives of subdivision control are essentially the same as those of comprehensive zoning, which are usually said to be: to promote, improve and protect the public health, safety, morals, order, appearance, land values and general welfare of the community; to protect property against blight and depreciation; to promote desirable living conditions and the sustained stability of neighborhoods; to encourage the most appropriate use of land and buildings; and to conserve the value of land and buildings.[1] Actually, these are the general objectives of the concept of community planning, and zoning and subdivision controls are but two legal instruments devised to implement the planning program.

Subdivision control is an important tool in the program of community planning. Although zoning is older and much broader in scope and effect, subdivision control is increasingly necessary to urban development as private developers build huge residential tracts that establish land use patterns which endure for years through the creation and installation of streets, utilities, water and sewage systems, and parks and open spaces (or the lack thereof). Through the proper exercise of the police power, such development can be guided, as aptly expressed in *Mansfield & Swett, Inc. v. West Orange*:[2]

> Planning confined to the common need is inherent in the authority to create the municipality itself. It is as old as government itself; it is of the very essence of civilized society. A comprehensive scheme of

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1. *E.g.,* S.C. CODE ANN. §14-350.16 (Supp. 1970).
2. 120 N.J.L. 145, 198 A. 225 (Sup. Ct. 1938).

> physical development is requisite to community efficiency and progress. To particularize, the public health, safety, order and prosperity are dependent on the proper regulation of municipal life. The free flow of traffic with a minimum of hazard of necessity depends upon the number, location and width of streets, and their relation to one another, and the location of building lines; and these considerations likewise enter into the growth of trade, commerce, and industry. . . . We are surrounded with the problems of planless growth. The baneful consequences of haphazard development are everywhere apparent. There are evils affecting the health, safety, and prosperity of our citizens that are well-nigh insurmountable because of the prohibitive corrective cost.[3]

The Comprehensive Planning Act of South Carolina,[4] states that subdivision regulations are designed to accomplish the following objectives:

> (1) To encourage the development of economically sound and stable municipalities and counties;
>
> (2) To assure the timely provision of required streets, utilities, and other facilities and services to new land developments;
>
> (3) To assure the adequate provision of safe convenient traffic access and circulation, both vehicular and pedestrian, in and through new land developments;
>
> (4) To assure the provision of needed public open spaces and building sites in new land developments through the dedication or reservation of land for recreational, education, and other public purposes, and
>
> (5) To assure in general the wise and timely development of new areas, in harmony with the comprehensive plan of municipalities and counties.[5]

More specifically, subdivision regulations undertake to require developers to do the original work of installing the streets, drainage facilities, water and sewage systems, and utilities in proper condition and in coordination with existing services and planned routes. At least indirectly, most regulations prevent or discourage fraud on purchasers by simplifying records and preventing confusion in land descriptions.

On the other hand, the regulations are not supposed to be concerned with the advantage or detriment of a subdivision to a particular neighboring property owner, but rather the effect upon the entire community as a social, economic and political unit. Thus, a proposed subdivision plan cannot be rejected by the planning commission simply

3. *Id.* at 150-51, 198 A. at 229.
4. S.C. CODE ANN. §§14-341 to 350.46 (Supp. 1970).
5. *Id.* §14-350.29.

because certain adjacent landowners do not want a subdivision established in the vicinity.[6] Furthermore, although one of the objectives of subdivision control is "the wise and timely development of new areas,"[7] it is doubtful that a planning agency can reject a proposed subdivision plan on the ground that the development is "economically unfeasible" or that the demographic projections of the community do not indicate enough influx of people in that area of the community to justify the development at the particular time.

II. POWER TO IMPOSE SUBDIVISION REGULATIONS

Regulation and control of subdivision activity is the responsibility of the municipality or county governing authority. Since these governing bodies are statutory creations, they have no powers other than those which are expressly granted by the legislature, or else necessarily implied therefrom. Accordingly, they must perform their prescribed activities within the statutory ambit.[8] Although the question has never arisen in this state, it is quite clear that the local governing authority has no power to regulate land subdivision without adopting the applicable provision of its state enabling legislation.[9] Once the locality has adopted regulations pursuant to the enabling act of the state, subdivision control must thereafter be exercised only through the avenues provided by law, and any deviation or circumvention is illegal.[10]

Litigation is rare in which the authority of a municipality or county governing body to impose subdivision controls has been broadly challenged. This is usually attributed to the fact that zoning was commonplace before subdivision regulation came into widespread use. Courts have noted that similarity between these kinds of land-use controls, and the approval of subdivision regulation has sometimes been supported by such analogy. Thus, subdivision controls have been consistently upheld where they have been tested.[11]

6. E. YOKLEY, THE LAW OF SUBDIVISIONS 121 (1963) [hereinafter cited as YOKLEY].

7. S.C. CODE ANN. §14-350.29(5) (Supp. 1970).

8. YOKLEY §4.

9. Gruber v. Mayor & Township Committee, 68 N.J. Super. 118, 172 A.2d 47 (Super. Ct. 1961).

10. YOKLEY §4.

11. 3 R. ANDERSON, AMERICAN LAW OF ZONING §19.04 (1968) [hereinafter cited as ANDERSON].

The power to impose subdivision regulations, like zoning, is predicated on that part of the state's police power which may be delegated to its political subdivisions. Without this regulation the haphazard development of subdivisions would accentuate problems relating to streets, traffic safety, water and sewer services, and public health—all of which are proper subjects of police power regulation.

All states have enabling legislation authorizing the promulgation of local subdivision regulations. Although the various statutes differ in detail, most of them are similar in fundamentals, having been derived from the early model acts of Bettman and Bassett and Williams.[12] Both of these models provided that the planning commission rather than the legislative authority exercise the plat approval power, and this has been the pattern of most subdivision enabling legislation including that of South Carolina.

The present enabling law in this State is sections 14-350.28—14-350.38,[13] part of the Comprehensive Planning Act of 1967. Earlier legislation enabling the regulation of subdivisions in counties is found in section 14-351 et seq., and earlier enabling statutes for municipalities is in section 47-1001 et seq., and sections 47-699.158—47-699.161. The 1967 Act does not repeal these older laws but rather is intended to provide the basis for all new ordinances. Thus, the new law in no way affects the validity of the earlier legislation or the several ordinances adopted thereunder.

The focus of this text is primarily on the 1967 Act because it is the enabling legislation now being used. But this analysis is not irrelevant to those areas operating under the older acts. The rules are generally the same except where some valid provision of any earlier legislation is expressly to the contrary.

III. IMPOSITION OF CONDITIONS

A. *In General*

It is well settled that, as a condition precedent to the approval of subdivision plats or plans, reasonable conditions may be imposed by the ordinance and implemented by the staff of the planning commission. These requirements can

12. *Id.* §19.05.

13. S.C. CODE ANN. §§14-350.28-.38 (Supp. 1970).

pertain to provision for streets, curbs and gutters, water and sewer systems, drainage, and other facilities that tend to create conditions favorable to the safety and convenience of the residents and of the general community.[14] The ability to impose conditions affords the community its last opportunity to insure that the new development will be served by proper water, sewage and utilities systems and will comport with the land-use plan of the community, and to require that the subdivider absorb the cost, or some of the cost, of providing essential services to the residents of the new area.

