Jenad, Inc., Respondent, v. Village of Scarsdale et al., Appellants

[NO NUMBER IN ORIGINAL]

Court of Appeals of New York

18 N.Y.2d 78; 218 N.E.2d 673; 271 N.Y.S.2d 955; 1966 N.Y. LEXIS 1170

March 29, 1966, Argued
July 7, 1966, Decided

PRIOR HISTORY: Jenad, Inc. v. Village of Scarsdale, 23 A D 2d 784.

Appeal from an order of the Appellate Division of the Supreme Court in the Second Judicial Department, entered April 19, 1965, which reversed an order of the Supreme Court at Special Term (George M. Fanelli, J.; opinion 38 Misc 2d 658; see, also, 35 Misc 2d 450), entered in Westchester County, (1) denying a motion by plaintiff for summary judgment and granting defendants' motion for summary judgment dismissing the complaint and (2) granted plaintiff's motion and denied defendants' motion.

DISPOSITION: Order of Appellate Division reversed and that of Special Term reinstated, with costs in this court and in the Appellate Division.

CASE SUMMARY

PROCEDURAL POSTURE: Defendant village sought review of an order of the Appellate Division of the Supreme Court in the Second Judicial Department (New York), which reversed an order denying a motion by plaintiff developer for summary judgment and granted plaintiff's motion for summary judgment dismissing the complaint in plaintiff's action challenging the validity and constitutionality of N.Y. Village Law § 179-1.

OVERVIEW: Defendant, pursuant to N.Y. Village Law, §179-k, gave its planning commission the authority to approve proposed plats for subdividing lands in the village including the authority to require, as a condition precedent to the approval of subdivision plats which show new streets or highways, that the subdivider allot some land within the subdivision for park purposes or, at the option of the village planning board, pay the village a fee in lieu of such allotment. A trial court denied plaintiff's motion for summary judgment and dismissed. The appellate court reversed. On appeal, the court reversed and held that N.Y. Village Law § 179-l was valid and enforceable and not in violation of any constitutional or statutory ban. The court found that the language of the statute was not vague and that the provision was not a tax, but a reasonable form of village planning for the general community good.

OUTCOME: The court reversed and granted defendant's motion for summary judgment dismissing the complaint.

CORE TERMS: village, playground, plat, developer, municipality, subdivider, street, planning board, recreational purposes, recreation, planning, tract, dedication, suitable, map, village planning board,

proper cases, authorize, collected, ordinance, municipal, waive, dedication of land, separate fund, special benefits, apportionment, acquisition, suitably, zoning, site

LexisNexis® Headnotes Hide Headnotes

Real Property Law > Zoning & Land Use > Comprehensive Plans
Real Property Law > Zoning & Land Use > Impact Fees
Tax Law > State & Local Taxes > Real Property Tax > Assessment & Valuation > General Overview
HN1Go to the description of this Headnote. Where subdivisions are too small to permit substantial park lands to be set off, yet the creation of such subdivisions, too, enlarges the demand for more recreational space in the community, it is just as reasonable to assess the subdividers an amount per lot to go into a fund for more park lands for a village or town. One arrangement is no more of a "tax" or "illegal taking" than the other.

Governments > Local Governments > Police Power
Real Property Law > Ownership & Transfer > Transfer Not By Deed > Dedication > Elements
Real Property Law > Ownership & Transfer > Transfer Not By Deed > Dedication > Procedure
HN2Go to the description of this Headnote. It is not necessary to prove that the land required to be dedicated for a park or school site is to meet a need solely attributable to the influx into the community of people who would occupy this particular subdivision. A required dedication of land for school, park, or recreational sites as a condition for the approval of a subdivision plat is a valid exercise of police power if the evidence reasonably establishes that the municipality will be required to provide more land for schools, parks, and playgrounds as a result of approval of the subdivision. The same reasons justify with equal force the land dedication requirement and the provision for an equalization fee. Equalization fees are not a tax imposed on the land as such but imposed on the transaction of obtaining approval of the plat.

