

THE OFFICE-HOUSING LINK:  
SOCIAL POLICY UNDERWRITTEN BY PRIVATE ENTERPRISE

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ABSTRACT

This thesis analyzes the effectiveness and legality of San Francisco's Office/Housing Production Program (OHPP), which links office and residential development. Reasoning that new office buildings attract new residents to the city, San Francisco now requires office developers to build, sponsor, rehabilitate or finance housing in order to receive permission to build offices.

The city developed the program in response to a severe housing shortage, a prosperous office market, cutbacks in federal housing funds and a heavily-regulated planning environment. The planning department calculates each office developer's housing requirement under a formula, which relates office space to housing demand and which encourages, but does not require, production of low- and moderate-income housing. To date, OHPP has succeeded both economically, insofar as it has apparently increased housing production in the city (although not all the OHPP units are necessarily net adds to the housing stock), and politically, insofar as the program alone has neither provoked a major development exodus nor created litigation.

In imposing OHPP, the city has chosen not to enact an OHPP ordinance but to instead rely on the planning commission's discretionary review power as authorization for the program. Analysis suggests, however, that an OHPP ordinance, sanctioned by the Board of Supervisors, would both improve the legal underpinnings of the program and decrease the possibility of political manipulation. The constitutional validity of the program merely requires that housing production be found to serve a legitimate state interest and that an increase in office space be related to an increase in housing demand. The city can and should require production of low- and moderate-income housing, although the provision of any kind of housing would probably be legally acceptable as long as the success of filtering is fairly debatable. If the cost of participation in OHPP is related to, but not greater than, the investment necessary to generate a housing unit, then Proposition 13's prohibition against special taxes will not prove an obstacle to the imposition of the program.

Although the program meets the letter of the law, San Francisco should mandate participation only as long as developers continue to flock to the city. Moreover, the city should assume a broader coordinating role to ensure that the housing produced meets the city's needs.

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## THE OFFICE-HOUSING LINK:

### SOCIAL POLICY UNDERWRITTEN BY PRIVATE ENTERPRISE

The demand for housing is unrelenting. Vacancies are all but non-existent. The prices of condominiums and houses soar. Rents are the highest in history. Over 2000 households enter the City each year, but annually less than 1000 new housing units are built . . . . This is intolerable. Yet, the federal budget cutters, instead of confronting the housing crisis here and throughout the United States, merely aggravate it by the ruthless elimination of vital housing programs . . . . We will not turn our back on the housing crisis. With resilience and resourcefulness, and a determined self-reliance, we must develop a comprehensive housing program of our own -- to build where possible, to subsidize where practical, to encourage rehabilitation.<sup>1</sup>

#### I. INTRODUCTION

Across the country, high interest rates, large cutbacks in federal housing funds, and an increase in the number of households have helped to create a housing shortage, especially for families of low- and moderate-income.<sup>2</sup> Unable to control interest rates or the federal budget, city officials are searching for innovative solutions that will ameliorate the housing problem in their own jurisdictions.

As part of its regulatory approach to solving the housing shortage, particularly for low- and moderate-income families, San Francisco has devised a

program that capitalizes on its relatively prosperous office economy. As a prerequisite to planning permission, downtown office developers must mitigate their impact on the housing market; reasoning that new office buildings attract new residents to the city, the city now requires office developers to build, rehabilitate, sponsor or fund housing in order to receive planning permission for office development. The number of housing units for which an office developer is responsible depends on the number of square feet in the office building. This "Office Housing Production Program" (OHPP) is currently being administered by the City Planning Department and the Mayor's Office of Housing and Community Development (OHCD) and has not yet been enacted by ordinance. Implementation of the program has sparked heated debate in the development community, causing the city to proceed cautiously in selecting the appropriate legal form of the program.

Toronto, Canada,<sup>3</sup> London, England,<sup>4</sup> and Denver, Colorado<sup>5</sup> have implemented incentive programs that link offices and housing, while Santa Monica, California<sup>6</sup> has attempted to institute a more all-inclusive system for linking land use functions. San Francisco's program is unique, however, in its exclusive focus on the office-housing link and the mandatory nature of the housing contribution requirement. This controversial

program has drawn inquiries from a number of cities,<sup>7</sup> as other localities consider whether they can or should solve housing problems by shifting some of the burden to office developers.

This article explores the effectiveness and legality of OHPP, suggesting changes both to help the program meet its stated goals and to reinforce its legality. More specifically, the article discusses the rationale for requiring office developers to contribute to housing, the extent to which the program meets its objectives, and legal arguments which both challenge and support the program. Finally, the article proposes modifications in the structure of the program, the most important of which include restricting the use of OHPP housing contributions to the production of housing aimed at residents of low- and moderate-incomes, enabling the city both to better coordinate the contributions of office developers and the housing needs of the city and to adapt the requirement to changes in the office and housing markets, and, perhaps the most pressing need, codifying the program in an ordinance.

## II. HISTORY AND RATIONALE

### A. Context of the Program

OHPP was first proposed by housing activists in 1980, and was implemented by the city planning commission later that year.<sup>8</sup> The program, a response to the city's

severe housing crisis, was shaped by a variety of factors affecting the San Francisco housing market; these factors include the effects of cutbacks in federal funding for housing, a booming office market, and a regulatory planning environment.

1. Severe Housing Shortage

The housing shortage in San Francisco is characterized by an imbalance between supply and demand generally, and particularly between the cost of housing and the incomes of housing consumers.<sup>9</sup> The average buyer cannot afford monthly mortgage payments at current high interest rates; therefore housing developers are holding back construction.<sup>10</sup> For example, there were 1402 "net adds" (additions minus demolitions) to the housing stock in 1979, but only 852 in 1980.<sup>11</sup> While the rate of supply is decreasing, however, demand for housing is on the upswing. The most noticeable trend is an increase in the number of young professionals, who have a high demand for city center housing;<sup>12</sup> the population in the 25-44 age bracket is increasing,<sup>13</sup> the number of households is rising,<sup>14</sup> and employment in the professional, managerial, and service sectors is growing.<sup>15</sup> This imbalance between supply and demand results in high prices and rents;<sup>16</sup> the imposition of condominium conversion restrictions and rent control laws in response to this situation<sup>17</sup> has not proven to be an adequate solution.

Another, related aspect of the housing crisis in San Francisco is that the housing that is being produced caters almost exclusively to those in upper-income brackets, since they alone can afford the current mortgage interest rates.<sup>18</sup> The private housing market is not meeting the needs of the low- and moderate-wage earners.<sup>19</sup> While studies of the housing situation in San Francisco disagree as to whether the primary need for housing is for very low-income households<sup>20</sup> or for middle class two-income households<sup>21</sup>, they do agree that more luxury housing is not a high priority and that those earning less than the median income are hardest hit by the housing shortage.<sup>22</sup>

## 2. Large Federal Cutbacks

Reduced spending for public sector housing programs is one factor that has helped to make the housing crisis particularly severe for low- and moderate-income households. In 1981 and 1982 the federal government drastically reduced funding for the housing program budget of the United States Department of Housing and Urban Development;<sup>23</sup> San Francisco consequently was forced to cut back its plans for federally funded new and rehabilitated housing.<sup>24</sup>



### 3. Commercial Boom

In contrast with its housing market, San Francisco's commercial market has been relatively successful in withstanding the recession.<sup>25</sup> Office buildings are a driving force in the economy of the city: San Francisco is a major financial center and headquarters city, serving international business<sup>26</sup> and providing jobs in services, finance, insurance, real estate, transportation, utilities communications and wholesale trade.<sup>27</sup>

The office market boomed in 1980 and 1981. The office vacancy rate was very low, at 0.1%;<sup>28</sup> the national average of office vacancy rates ranged from about 3.5% to 4.8% during this period.<sup>29</sup> Gross rents in the tight downtown market were very high, typically \$24-35 per square foot, with projections that rents would increase to \$35-45 per square foot in 1982.<sup>30</sup> Moreover, in December of 1981, it was estimated that over 12,000,000 square feet of new downtown office space, attracting 46,000 new employees would be built over the next five years.<sup>31</sup> The average annual increase in downtown office space during the past few years has been approximately 1.5 million square feet.<sup>32</sup>

The office market did soften somewhat in 1982 as a result of the recession, the increasing tendency of firms to move data processing operations to the suburbs,<sup>33</sup> and the fact that demand was partially satisfied by the new wave of downtown office construction.<sup>34</sup> The vacancy

factor rose from .01% to 3.6%, with projections that it would stabilize at 6-7% by the end of 1983.<sup>35</sup> Even this higher vacancy rate, however, was low by national standards: between March and September of 1982, the nationwide average office vacancy rate rose from 5.6% to 9%.<sup>36</sup>

#### 4. Regulatory Planning Environment

Throughout California there is an increasing tendency to use land use regulations to exert planning control.<sup>37</sup> Revisions to the new state housing law,<sup>38</sup> for example, contain detailed provisions that govern the contents of the housing element of local general plans.<sup>39</sup> The new provisions require that cities identify and provide for their fair share of the regional housing need,<sup>40</sup> and make plans to assist in the development of adequate housing for households of low- to moderate-income.<sup>41</sup> The legislation envisions that the local governments will form new partnerships with the private sector to implement these housing requirements.<sup>42</sup>

Reflecting the statewide tendency, San Francisco has relied on regulation to respond to local antigrowth initiatives<sup>43</sup> and to implement planning goals. The city has imposed a growing number of development restrictions on a business community which, until recently, has responded to rather than initiated proposals for mitigating development impacts.<sup>44</sup> These city

regulations range from the imposition of rent control<sup>45</sup> and requirements for condominium and residential hotel conversions<sup>46</sup> to plans for a transit impact development fee.<sup>47</sup> The city is currently formulating an overall strategy to guide downtown development.<sup>48</sup> Although developers assert that the large number of restrictive planning regulations and the slowness of the permit process make it difficult to function in San Francisco, there has been no widespread rebellion against the imposition of the restrictions.<sup>49</sup>

#### B. Alternative Solutions

San Francisco could theoretically have chosen a number of conceptually different ways to (1) reduce the supply-demand housing imbalance, (2) increase the affordability of housing, (3) find a substitute source of money to replace dwindling federal grants, and (4) fulfill the state housing requirements.

First, the city could have chosen to socialize the housing burden by forcing people to pay according to their ability. A city wanting to implement such a collectivist solution could theoretically raise property taxes or levy a local income tax. As discussed below, taxpayer intolerance with further tax increases expressed by the passage of Proposition 13 makes this solution politically infeasible in San Francisco.

Second, the city could have chosen to adopt a regional solution by shifting the housing burden to the suburbs. This approach is foreclosed, however, by Cal. Gov't Code § 65583 which requires that each city provide for its fair share of the regional housing need. Moreover, housing downtown workers in the suburbs would increase traffic congestion and air pollution and cause a regional transportation shortfall.

Third, the planning department could have chosen to discourage office growth in the city. Although the city administration has not adopted this policy, business firms are themselves choosing to move certain functions out of the downtown area in order to take advantage of lower costs and greater supply of buildable land in the suburbs.

Fourth, the city could have chosen to use its selective taxing power to increase local revenues. The city has already burdened local business, however, with a large number of taxes and charges including payroll taxes, business license taxes, utility user taxes, commercial tenants' occupancy taxes, sales taxes, transient lodger taxes, sewer user charges and construction charges. These additional costs have prompted the business community to rally against any further charges.<sup>50</sup>

Given the pervasive regulatory environment in California it is not surprising that San Francisco decided not to use any of the above methods but instead to devise a package of regulatory devices promoting the production

of new housing units. In addition to OHPP, the city is helping to identify new sites for housing, creating a new financing mechanism to provide low interest home mortgages, and legalizing secondary units.<sup>51</sup> While OHPP is only one component of this plan, it has the potential to satisfy a large portion of San Francisco's housing need. The Regional Council of Governments has estimated that demand for housing in the city would require the addition of approximately 2,408 housing units per year between 1980 and 1985.<sup>52</sup> If office space continues to be developed at the current rate, under the OHPP formula discussed below, office developers would be required to build or fund up to 1,333 units of housing per year. Thus, OHPP could potentially supply 55% of San Francisco's housing needs.

### C. Rationale for OHPP

The underlying rationale for OHPP can be analyzed from both theoretical and pragmatic perspectives. Windfall recapture theory provides a useful theoretical framework; although the term "windfall" refers to any increase in the value of real estate not caused by the owner or general inflation,<sup>53</sup> "[e]xisting windfall recapture devices in the United States are limited to attempts to recoup part of the governmental costs associatd with new

development."<sup>54</sup> Two particular windfall recapture techniques, exactions and land valuation taxation, are particularly helpful in explaining the basis for OHPP.

An "exaction" is imposed when a developer is required to fulfill a condition before the city will grant subdivision approval, rezoning, conditional use or building permits, or annexation.<sup>55</sup> The goal of an exaction is the internalization of external costs imposed on the community by developers. When the local government uses municipal revenues to pay for the public costs generated by the new development,<sup>56</sup> the developer reaps a windfall. In theory, to recapture some of this benefit to the developer, the community measures the anticipated tax revenues of the development against the cost of the public services it expects to supply to the project. If revenues are less than costs, then the development is not considered to pay its own way and the locality exacts a payment, in money or in kind, from the developer.<sup>57</sup>

Subdivision developers, for example, commonly are required to pay for the public infrastructure that services their development.<sup>58</sup> The definition of public costs has recently expanded to the point where cities may require developers to dedicate sites or pay in-lieu fees for schools<sup>59</sup> and parks.<sup>60</sup>

OHPP expands the scope of public costs to include not only costs of government, paid for by the community out of municipal revenues, but also the costs absorbed by the

community at large in the form of increased housing costs. By implementing OHPP to alleviate the pressure that the new office projects place on the housing market, the city makes the judgement that the benefits of office projects are not greater than the costs imposed on the city unless the office developer internalizes the housing costs of his project.<sup>61</sup> The city is apparently reasoning that office development creates an externality, stemming from the fact that new offices attract new residents to the city. This drives up demand for housing and, consequently, raises the price of housing; the level of office activity thus has a financial impact on the housing market. OHPP is not designed as much to avoid this impact as to shift the burden it creates to the office sector.<sup>62</sup> The program is redistributive, with housing requirements imposed on developers for reasons of equity rather than efficiency.

