SHARING THE RESPONSIBILITY:
The Role of Developer Contributions in the Provision of
Lower Income Housing in California and its
Implications for Victoria.

GARY SPIVAK
Bachelor of Arts
Bachelor of Social Work
Graduate Diploma in Urban Policy and Research

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Department of Sociology
Swinburne University of Technology
Melbourne
Australia

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This thesis investigates the relevance and transferability of developer contributed affordable housing in the USA as an alternative method of funding and delivering affordable housing in Australia.

Local Government, the vehicle for the delivery, is explored because of its central role in co-ordinating developer contributed affordable housing in the USA; and because its role in both counties as both the planning authority and a potential provider or facilitator of community housing.

Additionally, the nature and role of community based housing providers in the USA is considered important in maintaining the purpose of developer contributed affordable housing and also expanding the size of the community housing sector.

The thesis investigated developer contribution policies and programs in four Californian municipalities: San Francisco, Santa Monica, Los Angeles and San Diego. This State and these cities have established some of the most well developed programs of this type in the USA.

The investigation included controls and incentives, both mutually reinforcing, used in these Californian programs as well as operational program factors which led to their success. These were contrasted with Australian conditions to determine the relevance and transferability of the US experience.

A central conclusion was that the US developer contribution programs had limited relevance and transferability to Australia for a number of reasons. These reasons include the divergent roles, track records and legal powers of local government in the USA and Australia in planning and housing provision or facilitation; contrasting legislative frameworks and nature of housing developers between the two countries; and the lack of an imperative in Australia to develop alternatives to centrally provided public housing systems which is in contrast to the USA.
Consequently, the value of the US experience was that their particularly successful and problematic aspects of developer contributed housing programs and community housing arrangements would develop a useful context for an Australian model.
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Lastly, I would like to acknowledge the values associated with the St. Kilda community’s support for social inclusion, tolerance, compassion and diversity which I have absorbed from my employment as a Housing Development Officer with the former City of St Kilda and now City of Port Phillip. These values are reflected in this thesis.
I declare that this thesis contains no material accepted for the award of any other degree or diploma and contains no material previously published or written by another person, except where properly acknowledged.
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CHAPTER ONE:
Defining the Problem

Introduction

This thesis was borne out of a desire to document the experience of the former City of St Kilda in Victoria (now forming part of the City of Port Phillip) in its attempt to use planning controls on the subdivision of blocks of rental flats and to analyse the reasons for the failure of their implementation. The failure derived from a planning appeals ruling which stated that developer contributions were illegal as mechanisms for providing affordable housing. This raised an issue of innovation in low income housing provision at the local level and specifically the potential and limitations of developer contributions in local government housing provision.

Developer contributions and related planning controls have been used in the USA, notably in California, for affordable housing provision but little information was available in Australia on how they were set up, how they work and how successful they have been. The American experience prompted the question of what lessons there may be for Victoria in the Californian experience. This thesis emerged from this questioning. The thesis is, thus, a comparison of alternative approaches to low income housing provision at the local government level, paying particular attention to developer contributions. It is designed to document the process of affordable housing provision in California and compare it to Victoria (with particular reference to developer contributions) and to draw out what lessons there maybe for Victoria. More specifically the thesis aims to identify the institutional and organisational conditions that have enabled California to be more innovative in the provision of affordable housing at the local level than Victoria. The outcome of this research process will enable a conclusion to be drawn as to whether the developer contributions used in the California could be adapted to the Australian and specifically to the Victorian context.

The idea for comparison was based on the need to explore municipal mechanisms as means of funding affordable private or public sector housing within Victoria. This need arose from the
recognition that land use planning controls in Australia are weak and existing mechanisms for maintaining existing, affordable, private housing are ineffective.

A secondary aim of the thesis was to determine whether Californian ‘non-profit developers’ provided a model for Victorian community groups wishing to overcome their dependence on State provided community housing by becoming independent and sophisticated providers in their own right. In the 1990s most community housing has been funded via federal and state grants using few external sources of funding. As housing budgets contracted, it seemed imperative to identify other ways of leveraging funds into community housing.

Throughout the preparation of this thesis, the focus on models for community housing providers was sustained. However, the relevance to Australia of municipal developer contribution programs and their relationships with community-based providers has increased because of two processes.

Firstly, the gentrification of inner areas with impacts on local affordability (Badcock, 1995) and concerns regarding this process have failed to transfer into Victorian planning legislation in the form of any social impact provision. This failure and the equally slow development of planning appeal procedures which recognise social impacts such as affordability, was, and still is, retarding the ability of Local Government as planning authorities to provide alternative, affordable housing. The US experience offered an opportunity to determine those practices which might be transferable to the Australian context. It also allowed the investigation of the shortcomings of the US system which could be avoided in Australia.

Secondly, the emergence of Economic Rationalism as the dominant political philosophy has resulted in both the reduction of government intervention and expenditure and an increased reliance on alternative, private sector funding for infrastructure and services (Horne, 1992; Stretton and Orchard, 1994). While Economic Rationalism has a number of meanings it is essentially a philosophy of greater marketisation where the activities of the state are wound back and the market has a greater role in resource allocation and distribution. While a complete dismantling of the public housing system in Australia has not occurred as it did in the USA during the 1980s (Schwartz, 1988), an economic rationalist approach to public housing
provision is nevertheless emerging in some states, such as Victoria. This situation is having the effect of both decentralising and restricting the delivery of public housing. Community housing, if adequately funded, could provide an alternative to centralised public housing.

These two broad subjects - social impact planning controls in response to gentrification and community-based housing provisions - are highly relevant to Local Government. Local Government in both California and Victoria are the primary land use planning authorities and also have the ability to be housing providers or to facilitate the provision role of community-based organisations. This combined role offers a potentially powerful means for meeting the social housing needs of local communities.

In Victoria, however, and Australia generally, the delivery of low income housing still largely remains centralised through State housing authorities and the community housing sector, i.e. low income housing provided and managed by non Commonwealth and State government agencies, is a young and small sector. Both are inadequate in meeting low income, rental housing need. Municipalities in general disregard the need to adopt a serious, ongoing housing provider role (Burke, 1999 (b): 20; Spivak, 1999: 15). In an Australian environment of financial stringency and dominant ‘economic rationalist’ ideology, the need to explore the potential of developer contributed low income housing is not only relevant but increasingly necessary in order to share the cost of addressing housing need in the face of inadequate alternatives.

Chapter one of this thesis provides a rationale for the relevance of the US developer contribution experience for the provision of lower income housing. This is tackled from both the perspective of Australian conditions which supports the potential use of developer contributions or the shortcoming of alternative delivery mechanisms and the broad characteristics of the US and Californian housing and planning systems which are relevant to Australia. The relevant experience of two Australian municipalities, the City of St Kilda and the North Sydney City Council, are used as case studies in illustrating the limitations of the use of planning controls and developer contributions.

Chapter Two documents key milestones in US the evolution of land-use planning, planning law, housing reforms and community-based housing. These milestones must be appraised when critical in attempting to understand how and why the US developer contributions system
developed. From here one can determine the historic origins both as a context to the current system and as an indicator of its relevance to Australia.

Chapter Three describes the planning controls and incentives used by Californian municipalities in the operation of developer contribution programs for lower income housing provision. The relationship between controls and incentives is a key feature of the programs. This description is based on interviews with staff of four municipalities as well as the analysis of municipal policy documents listed at the end of the Bibliography. As reference to these documents has been intensive, sources for the descriptions have not been provided in the text of Chapter Three.

Issues arising from these programs are discussed in Chapters Four and Five. The information is organised to illustrate ways in which planning and developer contributions are institutionally and organisationally arranged in California along with insights into their relevance to Australia.

Lastly, Chapters Six and Seven explore the relevance of or transferability of the US and Californian experience to Australia. It reaches a conclusion on the question of whether Australia can and should learn from this experience not only to avoid costly mistakes but also to emulate worthwhile characteristics. It determines the importance of developer contributions in the future of low income housing delivery in Australia and whether developers may play a significant role in sharing this responsibility with government.

The methodology used in this research is varied but includes participant observation, primary data collection as well as analysis of relevant literature and policy documents. The participant observation part of the research is because the researcher was housing officer for the City of St. Kilda, later Port Phillip, for the duration of the study and was actively involved in that municipality’s efforts to evolve an affordable housing program and to use developer levies as a mechanism to assist this process. As an ‘insider’ the researcher not only has access to relevant documents but also knowledge of the pertinent political and organisational issues raised by the topic.

‘Participant observation’ was supplemented by a study tour of California to visit municipalities with an affordable housing program that included developer levies. The researcher conducted interviews with key planning staff of the municipalities of Los Angeles, Santa Monica, (both
part of greater Los Angeles), San Diego and San Francisco. In addition to interview material, participating organisations also provided procedure manuals, policy reports and guidelines for implementation. Analysis of this material provided much of the content of Chapters Three and Four. In addition to interviews with local government, officials interviews were also conducted with non profit housing organisations in the same municipalities. All interviews were non structured to allow for free ranging discussion. Interview material and all reports were collated into three, 500 page volumes and have been donated to Swinburne Centre for Urban and Social Research.

An important part of the methodology is comparative analysis. The thesis is not grounded in any theoretical framework but is guided by a comparative perspective. This draws out the different institutional environments shaping the capacity to deliver affordable housing. Comparative analysis of the type that compares attributes and processes between countries can be very useful for highlighting the distinctive nature of issues and problems in one's own country. It may throw new light or explanations on problems and issues and (from a policy perspective) may suggest benchmarks for performance. However comparative method must be conducted appropriately. If the objective is to understand, or improve policy performance, the country of comparison should be meaningful. Thus the institutional conditions of the comparative country or countries should not be too dissimilar to render comparison useless, and the countries should be at a relative similar stage of economic development. California (USA) is therefore an appropriate comparison for Victoria (Australia). Both are states within a federal system, and both have comparable housing systems with around seventy percent ownership, one-quarter private rental and marginalised public rental sectors in both states (Burke et al, 1990). The respective economies are those of advanced industrial societies and population is largely concentrated in large and relatively rapidly growing cities: Melbourne in the case of Victoria, and Los Angeles, San Diego and San Francisco in the case of California. Each of these cities has been experiencing similar housing affordability problems to Melbourne. Of particular relevance to the theme of this thesis is that California, among all the USA states that have implemented developer contributions and related planning legislation, is seen as the state with the most wide spread and comprehensive interventions (Weschler et al, 1987:25). If there are lessons for Australia in this area they are most likely to be found in California.
Why Should there be Developer Contributions in Australia?

The catalyst for this thesis was the need to review the role of local government as a land use planning authority which could levy developers for part of the capital cost of providing low income housing.

Australia, unlike the USA, has no well-developed ethos of private sector contribution to the cost of providing infrastructure or community services, let alone the provision of low-income housing. Yet changes to the economic and political environment indicate the need to review Victorian governmental powers and objectives to determine whether developers can or should share the cost which government has traditionally shouldered alone. These changes include the emergence of funding cuts in the wake of ‘economic rationalism’, the inadequacy of public and community housing to meet housing need for low income households, the mixed performance of Local Government as a provider of housing and the political acceptance of developer contributions in other parts of Australia.

In Australia the model adopted for social housing provision was one provided by a centralized state (Hayward, 1996). Social housing was, and is, funded by the Commonwealth and provided and managed by State housing agencies. This is a very different model from those used either by the UK or USA. In these countries local government is the provider. In Northern Europe local government and/or non-profit community agencies are the providers (Harloc, 1998). Such centralisation of provision creates major limitations because there is no effective alternative when or if state housing authorities fail to provide sufficient public housing. Yet the potential of developers to provide for some of this unmet need through the land use and development planning process, in the form of a developer contribution as a condition of receiving a planning permit, is an alternative which has failed to be explored widely across Australia. This is because Local Government, as the planning authority, focuses on physical planning objectives. It is generally inactive in a direct housing role (Purden and Burke, 1989:23; Spivak, 1999:15; Lawson, 1995). The failed exploration is also due to the absence of a State or Commonwealth legislative requirement to provide such housing, which in turn reflects their respective roles as providers and funders of affordable, public housing. Further, those imbued with values of
economic rationalism see government required developer contributions for affordable housing as a fettering of the private sector.

The domination of economic rationalist ideology during the 1980s and 1990s prompts the question whether the private sector, as the sector which Commonwealth and State Government is promoting as the lead player in meeting the needs of society, should also extend its role to affordable housing provision given the financial constraints of government funding.

Within this scenario, the rationale for taking the view that local Government should encourage or require developers to contribute to the provision of lower income housing, lies in the absence of alternative mechanisms to fund its provision, the absence of a suitable political climate and the gradual shift toward the general use of developer contributions by Local and State Government. In this chapter the rationale addresses the inadequacy of public and community housing; a growing inner urban affordability problem, the push for urban containment and associated development controls; and the related issue of the emergence of economic rationalism.

The Inadequacy of Public and Community Housing

Public and community housing comprise two components of social housing. Social housing has been defined as ‘forms of rental housing which are financed, owned and managed in ways that ensure this housing meets social objectives and social obligations’ (McNellis, 1992:2). Public housing is affordable rental housing for low income households which is funded, delivered and managed by State housing authorities. Community housing often comprises similar housing which is, at minimum, managed by a community-based group and sometimes also partly or fully funded and delivered by community organisations, including Local Government.

The provision of public housing has been the principle means by which the Commonwealth and State Governments have addressed the housing needs of low-income rental households. Since 1945, Commonwealth policy has been set within the framework of the Commonwealth-State Housing Agreement (CSHA) whereby the Commonwealth provides tied funds to the States for the purchase, construction and maintenance of public housing by State housing authorities.
The 1987/88-1998/99 CSHA Agreement (an interim one) provides funds of around one billion dollars per year of social housing, which was matched by State/Territory Governments by over $400 million per year. This funding resulted in the provision of a total of 370,000 public housing dwellings in Australia with an estimated value of $32 billion. However, net funding (which takes into account repayments of states to the Commonwealth) has fallen over recent years from $1 billion to $700 million with the resultant fall in new provision from 14,000 to 7,000 units per year. (Ecumenical Housing Inc.,1997). Further, trends in Victoria suggest that a withdrawal of the public housing system may be occurring because of the increasing targeting of public housing to those with supported housing needs and disabilities, the privatisation of public housing through sale and mixed use redevelopment of estates and the decentralisation of housing delivery through community housing providers. However, this trend will need to continue before sufficient community demand occurs for alternative funding sources for social housing.

The performance of State Housing authorities has varied between states and for each state over time. Centralised delivery of public housing has continued to varying degrees. Victoria, in 1997, had one of the lowest proportions of social housing among the States and Territories (3.5%), a waiting list of 49,200 when only some 9000 applicants can be allocated each year. 2500 of these are priority allocations. The rate of new provision of less than 1000 per annum is down by more than 50% compared to five years earlier (Department of Social Security; Housing Act 1996 Annual Report Appendix 1). Under these circumstances there is little hope that social housing (whether public or private) funded in the traditional CSHA way can provide a housing solution for low-income Victorian families.

The community housing sector counters few of the problems created by a contracting public sector because most of the funds come out of the same CSHA budget which impacts on the provision of public housing. While the community housing sector in Victoria comprises 8.6% of social housing, the largest proportion of all states, little growth has occurred in recent years. Given we are only talking about a stock of around 5500 in total such growth represents a few hundred houses statewide (National Community Housing Forum 1997).

For community housing to address a significant proportion of housing need currently addressed by public housing, the community housing sector would need to grow considerably both in absolute stock numbers and proportionately to total social housing and total dwellings, to
make a significant contribution. But with only $62 million provided Australia-wide in the CSHA for community housing in its peak year of 1995/95 and subsequently stabilised, the sector's growth is limited unless State Government funding or alternative funding sources such as developer contributions increase. Concerns about the above cuts in social housing would not be as alarming if there were no major problems within the private market, particularly with respect to affordable housing.

Housing Affordability.

The gentrification of inner urban areas in Australia is a well-documented process (CURA 1977; Badcock 1995: 70-90). Whereas in the early 1970s areas such as St. Kilda in Melbourne and Glebe in Sydney were municipalities of cheap and affordable housing, a complex process of gentrification has progressively undermined the affordability of these and equivalent inner areas. This is signaled by a number of indicators. The most vivid one is the change in affordability. In 1976 the median weekly rent in St.Kilda was $32.00, representing 24% of average weekly earnings, in 1997 it was $200.00, representing 31% of average weekly earnings (Burke, 1983: Table 3.3.3; Office of Housing 1997:3). In terms of house purchase, the threshold income to enter home ownership in 1996 was $58,136.00 compared to $8,820.00 in 1976. The former figure represents 1.7 times average earnings and the latter only 0.95 times such earnings. (Victorian Valuer General, 1976, 1996). Another significant outcome has been the decline of private rooming (apartment and boarding) houses from 636 rooming houses housing 9500 persons at the 1954 peak to 44 rooming houses housing 871 persons in 1997 (Spivak 1997:143).

A final indicator, and one of extreme concern to St.Kilda, was the subdivision of rental flats for owner occupancy. This process diminished the already contracting stock of rental accommodation. In 1984 of the total stock of 19,768 flats, 62% or 12,218 units were unsubdivided. By 1997 it was only 5,827 flats, or 30% of the total (Spivak, 1997:139). Given subdivided flats are converted with a 58:42 ratio of owner occupied units to re-rented investment flats (Spivak, 1997:37), this process suggests a loss of nearly 2,700 affordable rental properties over the last decade. What these indicators illustrate is, as will be seen in Chapter Two, is the very same issue that gave momentum to the USA push for affordable housing programs, ie, a marked decline in the housing opportunities of poor to lower income households. Concerns about the loss of affordable housing in St. Kilda both by the Council,
housing lobby groups and local residents created a political context. To tackle this issue policy intervention was seen to be necessary with development controls one of the mechanisms considered.

**Urban Containment and Development Controls**

Another theme, which supports a rationale for the use of developer contributions, is the metropolitan planning policy direction being emphasized in Melbourne. In brief this policy addresses the containment of urban growth. A bipartisan policy, it was established by the previous Labor State Government and continued by the current Liberal State Government.

This policy direction was based on three concerns: firstly, government initially expressed concern that the majority (85%) of all public infrastructure costs was being paid for by State and Local Government. More specifically, government was concerned that developers only pay 44% of the costs of providing services (roads, gas, electricity, etc.) to each new housing block in outer/fringe suburban housing estates, with the remaining 56% of costs being met by the State and Local Government (Colebatch 1991:15). In the 1990s this concern also applied to the high cost of infrastructure projects across Melbourne.

Secondly, the policy direction was fuelled by broader concern at the costs of servicing the urban sprawl of Australian capital cities, especially Sydney and Melbourne. Amongst the largest in the world in area, these cities have relatively modest populations by world standards, also making their population densities also very low by world standards (Newman, 1999:96).

Thirdly, in the case of both Sydney and Melbourne, increased environmental and development standards expected by the community coupled with restriction on the taxing, spending and borrowing powers of State and Local Government created the conditions for seeking private sector capital contributions and direct private sector or joint venture infrastructure projects (Simpson, 1989:22).

In an effort to contain urban sprawl as well as reduce the cost to government of developing new land, urban planning policy of successive State Governments from the late 1980’s onwards supported urban ‘consolidation’. This is the increase in urban population and dwelling densities. Urban consolidation has been attempted through supporting smaller lot subdivisions
in new estates, medium density housing in the inner urban areas and dual occupancy development of existing single house blocks in established areas. After the 1992 State election, the incoming Liberal State Government also set population targets for Melbourne’s municipalities in an attempt to force Councils to develop policies to ensure greater population density through increased or higher density housing (Burke, 1999(a): 22-23).

As well as this initiative government adopted policy on developer contributions aimed at the provision of urban infrastructure and services, titled Melbourne’s Growth- a Time to Act: the Victorian Government’s Plan for Managing Future Growth in the South East Corridor. Although prompted by the enormous public costs of servicing new housing estate on the urban fringe, the policy also applied to major infrastructure projects and development projects. Under the Labor State Government, this policy was promoted by discussion papers in late 1990 (State Government of Victoria, 1990; Department of Planning and Urban Growth, 1990); increased water, sewage and drainage charges to developers of new subdivisions by the Board of Works in late 1990, and guidelines for developer contributions and State infrastructure policy in late 1991 (Department of Planning and Housing, 1991 (a) and (b)).

After 1992 the Liberal State Government continued this policy in broad planning strategy. Culminating in the release of Guidelines for Developer Contributions (Department of Planning and Development, 1995), these guidelines allow, with some limitations, the levying of developers for ‘development infrastructure’, e.g. roads and drainage as well as ‘community infrastructure’, e.g. child care centers, nursing homes and libraries following the preparation of comprehensive developer contribution plans. However, the guidelines severely limited the size of contributions, especially for community infrastructure, thereby reducing their effectiveness as a source of funding. While not aimed specifically at funding the cost of community housing, the guidelines provide a framework for municipalities to investigate developer contributions to part fund the provision of affordable, community housing and test municipal powers through implementing the contributions. Whether this is enforceable in the face of developer appeals or State ministerial intervention is not clear.

The Emergence of Economic Rationalism as the Dominant Political Philosophy

The final reason to consider developer contribution was the emergence in the 1980s and first half of the 1990s of ‘economic rationalism’. This ideology has pervaded the Commonwealth
Government and many State Governments, along with Local Government in Victoria after amalgamation and reform imposed by the State Government.

Economic rationalism and its equivalents of Reaganism and Thatcherism in the USA and UK respectively represent a late twentieth switch from a philosophy and policy of one of social democracy characterised by the 'welfare state' and Keynesian economics (Lavalette and Pratt, 1997: chapter 3). Economic rationalism is based on a firm belief in private property, small governments and the 'markets', with the role of government seen as one of facilitating rather than overriding or controlling markets (Horne, 1992: 7-9; Carrol and Manne, 1992). The public policy manifestations of economic rationalism are restrictions on public sector borrowing rights because its supporters see public borrowing as bad. They cut government spending because it is seen as crowding out private spending. They reduce in welfare payents to increase individual incentive. They support greater use of user charges to make subsidies transparent increase efficient decision making. Lastly, they support privatisation to bring more efficient management.

This is not the place to go into the history of economic rationalism but it is important to bring attention to it for three reasons: firstly, it has helped precipitate the housing stress and public financial constraint that has put developer contributions on the agenda; secondly, it has provided a rationale for such contributions because they exemplify the economic rationalist notion of user pays and thirdly, it has encouraged new ways of leveraging private funds into local government housing.

Economic rationalism has meant substantial cuts for public housing. By 1996/97 new capital expenditure for public housing in some parts of Victoria had ceased and in others became ad hoc rather than being based on any needs based resource allocation model. The financial restrictions created by economic rationalism have reactivated the sale of the public housing, largely in inner urban areas, with proceeds spent on new public housing in outer urban growth areas where money can buy more housing on cheaper land (Hayward, 1996). This process over time only reinforces the housing stress in inner city areas such as Port Phillip. In the eighties and early nineties new housing provision (and any sales) was based on a warranted needs formula (Maher and Burke 1993: 128) but the policy application of economic rationalism philosophies has seen a move toward provision based on commercial rather than needs criteria.
With public housing expenditure becoming increasingly tight as explained, the need for alternative funding mechanisms for general, community housing (i.e. targeted at households of low income only) is becoming increasingly necessary if these groups are to receive housing assistance. Developer contributions provide one source of funding for this purpose, as they are immune from government budget constraints.

The Absence of Social Impact Provisions in Land Use Planning

Planning legislation, with the exception of New South Wales, is generally not able to mitigate the social impacts of development through the planning permit process (Spivak, 1988: 7). This is because most states’ planning legislation preclude social impact as relevant criteria. With planning authorities being unable to control social impacts through planning instruments, this gives weight to the alternative of utilising developer contributions to provide an alternative instrument to either, discourage residential development which has a significant social impact, or, mitigate the impact of the residential development process.

This section examines the reasons for the general absence of controls in Australia, using Melbourne as an example, and then examines the limitations of the current social and economic legislative provisions in Victoria and New South Wales, including the varying ability to levy effective contributions from developers. This second issue is important because the existence of legislative provisions in the USA and particularly California is the single most important factor in successfully levying developer contributions.

The Genesis of a Physical Planning Focus in Melbourne.

The absence of social provisions in planning legislation in Melbourne had its origins in 1949 when engineers developed Melbourne’s first land use planning instrument. This instrument exerted a dominant culture which, according to McLoughlin (1992:25), imposed a technological approach to how land use planning was conceptualized, legislated and practiced. Any concern for social issues was confined to the social impact of inner suburban, Victorian era housing in poor condition where appropriate solutions were considered to be ‘reclaiming’ ‘slums’ by development of high rise urban renewal projects (Burke, 1989). This concern was reflected in contemporary literature (for example Melbourne and Metropolitan Board of
Works 1954: PP 54-55, 60-63), and was implemented by the redevelopment of inner urban slums by the Housing Commission of Victoria in the 1960’s and early 1970’s.

In the 1950’s and 60’s, there were massive levels of immigration predominately from Southern and Central Europe, with migrants mostly settling in Melbourne and Sydney. In addition, a large commodity manufacturing industry developed and real incomes rose. Urban sprawl resulted (McLoughlin 1992:25).

The economic boom of these two decades meant there was little political or academic interest in housing issues (Hayward, 1992:169). Town planning, as a young discipline, focused on the aesthetic qualities of the built form. Research studies ignored the social forces, which contributed to the type of built form, and concentrated instead on human occupation and land use derived from a more geographic perspective. The only social considerations were studies of the ‘relative’ power of different groups in society in shaping the environment, and ignored the influence of public policy on land use planning (McLouglin, 1992, pp10, 11).

The early 1970’s heralded a shift in attitude as the long boom ended. According to Hayward (1992: 169-70), rapid house and residential land price inflation, ended the stability and complacency in both housing provisions and housing policy respectively. McLoughlin (1992: 11) described this period as the one of a ‘coming out’ of intellectual interest stemming from fresh readings of Marx and Weber (referred to as ‘new urban studies’). Other features of this era included the increase in public housing waiting list and the gentrification of Inner Melbourne, ‘resulting in regressive social and spatial distributions in Melbourne’ (McLoughlin, 1992:51).

Both the emergence of intellectual interest in the problems of Australian cities in the seventies and eighties and the emergence of gentrification with the creation of apparent inequalities and displacement generated considerable debate about its social effects, particularly on affordable housing. In the wake of this response there emerged a growing body of literature documenting the process with pressures for appropriate policy responses (Badcock et al, 1981: 41-55; Logan, 1982: pp. 65-95; City of St Kilda, 1979). Similar processes occurred in the USA, including California, over the same time period but with different responses. As outlined in Chapter Two, many states in the USA evolved interventionist programs for inclusionary zoning and developer contributions (the two often related) in recognition that social impacts of planned
developments (notably affordability problems) were a legitimate planning concern and some form of legislative response was necessary. By the end of the 1980s, by contrast, Australia did not respond similarly apart from select municipalities in Sydney (Simpson 1989:26-28; North Sydney City Council, 1992:42; Cox and Miers, 1995:16-18). The municipalities were able to respond by virtue of enabling mechanisms in the New South Wales Environmental Planning and Assessment Act 1979 (Taylor, 1989:304).

The Limitations of Social Impact Provisions in Planning Legislation: North Sydney City Council and the City of Port Phillip as Case Studies

Literature on social impact provisions in land use planning is related to literature on developer contributions for affordable housing because the provisions can be used to justify developer contributions and provide part of the legislative context. In effect, municipalities wishing to levy developers for community housing purposes did so by considering their powers under both social impact and developer contribution provisions of planning legislation. The literature concentrates on the situation in Victoria and New South Wales partly because they account for over half the urban population, have the highest development pressures and because the two capital cities have more of the housing affordability problems that social housing provision and developer contributions are able to address.

The only other application of developer contributions by State Government that is mentioned in the literature is limited to the funding of public open space in Queensland and South Australia and sewage, water and roads in Queensland (Simpson 1987:27).

Due to the time of publication, Simpson did not include the case of City West Housing Pty. Ltd. This company was established in 1994 by a $50 million Commonwealth grant under the Building Better Cities Program to be an affordable housing developer and manager. Its charter is to provide for low to moderate income households in the Ultimo/Pyrmont area of inner west Sydney. It can receive extensive developer contributions levied by the City of Sydney from redevelopment in the area which are levied under the powers of the Sydney Regional Environmental Plan No. 26 (Amendment Four) which was gazetted in March, 1995. These plans are allowable under The Environmental Planning and Assessment Act 1979. City West Housing targets a level of 8-10 % social and affordable housing in the area. It sets an on-site contribution rate at 1.1 % of the total floor area or an off-site (in lieu) contribution of $23.34
per square metre or $16.24 per square for commercial or residential development respectively, which are indexed from 1994 rates (Department of Urban Affairs and Planning, 1996:8). There are no available documents on the achievements of the company. However, it has been determined from a telephone interview in 1999 with a company officer that these rates have allowed the company to receive developer contributions totaling $7.2 million by March, 1999. It has also been empowered under the Plan to receive a 4% levy on government land sales which has raised an additional $5.4 million since 1994. Invested funds have also earned the company a further $1.2 million in interest. These funds have provided 245 units of affordable housing and there are another 137 units committed or being investigated.

However, the precedent of City West is not directly relevant to Local Government. This is because City West Housing was established as a one-off arrangement under the Act without having any general application to municipalities. It also received a large, initial grant not otherwise available to Local Government. Further, while not documented, an office of the NSW Department of Urban Affairs and Planning stated in a telephone interview that these powers do not derive from section 94 of the Act. This is because the nexus between the development and the needs generated from it required to justify the contributions under section 94 is absent. It is this nexus which Simpson (1989: 119) indicated was an essential basis for municipal levying powers. Of interest, however, is the similarity between provisions enabling the City of Sydney to levy developers in the Ultimo-Pyremont area and State powers used in California, which are discussed in Chapters Two, Three and Four.

Aside from City West, concentrations of literature on developer contributions for social housing provision relate to the municipalities of North Sydney and former St. Kilda. These municipalities’ policies address social housing need partly through planning mechanisms including developer contributions. For this reason, these two municipalities have been used as case studies which illustrate municipal experience of developer contributions set within their States’ legislative frameworks.

**New South Wales and the North Sydney City Council**

In New South Wales, developer contributions have been utilised since the 1920s. Initially confined to donation of land for parks and road construction, developer contributions were later expanded to include monetary payment for drainage work and sewage and water reticulation.
Following the gazettal of the Environmental Planning and Assessment Act 1979, contributions have also been sought for public amenities or services (Simpson 1989:1) with a increasing emphasis on targeting the private sector (Simpson, 1989:22).

Simpson (1989:1) noted that in New South Wales a shift of urban infrastructure funding from the public to the private sector occurred between the 1920s and late 1970s in the context of:

the high cost of capital, restriction on traditional loan and revenue raising methods, additional cost of servicing public needs and increased expectation regarding number and standard of amenities and services and a general trend towards the user pays principle.

The three enabling mechanisms for the expansion of the use of developer contributions to public amenities and services were Sections 90 (1)(d), 93 and 94 of the Environmental Planning and Assessment Act 1979 and with the subsequent state guidelines known as State Environment Planning Policy Number 10 (SEPP 10) which was gazetted in July, 1984 (Taylor, 1989: 304).

The first enabling mechanism, Section 90(1)(d) of the Act, requires a consenting authority, to consider 'the social effect and the economic effect of that development in the locality' when determining a development application. This section was used by some New South Wales municipalities to try to control strata subdivisions of blocks of flats and rooming houses (Taylor, 1989:302). From case precedent of appeals to the Land and Environment Court, it became evident that clear and forceful legislative provisions were required to determine the scope of section 90 (1)(d) following both the success and failure of municipalities to use this section of the Act as section 90 (1) (d) could not be relied on alone without clear and forceful legislation (Taylor, 1989:303).

This failure led to the preparation, under Section 93 of the Act, of SEPP10 as gazetted policy to guide the use of Section 90 (1)(d). This comprised the second enabling mechanism. Significantly, this was the specific allowance in the policy to reject a proposed development if it had a significant impact on the supply of private rental stock. It specifically applies to 14 Inner Sydney municipalities, along with the separate cities of Newcastle and Wollongong where the major concentrations of private rental housing exist for low to moderate income
households. Originally called 'Strata Subdivisions of Buildings Used for Residential Purposes' in 1984, this policy basically applied only to the Strata subdivisions of flats and rooming houses.

SEPP 10 basically made it mandatory for these 16 municipalities to reject planning permits for additions, alterations, demolition or change of use to flats unless the applicant supplied written information to municipalities that there was sufficient, alternative, comparable accommodation to meet the demand of low to moderate income households. This policy originally applied to residential buildings containing two or more dwellings which were proposed to be subdivided, even where the building was vacant, as long as it was suitable for residential use.

SEPP 10 was subsequently amended five times with the first, third, and fourth amendments significant. Detailed in Appendix One, in summary, the amendments initially broadened the types of development targeted from subdivisions to include all rooming houses. Potential application was then restricted by requiring an impact assessment when a development approval is refused. This takes into account the viability of the premises to be considered. Impacts criteria is restricted to the availability of sufficient, alternative accommodation and allow vacant buildings deemed to provide no affordable housing to be considered for their social impacts. The North Sydney Council tested its powers under SEPP 10 by trying to retain 'The Ritz Hotel's' rooming house and other rooming houses, with the amendments initially, preventing and then enabling the redevelopment of this property and other rooming houses. (Rosenberg, 1990: 5; North Sydney City Council, 1990: 31, 34). This case was seen as one of the key precedents which ultimately tested the restricted Local Government powers under SEPP 10 (Taylor, 1989: 313).

The third enabling mechanism (after section 90 (l) (d) and SEPP 10), section 94 of the Act, specifically allowed municipalities to require developers to contribute land or cash to mitigate the increase in demand for public amenities or services.

Many Inner Sydney municipalities, mainly Randwick, Leichhardt, Sydney and especially Waverley and North Sydney, relied on section 94 instead of their powers under SEPP 10, especially after the fourth amendment to SEPP 10. For example, North Sydney, which had the highest proportion of private renters in New South Wales (48.3%), required a contribution of $500 per bedroom lost in 1985, increasing this to $1,575 in 1988 and $2,275 in 1996 (North
Sydney City Council, 1992:42). However, in the five years to January 1989 only $186,000 had been raised from this source for its Low Income Housing Fund. This could only fund the construction costs (land costs excluded) of two 2 bedroom town houses in a period when there was a loss of 320 low cost rental units (North Sydney City Council, 1992:42). Waverley City Council adopted higher levies of between $3995 and $6144 (1997) per bedroom lost (Cox and Miers 1995:16-18). This potentially enabled the Council to replace 1.7 or 2.4 bedrooms out of every 11 rooming house lost or 4.8 or 6.7 bedrooms out of every 21 bedrooms subdivided (Cox and Miers 1995:16-18).

In practice, most municipalities tended to use section 94 contributions minimally to discourage appeals to the Land and Environment Court by developers. These could have resulted in adverse determinations. Combined with low amounts levied, municipalities raised insignificant funds to replace the low income housing lost. For example, between early 1984 and late 1991, 817 low income rental housing units were subdivided, demolished or redeveloped in North Sydney and replaced by only 115 units provided by Council - a replacement rate of 14 percent. While it could be argued that the replacement rate funded from developer contributions seems reasonable, a majority of the 115 units was funded by sources other than developer contributions. These include other council funds or joint ventures within the State housing authority.

In 1989 the State Liberal Government undertook an inquiry into Section 94 contributions. The inquiry, by Judge William Simpson (Simpson, 1989), was widely feared by Local Government as a means for removing or weakening this provision and to appease owners and developers. However, the inquiry found that the use of developer contributions was justified and it supported their ongoing use on the basis that five principles were followed, these being:

1. need created by the development is identified;
2. the contribution is defined, quantified and costed and benefits the development concerned;
3. the contribution is a fair apportionment of the cost of meeting the need;
4. the municipality is publicly accountable in regards to how it determined the contribution and how it is spent; and
5. the system operates in an equitable manner. (Simpson, 1989: 3 - 4).
The essence of these principles were the concepts of need, nexus, reasonableness, accountability and equity. Noted by Simpson as used in the USA, similar principles also were required to be met under Victorian legislation (Department of Planning & Development Victoria, 1995:1-2). This had the effect of tightening the municipal approach towards justifying and using Section 94 contributions appropriately and forcing every New South Wales municipality to develop Section 94 plans to comply with these principles (Walkley, 1991:23). This was required because many municipalities failed to meet the five principles due to using arbitrary policies on which developments were targeted and using poor justification of the developer contributions they sought (Spiller Gibbins Swan, 1993:48).

Simpson also stated that developer contributions can be used to assist in the provision of low income housing as long as the nexus test is utilised. This he contrasted to ‘linkage fees’ (as opposed to developer contributions which are often called ‘impact exactions’) in the USA which require a percentage of all development costs be taxed or levied for the provision of low income housing by some municipalities. ‘Linkage fees’, he argued, required specific legislation to be justified in NSW (Simpson, 1989:120-121).

Despite the limitations of SEPP 10, and with encouragement from the Simpson Report, some Sydney municipalities such as North Sydney, South Sydney, Waverley and Leichardt have developed housing programs partly funded by a variety of sources including developer contributions. Comprehensive and well developed, these programs involve municipal roles in seeking and utilising developer contributions in established urban areas. These municipalities use developer contributions as a means to partly fund community housing and use provisions which seek to obtain the largest contributions possible. It remains, however, one of a number of funding sources, and as such requires careful adoption of the principles raised in the Simpson Report. Further issues raised are the inadequate replacement funds and the ongoing threat of developer appeals and consequent unsupportive appeal precedent.

Recent reforms to the Act and SEPP 10 in 1999/early 2000 have strengthened the social provisions by specifically including recognition of affordable housing as both an object of the Act and SEPP 10. The Act also now specifies that environmental planning instruments may deal with the provision and maintenance of affordable housing and defines affordable housing as being very low, low and moderate income households. Gazetted amendments to SEPP 10 on 28 January, 2000 include increasing the number of municipalities that the policy applies to 53
in the Greater Sydney-Wollongong-Newcastle Metropolitan Region and clarification on affected properties and assessment methodology. These reforms move the NSW planning instruments closer to those in California. This may reflect the more severe Sydney housing affordability levels in comparison to Melbourne and reflect a possible evolutionary process likely for future legislation in Victoria.

**Victoria and the Former City of St. Kilda**

In Victoria, the use of social considerations in the planning permit process has been far less extensive, reflecting a weaker legislative framework than that operating in New South Wales.

While the use of developer contributions for open space and drainage, sewage and roads have been a feature of the development process in Victoria since the 1960s (Spiller Gibbins Swan (b) 1993:7), this was only extended to public services and facilities in urban fringe estate development around Melbourne from 1989 when the former Shire of Cranbourne implemented a Developer Contributions Policy. This policy was not unlike Section 94 in New South Wales, which used principles to justify contributions. This was followed by similar policies in municipalities such as the former Shires of Pakenham, Melton, Keilor, Kilmore and Whittlesea.

However, social impact considerations in the land use planning process were initially enabled by the revision to the Planning and Environment Act 1987. Although the planning act review process had its origins in the late 1970's and early 1980's, it was in the later period of this process that the inclusion of social and economic provisions occurred. Justification for these inclusions appears to have been the influence of a number of factors, namely the role model of existing social considerations in New South Wales planning legislation's, supportive 1982 election policies of the Australian Labor Party (Victorian Branch); and the need to respond to deficiencies in the Administrative Appeals Tribunal's ability to deal with cases involving social considerations and criticism by planners (Spivak, 1988: 3,4).

These provisions in the Act comprised three generally worded and brief sections, section 4 (2)(c) and (d) which includes social policies and effects in planning objectives; section 12 (2)(c) which enables planning authorities to consider social effects; and section 60 (b)(i) and (ii) which states that the Responsible Authority:
(b) If the circumstances appear to so require, may consider:

(i) any significant social and economic effects of the use of development for which the application is made;

(ii) any strategic plan, policy statement; code guidelines or amendment to the planning scheme which has been adopted by a planning authority and is in force but which does not yet form part of the planning scheme.

Section 62 (2) of the Act also enabled Councils to impose development contributions or levies for local infrastructure as conditions on permits for specified works, services or facilities. In 1987 this section did not detail how this was to occur, nor provide until 1991 and 1995 supplementary guidelines for municipal planning authorities. Thus for any municipalities wishing to use developer contributions for low income housing, the social impact provisions were seen as providing the rationale for their use.

It appears that the inclusion of the social impact provisions was a reluctant initiative as the provisions were not followed by any policy or guidelines to determine their scope and application until October 1991, after considerable pressure from planners and municipalities. Further, it appears that the provisions were not to be used in the manner of SEPP 10 in New South Wales as the guidelines did not refer to housing impacts, although they did not exclude housing impacts. This lack of clarity made any interpretation of the provisions, applying to developer contributions for housing impacts, very risky. Further, verbal and confidential advice from a Department staff member provided to the author in 1988 indicated that the guidelines were designed to thwart the City of St. Kilda’s interpretation of social impact provisions under the Act through attempts to control development. Specifically these controls referred to the subdivision of blocks of rental flats deemed to be a significant social impact. The City sought this control under its planning policy, *Social and Economic Assessment for a Change of Use of Residential Properties/Buildings, July 1988.* Consequently, any municipalities wishing to prevent the loss of existing rental housing or mitigate the loss of affordable, private housing through developer contributions would have been forced to determine the scope of their powers through the Administrative Appeal Tribunal appeal precedent (Spivak, 1988:7). In reality, however, only the City of St. Kilda sought to test this interpretation of the provisions.

In 1991 the Department of Planning and Development produced an interim document entitled *Guidelines for Development Contributions.* These guidelines were reviewed in 1993 (Department of Planning and Development, 1993) which led to the enactment of the Planning
and Environment (Developer Contributions) Act 1995. This Act repealed Section 62 (2) (h) of the Planning and Environment Act 1987, and instead provided discrete legislation on developer contributions.

In 1995 these guidelines for the use of developer contributions were finalised as *Guidelines for Developer Contributions, 1995* (Department of Planning & Development, 1995). This resulted in further restrictions for municipalities in Victoria wishing to test their powers to levy developers for affordable housing. While the guidelines relate to Section 62 (2) (h) of the Planning & Environment Act, 1987 which enables contributions through permit conditions, the guidelines provide eight potential constraints. Firstly, affordable housing is not included in the examples of community infrastructure as being suitable for funding from contributions (Department of Planning and Development, 1995:9). However, the list of infrastructure is not exclusive and the inclusion of affordable housing would need to be tested. The likelihood of success is small given the State’s view that the direct provision of community housing or the facilitation of affordable housing through the planning permit process is not a core local government role. This view was expressed verbally to the City of Port Phillip between 1994 and 1997, during and after the time of Local Government amalgamation by the State Minister for Planning and Local Government and State appointed Commissioners of Port Phillip (temporary administrators appointed to restructure the municipality after its creation). In this environment, Ministerial intervention in response to developer criticism was likely.

Secondly, the guidelines impose a ceiling limit for community infrastructure (but not in the case of development infrastructure) of $450.00 per dwelling being developed or 0.25% of the construction costs of non-residential development. As in the case of New South Wales, this achieves an insufficient contribution to seriously mitigate even part of the social impact caused by developments. For example, a 50 unit residential development providing the top amount would contribute only $22,500.00; and a $10 million commercial development would contribute only $25,000.00. In both cases these amounts would fund just under half the cost of providing one rooming house room (land and construction/rehabilitation costs) in an inner urban area of Melbourne.

Thirdly, one of the definitions of nexus used by the guidelines is ‘causal’, ie. needed as a result of the development, while ‘backlogs’ in infrastructure are to be excluded from contributions (Department of Planning and Development, 1995:11). While this requirement would apply to
any use for contributions, in the case of housing uses this causal link is difficult to prove, i.e. it is unclear whether the development has to directly result in a loss of affordable housing, e.g. the demolition or conversion of a rooming house, or only need to create higher gentrification through increased property values, rent levels or closures of affordable housing. The latter link would be more difficult to prove as would the apportionment to the development in question of the need created. Further, developers could appeal against any required contribution on the basis that low income tenants housed from a waiting list would not have need directly caused by the development. They could argue that need was caused by a backlog of social housing infrastructure. A sophisticated nexus argument would need to be developed to address this potential constraint and there are numerous examples to draw from in the USA and to a limited extent from the more active municipalities in Sydney.

Fourthly, the nexus needs to be geographically related to the development so that there is benefit provided to the development (Department of Planning and Development, 1995:11). This constrains the ability of contributions funding community housing projects across the municipality as opportunities to provide housing close to the development would be difficult to achieve. This is especially true as gentrifying developments themselves preclude the viability of affordable housing through increasing land values. In this case, the opposing precedent caused by the appeal case, *Eddie Barron Constructions Vs Shire of Pakenham* (1990:30), could be drawn to argue effectively in planning appeals. This seminal case determined that contributions for road infrastructure and community facilities could be spent across the municipality, not in the area immediately around the development site (this is discussed in Appendix One in the context of the experience of the City of St. Kilda).

Fifthly, infrastructure costs must be apportioned to include other sources where the infrastructure confers a wider benefit to the general community (Department of Planning and Development, 1995:11). Community housing could be defined as having a wider benefit without any other source of contributions. Any apportionment would further weaken the effectiveness of the meager developer contribution.

Sixthly, the guidelines require that the infrastructure provided by contributions must be reasonably accessible to ‘any’ group within the community. If the community is defined broadly as any household type of varying incomes, it is reasonably accessible and meets the
sixth prerequisite. However, if the contributed, alternative community housing is targeted at only low income renters eligible for the housing type provided, it would fail the test.

The seventh constraint is that contributions should minimise adverse impact on the affordability of housing in the levied development, e.g. not adversely increase development costs and, consequently, sale prices. However, as ‘adverse impact’ is not defined, this could provide fertile grounds for appeal, although the ceiling imposed for contributions for community infrastructure may minimise adverse impact.

Lastly, the operation of developer contributions can be reviewed at any time by the State planning authority. This could result in aggrieved developers seeking ministerial intervention against the use of contributions for low income housing, whether the basis for the contribution can be justified or not.

Conversely, the guidelines provide two opportunities. Firstly, they limit the scope for unacceptable duplication of various types of contributions to open space contributions under the Subdivisions Act 1988, State funding for road construction or maintenance and municipal special rates. Thus, these specific contributions cannot be duplicated by their additional use under the guidelines. This is less restrictive than the argument put forward by Spiller Gibbins Swan, consultants to the City of St. Kilda, who suggested that Local Government should not levy developers for community housing because it constitutes a funding duplication. By this they mean it could be argued the availability of governmental funding could potentially be available for funding community housing (refer to Appendix One).

Secondly, the guidelines offer flexibility in the type of contribution allowed. The types used by US municipalities—land, cash or infrastructure within a development are all possible under the guidelines, and cash contributions can be made as a lump sum, in installments or as negotiated.