Although the subdivision approval process is clothed in legal standards and has several formal stages — including notice and public hearing — the heart of the review process is the dialogue between the planning commission staff and the subdivider and his engineer. The author of a major treatise on land regulation has appropriately described the actual method by which conditions are applied:

> Most municipalities provide a two-step procedure which includes a preliminary or tentative approval, followed by final approval of the plat. Preliminary approval commonly is a product of examination of a preliminary plat and other information furnished by the subdivider, examination of the site and its environs, the hearing, and conferences with the subdivider. While a determination of compliance with the official map, the master plan, and the zoning regulations may be a relatively simple matter, the application of many of the standards articulated in the subdivision regulations (or in the enabling acts) may be more difficult. These may range from the installation of fire alarm boxes to the design and location of one-way streets, and may include paving specifications, drainage systems, sanitary sewers, recreational space, and numerous other improvements. The need and the cost will vary widely from one subdivision to another.
>
> The common practice is to confer at length with the subdivider and finally to articulate the specific application of standards in the form of conditions for approval of his plat. In other words, approval of the plat is conditioned upon specific changes in his design, the installation of specified improvements, and sometimes the reservation or dedication of land for certain public purposes . . .
>
> From the developer's point of view, the economics of his venture require that he pass the cost of meeting these conditions to the purchaser of his lots or homes. Accordingly, he will submit to the conditions which permit him to develop the land at a projected profit, but he will litigate if the conditions render development unprofitable, or less

14. Ayers v. City Council, 34 Cal. 2d 31, 207 P.2d 1 (1949); Exchange National Bank v. Lake Forest, 40 Ill. 2d 281, 239 N.E.2d 811 (1968); Sansoucy v. Planning Board, 246 N.E.2d 811 (Mass. 1969).

> profitable than his minimum expectation. [T]he cost of satisfying a condition is at the center of every dispute.[15]

The power to impose conditions is derived from a state's enabling act. Thus, a condition for approval can be imposed only if it is authorized by the statute.[16]

In South Carolina, the new Comprehensive Planning Act sets forth in some detail the conditions that subdivision regulations must or may contain.[17] All regulations adopted pursuant to the Act *must* prescribe that no subdivision plan will be approved unless all land intended for use as building sites can be used safely for building purposes without danger from flood or other menaces to health and safety. In addition, the regulations *may* provide for the harmonious development of the municipality and the county; for the coordination of streets within subdivisions with other existing or planned streets or official map streets; for the size of blocks and lots; for the dedication or reservation of land for streets, school sites, and recreation areas and of easements for utilities and other public services and facilities; and for a distribution of population and traffic which will tend to create conditions favorable to health, safety, convenience, prosperity or general welfare. More specifically, the statute states that the regulations . . .

> may include requirements as to the extent to which and the manner in which streets shall be graded, surfaced, and improved, and water, sewers, septic tanks, and other utilities mains, piping, connections, or other facilities shall be installed as a condition precedent to the approval of the plat.[18]

B. *Streets*

The South Carolina enabling legislation provides that subdivision regulations may require streets to be graded, surfaced and improved in proper fashion as a prerequisite to plat approval.[19] This is the most common condition to plat approval throughout the country, and is everywhere upheld as reasonable. These requirements are intended (1) to protect purchasers in the subdivision by providing adequate ingress

15. ANDERSON §19.24 (footnotes omitted).

16. Beach v. Planning & Zoning Comm'n, 141 Conn. 79, 103 A.2d 814 (1954); Castle Estates v. Park & Planning Bd., 344 Mass. 329, 182 N.E.2d 540 (1962).

17. S.C. CODE ANN. §14-350.30 (Supp. 1970).

18. *Id.*

19. *Id.*

and egress; (2) to advance the objectives of the community plan and the street patterns as set forth in the official map; and (3) to protect the local government from the financial burden of constructing additional streets into particular areas every time a new private development originates, and of having to continuously repair poorly-constructed streets.

Normally, the regulations require that streets shown on the plat be of at least a certain width and design. For example, the commission can require that there be no dead-ends, that the right-of-ways be at least 50 feet, that intersections not contain "jogs," that streets not be built parallel with contour lines, that streets not be built directly up steep slopes if avoidable, etc. These problems are usually resolved satisfactorily in conference, and have not been widely litigated. Where width and design requirements have been contested, they have been upheld.[20]

Another commonly-used condition to plat approval is the improvement of streets. Most regulations require the developer, at his expense, to grade and pave the streets according to stated specifications, and to install gutters, curbs, culverts, drainage structures, and other necessary devices. The leading case of *Brous v. Smith*[21] upheld a regulation which required suitably paved streets as a precondition to home construction, and the other cases on point have followed this view.[22] The requirement that the developer absorb the costs of street installation and improvement does not constitute a "taking" in the constitutional sense; it is a reasonable condition to the privilege of subdivision, the purposes of which are to insure adequate access for the residents of the new subdivision and to protect the municipality from the exceptional expense of maintaining substandard avenues open and safe for travel.

The common practice is for the developer to dedicate to the public the streets in his subdivision. Such an action gives the public the land without cost and relieves the developer of tax and maintenance costs and liabilities relating to the land.

20. Garvin v. Baker, 59 So. 2d 360 (Fla. 1952); Petterson v. Naperville, 9 Ill. 2d 233, 137 N.E.2d 371 (1956); Baltimore v. Princeton Constr. Co., 229 Md. 176, 182 A.2d 803 (1962); Church of Sts. Peter & Paul v. Lake George, 252 Minn. 209, 89 N.W.2d 708 (1958); Noble v. Township Comm., 91 N.J. Super. 111, 219 A.2d 335 (Super. Ct. 1966).

21. 304 N.Y. 164, 106 N.E.2d 503 (1952).

22. ANDERSON §19.34.

Rarely does a subdivision contain private thoroughfares. The question whether a developer can be *compelled* to dedicate his streets (without compensation) is rarely litigated since most developers are eager to relinquish all responsibilities for these areas once they have been cut and improved. The courts of most states that have considered the matter have held that a subdivider can be required to dedicate land for street purposes provided the need for new (or wider) streets is specifically and uniquely attributable to activity which arises from the subdivision. On the other hand, if there is no anticipated change in activity which will be attributable to the proposed subdivision, a requirement that land be dedicated for new public roadways is invalid.[23]

C. *Water*

The installation of water facilities is clearly essential to the health and safety of the community. Most communities require the installation of water systems and demand that such facilities be constructed according to adopted specifications.[24] Because the capital outlay for such systems can be large, there has been some litigation on the reasonableness of particular requirements, but the right to compel installation of water supplies is rarely questioned.

Generally, the regulations require the subdivider to install water mains throughout the tract, and the lines are connected to the public water system. If the enabling legislation permits it (as does section 14-350.30[25] in South Carolina), the few

23. Ayers v. City Council, 34 Cal. 2d 31, 207 P.2d 1 (1949); Hudson Oil Co. v. Wichita, 193 Kan. 623, 396 P.2d 271 (1964). (For a more detailed consideration of the dedication process, see Part IV. *infra*). In a survey of South Carolina communities and ten selected out-of-state cities and counties in the southeast, conducted by the author in July-August, 1970, all agencies reported that their regulations required installation of streets as a prerequisite to plat approval. Most communities require the streets to be paved and otherwise improved according to specified standards, but a small number of localities (all in South Carolina) stated that in some cases paving is not necessary. In Greenville, Aiken and Spartanburg, the city bears part of the cost of street improvement, but in other reporting localities in the state the developer absorbs all the expenses. (Of the out-of-state agencies, Charlotte and Atlanta report cost-participation or reimbursement plans.) (For the questionnaire used in the survey see W. LEDBETTER, JR., SUBDIVISION CONTROL IN SOUTH CAROLINA app. (1970)).