The second windfall recapture technique, land value taxation, is based on the argument that the community has the right to recapture the "unearned increment" in increased land values. Proponents contend that the largest share of increases in land value is due to such factors as public and private improvements in surrounding areas, paid for by people other than the landowner, and the increase in demand for land caused by population growth.<sup>63</sup> It is argued that economic rent does not rise spontaneously from the land, but represents value added by

activities of the community as a whole.<sup>64</sup> While courts have not explicitly allowed cities to use exactions to recapture unearned increments aside from specifically defined social or governmental costs,<sup>65</sup> language in their opinions indicates that they may be implicitly relying on the concept.<sup>66</sup>

From the pragmatic perspective, it appears that city officials are balancing general antidevelopment sentiments, and the demands of vocal neighborhood housing proponents,<sup>67</sup> against potential court battles and the loss of tax revenues if burdensome requirements force developers and tenants to move to the suburbs or Oakland. In setting both the cost of the OHPP housing contribution and the office to housing ratio, the city's goal was to shift costs to developers at a rate high enough to help mitigate the housing situation yet low enough to ensure that developers do not litigate or take their projects elsewhere. Under OHPP, the city is relying on the prosperous and fiscally beneficial office market to subsidize the more problematical housing market.



### III. Mechanics of OHPP

The OHPP housing requirement, which is only levied on office buildings of greater than 50,000 square feet,<sup>68</sup> is calculated by the San Francisco City Planning Department according to the following formula:

$$\# \text{ units} = \text{gross sq.ft. office space} \times 1 \text{ worker}/250 \text{ sq.ft.} \\ \times .4 \times 1 \text{ unit}/1.8 \text{ workers} \quad ^{69}$$

This formula is based on the following assumptions:

1. 250 gross sq.ft. of office space would accommodate one worker;
2. 40% of office workers would live in San Francisco;
3. The average household in San Francisco has 1.8 workers.<sup>70</sup>

The Mayor's Office of Housing and Community Development (OHCD) administers the program, reviewing and approving each developer's proposal to meet the particular housing requirement computed by the planning department.

The developer may implement the requirement by constructing new housing units or substantially rehabilitating a vacant building.<sup>71</sup> The developer may elect to serve as an equity or development partner of a housing development,<sup>72</sup> to contribute to the financing of a project, provided that the contribution is not used solely to reduce the sale price of a housing unit already under construction,<sup>73</sup> or to contribute to the Home

Mortgage Assistance Trust, a pool of funds to be used for shared appreciation mortgages,<sup>74</sup> at a rate of \$6,000 per unit required.

The city has encouraged the production of multifamily "affordable"<sup>75</sup> housing units by defining a bedroom as a unit and by offering incentives based on a credit system. If the developer sponsors an affordable housing unit, assisted by government subsidies, credit is granted for two units. If a moderate-income unit is sponsored without government subsidies, the developer receives credit for three units; four credits are granted for a low-income unit, sponsored without government subsidies.<sup>76</sup>

The city enforces the program by issuing a temporary certificate of occupancy for the office only after the developer has obtained preliminary approval of the housing units from the city planning department. A final certificate of occupancy is issued when the city planning director finds that the construction of the new housing development has begun. In the case of rehabilitation, work must have begun or been completed, and the developer must post a letter of credit equal to a portion of rehabilitation costs.<sup>77</sup> Alternatively, the developer may invest \$6,000 per unit in the shared appreciation pool of the mortgage revenue bond program.<sup>78</sup>

The developer may transfer approved housing credits to

other office developments if he either abandons an office project or accumulates a surplus of credits for a particular office development.<sup>79</sup>

#### IV. COMPARISON OF GOALS AND OUTCOMES

From the program's initiation in late 1980 through March 1983, it generated commitments for a total of 2637 housing units. Of these units, 1325 are for new construction and 1312 are for rehabilitation.<sup>80</sup> All of the renovated units are underway or completed and, of the new units, 437 are underway and 888 are proposals.<sup>81</sup> Since the program has been in existence for only two years, and some of the obligations remain proposals, it is not yet possible to measure precisely its secondary impacts in the housing market. Its potential impacts can be estimated, however, through an analysis of the initial reaction of office developers to the program. This evaluation of the impact of OHPP is most usefully considered within the context of the city's political and economic goals in implementing the program: to produce more housing units, particularly low- and moderate-income units.<sup>82</sup>

The city expects that the first goal, to increase the overall supply of new housing, will be met. It should be recognized, however, that not all the OHPP units produced will necessarily be net adds to the housing stock.<sup>83</sup> While housing developers who actually receive OHPP funds

should increase production, this increase may cause a decrease in the price of housing; some non-OHPP funded housing developers may decide to leave the market.<sup>84</sup> It is also possible that some of the units produced with OHPP funds would have been built without the funding, despite the city's admonition that OHPP funds be used to produce only those units that would not be produced "but for" OHPP.<sup>85</sup>

OHPP has succeeded politically insofar as it has failed, so far, to cause a major exodus,<sup>86</sup> or rebellion,<sup>87</sup> by office developers. Whether motivated by the desire to maintain harmonious relations with the planning department<sup>88</sup> or by the need to avoid costly construction delays<sup>89</sup> and penalties for finishing behind schedule,<sup>90</sup> office developers have generally complied with the OHPP housing requirement.<sup>91</sup> Although developers consider OHPP to be an annoyance,<sup>92</sup> they do not find the price of participation prohibitive.<sup>93</sup> Various estimates of the relative cost of OHPP range from three to five dollars per square foot on construction costs,<sup>94</sup> compared to downtown office construction costs of approximately \$250 per square foot<sup>95</sup>; the requirement adds from ten to seventy cents per square foot on rents,<sup>96</sup> while downtown rents average about \$35 per square foot.<sup>97</sup> OHPP costs apparently have not been worth the expense and delay of a lawsuit.<sup>98</sup>

Office developers have adjusted to OHPP by treating it as a credit game, involving a non-productive investment of resources. After the city determines the number of units the developer is obligated to fund, the developer is left free to use his entrepreneurial talents to negotiate his own deal in the housing market. Few office developers consider building the housing themselves, for the development industry is highly segregated and specialized; commercial developers do not usually engage in residential development and vice versa.<sup>99</sup> Consequently, developers devote staff resources to finding the least expensive deal available. The particular method that a developer chooses to fulfill the requirement depends on both the cost of the deal and the nature of the development company.

Developers choose to sponsor housing projects rather than participate in the mortgage revenue bond program only if the cost per unit is less than \$6000,<sup>100</sup> the cost of contributing to the mortgage revenue bond program. Few of the developers have actually paid as much as \$6,000 per unit because they have taken advantage of the multiple credit incentive system. Several office developers have funded the rehabilitation of floundering low income public housing projects, at costs ranging from \$2253/unit to \$4000/unit and \$4951/unit.<sup>101</sup> Homebuilders seeking joint venture partners or selling housing credits approach office developers, but the office developers generally consider these deals too risky unless they know the

homebuilder or the deal is very attractive. Office developers are also inundated with appeals from proponents of small low-income housing projects who need a new source of funding to replace diminishing public subsidies.<sup>102</sup> Office developers typically do not consider these projects as potential OHPP candidates due to fears that the housing project will not get off the ground.<sup>103</sup> Finally, some developers have responded to the OHPP housing requirement by building luxury condominium on top of their office buildings.<sup>104</sup> A summary of all the OHPP deals made from Dec. 1980 to March 1983 can be found in Appendix A.

The uneasy acceptance of OHPP by office developers in the strong San Francisco commercial economy is only a partial political success for the program. OHPP would more closely match the city's objectives if it required office developers to fund only low- and moderate-income units.<sup>105</sup> As indicated by the multiple credit incentive system, the preferred objective of OHPP is to increase the production of low- and moderate-income housing. Most office developers are taking advantage of the incentive system to sponsor low- and moderate-income housing, but there is no guarantee that future office developers will not follow the lead of some current developers and produce only market-rate housing. This concern may become more serious as the number of floundering public housing projects available for OHPP contributions diminishes. Although restructuring the program to require production

of low- and moderate-income housing might not avoid the general problem of the production of units that are not net adds to the housing stock, it would help to further the more specific goal of providing housing for those who need it most during the current housing shortage.<sup>106</sup>

## V. LEGALITY OF OHPP

OHPP is backed by the force of law only if San Francisco is authorized to implement the program by some statutory or state constitutional source of authority. The substance of the program must further comply with requirements of constitutionality. This section discusses the availability of alternative affirmative sources of legal authority and the limitations imposed by the state and federal constitutions.

### A. Affirmative Grants of Authority

#### 1. Statutory Authority

The city relied on the California Environmental Quality Act (CEQA) for statutory authorization of OHPP.<sup>107</sup> CEQA empowers the city to require, first, that environmental impact reports be prepared for office buildings<sup>108</sup> and, second, that significant effects on the environment caused by the office buildings be mitigated where feasible.<sup>109</sup> San Francisco found specific support for OHPP in 1979 amendments to CEQA mandating consistency between environmental protection policy and the provision of a safe and suitable living

policy and the provision of a safe and suitable living environment for every Californian.<sup>110</sup> To support the proposition that the impact of office development on the housing market is a significant environmental effect, which the city could require developers to mitigate, the city could point to the role of housing in providing a "safe and suitable living environment" of Californians.

This expansive reading of CEQA, requiring mitigation of impacts on both the socioeconomic and physical environments, generated much controversy in the development community as to whether CEQA could appropriately be used as an instrument of social policy.<sup>111</sup> The issue became moot, however, when the California Legislature amended CEQA in 1981 to limit the definition of "significant effects on the environment" to substantial adverse changes in the physical environment.<sup>112</sup> A 1982 amendment then negated contentions that CEQA alone confers independent authority on public agencies to levy fees and impose exactions to mitigate significant effects on the environment.<sup>113</sup>

## 2. Local Discretionary Review Power

Since the Legislature eliminated CEQA as a possible source of authority, the city planning commission has been imposing the program on the basis of its power to take into consideration the effect of the proposed business on surrounding property and residents when using its



imposition of requirements such as OHPP on permit applicants, but the planning commission considers this particular use of the power a temporary measure.<sup>115</sup> The commission plans to take further action to legitimate OHPP after it has adopted new downtown zoning controls based on a recent study of methods for controlling downtown growth.

### 3. Homerule Power as Authority to Enact an OHPP Ordinance

From a policy perspective, the disadvantages of the current status of OHPP, unsanctioned by the Board of Supervisors and existing solely as a creature of the planning commission, outweigh its advantages. The administration of the program under the commission's discretionary review power, like the initial reliance on CEQA, gives the planning commission flexibility to shape the requirement to the needs of particular cases; such flexibility, however, increases the likelihood of political pressure and dealmaking. Office developers, whose trade requires skill in negotiation, may well be able to take advantage of a system that leaves open such important items as the timing and price of the contribution and the number of credits gained.

San Francisco could possibly use the homerule power granted to it by the California Constitution to embody OHPP in a municipal ordinance. Pursuant to this power, any city in California may make and enforce valid local, police, sanitary, and other ordinances and regulations not in conflict with general laws.<sup>116</sup> Furthermore, the

state constitution enables San Francisco, as a charter city, to make and enforce all ordinances and regulations in respect to municipal affairs.<sup>117</sup> Thus, an OHPP ordinance would be valid under these constitutional provisions if it did not conflict with state law or if it were viewed as a municipal affair.<sup>118</sup>

Arguably, a court could interpret the 1982 amendments to CEQA, discussed above, as requiring explicit statutory authorization for fees and exactions imposed in order to mitigate environmental impacts. In enacting these CEQA amendments, however, the Legislature stated that if the California Constitution, a charter, or a statute generally gave a city authority to levy fees or exactions for the public welfare, the city could impose such fees or exactions to mitigate significant effects on the environment.<sup>119</sup> Consequently, an OHPP ordinance enacted pursuant to the city's home rule power to further the public welfare would not conflict with the CEQA amendments.

The 1980 amendments to the housing statutes,<sup>120</sup> moreover, indicate legislative approval of local governments' actions to meet the housing needs of their citizens. These amendments specify the necessary contents of the housing element of local general plans. The new provisions require that all localities, including charter cities,<sup>121</sup> cooperate with the private sector in providing housing for all economic segments of the community,<sup>122</sup> by such measures as assisting in the development of low- and moderate-income housing.<sup>123</sup> The

Regional Council of Governments is empowered to analyze each locality's share of the regional housing need,<sup>124</sup> but each locality is deemed best able to determine the specific form of its contribution to the attainment of the state housing goal.<sup>125</sup> The regional nature of this state-mandated approach<sup>126</sup> indicates that housing is not a purely municipal affair.<sup>127</sup> The statute's scope and purpose, however, do not preclude local control. Furthermore, a 1982 amendment to the housing element legislation indicates that even if a city failed to adopt a housing element by the required 1981 date, non-residential projects approved before May 1983 on condition that the non-residential developer cause housing to be produced in accordance with planning commission guidelines would not be invalidated.<sup>128</sup> This fact situation so closely parallels OHPP that this amendment could be interpreted as tacit legislative approval of OHPP. In sum, OHPP implements rather than conflicts with the state housing requirement,<sup>129</sup> which could be sufficient to authorize the city to pass an OHPP ordinance.

#### B. Constitutional Challenges to OHPP

When land use regulations attempt to achieve a particular end by placing special burdens on one group, landowners can challenge the regulations on due process and equal protection grounds under the state and federal constitutions.<sup>130</sup> It is thus necessary to explore whether OHPP (1) is reasonably related to a legitimate

government objective, as is required by substantive due process analysis; (2) effects a taking of a developer's property in violation of the Just Compensation Clause of the Fifth Amendment; or (3) singles out office developers for unfair treatment, as is prohibited by the guarantee of equal protection.<sup>131</sup> It is also necessary to determine whether OHPP violates Article XIII § 4 of the California Constitution, which prohibits the imposition of special taxes unless first sanctioned by a two-thirds vote of the population.