Real Property Law > Eminent Domain Proceedings > Procedure
Real Property Law > Zoning & Land Use > Comprehensive Plans
Real Property Law > Zoning & Land Use > Impact Fees
HN3Go to the description of this Headnote. If a subdivision creates the specific need for local parks and playgrounds, then it is not unreasonable to charge the subdivider with the burden of providing them.

Hide Headnotes / Syllabus

HEADNOTES

Municipal corporations -- subdivision of lands -- parks and playgrounds -- Village of Scarsdale, in giving its Planning Commission power to approve subdivision of lands (Village Law, § 179-k), had power to authorize board to require subdivider to allot some land within subdivision for park purposes or to pay village fee in lieu of such allotment -- statute (Village Law, § 179-l) contains sufficient grant of power to permit developers to pay cash in lieu of setting aside land.

1. The Village of Scarsdale, in giving its Planning Commission power to approve proposed plats for subdividing lands in the village (Village Law, § 179-k), had the power to authorize the planning board to require, as a condition precedent to the approval of subdivision plats which show new streets or highways, that the subdivider allot some land within the subdivision for park purposes or, at the option of the village planning board, pay the village a fee in lieu of such allotment.

2. There is no constitutional or statutory ban against section 2 of article 12 of the Rules and Regulations of the Planning Commission as approved by the village trustees, which gives the commission power to direct that, in lieu of such dedication of land, a charge or fee of $ 250 per lot be collected by the village "and credited to a separate fund to be used for park, playground and recreational purposes in such manner as may be determined by the Village Board of Trustees from time to time."

3. There is a sufficient grant of power in section 179-1 of the Village Law to permit developers to pay cash in lieu of setting aside areas for parks, playgrounds and similar purposes and it is valid and enforcible. While the statute does not specifically make such provision, it does provide that a village planning board may waive the provision for providing park plans "subject to appropriate conditions and guarantees". The phrase "appropriate conditions and guarantees" reasonably includes the provision for the payment of cash in lieu of setting aside the lands -- the fund "to be used for park, playground and recreational purposes".

4. The rules and regulations provide that the moneys collected be put into "a separate fund to be used for park, playground and recreational purposes" and that expenditures from such fund are to be made only for "acquisition and improvement of recreation and park lands" in the village. These provisions are not unconstitutional for vagueness (Gulest Assoc. v. Town of Newburgh, 25 Misc 2d 1004, affd. 15 A D 2d 815, distinguished and disapproved).

5. The provisions with regard to parks do not constitute an unconstitutional and unauthorized "tax".

COUNSEL: Richard A. Tilden for appellants. I. The fact that plaintiff made the payment to the village voluntarily, and without protest, precludes it from recovery. (Mercury Mach. Importing Corp. v. City of New York , 3 N Y 2d 418; Five Boro Elec. Contr. Assn. v. City of New York, 12 N Y 2d 146.) II. The fact that plaintiff benefited from the payment estops it from now recovering its money back and retaining the benefits it received. (Belmont Homes v. Kreutzer, 6 A D 2d 697, 6 N Y 2d 800; Mayor of City of N. Y. v. Sonneborn, 113 N. Y. 423; City of Buffalo v. Balcom, 134 N. Y. 532; City of New York v. Delli Paoli, 202 N. Y. 18; Shepherd v. Mount Vernon Trust Co., 269 N. Y. 234.) III. The failure of plaintiff to file the notice of claim and bring the action as required by section 341-b of the Village Law bars recovery in the present action. (Schenker v. Village of Liberty, 261 App. Div. 54; Village of Victor v. Angelo, 13 A D 2d 889; Stiger v. Village of Hewlett Bay Park, 283 App. Div. 827; Sammons v. City of Gloversville, 175 N. Y. 346; Missall v. Palma, 292 N. Y. 563; Meinken v. County of Nassau, 14 Misc 2d 304; Feuer v. Brenning, 201 Misc. 792, 279 App. Div. 1033, 304 N. Y. 881; Foster v. Webster, 8 Misc 2d 61.) IV. The laws and regulations under which the payment was required are valid and constitutional. The power of planning boards to require dedication of park lands in connection with approval of subdivision plats is constitutional. (Matter of Lake Secor Development Co. v. Ruge, 141 Misc. 913, 235 App. Div. 627; Reggs Homes v. Dickerson, 16 Misc 2d 732, 8 A D 2d 640; Gulest Assoc. v. Town of Newburgh, 25 Misc 2d 1004.) V. Any recovery by plaintiff should be limited to its actual damages.