24. Zastrow v. Brown, 9 Wis. 2d 100, 100 N.W.2d 359 (1960).

25. S.C. CODE ANN. §14-350.30 (Supp. 1970).

cases on the point allow local regulations to require the developer to absorb all costs of the waterlines.[26] In *Crownhill Homes,* the Texas court made the following statements:

> The authorities hold that the municipality has the right to impose conditions on subdivision development, including the "donation" of streets, alleys, drains, water mains, sewer mains and the like. . . . The overwhelming weight of authority is that such donation is not a taking of . . . property for public use without reimbursement. The exercise of governmental discretion to impose reasonable regulations as a condition for the use of property, or as a condition precedent to the subdivision of land, does not amount to a taking of private property for public use without just compensation.[27]

Of course, if a public water system is not accessible to the proposed subdivision, it would be unreasonable to disapprove a plat for failure to provide public water. In such cases—which are common in this State outside the urban areas—regulations require water systems to be installed that are connected to accessible service district lines, or require the devloper to make provision for multi-lot wells or individual pumps. These facilities must conform to the standards of the State Health Department rules for water supplies. The Department has promulgated regulations governing the development of subdivisions pursuant to section 32-8,[28] and enforces them through the county health departments. Thus, as a practical matter, planning agencies either do not regulate the water supplies, or they approve them pro forma if they satisfy the health authorities.

D. *Sewers*

Adequate sewage disposal is certainly a proper concern of local government under the police power delegated to it by subdivision control legislation. Thus, the installation of sewers can be required as a condition to the approval of a plat.[29] Such installations can be required to be in accordance with

26. *E.g.,* Crownhill Homes, Inc. v. San Antonio, 433 S.W.2d 448 (Tex. Ct. Civ. App. 1968).

27. *Id.* at 460. According to the survey conducted in July-August, 1970 (see note 23 *supra*), most communities require the developer to bear the expenses of installation of waterlines, but a few communities, e.g., Aiken, Raleigh (in some cases) and Atlanta, participate in the costs of such installations.

28. S.C. CODE ANN. §32-8 (Supp. 1970).

29. Allen v. Stockwell, 210 Mich. 488, 178 N.W. 27 (1920).

specifications and subject to periodic inspection by public officials.[30]

As in the case of water systems, sewer lines are generally installed throughout the tract and connected to the public sewer main at some point. Almost everywhere where public sewerage is available, private facilities and septic tanks are discouraged or prohibited.

In South Carolina, those communities which provide sewerage service require developers to hook on if the lines are within reach of the tract (e.g., within 500 feet of the property). In those numerous communities where no public sewers are provided, the regulations either do not regulate the sewage disposal or approve the facilities pro forma if they satisfy health authorities. The Rules and Regulations Governing the Development of Subdivisions,[31] promulgated by the State Department of Health, regulate private waste disposal systems. These rules are now implemented and enforced generally through the Pollution Control Authority, and generally require some sort of suitable neighborhood treatment equipment, oxidation pond or lagoon, and permit septic tanks only in infrequent instances of sizeable lots, proper soil conditions, and no access to municipal lines or service district lines.

In some of those areas that are not accessible to sewage lines, there has been a proliferation of private sewage facilities constructed by the developer and transferred to an uncapitalized utility corporation which has neither the personnel nor inclination to maintain the facilities properly. Where these facilities cause difficulty, litigation should be instituted against the corporation and the developer who established it (by "piercing the corporate veil" of the utility corporation). Such proceeding can be instituted, arguably, by the aggrieved purchasers in the subdivision, by the Pollution Control Authority, the Public Service Commission, or perhaps by the planning agency which approved the subdivision.[32]

30. Mefford v. Tulare, 102 Cal. App. 2d 919, 228 P.2d 847 (Dist. Ct. App. 1951).

31. State Board of Health Rules and Regulations, S.C. CODE ANN., vol. 17 at 189-92 (Supp. 1970).

32. The survey conducted in July-August, 1970 (see note 23 *supra*), indicates that all regulations in this state require developers to install proper sewage facilities, and to connect to public mains if they are available. Where public lines are inaccessible, the planning agencies defer to the Health Department or Pollution Control regulations in one way or another.

E. *Drainage*

In order to create conditions favorable to the health and safety of the residents, and to prevent inundation of properties,[33] subdivision regulations normally require as a condition to plat approval that storm drains be installed throughout the tract. These facilities are usually provided at the developer's expense, according to specifications established by the engineer of the municipality or county.[34] One case has held that the planning commission cannot arbitrarily reject drainage plans drawn by a competent engineer,[35] but this decision cannot be said to stand for the proposition that the subdivision regulations cannot establish reasonable engineering standards that must be adhered to by all developers.[36]

F. *Miscellaneous Installations*

In addition to the major improvements discussed in the preceding sections, subdivision regulations often require the developer to install street markers, curbs and gutters, fire-alarm devices and sidewalks, usually at the expense of the developer. In the few cases involving these items, the courts have upheld enabling legislation and local regulations which impose such installations as conditions to plat approval.[37]

G. *Exactions of Land for Streets, Parks, School Sites, Etc.*

1. *In General*

Of central importance in the system of subdivision control is the dedication or reservation of land for streets, alleys, drainage, water and sewage systems, and sometimes parks, schools, and open spaces. If developers had discretion as to width, design, and arrangement of streets and utilities, and as to whether any provision would be made for open space, drainage, etc., the communities would be plagued with nightmare patterns and problems. Even assuming that many developers would furnish their subdivisions with high quality

33. S.C. CODE ANN. §14-350.30 (Supp. 1970).

34. Brown v. Joilet, 108 Ill. App. 2d 230, 247 N.E.2d 47 (1969); Auto Acceptance, Inc. v. Allentown, 431 Pa. 121, 244 A.2d 722 (1968).

35. Kesselring v. Wakefield Realty Co., 306 Ky. 725, 209 S.W.2d 63 (1948).

36. The survey conducted in July-August, 1970 (see note 23 *supra*), indicates that all but two or three ordinances in South Carolina require adequate drainage facilities. Several communities surveyed (Richmond, Raleigh, Atlanta, Aiken and Spartanburg) assist in the cost of installation of drains.

37. *See* YOKLEY §58.

installations as inducements for purchase and as proud monuments to their developmental savvy, their notions of quality and arrangement may not comport with the plans established by the community planning agency which is charged with the responsibility of devising and implementing an overall plan suitable to all interests of the area. For these reasons, almost all subdivision regulations require these improvements as conditions of approval of plats, and compel their dedication to the public in most instances.

Dedication is a conveyance of an interest in land, a fee or an easement, to the government for a public purpose. The dedicator receives no compensation (the transfer is gratuitous) but usually this is done to achieve an end, such as plat approval. Dedication can be accomplished by statutory procedure in some states or pursuant to common law as in this and many other states.[38]

Reservation of land, sometimes required instead of dedication, is the setting aside of specified land for a public purpose. There is no conveyance but this procedure restricts the developer's right to use the reserved land. In this fashion, the local government gains protection of space needed for parks, schools, street extension, and the like, but the developer must be compensated for the land when the government decides to acquire it. In most subdivision regulations, the government must make a decision whether to utilize the land within a specified period of time (e.g., 90 days, six months, three years), or the developer can use the land as he had intended.

Whether planning agencies can exact dedication or reservation of land for various purposes and, if so, the limitations of such power of exaction, are questions that are popular topics of debate among planners and real estate lawyers today. Most developers are willing and eager to dedicate their streets and water and sewer mains to the public, so that they will be relieved of the taxes, maintenance costs, and landowner liability on that land; thus, the main battles are being waged over such things as parks, open spaces, and school sites. These latter items involve expensive "gifts" if the local authority can compel dedication of such areas as prerequisites to plat approval.

38. For a discussion of dedication, see Part IV *infra*.

Two rationales, similar but slightly different in approach, have received the most attention as attempts to provide a reasonable set of standards for the imposition of, and limitations of, subdivision land exactions.