1. Substantive Due Process

Courts adopt a deferential standard in reviewing the constitutionality of a restriction regulating social and economic relations; such restrictions are presumed valid and "the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way."<sup>132</sup> The courts require only that the restriction be rationally related to a legitimate state interest.<sup>133</sup> The Supreme Court has ruled that if this requirement has been met, and the restrictions are not arbitrary or discriminatory, due process requirements are satisfied. If no other constitutional restrictions apply, a state is then "free to adopt whatever economic policy may reasonably be deemed to promote public welfare, and to enforce that policy by legislation adapted to its purpose;" the courts have no further say in the matter.<sup>134</sup> As stated in the Supreme

Court's seminal zoning case, Euclid v. Ambler, "the [zoning] ordinance now under review, and all similar laws and regulations, must find their justification in some aspect of the police power, asserted for the public welfare."<sup>135</sup>

In short, a land use restriction is valid if it is "fairly debatable"<sup>136</sup> that the restriction bears a reasonable relation to the public welfare.<sup>137</sup> Two issues, then, must be resolved: whether OHPP serves a legitimate state interest, and whether the program is structured to ensure a rational relation between the means and the end of the regulation.<sup>138</sup>

a. Legitimate State Interest

The stated purpose of OHPP is to provide more housing in San Francisco, particularly, but not exclusively, low- and moderate-income housing. Thus, the program serves a legitimate state interest, and is a valid exercise of the police power, if the production of housing for all income groups<sup>139</sup> reasonably relates to the "public health, safety, morals or general welfare."<sup>140</sup>

Although challenges to the legitimacy of the state interest in housing cases are typically concerned with the production of housing through the expenditure of public funds, rather than with regulatory measures such as OHPP, the cases do help to define the extent of the police power

in the housing field. In fact, in Berman v. Parker,<sup>141</sup> the Supreme Court analyzed the legislative exercise of eminent domain power to eliminate substandard housing conditions in terms of the scope of the police power:

An attempt to define its limits is fruitless, for each case must turn on its own facts. . . . Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive. In such cases the legislature, not the judiciary, is the main guardian of the public needs to be served by social legislation. . . . This principle admits of no exception merely because the power of eminent domain is involved. . . . Public safety, public health, morality, peace and quiet, law and order - these are some of the more conspicuous examples of the traditional applications of the police power to municipal affairs. Yet they merely illustrate the scope of the power and do not delimit it.<sup>142</sup>

This "broad and inclusive"<sup>143</sup> notion of the public welfare has been expanded over time. A typical early ruling<sup>144</sup> found that slum clearance, combined with the construction of public housing for low-income families, promoted the public welfare. Since then, courts have found that either of these two elements suffices; the construction of low-rent public housing, without the need for accompanying slum clearance, has been found to promote the public welfare,<sup>145</sup> as has the clearance of both blighted and unblighted areas within slums in order to create a "balanced" community.<sup>146</sup> Even middle-income housing has been upheld as a valid promotion of public welfare, under conditions of housing crisis when the market fails to supply the needed units.<sup>147</sup>

These rulings indicate that OHPP serves a undoubted legitimate state interest if it increases housing opportunities for low- and moderate-income households.<sup>148</sup> The emphasis in these rulings is also present in California's statutory definitions of government activities which promote the public welfare: government assistance to low- and moderate-income households whose housing needs are not being met by private enterprise,<sup>149</sup> and density bonuses to developers constructing at least 25% of a housing development for low- and moderate-income households.<sup>150</sup>

It remains to be determined whether the courts would consider the provision of housing for upper-income groups, in and of itself, a legitimate state interest. The California Legislature has expressed concern with the adequate provision of housing for all economic segments of the community, which of course includes the wealthy;<sup>151</sup> the courts, however, generally base their approval of affirmative government action in housing on a showing of a housing shortage or of a prevalence of inadequate housing.<sup>152</sup> San Francisco meets this test as long as it relies on OHPP to solve the housing shortage; the city could thus require the office developers to build low-, moderate-, and even middle-income housing. The production of upper-income housing, on the other hand, may not serve

a legitimate state interest, since this is the one sector of the housing market which is currently being served by private residential developers.<sup>153</sup>

San Francisco could argue, however, that the provision of luxury housing is not an end but a means, in that more luxury housing units would eventually result in more moderate-income units through the "filtering" process.<sup>154</sup> If San Francisco merely can demonstrate that it is at least fairly debatable that filtering is occurring,<sup>155</sup> then OHPP can be used to produce luxury housing. At least one local study shows, however, that "filtering up" rather than "filtering down" is taking place in San Francisco.<sup>156</sup> One manifestation of this process is gentrification. Low-, moderate-, and middle-income households are competing for the scarce housing supply by doubling up or devoting a large proportion of their incomes to housing. Because of this phenomenon, houses are increasing in value and are being transferred to higher-income households, rather than eventually decreasing in value and becoming available to lower-income households.<sup>157</sup> Under these circumstances, the production of luxury housing would not be a "means" but only a legally questionable "end".

In sum, OHPP serves a legitimate state interest if office developers invest in housing which the market is failing to supply. If it is even fairly debatable that housing is filtering from upper- to lower-income



residents, the program can be used to fund luxury housing even if the production of such housing, in itself, is held not to serve a legitimate state interest.

b. Rational Relationship Between Means and End

OHPP may be used as a means to promote a legitimate end if there is a rational nexus between "the service need created by the development and that which is exacted as a condition for development permission."<sup>158</sup> In other words, the exaction must be designed to assist in remedying a problem visited upon the community by virtue of the activity upon which the exaction is imposed. While the case law in this area has been developed primarily through challenges to subdivision exactions,<sup>159</sup> the doctrine has also been applied to applications for other kinds of changes in land use, such as building permits,<sup>160</sup> zoning variances,<sup>161</sup> and rezonings.<sup>162</sup>

The municipality need not show that the developer's activity is the specific and unique cause of the public cost to which the exaction is related,<sup>163</sup> but only that the exaction is reasonably related to the needs of the proposed development.<sup>164</sup> The California standard, as formulated by Appeals Court in Scrutton v. County of Sacramento, is more specific:

[C]onditions imposed on the grant of land use applications are valid if reasonably conceived to fulfill public needs emanating from the landowner's proposed use.<sup>165</sup>

In applying the rational nexus test, California courts have upheld exactions which are intended to benefit the public as a whole, rather than limiting the effects of permitted exactions to the needs of the developments in question. The courts have also permitted exactions based on projected future needs. In Ayres v. City Council of Los Angeles,<sup>166</sup> for example, the court held that the city could require a subdivider to dedicate a strip of land which abutted a major thoroughfare, but did not provide access to the subdivision, to the city. The court found that the subdivider had a duty to comply with reasonable conditions to conform the welfare of the lot owners to that of the public. The exaction was upheld, even though it benefited not only the subdivision residents but the city as a whole and was based on the effects of future neighborhood population increases as well as the present effects of the subdivision.<sup>167</sup>

In Associated Homebuilders of the Greater Easy Bay, Incorporated v. City of Walnut Creek,<sup>168</sup> the court upheld a statute<sup>169</sup> authorizing localities to require subdividers to dedicate land, or pay fees in lieu thereof, for park or recreational purposes. The court, interpreting the statute in the context of the urgency of the need for parks and the rapid disappearance of open land, held that it was unnecessary to find that the particular subdivider would increase the need for parks to such an extent that additional facilities would be

needed.<sup>170</sup> The court found instead that the statute was justified by the "general public need for recreational facilities caused by present and future subdivisions."<sup>171</sup> Dicta in the opinion goes further, however, indicating that the object of the exaction does not have to be specifically tied to the needs of the residents of the development. The court notes the logic, in some circumstances, of using fees tendered by subdividers to purchase or develop land which would be available for the use of subdivision residents, but which would be at some distance from the development. The contribution would not be used for the specific benefit of the future residents of the subdivision, but would be employed for facilities used by the general public:

If for example, the governing body of a city has determined, as has the city in the present case, that a specific amount of park land is required for a stated number of inhabitants, if this determination is reasonable, and there is a park already developed close to the subdivision to meet the needs of its residents, it seems reasonable to employ the fee to purchase land in another area of the city for park purposes to maintain the proper balance between the number of persons in the community and the amount of park land available.<sup>172</sup>

Thus, under the rationale of Ayres, Associated Homebuilders, and Scrutton, San Francisco must be able to show that the OHPP housing requirement is reasonably conceived to fulfill a public need emanating from office development. The city can meet this test by demonstrating

that new downtown offices<sup>173</sup> attract new office workers to San Francisco, a certain percentage of whom wish to live in San Francisco.<sup>174</sup>

The profit potential of office projects may also factor into the determination of the legitimacy of the housing requirement. Courts are apparently influenced, not only by the cost that the developer is imposing on society, but also by the benefit that the developer receives from the city's grant of permission to develop. In Associated Homebuilders, the court summarized this rationale as follows:

[The cases] reason that the subdivider realizes a profit from governmental approval of a subdivision since his land is rendered more valuable by the fact of subdivision, and in return for this benefit, the city may require him to dedicate a portion of his land for park purposes whenever the influx of new residents will increase the need for park and recreational facilities. (Jordan v. Village of Menomonee Falls, 28 Wis. 2d 608, 137 N.W. 2d 442, 448; Billings Properties, Inc. v. Yellowstone County, 144 Mont. 25, 394 P.2d 182, 187.)<sup>175</sup>

Office developers may oppose this conception of the scope of government power to impose OHPP on the basis that housing is not a public cost. Unlike parks, sewers, roads and schools, which have traditionally been financed by local government, housing has traditionally been provided by private enterprise and federal government subsidies. If the courts accept the premise that solving the housing shortage in San Francisco is at least as legitimate a state interest as halting the destruction of open

space,<sup>176</sup> and is at least partially caused by office development, however, this argument will fail. While municipal governments may not themselves incur housing costs as a result of the approval of office developments, making the case for imposing government regulations to increase the housing stock more attenuated, San Francisco would argue that higher housing costs are imposed directly on residents. Government intervention to mitigate the problem is then a judgement by the city that the production of housing is a rational and equitable way to deal with the problem, just as the requirement that subdividers contribute to park space has been deemed a rational and equitable way to help mitigate the impacts of these developments.

The city need not show that a particular office building will, individually, create the need for more housing, but only that the sum of new and anticipated office developments will increase demand.<sup>177</sup> The fact that non-office workers may reside in the housing generated by OHPP is not fatal to the constitutionality of the program, since the court in Ayres held that an exaction is not improper even if it benefits the city as a whole. The tightest nexus between OHPP and housing production would be created if OHPP funds were used to build housing that exactly matched the income profile of tenants. In the past, most office workers residing in the city have been clerical or sales personnel, while the more wealthy

professional and management personnel have tended to commute from the suburbs.<sup>178</sup> As a result of the current tendency of professionals to move to the city, and of firms to relocate clerical functions in the suburbs, it is expected that most new workers moving to the city will be in the moderate- and middle-income groups.<sup>179</sup> This changing income profile suggests that OHPP funds be concentrated in the production of moderate and middle-income housing.

The dicta in Associated Homebuilders, discussed above,<sup>180</sup> however, could be interpreted to mean that the housing built with OHPP funds need not exactly match the income profile of office tenants. For example, if middle-income professional personnel are moving into older existing housing in former low-income neighborhoods, displacing low-income households,<sup>181</sup> San Francisco could require that the OHPP funds be used to build low-housing in order to maintain a balance between the income of downtown residents and the variety of types of housing units available.

The city must bear in mind, however, that this use of exaction rationale is not unlimited. In Liberty II v. California Coastal Commission,<sup>182</sup> the court held that the Coastal Commission could require a restaurant owner to provide parking for restaurant customers; it could not, however, require the owner to provide free parking for beach users and the patrons of other restaurants. The

court stated that the police power cannot be invoked to impose conditions which are unrelated to the use of property, and which simply shift the entire cost of a public benefit to a property owner who is only a remote beneficiary.<sup>183</sup> To ensure that OHPP is not invalidated on similar grounds - that the entire cost of a public burden is being unfairly shifted to only one, fairly remote source - San Francisco must be able to substantiate the premise of a direct relationship between office development and increased housing need.

A court will find that OHPP is valid if there is any basis in reason that can be conceived for the program. The city should be prepared, however, to litigate fully the validity of its methodology in calculating the costs and ratios forming the OHPP formula. The program operates in a previously unregulated area and the city should be ready to convince even the most skeptical court that it is reasonable to believe that there is a rational nexus between an increase in office space and increase in housing demand. To be confident that OHPP meets this requirement, the city should ensure that it has current data demonstrating that the formula used to determine housing contribution requirements is an accurate reflection of the impact of office buildings on the housing market.

## 2. Taking Without Just Compensation

Under the United State Supreme Court's current test to determine when a regulation results in an unconstitutional taking of property without just compensation, it is unlikely that a court would find that OHPP effects a "taking". The test, as articulated in Penn Central Transportation Co. v. New York City,<sup>184</sup> emphasizes ad hoc factual inquiries into the economic impact of the regulation on the claimant, the reasonable necessity of the restriction to effectuate a substantial public purpose, and the character of the governmental action.

The Court has upheld land use regulations which promote the public welfare even if they substantially diminish the value of property;<sup>185</sup> if the land use regulation is reasonably related to the promotion of the general welfare, a diminution in property value will not in itself effect a taking.<sup>186</sup> Since OHPP amounts to less than 3% of the cost of an office project,<sup>187</sup> the program cannot even be considered to have substantially reduced the value of the property.<sup>188</sup> Moreover, the program does not interfere with the office developer's plans for his property and still allows him a reasonable return on his investment. Consequently, OHPP would not be ruled facially invalid on these grounds, although it would be necessary to examine the circumstances of individual cases.



Office developers might attempt to characterize OHPP as a physical taking,<sup>189</sup> however, by pointing out that most land use regulations either prevent developers from taking certain actions or force developers to continue past practices.<sup>190</sup> OHPP, it could be argued, is a different kind of imposition, since it forces commercial developers to take affirmative action to engage in residential development, a totally new endeavor. Because the city has given office developers the option of donating money instead of building, however, this argument will not succeed against OHPP.

A court might find it objectionable that OHPP could result in a transfer of benefit from one private party, commercial developers, to private residential developers, another private party. If the transfer of benefit is merely incidental to the promotion of the public welfare, however, a court is unlikely to find that the third party benefit has resulted in a taking or is an excessive use of the police power.

### 3. Equal Protection

The structure of OHPP raises several questions relating to the fairness of the program. The first is why office developers must bear the burden of providing housing when hotel or shopping center developers, for example, do not have to meet the same requirement. The city is apparently imposing different regulations on

different classes of developers. As OHPP regulates socioeconomic relations, a court reviewing the program on an equal protection challenge need only ensure that the classification is not "palpably arbitrary."<sup>191</sup> Since the Supreme Court has ruled that housing does not rise to the level of a fundamental interest,<sup>192</sup> no more stringent standard of review than "mere rationality" would apply.

It is not accurate to state, however, that office developers alone must provide housing. San Francisco has been consistent in its attempts to extract contributions to housing from all applicants for land use changes. It has imposed an inclusionary zoning system on residential developers,<sup>193</sup> and required one-for-one replacement in connection with residential hotel conversions.<sup>194</sup>

In any event, "there is no constitutional requirement that a regulation, in other respects permissible, must reach every class to which it might be applied - that the legislature must be held to the choice of regulating all or none."<sup>195</sup> For example, in Norsco Enterprises v. City of Fremont,<sup>196</sup> the city had imposed a fee towards park provision when an apartment house was converted into condominiums; no such requirement had been imposed on the same building when the units it contained were apartments rather than condominiums. The court held that the classification was not palpably erroneous or arbitrary, despite the contention of the applicant for conversion

that he had been denied equal protection because the city treated like things differently. The court reasoned that the legislature must have had information showing that condominium developments, unlike buildings with rental units, lack centralized management and thus present additional land use problems.<sup>197</sup> Similarly, San Francisco could argue that new large office buildings, unlike hotels, retail establishments or existing office buildings tend to attract a large number of new residents to the city, justifying different conditions.