Robert K. Ruskin for respondent. I. The fact that defendants compelled plaintiff to make the payment in question as a condition to their approving plaintiff's application for land development constitutes duress as a matter of law. (Five Boro Elec. Contr. Assn. v. City of New York, 12 N Y 2d 146; Adlerstein v. City of New York, 6 N Y 2d 740; Buckley v. Mayor, 39 App. Div. 463, 159 N. Y. 558; Mercury Mach. Importing Corp. v. City of New York, 3 N Y 2d 418.) II. The fact that defendants chose to condition their approval of plaintiff's application upon a cash payment rather than the dedication of lands did not confer a "benefit" upon plaintiff and does not estop plaintiff from recovering the cash payment. (Gordon v. Village of Wayne, 370 Mich. 329; Coronado Development Co. v. City of McPherson, 189 Kan. 174; Pioneer Trust & Sav. Bank v. Village of Mt. Prospect, 22 Ill. 2d 375.) III. The provisions of section 341-b of the Village Law relating to the time requirement for the filing of a notice of claim are inapplicable to the case at bar. (Teall v. City of Syracuse, 120 N. Y. 184; Miller v. City of Oneida, 153 Misc. 438; Pansmith v. Incorporated Vil. of Is. Park, 188 Misc. 1052; Meinken v. County of Nassau, 14 Misc 2d 304; Grant v. Town of Kirkland, 10 A D 2d 474; Buchanan v. Town of Salina, 270 App. Div. 207, 1074; Grant v. Town of Kirkland, 10 A D 2d 474; Village of Victor v. Angelo, 14 Misc 2d 577.) IV. The rules, regulations and ordinances pursuant to which plaintiff was required to make the payment in question are clearly illegal and unconstitutional, thereby entitling plaintiff to summary judgment against defendants in the sum of $ 6,000. (Gulest Assoc. v. Town of Newburgh, 25 Misc 2d 1004.) V. Plaintiff's actual damages are in the sum of $ 6,000 and its recovery should be in that amount. (Wittner v. Burr Ave. Development Corp., 222 App. Div. 285.)

John T. DeGraff and Frank J. Lasch for New York State Home Builders Association, Inc., amicus curiae. I. The zoning statutes enacted in 1926-27 did not require the compulsory dedication of lands for park purposes. II. The Comptroller's construction is contrary to the intent as well as the express terms of the statute. As so construed, the statute is unconstitutional. (Matter of Lake Secor Development Co. v. Ruge, 141 Misc. 913, 235 App. Div. 627; Reggs Homes v. Dickerson, 16 Misc 2d 732, 8 A D 2d 640; Gulest Assoc. v. Town of Newburgh, 25 Misc 2d 1004, 15 A D 2d 815.) III. The practices approved by the Comptroller have uniformly been condemned as unconstitutional. (Matter of Catalfamo v. Zirk, 22 A D 2d 802; Gordon v. Village of Wayne, 370 Mich. 329; Pennsylvania Coal Co. v. Mahon, 260 U.S. 393; Miller v. City of Beaver Falls, 368 Pa. 189; Pioneer Trust & Sav. Bank v. Village of Mt. Prospect, 22 Ill. 2d 375; Kebler v. City of Upland, 155 Cal. App. 2d 631; Rosen v. Village of Downers Grove, 19 Ill. 2d 448; Coronado Development Co. v. City of McPherson, 189 Kan. 174.) IV. The cash payment required by the municipality is in effect a tax and consequently unconstitutional. (Matter of Hanson v. Griffiths, 204 Misc. 736, 283 App. Div. 662; Sperling v. Valentine, 176 Misc. 826; Adlerstein v. City of New York, 11 Misc 2d 754, 7 A D 2d 717, 6 N Y 2d 740; Haugen v. Gleason, 226 Ore. 99; Daniels v. Borough of Point Pleasant, 23 N. J. 357.) V. The Legislature has repeatedly refused to sanction the practices that have been authorized and approved by the Comptroller's opinions.