The theory used most often in judicial decisions is one made popular by *Ayres v. City Council*[39] and *Pioneer Trust and Savings Bank v. Mount Prospect*,[40] among others. The question, said the Illinois Court in *Pioneer Trust*, is not one of desirability of parks, education or other public conditions, but rather, "one of determining who shall pay for such improvements. Is it reasonable that a subdivider should be required under the guise of a police power regulation to dedicate a portion of his property to public use; or does this amount to a veiled exercise of the power of eminent domain and a confiscation of private property behind the defense of police regulations?"[41] The Court then sought to answer the question by resort to this test:

> If the requirement is within the statutory grant of power to the municipality and if the burden cast upon the subdivider is specifically and uniquely attributable to his activity, then the requirement is permissible; if not, it is forbidden and amounts to a confiscation of private property in contravention of the constitutional prohibitions rather than reasonable regulation under the police power.[42]

This standard, which holds that the developer can be required to assume those costs which are "specifically and uniquely attributable" to his activity, and which would otherwise cast the expense upon the public, is the most widely used criterion. It lacks specificity and certainty, but it serves as a guide to planning agencies and courts in their thinking about exactions.

An attempt at a more sophisticated analysis using a dual test for determining the legitimacy of exactions has been urged by two authorities:

> [I]nsofar as dedications, activities, and expenditures are positively required of the subdivider, these requirements should be reasonably related to the subdivision in question and should concern types of improvement for which municipalities have generally been conceded the power to levy special taxes or assessments.
>
> The proposed test imposes two limitations upon the police power. The first, reasonable relation to the subdivision, is quantitive and

39. 34 Cal. 2d 31, 207 P.2d 1 (1949).
40. 22 Ill. 2d 375, 176 N.E.2d 799 (1961).
41. *Id.* at 381, 176 N.E.2d at 802.
42. *Id.*

spatial. The benefits to be conferred by the required improvements must inure directly to homeowners in the subdivision itself, and to the extent that they inure to outsiders, compensation is required. The second, that the improvement be one for which the municipality could generally levy special assessments, is qualitative, based upon the type of improvement concerned. These limitations intend to allow the taking of private property without compensation only insofar as it is justified by the underlying policy of subdivision legislation. . . .

The second limitation suggested above may be somewhat less clear; it purports to limit the power of the municipality insofar as the improvements required are of a type which cannot generally be financed by special assessment. Concerning this limitation, it should be noted that a subdivision is potentially a drain on many aspects of the municipal budget. It entails not only the extension of streets, sewers, and recreational areas, but also the extension of public school facilities, of police and fire protection, of various departments of sanitation. Arguably, therefore, the subdivider could, in proper circumstances, be compelled to construct a school building, or dedicate land for a fire station and, in all circumstances, to pay fees for his pro rata portion of any such extension. But the writers return to the special assessment analogy to point out that while installation of streets, sewers, and parks, have long been considered local in nature and financed by special assessment, public school buildings and fire stations have generally been thought to be so much a responsibility of the general public that such financing was not available. While special circumstances may make it inappropriate, this distinction seems a proper basis for limiting the municipality's constitutional power in the subdivision area, and it is thought to be borne out by decisional law.[43]

The concept of special assessments upon which the Reps-Smith theory[44] is based is in turn based on the doctrine:

> [T]hat the property against which it is levied derives some special benefit from the improvement; that while property is made to bear the cost of the improvement, it or its owner suffers no pecuniary loss thereby since the property is increased in value by an amount at least equal to the sum it is required to pay. . . . [A] special assessment can be levied only on land, is based wholly on benefits conferred and is exceptional both as to time and locality.[45]

Another approach, quite similar, is that expressed by Allison Dunham, a noted legal scholar. He makes the distinction between (1) preventing developers from using their property so as to cause harm to the community by burdening the community with their own external costs, and (2) charg-

43. Reps and Smith, *Control of Urban Land Division*, 14 SYRA. L. REV. 405, 407-10 (1963) (footnotes omitted).

44. *Id.*

45. State Highway Comm'n v. Topeka, 193 Kan. 335, 337-38, 393 P.2d 1008, 1010 (1964); LEFCOL, LAND DEVELOPMENT LAW 320 (1966).

ing to developers the community costs of regulations designed only to produce community benefits. The first notion is consistent with our traditions and any exactions within this category are valid; the latter is contrary to the just compensation provisions of the constitutions and exactions resting on such a basis are not sustainable.[46]

Many of the decisions discussed in the following sections do not fit any of the rationales described above, and some cases do not articulate any meaningful standard or justification for approving or disapproving a particular exaction. Nevertheless, these tests are being considered more in the recent cases and should be used by agencies and courts in this state in making decisions with respect to the legality of various land exactions.

2. *Streets*

Once the developer is saddled (in his view) with mandatory standards relating to width, paving, design and arrangement of streets, and most utility lines, he has no brief for retaining title to and responsibility for these areas. The subdivider usually parts with his interest in these areas without protest because dedication means that he is no longer liable for taxes on that land, he is not burdened with the cost of maintenance of the facilities, and he is no longer susceptable to landowner liabilities relating to the land.

Thus, the common practice is for subdividers to dedicate the land to be used for street purposes in the tract. So long as the enabling legislation permits compulsory dedication, the courts uphold denial of plat approval for failure to dedicate streets.[47] Similarly, the courts have upheld the requirement that the developer dedicate land to allow for street-widening

46. *See* Heyman and Gilhool, *The Constitutionality of Imposing Increased Community Costs on New Subdivision Residents Through Subdivision Exactions*, 73 YALE L. J. 1119 (1964) for a list and discussion of all of the tests that have been proposed. *See also* Johnston, *Constitutionality of Subdivision Control Exactions: The Quest for a Rationale*, 52 CORNELL L. Q. 871 (1967).

47. Ayres v. City Council, 34 Cal. 2d 31, 207 P.2d 1 (1949); Garvin v. Baker, 59 So. 2d 360 (Fla. 1952); Hudson Oil Co. v. Wichita, 193 Kan. 623, 396 P.2d 271 (1964); Ridgefield Land Co. v. Detroit, 241 Mich. 468, 217 N.W. 58 (1928).

to accommodate the increase of traffic caused by his subdivision.[48]

In South Carolina, section 14-350.30[49] authorizes required dedication:

> Such regulations may provide for . . . the dedication or reservation of land for streets . . . and other public services and facilities . . . .

3. *Parks and Recreational Areas*

Open space in the central cities disappeared before planners and land development experts realized what had happened. To avert this tragedy in the rapidly-developing suburbs, many municipalities in some parts of the country are requiring as a condition for plat approval the dedication or reservation of certain land for public use as a park or playground.

This requirement has given rise to more protests and, consequently, to more litigation, than forced dedication of streets and utility lines. Streets and sewage and water facilities are essential parts of every neighborhood and developers have little hesitancy about providing for them in some fashion. But parks and playgrounds are less common and, the developer usually reasons, should be added or omitted as his business judgment dictates. Besides, this argument would go, parks and playgrounds benefit the total community and should be purchased with general tax money, not exacted from private developers.

The courts that have considered the matter have found no basis for the position that such a public acquisition is a taking without just compensation and have resolved the matter in favor of legality.[50] The Montana Court, in *Billings Properties, Inc. v. Yellowstone County*,[51] reasoned that "if the subdivision creates the specific need for such parks and playgrounds, then it is not unreasonable to charge the subdivider with the burden of providing them."[52]

48. Newton v. American Sec. Co., 201 Ark. 943, 148 S.W.2d 311 (1941); Southern Pacific Co. v. Los Angeles, 242 Cal. App. 2d 38, 51 Cal. Rptr. 197 (Dist. Ct. App. 1966); Krieger v. Howard County, 224 Md. 320, 167 A.2d 885 (Ct. App. 1961).