The second aspect of the program that raises fairness questions is the fact that office developers are required to mitigate impacts on housing but not on other land uses, such as restaurants or retail shops, that are functionally or fiscally related to office buildings. This exclusive focus on housing is also unlikely to be considered unconstitutionally discriminatory. The court has held that "[t]he Legislature is not bound, in order to adopt a constitutionally valid statute, to extend it to all cases which might possibly be reached, but is free . . . to confine its regulations to those classes of cases in which the need is deemed to be most evident".<sup>198</sup> San Francisco could thus argue that the imperfections in the housing market are not necessarily evident in other markets.

In sum, equal protection challenges to OHPP would be hampered by the deference of the courts to legislative

determinations, as exhibited by the willingness of the court in Norsco Enterprises to impute worthwhile motives to apparently discriminatory measures.

#### 4. Proposition 13

Since the enactment of Article XIII A of the California Constitution, popularly known as Proposition 13,<sup>199</sup> a number of land use fees and exactions have been challenged as "special taxes".<sup>200</sup> Unless approved by two-thirds of the electorate, such taxes are prohibited by § 4 of the Article.<sup>201</sup> A determination of whether OHPP violates § 4 depends on whether the housing contribution requirement falls within the definition of a special tax.

While "[t]he term 'special taxes' is ambiguous in the sense that it has been interpreted to mean different things in different contexts",<sup>202</sup> the California Court of Appeals has explicitly examined the applicability of § 4 to exactions which are based on a rationale similar to that of OHPP. In Trent Meredith v. City of Oxnard,<sup>203</sup> the court held that an exaction imposed on subdivisions to help provide school facilities was not a special tax. The court stated that the Attorney General's definition of special taxes, which included "any new or additional taxes imposed for revenue purposes",<sup>204</sup> was too broad<sup>205</sup> as it did not consider the purpose of the fee and the regulatory nature of the fee. It is thus necessary to

examine whether OHPP (1) falls within the purpose of § 4, and (2) is imposed for regulatory rather than revenue purposes.

Courts examining the purpose and scope of § 4<sup>206</sup> generally refer to the construction it was given in Amador Valley Joint Union High School District v. State Board of Equalization<sup>207</sup> in which the California Supreme Court upheld the constitutionality of various provisions of Art. XIII A. Section 4 is one of four tax limitations in the Article;<sup>208</sup> the other three limitations are a real property tax rate limitation (§ 1), a real property assessment limitation (§ 2), and a restriction of state taxes (§ 3). According to the Amador analysis, these four limitations are interdependent, and the § 4 curb on local taxes serves to limit the locality's ability to use a local tax to replace funds from the other sources.<sup>209</sup>

While the broadest reading of "tax" as used in § 4 would require a two-thirds vote for all charges, "however labeled, which are to exact money for the support of government or for public purposes",<sup>210</sup> the courts have construed the scope of the provision more narrowly. They have excluded, for example, fees conferring direct benefits on the individual charged.<sup>211</sup> The court in Trent Meredith also interpreted the purposes of § 4 narrowly, distinguishing fees imposed on the privilege of subdividing land from fees imposed on land as such.<sup>212</sup>

The court decided that, even if the exaction were found to be a tax, it was not a special tax.

It would thus appear that OHPP's purpose does not place it within the scope of § 4, according to the Amador test; if housing has not been funded by property tax revenues in the past, the money raised through OHPP will not be used to replace funds reduced by other sections of Article XIII A.

The second test for an exaction under § 4, according to Trent Meredith, is whether it is imposed for regulatory or revenue purposes. This test inquires into whether the exaction can even be characterized as a tax. In determining that the exaction for school facilities was regulatory, and thus outside the scope of § 4, the court in Trent Meredith emphasized the relation of the exaction to benefits received and burdens created. The court stated that, unlike taxes which need not be related to benefits and burdens, the school exaction at issue, like the park exaction in Associated Homebuilders,<sup>213</sup> was expressly limited to the amount of land or fees which had a reasonable relationship to the need for parks and

schools.<sup>214</sup> This reasoning echoes the opinion in Mills

v. County of Trinity:

Traditionally, courts have determined whether a local governmental charge denominated a regulatory fee is an exercise of the police power or the power to raise revenue by analyzing the use of the fee involved rather than relying on its label . . . [citation omitted]. The general rule is that a regulatory fee must not 'exceed the sum reasonably necessary to cover the costs of the regulatory purpose sought' in order to be considered as a fee rather than a guise for a tax. . . . [citation omitted]<sup>215</sup>

Section 4, then, does not include fees which do not exceed the reasonable cost of the regulatory service and which are not levied for unrelated revenue purposes.<sup>216</sup> Consequently, if the cost per housing unit under OHPP does not exceed an amount which bears a reasonable relationship to the housing need generated by the office development, and the OHPP funds are not placed in general revenues but are used to produce housing, then the exaction would be considered to be levied for regulatory rather than revenue purposes. The current cost of participation, set at \$6,000 per required housing unit is not based on objective standards related to the cost of producing housing. Rather than setting an arbitrary fee per unit, the city should more precisely relate the required level of participation to the investment necessary to generate a housing unit.<sup>217</sup> The amount charged under OHPP must not exceed the costs incurred in responding to the housing problem generated by the offices.

In sum, although the courts' pronouncements on many issues of the special tax are neither consistent nor comprehensive, OHPP would probably not be defined as a special tax under the Trent Meredith test and related decisions of the California courts. This outcome would comport with the court's latest pronouncement on the special tax issue, in which it stated that "the language of § 4 must be strictly construed and ambiguities therein resolved so as to limit the measures to which the two-thirds requirement applies."<sup>218</sup>

#### VI. SUGGESTED MODIFICATIONS

The previous discussion has indicated that, in order both to decrease the political overtones of OHPP and to improve its enforceability and legality, the city can and should codify OHPP in an ordinance that spells out the details of the program.<sup>219</sup> OHPP represents a significant step in shifting costs to office developers; such a substantial change in policy should be implemented only with legislative approval. Moreover, substantive due process and equal protection analyses are premised on the notion of judicial deference to legislative decisions. Presumably an ordinance that is officially sanctioned by the Board of Supervisors is more representative of and more responsive to the needs of various groups of constituents. Embodying OHPP in an ordinance would give the program a more substantial legal underpinning, as well



as helping to remove any doubts that it is a personal program of the planning commission and planning staff.<sup>220</sup>

Once it is established that the city has the authority to implement OHPP, the program should withstand constitutional challenges. The law merely requires that the production of housing serve a legitimate state interest in solving the housing shortage, and that an increase in office space be linked to an increase in housing demand. The development of any kind of housing through OHPP contributions, including luxury housing, will probably be legally acceptable as long as the success of filtering is fairly debatable. The city may decide, however, to specify that office developers satisfy the OHPP requirement by producing only low- and moderate-income housing, in order to correct the current market imbalance and to establish that the program furthers an unquestionably legitimate state interest.

While legal challenges to OHPP do not seem too formidable, the implementation of the program must also be considered outside the legal context; the city has to balance the need to retain development tax dollars against the desire to structure a rational program that meets its goal of producing low- and moderate-income housing units. In addition to the modifications recommended above to strengthen OHPP's legal status, political, economic, and administrative considerations suggest the following changes in the program's current structure.

A. Mandatory Program with Internal Checks

The major impact of OHPP is to redistribute some of the rights that office developers previously associated with the ownership of private property; a new social burden is placed on office development by the program. Developers may resist this attempt to force them to internalize the costs of their projects in several ways. First, office developers will probably attempt to pass the costs to tenants in the form of higher rents. Although these increased rents may more accurately reflect the cost of office space in terms of its impact on the city, the price hike may convince more office tenants to move some or all of their functions away from downtown San Francisco. Second, office developers may lobby to prevent passage of an OHPP ordinance.<sup>221</sup>

The city could attempt to bypass these problems by implementing OHPP on an incentive rather than a mandatory basis. In an incentive system,<sup>222</sup> the city uses its zoning power to provide the developer with a bonus marginally greater in value than the cost of providing an amenity desired by the city.<sup>223</sup> In return for giving something to the public, the developer may obtain permission to build extra rentable space or a promise of reduced time for review and paperwork.<sup>224</sup>

Incentive zoning also raises some problems. First, an incentive system does not always produce the desired or expected results. For example, an incentive OHPP-type

program in Toronto, Canada has resulted in a surplus of high-income housing;<sup>225</sup> incentive inclusionary zoning in California has not produced a sufficient amount of low- and moderate-income housing;<sup>226</sup> and it has been argued that the incentive zoning system in New York has resulted in too many lifeless plazas and arcades overshadowed by skyscrapers.<sup>227</sup> Second, if existing height and bulk regulations meet developers' needs, the necessity of downzoning prior to the institution of an incentive zoning system may create political difficulties. Third, incentive zoning undermines the validity of existing height and bulk regulations,<sup>228</sup> which seem arbitrary once the city grants exceptions to them in deals with developers. Because of these problems, the implementation of OHPP on an incentive basis is not recommended.

It is possible, however, to incorporate features of both incentive and mandatory programs in order to avoid some of the problems inherent in each. San Francisco could continue to require office developers to contribute to housing, for example, but reward participation with a bonus.<sup>229</sup> The problem with this proposal lies in determining the nature of the appropriate bonus. Granting additional rentable space could result in too great an overall increase in office development, while granting procedural bonuses probably would make non-OHPP developers insist that the city streamline the permit process for all development.

Given the strong development market in San Francisco, the city can probably continue to dictate the terms of OHPP to office developers without needing to offer bonuses.<sup>230</sup> OHPP will be successful on this basis, however, only as long as office developers continue to reap enough return on their investments to make it worth their while to remain in San Francisco. If increasing vacancy rates and declining rental rates force office developers to leave, then the city will have to reconsider the desirability of shifting housing costs to the office developers.<sup>231</sup> The city should thus have a team monitoring the impact of OHPP on the office and housing markets.<sup>232</sup> Factors to be examined should include: (1) the income levels of office workers; (2) the percentage of office workers living in San Francisco; (3) the amount and type of OHPP production as a percentage of total production; and (4) OHPP's impact on office and housing rental rates and housing sales prices. The ordinance should be amended if any of the collected data indicates that the program is not achieving its goals.

B. Coordination Between Office Developers' Contributions and City Housing Needs

The use of OHPP funds to produce low- and moderate-income housing, and the requirement that the city monitor the success of the program, are only first steps in ensuring that the program meets its goals. Other

important factors in the success of the program include (1) the ability to make inroads on the citywide need for specific types of units (i.e. housing for the elderly and handicapped, and multifamily housing); (2) the coordination of the location and timing of housing developments with the availability of complementary city programs (i.e. schools, infrastructure, day care centers); and (3) the need for new investment in specified areas of the city (i.e. urban renewal zones).

The great strength of OHPP is that it gives planners the power to implement planning goals through affirmative, rather than the more usual negative measures. The program's current structure, however, does not provide assurance that the resultant housing will be of a type, or produced at a time or in a location, that comports with the city's general plan. This is because the existing option system, whereby office developers obtain the requisite number of credits by building, sponsoring or funding housing units, has created a market of housing credits; when their only goal is to accumulate the minimum required number of housing credits, office developers have no incentive to consider anything besides cost.

Most office developers have little experience with residential development, and are especially hesitant to sponsor low- and moderate-income housing. This is evidenced by their reluctance to contribute to, or participate as joint-venture partners in, low-income

housing projects developed by non-profit housing organizations.<sup>233</sup> The city needs to modify the program to ensure that the OHPP funds produce projects that implement city objectives. One way to encourage such projects would be to give the OHCD or, perhaps, an independent joint public/private body a stronger coordinating role. Instead of simply approving deals that office developers have already made with residential developers, this coordinator would act as an intermediary, or broker, between office developers and low- and moderate-income housing developers. Office developers could be required to contribute a set amount per unit to a housing trust fund, administered by either the independent public/private body or by OHCD.<sup>234</sup> Low- and moderate-income housing developers would take their projects to this coordinator, which would approve only those projects that implemented the city housing plan. Approved projects would then be eligible to receive funds from the housing trust fund. Since developers would only be allowed to make donations to the fund at a fixed cost per unit, instead of making deals on the market as is presently the case, this system would guarantee that each developer carried his proportional share of the housing burden and that the units produced fulfilled city objectives.

Alternatively, OHCD could send approved housing developers to office developers and allow them to work out

their own deal. The advantage of this approach is that it reduces the amount of bureaucratic involvement and might encourage more creative arrangements;<sup>235</sup> furthermore, with the city as the responsible intermediary, office developers would no longer be concerned with the risk of failure of low-income housing projects, while proponents of such projects would no longer have to rely on outside third parties to recommend them to office developers.<sup>236</sup> Office developers may not find this alternative attractive, however, because of increased transaction costs and decreased certainty. Moreover, individual arrangements would not result in a standard price of participation, reducing the equity of the requirement.

To suggest that the city take more affirmative steps to increase its power and rights<sup>237</sup> is not a recommendation that the city itself become a housing developer. The rationale for public sector land development,<sup>238</sup> however, does lead to the conclusion that San Francisco must play a stronger role both to overcome legal and institutional obstacles to expansion and to ensure that broader social goals influence the allocation of new investment in the housing market.<sup>239</sup>

The mandatory donation requirement set at a fixed cost per unit should not only be more advantageous to office developers, the city, and residential developers, but it should also comport better with the concept of a

partnership capitalizing on each partner's area of expertise. The office developer can eliminate the time and transaction costs associated with the search for cheap units and can predict costs at an earlier date.<sup>240</sup> The city can use its own special powers - reserving sites, setting densities, combining funding from various sources, zoning, tax-exempt financing, tax abatement - to ensure that the type, timing, and location of the OHPP units implement the housing goals. Since all housing would be built by residential developers, this system would also allay any existing fears that office developers are usurping residential developers' business.

## VII. CONCLUSION

OHPP is a noteworthy example of a local planning body acting affirmatively to solve community problems. The impetus for programs such as OHPP arises from a desire on the part of the public sector to compel the private sector to accept responsibility for problems that their projects either create or exacerbate. In the case of OHPP, the city requires office developers to internalize the housing costs generated by their projects, in return for being given the opportunity to reap a profit. OHPP reflects a belief that projects have a wide range of impacts for which developers should be held financially accountable; the potential reach of such programs is legally limited only by the need to demonstrate that the program furthers



the public welfare and is a rational way to mitigate impacts of development.