JUDGES: Judges Fuld, Bergan and Keating concur with Chief Judge Desmond; Judge Van Voorhis dissents and votes to affirm in an opinion in which Judges Burke and Scileppi concur.

OPINION BY: DESMOND

OPINION

[*82] [**674] [***956] The Village of Scarsdale, pursuant to statute (Village Law, § 179-k), has given its Planning Commission the authority to approve proposed plats for subdividing lands in the village. On this appeal the principal question of law, answered in the negative by the Appellate Division, is this: was it valid for the village to authorize its planning board to require, as a condition precedent to the approval of subdivision plats which show new streets or highways, that the subdivider allot some land within the

subdivision for park purposes or, at the option of the village planning board, pay the village a fee in lieu of such allotment? Our answer is in the affirmative. We hold, first, that section 179-l of the Village Law, empowering a village to require as to subdivision plats that there be set aside therein lands for parks, playgrounds or other recreational purposes, is valid and enforcible. Further, we hold that there is no constitutional or statutory ban against section 2, article 12, of the Rules and Regulations of the Planning Commission of defendant Village of Scarsdale as approved by the village trustees on September 24, 1957. These rules and regulations give the commission power [**675] to direct that, in lieu of such dedication of land, a charge or fee of $ 250 per lot be collected by the village "and credited to a separate fund to be used for park, playground and recreational purposes in such manner as may be determined by the Village Board of Trustees from time to time."

The facts of the particular controversy between plaintiff and the village are set out in full in the dissenting opinion and need not be repeated. We add some generally pertinent items. In at least five counties of this State there are cities, towns or villages which make it possible to insist on developers' paying cash in lieu of setting aside areas in their developments for parks, playground and similar purposes (information supplied by the New York State Office for Local Government). In Westchester [***957] County alone 16 or more local governments (among them [*83] several villages including Scarsdale) have "monies in lieu of land" regulations (this data received from Westchester County Department of Planning). As we shall see later on when we cite recent cases from Wisconsin and Montana, such rules exist and are upheld by courts in other States. There is conflict between a 1956 opinion of the State Attorney-General that a city has no such power under section 33 of the General City Law, and three separate opinions of the State Comptroller dated in 1954, 1961 and 1963 (1954 Op. St. Comp. No. 6836; 17 Op. St. Comp., 1961, p. 79; 19 Op. St. Comp., 1963, p. 3) which state that towns and villages could exact such fees under section 277 of the Town Law and section 179-l of the Village Law.

We find in section 179-l of the Village Law a sufficient grant to villages of power to make such exactions. In specific terms the statute validates "in proper cases" requirements by village planning boards that a subdivision map, to obtain approval, must show "a park or parks suitably located for playground or other recreation purposes." There is, to be sure, no such specificity as to a village rule setting up a "money in lieu of land" system. However, section 179-l says that a village planning board, when the specific circumstances of a particular plat are such that park lands therein are not requisite, may "waive" provision therefor, "subject to appropriate conditions and guarantees". We agree with the above-cited opinions of the State Comptroller that the phrase "appropriate conditions and guarantees" reasonably includes the kind of arrangement here made. That is, instead of alloting part of the subdivision itself for parks and play areas, the subdivider may be ordered to pay so much per lot into a separate village fund which is "to be used for park, playground and recreational purposes", in such manner as the village trustees may decide.