49. S.C. CODE ANN. §14-350.30 (Supp. 1970).

50. Aunt Hack Ridge Estates, Inc. v. Planning Comm'n, 27 Conn. Supp. 74, 230 A.2d 45 (Super. Ct. 1967); Billings Properties, Inc. v. Yellowstone County, 144 Mont. 25, 394 P.2d 182 (1964); Jordan v. Menomonee Falls, 28 Wis. 2d 608, 137 N.W.2d 442 (1965).

51. 144 Mont. 25, 394 P.2d 182 (1964).

52. *Id.* at 33, 394 P.2d at 187.

In this state, section 14-350.30[53] provides for dedication of land for "recreational areas . . . and other public services and facilities," which surely includes parks and playgrounds. Whether this statutory provision is valid as constitutionally within the scope of police power, or is a taking without just compensation, has not been decided in this State and there are no analogies from which a prediction can be drawn.[54]

Subdivision regulations that provide for exactions in other jurisdictions require amounts ranging from three to twelve percent of the platted land.[55]

In some communities which use exactions to acquire space for parks, a further step has been taken: money in lieu of land. Because all land is not suitable for parks and recreation, the community requires the developer to pay an equivalent amount of money into a fund marked for park and recreational use. The amount is usually set at so much per lot, and some regulations figure the fee as a percentage of the assessed value of the land on the plat.

The courts are divided on the issue of exactions of money in lieu of land. Most of the decisions that disapprove the tactic argue simply that the agency's authority to require dedication[56] does not impliedly grant authority to require money payments.[57] The rationale for disapproval, other than merely lack of statutory authority, seems to be that the fund into which the money is to be paid is not specifically confined and limited to the benefit of the particular subdivision—it is used for parks all over the community, which are not "specifi-

53. S.C. CODE ANN. §14-350.30 (Supp. 1970).

54. The survey conducted in July-August, 1970, (*see* note 23 *supra*) did not locate any South Carolina county or municipality that requires dedication of land for parks as a condition to plat approval. Some communities encourage this practice in rapidly-growing suburbs and some communities use the reservation method whereby the developer is required to hold certain portions of his land for a specified period of time (e.g., 90 days, one year, etc.) to give the government or some agency thereof (*e.g.*, the school board or the parks commission) time to make a decision whether it should purchase the site for public use.

55. ANDERSON §19.39.

56. *See, e.g.*, S.C. CODE ANN. §14-350.30 (Supp. 1970).

57. Kelber v. Upland, 155 Cal. App. 2d 631, 318 P.2d 561 (Dist. Ct. App. 1957); Aunt Hack Ridge Estates, Inc. v. Planning Comm'n, 27 Conn. Supp. 74, 230 A.2d 45 (Super. Ct. 1967); Coronado Dev. Co. v. McPherson, 189 Kan. 174, 368 P.2d 51 (1962); Gordon v. Wayne, 370 Mich. 329, 121 N.W.2d 823 (1963).

cally and uniquely attributable" to the subdivision in question.

A few courts have approved the money exaction, relying essentially on the reasoning of *Jordan v. Menomonee Falls*:[58]

> The basis of upholding a compulsory land dedication requirement in a platting ordinance . . . is this: The municipality by approval of a proposed subdivision plat enables the subdivider to profit financially by selling the subdivision lots as home building sites and thus realizing a greater price than could have been obtained if he had sold his property as unplatted lands. In return for this benefit the municipality may require him to dedicate part of his platted land to meet a demand to which the municipality would not have been put but for the influx of people into the community to occupy the subdivision lots.[59]

The *Jordan* court also reasoned that:

> [I]n most instances it would be impossible for the municipality to prove that the land required to be dedicated for a park or a school site was to meet a need solely attributable to the anticipated influx of people into the community to occupy this particular subdivision. On the other hand, the municipality might well be able to establish that a group of subdivisions approved over a period of several years had been responsible for bringing into the community a considerable number of people making it necessary that the land dedications required of the subdividers be utilized for school, park and recreational purposes for the benefit of such influx. In the absence of contravening evidence this would establish a reasonable basis for finding that the need for the acquisition was occasioned by the activity of the subdivider.[60]

Thus, in justifying exactions of land for park purposes, the Wisconsin Court expressly repudiated the "specifically and uniquely attributable" test [61] as too stringent. In *Jenad, Inc. v. Scarsdale*,[62] the New York court overruled prior cases and upheld a land exaction declaring "[t]his is not a tax but a reasonable form of village planning for the general community good."[63]

4. *School Sites*

The dramatic increase in subdivision development has created the need for many new and expanded school facilities in the growing areas. To make provision for these educational

58. 28 Wis. 2d 608, 137 N.W.2d 442 (1965).

59. *Id.* at 619-20, 137 N.W.2d at 448.

60. *Id.* at 617-18, 137 N.W.2d at 447.

61. *See* notes 42 and 43 *supra* and accompanying text.

62. 18 N.Y.2d 78, 218 N.E.2d 673, 271 N.Y.S.2d 955 (1966).

63. *Id.* at 84, 218 N.E.2d at 676, 271 N.Y.S.2d at 958. *See also* Colorado Springs v. Kitty Hawk Dev. Co., 154 Colo. 535, 392 P.2d 467 (1964).

demands, some communities in other jurisdictions have attempted to pass much of the cost on to the developer (and, consequently, to the incoming residents) by requiring as a condition for plat approval that the developer dedicate certain land in the tract for school sites.

Unlike parks, recreational areas and open spaces, schools are seldom "specifically and uniquely attributable" to a particular subdivision. Further, schools, like most other public services unrelated to land, traditionally have been supported by general tax funds. For these reasons, land exactions for school purposes do not meet either of the two prevailing tests.[64] Thus, in the most frequently cited case, the Illinois Court held that a subdivider could not be compelled to dedicate a school site even though his development would undoubtedly "aggravate" the existing school situation.[65]

The exception to the above-stated rule is *Jordon v. Menomonee Falls*,[66] where the Court approved the requirement that a subdivider dedicate land for schools. There, the Court discarded the older "specifically and uniquely attributable" test and said that it is proper for a community to require a developer to provide land for expanded public facilities needed because of his *and other* subdivisions in the area.[67]

In a few jurisdictions where exactions are being used, some communities have tried to exact money in lieu of land from subdividers as a condition of plat approval. To justify this additional step in the exaction approach, it is said that this is preferable to the dedication of a small parcel in each subdivision because those sites would be inadequate in size and imperfectly located. Most of the cases conclude that the governing authorities and the planning agencies have no power to implement this technique.[68] A lower Illinois court

64. *See* notes 42 and 43 *supra* and accompanying text.

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

66. 28 Wis. 2d 608, 137 N.W.2d 442 (1965).

67. The survey conducted in July-August, 1970 (*see* note 23 *supra*) did not locate any South Carolina county or municipality which requires dedication of land for school purposes as a condition to plat approval. Some communities use the reservation method whereby the developer is required to hold certain portions of his land for a specified period of time to give the school board or some other agency time to make a decisoin whether it should purchase the site.

68. Kelber v. Upland, 155 Cal. App. 2d 631, 318 P.2d 561 (Dist. Ct. App. 1957); Rosen v. Downers Grove, 19 Ill. 2d 448, 167 N.E.2d 230 (1960); West Park Ave., Inc. v. Ocean, 48 N.J. 122, 224 A.2d 1 (1966).

approved an agreement between a subdivider and the board of education whereby the former would pay the latter $95,000 toward the erection of a school building, although the developer later claimed that this arrangement was entered under duress.[69] In the sweeping decision of the Wisconsin Court in *Jordan v. Menomonee Falls*,[70] the exaction of money in lieu of land for educational purposes was approved.