In order to gain acceptance of such innovative, activist measures, however, city governments cannot merely satisfy the letter of the law. The success of such programs hinges on the ability of the city to strike a balance between public benefits and private burdens. Political realities demand that the city take a hard look at the consequences of such programs: developers may lose their incentive to invest in communities that impose costly and onerous building conditions and may take their entrepreneurial talents elsewhere. Before shifting costs to the private sector, the city should be able to demonstrate that the cost is clearly attributable to the project, that the program is structured to produce the desired outcome with minimal negative side effects, that responsibilities for implementation are distributed rationally, and, most important, that the underlying concept has been sanctioned by the legislative body.

When cities shift a number of costs, one at a time, to developers, public sector representatives may lose sight of the fact that they are chipping away at the incentives that encourage private enterprise. Cities have gradually raised the level of developers' responsibility for community costs from infrastructure to parks and schools and, under the OHPP program, to housing. This succession of development requirements is bound, at some point, to

redistribute substantially the current assignment of public and private responsibilities. It is not clear that local, rather than state or federal, bodies should be effecting such fundamental changes. If it is presumed, however, that local bodies at least have the power to solve problems in their own jurisdictions, they should not impose such consequential policies without local legislative approval.

## FOOTNOTES

1. Press Release of San Francisco Mayor Diane Feinstein (Apr. 9, 1981) (hereinafter cited as Feinstein Press Release).

2. See Guenther, Outlook in Low Cost Housing Is Gloomy as Programs Expire, Wall St. J., Dec. 8, 1982 at 33, col. 1 (The article quotes a developer from the National Corporation for Housing Partnership, a congressionally chartered developer, who stated that his company would only be able to produce rental housing for the upper-income market unless interest rates are reduced to 7 1/2%).

3. Telephone interview with Bruce McCormick, planner and zoning specialist at the Zoning and Official Plans Division of the Toronto Planning and Development Department (Nov. 26, 1980).

4.. See Planning Gain, Plan. Bull., April 23, 1982, at 2, col. 1 (bulletin of the Town and Contry Planning Ass'n in London, England).

5. Brown, New Activism in Zoning, Building Design and Construction, Sept. 1982, at 46.

6. See Moberg, The Santa Monica Story - From Rent Control To Municipal Power, In These Times Jan. 12-18, 1983, at 11; see also United Brotherhood of Carpenters and Joinders of America v. City of Santa Monica, No. WEC 069227 (Superior Court of Cal. for the County of Los Angeles) (Dec. 23, 1981) (order granting preliminary injunction). In this case, the union challenged the legality of a building moratorium during the period of which the city would allow interim permits under certain specified conditions. Such conditions for commercial and industrial development included: (1) arts and social service fee of 1.5% of total costs for projects under 7500 sq. ft.; (2) one low- or moderate-income housing unit of 5000 sq. ft. or an in-lieu fee of 6.5% of project costs plus (1) above for projects between 7500-20,000 sq. ft.; (3) traffic and emission abatement plan plus (1) and (2) above for projects between 20,000-40,000 sq. ft.; (4) day care center plus (1), (2), and (3) above for projects between 40,000-70,000 sq. ft.; and (5) open space plus (1), (2), (3), and (4) above for projects over 70,000 sq. ft. The court said that in order to justify exactions "there must be a rational relation between the benefit conferred on the developer by the community and the burden on the public created by the development", and held that it was counterproductive to declare and extend a moratorium when there was a housing shortage and high unemployment.

7. Interested cities include Stamford, Connecticut, Santa Barbara, California, Sydney, Australia, and Boston, Mass. An Exaction That Really Works, Plan, Oct. 1982, at 6; Boston City Council, Expanding Housing Development in Boston (Feb. 1, 1983) (Committee on Planning, Development, and Housing).

8. The concept of linking office and housing markets originated with Petition No. 65447 dated June 9, 1980, sponsored by several of San Francisco's housing activists. The petition requested that the city planning code be amended to institute a housing requirement for office developments. Interview with John Elberling of TODCO in San Francisco (July 22, 1982); interview with Toby Rosenblatt, San Francisco Planning Commissioner (July 14, 1982). Mayor Feinstein presented the program on Apr. 9, 1981 although three developers had already agreed to comply with the requirement since Dec. 1980.

9. City and County of San Francisco Citizens Housing Task Force, Report of the Citizens Housing Task Force, 1 (July 29, 1981) [hereinafter cited as Task Force Report].

10. Coldwell Banker, San Francisco '82: A Coldwell Banker Real Estate Overview for Business, Transcript of Remarks 15 (Dec. 2, 1981) [hereinafter cited as Coldwell Banker 1982]; see also Lefcoe, When Governments Become Land Developers: Notes on the Public-Sector Experience in the Netherlands and California, 51 S. Cal. L. Rev. 165, 195 (1978) [hereinafter cited as Lefcoe, When Governments Become Land Developers] (in general, at high interest rates buyers tend to withdraw from the market and invest instead in short-term durables).

11. San Francisco Dep't of City Planning, A Proposed Revision of the Residence Element of the Comprehensive Plan of the City and County of San Francisco 1.14-1.15 (June 1982) [hereinafter cited as Proposed Residence Element].

12. Task Force Report, supra note 9, at 62, 64.

13. Proposed Residence Element, supra note 11, at 1.3; see also M. Sumichrast & M. Seldin, Housing Markets: The Complete Guide to Analysis And Strategy For Builders, Lenders, and Other Investors 103 (1977) (total number of heads of households in the United States increased from 1970-1980).

14. Task Force Report, supra note 9, at 36; see also M. Sumichrast & M. Seldin, supra note 13, at 103 (basic relationship between number of households and housing demand).

15. Task Force Report, supra note 9, at 62 (growth in professional and managerial sectors); San Francisco Chamber of Commerce, San Francisco's Strategic Plan, Phase I Management Summary 12 (May 1982) (growth in the service sector) [hereinafter cited as Strategic Plan] .

16. Coldwell Banker 1982, supra note 10, at 10, 14; see also Strategic Plan, supra note 15, at 11.

17. Coldwell Banker 1982, supra note 10, at 14.

18. Guenther, supra note 2; see also San Francisco Chamber of Commerce, San Francisco Data Sheet (Aug. 1982). A 30 year mortgage at 15% interest on 80% of \$146,300, the median price of a new home in San Francisco, is \$17,825/yr. If housing payments should amount to no more than 30% of annual income then a household would need to earn \$59,417/yr. to afford such a house. In fact, the median income in San Francisco for a household of three is \$27,450. Proposed Residence Element, supra note 11, at 1.33.

19. The city administration estimates that approximately 80,970 or 27% of San Francisco's total households are low or moderate income households, living in inadequate conditions. City and County of San Francisco, Mayor's Office of Housing and Community Development, 1983 Community Development Program and Housing Assistance Plan, Preliminary Proposal 7 (Aug. 1982) [hereinafter cited as Community Development Program].

20. Proposed Residence Element, supra note 11, at 1.23 [citing Revised Estimates from Association of Bay Area Governments, Housing Needs Report, San Francisco Bay Area (Dec. 1981)] [hereinafter cited as ABAG Report].

21. Task Force Report, supra note 9, at 4.

22. The public expressed its frustration with the housing shortage by voting for Proposition K on November 4, 1980, registering approval for the encouragement of the development of 20,000 new housing units in San Francisco by 1985. Proposed Residence Element, supra note 11, at 1.38.

23. Housing Affairs Letter, Feb. 12, 1982, at 2, col 1 (CD Publications).

24. Telephone interview with S. Small, Public Affairs Officer at Dep't of Housing and Urb. Dev't Area Office in San Francisco (Nov. 1982) (federal cutbacks in F.Y. 81 and 82 resulted in reduced spending under the Section 8 new construction, Section 312 rehabilitation and Section 202 elderly and handicapped housing programs in San Francisco); see also Feinstein Press Release, supra note 1 ("[in 1981], the loss of federal funds will guillotine plans to add 550 low or moderate income units in San Francisco"); Community Development Program, supra note 19, at intro. (The Mayor reports that San Francisco expects to receive \$20 million in Community Development Block Grant funds in 1983 which is \$4 million less than in 1982.).

25. Brown, supra note 5, at 42.

26. Coldwell Banker 1982, supra note 10, at 7, 26.

27. Strategic Plan, supra note 15, at 12.

28. Coldwell Banker 1982, supra note 10, at 17.

29. Coldwell Banker, The Commercial Real Estate Market in The San Francisco Bay Area - 1983 (Dec. 1982), at 6 [hereinafter cited as Coldwell Banker 1983].

30. Coldwell Banker 1982, supra note 10, at 18.

31. Id. at 13; See generally memorandum from San Francisco Planning Director Dean Macris to San Francisco City Planning Commission 8-11 (Nov. 18, 1981) (discussing office development trends and projections). Compare Task Force Report, supra note 9, at 54 ("Including indirect and induced employment effects, office sector expansion by itself will add about 56,000 new jobs to the city's economy between 1980 and 1985.").

32. Memorandum from San Francisco Planning Director Dean Macris to the San Francisco Planning Commission 8 (Nov. 18, 1981).

33. Some firms, such as Standard Oil, Bank of America, Bechtel, Pacific Telephone, P.G. & E., and Fireman's Fund Insurance have been looking to the cities on the peninsula south of San Francisco, the East Bay, or Marin County to relocate some of their business functions in order to lower occupancy costs. Clerical workers are often moved to the suburbs, leaving executive and administrative staff downtown. Coldwell Banker 1982, supra note 10, at 21; see also Task Force Report, supra note 9, at 40, 62.

34. Coldwell Banker 1983, supra note 29, at 7-8.

35. Coldwell Banker 1983, supra note 29, at 8.

36. Id. at 6.

37. See, e.g., Agins v. City of Tiburon, 24 Cal. 3d 266, 598 P.2d 25, 157 Cal. Rptr. 372 (1979), aff'd 447 U.S. 255 (1980) (downzoning); Associated Homebuilders of the Greater East Bay v. City of Walnut Creek, 4 Cal. 3d 633, 484 P.2d 606, 94 Cal. Rptr. 630 (1971) (subdivision exactions); Metromedia, Inc. v. City of San Diego, 26 Cal. 3d 848, 610 P.2d 407, 164 Cal. Rptr. 510 (1980), rev'd 453 U.S. 490 (1981) (billboard restrictions).

38. Cal. Gov't Code §§ 65580-65589 (West Supp. 1981). See generally Burton, California Legislature Prohibits Exclusionary Zoning, Mandates Fair Share: Inclusionary Housing Programs a Likely Response, 9 San Fern. V.L. Rev. 19, 24-29 (1981); Lefcoe, California's Land Planning Requirements: The Case For Deregulation, 54 S. Cal. L. Rev. 447, 475-488 (1981).

39. All cities and counties in California must "adopt a comprehensive, long-term general plan for the physical development of the county or city." Cal. Gov't Code § 65300 (West 1966).

40. Id. at § 65583.

41. Id. at § 65583(c)(2).

42. Id. at § 65580(b).

43. Such actions range from Proposition O, the high-rise initiative on the Nov. 1979 ballot, to a lawsuit by San Franciscans for Reasonable Growth (housing activist group) against the San Francisco Planning Commission and Planning Department seeking a moratorium on downtown development until the downtown environmental impact report examining new methods of controlling downtown growth is finished.

44. Interview with Dick Morton of the San Francisco Chamber of Commerce (July 7, 1982); see also Strategic Plan, supra note 15.

45. San Francisco, Cal., Ordinance 267-79 (cited in Defendants' Memorandum of Points and Authorities in Opposition to Complaint for Declaratory and Injunctive Relief at 23, [brief filed 12/22/81, argument set for 1/18/82], Terminal Plaza Corp. v. City and County of San Francisco, No. 786-779).

46. San Francisco, Cal., Subdivision Code § 1341 (condominium conversion) (cited in id. at 23); San Francisco, Cal., Ordinance 330-81 (residential hotel conversion) (cited in id. at 2).

47. San Francisco, Cal., Admin. Code ch. 38 (ordinance 224-81) (May 5, 1981) The transit impact development fee is a five dollar per square foot charge on new office space in downtown to be used to expand transportation facilities to accomodate the increased ridership. The validity of the fee is currently in litigation in the Superior Court of Cal. in San Francisco, Russ Building Partnership v. City and County of San Francisco, No. 780-795). Plans for a transit assessment district have been temporarily shelved. Johnston, Supervisors Sideline Transit Tax for Downtown, San Francisco Examiner, July 13, 1982, at § B, col. 1.

48 Several development scenarios for the downtown C-3 district are currently being analyzed in an environmental impact report by Enviromental Science Associates of San Francisco. Interview with Paul Zigman, Director of Enviromental Science Associates (June 11, 1982); City and County of San Francisco, Department of City Planning, Guiding Downtown Development (July 1981).

49. Kilduff, San Franicsco's Novel Scheme To Provide Affordable Housing, XII Cal. J. 169 (May 1982).

50. See Deloitte, Haskins and Sills, Comparative Study of Taxes and Other Charges Paid by Business in San Francisco and Other Areas - Summary (May 1981) (commissioned by the San Francisco Chamber of Commerce); see also Arthur Andersen & Co., Downtown Highrise District Cost Revenue Study (Nov. 1980); Strategic Plan, supra note 15.

51. San Francisco Planning and Urban Research Association, The Mayor's Housing Program: A Cautious Approach to a Large and Complex Problem, 174 SPUR Report 1 (June 1981) [hereinafter cited as SPUR Report].

52. The Association of Bay Area Governments, (ABAG), the regional council of governments charged with assessing the housing need for the San Francisco Bay area has determined that the projected increase in housing need in San Francisco from 1980-1985 is 12,042 housing units. ABAG Report, supra note 20, at 29.

53 D. Hagman & D. Miscynski, Windfalls For Wipeouts 15 (1978) [hereinafter cited as D. Hagman].



54. Id. at xxxv.
55. Id. at xxxvi, 342.
56. Id. at 364.
57. Frieden, Allocating the Public Service Costs of New Housing 14 (original paper on file with author) (published in revised form in Urb. Land, Jan. 1980 at 12-16).
58. Id. at 5-6; see also D. Hagman, supra note 53, at 349.
59. See, e.g., Trent Meredith, Inc. v. City of Oxnard, 114 Cal. App. 3d 317, 170 Cal. Rptr. 685 (1981).
60. See, e.g., Associated Homebuilders, 4 Cal. 3d 633; Jenad, Inc. v. Village of Scarsdale 18 N.Y.2d 78, 218 N.E.2d 673, 271 N.Y.S.2d 955 (1966).
61. See Kilduff, supra note 49, at 169 (OHPP is an outgrowth of a strong trend to make downtown developers pay for more services).
62. See generally Baumol & Oates, The Theory of Environmental Policy; Externalities, Public Outlays, and the Quality of Life (1975) (detailed discussion of the difference between pecuniary externalities, which result from a change in the prices of some inputs or outputs in the economy, and technological externalities, which produce resource misallocation).
63. D. Hagman, supra note 53, at 400.
64. More Progress And Less Poverty - A Business Man Reviews Henry George 96 (J. Thompson ed. 1942).
65. D. Hagman, supra note 53, at 364.
66. See id. at 33; see also Penn Central Transportation Co. v. City of New York, 42 N.Y.2d 324, 366, 366 N.E.2d 1271 (1977), aff'd 439 U.S. 104, ("It is that privately created and privately managed ingredient which is the property on which the reasonable return is to be based. All else is society's contribution by the sweat of its brow and the expenditure of its funds. To that extent society is also entitled to its due.").
67. Kilduff, supra note 49, at 169.