We turn our attention to the arguments advanced against the constitutionality of collecting such fees from developers. Plaintiff like the Appellate Division relies on Gulest Assoc. v. Town of Newburgh (25 Misc 2d 1004, affd. 15 A D 2d 815) which held invalid a 1959 amendment to section 277 of the Town Law. The amendment specifically authorized towns (there is in the Village Law no such specific authorization) to demand money payments instead of assignment of subdivision lands for recreational uses. The Special Term opinion in Gulest turns on what the court [*84] thought was vagueness in the Town Law amendment at the point where it appeared to give a town planning board the privilege of using the money for "any recreational purpose". Even if the Gulest decision were correct -- and we hold it is not -- it would not apply here since by the Scarsdale rules and [***958] regulations the moneys collected as "in lieu" fees are not only put into "a separate fund to be used for park, playground and

recreational purposes" (there was no such reserve set up in Gulest) but, as provided by the board of trustees, expenditures from such fund are to be made only for "acquisition and improvement of recreation and park lands" in the village. There is nothing vague about that language.

[**676] Going beyond Gulest (supra), plaintiff (and amicus curiae) insist that what Scarsdale has imposed is an unconstitutional and unauthorized "tax" on plaintiff and others similarly situated, in that the payments are for general governmental purposes thus charged against subdivision developers. We think that this labeling distorts the purpose and meaning of the requirements. This is not a tax at all but a reasonable form of village planning for the general community good.

Scarsdale and other communities, observing that their vacant lands were being cut up into subdivision lots, and being alert to their responsibilities, saw to it, before it was too late, that the subdivisions make allowance for open park spaces therein. This was merely a kind of zoning, like set-back and side-yard regulations, minimum size of lots, etc., and akin also to other reasonable requirements for necessary sewers, water mains, lights, sidewalks, etc. If the developers did not provide for parks and playgrounds in their own tracts, the municipality would have to do it since it would now be required for the benefit of all the inhabitants.

HN1Go to this Headnote in the case.But it was found, in some instances, that the separate subdivisions were too small to permit substantial park lands to be set off, yet the creation of such subdivisions, too, enlarged the demand for more recreational space in the community. In such cases it was just as reasonable to assess the subdividers an amount per lot to go into a fund for more park lands for the village or town. One arrangement is no more of a "tax" or "illegal taking" than the other.

[*85] In 1965 (Jordan v. Menomonee Falls, 28 Wis. 2d 608) the Supreme Court of Wisconsin in a careful and convincing opinion upheld as against assertions of unconstitutionality a village ordinance or statute which, for present purposes, is identical with the one we are considering. The Wisconsin court noted that municipal planners agree that to create a good environment for dwellings there must be a minimum devotion of land to park and school purposes. HN2Go to this Headnote in the case.It was held in the Jordan case that it was not necessary to prove that the land required to be dedicated for a park or school site was to meet a need solely attributable to the influx into the community of people who would occupy this particular subdivision. The court concluded that "a required dedication of land for school, park, or recreational sites as a condition for the approval of the subdivision plat should be upheld as a valid exercise of police power [***959] if the evidence reasonably establishes that the municipality will be required to provide more land for schools, parks, and playgrounds as a result of approval of the subdivision" (p. 618). As to the constitutionality of what was called an "equalization fee provision" the court said that the same reasons justify with equal force the land dedication requirement and the provision for an equalization fee, and that the equalization fee was not a tax imposed on the land as such but was a fee imposed on the transaction of obtaining approval of the plat (p. 622). In 1964 the Montana Supreme Court in Billings Props. v. Yellowstone County (144 Mont. 25) passed on a State statute which required land to be dedicated for park and playground purposes as a condition precedent to approval of a subdivision plat and which statute authorized the county planning board to waive the requirement in appropriate cases. The Montana court remarked (p. 29) that: "Statutes requiring dedication of park and playground land as a condition precedent to the approval of plats are in force in one form or another in most all states." The court said this at page 33: "Appellant does not deny the need for parks and playgrounds, however, it would require the city to purchase or condemn land for their establishment. HN3Go to this Headnote in the case.But this court is of the opinion 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."