Prior to the former City of St. Kilda’s testing of its powers to levy developers for the funding of community housing (see Appendix One), the most recent testing of similar municipal powers to levy developers for community housing was initiated by the City of Melbourne whist preparing the policy document, A Livable City- A Social Housing Strategy for the City of Melbourne (City of Melbourne, 1997). The City of Melbourne in April, 1997 wrote to the State Department of Infrastructure requesting legal advice on the City’s powers to levy developers for the
provision of low income or low 'cost' (community) housing under a Development Contribution Plan. In turn, the Department sought the advice of the Victorian Government Solicitor (VGS) which was provided in June, 1997 (Planning and Environment Act 1987-sections 46H-46Q; City of Melbourne's proposal for Development Contribution Plan to Provide for Low Cost Housing). The advice quashed any plans for the intended use of developer contributions by arguing against it via an argument which, in essence, sought in three ways to distinguish 'low cost' housing from other services and infrastructure able to be funded by developer levies.

The VGS' argument, firstly, differentiated 'low cost' housing from community facilities which were eligible for funding under a Developer Contributions Plan under the category, 'community infrastructure levy'. This was due to the opinion that the need for low cost housing arises as soon as affordable housing is demolished during the development process; whereas the need for community facilities such as libraries, health centres, pre-school and day care centers, community halls and recreational and sporting facilities arises once the development is completed and its occupants seek use of these facilities. Secondly, the VGS argued that low cost housing was traditionally provided from taxes and rates, rather than by imposing levies on particular properties. This provision made it similar to 'social service' rather than providing the infrastructure required for a community to function properly. Lastly, low cost housing was not seen as part of the physical infrastructure, such as roads and open space which is required as a development proceeds.

These arguments are poorly developed. The basis for distinguishing the timing of the need for housing as against community facilities or physical infrastructure is unsubstantiated. While housing need may arise very early in the development process, this is simply an issue of timing of when a contribution should be provided, not a reason for arguing that housing need uniquely is ineligible for funding under Developer Contributions Plans. If it can be justified under the principles of need, nexus, reasonableness, accountability and equity, low cost housing should be eligible. Secondly, distinguishing low cost housing from infrastructure on the basis that it was traditionally funded differently ignored the changing roles of the Commonwealth, State and Local Government as well as the role of the emerging community housing sector in providing affordable rental housing. This change is gradually, although not evenly, resulting in a shift towards the provision of social services by lower levels of government and towards the community housing sector for responsibility for direct provision of social and, in particular, community housing. This shift, including Commonwealth-State Housing Agreement reforms,
necessitates the use of new mechanisms for funding community housing; whilst tax reform is progressively seen by all levels of government as a necessity which could involve reallocated taxation responsibilities. Thus, a reference by the VGS to the historic funding sources for social housing seems an artificial method of discounting funding for community housing from developer contributions. For example, as less Commonwealth and State income is allocated to the new provision of social housing in the late 1990s under the Commonwealth-State Housing Agreement, it is illogical to argue that ‘historic’ funding sources should be used against developer contributions.

Shortcomings aside, this legal advice prevented the City of Melbourne from including developer contributions as a funding source for its Housing Trust, a reserve fund for the provision of community housing, as it was clear that the State would not support its inclusion in a Development Contributions Plan.

Appendix One offers a detailed review and analysis of the significance of the former City of St. Kilda’s mixed experience during the late 1980s and early 1990s in using developer levies for community housing. This case study illustrates the limitations encountered by a municipality with strong objectives when confronted with inadequate State legislative framework and underdeveloped planning appeal precedent.

In conclusion, the experience of St Kilda (as illustrated in Appendix One) and Victorian appeal precedent suggest that developer contributions for low income housing in Victoria can only be achieved in two ways. Firstly, developers can not be required, through planning permit conditions, to contribute towards the cost of housing provision, although the extent of this impediment needs to be carefully re-tested under the 1995 State guidelines, using lessons from the former City of St. Kilda. Only a voluntary agreement with a sympathetic developer is unambiguously possible under Section 173 of the Planning and Environment Act 1987 except where valid and enforceable development standards could be waived or varied in order to enable a development to proceed. Secondly, planning appeal precedent such as the Eddie Barron case will slowly move in the direction of US and New South Wales controls by enabling Local Government to develop a case to use developer contributions through appeal precedent, even though the legislative framework is not overtly supportive.
While the use of developer contributions in Victoria currently applies to broad hectare development, since the mid 1990s it is gradually being used to fund physical infrastructure by inner urban municipalities in Melbourne, such as the Cities of Melbourne and Port Phillip. It is also beginning to be used for ‘community infrastructure’ such as by the City of Maribyrnong.

In the future, planning appeal precedent may also provide a rationale for levying which cause loss of low income housing developments in established or inner urban areas, including infill development where a nexus between loss of affordable rental housing and the provision of community housing can be more easily substantiated. This scenario will require a different, more complex methodology for determining a nexus. However, supportive precedent will always ultimately need to be reinforced by legislation to minimise the likelihood of successful developer appeals. Despite supportive legislation and State guidelines in New South Wales, municipal powers have not been fully test. This indicated that the scope of SEPP 10 in New South Wales or any similar guidelines in other States needs to be broadened and linked more overtly with developer contributions provisions in legislation, such as section 94 contributions in NSW, in a manner which enables municipalities to effectively levy developers for community housing. This is yet to be considered an important issue with Victorian policy makers. This is illustrated by the review of Developer Contribution Plans by the Department of Infrastructure which commenced in 1999 which is not extended to include the associated Act or Guidelines and has not included community housing within its scope.

The Role of Local Government in Housing

The Potential of and Constraints on Local Government in Addressing Low Income Housing Need

Local Government in Australia has the potential to become a significant provider of community housing and to augment the role of State housing authorities in addressing housing need for low income persons. Notwithstanding any constraints in being able to use developer contributions for community housing, especially in Victoria, is the poor track record of Local Government in meeting this potential which suggests that Local Government in general should, at a minimum, aim to facilitate the provision of community housing capital funding for expenditure by other community housing providers through levying development contributions.
This argument is based on its potential to combine various strengths and roles, namely: in undertaking strategic planning which can include social planning and provide a policy context in which housing provision can take place; the dual co-ordination of physical and social infrastructure at the local level which can facilitate community housing provision; undertaking statutory planning through being the local planning authority to encourage or support community housing use; its local knowledge of housing need, the property market and local resources to achieve community housing and take advantage of local opportunities; and in addition being an actual or potential affordable housing facilitator and/or provider (Ministry of Housing Victoria, 1983:21; Jose, 1991:13-18; Department of Immigration, Local Government and Ethnic Affairs: 6; McNellis, 1993: 11; Briggs Brindle Chambers, 1995:41,45,46; Burke, 1999(a) :9; Burke, 1999(b):20; Spivak, 1999:15).

Yet Local Government also faces many constraints which limit its ability to address low income housing need generally and in being an effective provider of community housing specifically (Ministry of Housing Victoria, 1983; Jose, 1991:19; Department of Immigration, Local Government and Ethnic Affairs, :7; Briggs Brindle Chambers, 1994: (iii), 54,55,59-63; Burke, 1999 (b): 20; Spivak, 1999:15; Howe, 1999:5). Firstly, the electoral system of Local Government with diverse policy platforms of individual electoral candidates and elected councillors often leads to political instability due to the potential for policy fragmentation, as against the dominance of party-based policy platforms. Such instability creates a climate of uncertainty around long-term planning or policy implementation. However, there is an increasing incidence of 'machine party politics' into Local Government which, over time, will provide more certainty into Local Government political process.

Secondly, the lack of Commonwealth or State constitutional recognition of Local Government as a genuine sphere of government limits its powers and creates a reliance on enabling State legislation to implement some housing initiatives. This limitation is exemplified in the case of Victoria where section 193 of the Local Government Act 1989 restricts profit sharing, entrepreneurial relationships, co-operation or joint ventures with any party or corporation which can directly or indirectly benefit municipalities without Ministerial approval (Mallesons Stephen Jacques, 1989:2). This impedes the ability of municipalities to jointly provide community housing with community housing agencies, developers or other corporations as a means of resource sharing. This can potentially extend to joint ventures with State housing authorities as the Act only makes provision for joint ventures with other municipalities under
section 208B (3) (City of Port Phillip, 1996: 8). This interpretation has never been tested or pursued due to its ramifications for State encouragement of joint ventures with Local Government.

Thirdly, Local Government because of its tenuous governmental status, is held by the imposition of State policies and programs. These may restrict Local Government potential to address housing needs, such as through restrictive project funding or restrictive targeting of the beneficiaries of community housing.

Fourthly, Local Government lacks a defined role in housing provision due to the relatively recent (since the early to mid 1980s) consideration of housing provision roles, the relatively recent (since 1984/85) funding targeted at Local Government for community housing under the Local Government and Community Housing Program and the recent conceptualisation of the term, 'community housing' in the 1980s. This includes its promotion as an alternative or complimentary housing sub-sector within the social (public and community) housing sector in the early 1990s (McNellis, 1992:4).

Fifthly, as there is an ongoing role for State housing authorities to provide public housing, this weakens the argument that Local Government should have a direct provider role and leads to divisions in the public housing sector between proponents of public and community housing (McNellis, 1992:4,5).

Sixthly, because Local Government is influenced by local vested interests in their constituent communities such as rate paying businesses, real estate agents and service organisations, decisions are often based on parochial needs rather than those which address broader social needs. In this context broader issues can threaten these vested interests.

Seventhly, the restricted financial base and income generating potential of Local Government often means that income is directed into other more traditional roles such as cleansing, physical and community infrastructure maintenance and provision which compete with non-core roles, even in States such as Victoria and Tasmania where larger municipalities have been created through amalgamation of smaller ones.
Eighthly, the increasing resource constraints faced by Local Government which are required to accommodate new roles and responsibilities from other spheres of Government and growing expectations of local communities; or a managerial focus on efficiency can eliminate all but 'core business', particularly in the context of budget constraints (Burke, 1999 (b): 20).

Ninthly, the organisational structure of many municipalities limits the co-ordination and effectiveness of housing roles by dividing responsibilities across the organisations without enabling or even preventing individual staff to co-ordinate or lead the development of enabling policy or its implementation.

Tenthly, the structure and role of Local Government often lead to a lack of experience and confidence in undertaking roles leading to community housing provision such as housing needs analysis, housing policy development, project management and property and tenancy management.

Lastly, because housing poverty, the absence of overt homelessness and the benefits of the ongoing role of State Housing Authorities is often invisible, there is low interest and imperative to address housing affordability by directing provision.

**The Poor Track Record of Local Government**

These constraints have resulted in an insignificant level of direct housing provision by Local Government in Australia (Briggs Brindle Chambers, 1994:48). For example Table One shows that only $35 million was contributed to community housing provision in 208 projects by Australian Local Government under the Local Government and Community Housing Program between 1984/85 and 1991/92. This represents $4.4 million per year across Australia, an amount which would not have produced many housing units. Significantly, 50.9 % of expenditure and 38 % of projects were provided by Victorian municipalities. However, since the amalgamation of Victoria's former 210 municipalities into 78 larger ones by the State Government after 1994, there has been a decrease in municipal involvement in housing provision due to State Government discouragement of this role (Howe, 1999:5).
Table 1  Comparison of Australian State Output of Low Income Rental Housing Units under LGCHP

<table>
<thead>
<tr>
<th>State</th>
<th>Expenditure in $,000s</th>
<th>%</th>
<th>Number of projects</th>
<th>%</th>
</tr>
</thead>
<tbody>
<tr>
<td>Victoria</td>
<td>18,249</td>
<td>50.9</td>
<td>79</td>
<td>38.0</td>
</tr>
<tr>
<td>South Australia</td>
<td>4,770</td>
<td>13.3</td>
<td>42</td>
<td>20.2</td>
</tr>
<tr>
<td>Western Australia</td>
<td>4,465</td>
<td>12.4</td>
<td>30</td>
<td>14.4</td>
</tr>
<tr>
<td>New South Wales</td>
<td>4,306</td>
<td>12.0</td>
<td>19</td>
<td>9.1</td>
</tr>
<tr>
<td>Queensland</td>
<td>3,278</td>
<td>9.1</td>
<td>28</td>
<td>13.5</td>
</tr>
<tr>
<td>Tasmania</td>
<td>799</td>
<td>2.2</td>
<td>10</td>
<td>4.8</td>
</tr>
<tr>
<td>A.C.T.</td>
<td>---</td>
<td>---</td>
<td>---</td>
<td>---</td>
</tr>
<tr>
<td>Total</td>
<td>35,867</td>
<td>100</td>
<td>208</td>
<td>100</td>
</tr>
</tbody>
</table>

N.B.: Excludes joint ventures between Local Government and State Housing Authorities

Further, of these Victorian provider municipalities, 70% were rurally located, most undertook sole projects and contributed only between $94,000 and $168,000 per municipality (aggregated from data in Municipal Association of Victoria, undated).

These results are significant because urban municipalities relate to the greatest proportion of housing needs and tend to be more unstable in continuing housing provision roles (see examples in Appendix IX) in contrast with rural municipalities (Municipal Association of Victoria, undated; Lawson, 1995:14). This is possibly due to the encouragement of broader municipal roles including housing provision due to the isolation of many rural areas from State resources and services (Briggs Brindle Chambers, 1995: 49) as well as the general community interest and imperative in rural areas of the effect of suitable housing on achieving population stability, compared to urban areas. This general community interest generates broader support and resource contributions to projects from across these rural communities, for example from local business, service organisations, hospitals and individual residents (as illustrated in Appendix VI).

The Relevance of Developer Contributions to Municipal Housing Roles
These strengths and opportunities of Local Government in undertaking housing roles could either be used by proponents or opponents of Local Government developer contributions for community housing. Proponents could argue that Local Government's dual role as a planning authority and potential community housing provider places Local Government in an ideal position to produce and enforce Developer Contribution Plans which justify the nexus between the required contribution and its use for community housing, i.e. it expends the contributions itself under the terms of the Plan. This would be relevant for municipalities which are ongoing direct providers. Further, proponents could argue that Local Government's perceived poor track record in community housing provision (Burke, 1999 (b): 20; Spivak, 1999: 15), could justify the use of contributions as a mechanism for generating funds to be channeled by Local Government to other providers of community housing for expenditure. Conversely, opponents could argue that Local Government's poor track record in the provision of community housing indicates that it should not seek developer contributions. They could argue Local Government has no direct means to expend them and due to this poor track record, it should not seek indirect funding mechanisms. Instead it should leave the role of social housing provision to the State Government.

While there will always be debate on whether Local Government should levy developers for the provision of community housing, the purpose of this section of the thesis is to demonstrate that Local Government is unlikely to be a significant direct provider and, consequently, should explore the potential of using developer contributions as a mechanism which allows flexible housing roles. These roles could include partly or fully funding community housing provision from developer contributions whether it be directly provided by Local Government or others. In the latter option, Local Government becomes a facilitator of affordable housing which could be provided by community housing organisations, as would be more relevant in Australia due to the poor track record of Local Government as a community housing provider. Alternatively, Local Government can require developers to provide affordable private housing. These options tend to be the practice of Californian municipalities and are discussed in Chapters Four and Five and indicate the relevance of the Californian experience.
The Relevance of the US Experience

The Value of Local Responses as Examples

Evaluating policies and programs in a non-Australian context such as the USA for the purpose of possible application in Australia can be useful for policy development. Arguably other countries have a different cultural, political, social and economic system that can sometimes promote the generation of more innovative ideas and their application that would not be suitable in Australia. Alternatively, considering other experiences may reduce the time Australia must take to develop similar ideas which may have developed more slowly.

While looking abroad for ideas can also be criticised for contributing to a ‘cultural cringe’, by which is meant an unwillingness to value local ideas in preference to those from overseas, if the comparison and evaluation is thorough and includes the contexts of the compared countries, valuable lessons that can be learned.

The Similarity of US and Australian Housing Systems and Markets

Chapter Six compares how housing is produced in the USA and Australia and points to major, broad differences. There are, however, many more similarities between Australia and the USA than there are differences (Purdon & Burke, 1991, Burke, 1991). Purdon and Burke (1991: 54) described how both have high levels of urbanisation and home ownership rates, low density urban forms, similar land use planning systems, basic ethics of privatisation in urban development and similar economic, problems and policy responses, ie. economic rationalism. This policy response originated from the election of the Reagan Republican administration in 1980 in the USA and in about 1982 under a Labor Federal Government in Australia. The parallel is striking, although the USA has implemented this policy response to a greater extreme.

Further, both the USA and Australia share similar demographic trends towards smaller and
more diverse household types, with the traditional, nuclear family being replaced by single person, single parents and childless couples (Burke, 1991: 4).

In contrast, major differences exist. US Local Government is responsible for the development of policy and the delivery of services for many functions which, in Australia, the individual States or state based, semi-independent authorities are responsible. This is true in the case of law enforcement, education, sewage, civil aviation and fire services. These US municipal roles are funded by local government property taxes constituting between 15 and 30 per cent of the total cost of housing (Purdon and Burke, 1991: 54). Consequently, in contrast to Australia, US municipal budgets are very large and can resource the development of policy and programs through higher levels of staffing and use of consultants. Further, municipalities in the USA have few restrictions in raising revenue. They can float bonds for instance because of their relative independence from Federal control and direction (Purdon and Burke, 1991: 54).

In the USA, the wholesale cuts to or elimination of Federal public housing and other housing programs as described in Chapter Two have not been paralleled in Australia. Although there are increasing financial constraints imposed on the provision of public housing in Australia, the funding of public housing has continued. Only Victoria appears to be departing from the role of public housing provision, although it is unclear how far this withdrawal may extend.

In the USA, Federal funds have been increasingly targeted at local government and community based, non-profit housing corporations as the Federal public housing role has declined. These funds have been utilised unevenly across the USA by local government which, in general, is much more sensitive and responsive to citizen demand regarding issues of growing urban problems such as declining affordability, increasing homelessness, inadequate infrastructure, and, on the West Coast, the environmental effects of urban sprawl and concerns about immigration (Purdon and Burke, 1991: 55). In contrast, in Australia the Community Housing Program alone directly funds local government housing provision. Local Government uptake of these funds is rarely because of popular demand but rather as a response to a high profile local housing need, progressive local communities or as a response to declining local population. These issues are often addressed in isolation from an overall planning framework. Further, the existence of State public housing systems and the continuation of poor metropolitan or regional strategic planning frameworks continue to limit ownership of extensive housing roles by local government in Australia.
The Importance of the Californian Experience

Of all the states in the USA, California is the most relevant and useful to evaluate for a number of reasons. Firstly, a greater number of Californian municipalities have adopted and applied developer contributions policies for services and infrastructure costs than municipalities in the other states. This is followed by Florida, Washington, Oregon and Texas. Californian municipalities have been the greatest users of cash exaction's (followed by Florida, Texas and Indiana) and land dedication and building/ installation requirements (followed by Texas, Florida and Virginia) (Weschler et al, 1987: 25). It is significant that rapid growth states are well represented in the four to six states most often using developer contributions, reflecting the nexus between the use of levies and levels of new construction (Weschler et al, 1987: 25).

Secondly, the rapid growth of California also requires it to seek alternative funding for services and infrastructure as need outstrips traditional funding ability (Roberts, 1985: 14). This has relevance to the high growth urban regions in Australia such as Melbourne, Sydney and Brisbane/Gold Coast where funds are inadequate for servicing new urban growth.

Thirdly, the cost of housing in major Californian cities such as Los Angeles, San Francisco and San Diego is extremely unaffordable by US standards. Burke (1991: 8) notes that in the late 1980's over one third of renter households in every state of the US could not rent at an affordable level while in California this proportion increased to one half. There households were forced to live in housing related poverty. Home ownership is equally unaffordable and applies equally to inner urban areas as well as urban fringe estates. For example, by mid 1990 only 22 percent of all homes sold in Los Angeles were affordable by medium income households. (Burke, 1991: 5). The very high proportion of medium density housing in these Californian cities did not translate to more affordable housing (Burke, 1991: 8). The relevance of housing unaffordability has placed an imperative on US municipalities and housing authorities to find creative means of financing the provision of affordable housing.

The outcome of citizens' referenda in California at the local and state levels have heightened the need to imperative find additional income by reducing tax levels and, thus, government income, as described in Chapter Two. Such constraints have required municipalities to exploit
any avenue for obtaining off-budget or indirect income such as developer contributions (Weschler, Mashkatel and Frank, 1987:16, 34).

Lastly, Californian enabling legislation is so well developed that it not only facilitates the use of developer contributions, but requires its use. This statutory basis exists in contrast to many other US states which rely more on demonstrating a nexus between social impacts from developments and the way impact fees or developer contributions are collected and expended. This has the effect in California of reducing, although not eliminating, the likelihood of litigation by developers (this legislative framework and its legal implications is further discussed in Chapter Four). This legislative basis stands in sharp contrast to Australia, with the limited exception of the 16 New South Wales municipalities able to use section 94 contributions and SEPP10, and is unlikely to be more widely developed in Australia in the foreseeable future. Nevertheless, the Californian experience provides a useful yardstick to gauge possible, prerequisite conditions for the successful establishment and implementation of developer contribution policy in Australia.

Thus, because California has been the US laboratory for extremes in types, levels and applications of developer contributions, this makes it an ideal state to evaluate in relation to the applicability of these contributions to Australia. The variety of local responses to these catalysts in the US illustrate the diverse ways developer contributions can be applied by Local Government in Australia so as to solve the problem of housing affordability and accessibility for low to moderate income households.

Conclusion

Australian government mechanisms are severely limited when required to effectively produce housing outcomes to meet the needs of low income groups. This limitation is in the context of the combined effect of increasing problems of housing affordability, inadequate public housing provision, the inability in general of Local Government or the community housing sector in Australia meeting the public housing shortfall in the foreseeable future and, most importantly, the overall climate of public sector financial constraints faced by all levels of Government under the dominant economic rationalist ideology.
Corresponding with these trends is an increased interest in developer contributions as a means of meeting the costs of urban sprawl and deteriorating infrastructure in Sydney and Melbourne particularly.

Against this interest is the experience of North Sydney and the former St.Kilda municipalities in targeting developer contributions to low income housing. These experiences serve to demonstrate the limitations in the use of social impact planning provisions or developer contributions legislation to justify this use of developer contributions without there being adequate State legislative framework.

Nevertheless, in the absence of adequate, alternative means of funding affordable housing and in the event of future, supportive State legislative framework, the latent potential of such contributions needs to be further investigated and tested. This may be facilitated by the slow evolution in Australia of supportive planning appeal precedent and the growing governmental acceptance in Australia of developer contributions to fund infrastructure and services. The relevance of the US and particularly Californian experience indicates alternative models with potential but only partial relevance to Australia. However, while developer contributions may never constitute an alternative for inadequate government funding due to the limited size of contributions compared with the high cost of providing housing, developer contributions provide another means of sharing the responsibility for the provision of lower income housing in a constrained political and economic environment.

Notwithstanding the precedent of the few Sydney municipalities already active in directing developer contributions to community housing, the extension and broadening of this precedent across Australia is likely to be limited and will not provide sufficient funds to adequately address housing need if public housing is ever to be significantly reduced. In this sense Australia will mirror the US experience, which is described in Chapter Two, where municipal and non-profit developer community housing failed to provide a universal replacement of the public housing system.
CHAPTER TWO:

The Evolution of the Use of Developer Contributions in California and the USA from the 1920’s Until the Early 1990’s and Changes in Social Policy in the 1980’s

Introduction

To understand the context from which issues arise from the use of developer contributions, it is useful to outline the evolution of the use of developer contributions from both a planning and housing perspective in the USA, and in particular California.

Contrasting the American evolution with the Australian evolution explains how developer contributions evolved in the USA and California and how the preconditions of their use underpin the support for developer contributions as well as the timeframe in which different planning systems develop these preconditions. This awareness helps to determining the likelihood of these preconditions occurring in Australia.

The Inception of Developer Contributions - 1920s to 1950s

Developer contributions originated early in the development of town planning. They stemmed from the 1920's 'boom and bust' environment of post World War One city building. This created strains on municipalities to both fund infrastructure needs and to maintain underutilised infrastructure.
This environment triggered the adoption of zoning and planning ordinances in virtually all states. It also established the practice of requiring developers to contribute towards providing internal roads, sewers and water systems (Weschler et al., 1987:17). Contributions were collected through special rate assessments and user charges. Collection authority usually derived from taxing powers underpinned by State statutes or the U.S. constitution.

Against this backdrop was the 1926 historic landmark case in the U.S. Supreme Court of Village of Euclid v Ambler Realty Co. This case addressed the exclusion of rental housing from a residential, single family district in Cleveland, Ohio, called Euclid. of the Great Depression which started in 1929, the Democratic presidency of Franklin Roosevelt created a welfare state through a series of legislative Acts called ‘New Deal’. This legislation enabled slum clearance and massive public housing projects, central regulation of the working conditions of labour, increased powers of government to restructure federal agencies and the provision of a social security system. Explained by Frisch:

Fundamental to the welfare state position was Roosevelt’s contention that “Government has the final responsibility for the well-being of its citizenship”, that is for securing the material happiness or well-being of its citizens, while the earlier liberalism, setting society apart from government, continued to believe in government as being necessary only under certain conditions (Frisch, 1975: 116).

The New Deal premised on the notion that individualism is not always in the interest of the common good, was by nature preventive rather than remedial and through restructuring the economy sought to redistribute its benefits (Frisch, 1975: 111, 112).

The legacy of the New Deal lasted 50 years until 1981 when the Reagan Republican Administration started to wind back Federal expenditure. Remnants of this legacy in 1995 were targeted by the ‘Contract with America’ group of policies espoused by the emerging extreme right of the Republicans under the leadership of the Senator Newt Gingrich. Residual effects continue influence the Clinton Democratic Administration in the latter half of the 1990s.

Compounding this legacy was the fiscal impact of the 1929 Great Depression which left many municipalities bankrupt as revenue sources dried up. World War Two diverted both attention and capital from public facility issues. It was only through the late 1940s' building boom and urban sprawl, based on a frustrated demand for housing (Porter, 1987:73), that exerted
renewed wed pressure on municipalities to provide services for needs of expanding cities. This time, municipalities learnt not to rely on rate income and user but required developers to contribute funds for services and infrastructure or dedicate land for open space or services such as schools (Porter, supra at p.73).

The 1960s and 1970s - Watershed Decades for Inclusionary Housing

Five new directions developed during the 1960s. An article by Heyman and Gilhool, The Constitutionality of Imposing Increased Community Costs on New Suburban Residents Through Subdivision Exactions, was published in the Yale Law Journal in 1964 (Bosselman & Stoud, 1987:74). It argued that subdivision exactions are valid if a proper cost accounting apportions costs generated by new residents and charges developers appropriately. Referred to as the 'rational nexus' between cost generated by the development and the exaction, this is the first known use of this concept. Rational nexus is defined as the principle of testing the nexus between the contribution and the public costs generated by the development.

By the end of the 1970s, State Courts had adopted the 'rational nexus' as a prevailing standard test for developer contributions. Bosselman and Stroud (1987:74-75) argue that this both liberated developers from the fiction that they were obtaining a privilege and provided municipalities with a flexible way to justify payment of money as easily as land.

In the 1960s the first program aimed at subsidising housing for low income persons in private rental housing was established. The 'Section 23 Leased Housing Program' was authorised in 1965 and administered by the Federal Department of Housing and Urban Development (HUD). Housing authorities were able to establish long-term contracts to subsidise the gap between market rent and an affordability benchmark in tenant income, and there was greater scope for housing assistance in lower income households. This program was superseded by the 'Section 8 Existing Housing Program' in 1974. Subsidies expanded the mechanisms for maintaining rental housing affordability and also targeting developer contributed rental housing to assist households under affordability targets set by municipalities until the 1980s.
Thirdly, the 1960's and 1970's were watershed decades. During this period most municipalities adopted developer contributions in one form or another and applied them to a wide range of services and infrastructure. A 1985 survey by the Homer Hoyt Centre, Florida State University, of the use of developer contributions by 11,722 U.S. municipalities (the results are discussed in Chapter Four) also found that, while occasional use of developer cash contributions for services and infrastructure occurred prior to the 1960's, most introduced them after 1960 with a peak of introductions occurring between 1970 and 1979 (Purdum and Frank, 1987:134).

Municipal involvement in developer contributions for housing under the term 'inclusionary' housing programs, showed a more uniform pattern. Prior to 1950 4.1 percent of municipalities were involved in land dedication contributions and 3.4 percent were involved in building/installing housing contributions, with no cash contributions recorded. From 1960, small numbers became involved in all three forms of contributions, with the bulk (58.8 percent) involved between 1970 and 1974 and another 16.4 percent involved between 1980 and 1985 (Purdum and Frank, 1987:134).

The greatest use of inclusionary housing programs occurred in California, in particular the San Francisco Bay Area and Southern California. Mallach (1984:200) argues that although while State agencies contributed towards this activism, it was largely caused by a local view that a substantial proportion of the local population was affected by housing affordability. This situation could rationally be addressed by 'inclusionary' policies and programs. These programs included a range of substantive incentives to offset some of the costs to developers with making contributions. These incentives have become an essential ingredient of successful programs, especially since the withdrawal of Federal rental subsidies in the 1980's.

Fourthly, during the 1960's and 1970's saw Redevelopment Agencies were established in the USA to redevelop blighted urban areas. Although they provided housing they tended to provide commercial redevelopment at the expense of housing. Rent control was introduced in the mid 1970's and, most importantly, flexible zoning across the USA was gradually introduced and involved bargaining and negotiation between municipalities and developers. The authority for zoning was also extended to regional and state bodies, removing certainty of outcome from the planning process (Weschler, Mushkatel and Frank, 1987:17).
Lastly, during the 1960's and 1970's an extensive migration of upwardly mobile people out of central cities occurred. As a result zoning was used by the growing urban fringe communities for fiscal or racial reasons to keep subdivisions free of minority groups. As jobs moved out from the city centres, minority groups were prevented from having access to jobs (Bosselman and Stroud, 1987: 88). These zonings have been termed 'exclusionary zoning'.

Such policy and zoning became contentious issues as some rapidly growing municipalities could not hire police or fire school employees from within their own boundaries. They concluded that zoning should include minority groups. This 'inclusionary' zoning required the reservation of a small number of units for low income persons in new developments. It grew out of the critical mass and tipping point theories (Bosselman and Stroud, 1987: 88, 89) which assumes that a small number of minority group members could be integrated into an area without changing its character or property values and without having substantial or adverse effects, ie. integration would occur without reaching the tipping point which would cause original residents would leave. Such zoning was adopted in particular by municipalities around Washington D.C. and in Southern California (Bosselman and Stroud, 1987: 88, 89).

Many 'exclusionary' zonings were challenged through the state courts, leading to 'inclusionary' judgments. The most far reaching and influential judgement was made by the New Jersey Supreme Court in the case South Burlington County NAACP v. Mount Laurel Township in 1975. The court found the Township's zoning of large, minimum lot sizes was unconstitutional because it prevented the construction of housing for low and moderate income persons. The decision concluded that a municipality, in entering the field of land use regulation, '... assumes a duty - one of [state] constitutional dimensions - to act affirmatively to provide its fair share of the low income and moderate income housing necessary to meet the regional housing needs' (Justice Pashman, cited in Burton, 1981:19,20).

A subsequent law case in the mid to late 1970's included the so-called Mount Laurel-II decision in 1980. Plaintiffs appealed to the New Jersey Supreme Court on the basis that the Mount Laurel mandate for affirmative zoning (to provide for low to moderate income housing) had not been met. Consolidating this case with five other similar appeals, the Supreme Court decision reinforced the court's rejection of exclusionary zoning and progressively defined municipal responsibilities to ensure that sufficient, affordable housing is provided (Burton, 1981: 20-22). These cases will be further discussed in Chapter Four.
In California, three specific factors led to the accelerated use of inclusionary zoning including developer contributions and the fact that California led the way in their use. Firstly, the use of such contributions and service and impact fees were encouraged by the outcome of two public ballots. In 1978, Californian voters, believing that State and municipal taxes were too high, voted in an unprecedented way by a two to one margin to limit property taxes and this was known as ‘Proposition 13’. Similar Propositions were subsequently adopted in some other states. Such revenue ceilings forced municipalities to seek innovative ways for raising revenues (Weschler, Mashkatel and Frank., 1987:16,34).

In addition, another public ballot resulted in ‘Proposition 4’. This required municipalities to return to tax payers any revenues above the maximum allowed under Proposition 13 if ceiling was breached. Ironically Propositions were adopted at a time of economic growth and rising property values, not during the erosion of wealth. It was economic growth rather than stagnation which created the conditions leading to expenditure cutbacks- a situation Molotch (1990:183) describes as ‘gratuitous’.

Secondly, Californian State legislature in 1980 enacted laws which prohibited exclusionary zoning and imposed inclusionary zoning on Californian municipalities. This effectively legislated the New Jersey Supreme Court earlier decision through case law and was, at the time, unparalleled in the USA. Prior to this, municipalities chose whether or not to follow ‘Housing Element Guidelines’ which were the earlier inclusionary zoning guidelines adopted by the State Department of Housing and Community Development in 1977 (Burton, 1981:23, 25). However under amendments to the Californian Evidence Code and Californian Government Code, the State imposed a range of requirements including the following:

1. The assumption that municipal ordinances which limit building permits also issued assessment of the impacts on the supply of residential units inside and outside the municipality and in any appeals against the ordinance prove that the ordinance is necessary to protect public health, safety and welfare.

2. Under any municipal General Plan adopted to limit the number of housing units built yearly, municipalities must describe their share of regional housing needs, housing programs fulfilling housing element requirements and how the public health, safety and welfare is promoted by the plan or ordinance by way of housing needs analysis, policies and objectives, a schedule of programs and identification of resources and constraints.
3. Cooperation between municipalities in order to address regional housing needs; and HUD data on municipal housing needs is to be distributed to regional Councils of Government (COG) which prepare regional plans for housing each income group based on market demand, employment opportunities, the availability of sites and public facilities, commuting patterns, type and tenure of housing needed etc.

4. Affirmative zoning to provide for a variety of housing types for all income levels.

5. Address and, where legally possible, remove governments constraints to the development of housing.

6. Undertake Five year plans which achieve housing element objectives through the administration of land use and development controls, provision of regulatory concessions and incentives and the utilisation of State and Federal financing and incentive programs when available, including the granting of a 25 percent density bonus when developers set aside 25 percent of a development for affordable housing.

7. Designate and zone for sufficient vacant land for residential use with appropriate standards.

8. Where there is a direct, public financial contribution to a project, a municipality must impose resale controls to ensure affordability for at least 30 years (Burton 1981: 23-29).

Burton (1981:29, 30) notes that the legislation does not just seek that municipalities require and developers provide 'least cost' housing but specifies housing for fixed percentages of low and moderate income housing.

The third factor to accelerate inclusionary zoning was that two Californian regional bodies/statutory authorities promoted the use of inclusionary programs. These were the Californian Coastal Commission (CCC) and the Californian Air Resource Board (CARB). The CCC (enacted under the Californian Coastal Act 1946) was required by the state in the 1970s to carry out an extensive inclusionary housing program in the Coastal zone. Local government was given the role of implementing the program through local policies (Mallach, 1984:149). The Act required that:

Housing opportunities for persons of low and moderate income shall be protected, encouraged and, where feasible, provided .... New housing in the coastal zone shall be developed in conformity with the standards, policies and goals of local housing elements adopted in accordance with the requirement of subdivision (c) of section 65302 of the Government Code (Mallach, 1984:198).
In response, the Commission set a goal that 25% of all new units in developments were for low and moderate income housing. Flexible requirements allowed for on or off-site provision or cash contributions. However, the CCC could not provide incentives to ensure suitable zoning (a local government role) or accept fees because it was not a housing authority. It relied on cooperation with municipalities and was stripped of these responsibilities in 1981 which were subsequently shifted to local government. Decentralising the program to municipalities with differing policies reduced its overall effectiveness (Mallach, 1984: 199).

In the late 1970's the CARB, working in the rapidly growing Orange County, required the inclusion of low and moderate income housing in new developments to mitigate the negative impacts of pollution caused by workers having to commute because of a lack of affordable housing. Formal guidelines were never established and the requirement ceased when Orange County adopted its own inclusionary housing program in 1979 (Mallach, 1984:199-200).

In the 1970s the first reversal of Federal support for subsidised housing programs, principally public housing provision occurred. In 1973, Republican President Nixon stopped the growth of these programs, forcing them to continue at significantly lower levels.

From about 1975 onwards, the role of the city in general had progressively changed. The world economy had undergone massive restructuring to transform the economic base of cities from manufacturing to services, with cities lying at the top of the global hierarchy (Farnstein, 1990: pp 120-121). Economic control was concentrated within multinational companies and finance institutions; manufacturing and routine office functions were decentralised; manufacturing in the Third World developed; and new economic powers in the Pacific Rim emerged (Farnstein, 1990: pp 120-121). Farnstein describes how the large size of corporations enable them to break into component parts. She also described the role of negotiation in acquisition and restructuring and the need to co-ordinate company components which were dispersed across the world. This required a concentration of corporate deal making and control, with ‘...key cities throughout the world being used by global capital as basing points in the organisation and articulation of markets.’ From this emerging role of cities innovation and experience in the use of developer contributions grew.
The 1980s: Intra City Competition and Reaganism- the Retreat of the Welfare State.

By the early 1980s, according to Rosan (1990: 7-2), zoning no longer involved design issues. Zoning became a tool for addressing social and environmental issues.

Further, local government focus changed along with the restructuring of the world economy. The trend continued which was already underway, with the election of the conservative Reagan administration in 1981. Competition between cities increased as bidding for mobile capital tried to provide as many preconditions for capital to invest. Competition between cities included trying to convert manufacturing to business and financial services swelling ‘booms’ in the central business district real estate; providing incentives for hotel construction; assisting with financing for office construction and facilitating retail expansion and investing in cultural and recreational infrastructure. Strong competition to capture the market was the basis of this city rivalry (Clavel and Kleniewski, 1990: pp 202, 206).

These changes in the role of cities have not affected the fortune of world cities in the same ways. Some cities in the USA are more favourably placed than others to require developer contributions because they attract investment capital (refer to Chapter Four for further discussion on ‘location related factors’).

Despite the impact of the Nixon Administration in the 1970s, the election of the Reagan Republican Administration in 1981 heralded the most significant shift in Federal social policy since President Roosevelt’s ‘New Deal’ in the 1930s. Initiatives were established to withdraw Federal support and funding for most social programs. In some instances, other levels of government were discouraged from replacing this Federal role (Hartman, 1986: 367).

Combined with the economic boom of the 1980s, the reforms reinforced the foundations established over 60 years for the use of developer contributions. Reforms moved beyond developer contributions being simply allowable and an option to provide affordable housing to a situation where developer contributions became the principal means of addressing housing
need because most targeted housing assistance programs were either ineffective or non-existent.

The Reagan and subsequent Bush Administrations held conservative, ideological views. Conservatism is best defined by Huntington (1957: 455) as follows:

...the ideology arising out of a recurring type of historical situation in which a fundamental challenge is directed at established institutions and in which the supporters of those institutions employ the conservative ideology in their defense. Thus, conservatism is that system of ideas employed to justify any established social order, no matter where or when, it exists, against any fundamental challenge to its nature or being....

In this case, the conservative ideologies of the Reagan and Bush administrations were in direct opposition to decades of evolving social justice laws, policy and programs aimed at protecting ethnic minorities, women and low-income persons from discrimination or disadvantage. Conservatives believed these policies, laws and programs threatened institutions which historically have been championed by conservatives: the unfettered private sector, the family unit, patriarchy and white Anglo-Celtic-European culture. Conservative initiatives were broadly aimed at social, legal, environmental and health policy areas. Particular policies and initiatives to undermine public housing and housing assistance programs also occurred. These arose out of the President’s Commission on Housing which was guided by a ‘statement of Principles’ noted in its October, 1981 Interim Report, which aimed to:

- achieve fiscal responsibility and monetary stability in the economy;
- encourage free and deregulated housing markets;
- rely on the private sector;
- promote a continuing role of government in addressing the housing needs of the poor;
- direct programs towards people, rather than towards structures; and
- allow maximum freedom of housing choice (Hartman, 1986: 363);

The Commission was composed almost entirely of Republicans mainly from banking, real estate, the development sector and lawyers. Construction trades or housing consumer rights groups were not represented and only three women and two minority groups were represented. According to Hartman (1986: 365), its recommendations were a foregone conclusion and their effects are listed in Table Two. The key reforms can be summarised as the elimination of the public housing provision role and subsidy programs for developers providing low income
housing, reducing operating subsidies to local housing authorities and encouraging public housing conversion.

Table 2  Regressive Housing Initiatives of the Reagan and Bush Administrations in the USA

<table>
<thead>
<tr>
<th>INITIATIVE</th>
<th>IMPACT</th>
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<tbody>
<tr>
<td>Reversing the tradition since the 1930s for HUD to produce public housing</td>
<td>- an 80% reduction in public housing expenditure from US $73 billion in 1981 to $8 billion in 1988</td>
</tr>
<tr>
<td>The elimination of Section 8 subsidies to developers housing low income households (Hartman, 1986: 363)</td>
<td>- elimination of a program which has produced (since 1974) 1.4 million units housing 3.5 million people (as many people as in public housing)</td>
</tr>
<tr>
<td>- elimination of the possibility of units set aside by developers for lower income households being cost free</td>
<td></td>
</tr>
<tr>
<td>Slashing public housing operating subsidies to local housing authorities so that by 1986 it was lower than the 1981 budget (Hartman, 1986: 365)</td>
<td>- reduction in the viability of public housing management</td>
</tr>
<tr>
<td>- reduction in the attractiveness of local housing authorities to manage public housing</td>
<td></td>
</tr>
<tr>
<td>Slashing cyclical maintenance and upgrading funds paid to local housing authorities managing public housing (Hartman, 1986: pp 366-367)</td>
<td>- reduction of housing standards below rational norms</td>
</tr>
<tr>
<td>- deterioration and neglect of public stock to the point where it becomes not viable and is redeveloped (often for non-low income housing)</td>
<td></td>
</tr>
<tr>
<td>Encouraging local housing authorities to not continue public housing use once the (usually) 40 year period for financing construction capital (from raising housing funds) expires and ownership reverts to local authorities</td>
<td>- pressure from developers to redevelop public housing sites for other uses</td>
</tr>
<tr>
<td>- gentrification of public housing through conversion to condominiums or upgrading them for older persons housing</td>
<td></td>
</tr>
<tr>
<td>- sale of public housing to public housing tenants</td>
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</tr>
<tr>
<td>- many local housing authorities not willing to retain stock given that 30 of the 134 largest authorities (managing 23% of public housing stock) were in financial difficulties (Bratt, 1988: 346)</td>
<td>- a savings of $2.445 billion to the Federal Government in 1986 or nearly $6 billion between 1982 and 1986</td>
</tr>
<tr>
<td>Increasing the percentage of income spent on rent from 25% to 30% except for minors and elderly persons (Hartman, 1986: 368)</td>
<td>- increasing housing related poverty</td>
</tr>
<tr>
<td>Attempting to include as income day care expenses for working mothers, extraordinary medical expenses and the cash value of food stamps (vouchers) to be counted for the calculation of public housing and Section 8 rents (Hartman, 1986: 368)</td>
<td>Not applicable (reforms unsuccessful)</td>
</tr>
<tr>
<td>Changes to Community Development Block Grants (CDBG), ie reduction in funding, combining the CDBGs with other funding programs and weakening of requirements that the beneficiary primarily be low and moderate income households (Hartman, 1986: pp 364 - 365)</td>
<td>- reduction in the rehabilitation of substandard housing (of which 30% of CDBG outlays were used for)</td>
</tr>
<tr>
<td>- reduction of funding options for local housing authorities or non-profit developers seeking to pool funding from different sources for project capital costs</td>
<td></td>
</tr>
<tr>
<td>- less targeting of funding to those most in need; funding contributes to gentrification through more of a focus on improving residential amenity and economic development</td>
<td></td>
</tr>
<tr>
<td>Cuts to the budget of the Legal Services program (Hartman, 1986: 365)</td>
<td>- less ability for legal representation and law reform for tenants</td>
</tr>
<tr>
<td>- less ability to monitor landlord/tenant compliance with laws</td>
<td></td>
</tr>
<tr>
<td>Introducing housing vouchers to persons wanting to rent in the private sector with two thirds of the vouchers in 1986 being targeted at tenants displaced by the demolition of public housing (Hartman, 1986: 367)</td>
<td>- providing an excuse for the federal Government to abandon any direct or indirect role in housing provision</td>
</tr>
<tr>
<td>- contribution of the reform toward public housing tenants abandoning poorly maintained public housing. This may not result in landlords improving the standard of rental housing (the impact was not conclusive at the time when available mid 1980s literature)</td>
<td></td>
</tr>
</tbody>
</table>

Most significantly, over this period, 80% of public housing expenditure by HUD was slashed, thereby eliminating any new provision of public housing. The only significant area of Federal
housing assistance to remain comprised special purpose grants such as the community Development Block Grant and Home Grants (Hartman, 1986: 364). As these grants were directed at supporting State, municipal and community- based housing programs, this limiting of Federal Assistance demonstrates a clear policy shift from centralised housing delivery to decentralised housing delivery.

The Emerging Role of Non-Profit Developers and Local Government Housing Programs in the 1980s and 1990s

Paralleling the advent of municipal and state inclusionary housing programs has been the development of direct housing provision roles principally by municipalities and to a lesser extent states as well as the establishment of public-private partnerships. The direct provision through funding, purchase and construction of housing resulted in a range of innovative, localised programs funded from various sources. These include municipal funds and taxes, state funds, bonds, developer contributions and Federal grants. These programs generally produce high quality, well designed housing for low to moderate income persons with community- based management. By comparison previously provided public housing by HUD were usually poorly located and designed. These partnerships have been most developed in the San Francisco Bay Area and Boston. By way of comparison, Canada also has well developed partnerships but this is beyond the scope of this thesis and will not be discussed further.

These public-private partnerships originated in the 1960's to encourage community involvement in social programs (including the provision of housing) by providing them with funds. Most schemes languished, but the idea of partnerships was later resurrected in the form of private, non-profit housing developers. The initiative for this development originated from municipalities and independent community activism. In the early 1970s for example many non-profit and community- based groups moved housing management and providing emergency relief to raising funds to buy, develop and independently operate low and moderate income rental housing projects. By contrast, this trend generally only occurred in Australia in the 1990s. These US groups became non-profit developers in their own right and often also formed partnerships with developers as well as investment syndicates with investors to raise development capital (Schwartz et al, 1988:165). Some municipalities also directed much or all of their housing funds to non-profit developers rather than become involved in direct
provision (Schwartz et al, 1988:166-167). The role of non-profit developers is discussed in detail in Chapter Five.