68. Meeting of the American Planning Association in San Francisco (July 14, 1982) (discussing OHPP); SPUR Report, supra note 51, at 1. The city has also had to decide whether OHPP should be imposed only on office buildings attracting new tenants to the city or also on office buildings attracting relocating San Francisco companies. When the planning department attempted to impose OHPP on U.S. Leasing, a San Francisco company relocating to an office building which it intended to renovate, the Mayor asked the planning department to "re-evaluate" the requirement as it applied to relocating San Francisco companies. The planning director agreed that the requirement could be mitigated in that instance. Marcene Henricksen, The Housing Requirement: A Case In Point, San Francisco Bus., May 1982, at 14.

69. Memorandum from San Francisco Planning Director Dean Macris, OHPP Guidelines 5 (Jan. 22, 1982) [hereinafter cited as OHPP Guidelines].

70. The assumptions in the formula are primarily based on a consultant study by Sedway Cooke for the Dep't of City Planning in Oct. 1979 entitled Downtown San Francisco Conservation and Development Planning Program, Phase I Study. Memorandum from San Francisco Planning director Dean Macris to San Francisco City Attorney George Agnost (Mar. 2, 1982).

71. OHPP Guidelines, supra note 69, at 10.

72. Id. at 8, 10.

73. Id. at 11.

74. These funds are to be used in conjunction with proceeds from the sale of \$60,000,000 of tax exempt mortgage revenue bonds. Id. at 13, 16. Sixty million dollars in lower interest tax exempt bonds will be issued at a rate of 10.75% per annum for a 30 year term. As needed, monthly mortgage payments of low- and middle-income homebuyers will be further reduced by the pool of shared appreciation funds contributed by office developers at a cost of \$6,000 per unit required. Mortgage assistance payments are available for buyers of newly constructed homes with maximum incomes of \$40,260 and for buyers of existing homes with maximum incomes of \$33,550. The assistance payments will reduce the borrower's share of the housing expense to 33.33% of gross family income. Memorandum from the Office of Housing and Community Development, Citywide Affordable Bond Program (July 6, 1982); Bulletin from 1st Nationwide Savings, City and County of San Francisco Citywide Affordable Bond Program - How To Apply.

75. "Affordable" housing units are those units which are rented or sold to low-income families (income under 80% of the median) or moderate-income families (80-120% of the median) at a rent not exceeding 30% of their gross monthly income or a homeownership expense not exceeding 38% of their gross monthly income. OHPP Guidelines, supra note 69, at 7.

76. Id. at 9-10.

77. Id. at 14-16.

78. See supra note 74.

79. OHPP Guidelines, supra note 69, at 16. Cf. Orange County, Cal., Res. No. 79-1840 (the inclusionary housing program guidelines allow for transfer of excess credits for affordable units). For an explanation of Orange County's inclusionary program see Burton, supra note 38; for an explanation of the inclusionary concept, see infra note 105.

80. Telephone interview with Laurie Share of San Francisco's Mayor's Office of Housing and Community Development (Mar. 10, 1983).

81. Id.

82. See supra text accompanying notes 75-76.

83. Cf. U.S. Dep't of Housing and Urban Development, Housing For The '70s: A Report of the National Housing Policy Review, at 135 (1974) (Provision of housing subsidies through the federal programs of the early 1970s increased the quantity and quality of housing for those few who were subsidized but decreased production of new units for everyone else. Although the programs resulted in a net addition to the housing stock, the net adds were only equal to a portion of the total number subsidized because (1) a portion of credit for subsidy programs was bid away from unsubsidized buyers, and (2) the subsidies were financed by increased taxes or increased government borrowing which reduced consumption and investment elsewhere in the economy at the expense of unsubsidized housing, and (3) subsidized housing was produced inefficiently).

84. According to Laurie Share of OHCD, however, the city's economists feel that demand so far exceeds supply in San Francisco that it would take a massive injection of new units into the market to affect residential developers' building decisions. Telephone interview with Laurie Share of OHCD (Mar. 10, 1983).

85. See supra text accompanying note 73.

86. Certain developers have seriously looked at San Francisco and decided to take their projects elsewhere. Given current high interest rates, the length and concomitant cost of the permit process in San Francisco, and the uncertainty associated with the outcome of the transit impact development fee described supra note 47 it is difficult to attribute these decisions not to locate in San Francisco solely to OHPP. The office-housing program can be characterized, however, as one more cost that makes a project less profitable sooner and, therefore, does affect location decisions.

87. The decision not to contest the imposition of OHPP is due to the fact that each developer is so committed to his project in terms of time and money that he acts in his own self-interest. It appears that certain of the developers have chosen to fight the transit impact development fee described supra note 47 but to comply with OHPP.

88. Interviews with John Harris of Norland Properties in San Francisco (June 10, 1982) and Jim Schaffer of Lincoln Properties in San Francisco (July 7, 1982).

89. Interview with John Harris of Norland Properties in San Francisco (June 10, 1982).

90. Interview with Dick Morton of the San Francisco Chamber of Commerce (July 7, 1982); see also Kilduff, supra note 49 at 169.

91. The first three office developers upon whom the city levied OHPP requirements agreed to comply for various reasons, including relatively innocuous initial requirements, stiff penalties for finishing behind schedule, and fairly inexpensive methods of fulfilling the requirement.

92. Office developers have labeled OHPP as "ransom" but appear to abide by the rules of the game of the city in which they choose to develop their projects. Kilduff, supra note 49, at 169.

93. Cf. Hack and Ginoza, Private and Public Responsibilities in Housing Site Development (July 1, 1982) (paper presented at a conference sponsored by the Jt. Center for Urban Studies of M.I.T. and Harvard University and the Lincoln Institute for Land Policy) (subdivision developers paid \$6,178 per unit for growth impact fees in Livermore, Cal. in 1981).

94. Interviews with Willian Witte, Deputy Director of OHCD in San Francisco (July 22, 1982), and John Harris of Norland Properties in San Francisco (June 10, 1982).

95. Interview with John Harris of Norland Properties in San Francisco (June 10, 1982).

96. Interviews with John Harris of Norland Properties in San Francisco (June 10, 1982) and Dick Morton of the San Francisco Chamber of Commerce (July 7, 1982).

97. See supra text accompanying note 30.

98. Kilduff, supra note 49, at 169.

99. Meeting of the American Planning Association in San Francisco (July 14, 1982) (discussing OHPP).

100. For example, the Bank of Canton is participating in the mortgage revenue bond program. Mayor of San Francisco's Office of Housing and Community Development, OHPP Commitments to Housing Development (May 24, 1982).

101. Kilduff, supra note 49, at 170.

102. Interview with Jim Schaffer of Lincoln Properties in San Francisco (July 7, 1982).

103. One office developer was in fact contemplating investing in such a project, but has instead decided to meet the requirement by contributing to a federally funded Section 8 project. Telephone interview with Laurie Share of OHCD (Mar. 10, 1983). The proposal under consideration would have involved a partnership between a non-profit group (South of Market Development Corp.) and the office developer (Trammel Crow) to rehabilitate a residential hotel. The office developer was to serve as limited partner, the non-profit group was to serve as general partner, and a tenants' organization (TODCO) was to manage the building. The building was to be sold after twenty years with the non-profit group and the office developer splitting the proceeds 25%-75%. Interview with John Elberling of TODCO in San Francisco. (July 22, 1982).

104. For example, Campeau, Norland Properties, and Trammel Crow are all considering building residential units in the offices. Interview with Bill Cumbelich of Coldwell Banker (July 12, 1982).

105. A proposal that OHPP be used to fund only low- and moderate-income housing is similar to the concept of inclusionary zoning, whereby a city requires a housing developer to set aside a set number of housing units within the project for occupancy at reduced rates by low- and moderate-income families. See generally Ellickson, The Irony of "Inclusionary" Zoning, 54 S. Cal. L. Rev. 1167 (1981); Burton, supra note 38; Taylor, Inclusionary Zoning: A Workable Option for Affordable Housing, Urban Land, Mar. 1981, at 6.

106. The requirement would also please housing activists, although some of them believe that the OHPP revenue bond fee should be set at a much higher amount, i.e. \$20,000.

107. Cal. Pub. Res. Code § 21000 et seq. (West 1977 and Supp. 1982).

108. An Environmental Impact Report (EIR) is required to be prepared for all projects that must be approved by public agencies. Cal. Pub. Res. Code § 21080 (West Supp. 1982). EIRs are required for private as well as public projects. Friends of Mammoth v. Board of Supervisors, 8 Cal. 3d 1, as modified, 8 Cal. 3d 247, 502 P.2d 1049, 104 Cal. Rptr. 761 (1972). Downtown office buildings require EIRs because they are private projects subject to discretionary approval by the Planning Commission. See, e.g., San Diego Trust & Savings Bank v. Friends of Gill, 121 Cal. App. 3d 203, 174 Cal. Rptr. 784 (1981).

109. Cal. Pub. Res. Code §§ 21002, 21002.1(b) (West Supp. 1982).

110. Cal. Pub. Res. Code § 21000(g) (West Supp. 1982) (amended by 1979 Cal. Stat. c. 947, p. 3270, § 4); Cal. Pub. Res. Code § 21001(a) (West Supp. 1982) (amended by 1979 Cal. Stat. c. 947, p. 3271, § 5).

111. Interview with Paul Zigman of Environmental Science Associates in San Francisco (June 11, 1982).

112. Cal. Pub. Res. Code § 21100 (West Supp. 1982) (amended by 1981 Cal. Stat. c. 264, p. \_\_\_ § 1).

113. Cal. Environmental Quality Act, ch. 1438, Cal. Pub. Res. Code § 21004 (Sept. 27, 1982).

114. San Francisco, Cal., Municipal Code, Part 3, § 26. The city planning commission approved Resolution No. 8474 on Jan. 17, 1983, establishing a policy that any downtown building permit application would be reviewed by the Planning Commission under this discretionary power. Such topics of review could include the protection and enhancement of the pedestrian environment, preservation of architecturally and historically significant buildings or of housing, avoidance of industrial displacement, adequate transportation, energy conservation, and the effect of development on the skyline and on views from public areas.

115. San Francisco, Cal, Planning Commission Res. 8474 (Jan. 17, 1980).

116. "A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." Cal. Const. art. 11, § 7 (West Supp. 1982). See, e.g., Mills v. County of Trinity, 108 Cal. App. 3d 656, 662, 166 Cal. Rptr. 674, 677 (1980).

117. Cal. Const. art. 11, § 5 (West Supp. 1982); see generally Sato, "Municipal Affairs" in California, 60 Calif. L. Rev. 1055 (1972).

118. The ordinance also must not violate the state and federal constitutions. Sandalow, The Limits of Municipal Power Under Home Rule: A Role for the Courts, 48 Minn. L. Rev. 643, 665, 665 n.8 (1964).

119. See Senate Bill 2011, Legislative Counsel's Digest, 91 130, Sept. 1982 explaining supra note 113.

120. Cal. Gov't Code §§ 65580 (West Supp. 1982).

121. Id. at § 65700.

122. Id. at § 65580(b).

123. Id. at § 65583(c)(2).

124. Id. at § 65584(a).

125. Id. at § 65581(c).

126. See id. at § 65580(c) ("The provision of housing affordable to low- and moderate-income households requires the cooperation of all levels of government"); see also id. at § 65580(e) ("[E]ach local government also has the responsibility . . . to cooperate with other local governments and the state in addressing regional housing needs").

127. If there is a conflict between state law and local law on a specific issue, local law prevails only if the issue involves a purely municipal affair. See generally Sato, supra note 117.

128. Cal. Gov't Code § 65587.1(b) (West Supp. 1983).

129. Compare Cal. Gov't Code § 65913.1 (West Supp. 1982) ("In exercising its authority to zone for land uses, a city . . . shall designate and zone sufficient vacant land for residential use with appropriate standards, in relation to zoning for nonresidential use, and in relation to growth projections of the general plan to meet housing needs as identified in the general plan . . .").

130. The California courts tend to use the same method of analysis when examining a land use restriction challenged under both the state and federal constitutions. See, e.g., Agins v. City of Tiburon, 24 Cal. 3d 266; Associated Homebuilders v. Walnut Creek, 4 Cal. 3d 633 (1970); Southern Pacific v. City of Los Angeles, 242 Cal. App. 2d 38, 51 Cal. Rptr. 197 (1966), appeal dismissed 385 U.S. 647, Miller v. Board of Public Works, 195 Cal. 477, 234 Ps 381 (1925).

131. See generally R. Ellickson & A. Tarlock, Land-Use Controls 63 (1981) [hereinafter cited as R. Ellickson].

132. Usery v. Turner Elkhorn Mining Co. 428 U.S. 1, 15 (1976).

133. See, e.g., U.S. Railroad Retirement Board v. Fritz, 449 U.S. 166, 176-177 n.10 (1980); Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 124-125 (1978); New Orleans v. Dukes, 427 U.S. 297, 303-304 (1976); Williamson v. Lee Optical Co. 348 U.S. 483, 487-488 (1955).

134. Nebbia v. New York, 291 U.S. 502, 537 (1934).

135. Euclid v. Ambler, 272 U.S. at 387.

136. Id. at 288.



137. "The California Courts have long been exceedingly deferential to land-use controls adopted by local governments . . . . The California approach is consistent with the Supreme Court's most recent reading of the Constitution, which the Court now construes to impose only minimal constraints on the enactment of 'social and economic' legislation." R. Ellickson, supra note 131, at 75; see, e.g., Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1920); Associated Home Builders, Inc. v. City of Livermore, 18 Cal. 3d 582, 557 P.2d 473, 135 Cal. Rptr. 41 (1976); Lockard v. City of Los Angeles, 33 Cal. 2d 453, 202 P.2d 38 (1949); Miller v. Board of Public Works, 195 Cal. 477, 234 P. 381 (1925).