[*86] [**677] Defendants make two other arguments against recovery back by plaintiff of these fees. They point to the fact that plaintiff paid without protesting, and to plaintiff's failure to comply with the time requirements of section 341-b of the Village Law for filing claims and bringing actions against villages. Since we are holding that the village acted within its rights in collecting these moneys from plaintiff, we need not consider these other points made by defendants.

The order appealed from should be reversed and defendants' motion for summary judgment dismissing the complaint granted, with costs in this court and in the Appellate Division.

DISSENT BY: VAN VOORHIS

DISSENT

Van Voorhis, J. (dissenting). The principle of decision in this case would constitutionally allow municipal officers to prohibit real estate development in cities, towns and villages unless the newcomers pay whatever sums of money the local public authorities may decide arbitrarily to impose upon them for the privilege of moving into the community, to be spent on schools, public buildings, police and fire protection, parks and recreation or any other general municipal purpose past, present or to come, and without relation to special benefits or assessed valuation. The comment is apt by the late [***960] Chief Justice Vanderbilt, speaking for the Supreme Court of New Jersey in Daniels v. Borough of Point Pleasant (23 N. J. 357, 362): "The philosophy of this ordinance is that the tax rate of the borough should remain the same and the new people coming into the municipality should bear the burden of the increased costs of their presence. This is so totally contrary to tax philosophy as to require it to be stricken down; see Gilbert v. Town of Irvington, 20 N. J. 432 (1956)."

This enormous increase in the discretionary power of local public officials in violation of what would formerly have been considered to be the constitutional rights of property makes its appearance in the form of a seemingly innocuous assessment against the development of vacant land for the socially acceptable purpose of public parks and recreation. Once the constitutional power to do this is established, however, the power can be extended by statute or ordinance to any other public purpose. There is no constitutional authority, by this means, to prevent city dwellers from migrating to the suburbs or country to live in tracts which are otherwise suitably developed, whenever it [*87] seems desirable to those who are already there to prevent them from coming except at a price. Not only is there no statutory authority for the requirement by the Village of Scarsdale that developers pay into the park fund for the acquisition and improvement of recreation and park lands for general village use, but under the resolution of the Village Board the allocation of this burden is purely arbitrary. The validity of this impost appears to depend, according to the majority opinion, on whether it is to be classified as a fee or a tax. If it is a fee, the reasoning runs, it does not have to be allocated according to any basis except such apportionment as the Village Trustees may choose to impose. The name given to it is not important. In substance this is a levy upon the approval of subdivision maps, without which lands cannot be sold or built upon, to serve a general public purpose of the village conferring no special benefit upon this subdivision, and inflexibly imposed at $ 250 a lot in the case of any subdivision map anywhere in the village, without regard to the location, size, shape, value or restrictions of the lot. In the leading case of Stuart v. Palmer (74 N. Y. 183, 188-189) the classic statement was made that while it is not disputed that the Legislature has power to impose taxes and assessments for public purposes, unlimited except by the

Federal Constitution, "there must be apportionment of the burdens, either among all the property-owners of the State, or of the local division of the State, or the property-owners specially benefited by the improvements. In either case, if one is required to pay more [**678] than his share, he receives no corresponding benefit for the excess, and that may properly be styled extortion or confiscation. A tax or assessment upon property arbitrarily imposed, [***961] without reference to some system of just apportionment, could not be upheld."

Unless the courts are to surrender their function of protecting basic property rights, and leave their safeguarding to the discretion of administrative and frequently politically minded public officials, these basic principles of taxation must be observed. Their defiance by the decision about to be rendered seems to us to be incontestable. No one contends that this park and recreation fund of the Village of Scarsdale is for the special benefit of this real estate tract; it can be expended only for the benefit of the village as a whole yet every lot in every new tract [*88] is required to be assessed at $ 250 wherever the Planning Commission so directs. This sum is prescribed by the Village Code regardless of whether the lot is worth $ 2,000 or $ 25,000, or whether the size is two acres or half an acre, and regardless of where it is located in the village or whether it will ever receive any benefit from some general village project not yet conceived.