In the 1980s the Federal Government withdrew from public housing provision and this role was not entirely satisfactorily replaced by Local Government and the non-profit sector. Expertise in social housing provision shifted from the Federal Government to Local Government and the non-profit sector, in some cases supported by State Governments. Centres of innovation in the USA became Boston (Massachusetts) and municipalities in the San Francisco Bay Area and in Southern California (stated in an interview with an officer of The Housing Authority of the County of Santa Clara, California, 1991).

**Legislative Treachery - a Counterproductive Solution to a Housing Crisis.**

While developers were expected to support municipal affordable housing plans by contributing cash, land or units, this contribution was ‘sweetened’ by Federal, State and Local Government incentives as well as sunset clauses on affordability restrictions. These sunset clauses set a date to terminate restrictions usually after 15 to 30 years.

Two Federal pieces of legislation quickly undermined the principle of give and take. Firstly, the *Tax Reform Act 1986* removed tax deductions on losses given to developers and investors (limited partners) who formed syndicates with non-profit developers (general partners). Thousands of investors and developers were affected by projects committed prior to the legislation. Investor trust in affordable housing projects had been damaged (Schwartz, et al., 1988:52).

Secondly, the *Cranston-Gonzales Affordable Housing Act 1990* reversed the Federal Government’s commitment that the affordability restrictions on affordable housing reserved under agreement with private developers through 'inclusionary' programs would expire after 15 to 30 year terms. While this postponed a housing crisis (over 500,000 units restricted under ‘inclusionary’ agreements since the 1970's were facing expiry), it reduced developer willingness to enter into new agreements (Schwartz, et al., 1988:52).
The housing affordability implications of these two Acts are described in Chapter Five.

**Summary and Conclusion**

The evolution of the use of developer contributions for the provision of services and infrastructure and, in particular the provision of housing for lower income households, has led to reinforcement of their use and acceptance.

In the 1920’s the use of developer contributions was justified as a means of addressing the ‘back-log’ in the provision of infrastructure caused by World War One. The Euclid case in 1926 squarely upheld the constitutional powers of Local Government to use zoning as a policing power, enabling Local Government over the next 40 years to utilise developer contributions free of appeals. The Great Depression and then Roosevelt’s ‘New Deal’ in the 1930’s provided a financial imperative and a political manifesto. At the same time an interventionist, land-use planning approach within a welfare state framework was emerging. This imperative was supported by the financial demands of urban sprawl which started in the 1940s.

By the 1960’s and 1970’s the justification for the use of developer contributions under inclusionary zoning ordinances was assisted by the application of the ‘rational nexus’ principle, the establishment of redevelopment agencies with broad powers, the introduction of flexible zoning which enabled negotiated outcomes, the emergence of exclusionary zoning and, in response, inclusionary zoning, leading to the landmark Mount Laurel ruling in 1975. Most municipalities adopted developer contribution policies by the early 1970’s. California moved beyond the national norm by adopting the public ballots, Propositions 13 and 4, which restricted tax income and made the use of developer contributions a financial imperative. In 1980 California imposed inclusionary zoning requirements on municipalities.

In the early to mid principally 1970s Federal withdrawal from a public housing role and the beginning of restructuring of the world economy began. This lead to intra-urban competitiveness and a varied capacity to use developer contributions. By the 1980’s, the conservative Reagan administration largely withdrew the Federal Government from a public housing provider role. This facilitated the transfer of housing innovation and provision to Local Government and non-profit developers whose emerging roles had begun in the 1920s.
This period also saw dramatically increasing poverty, inequality and homelessness which exerted pressure on local authorities and agencies to find local solutions to poverty and homelessness.

In each period in which developer contributions evolved, historical circumstances have established conditions which have gradually locked-in the use of developer contributions, building on a unique set of legislative, financial, political and social characteristics. Their effective use must be evaluated in the context of this history.
CHAPTER THREE:

Maintaining the Balance—a Description of Controls and Incentives Used by Californian Municipalities to Achieve Low to Medium Income Housing.

Introduction

California, arguably the State with the most advanced developer contribution programs, is most suitable to research as an example of the potential of such programs (described in Chapter One). For this reason, four Californian municipalities were selected: San Diego, Los Angeles, Santa Monica and San Francisco. In addition, private housing developments in Orange County involving a developer contribution of low income housing have also been investigated. The four identified municipalities either had innovative or extensive programs and are described in this chapter. In general, the experience of these four municipalities indicates a range of relevant issues associated with the strengths and weaknesses of these programs. These issues are discussed in Chapter Four.

Information on municipal programs was obtained through interviews with municipal housing and planning staff and staff of non-profit developers, through reports and other documents from municipalities and non-profit developers and from inspections of numerous housing projects which comprise either projects within municipal housing programs or private developments where developer contributions were made. Because heavy reliance was placed on these documents and interviews to obtain information on the controls and incentives, involving some interpretation of both the documents and interviews, the descriptions of the controls and incentives are not sourced in the text. The source documents are, however, listed in the Bibliography as ‘Other References Used but Not Cited’.

There are two broad elements in the programs: controls and incentives. The controls represent the private or regulatory means by which developers are required to contribute towards the
provision of lower income rental or ownership housing. Such regulations are based on policy or planning codes and enforced through the planning permit process. In other words, permits are not issued for certain development types until the required contribution is made or at least committed. In effect, this is the 'stick' which influences developer choice of how, when and where many developments occur.

Incentives represent the opposite end of the equation: "the 'carrot' which attempts to mitigate the effects of the controls." (Purdon and Burke, 1991:56). Incentives have become an essential feature of the developer contributions culture in California and they are extremely important.

Separating controls from incentives as an analytical approach not only clarifies the nature of developer contributions but highlights the juxtaposition of these two opposite elements. This encourages wider debate on the respective roles of public authorities and developers in the housing market and in particular the provision of lower income housing.

Further, it highlights the mutual dependence of controls on the provision of incentives. For example, controls can often only be viable for developers when combined with incentives; and the provision of incentives cannot be justified by the planning authorities unless coupled with the amenity, environmental or social benefits of the controls. Table Three summarises the forms of controls and incentives.
Table 3  Summary Of Controls And Incentives Used By Californian Municipalities Using Developer Contributions Towards Lower Income Housing Provision.

<table>
<thead>
<tr>
<th>Aspects of the Controls or Incentives</th>
<th>Various Approaches of the Four Municipalities (Combined Standards or Options Allowed/Used)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. Controls</td>
<td>• Existing residential building being:</td>
</tr>
<tr>
<td>Development type targeted for</td>
<td>- rehabilitated,</td>
</tr>
<tr>
<td>affordability restrictions ('set</td>
<td>- converted,</td>
</tr>
<tr>
<td>aside' requirements, cash</td>
<td>- subdivided or</td>
</tr>
<tr>
<td>contributions, etc.)</td>
<td>- demolished.</td>
</tr>
<tr>
<td>Development size targeted for</td>
<td>• Construction of new, market-rate housing.</td>
</tr>
<tr>
<td>affordability restrictions</td>
<td>• Office development.</td>
</tr>
<tr>
<td>(set aside requirements, cash</td>
<td>• Other commercial development.</td>
</tr>
<tr>
<td>contributions, etc.)</td>
<td>• Acquisition of property.</td>
</tr>
<tr>
<td></td>
<td>• Subdivision of commercial and industrial land.</td>
</tr>
<tr>
<td>Proportion of a development to be</td>
<td>• Office or commercial</td>
</tr>
<tr>
<td>set aside as affordable housing:</td>
<td>- any size</td>
</tr>
<tr>
<td></td>
<td>- square feet or more</td>
</tr>
<tr>
<td>Terms of restrictions:</td>
<td>• Residential</td>
</tr>
<tr>
<td></td>
<td>- 2 units or more</td>
</tr>
<tr>
<td></td>
<td>- 5 units or more</td>
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<td>- 10 units or more</td>
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<td></td>
<td>- 15 units or more</td>
</tr>
<tr>
<td></td>
<td>- any size</td>
</tr>
<tr>
<td>Safeguards/enforcement means used to</td>
<td>• Office/commercial</td>
</tr>
<tr>
<td>ensure compliance with affordability</td>
<td>- negotiable</td>
</tr>
<tr>
<td>restrictions:</td>
<td>• Residential</td>
</tr>
<tr>
<td></td>
<td>- 10%, 20%, 30%, 40%, negotiable</td>
</tr>
<tr>
<td></td>
<td>• 30 years, 40 years, 50 years, negotiable</td>
</tr>
<tr>
<td></td>
<td>• Deed restrictions/deed of trust;</td>
</tr>
<tr>
<td></td>
<td>• Regulatory agreements;</td>
</tr>
<tr>
<td></td>
<td>• The issuing of building permits withheld until compliance;</td>
</tr>
<tr>
<td></td>
<td>• The issuing of occupancy permits withheld until compliance;</td>
</tr>
<tr>
<td></td>
<td>• Withdrawal of occupancy permits if breach of agreement;</td>
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<tr>
<td></td>
<td>• Minimum construction start timelines;</td>
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<tr>
<td></td>
<td>• Annual reports from developers or owners on the maintenance of affordability;</td>
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<tr>
<td></td>
<td>• Annual income recertification;</td>
</tr>
<tr>
<td></td>
<td>• of tenants to agree to conversion with 1/2 also</td>
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<tr>
<td></td>
<td>• intending to buy units;</td>
</tr>
<tr>
<td></td>
<td>• fees;</td>
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<td></td>
<td>• Lien proceedings (possession of property until the requirement is met) with lien</td>
</tr>
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<td></td>
<td>administrative charges;</td>
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<tr>
<td></td>
<td>• Adding the amount of any money owed by a developer to municipal rates/taxes charged</td>
</tr>
<tr>
<td></td>
<td>to the developer;</td>
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<tr>
<td></td>
<td>• Right of first option by the municipality to purchase the property;</td>
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<tr>
<td></td>
<td>• Restricted units are not to be rented to the developers relations or affiliates;</td>
</tr>
<tr>
<td></td>
<td>• Further property encumbrances not permitted;</td>
</tr>
<tr>
<td></td>
<td>• Where municipal loans provided, breach of agreements requires repayment of principle</td>
</tr>
<tr>
<td></td>
<td>and interest along with fees;</td>
</tr>
<tr>
<td></td>
<td>• Deposits (bond program);</td>
</tr>
</tbody>
</table>


<table>
<thead>
<tr>
<th>Aspects of the Controls or Incentives</th>
<th>Various Approaches of the Four Municipalities (Combined Standards or Options Allowed/Used)</th>
</tr>
</thead>
<tbody>
<tr>
<td>2. Incentives Offered:</td>
<td>• Planning/building benefits:</td>
</tr>
<tr>
<td></td>
<td>- density bonuses (25%, 50%, 75%);</td>
</tr>
<tr>
<td></td>
<td>- phased construction allowed;</td>
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<tr>
<td></td>
<td>- fast tracking of permits/streamlining permit processing;</td>
</tr>
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<td></td>
<td>- relaxing of codes/modification of development standards.</td>
</tr>
<tr>
<td></td>
<td>• Direct financial benefits:</td>
</tr>
<tr>
<td></td>
<td>- waiving or partial waiving of permit fees;</td>
</tr>
<tr>
<td></td>
<td>- allocation of normal or deferred interest loans (repayments waived if long term or majority affordability provided)</td>
</tr>
<tr>
<td></td>
<td>- allocation of grants;</td>
</tr>
<tr>
<td></td>
<td>- issuing of tax exempt housing bonds at below market interest rates;</td>
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<tr>
<td></td>
<td>- Federal and State tax credits;</td>
</tr>
<tr>
<td></td>
<td>- financial subsidies.</td>
</tr>
<tr>
<td></td>
<td>• Indirect benefits:</td>
</tr>
<tr>
<td></td>
<td>- developers being able to sell credits from the provision of excess, affordable housing to other developers who subsequently can provide less than the required amount of affordable housing;</td>
</tr>
<tr>
<td></td>
<td>- pro-rata cash contributions or credit refund to developers by municipalities where developers comply for less than an agreed period;</td>
</tr>
<tr>
<td></td>
<td>- allowing above market rents in a number of units matching restricted units.</td>
</tr>
</tbody>
</table>

**Controls**

Controls used in the four Californian cities are enforced through the planning permit process. Controls require, for certain types of developments, the developer to provide a given proportion of the development to lower income housing. This proportion can be located on the development site (the 'set aside' option) or in another approved site, or, as a cash contribution in lieu of housing (also known as cash in lieu, in lieu fees or levies). It is usually optional how developers contribute towards the provision of lower income housing.

'Set Aside' Policy

This control requires developers to designate and set aside a proportion of new residential units or new commercial or office space as affordable housing. This control is used in Santa Monica, San Diego and San Francisco and is stated in various municipal codes, ordinances and guidelines.
Developments required to comply with this control vary from residential development of two or more units in Santa Monica to 10 or more units in San Francisco. In San Francisco, developments are particularly targeted when the number of lower income housing units is reduced because of demolition, conversion or removal. In Santa Monica, office and commercial development must also contribute towards the provision of lower income housing.

The proportion of new housing units to be set aside as lower income units varies from 10% in San Francisco to 30% in Santa Monica. While the former stipulates the precise number of units in accordance with the perceived benefit of the development for the developer, in Santa Monica the percentage is defined. With office and commercial development in Santa Monica, the proportion set aside is negotiable. Affordable housing provided can be for home ownership or rental purposes, the one exception being Santa Monica where construction of new housing requires the setting aside of rental housing only.

Affordability is usually established by determining a minimum number of units which can be rented to people on low to moderate income, with income limits determined from median area income and determined by HUD. For example, in Santa Monica's 'set aside' controls for residential development, 20% of units have to be affordable to households earning 60% of median area income. For home ownership housing, affordability is controlled by setting limits to the household income allowed for purchasers. Where units are for rental purposes, rents are pegged to avoid exceeding a given percentage of median area income. Usually income thresholds are higher in relation to affordable home ownership units compared to affordable rental housing. In San Francisco for example they are 120% of area median income as against 80% of area median income respectively. The adequacy of these affordability restrictions is discussed in Chapter Five.

Housing set aside as restricted units also have design and construction timing conditions. This is particularly the case with Santa Monica and San Diego. In Santa Monica, restricted units must have the same appearance, be of the same size and be constructed at the same time as the market rate units in the same development. This ensures that units to be set aside as restricted units do not become inferior units or perceived as different from units which are sold or rented at market prices.
In all cases, 'Set Aside' controls provide alternative options which offer flexibility in how the control can be met by the developer. These options include providing restricted units off-site or a cash contribution towards the provision by the municipality. Mostly this is a standard option which applies to most controls. The features of these alternative controls are similar to those of the standard 'set aside' control.

Where the contribution is a provision of units by the developer, restrictions to their affordability can be (as is the case in San Francisco) for terms of up to 50 years or more. By contrast, Santa Monica's office/commercial development control does not set fixed time limits but rather seeks to negotiate a term with the developer. This becomes a regulatory agreement in the form of a legal deed. The granting of building and occupancy permits depends on compliance and can be revoked in the case of non-compliance.

Municipalities have established a series of measures which protect the intent of a development's permit conditions relating to affordable housing. In other words, a series of safeguards enable permit conditions to be enforced. These usually comprise regulatory agreements or deed restrictions between the municipality and the developer. Further, often building permits and/or occupancy certificates are not provided without proof of compliance with the requirements. Acquiring annual reports from developers or owners for rental housing - or at the time of sale of ownership housing - provide municipalities with ways of monitoring compliance.

Developers who comply with the requirements of the set aside policy automatically receive a range of incentives. These incentives include allowing density bonuses (Santa Monica, San Diego and San Francisco), fast tracking (San Diego, San Francisco), relaxing or varying development standards and building codes (Santa Monica, San Diego), and offering tax exempt, below market interest loans to developers (San Diego).

**Developer Levies/Cash Contributions/In-Lieu Fees**

Developer levies comprise one of the alternative options to the 'set aside' control described above. As an option, therefore, it also can be treated as a separate control. In the case of
acquisition, rehabilitation or construction of commercial property in San Diego, it is the sole required control with no options provided.

The four Californian municipalities prefer the 'set aside' control instead of developer levies, for reasons discussed in Chapter Four. Little detail is provided in municipal documentation about cash contributions, except in the case of San Francisco, especially on the matters of safeguards/enforcement and incentives. Developers, conversely, usually prefer to make a cash contribution and this preference is also discussed in Chapter Four.

The classes of development required to provide levies to municipalities vary between the municipalities. Santa Monica requires levies for a number of forms of private building works, ie. office construction, demolition of multi-unit residential buildings and conversion of private rental housing for home ownership, where in all cases no minimum development size is designated. Further, construction of market rate housing of five or more units also can mean that developers pay a levy. In San Diego, levies are required for acquisition of property, rehabilitation of existing buildings or new construction of any sized development, while in San Francisco this control only targets office development.

The size of the levy varies according to the municipality and development type. In many cases the levy is based on an amount per square foot of the development and is adjusted for CPI annually. In other cases, the levy is determined by a sliding scale based on the amount of housing lost or, in the case of conversion of rental housing, based on the annual rental income per unit prior to conversion.

Levied funds are used in a variety of ways, although in all cases their use for the provision of lower income housing is guaranteed. For example, office construction levies in Santa Monica are used as loans to other developers wishing to construct lower income housing, while levies from the conversion of rental housing funds a home ownership assistance program. In San Diego, levies at the time of principle research for this thesis (1990/91), are combined with four other types of levies to form a housing trust fund which raises U.S. $12.9 million annually. This is used to fund private and non-profit providers as well as public providers of lower income housing. This also occurs in San Francisco, although most funds accrued are targeted at
housing associated with private, non-profit developers. Non-profit developers are described further in Chapter Five. In all cases, affordability restrictions are placed on the housing provided using funds levied similar to the restrictions applying to the 'set aside' policy.

While details about the safeguards applying to levies are not as readily available (with the exception of San Francisco), it is assumed in this thesis that, at their most developed form, they would be similar to those used for the 'set aside' policy. The lack of detail in municipal codes, ordinances and policy documents probably reflects the fact that funds are spent on municipal or non-profit developer provided housing where ongoing affordability is guaranteed and, hence, safeguards are not required. In San Francisco, when all safeguards aimed at securing the cash contribution fail, the municipality adds the outstanding levy to the municipal taxes (equivalent to municipal property rates in Australia) which are payable in the case of foreclosure of the company/business or sale of the property. The taxes/rates collected are still earmarked for the housing fund.

It is not clear whether the range of incentives also apply to levies. As stated earlier, lack of available details may reflect a municipal preference for the 'set aside' options. An innovative option used in San Francisco allows developers to build up credits with municipalities where they provide or fund more than the required amount of affordable housing. These credits can then be sold to other developers needing to fulfil their own affordable housing obligations to the municipality on other development sites, thereby abrogating the purchasers of the credits from having to comply with this control to the same degree or at all. With the control seen as a standard development requirement, this enables the provision of affordable housing to become potentially attractive and marketable commodity in the development industry, which some developers take advantage of. This provides a flexibility which may suit some developers who calculate a potential financial advantage in this arrangement.

**Conversion Controls**

Conversion controls warrant special consideration as they involve a separate set of contentious issues. These include: the encumbrance of existing property rights of a property use usually in existence before the control was established; the social impact on existing tenants or the last,
former tenants where they all have been evicted; and the effect of the policy on the building's maintenance, property ownership rights and the property's viability as an investment.

While this control can be incorporated into a municipality's 'set aside' policy or developer contribution/levy policy, as in the case of Santa Monica, in other municipalities it is treated separately. This control also applies to existing, built up areas which have a limited ability to have particular housing needs provided by controls over new construction. As both Santa Monica and San Francisco are without 'green field' new construction opportunities, they have developed conversion controls.

In Santa Monica, conversion of private rental housing for home ownership is rejected unless the developer or owner provides a levy to the municipality. This levy is equivalent to one year's rental income per unit and is paid upon the sale of each unit. Thus, if the annual rental income for a unit is, say, $7,800 per year and there are ten units in question, the levy would be $78,000. Further, as a precondition for approval, two thirds of the existing tenants need to approve the conversion and half of them must intend to buy their units.

Interestingly, in Santa Monica the fees collected do not contribute towards the provision of replacement rental housing but instead towards assistance for affordable home ownership. This particularly targets existing tenants wishing to purchase their unit. Thus, while the control can help limit the incidence of conversion, if the levy is provided and other preconditions are met, fees can paradoxically increase the likelihood of meeting the control's preconditions for conversion - that is tenant willingness and ability to purchase their units.

In San Francisco, low to moderate income rental housing units of any size cannot be converted without being replaced with alternative housing on a one-to-one basis for low to moderate income, rental purposes. San Francisco monitors proportions of rental and home ownership housing in the municipality to achieve a particular balance of tenures. It then allows conversion when it is considered there is a sufficient amount of rental housing.

As with Santa Monica, a precondition for conversion is the willingness of a proportion of tenants to purchase their units with, in this case, elderly and disabled tenants given extended rental leases after conversion and 10% of converted units remaining permanently affordable. Other options in San Francisco involve 10% of units converted being constructed off-site or a
levy paid to the municipality. Conversion of residential hotels or 'single room occupancies' (referred to as rooming houses in Australia), are also controlled in San Francisco unless units or rooms are replaced on one to one basis.

**Land Subdivision Controls**

San Francisco has large tracts of commercial and industrial land on its east shore, some of which is being converted to residential use. The municipality has required that where this change of use occurs and the land is suitable for residential use, that 10% of units be made permanently affordable. To partly compensate developers, density bonuses and financial subsidies are provided by the municipality.

**Incentives**

Incentives used by the four municipalities can be categorised into nine types. These types are the provision of loans, the provision of grants, the provision of density bonuses, allowing phased construction, relaxing development standards, fast-tracking of planning permits, waiving fees, providing loans from housing bonds and the provision of tax credits.

**Loans**

Access to loans with attractive terms are available to developers providing affordable housing. These loans came from a variety of sources which directly include municipalities as well as Re-development Agencies and bond programs operated by banks, municipalities and the State of California (bonds will be discussed towards the end of Chapter Three).

Re-development Agency loans will be discussed here as municipalities do not always directly lend to developers from their general budgets or housing funds. However, such loan mechanisms could equally apply to municipalities directly. Redevelopment Agencies are powerful, semi government agencies established to compulsorily acquire land, assemble sites and sell land for private sector re-development within a designated re-development area. Once designated, property rates (taxes) from that area are fixed with Local Government continue to receive the same amount of property rates/taxes from that area in succeeding years. However,
increased rates/taxes from the improvements/redevelopment of the site are paid into a re-development tax increment fund and are often known as 'tax increments'. These funds can be used to pay for a variety of projects, often involving shopping complexes but including low income housing. Often a Development Agency is required to allocate a given percentage (20-25%) of tax increments to low income housing projects by way of grants or loans under a variety of terms. Re-development Agencies are widely used within the greater metropolis of Los Angeles due to its extensive amount of urban blight, limitations on physical planning controls and large scale re-development of urban areas. Two examples have been obtained from Santa Monica: deferred loans and 'normal 'loans.

Deferred loans (or residual receipt loans) are available for non-profit developers providing low income rental housing by way of acquisition, rehabilitation or construction. These loans defer interest and principal payments for the life of the loan (usually 30 years). In return rents are restricted to affordable levels for periods of between 30 and 75 years. Loans are waived or 'forgiven' if the affordability restrictions are adhered to for 50 years, thus converting the notional loan to an outright grant. A maximum of US$45,000 is lent for any one project.

Normal loans involving principle and interest repayments are also available from the redevelopment agency in Santa Monica. To be eligible for the normal loans, developers must provide affordable housing in market-rate housing or office developments. A maximum of $60,000 per unit is available. Loans are waived (thus becoming grants) if there is 75% initial occupancy by low to moderate income households and rents are deemed to be affordable.

**Grants**

Grants are available from States and municipalities but Federal Grants are mostly used. The most well-known Federal grant is the *Community Development Block Grant Program*. This is provided across the USA by HUD.

The flexible use of this grant is one of its features. Funding is available for housing provision and/or services or projects which improve residential 'amenity' and urban blight. This can include property acquisition, demolition, relocation, construction, provision of public facilities and historic building preservation. Community Development Block Grants are usually used to 'write down', subsidise or offset the cost of developments to make them viable. They are often
used in combination with other incentives such as bond financing or tax credits (described below) as pooled project funding, an important feature of project funding in California which is described in Chapter Five.

Recipients of grants can be for-profit developers and non-profit developers, community agencies and neighborhoods. For-profit developers comprise developers providing or required to provide affordable housing under regulatory agreements through the planning permit process. Non-profit developers tend to seek grant funding specifically to provide affordable housing. Issues associated with maintaining housing affordability in these scenarios are discussed in Chapter Five. The role of municipalities, however, is integral to this program because they undertake the up-front administration of the grant. This involves assessing project eligibility and applying for funds on behalf of HUD.

Further, as a condition of being able to allocate these grants, municipalities are required to undertake a review of housing needs, conditions and municipal housing goals. This encourages the appropriate targeting of grants. It also encourages supportive municipal policy for those municipalities without housing policies or for those needing to refine them. Municipalities also become accountable to the Federal Government for expenditure decisions under grant guidelines.

A second and more recent form of grant is the Home grants which were available after 1992. Established under the Cranston-Gonzales Affordable Housing Act 1990, this grant also is provided by HUD across the USA In contrast to Community Development Block Grants, Home grants specifically target affordable rental housing providers. Municipalities administer the funding allocation. The grants are available for site acquisition and improvement (both on and off the development site which is the subject of the application for the funds), rental housing rehabilitation and construction, financing costs and rental assistance. However, programs emphasise the rehabilitation of existing rental housing.

To be eligible, 20% of units in a project must be set aside for very low income households paying rent which comprises 30% of median area income; or 40% of units need to target households paying rent comprising 60% of median area income. Housing must also be for
households earning less than 80% of median area income with a majority of households earning below the median income. Further, rents are also set at a given percentage of median area income.

Of the total annual Home grants available, 60% are set aside for cities and counties with 40% being for states. A minimum proportion of available grants are set aside for specific recipients: 15% is set aside for community-based, non-profit developers and US$14 million are set aside to provide technical assistance to non-profit housing sponsors and project seed money.

Municipalities must be able to demonstrate a housing shortage to be eligible to allocate grants. In addition, municipalities or states are required to contribute funds at the ratio of one municipal/state dollar to every two, three or four Home grant dollars, depending on the type of project. Contributions can include land value, foregone value of fees or taxes and the value of on and off-site improvements, but they usually excludes low interest loans unless the loans are committed to municipal or State contributions to Home grants.

Density Bonuses

This incentive, enforced under the planning permit process, enables developers who provide affordable housing to increase their developments' densities to higher levels than those normally allowed under planning zoning for developments which satisfy the zoning conditions. A 1980 State of California law requirement, this incentive is available in all Californian municipalities. However, each municipality allows a density bonus under differing guidelines, for example in Santa Monica, San Diego and San Francisco.

In Santa Monica, three levels of bonus are available for three different types of developments. Firstly, there is a 25% bonus on the number of units allowed on or off the site of the development for residential developments with 5 or more units. To be eligible, 20% or more of units must be for renting households which have incomes at a given percentage of median area income and which will pay a given percentage of their incomes on rent. This bonus is safeguarded by deed restrictions on affordability which apply for 30 year terms.

Secondly, a 75% density bonus is allowed for affordable rental housing for low income households provided in the 'down-town' area. This bonus specifically aims to encourage such
housing in areas which have less rental housing, higher land values and which have greater likelihood of commercial development. These bonuses are made possible by allowing higher height controls. Thirdly, where affordable rental housing is provided in commercial development in the 'down-town' area or in commercial zones, a 25% floor area ratio bonus on the residential use is allowed. This bonus is calculated on the gross residential area, not the total development's area.

In 1990 San Diego was considering adopting a draft density bonus policy. This would allow for a bonus of 25% more residential units than would be normally allowed by the zoning where some affordable housing is provided. This could be negotiated to a 50% bonus where very low income housing is provided. Eligible projects would need to comprise 6 or more units. 25% of the units would need to have affordability restrictions pertaining to household incomes and maximum rents charged. Further, restricted units would also required to be similar to market rate units in the same project.

Most other aspects of municipal planning codes, regulations and ordinances are not overridden by density bonuses. Some zoning, however, do not allow density bonuses.

Various safeguards and enforcement mechanisms are used to maintain affordability restrictions. These include regulatory agreements, tenant income certification and fines for default of the agreements. For example, San Francisco provides a 25% density bonus on the number of residential units allowed. This bonus applies to projects providing 20% of units for lower income households, 10% of units for very low income households or 50% of households for elderly persons. A 50% density bonus is available for projects solely providing housing for elderly or disabled persons.

**Allowing Phased Construction**

This incentive enables construction of particular development components over an agreed period. This period would exceed that normally allowed through the standard conditions of the planning permit. For example, Santa Monica allows this incentive. In return for phased contribution, developers need to provide affordable housing or meet other community needs under restrictions which last for at least 40 years.
This incentive would provide a number of benefits for developers. These include the ability to complete and receive income from one component of a development before being required to start the next; the ability to coincide the release of completed components with any improvements in market conditions; the ability to apportion released units or floor space amongst a limited demand for such units or space over time; and the ability to access development funding on a component by component basis.

Relaxing Development Standards

Most municipalities offer a negotiated relaxation in development standards in order to make affordable housing provision more cost effective. Two examples of this situation are Santa Monica and San Diego.

In Santa Monica, projects seeking density bonuses may negotiate a relaxation of the zoning code and architectural design requirements where the negotiated standards still exceed the minimum state standards. These standards can include reduced set backs, square footage and car parking requirements.

In San Diego, projects providing a given proportion of affordable units are allowed a modification of development standards such as car parking requirements as well as relaxed building codes. For example, single room occupancies (rooming houses) may have sprinkler systems installed to replace fire rated doors (now a common allowance in Australia) use plastic instead of metal sprinkler system pipes (Lawson, 1993: 27) and as well, provide smaller room sizes such as 150 square feet (16.7 square metres) for one to two persons.

Relaxed standards can be very attractive to developers and facilitate the provision or inclusion of affordable housing. Lowering standards can decrease the amount of floor space and increase the number of units provided or increase building height allowable. This situation benefits the developer. Relaxed car parking or open space requirements mean the developer can avoid costly construction and the cash in lieu contributions to municipal car parking or open space funds. The building achieves greater site coverage and, therefore, the developer is assured of greater returns.
Fast Tracking of Planning Permits

The speedy processing or 'fast tracking' of planning permit applications is offered as an incentive to developers in San Diego and San Francisco. Fast tracking can reduce holding costs and enable developers, with careful project planning, to time the release of housing or floor space and take advantage of market trends. As one developer noted,

municipal officials have become sophisticated negotiators - they know how much developers abhor interest costs and other expenses associated with delays of any kind (Korpacz, 1990:13-8).

San Diego offers fast tracking for developers who provide some affordable housing while taking advantage of other incentive programs, such as the density bonus program. San Francisco, however, has a more comprehensive policy of fast tracking which offers a 'one stop' permit processing centre and a preventative strategy for potential delays. Here, all applications involving affordable housing development are fast tracked using a streamlined administration process.

Further, in San Francisco, potential delays are avoided by preparing Environmental Impact Reports at the area level to prevent the requirement of individual development reports. Environmental Impact Reports are integral to the planning permit assessment process in California and many U.S. states. They are additional to normal statutory planning assessment and can include consideration of land use and aesthetics, cultural resources, circulation and parking, air quality, noise, business and employment, energy, geology, soils and hydrology. These reports can take up to 12 months to complete for larger projects and can significantly increase holding costs, especially when they do not comply with municipal planning codes to be classified as an as-of-right use. Further, proactive neighborhood 'consultation' meetings minimise appeals over particular projects and build community acceptance of affordable housing projects.

Waiving Fees

Fees for planning and building permits are waived by San Diego as an incentive for developers providing some affordable housing. This incentive is poorly documented in municipal codes,
guidelines and policies in 1990 when primary research was undertaken and, consequently, no
details have been provided on this incentive.

Housing (Revenue) Bonds

Bonds are a written contract evidencing a long-term, fixed interest bearing loan or security
issued by the State or by local authorities. Bonds are floated on the market and purchased by
investors. In return for the proceeds of the bonds, organisations which float the bonds, such as
municipalities and states, are required to pay investor interest on the proceeds. Interest rates are
usually lower and give investors a slower rate of return, but nevertheless a safe and secure
investment compared to the risks involved with shares or property investment. Bonds also often
attract Federal tax exemptions. The net proceeds obtained by municipalities or states are then
allocated to a housing fund and subsequently lent as tax exempt financing at below market
interest rates to developers who provide affordable housing.

Bonds have become a major source of producing off-budget income and a way of overcoming
some of the limitations of Proposition 13, the state law which limits the collected amount of
state and municipal tax (see further discussion in Chapters Two and Four). In some Californian
cities bonds are used specifically to fund affordable housing.

In Los Angeles and San Diego, bond finance is provided to developers as primary financing. In
Dan Diego it is also provided for secondary gap financing to ensure project viability. When
developers seek secondary financing in Los Angeles, they must provide 15% equity to a
project. The interest rate for bond finance was 7% in Los Angeles (in 1990/91 when the
research was undertaken) and 2% below current market interest rates in San Diego. Los
Angeles lends up to $20,000 per unit of affordable housing or $20,000 per unit for all units in a
priority housing area where housing is for very low income persons. Up to $40 million is lent
for any single project or $50 million for projects pooled for common funding. Bond financing
is often combined with density bonuses and Federal or State tax credits as a package of
incentives. Due to this complexity, financing of bonds in both municipalities is managed by
bond finance teams and usually comprise bond counsel, investment bankers and underwriters,
the trustee, lenders and developers.
Loans are given for 30 year terms in both municipalities. In Los Angeles, loans are given for construction costs and permanent financing with a ceiling of 24% of a loan available for land acquisition. In San Diego, loans are given for capital and financing costs including acquisition, construction, improvements, architectural and engineering services, construction interest and loan fees of up to 25% for land acquisition. In both municipalities, loans cannot be used to finance previous debts held by developers.

Projects in Los Angeles receiving financing must set aside 20% of units for households at rent levels not exceeding 50% of median income or set aside 40% of units rented at or below 60% of area median income. In San Diego, 20% of units in projects must be set aside for households earning at or below 50% of area median income or 40% of units for those earning at or below 60% of area median income. Restricted rents are based on guidelines provided by HUD. These restrictions are for terms of 30 years in Los Angeles and 15 years in San Diego. Remaining, non restricted units can be rented at market rates.

Restricted units must also be evenly distributed throughout the development. In San Diego added requirements demand that amenities, floor areas and access to facilities such as communal tennis courts or swimming pools are the same. These measures are aimed at reducing the marginalisation of low income households and treating them differently from the remaining residents in the development. In Los Angeles, areas with little affordable housing as well as ethnic minority and women owned businesses receive priority attention.

To be eligible, developers in both municipalities must pass stringent viability tests. These include a sufficient estimated income, development expertise and financial strength, loan originating servicing, underwriting and credit support from financial institutions. Finally, approval is required from the State of California Debt Limit Allocation Committee. In Los Angeles, developers who borrow bond funding must provide a minimum 55% equity. Developer’s using housing bonds must also comply with all normal planning and building codes. In San Diego, eligible projects must have a minimum development size of 75 units with no ceiling on development sizes. Small projects unable to comply with the stringent financial viability tests can be pooled for common financing.
Safeguards against non compliance as well as methods of enforcement used in bond financing include regulatory agreements recorded against properties; further restrictions on encumbering of properties; repayment of principle and interest when breaking the agreement through sale, transfer or conveyance of land; refinancing of loans on extraction from the project's affordability provisions; and annual income certification on tenants from the restricted, affordable units. The effectiveness of enforcement mechanisms is described in Chapter Five (section on Affordability Benchmarks, Enforcement Mechanisms and Subsidies) and Table Seven specifically.

**Tax Credits**

Tax credits involve a reduction in income tax liability for owners providing affordable rental housing. This applies to residential developers who set aside a percentage of existing or newly constructed housing for low income use. Tax credits are provided across the USA by the Federal Government as well as by some States such as California. In California, the allocation of Federal and State tax credits is controlled by the Tax Credit Allocation Committee based in Sacramento.

Eligible projects can involve new construction and the rehabilitation or acquisition of buildings at risk of conversion. Credits are calculated to yield either 70% of the building value over 10 years for project costs involving construction and rehabilitation or 30% of the building value over 10 years for project costs involving acquisitions in conjunction with rehabilitation.

Federal tax credits are used as a primary means of financing a project. State tax credits are used for secondary gap financing only where Federal credits are insufficient. Credits are only available when required to make a project viable. For each project, developers may apply for Federal tax credits annually for 10 years and state tax credits may be applied for on an annual basis for 4 years.

Affordability restrictions are similar to those used for housing bond programs, involving maximum allowable income levels and rent levels. The compliance period of up to 30 years applies for income and rent restrictions. Tax credit funds are set aside in the allocation process and made specifically available for projects where affordability is maintained for 30-55 years for three types of projects: 10% of funds for non-profit organisations (non-profit developers)
directly involved in the project or in partnership with an investor; 20% of funds available for rural projects; and 2% of funds for small projects of up to 10 units.

Generally, priority is given for projects with the following characteristics (in order of highest to lowest priority): lowest income tenants where affordability is maintained for 30 years; projects involving restrictions generally for 30 or more years; housing for large families (3 or more bedrooms); homeless or extremely low income persons; transitional and rooming house ('single room occupancy') accommodation; projects already Federally subsidised and at risk of conversion; projects with tax exempt organisation participation, e.g. municipal contributions to the level of 15% of development costs, or significant owner equity of at least 30% of development costs; projects providing special tenant amenities such as on-site child care and unit security systems; and projects located in areas where it is difficult to provide affordable housing. Priority is determined by a point system.

A range of tests are applied to determine suitability to funding. Applicants must demonstrate financing commitments of at least 50% of project costs (including tax exempt bond financing); a successful track record in construction, maintenance and management of rental housing; confirmed construction contracts, loans, site acquisition, permanent financing, planning and other approvals; free title or long-term leasehold; and housing needs in the area and other requirements.

The above assessment is undertaken by a Local Reviewing Agency appointed by the municipality. In the absence of such an agency, municipalities or housing authorities may be asked to evaluate an application. Credits are only allocated upon project completion, submission of acceptable cost documentation and required financial feasibility information.

To safeguard against non-compliance with affordability restrictions after tax credits have been allocated, the performance deposit equaling 4% of the first year's Federal credits can if necessary be forfeited. Further, as income and rent agreements are recorded against the property title, it is enforceable against future owners within the agreed period. This prevents speculative trading of property once tax credits have been given.
Conclusion

The wide variety of development controls used by municipalities restricts the activities of developers in substantial ways. This restriction particularly applies to the 'set aside' requirements placed on developers because it forces them to provide a proportion of their development for low income households (up to 25% of total units in the development) and allow a mix of housing affordability which they otherwise would not consider. However, the variety of incentives offered in association with the controls often match the variety of controls. Density bonuses, for example, can comprise between 25 and 75% additional units or floor area compared to the number of units or areas usually allowed.

A number of issues can be extracted from the description of the controls and incentives. These include the reasons for Californian municipalities providing choice and flexibility to developers in the manner in which controls are framed; the mitigation of controls by incentives; control effectiveness in relation to the location of the municipality; the legal ramifications of the controls; and mechanisms to ensure that set-aside units remain affordable. These issues are discussed in Chapters Four and Five. An understanding of these issues assist with analysis of the effectiveness of the controls in California and their relevance to Australia as discussed in Chapter Six.
CHAPTER FOUR:

Issues Arising from the Use of Developer Contributions in the U.S.A

Introduction

This chapter will examine the preconditions necessary for an effective developer contributions program in housing in Australia, with specific relevance to Victoria. Analysis focuses on housing and specifically focuses on affordable housing in the next chapter.

Examination of implementation conditions considers two key concepts: predictability and flexibility, which, in the author's view, are critical to understanding the approaches taken by municipalities.

As indicated in earlier chapters, housing policies and programs involving developer contributions specifically for community housing have operated in the USA for about 20 to 30 years. This has resulted in three relevant outcomes: firstly, a range of contentious issues which are receiving ongoing debate in public and private arenas have arisen. Secondly, documentation of this debate occurs in evaluative literature. A limited number of useful texts and studies exist given the scope and history of developer contributions and their impact on the planning process. Lastly, a useful though limited body of information in the texts exists on programs which have developed extensively over a sustained period so outcomes can be evaluated.

Evaluating issues associated with established programs as well as their implementation processes provide a valuable guide for any new, similar Australian programs and their attendant issues. Establishing mechanisms and guidelines for obtaining developer contributions without considering relevant issues is to risk developing policy in a haphazard way without learning from the experience of overseas programs.
This chapter, along with Chapter Five, examines issues without reference to Australian relevance. Chapter Six discusses the relevance of the U.S. experience to Australia and draws parallels with Australia.

The Approach to developers: Predictability and flexibility

Introduction

A common theme in literature on developer contributions is how land use planning authorities, be they municipal, regional, state or federal authorities, approach developers.

While social objectives underlie developer contribution programs, the central issue is to determine whether they achieve this by hindering and policing developers with no consideration of their effects (or even as a disincentive to development) or by controlling the development process to achieve the social benefits at the same time as minimising unreasonable or unnecessary financial impacts on developers and establishing greater developer acceptance for the programs.

This section examines how municipalities and other planning authorities can and should aim for the latter objective by crafting developer contribution programs. Central to this aim is how predictable, clear, well documented and flexible program requirements are (Mallach, 1984, Frank and Rhodes, 1989). As a corollary, the latter section of this chapter on ‘Development Viability’ examines this aim from a developer’s perspective. Combined, the two issues seek to balance the needs of municipal social objectives with the developers’ profit making objectives.

This part of the thesis, therefore, argues that the role of ‘The State’ should be to reduce unnecessary hindrance or disregard for the private development process by making the contributions more attractive to developers while also achieving the desired social benefits. This thesis seeks to demonstrate how developer contributions can be tailored to better suit the interests of developers while also addressing housing need.
Predictability and Flexibility

A public policy dilemma in any is that program objectives or the policy itself can be contradictory. This contradiction occurs in two program objectives:

1. policies and programs should be clear, well documented, predictable as well as consistently applied; and
2. controls should be flexible so as to provide options for developers to choose between.

Developer contributions illustrate public policy dilemma. While each principle in itself appears to be common sense and reasonable, together they appear to be conflicting, i.e. greater flexibility increases unpredictability for the developer as well as the municipality and affected community. This is a broad issue for any planning control but is more contentious because contributions apply over and above other planning controls or requirements.

The first principle is based on the view that outcomes ought to be predictable from the start. This will ensure that within the program there is equity in the way a municipality treats developers. Two different developers for example will be treated equally regarding similar developments. Assumedly treating of developers equally also helps to generate greater interest among developers to participate in programs. Equal treatment also reduces the likelihood of either legal challenges or a developer appealing 'unreasonable' costs.

When municipalities clearly document policies and their implications, developers can evaluate the cost of controls and incorporate them into the feasibility studies from the start of the development process (Furnald and Snaman, 1987:159; Mallach 1984:128). As part of the feasibility study, evaluation helps developers to determine (with full knowledge 'public prices' to add to the development costs) whether or not to proceed (Fernald and Snaman, 1987:154).

However, theory does not always fit practice. Firstly, Mallach (1984:128) contends that many developers perceive the provision of low income housing to be an arbitrary burden rather than an obligation. Developers, consequently, tend to prepare financial plans which exclude the cost of providing low income housing and then add or superimpose these costs onto the financial plan as an afterthought.
The second shortcoming of practice is that Californian municipalities are not always predictable. A survey of all cities and counties in the USA (totaling 11,722) was undertaken by the Homer Hoyt Center for Land Economics and Real Estate at Florida State University in 1985 (Purdum and Frank, 1987:126). The survey covered exactions of all types and for all facilities and infrastructure, including low to moderate income housing.

Respondents (public authorities) were asked how they determined the amount of land to be dedicated or set aside for whatever purpose—whether it was determined by a fixed formula, based on standards with a precise requirement negotiated or determined case by case. Of the 35.6 percent of communities with such controls, 21.9% used a formula, 30.1% used standards with the precise requirement negotiated and 35.6% used case by case negotiation (Purdum and Frank, 1987:126).

However, Purdum and Frank’s study was cross-sectional at one point in time so is not a good indicator of trends. Nevertheless, within this limitation it is still useful to note that Purdum and Frank found that negotiated and therefore more unpredictable controls are widely used. While Purdum and Frank explain their finding on the basis that, although most exactions are for roads, sewers, drainage and other engineering requirements determined by the unique characteristics of each site or facility, they argue that negotiated outcomes are used increasingly in the USA.

This finding in the USA paralleled the advent of flexible zoning which, since the early 1960s, had freed the development process of rigid zoning. This rigid process specified planning requirements such as lot sizes and building set-backs and required a process of negotiation (Weschler et al., 1987:19).

This tendency becomes more obvious when a planning applicant wishes to change the land use or development standards applicable under a zoning ordinance (Frank and Rhodes, 1987:10-11). Exactions negotiated case by case are almost unpredictable except where it could be assumed that the last negotiated outcome to some extent sets the standard or expectation for the next one (Porter, 1987:119).

The second principle underpinning contributions is flexibility which refers to how the exactions can be contributed. As illustrated in Chapter Three, the four Californian municipalities offered developers an option to contribute a proportion of total units provided as affordable units.
either on-site, off-site or by way of a cash or land contribution in lieu of this direct provision. This tendency is common throughout the USA (Porter, 1987:12). Porter argues that these options enable developers to determine which option best suits their individual requirements given the nature of the site, project financing and development scheduling.

Providing developers with flexible, alternative financing sources is also considered an attractive replacement for expensive construction financing. Alternative financing can include tax or rate increment financing (using increased rates accrued from redeveloped land developed by Redevelopment Agencies) (Porter, 1987:120); attractive loans such as tax exempt bond financing; community reinvestment corporation loans from banks pooling funds for affordable housing developments (as discussed in Chapter Five) or grants used to increase a project’s viability. Such a wide choice of funding options enable municipalities to pool funds during negotiations with developers and meet the project’s needs.

Flexible payment methods can also be provided. Allowing exactions to be paid closer to the commencement of project income or from project income will greatly assist a development’s viability. Porter (1987:120) gives examples of payment stages, and these have been supplemented by other payment stages used by Californian municipalities. The implications for project financing have then been provided and the payment options ranked from a developer’s perspective (see Table Four).