138. The distinction between means and ends is often used to analyze substantive due process and equal protection cases. "Does the challenged law (understood as a means to an end) achieve its objective; and is that objective, if achieved, legitimate?" Perry, Substantive Due Process Revisited: Reflections on (and Beyond) Recent Cases, 71 Nw. U. L. Rev. 417, 422 (1976)

139. Alternatively, San Francisco could characterize the objectives of the program as (1) decreasing traffic congestion and (2) improving air quality and saving energy by decreasing commuting time. Task Force Report, supra note 9, at 7; Lefcoe, When Governments Become Land Developers, supra note 10, at 198. The city could then argue that transportation and environmental quality were legitimate government functions.

140. Euclid v. Ambler, 272 U.S. at 395.

141. Berman v. Parker, 348 U.S. 26 (1954) (Congressional determination that renovation of the District of Columbia was in the public interest justified free exercise of eminent domain power by agency).

142. Id. at 32.

143. Id. at 33.

144. Housing Authority of Los Angeles v. Dockweiler, 14 Cal. 2d 437, 449-450, 94 P.2d 794 (1939).

145. Keyes v. United States, 119 F.2d 444 (D.C. Cir. 1941) cert. denied 314 U.S. 636 (1941).

146. Berman v. Parker, 348 U.S. at 34.

147. Chelcy v. Buffalo Municipal Housing Authority, 24 Misc.2d 598, 206 N.Y.S.2d 158 (1960); Cremer v. Peoria Housing Authority, 399 Ill. 579, 78 N.E.2d 276 (1948); San Francisco City Att'y Opinion No. 64-30 (Dec. 31, 1964); see Middle Class Gets Help With Housing, N.Y. Times, Dec. 5, 1982, at 46, col. 1. But see Massachusetts Housing Finance Agency v. New England Merchants National Bank of Boston, 356 Mass. 202, 249 N.E.2d 599 (1969) (provision of moderate-income housing upheld only because incidental to provision of low-income housing); see also Martin v. North Carolina Housing Corporation, 277 N.C. 29, 175 S.E.2d 665 (1970) (loans made by state agency to developers only constitutional if used to supply low-income housing).

148. In Note, State Economic Substantive Due Process, 88 Yale L.J. 1487, 1501-2 (1979), the author proposes that courts examining issues of substantive due process employ an analysis based on the functional categorization of state ends traditionally used by economists: allocation, stabilization, and redistribution. Using OHPP funds to produce low- and moderate-income housing could serve a legitimate end under this proposed analysis because it could be characterized as (1) an allocative measure that attempts to correct housing market failures; (2) a stabilization measure that attempts to prevent massive increases in housing price during a period of housing shortage; and (3) a redistributive measure that attempts to transfer wealth from the rich to the poor.

149. Cal. Health & Safety Code § 50003 (West Supp. 1982); see also Burton, supra note 38, at 33.

150. Cal. Gov't Code § 65915 (West Supp. 1982).

151. Cal. Gov't Code § 65580(b) (West Supp. 1982). The federal government also promotes housing for upper income households by allowing homeowners to deduct interest payments from their federal taxes. Internal Revenue Code § 163.

152. See, e.g., *New Jersey Mortgage Finance Agency v. McCrane*, 56 N.J. 414, 420, 267 A.2d 24, 27 (1970) ("[T]he Legislature made a determination that there was a critical shortage of adequate housing"); *Martin v. North Carolina Housing Corp.*, 277 N.C. 29, 44 ("[T]here exists a serious shortage of decent, safe and sanitary residential housing available at low prices or rentals to persons of . . . lower income"); *Chelcy v. Buffalo Municipal Housing Authority*, 24 Misc.2d 598 ("[B]uffalonians are leaving the city and it is reasonable to assume that inadequate housing is one of the substantial causes"); *Cremer v. Peoria Housing Authority*, 399 Ill. 579, 589 ("[W]e take judicial notice of the obvious and pressing need for more housing - and, further, the record fully affirms the existence of a critical housing shortage").

153. Cf. *Poletown Neighborhood Council v. The City of Detroit*, 410 Mich. 616, 304 N.W.2d 455 (1981) (a city can condemn property in a viable functioning neighbourhood and transfer it to a private corporation to build a plant to promote industry and commerce adding new jobs and taxes to the economic base of the community).

154. "As time passes, any individual housing unit tends to filter downward in relative quality as its components depreciate, and as its layout and equipment become obsolete . . . .The infusion of new housing units into a regional market sets off a chain of moves that eventually tends to increase vacancy rates (or reduce prices) in the housing stock within the means of low- and moderate-income families." Ellickson, *The Irony of "Inclusionary" Zoning*, supra note 105, at 1185. For a more detailed discussion of the definition of filtering and the mechanics of the filtering process see W. Grigsby, *Housing Markets and Public Policy* 84-130 (1963); see also J. Lansing, C. Clifton & J. Morgan, *New Homes and Poor People* 3 (1969) ("Two approaches to the analysis of filtering have been distinguished. In one approach, the focus is on the dwelling unit and on analysis of its history. Thus, a particular dwelling unit may be said to filter down over the years as it gets older and its market value or price falls. In the second approach the focus is on people, and how people of successively lower economic position obtain dwellings. Following the first approach, filtering may be defined in terms of a change in the selling price (or rent) of the dwelling unit, measured in constant dollars; or it may be defined in terms of changes in the rank order of the dwelling unit among all dwelling

units when ranked by quality. Following the second, it may be defined in terms of the income level in absolute terms of the people who live in the dwelling, or their rank position among all income receiving units. Thus, a dwelling which at one time was occupied by a family in the top tenth of the income distribution may, after a long history, be the home of a family in the bottom tenth.").

155. For a study that concludes that filtering works, at least for the low-income white population, see J. Lansing, supra note 154, at 68.

156. Task Force Report, supra note 9, at 115.

157. Id. at 116; see also Achtenberg, Social Utility of Rent Control, Housing Urban America 443 (ed. Pynoos, Schafer, Hartman, 1973) ("Without subsidies, new housing costs are far beyond what [low and moderate income] groups can afford, and in periods of excess demand such housing is more likely to filter "up" than "down"the income scale.).

158. N. Marcus & M. Groves, The New Zoning: Legal, Administrative, and Economic Concepts and Techniques 45 (1970); see also Berman v. Parker, 348 U.S. 26, 33 ("Once the object is within the authority of Congress, the means by which it will be attained is also for Congress to determine.").

159. See, e.g., Ayres v. City Council of Los Angeles, 34 Cal.2d 31, 207 P.2d 1 (1949); see generally Heyman & Gilhool, The Constitutionality of Imposing Increased Community Costs on New Suburban Residents Through Subdivision Exactions, 73 Yale L. J. 1119, (1964); Marcus, A Comparative Look at TDR, Subdivision Exactions, and Zoning as Environmental Preservation Panaceas: The Search for Dr. Jekyll without Mr. Hyde, 20 Urb. L.J. 3, 20-27 (1980); Ellickson, Suburban Growth Controls: An Economic and Legal Analysis, 86 Yale L.J. 385 (1977).

160. Southern Pacific Company v. City of Los Angeles, 242 Cal.App.2d 38, 51 Cal.Rptr. 197 (1966), appeal dismissed 385 U.S. 647.

161. Bringle v. Board of Supervisors of County of Orange, 54 Cal.2d 86, 351 P.2d 765, 4 Cal.Rptr. 493 (1960).

162. Scrutton v. County of Sacramento, 275 Cal.App.2d 412, 79 Cal. Rptr. 872 (1969).

163. Pioneer Trust & Savings Bank v. Village of Mt. Prospect, 22 Ill. 2d 375, 176 N.E.2d 797 (1961).

164. *Jordan v. Village of Menomonee Falls*, 28 Wis. 2d 608, 137 N.W.2d 442 (1965), appeal dismissed, 385 U.S. 4 (1966); *Jenad, Inc. v. Village of Scarsdale*, 18 N.Y.2d 78, 218 N.E.2d 673, 271 N.Y.S.2d 955 (1966); *Ayres v. City Council of Los Angeles*, 34 Cal.2d 31.

165. 275 Cal.App.2d at 421.

166. 34 Cal.2d 31 (1949).

167. Id. at 41.

168. 4 Cal.3d 633.

169. Cal. Bus. and Prof. Code § 11546, now Cal. Gov't Code § 66477 (West Supp. 1982).

170. 4 Cal. 3d at 639-640.

171. Id. at 638.

172. Id. at 640 n.6.

173. The city is assuming that office developers will pass the cost of the OHPP contribution forward to the tenants - the parties who are actually increasing housing demand in San Francisco. Meeting of the American Planning Association in San Francisco (July 14, 1982) (discussing OHPP). But see Ellickson, supra note 105, at 1187-1191 (the incidence of an inclusionary tax depends on the perceived uniqueness of the city and the tax may, under varying circumstances, be passed back to the landowner, borne by the developer, or passed on to the consumer).

174. If the city characterizes the objectives of the program not as providing housing but as decreasing traffic, saving energy, and reducing air pollution, it can meet the nexus test by demonstrating that suburban residents who commute downtown increase traffic congestion, pollution, and energy consumption. San Francisco can use OHPP to balance the growth of jobs and housing, and meet objectives by housing people close to their work place. See supra note 139.

175. *Associated Homebuilders*, 4 Cal. 3d 633.

176. Id.

177. In fact, under the rationale of *Norsco Enterprises v. City of Fremont*, 54 Cal.App.3d 488, 126 Cal.Rptr. 659 (1976), the city may even be able to impose the OHPP housing contribution requirement on companies that are merely relocating to new offices in San Francisco and are not necessarily bringing new workers to the city. See supra note 68. The Norsco court allowed the municipality to levy in-lieu recreation fees on the owner of an apartment building who had filed for approval of a subdivision map for conversion of his building to condominiums. Even though the conversion did not add new residents to the community or otherwise increase the city's need for recreation facilities, the court allowed the city to impose the requirement, reasoning that the statute was based on the general public need for recreation facilities caused by existing and future subdivisions.

178. Task Force Report, supra note 9 at 60-64.

179. Id.

180. See supra text accompanying note 172.

181. See Task Force Report, supra note 9 at 204.

182. *Liberty II v. California Coastal Com'n*, 113 Cal. App. 3d 491, 170 Cal. Rptr. 247 (1980).

183. Id. at 502.

184. 438 U.S. 104 (1977).

185. See, e.g., *Goldblatt v. Hempstead*, 369 U.S. 590 (1962); *Nectow v. Cambridge*, 227 U.S. 187 (1928); *Hadacheck v. Sebastian*, 239 U.S. 394 (1915). The leading case for the proposition that a statute may so frustrate investment-backed expectations as to result in a taking is *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922). In situations where the regulation does severely disturb investment-backed expectations the law is currently in a state of flux as to whether what has occurred is a taking which would give rise to an action for inverse condemnation, see *San Diego Gas & Electric Co. v. City of San Diego*, 450 U.S. 621 (1981) (Brennan, J. dissenting), or an excessive use of the police power which would result in invalidation of the regulation. In *Agins v. City of*

Tiberon, 24 Cal. 3d 266, 598 P.2d 25, 157 Cal.Rptr. 372 (1979), affirmed, 447 U.S. 255 (1980), the court held that a zoning ordinance may be unconstitutional and subject to invalidation only when its effect is to deprive the landowner of substantially all reasonable use of his property; see also Fred F. French Inv. Co. v. City of New York, 39 N.Y. 2d 587, 350 N.E.2d 381, 385 N.Y.S.2d 5 (1976).

186. Penn Central v. City of New York, 438 U.S. at 131.

187. See supra notes 94-98 and accompanying text.

188. See, e.g., Euclid v. Ambler, 272 U.S. 365 (75% diminution in value not a taking); Hadachek v. Sebastian, 239 U.S. 394 (87.5% diminution in value not a taking).

189. The Supreme Court recently held in Loretto v. Teleprompter Manhattan CATV Corp., 5 U.S.L.W. 4988 (June 30, 1982), that if the regulation involves an actual physical taking, then character is no longer just a factor but is determinative of a taking.

190. See, e.g., Penn Central, 438 U.S. 104 (forced maintenance of exterior features of landmarks).

191. Norsco Enterprises v. City of Fremont, 54 Cal. App. 3d 488, 126 Cal. Rptr. 659 (1976). See also Estate of Horman, 5 Cal. 3d 62, 75, 485 P.2d 785, 95 Cal. Rptr. 433, cert. denied, 404 U.S. 1015.

192. Lindsey v. Normat, 405 U.S. 56, 73 (1972).

193. Task Force Report, supra note 9, at 127.

194. See supra note 46; Terminal Plaza Corp. v. City and County of San Francisco, No. 786-779, at 23-24, (Superior Court of the State of Cal. for the City and County of San Francisco) (Jan. 18, 1982) (Memorandum of points and authorities in opposition to complaint for declaratory and injunctive relief) (legality of one-to-one residential conversion requirements).

195. Silver v. Silver, 280 U.S. 117, 123 (1929); Werner v. Southern Cal. Newspapers, 35 Cal. 2d 121, 132, 216 P.2d 825 (1950), quoted in, Norsco Enterprises, 54 Cal. App. 3d at 497.

196. 54 Cal. App. 3d 488, 126 Cal. Rptr. 659 (1976).

197. See Westfield-Palos Verdes Company v. City of Rancho Palos Verdes, 73 Cal. App. 3d 486, 141 Cal. Rptr. 36 (1977) (an environmental excise tax imposed by the city did not unreasonably discriminate against residential developers, even though they were taxed at a higher rate than were contractors). The distinction the court found in this case was that developers plan entire subdivisions, while contractors produce individual custom-designed homes.

198. Board of Education v. Watson, 63 Cal. 2d 829, 833, 409 P.2d 481, 48 Cal. Rptr. 481 (1966), quoted in Norsco Enterprises 54 Cal. App. 3d at 498.

199. Proposition 13, which appeared on the June 6, 1978 ballot in California is also known as the Jarvis-Gann initiative.

200. See, e.g., City and County of San Francisco v. Farrel, 32 Cal. 3d 47, 648 P.2d 935, 184 Cal. Rptr. 713, (1982) (payroll and gross receipt taxes); Trent Meredith, Inc. v. City of Oxnard, 114 Cal. App. 3d 317, 170 Cal. Rptr. 685 (1981) (school facility fees and in-lieu dedication requirements); Albert Mills v. County of Trinity, 108 Cal. App. 3d 656, 164 Cal. Rptr. 674 (1980) (fee for county services in processing subdivision, zoning and land-use applications); County of Fresno v. Malmstrom, 94 Cal. App. 3d 974, 156 Cal. Rptr. 777 (1979) (special assessments); 62 Op. Cal. Att'y Gen. 831 (1979) (charges imposed in a county service area); 62 Op. Cal. Att'y Gen. 673 (1979) (in-lieu fee imposed as a condition on issuance of building permit for construction of low- and moderate-income housing); 62 Op. Cal. Att'y Gen. 663 (1979) (subdivision fees for defraying the cost of constructing bridges, railways, freeways, canyons and thoroughfares); 62 Op. Cal. Att'y. Gen 254 (1979) (subdivision school fees).