IV. DEDICATION

A. *In General*

Dedication is the term applied to the several ways by which the owner of land gratuitously transfers to the public an interest in the land or some privilege of use thereof.[71] Dedication may be formal or informal, may concern either a fee or some lesser interest such as an easement, and may be by statute (in the jurisdictions where such procedure exists) or pursuant to common law.

Land may be dedicated to the public for any number of purposes. Although most dedications involve streets and thoroughfares, land may be dedicated for recreational areas, parks, open spaces, school sites, cemeteries, and the like.[72]

The common practice is for the developer of a subdivision to dedicate to the public the streets in his subdivision, along with various facilities such as water and sewer mains. Such an action gives the public the land without costs and liabilities relating to ownership of the land. But as noted previously, unless the subdivision regulations require it as a condition to plat approval, developers seldom dedicate open space, parks and school sites. The reasons for this are obvious: the amount of land involved is greater and is more apparently a salable portion of the tract, and these latter items are not generally thought of by developers as "essential services" in a subdivision.

B. *Common Law Dedication*

1. *In General*

The concept of dedication has been long entrenched in the common law and is still widely used today. Many states

69. Board of Educ. v. E. A. Herzog Constr. Co., 29 Ill. App. 2d 138, 172 N.E.2d 645 (1961).

70. 28 Wis. 2d 608; 137 N.W.2d 442 (1965).

71. Grady v. Greenville, 129 S.C. 89, 123 S.E.2d 494 (1924).

72. Compulsory dedications, or exactions, are discussed later in this article.

have statutes setting forth procedure for dedication but there are numerous jurisdictions, including South Carolina, which have no statutory process and which depend on the common law methods. (Even in those states which provide for statutory dedication, it is usually said that the statute is not exclusive and that common law dedication can be found in lieu of the statutory scheme, or where an attempt to comply with the statute falls short but meets the requirements of the common law).[73]

The operative facts requisite to finding a dedication have two aspects: the objectively manifested desire of the developer to devote his land, or an interest in it, to public use; and the public acceptance of this offer.[74] These requirements are analogous to the offer and acceptance of the law of contracts. Policy considerations strengthen this analogy. Because dedication involves a transfer of an interest in land, a showing of unequivocal manifestation of a desire of the dedicator to part with his land is demanded. On the other hand, the public must be protected from landowners who want to get rid of land which would be more of a burden to taxpayers than a benefit to the public.

2. *Offer*

The main essential of a dedication is the offer — a manifested desire of the dedicator to part with his land.[75] Although some states require only a preponderance of the evidence to establish an intent to dedicate, South Carolina requires that the intent to dedicate be shown by clear, cogent and convincing evidence.[76] The intent to dedicate, or offer, can be shown by the developer platting his land and selling lots pursuant to a plat, by execution and delivery of a deed or other instrument which contains recitals recognizing the public's rights in the land, by the developer's oral declarations, by affirmative acts of the developer, or by the developer's acquiescence in the publice use of the disputed land for a public purpose.

Probably the most frequent form of common law dedication is that which involves the filing of a plat. Whether or

73. 26 C.J.S. *Dedication* §§3-4 (1956).

74. 6 POWELL, REAL PROPERTY §934 (1968) [hereinafter cited as POWELL].

75. Note, *What Constitutes Intent to Dedicate,* 6 S.C.L.Q. 96 (1953).

76. Antonakas v. Chamber of Commerce, 130 S.C. 215, 126 S.E.35 (1925); Seaboard Air Line Ry. v. Fairfax, 80 S.C. 414, 61 S.E. 950 (1908). *See* ANDERSON §19.27.

not subdivision regulations require it, most subdivisions are developed and marketed by reference to a plat recorded in the courthouse. These survey maps show the streets and other public areas and often make some express reference to the fact that the designated areas are public lands. As a general rule, if an owner of a tract of land plats it and sells lots by reference to the plat, this constitutes a sufficient offer to dedicate the areas designated for public use. Some jurisdictions hold that such a transaction constitutes a completed transaction, because of a presumed acceptance, and in fact one South Carolina case takes this position.[77] The better view, however, is that the making of a plat and the sale of lots in reference thereto are merely evidence of an intent to dedicate, which intent, or offer, must be acted upon, or accepted, like any other common law dedication.[78] This is the rule in South Carolina. At least in those communities which adopt subdivision regulations pursuant to the Comprehensive Planning Act, the following statute applies:

> The approval of a plat by the local planning commission shall not be deemed to constitute or effect an acceptance by the municipality or the county or the public of the dedication of any street or other ground shown upon the plat.[79]

To be distinguished from dedication, but perhaps just as important, is the rule that sales of lots in a subdivision by reference to a plat creates private easements to the streets, etc., in the purchasers who buy lots in reliance on the plat references. Although the courts often talk of these private rights as "dedication," there is clearly a distinction. The South Carolina Supreme Court has said:

> As between the owner, who has conveyed lots according to a plat, and his grantee or grantees, the dedication is complete when the conveyance is made, even though the street is not accepted by the public authorities.[80]

The court went on to say:

> Persons owning lots fronting on or adjacent to property dedicated as public parks or squares, or streets, highways, and the like, have such special property interests as entitle them to maintain a suit for the

77. Marshall v. Columbia & Eau Claire Elec. S. Ry., 73 S.C. 241, 53 S.E. 417 (1905).

78. Outlaw v. Moise, 222 S.C. 24, 71 S.E.2d 509 (1952); Cason v. Gibson, 217 S.C. 500, 61 S.E.2d 58 (1950).

79. S.C. CODE ANN. §14-350.34 (Supp. 1970).

80. Cason v. Gibson, 217 S.C. 500, 509, 61 S.E.2d 58, 62 (1950), *citing*, 16 AM. JUR. *Dedication* §31 (1938).

> enforcement and preservation of the use of the property as such. This right is not affected by the fact that the dedication has never been accepted by the municipal authorities.[81]

Despite some restrictive wording in the *Cason* case, the South Carolina Court apparently subscribes to the so-called "broad view" that a purchaser who buys in reference to a plat gets an easement in all streets and other such areas, near or remote, as laid out on the plat by which he purchases.[82] This is in contrast to the narrower view that the purchaser has an interest only in those streets and similar areas which abut or adjoin his property.

While the principle of private easements is not a part of the law of dedication, it acts as a vital complement to dedication. In those cases where the public does not accept the developer's offer of dedication, and in those cases where the public accepts the offer and later abandons or vacates the dedicated land, the rules discussed in the preceding two paragraphs afford protection to those persons who have purchased lots in the tract in reliance on a plat which designated various areas as available for public use.

In some cases, intention to dedicate can be found in declarations and conduct of the developer which fall short of platting or execution of a legal instrument. For example, an "implied offer" of dedication has been found where the landowner petitioned the governing authority to grade the streets, or where the landowner asked the city street department to pave the streets, or where the landowner continually referred to the land as "public" in character.[83] Considerable ambiguity exists in this type of manifestation of intent, and it is for this reason that the cases commonly say that the evidence must be clear, cogent and convincing.

An intention to dedicate can be found by inference from long acquiescence to use of the land for a public purpose. In *Shia v. Pendergrass*[84] the court recognized this principle but refused to apply it to that case because the landowner had allowed only certain tenants and patrons of those tenants to

81. 217 S.C. at 510, 61 S.E.2d at 62, *citing*, 26 C.J.S. *Dedication* §71 (1956).

82. Blue Ridge Realty Co. v. Williamson, 247 S.C. 112, 145 S.E.2d 922 (1965); Newton v. Batson, 223 S.C. 545, 77 S.E.2d 212 (1953); Outlaw v. Moise, 222 S.C. 24, 71 S.E.2d 509 (1952); Billings v. McDaniel, 217 S.C. 261, 60 S.E.2d 592 (1950).