Table 4  Stages in a Development in which an Exaction, Developer Contribution or Levy can be Sought

<table>
<thead>
<tr>
<th>Project stages</th>
<th>Implications for project funding</th>
<th>Likely Preference from a developer's perspective **</th>
</tr>
</thead>
<tbody>
<tr>
<td>Payment when the land subdivision is issued *</td>
<td>Up-front cost</td>
<td>6 (worst)</td>
</tr>
<tr>
<td>Payment when the planning permit is issued *</td>
<td>Up-front cost</td>
<td>5</td>
</tr>
<tr>
<td>Payment when the building permit is issued</td>
<td>Up-front cost</td>
<td>4</td>
</tr>
<tr>
<td>Payment when the housing units or the building have/has been sold (for home ownership or commercial use) *</td>
<td>Cost borne from returns</td>
<td>3</td>
</tr>
<tr>
<td>Payment when a certificate of occupancy has been issued (for tenancy or after sale)</td>
<td>Cost borne from returns</td>
<td>2</td>
</tr>
<tr>
<td>Payment from project income after returns have been made over several years *</td>
<td>Cost borne from returns or invested returns</td>
<td>1 (best)</td>
</tr>
</tbody>
</table>

* From Porter (1987:120) (part of column one only).
** The lower the number, the higher the preference.
Municipal policy makers can tailor the timing of contributions to both suit the reasonable needs of developers and minimise punitive impacts. This involves understanding developers' critical concerns in relation to project phases, as set out in Table Four. This approach, however, is not always applied. When legal powers are used to exact developer contributions this is sometimes at the expense of building widespread stakeholder acceptance in the development process.

Lastly, planning codes or development standards can provide flexibility, as described in Chapter Three.

How much conflict exists between providing predictability and flexibility will depend on how well it has been negotiated. Conflict can be reduced for example if negotiations regarding building dispensations or payment stages of the exaction occur early enough in a developer's project feasibility assessment. Further, if the policy clearly describes the municipal approach to issues such as such as exaction calculations, the range and conditions of incentives offered as well as the timing and flexibility of payment options, the developer can assess possible outcomes and the project's viability. The developer is aware of both positive and negative outcomes either before or at the start of negotiations.

The most significant choice offered to Californian developers is the opportunity to construct housing either on or off-site or contribute in lieu by paying a financial exaction/contribution/levy. Chapter Three described how four Californian municipalities offered developers choice between these options. However, municipal documentation provided for developers does not indicate preferred municipal options. This raises the question of whether municipalities prefer that developers choose one option and, if this is the case, why they have a particular preference and whether developers have similar or different preferences?

The Homer Hoyt Centre's survey of US municipalities asked whether municipalities required developers to provide facilities (which includes housing) and/or dedicate land or make a cash payment. Most responded that their preference was to build or install facilities off site or even dedicate land rather than provide a cash contribution. Regarding contributions for low income housing the same study found that the difference was less marked.

Appendix Three illustrates how the frequent use of different types of developer contribution varies according to the municipality's status as a city or county and according to the
municipality's population. In particular, it illustrates that contribution by land dedication or building/installation of housing is preferred by both cities and counties against cash contributions; that the use of land dedication and building/installing contributions increases in municipalities with higher populations, i.e., over 500,000 people; and that large cities of 1 million or more people tend more often to state that they 'sometimes' used cash contributions.

About 41.2 percent of municipalities never required developers to make a cash contribution. Reasons included lack of development in the area (15.3 %), development approval the responsibility of another level of government (4.2%) or because State law prohibits such a requirement (2.7%). Purdum and Frank (1987:137), interpreting these results, say this demonstrates there are no political impediments in the USA to using cash contributions.

The survey also investigated the location of the required facilities relative to the development site. It found most facilities located on the site of the development (71.6%) compared to facilities located adjacent to the site (2.8%) and facilities located on another site (20%) (Purdum and Frank, 1987: 137). When location of facilities was correlated with the type of contribution required by the municipalities, results illustrated how most types of contributions (cash, land or provision) were for on-site facilities rather than for facilities located nearby or in another location (see Table Five).

Table 5 The Location of the Facilities for Which the Contribution is Made by the Type of Contribution.

<table>
<thead>
<tr>
<th>Location of the facility</th>
<th>Type of Contribution</th>
<th>Land</th>
<th>Provision (Build/Install)</th>
</tr>
</thead>
<tbody>
<tr>
<td>On site</td>
<td>23.0</td>
<td>63.6</td>
<td>60.8</td>
</tr>
<tr>
<td>Adjacent to development site (within 1/2 mile)</td>
<td>3.2</td>
<td>5.6</td>
<td>2.3</td>
</tr>
<tr>
<td>Off site</td>
<td>5.0</td>
<td>2.0</td>
<td>1.7</td>
</tr>
<tr>
<td>No requirement</td>
<td>12.0</td>
<td>2.4</td>
<td>5.2</td>
</tr>
<tr>
<td>Varies</td>
<td>6.1</td>
<td>4.1</td>
<td>3.7</td>
</tr>
<tr>
<td>Not applicable or not answered</td>
<td>50.7</td>
<td>22.2</td>
<td>26.4</td>
</tr>
</tbody>
</table>

N.B.: Contributions are for all types of infrastructure and services including the provision of low income housing.


Attitudes by municipal staff regarding whether or not it is preferable for developers to provide low income housing or make a cash or land contribution, vary considerably. All the four surveyed Californian municipalities prefer developers to provide affordable housing rather
than to contribute cash in lieu of this provision. For example the City of Los Angeles stated that the number of affordable units can be maximised where they are provided by developers rather than having the municipality spend the funds. This is because municipal spending of funds is considered to be less 'efficient' (as if to imply that the value of housing provided exceeds that which can be provided by a cash contribution); and that a greater social mix can be provided on development sites by requiring affordable housing to be dispersed with market rate housing. However, it was acknowledged that cash contributions do increase flexibility and that there is greater choice in how the city can spend the funds compared to how a developer will meet municipal requirements. Staff at the City of San Diego also prefer that the developer provided affordable housing because the municipality did not have to spend the cash contribution in acquiring land and developing sites.

Some municipalities in the U.S. further prefer that developers provide housing on the site, subject to a development application, rather than on a separate site. New Jersey, an early pioneer and major user of developer contributions, weighted options for developers so that provision on-site was less costly than provision on another site and was less costly than a cash contribution (Mallach, 1984:116). This thesis notes that even the New Jersey Court in the Mount Laurel II judgement favoured 'set aside' contributions without explaining why, although case law trends appear to favour cash contributions (see 'Legal Precedents, Approaches and Ramifications’ later in this chapter).

Mallach (1984:173,177) argues that developer provided affordable housing is preferable because it overcomes the risk of insufficient cash contributions to provide the required units; municipal actors and processes causing delays or obstacles in the spending of any cash; and small or suburban municipalities not often having the technical capacity to undertake their own projects.

Conversely, the cited benefits of receiving a cash contribution to a municipal housing fund or to a housing authority are that it enables the better targeting for spending of funds; the U.S. experience indicates that cash contributions can provide long-term, secure and affordable housing unlike developer provided housing which has restricted rents or sale prices for limited terms under agreement. This major, long-term affordability issue will be discussed further in Chapter Five.
Distinct from municipalities, developers in almost all cases prefer cash contributions despite any weighting municipalities may place on contribution options to discourage the cash contributions. Mallach (1984:116) argues that developers prefer to provide cash and avoid the perceived market risk in providing lower income units.

The above discussion highlights how the debate over preference for direct municipal provision or developer provision of low to moderate income housing is inconclusive. However, this thesis has found the authorities and analysts tend to prefer developer provided housing and for developers to take the converse view.

The ‘Location Related Effects’

No matter how clear, predictable, well documented, consistently applied and flexible a developer contributions policy is, its success is largely subject to what this thesis describes as the ‘location related effect’.

Investors and developers are more likely to comply with affordability controls in locations they consider to have desirable attributes. The attributes of these locations can be variously described as ‘unique’, at a ‘premium’, ‘in demand for development’, subject to population or economic growth or occurring in large cities. These locations may be regional, comprise an entire city or contain just a few city blocks.

Location attributes create a demand from commercial or residential renters or purchasers wanting to live there. Developers, as a result, will accept higher or non-standard costs from controls because they can be passed on to the renter or purchaser at levels premium qualities allow. The same principle applies to the absorption of other, more usual, non-standard costs such as unusually costly sites, high site preparation costs or high off-site improvement costs (Mallach, 1984:90). This view about the benefits for developers of unique, premium or in-demand locations is uniformly found in other literature (Weschler et al, 1987:37; Fainstein, 1990:19; Schwartz, 1988:157; and Logan and Swanstrom, 1990: 20). The general view is that such locations enable developers to externalise the extra costs of the contributions. In effect, certainty is provided by the attributes of the location and not necessarily the contribution program itself. Logan and Swanstrom (1990: 20) note that:
Cities with strong service economies, for example, recognising that capital will not take flight when required to contribute to the commonweal, have enacted linkage policies designed to redistribute some of the benefits of growth.

San Francisco (which, in this case, must be seen as the leader in the grouping of bayside municipalities which include Oakland, Berkeley and San Jose), has a set of useful attributes for developer contributions. San Francisco is subject to population growth, it is California's second largest city, it has desired physical and aesthetic attributes, it has a strong service and computer industry in the greater San Francisco Bay area and it is a major tourist destination. San Francisco, unlike most other U.S. major cities, can rate the need for affordable housing ahead of central business district development (Mallach, 1984:187). Consequently, its Office-Housing Production Program is premised on an acceptance of reduced, future office development as an acceptable trade-off for the provision of affordable housing by office developers. This is because there will still be a sufficient demand for office development despite these controls.

In California, other locations with a beneficial location related effect include San Rafael (Marin County) and Berkeley (which are both across the bay from San Francisco), Sunnyvale and Palo Alto in the Silicon Valley on the southern edge of the Bay, Orange County south of Los Angeles, Santa Monica which is a coastal municipality near Hollywood in greater Los Angeles and parts of San Diego.

In the U.S. generally, similar locations are mostly concentrated in the New England states, eg., Boston, New Jersey, the Mid Atlantic states and West Coast states which have strong or booming regional economies. These economies are usually driven by service or financial sector growths which have externalised some infrastructure costs (Schwartz et al, 1988:157). Outside these areas the authorities are mostly applying controls more successfully in affluent areas such as Aspen or Boulder, Colorado (Mallach, 1984:218).

In contrast, most small scale or small to medium cities in northern or central U.S. such as Detroit or Cleveland, the 'rust belt' areas with declining private investment, could not assertively apply similar controls. These cities are unable to attract much development which creates employment and revenue from increased property taxes. As a result, development at any cost would take priority despite the need for mitigating any severe housing problems (Mallach, 1984:188).
Mallach (1984:96) notes that there is a sense of 'poetic justice' for premium locations to absorb the cost of affordability controls. It is in these communities, he argues, that the most expensive housing and the consequent highest need for affordable housing exists. In these affluent communities, the redistributitional effect is thus enhanced.

Clavel and Kleniewski (1990:211) contend that desirable attributes are not always important. The City of Hartford, Connecticut for example in the 1980s had neither an office construction boom nor land in demand. Unwilling to withhold development, it chose instead to provide developers with financing aid and tax reduction in return for rising linkage policies to finance affordable housing.

Generally, however, these location related effects highlight a number of issues. Firstly, municipalities which do not have these unique or premium attributes may not desire to apply controls or may need to apply them in limited areas fearing they may weaken the property market and contribute to developers relocating to other cities or moving from the central city to the suburbs (Mallach, 1984:187).

Secondly, other municipalities without beneficial location related effects may find that applying these controls eliminates the cost advantage of luxury housing or office development and, consequently, developers will choose not to develop there (Gossman, 1990: 3-8). This will mean that developer contributions will not be provided. This may be a disadvantage where replacing lost rental housing with new and secure, affordable housing is considered a priority higher than controlling the ongoing loss of existing rental housing.

Although elimination of cost advantages will discourage investment pressure and gentrification, it will preserve much of the existing supply of affordable, private sector housing, an outcome some municipalities (eg., San Francisco, Santa Monica) would see as equally desirable or even preferable (Mallach, 1984:189).

Lastly, the success of the controls in unique, elite or premium locations means that affordable housing provision becomes unequally distributed (Mallach, 1984:96). This distribution may conflict with the distribution of housing needs and frustrate policies and programs which are based on wider geographic areas such as greater cities, regions or even states.
In conclusion, cities which have sufficient desirable locations can juggle two diametrically opposed goals: maintaining government control of capital while at the same time remaining internationally, nationally or regionally competitive. The experiences of some Southern Californian cities illustrate that balance can be achieved.

Community Activism

In addition to a favourable ‘location related effect’, many USA municipalities with extensive and successful inclusionary housing programs also have active, progressive communities:

In the United States, there have been a dozen or more communities in which left-leaning groups have dominated or heavily influenced local government and have self-consciously set out a progressive local economic development agenda. These progressive cities have been guided by the aggressive use of public planning to shape the nature of the local economy and a commitment to democratic participation in local decision making by previously disenfranchised groups. (Clavel and Kleniewski, 1990: 202).

While such municipalities include San Francisco and Boston, the best known is Santa Monica in greater Los Angeles. There, the pressure of development has led to high exactions to fund social services and low-income housing, with a strong coalition of progressive movements monitoring the use of exaction monies (Clavel and Kleniewski, 1990: 187).

The significance of community activism is that, firstly, it provides the initial support for the development of progressive policies and programs and secondly, it enables the policy and programs to be implemented without significant electoral backlash and, thus, in an ongoing manner. This environment encourages innovation and risk taking in maximising developer contributions for low income housing.

Development Viability

Introduction

As a general rule, a development’s viability will determine how willing a developer will be to
commence projects. By reducing profit margins, developer contributions could stop a project. Viability developments are therefore for developer contribution policy to succeed. Otherwise developers may:

- invest elsewhere;
- leave sites undeveloped;
- pass the costs on to a land owner (if separately owned) by lowering purchase price or to residential users by increasing rent levels or sale prices of the new housing to cover extra costs;
- design projects differently which may not always be preferred by the planning authority or the community;
- reduce the size or change the type of their development to minimise or avoid exactions; or
- seek whatever means possible including legal recourse to circumvent or mitigate controls.

While municipalities may actually inhibit development, this is usually not the case. Most U.S. municipalities encourage development, benefiting from increased revenue from property taxes and indirectly from economic activity.

It is difficult to determine how controls can be designed to also meet developer needs. The literature fails to adequately discuss developer contributions from a developer's perspective or consider how the level of the contribution can preserve a development's viability. This may be partly because viability would differ between developers, locations and projects. It is also due to a range of specific factors peculiar to each development such as the type of project financing used as well as types of used controls and how they are applied to development. Only specific case studies would illustrate the combination of factors which enable both affordable housing and viable development. Such case studies are, unfortunately, absent from the literature.

Administrators of developer contribution programs tend to pay little attention to developer viability. For example, in the early 1990s the Mayor's Office of Housing, which monitors the ongoing regulatory agreements with developers in the City and County of San Francisco (one of the major U.S. users of developer contributions), undertook (in the absence of any studies) to determine what makes projects economically viable for developers. Using a 'wait and see' approach, it simply administers a policy and program and awaits developer reaction. While the
municipality's Office-Affordable Housing Production Program is based on a nexus study, its policy of requiring a developer contribution from the construction of market rate housing is not based on research. Instead each development is assessed on a case by case basis (called the 'conditional case review') which considers project characteristics such as location, size and housing type. This approach may be because there is a strong and ongoing demand for development investment.

Despite the lack of adequate case studies, it is possible to examine a number of factors which are ingredients to a viable development. These factors comprise the nature of US developers and of municipal developer contribution programs, the character of housing developments and developer and municipal tenure preferences under these programs.

The Nature of Developers in the USA

The ability of governments to successfully implement housing contribution programs in part derives from the national and local characteristics of the residential development industry, and in particular whether developers operate on a large or small scale. Since the end of World War II changes have occurred both in the way developers operate and the way residential development evolved. Large builder developers grew away from an industry dominated by small builders. Today it is an industry accommodating both large and small scale builders (Checkaway 1986:121; Feagin, 1986: 115).

The capacity of companies engaging in residential development after the 1940s and 1950s increased dramatically which was not due to increased numbers of builders but due to increasingly large builders with greater output (Checkaway, 1986: 122). Large builder developers can adapt to fluctuating economic cycles which would ruin or impair the operations of smaller competitors. Large builder developers can expand and contract operations according to shifts in population and demand for new construction. In particular the size of developers affects variously their ability to participate in inclusionary housing programs. Mallach (1984:127) describes how small developers are significantly disadvantaged because they cannot afford innovative design and technology, they are unable to set aside affordable housing on site within small projects without negatively affecting market perception, they cannot utilise economies of scale, they are not experienced in resolving inclusionary housing requirements and cannot afford to employ specialist staff to work with municipalities to meet requirements.
Consequently, they cannot use incentives such as density bonuses or project financing effectively. This has implications for those municipalities which are unable to target small developers because they cannot afford or have no access to inclusionary housing programs, described earlier in this chapter.

Large scale developments or subdivisions seem to be targeted by inclusionary programs for several reasons: They attract more attention from planning authorities; they have economies of scale which better absorb developer contributions with less impact on viability (possibly because they are long-term projects which incorporate substantial cash flows prior to full completion); they possibly contain more contingency land or funds that can be factored in to compensate; large developers may be more amenable because of their anticipated local area market domination; and lastly, they often employ staff (and assumably consultants) with the time and experience to develop creative solutions to problems caused by the controls (Porter, 1987:117). Consequently, they tend to utilise municipal and other incentives more than smaller developments.

In contrast, it is noted (Schwartz, Johnston and Butrow, in Mallach, 1984:127-8) that smaller and mid-sized residential developments or subdivisions were less targeted by controls which include developer contributions. These developers cannot afford the cost of incorporating innovative design or technology; they have small sites which prevent separation of lower income housing components; they are unable to utilise economies of scale and are less able or willing to utilise incentives such as below-market-rate financing or density bonuses if they consider that compliance with the ‘inclusionary’ requirement is a market risk. In short they often cannot incorporate public benefit requirements.

Further, it is inefficient for municipalities or housing authorities to tie up too much staff time pursuing contributions for numerous small projects. Consequently, it may be concluded that larger developments tend to be more often targeted to focus resources for maximum results.

However, in areas with good ‘location related effect’, small developers can often indirectly benefit from inclusionary housing requirements. In Orange County, a southern part of the Greater Los Angeles, much of the county is rapidly being developed by large developers targeting upper-middle income households wanting two level large houses with four bedrooms, three car garages and large living areas. Much of Orange County comprises rocky
hills surrounding and contrasting to the Los Angeles plain which has higher pollution levels, higher levels of crime and earthquake susceptibility. In Orange County large developers have monopolised utilisation of incentives such as density bonuses and bond issues. Many have exceeded municipal requirements for units set aside by often almost entirely providing affordable housing. This enables them to sell credits in lieu of excess units provided to small developers, who otherwise would be unable to meet municipal set-aside requirements. In the process, small developers are absolved from making set-aside contributions to the value of the acquired credits. In selling the credits, large developers made a substantial cash return. Non-complying, small developers pay $15,000 or more per credit which may exceed the loss made by large developers in producing the affordable housing. Thus, credit payments were far more affordable for small developers than to construct affordable housing (Mallach, 1984:128).

Factors Affecting Development Viability: the Program and the Development.

Program related factors which have already been discussed are the predictability and flexibility of controls, including the timing of options for contributions. From a developer's perspective, there are further factors which can affect a development's viability. These can be grouped into two categories: program, and development related factors.

In relation to programs, the literature is limited mainly to Mallach (1984) and fragmented within this text. The principles in this text, argued in this thesis, are believed to be relevant to the 1990s. For this reason they will be heavily drawn upon in this section. A first program related factor is the cost of the contribution (it's 'reasonableness'):

the process of reducing costs through maximising economy and efficiency is a joint undertaking between the developer and the municipality. The regulatory standards and procedures of the typical municipality or county in the United States are riddled with features which generate additional costs which must be borne by developers, often with little or no commensurate benefit to the public. For inclusionary programs to work, the municipality must be aware of these cost-generating features and must resist the natural tendency to seek the maximum possible concessions from each developer seeking to build in the community (Mallach, 1984:58).

Mallach (1984:107, 116) gives an example of an excessive contribution requirement from Bridgewater township in New Jersey involving both an excessive proportion of low income and moderate income units and defining low and moderate income restrictively. It required
40% of a residential development to be low and moderate income housing, of which 15% must be low income and 25% moderate income housing. This requirement had inhibited all new residential development in the seven years prior to 1984 that the control had operated within a zone which was attractive for development. Another example from New Jersey involved allowing a density bonus only if developers set aside 20% of units for low to moderate income persons as well as either the same requirement on a different site owned by the same developer but not subject to the development application or provision of a substantial cash contribution to a designated housing agency for the provision of low to moderate income housing.

Equally inappropriate would be a set aside requirement of, say, 5% (Mallach, 1984:108). Equivalent funds would provide half an affordable unit in a 10 unit development, one in a 20 unit development or five in a 100 unit development. The same principle would apply to inadequate cash contributions. Both would minimally impact housing need, especially where the development resulted in a loss of affordable housing in the first place. Mallach argues that a generally accepted rule of thumb is that a 40% set aside requirement is unaffordable for developers but that a 20% requirement is affordable. The basis for this view is unsubstantiated.

Thus, while developers may never like affordable housing controls, if they are considered tolerable or reasonable developers are more likely to agree to them. This could be considered a test of appropriately crafted controls where a balance occurs between appropriate levels of contributions and development viability.

The role of incentives is a further program related factor which maintains project viability. As described earlier in Chapter Three, incentives facilitate the developer provision of lower income housing. As described in Chapter Two, under Californian State law a municipality is required to offer incentives to any developer providing at least 25% of the total units in any housing development for persons of low or moderate income. Both the legislation in the first instance and the subsequent municipal codes and programs achieve the inclusion of low to moderate income housing within private residential development initiatives with the positive participation of local government offering various incentives.

Mallach (1984:19) states the rationale for these incentives:
if a developer is to be expected to provide low- and moderate-income housing, the
municipality making that demand must ensure, to the degree feasible, that the
circumstances under which he is to develop are conducive to that goal.

Mallach specifically argues that municipalities must ensure a developer can construct a cost-
efficient, economical product; that unnecessary costs should be minimised; and that the
affordability of units should be increased by using outside subsidy funds or municipal
resources. He goes as far as describing a municipality with an inclusionary requirement but no
incentives as irresponsible.

Similarly, excessive developer contributions are arguably benefits which a municipality and its
residents obtain from a developer which they are unwilling to pay for themselves. Consequently, it is only reasonable for a municipality to minimise the imposition of other (ie. non low income housing) contributions from developers providing low and moderate income housing (Mallach, 1984: 63-64).

Providing a package of incentives is arguably also important. In the early 1980s, it was noted
that, outside California and New Jersey, most inclusionary housing programs provided
incentives only in the form of density bonuses, and that this produced only a relatively low
number of affordable housing units in these localities. This reinforces the author's observations
that, in the experience of Californian municipalities, providing a range of complimentary
incentives helps developers to provide affordable housing (Mallach, 1984:221).

Other factors affecting development viability are project related. The factors canvassed by the
literature relate to which party pays for costs incurred by program requirements, the
characteristics of the housing developments as well as their location and design features which
allow developments to succeed where lower income and market rate housing is mixed.
(Another relevant project related factor is that contributions are timed vis-a-vis project
development and cash flows. This has been discussed earlier in the section on the nature of the
municipal approach to developers).

As already discussed, the size of developers affects their ability to be targeted for contributions.
Generally developers can choose where to shift the contribution costs. They can shift the cost
back to the land owner by lowering purchase prices (if the developer is not the owner as often
occurs in the USA), absorb the cost within the project where possible or pass it on to purchasers or renters by imposing higher sale prices or rent levels.

In relation to the effect on land values, affordable housing controls can be perceived by a housing market as a down-zoning of land, thus reducing land value. When a land owner (who is not always a developer) does not reduce land values sufficiently in order to enable a developer to build under the controls, then the developer will either be forced to develop elsewhere or try to achieve economies of scale to compensate for higher land prices. Alternatively, if land stockpiles considerably exceed demand, the controls will, over time, result in declining land values which reflect their reduced values under the controls. However, in areas with land shortage or in premium communities, developers are likely to be forced elsewhere or try to save costs (Mallach, 1984:90).

Continuing this thinking, Mallach argues that land values reduced by controls should be seen not as a devaluation from intrinsic value but from the valuation created by the original or underlying zoning established by the planning authority. He argues that the establishment of zoning or controls which seek inclusions or contributions to affordable housing should be seen as no different from the responsibility to create or change general zoning. In other words, such controls would have the same status as those which prevent demolition for heritage protection reasons or basic land use zoning which limit land use which produce lower returns.

Only empirical studies on the impacts of developer contributions on actual communities can indicate which party pays for the cost of the contribution. Delaney (1989:44) notes that while much of the literature deals with the planning and legal aspects of developer contributions, little of it examines the economic impact except from a theoretical perspective. Two exceptions, however, shed light on this matter. Studies by separate researchers using time-series data in Florida and Colorado (the two other highest using states of developer contributions) are filling this gap in understanding (Delaney 1989:44).

The Florida studies undertaken in the late 1980s examined house price increases in particular cities between 1971-82 to identify any impact of introducing of developer contribution requirements in 1974. In one study, new home prices in Dunedin, Florida, which implemented developer contributions in 1974, was compared with new home prices in another city, Clearwater, which did not implement developer contributions. In the short term, housing
prices for homes, (when contributions of 2-3% of sale price were paid prior to construction), increased by more than (100% of) the developer contribution price. This was possibly because the developer added the contribution costs to the costs of financing increased marketing costs, overheads and profit margins. This price differential tended to disappear over the next 6 years as prices gradually adjusted to the market norm (Delaney and Smith, 1989: 9-10).

Further, the price of existing houses in Dunedin also increased, but by a reduced amount after developer contributions were introduced for new housing development. This price increase tended to lag behind new housing by one year. Delaney and Smith (1989:10) argue that the price increase on existing housing would give existing owners a windfall gain if they sold their property and would reduce housing affordability in that market segment.

The second study in Loveland, Colorado (Singell and Lillydahl, 1990:89) examined home prices between 1983 and 1985 to determine the impact of expanding of the use of developer contributions from traditional water and sewage fees to library, parks, recreation, fire protection, law enforcement and from other fees after 1984. Findings were similar to those of the Dunedin study. While fees increased by $1,182, the price of new housing increased by the greater amount of $4,500, a differential which decreased to $3,300 nine months later. This increase in home prices was explained by the study authors. Firstly, builders may mark up the fee to cover other carrying costs, although a mark up greater than 100% would be unlikely. Secondly, builders used the imposition of the new fee system to review their returns. Thirdly, it is possible that the quality of homes were improved by developers to return a higher sale price more easily achievable at the higher end of the market and would, therefore, cover the cost of the developer contributions (Singell and Lillydahl, 1990:89).

Existing homes were found increased in value by $7,000 - more than the full amount of the developer contributions. This was explained by the theory that impact fees encourage developers to reduce the quantity of new housing built. This situation, subsequently, increases the price and the intensive use of existing, old housing. In fact, anticipation of developer contributions could result in an increase in existing home prices before developer contributions are imposed on new housing in the area (Singell and Lillydahl, 1990:90, 85).
From these findings, it is possible to make the following conclusions about broader market impact and policy implications:

1. Affordability for home purchasers declined by an amount greater than the amount for developer contribution (Delaney and Smith, 1989:101; Singell and Lillydahl, 1990:91);

2. As rent levels are indexed to home prices, rents are also expected to rise (Singell and Lillydahl, 1990:91);

3. The social costs of a reduced supply of affordable housing may be greater than the savings accruing to municipal budgets from developer contributions (Delaney and Smith, 1989:101);

4. Windfall gains for existing home owners should be taxed by municipalities and used on mitigation programs such as interest rate buy downs, reduced down payment requirements, affordable housing, renter subsidies or exemption of low cost housing units from impact fees (Delaney and Smith, 1989:10; Singell and Lillydahl, 1990:101); and

5. Developer contributions, by increasing property values, also increase municipal revenue to fund increased infrastructure costs without creating opposition from existing home owners who are not affected by the developer contributions (except where they face increased property taxes)

(Singell and Lillydahl, 1990:91).

Another important issue is both the impact on the surrounding area of inclusionary housing requirements involving the mixing of lower and market rate housing in projects and the ability to incorporate affordable housing in gentrified or affluent areas. The literature is mostly silent on this issue. Some anecdotal evidence, however, referred to in Mallach (1984:97-98) suggests that compatibility is possible. He refers to the example of the affluent Princeton Township in New Jersey. By 1980 two large, low-income housing projects had been constructed comprising just over 7% of the total housing stock in the municipality. Following their completion, no market shift occurred in Princeton. Princeton continued to be perceived as a residential community for affluent households. Mallach argues that large scale, low income housing projects can be absorbed as long as they are geographically limited and relatively well defined. Unfortunately, he fails to describe other examples to endorse his contention.

Equally relevant is the impact on the development when developers are required to mix housing for lower income households with affluent households in more up-market developments. This impact is better documented in the literature. Given the principle that houses get better prices if they are surrounded by houses of a similar or greater value, Mallach (1984:98)
acknowledges that requirements for more affordable housing within a development could reduce the price of more expensive housing. He refers to the then (1984) absence of empirical evidence to support this principle. Instead, he points to anecdotal, intuitive and practice-based generalities. He contends that income and price disparities are more tolerable in ‘multi-family’ housing (ie. multi-unit buildings) compared to ‘single-family’ (ie. detached or semi-detached) housing developments. He also contends that the larger the development, the wider the range of housing prices, types and sizes. Both factors, he argues, stem from the ability to design ways of disguising the differences in larger developments.

Just as developers in response to planning controls may alter their projects’ design to avoid or minimise the impact of the control, design techniques can be used to incorporate a variety of floor plans within multi-unit buildings which contain lower income and market priced units. Lower income units can be designed differently from market rate units. They can be physically separated in large developments using visual buffers such as woods, parks, berms, roads, and non-residential development. These techniques have been used in developments of 1,000 or more units (Mallach, 1984:98).

Since Mallach’s writing, many examples of affordable housing set-aside within up-market housing have occurred. Some of these are illustrated in Plates 1 to 5. These examples are of large developments of townhouses in up-market Orange County. Planning permit conditions have required them to include lower income housing mixed with high income, private housing. This mix has not prevented these developments being perceived by project or area residents as luxury housing in the area. Many people are not even aware of this income mix.

Two examples of large, medium density home ownership developments lower income is mixed within the luxury private housing without affecting the area residents’ opinion about the luxury status of the development.

Plate 1 ‘Cyprus Point’, private home ownership development, Mission Viejo, Orange County, California.
Further, Mallach (1984:99) argues that where a developer is building up-market housing and is required to include some lower income units, its up-market character must be established initially by constructing a sufficient number (about 20-25% of total units) of more expensive units. The cost of lower income housing can be borne by returns, as illustrated earlier by Table
Four. He bases this contention on the principle that the more affluent buyers (and assumedly renters) will not be deterred by low-income buyers (and assumedly, renters) where the development’s character represents a middle or upper income community. He acknowledges, however, that it is unclear whether more affluent people will pay the same price for units in a mixed lower income-market rate development compared to non mixed income developments.

It should be noted that Mallach was writing in 1984 and since then many developers have successfully included affordable housing in their developments. The ability to mask lower income housing from market rate housing by utilising design techniques and/or constructing a proportion of lower income units first is relatively easy to achieve in California given the large size of many developments and the accepted norm of design homogeneity in large estate developments.

Unlike Mallach’s argument about distinguishing the lower income units or varying their floor plan, some Californian municipalities require that units have identical floor plans and general appearance. Units must often be scattered evenly throughout the development and built at the same time. This is especially the case for townhouse developments. For example, San Francisco requires affordable units to have the same design standards and to be constructed at the same time as up-market units. These requirements avoid distinction between low income and market rate units in developments which are based on appearance or location, achieving a good mix, avoiding the stigma of 'ghettos' of low income housing and possibly avoiding a negative market reaction to the mix. However it has been argued that these requirements are counterproductive. Mallach (1984:108) argues that such requirements remove a developer’s ability to make low to moderate income housing more economical by reducing floor areas or by modifying internal features. He states that developers should be able to cluster lower income units, unless a convincing case can be made for the negative market effect of this clustering; and that developers should be able to provide lower income units with a lower number of bedrooms than in the case of luxury units (Mallach, 1984:109).

These latter views reinforce the notion that a flexible approach is needed. Developers should be able to find their own design solutions which preserve a favourable market perception for their developments, as long as the quality of the lower income housing under agreed, minimum standards is not compromised. This may be achieved either by allowing cluster(s) of lower income units or by mixing them so that they become indistinguishable. The mix would depend
on the individual characteristics of the area, the development's location and design of the developments and the proportion of low to moderate income housing and the income mix.

The following examples of three rental housing developments in San Francisco illustrate developments in sought-after areas of San Francisco. Lower income units are mixed with luxury units (called 'condominiums' in the USA) in multi level-multi unit buildings under 'set aside' requirements of planning permits. Affordable units are not identifiable and their luxury status unaffected.
Example One: The Filmore Centre

Located midway between the Civic Centre and the Golden Gate Park, this multi-unit group of buildings which varies between 5 and 11 levels was completed in 1989/90. It contains 1,113 rental units of which 20% or 223 units are set aside for low income persons.

Plate 3
The 'Filmore Centre' private housing with low income units included, corner Turk Boulevard and Filmore Street, San Francisco
Example two: Bayside Village

Located in the expensive Embarcadero precinct near San Francisco Bay and downtown San Francisco, this multi-unit, four level block of rental housing was built between 1988 and 1990. Of its 868 studio, one and two bedroom luxury apartments, 174 or 20% are set aside for low income households at affordable rent levels.

Plate 4: ‘Bayside Village’ private housing with low income units included, corner of 1st. Street and Brannan Street, San Francisco
Example Three: Rincon Centre

These multi-unit, 17 level twin towers contain 320 units. It is located on top of 6 levels of offices and alongside and incorporating the old, art deco style, former post office building which has been converted to offices. It is located in the 'downtown' (central business) area and, of its units, 20% are set aside for low income persons and 20% for moderate income persons, or 120 low to moderate income units to total.

Plate 5 The ‘Rincon Centre’, private housing with low income units included, corner Mission Street and Spear Street, San Francisco.
Few examples involving up-market home ownership housing in San Francisco exist. Additional research on this issue could be worthwhile.

**Tenure Preference Under Municipal Inclusionary Housing Programs**

It is worth examining the outcomes of overall municipal housing programs in relation to the tenure and income group they are provided for. Figure 1, using data from San Francisco and Los Angeles inclusionary housing programs, provides an insight into program outcomes for tenure and income groups.

The San Francisco housing summarised in Figure One, (including the above three examples shown in Plates 3-5), comprised a sample of the recent projects (with available data) at the time of the research visit. The sample showed that 33 new, multi-unit or cluster housing developments had been constructed between 1988 and 1990 comprising 6163 units. Of these units, 1930 or 31.3% comprised lower income units set aside under regulatory agreements. Of these, 87.7% (1694 units) were low income units for rental purposes, which comprised 27.5% of total units or 38.5% of rental units. Only 15.3% (295 units) of the units for low income households were available for home ownership, and comprised only 4.8% of total units or 16.8% of total home ownership units. All the low income home ownership units were provided through non-profit developers. Other home ownership units were market rate units.

In the case of Los Angeles inclusionary housing shown in Figure One, 225 projects were listed in its inclusionary housing inventory comprising 9129 units. Of these total units, 1310 (14.3%) were designated for low income persons. By tenure, 1128 units or 86% were low income units for rental purposes, which comprised 12.4% of total units and 15.3% of low income units. For home ownership, only 132 units or 13.9% were low income units for home ownership purposes, comprising 2% of total units or 10.5% of total rental units.
Figure 1  Characteristics of Housing under Municipal 'Inclusionary' Housing Programs in San Francisco and Los Angeles, USA, as of 1990/91 (in percentages).

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Thus, in both municipalities, 70-80% of all units were for rental purposes and 14-31% of all units were for low income persons. By tenure, a higher number of rental units were designated for low income households, especially in San Francisco, than were designated for home ownership units. Low income, home ownership units were of negligible proportions in both municipalities. Experience from other cities, although less well documented, would also suggest a preference for rental accommodation.

This situation appears to suggest that developers prefer to provide rental rather than home ownership housing under inclusionary housing programs. A number of factors could explain this. Firstly, the strong market for rental (apartment) housing in large Californian cities encourages rental tenure. Secondly, developers under inclusionary housing programs may prefer to provide rental housing so that, when affordability restrictions expire, rent levels can either rise to market levels or the units be converted to home ownership. This flexibility would not exist for home ownership where developers immediately lose future opportunities for increased sale profits once restricted units are sold.

The preference for rental units is probably attributable to a range of legislative and policy factors which have made rental housing investment more popular since the mid 1980s. Firstly, in 1986 under the Tax Reform Act, the Federal Government provided the Low Income Housing Tax Credit. This provided tax deductions for privately invested, low income housing under two conditions:

i) if corporations owned the housing;

ii) where investors teamed up with non-profit developers in tax syndications. The developers provided 40-50% of project capital requirements up-front in return for receiving tax benefits through association with non-profit developers.

In relation to the second condition, because municipalities often prefer to allocate their housing trust funds to non-profit developers and most non-profit developers prefer to provide rental housing, this situation served to increase the number of affordable rental housing units provided. For example, this applied to Santa Monica for all its trust funds and San Francisco for funds generated from office development. A likely reason for targeting non-profit developers is that there is the considerable cost to municipalities in monitoring the affordability requirements of rental housing when developers provide it.
Thirdly, there was a governmental preference for the rental tenure. For example, the Federal Home Program only provided Federal grants for rental housing projects. While many municipal programs allowed developers to choose between ownership or rental projects, such as the San Diego or San Francisco 'set aside' or cash contribution programs, many incentives were only provided only for rental projects. These incentives included housing bonds in Los Angeles and San Diego, and density bonuses and deferred loans in Santa Monica.

Since the early 1980's municipalities have improved the mix of controls and incentives to both encourage more rental housing and to make it more viable. Further research on municipal and developer preference and viability issues of rental versus ownership housing under these programs is required. For example, the quantifying of the benefits of particular incentives or packages of incentives targeted at ownership or rental housing would help to identify the comparative viability of tenures under 'inclusionary' housing programs.

**Legal Precedents, Approaches and Ramifications**

So far in this thesis, the specific legal issues affecting developer contributions have been ignored. However, the legal issues in requiring developers to contribute towards affordable housing ultimately determine the success or failure of controls.

Without a legal basis for inclusionary housing controls, municipalities cannot successfully and strategically plan for the social needs of its population. Municipalities are unable to plan without facing risks of planning appeals which could result in municipalities having to compensate developers who win appeals. This compensation is in the form of developer holding costs and legal fees. Developers' ability to overturn the controls affects their profit margins, the type of housing provided and sometimes the location of the project. Generally, any social or ethical basis for inclusionary housing policy has no value without legal enforceability.

**The Legal Framework in the USA**

As described in Chapter Two, in 1980 California adopted enabling legislation for developer contributions. This legislation, based on amendments to the 'Californian Evidence Code' and the 'Californian Government Code', required municipalities to ensure that the housing welfare
of their population was protected. This included designating specific targets for housing low and moderate income groups. Some other states followed, such as New Jersey with its Fair Housing Act, 1985. This Californian legislation provided the clearest and most substantial legal basis for municipal housing programs which require developer contributions. It also provided municipalities with a wider variety of legal routes to achieve affordable housing provision. This contrasted with other states which did not have similar Acts, or before similar Acts were promulgated, they relied on case law. In these other states, while mandatory contributions were legal, they could be found to be illegal if they were based on policies and negotiation which deviated from explicit standards found in land use zoning ordinances required by State law.

In California, other legislation such as the California Environment Quality Act, as utilised by the Californian Air Resource Board, provided a secondary basis for such programs. This legislation required, for example, the provision of affordable housing by office developers in order to reduce air pollution created by heavy commuting. Similarly, the Californian Coastal Act 1976 enabled the Californian Coastal Commission (CCC), which was established to manage coastal planning, to require municipalities along the Californian coast to provide housing for all income groups between 1976 and 1981. They required that 25% of units in new developments be allocated to low to moderate income earners. Although the CCC relied on municipalities to implement the requirements, its role helped to encourage municipal housing plans and programs and provided a uniform approach during the five years it had these powers.

‘Proposition 13’, as described in Chapter Two, provided further justification. A people’s ballot, it provided a ceiling in property taxes able to be levied. This gave municipal endeavors a state constitutional basis and a local, political imperative to raise funds from developers.

Notwithstanding case law precedents, this enabling legislation provided strong bases for municipalities requiring developer contributions, each basis reinforcing the other without contradiction.

Case Law - the Approach of US Courts

Appeals by developers against municipal requirements or by plaintiffs to force a municipality to implement its housing plan are heard by local courts and, on appeal, by State Supreme Courts. The long evolution of the use of developer contributions for infrastructure and
community services, including the provision of low to moderate income housing, has resulted in a court approach which is relatively consistent and supportive, although it contains State variations.

Municipalities have broadly delegated powers to control development and building to achieve the health, safety and welfare of the general community. Accordingly, as argued by Frank and Rhodes (1987:6), the State does not require that Local Government adopt particular statutes and never stipulates the nature of any regulatory instruments. This was illustrated by the Californian Supreme Court in a 1976 judgement when it held that:

...the land use restriction withstands constitutional attack if it is fairly debatable that the restriction in fact bears a reasonable relation to the general welfare. (Associated Home Builders of Greater East Bay, Inc., v City of Livermore, cited in Burton, 1981:33)

Similarly, in a New York judgment in 1966, a contribution was found to be:

...a reasonable form of village planning for the general community good. (Jenad, Inc. v Village of Scarsdale, cited in Bosselman and Stroud, 1987:76).

While there are many other judgements, the importance of the Mount Laurel II judgement (as described in Chapter Two) in setting a legal precedent for developer contributions for housing purposes is so important that it is worthwhile detailing some of the arguments used by the New Jersey Supreme Court. The following quote speaks for itself:

It is nonsense to single out inclusionary zoning (providing a reasonable opportunity for the construction of lower income housing) and label it 'socio-economic' if that is meant to imply that other aspects of zoning are not. Detached single family residential zones, high-rise multi-family zones of any kind, factory zones, 'clean' research and development zones, regional shopping mall zones, indeed practically any significant kind of zoning now used, has a substantial socio-economic impact and, in some cases, a socio-economic motivation. It would be ironic if inclusionary zoning to encourage the construction of lower income housing were ruled beyond the power of a municipality because it is 'socio-economic' when its need has arisen from the socio-economic zoning of the past that excluded it (cited in Mallach, 1984:30).

Other arguments used by the Court in the Mt. Laurel II judgment have included the following (as summarised):
• That municipal police powers must be exercised for the general welfare, which includes the housing needs of people living within the municipality, and the region which contributes to the housing demand within the municipality. Municipal land use regulations which conflict with this objective are an abuse of police powers and are unconstitutional (Schwartz et al., 1988:159-160).

• Affirmative pressures will be required by municipalities unless the removal of restrictive barriers meets the municipality's fair share of the regional housing need (Mallach, 1984:31).

• Courts may have to require that these affirmative measures occur (Mallach, 1984:31).

• The builder, who undertakes a project which includes a mandatory set-aside, voluntarily assumes that financial burden without requiring a subsidy from the landlord or other tenant bearing some burden for the benefit of the lower income units.

• The mandatory 'set aside' is a more effective inclusionary device that municipalities must use if they cannot meet their fair share obligations (the unclear comparison here is discussed below).

It is interesting that the judgment has singled out the mandatory 'set aside'. In doing so it has, for reasons unclear, suggested that this is the best way for developers to contribute towards lower income housing. It raises the question why a range of contribution forms, including cash contributions in lieu of the 'set aside', are not permissible. Perhaps it simply reflected the predominance of, and preference for, set-aside contributions under municipal programs.

A further point of interest is the assumption that developers should subsidise the lower income units. It is unclear why it is assumed that this should occur in all cases. For example, in the cases of small developments which have limited returns and high development costs or where a substantial proportion of a development is set-aside for lower income use, a public, not developer subsidy may be justifiably required to maintain project viability. Perhaps the court simply did not wish developers to assume the provision of a public subsidy.

Despite these ambiguities, the judgment has formed part of the 'folklore' for housing advocates involved in inclusionary housing.
In general, a body of case law has been developed over 60 years which stands independently in the legal system. Courts in the larger states interpret their own statutes and state constitutions in making a judgment and, over time, have tended to apply established principles of land use law to test the limits of municipal powers without reference to the underlying statutes or constitutional provisions (Bosselman and Stroud, 1987:85). In general, Court precedent in individual US states is more relevant to other states in the US, in contrast to Australia where State legal systems are more independent. Further, in the US where the Court is persuaded that a facility or service is needed (for which a contribution is sought), any lack of statutory authority or guidelines is not considered an obstacle in validating the contribution (Bosselman and Stroud, 1987:76).

In general, the courts do not interfere with municipal zoning powers and tend to accept the basis of municipal decisions (Burton, 1981:33). This deference to zoning powers has occurred since the Euclid v Abler case in 1926 described in Chapter Two. This approach followed a doctrine, established by case law, that local government can, within its legal rights, preserve the public good. It follows, then, that inclusionary zoning is presumed to be valid unless otherwise demonstrated.

In relation to developer cash contributions (which could also apply to other forms of contributions), these contributions are seen by the courts to fall within the ambit of municipal policing powers. In fact they are accepted to such an extent they are often compared with physical planning requirements such as set-backs, minimum lot sizes, and street widths. Further, fees for differing purposes are not distinguished but treated on their own merits. In considering evidence to support contributions, courts happily utilise public policy, municipal reports and professional or scholarly reports and statements of intent (Bosselman and Stroud, 1987:76).

A further justification for levying cash contributions used by municipalities is that, as municipalities have the authority to collect tax, they can consider developers a taxable class in order to impose such contributions (Schwartz, 1988:157). However, Schwartz notes that courts, in relation to housing, usually required a more substantive discussion of the causal nature of the development burden on housing and the ways collected funds are spent to address the burden.
Overall, while court precedent has a bearing on court decisions in other states, differences exist in the approach of courts between States. Some States are very supportive of requiring developer contributions; others have limited these powers to specific rational nexus requirements; and others are unpredictable in their attitude. In relation to low to moderate income housing contributions, States such as New Jersey and California have social policy commitments which enable them to find means to approve these contributions (Mallach, 1984:170). It is this commitment, embodied in State legislation and not undermined by the approach of the courts, which allows California to be the highest developer contribution using state in the USA. Within this framework a number of legal issues exist relevant to developer contributions for lower income housing.

Some Specific Legal Issues

It is beyond the scope of this paper to discuss all the relevant legal issues associated with developer contributions, and, in particular, those relating to the provision of low to moderate income housing. Instead, some salient issues which might have relevance to Australia are discussed in Appendix XI. These issues relate to how Courts approach the principles of nexus, reasonableness and accountability. The approach of the Courts to maintaining affordability are also discussed along with other issues such as applying developer contributions in established, urban areas experiencing population decline.