201. "Cities, counties, and special districts, by a two-thirds vote of the qualified voters of such district, may impose special taxes on such district, except ad valorem taxes on real property or a transaction tax or sales tax on the sale of real property within such city, county, or special district." Cal. Const., Art. XIII A, § 4.



202. Farrel, 32 Cal. 3d 47. The court held that a payroll and gross receipts tax was not a § 4 special tax, construing special taxes to mean taxes which are levied for a specific purpose rather than a levy placed in the general fund to be utilized for general government purposes. While this definition might seem to characterize OHPP as a special tax, the court explicitly stated that it was considering the applicability of § 4 to taxes for general revenues and not to fees for services provided.

203. 114 Cal. App. 3d 317.

204. 62 Op. Cal. Att'y Gen. 673 (1979).

205. 114 Cal. App. 3d at 324 ("A reading of the Attorney General's opinions leads us to conclude that the definition is overly broad. It fails to consider the regulatory nature of fees, upon whom the fee is imposed and the purpose of the fee".).

206. See, e.g., Farrel, 32 Cal. 3d 47; Trent Meredith, 114 Cal. App. 3d 317; Malmstrom, 94 Cal. App. 3d 974.

207. 22 Cal. 3d 208, 583 P.2d 128, 149 Cal. Rptr. 239 (1978).

208. 22 Cal. 3d at 231.

209. Cf. Los Angeles County Transportation Commission v. Richmond, 31 Cal. 3d 197 (1982) ("Since only those 'special districts' which levied property taxes would 'replace' the 'loss' of such taxes, these statements imply that the 'special districts' referred to are those which are authorized to levy a property tax.").

210. Mills, 108 Cal. App. 3d at 660.

211. See, e.g., Malmstrom, 94 Cal. App. 3d 974 (special assessments are not special taxes); Mills, 108 Cal. App. 3d 656, 660 (the court stated that it did not believe that the voters intended that fees for governmental activities conferring a direct benefit on the specific individual who is charged for hospital services, public transportation, and garbage collection would require the two-thirds stamp of approval).

212. The Attorney-General opinions reflect a more stringent attitude in measuring fees and exactions against the purposes of § 4. The Attorney-General seems to exempt from § 4 only those fees whose purpose "is not to raise revenue for the benefit of the governmental agency as distinguished from the persons or property from whom or which it is exacted". 62 Op. Cal. Att'y. Gen 663, 667. Hence, the Attorney-General finds that special assessments are not special taxes, for they are for the benefit of the assessed property and are therefore not a mechanism for circumventing § 1 and § 2 of Art. XIII A. 62 Op. Cal. Att'y Gen. 663. He also finds that "fees . . . which compensate a public agency for its cost of rendering a particular service to citizens and exacted from recipients of that service are not taxes and would not run counter to the objectives of Art. XIII A." 62 Op. Cal. Att'y Gen. 831, 838. He states, however, that "charges for services that are exacted from all or a portion of taxpayers irrespective of whether the services are used by or rendered to the taxpayers" would constitute special taxes. Id.

213. See supra text accompanying notes 168-172.

214. 114 Cal.App.3d 317, 327.

215. 108 Cal. App. 3d at 661-662.

216. Id. at 663. See also Cal. Gov't Code § 50076 (West Supp. 1982) ("special tax shall not include any fee which does not exceed the reasonable cost of providing the service or regulatory activity for which the fee is charged and which is not levied for general revenue purposes."). But see 62 Op. Cal. Att'y Gen. 673. The Attorney General decided that an in-lieu participation fee on residential developers for low- and moderate-income housing was a special tax: "although it is part of a regulatory scheme, the primary purposes and effect is to raise revenue." Id. at 679. Perhaps the Attorney General's opinion can be distinguished from OHPP on the basis of the rational nexus test. OHPP provides a more direct benefit to new tenants of office buildings in the form of increased housing opportunities than a housing fee provides to subdivision residents who already have a place to live.

217. Research may indicate, for example, that more units will actually be produced if the developers' OHPP contribution is concentrated in a smaller number of units at an investment of greater than \$6,000 per unit than if the money is spread over a larger number of units at a cost of only \$6,000 per unit.

218. Farrel, 32 Cal. 3d 47. Resolution of the validity of the transit impact development fee, described supra note 47, may well bear on the determination of whether OHPP is a tax or a fee.

219. The city can retain a certain amount of flexibility by inserting a safety valve into the ordinance for hardship cases. Although the clause might be viewed as a loophole, the courts might see the program as more reasonable if it contains provision for exceptional cases. It would then be the city's duty to ensure that the exception did not swallow the rule. San Francisco is currently considering placing OHPP in an ordinance based on its ability to designate certain uses conditional uses. Conditional use zoning is based on the premise that while conditional uses are essentially desirable, necessary or convenient they present special problems which cannot be solved by restrictions of general application to all permitted uses. A. Rathkopf, Law of Zoning and Planning, Vol 3 § 41.01 (4th ed.) This approach may prove suitable but this paper does not discuss the implications of using conditional use zoning to implement OHPP.

220. Interview with William Witte, Deputy Director of OHCD, and Dean Macris, Planning Director, in San Francisco (July 21, 1982).

221. J. Barnett, Urban Design and Public Policy 38 (1974) (new and stringent regulations have a high incidence of defeat in legislatures).

222. The original incentive zoning system programs started in New York when the city offered to increase the permissible height and bulk in buildings if developers agreed to provide amenities such as plazas, arcades and, later on, legitimate theaters and retail space. See Kayden, Incentive Zoning in New York City; A Cost-Benefit Analysis (Land Policy Roundtable Policy Analysis Series number 201, Lincoln Institute of Land Policy ) (1978); Whyte, What Price Sunlight? Designing a Livable Midtown, New York, Mar. 9, 1981, at 24-25; Peck, Living Over the Museum: Mixed Use Cultural Projects (Conference on the Economic Impact of the Arts, Graduate School of Business and Public Administration, Cornell University May 27-28, 1981).

223. John Costonis argues that incentive zoning recognizes that development options are a product of bulk, use, and height regulations imposed by local governments; urban space, he argues, should not be regarded as private property but as a public asset which cities may property allocate through incentive zoning to achieve community goals. J. Costonis, Space Adrift, 38 (1974).

224. C. Page & P. Cuff, *Negotiating for Amenities* 10 (1982) (published by Partners for Livable Places).

225. Telephone interview with Bruce McCormick, planner and zoning specialist at the Toronto Planning and Development Department (Nov. 26, 1982).

226. Burton, supra note 38.

227. Whyte, supra note 222. The developer also often ends up with a potential windfall under an incentive zoning system. J. Kayden, *Innovative Implementation Techniques for Downtown Washington* (1981), discussed in Page and Cuff, supra note 224.

228. Whyte, supra note 222.

229. C. Page & P. Cuff, supra note 224 at 11-12; Ellickson, supra note 105 at 1213-1214.

230. C. Page & P. Cuff, supra note 224, at 11.

231. A sunset provision requiring termination of the program unless extended by a vote is a built-in mechanism for further deliberation of the merits of the program. The city is considering another alternative, however, for coping with this problem of adjusting the program to swings in the economy. Its proposal entails amending the City Planning Code to enact § 313 entitled Special Development Requirements. The purpose of the new ordinance would be to approve the grant of discretionary review power to the planning commission without actually specifying the details of any particular program such as OHPP. The planning commission would be granted the power to establish special development requirements which could apply to any development proposal for which a building permit application is required to be filed with the Department of City Planning. The rationale of this approach is that the planning commission would then be able to use its discretion to not impose requirements such as OHPP in periods of economic downturn. Telephone interview with William Witte of OHCD (Feb. 24, 1983); *Proposed Amendment to the City Planning Code § 313 establishing Special Development Requirements*, (Draft, Mar. 8, 1983). It would seem, however, that this proposed approach would impose no constraints on a planning commission that chose to exact very stringent building conditions from developers or chose to exact no conditions at all.

232. Whyte, supra note 222.

233. See supra text accompanying notes 102-103.

234. The establishment of a separate fund would ensure that OHPP contributions would not wend their way into general revenues, violating the intent of the exaction and leaving it open to a possible attack as a "special tax" under Proposition 13. See text accompanying notes 216-218.

235. An example of the sort of innovative approach that should be encouraged is the formation of a partnership for the rehabilitation of a residential hotel where the office developer served as limited partner and the non-profit group served as general partner. See supra note 103.

236. Interview with Paul Zigman of Environmental Science Associates in San Francisco (June 11 1982).

237. See generally Frug, The City as a Legal Concept, 93 Harv. L. Rev. 1057 (1980); see also J. Barnett, supra note 221 at 35.

238. Lefcoe, When Governments Become Land Developers, supra note 10. In a case study on the Netherlands and California, Lefcoe concluded that, if public sector land development activity increases in the United States, it will not be because of a socialist ideological commitment to public ownership of all natural monopolies. The motivation would be more pragmatic: cities do what they must to avoid immediate crises. Rather than simply telling property owners what they cannot do and giving them little incentive to do what they might, governmental bodies need an affirmative tool to help achieve planning goals. Since World War II, the government in The Netherlands has been subsidizing housing for all but the wealthiest by building social housing or by assisting non-profit organizations to do the necessary work. By acting as land developer, the local government can reserve sites for social housing while subsidizing the costs of these sites out of sales of land to private builders of luxury villas. Cities in The Netherlands can require, as a condition of building, that the developer build all of what a plan requires including low-rent apartments, nursery schools, and cemeteries. Id. at 175-223.

239. Task Force Report, supra note 9, at 12.

240. See Lefcoe, When Governments Become Land Developers, supra note 10, at 205.

APPENDIX A

OHP COMMITMENTS TO HOUSING DEVELOPMENTS

REVISED DATE: February 1, 1985

HOUSING PROJECT				HOUSING CREDITS					
OFFICE DEVELOPER	NAME	SPONSOR/DEVELOPER	HOUSING TYPE	NUMBER	COST	DATE OF CITY COMMITMENT	PRELIMINARY CREDITS APPROVED	FINAL CREDITS APPROVED	NO. HOUSING UNITS
Cahill Construction & Highfield (Calif. Jones Co./Highfield Holdings, Inc.)	Pink Palace Yerba Buena Plaza Annex	S.F. Housing Authority	low income public housing rehab.	610	\$2,440,000	1/82		X	** 305
Norland Properties and Daon Corporation	Scattered site public housing rehab.	S.F. Housing Authority	low income, public housing rehab.	450	1,014,000	10/81		X	450
Marathon U.S. Realty	Northridge Coop. Homes, Bayview Hunters Point	All Hallow Com. Dev. Corp., S. F. Redev. Agency	low/moderate income family Sec. 8 new construction	707	3,500,000	1/82		X	301
Norland Properties	Ocean Beach Assoc. . Sec. 8 new construction . Parcel 4 Dev.	Ocean Beach Assoc.	new low/moderate income elderly Sec. 8	170	500,000	10/82		X	85
		Ocean Beach Assoc. & Daon Corp.	----- new market-rate	*	*	4/82	X		*
San Francisco Federal Savings & Loan Association	Lassen Apartments 441 Ellis Street Sec. 8 sub. rehab.	A.F. Evans & Co. and Asian, Inc.	low/moderate income elderly Sec. 8 substantial rehab.	162	621,000	8/82		X	81
Trinity Properties	Scattered site new construction	Trinity Properties	new market-rate	*	*	2/82	X		*
Gerald Hines Interests	308 Eddy Street Herald Hotel	Hagan Family Trust	low/moderate income elderly Sec. 8 rehab.	146	588,000	6/82		X	73
Grosvenor Properties	Post/Van Ness Hsg.	Grosvenor Properties	new market-rate	*	*	7/82	X		
Milton Meyer & Co.	McAllister Towers 100 McAllister St.	Hastings College of the Law	low/moderate income student housing	564	3,228,000	8/82		X	282
Bank of Canton	Citywide Affordable Housing Program	City of San Francisco	low/moderate/middle income new construction	155	933,000	11/82	11/82	X	} 600-650
Gerald Hines Interests	Citywide Affordable Housing Program			147	882,000	11/82	11/82	X	
Citicorp	" "			512	3,072,000	11/82	11/82	X	
* UNKNOWN BECAUSE PROJECTS ARE IN PLANNING STAGE OF DEVELOPMENT				3,623	\$16,778,000				2177

1  
85

\*\* NUMBER OF PERSONS RESIDING IN SHARED LIVING ACCOMMODATIONS

OIHP COMMITMENTS TO HOUSING DEVELOPMENTS

REVISED DATE: February 1, 1983

HOUSING PROJECT

HOUSING CREDITS

OFFICE DEVELOPER	NAME	SPONSOR/DEVELOPER	HOUSING TYPE	NUMBER	COST	DATE OF CITY COMMITMENT	PRELIMINARY CREDITS APPROVED	FINAL CREDITS APPROVED	NO. HOUSING UNITS
Vintage Properties/ (Spear Street Investors)	Carter Street Condominiums	A.F. Evans Company	Moderate Income Market rate	*	700,000	1/83	x		228±
Lincoln Properties/ (Lincoln, Mission-Speer Associates, Ltd.)	Silverview Terraces Bayview Hunters Point	Hofmann Construction Co. Inc.	Moderate Income Market rate	180	500,000	1/83	x		60**
Firehouse II (Seaton Corporation)	Chestnut Court 950 Columbus Ave.	Seaton Corporation	Market rate	36	***	10/82		x	18
Crow-Spleker #99/ (Trammel Crow Co.)	Aspen Tenderloin Apts 249 Eddy, 165 Turk	Housing Supervisors, Inc. Aspen Group West, Inc.	Low/moderate Section 8 Subst. rehab.	164	820,000	12/82		x	82
Crow-Spleker #99 (Trammel Crow Co.)	655 Montgomery St.	Crow-Spleker #99	Market rate	65	***	12/82		x	33
Amerisport International	Federal Hotel 1087 Market Street	Amerisport International	Low/moderate	116	***	10/82		x	39
			SUB TOTAL	561	\$2,020,000				460
			TOTAL	4184	18,798,000				2637

\*UNKNOWN BECAUSE PROJECTS ARE IN PLANNING STAGE OF DEVELOPMENT

\*\*TOTAL DEVELOPMENT SIZE= 141 UNITS OF WHICH 60 WILL BECOME MODERATE INCOME THROUGH THE OIHP

\*\*\*UNKNOWN BECAUSE PROJECTS WERE DEVELOPED BY THE OFFICE DEVELOPER

APPENDIX A (continued)