83. POWELL §935.

84. 222 S.C. 342, 72 S.E.2d 699 (1952).

travel the alleyway in question. The use must be by the public at large, and not by a limited number of persons.

In most cases today, the developer's intent to dedicate is clearly manifested by his execution of a deed to the municipality or county. In *Glenn v. Woodworth*[85] the deed to the City of Spartanburg of land partly in and partly out of the city provided that the city should improve roads on that part of the tract inside the city "and I am to improve roads and streets lying outside of the city limits on the said tract of land."[86] The court held that this language manifested an intent to dedicate those streets. The better practice is to transfer the land by general warranty deed conveying a fee simple title.

Of course, a subdivider will not be held to have dedicated land if the intention to dedicate is absent or is negatived by his conduct. For example, an intention not to dedicate can be inferred from the payment of taxes on the land.[87] However, such payment is not conclusive evidence of an intention not to dedicate.[88] Thus, various acts of the developer which seem to suggest an offer of dedication can be rebutted by certain acts (e.g., payment of taxes, obstruction of the area) and statements (e.g., declarations that the land belongs to him) inconsistent with the alleged offer. Further, a plat can contain a notation preventing the inference that selling lots by reference to a recorded plat constitutes an offer of dedication of the streets and similar designated areas. In *Tyler v. Guerry*[89] the court held that the fact that landowners supplied labor and material to construct a road over their land was inconsistent with dedication of the road to the public.

An offer to dedicate can be made only by one competent to so act. Since the law of dedication involves a transfer of an interest in real estate, the rules applicable to competency in deeds and grants are relevant.[90] No one other than the owner of the fee simple title or someone expressly authorized by him can make a dedication of land.[91]

85. 197 S.C. 56, 14 S.E.2d 555 (1941).

86. *Id.* at 59, 14 S.E.2d at 557.

87. Shia v. Pendergrass, 222 S.C. 342, 72 S.E.2d 699 (1952). *See* ANDERSON §19.28.

88. Woodside Mills v. United States, 160 F. Supp. 356 (D.S.C. 1958).

89. 251 S.C. 120, 160 S.E.2d 889 (1968).

90. Grady v. Greenville, 129 S.C. 89, 123 S.E. 494 (1924).

91. Safety Bldg. & Loan Co. v. Lyles, 131 S.C. 540, 128 S.E. 724 (1925). *See* 26 C.J.S. *Dedication* §7 (1956).

3. *Acceptance*

Where a valid offer has been made by the developer, the purported dedication is incomplete absent acceptance by acts of public officials or by general public use.[92] The acceptance may be by formal act or by conduct of government officials or the general public. Treatises say that an acceptance must be made within a reasonable time after the offer by the developer, but a South Carolina case holds that an acceptance can occur twenty years after the offer of a right-of-way dedication was made.[93]

A municipality or county can accept an offer of dedication by formal action, as by passing an ordinance or a resolution. Another clear formal act quite often used is the acceptance of a deed from the developer conveying the various areas in the subdivision to the public.

An "implied" acceptance may be inferred in a variety of ways. Frequently, acceptance is proved by such governmental conduct as grading, paving or maintaining the public area. Other examples of conduct from which an acceptance can be inferred include: installation of sidewalks along and sewers under the streets; park improvements on the area offered for park purposes; ordinances adopted to appropriate funds to pave one of the streets designated on the plat; letting bids for construction of culverts and other improvements along the street.[94] The general public's use of the land for the purpose for which it was dedicated also can suffice to raise the inference of acceptance.[95]

Whether the governing authority can accept only a part of the offered land is a question on which there is a split of opinion. As one writer has said, "It seems reasonable that there should be a power in the offeree to take for the public such part, and such part only, as is believed useful to the public, except where the terms of the offer clearly restrict acceptance to all or none."[96] In *Corbin v. Cherokee Realty Co.*[97] the court upheld the right of the city to accept a part of the street right-of-way and to reject the remainder.

92. Hodge v. Manning, 241 S.C. 142, 127 S.E.2d 341 (1962).
93. Corbin v. Cherokee Realty Co., 299 S.C. 16, 91 S.E.2d 542 (1956).
94. ANDERSON §19.28; POWELL §935.
95. 26 C.J.S. *Dedication* §37 (1956).
96. POWELL §935.
97. 229 S.C. 16, 91 S.E.2d 542 (1956).

Although some courts state that in some circumstances an acceptance is presumed because of the benefit to the public, most authorities agree that this presumption is not a proper one. For instance, a few cases in other jurisdictions hold that recording a plat with streets and other areas designated for public use constitutes a dedication, not merely an offer, because acceptance is presumed. This view is not accepted by the later South Carolina cases.[98] Clearly an acceptance is not presumed in plat cases at least in those communities which adopt subdivision regulations pursuant to the Comprehensive Planning Act, because of section 14-350.34,[99] which states:

> The approval of a plat by the local planning commission shall not be deemed to constitute or effect an acceptance by the municipality or county or the public of the dedication of any street or other ground shown upon the plat.

4. *Effect*

Under common law dedications, the public typically gets only an easement, with the fee left in the dedicator.[100] This is not true where the document—the plat, deed or other legal instrument—expressly states or strongly indicates that the dedication is in fee and that the dedicator retains no interest in the land so dedicated.

Sometimes, a dedicator may want to impose reservations or restrictions on the land that he dedicates. The courts generally say that such restrictions are invalid if they interfere with the necessary control by public authorities over the dedicated area. In such cases, the dedication is effective but the attempted restrictions are killed.[101]

A similar problem arises when the statement of purpose in the original dedication operates to prevent utilization of the land from keeping pace with environmental changes. These matters are handled with some flexibility, but definite statements of purpose in the original dedication do fix an outer limit on changes in use. The concept of cy pres, which is a rule familiar to other areas of the law by which the intention

98. Outlaw v. Moise, 222 S.C. 24, 71 S.E.2d 509 (1952); Cason v. Gibson, 217 S.C. 500, 61 S.E.2d 58 (1950). *See* Note, *What Constitutes Intent to Dedicate,* 6 S.C.L.Q. 96 (1953).

99. S.C. CODE ANN. §14-350.34 (Supp. 1970).

100. Leppard v. Central Carolina Tel. Co., 205 S.C. 1, 30 S.E.2d 755 (1944). *See* POWELL §936.

101. POWELL §936.

of the party is carried out *as near as may be* when it would be impossible or illegal to give it literal effect, is liberally invoked in some jurisdictions. In South Carolina, the court has followed the rule that where the intention of the dedicator is uncertain or the dedication is in general, unrestrictive terms, the property can be used for any public purpose as determined by the proper legal authority, and the fact that the property has been devoted to one use does not deprive its devotion to other more comprehensive uses. For example, in *Knoerr v. Crews*,[102] the court held that the city of Seneca could use certain parcels for parking which were originally dedicated "for the convenience of the public and of the said Railway Company," although the land had been used for many years as a park. On the other hand, where the intent is expressed and is specific and restricted, no deviation from such use may be permitted no matter how advantageous the changed use may be to the public.[103] The court in a highly questionable decision[104] held that the city could not permit a private garage to extend out over the street for eight feet because the street area had been dedicated to the public for transportation purposes and could not be used for another purpose.[105] A use of the land by the public authorities for purposes other than those contemplated in the dedication will be restrained upon the application of owners of such land injured by such change of use or by the dedicator if he has given only an easement.[106]

5. *Abandonment and Vacation*

It is never easy to establish a public abandonment of dedicated land. Misuse or diversion does not constitute abandonment.[107] Generally, abandonment may be shown by an attempt to convey the land, a substitution of other land for the purpose indicated in the dedication, a long period of nonuse, or some other strong showing that the municipality

102. 246 S.C. 174, 143 S.E.2d 120 (1965).