Another legal issue worthy of separate consideration is the role and position of the U.S. Supreme Court and the relevance of the U.S. Constitution. While some analysts conclude that they have relevance, (Bosselman and Stroud, 1987: 102), it is the view of this thesis that State court case law has taken precedence and, therefore, the US constitution has no relevance. This is discussed further in Appendix XII).

Appeals - the Developer Reaction

Notwithstanding the relatively supportive attitude of the State courts in a number of U.S. States towards developer contributions, the incidence of appeals by developers can indicate legal ramifications of developer contributions for both developers considering to appeal and municipalities opposing them.
A privately produced manual targeting developers (Grossman, 1990:3-9) lists the following grounds for developers to legally challenge a developer contribution:

- a disguised tax (ie, one that does not benefit the development in some significant way) that is imposed to raise general revenues and is not earmarked for use with respect to the project or the needs created by the project;
- an unauthorised act of the local government - where no express statutory authority exists particularly with respect to off-site improvements sought to be imposed upon the developer;
- a violation of the due process or equal protection provisions of the constitution;
- a taking of property without just compensation; and
- a fee imposed without any reasonable or rational nexus to the development; a fee not specially attributed to the development or to the needs or requirements created nearby.

While the developer's perspective is useful regarding unacceptable types of developer contributions, its implicit acceptance of the developer contribution culture is more significant. Reasonable developer contributions, even for low-income housing which is cited occasionally in the manual as a contribution type, are accepted. Given this implicit acceptance, grounds for appeal are more likely to provide a check list which guard against municipal over zealouness.

Land use zoning involving developer contributions has been almost completely appeal free at the State level. At the time of writing in 1981, Burton (1981:34) noted that no inclusionary zoning ordinances had been challenged by developers. She concluded that there is no substance to the view that such contributions represent an unconstitutional 'taking' in terms of the Federal Constitution.

In 1987, Bosselman and Stroud (1987:91), in reference to San Francisco and Boston's linkage exactions (ie., office, retail, hotel developers required to provide housing to satisfy their employees' housing needs), also noted there were no appeals. This was despite the fact that San Francisco's Office-Housing Production Program relied on negotiated contributions which provided no predicability to the planning permit outcome.

In 1990, Molotch (1990: 188) noted that developers have not withdrawn development, despite municipalities not reaching their legal limit in size or types of contributions. In 1991, still no
appeals were lodged against the City and County of San Francisco. Palo Alto, a San Francisco bayside municipality, had operated an 'inclusionary' housing ordinance for 20 years with no appeals lodged against them.

There are three likely reasons why no appeals were lodged into the early 1990s. Firstly, the long history of developer contributions in the USA and the large body of supportive State case law would present a formidable financial barrier to developers given the costs of any appeal. Developers would know that many municipalities would have experienced legal advice in the preparation of policies and ordinances.

Secondly, as discussed earlier in Chapter Four, the powers to adopt policies and ordinances stem from State legislation which provides municipal authority on a broad basis. General services and infrastructure are required to 'adequately provide for the community's transportation system' or to make 'reasonable provision of the community's parks and recreational systems' (Frank and Rhodes, 1987:11). In relation to housing, the Californian Government Code states that programs are required to include:

A five-year schedule of actions that local government is undertaking or intends to undertake to implement the policies and achieve the goals and objectives of the housing element through the administration of land use and development controls, provision of regulatory concessions and incentives, and the utilisation of appropriate federal and state financing and subsidy programs when available (California Government Code, cited in Burton, 1981:28, emphasis added).

Further, the code states that housing programs must:

Identify adequate sites which will be made available through appropriate zoning and development standards and with public services and facilities needed to facilitate and encourage the development of a variety of types of housing for all income levels, including rental housing, factory built housing and mobile homes, in order to meet the community's housing goals ... (California Government Code, cited in Burton, 1981:29, emphasis added).

This authorising language, while broad in its scope, specifically includes the words 'development controls', 'zoning' and 'development standards'. This allows municipalities the power to approve land use permits with attached conditions stemming from municipal plans.

Lastly, the trend towards negotiation and bargaining between developers and municipalities to negotiate agreement on the type and level of developer contribution strengthens the municipal
position. For example, when a developer wishes to obtain approval for a development density greater than would otherwise be allowed under the zoning ordinance, a municipality's discretionary authority is enhanced (Frank and Rhodes, 1987:11). It has even been suggested that in cases where the nexus is weak, negotiated outcomes involving a concession in development standards to a developer would assist in safeguarding the agreement from litigation (Bosselman and Stroud, 1987:91).

**Conclusion**

A number of issues discussed in this chapter indicate the conditions which developer contributions operate with relative success. This can be contrasts the Australian limitations described in Chapter One.

While aspects of municipal programs can be criticised, many US and Californian municipalities have structured their inclusionary housing programs to achieve developers' general acceptance. By enabling contributions to be predictable they become 'public prices' which are added to the cost of development. The simultaneous application of flexible program implementation through contribution types, payment timing and flexible municipal codes and standards (under the trend for flexible zoning) moves the requirement from a fixed to a negotiable outcome which enhances the predictability of contribution requirements. This is so when options are identified early in the negotiation process and, therefore, enhance the attractiveness of contribution.

Developer acceptance is also enhanced by municipal programs which achieve viability through reasonable contribution requirements. These include contribution levels and project design flexibility which maintains project marketability and income mix. This is important because development contributions increase the price of existing and new housing and can disadvantage developers who only operate in specific locations. A carefully crafted set of incentives can minimise the contribution's impact.

The growth of large scale housing developers in the USA has allowed municipal inclusionary housing programs to target developer contributions. Developers' economies of scale, research capacity and diversification have enabled them to accommodate developer contribution requirements. This is a critical factor in the effectiveness of inclusionary housing programs. A likely contributing factor in growth of developer contributions from the 1960's is the parallel
growth of large developers. Although small developers can be disadvantaged in accessing municipal incentives, the Orange County experience showed how they can indirectly 'participate' by acquiring credits in lieu of the unit set-aside requirement. In general, many larger developers in the USA have accepted contributing towards lower income housing provision. They still prefer cash contributions instead of housing 'set aside', and if setting aside units under regulatory agreements, still prefer rental units instead of ownership units.

Developer preference for cash contributions, while not shared with municipalities, is a more effective long term use of municipal resources because it prevents municipalities from having to establish bureaucracies to monitor regulatory agreements on set aside contributions.

The municipal program's ability to consider development viability is not sufficient to enable contribution programs to succeed. In states with active programs, municipal powers are reinforced using enabling and clearly articulated legislation. These powers are further reinforced through court case precedent premised on the acceptance of municipal powers to levy in the public welfare. Under these powers, developers become simply another taxable class under inclusionary zoning.

Case precedent are usually based around the court's deliberations on the contribution's performance requirement to meet criteria for approval, such as nexus, reasonableness and accountability. While the trend in case law is for increased use of cash contributions, municipal preference for unit set-asides ensures that negotiable outcomes involving the provision of municipal incentives becomes a supported process. Further, case law trend exists to allow contributions to benefit the entire municipality, not just the development. This suggests that cash contributions' advantage to municipal housing programs in housing provision is opportunity driven and determined by housing needs. The absence of appeals by developers reflects the mutual reinforcement of the State legislation and case law precedent.

This advantage of cash contributions is also discussed in Chapter Five from the perspective of maintaining housing effectiveness and affordability, the remaining issue relevant to developer contributions.
CHAPTER FIVE:
Maintaining Housing Effectiveness and Purpose

Maintaining Housing Affordability

Rationale

Chapter Four indicated the need for municipalities to design developer contribution programs to deliver flexible, predictable and reasonable contribution requirements. These requirements should aim to maintain the programs' major purpose which is to provide affordable housing.

There are two reasons to maintain affordable housing using developer contributions. The main reason is that the amount of affordable US housing in large capital cities, like those in Australia, has diminished considerably during the last 20 years. This situation has a number of social and economic implications (Van Vliet, 1997). The most visible one is increased homelessness. Homelessness in the USA has several causes: withdrawal of social benefits, deinstitutionalisation, the contraction of public housing under the Reagan and subsequent administrations and the affordability problem in large cities on the US east and west coasts.

These two causes are beyond local control. Local affordability can be controlled to some extent by developer contributions. The 80% withdrawal of Federal expenditure on public housing during the 1980's was, therefore, a catalyst which accelerated the development of inclusionary housing policies and programs to the existing levels of the 1990s. If local government did not address the gap created by the removal of Federal programs, local homelessness problems would be even greater. Other effects of declining affordability include a contraction in the rate of ownership (a social concern as well one felt in the pocket by local realtors and developers) and an inability to attract cheap labour to industries often located in the high housing costs areas (Calavita 1994). Both these factors created a need for interventions in local housing markets.
Affordability requirements are needed to protect limited public subsidy dollars provided to developers in grants, loans and fees foregone tax. If such subsidies are given to developers the rationale must exceed the need to encourage development. Affordability requirement ensures some community outcomes consistent with the subsidy.

**Affordability Benchmarks, Enforcement Mechanisms and Subsidies**

Chapter Three described the range of safeguards and enforcement mechanisms for maintaining housing affordability for developer provided housing. This section discusses broader issues in establishing and maintaining affordability.

Affordability benchmarks are based on area median incomes which are known as Standard Metropolitan Statistical Areas or SMSAs. Between the decennial census, these area median incomes are set on annually HUD. Municipalities then establish affordability benchmarks against area median incomes. For example, the San Francisco 'set aside' policy required ownership housing to be set aside for households earning up to 120% of area median incomes, rental housing was for households earning up to 80% of area median incomes, and the average income of all households in any development was to not exceed 60% of median area income.

Affordability benchmarks vary depending on the housing location. For example, the landmark judgment, Mount Laurel II by the New Jersey Supreme Court in 1980 (discussed in Chapter Four), applicable to New Jersey, categorised moderate income households between 50-80% of area median income and low income families up to 50% of area median income (Mallach, 1984:15). However, no legal obligation exists for municipalities to use the Mount Laurel benchmarks.

There are several ways in which affordability can be undermined or negated. Firstly, many municipalities have set their own benchmarks extending the definition of affordability. In the early to mid 1980s, Orange County, the large, prosperous and up-market growth area on the southern edge of greater Los Angeles, set its benchmark at 120% of area median income. Mallach, (1984:15) argues that, typical of many municipalities, this reflected a political objective of assisting middle class households priced out of the housing market by high inflation.
Targeting like this is becoming especially counter-productive when inadequate resources are directed at providing or maintaining low income housing or when market conditions prohibit housing affordability. Many parts of coastal California have these conditions. In these cases scarce public resources should be directed to those most in need.

Secondly, while it is normally the case that affordability benchmarks can be skewed in smaller areas, they can also be ‘skewed’ in large areas when they include significant proportions of higher income people. This is because the benchmarks are inflated by the extremes of incomes, in this case the existence of wealthy pockets within the areas. For example, the San Francisco SMSA includes the counties of Merin and San Mateo populated predominantly by wealthy people. This skews the median income figure at too high a level, resulting in low income affordability being set at 80% of median income and for very low income affordability at 50% of median income. Many very low income people in these parts of San Francisco are therefore not able to afford restricted rentals or sale prices because their incomes fall below affordability benchmarks. In some other areas this would not be the case.

Thirdly, for ownership housing, with no resale controls, the first owner, who purchased subsidised housing, gains capital appreciation windfall on resale which is higher than equivalent market rate housing. Subsequent owners do not benefit from any ongoing subsidy. The original subsidy benefit is lost to the first household. This can only be avoided when households benefiting from ongoing purchase price subsidies compromise on the resale prices allowed for the term of the regulatory agreement..

Fourthly, limited municipal resources required to monitor developer provided housing and difficulties involved in enforcing breaches of agreements can undermine affordability provisions. This becomes evident when reviewing ways to remedy breaches of agreements and their shortcomings illustrated in Table Six.
Fifthly, when breaches are related to ownership housing, which often occurs after a secret sale, the municipality must conduct a title search to determine the new owner. Because the new owner may or may not be aware of the use restriction, the municipality must try to enforce the restrictions under difficult conditions.

Lastly, many developers have received incentives from municipalities, the State or the Federal Government on the basis of maintaining affordability for 20, 30, 40 or 50 years under regulatory agreements. The Federal Government started this practice in the 1960s and provided Federal guaranteed loans with interest 'write-downs' in return for 20 year affordability restrictions. The affordability terms of these and subsequent agreements began to expire in the mid 1980s enabling owners of rental units to charge either market rents or convert the units to home ownership. For ownership housing, units could be sold at the market valuation instead of a set, restricted value.

According to Schwartz et al (1988:23-24) about 1.9 million privately owned units exist under such agreements. Most began to expire from 1990. By the year 2000 most will be at risk. In the late 1980s HUD estimated that by 1996 between 470,000 and 577,000 people will be displaced. Another source, the Government Accounting Office, estimate that up to 900,000 of

<table>
<thead>
<tr>
<th>Remedy</th>
<th>Potential Shortcomings</th>
</tr>
</thead>
<tbody>
<tr>
<td>Revocation of land use.</td>
<td>Questionable as to its enforceability, eg., if the buildings are already constructed.</td>
</tr>
<tr>
<td>Withdrawal of any cheap financing, e.g., loans or bonds, or other incentives such as tax exemption.</td>
<td>Possible but can create a negative investment image for other investors and affect market confidence in bonds (depending on the strength of investor interest to invest in any given area).</td>
</tr>
<tr>
<td>Municipal right of re-entry, possession and subsequent reduction of the rental or replacement of ineligible households with eligible ones.</td>
<td>Victimising innocent, ineligible households and contributing to a destabilisation of housing tenure.</td>
</tr>
<tr>
<td>Legal recourse - suing for specific performance of the agreement on the grounds of recompensing the municipality for programmatic costs (municipal/housing authority staff resources use in negotiation, monitoring, legal fees etc.) or seeking damages.</td>
<td>Untested ability to enforce agreements through the courts as there have been no appeals in California (as at early 1991).</td>
</tr>
<tr>
<td>Placement of a caveat against the property title to prevent sale and to ensure remedy of the breach upon sale of the property or unit.</td>
<td>While this limits the impact to the owner, it can affect marketability of regulated housing as a tradable investment. This, however, would occur with limited cases and remains a useful remedy.</td>
</tr>
</tbody>
</table>

Source: Compiled from interviews with municipal officers in San José, Los Angeles, San Diego and Santa Monica in 1991.
these units will become unaffordable by 1996. Although some differences exist the impact of the agreement expiry, even the most conservative estimates indicate that such arrangements create conditions for a sudden housing affordability crisis.

Most owners with units under expiring agreements will not renew the agreements, according to Schwartz et al (1988:24). This is because, they say, properties are owned by partnerships controlled by a general partner who manages the project financing on behalf of investors. Legally obliged as fiduciaries to their investors to obtain the highest rate of return, the partners do not renew the agreements even if investors wish to maintain affordability for ideological or management reasons. Further, profit opportunities also would influence owners or investors.

This expiration of regulatory agreements also started at the time when Federal funding for incentives or subsidies such as the Section 8 subsidies or tax deduction on losses was diminishing. This eliminated inducements to developers to renew many of the expiring agreements or to replace of expired agreements with new ones. The cost of buying these regulatory agreements would be very high, with one estimate placed at US$17 billion, according to an interview with the Housing Authority of the County of Santa Clara. Consequently, the policy response to this impending crisis was to impose a permanent moratorium on the expiry of affordability terms through the Cranston-Gonzales National Affordability Housing Act, 1990. This Act followed the 1986 Tax Reform Act which significantly reduced tax benefits to investors and developers involved in the provision of low to moderate income housing. The Tax Reform Act taxed capital gains at a rate higher than the rate imposed prior to the Act. It reduced the early year attractiveness of investment in rental units by lengthening depreciation schedules. It prevented most investors offsetting losses on real estate from other taxable incomes. It imposed a limitation on the amount of tax free bonds states could issue. Lastly, it pooled housing bonds with all other tax free bonds, forcing state officials to choose between issuing bonds for housing and non-housing activities such as roads, schools, etc. (Schwartz et al., 1988:52).

To compensate for effects on profitability, the Act introduced a new, three year tax incentive program enabling each state to allocate a limited amount of tax credits to the value of US$1.25 per citizen. The nature of the housing projects determined different rates. To construct or rehabilitate of low income housing units not Federally subsidised, a 9% annual tax credit was available for 10 years for up to 80% of the value of units. For the acquisition of low income
housing without rehabilitation or for units receiving other government subsidies including tax exempt bonds, a 4% annual tax credit was provided for 10 years. In both cases, the term of the affordability restriction for units set aside was extended for 15 years (with the possibility of tax credits being extended beyond 10 years). In addition, 10% of each state's allocation must be set aside for non-profit organisations which aim to foster low income housing (Schwartz et al., 1988:53). For construction, investors were to provide 40-50% of up-front capital and a lesser amount for rehabilitation.

Thus, as the intervention in the Cranston-Gonzales Act illustrates, affordability requirements under regulatory agreements have only served to delay housing affordability problems rather than overcome them. To remedy the effects of an earlier policy with poorly considered long term implications, a new legislated policy resulted in a breach of agreement with developers. These legislative changes reinforce how easily hard won private sector trust and interest can be sacrificed to policy changes, especially those which affect existing projects. From a developers perspective, the impact of the Act was:

The economics that they had projected were completely undone through no fault of their own... the limited partners were generally promised tax benefits and gave the general partner commitment to put money into a project over a period. When the tax laws changed, often the limited partners re-evaluated their tax position and found that they would be in a better tax position if they reneged on their commitments to continue funding, took the penalties to recapture on what they had funded, and walked away from their investments. Developers and lenders suffered the consequences and were faced with troubled projects. (Alenick, 1990:17-4).

Reactions to legislative changes from developers also underscores a need to guarantee that such changes only affect new projects. This will avoid inhibiting investors who fear policy reversal after projects are committed or developed. Equally, it highlights the vulnerability of housing affordability when it relies on limited term agreements. This can only be mitigated by establishing longer term agreements (which only delays the problem further) or, alternatively, obtaining cash contributions to enable municipalities to provide housing with no affordability 'sunset' period.

The question of affordability inevitably leads to the question of maintaining developer viability, a central issue in Chapter Four. Affordability and developer viability can only be
reconciled when programs increase opportunities for developer provided affordable housing without imposing excessive burdens on developers.

Balancing Affordability and Viability

Housing affordability and project viability can be achieved together. Requiring developers to provide a proportion of a development with units for households earning 50% of the median area income will result in losses for developers and may make developments unviable. On the other hand, requiring developers to provide some of these units for households earning 80% of the median area income or having lower income households located in a larger development can be achieved without adversely affecting the project's viability (Mallach, 1984:182). This is illustrated in Table Seven using the example of median incomes in Newark, New Jersey.

Referring to this table, Mallach (1984:102) states that requiring units at 50% of mean area income can only be achieved if the number of restricted units is low, the development is in an area with enough unique attributes to generate good profits for the market rate units, atypical savings or economies, such as low land costs (this also applies to very large developments) could be achieved by the developer or public sector support was available. However, Mallach also indicates that, in some cases, developments required to provide 10% of units at 50% of median area income and more units at between 50-80% of median area income can be viable.

<table>
<thead>
<tr>
<th>Number of bedrooms</th>
<th>Household size</th>
<th>Income ceiling</th>
<th>Unit sales price</th>
<th>Affordability ceiling</th>
<th>Developer profit or loss</th>
</tr>
</thead>
<tbody>
<tr>
<td>Moderate income (80% of median income, adjusted for household size)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1</td>
<td>2</td>
<td>$20,150</td>
<td>$35,000</td>
<td>$37,613</td>
<td>+2,613</td>
</tr>
<tr>
<td>2</td>
<td>3</td>
<td>$22,700</td>
<td>$42,500</td>
<td>$42,373</td>
<td>-217</td>
</tr>
<tr>
<td>3</td>
<td>4</td>
<td>$25,200</td>
<td>$51,500</td>
<td>$47,040</td>
<td>-4,460</td>
</tr>
<tr>
<td>Low income (50% of median income, adjusted for household size)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1</td>
<td>2</td>
<td>$13,100</td>
<td>$35,000</td>
<td>$24,453</td>
<td>-10,547</td>
</tr>
<tr>
<td>2</td>
<td>3</td>
<td>$14,700</td>
<td>$42,500</td>
<td>$27,440</td>
<td>-15,060</td>
</tr>
<tr>
<td>3</td>
<td>4</td>
<td>$16,350</td>
<td>$51,500</td>
<td>$30,520</td>
<td>-20,980</td>
</tr>
</tbody>
</table>

Affordability, like project viability, is a relative concept which depends on benchmarks set, area income levels and project specific factors. Each project must be evaluated based on these criteria. Because developers are concerned about long-term constraints placed upon their properties and municipalities want to attract experienced for-profit developers, American municipalities must design profitable programs in the short term developmental phase for developers which allow properties to retain a high residual value. This can be a 'no win' situation for authorities. Maintaining more rigorous affordability provisions with developer provided housing discourages developer interest in inclusionary housing (especially where location related factors do not work in a municipality's favour). As well, inadequate affordability provisions lead to poor program targeting or inevitable future social and public costs.

The dilemma of non-profit developers forming tax syndicates with developers to control housing affordability can only be fully avoided by using developer cash contributions instead of mandatory 'set-asides' preferred by many municipalities. Using these and any other municipal housing funds for direct municipal provision or directing housing funds to non-profit developers established with the specific charter of maintaining housing affordability (as is discussed in the next section of this chapter) will guarantee the maintenance of term affordability.

One last issue deserving consideration is the role of public subsidy in maintaining affordability. While related to much of the above discussion, its special relevance to government policy suggests that a discrete discussion of its role in inclusionary housing programs is worthwhile.

Public subsidy can be achieved through project incentives which reduce construction costs or increase returns. Examples are relaxed development controls or density bonuses, financial assistance for grants or bond revenues, direct rental subsidies to tenants or mortgage relief programs. The range of incentives are described in Chapter Three. Despite the advantages to developers of various subsidies, Mallach (1984:127) notes that builders are typically disinterested in utilising government subsidy programs because of their 'adversarial posture' towards government and their difficulty in effectively using these programs. In a survey, 55% of builders would not take advantage of these programs to produce cheaper housing (Mallach, 1984:132). Sometimes, as described in Chapter Four, this was because small developers were unable to use government subsidy programs, afford innovative design, separate lower income
units, utilise economies of scale, benefit from incentives for on-site ‘set-aside’ units or employ specialist staff to work with municipalities. (Mallach, 1984; 127-128).

The above discussion highlights the dilemma faced by municipalities trying to maintain affordability of private units. When direct tenant subsidies have failed or been discontinued, municipalities and housing authorities have attempted to replace them with a range of other subsidies or incentives to reduce project costs. Mallach (1984:216) notes that in areas of high land value and improvement costs he believes this goal is unachievable. However, he cites the example of a 124 unit home ownership development in Orange County. Unusually low land costs and tax exempt mortgage bond funding enabled 20% of the units to be sold to households earning 80% of the area median income and the remainder to households earning between 80 and 120% of the area median.

Using the Orange County example and the experience of the other four Californian municipal programs examined in this thesis, a range of innovative techniques and incentives will be necessary to subsidise private developers in the provision of lower income housing. Schultz (1988:161) notes that the State of New Jersey acknowledged this reality under its Fair Housing Act, 1985, as well as the need for some form of State subsidy to augment or fund municipal incentives. These incentives have included the use of density bonuses and State construction subsidies with a target project the rehabilitation of substandard or abandoned structures. Funds to pay for these municipal incentives started with an initial $15 million fund set up by the State. As well 25% of bond proceeds were reserved and another $20 million per year was provided based on real estate transfer fees. This pooled funding approach will be further discussed in the next section of this Chapter.

Alternatives to such arrangements are limited: Municipalities will be forced to allow developers to contribute moderate income housing to replace public subsidy (Mallach, 1984:217). As well, because municipalities have the option of only seeking cash contributions, the entire question of public subsidies to developers is avoided. Developments most likely to maintain their affordable units to maintain tax shelters for project investors provided by tax syndicates can be targeted. This has been achieved by pooling funding and by encouraging project partnerships.
Pooled Funding and Partnerships

The contraction of federal expenditure on low income housing and the pressure on local governments to fill the gap created innovative funding and partnerships with the private and community housing sectors. This section evaluates these arrangements.

Pooled Funding and Municipal Housing Trust Funds

The use of diverse funding sources for States, municipal and non-profit developer provision of housing has been, since the 1980s, an important characteristic of funding and achievement of project viability. Appendix V lists most sources used by these organisations.

A large proportion of these sources involve taxes on private sector business and development activities. The predominance of municipal funding sources reflects the significant responsibility municipalities have in collecting a wide range of taxes. In Australia these would be collected the State and Federal levels of government. When the US Federal Government stopped providing special purpose grant programs to fund and/or to provide rental subsidies to eligible projects, States and municipalities became major collectors of funding and municipalities, non-profit and for-profit developers the major recipients of funding.

The roles of funding collector, distributor and recipient are of complex. They overlap with the role of municipalities emerging from the 1980s as critical in the facilitation of low to moderate income housing. Non-profit developers have also emerged as major recipients and providers. These roles will be discussed later in this section and summarised in Table Eight.
Table 8  Funding Roles Held by Levels of Government and For-Profit and Non-Profit Developers in the USA in the 1980s and 1990s

<table>
<thead>
<tr>
<th>Roles</th>
<th>Body holding funding roles</th>
</tr>
</thead>
<tbody>
<tr>
<td>Primary funding collector and distributor</td>
<td>Federal Government</td>
</tr>
<tr>
<td></td>
<td>State Governments</td>
</tr>
<tr>
<td></td>
<td>Municipalities</td>
</tr>
<tr>
<td>Funding recipient for distribution</td>
<td>State Governments</td>
</tr>
<tr>
<td></td>
<td>Municipalities</td>
</tr>
<tr>
<td>Funding recipient for direct provision</td>
<td>State Governments</td>
</tr>
<tr>
<td></td>
<td>Municipalities</td>
</tr>
<tr>
<td></td>
<td>Non-profit developers</td>
</tr>
<tr>
<td></td>
<td>For-profit developers</td>
</tr>
</tbody>
</table>

N.B. refer to other non-government funding sources shown in Figure Four.

Municipalities have the most critical role in ensuring that funding is used for its housing objective. More specifically, municipalities, as primary collectors of revenue earmarked for housing provision, are also recipients of Federal and State funds earmarked for specific projects sponsored or supported by municipalities. They also identify and assess the eligibility of proposed non-profit and for-profit development projects, their own projects and those proposed on behalf of State and Federal funding programs. Municipalities distribute Federal, State and their own funds for their own projects as well as those of non and for-profit developers. This diverse role means that pooled funding from diverse sources has become necessary to facilitate affordable housing.

This pooled funding approach is manifested: in housing trust funds and in project funding. Firstly, in the early 1980s state and municipal housing trust funds emerged in various locations across the USA. By late 1989, 20% of the 51 states had developed trust funds (spending over $3 billion between 1980 and 1986), 9% were developing trust funds and 22% had not developed them. In addition, 12 municipalities had developed trust funds. This is illustrated in Figure 2.

These trust funds were based on the original model provided by the Interest on Lawyers Trust Account (IOLTA) program which generated revenue from deposits made in advance of legal services. These were aggregated statewide and made available to cover the legal expenses of those unable to afford legal representation (San Diego Housing Commission, 1989: 20). Case studies of developments using such funds including trust funds are illustrated in Appendix VII.

Housing trust funds were established by government legislation, ordinance or policy as ongoing sources of revenue and dedicated specifically to providing housing for low to moderate income persons. Revenue from a variety of sources is either deposited in trust funds for aggregation
and expenditure on future projects or collected for worthy existing projects. This is illustrated in Figure Three.

Figure 2  States and Municipalities in the USA with Housing Trust Funds

Cities
Seattle, WA
San Francisco, CA
Los Angeles, CA
Denver, CO
Duluth, MN
Chicago, IL
Montgomery County, MD
Dade County, FL
Jersey City, NJ
Hartford, CT
Boston, MA
Burlington, VT

[Map of the USA with states shaded to indicate states and municipalities with housing trust funds]

Source:  San Diego Housing Commission, 1989:20
San Francisco’s housing trust fund is an example. In 1990, despite diminished Federal and State assistance, it provided US$11 million in local funding and leveraged US$45 million in State and Federal funding. The ratio of local to State and Federal funding was 1:4:1. This provided 2,240 low to moderate income housing units. The municipal funding came from the following pooled sources:

- Sale of tax increment bonds by the Redevelopment Agency…….. US$10.00 million
- Office developer feesUS$5.48 million………………..US$5.48 million
- Hotel taxes……………………………………………………………………..US$2.70 million
- Total US$18.18 million

Three models for the administration of trust funds were identified by the San Diego Housing Trust Fund Taskforce appointed by the San Diego Housing Commission in 1989 to develop a proposal for a trust fund. The first model involves administration by a government department or agency where ultimate authority and responsibility is vested in itself. The second model
involves administration by a non-profit group where the group independently manages funds according to policies developed by the group’s Board. The third model involves the appointment by a governmental body of a Board of Trustees which has vested the authority to develop procedures and operate the fund. It also is dependent on a government body for staff support and accountable to the establishing body (San Diego Housing Commission, 1989:21).

Most funds are government or Trust managed. Administration of Trust funds are sometimes undertaken by boards of trustees or committees comprising a broad representation. For example, the San Diego Trust Fund which started with funding of U.S.$12.9 million in 1990, is administered by a Board of Trustees. Membership comprises six business, industry and labour representatives (two must be from the labour component), five non-profit representatives, community-based organisation representatives, and two municipal representatives, who are the Executive Director of the Housing Commission and the City Manager (San Diego Housing Commission, 1989:24).

Individual project funding also reflects a pooled approach. All but one of the following 12 projects in Santa Monica and San Francisco (see Appendix X) are non-profit developer sponsored (reflecting the greater availability of information for these projects) rather than for-profit projects (see the one example shaded in this Appendix). These examples as well as Table Nine illustrate the pooled funding approach.

Table 9  Summary of Funding Sources for Projects Managed by the Community Corporation of Santa Monica as at 1990/91 (Summarising Project Funding Information Provided in Appendix X)

<table>
<thead>
<tr>
<th>Source</th>
<th>Amounts (U.S.$m)</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>Tax credits</td>
<td>6.8</td>
<td>26.9</td>
</tr>
<tr>
<td>Bank loans</td>
<td>6.6</td>
<td>26.1</td>
</tr>
<tr>
<td>Federal grants</td>
<td>5.3</td>
<td>20.9</td>
</tr>
<tr>
<td>Municipal funds</td>
<td>4.6</td>
<td>18.2</td>
</tr>
<tr>
<td>Philanthropic funds</td>
<td>1.0</td>
<td>3.9</td>
</tr>
<tr>
<td>Third parties to projects</td>
<td>0.5</td>
<td>2.0</td>
</tr>
<tr>
<td>Other</td>
<td>0.5</td>
<td>2.0</td>
</tr>
<tr>
<td>TOTAL</td>
<td>25.3</td>
<td>100</td>
</tr>
</tbody>
</table>

N.B.: This is not indicative of typical breakdowns of funding sources but is used as an example only.
Source: Compiled from information in Community Corporation of Santa Monica, undated: 11-14.
The large number of funding sources available, often between 4 and 10 per project, enables pooling in various combinations. Combinations vary and depend on whether the project is undertaken by municipalities, non-profit or for-profit developers, as well as the housing target group, the method of provision (e.g., rehabilitation construction) and housing tenure. Often funding sources are targeted at discrete components of project costs. For example, site acquisition on the San Cristina project in San Francisco was funded by the City and County of San Francisco. Building rehabilitation was funded by the State of California and operating costs were funded by Federal subsidies. Combined with the various incentives described in Chapter Three, funds help to offset controls and achieve project viability.

Pooled funding has resource implications for State and municipal housing trust funds and project developments. Funding must be obtained from a number of sources. Initial eligibility funding requirements have to be met and detailed legal agreements must be drafted to set out roles and responsibilities. Ongoing accountability requirements by for profit or non-profit developers utilising the funds must be determined and monitored. Examples of eligibility and accountability requirements are given in Appendix II. Requirements involve establishing variously sized housing bureaucracies with expert staff, as applies to non-profit and for profit developers managing the receipt of various grants. However, the resource intensive period is limited to project facilitation and development phases over a few years. In contrast lower level resourcing associated with monitoring regulatory agreements with developers occurs over a several decades.

Despite this resource implication, a variety of funding sources allows housing providers to pool funding from various sources. Pooled funding assists in meeting project costs (in the case of State, municipal or non-profit developer housing) and ensuring project viability (in the case of developer contributed low to moderate income housing). Dedicated providers can therefore successfully fund a high number of units in an ongoing manner. In Santa Monica, for example, 365 units were provided over five years (1986-1990) with another 300 under development. In San Francisco, 2,638 new low and moderate income units were constructed between 1980 and 1988 (San Francisco, 1990a: 22). This represents 133 completed or committed units per year in Santa Monica and 330 completed units per year in San Francisco. Although new housing opportunities are more difficult to achieve in these two municipalities, location advantages are good.
There is a consensus amongst housing providers and advocates (e.g., San Diego Housing Commission, 1989:21) that housing trust funds and the provided housing are inadequate replacements for withdrawn Federal public housing. A range of reasons account for this inadequacy. Firstly, despite the impressive funds generated by trust funds, they are not large enough to replace amounts previously provided by the Federal Government for public housing. For example, in 1981 the Federal Government provided US$73 billion before expenditure cutbacks. Secondly, successful, localised efforts by dedicated municipalities have produced impressive results. However, efforts have not always addressed regional needs. Large areas of the USA are located where authorities or non-profit developers are either unable to obtain sufficient funding because of limited private development activity or because they have no legal or political ability to obtain developer contributions, such as the absence of supportive State legislation or progressive communities.

Partnerships: Non-Profit Developers, Tax Syndications, Enabling Bank Legislation, Community Loan Funds and Financial Intermediaries.

The other major trend accelerated by the Federal public housing expenditure cuts was the formation of partnerships between State and local government, non-profit developers and for-profit developers. These partnerships constitute an important element in developer contribution programs.

In the early 1970s voluntary partnerships with community-based, non-profit developers emerged. Non-profit developers, also known in the USA as 'community development corporations', raised funds to buy, develop and operate low and moderate income housing projects. They achieved this by forming partnerships with developers and investors. Non-profit developers increased their technical expertise by working closely with for profit developers in the construction or rehabilitation of housing. Non-profit developers formed limited partnership or syndications to attract the development capital otherwise denied to community-based groups (Schwartz et al., 1988:165). Schwartz (et al., 1988:165-166) describes how these syndications operate:

In syndication, shares of a housing development are sold to investors in the form of limited partnerships. As the rental property depreciates for tax purposes, the
lost value offsets or shelters other income of the limited partners. Limited partners - usually wealthy individuals such as doctors and lawyers - are solicited on the basis of their need to shelter income.

In relation to the benefit of partnerships between non-profit and for-profit developers:

Private developers have business experience and good relationships with banks, giving them much easier access to working capital and lines of credit. For commercial lenders, the for-profit track record minimises their risk. Non-profit, community-based organisations learn development skills and obtain technical assistance from the for-profit partner.

Access to capital funding is a major limitations for community-based organisations. Syndications are an important ways for them to obtain funding rather than from government grants or subsidies. The examples of project funding in Appendix X indicate that syndication funds (referred to as 'tax credits') contribute per project between four and 63% of funding in the sample of pooled funded projects in Santa Monica and San Francisco. For the one example of an inclusionary housing project, the developer contribution was only 7%. While developer equity would usually be much more, this example indicates using the pooled funding, developer equity can be very small. This especially is so when the developer is prepared to provide either a high proportion of restricted units and/or housing for very low income households.

The non-profit developer within a syndication is appointed the controlling body by the other levels of government involved. In this way non-profit developers learn from developers which ensures affordability is maintained. The Federal Government, some municipalities and States direct all or part of their funds to non-profit developers to ensure ongoing affordability, appropriate management and/or to avoid involvement in direct provision. The Community Development Block Grant, for example, includes non-profit developers as target recipients. This grant allows 10% of U.S. tax credits to be allocated to projects involving direct non-profit developer partnerships. San Diego's Housing Trust Fund allocates funding to municipal, for-profit and non-profit auspiced projects. Santa Monica directs much of its developer cash contributions to non-profit developers and San Francisco's Office Affordable Housing Production Program has contributed $8 million to non-profit developers since 1985.

Between the 1970s and 1988, over 100 non-profit developers were established in the USA and by 1990 they were producing around 20,000 units per annum USA nation wide. This is
roughly the same number as those lower income housing units financed by HUD's subsidized housing programs (Goetz, 1993). Non-profit developers develop housing in specific localities and often specialise in project types (eg. construction, rehabilitation), income levels and target groups. Target groups can include aged persons, singles, Asians, Latinos and church groups. Table Ten provides five examples to illustrate this diversity.

<table>
<thead>
<tr>
<th>Name</th>
<th>Municipality</th>
<th>Project Type</th>
<th>Income Level</th>
<th>Target Group</th>
</tr>
</thead>
<tbody>
<tr>
<td>Community Housing Partnership</td>
<td>San Francisco</td>
<td>Rehabilitation</td>
<td>Low</td>
<td>Mostly singles from shelters and 'transient' housing for single room occupancy (rooming house) accommodation</td>
</tr>
<tr>
<td>Mission Housing Development Corporations</td>
<td>San Francisco</td>
<td>Rehabilitation (mostly) and a little construction</td>
<td>Low</td>
<td>Latinos in the Inner Mission Area.</td>
</tr>
<tr>
<td>Chinese Community Housing Corporation</td>
<td>San Francisco</td>
<td>Rehabilitation and construction</td>
<td>Low to moderate</td>
<td>Chinese in the Chinatown North Beach and North of Market Areas.</td>
</tr>
<tr>
<td>Community Corporation of Santa Monica</td>
<td>Santa Monica</td>
<td>Construction (mostly) and some rehabilitation</td>
<td>Low to moderate</td>
<td>Aged persons, families and singles from all ethnic origins</td>
</tr>
<tr>
<td>Tenderloin Neighborhood Development Corporation</td>
<td>San Francisco</td>
<td>Rehabilitation</td>
<td>Low</td>
<td>Mostly single person in the North of Market Area</td>
</tr>
</tbody>
</table>

Source: Compiled using information from the Mayor’s Office of Housing, City and County of San Francisco, 1991; Corporation of Santa Monica, undated; 2 Neighborhood Housing Development Corporations, 1990; and the Mayor’s Office of Housing, City and County of San Francisco.

As community corporations have developed, housing innovation has shifted particularly during the 1980s to municipalities and non-profit developers. Non-profit developers have developed expertise in construction, rehabilitation, contract supervision, and management finance. In an interview with the Housing Authority of the County of Santa Clara (part of the San Francisco Bay Area) six non profit developers in Northern California were described to be just as good at housing development as for-profit developers. Examples of Community Corporation projects are provided in Appendix VIII.

Two aspects of non-profit developer responsibility and expertise warrant closer attention: financial management and housing development. From the 1980s financial management became a complex task and funds came from a variety of sources. Managing this funding is demanding and can involve seeking funding, ensuring that eligibility criteria and ongoing accountability requirements are met and matching project cash flows with funding.
availability, as well as efficient spending of funds. In particular, non-profit developers can borrow from banks and must ensure these loans are amortised to bank requirements.

It is significant that properties can be used by non-profit providers as security for the purpose of borrowing from banks due to non-profit providers controlling funds in partnerships with developers and government. This contrasts with the situation of government controlling the property assets and having to borrow on behalf of non-profit developers. The ability of non-profit developers to borrow from banks is also enhanced by the Community Reinvestment Act 1977, which requires banks to '... help meet the credit needs of the local community in which they are chartered, including low and moderate income communities'. This Act is enforced by Federal regulators who can deny bank mergers, acquisitions and new branch openings if their neighborhood investment record is poor. By 1988 non-profit developers had used this Act to challenge banks with poor lending records, (resulting in $7 billion in consequent loans), and to seek loans through non-adversarial application (about $1.6 billion has been lent in this manner). It has also had a positive affect on partnership negotiations (Schwartz et al., 1988:233).

Further, at least 30 Community Loan Funds have been established in the USA Non-profit developers, community land trusts and limited equity co-operatives can obtain below market interest rate loans to finance low income housing. Funds are contributed by individuals, corporations, religious organisations, philanthropic foundations and other socially conscious investors willing to take a lower rate of return on investments. With combined assets of only US $20 million by 1988, they provide an additional funding option for non-profit developers and assist banks to meet their Community Reinvestment Act obligations (Schwartz et al., 1988:165).

The second aspect of responsibility and expertise is in housing development. Non-profit developers usually contract architects, builders, engineers and quantity surveyors and supervise these contracts. Sometimes they also undertake construction using their own skills and labour ('sweat equity').

While partnerships with developers enabled them to gain construction and building rehabilitation skills, the non-profit housing sector has also encouraged the publication of a range of resource literature. This literature describes in detail development skills such as project costing, project management, project cost savings, relevant legislation, preparing specifications and contracts, contract supervision, purchasing materials and reading forms and
documents. It also covers financial management skills such as selecting computer software for budgets and completing project cash flows, conducting a feasibility analysis, financial underwriting, loan processing and managing consultants. These resources assisted non-profit developers become more independent in the development of building/rehabilitation and financial skills.

The work of non-profit developers in forming partnerships has been recognised by national corporations or national financial intermediary entities. These entities were established to facilitate non-profit developers (often through municipalities) to form partnerships or syndications with investors. Schwartz (1988:172) describes how these entities evolved in the 1980s to fill some of the gaps left by the withdrawal of HUD activities. They have actively participated in the design and implementation of supported projects and in doing so influenced the goals and activities of many community developers.

Two examples of financial intermediary entities are provided to illustrate the key and emergent role of these national financial intermediary entities.

**Financial intermediary entity- case study one:**

The Local Initiatives Support Corporation (L.I.S.C.) was established by the Ford Foundation in 1981 and is the largest of these entities. According to Schwartz et al., (1988:172, 173) it has raised almost $100 million from nearly 300 corporations for housing and economic development projects in distressed cities and has made loans to about 400 community organisations in 120 cities in the USA to build 10,000 new and rehabilitated, low-priced housing units. L.I.S.C. identifies and analyses worthwhile projects and co-ordinates the social investment plans of many national corporations. It usually provides non-profit developers, which have a proven track record and which are unable to raise finance from banks, with below market interest rate loans or higher risk loans. L.I.S.C. has an organisational structure which makes it active in California. Figure 4 illustrates this.
Figure 4: A Diagrammatic Explanation of How the Local Initiative Support Corporation, through the Californian Equity Fund, Facilitates Corporate Funding for Non-Profit Developers (Syndicates).

Ford Foundation
(establishment body)

Local Initiative Support Corporation

many initiatives

Established the
National Equity Fund

many funds

Californian Equity Fund

facilitates
Non-profit partnerships
developers

Private, corporate investors, e.g., Sears, Chevron, Levi Strauss

Low income housing

Financial intermediary entity - case study two:

The Enterprise Foundation. Also a national intermediary, it works with 68 community groups in 27 cities and targets projects for households with incomes below $20,000 per year. It was established by a real estate developer in 1981 and is capitalised by the Enterprise Development Corporation, a for-profit subsidiary of the Foundation which owns suburban shopping complexes and other retail investments. The Foundation provides technical assistance for organisational development, financial assistance via grants and loans and directly involves neighborhood people in the decision making process (Schwartz et al., 1988:173).

The development in the USA of state and municipal housing trust funds, community loan funds, National Financial Intermediary entities and tax syndicates has resulted in a partial
replacement of Federal public housing funding (except for special purpose grants). They provide a complex but effective array of financing vehicles mostly directed at non-profit housing developers. This is illustrated in Figure 5.

As shown in Table 11, these vehicles are increasingly directing funds towards non-profit developers, making the non-profit sector more viable and a partial alternative to Federal public housing expenditure.
Conclusion

The advent of non-profit developers (community corporations) after the early 1970s to undertake most housing roles has opened a new option for channeling funds and developing and managing affordable housing without the monitoring and enforcement difficulties of the ‘set aside’ approach under regulatory agreements with developers. These partnerships continue to form important roles during the 1990s as recipients of developer cash contributions.

While this challenges non-profit developers in financial and project management, the non-profit sector has also taken advantage of community loan funds, tax syndicates and financial intermediaries. Abundant literature guides and assists its expansion. Significantly, this sector has worked closely with municipal housing programs and housing authorities. Together they have provided the overall strategic planning role in assessing needs, accessing and directing funds from various sources such as the Federal and State Governments and financial intermediaries. Lastly, pooled funding, while creating complexities in funding administration, has played an important role in diversifying funding sources. An over reliance on single sources of funds has been avoided and an aggregation of funds from a wide variety of sources to cover project costs and to meet the needs of differing project types is now available.
While non-profit developers are part of the funding source and provider network, in the future they may become the primary providers of low to moderate income housing as they continue to grow and demonstrate their advantage over restricted housing 'set aside' by developers. It also appears that municipalities will continue to have a key role as the level of government closest to the community. Municipalities are best able to assess and monitor non-profit and for-profit developer provisions, especially when Federal, State and municipal funds are involved. This role compliments their role in provide planning and other regulatory assistance such as with density bonuses, zoning and relaxing building standards.
CHAPTER SIX:
The Relevance of the US Experience to Australia

Introduction

Use of developer contributions for services and infrastructure funding in the outer growth areas of Melbourne and Sydney have become increasingly accepted. Also used for large engineering projects, their effective use, however, for low income housing in the late 1980s and early 1990s has been limited. A way determine why this experience has occurred is to compare it with the experience of the USA. Lessons from this experience and comparison the two approaches can shed light on ideas relevant to Australia.

The US political system is an unusual place to find the most extensive and advanced use of developer contributions for services and infrastructure funding amongst members of the Organisation for Economic Co-operation & Development. This has not been affected by whether the governing Federal administration is Democratic or Republican. In general, the US land use planning system is highly regulated. The use of rent control in cities like Santa Monica and New York, environmental controls and the use of developer contributions are some examples.

Following a 10 year delay, these controls are becoming relevant in the Australian political environment because of increasing pressures from urban redevelopment and resultant demands for infrastructure and community services. In Australia, both the Australian Labor Party and The Australian Liberal Party at either the State or Commonwealth levels are increasingly supporting large scale development projects funded by private developers in order to limit the impact on public funds. Both parties also encourage municipal Developer Contribution Plans. This is similar to the US experience.
However, any political parallels with the USA do not have simple implications for land use planning in Australia. This is because a paradox exists in the US planning system. Largely fragmented, it is without comprehensive, metropolitan strategic planning for large urban areas, in contrast to European planning systems and to a lesser extent, to those in Australia. The fragmented US planning system runs parallel with both comprehensive planning controls at the municipal level, such as those relating to developer contributions, and with a very rigorous and complex planning assessment process for individual developments. However, the comprehensiveness of controls and assessment varies considerably. For example, in relation to developer contributions, some municipalities have a mandatory requirement for contributions to provide low to moderate income housing. Others are only based on the rational nexus principles without this specific requirement. At one extreme comprehensive housing policies and strategies combine with municipal housing programs associated with developer contributions to. At the other extreme, an absence of interventionist housing roles exists alongside a laissez-faire approach to development.