This is a different question from whether, in suitable cases, areas may be required under section 179-l of the Village Law to be set aside for a park or parks suitably located for playground or other recreational purposes for the benefit of lot owners in the subdivision. Even so it is stated by section 179-m that the owner of the land or his agent who files the plat may add a notation to the effect that no offer of dedication of such highways or parks is made to the public. Comparable sections were added to the General City Law by chapter 690 of the Laws of 1926 (General City Law, § 33) and to the Town Law by chapter 175 of the Laws of 1927 (Town Law, former § 149-n). These statutes were adopted on the recommendation of the New York State Legislative Commission on Zoning, of which Mr. Edward M. Bassett was General Counsel, which submitted a model zoning enabling act containing the following comment regarding the foregoing provisions (1925 Committee Bulletin No. 10, footnote to § 7 thereof): "This form does not relate to the acquirement of any street or park. That entire subject is within the field of eminent domain. This form of statute merely provides a method of creating non-buildable strips of land (mapped streets) and other open places on the official map or plan. They may never become public streets or public parks so far as this statute is concerned. Their becoming publicly owned land depends on whether the owner desires to cede or offer dedication, whether the municipality desires to accept a cession or dedication, or whether the municipality desires to take title by condemnation."

The intention, so expressed, was to insure that, where suitable for parks, not all of the areas in subdivisions should be devoted to building lots, and to set aside suitable areas for park or recreation purposes and streets for the private use of the lot owners in the subdivision unless voluntarily [***962] dedicated by the tract owner to the municipality, or condemned by the municipality.

[*89] This provision of the Village Code is unauthorized by section 179-l of the Village Law as well as being unconstitutional. That section is long and explicit, but it says nothing about payments to the village to be absolved from a requirement that land in the subdivision be set aside for park purposes. Upon the contrary, in directing that land in the subdivision be earmarked for park use, it provides that title is to be transferred to the village only at the option of the tract developer, and, by necessary inference, that, if the tract does not contain land "suitably located for playground or other recreational purposes", it is not a "proper case" to require land within the subdivision to be set aside for these purposes which should not be "required by the planning board". In other words, the statute authorizes

the planning board, as a condition of approval of the plat, reasonably to require some land in the subdivision to be set aside as park in suitable instances but, if it be [**679] not a proper case for the exercise of such power, the power of the planning board ends. The mere language in the statute that the planning board may waive requirements of section 179-l "subject to appropriate conditions" adds nothing here. If the proposed subdivision does not contain land suitable for park purposes, there is nothing for the planning board to waive inasmuch as it can only require land in the subdivision to be set aside for parks in proper cases. If it be not a proper case, as the planning board has decided here, it has no further power in the matter.

If the $ 6,000 paid by plaintiff to Scarsdale could be used for the "acquisition and improvement of recreation and park lands" for the village generally, as the language of the fund says, the exaction would be in the nature of a tax and not a fee or assessment for special benefits (see Matter of Hanson v. Griffiths, 204 Misc. 736, affd. 283 App. Div. 662; 4 Cooley, Taxation [4th ed.], § 1784, p. 3509). No tax may be levied by a local municipality unless specifically authorized by a State enabling act, and unless it be properly apportioned and provision made for review of the apportionment (Stuart v. Palmer, supra). If $ 250 per lot is legally imposed, no standard of judgment is supplied which would prevent the amount being fixed at $ 500 or any other sum which the Village Code might set. The article of the Village Law under which these park funds were extracted [*90] does not contain a delegation to the village of the power to tax, nor mention such "in lieu of" payments at all. Section 1 of article XVI of the New York State Constitution provides that "Any laws which delegate the taxing power shall specify the types of taxes which may be imposed thereunder and provide for their review."

[***963] In Haugen v. Gleason (226 Ore. 99 [1961]), the court was faced with a county regulation of this nature. Although no specific authority was contained in the State act, the county regulation purported to require the dedication of land for park purposes or money in lieu thereof.