103. Miller v. Columbia, 138 S.C. 343, 136 S.E. 484 (1927). *See also* Grady v. Greenville, 129 S.C. 89, 123 S.E. 494 (1924).

104. 235 S.C. 277, 111 S.E.2d 573 (1959).

105. *See* Guerard and Sinkler, *Public Corporations, Survey of South Carolina Law: April 1959 - April 1960*, 13 S.C.L.Q. 370 (1961).

106. 4 H. TIFFANY, LAW OF REAL PROPERTY §1113 (3d ed. 1939) [hereinafter cited as TIFFANY].

107. POWELL §936.

or county no longer assumes title to and responsibility for the area.

Nonuse can establish failure to accept an offer of dedication, but can seldom be used to show an abandonment once the dedication has been accepted. In *Chaffee v. Aiken*[108] the plaintiff brought action against the city seeking to enjoin its attempt to open a street on part of her property. The defendant city claimed title to the disputed land by dedication and the plaintiff raised the issue of abandonment because the city had not used the strip. The court said, "[W]e do not think that mere nonuse of a street or alley of a town, for a period of twenty years, would amount to such an abandonment as would destroy the rights of the public."[109]

In some states there is a statutory method of vacation. In this state any interested party may move the court to vacate a street, road or highway, and the court may make appropriate findings. These statutory provisions do not affect the other methods of termination of dedicated lands.[110]

On abandonment or vacation, the question arises as to who owns the dedicated land. As is generally the case in common law dedications, only an easement is transferred to the public with title in fee retained by the dedicator. This being so, upon abandonment of the dedicated land, the dedicator or those claiming under him would resume complete dominion and ownership of the land.

However, if the dedicator has conveyed parcels along the street or highway, he has probably conveyed to the purchasers the fee to the roadbed. It is a well settled rule of construction in boundary cases that when a grantor owns the land under the street or highway, and sells land along that street or highway, there is a presumption that he intends to convey the fee of the land to the center of the street or highway. So, when lots abutting a street are conveyed by terms of description which makes no mention of the street, as when conveyed by plat, the grantor's interest in the land within the street limits presumably passes to the grantee. The same presumption applies where the grantor sells land along the highway and describes the land as bounded "by," "on" or as running "along" the street or highway. Of course, this presumption

108. 57 S.C. 507, 35 S.E. 800 (1900).
109. *Id.* at 516-17, 35 S.E. at 803.
110. S.C. CODE ANN. §§33-521 to -524 (Supp. 1970).

can be rebutted by an express reservation of the streets to the developer.[111] Thus, in subdivisions, the abutting owners normally acquire the interest in the abandoned street.[112] This has been held to be the rule even where the fee is vested in the public.[113] In *Greenville v. Bozeman*[114] the South Carolina court said that title vested in the abutting propery owners unless the original owner had specifically reserved the right of reversion on vacation. Where larger tracts are involved, such as parks and recreational areas, a different rule probably applies. For example, in *Mosely v. Searcy*,[115] title to a dedicated park was held to revert to the dedicator upon abandonment.

Several situations which may arise upon abandonment of highway right-of-ways are not within the scope of this material. Suffice it to state that owners of land along public ways have no property or other vested right in continuance of the road, and the public authorities may abandon the road.[116] On the other hand, the public authorities cannot close the abandoned road without paying damages to the affected abutting landowners.[117]

C. *Statutory Dedication*

A procedure for dedicating land is prescribed by statute in several states. This type of dedication cannot exist without a statute, and therefore is not available in South Carolina. There is special legislation applicable to Greenville County requiring all land dedicated therein to be conveyed to the county by deed.[118]

V. RELIEF FROM SUBDIVISION REGULATIONS

A. *Variance*

Some enabling acts authorize administrative relief from subdivision regulations in cases of hardship, much like that provided by variances in zoning laws.[119] In South Carolina,

111. TIFFANY §996.
112. ANDERSON §19.30; POWELL §936.
113. TIFFANY §1113.
114. 254 S.C. 306, 175 S.E.2d 211 (1970).
115. 363 S.W.2d 561 (Mo. 1962).
116. State v. Hughes, 147 S.C. 452, 145 S.E. 297 (1928).
117. Highway Dept. v. Allison, 246 S.C. 389, 143 S.E.2d 800 (1965); Powell v. Spartanburg County, 136 S.C. 371, 134 S.E. 367 (1926).
118. S.C. CODE ANN. §33-1679 (Supp. 1970).
119. ANDERSON §19.47.

it seems that a variance from the subdivision regulations may be obtained by appealing to the board of adjustment from an adverse decision by the planning commission,[120] but there is some question whether this is the intent of the legislation. The variance may be granted in an individual case of unnecessary hardship upon a finding by the board of adjustment that:

> (a) There are extraordinary and exceptional conditions pertaining to the particular piece of property in question because of its size, shape or topography, and
>
> (b) The application of the ordinance or resolution of this particular piece of property would create an unnecessary hardship, and
>
> (c) Such conditions are peculiar to the particular piece of property involved, and
>
> (d) Relief, if granted, would not cause substantial detriment to the public good or impair the purposes and intent of the ordinance or resolution or the comprehensive plan. . . .[121]

Because of the paucity of judicial decisions, such terms as "unnecessary hardship" and "substantial detriment" in the context of subdivision regulations are not defined, but certainly reference can be made to the decisions relating to these issues in zoning variances since the statute applies to both and many of the concepts are derived from similar policy considerations.[122]

B. *Waiver of Conditions*

Subdivision enabling acts provide that the planning commission must impose certain standards on all subdivisions, and may require certain other conditions on plat approval.[123] For example, section 14-350.30[124] provides that subdivision regulations *shall* "prescribe that no subdivision plan will be approved unless all land intended for use as building sites can be used safely for building purposes, without danger from flood or other inundation or from other menaces to health, safety or public welfare." This standard, although very broad in nature, is clearly mandatory and cannot be waived in any case. On the other hand, it is generally accepted that the

120. S.C. CODE ANN. §14-350.19 (Supp. 1970).

121. *Id.*

122. *See, e.g.*, W. LEDBETTER, JR., ZONING LAW IN SOUTH CAROLINA 12-18 (1970), for a discussion of variances in zoning administration.

123. The imposition of conditions on plat approval is discussed earlier in this article at Part III *supra*.

124. S.C. CODE ANN. §14-350.30 (Supp. 1970).

planning agency may waive some of the technical engineering specifications in cases of substantial difficulty or hardship. The many provisions relating to the grading and surfacing of streets, water supply, sewers, utility lines, piping, connections, and other facilities to be installed as conditions to plat approval, are quite often altered to resolve conflicts that arise during consultation between the developer or his engineer and the planning agency. Little litigation has arisen on the subject because these matters are engineering questions and are treated with reasonable flexibility even in exceptional cases.

It has been held, however, that where a planning commission has authority to waive conditions, e.g., restrictions on dead-end streets, it must support its decision by findings that strict adherence to the regulations would cause impractical hardship.[125]

CONCLUSION

Efficient land use and effective land use control become increasingly more important each year as rural land is urbanized. Few cities or communities are willing or financially able to subsequently undertake correction of problems created by planless growth, and state and local government regulations of land subdivision is perhaps the only way to avoid costly consequences of haphazard and unrestrained subdivision development. The fact that the community as a whole is vitally concerned with and affected by the process of subdivision justifies governmental control over individual private land developers.

The South Carolina Comprehensive Planning Act subdivision regulations grant the basic authority needed by local government units to control the physical development of their communities. Prudent and reasonable regulations adopted by local governing bodies pursuant to the authority granted can promote the economic interests and general welfare of growing communities and private developers alike.

125. Smith v. Morris, 101 N.J. Super. 271, 244 A.2d 145 (Super. Ct. 1968).