In the USA, factors determining the use of developer contributions (as discussed in Chapter Four) have included the municipality’s uniqueness location for investment, the progressiveness of the local community and the nature of the State case law and legislation. These factors have resulted in an uneven distribution of any serious and effective use of developer contributions for low income housing, especially since the withdrawal of public housing capital funding over the 1980s.

Given these similarities and differences, what can Australia learn from the US experience? What lessons are transferable to Australia? More specifically, could Australian municipalities feasibly provide lower income housing through developer contributions? If so, how do we ensure its success? Where will success likely to occur and what are major hindrances to their use? These questions will be explored in reference to issues raised in Chapters Four and Five. In the first instance it is important to determine whether municipal developer contribution programs for community housing could successfully be established by Australian municipalities. Secondly, where similar programs can be developed, relevant issues associated with operating these programs will be discussed.
The Historic Context in which Developer Contributions Evolved

Chapter Two described the long evolution of the use of developer contributions in the USA. Their use started as early as the 1920's, less than 10 years after the first land use zoning was developed. Subsequent economic, political, social and legal events progressively reinforced its use and acceptance. Other influences included the Keynesian principles behind the 'New Deal' programs and policies of the 1930's, public reaction to exclusionary housing policies, propositions 4 and 13 in California, the Mt. Carmel Supreme Court legal precedent in 1980 and the withdrawal of the Federal public housing role after 1981.

The progressive evolution of complex planning requirements in the USA, while not uniform, has generally been unaffected by municipal, state and federal election outcomes. This may be because support from the Democratic and Republican parties and the generally well-established, ingrained, interventionist planning approach to development has been consistent. The broader role of local government in the USA also made developer contributions more acceptable. The interventionist land use planning approach is generally not challenged despite its contradiction stand to liberalism and individualism. Asking the market to meet some social needs also reduces the role of government and paradoxically satisfies those who support a dominant private market.

Australia has had no long-term legacy of using developer contributions. Only in the late 1970s and 1980s (particularly in Sydney and Melbourne) did Australia expand its role expand its use beyond its application to open space and broad infrastructure. Development pressures were severe and metropolitan strategic planning policies wished to both reduce the cost of estate development and contain urban sprawl. In Australia, however, only the localised use of SEPP 10 in some of the 14 Sydney municipalities along with Wollongong and Newcastle, in conjunction with Section 94 developer contributions, have enabled these municipalities to levy for low income housing provision. Of those 14 municipalities, only a few inner Sydney municipalities have utilised their powers more extensively. Because of power constraints, Australian municipalities responded passively in comparison to many US municipalities.

Appreciation of the social impact of development in Australia is generally underdeveloped in comparison to parts of the USA. This will slow the process of mainstreaming planning
mechanisms to address the social impacts of land use planning in Australia during the 1990's. The use of developer contributions has not and, in the current political context, will not be used for lower income housing provision in an outer or inner urban context in a more uniform manner across Australia. In Victoria, the use of developer contributions for lower income housing would be only possible from a change of State Government to a Labor Government in the 1999 State election and a subsequent review of developer contribution legislation.

Australia has fortunately not experienced any conservative reaction (through exclusionary zoning) to a depth of urban blight and poverty which is experienced by many US cities with their large, disadvantaged ethnic minorities living in depressed urban areas. In turn, this has not led to political support for inclusionary municipal housing roles and zoning which supports developer contribution policy, in contrast to parts of the USA such as California. Further, Australia’s relatively well developed social security system, social wage system (eg. maternal and child health, child care, state education,) and public housing system have prevented the worst excesses of visible homelessness. Further, housing affordability problems in US West Coast cities are not matched by Australian cities, with the exception of Sydney. However, higher housing prices in Melbourne and Sydney in the 1990s and the start of the 21st Century will continue to encourage municipalities to explore housing funding sources to add to traditional grant funded sources for public and community housing. This is especially so for Melbourne which has no history of such contributions.

Australia has none of the prerequisites of many US cities. As it continues its gentrification process even Australia’s more progressive communities, such as Port Phillip and North Sydney, which have significant housing roles and programs, risk having them perceived as unnecessary roles for local government. These roles become vulnerable, especially in the case of Australian urban municipalities (as discussed in Chapter One). Major differences clearly exist between the municipal role in the US and Australia.

Australia may gradually develop some of the features which have contributed to the evolution of US developer contributions. Features may include a reduced level of governmental social housing provision as well as an increased number of non-profit developers and larger medium density housing developers. However, it is unlikely in the next decade Australia will develop enabling legislation, legal precedent and other powers to the same extent as in the US. This is
because of the large role government plays in addressing social need and its therefore unwillingness to impose planning controls to address social impacts.

The Municipal Role in Australia

Chapters One, Three and Four described the role of US municipalities. In contrast with Australian municipalities they have greater roles, larger budgets and more expert staff or consultants. US municipalities also have elected office bearers and public ballots to determine major policy which includes performance targets (eg. 'Propositions 4 and 13').

Paradoxically, these characteristics enable two outcomes. They enable innovation and implementation of inclusionary housing initiatives. They also, however, permit extreme conservatism and self interested policy such as exclusionary policy against ethnic minorities or low income housing. Progressive communities in areas with high location value such as Santa Monica and San Francisco have used these characteristics to achieve impressive inclusionary housing programs and municipal housing programs. Conservative, wealthy areas on the other hand have either created ‘gated’ communities to restrict unwanted access or exclude household or socio-economic types or minorities from acquiring property. In one case in Orange County they shifted municipal boundaries to exclude areas with high concentrations of low income households living in mobile homes.

Australian municipalities have inherent disadvantages because they are unable to match the inclusionary zoning or direct provider achievements of US municipalities discussed in Chapter Three. As stated, disadvantages include the greater political instability because of more frequent municipal elections, the smaller revenue base which constraints ability to take on programs and the more limited services provided by Australian local government which fulfill traditional roles such as road construction and maintenance, operating libraries and collecting rubbish. Paradoxically, the impact larger, more resource rich municipalities in Victoria following the amalgamation process in the mid 1990s has not produced inclusionary housing policies or roles simply due to their greater size, budgets and strategic planing capacity, although by the late 1990s some interest in inner Melbourne has started to emerge (ie. Melbourne and Moreland municipalities). Only a few municipalities have maintained extensive housing roles over the 1990s.
In this context, municipalities seeking other sources of funding for the provision of low income housing must design developer contribution programs which achieve compliance with the five principles broadly used to test the adequacy of developer contributions. They also must gain greater acceptance of these programs from developers. Key ingredients for success are providing predictable yet flexible developer contribution programs, providing incentives and ensuring that most effective type of contribution is used, in particular the avoidance of the troublesome ‘set aside’ contributions.

Municipal interest in developer contributions for affordable housing will continue to be highly focussed. Rural municipalities are unlikely to adopt any form of developer contributions because their aims is to attract development and employment and increase population. Until the mid to late 1990s only fringe urban municipalities used developer contributions and only for non-housing services and infrastructure. This reflects the pressures these municipalities face to provide services and infrastructure for rapidly expanding populations. However, these municipalities are singularly focussed on meeting the needs of young families in the process of home building and, consequently, ignore the needs of lower income households, especially renters. Inner urban municipalities of major state capital cities tend to have neither consistent housing policy and programs nor the ability to easily justify developer contributions. These municipalities, however, have most of the lower income rental housing slowly being reduced through gentrification and where there will be continued pressures to find alternative funding sources to address housing need. Only after these inner urban municipalities have gentrified will more outer urban municipalities which have received the displaced low income households face similar housing need pressures and consider a housing policy response.

The poor resources of most Australian municipalities suggests that even if they were able to develop inclusionary housing policies, programs and zoning, they would be unable to adequately manage these programs like their US counterparts. This is for two reasons. Firstly, monitoring costs are high and highly skilled and experienced staff are to monitor restricted ‘set aside’ units under regulatory agreements, should these agreements be sought. Municipalities must also be prepared to legally challenge developers who breach these agreements. This response would involve a commitment of legal resources. Secondly, if cash contributions were made to municipal housing programs, long-term strategic planning would be required to ensure accumulated funds were spent on the provision of community housing. Projects can have a two or more year lead time and urban municipalities have a checkered history of developing
ongoing, consistent housing policy and programs. Thus their ability to meet two of the prerequisites of 'accountability' and 'equity' stated in the Eddie Barron case in Melbourne in 1990 and the Simpson Report into developer contributions in New South Wales of 1989 is at risk.

This does not, however, preclude progressive, urban municipalities being able to manage developer contribution programs for low income housing or municipalities contracting community housing project management roles to other provider organisations. This situation is, however, more likely in the future to be exceptional. Municipalities will continue to rely on voluntary contributions as in Melbourne or ineffectual, small contributions as in Sydney in the absence of enabling legislation.

**Municipal Location and Community Activism**

The importance of the location of US municipalities (their location related effects) was demonstrated in Chapter Four. To reiterate, municipalities with sought after or unique attributes could more successfully require developers to contribute towards low income housing provision without scaring away new development investment. Additional developer incentives must be provided by municipalities when location related attributes are weak or absent.

The experience of North Sydney and the former St. Kilda have some important comparisons with the four Californian municipalities. Both St. Kilda and North Sydney are in unique areas. They are sought after by investors and developers because they are close to Melbourne and Sydney Central Business Districts and to Port Phillip Bay and the Sydney Harbor respectively. Both are tourist destinations and have high property values. This mirrors the characteristics of San Francisco, Santa Monica and parts of San Diego. Both St. Kilda and North Sydney had/have progressive communities and municipal staff and councillors which support the establishment and maintenance of municipal roles to mitigate the impacts of gentrification through testing the limits of municipal powers to control development. Strikingly similar to San Francisco and Santa Monica, they have inadequate levels of public housing to meet the needs of low income residents and seek to use the planning permit process to maintain affordable, private rental housing and fund the provision of alternative community housing. A further similarity is that these municipalities in both countries use or try to use development growth as a mechanism to fund social programs. It is no coincidence in both countries there seems to
be a nexus between community progressiveness and their location in areas with higher built densities, social and housing diversity. These areas which offer sought after or unique attributes for developers are also undergoing transition due to gentrification.

Few other municipalities in Australia have the same combination of attributes. An unequal distribution of local initiatives to provide community housing will occur in Australia as in the USA unless State enabling legislation requires municipalities to develop housing plans and use alternative funding sources. Only a handful of municipalities in capital cities are likely to establish or maintain extensive, inclusionary housing policy and programs in Australia.

**Social Impact Provisions in the Planning Process and Other Legal Issues.**

Chapter One illustrated the generally underdeveloped nature of social impact provisions in Australian land use planning. Using St Kilda and North Sydney as examples, limitations facing two of the most progressive municipalities seeking to use developer contributions for low income housing provision were also highlighted.

In the case of St Kilda, limited social impact provisions in planning legislation had not enabled the Council in the late 1980's and early 1990's to levy developers (who contribute to the loss of low income housing) for the provision of alternative, low income housing except under voluntary agreement. With section 173 (voluntary) Agreements rarely achieved, the former City of St Kilda was prevented from using developer contributions for this purpose.

The City of North Sydney, in comparison, using the provisions state planning legislation (sections 90 and 94) and the associated guideline (SEPP 10), has on the one hand statutory authority to use developer contributions but on the other hand has limited scope to raise sufficient replacement funds. The municipality has to balance the continuing mandate to use its statutory powers with the principals outlined in the Simpson Report and the limitations of the weakened SEPP 10.

In contrast, Californian municipalities have clear, broad mandates under state legislation to levy developers for low income housing provision for a broad range of development types. They must justify levies under State required municipal housing plans. The essential
The difference is that Californian legislation specifically refers to low income housing requirements whereas in most Australian states, at best, only a broad and limited reference to social impact considerations exists. The Californian requirement ensures that municipalities suitably respond to housing need while Australian social impact considerations, where they exist, give municipalities a choice whether to consider broad social impacts only, let alone consider specific housing needs without necessarily acting on the impacts. Most municipalities choose not to consider social impacts or include them in broad objectives without providing mechanisms to achieve the objectives. The model of City West Housing Pty. Ltd. (described in Chapter One) provides closer comparison to California but has little direct application to Australian municipalities due to its unique powers and circumstances.

Australian municipalities will continue to be constrained by the absence of enabling, state legislation. Meanwhile, apart from the municipalities using SEPP 10, slowly progressing legislative precedents (such as the Eddie Barron appeal) may open up opportunities for increasing the use of developer contributions. However, this will require intentional testing through the planning appeal process before it can apply to low income housing in any location. This testing of planning powers must bridge two important hurdles. It must apply to established, inner urban context where gentrification reduces the demand for community services and housing for low income households, and consequently makes more difficult the determination of the nexus between the development and the need. It also must result in winning land use planning appeals. Only progressive communities will be willing to take this risk and then only when the right conditions apply. In Victoria, the right conditions do not exist under the current, Liberal State Government and unsupportive planning appeal precedent.

The Simpson Report (1989: 118), in relation to applying Section 94 developer contributions to established urban areas in New South Wales, concludes that the establishment of nexus is the principle hurdle. In this regard, Judge Simpson argues that developer contribution plans should include four components: firstly, the type and extent of development likely to occur as a result of zoning; secondly, likely changes in the demographic, social and economic profile of the area where development will occur; thirdly, methods necessary to accommodate such needs or changes and the practicality and financial capacity of Council to implement those measures and fund them in future years; and lastly, an audit of existing public amenities and services in the area and a detailed structure plan relevant to a given time frame showing how these facilities
may need to be expanded, reviewed or embellished to accommodate increased need and the funds required to do this. He cautions that municipalities must:

...clearly distinguish between need created by development requiring consent and that occurring without need for consent with appropriate separation of costing if Section 94 contributions are to be properly determined in accordance with nexus and fair apportionment of cost concepts.

In Victoria, developer contributions for lower income housing in inner urban areas will involve a nexus between the development and the housing needs generated and/or the cost of meeting changes in the nature of service provision as a result of demographic changes caused by development. Establishing a methodology to determining the nexus for these scenarios is beyond the scope of this research and some precedent has been set by Sydney municipalities using Section 94 and SEPP 10 as well as municipalities levying developers in established, urban areas (for the latter refer to Simpson, 1989: A 28). However, unlike regulatory agreements used between developers and planning authorities in California and the USA generally, Victoria has no controls for converting housing between the home ownership and rental tenures. These conversions are not considered to be a valid planning issue due to the emphasis on physical, building related planning issues and it is unlikely that Victoria will follow the US trend in this regard.

Secondly, the St. Kilda experience (described in Chapter One and Appendix One) demonstrated that, in the absence of clear legal powers, careful timing must occur when testing municipal powers through the planning appeal process. This includes the existence of an appropriate political environment, use of supportive appeal precedent if possible, extensive on the social profile of affected residents or changes in service delivery, careful wording of permit conditions, the adequacy of the policy framework within which the controls sit and the harnessing of all relevant municipal resources behind justifying the planning control test case. Lastly, preparation by specialist solicitors would be required to determine the likelihood of succeeding in the face of developer appeals in both a general sense as well as through individual test cases. Any test cases would need to be undertaken within the framework of a fully developed developer contributions plan relating to the provision of all infrastructure and services. This would help legitimise contributions for low income housing on the basis that they respond to one of a range of development impacts and on the basis that they fund one of a range of infrastructure and services within the developer contributions plan. The lessons of the 'Mandalay' test case used by the former City of St.Kilda and the Ritz Mansions test case used
by the North Sydney Council provide valuable lessons for the further testing of municipal powers.

Consequently, the relevance to Australia of the US experience is to illustrate the necessary legal conditions for the effective use of developer contributions for lower income housing purposes. It is also to highlight the extent of the limitations facing Australia. In relation to these necessary conditions, US case law and legal issues highlight four potential, future issues facing Australian appeals as well as several approaches municipalities may wish to follow.

Firstly, US state courts tend to accept developer contributions and do not require validatoratory proof as municipal ‘taxing’ powers. Since 1926 US Courts treat these powers as valid policy roles and developers as a taxable class. Arguments that developer contributions create double taxation carry no weight in the US. The emphasis in Australia, however, has been the validity of powers determined by case work precedent because of no enabling legislation. This represents a more conservative and narrower interpretation of the law which would render developer contributions as ‘Ulla Vires’, ie. outside the scope of the law. Without legislation, validating powers though the evolution of appeal precedent will be very slow and gradual.

Secondly, authorising language in Californian legislation is specific about key concepts which reinforce powers, making them difficult to legally challenge. The wording also allows for variation in the municipal response to legislative mandates. An established framework ensures that a comprehensive housing plan is prepared and implemented without municipalities avoiding their responsibilities.

Thirdly, US developer contributions for low income housing are treated in the same way as any other contributions. Adequate justification is emphasised by the nexus test rather than by questioning the validity for developer contributions for addressing housing impacts. This is founded on the notion that Local Government has the power to preserve the public good through zoning powers, with the public good being defined broadly and where inclusionary zoning is not treated differently to other zoning. Supportive municipal policies and guidelines become a critical way to justify the need for contributions. Because extensive strategic planning through the preparation of a developer contributions plan is required to justify
developer contributions, Australian municipalities would do well to better resource their strategic planning functions so that they justify developer contribution programs for community housing.

Lastly, the general body of US case law allows developer contributions to fund infrastructure and services which are used by the general public rather than exclusively or even partly by the users of the contributing development. This is in accordance to the similar precedent set by the 'Eddie Barron' appeal in Victoria which provided infrastructure and community services but not low income housing as described in Chapter One. This case reinforces the ability of levying municipalities to spend the contribution in any area of the municipality according to identified needs and this and other supportive appeal precedent should be used by municipalities without legislative powers to gradually achieve supportive appeal precedent specific to contributions for low income housing.

The Role of Incentives for Developers

Legal impediments aside, the Californian experience highlights the positive characteristics we can emulate and the negative ones to avoid in a developer contributions housing program. The lack of developer appeals against developer contributions in the US (as at 1990/91) is due to a combination of factors. These include the long history of and legislative mandate for their use as a legitimate taxing mechanism; negotiating with developers based on predictable yet flexible policy; and providing compensatory incentives and dispensations. These incentives or dispensations, mandatory in certain US states such as California and New Jersey, are described in Chapter Four. They comprise financial incentives, full, clear and predictable policies and guidelines, choice in the timing of the contribution via-a-vis the development process, choice in whether the contributions is on or off the site of the development, choice between a cash, land or unit 'set-aside' contribution, and ability to negotiate an outcome to minimise the impact on the developer and the development.

These incentives endorse the belief that a municipality should use developer contributions but that it is not developers problem but rather a shared problem how it accommodates and affords a contribution but a shared problem. This is because it is in both the developer and the
municipality’s interest that contributions be provided and this can only occur if developments remain viable and the contribution requirements not appealed by the developer. This approach effectively balances social and economic objectives compared to a more punitive one.

Generally, incentives should be substantial so that they will impact on the developers’ financial feasibility studies of their developments. A range of incentives should address the needs of each development. This was highlighted by increased participation in inclusionary housing by US developers from the late 1980s. Reliance on density bonuses shifted to an increased variety of incentives. This approach has been easier to achieve in the US than in Australia because a greater range of Federal, State, Municipal and private sector incentives are available. They are usually channeled through municipalities which coordinate and legitimise their use. Municipalities in the USA also have a broader range of income sources available than do Australian municipalities, as illustrated in Appendix V (USA) and Appendix VI (Australia). They also have greater range of external funding sources available for-profit and non-profit developers, as illustrated by Appendix X and Tables 10 and 12. As demonstrated by Table 13, Australia generally offers few choices, as demonstrated by Table 13.

<table>
<thead>
<tr>
<th>Source of Incentive</th>
<th>Incentives Potentially Available in Australia</th>
<th>Tax-profit developers</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Non-Profit developers (community housing providers)</td>
<td>Tax incentives (negative gearing for rental housing - no affordability requirement)</td>
</tr>
<tr>
<td>Federal Government</td>
<td>Community housing grants (the former Community Housing Program and the State equivalents under the untied Commonwealth-State Housing Agreement)</td>
<td></td>
</tr>
<tr>
<td>State Government</td>
<td>Joint venture funding (some states only) Community housing grant programs</td>
<td></td>
</tr>
<tr>
<td>Municipalities</td>
<td>Grants (rarely provided) Density bonuses Allowing phased construction Relaxing development standards Fast tracking planning permits Waiving permit fees Rate waivers</td>
<td></td>
</tr>
</tbody>
</table>

Notably in Australia is the unavailability of housing bonds and tax incentives for the provision of affordable housing. These incentives are unlikely to occur because of the Commonwealth Government’s disinterest in addressing broad social or environmental problems through
financial or taxation measures. This reflects the influence of economic rationalist views resulting in a failure to intervene through incentives and a reliance on traditional but contracting expenditure solutions. Highlighting this limitation was the failure of the National Housing Strategy 1991 to obtain Commonwealth Government support for housing bonds and the continued use of tax incentives to increase the polarisation between wealthy and poor Australians. This absence of substantial financial incentives in Australia greatly limits the encouragement of developers and investors in lower income housing.

Further, Australia does not combine or pool incentives to finance projects. A typical funding package for a US developer would be bond finance, a density bonus and Federal or State tax credits (when Federal tax credits are used for primary financing and State tax credits for secondary, gap financing). By comparison, Australia pools incentives or funding sources poorly and often discourages pooling. For example, the State housing authority in Victoria would not allow Commonwealth funds under the Community Housing Program to be combined with joint venture funds provided by the Authority due to their similar purpose (City of Port Phillip, 1995:5). Australian government needs to broaden the range of funding sources and also encourage pooling to ensure that projects which include affordable housing are viable and major developers are prepared to tolerate developer contributions. A dependence on a single grant funding source, as in Victoria, is risky if funding sources terminate or are inadequate to address demand. This will result in less projects proceeding.

The poor lack of opportunity in Australia for significant developer incentives parallels Australia’s embryonic tradition of seeking developer contributions. Only over time as contribution requirements grow will the demand for suitable incentives emerge. It may take the advent of larger developers in Australia seeking appropriate incentives before planning authorities address this issue.

**Contribution Type and Location On or Off the Development Site**

The difference between municipal and developer preference regarding the type of contribution required (ie. units set aside or cash contributions) is generally unresolved in California and the USA. Housing units set aside by the developer on the development property receiving the
planning permit have the following advantages. They are preferred by municipalities which consider them a more efficient way to spend funds. They can achieve a greater social mix when lower income units are set aside amongst up-market units. They avoid municipalities having to find land, overcome project obstacles and expend funds and they avoid the risk of inadequate cash contributions. The disadvantages of set-aside contributions are that they are not preferred by developers, they require municipalities to provide considerable resources to monitor set aside regulatory agreements which have limited term affordability restrictions and only defer housing affordability problems to the future. Advantages for housing provided by the municipality or non-profit developer on another site using cash contributions include greater flexibility in housing outcomes through housing design, type and location; better targeting of funds; long-term, secure and affordable housing as against units 'set aside' for a limited term; and developer preference because it avoids having to incorporate affordable housing into their developments.

Because most Australian municipalities have limited powers and are inherently unstable, cash contributions are easier to manage. This is because municipalities lack the resources, sophistication and continuity of programs to monitor long-term set-aside contributions. Municipalities would prefer the familiar role of managing cash contributions which are similar to the familiar role of managing cash-in-lieu contributions from shop traders for car parking provisions, street improvements or shopping centre promotion or open space contributions made by developers. While municipalities would need to improve their accountability systems for the use of developer contributions, this is a manageable task. Most importantly, cash contributions provide municipalities with more control of housing outcomes, especially in the critical area of maintaining long-term affordability.

Cash contributions would, however, necessitate that municipalities provide housing or engage external organisations to undertake the provider role. Municipalities reluctant to do this may establish a non-profit community organisation or use an existing one to both develop and manage the housing on its behalf.
Development Viability and the Nature of the Australian Developer

Municipalities programs can offer several ways to achieve development viability and most of these ideas apply to Australia. However, the most significant inhibiting factor is the smaller size of Australian developers and developments. This smaller size means that developers are less able to achieve economies of scale, their land holdings and cash resources are not large enough to absorb additional contribution costs, they have less local area domination, their staff are less skilled in finding ways to accommodate controls, they are less able to blend a mix of incomes on the one site and they have less access to finance. The US experience showed that for these reasons smaller developers were less likely to use incentives. Consequently, municipalities targeted larger developers.

In the US, residential development is dominated by developers who acquire land, rezone it, provide underground services and infrastructure, subdivide the land, manufacture building components and build speculative housing. In contrast, land developers in Australia operate similarly (albeit without manufacturing building components) but on a much smaller scale. Hayward (1992) illustrates this by characterising Melbourne land developers as having a small unit output (Hayward, 1992:264), as being mostly builders rather than land developers and build only under contracts from land owners or developers (Hayward, 1992:231-232), having a small annual turnover, large builders being few in number, operating mostly in one state instead of a number of states and being highly geographically segmented (Hayward, 1992: 227-231). These characteristics contrast with those of large US housing developers.

However, since the early 1990s, especially in Victoria, developers of both land and medium to high density residential buildings have emerged following the collapse of the stock and property markets in the late 1980s and early 1990s (Spivak, 1997: 115-117). These provide a more appropriate target for developer contributions due to economies of scale created by their construction methods, in contrast with the low density housing estate developers Hayward refers to. This may result in them developing a more sophisticated approach to addressing municipal social impact requirements, however, this possibility requires investigation. They also focus their development in inner areas of Melbourne where housing need is greater. In this context the US experience will become increasingly more relevant.
Considering these limitations and opportunities, Australian municipalities must be extremely careful in how they design developer contribution requirements. Firstly, levels of contribution must not be too high and therefore unreasonable. Contributions which are too small are also problematic (as illustrated by Sydney municipalities' use of Section 94 contributions). However, municipalities may have to accept undersized contributions (1-10% cash or set aside) in order to overcome industry and legal limitations and gradually build up local acceptance for contributions.

Municipalities should not avoid lower income housing provision in up-market areas. While Australian research on this market impact is required, if the US experience is transferable some level of well designed lower-income housing, so long as it is of good design, is likely to be tolerated. This conclusion is supported by a lack of real (compared to a perceived negative) market impact from the inclusion of public or community housing in gentrifying or gentrified Australian communities. No general limit to the proportion of low income housing in areas can be applied given the differing nature of Australian communities. For example, gentrified areas of Melbourne with existing public housing (e.g., South Melbourne and Carlton) may be more tolerant than areas of established wealth and with no tradition of low income housing (e.g., Brighton or Camberwell). Municipalities must determine this tolerance level to reduce the risk of electoral backlash.

Successful mixing of low and high income housing within the one development has also been achieved in the USA. This applies both to medium density townhouse development and multi-unit buildings. However, in Australia there is little experience of this mixing, in particular in multi level-multi unit buildings. There are two recent exceptions. These involve two authorities in 1999 attracting, through specific joint ventures, developer interest in mixed social and private housing scattered throughout multi level-multi unit buildings in relatively high density and mixed use areas with traditionally high levels of rental housing. The first example is City West Housing Pty. Ltd. in the Ultimo-Pyremont area of Inner-West Sydney, which was described in Chapter One. It will acquire 'off the plan' 38-45 units of low income housing out of a total 95-98 units (or 39-47%) of a five level, multi level-multi unit apartment building This building is being constructed by a developer, Satellite Group Pty. Ltd.(from an interview of staff of City West Housing, 1999). This project is yet to be documented. The second example is the City of Port Phillip with 'The Depot' housing project in St.Kilda. 27 units of low income housing comprising 11% of the total 238 units are currently being constructed on former
municipal land for the City in six, three to five level buildings by Contract Properties Pty. Ltd. in joint venture with Riverside Properties Pty. Ltd. Under the terms of a Contract of Sale, the community housing will be mixed with the private housing in two buildings and there is a allowance for further community housing in the development. This could result in up to 15% social housing (City of Port Phillip, 1999:20). However, once completed the longer-term success of these two projects must be evaluated.

In encouraging or requiring the inclusion of lower income units, municipalities should consider the US experience and allow developers a choice between scattering or grouping lower income units in a disguised way. To minimise any negative market perceptions, they should permit units of a lower but still acceptable standard and allow the construction of lower income units to occur after sufficient number of more expensive units have been sold (at least 20-25). Developers should have the freedom to find their own design solutions under flexible inclusionary housing requirements.

Mixed income, home ownership housing under developer contribution programs are unlikely to occur in Australia and be supported by Australian developers for the same reasons as in the USA (refer to Chapter Four). As most medium density housing in Australia is built for home ownership, in contrast with California, but with a high proportion of units (up to 60%) purchased by investors for rental purposes, the Australian tolerance for this mix is likely to be lower. This suggests that Australian municipalities requiring affordable, set-aside units should either reduce the impact on the development by requiring small numbers of set-aside units under lower standards or else encourage cash contributions to avoid the problem altogether.

**Housing Affordability**

Although there are a number of useful methods employed by US municipalities and housing authorities which maintain housing affordability, it is essential to understand the ramifications of the US experience with using developer contributed, set aside affordable housing under regulatory agreements and developer contributed cash contributions for municipal or non-profit provider use.

Maintaining housing affordability in US developer provided units produced many challenges and problems for municipalities monitoring the agreements. Affordability benchmarks set by
the Federal Government must be fair to the developer and affordable to lower income persons. Secondly, limited enforcement mechanisms for developers who broke agreements did not encouraging new agreements. Thirdly, the agreements were for fixed terms of 20-50 years and created a housing affordability crisis. Once agreements expired, large numbers of residents faced large rent or sale price increases. The legislative solution for mandatory extensions of agreements only deferred the crisis and developers and investors lost confidence in the process. Lastly, municipalities and states were forced to replace withdrawn Federal rent subsidies with incentive packages.

Requiring cash contributions to be placed in municipal housing funds avoided all these problems in the USA. These funds were then directed either to municipal housing authorities or non-profit developers. Permanent, affordable housing was provided without the need to monitor and enforce of regulatory agreements involved with ‘set aside’ contributions.

Cash contributions are necessary in the Australian context. This is because municipalities have neither the resources nor the expertise to monitor regulatory agreements. Australia’s smaller developers are most likely to support this cash option because they are not used to providing subsidised housing. Lastly, and most importantly, cash contributions avoid the US dilemma of deferring an affordability crisis when limited term agreements expire and municipalities may be faced with insufficient funds and political will to tackle the problem. In this sense, Australian municipalities are well placed to maintain housing affordability using cash contributions.

**Partnership with Community Based Housing Providers and Other Intermediaries and Arrangements.**

In the USA, non-profit housing developers (community corporations) were established from the 1970’s. Since the mid 1980’s Australia has followed the same path.

There are many differences between Australian community housing providers and US non-profit developers. Firstly, community housing providers and Local Government in Australia generally are not working partnership like their US counterparts. In the USA, in response to
the cessation of Federal public housing, Local Government acted for non-profit developers as a conduit for State and Federal Government funds as well as funds from Community Loans and Financial Intermediaries. By contrast Australian Local Government and community housing providers tend to operate in isolation. Most municipalities in Australia, which are direct housing providers, have not established or identified an existing, local housing association to manage completed housing or receive external project funding. These partnership roles are worthwhile models for those Australian municipalities who do not wishing to become direct providers or managers but want to secure funding for housing provision or who are happy to provide housing as long as a property or tenancy management organisation exists. In Australia, one of the few successful, long-term partnerships of this kind in Melbourne is between the City of St. Kilda/Port Phillip and the St. Kilda Housing Association Inc. Operating since 1986, the use of a single, designated manager has been a critical element of this partnership’s success and provides a model for Australia.

Non-profit developers in the USA have developed considerable expertise in the financial and project management of community housing and created a vast amount of literature. While Australian community housing providers generally are not yet this sophisticated, they are developing expertise by ‘trial and error’ learning as grant recipients under the CHP or equivalent programs administered by State housing authorities. They also receiving considerable support from the Commonwealth Government on a broad policy level and some State Governments, especially Victoria, New South Wales and South Australia, which are committed to the growth of the community housing sector, although in Victoria the sector’s independence has been significantly curtailed under the Liberal State Government. The establishment of peak bodies in all States and Territories by the 1990s which represent and resource the sector provide it with an identity and influence in political decision making. Australian providers are likely to ‘fast track’ their expertise as they grow and achieve economies of scale. This will be enhanced by the appointment of experienced members on their committees of management or boards of directors with corporate or professional backgrounds. Appointing specialist staff will also allow providers to focus on financial management, project and contract management and also to work with consultant architects and sub consultants. The community housing sector’s development is important if municipalities are to form partnerships for the development and management of developer contributed community housing.
A number of special purpose entities have no equivalent in Australia. These are the US tax syndications between non-profit and for-profit developers, Federal requirements on banks to make loans to low and moderate income communities under the Community Reinvestment Act 1977, Community Loan Funds as an ethical investment under the Act’s requirements and national financial intermediary entities which coordinate the investment of national corporations into low income housing. This absence will hamper the development of opportunities for corporate involvement in or contribution to community housing in Australia. It also will limit the potential involvement of developers in providing community housing under inclusionary housing policy or developer contributions as these entities facilitate corporate funding and partnerships. Further, until the prevailing economic rationalist ideology ceases to dominate political and economic policy, Australia will not adopt interventionist requirements for its financial system, let alone for social benefit purposes.

The establishment of national financing intermediary entities, alternatively, requires a maturation of the Australian corporate sector, philanthropic trust funds and ethical investment. This will be hampered by the deregulated financial environment. Such an environment encouraged a wastage of private investment on speculative ventures and corporate mergers in the 1980s. Although philanthropic interest in specific (eg. youth) community housing exists, it remains embryonic. Australia’s first non-profit acquisition entity, the Australian Bush Heritage Fund was established in 1990 and seeks the acquisition of endangered natural habitats and ecosystems, similar to the US Nature Conservancy. A similar mechanism is required in Australia to acquire existing low income or fund the construction of new, low income housing or to direct philanthropic or ethical investment to accredited community housing providers. This represents an untapped growth area which may slowly evolve as the community housing sector develops over the next decade. Once established, these entities will assist developers form partnerships and fund projects to meet municipal affordable housing requirements.

The threads of this analysis and their relevance to Australia are summarised in the final chapter.
CHAPTER SEVEN:
Sharing the Responsibility

Similarities and Differences

The shared responsibility of developers with Local State and Federal Government and non-profit providers in contributing towards the provisions of lower income housing is a paradoxical aspect of the US planning system. The nation which champions freedom of individual rights and an unfettered private market nevertheless imposes a strict set of laws which regulate the activities of government and corporations. These activities include using manufacturing subsidies, maintaining import tariffs, imposing extensive conservation and private rent controls and, as described in this thesis, requiring significant developer contributions. In Local Government using the market to provide affordable housing, this accords with the prevailing US system, a likely reason for the general political acceptance of these developer contributions.

While the US housing market has many similarities with its Australian counterpart, the differences between factors affecting the US and Australia system of developer contributions, described in Chapters Two, Four and Five, are significant and are major hinderances in transferring models to Australia. As described in the first half of Chapter Six, these differences relate to the longer evolutionary period of US developer contributions, the broader US Local Government role, the more effective social impact provisions enshrined in legislation and appeal precedent, the less conservative interpretation of the law by the Courts and the larger and more sophisticated nature of the US developer. Caution is required if one wishes to emulate US models of developer contributions in Australia. We must understand these essential differences and adjust Australian approaches to suit local conditions.

Currently the constraints in Australia are more significant than the opportunities. The experiences of the City of St Kilda through the ‘Mandalay’ appeal case in 1989 provides a warning. Municipalities across Australia must understand that requiring developer contributed
lower income housing is unlikely to succeed under prevailing conditions. Only the 16 New South Wales municipalities using SEPP 10 and Section 94 contributions have limited legal powers in this area which still compare unfavourably with the powers of many US municipalities. This is illustrated by the small contributions raised by these municipalities to replace redeveloped affordable housing and the inability of North Sydney City Council to prevent the closure of the Ritz Hotel rooming house (North Sydney Council, 1992:42).

Despite these constraints and parallel to US trends from as early as the 1920s, as Australia's state capital cities continue to sprawl and capitol infrastructure projects become more costly, there will also be the increasing political emphasis (which commenced in the 1980s) on encouraging or requiring urban consolidation and infrastructure costs to be financed by developer contributions. Where an economic rationalist view prevails, this may result in more widespread support for developer contributions for community housing as an extension of the activities of the private market. Where this view does not prevail in government, developer contributions for community housing may be supported as it helps to achieve social redistribution.

In turn the increased use of developer contributions by local Government will slowly set legal precedent. Broader applications of municipal developer contribution policy as well as appeal precedent such as the Eddie Barron case in Victoria will occur. The nexus between the development and affordable housing need in inner urban or established areas will also become non-controversial. This must occur under a developed nexus test similar to that recommended by Judge Simpson in New South Wales or the Victorian Guidelines for Developer Contributions along with the other requirements of reasonableness, equity and accountability. These principles have become a universal requirement in many parts of both the USA and Australia. In Victoria, the scope of the Guidelines to apply to low income housing provision would need to be tested or the Guidelines reviewed when State political conditions allow.

In each Australian state, planning policy and appeal precedent will need to be followed by legislation to set a framework for the legal process and reduce the risk for municipalities which wish to test the limits of their powers. Legislation would need to be broadened in the case of Victoria and New South Wales and created for other states. Californian legislation in contrast with State legislation in Australia illustrates the effectiveness of clear, proscriptive and detailed requirements on municipal powers, roles and responsibilities.
If Australian municipalities eventually attain the necessary powers, they must also be committed enough to exercise them. At present most urban municipalities lack commitment despite facing pressure to encourage diverse and affordable housing in the area their constituents wish to live. Failure to develop consistent, ongoing housing policy contrasts with rural or regional municipalities. In these municipalities diverse and affordable housing helps declining townships to survive and tight knit communities muster large contributions to provide housing. However, only areas with development pressure (large cities) will be in a position to seek developer contributions without inhibiting development. Increasing the size of municipalities, as occurred by Local Government amalgamation in Victoria after 1994, will not necessarily provide the resources or commitment to develop sophisticated strategic housing plans. The critical factor is likely to remain the progressiveness of the municipality and the commitment of councillors and staff to meeting community expectations that address social redistribution, social equity and diversity and social inclusion. This situation will continue unless State legislation requires a uniform and significant role in addressing affordable housing need and this role can be enhanced by the inclusion of a developer contribution plan for affordable housing.

Lessons from the USA

As conditions in Australia are not yet favourable to requiring developers to share the responsibility for lower income housing provision, the value of the US and Californian experience is to illustrate the prerequisites for developer contribution programs and how developer contribution programs can operate once these conditions exist.

The characteristics of successful Californian municipal programs partly centre on the attempts to integrate the needs of developers with mandatory contribution requirements. They include significant incentives and predictability through known and clear requirements while also providing flexibility and negotiable outcomes. It also relates to establishing mechanisms for achieving housing affordability and developing partnerships with non-profit developers which establish complimentary housing roles to further municipal housing objectives. Municipalities in California are the best vehicle to channel and pool resources and coordinate their distribution, regardless of whether the municipalities are also involved in direct housing provision themselves.
The shortcomings of the Californian experience are also valuable indicators. Affordability of developer contributed housing is not always achieved for a range of reasons such as because the methods for calculating benchmark (median) incomes are crude or skewed. However, a key lesson relates to the municipal emphasis in the USA on encouraging affordable housing set-aside by developers under regulatory agreements. This creates both a burden on municipal resources to monitor and enforce these agreements as well as a deferred housing affordability crisis when set aside regulatory agreements with developers expire. This problem can be avoided by use of cash contributions for community housing. Ways of tailoring programs so as to increase the viability of developers who are required to make contributions are inadequate. Municipalities need to be more proactive in making this a direct rather than indirect goal and an explicit rather than an implicit policy. The US experience in achieving this and negotiating mutually acceptable outcomes must be considered by Australian municipalities.

Lastly, trends indicate that conditions in Australia are slowly transforming so that eventually some of the US models may be adopted, albeit in a modified way. The development of a community housing sector will progressively decentralise social housing delivery in Victoria and Australia generally and offer a more attractive alternative to public housing. However, Australian trends indicate that it will follow the US trend of replacement community housing being unequally distributed due to municipalities and communities not having a uniform interest and capacity to address affordable housing needs. Progressive communities will carry an unequal share of responsibility for providing community housing or seeking developer contributed affordable housing. Within another decade, if the current economic rationalist view continues to prevail in the Commonwealth and Victorian Governments, this may result in a policy decision to withdraw the provision of public housing and only fund the provision of community housing. As experienced in the USA, this may result in severe homelessness if community housing is inadequately funded to replace public housing. Any withdrawal of public housing provision will place pressure on municipalities which are supportive of public housing and concerned about the housing needs of their low income residents. They will be pressured to assist with the development of community housing as an alternative to public housing, as occurred in the USA after 1981. They will also be pressured to investigate or use other, non-traditional sources of funding community housing such as developer contributions. The growth of the community housing sector will also provide a more attractive target for cash developer contributions. This social housing redistribution trend has already started in Victoria
but the tenuous public housing capital funding from the Commonwealth Government to the
States under the Commonwealth-State Housing Agreement in late 1999 has delayed this trend
becoming as definitive as in the USA.

Geographically even distribution of affordable housing is only likely to occur when legislative
requirements at a Commonwealth or the State level compel municipalities to develop
sophisticated, broad housing plans which address a range of housing issues and require them to
become effective housing providers and/or facilitators.

Developer contributions have the potential to share the responsibility for the provision of
affordable housing in Australia. Yet under Australian conditions, their use for affordable or
community housing will remain constrained and limited for the foreseeable future. When
favourable conditions develop, the lessons of the USA will become important both to avoid its
weaknesses and use its strengths.
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Appendix I: the Experience of North Sydney Council and the Former City of St. Kilda in Using Developer Contributions for Community Housing and Social Impact Planning Provisions to Retain Affordable, Private Housing

The North Sydney Council Case Study

The relevant experience of North Sydney Council, apart from its use of section 94 developer contributions under the New South Wales Environmental Planning and Assessment Act 1979, relates to use of State Environment Planning Policy 10 (SEPP 10) referred to in Chapter One, specifically in the section on ‘The Limitations of Social Impact Provisions in Planning Legislation...’. SEPP 10 is a State planning policy which gave local planning authorities powers to prevent the redevelopment of low cost housing through consideration of the social impacts of the proposal. The experience which had the most significant impact on North Sydney’s planning policy relating to the preservation of existing, affordable, private rental housing concerned its attempts to save The Ritz Hotel rooming house and other rooming houses from redevelopment through use of SEPP 10 and how various amendments to SEPP 10 affected its powers to maintain The Ritz.

The first amendment, in 1987, made rental value rather than household income the determining factor of social impacts for buildings housing low to moderate income households.

A third amendment, in 1988, addressed the exclusive focus on subdivisions by including other changes affecting rooming (apartment and boarding) houses. Renamed ‘Retention of Low Cost Accommodation’, the 10 page policy document provided explanatory information,
interpretation of use and housing statistics. This strengthened SEPP 10 and enabled municipalities to significantly reduce the loss of rooming houses. For example, with the North Sydney Council, the number of development applications involving rooming houses halved after the third amendment was gazetted (Rosenberg, 1990).

Developers sometimes exploited a loophole in SEPP 10 by initially evicting tenants and upgrading the premises before lodging a planning permit application (Rosenberg, 1990). SEPP 10 could not apply in these circumstances as the buildings had ceased to comprise low cost rental accommodation. Further, non-structural changes to buildings not requiring planning permits did not apply, such as the conversion of rooming houses to backpacker hostels, flats to serviced apartments or a dramatic increase in rents.

However, some major developments were initially prevented under the third amendment. For example, the North Sydney City Council prevented three successive applications by the owner of the 100 room ‘Ritz Hotel’ rooming house to convert the building to 10 three bedroom luxury flats as the owner could not demonstrate sufficient, alternative accommodation. Further, an appeal by a developer to the Land and Environment Court against the North Sydney City Council resulted in a determination that SEPP 10 applied to all rooming houses existing at the gazetted of the third amendment, thus retrospectively protecting all rooming houses existing at that time.

Despite this precedent, as a result of pressure from developers and owners, the fourth amendment (in 1989) weakened SEPP10 by requiring municipalities to consider only whether sufficient, alternative accommodation existed; and for municipalities to consider the financial viability of premises continuing to operate as well as the fire safety and structural soundness of the building (and, by interpretation, by the Department of Planning, the cost of necessary repairs by the owner or applicant). Further, a building’s low cost housing use was deemed to be that occurring at the time of application only, thus removing protection under SEPP10 of all rooming houses existing at the time of the third amendment was gazetted (Rosenburg, 1990).

As a consequence of the third amendment, municipalities found it more difficult to prove that
demand for sufficient, alternative accommodation existed where individual development proposals involved a loss of small numbers of units, despite there being a significant, cumulative loss over time; and declining population in municipalities mitigated some of the loss in the low income rental market. Soon after the gazettal of the fourth amendment, 'The Ritz' Hotel's owner was able to be convert the hotel to luxury flats. The success of applying SEPP 10 became dependent more on the commitment of particular municipalities to test their powers rather than the powers of SEPP 10 alone (Taylor, 1989:313).

*The City of St. Kilda Case Study*

The experience of the former City of St Kilda (prior to amalgamation with South Melbourne and Port Melbourne to become the Port Phillip City Council in 1993) is worthy of discussion. This is due to St. Kilda being the only municipality in Victoria to seriously attempt to integrate social and physical planning in relation to the provision of private, affordable, rental housing and test its powers under the Act. This resolve was due to a combination of factors including the high proportion of private rental housing (60.4% in 1984), its high proportion of low income renters, articulate and highly organised community groups and their representation on Council, a dominant, pro-housing faction of councillors elected to control development and slow the loss of low income rental housing so as to maintain social diversity, and the Council's willingness to test its planning powers to protect existing rental housing and develop a fund to provide a supply of alternative, Council owned and developed, low income rental housing.

St Kilda tested in powers under the Planning and Environment Act 1987 to consider social impact provisions after 16 households in a block of flats, 'Mandalay', were threatened with redevelopment. Responding to the pressure from a small but vocal pressure group, 'Save St. Kilda', which had members living at 'Mandalay', Council selected this property as its first test case of the use of social provisions. 'Mandalay' was to be redeveloped from 16 rental flats to a highrise block of luxury, subdivided apartments. In response, Council decided to impose permit conditions which included a requirement that 16 (later reduced to seven) units in the proposed 54 unit development were to be sold to either Council or the State Housing Authority. This
effectively sought to replace the rental housing to be lost on site within the new development.