The court held this to be a tax and beyond the authority of the county, stating at page 106: "If ORS 92.044 permits the county to demand money from a subdivider to buy land to be used for park purposes somewhere in the vicinity of the subdivision, it equally follows that the same statute authorizes the county to demand additional money to buy and equip schools, fire stations, police stations, and to defray all or part of the expenses of each of the other objectives tabulated above. No such legislative intent can be found."

Not only is there no standard by which to equate the flat rate of $ 250 a lot to the value of potential park land in the subdivision, but the Village Code provision also goes on the false assumption that the tract developer is obliged or can be compelled to transfer title to suitable park land in the subdivision (or its equivalent) to the municipality. It is clear that this is not the intention of the statute, which contemplated that park areas like the streets within a subdivision are for the benefit of lot owners therein unless the parks and streets are voluntarily transferred to the unit of government or acquired by it under the power of eminent domain. This appears from the statutory language and, likewise, from a bulletin prepared by the author of the statute which states that it remains for the municipal governing body "alone to decide when, if ever, they become public streets and parks by the council accepting cession, accepting dedication, or beginning condemnation proceedings".

Such case law as exists in New York State points in the same direction, e.g., Matter of Lake Secor Development Co. v. Ruge (141 Misc. 913, affd. 235 App. Div. 627); Reggs Homes v. Dickerson (16 Misc 2d 732, affd. 8 A D 2d 640). The Supreme Court [*91] of Michigan in Gordon v. Village of Wayne (370 Mich. 329) held that subdividers [**680] who were wrongfully required by a village to donate property

or its monetary equivalent to a village in order to obtain approval of plats were entitled to recover the amount paid. The Supreme Court of Illinois in Pioneer Trust & Sav. Bank v. Village of Mt. Prospect (22 Ill. 2d 375) held that a municipality may require a developer to provide streets which are required by the activity within the subdivision, but could not be forced to dedicate 6.7 acres of land "for the use of the Mt. [***964] Prospect Park District as an elementary school site and a secondary use as a playground." The Mt. Prospect Planning Commission sought to impose that as a condition on the approval of a subdivision map, on the theory that this additional school and recreation facility would be required by the increase in population in that part of the village resulting from development of the subdivision. The court (pp. 378-380) cited and quoted from Rosen v. Village of Downers Grove (19 Ill. 2d 448), in which it was said that "the developer of a subdivision may be required to assume those costs which are specifically and uniquely attributable to his activity and which would otherwise be cast upon the public", but added that "because the requirement that a plat of subdivision be approved affords an appropriate point of control with respect to costs made necessary by the subdivision, it does not follow that communities may use this point of control to solve all the problems which they can foresee. The distinction between permissible and forbidden requirements is suggested in Ayres v. City Council of Los Angeles, 34 Cal. 2d 31, 207 P. 2d 1 [11 A. L. R. 2d 503], which indicates that the municipality may require the developer to provide the streets which are required by the activity within the subdivision but cannot require him to provide a major thoroughfare, the need for which stems from the total activity of the community." The Illinois court added in the Mt. Prospect case (supra, p. 380) that, "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." In Kelber v. City of Upland (155 Cal. App. 2d 631), the District Court of Appeal of California [*92] held that an ordinance requiring a subdivider, as a condition of approval of a subdivision map, to pay $ 30 per lot to be placed in park and school site fund and $ 99.07 per acre to be placed into a subdivision drainage fund in lieu of specific drainage structures both inside and outside of the subdivision, was not a local ordinance regulating the design and improvement of a subdivision, as authorized by the statute, and that fees collected by the city thereunder were illegally imposed. The Supreme Court of Kansas held in Coronado Development Co. v. City of McPherson (189 Kan. 174) that a planning and zoning regulation requiring payment to the city by subdividers of 10% of appraised value was beyond the scope of the enabling statute. The court said: "The fact that the payment is to be placed in a special fund solely for the purchase of land for public parks or playgrounds and other public areas does not add to the city's authority under the statute. Indeed, a careful analysis of the statute compels a conclusion there is nothing in any of its provisions authorizing [***965] the assessment of money as a revenue measure for other public areas" (p. 177; italics from original).

The order appealed from should be affirmed, with costs.