These Council conditions, amongst others, were appealed in 1988 to the Administrative Appeals Tribunal by both 'Save St.Kilda' (on the basis that the conditions were inadequate—they did not reject the development) as well as by the developers (on the basis that the conditions were not supported) in K. Shaw and Ors V City of St.Kilda & Mandalay Gardens Pty. Ltd. Council defended the appeals, although both Council and Save St.Kilda co-operated to a degree due to their mutual opposition to the development.

In response the Tribunal rejected the City of St.Kilda's social conditions and appeal case by arguing in a majority decision that planning controls were not the appropriate mechanism for achieving a diverse social mix through the availability of low cost housing; that there would have to be a more significant, cumulative loss of low cost housing to undermine the demand for established community support services; and that rejecting the development would only result in the dislocation of low income tenants by upgrading and increasing the rents; and that the permit conditions did not constitute a voluntary agreement with the developer as allowed under Section 173 of the Planning and Environment Act 1987 (Costello, 1991:38-39). A minority decision by one panel member supported Council's conditions. Both Council and the community group appealed to the Supreme Court. The appeal was dismissed on the basis that the requirement of providing the seven flats would prevent worthwhile development taking place and because the social effect of the development was considered to be insignificant. Costs to the developer of $400,000 were awarded against Council, which also had to bear its own $78,000 legal costs.

It is the view the author of this thesis based on his personal involvement in evaluating the appeal as Housing Development Officer with the City of St. Kilda that six factors contributed to the loss of the Mandalay appeals. Firstly, Council decided to use the 'Mandalay' flats as a test case before it had developed a policy framework for determining target properties and grounds for the rejection of development applications. Secondly, no resident profile data had been obtained prior to the decision to use the property as a test case. Consequently, the weakness of the tenant profile, in terms of the property being an ideal test case for appeal precedent, was only known after Council felt politically committed to the appeal process. Thirdly, Council's social impact permit conditions were poorly considered. A
condition that the developer provide low income units in a luxury development was not based on knowledge of the success of this mix, and no definition of affordability was provided; and Council had not discussed the conditions with the state housing authority nor determined an acceptable acquisition price to ensure that acquisition was affordable. Fourthly, the above facts reflected a temporary breakdown in co-ordination between the statutory planners and staff developing the policy framework for target properties. Fifthly, social provisions in the Act were general and vague, preventing Council from adequately justifying its interpretation of the provisions. And lastly, a conservative interpretation of the provisions by the AAT, led by Tribunal member, Wally Webb, ensured that the social provision would be limited in scope. Mr. Webb’s repeated sitting on hearings of developer appeals against City of St Kilda permit conditions meant that the AAT became embroiled at the time in accusations of bias. These accusations were never resolved following the lack of commencement of the review of the AAT by the State Labor planning minister, Andrew McCutcheon after he initially agreed to the review as proposed by Council.

Following this setback, in 1990 and again in 1994, the City of St Kilda reviewed its attempt to control the loss of rental housing by reviewing planning controls aimed at controlling the subdivision of flats when a significant social impact occurs. In both reviews, Council accepted that controls were not suitable based on the Administrative Appeals Tribunal’s adverse interpretation of the social provision in the Act, the outcome of survey research showing a limited social impact from subdivision which would not provide empirical support for controls at tribunal appeals, and the likelihood of another test case being again rejected through the appeal process at a cost to Council.

Consequently, the City of St.Kilda reverted to use of section 173 of the Act to achieve its social objective through the planning process. This section enables permit conditions of a broad scope where they are agreed to voluntarily between developers and Local Government. In three instances Council sought to obtain developer contributions through voluntary agreement. In 1992 with the redevelopment of the 90 room rooming house, the Majestic Hotel, it sought to include in the legally enforceable open space contribution (up to 5% of development costs) a contribution amount for Council’s Housing Trust Fund to be spent in the area. This was aimed at creating a developer contribution for community housing under the guise of an open space contribution. This was found to be illegal as housing did not constitute open space and
could not be enforced. Secondly, and again in 1992, it sought 1% of the development costs ($40,000) for the municipal housing fund of the redevelopment of two blocks of flats at 4 Alfred Square into a seven level tower block of luxury apartments. Although under duress a voluntary agreement was verbally reached with the developer, this failed to materialize when the developer chose to upgrade the existing flats instead, thereby reducing the scale of the development to one which became an unsuitable target for developer contributions. In a final case in 1993, Council successfully negotiated under a section 173 Agreement a two year deal with the owner and proposed developer of the 72 room rooming house, the Regal Hotel, whereby most of its rooms would be retained in use as well as have rents frozen and tenancies protected, with these restrictions to be renegotiated after the two years. It should be noted that this outcome was only possible due to rare the co-operation of the developer who was apparently sympathetic due to his own childhood experience of poverty. After the expiration of the Section 173 Agreement, the property was sold twice and, under threat of redevelopment, Council decided in 1997 to acquire the Regal for ongoing rooming house use from its owner, St. Kilda Properties Pty. Ltd.

There were two exceptions where developer contributions have been successful in St Kilda. Firstly, between 1977 and 1983 Council levied some developers wishing to subdivide (then known as strata subdivide) blocks of rental flats in single ownership to individually owned flats where the owners were unable to comply with open space and car parking requirments. Faced with a permit rejection, developers paid a cash-in-lieu contribution of up to $39,000 for open space and $143,000 for car parking. In the case of open space, this was calculated by multiplying the deficient area by its land value. For car parking, this was calculated by adding the balance of the area of the car parking deficiency, half of the volume of the width of the access land to each space and the construction costs of each space and access lane which is deficient. Only 15% of developers facing permit rejection decided to make the contribution, with the balance having their permits rejected. Those proceeding had their deficiencies allowed through the City of St Kilda supporting modifications to the State Building Referees Board which enabled development approval where deficiencies could not be rectified on site. This process, however, was an opportunistic revenue raising mechanism with no concern for the social impact of the subdivision process. This practice ceased in 1983 following the appeal of a planning permit applicant to the Local Government Arbitrator who determined that the practice was illegal.
Secondly, in 1986 Council’s Town Planner allowed the development approval for an office development at 245 to 249 St Kilda Road, St Kilda in return for the developer donating the adjoining single fronted house at 48 Charles Street to Council’s housing program. The basis of this donation was Council varying its development conditions to allow driveway access for the office development off Charles Street, a small residential street, instead of St Kilda Road as normally required but rejected by the State Government’s Road Traffic Authority.

In both cases, developer contributions were required to enable development consent where rejection was either legally allowable but only under a voluntary agreement (in the case of 48 Church Street) or perceived to be legally allowable (in the case of strata subdivision from 1977 to 1983). As the conditions for repeating the 48 Charles Street contribution were rare, this was deemed by the City of St. Kilda to be a one-off arrangement without general scope for replication.

This limited and unpredictable ability to control development has, in the face of weak social provision in the Act, been fuelled by contradictions in legal opinion received by the City of St Kilda. In 1987 Maddock Lonie and Chisholm solicitors argued that levying developers for a housing fund for alternative housing was not possible as planning permit conditions have to relate to the site which is the subject of the development in question, and therefore be without basis. A contribution to a fund to be spent on projects across a municipality, would in this opinion have no relevance to the development. In 1990, Mallesons Stephen Jaques solicitors argued that the social provision of the Act did not extend to levying funds for low income housing; and in 1992 Blake Dawson Waldron solicitors, while acknowledging that the ‘Guidelines for Developer Contributions’ produced by the State were aimed at broad hectare development, not the retention of housing in existing urban areas, it did not preclude applying them to infill development if the criteria of need, nexus, equity and accountability were met’ (Blake Dawson Waldron, 1992:2).

This latter opinion referred to the appeal to the Administrative Appeals Tribunal, Eddie Barron Constructions Pty Ltd V’s Shire of Pakenham in 1990. The significance of the Barrons case was that, for the first time in Victoria, the Tribunal supported a municipality levying a developer for road upgrading or construction and for the purchase of sites for community facilities (pre-school, child health, neighborhood houses) across the Shire of
Pakenham, not in the area immediately around the development site. (*Eddie Barron Constructions Pty Ltd V's Shire of Pakenham*, 1990:30). The Tribunal found that the contribution was justifiable as need, nexus, reasonableness, accountability and equity had been demonstrated by the Shire. This determination was significant: as it is similar in principle to developers contributing to a housing fund to be spent on housing across a municipality, in the area surrounding the development site, and was contrary to the earlier legal advise of Maddock Lonie and Chisholm to the City of St Kilda in 1987.

St Kilda also sought the advice of consultants, Spiller Gibbins Swan, on how developer contributions for low income housing could operate in an inner urban context. It was advised that the critical issue was establishing a nexus by determining whether the infrastructure sought to be paid by the contribution would be provided without the development occurring. If the answer is yes there is no nexus: if the answer in no then there is a nexus (*Spiller Gibbins Swan*, 1993:9). The consultants agreed that against this test, discounts on the contribution to be sought need to be given for three reasons. Firstly, if government funding is available for the infrastructure/facilities, then it is not fair to collect contributions for the component of cost fundable by government. Secondly, backlog needs should not be funded by developer contributions. Likewise, spare capacity in existing infrastructure should reduce the infrastructure costs of new development and contributions should be proportionally lower. Lastly, develop contributions should be discounted when infrastructure/facilities are used by persons outside the planning area such as highways which are State funded (*Spiller Gibbins Swan*, 1993:17-18). The principles of nexus, reasonableness and equity would be supported by the application of these discounts. However, the discounts also reduce the size of contributions in contrast to the imposition of more arbitrary contributions sought, increase the complexity of determining infrastructure/facility needs and highlighted the inadequacy of the City of St. Kilda's data on infrastructure/facility needs. The advice did not, however, argue that contributions could not be levied. Rather, it highlighted the complexity of justifying them in an inner urban context. This advice failed adequately explore the potential for gradual planning precedent to overcome obstacles or the relevance of the New South Wales experience to Victoria.
It appears that Spiller Gibbins Swan's justification for discounting contributions was argued from the perspective of a developer's rights to a free and unfettered private market without questioning whether such a market exists and whether planning authorities should seek to control these markets. In contrast, some municipalities in Sydney using Section 94 developer contributions under State planning legislation explicitly disregards discounts. For example, the North Sydney City Council's *Section 94 Contributions Plan - Affordable Housing (1995)* states that:

> Unless otherwise agreed to by Council, the payment of contributions will only be discounted where a clear benefit to affordable rental housing can be demonstrated from the proposed development. Any discounts are entirely at Council's discretion.
Appendix II: Affordable Housing Controls In Select Municipalities, California, 1990/91

<table>
<thead>
<tr>
<th>CONTROL TYPE</th>
<th>MUNICIPALITY</th>
<th>DEVELOPMENT TYPE &amp; SIZE</th>
<th>% TO BE SET ASIDE</th>
<th>FEATURES</th>
<th>ALTERNATIVE OPTIONS</th>
<th>TERM OF RESTRICTION</th>
<th>SAFEGUARDS/ENFORCEMENT</th>
<th>INCENTIVES</th>
</tr>
</thead>
<tbody>
<tr>
<td>'Set aside policy' (developers setting aside a percentage of a development as restricted, affordable units)</td>
<td>Santa Monica</td>
<td>Residential</td>
<td>30% + (originally 15%)</td>
<td>Involves rental housing. 30% units affordable to low income households (60% of median income). Units to be of similar standard, visual appearance. Minimum floor areas apply. To be constructed at the same time as market units.</td>
<td>Off-site, affordable units. Providing a cash contribution to the City (unless a density bonus is taken up).</td>
<td>0%</td>
<td>Deed restricted units</td>
<td>Density bonus (only if affordable units are built on site).</td>
</tr>
<tr>
<td></td>
<td></td>
<td>Office/Commercial Size is not applicable.</td>
<td>Negotiable in development agreements</td>
<td>Negotiable</td>
<td>Provision of off-site affordable units Providing a cash contribution to the City.</td>
<td></td>
<td>Deed restricted units</td>
<td>Phase construction within a set period. Development standards also set for this period.</td>
</tr>
</tbody>
</table>

AFFORDABLE HOUSING CONTROLS IN SELECT MUNICIPALITIES, CALIFORNIA, 1990/91 DERIVED FROM INTERVIEWS WITH MUNICIPAL STAFF IN 1990/91 AND INFORMATION FROM MUNICIPAL DOCUMENTS LISTED IN THE BIBLIOGRAPHY
### AFFORDABLE HOUSING CONTROLS IN SELECT MUNICIPALITIES, CALIFORNIA, 1990/91

<table>
<thead>
<tr>
<th>CONTROL TYPE</th>
<th>MUNICIPALITY</th>
<th>DEVELOPMENT TYPE &amp; SIZE</th>
<th>% TO BE SET ASIDES</th>
<th>FEATURES</th>
<th>ALTERNATIVE OPTIONS</th>
<th>TERM OF RESTRICTION</th>
<th>SAFEGUARDS/ENFORCEMENT</th>
<th>INCENTIVES</th>
</tr>
</thead>
</table>
| San Diego (proposed programme) | Residential | Undetermined size requirements | ? | • Involves rental housing or home ownership  
• Restricted rental units to be rented at rates no more than 30% of monthly household income where household income is no more than a given % of median area income (MAI) and occupied by household earning less than a given % of MAI.  
• Restricted sale units sold at prices no more than a given % of monthly median income where household income is no more than a given % of MAI and purchased by households earning less than MAI.  
• The number of bedrooms in affordable units shall be proportionate to that in market rate units.  
• At least a set % of affordable units to be for large families, i.e., 3 or 4 bedrooms | • Provision of off-site affordable units.  
• Donation of land.  
• Provision of a cash contribution to the municipal housing trust fund. | ? | • Agreements with developers.  
• Deed restrictions.  
• Building permits not issued until requirements are undertaken. | • Density bonuses (State programme) where more than 20% of units are affordable to lower income households.  
• Federal and State tax credits apply.  
• Subsidies.  
• Fast tracking of processing planning applications & permits.  
• Partial waiver of development impact fees.  
• Modification of development standards, eg., car parking requirements.  
• Relaxation of building codes.  
• Allocation of Federal Community Development Block Grants to 'write down' costs.  
• Issuing tax exempt bonds (at far below market interest rate mortgages) made available for the housing of specified income groups. |
## Affordable Housing Controls in Select Municipalities, California, 1990/91

<table>
<thead>
<tr>
<th>San Francisco</th>
<th>Residential Developments of 10 or more units</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td><em>Projects resulting in a loss (demolition, conversion or removal) of affordable housing units need to replace most units lost or provide 10% affordable units.</em></td>
</tr>
<tr>
<td></td>
<td><em>The exact number of units to be determined from the benefit of the development to the developer.</em></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th></th>
<th>Units to be affordable for ownership or rental purposes:</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>- For ownership housing, units are to be sold to households earning up to 120% of median family income.</td>
</tr>
<tr>
<td></td>
<td>- For rental housing, units are for households earning up to 60% of median family income and where average income of households in any one development does not exceed 89% of median family income.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th></th>
<th>Off-site provision of the equivalent number of units on a nearby site.</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Off-site provision of the equivalent number of units in a high need area, not necessarily nearby the development site (City Planning Commission to authorize off-site provision).</td>
</tr>
<tr>
<td></td>
<td>Cash contribution to the City housing fund.</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th></th>
<th>The period developers have to set aside 10% of units as affordable units is 50 years (or more if legally permissible).</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>No lower environmental or design standards will be accepted in order to meet the 10% requirement.</td>
</tr>
<tr>
<td></td>
<td>Financial subsidy by the municipality to meet the affordability standards.</td>
</tr>
</tbody>
</table>

- Fast tracking of application processing in the following priority:  
  - Highest: projects with public subsidy;  
  - Then: projects with over 10% affordable housing;  
  - Then: those providing 10% affordable housing;  
  - Lowest: those with less than 10% affordable housing, Normal processing.  
- Density bonuses can be used to enable the achieving or exceeding of the 10% requirement.
# AFFORDABLE HOUSING CONTROLS IN SELECT MUNICIPALITIES, CALIFORNIA, 1990/91

<table>
<thead>
<tr>
<th>CONTROL TYPE</th>
<th>MUNICIPALITY</th>
<th>DEVELOPMENT TYPE &amp; SIZE</th>
<th>AMOUNT</th>
<th>USE OF FUNDS</th>
<th>OPTIONS</th>
<th>SAFEGUARDS/ENFORCEMENT</th>
<th>INCENTIVES</th>
</tr>
</thead>
<tbody>
<tr>
<td>Developer levies/cash contributions / in-kind fees</td>
<td>Santa Monica</td>
<td>Office Construction. No minimum size.</td>
<td>$2.77/sq. foot for the first 15,000 sq. feet, $4.14/sq. foot over 15,000 sq. feet.</td>
<td>Towards a fund used to make loans to developers to construct affordable housing.</td>
<td>On-site provision of affordable housing. Off-site provision of affordable housing.</td>
<td>?</td>
<td>Density bonuses only if affordable units are built on-site.</td>
</tr>
<tr>
<td></td>
<td>Santa Monica</td>
<td>Demolition of multi-unit residential buildings. No minimum size.</td>
<td>Depends on the amount of housing lost. Levies of $77,000 to $63,000 have been collected. Base fee adjusted by C.P.I.</td>
<td>?</td>
<td>On-site replacement of units.</td>
<td>?</td>
<td>?</td>
</tr>
<tr>
<td></td>
<td>Santa Monica</td>
<td>Conversion of private rental housing for home ownership. No minimum size.</td>
<td>Fees equal to one year’s rental income per unit paid by the property owner to the city upon the sale of each unit.</td>
<td>Fees used for home ownership assistance for low to moderate income households.</td>
<td>?</td>
<td>2/3 of tenants needs to agree to conversions plus 1/2 intending to buy their units.</td>
<td>?</td>
</tr>
<tr>
<td></td>
<td>Santa Monica</td>
<td>Market rate housing construction 5+ units</td>
<td>$15.00/sq. foot of total (gross) residential square footage. Base fee adjusted by C.P.I.</td>
<td>Funds are used by the City to develop low and moderate income housing only, with the following targets: 60% for low income persons, up to 15% for administrative costs. Rents set at 30% of gross income of qualifying tenants. 1st priority to City residents, 2nd to workers in the City and 3rd to others.</td>
<td>‘Set aside’ of 15% of units for affordable housing. Off-site provision of 15% of units for affordable housing.</td>
<td>?</td>
<td>Levy is secured by a letter of credit. This entitles the issuing of a building permit. Full payment allows for the issuing of a certificate of occupancy.</td>
</tr>
<tr>
<td>Control Type</td>
<td>Municipality</td>
<td>Development Type &amp; Size</td>
<td>Amount</td>
<td>Use of Funds</td>
<td>Options</td>
<td>Safeguards/Enforcement</td>
<td>Incentives</td>
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<tr>
<td>San Diego</td>
<td>Acquisition of property, rehabilitation of existing buildings or new construction. Any size.</td>
<td>- Building areas Office: $2.20/sq. foot. Hotel: $1.20/sq. foot. Research and development: $1.50/sq. foot. Retail: $1.20/sq. foot. Manufacturing: $1.50/sq. foot. Warehouse: $0.50/sq. foot.</td>
<td>- To contribute $12.9m annually to a Housing Trust Fund. - Funds used by private providers (for profit and non-profit) as well as public providers of new, affordable rental and ownership housing by way of construction, rehabilitation or rental subsidies on existing housing. - This levy combined with 4 other levies to create the fund, viz: - Transient Occupancy Tax; - Landscape, Lighting and - Park Maintenance fee; and - the Utility users fee.</td>
<td>Compulsory fee, treated similar to property taxes, options not applicable.</td>
<td>Use of funds management by a Board of Trustees comprising representatives from business, industry and labour (6 reps.), community based housing organisations (5), and the Executive Director of the Housing Commission and City Manager (non-voting).</td>
<td>No directly related incentives.</td>
<td></td>
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<tr>
<td>Control Type</td>
<td>Municipality</td>
<td>Development Type &amp; Size</td>
<td>Amount</td>
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</tr>
<tr>
<td>Developer levies/cash contributions / in-lieu fees</td>
<td>San Francisco</td>
<td>Office</td>
<td>$6.65.94 per gross square foot over the threshold size.</td>
<td>To mitigate the demand for affordable housing created by office workers attracted to the work area and to mitigate the shortage of affordable housing created in part by the addition of office workers.</td>
<td>On-site provision of affordability units equivalent in value to the levy.</td>
<td>The fee must be paid or housing construction begun before issuance of the first site or building permit for the office.</td>
<td>Developers could sell any affordable housing, provided over the requirements, as housing credits to other office developers wishing to fulfill their obligations. This does not necessarily result in development approval given to the new (purchasing) developer.</td>
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<td>Excludes retail components of office developments.</td>
<td>Formula revised each year based on the % increase or decrease in the average area purchase prices.</td>
<td>Fees are paid to the municipal fund to be used for affordable housing or towards a specific affordable housing project.</td>
<td>Off-site provision of affordable units equivalent in value to the levy.</td>
<td>Off-site provision is also conditional upon a performance bond enforceable by the construction lender for 100% of replacement cost of the housing project.</td>
<td>Demolition or conversion of the office prior to the expiration of its useful life will result in the City granting pro rata credits for housing provided or a pro rata levy refund.</td>
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<td>25,000 square feet or more (reduced from 90,000 sq. feet).</td>
<td>The % increase is not to exceed 20% per year.</td>
<td>Affordable rental or ownership housing must be created via new construction, rehabilitation of vacant housing or conversion of non-residential space.</td>
<td>Payment to another housing developer to construct the affordable housing instead.</td>
<td>Where payment is made to another housing developer, quantification of the arrangement is required.</td>
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<td>This focuses on the cumulative effect of office growth over time on employment, labour and housing.</td>
<td>Most funds are targeted at non-profit housing developers, of which 2% receive State and Federal funds.</td>
<td>The levy options must apply if the developer fails to nominate an opinion after 1 year of final approval.</td>
<td>Failure to pay the fee or provide housing results in lien proceedings initiated against the office developer to the sum of $4,800 per housing unit, adjusted annually.</td>
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<td>Developers opting to pay another developer to construct required housing must provide a payment sufficient to construct a given number of units based on the formula: net additional gross sq. feet of office space x .000386 (136.6 units per 100,000 sq. feet of additional office space).</td>
<td>Rents must not exceed 30% of the income of households earning 60% of the area median income.</td>
<td>Ownership housing must be affordable to households earning 100% of area median income.</td>
<td>Other Liens are subordinate except those of the State, County and Municipal rates which are on parity.</td>
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<td></td>
<td>Affordability must be maintained for 50 years (increased from 20 years).</td>
<td>Administrative charges for lien proceedings apply plus interest of 15% compound per month.</td>
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<td>Ultimate recourse is to add the sum owed to municipal property rates/taxes which are payable in the case of foreclosure or property sale. Such additional rates still go to the housing fund.</td>
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<td>Long term affordability can be enforced through shared appreciation mortgages, deed restrictions, enforcement instruments and rights and first option of the municipality to purchase at the time of sale.</td>
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<td></td>
<td></td>
<td>Affordability terms set at 50 or more years (increased for 20 years).</td>
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</tbody>
</table>
# AFFORDABLE HOUSING CONTROLS IN SELECT MUNICIPALITIES, CALIFORNIA, 1990/91

<table>
<thead>
<tr>
<th>CONTROL TYPE</th>
<th>MUNICIPALITY</th>
<th>TARGET DEVELOPMENT &amp; SIZE</th>
<th>FEATURES</th>
<th>OPTIONS</th>
<th>SAFEGUARDS/ ENFORCEMENT</th>
<th>INCENTIVES</th>
</tr>
</thead>
<tbody>
<tr>
<td>Demolition of multi-unit residential buildings</td>
<td>Santa Monica</td>
<td>See Developer Levies</td>
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<td>See Developer Levies</td>
<td>See Developer Levies</td>
</tr>
<tr>
<td>Market rate housing construction</td>
<td>Santa Monica</td>
<td>See Developer Levies</td>
<td>See Developer Levies</td>
<td>See Developer Levies</td>
<td>See Developer Levies</td>
<td>See Developer Levies</td>
</tr>
<tr>
<td>Office construction</td>
<td>Santa Monica</td>
<td>See Developer Levies</td>
<td>See Developer Levies</td>
<td>See Developer Levies</td>
<td>See Developer Levies</td>
<td>See Developer Levies</td>
</tr>
<tr>
<td>To Prevent conversion of rental housing for home ownership</td>
<td>Santa Monica</td>
<td>See Developer Levies</td>
<td>See Developer Levies</td>
<td>See Developer Levies</td>
<td>See Developer Levies</td>
<td>See Developer Levies</td>
</tr>
<tr>
<td>San Francisco Low and moderate income rental housing.</td>
<td>Any size</td>
<td>• 10% of converted units to be made permanently affordable.</td>
<td>• Limits to conversion based on maintaining balance between municipal ownership housing and rental housing.</td>
<td>• Units allowed to be converted are to be replaced on a 1 to 1 basis and to provide low to moderate income housing.</td>
<td>• An equivalent of 10% of units constructed off-site.</td>
<td>• Refer to 'Set Aside' policy or Development Levies for probable safeguards/enforcement relating to the options.</td>
</tr>
</tbody>
</table>
### SHARING THE RESPONSIBILITY:
The Role of Developer Contributions in the Provision of Lower Income Housing in the USA and its Implications for Australia

<table>
<thead>
<tr>
<th>CONTROL TYPE</th>
<th>MUNICIPALITY</th>
<th>TARGET DEVELOPMENT &amp; SIZE</th>
<th>FEATURES</th>
<th>OPTIONS</th>
<th>SAFEGUARDS/ ENFORCEMENT</th>
<th>INCENTIVES</th>
</tr>
</thead>
<tbody>
<tr>
<td>Residential</td>
<td>&quot;Locals&quot; for low income persons, eg., singles room occupancies (rooming houses). No minimum size.</td>
<td>Demolition is prohibited unless units are replaced on a 1 to 1 basis or a developer levy is paid. Consideration is being given (Sept. 1990) to extending controls to other forms of housing</td>
<td>Replacement of units/rooms on a 1 to 1 basis. Payment of development levy sufficient to replace the housing lost.</td>
<td>Refer to 'Set Aside' policy or Development Levies for probable safeguards/ enforcement relating to the options.</td>
<td>Refer to 'Set Aside' policy or Development Levies for probable incentives relating to the options.</td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>CONTROL TYPE</th>
<th>MUNICIPALITY</th>
<th>TARGET PROPERTY</th>
<th>FEATURES</th>
<th>TERMS OF RESTRICTION</th>
<th>OPTIONS</th>
<th>SAFEGUARDS/ ENFORCEMENT</th>
<th>INCENTIVES</th>
</tr>
</thead>
<tbody>
<tr>
<td>Rent control</td>
<td>Santa Monica</td>
<td>15+ units rental properties. A minimum of 15+ units in these properties need to participate in the rent control. Participating units to have been vacated voluntarily by the previous tenants.</td>
<td>Rents in controlled units set at affordable limits in exchange for allowing rents from the same number of units set at a higher level. Affordability limits for rentals to allow for persons with low to very low incomes. Allocation of restricted rentals to units by priority; households with children, then the elderly, then others.</td>
<td>The period in which rents are to be controlled is 10 years.</td>
<td>Not applicable</td>
<td>Local agreements Verification by Rent Control Boards.</td>
<td>Rents in a matching number of units allowed to increase to higher limits. This can increase again by $100 per unit if affordable units have households with children.</td>
</tr>
<tr>
<td>Land subdivision controls</td>
<td>San Francisco (adopted Sept. 1990)</td>
<td>Commercial and industrial land being subdivided for residential development and which is suitable for residential use. 10% or more of units to be permanently affordable.</td>
<td>?</td>
<td>?</td>
<td>?</td>
<td>Density bonuses Financial subsidy from the municipality to meet the affordability standards.</td>
<td></td>
</tr>
</tbody>
</table>
## INCENTIVES FOR THE PRIVATE SECTOR INVOLVED IN AFFORDABLE HOUSING PROVISION IN SELECT MUNICIPALITIES, CALIFORNIA, 1990/91

<table>
<thead>
<tr>
<th>TYPE</th>
<th>MUNICIPALITY</th>
<th>FEATURE</th>
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</thead>
</table>
| Deferred loans (for residential receipt loans) | Santa Monica | • Interest and principal is deferred for the life of the loan (30 years)  
• Maximum of $40,000 loans per unit  
• 35–75 year restrictions on rent and occupancy  
• Loans waived if the agreement is kept for a 50 year loan term  
• Loans help overcome high land costs in particular  
• Developers eligible if they are not excessively profiting from the development. |
| Normal loans | Santa Monica | • Borrowers repay principal and interest  
• Maximum of $60,000 loan per unit  
• Loans waived if 75% initial occupancy by low to moderate income households at affordable rents. |
| Community Development Block Grants | All (USA wide) | • Makes available funds to municipalities to allocate to projects involving low to moderate income housing.  
• Funding can be for housing provision and/or services related to housing which improves residential amenity so as to reduce urban blight, eg., property acquisition, demolition, relocation, construction, public facilities, historic preservation, etc.  
• CDBG grants usually used to 'write down' the cost of developments to make them viable, and often in combination with incentives, eg. bond loans, tax credits, etc.  
• Municipalities wishing to allocate CDBG Grants are required to undertake a review of housing needs, conditions and municipal housing goals.  
• Recipients of funding are: developers, non-profit developers, community agencies, areas/ neighbourhoods, etc. |

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<thead>
<tr>
<th>TYPE</th>
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<th>FEATURE</th>
</tr>
</thead>
</table>
| | | • Non-profit developers  
• For low income rental housing  
• For acquisition, rehabilitation, construction, financing of development costs and acquisition deposits  
• Rents to not exceed 30% of household income |

<table>
<thead>
<tr>
<th>SOURCE OF INCENTIVE</th>
<th>SAFEGUARDS/ ENFORCEMENT</th>
</tr>
</thead>
</table>
| Redevelopment Agency | • Secured by a deed of trust.  
• Regulatory agreements also secure the loans. |
| Redevelopment Agency | • Secured by a deed of trust.  
• Regulatory agreements also secure the loans. |
<p>| Federal Government and administered by municipalities. | • Municipalities are accountable to the Federal Government for allocation decisions under CDBG Grant guidelines. |</p>
<table>
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<th>TIPEH</th>
<th>MUNICIPALITY</th>
<th>FEATURE</th>
<th>ELIGIBILITY</th>
<th>SOURCE OF INCENTIVE</th>
<th>SAFEGUARDS/ENFORCEMENT</th>
</tr>
</thead>
<tbody>
<tr>
<td>Home's grants in program to start in fiscal year 1992</td>
<td>All USA wide</td>
<td>• For rental housing rehabilitation, construction, site acquisition and improvement (on or off the site of the development applying for funds), financing costs and rental assistance. No administrative cost can be included except CDBG funds up to 7% of Home funds. Rehabilitation is emphasised. • For housing households earning less than 80% of median area income, including those in mixed income projects. 90% of assisted households must earn 60% of median income while 10% must earn 60-80% of median income on a program wide basis. • Per project, 20% of units are to be for very low income households paying 30% of median income for rent or 40% of units for those paying rent of 60% of median income for rent. • Rents must be set at 30% of 60% of median area income or 'Section 8' fair market rents (a standard), whichever is the lesser. • 18% of funds received are to be set aside for non-profit developers (providing rental housing) which are community based and have accountability to residents. • $1m set aside for technical assistance to non-profit housing sponsors and project seed money.</td>
<td>• 60% of funds for cities and counties, 40% for States. • Localities need to demonstrate a housing shortage. • Municipalities/States need to match funds on a 1 (recipient): 4 (HOME basis) (for rehabilitation, rent assistance); on 1:1 or 1:2 basis (major rehabilitation, construction). • Funding ratios exclude low interest loans unless committed to HOME grant matching or equity from the sale of Federal tax credits. • Funding ratios can include land value, foregone value of fees or taxes and the value of on/off site improvements.</td>
<td>• Federal Government (administered by municipalities) • Matching funds from States or municipalities (see 'Eligibility')</td>
<td>• Annual monitoring of rent and income restrictions. • Other restrictions, eg. deed restrictions, may apply.</td>
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<tr>
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<tr>
<td>Density bonus</td>
<td>Santa Monica</td>
<td>25% bonus. It is being proposed that bonus units are to be allowable in the area around the new units, not just on site; and for an extra bonus again to be allowed at the City’s discretion</td>
<td>For residential developments - developments of 5 + units - Where 20% of units are for low income households (80% of median income) or rents affordable to households earning 60% of median income or 50% of median income at rents affordable to households earning 50% of the median income.</td>
<td>Municipality</td>
<td>Deed restrictions 30 year terms for unit affordability</td>
</tr>
</tbody>
</table>

| 75% bonus | For developers of units for low income households rented at affordable rents in the 'downtown' area | Municipality | Deed restrictions |

| 25% floor area ratio bonus (see next column), calculated on the gross residential square footage only. This is for bonus residential units, not commercial space | For residential housing in commercial development in the downtown area or commercial zones | Municipality | Deed restrictions |
### SHARING THE RESPONSIBILITY:
The Role of Developer Contributions in the Provision of Lower Income Housing in the USA and its Implications for Australia

<table>
<thead>
<tr>
<th>TYPE</th>
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<th>LEVEL OF BONUS</th>
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</tr>
</thead>
</table>
| San Diego (draft policy as at early 1991) | 20% more units than normally permitted by the zone. Up to a 50% bonus is negotiable where developers provide housing for very low income housing in high income areas. | For residential developments (rental or ownership, new construction or substantial rehabilitation) of 6 or more units on the basis that 25% of the units have affordability restrictions for 20-22 years, i.e.:  
- household incomes set at the lesser of two amounts: a maximum of 60% of median area income (according to household size) or 10% less than the rent charged on the most recently rented, comparable, market rate units. Rents are adjusted annually;  
- maximum rents set at 80% of similar unit market rents;  
- restricted units to be similar to market rate units and dispersed throughout the project;  
- projects receiving density bonuses may also be in receipt of other local, State or Federal incentives, or subsidies, including the funding form the bond program. | Municipality  
- Restricted units to be comparable to the market rate units in the project and with the same number of bedrooms.  
- Deed restrictions based on a regulatory agreement.  
- Tenant income certification is required on an annual basis.  
- Affordable units not to be rented to the developer, relations or affiliates of the developer or full-time students or home owners.  
- Default of the regulatory agreement will result in a fine calculated on the basis of the unauthorised, increased rental income  
- Any legal fees accrued by the City in any legal action or dispute resolution are recoverable from the developer once the agreement has been signed.  
- A permit is required where density bonuses exceed 25%.  
- Density bonuses do not bypass the requirements of planning codes/ regulations/ ordinances except for the density bonus itself. Discretionary variations can be applied for other planning matters, eg. car parking.  
- Some zoning overrides the ability to use density bonuses. |
<table>
<thead>
<tr>
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<th>SAFEGUARDS/ ENFORCEMENT</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>San Francisco</td>
<td>25% density bonus</td>
<td>Projects providing 20% of units for lower income households, 10% of units for very low income households or 50% of units for elderly persons</td>
<td>Municipality</td>
<td>?</td>
</tr>
<tr>
<td></td>
<td>(proposed as at early 1991)</td>
<td>50% density bonus</td>
<td>Projects providing housing for elderly persons or persons with a physical disability.</td>
<td></td>
<td>?</td>
</tr>
<tr>
<td></td>
<td>Los Angeles</td>
<td>Information not available</td>
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</tr>
<tr>
<td></td>
<td>Santa Monica</td>
<td>Phased construction over an agreed time period.</td>
<td>Developer to provide affordable housing and/or other community needs.</td>
<td>Municipality</td>
<td>Deed restricted for a minimum of 40 years.</td>
</tr>
<tr>
<td>TYPE</td>
<td>MUNICIPALITY</td>
<td>LEVEL OF BONUS</td>
<td>ELIGIBILITY</td>
<td>SOURCE OF INCENTIVE</td>
<td>SAFEGUARDS/ ENFORCEMENT</td>
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<tr>
<td>Relaxing</td>
<td>Santa Monica</td>
<td>To make the provision of affordable housing more cost effective there is approval for a negotiated reduction in site development standards and a modification of the zoning code and architectural design requirements which exceed the minimum state building standards, eg. reduced set back and square footage requirements, car parking requirements, etc.</td>
<td>Projects seeking density bonuses arising from the proposed provision of affordable housing.</td>
<td>Municipality</td>
<td>Negotiable</td>
</tr>
<tr>
<td>development</td>
<td></td>
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<tr>
<td>standards</td>
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<tr>
<td>(cont..)</td>
<td>San Diego</td>
<td>• Modification of development standards, eg. car parking</td>
<td>Projects with a given % of affordable units.</td>
<td>Municipality</td>
<td>As applies to the 'Set Aside' policy:</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• Relaxing building codes.</td>
<td></td>
<td></td>
<td>• Agreements and deed restrictions;</td>
</tr>
<tr>
<td></td>
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<td></td>
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<td></td>
<td>• Building permits being conditional upon affordability requirements being met.</td>
</tr>
<tr>
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</table>
| Housing (revenue) bonds | Los Angeles | • Provides tax exempt primary financing for projects providing some low income rental housing.  
• Provides secondary gap financing if required to make a project viable. This comes from the City at 7% interest/year for projects providing very low income rental housing for 30 years of an amount up to $20,000/restricted units or $20,000/unit in a priority area (see below) for projects providing very low income housing.  
• Financing is for construction costs and/or permanent financing of a project of up to US$40million/single project or US$50m for pooled projects (see 'Eligibility'). Financing is not for previous project debts and up to 24% can be for land acquisition.  
• Financing will be managed by bond finance teams, including bond counsel, investment bankers, the trustee, lenders, and developers.  
• Projects are required to have 20% of units restricted for low income households (rented at less than 50% of median income) or 40% of units for households at or below 60% of median income, adjusted for family size.  
• Restrictions are for 30 year terms.  
• Remaining units can be at market prices.  
• No rental subsidies are provided.  
• Restricted units have maximum rent levels, which are not to increase more than once per year and according to Federal Department of Housing and Urban Development guidelines. Most restricted units to have rents at or below maximum levels.  
• Restricted units to be distributed throughout the project.  
• Family units (2, 3 & 4 bedrooms) encouraged with a proportionate number of each being designated.  
• Maximum rent levels set. Most units to be below these maximum levels.  
• Projects prioritised if in the designated 'priority area'.  
• Minority and women owned businesses will be encouraged.  
• State density bonus policy applies.  
• Federal and State tax credits apply (see the Tax Credits Incentive). | • Developers to provide a minimum of 1%/equity to a project if secondary gap financing is to be provided.  
• Project income must be estimated to cover the primary debt servicing payments and expenses.  
• Eligible developers would need to have sufficient development experience, financial strength and have a feasible project.  
• Agreement is needed from a financial institution for 'credit enhancement', i.e., a guarantee that the principle and interest will be paid on time (loan underwriting and credit support).  
• A commitment is made by one or more financial institutions to underwrite, originate and service the bond financed loan.  
• The City needs to obtain an allocation from the State of California Debt Limit Allocation Committee.  
• Projects without the required lender commitments at the time of application may be bond financed by pooling them with other projects for 'pooled project financing'.  
• Projects still have to comply with building codes, allowable densities, land use zoning, environmental clearances and decisions, and tenant relocation requirements. | Municipality  
• A 'Regulatory Agreement' is to be prepared, lodged with the City and recorded against the property.  
• Owners may not further encumber the property.  
• Developers are to provide initial income certification forms for restricted unit households prior to occupancy.  
• Owners are to provide and verify annual income recertification for restricted households.  
• Where a tenants' income increase above the limits, a next comparable unit must be rented to a low income household. No evictions are required in this situation.  
• Vacant, restricted units must be advertised.  
• Sale, transfer, conveyance, refinancing or 'quit claim' would necessitate payment of principle and interest of the financing. Fees will be charged in this situation. |
<table>
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<tbody>
<tr>
<td>Housing revenue bonds (cont.)</td>
<td>San Diego</td>
<td>• Provides tax exempt primary financing at interest rates usually at least 2% below conventional market rates for private projects providing some low income, rental housing.</td>
<td>• Agreement is needed from a financial institution for credit enhancement, i.e., a guarantee that the principle and interest will be paid on time (loan underwriting and credit support).</td>
<td>Municipality</td>
<td>• A regulatory agreement is to be prepared, lodged with the City and recorded against the title.</td>
</tr>
<tr>
<td></td>
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<td>• Financing has 30 year amortisation period and is for capital costs or permanent financing including acquisition, construction, improvements, architectural and engineering services, construction interest, loan fees, etc. It is not for financing previous debts relating to the property. Up to 25% can be for land acquisition. Developers to pay all fees (3.5-4% of funds provided).</td>
<td>• The municipality needs to obtain an allocation from the State of California Debt Limit Allocation Committee for authorisation to issue bonds.</td>
<td></td>
<td>• A deposit of 1% of the bond amount is made to the municipality as a security for applying for a State allocation. It is returnable at allocation.</td>
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<tr>
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<td>• Financing is to be managed by bond finance teams composed of underwriter(s), bond counsel and lender/credit enhancement provider.</td>
<td>• All normal planning approvals are required.</td>
<td></td>
<td>• Owners to provide annual tenant income recertification for restricted households.</td>
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<tr>
<td></td>
<td></td>
<td>• Projects are required to have at least 20% of units restricted for low income households with incomes at or below 50% of area median income or 40% of units for households at or below 60% of median income (adjusted for family size).</td>
<td>• A minimum development size of 75+ units is encouraged. Smaller projects may be pooled together to be eligible for an allocation. There is no limit to development size.</td>
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<tr>
<td></td>
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<td>• Restrictions are for 15 year terms.</td>
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<td>• Remaining units can be at market rentals.</td>
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<td>• No rent subsidies are provided.</td>
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<td>• Restricted units to have rents which are not to exceed 30% of applicable income (50% or 60% of median income), adjusted for household size and maximum rents include a utility allowance in the case of tenant paid utilities. Rents are based on Federal Department of Housing and Urban Development guidelines. Most restricted units are to be at or below the maximum rent allowable.</td>
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<td>• Restricted units to be distributed throughout the project and have the same floor area, amenities and access to facilities as market rate units.</td>
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<td>• State density bonus policy applies.</td>
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<td>• Federal and State tax credits apply (see the 'Tax Credits' incentives).</td>
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<tr>
<td>Fast tracking</td>
<td>San Diego</td>
<td>Faster processing of applications and permits.</td>
<td>Residential developers providing a given % of units as affordable housing under particular programmes, eg. Density Bonus Program.</td>
<td>Municipality</td>
<td>As applies with the % 'Set Aside' policy.</td>
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<tr>
<td></td>
<td>San Francisco (Policy Sept 90, unknown if implemented)</td>
<td>- 'One stop' permit processing centre.</td>
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<td>- Prioritising the assessment of projects.</td>
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<td></td>
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<td>- Allocation of extra staff resources.</td>
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<td>- Preparing area Environment Impact Reports to prevent the need for project specific E.I.R.s.</td>
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<td>- Streamlining and consolidating public hearing processes.</td>
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<td>- Adopting neighbourhood consultations to minimise appeals as well as to promote the benefits of existing and successful projects which include affordable housing.</td>
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<tr>
<td>Waiver of fees</td>
<td>San Diego</td>
<td>Partial waiver of development impact fees.</td>
<td>Residential developers providing a given % of units as affordable housing.</td>
<td>Municipality</td>
<td>As applies with the % 'Set Aside' policy.</td>
</tr>
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</table>
| Tax Credits  | All (USA wide)    | • Applies to residential developers setting aside a percentage of existing or newly constructed housing for low income use.  
• The aim is: to encourage development of a variety of housing types at affordable rents to serve those (very low income, special housing needs, etc.) populations for the longest periods.  
• Involves a reduction in tax liability for owners of such housing who agree to certain restrictions.  
• Federal tax credits are for primary financing; State tax credits are for secondary gap financing only where Federal funds are insufficient. Only the amount needed for project viability is provided.  
• Credit amounts are calculated so as to yield either 70% or 30% of the present building value over a 10 year period. 70% is given for construction and rehabilitation costs and 30% for acquisition costs in conjunction with rehabilitation.  
• Federal tax credits may be applied for on an annual basis for 10 years while State tax credits may be applied for annually for four years. | • Projects can involve new construction, rehabilitation or acquisition of buildings at risk of conversion.  
• Funds are set aside in the allocation process where affordability is maintained for between 30-55 years for the following project types:  
  - non-profit organizations (direct or partnership involvement) receiving 10%  
    - rural projects receiving 20%  
    - small projects (10 units or less) receiving 8%  
• Projects are point scored and allocation within a quota in given where affordability is maintained for between 30-55 years.  
• Priority is given where there are:  
  - tenants on lowest incomes where a 30 year set aside applies (30 points)  
  - projects offering restrictions for 30 or more years (max. 25 points)  
  - large families: 3 or more bedrooms (max. 25 points)  
  - homeless or extremely low income persons, single-room occupancy housing, or transitional housing for households at or below 40% of area median income as well as being rented at 30% of income (max. 15 points)  
  - project at risk of conversion to market rate units which are already Federally subsidised (10 points)  
  - tax exempt organisation participation (eg. municipal contribution/support to 5% of development costs) or significant owner equity of at least 30% of total development costs (15 points)  
  - provision of special tenant amenities: on site child care, unit security systems, other significant social services (5 points)  
• Located in 'difficult development areas' or 'qualified census tracts' (5 points)  
• A financial feasibility analysis will determine project viability and amount of credit needed and considers development costs, source of funds, operating reserves, projected income and expenses and tax benefits in relation to market conditions. This will test the reasonableness of the applicant's figures. | Federal Government and State Government (controlled by the Tax Credit Allocation Committee, Sacramento) | • Projects must start construction within 180 days of the preliminary reservations of tax credits.  
• An application fee of $1,000 applies. It is non-refundable regardless as to the outcome of the application. The fee may be halved as an incentive if the local reviewing Agency (see 'Eligibility' column) waives its fee.  
• A reservation fee for reserved tax credits is required equal to 3% of annual Federal credits reserved for the project. This is due within 20 days of reservation of the credit.  
• A performance deposit must be lodged equal to 4% of the 1st year's Federal credits for the project. This will be refunded within 180 days if the requirements cannot be met. Where projects receive credits but do not provide affordable housing and where credits are not returned, the deposit will be forfeited. If all requirements are met within the 180 days, 50% of the deposit will be returned.  
• Progress reports (2 per year) determine satisfactory project progress.  
• Credits will only be allocated upon project completion, submission of acceptable cost documentation and a final financial feasibility.  
• Tenant incomes must be recertified annually.  
• Income and rent agreements are recorded against the property title and enforceable against future owners within the agreed period.  
• The minimum compliance period is 30 years. |
<table>
<thead>
<tr>
<th>TYPE</th>
<th>MUNICIPALITY</th>
<th>FEATURES</th>
<th>ELIGIBILITY</th>
<th>SOURCE OF INCENTIVE</th>
<th>SAFEGUARDS/ ENFORCEMENT</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>• Eligible projects must have the following characteristics:</td>
<td>• Projects must have financing commitments for a least 50% of project costs. This can include the proceeds of tax exempt bonds where financing is to the level of 5% or more. Otherwise applicants must prove the availability of their own resources.</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>• The applicant must demonstrate a capacity to construct, maintain and manage rental housing of the type and size proposed. Successful track records are required.</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>• A Local Reviewing Agency voluntarily appointed by the municipality undertakes a site visit and evaluation report. Where no LRA is available, the municipal Chief Executive Officer will be forwarded a report for comment. In the absence of an LRA, the Californian Housing Finance Agency or the Housing Authority, may be asked to take on this role.</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>• Eligible projects must have:</td>
<td>• Eligible projects must have:</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>• Rent restrictions are based on a formula depending on family size and are based on a % of area median income for the households with the differing income restrictions (20/50, 40/60, 15/40) as given above.</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>• The compliance period for income and rent restrictions is 15 years plus an extended use period of 15 years or 30 years in total.</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>Applications must demonstrate:</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>• Applicants must demonstrate housing needs by particular means.</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>• Free title,</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>• Long-term leasehold interests,</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>• Option to purchase or lease property,</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>• Land sales contract, and</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td>• Development agreement with a public agency.</td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
### Appendix III: Frequency of the Use of Developer Contribution Type for Low and Moderate Income Housing by Population Size of U.S. Municipalities (%)

<table>
<thead>
<tr>
<th>Municipality size</th>
<th>Land dedication</th>
<th>Building/installation</th>
<th>Cash contributions</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Never</td>
<td>Sometimes</td>
<td>Frequently</td>
</tr>
<tr>
<td>Cities</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Under 10,000</td>
<td>97</td>
<td>0</td>
<td>0</td>
</tr>
<tr>
<td>10,000-24,999</td>
<td>92</td>
<td>8</td>
<td>0</td>
</tr>
<tr>
<td>25,000-99,999</td>
<td>83</td>
<td>14</td>
<td>2</td>
</tr>
<tr>
<td>100,000-249,999</td>
<td>91</td>
<td>9</td>
<td>0</td>
</tr>
<tr>
<td>250,000-499,999</td>
<td>83</td>
<td>17</td>
<td>0</td>
</tr>
<tr>
<td>500,000-999,999</td>
<td>56</td>
<td>44</td>
<td>0</td>
</tr>
<tr>
<td>1 million+</td>
<td>-</td>
<td>-</td>
<td>-</td>
</tr>
<tr>
<td>Counties</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Under 10,000</td>
<td>86</td>
<td>9</td>
<td>5</td>
</tr>
<tr>
<td>10,000-49,999</td>
<td>94</td>
<td>4</td>
<td>0</td>
</tr>
<tr>
<td>50,000-99,999</td>
<td>94</td>
<td>4</td>
<td>1</td>
</tr>
<tr>
<td>100-249,999</td>
<td>94</td>
<td>3</td>
<td>1</td>
</tr>
<tr>
<td>250,000+</td>
<td>86</td>
<td>14</td>
<td>0</td>
</tr>
</tbody>
</table>

Source: Purdum and Frank, 1988: 132, 140, 145
### Appendix IV: San Francisco and Los Angeles Private Residential Developments Which Comprise or Incorporate Low Income Housing

<table>
<thead>
<tr>
<th>Municipality</th>
<th>Number of projects</th>
<th>Number of rental projects</th>
<th>% of total projects</th>
<th>Number of ownership projects</th>
<th>% of total projects</th>
<th>Number of rental projects with all or some low income units</th>
<th>% of ownership projects</th>
<th>Number of total units</th>
<th>Average size of projects (in units)</th>
<th>Number of rental units</th>
<th>% of total units</th>
<th>Number of ownership units</th>
<th>% of total units</th>
<th>Number of total units for low income households</th>
<th>% of total units</th>
<th>Number of rental units for low income households</th>
<th>% of total units</th>
<th>Number of ownership units for low income housing</th>
<th>% of total units</th>
<th>Number of ownership units</th>
<th>% of total projects</th>
</tr>
</thead>
<tbody>
<tr>
<td>San Francisco</td>
<td>32</td>
<td>21</td>
<td>(66.0%)</td>
<td>11</td>
<td>(33.3%)</td>
<td>19</td>
<td>(59.4%)</td>
<td>4-8</td>
<td>6163</td>
<td>187</td>
<td>(71.4%)</td>
<td>4403</td>
<td>(29.0%)</td>
<td>1930</td>
<td>(31.3%)</td>
<td>1694</td>
<td>(27.5%)</td>
<td>295</td>
<td>(4.8%)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>(1988-90)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
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<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Los Angeles</td>
<td>225</td>
<td>191</td>
<td>(84.8%)</td>
<td>34</td>
<td>(15.1%)</td>
<td>174</td>
<td>(91.1%)</td>
<td>8</td>
<td>9129</td>
<td>40.6</td>
<td>(81.0%)</td>
<td>7395</td>
<td>(19.0%)</td>
<td>1310</td>
<td>(14.3%)</td>
<td>1128</td>
<td>(12.4%)</td>
<td>122</td>
<td>(2.0%)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>(total period of operating controls)</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
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<td></td>
<td></td>
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<td></td>
</tr>
</tbody>
</table>

Source: Compiled from the following sources:
Residence Element - Changes in the San Francisco Housing Inventory for 1989, City and County of San Francisco, October, 1990.
Listing of Covenants and Agreements, Housing Division, Department of Housing Preservation and Production, City of Los Angeles, undated (obtained 1/91)

*** Comprises rental projects with a proportion of low income or low and moderate income households. Projects for solely low income households comprise 36 or 16% of rental projects.

**** Comprises ownership projects with a proportion of low income or low and moderate income households. Projects for solely low income households comprise 5 or 2.2% of ownership projects.

***** Comprises units with low or low and moderate income households.
Appendix V: Some Funding Sources Used or Considered for Use for the Provision of Low to Moderate Income Housing by States, Municipalities, Non-Profit Developers Inside the USA.

<table>
<thead>
<tr>
<th>Funding Options</th>
<th>Notes</th>
<th>Use of Funding Options by:</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td></td>
<td>States</td>
</tr>
<tr>
<td>Voluntary Contributions of Sale Escrow Account Interest</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Voluntary Contributions of Mortgage Impound Account Interest</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Tax on Interest From Tenant Security Deposits</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Document Transfer Tax</td>
<td>Limited in California by Proposition 13</td>
<td></td>
</tr>
<tr>
<td>Loan Origination Tax</td>
<td>Cannot be levied on State or Federal banks - limited in California by Proposition 13</td>
<td></td>
</tr>
<tr>
<td>Sales and Use Tax</td>
<td></td>
<td></td>
</tr>
<tr>
<td>General Fund Revenues</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Property Tax (rates)</td>
<td>Limited in California by Proposition 13</td>
<td></td>
</tr>
<tr>
<td>• Real Estate Profits Tax</td>
<td></td>
<td></td>
</tr>
<tr>
<td>• Property Transfer Tax</td>
<td></td>
<td></td>
</tr>
<tr>
<td>• Inclusionary Zoning</td>
<td></td>
<td></td>
</tr>
<tr>
<td>In-Lieu fees (cash contributions)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>- Residential Dev't</td>
<td></td>
<td></td>
</tr>
<tr>
<td>- Commercial Dev't</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Occupancy Tax</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Funding Options</td>
<td>Notes</td>
<td>Use of Funding</td>
</tr>
<tr>
<td>---------------------------------------------</td>
<td>-------</td>
<td>----------------</td>
</tr>
<tr>
<td></td>
<td></td>
<td>States</td>
</tr>
<tr>
<td>Fees on Port Activity</td>
<td></td>
<td>✓</td>
</tr>
<tr>
<td>Business Licence Tax</td>
<td></td>
<td>✓</td>
</tr>
<tr>
<td>Condominium Conversion Tax</td>
<td></td>
<td>✓</td>
</tr>
<tr>
<td>Housing Preservation Fee</td>
<td></td>
<td>✓</td>
</tr>
<tr>
<td>Utility Users’ Tax</td>
<td></td>
<td>✓</td>
</tr>
<tr>
<td>Increased Utility Franchise Fees</td>
<td></td>
<td>✓</td>
</tr>
<tr>
<td>Tax Increment Revenues from Redevelopment Activity</td>
<td></td>
<td>✓</td>
</tr>
<tr>
<td>General Obligation and ‘Mello-Roos’ District Bonds</td>
<td></td>
<td>✓</td>
</tr>
<tr>
<td>Housing (Revenue) Bonds</td>
<td></td>
<td>✓</td>
</tr>
<tr>
<td>Surplus Bond Reserve Funds</td>
<td></td>
<td>✓</td>
</tr>
<tr>
<td>Secondary Mark Public Loan Sales</td>
<td></td>
<td>?</td>
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<tr>
<td>Transient (Tourist) Occupancy Tax/tax on hotels</td>
<td></td>
<td>✓</td>
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<tr>
<td>Business Gross Receipts Tax</td>
<td></td>
<td>✓</td>
</tr>
<tr>
<td>Landscaping, Lighting and Park Maintenance Fee</td>
<td></td>
<td>✓</td>
</tr>
<tr>
<td>Community Development Block Grants</td>
<td></td>
<td>✓</td>
</tr>
<tr>
<td>Home Program Grants</td>
<td></td>
<td>✓</td>
</tr>
<tr>
<td>Other Federal (HUD) Grants</td>
<td></td>
<td>✓</td>
</tr>
<tr>
<td>Federal Rental Rebate Program</td>
<td></td>
<td>✓</td>
</tr>
<tr>
<td>Redevelopment Tax</td>
<td></td>
<td>✓</td>
</tr>
<tr>
<td>Increment Funds (from Redevelopment Agencies)</td>
<td></td>
<td>✓</td>
</tr>
</tbody>
</table>
## Funding Options

<table>
<thead>
<tr>
<th>Notes</th>
<th>Use of Funding</th>
<th>Options by:</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>States</td>
<td>Municipalities</td>
</tr>
<tr>
<td>Municipal Trust Funds (various sources)</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>State Trust Funds (various sources)</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Bank Loans</td>
<td></td>
<td>✓</td>
</tr>
<tr>
<td>Bank Mortgage Pools for Lower Income Housing</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>Revenue from Investment for Investors/developers and through tax syndications with non-profit organisations</td>
<td></td>
<td>✓</td>
</tr>
<tr>
<td>Tax credits ( reductions in income tax liability)</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Off-shore Oil Revenues</td>
<td>✓</td>
<td></td>
</tr>
<tr>
<td>Casino Tax Revenues</td>
<td>✓</td>
<td></td>
</tr>
<tr>
<td>Repayments of Indebtedness</td>
<td>✓</td>
<td>✓</td>
</tr>
<tr>
<td>New types of Housing Securities</td>
<td>✓</td>
<td></td>
</tr>
<tr>
<td>State Held, Unclaimed Properties</td>
<td>✓</td>
<td></td>
</tr>
<tr>
<td>Philanthropic grants and low interest loans</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**Source:** Compiled from Schwartz et al., (1988); The Office/Affordable Housing Production Program (updated), City and County of San Francisco; Residence, (1990), City and County of San Francisco; Community Corporation of Santa Monica, (undated); Creating Affordable Housing for San Diegans, (1989), City of San Diego; City of Santa Monica Adopted Budget 1990-01, City of Santa Monica; various interviews with municipal officials in 1991; other research by the author.
Appendix VI: Victorian Municipal Capital Contributions To The Local Government And Community Housing Program Distinguished By Rural (Borough, Shire, Provincial City) Or Urban Municipalities, 1984/85 To 1991/92

<table>
<thead>
<tr>
<th>Rural Municipalities</th>
<th>LGCHP Grants $</th>
<th>Municipal Contributions $</th>
<th>Notes</th>
</tr>
</thead>
<tbody>
<tr>
<td>Shire of Baccus Marsh</td>
<td>$194,000.00</td>
<td>$60,000.00</td>
<td>C/L</td>
</tr>
<tr>
<td>Borough of Eaglehawk</td>
<td>$85,000.00</td>
<td>$17,600.00</td>
<td>L</td>
</tr>
<tr>
<td>City of Hamilton</td>
<td>$20,000.00</td>
<td>$?/C</td>
<td></td>
</tr>
<tr>
<td>Shire of Heytesburg</td>
<td>$137,000.00</td>
<td>$159,500.00</td>
<td>C/L/P</td>
</tr>
<tr>
<td>Shire Of Korumburra</td>
<td>$110,000.00</td>
<td>$19,573.00</td>
<td>C/L</td>
</tr>
<tr>
<td>City of Warrnambool</td>
<td>$154,000.00</td>
<td>$34,200.00</td>
<td>C/L</td>
</tr>
<tr>
<td>Shire of Alberton</td>
<td>$106,000.00</td>
<td>$20,000.00</td>
<td>C/L</td>
</tr>
<tr>
<td>Shire of Bet Bet</td>
<td>$136,000.00</td>
<td>$33,500.00</td>
<td>C/L</td>
</tr>
<tr>
<td>Shire of Cobram</td>
<td>$145,000.00</td>
<td>$28,000.00</td>
<td>L</td>
</tr>
<tr>
<td>Shire of Marong</td>
<td>$218,500.00</td>
<td>$63,363.00</td>
<td>C</td>
</tr>
<tr>
<td>City of Sale</td>
<td>$168,000.00</td>
<td>$42,000.00</td>
<td>C</td>
</tr>
<tr>
<td>Shire of Gippsland</td>
<td>$106,000.00</td>
<td>$20,000.00</td>
<td>C/L</td>
</tr>
<tr>
<td>Shire of Alexandra</td>
<td>$74,000.00</td>
<td>$35,000.00</td>
<td>C/L</td>
</tr>
<tr>
<td>Shire of Bet Bet</td>
<td>$143,680.00</td>
<td>$43,500.00</td>
<td>C/L</td>
</tr>
<tr>
<td>Shire of Bass</td>
<td>$91,000.00</td>
<td>$23,500.00</td>
<td>C/L/O</td>
</tr>
<tr>
<td>Shire of Corio</td>
<td>$175,340.00</td>
<td>$65,000.00</td>
<td>C/L/O/P</td>
</tr>
<tr>
<td>Shire of Daylesford &amp; Glenlyon</td>
<td>$76,600.00</td>
<td>$19,150.00</td>
<td>C/L</td>
</tr>
<tr>
<td>Town of Kyabram</td>
<td>$242,600.00</td>
<td>$4,600.00</td>
<td>L/O</td>
</tr>
<tr>
<td>Shire of Kyneton</td>
<td>$88,080.00</td>
<td>$26,000.00</td>
<td>C/O/P</td>
</tr>
<tr>
<td>Shire of Newham &amp; Woodend</td>
<td>$119,000.00</td>
<td>$42,000.00</td>
<td>L/O/P</td>
</tr>
<tr>
<td>Town of Bairnsdale</td>
<td>$297,850.00</td>
<td>$80,400.00</td>
<td>L/C/P</td>
</tr>
<tr>
<td>Shire of Cobram</td>
<td>$141,150.00</td>
<td>$40,000.00</td>
<td>L/O</td>
</tr>
<tr>
<td>Borough Of Eaglehawk</td>
<td>$105,000.00</td>
<td>$43,500.00</td>
<td>L/O</td>
</tr>
<tr>
<td>Shire of Marong</td>
<td>$182,000.00</td>
<td>$91,600.00</td>
<td>O/P</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Urban Municipalities</th>
<th>LGCHP Grants $</th>
<th>Municipal Contributions $</th>
<th>Notes</th>
</tr>
</thead>
<tbody>
<tr>
<td>City of Box Hill</td>
<td>$245,000.00</td>
<td>$120,000.00</td>
<td>L</td>
</tr>
<tr>
<td>Cities of Croydon &amp; Ringwood</td>
<td>$160,000.00</td>
<td>$144,000.00</td>
<td>C/L</td>
</tr>
<tr>
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<td>Cities of St Kilda &amp; Prahran</td>
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<td>$201,000.00</td>
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<td>Rural Municipalities</td>
<td>LGCHP Grants $</td>
<td>Municipal Contributions * $</td>
<td>Notes</td>
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<tr>
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<td>$39,000.00</td>
<td>L/O</td>
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</tbody>
</table>

Legend for Notes Column:

C cash contributions
L land contribution
O other contribution, ie. in-kind, professional fees, site works, landscaping, engineering etc.
P partnership with a local agency (eg. local hospital, RSL, service organisation, etc.), residents contribution etc.

Notes: * Excludes the value of 'other' contributions (see legend)
Appendix VII: Examples of Non-Profit Developer Housing Projects in San Francisco

Plate 6 'Plaza West' municipal housing project, 1123 Pierce Street, San Francisco

A 208 unit project for low income families under construction in 1990/91 by the City and County of San Francisco and funded by the municipality and Federal Government, demonstrating pooled project funding by two levels of government.
Plate 7  'Parkview Commons' municipal housing project, 200 Frederick Street, San Francisco

Constructed between 1988 and 1990, this 114 one to four bedroom unit home ownership project was built on the site of an old school demolished by the municipality at a cost of US$1 million. This project illustrates the complex role of municipalities: the municipality entered into a 75 year lease with the S.F. United School District and negotiated a Land Disposition Agreement with the developer, a partnership composed of the non-profit developer, Bridge Housing, and Pacific Union Development Co. Permanent financing for the individual, first time home buyers was provided from the proceeds of City Single Family Mortgage Revenue Bonds. In addition, all units carry land liens for the difference between market value and restricted sale price; and the municipality also provided mortgage assistance loans for those home buyers who require mortgage assistance to qualify for a loan. Upon sale of a unit, the municipality will recover all mortgage assistance payments plus interest and the amount of land lien plus a share in the net appreciation of the unit. All units must remain owner occupied for the life of the lease.
Plate 8   ‘Cambridge Hotel’, 473 Ellis Street, San Francisco

Currently being converted from a tourist hotel to a 60 room single room occupancy (rooming house) for very low income persons at a cost of US$3.835 million by the not-for-profit developer, the Chinese Community Housing Corporation.
Plate 9  'Fairview' non-profit housing, corner Broadway and Mason St., San Francisco

A 70 unit rental project by the Chinese Community Housing Corporation for very low income persons built on airspace rights over Mason Street which tunnels under the hill. These rights were given by the City.
Plate 10  ‘Coleridge Park’, 33 Mission Street, San Francisco- A project by the non-profit developer, ‘Bernal Heights Community Foundation’,

Comprises 49 studio and two bedroom units for elderly persons, 80% of which are for low income households. Built on airspace over a Standard Brands Paint Store which contributed $200,000 or 4% of the project costs. (See Table 15, shaded cell.)

Appendix VIII: The Community Corporation of
Santa Monica as an Example of a Non-Profit Developer

The nature of non-profit developers as discussed in Chapter Five is best illustrated by example:

The Community Corporation of Santa Monica (CCSM) was founded in 1982 by members of two neighborhood groups who were concerned about the loss of affordable housing in their respective parts of the city. They both received Community Development Block Grants along with the municipality. The groups then formed as a single, non-profit developer and the municipality placed its CDBGs into a municipal housing trust fund along with funds from subsequent sources.

The CCSM purchased its first building in 1983 and by 1989 had 324 units on 27 sites valued at U.S.$23.1 million and funded from grants, state and municipal contributions, tax credits, philanthropic funds, bank loans, tax credits and other sources (see Tables 10 and 11). It also had in 1990 seven further sites to be developed for 220 units valued at about U.S.$2.9 million. Projects usually varied in size from between 6 and 20 units. Housing is provided for people of all ethnic groups who have a low to moderate income and need singles, aged persons and family housing.

The CCSM has 23 full-time and 20 part-time employees and an annual budget of about U.S.$1.02 million. Forty percent of this budget is financed by the municipality and 60% by CCSM earnings. Its activities include raising funding, forming syndications and partnerships, housing design, contract supervision for rehabilitation and construction, and financial management, housing management and offering development consulting and construction management sources to non-profit service organisations within and beyond Santa Monica.

The CCSM has a board of directors with 19 members. Of significance and, characteristic of many non-profit developer boards, is the high profile membership of the Board. Members include prominent architects, lawyers, professors, business persons, planners, a health psychologist and author, a child development specialist, a housing consultant, a mediator, a teacher and an accountant. These people are also members of or working for the YMCA, Santa Monica Chamber of Commerce, two neighborhood resident associations, the National Association for the Education of Children, the Southern Californian Association of Planners, the New York State Bar Association, Westside Legal Services, the Commission for the Status of Women, the Mexican-American Political Association, the Westside Shelter Coalition and other organisations.

The Board's profile enables the housing to receive support from a wide cross-section of the community, legitimise its operation in the private sector and tap into community expertise.

The four key staff employed by CCSM are qualified in law, real estate, planning, business administration, accounting and mechanical engineering; they have
experience in housing development and rehabilitation, property management, contract supervision, tenant self-help, fund raising, program development, budgeting, computing, governmental and financial reporting, construction inspection and building maintenance and repair.

Source: Community Corporation of Santa Monica, undated.

Plate 11  A Community Corporation of Santa Monica project, 642 Marine Street, Santa Monica, California

A newly constructed rental project for low to median income households.
Plate 12 A Community Corporation of Santa Monica project, 3005 Highland Ave., Santa Monica, California, 10 flats for low to moderate income households.
Plate 13  A Community Corporation of Santa Monica project. 2407 4th Street (corner Hollister St), Santa Monica, California. 10 flats for low to moderate income households.
Plate 14  A Community Corporation of Santa Monica project. Corner of 5th Street and Hollister Ave., Santa Monica, California. Eight flats for households up to 30% of area median income.
Plate 15  A Community Corporation of Santa Monica project. 2302 5th Street (corner of Strand Street), Santa Monica, California. Purchase and rehabilitation of a 1920's house (rear view).
Appendix IX  Some Examples of Housing Initiatives Being Affected by Political Instability or Parochialism in Victoria and New South Wales

<table>
<thead>
<tr>
<th>Municipality</th>
<th>Period of Instability</th>
<th>Housing Initiative</th>
<th>Political Instability</th>
<th>Outcome</th>
</tr>
</thead>
<tbody>
<tr>
<td>City of Fitzroy</td>
<td>Early to mid 1980s</td>
<td>A progressive Council supportive of public housing and community based organisations assisting low income or under privileged people; a supporter of early social advocacy social reform agencies based in Fitzroy.</td>
<td>Gentrification over the 1970s and early 1980s led to the growing prominence of conservative rate payer groups focusing on property amenity issues and Council roles which imposed property values.</td>
<td>Policy opposing further public housing by the mid 1980s.</td>
</tr>
<tr>
<td>(Inner Urban, Victoria)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>City of Footscray</td>
<td>1986/87</td>
<td>Undertook two, low income rental housing projects in 1984/85 and 1985/86 comprising 8 units under LGCHP. Further projects were proposed.</td>
<td>Management problems led to an inexperienced Council management committee which included councillors and was not at arms length from Council reacting to rather than resolving problems.</td>
<td>Resolved not to become involved in any existing or future low income housing management or provision roles and returned the two Council- LGCHP projects to the state housing authority</td>
</tr>
<tr>
<td>(Inner Urban, Victoria)</td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Municipality</td>
<td>Period of Instability</td>
<td>Housing Initiative</td>
<td>Political Instability</td>
<td>Outcome</td>
</tr>
<tr>
<td>--------------------------------------</td>
<td>-----------------------</td>
<td>------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
<td>-----------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------</td>
<td>----------------------------------------------------------------------------------------------------------------------------------------------------------</td>
</tr>
<tr>
<td>City of Melbourne</td>
<td>1990 (?)</td>
<td>Established a Housing unit to undertake demonstration projects for lower income persons in the Central Business District and adjoining suburbs so as to increase residential use. Two projects undertaken involved shop top housing and building recycling demonstration projects using underutilised Council properties and unsuccessful attempts at securing a portion of the Great Southern Hotel as low income singles housing though a joint venture. A separate department was developing the 'Postcode 3000' program to facilitate developer recycling of vacant CBD office buildings for residential use using a package of incentives.</td>
<td>A lack of consistent supportive Council policy and a lack of supportive organisation culture and integration of Housing Unit into the organisational structure meant that there was little support from management. Consequently the Unit became vulnerable due to political swings at elections, with councillor support being eroded at an election. This vulnerability was exacerbated by the low output of the housing unit and high capital cost per unit.</td>
<td>Council completed the 2 demonstration projects and rented them at market rates. The unit was then disbanded and staff retrenched or dispersed within the organisation. Housing initiatives were then limited to the Postcode 3000 facilitation role, between until 1995 when interest in low income, community housing under the Community Housing Program emerged due to a change of CEO, resulting in contributions of $330,000 in 1994 and $150,000 in 1995 (along with a $3.8 million CHP grant) for singles &amp; youth housing.</td>
</tr>
<tr>
<td>City of Sydney</td>
<td>1980s</td>
<td>The municipality's housing program accumulated a large number rental housing units over a long period for low income households from a variety of funding sources.</td>
<td>As part of a regular occurrence of division or consolidation, the New South Wales State Government split the City of Sydney into the Cities of Sydney and South Sydney.</td>
<td>Upon formation, the City of South Sydney sold its housing stock on the open market to investors and developers. However, ongoing housing needs' eventually resulted in the municipality re-establishing its housing program in 1990s.</td>
</tr>
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</table>
### Appendix X: Examples of Pooled Funding for Municipalities

<table>
<thead>
<tr>
<th>Municipality</th>
<th>Period of Instability</th>
<th>Housing Initiative</th>
<th>Political Instability</th>
<th>Outcome</th>
</tr>
</thead>
<tbody>
<tr>
<td>Shire of Melton (Outer Urban satellite/ computer suburb, Victoria)</td>
<td>Later half of 1994/ first half of 1995</td>
<td>Melton had undertaken three Council LGCHP projects in 1987/88, 1988/89 and 1990/92 comprising 13 units and five beds for single parent families, older persons and youth, as well as 10-14 supported aged units. The development of a local Housing association was being investigated by Council under CHF infrastructure and capital funding grants of $3.5 million for family housing. Support was coming from local churches, service organisations, housewives and shop traders in a typical rural style which supported the role of an interventionist Council and project oriented staff.</td>
<td>In 1994 the State Government amalgamated the Shire of Melton with two adjoining municipalities to form the Melton Shire Council. Elected councillors were replaced by caretaker commissioners and an organisation restructured and new managers appointed.</td>
<td>The commissioners removed previous staff who supported housing initiatives. The housing provider roles were reviewed and support withdrawn with a return to the traditional, core municipal service roles. The large CHF grant was handed over to non-local, community housing provider to expend in Melton with no future Council capital contributions to be made external grants to be sought. The fate of the existing Council-LGCHP projects is undetermined.</td>
</tr>
<tr>
<td>City of St.Kilda (Inner Urban, Victoria)</td>
<td>Later half of 1994/95</td>
<td>St Kilda developed the largest Local Government based community housing program in Australia between 1985 and 1995, comprising 185 low income rental housing units for 310 families, youth, older persons and singles. Council expended $5.2 million of its funds and attracted $12.2 million of State or Commonwealth funds under its own initiative for Council or joint venture projects. It also developed a Shop Top Housing Program to facilitate private shop top housing through an incentives package. Support for these initiatives was consistent and growing throughout the 10 years with close Councillor - staff - community co-operation.</td>
<td>In June, 1994 the State Government amalgamated the City of St Kilda with the Cities of South Melbourne and Port Melbourne to form the City of Port Phillip. Elected councillors were replaced by caretaker Commissioners and the organisation restructured and new managers appointed.</td>
<td>The Commissioners retained the housing officer position but determined in 1994 that there would be no further direct community housing provision beyond 2 further committed projects. While the Shop Top Housing Program was continued, housing policy was priorities in late 1995 to focus on maintaining State required population targets, with strategies to facilitate community housing and policies as public housing reduced in importance. After the return to elected councillors in February, 1996, the Council readopted a direct provider role and allocated $900,000 for community housing in the 1996/97 year and committed itself to providing two large housing projects.</td>
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Appendix X: Examples of Pooled Funding for Low Income Rental Housing Projects

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<td>27.2</td>
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<td>Bank loan</td>
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<td>3.8</td>
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<td>Calif. rehabilitation loan</td>
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<td>4.9</td>
<td>4.57</td>
</tr>
<tr>
<td>Conventional loan</td>
<td>Federal grant</td>
<td>0.2</td>
<td>10%</td>
</tr>
<tr>
<td>City housing fund</td>
<td>Developer equity</td>
<td>0.8</td>
<td>40%</td>
</tr>
<tr>
<td>Federal grant</td>
<td>Hotel tax fund</td>
<td>0.2</td>
<td>10%</td>
</tr>
<tr>
<td>Federal grant</td>
<td></td>
<td>0.8</td>
<td>40%</td>
</tr>
<tr>
<td></td>
<td></td>
<td>2.0</td>
<td>4.57</td>
</tr>
<tr>
<td>Bank loan</td>
<td>Life Insurance Co.</td>
<td>0.3</td>
<td>24%</td>
</tr>
<tr>
<td>City loan</td>
<td>Federal grant</td>
<td>0.5</td>
<td>38%</td>
</tr>
<tr>
<td>Federal grant</td>
<td>City site acquisition</td>
<td>0.5</td>
<td>38%</td>
</tr>
<tr>
<td></td>
<td>Tax credits</td>
<td>1.3</td>
<td>25%</td>
</tr>
<tr>
<td></td>
<td>Paint shop Co.***</td>
<td>0.2</td>
<td>4%</td>
</tr>
<tr>
<td></td>
<td></td>
<td>1.3</td>
<td>5.2</td>
</tr>
</tbody>
</table>

* Tax credits are for low income housing provision unless specified otherwise.
** OAHPP is the San Francisco Office-Affordable Housing Production Program.
*** From the sale of tax increment funds by the redevelopment agency from improved tax (rate) values.
**** This project is a unique, private-public partnership involving low income, non-profit developer sponsored housing over a paint shop where the paint company made a contribution towards the overall project (See Plate 14).

N.B: The shaded project is the one for-profit developer sponsored project in the above sample.
Source: Community Corporation of Santa Monica (undated); San Francisco (1990b); Untitled document, City and Country of San Francisco (percentages added).
Appendix XI: Some Specific Legal Issues

Chapter Four discussed the importance of US legal precedent, approaches and ramifications on the use of developer contributions for affordable housing. Appendix XI discusses in detail some specific legal issues associated with the approach of the courts to the principles of nexus, reasonableness and accountability. It also discusses from a legal perspective the issue of maintaining housing affordability and applying developer contributions in areas with population decline.

One issue is the process the courts undertake in determining whether to justify a developer contribution. This is described in Table Six.

<table>
<thead>
<tr>
<th></th>
<th>The Process Undertaken by Courts in Determining the Acceptance of a Developer Contribution</th>
</tr>
</thead>
<tbody>
<tr>
<td>1</td>
<td>The Court will review the statutory authority for the particular exaction, often reading that authority broadly and in the context of the legislative intent of the plan for controlled community development.</td>
</tr>
<tr>
<td>2</td>
<td>The Court will address the relationship between the development that is to be charged, the fee and the amount and use of the fee. This analysis is becoming increasingly sophisticated as the courts develop more criteria by which to review the relationship.</td>
</tr>
<tr>
<td>3</td>
<td>The Court will consider the way in which the collected fees are administered, generally preferring that the funds be specially earmarked to ensure that they are reserved for the purposes for which they were collected.</td>
</tr>
</tbody>
</table>

Source: Bosselman and Stroud, 1987: 75.

The first requirement of the courts is to review of authority for the exactions, with reference to the legislative framework and legal precedent. The second requirement is the analysis described in step two of Table Six which refers to what is known as the 'rational nexus' test. This test, first conceptualised by Heyman and Gilhool in 1964, has become the principal consideration to determine whether a developer contribution can be required. The test has been used to refer to three steps shown above (in Australia, the term is used more narrowly to refer to step two, the relationship between the fee and the development).

In most cases, US Courts will require greater analysis than simply using the argument that a development creates a need for services or facilities. Instead, they will require that the contribution 'bears some reasonable relationship to the proportion of the need that can be
attributed to the fee payer' (Bosselman and Stroud, 1987:77).

Literature on developer contributions for lower income housing does not comprehensively analyse which types of nexus situation are acceptable to the courts. Rather, it contains scattered references to nexus issues. For example, it is a contentious issue whether or not developer contributions from specific developments designed to solve broad public problems are warranted. Bosselman and Stroud (1987:95) argue that it is difficult to justify contributions for those purposes when a nexus is absent. They argue that courts will view this as requiring individuals to provide more than their fair share of services or facilities to meet the needs.

However, a nexus is defined broadly by U.S. courts. This is evidenced by the continued operation (appeal free in 1991) of the range of programs involving developer contributions in San Diego, Los Angeles, Santa Monica and San Francisco. This relates, in particular, to programs requiring contributions for land subdivision (San Francisco), office and commercial development (Santa Monica, San Francisco), and property acquisition (San Diego) where there is no direct loss of housing caused by these activities.

Mallach (1984:170), a strong advocate of developer contributions and 'inclusionary' zoning, argues that when direct loss to lower income housing is caused by a development or an indirect but closely related impact, a clear nexus can be demonstrated and a contribution is required by the developer to mitigate the impact.

He argues (p.169-170), however, that a nexus is tenuous for a 'typical suburban housing development' which neither affects lower income housing nor creates a significantly increased demand for lower income housing. Likewise, it is difficult to justify a luxury high-rise development in a high density, high demand area contributing towards affordable housing the indirect impact on lower income housing is not demonstrated. Assumedly, he means that the development itself did not directly or indirectly result in the loss of low income housing but rather contributed to the general process of gentrification. He gives, as an example, the New Jersey Division of Coastal Resources. Under the New Jersey Coastal Area Facilitates Review Act, this body obtained agreement through negotiation on ocean front high-rise home ownership development in up-market Atlantic City to either provide lower
income housing elsewhere or make a cash contribution. Mallach argues that for such targeting, luxury developments:

...are likely to be viewed as a tax imposed on to further social policy goals; the only apparent rationale... is that the development of such housing represents a large stationary target (Mallach, 1984:170).

Yet, despite this view, many luxury developments which have occurred since 1984 when Mallach wrote, have been targeted without legal challenge, exemplified in the earlier San Francisco case studies (refer to Plates 3-5). These case studies are subject to the 'location related effects' described earlier, i.e., located in a sought-after, unique area as well as located in a state where the government and courts impose social policy objectives through legislation and court judgments. Yet luxury developments will occur in these unique or sought after areas. The successful imposition of contribution requirements, therefore, has set precedents applicable to U.S. legal practice generally.

Despite these precedents, Courts are increasingly require a more sophisticated analysis of nexus. A widespread use of complex formulae will be established to prove a nexus exists.

The courts carefully examine the second requirement, described in Table Six, that the contribution bear a reasonable relationship to the proportion of need created by a development. Bosselman and Stroud (1984:78) refer to a number of cases involving developer contributions which were not upheld because they were excessive. Reasonableness was not an issue in other cases mentioned. As with the nexus test, courts increasingly require rigorous accounting analysis to demonstrate the sought contribution is reasonable.

In one particular 1971 landmark case of the Californian Supreme Court, Associated Home Builders of Greater East Bay V City of Walnut Creek, the Court found that a flat charge of 7% of a subdivided land value or the equivalent in cash value did not unfairly burden a high density development. It also found the fee did not result in double taxation simply because residents outside the subdivision did not pay the contribution (Bosselman and Stroud, 1987:78).
Bosselman and Stroud (1984:78,79) refer to two situations regarding court decisions for service and facility provision in the State of Utah. The first situation refers to contributions aimed at recouping a proportion of previously expended outlay for constructed, existing capital facilities with excess capacity. To address this situation developments purchase a part of the value of existing services or equity share allowing for facility depreciation. In this way, the Courts address the problem of apportioning impacts.

In relation to housing, municipalities required contributions to new projects rather than existing low income housing developments. However, where contributions are to existing developments, the Courts may impose requirements which may deflate the value of the contribution made to allow for asset depreciation.

The second decision made by Utah courts involves the developer paying for capital facilities in a number of ways such as developer contributions and ad valorem (in proportion to the estimated value of the property) property taxes (rates). Utah courts required a deduction from the contribution of the cost of any similar facilities provided by the development and the present value of past and future tax (rate) payments made or to be made by the development. Bosselman and Stroud (1987:96) argue that this principle should equally apply to any housing contribution (this requirement does not apply in some states such as California).

Issues of 'reasonableness' are influenced where incentives with financial implications (such as density bonuses or access to cheaper finance) are offered to developers as quid pro quo for the costs of contributions. Mallach (1984:171) suggests that when incentive values equal the costs of contributions, nexus issues are resolved (at least the 'reasonableness' aspect as used in Australia).

The third court requirement described in Table Six is accountability for the use of contributions. This involves ensuring that the authority provides the service or facility being levied. It also ensures authorities segregate and earmark levied funds levied so that they are not simply added to general revenue. In some States, authorities must demonstrate the expenditure was used for the purpose they were levied. Florida, for example, requires a capital facilities program in all municipal plans to predetermine legitimate uses for contributions.
Bosselman and Stroud (1987:80-81) argue that this 'earmarking' process can create budget problems when future contributions are unpredictable. Instead, authorities could establish a program which spends an amount equal to or greater than expected contributions. In doing so, they note, revenue may not equal expenditure. In some cases, capital programs have been abandoned. To prevent this, they recommend regular monitoring.

Where municipalities receive cash contributions and provide their own housing using non-profit developers, accountability should be easy to achieve. Some municipalities, however, prefer that developers contribute by setting aside restricted units in a development which developers then manage. This involves, as Bosselman and Stroud (1987:97) note, a complex and cumbersome set of restrictions to ensure ongoing affordability. As noted in Chapters Four and Five, this also involves considerable municipal resources to monitor compliance.

Bosselman and Stroud (1987:101) note that the case law trend towards increased accountability may favour cash contributions over dedications of land. This contrasts with the municipal preference to 'set aside' units. When choice exists between setting aside units or making cash contributions, municipalities often bargain with developers. A cash contribution can be made instead of a set aside which is the usual standard 'inclusionary' requirement of the zoning. Mallach (1984:168) questions the status of any zoning which require a set aside of low to moderate income housing if this zoning requirement can be waived in return for a cash contribution. However, he acknowledges that this issue is unlikely to be contentious since having a choice will be viewed as fair and reasonable.

Further, as discussed earlier, municipalities believe that effective negotiation provides lower income housing in a manner acceptable to both the community and developers because all parties can identify mutually acceptable conditions for development.

When a municipality offers a choice between a cash contribution or a 'set aside' of units, the developer opts for the cheaper alternative. Without choice, Mallach (1984:174) contends that legal problems could occur if the type of contribution required is more expensive than the alternative. This becomes a potential problem for programs which offer a choice of
contributions to some developers and not to others.

Affordability requirements of municipalities can be undermined by court judgments. They allow housing mandates to be met by developer provision of 'least cost' housing instead of providing low and moderate income housing. Citing the 1977 case *Madison, Inc V Madison Township*, Burton (1981:20) describes how the New Jersey Supreme Court weakened and undermined the earlier Mount Laurel judgment by allowing 'least cost' housing. Housing was constructed at the lowest possible cost consistent with minimum health and safety standards to satisfy the housing mandate. While this judgment attempted to maintain the viability of this development, it left uncertain the affordability of 'least cost' housing to low and moderate income persons and acknowledged affordability may not be achieved.

The Courts say that housing provided or funded by developers can include low and/or middle income persons, which reflects their broad views on affordability. Bosselman and Stroud (1987:97) refer to the increasing tendency for municipalities to subsidise middle-income housing and point out that the courts have not questioned this practice.

To determine whether a nexus exists between the development’s needs and the contribution sought to mitigate them, services or facilities provided by the contribution must, to some extent, benefit the users of the development. This issue is relevant to Victoria as shown by the importance of the ‘Eddie Barron’ case in establishing precedent, as described in Chapter One. In reference to the 1971 case, *Associated Home Builders of Greater East Bay V City of Walnut Creek*, the Californian Supreme Court upheld the payment of a recreational fee for a subdivision on the basis of a reasonable relationship which existed between the development and the recreational facilities as long as users of the subdivision had access to the facilities. This case was similar to the findings of the Eddie Barron planning appeal case in Victoria. The Californian Court rejected the developer’s argument that the developer should be credited with on-site recreational improvements particularly as these were not part of the city's recreational plan (Bosselman and Stroud, 1987:77,78). This is considered by Mallach (1984: 63, 84) to be the leading case in upholding the principle that received funds not only benefit the residents of the development but also the general public.

Bosselman and Stroud (1987:103, 97) argue that proximity is key in determining whether a
nexus exists. Using the example of an office development contributing towards the development of housing for its low to middle income workers, they argue that housing must be located conveniently close to the office buildings to satisfy this part of the nexus test. Where adequate public transport exists, the geographic separation can be greater.

In relation to this example, many municipalities requiring contributions for a nexus between office employment and housing are usually relatively small, compact municipalities. They are often well serviced by public transport, such as the municipalities of San Francisco and Santa Monica. Further, the example illustrates a case for close proximity in the nexus. A weaker case would exist where developments do not create a housing need in themselves, as occurs often in the four Californian municipalities. From the perspective of Bosselman and Stroud, even where a development displaces lower income residents, there may be a need for replacement, contributed housing to be located in the surrounding area.

The Homer Hoyt Centre's 1985 survey of municipalities receiving developer contributions (described earlier in this chapter) found that only 2% of land contributions, 1.7% of contributions built or installed by the developer and 5% of cash contributions were located off-site to the levied development. This reflected the predominance of road, sewer, water and drainage uses for contributions (Purdum and Frank, 1987:129,137). It is likely that off-site housing contributions are at a higher percentage given developers' preferences to make a cash contribution. Unfortunately, the proximity of off-site facilities or services was not surveyed by the Homer Hoyt Centre. Nevertheless, these survey findings indicate that most contributions are on-site and therefore do not test the issue of the proximity of the provided service or facility by off-site or cash contributions.

Despite the view that a close geographic proximity is important and despite the low proportion of off-site developer contributions, the body of case law agrees that capital facilities may be used by the general public and not exclusively by the users of the contributing development (Bosselman and Stroud, 1987:77). This is important because it removes this issue from possible litigation.

An important legal issue for municipalities in established areas is how to establish a nexus when the municipality and its service and infrastructure needs are not expanding. This is
important for Australia because in some State capitals only inner municipalities levy or wish
to levy developers for community housing. The US literature has nothing to say about this.
This is surprising as many municipalities active in obtaining developer contributions are in
established areas. These include all the Californian municipalities surveyed except parts of
San Diego. There seems to be no controversy over the principle that contributions can be
made in non-growth areas, with complex formulas commonplace to prove a nexus in those
situations.

Bosselman and Stroud (1987: 97) question the ability to levy contributions in areas with
population decline:

Where population outflows are expected, it would seem likely that the people
attracted to the new office jobs could obtain adequate housing on the open
market unless declining family sizes and increasing space expectations balance
moderate population outflows. Methodologies for predicting all of these facts
should make it possible to test the appropriateness of the exaction's
proportionality.

Here, Bosselman and Stroud have presented a simplistic argument which fails to take account
of other relevant factors. These include changes to area social profiles and reducing
availability of the required housing tenure and housing affordability. It is arguable that using
contributions to maintain social diversity in reaction to gentrification is a justification for
developer contributions as low income households may continue to be unable to access
affordable housing in gentrifying areas with population decline. Further, the need for
contributions to mitigate the impact of development on the continued suitability and viability
of services and infrastructure in these areas could be another a relevant justification for
developer contributions. These issues have more relevance to Australia where legal precedent
is less developed.

Appendix XII: The Relevance of the US Constitution

Chapter Four discussed the legal issues associated with the use of developer contributions.
One particular issue relates to the relevance of the US constitution.
The U.S. Constitutional clauses most likely to be applied to the development of land are, firstly, the Fourteenth Amendment's prohibition of State and Local Government depriving people of liberty or property without the due process of the law; secondly, the Fourteenth Amendment's requirement that State and Local Government recognise each person's right to equal protection of the laws, and the Fifth Amendment's limitation of the power of State or Local Government from taking property unless just compensation is provided. Bosselman and Stroud (1987:87) argue that only the latter Amendment on 'taking' has potentially serious legal implications.

Since the Euclid V Ambler case of the 1920s (refer to Chapter Four), the U.S. Supreme Court resisted taking up land use cases for over 40 years, leaving the State courts to develop a body of case law. However, in the 1980s, the U.S. Supreme Court re-entered the land use arena with two cases involving authorities taking land. In the first case, Loretta V Teleprompter Manhattan CATV Corp., cable wire and boxes were to be installed on the property of a rental housing complex; in the second case, Nollan V Californian Coastal Commission (1987), the Commission required public beach access across private property as a condition of construction. In both cases, the Supreme Court found that the respective authorities requirements were an unconstitutional taking (Bosselman and Stroud, 1987: 102, Addendum).

The implications of these cases, according to Bosselman and Stroud (1987: 102, Addendum) are firstly that regulators must substantiate the amount and purpose of a developer contribution; secondly, that funds levied could be earmarked with the financial structure of the levying authority so that expenditure on the intended purpose is clear; thirdly, the cumulative impact of development must be taken into account and the burden shared amongst others in the same class or the public as a whole, rather than individual developments carrying an undue burden; fourthly, negotiable regulations which waive or vary agreements in return for developer contributions unrelated to the land use regulation are inappropriate (Bosselman and Stroud note that this questions the use of conditional permits); and lastly, analysis used by the court reinforces the trend of State courts towards the use of the notional nexus test.
Yet since these 1980s judgments no noticeable and corresponding limitations to the use of developer contributions for housing purposes have occurred. This reflects the essential difference between situations existing in both the cases of Loretta and Nollan and inclusionary housing. In both cases land use imposed on individual land owners with use rights was fettered by specific and inflexible encumbrances. With inclusionary housing, developers can choose to develop their properties under inclusionary housing requirements or choose not to develop them. This choice is often made through a negotiated agreement. Further, incentives are offered which partially or fully offset the costs of the 'inclusionary' requirements and provide specific benefits to developers which are usually not available. Consequently, inclusionary zoning is similar to any other zoning which sets conditions for the developer prior to site development.

Thus, Bosselman and Strouds suggestion that there is a possible U.S. Constitutional limitation to developer contributions under the 'taking' clause appears to be unfounded. It appears that State Supreme Court judgements will continue to be the main legal influence on the powers of municipalities to obtain developer contributions for services and infrastructure, as well as inclusionary housing.